



School of Law

**NATURAL RIGHTS, ECONOMIC
LIBERTIES, AND THE PRIVILEGES OR
IMMUNITIES OF UNITED STATES
CITIZENSHIP: A MODEST TRIBUTE TO
PROFESSOR SIEGAN**

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Natural Rights, Economic Liberties, and the Privileges or Immunities of United States
Citizenship: A Modest Tribute to Professor Siegan[©]

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I. Professor Siegan's Scholarship on the Privileges or Immunities Clause

I never met Bernard Siegan, but as I write this Essay I am keenly aware that I owe him a significant scholarly debt. Today in the American legal academy, defenders of traditional property rights are a fairly small minority. That has its goods and bads. We are probably not numerous enough to be influential, but there are still enough of us that we can learn from one another and enjoy the friendly pleasures that come from cooperating in pursuit of commonly-shared ideals. Professor Siegan had far fewer friendly colleagues when he wrote most of his important works, and yet he forged ahead. In doing so, he helped clear the intellectual terrain in property and land use that my cohort now takes for granted.

I say all this uncertain how Professor Siegan's scholarship will be received in another generation. While Professor Siegan wrote widely on property and land use, he is best remembered for his writings on the topics that guide this Symposium—the relation between property, economic liberty, and the United States Constitution. Those writings are caught in the same bind as Richard Epstein's writings on the same topics today. Most non-originalists reject Siegan and Epstein's theories of property and government on the merits. So if either's constitutional work is going to be taken seriously in another generation, it will need to be among constitutional scholars who sympathize with property. But many constitutional scholars who fit

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that description are skeptical of constitutional property rights, for reasons that relate not to property but to constitutional interpretation.¹

In particular, Professor Siegan's constitutional scholarship has been received only lukewarmly among constitutional originalists, because it highlights a fissure that causes originalists to disagree about the original meaning of the Constitution. For simplicity's sake, we can classify originalists on a rough and hypothetical continuum between "formalist originalists" and "fundamental-rights originalists." My hypothetical fundamental-rights originalist holds that the meanings of many constitutional clauses are informed, with enough specificity for politicians and judges to follow, by natural-law and -rights principles as understood in the early Enlightenment. For the Constitution of 1787 and the Bill of Rights, these principles cover the natural-law and -rights theory expressed in the U.S. Declaration of Independence and many Founding Era state constitutions. For the Civil War Amendments,² these principles are also reflected (with some minor updating) in early nineteenth-century "higher law" judicial opinions³ and the free-soil and free-labor ideology on which the Republican Party relied to abolish slavery after the Civil War.

By contrast, my hypothetical formalist originalist holds that most if not all of the provisions of the Constitution implement determinate, rule-like provisions that need not be fleshed out with reference to natural-rights principles. It may well be, the formalist might concede, that the drafters of various constitutional clauses wrote those clauses to secure in practice moral principles justified in reference to natural-rights political theory. But the formalist maintains that the legal provisions can be interpreted as a series of fixed rules. Public officials,

¹ I have surveyed some of the factors contributing to this climate in *Takings: An Appreciative Retrospective*, 15 *William & Mary Bill of Rts. J.* 439 (2006).

² See U.S. Const. amends. XIII, XIV, XV.

³ See, e.g., [editors—please insert a citation to Jim Ely's contribution to this conference].

the formalist assumes, can ascertain and enforce the meanings of these rules without needing to deliberate how to apply general and perhaps-underdeterminate principles of political philosophy to particular cases or political problems.

To be sure, this continuum is rough and forced in some respects. Not all originalists fit along this continuum. The differences among this continuum are confounded and complicated by other methodological differences. In particular, “originalists” also disagree about whether constitutional interpretation refers primarily to recovering the legal meaning intended by the Constitution’s drafters and ratifiers, or to the public meaning of the Constitution’s text as understood by a hypothetical audience of reasonable readers educated to understand the general meaning of the text’s operative terms.⁴ In addition, the formalist/fundamental-rights debate is not entirely about originalism. It can degenerate into an *ad hominem* debate in which each side accuses the other of being *non*-originalist. In their worse moments, formalist originalists accuse fundamental-rights originalists of reading into the Constitution a theory of government that is not there.⁵ By contrast, fundamental-rights originalists accuse formalists of reading *out* of the Constitution a theory that *is* there, and of substituting in its place Robert Bork and Alexander Bickel’s theories of judicial restraint.⁶

Even so, in their better moments, originalists disagree reasonably and civilly about whether and to what extent the Constitution declares and makes legally enforceable fundamental

⁴ See, e.g., John C. Harrison, Forms of Originalism and the Study of History, 26 Harv. J. L. & Pub. Pol’y 83 (2003); Vasani Kesavan & Michael Stokes Paulsen, 91 Geo. L.J. 1113, 1134-48 (2003); Gary Lawson, Conservative or Constitutionalist?, 1 Geo. J. L. & Pub. Pol’y 81, 82 (2002). As is the case with my continuum of formalist and fundamental-rights approaches to interpretation, the descriptions of intentionalism and textualism in the text are not meant to be exhaustive but only to describe two viable and illuminating extreme positions.

⁵ See, e.g., David P. Currie, The Constitution in the Supreme Court 1789-1888, at 346-47 (1985) (“The fundamental-rights notion [of the Privileges or Immunities Clause] reflects once again the incessant quest for the judicial holy grail; perhaps at long last we have discovered a clause that lets us strike down any law we do not like.”).

⁶ See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (1990); Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2d ed. 1986); Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L. J. 1 (1971).

moral and pre-political rights. For example, in *Troxel v. Granville*, Justice Thomas and Justice Scalia disagreed about whether the Fourteenth Amendment's Due Process Clause protects constitutionally a higher-law right of parents to direct the upbringing of their children.⁷ In *Saenz v. Roe*, Justice Thomas wrote a separate opinion to signal that he reads the Privileges or Immunities Clause of the Fourteenth Amendment to protect certain general natural rights relating to citizenship.⁸ Although Justice Scalia did not write his own opinion, he did not join Thomas's opinion. It is reasonable to suspect Scalia harbors formalist doubts about a fundamental-rights interpretation of the Privileges or Immunities Clause. Professor Siegan's legacy is caught up in these debates because in his constitutional scholarship Siegan embraced the fundamental-rights approach. My general sense is that more originalists incline toward the formalist approach exemplified by Justice Scalia than toward the fundamental-rights approach exemplified by Justice Thomas. Since Professor Siegan espoused the latter approach, his legacy suffers accordingly.

In this Essay, I hope to contribute to Professor Siegan's legacy by suggesting some new reasons why originalists ought to take more seriously fundamental-rights readings of the Constitution. This Essay focuses on a single provision of the Constitution: the Fourteenth Amendment's Privileges or Immunities Clause.⁹ As Justice Thomas's opinion in *Saenz* suggests, this clause illustrates powerfully the interpretive differences between formalist and fundamental-rights originalists. Professor Siegan propounded a fundamental-rights reading of the Clause, anticipating the position Justice Thomas proposed in *Saenz*. Randy Barnett¹⁰ and

⁷ 530 U.S. 57 (2000).

⁸ 526 U.S. 489, 521 (1999) (Thomas, J., dissenting).

⁹ U.S. Const. amend. XIV. The text of the Clause is restated infra text accompanying note --.

¹⁰ Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 194-203 (2004).

Richard Epstein have endorsed this view more recently.¹¹ There are several different formalist renditions of the Clause. The hardline rendition is Robert Bork's: The terms "privileges" and "immunities" are so open-ended that they are really just "ink blots" which can be read to encompass any civil right the interpreter wants to protect.¹² Another formalist position is the "non-discrimination" approach. As David Currie¹³ and John Harrison¹⁴ explain this view, states have substantial discretion what "privileges" and "immunities" to provide for their citizens. But once they have chosen whatever privileges and immunities they decide to provide, they must provide those rights on justifiably equal terms to all citizens. There is also a third general approach to the Privileges or Immunities Clause that does not fit the formalist/fundamental-rights divide very cleanly: the incorporationist approach proposed by Justice Black¹⁵ and more recently by Michael Kent Curtis¹⁶ and Akhil Amar.¹⁷ This approach holds that the Privileges or Immunities Clause incorporates by reference and applies to the states some or all of the individual rights the Bill of Rights applies to the federal government.

The argument over the Privileges or Immunities Clause highlights the challenge to Professor Siegan's legacy. The fundamental-rights and (to a lesser extent) the incorporationist accounts of the Privileges or Immunities Clause both suggest that the Fourteenth Amendment may protect substantive property and economic rights. The various non-discrimination readings, by contrast, are much more skeptical of that suggestion. Today, most originalist scholars probably embrace the formalist, non-discrimination reading of the Privileges or Immunities

¹¹ See Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 NYU J. L. & Liberty 334, 340-46 (2005); Richard A. Epstein, *Further Thoughts on the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & Lib. 1096 (2005).

¹² Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 166 (1990).

¹³ See Currie, *supra* note --, at 239 n. 12, 342-51.

¹⁴ See John C. Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. at 1410-33, 1451-66.

¹⁵ *Adamson v. California*, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting).

¹⁶ Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 64-65 (1986).

¹⁷ Akhil Reed Amar, *America's Constitution: A Biography* 387-89 (2005); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 166-69 (1998).

Clause.¹⁸ If we review the pros and cons of the debate over the Privileges or Immunities Clause, we will be in a much better position to appreciate what is memorable in Professor Siegan's legacy and what obstacles stand in the way of its just appreciation.

Although a tribute Essay cannot settle the debates over the Privileges or Immunities Clause or Professor Siegan's scholarship, it can at least suggest that the professor was righter than most originalists now appreciate. This Essay does so by focusing on evidence that all originalists should agree to be important or even central: the Privileges or Immunities Clause's text; the structure of the rest of the Constitution; and some prominent public-law precursors to the Clause elsewhere in the Constitution, the Articles of Confederation, Founding Era constitutions, and colonial charters.

These materials are important in their own right, but they are especially important given trends in originalist interpretation. Professor Siegan wrote his scholarship at a time when most originalists tried to ascertain the likely intentions of the Constitution's drafters and ratifiers. Thus, when Siegan concluded that the Privilege or Immunities Clause refers to civil laws written to secure a class of natural rights not otherwise specifically enumerated, he focused primarily on "what motivated the 128 representatives and 33 senators who favored the joint resolution proposing the fourteenth amendment."¹⁹ It would be easy to dismiss Siegan's conclusions out of hand, on the ground that the subjective intentions of those Representatives and Senators are not binding. In other words, what *is* binding is the objective public meaning of the Fourteenth Amendment's text, as understood at the ratification of the Amendment, by observers who read texts charitably, and who were reasonably educated in the legal and moral meanings of the Amendment's terms of art. The evidence on which I rely here is extremely relevant evidence for

¹⁸ See, e.g., Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 Mich. L. Rev. 1555, 1561-62 & n.23 (2004).

¹⁹ See Bernard H. Siegan, *The Supreme Court's Constitution* 47 (1987).

that very inquiry. It confirms the fundamental-rights reading of the Privileges or Immunities Clause more than most originalists now appreciate.

