STATE CONSTITUTIONS AND PRIVILEGES OR IMMUNITIES

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I. INTRODUCTION

The Supreme Court has long wrestled with the federal protection of unenumerated rights. The Constitution lists some rights,[1] yet America's founding documents whisper of other, unnamed rights. The Declaration of Independence tells us that all humans have unalienable rights, that governments must secure these rights, and that governments which fail to do so are illegitimate.[2] The Ninth Amendment speaks of other rights, "retained by the people."[3] The Declaration does not, however, tell us how to decide which rights are unalienable, and the Ninth Amendment does not speak of the federal enforcement of retained rights.

This unenumerated-rights conundrum pits two bedrock principles of our legal system against each other: first, *Marbury*'s[4] "settled and invariable principle . . ., that every right, when withheld, must have a remedy, and every injury its proper redress";[5] second, *McCulloch*'s[6] principle, "acknowledged by all," that the federal government is "one of enumerated powers. . . . [T]hat it can exercise only the powers granted to it."[7] A federal judge asked to enforce a real-but-unenumerated right must ostensibly select between disobeying *Marbury*, by leaving a right without a remedy, and disobeying *McCulloch*, by enforcing a right that the Constitution does not clearly authorize the judge to enforce.

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[1] *See* U.S. CONST. amends. I–VIII.

[2] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[3] U.S. CONST. amend. IX.

[4] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[5] *Id.* at 163.

[6] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[7] *Id.* at 405.

The Supreme Court has tried to release this tension through the Fourteenth Amendment's Due Process Clause, but this approach has proven unsatisfactory. It is incoherent, unprincipled, and ungrounded: incoherent because it shapes substance through a clause about process;[8] unprincipled because it holds some rights to a much higher standard than others without justification;[9] ungrounded because it is not based in the text or history of the Due Process Clause but in the flexible judgment of federal judges.[10]

Before it chose the Due Process Clause to enforce unenumerated rights, the Court considered a different path: the Fourteenth Amendment's Privileges or Immunities Clause. The best originalist reading has that Clause protecting fundamental rights, enumerated in the federal Constitution or otherwise. But the Supreme Court blocked that path by adopting a narrow view of the Privileges or Immunities Clause. And it has given two reasons for refusing to correct its error: (1) scholars remain sharply divided over the true meaning of the Clause, and (2) no one has provided limiting principles that would allow a court to enforce the Clause.

This Article seeks to address those two points of hesitation. Part II provides background information on the Privileges or Immunities Clause and introduces the three most plausible readings of the Clause: the Fundamental Rights Reading, the Incorporation Reading, and the Anti-Discrimination Reading. Part III takes on the first point of hesitation. It argues that the Fundamental Rights Reading is the best originalist reading and that it can unify all three readings. Part IV takes on the second point of hesitation. It argues that federal courts can find limiting principles by looking to state constitutional law, and in particular to judicial review under state constitutions. Part IV also forecasts how a shift to enforcing the Privileges or Immunities Clause through the lens of state constitutions might play out in particular cases.

[8] *See* McDonald v. City of Chicago, 561 U.S. 742, 811 (2010) (Thomas, J., concurring in part and concurring in the judgment).

[9] *See id.* (citing Lawrence v. Texas, 539 U.S. 558, 562 (2003)) (contrasting the high standard articulated in *Glucksberg* to the low standard applied in *Lawrence*, *Lochner*, and *Roe*).

[10] *See McDonald*, 561 U.S. at 811–12.