II. Property and Trade: The Topical Content of the Privileges or Immunities Clause

Let us begin by surveying the Privileges or Immunities Clause as a whole: “No State shall make or enforce any law which abridges the privileges or immunities of citizens of the several States.”²⁰ This clause raises many textual questions,²¹ and we will focus on only three here. One asks what substantive principles inform the content of “privileges” or “immunities”; the next asks what topics or rights count properly as the subjects of “privileges” or “immunities”; and the last asks when “privileges” or “immunities” are “abridg[ed]” by state law.

I am going to proceed out of logical order, by addressing the second issue, then the first, then the third. We are interested here above all in whether the Privileges or Immunities Clause protects fundamental, moral, and pre-political rights. If the Clause *does* protect such rights, it is to be sure then a difficult process to delineate which rights the Clause covers and which it does not. But as long as we are sure the Clause protects rights relating to at least a few definable topics, we can put this delineation process off to another day. We may safely use the topics we know to be covered to illustrate and examine our main inquiry here—whether privileges or immunities, whatever rights are in that set, are substantive or formal rights claims.

I find it reasonable to assume that the Privileges or Immunities Clause covers property rights and the right to trade because important public-law precursors to the Privileges or Immunities Clause were assumed to cover the same rights. The terms “privileges,” “immunities,” and “citizenship” were not written on a blank slate after the Civil War. The Privileges or Immunities Clause presumed an intellectual context evident in many important

²⁰ U.S. Const. amend. XIV.

²¹ For an especially careful parsing of the Clause, see Amar, *The Bill of Rights*, *supra* note --, at 163-80.

foundational American public-law documents. A good place to start is Article IV of the Articles of Confederation:

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.²²

Even though this clause is repetitive in some respects, its core meaning is tolerably clear.

Before the Revolution, each of the colonies was bound by its own charter and general imperial law to respect the rights of subjects in other English colonies. In his *Commentaries on the Constitution of the United States*, Justice Joseph Story explained:

A]lthough the colonies were independent of each other in respect to their domestic concerns, they were not wholly alien to each other. On the contrary, they were fellow subjects, and for many purposes one people. . . . The commercial intercourse of the colonies . . . was regulated by the general laws of the British empire; and could not be restrained, or obstructed by general legislation.²³

Article IV picked up where these colonial and English guarantees left off. The Article established a binding confederate constitutional requirement that free inhabitants in one state enjoy in other states the rights they had formerly enjoyed as subjects in sister colonies.

Important here, these colonial and confederate rights include rights relating to property and trade. Article IV specifically guarantees “the people of each state” (whoever they are) “all the privileges of trade and commerce,” and it also guarantees that state economic regulations

²² Articles of Confederation art. IV § 1 (U.S. 1781).

²³ 1 Joseph Story, *Commentaries on the Constitution of the United States with a Preliminary View of the Constitutional History of the Colonies and States, Before the Adoption of the Constitution § 178*, at 164-65 (1991) (1833).

“shall not extend so far as to prevent the removal of property imported into any state.” Justice Story assumed that colonial and general British law guaranteed each colonist a right, “as a British subject, [to] inherit[] lands by descent in every other colony” and to engage in “commercial intercourse” consistent with “the general laws of the British empire.”²⁴ Blackstone’s *Commentaries on the Law of England* confirms as much when it treats the rights of aliens and English-born subjects.²⁵ Aliens could not acquire real estate (at least not without automatically forfeiting it to the crown); they could only acquire personalty except as a matter of “indulgence”; they could trade and work freely, but only subject to higher duties.²⁶ By reverse inference, citizens could acquire realty and personalty as of right, work and trade, and do so subject to lower duties.

The Comity Clause does in the U.S. Constitution what Article IV does in the Articles of Confederation. The Comity Clause reads: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”²⁷ Although this Clause is more laconic than Article IV of the Articles, here less is more. Article IV of the Articles is somewhat repetitive, and the repetitions create internal inconsistencies. As *Federalist 42* observed, Article IV secures different rights to “free inhabitants” and “the people of each state,” and it holds out the possibility that a “free inhabitant” of one state, who is not entitled to certain rights of citizenship in that state, to “all privileges and immunities of free citizens” in other states.²⁸ By

²⁴ 1 Joseph Story, *Commentaries on the Constitution of the United States with a Preliminary View of the Constitutional History of the Colonies and States, Before the Adoption of the Constitution* § 178, at 164-65 (1991) (1833).

²⁵ 1 Blackstone, *supra* note --, at 354.

²⁶ 1 *id.* at 360. See also 2 James Kent, *Commentaries on American Law* 46-54, 60-61 (1971) (1827) (contrasting the rights and disabilities aliens have in comparison with citizens in their powers to acquire and dispose of real estate).

²⁷ U.S. Const. art. IV § 2.

²⁸ See, e.g., *The Federalist No. 42*, at 232, 237-39 (1999) (1961) (Clinton Rossiter ed. & Charles R. Kesler intro.) (Madison).

contrast, the Comity Clause focuses on a uniform set of people—citizens in each state—and a uniform set of rights—the privileges and immunities of citizens in the several states.

Now, because the Comity Clause is shorter than Article IV of the Articles of Confederation, it is more opaque. Article IV makes clear that property and trade count as privileges and immunities, but the Comity Clause does not. One could reasonably infer that the Comity Clause was drafted to sever the connection between property and trade on one hand and privileges and immunities on the other. But one might also reasonably infer that the Comity Clause was meant to cover more or less the same substance more economically and internally consistently. I find the latter view more persuasive. If one insists on public evidence available during the debates to ratify the Constitution, *The Federalist* suggests that the Comity Clause is meant to enforce the same substance as Article IV of the Articles, and that the main differences between the two are attributable to the fact that the Comity Clause was meant to close loopholes that Article IV created by referring at different points to “people,” “free inhabitants,” and “citizens.”²⁹ If one does not mind a little post-ratification evidence, in the 1797 case *Campbell v. Morris*, the first reported Comity Clause case of which I am aware, the Maryland general court reads the Clause to mean “that the citizens of all the states shall have the peculiar advantage of acquiring and holding real as well as personal property.”³⁰ In his *Commentaries*, Justice Story assumed that the Comity Clause covered rights to “take, or hold real estate.”³¹

It is also reasonable to assume that the Privileges or Immunities Clause also covers some set of property and trade rights. This assumption is reasonable simply by virtue of the fact that the Clause tracks the Comity Clause in referring to “privileges” and “immunities.” It is also reasonable given important evidence about the Privileges or Immunities Clause’s original

²⁹ See *id.*

³⁰ *Campbell v. Morris*, 3 H. & McH. 535, 554 (Md. 1797), *rev’d on other grounds, id.* at

³¹ 3 Story, *supra* note --, § 1800, at 674.

meaning. *Corfield v. Coryell*³² is an 1823 Comity Clause case acknowledged by all commentators to be an important precedent informing the drafting and understanding of the Privileges or Immunities Clause.³³ *Corfield* assumed that “some of the particular privileges and immunities of citizens” included “[t]he 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,” and “to take, hold and dispose of property, either real or personal.”³⁴

Similarly, it is generally agreed that one of the main purposes of the Fourteenth Amendment was to provide Congress with clear constitutional power to enforce section 1 of the Civil Rights Act of 1866.³⁵ The Act’s first provision declares persons born in the United States not Indians or persons subject to foreign jurisdiction to be U.S. citizens. This provision anticipates the first sentence of the Fourteenth Amendment, which makes the same declaration with a few more qualifications.³⁶ Successive provisions of the Act anticipate the Equal Protection and Due Process Clauses, which follow the Privileges or Immunities Clause in section 1.³⁷ Yet where the Privileges or Immunities Clause is positioned in section 1 of the Fourteenth Amendment, the Civil Rights Act declares that such citizens “shall have the same right, in every State and Territory in the United States, in every State and Territory in the United States, to

³² 6 F. Cas. 546 (C.C. Pa. 1823).

³³ See Harrison, *supra* note --, 102 Yale L.J. at 1419 (noting, during the congressional debates over the Fourteenth Amendment, members of Congress needed to make an “obligatory quotation from *Corfield*”); accord Barnett, *supra* note --, at 63-65; Siegan, *supra* note --, at 48-49, 64-65.

³⁴ *Id.* at 552.

³⁵ Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27; see, e.g., Siegan, *supra* note --, at 46.

³⁶ See U.S. Const. art. XIV, § 1. cite also Ed Erler’s work on immigration.

³⁷ Compare Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (guaranteeing new black citizens “full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary withstanding”) with U.S. Const. art. XIV § 1 (“nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws”).

make and enforce contracts [and] to inherit, purchase, lease, sell, hold, and convey real and personal property.”³⁸

I find this evidence convincing enough to make it reasonable to assume that, whatever else Fourteenth Amendment privileges or immunities cover, they thus probably cover a significant class of property and commercial rights. One might object, however, that this assumption punts away one of the most challenging features about the Privileges or Immunities Clause: if a theory concludes that an unenumerated class of rights all count as constitutional privileges or immunities, it opens a Pandora’s box. Even if the theory is right, it leaves legislatures and courts to slug it out arguing whether the Fourteenth Amendment covers family rights, abortion rights, gun rights, rights to travel, criminal-procedure guarantees, and so on. As Bork has argued, the Privileges or Immunities Clause “can be read as an almost illimitable discretionary power in the courts.”³⁹ And the fact “that the ratifiers of the amendment presumably meant something is no reason for a judge, who does not have any idea what that something is, to make up and enforce a meaning that is something else.”⁴⁰

A few answers suffice for our inquiry here. First, this complaint is not really a complaint about constitutional interpretation but about constitutional construction. An originalist is bound to identify the “something” that supplies the Constitution’s original meaning. A judge may decide, for jurisprudential reasons, that the “something” is not determinate enough to make it practicable or advisable for him to make a determinate rule of law out of it. But that is a separate inquiry. Second, the argument is probably not even decisive as an argument for construing the Constitution. For example, as a matter of original public meaning, the term “proper” in the

³⁸ Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27.

³⁹ Bork, *supra* note --, at 39.

⁴⁰ *Id.*

Necessary and Proper Clause⁴¹ is probably about as (in)determinate as the terms “privileges” and “immunities.” As matter of original meaning, a law “properly” carries into execution one of Congress’s enumerated powers in Article I section 8 if it does not upset the Constitution’s general federal-state balance, if it does not subvert the Constitution’s separation of powers, or (more controversially) if it advances Congress’s legislative objective with proportionate regard for individual rights.⁴² Justice Scalia prefers not to follow this meaning because it is too discretionary, but he does make exceptions for a few clear and judicially-manageable federalism doctrines like sovereign immunity and anti-commandeering.⁴³ In the Privileges or Immunities Clause’s case, formalists who advocate formalism for policy reasons could similarly cover property and trade rights and stop there.

One might also reasonably wonder how this suggestion relates to other prominent readings of the Privileges or Immunities Clause. It runs contrary to the reading adopted in *The Slaughter-House Cases*,⁴⁴ which hold that “privileges” or “immunities” refer only to rights of citizenship owed especially by the national government and not the states to U.S. citizens.⁴⁵ The Court opinion in *The Slaughter-House Cases* took notice of Article IV, the Comity Clause, and other similar history,⁴⁶ but it declined to follow these authorities on the ground that the privileges and immunities “of *citizens of the United States*” must have been meant to refer to a class of rights different from these rights of citizens of the “states” or the “several states.”⁴⁷ This interpretation is implausible, because it puts too much emphasis on the distinction between

⁴¹ U.S. Const. art. I § 8 cl. 18.