II. BACKGROUND

A. Slaughter-House *Sets the Stage*

The Supreme Court first addressed the Privileges or Immunities Clause in the *Slaughter-House Cases*.[11] In *Slaughter-House*, butchers sued for relief from a monopoly imposed by Louisiana.[12] The question was whether that monopoly violated Section 1 of the Fourteenth Amendment, which reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; 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 its laws.[13]

Answering that question required the Court to interpret for the first time the "Privileges or Immunities Clause," and it adopted a narrow interpretation.[14] That narrow interpretation relied on a textual connection between the first two sentences of the Fourteenth Amendment.[15] The Court observed that the first sentence recognizes two different citizenships: national citizenship and state citizenship.[16] Two citizenships, it thought, meant two mutually-exclusive sets of rights.[17] The Privileges or Immunities Clause refers only to the citizens of the United States and copies that language from the previous sentence in the Amendment.[18] From this, the Court concluded that because the first sentence refers to national and state citizenships and the second sentence refers only to national

[11] *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 74 (1873).
[12] *See id.* at 59–60.
[13] U.S. CONST. amend. XIV, § 1; *Slaughter-House*, 83 U.S. (16 Wall.) at 80.
[14] *Slaughter-House*, 83 U.S. (16 Wall.) at 74, 78.
[15] *See id.* at 74. The first two sentences read: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." U.S. CONST. amend. XIV, § 1.
[16] *Slaughter-House*, 83 U.S. (16 Wall.) at 72–74.
[17] *See id.* at 74.
[18] *See id.*

citizenship, the framers intended the second sentence to protect only rights that flow from national citizenship.[19]

The Court thus announced that there are two, distinct sets of rights: one set of rights belongs to a "citizen of the United States *as such*"; the other belongs to a "citizen of the State *as such*."[20] One set of rights flows only from federal citizenship, one set only from state citizenship.

Applying a process of elimination, the Court sought to identify the rights that accompany state citizenship to determine which rights did not accompany federal citizenship.[21] It located the rights of state citizens in the Comity Clause, Article 4, Section 2, which refers to the "Privileges and Immunities of Citizens in the several States."[22] The privileges and immunities of state citizens, the Court said, include those "which are *fundamental;* which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign."[23]

But because those are rights of state citizens and because rights of state citizens are different from and mutually exclusive with the rights of citizens of the United States, those fundamental rights are not rights of citizens of the United States.[24] Accordingly, the Privileges or Immunities Clause does not protect them.

The Privileges or Immunities Clause, instead, protects those rights which "owe their existence to the Federal government, its National character, its Constitution, or its laws."[25] The rights that flow from the national character of the government include protection on the high seas and access to seaports and foreign commerce; the rights that flow from the Constitution include the privilege of habeas corpus (Article I) and the privilege of becoming a citizen (the Fourteenth Amendment).[26]

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[19] *See id.*

[20] *See id.* at 75 (emphasis added).

[21] *See id.* at 75–78.

[22] U.S. CONST. art. IV, § 2, cl. 1. Perhaps too eager to make the strongest textual argument, the Court misquoted the Comity Clause as protecting the privileges and immunities of citizens "*of* the several States" instead of "*in* the several States." *Slaughter-House*, 83 U.S. (16 Wall.) at 75 (emphasis added).

[23] *Slaughter-House*, 83 U.S. (16 Wall.) at 76 (quoting Corfield v. Coryell, 6 F. Cas. 546, 551 (Washington, Circuit Justice, C.C.E.D. Pa. 1823) (No. 3,230)). This portion of *Corfield* is worth studying because it will feature heavily in the analysis of the original meaning of the Clause.

[24] *See Slaughter-House*, 83 U.S. (16 Wall.) at 77.

[25] *Id.* at 79.

[26] *Id.* at 79–80; *see also* U.S. CONST. art. I, § 9, cl. 2; *id.* amend. XIV, § 1.

That sufficed to doom the butchers' case. Any right against monopoly would derive from state citizenship, not from federal citizenship.[27]

Slaughter-House construed the Privileges or Immunities Clause into near irrelevance. Between 1872 and 1999, the Supreme Court invoked the Privileges or Immunities Clause to halt state action only once.[28] And it quickly reversed this aberration.[29] *Slaughter-House* thus rendered the Privileges or Immunities Clause inoperative for over a century.

B. Justices and Scholars Criticize Slaughter-House

"Virtually no serious modern scholar—left, right, and center" agrees with *Slaughter-House*'s narrow reading of the Privileges or Immunities Clause.[30] *Slaughter-House* inserted "misleading" italics by quoting the Clause as referring to the "privileges or immunities of citizens of *the United States*."[31] It divided the two citizenships of sentence one when that sentence "staples them together."[32] It relied on *Corfield* to cabin the Comity Clause rights but ignored the fact that those rights belong to citizens of all free governments.[33] It overemphasized the general purpose of the Reconstruction Amendments and underemphasized the text of the provision before the Court.

Scholars, however, do not agree with each other either. The congressional record contains statements which support three alternative interpretations of the Privileges or Immunities Clause: the Fundamental Rights Reading, the Anti-Discrimination Reading, and the Incorporation Reading.[34] The *Slaughter-House* dissents argued for these interpretations, and so have modern scholars.[35]

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[27] *See Slaughter-House*, 83 U.S. (16 Wall.) at 80.

[28] *See* Saenz v. Roe, 526 U.S. 489, 508 (1999); *id.* at 511 (Rehnquist, C.J., dissenting). That case was Colgate v. Harvey, 296 U.S. 404, 436 (1935), *overruled by* Madden v. Kentucky, 309 U.S. 83 (1940).

[29] *Madden*, 309 U.S. at 93.

[30] *See* Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 n.178 (2001).

[31] *See* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1414–15 (1992) (quoting Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 74 (1873)).

[32] Harrison, *supra* note 31, at 1415.

[33] *See id.* at 1416–20.

[34] *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888, at 345–46 (1985).

[35] *See, e.g.*, *Slaughter-House*, 83 U.S. (16 Wall.) at 100–01 (Field, J., dissenting); *id.* at 118 (Bradley, J., dissenting); *see also* Currie, *supra* note 34, at 346–51; Harrison, *supra* note 31, at 1387–88; Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61, 71, 73 (2011).

These views can be broken into two broad categories: substantive and equality-based. "A *substantive* protection either prescribes or forbids a certain content of state law. An *equality-based* protection, by contrast, says nothing about the substance of the state's law; it instead requires that the law, whatever it is, be the same for all citizens."[36]

Justice Field, dissenting in *Slaughter-House*, defended an equality-based reading. He reasoned:

> What the [Comity Clause] did for the protection of the citizens of one State against hostile and discriminating legislation of other States, the fourteenth amendment does for the protection of every citizen of the United States against hostile and discriminating legislation against him in favor of others, whether they reside in the same or in different States. If under the fourth article of the Constitution equality of privileges and immunities is secured between citizens of different States, under the fourteenth amendment the same equality is secured between citizens of the United States.[37]

Because the Louisiana monopoly bestowed upon select citizens a privilege denied to the public, Field would have struck down the law.[38] David Currie,[39] John Harrison,[40] and Philip Hamburger[41] have defended equality-based readings of the Clause.[42]

Justice Bradley argued that the Privileges or Immunities Clause does more than secure equal rights.[43] In his view, the Privileges or Immunities Clause prevents states from violating certain rights at all.[44] Bradley identified two sets of rights protected by the Privileges or Immunities Clause: fundamental rights and federal enumerated rights.[45]

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[36] Harrison, *supra* note 31, at 1387–88.
[37] *Id.*
[38] *See id.* at 109–10.
[39] *See* Currie, *supra* note 34, at 346–51.
[40] *See* Harrison, *supra* note 31, at 1387–88.
[41] *See* Hamburger, *supra* note 35, at 71, 73.
[42] There are some differences between the positions of Currie, Harrison, and Hamburger, but they agree that the Clause prevents states from denying certain rights to some when they are granted to others and that it does not impose a substantive prohibition. *See* Currie, *supra* note 34, at 346–51; Harrison, *supra* note 31, at 1387–88; Hamburger, *supra* note 35, at 71, 73.
[43] *See Slaughter-House*, 83 U.S. (16 Wall.) at 118 (Bradley, J., dissenting).
[44] *See id.* at 122.
[45] *See id.* at 118–19.