⁴² See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 57, 60-61 (2005) (Thomas, J., dissenting) (citing Currie, *supra* note --, at 165-64); Gary Lawson & Patricia B. Granger, *The ‘Proper’ Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 *Duke L.J.* 267 (1993).

⁴³ See, e.g., *Raich*, 545 U.S. at 33, 36-39 (Scalia, J., concurring in the judgment); Eric R. Claeys, *Raich and Judicial Conservatism at the Close of the Rehnquist Court*, 9 *Lewis & Clark L. Rev.* 791 (2005).

⁴⁴ 83 U.S. 36 (1872).

⁴⁵ See *id.* at 77-79.

⁴⁶ See *id.* at 75-77.

⁴⁷ *Id.* at 77.

“citizens of the several States” in the Comity Clause and “citizens of the United States” in the Privileges or Immunity Clause. As has been explained elsewhere, it is more plausible to read both clauses to refer to the same set of “privileges” and “immunities.” The clauses differ only in that the beneficiaries of the Comity Clause are state citizens, while the beneficiaries of the Privileges or Immunities Clause are U.S. citizens.⁴⁸ The reading presented here confirms the same point, by providing a reminder how close are the textual parallels between Article IV, the Comity Clause, and the Privileges or Immunities Clause.

The other major reading is the incorporation reading—“privileges” and “immunities” refer to the rights guarantees enumerated in the first eight amendments in the Bill of Rights. Whether the reading presented here contradicts the incorporation reading answer depends on whether incorporation supplies the meaning of the Privileges or Immunities Clause exclusively or only partially. Because we are interested here in whether the Privileges or Immunities Clause protects unenumerated property and commercial liberties, we need not try to disprove the incorporation thesis as it applies to the Bill of Rights. To the extent incorporationists hold that the Privilege or Immunities Clause protects *only* rights enumerated in the Bill of Rights, the sources treated in this section provide important evidence contradicting their claim. But incorporationists may hold, and at least some do hold, that the Privileges or Immunities Clause incorporates not only Bill of Rights guarantees but also other unenumerated rights.⁴⁹ The materials canvassed here confirm that reading.

III. Fundamental Rights: The Substantive Content of Privileges or Immunities

⁴⁸ See Harrison, *supra* note --, [101 yale l.j.] at 1415. For other criticisms, see Amar, [The Bill of Rights], *supra* note --, at 210-13.

⁴⁹ See Amar, [The Bill of Rights,] *supra* note --, at 175-78. Note that, for Amar, the Privileges or Immunities Clause incorporates the Bill of Rights guarantees targeted at citizens or the people, while the Fourteenth Amendment Due Process Clause incorporates the guarantees protecting all persons whether citizens or not. See *id.* at 173-74.

In short, it is reasonable to assume that, whatever else count as privileges or immunities, some rights relating to property and trade do. But that claim is still a long way from saying that the Clause protects fundamental economic liberties of the sort Professor Siegan championed. The property and trade rights in question could have self-standing substantive content. Or, the reasonable public meaning of the Privileges or Immunities Clause could remain agnostic about the substantive content of the rights. In that case, the Clause leaves states with substantial political discretion how to define property and trade rights, and the Clause merely imposes a non-discrimination side constraint on state legislation.

A. Privileges, Immunities, and Natural Rights

At first blush, it is reasonable for the modern reader to suspect that the latter interpretation is more plausible. In modern parlance, “immunity” and (especially) “privilege” refer to positive-law rights. One can find relevant sources defining these terms similarly. *Campbell v. Morris* says that “[p]rivilege and immunity are synonymous, or nearly so. Privilege signifies a peculiar advantage, exemption, immunity; immunity signifies exemption, privilege.”⁵⁰ In many contexts, a “privilege” refers to an exclusive chartered monopoly granted by the sovereign.⁵¹

This reading, however, is anachronistic. “Privilege” and “immunity” had very specific contexts as terms of art in American public law—particularly in public law relating to constitutionalism, citizenship, and naturalization. In these contexts, “privileges” and “immunities” focus particularly on positive-law protections and abstention rights associated especially with membership in the social compact. The comprehensive way to confirm this fact is to survey American colonial charters and Founding Era constitutional debate. But before

⁵⁰ *Campbell v. Morris*, 3 H. & McH. 535, 553 (Md. 1797).

⁵¹ See, e.g., Adam Mossoff, *Who Cares What Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Historical Context*, 92 *Cornell L. Rev.* 953 (2007).

proceeding to those sources, let us review William Blackstone’s exposition of the social compact. Because Blackstone’s exposition is discursive, it makes patent assumptions about privileges and immunities that are only latent in practical legal documents.⁵²

Early in his *Commentaries on the Laws of England*, Blackstone surveys English law and history to conclude that Englishmen enjoy a general presumption of legal liberty:

Thus much for the *declaration* of our rights and liberties. The rights themselves thus defined by [Magna Carta and other foundational] statutes, consist in a number of private immunities; which will appear, from what has been premised, to be indeed no other, than either that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals. These therefore were formerly, by inheritance or purchase, the rights of all mankind; but, in most other countries of the world being now more or less debased and destroyed, they at present may be said to remain, in a peculiar and emphatical manner, the rights of the people of England. And these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty; and the right of private property: because as there is no other known method of compulsion, or of abridging man’s natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.⁵³

This passage is bound to invite competing interpretations—consider for example Blackstone’s slightly-conflicting references to “private immunities” and “civil immunities.” But in broad outline, the following points are fairly clear. First, Blackstone presumes that Englishmen enjoy natural rights under natural law. If that were not clear enough from his several references to “natural liberty,” it is reinforced by the fact that he speaks of Magna Carta and other foundational statutes as “declaration[s]” of natural liberty. In principle, these foundational statutes do not give English subjects new rights; they merely “declare” that the

⁵² Other interpreters have noted that privileges and immunities have connections to Blackstone, but I am not aware that any of them have brought out the moral implications of Blackstone’s argument in detail. See, e.g., Amar, [The Bill of Rights], *supra* note --, at 169.

⁵³ William Blackstone, *Commentaries on the Laws of England* *125 (W.S. Hein & Co. reprint 1992) (1768).

subjects have in civil law rights they already enjoy as a matter of natural law. Second, these natural rights are the rights popularly associated with Locke—life (“personal security”), liberty, and private property.⁵⁴

Third, however, Blackstone is slightly vague about the ultimate foundation for justifying English law’s securing these privileges and immunities. On one hand, the foundation might be natural reason. The natural rights of personal security, personal liberty, and private property, Blackstone assumes, are “the rights of all mankind.” On the other hand, the foundation might be community authority, specifically in the form of the English people’s consent to those principles. Blackstone suggests as much when he acknowledges that the natural rights in question are “in a peculiar and emphatical manner, the rights of the people of England” because they have been “more or less debased or destroyed” elsewhere. In this respect, too, Blackstone follows Locke: While political society is judged by how well it secures basic natural rights, it also depends crucially on the consent of the governed.⁵⁵

Fourth, in any case, in organized political society, English subjects exchange these natural rights for positive-law rights—on condition that the society pledge to make its common end the preservation and enlargement of natural rights, specifically life, liberty and property. This conclusion has an important implication: “Rights” and “liberties” differ subtly from “privileges” and “immunities.” Many readers of the Fourteenth Amendment and its legislative history assume that the terms “liberties,” “rights,” “privileges,” and “immunities” are more or less interchangeable.⁵⁶ I have no doubt that these terms were often used as synonyms quite

⁵⁴ See John Locke, *Two Treatises of Government* II.87, at 323-24 (Peter Laslett ed., 1988) (1698) (justifying political society on the basis of a power that man “hath by Nature . . . to preserve his Property, that is, his Life, Liberty, and Estate”).

⁵⁵ See Locke, *supra* note --, II.95-.97, at 330-32. [cite political theory scholarship questioning coherence of consent theory]

⁵⁶ See, e.g., Amar, [The Bill of Rights], *supra* note --, at 166-67; Curtis, *supra* note --, at 64-65.

often, but if Blackstone is a reliable guide the terms differ slightly. “Rights” to some extent and “liberties” especially refer to natural rights, the moral freedom one enjoys independent from and prior to one’s participation in civil society. “Privileges” and “immunities,” by contrast, refer to legal rights, specifically the positive laws and rights that protect and give determination to moral freedom in organized political society. “Privileges” and “immunities” may also refer to the natural rights, but only inasmuch as the positive rights are so intertwined with the natural rights that it is impossible to separate the two. This distinction is often overlooked in Privileges or Immunities discussions. For example, in *Saenz*,⁵⁷ when Justice Thomas embraces a fundamental-rights reading, he concludes that “privileges” or “immunities” refer to fundamental moral rights—not the laws and legal rights that determine and secure the moral rights.

Finally, although Blackstone refers to these positive-law rights generally as “civil immunities,” this genus covers two different species of particular “privileges” and “immunities.” With some overlap, “civil privileges” refer to entitlements that replicate in positive law the general substance of natural rights. “Private immunities” refer to the domains of non-interference English subjects enjoy as residual rights to do that which is not prohibited by particular civil laws.

If one weaves these various implications together, “privileges” and “immunities” presume something like the following. Men enjoy natural rights, especially rights to life, liberty, or property. These rights are not rights to particular state policies, or to particular outcomes, or to particular personal results. They are rather domains of practical moral discretion, freedoms within which men may determine the ends for which their lives, liberties, and properties are used. In any case, privileges and immunities are positive laws, but with a substance informed by a common political morality. That common morality is informed (with some tension, to be sure)

⁵⁷ See *Saenz v. Roe*, 526 U.S. 489, 524 (1999) (Thomas, J., dissenting).

by two sources: the natural-law and –rights moral theory commonly associated with Locke, Blackstone, and the U.S. Declaration of Independence, and the laws and customs that have traditionally defined, secured, and enlarged natural rights in Anglo-American practice.

Blackstone’s discussion is not binding, not by any stretch. But in my opinion it does an excellent job laying out the intellectual context against most important references to “privileges” and “immunities” need to be read. The following examples are just examples, and they do not substitute for an exhaustive parsing of all the evidence relevant to the original meaning of the terms in question. Even so, these examples *are* important public-law precursors to the Privileges or Immunities Clause. Read in light of Blackstone, these materials suggest, in Founding and antebellum usage relating to citizenship and constitutions, “privileges” and “immunities” refer to positive laws and rights securing natural moral rights along the lines just sketched.

The term “privilege” was being used as a term of art for fundamental English rights as early as the beginning of the seventeenth century. Perhaps the most prominent early usage of the term comes in a Protestation adopted by the British Parliament, authored by Sir Edward Coke, in 1621, in protest against King Charles I. In the course of protesting the King’s domestic religious and foreign policies, Parliament insisted “That the liberties, franchises, privileges and jurisdictions are the ancient and undoubted birthright and inheritance of the subjects of England.”⁵⁸ Now, Parliament made this claim not to assert the general natural rights mentioned by Blackstone; it did so to assert co-equal governance rights in “affairs concerning the King, the State and Defence of the Realm, and of the Church of England” and to claim freedom of speech for members of Parliament to discuss these subjects.⁵⁹ Even so, “privileges” and the other terms of art mentioned make sense as placeholders for substantive rights that Englishmen enjoy by

⁵⁸ Protestation (December 18, 1621) (available at <http://www.british-history.ac.uk/report.aspx?compid=70138>).

⁵⁹ *Id.*

virtue of being Englishmen. It would have been strange for Coke to say that the rights that politically and legally “constituted” the English people were “ink blots” or a mere right not to be treated differently from other Englishmen.

In the same period, “privileges” and “immunities” were also being used in American colonial charters. In Virginia’s 1606 colonial charter, King James I granted to “all and every the Persons being our Subjects . . . all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions.”⁶⁰ The 1629 Charter of the Colony of New Plymouth guaranteed that “all and every the Subjects of [King James and his successors], which shall goe to and inhabite within [the chartered colony], and every of their Children . . . shall have and enjoy all liberties and Immunities of free and naturall Subjects within any of the Domynions of” the English Crown.⁶¹ These and similar guarantees to other colonies⁶² supplied the background which the Founders and Justice Story assumed when they construed Article IV of the Articles of Confederation and the Comity Clause. Now, maybe these charter provisions guaranteed to colonists only non-discrimination rights—that the colonies could not treat colonists any worse than English authorities were treating Englishmen in similar circumstances. But in context, it is more reasonable to expect that these guarantees were substantive and conservative. The English legal system protected an English way of life. The colonial

⁶⁰ The First Charter of Virginia—1606, in 7 *The Federal and State Constitutions: Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* 3783, 3788 (William S. Hein & Co. 1993) (Francis Newton Thorpe ed. 1906).

⁶¹ Charter of the Colony of New Plymouth Granted to William Bradford and His Associates—1629, in 3 *The Federal and State Constitutions*, supra note --, at 1841, 1857.

⁶² See, e.g., Charter of Rhode Island and Providence Plantations, in 6 *The Federal and State Constitutions*, supra note --, at 3211, 3220 (“shall have and enjoy all libertyes and immunities of ffree and naturall subjects within any the dominions of” the crown “as if they, and every of them, were borne within the realme of England”); Charter of Carolina—1663, in 5 *The Federal and State Constitutions*, supra note --, at 2747 (“liberties, franchises, and privileges”); Charter of Maryland—1632, in 3 *The Federal and State Constitutions*, supra note --, at 1669, 1681 (guaranteeing that all subjects of the colony would enjoy “all Privileges, Franchises and Liberties of this our Kingdom of England . . . and the same may use and enjoy in the same manner as our Liege-Men born . . . within our said Kingdom of England, without Impediment, Molestation, Vexation, Impeachment or Grievance of Use”).

governments might promote that way of life, but they might also be arbitrary or incompetent. These guarantees required the colonial governments to treat their subjects according to English substantive standards of decency.

Indeed, in the period leading up to the Revolution, the revolutionaries used “privileges” and “immunities” in exactly that fashion. They assumed that “privileges” and “immunities” established substantive standards of conduct, and they criticized the British government for its and the colonial governments’ failures to respect Americans’ substantive rights. For example, Thomas Jefferson penned two summaries remonstrating the English King and Parliament for violating the American colonists’ rights. Arthur Lee, an Englishman, penned a preface to one of them and wrote: “in justice bound to our country, and ourselves, and that fidelity we owe, Sir, to you, as our Sovereign, we openly declare, that . . . our brethren in America, . . . are entitled, in common with ourselves, to the privileges of men, and the liberties, franchises, and protection of Englishmen”⁶³ Maybe in this passage “privileges” could be read to refer to the local rights of Englishmen--although “the privileges of men” cuts against this reading—in which case Lee was just criticizing the King for not giving American colonists the same legal rights as Englishmen. But that reading is impossible to square with the passages omitted by the first and last ellipses: “the whole proceedings against” Americans “are in open violation of the natural laws of equity and justice.”⁶⁴ The colonists have the same privileges as Englishmen and all other men, and the Crown’s proceedings against the colonists violate the privileges because they violate the (substantive) natural rights of men.

The colonists used the term “privileges” and “immunities” in the same fashion as Lee. For example, in a series of *Resolves*, the Massachusetts people proclaimed: “*Resolved*, That there

⁶³ 2 The Works of Thomas Jefferson 54, 56 (Paul Leicester Ford ed., G.P. Putnam’s & Sons pub. 1904).

⁶⁴ Id.

are certain essential Rights of the *British* Constitution of Government, which are founded in the Law of God and Nature, and are the common Rights of Mankind—Therefore, . . . *Resolved* that no Man can justly take the Property of another without his Consent . . . this inherent Right, together with all other essential Rights, Liberties, Privileges and Immunities of the People of Great Britain have been fully confirmed to them by Magna Charta.”⁶⁵ Obviously, this usage confirms the fundamental-rights reading and refutes the non-discrimination reading of “privilege” and “immunity,” because it describes as a privilege or immunity the right to just compensation widely assumed to be required by natural law.⁶⁶ In the process, this passage also reinforces why any incorporation by the Privileges or Immunities Clause is not likely to determine the Clause’s meaning exclusively. The Resolves seem to confirm the incorporation reading, inasmuch as eminent-domain limitations are enumerated in the Bill of Rights in the Fifth Amendment.⁶⁷ But properly read, the Resolves suggest that “privileges” cover not only eminent-domain limitations but any unenumerated and “inherent” – that is, natural and substantive -- right that was confirmed to the British people by its legal tradition.

At least some Founding Era state constitutions carried the same usages of “privileges” and “immunities” forward into American constitutional law. For example, the Massachusetts Constitution of 1780 specifies that “no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges . . . or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land,”⁶⁸ bars the granting of “particular and exclusive privileges” to men and corporations, and vests in the inhabitants of taxed but

⁶⁵ The Massachusetts Resolves, in *Prologue to Revolution: Sources and Documents on the Stamp Act Crisis* 56 (E. Morgan ed. 1959). For other colonial references, see the sources collected by Justice Thomas in *Saenz v. Roe*, 526 U.S. 489, 523 n.3 (1999) (Thomas, J., dissenting).

⁶⁶ See, e.g., 1 Blackstone, *supra* note --, at *135.

⁶⁷ See U.S. Const. amend. V.

⁶⁸ Mass. Const. of 1780, art. XII.

unincorporated plantations “the same privilege of voting for councilors and senators in the plantations where they reside” as town inhabitants enjoy in relation to their towns.⁶⁹ In the latter two examples, the term “privilege” refers to a positive-law right with little or no connection to the natural law. But in the first, “privileges” and “immunities” surely refer to the positive-law rights that secure the substantive natural rights on Blackstone’s list.

“Privilege” and “immunity” were also used as markers for positive laws securing natural rights in the debate whether to scuttle the Articles of Confederation and ratify the Constitution of 1787. For example, during Pennsylvania’s ratification debate, Centinel argued, “Permit one of yourselves to put you in mind of certain *liberties* and *privileges* secured to you by the constitution of this commonwealth . . . before you surrender these great and valuable privileges forever.”⁷⁰ In *Federalist No. 2*, John Jay spoke of the American people as follows: “To all general purposes we have uniformly been one people; each individual citizen everywhere enjoying the same national rights, privileges, and protection.”⁷¹ Centinel and Publius disagreed about whether the new Constitution should be ratified. But they did agree on a common set of political and moral terms to wage the argument. By their usages Centinel and Publius both suggested that “privileges” were not repetitive of but slightly different from “rights” or “liberties.” More important, by their language both assumed that citizens were entitled to ask whether the Constitution of 1787 did a better job securing both the moral freedom and the privileges than the Pennsylvania Constitution and the Articles of Confederation. This is important evidence against the non-discrimination interpretation of “privilege.” Centinel was not arguing that the new Constitution would promote one class of Pennsylvanians over others; he

⁶⁹ See *id.* at arts. II, cl. 1, art. VI.

⁷⁰ Centinel, Letter I, in *The Anti-Federalist: Writings by the Opponents of the Constitution* 13, 13 (Herbert J. Storing ed. & Murray Dry, selections 1985).

⁷¹ *The Federalist No. 2*, at 5, 6-7 (Clinton Rossiter ed. & Charles R. Kesler intro. 1999) (Jay).

was arguing that it would make *all* Pennsylvanians have less substantive freedom than they were enjoying under the Articles of Confederation and their own constitution.

These statements are all fairly removed in time from the Fourteenth Amendment, to be sure. But natural-law and –rights principles continued to influence American law and politics significantly past the Civil War⁷²--indeed, they inspired the abolition movement and by extension the Civil War Amendments. So it is reasonable to expect that terms like “privilege” and “immunity” kept the same moral meaning as long as Blackstonian natural-law and –rights principles continued to influence common political morality. In addition, it is reasonable to expect that well-educated lawyers would know, whether through firsthand knowledge or through treatises like Story’s, that terms like “privileges” and “immunities” had consistent content from colonial charters through the Constitution of 1787 to the Civil War Amendments. It is therefore reasonable to suspect that privileges and immunities relating to property and commerce were positive laws that protected substantive interests shaped by natural-law and –rights principles.

B. Privileges, Immunities, and the Comity Clause

The sources just canvassed do not get substantial treatment in prominent non-discrimination scholarship on the Privileges or Immunities Clause. That scholarship tends to focus heavily on the same materials as Professor Siegan: the text, antebellum Comity Clause case law, and the legislative history of the Fourteenth Amendment.⁷³ Scholarship in favor of the non-discrimination reading has followed that trend. According to that scholarship, Comity Clause precedent enforces a formal non-discrimination protection; the other materials support several different interpretations; and at this point the antebellum Comity Clause case law

⁷² See, e.g., Mark Warren Bailey, *Guardians of the Moral Order: The Legal Philosophy of the Supreme Court, 1860-1910* (2004).

⁷³ See, e.g., Barnett, *supra* note --, at 200-03; Amar, [The Bill of Rights,] *supra* note --, at 163-230, Epstein, *supra* note --.

provides the tiebreaker resolving evidentiary conflicts in favor of the non-discrimination reading.⁷⁴

There are at least three problems with this approach. One should be clear enough already from part II and the previous section: If an originalist focuses only on antebellum Comity Clause case law and post-1865 Fourteenth Amendment legislative history, he is leaving on the cutting-room floor sources that provide important background context for understanding how “privileges” and “immunities” were understood. Another problem is that non-discrimination scholarship reads the antebellum Comity Clause case law to support a non-discrimination view more than the case law really does. As David Upham has shown, antebellum case law interpreted the Comity Clause to at least three different rules, including both the fundamental-rights view and the non-discrimination view. At a minimum, the fundamental-rights view had equal weight to the non-discrimination view in the cases.⁷⁵

Most fundamentally, however, the non-discrimination reading creates serious textual and conceptual problems for the Comity Clause, while the fundamental-rights reading does not. If originalism is the search for the most reasonable objective public meaning of text, the conceptual strength of the fundamental-rights reading counts as an important reason to follow the fundamental-rights case law when construing the Comity Clause. By the same token, the internal inconsistencies the non-discrimination reading creates create an important reason to discount the non-discrimination case law when construing the Comity Clause. And if it is reasonable to assume that the terms “privileges” and “immunities” should remain consistent from the Comity Clause to the Privileges or Immunities Clause, these textual comparisons provide important reasons to give weight to the case law and legislative history favoring the

⁷⁴ See, e.g., Currie, *supra* note --, at 345-49; Harrison, *supra* note --, [101 Yale L.J.] at 1397-1410.