In Justice Bradley's view, the privileges and immunities of citizens of the United States include fundamental rights, enumerated or otherwise.[46] Akhil Amar[47] and Randy Barnett[48] have defended this view.

Bradley also thought that the privileges and immunities of citizens of the United States included those enumerated in the Constitution.[49] These include the right of habeas corpus and the rights listed in the Bill of Rights.[50] Kurt Lash has argued that the Clause protects these rights alone; that its sole purpose was to incorporate the Bill of Rights.[51]

C. The Supreme Court Declines to Change Course

In *Saenz v. Roe*, the Court broke its silence and struck down a law under the Privileges or Immunities Clause and the Citizenship Clause.[52] In doing so, it recognized that two rights—the right to travel between States and the right to become a citizen of a new State—owe their existence to federal citizenship and thus rank among the Fourteenth Amendment's "privileges or immunities."[53] But it accepted *Slaughter-House*'s result and reasoning.[54]

The Court squarely addressed *Slaughter-House* in *McDonald v. City of Chicago*, where it entertained the idea of overruling *Slaughter-House* and incorporating the Second Amendment through the Privileges or Immunities Clause.[55] In the end, the Court saw "no need" to disrupt precedent by reconsidering *Slaughter-House* when it could achieve the same result by continuing to incorporate through the Due Process Clause.[56] To support this decision, the Court noted that the petitioners could not identify the full scope of the Privileges or Immunities Clause and that even scholars who reject *Slaughter-*

[46] *See id.* at 116–18.
[47] *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 157, 161 (2012). Amar also believes the Privileges or Immunities Clause protects federal enumerated rights like those in the Bill of Rights. *See id.*
[48] *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 60–68 (2004).
[49] *See Slaughter-House*, 83 U.S. (16 Wall.) at 118–19 (Bradley, J., dissenting).
[50] *See id.*
[51] *See* KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 73 (2014).
[52] Saenz v. Roe, 526 U.S. 489, 503–04, 507–08 (1999).
[53] *Id.* at 502–03.
[54] *See id.* at 503 (citing *Slaughter-House*, 83 U.S. (16 Wall.) 36). The Court did note the controversy surrounding the case. *See Saenz*, 526 U.S. at 503.
[55] *See* McDonald v. City of Chicago, 561 U.S. 753, 754–59 (2010).
[56] *See id.* at 758.

House disagree over the Clause's original meaning.[57] This provides a challenge for those who believe that the Court should correct *Slaughter-House*: to get the Court on board, they must come to some agreement about what the Clause means and provide limiting principles for applying the Clause.

That is what this Article seeks to do. It argues that the Privileges or Immunities Clause protects fundamental rights, enumerated or otherwise, and that the Fundamental Rights Reading can synthesize the competing views of the Clause. And it suggests that the Court can look to state constitutional law for help understanding the limiting principles of the Clause.

III. THE PRIVILEGES OR IMMUNITIES CLAUSE PROTECTS FUNDAMENTAL RIGHTS, ENUMERATED OR OTHERWISE

In this Part, I will present the argument in favor of the federal unenumerated right reading.

A. Text and Historical Context Support the Fundamental Rights Reading

The simplest argument in favor of the Fundamental Rights Reading comes from the textual link between the Privileges or Immunities Clause and the Comity Clause. But understanding that textual link requires understanding the text of the Privileges or Immunities Clause as a whole. I will therefore discuss the text in some detail here.