⁷⁵ See David R. Upham, Note, *Corfield v. Coryell and the Privileges and Immunities of American Citizenship*, 83 *Tex. L. Rev.* 1483, 1498-1510 (2005).

fundamental-rights view and not the corresponding law and history favoring the non-discrimination view.

To see why, let us consider again the text of the Comity Clause: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”⁷⁶ The verb in this Clause is “entitled.” “Entitled” does no work to determine what particular rights are enjoyed by the citizens covered. All the verb does is declare that citizens covered have whatever rights come within the ambits of “privileges” or “immunities.” For the Comity Clause to have coherent meaning, the terms “Privileges” and “Immunities” must have enough internal content to say what is covered in a right, and when a state action respects or infringes the right. In other words, “privileges” and “immunities” must presuppose a substantive theory of rights, which in turn delineates a substantive theory of government regulation. The non-discrimination reading cannot satisfy these demands—at least not without relying through the backdoor on a substantive theory of rights and regulation. But a “substantive” theory of constitutional privileges and immunities is basically a fundamental-rights theory of the same.

Let us illustrate with a few different examples showing the strengths and weaknesses of the two approaches.⁷⁷ North Carolina has a race conveyancing statute,⁷⁸ while Massachusetts has a notice statute.⁷⁹ Assume that a citizen of North Carolina buys land in Massachusetts, and that the buyer knows that the seller previously conveyed the land to an earlier Massachusetts buyer who has not recorded yet. Assume finally (and a little incredibly) that the two buyers

⁷⁶ U.S. Const. art. IV, § 2, cl. 1.

⁷⁷ In the rest of this section, I assume to be demonstrated and apply principles of natural property rights and regulation I have explained at greater length in Eric R. Claeys, Public-Use Limitations and Natural Property Rights, 2004 Mich. St. L. Rev. 877; Eric R. Claeys, Takings, Regulations, and Natural Property Rights, 88 Cornell L. Rev. 1549 (2003). Consistent with the sources set forth in part II and section II.A, I also assume that these natural-law and –rights principles inform the substance of a fundamental-rights reading of the Comity Clause. But the conceptual criticism I am making of the non-discrimination reading holds true whether or not “privileges” and “immunities” are informed by American natural-law and –rights principles.

⁷⁸ N.C. Stat. § 47-18.

⁷⁹ Mass. Gen. Laws Ann. Ch. 183, § 4.

litigate, and that the North Carolina buyer argues that Massachusetts would violate the Comity Clause by applying its own (notice-based) conveyancing rule. Under the non-discrimination view, it is clear this suit has no merit; the court treats the North Carolina buyer the same as any Massachusetts buyer by applying the Massachusetts conveyancing statute to the sale. The fundamental-rights view leads to the same result, even if the explanation is slightly more complicated. The fundamental-rights view recognizes in the North Carolina buyer a general fundamental right to buy and sell property in Massachusetts. However, that view also recognizes that “the modifications under which we at present find” property, “and of translating it from man to man, are entirely derived from society.”⁸⁰ Race and notice conveyancing statutes may have their differences, but the differences are so minor that neither can be said to count as an abridgment of the right to property. So the North Carolina buyer still loses, because the “privilege” to which he is entitled in Massachusetts is to protection of his land purchase under the Massachusetts positive laws that give determination to the natural right to dispose of land in Massachusetts. To that extent, both readings grant that, even if some state actions abridge or deny privileges, “states ha[ve] control over the content of those rights” in many respects.⁸¹

In some cases, the two approaches generate different results, but the differences do not point to conceptual problems. Consider three possible cases. In one, New York grants an exclusive monopoly to a New York resident to operate a steamboat on a New York river for a limited term, and the steamboat operator sues out-of-state citizens for operating a competing steamboat in violation of the charter. (These are more or less the facts of *Livingston v. Van Ingen*, the first prominent Comity Clause case embracing the non-discrimination view.⁸²) In the second, Louisiana grants to a Louisiana resident an exclusive monopoly over cattle-slaughtering

⁸⁰ 1 Blackstone, supra note --, at *134.

⁸¹ Harrison, supra note --, [101 Yale L.J.] at 1421.

⁸² 9 Johns. 507, 561, 577 (N.Y. 1812).

in New Orleans city limits, and the monopoly butcher sues a Texas butcher for establishing a competing slaughterhouse in New Orleans in violation of the monopoly. (These facts are adapted loosely from *The Slaughter-House Cases*.⁸³) In the third, Oklahoma bars businesses from making or selling ice without a certificate of public convenience and necessity, and it denies such licenses to some in-state ice makers and many out-of-state ice makers on the grounds that they would inject too much competition into the Oklahoma ice-making business. (These facts are adapted loosely from *New State Ice Co. v. Liebmann*.⁸⁴) In all of these cases, the non-discrimination approach holds in straightforward fashion that the out-of-state competitor has suffered no constitutional violation. The out-of-state competitor has only as much or as little right to compete as in-state competitors. Once the monopoly or licensing laws are in force, the general run of the citizenry have no general right to compete—only the monopolists or licensees have a privilege.

By contrast, under the fundamental-rights approach, out-of-state residents may have a constitutional claim even if in-state residents do not. In all of these cases, out-of-state citizens are “entitled” to a “privilege” or “immunity” in the form of a natural right to practice the trade of their calling, subject to natural-law duties to do so with regard for the like rights of others and the legitimate interests of the public. In each case, however, it is not enough to say that the state scheme restrains businesses from free competition. To determine whether the out-of-state businesses have been denied a constitutional privilege or immunity, the law must examine whether the state barriers to entry give determination to the natural-law responsibility that comes with the natural right to compete. In the Oklahoma ice-making example, it is extremely difficult if not impossible to make that case. Neither competitors nor the public suffer a legitimate harm

⁸³ 83 U.S. 36 (1872).

⁸⁴ 285 U.S. 262 (1932).

if too many businesses are making ice.⁸⁵ The Louisiana slaughter-house example is slightly more difficult but comes to the same result. The public does have a legitimate interest in stopping cattle from being slaughtered in conditions that could spread disease or food poisoning—but the state could advance this interest in several ways short of restricting the slaughtering business to a monopoly.⁸⁶ The New York case is closer. New York could restrain free competition by granting a monopoly to operate a steamboat exclusively for a limited term—if it could be shown that the monopoly was necessary to encourage the growth of the steamboat industry and that the monopoly was reasonably appropriate to achieve that end. Similar principles informed state bridge-building policy in the nineteenth century⁸⁷ and inform the basic design of American patent law.⁸⁸ So in the former cases, the would-be competitors’ “privileges” and “immunities” do not cease out of respect for legitimate police limitations on the competitors’ freedom to compete. But in the last case, the out-of-state boat operators might not be able to claim they are “entitled” to a privilege to compete in New York during the term of the New York operator’s monopoly—because the operators’ freedom to compete is tacitly qualified by the responsibility to respect a temporary exclusive right promoting the steamboat business.

These cases reveal non-originalist reasons why the non-discrimination view seems more attractive than the fundamental-rights view. The former, more than the latter, respects federalism. The former, more than the latter, stops federal judges from invalidating legislation approved by the political process. And the former, but not the latter, avoids the strange spectacle in which out-of-state citizens have more rights than in-state citizens against anticompetitive

⁸⁵ This is how the U.S. Supreme Court analyzed the police-power justification to the law challenged on substantive due process grounds in *New State Ice Co.*, 285 U.S. at 277-80.

⁸⁶ This is how the dissenters in the U.S. Supreme Court analyzed the police-power justification to the law challenged on Privileges or Immunities grounds in *The Slaughterhouse Cases*, 83 U.S. at 103-08 (Field, J., dissenting).

⁸⁷ See, e.g., *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837).

⁸⁸ See Mossoff, *supra* note --.

measures. But because our inquiry is originalist, policy arguments about judicial restraint carry no weight here. And in other cases, the non-discrimination approach has serious conceptual problems.

Consider the fact situation that arose in the 1797 Maryland case *Campbell v. Morris*.⁸⁹ Maryland law specified that a Maryland creditor could attach the property of a debtor who was not a citizen or resident of Maryland, but not upon the property of a Maryland citizen. Campbell sought to attach lands owned by Morris in Maryland, and Morris protested the attachment on the ground that the attachment law unconstitutionally gave preferential treatment to Maryland citizens and residents.⁹⁰ On the fundamental-rights view, the challenge lacks merit. Morris is entitled to buy and enjoy land in Maryland under the laws protecting substantially the same property rights as the rights Maryland citizens and residents enjoy. Morally, the fundamental right to property is a right to determine the use and disposition of one's property to the greatest extent consistent with the like rights of others and the legitimate needs of the public. To give force to "the rights of others," moral property rights come with correlative moral duties not to use property to perpetrate force or fraud on neighbors. The Maryland attachment scheme legitimately gives determination to that fraud proviso in Maryland law. Maryland personal-jurisdiction rules, one presumes, guarantee that Campbell, when defrauded, can hale a local debtor into a Maryland court; the attachment law creates substantive parity because it gives Campbell power over Morris even though he might otherwise avoid personal jurisdiction in Maryland.

⁸⁹ 3 H. & McH. 535 (Md. 1797).

⁹⁰ See *id.* at 536.

Harrison reads *Campbell* to count as a strong precedent for the non-discrimination interpretation of the Comity Clause.⁹¹ This reading is hard to square with language insisting that the Comity Clause “secures and protects personal rights,”⁹² and the fact, noted by Upham, that *Campbell* is quite precise about the respects in which the Comity Clause imposes non-discrimination protects and the respects in which it guarantees substantive protection.⁹³ But *Campbell* highlights another problem not noted by Upham or other commentators: To make a non-discrimination rule fit the case, the rule must bootstrap on a substantive account of property regulation.

Under the non-discrimination view, Morris is “entitled”⁹⁴ to “at least the same privileges and immunities that [Maryland’s] own citizens enjoy.”⁹⁵ Prima facie, Morris is getting treated worse by Maryland personal-jurisdiction rules than Maryland’s citizens are. Maryland citizens are not liable to have their property attached by a special proceeding, but Morris is. Obviously, the non-discrimination reading rebuts this prima facie conclusion, on the ground that the attachment proceeding really just puts Morris on the same footing on which Maryland debtors already stand under Maryland’s general rules of personal jurisdiction. That move only works, however, because a substantive theory of property regulation sets the baseline for measuring whether Morris is being treated fairly in contrast with Maryland debtors. *Campbell* requires that Morris’s “property shall be protected and secured by the laws of the state, in the same manner as the property of the citizens of the state is protected. [The Comity Clause] means, such property

⁹¹ Harrison, supra note --, [101 Yale L.J.] at 1401 n.50.

⁹² Campbell, 3 H. & McH. at 554.

⁹³ *Campbell* gives out-state residents a non-discrimination right against higher property taxes, but a substantive right protecting “the peculiar advantage of acquiring and holding real as well as personal property.” Campbell, 3 H. & McH. at 553-54. See Upham, supra note --, [83 Tex. L. Rev.] at 1501.

⁹⁴ U.S. Const. art. IV § 2 cl. 1.

⁹⁵ Harrison, supra note --, [101 Yale L.J.] at 1401.

shall not be liable to any taxes or burdens which the property of the citizens is not subject to.”⁹⁶

The “same” in the first sentence and the “burdens” in the second sentence do not make coherent sense without backfilling a substantive account of the rights and duties that come with land. For the same reason, textually, if Morris lacks a “privilege” or “immunity” to be free from the attachment proceeding, it is because his “privileges” and “immunities” are at once defined and limited by a substantive moral responsibility to subject his property to Maryland jurisdiction to answer for potential fraud in Maryland.

This example may seem minor, but the principle for which it stands is quite important. In 1820-21, just after the Missouri Compromise was passed, Missouri applied for statehood with a Constitution that purported to vest the general assembly with power “to pass laws . . . [t]o prevent free negroes and mulattoes from coming to, and settling in, this state, under any pretext whatsoever.”⁹⁷ Assume first that “privileges” and “immunities” in the Comity Clause refer to fundamental rights—to equal protection, under state positive laws, that give determination to the natural right to liberty without annihilating the substance of the right. When the Comity Clause is so construed, any laws carrying this provision of the Missouri Constitution into effect flatly violate the Comity Clause. The laws restrain out-of-state blacks and mulattos’ natural rights to travel, and there is no obvious justification why that right is being restrained. On this basis one member of Congress argued that black and mulatto state citizens held “rights and privileges”⁹⁸ equivalent to white citizens. (Here, like Centinel and Publius, the Congressman assumed a symmetry between moral “rights” and legal “privileges.”) On the same basis Congress admitted Missouri to statehood, on condition that the clause in question “shall never be construed to

⁹⁶ Campbell v. Morris, 3 H. & McH. 535, 554 (Md. Gen. Ct. 1797), rev’d on other grounds, --

⁹⁷ Missouri Constitution of 1820, art. III, § 26.

⁹⁸ 4 The Founders’ Constitution 493 (Philip B. Kurland & Ralph Lerner eds. 1987), reprinting 37 Annals of Congress: The Debates and Proceedings in the Congress of the United States 635-38 (statement of Rep. Eustis, Dec. 12, 1820).

authorize the passage of any law, and that no law shall be passed in conformity thereto, by which any citizen of either of the States in this Union shall be excluded from the enjoyment of any of the privileges and immunities to which such citizen is entitled under the Constitution of the United States.”⁹⁹

By contrast, conceptually, the non-discrimination reading is confounded by the same problem as in *Campbell*. Assume a black citizen of another state seeks to settle in Missouri, in defiance of a Missouri statute passed under color of the constitutional provision quoted above. Perhaps the “privilege” in question is defined in reference to the personal-liberty rights enjoyed by white Missouri citizens. In that case, the would-be black resident is “entitled” to the same rights of travel as the white citizens, and the law violates the Comity Clause. But Missouri could say it is treating the would-be resident equally to blacks already in Missouri, who lack personal liberty because they are slaves. In that case, the would-be resident has no “privilege” or “immunity” to mount a Comity Clause claim. If the former reading is required, it is only because the non-discrimination view tacitly draws on a substantive moral argument why the would-be black resident deserves the same right to travel as white Missourians. That argument makes the right to travel a fundamental moral right, and it determines what “equal” application of that right means as between blacks and whites, in-state residents and immigrants.

The Missouri example also powerfully highlights the interplay between racial equality and economic liberty in antebellum legal and political thought. Modern constitutional jurisprudence assumes that property rights and racial equality are separate topics.¹⁰⁰ In this respect, formalist readings of the Comity and Privileges or Immunities Clauses are distinctly

⁹⁹ Act of Congress, March 2, 1821, Statutes at Large, 16th Cong., 2d Sess. 3:645.

¹⁰⁰ Compare, e.g., *United States v. Carolene Products*, 304 U.S. 144, 152 (1944) (subjecting “regulatory legislation affecting ordinary commercial transactions” to rational-basis scrutiny) with *id.* at 152 n.4 (suggesting that a higher standard of review should apply to racial discrimination and laws burdening discrete and insular minorities).

modern.¹⁰¹ Those readings try to focus the Clauses in a manner that imposes “a simple prohibition of racial discrimination,” without “creat[ing] substantive federal rights” limiting states’ general discretion to regulate for a wide range of ends.¹⁰² But the Missouri example reveals these readings to be anachronistic. In colonial charters, Blackstone, and the Articles of Confederation, “privileges” and “immunities” had strong legal, moral, and historical association with natural rights. In these seminal sources the most frequent examples of “privileges” and “immunities” were the rights to acquire and hold real estate and the right to practice a trade. But as the Missouri example shows, the moral theory that propounds a thick substantive theory of property and commercial regulation also propounds a thick substantive theory of racial equality. Now maybe a formalist could reconcile Congress’s treatment of Missouri example with a more hands-off approach to state property restrictions. Maybe antebellum “privileges” and “immunities” toward personal liberty were thicker and more robust than their analogs for property and commercial rights. I am not aware that such a case has been made, however, and the natural-rights tradition of Locke and Blackstone treated freedom in one’s property as functionally identical to freedom in one’s person.

In many of the preceding cases, the non-discrimination reading does not bring the Comity Clause into tension with state regulation because it lacks a substantive account of rights and regulation. In other cases, however, that lack of theory brings the non-discrimination reading into far greater tension with state regulation than the fundamental-rights view. The simplest example is *Corfield v. Coryell*.¹⁰³ In *Corfield*, a Pennsylvania boating crew sailed into New Jersey waters and fished for oysters in defiance of New Jersey law, which forbid non-residents

¹⁰¹ See Harrison, *supra* note --, [101 Yale L.J.] at 1424 (“We are now used to legislation that rearranges people’s private law relationships . . .”).

¹⁰² Currie, *supra* note --, at 347; see Harrison, *supra* note --, [101 Yale L.J.] at 1411.

¹⁰³ 6 F. Cas. 546 (C.C. Pa. 1823).

from fishing for oysters without a New Jersey resident¹⁰⁴ or boat. The Pennsylvania boat owner challenged the oyster law on the ground that it withheld from him privileges and immunities in violation of the Comity Clause. Justice Bushrod Washington rejected this challenge on the ground that the right to fish in common New Jersey waters was not a “privilege” or an “immunity.” Under a fundamental-rights reading, this view is correct. Fundamental property and trade rights refer to the positive laws that secure to individuals their natural rights to be let alone, to determine the ends to which they may apply their property and economic liberty. To protect the rights of out-of-state citizens to be let alone, a state does not need to extend to those citizens usufructuary rights to extract common state resources.¹⁰⁵ So the fundamental-rights reading cleanly separates the Comity Clause from state decisions to provide special benefits or subsidies to its citizens.¹⁰⁶ The definition of a fundamental right excludes benefits or subsidies from the class of “privileges and immunities of citizens of the several states.”

By contrast, under the non-discrimination view, *Corfield* should have a Comity Clause claim. Formalists do not consider this possibility seriously enough. For example, according to Currie, *Corfield* holds, notwithstanding some “loose language,” that the Comity Clause “gave no protection even where there was [interstate] discrimination unless the right was fundamental.”¹⁰⁷ But in so doing, Currie begs an important question. If the law takes a hands-off view about the merits of state property rights and regulation, it is difficult or impossible for the law to determine whether a given property right is “fundamental.” To work out fully the non-discrimination reading of the Comity and Privileges or Immunities Clauses, Harrison maintains that “privileges”

¹⁰⁴ See *id.* at 547-58.

¹⁰⁵ See *id.* at 552 (“we cannot accede to the proposition . . . 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”).

¹⁰⁶ At least as long as the benefits or subsidies do not restrain out-of-state citizens’ rights to be let alone.

¹⁰⁷ Currie, *supra* note --, at 347 n.131. See also Harrison, *supra* note --, [101 Yale L.J.] at 1399 (reading *Corfield* to “involve[] not some well-known fundamental right” but merely “oysters.”).

and “immunities” refer “not to minimum Lockean freedoms but rather a full specification of state law on basic subjects,”¹⁰⁸ including “personal security, contractual capacity, and property.”¹⁰⁹ The non-discrimination principle then allows the state to “alter [these rights’] content equally for all,” but not to “withdraw[] them from certain citizens”—in the case of the Comity Clause, out-of-state citizens.¹¹⁰ If one follows this distinction logically, Corfield has a privilege in New Jersey oyster-fishing. The fishing rights are property rights, specifically usufructuary rights that entitle the fisherman to keep all that he captures. New Jersey may alter the content of these usufructuary rights for all citizens, in- and out-of-state alike, but it may not discriminate against out-of-state citizens by withholding from them property privileges it extends to its own citizens.

In all of these examples, the Comity Clause gives the state no chance to justify its choice to keep privileges and immunities among its own citizens only. The Comity Clause states that citizens of each state “shall be entitled to all” privileges and immunities covered. The verb “entitled” allows no room for state excuse or justification. If there were any doubt about this fact, the doubt is removed by the “shall” and the “all” bookending the “entitled.” Once the usufructuary right, or the welfare, or the corporate subsidy is a constitutional “privilege,” out-of-state citizens “shall be entitled” to “all” of them. So textually, a non-discrimination reading of the Comity Clause draws the federal courts into interstate disputes about state common property, welfare, and corporate subsidies as surely as the fundamental-rights reading of the Clause draws them into state restraints of competition. This reading threatens to undermine traditional state laws and practices as much or more than the fundamental-rights reading threatens state practices restraining free competition. One might avoid this problem by defining positive entitlements out of the class of Comity Clause “privileges” and “immunities,” but only at the cost of substantially

¹⁰⁸ Id. at 1418.

¹⁰⁹ Id. at 1422.

¹¹⁰ Id.

compromising the integrity of the non-discrimination reading. One might also call all of the different rights constitutional “privileges,” and then sort out the problems when weighing the government’s interest to restrain the benefit. But that approach, again, compromises originalism, because it defies the original meanings of “shall,” “entitled,” and “all.”

Now, maybe “privileges” and “immunities” are limited by some background notion of fundamental rights. The Comity Clause only applies to fundamental rights, it does not restrain how states legislate on those rights generally, but it does impose a side constraint that they refrain from treating state residents preferentially over out-of-state citizens. But neither Currie nor Harrison explains where this fundamental-rights principle comes from.

Conceptually, it would be hard to reconcile such a notion with the non-discrimination reading. Once “privileges” and “immunities” are conceived without reference to “minimum Lockean freedoms,” once they refer to pure “positive law rights,”¹¹¹ it becomes conceptually difficult or impossible to distinguish between (protected) private rights and (unprotected) public benefits. The “New” Property then creates state “privileges” and “immunities” for the purposes of the Comity Clause on the same terms as the “Old” Property that Justice Washington assumed to be the exclusive coverage of the Clause.¹¹² Thus, for example, *Saenz v. Roe* involved a challenge by an out-of-state citizen to a durational residency requirement stopping her from claiming California welfare benefits. The case was litigated under the Privileges or Immunities Clause, but Saenz could have quite logically have challenged the residency requirement under a non-discrimination reading of the Comity Clause. One can imagine challenges to state subsidies or tax breaks for in-state businesses raising the same problems.