1. Exploring the Text

The text of the Privileges or Immunities Clause reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[58]

The only other part of the Constitution that mentions "privileges" and "immunities" so closely together is the Comity Clause.[59] The Comity Clause reads: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[60] The clauses have some similarities and some differences. Both protect "privileges" and "immunities," though the conjunction

[57] *Id.* (citing *Saenz*, 526 U.S. at 522 n.1 (Thomas, J., dissenting)).
[58] U.S. CONST. amend. XIV, § 1.
[59] *See* U.S. CONST. art. IV, § 2, cl. 1.
[60] *Id.*

between the two is different.[61] Both refer to the privileges and immunities "of citizens," but one refers to those "in the several States" and one to those "of the United States."[62]

The Privileges or Immunities Clause's opening language, "No State shall," occurs elsewhere in the Constitution. Article I, Section 10, which follows the section limiting Congress's power, includes three paragraphs, each beginning with "No State shall," that list things the states cannot do: make treaties, coin money, pass ex post facto laws, etc.[63] The other clauses of the first section of the Fourteenth Amendment use similar language: "nor shall any State deprive any person of life, liberty, or property . . . nor deny to any person . . . the equal protection of the laws."[64] So does the Fifteenth Amendment: "[t]he right . . . to vote shall not be denied or abridged . . . by any state . . . ."[65]

The rest of the opening language, "make or enforce any law which shall abridge," closely tracks the opening of the Bill of Rights: "Congress shall make no law . . . abridging [the freedoms of speech and press or the rights of assembly or petition]."[66]

The word "abridge" recurs in the Reconstruction Amendments. Section 2 of the Fourteenth Amendment speaks of abridging the right to vote and reduces representation when a state denies or "in any way abridge[s]" the right.[67] The Fifteenth Amendment similarly prohibits states from denying or abridging the right to vote on racial grounds.[68] Other clauses in the Fourteenth Amendment do not use the word "abridge," but instead use "deprive" or "deny."[69]

Outside the Comity Clause, "privilege" appears twice in the original Constitution. Senators and Representatives are "privileged" from arrest.[70] The Constitution labels the writ of habeas corpus a "[p]rivilege."[71] Outside the Comity Clause, the original Constitution makes no reference to "immunities."

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[61] *See* discussion *infra* Part III.C. I conclude that the difference in language does not create a difference in meaning.

[62] U.S. CONST. amend. XIV, § 1; *id.* art. IV, § 2, cl. 1.

[63] *Id.* art. I, § 10.

[64] *Id.* amend. XIV, § 1.

[65] *Id.* amend. XV.

[66] *See id.* amend. I; *id.* amend. XIV, § 1.

[67] *Id.* amend. XIV, § 2.

[68] *Id.* amend. XV. This is later echoed by the Nineteenth, Twenty-fourth, and Twenty-sixth Amendments. *See id.* amends. XIX, XXIV, XXVI. However, these came after the Reconstruction era, so they are not useful evidence for determining the original meaning of the Fourteenth Amendment.

[69] *See id.* amend. XIV.

[70] *Id.* art. I, § 6, cl. 1.

[71] *Id.* art. I, § 9, cl. 2.

The unamended Constitution refers to citizens in four contexts: the requirements for holding congressional office,[72] the requirements for becoming President,[73] the requirements for the jurisdiction of federal courts,[74] and the Comity Clause.[75] "Citizen" does not appear in the Bill of Rights, which refers to "the people"[76] or the relevant class: "the Owner,"[77] "the accused."[78]

Many of the Amendments in the Bill of Rights are written in the passive voice. The subjects of their sentences are frequently the rights, not the right-holders. They can thus be ambiguous about whom they protect and about whom they protect from. The Fourteenth Amendment, on the other hand, seems to specify who receives which protections from whom. Of the three limitations on state power in the first section of the Fourteenth Amendment, only the Privileges or Immunities Clause refers to citizens.[79] The Due Process Clause protects "any person," and the Equal Protection Clause protects "any person within [the state's] jurisdiction."[80]

2. The Textual Link with the Comity Clause

The best, and simplest, interpretation is that the "privileges or immunities" mentioned in the Fourteenth Amendment are the "Privileges and Immunities" mentioned in the Comity Clause. Because they use strikingly similar language, the Comity Clause informs the meaning of the Privileges or Immunities Clause.[81] The ordinary reader, looking at the Constitution as a whole, would see that the language of the Comity Clause echoes in the Privileges or Immunities Clause. The reader therefore would infer that the "privileges or immunities" referred to in the Fourteenth Amendment are the same as those referred to in the Comity Clause.