¹¹¹ Harrison, *supra* note --, 101 Yale L.J. at 1418, 1420.

¹¹² See Charles A. Reich, *The New Property*, 73 Yale L.J. 733 (1964).

Now maybe an originalist could avoid these complications by finding evidence of traditions and histories suggesting that usufructuary rights to state commons, welfare benefits, and corporate subsidies have never been considered the sorts of property to which the Comity Clause applies. But it seems arbitrary for an originalist to use principles like these as a shield, when they keep state laws out of judicial review under the Comity Clause, but not as a sword, when they pull state laws into the Comity Clause. It seems especially arbitrary seeing that the Congress used the fundamental moral right of liberty as a sword in the case of Missouri statehood.

In short, one accords more closely to the simple meanings of “privileges,” “immunities,” and “entitled” if a moral theory informs the substance of privileges and immunities and their police regulation. Of course, all of these observations relate to the Comity Clause, not the Privileges or Immunities Clause. But if “privileges” or “immunities” in the Comity Clause parallel and foreshadow their counterparts in the Privileges or Immunities Clause, then the latter Clause protects substantive—that is, fundamental—rights.

* * * * *

To be sure, the observations in section III.B are primarily conceptual, and the historical sources interpreted in section III.A just scratch the surface. Even so, given the current state of scholarship on privileges and immunities, the materials presented here are extremely important. Again, originalist interpretation has shifted from focusing on the subjective and collective intentions of drafters to the reasonable objective public meaning of the text drafted. From that standpoint, colonial charters, Article IV of the Articles of Confederation, and the Comity Clause are all important because they anticipate the text used in the Privileges or Immunities Clause. They reveal important lessons about the internal conceptual structure of the Privileges or

Immunities Clause. In addition, these materials help organize and prioritize other evidence relevant to the Clause’s textual meaning—especially Comity Clause case law and the legislative history of the Fourteenth Amendment. When two sources of relevant evidence conflict, the source that fits better with what is known with a high degree of certainty about the text is to be preferred over the source that is not. So even though the sources canvassed here leave open many questions, they provide important reasons why subsequent scholarship should take more seriously the evidence supporting a fundamental-rights reading of “privileges” and “immunities.”

IV. “Abridging” Privileges or Immunities

One might reasonably protest that the preceding part, and especially section III.B, attacked a straw man. Much of the preceding part parsed the Comity Clause, and the Comity Clause is not identical to the Privileges or Immunities Clause. Perhaps it is unfair to saddle the Privileges or Immunities Clause with baggage from the Comity Clause—especially since many of the problems that follow from the non-discrimination reading of the Comity Clause follow from the fact that the latter Clause uses the verb “entitled.”

But the verb used in the Privileges or Immunities Clause confirms in its own way that “privileges” and “immunities” refer to fundamental substantive rights. When the Privileges or Immunities Clause stops states from interfering unjustifiably with privileges or immunities of U.S. citizenship, it bars them from “abridg[ing]” those privileges or immunities. Definitionally and conceptually, the verb “abridged” presumes that the thing that is not supposed to be abridged has a substance independent from the government action.¹¹³

At the Founding, through the Civil War, and as a legal and moral term of art, the verb “abridge” was used quite often as a synonym for “diminish,” and an antonym of “enlarge.” This

¹¹³ See Harrison, *supra* note --, [101 Yale L.J.] at 1420 (“it would be senseless to prohibit a state from abridging a right that is defined under state law; power over a right’s content implies the power to change the right at will”).

definition has important repercussions when legal language speaks of “abridging” rights. If “abridge” is a synonym for “diminish,” the rights that may not be abridged have a substance that comes from some authority different from the constitutional limitation. That outside authority provides a measure for the limitation. A government action does not abridge the right if it secures or enlarges the (pre-constitutional) substantive interest declared by the right—but it does abridge if it restrains the substance of the right without any offsetting justification.

Many usages of the term “abridge” illustrate. Blackstone’s *Commentaries* illustrate how “abridge” operates in the context of legal practice built on natural-rights moral philosophy. In the same passage in which he introduces his readers to privileges or immunities, Blackstone declares: “[A]s there is no other known method or compulsion, or of abridging man’s natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these may be justly said to include the preservation of our civil immunities in their largest and most extensive sense.”¹¹⁴ English subjects’ “civil immunities” (that is, their privileges and immunities) have pre-political substance because they are the determinations, under English positive law, of English subjects’ moral rights in the state of nature. English law does not “create” or “establish” those immunities—it “preserv[es]” immunities Englishmen already had by virtue of the laws of nature. Those immunities are legal expressions of a moral interest with which English subjects are endowed, namely to “free will.” This free will is not arbitrary or unlimited license; elsewhere, Blackstone defines “[p]olitical . . . or civil, liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the publick.”¹¹⁵ Those limitations justify government when it defines in positive law citizens’ general domain of

¹¹⁴ 1 Blackstone, *supra* note --, at *129.

¹¹⁵ 1 *id.* at *121.

non-interference, or when it restrains one person from invading another's domain. The substantive right and its limitations define when actors (public or private) diminish that substantive moral interest in "free will," by "infring[ing]" or "dimin[ishing]" English subjects' civil privileges or immunities. But when such acts diminish Englishmen's free will, the term of art Blackstone uses is "abridging."

Sometimes, pre-existing rights come not from natural-law and –rights morality but from sources of positive law. Thus, even up through the Civil War, it was not uncommon for a court to conclude that a state "abridges" a party's contract rights when it passes a law diminishing a contracting party's rights.¹¹⁶ Here, "abridge" acts as a synonym for the term "impair" as used in the Contracts Clause.¹¹⁷ Either term presumes that two contracting parties may contract substantive rights without needing the state to tell them in advance what rights they have. In contrast with moral natural-law and –rights theory, the contracting parties have rights that have an existence in positive law, namely the law of property and contract. But the laws of property and contract are legal codifications of a general moral presumption of liberty. Property and contract law secure domains of private liberty to individual actors, in which they may determine how to use and enjoy their freedom and their external assets. By presuming a distinction between public and private affairs, in a deep way property and contract law inherently presume that the political system does and should distinguish pre-political private moral interests. Both the positive law of contract and property, and the general public-private distinction they presume, precede a constitutional limitation on contract.¹¹⁸ The contracting parties enjoy their property and contractual rights under bodies of law separate from the public power states may

¹¹⁶ *Farnsworth & Reaves v. Vance & Fleming*, 42 Tenn. 108 (1865).

¹¹⁷ U.S. Const. art. I § 10.

¹¹⁸ Especially if the laws of contract and property are drawn up to declare and secure, consistent with natural-law and –rights theory, a realm of private freedom anterior to and distinct from the sphere of public law.

bring on contracts. A contract's terms generate substantial rights; a state law abridges or impairs those rights to the extent it eliminates those rights as defined by pre-constitutional property and contract law.

Indeed, the Constitution, as amended through the Fourteenth Amendment, uses the term “abridge” only in manners consistent with these usages. The most powerful illustration for this understanding is in the First Amendment. The Free Speech Clause orders Congress to make “no law abridging the freedom of speech.”¹¹⁹ Modern textualists are tempted to put the emphases on “no law” and “speech,” so that the Clause bars virtually all speech regulations. But read against the context of natural-law and –rights theory, the emphases ought to be on “abridging” and “freedom.” By speaking in terms of a “freedom” of speech, the First Amendment does not establish a new right but rather declares the existence of a natural right—that is, a moral and pre-political interest preceding the Constitution. The right is a negative liberty to determine the use and enjoyment of one's speech, consistent with the equal rights of others and the legitimate needs of the public. As Philip Hamburger has explained, at the Founding, when politicians, journalists, or preachers spoke about laws affecting speech, they overwhelmingly assumed that governments could “regulate” speech—that is, pass positive laws providing real-life determination to the natural-law limitations not to use one's speech to injure the natural rights of others or the legitimate interests of the public. That is why governments could regulate obscenity, defamation, or seditious libel without “abridging” speech. But when governments restrained the negative liberty in determining one's use of speech more than necessary to enforce these limitations, governments then “abridged” speech. In short, the term “abridging” assumed that the natural law prescribed the general substance of speech rights, it tacitly excluded positive

¹¹⁹ U.S. Const. amend. I.

laws that kept real-life speech within its natural-law substantive limits—and it stopped Congress from restraining the natural-law substance of speech.¹²⁰

Consider how John Marshall justified the seditious-libel laws in the Alien and Sedition Act. Marshall considered the possibility that the First Amendment literally said “no” law could restrain speech rights. For Marshall, if the First Amendment had meant to codify the “no law” reading, Congress should have used the verb “respecting,” as it did in the Establishment Clause, not the verb “abridging.” Marshall understood the *freedom* of speech and press to refer to “a liberty to publish, free from previous restraint, any thing and every thing at the discretion of the printer only, but not the liberty of spreading with impunity false and scandalous slanders which may destroy the peace and mangle the reputation of an individual or of a community.”¹²¹ For Marshall, those limitations on slander and sedition came from natural law and English common law. A government action did not “abridge” free speech if it restrained exercise of “the liberty of spreading . . . false and scandalous slanders”—because that liberty fell outside the substance of the Free Speech Clause.

The other relevant use of “abridge” in the Constitution as of the Civil War is section 2 of the Fourteenth Amendment, which specifies: “when the right to vote at any [specified] election is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way *abridged* . . . the basis of representation therein shall be reduced.”¹²² Here, the term “abridged” is read most reasonably as a backstop term catching any government action “diminishing” the right to vote without technically “denying” the vote.

¹²⁰ See Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 *Yale L.J.* 907, 944-55 (1993).

¹²¹ John Marshall, *Report of the Minority in the Virginia Resolutions*, in 5 *The Founders’ Constitution* 136, 138 (Philip B. Kurland & Ralph Lerner 1987), reprinted from *J. House of Delegates (Va.)* 6: 93, 95 (1798-99). Henry Lee has gotten attribution for this minority report, but I believe Marshall was the likely author. See Kurt Lash, *Minority Report: John Marshall and the Defense of the Alien and Sedition Acts*, 68 *Ohio St. L.J.* 435 (2007).

¹²² U.S. Const. amend. XIV § 2 (emphasis added).

Important here, the right to vote has substance independent of state actions abridging the vote. Section 2 provides the substance, much as state contract and property law supply the substance for contract law for the Contracts Clause. Section 2 confers a substantive right to vote on any 21-year-old male United States citizen. If a state diminishes this right for any eligible male citizen, the state “abridges” the right and is subject to section 2’s remedy, the reduction of apportionment.