The "Privileges and Immunities" in the Comity Clause comprise fundamental rights, enumerated in the federal Constitution or not. Riding circuit to hear the case of *Corfield v. Coryell*, Justice Bushrod

[72] *See id.* art. I, § 2, cl. 2; *id.* art. I, § 3, cl. 3.
[73] *See id.* art. II, § 1, cl. 5.
[74] *See id.* art. III, § 2, cl. 1.
[75] *See id.* art. IV, § 2, cl. 1.
[76] *See id.* amends. I, II, IV, IX, X.
[77] *Id.* amend. III.
[78] *Id.* amend. VI.
[79] *Id.* amend. XIV, § 1.
[80] *Id.*
[81] *See* McDonald v. City of Chicago, 561 U.S. 742, 819 (2010) (Thomas, J., concurring in part and in the judgment).

Washington wrote that the "Privileges and Immunities" mentioned in the Comity Clause were those rights

> which are, in their nature, *fundamental;* which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government . . . with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.[82]

But more to the point, the Comity Clause protected an equality with respect to those rights: because the "citizens of each State" were "entitled" to all the fundamental rights belonging to "citizens in the several States," the Clause prohibited states from treating out-of-state citizens differently from their own citizens when it came to fundamental rights.[83] Thus, in 1868, the public understood that the Comity Clause protected fundamental rights, and it did so through an anti-discrimination lens.

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[82] Corfield v. Coryell, 6 F. Cas. 546, 551–52 (Washington, Circuit Justice, C.C.E.D. Pa. 1823) (No. 3,230) (emphasis added).

[83] *See id.*; U.S. CONST. art. IV, § 2, cl. 1.

In sum, the "privileges or immunities" mentioned in the Fourteenth Amendment are the "Privileges and Immunities" mentioned in the Comity Clause, and the "Privileges and Immunities" in the Comity Clause are fundamental rights. The privileges and immunities of the Comity Clause include fundamental, unenumerated rights.[84] Therefore, the privileges and immunities of the Fourteenth Amendment also include fundamental, unenumerated rights.

This is how those who drafted and ratified the Fourteenth Amendment understood the Privileges or Immunities Clause to work. Congressmen invoked *Corfield* frequently during the debates over the Privileges or Immunities Clause.[85] Some explicitly argued that *Corfield* defined the rights protected by the Privileges or Immunities Clause and quoted its key passage in full.[86] Furthermore, their invocations and quotations of *Corfield* were not contained to the halls of Congress. They presented *Corfield* to the public in their addresses.[87] Senator Jacob Howard quoted the key passage of *Corfield* in a speech[88] that was widely published and read.[89] His speech was so well known that the press began calling the Amendment the "Howard Amendment."[90]

B. Blackstone Supports the Fundamental Rights Reading

A passage in William Blackstone's *Commentaries on the Laws of England* supports the Fundamental Rights Reading and provides further insight for identifying those rights.[91] Blackstone says:

> Thus much for the *declaration* of our rights and liberties. The rights themselves thus defined by these several 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

[84] *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 75–76 (1873) (quoting *Corfield*, 6 F. Cas. at 551–52).
[85] *See* BARNETT, *supra* note 48, at 62–63.
[86] *Id.* at 63–65.
[87] *See id.* at 65; LASH, *supra* note 51, at 187–88.
[88] BARNETT, *supra* note 48, at 65.
[89] *See* LASH, *supra* note 51, at 187–88.
[90] *Id.* at 188.
[91] *See, e.g.*, *id.* at 15–16; Harrison, *supra* note 31, at 1435–36, 1442; Hamburger, *supra* note 35, at 117; BARNETT, *supra* note 48, at 61 (citing MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 64 (1986)); AKHIL REED AMAR, THE BILL OF RIGHTS 169 (1998).