Harrison has relied on section 2 to conclude that “abridge” can mean “discriminate formally against.” In his interpretation, the vote is a creature of state government and will be more or less meaningful depending on what officers are elected or appointed.¹²³ True, a state may by state law limit the number of officers to which the vote may be applied. But to determine what the verb “abridged” means in context, it does not matter what officers the voter may vote for. It *does* matter, whatever officers the state makes electable, whether the state lets all males 21 or older vote. That baseline has a substance independent of state law—in section 2 of the Constitution. In this crucial respect, 21-year-old male citizens’ right to vote is a substantive constitutional right independent of state voting law—not a formal antidiscrimination right. In context, the verb “abridged” protects a substantive right established by an authority independent of the state law that may vary the scope of the right. The right comes not from natural law but from the positive law of the Constitution, to be sure. But it still may be “abridged” by state law whenever that law interferes with the right of 21-year-old males to vote as specified in the Constitution.

The implications for section 1 of the Fourteenth Amendment should by now be clear. As the preceding part suggested, when section 1 speaks of “privileges or immunities of citizens of the United States,” it is referring to fundamental and substantive rights with a moral content

¹²³ See Harrison, *supra* note --, at 1420-21.

informed to a large extent by general principles of natural law and rights, and perhaps to some extent by some common-denominator principles of English and general American law. State laws that respect, define, protect, or enlarge the general substance of those rights “regulate” such privileges and immunities. Such regulations limit the free exercise of rights as necessary (in *Corfield*’s description) to “subject [freedom] to such restraints as the government may justly prescribe for the general good of the whole.”¹²⁴ But state laws that restrain those rights more than necessary for “the general good of whole” “abridge” such rights and come within the ambit of the Privileges or Immunities Clause.

Of course, these examples are again suggestive, not exhaustive. To take one important example, a full analysis would need to examine how speakers used the term “abridged” during legislative and ratification debates over the Fourteenth Amendment. It could be that, in such debates, speakers used “abridged” in a manner according to which states enjoyed total control over the substance of positive-law property and contract rights as long as they did not withhold such rights from some class of citizens on the basis of race or some other invidious characteristic.¹²⁵ At the same time, the observations presented here should help review these materials with a sharper set of eyes. Thus, when a speaker from this period paraphrases “abridging privileges or immunities” by saying “discriminating against classes of citizens,” it seems on first read to confirm that the Privileges or Immunities Clause is a formal equality provision. But in context, the paraphrase fits the fundamental-rights definition in occasional context. Blacks hold fundamental rights to hold property and to contract, and to discriminate against their rights by withholding the positive-law protections for their rights is to abridge those fundamental rights.

¹²⁴ *Corfield*, 6 F. Cas. at 552.

¹²⁵ See, e.g., Harrison, *supra* note --, [101 Yale L.J.] at 1421-44.

And again, to the extent that the legislative history of the Fourteenth Amendment supports these and other readings of “abridged,” it is important that the First Amendment and the Fourteenth Amendment (twice) use “abridged” in a manner consistent with the fundamental-rights view. Extrinsic materials may help specify the Fourteenth Amendment’s meaning, but they should not be used to subvert meaning to the extent meaning is already reasonably clear from text and structure. I am not prepared to say here that the Constitution’s uses of “abridge” lock in the fundamental-rights interpretation of the Privileges or Immunities Clause. But it is fair to say that those usages create a stronger presumption than is commonly realized.

V. Conclusions, Limitations, and Unanswered Questions

Let us recapitulate what this Essay has shown. It has confirmed that important public-law documents and treatises, from the United States’ colonial period and Founding, assumed that “privileges” and “immunities” refer to at least some aspects of the rights to hold property and to trade. It has interpreted the terms “privileges” and “immunities” more sensitively than other originalist scholarship to their historical and philosophical contexts. In the course of so doing, it has shown how those terms presume and give effect to a moral theory of natural rights. Finally, it has interpreted the Comity Clause, the Privileges or Immunities Clause, and the structural interplay between the two. The verbs “entitled” and “abridged” both strongly reinforce the conclusion that “privileges” and “immunities” must come equipped with some internal moral substance. This historical, structure, and textual evidence suggests Professor Siegan was on the right track to the extent he suggested that the Privileges or Immunities Clause imposed principled limitations on states’ powers to restrain individual property and commercial rights.

Let us briefly recapitulate what this Essay has *not* shown. This Essay has not canvassed all the historical evidence relevant to the original meaning of the Privileges or Immunities

Clause. It has not examined what other topics besides property and commerce belong within the scope of constitutional privileges or immunities. It has not examined whether all property and commercial rights fall within that scope, or whether some rights fall out because they involve the wrong kinds of property or commerce, or the wrong rights in relation to property and commerce. To that extent, more needs to be done to determine whether Professor Siegan was right.

To make the lessons of this Essay clear, let us consider a few other general objections that have not been considered in the context of the specific claims made. One might reasonably ask how the evidence presented here squares with what we know about state and local regulatory practices from the colonial period through the Civil War. For example, much of the leading scholarship on the original understanding of eminent-domain limitations focuses on historical practices: especially at the Founding, and specifically in relation to eminent domain and land-use regulation.¹²⁶ This is important historical scholarship, and its “bottom up” methodology is useful to many approaches to constitutional interpretation.¹²⁷ However, if one is focusing on original public meaning, history is relevant only to the extent that it helps explain and give determinacy to the text under interpretation. To that extent, specific historical evidence about eminent domain must take a backseat to historical sources explaining the general theoretical background for the Privileges or Immunities Clause.¹²⁸ Both sources of evidence must be considered and reconciled, and that work has not been done here. But in general, in cases of conflict evidence about the textual meaning of “privileges,” “immunities,” and “abridging” would need to take priority.

¹²⁶ See, e.g., John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 *Nw. U. L. Rev.* 1099 (2000); John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 *Harv. L. Rev.* 1252 (1996); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 *Colum. L. Rev.* 782 (1995).

¹²⁷ See Martin Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 *Colum. L. Rev.* 523 (1995).

¹²⁸ See Richard A. Epstein, *History Lean: The Reconciliation of Private Property and Representative Government*, 95 *Colum. L. Rev.* 591, 592 (1995) (suggesting that “history offers us too much information, without the means of sorting it out,” and proposing to organize history by the extent to which it comports with text and structure).

One also might reasonably ask what the lessons presented here about the Privileges or Immunities Clause teach about section 1 of the Fourteenth Amendment as a whole. Unlike the Privileges or Immunities Clause, the Equal Protection and Due Process Clause protect not citizens but “persons.” It is reasonable to suspect that these clauses provide shallow protection for a few core attributes of natural rights to life, liberty, and property, while the Privileges or Immunities Clause provides citizens with narrower and deeper protection against state interferences with the positive laws a state reserves to citizens to enjoy these rights fully.¹²⁹ But to test that suspicion, one would need to know whether and how antebellum American law distinguished consistently between universal human rights and rights peculiar to U.S. citizenship. This is a vexing topic.¹³⁰ One would also need to determine comprehensively the meanings of all three clauses in section 1 of the Fourteenth Amendment. I find it tolerably clear that the Equal Protection Clause requires state executive and judicial authorities to enforce basic rights protections evenhandedly, but there remain questions about whether the Clause protects some basic core of substantive rights to life, liberty, and property.¹³¹ The Fourteenth Amendment Due Process Clause could guarantee all people only procedural and legal regularity, the rights to be punished only under standing laws and impartial government proceedings; but the Clause might also include a substantive component, for reasons suggested by James Ely¹³² and Mark Graber.¹³³ One cannot settle how the Privileges or Immunities Clause interacts with these other Clauses without settling on the meaning of all three clauses.

¹²⁹ See Epstein, *supra* note --, 1 N.Y.U. J. L. & Liberty at [part II].

¹³⁰ See, e.g., Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* 40-346 (1997).

¹³¹ See Harrison, *supra* note --, [101 Yale L.J.] at 1433-36.

¹³² *editors please insert cite*

¹³³ Mark A. Graber, *Dred Scott and the Problem of Constitutional Evil* 62-66 (2006). See also *The Heritage Guide to the Constitution* 394-404 (2005) (discussing alternative interpretations of the Due Process and Equal Protection Clauses).

Finally, some might conclude that the argument presented here supports the claims of Professor Siegan¹³⁴ and others¹³⁵ that the Privileges or Immunities Clause supports aggressive federal judicial review of state economic regulation. This Essay does not go that far out on a limb with Professor Siegan. Obviously, to the extent current law allows for and the Constitution requires strong judicial review, this Essay encourages more vigorous federal protection of citizen property rights against state and local interference. But section 5 of the Fourteenth Amendment expressly entrusts Congress with enforcing the Amendment,¹³⁶ and there are good reasons to doubt whether the federal judicial power gives federal courts background common law authority to develop the meaning of the Fourteenth Amendment similar to the authority they have for admiralty and the common law topics presumed in Article III. Without getting into the details, I can imagine an alternative legal universe either permitted or required by the Fourteenth Amendment. In that alternate universe, the U.S. Supreme Court would hear Fourteenth Amendment challenges to state economic restrictions under its appellate jurisdiction over state court decisions,¹³⁷ the federal courts would review the validity of and then apply federal laws passed under the authority of section 5 to prevent such restrictions,¹³⁸ and federal courts were otherwise kept out of the picture. In that world, state and local economic legislation would normally be left alone, and Congress would break the glass and pull the Privileges or Immunities alarm only when that legislation threatened local economic relations as badly as Jim Crow did local race relations that a national majority compelled it to intervene. In short, concerns about unrestrained federal judicial review are beyond the scope of this Essay.

¹³⁴ See Siegan, *Economic Liberties*, supra note --, at 83-108.

¹³⁵ See, e.g., Barnett, supra note --, at 131-47.

¹³⁶ See U.S. Const. amend. XIV § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

¹³⁷ See, e.g., *Martin v. Hunter’s Lessee*, 14 U.S. 304 (1816).

¹³⁸ See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997).

In short, this Essay provides some textual evidence supporting a fundamental-rights interpretation of the Privileges or Immunities Clause and some helpful hints for sifting through the rest of the relevant evidence. Even if the textual interpretations offered here of “privileges,” “immunities,” “entitled,” and “abridging” may leave many questions unanswered, it is still important to know that the Privileges or Immunities Clause covers not merely a formal non-discrimination right but also substantive individual rights.

In addition, the textual interpretation offered here should help subsequent interpretive efforts. The interpretations offered here of “privilege” and “immunity” may help scholars read historical sources more carefully. For example, the Civil Rights Act of 1866 guarantees persons protected “full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.”¹³⁹ A modern reader would be quite reasonable in assuming that this provision enforces “a simple prohibition of official racial discrimination.”¹⁴⁰ But a well-tutored reader would appreciate that the word “full” adds something different to the “equal benefit”—a guarantee of protection for the substantive core of moral liberty and property rights.¹⁴¹ Of course, even if insights like these tilt the evidence more in the direction of the fundamental-rights interpretation, the historical evidence will probably continue to support several competing interpretations. But to that extent, this Essay also identifies important textual reasons for giving greater weight to the evidence favoring the fundamental-rights interpretation. If the most essential evidence suggests that “privileges” or “immunities” refer to positive-law rights that secure and determine fundamental property and commercial rights, then the rest of the

¹³⁹ Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27.

¹⁴⁰ Currie, *supra* note --, at 347.

¹⁴¹ To this extent this Essay confirms and finds more support for an insight made by Amar, [The Bill of Rights,] *supra* note --, at 178-79 n.*.

evidence should be sorted by the extent to which it helps flesh out the substance and the legal details of those fundamental rights.