> 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. . . . 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 . . . .[92]

This portion supports the Fundamental Rights Reading because of the way it defines privileges and immunities. "Immunities" are the "*residuum* of natural liberty."[93] "Natural liberty" is the sum of "absolute rights,"[94] and "absolute rights" are those which humans possess inherently in their humanity.[95] Absolute rights exist independently of governments,[96] but governments are instituted to protect them.[97] Under a government, people give up some of their natural liberty in exchange for the benefits of government.[98] They recognize that it is better to temper their own liberty in order to temper their neighbor's license to do things that might interfere with their happiness and liberty.[99]

The residuum of natural liberty, which constitutes the immunities Blackstone speaks of, are the absolute rights that need not be sacrificed to live in society.[100] The privileges plainly refer to the benefits of government that are exchanged for the absolute rights we do give up.[101]

To summarize, people give up some of their absolute rights to live under a government. Immunities are the portion of absolute rights not given up. Privileges are those benefits received in exchange for the rights that are given up. Thus, under this reading, states may not abridge either the remaining rights or the reciprocal benefits.

That Blackstone understood privileges or immunities this way provides good evidence of the original public meaning of the Privileges or Immunities Clause. When it comes to determining the

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92 1 WILLIAM BLACKSTONE, COMMENTARIES *125 (emphasis in original).
93 *Id.* at *125 (emphasis in original).
94 *See id.* at *121.
95 *See id.*
96 *See id.* at *119.
97 *See id.* at *120; *see also* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
98 *See* 1 BLACKSTONE, *supra* note 92, at *121.
99 *See id.*
100 *See id.* at *125.
101 *See id. Corfield*'s understanding of "privileges and immunities" also included positive rights obtained in this exchange. *See* BARNETT, *supra* note 48, at 63. So, although the distinguishing feature of the natural rights reading is that it protects unenumerated inherent rights, its protection is not limited to those rights. *See id.* at 61.

original meaning of the Privileges or Immunities Clause, Blackstone is not just another commentator.[102] His *Commentaries* condensed the common law into an accessible form that was immensely useful to Americans.[103] For Americans in remote, newly-settled lands, Blackstone didn't just make learning the law easier; he made it possible.[104] "In the first century of American independence, the *Commentaries* were not merely an approach to the study of law; for most lawyers, they constituted all there was of the law."[105] Blackstone's *Commentaries* were "the bible" for American lawyers, and Chancellor James Kent named it the only law book he studied.[106] In a time and place with few law schools[107] and few law libraries,[108] Blackstone was both.[109]

This portion of Blackstone is particularly appropriate for interpreting the Fourteenth Amendment. It mentions both privileges and immunities together. After referencing privileges and immunities, it refers to the rights of life (personal security), liberty, and property.[110] This structure mirrors the Fourteenth Amendment's Privileges or Immunities and Due Process Clauses.[111]

C. Arguments Against the Fundamental Rights Reading Do Not Persuade

1. Textual Difference

A potential issue with the *Corfield* path to the Fundamental Rights Reading is that the prepositional phrase "of citizens of the United States" is appended to "privileges or immunities" in the Fourteenth Amendment.[112] This language departs from the text of the Comity Clause, which refers to citizens "in the several States."[113] The *Corfield* path to the Fundamental Rights Reading relies on the assumption that a reader will infer similar meaning from similar

[102] *See* RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT 48 (2021).
[103] *See* DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW, at xiii, 3 (Univ. of Chi. Press 1996) (1941).
[104] *See id.* at xiii.
[105] *Id.* at 3.
[106] *Id.* at 3–4.
[107] *See id.* at xiv–xv.
[108] *See id.* at xiii.
[109] *Id.* at 4.
[110] *See* 1 BLACKSTONE, *supra* note 92, at *125.
[111] *Compare id.* at *125, *with* U.S. CONST. amend. XIV, § 1.
[112] U.S. CONST. amend. XIV, § 1.
[113] *See id.* art. IV, § 2, cl. 1.

language. However, a corollary of this assumption is that a reader will infer different meanings from different language. If readers are likely to conflate the rights in the Privileges or Immunities Clause with the rights in the Comity Clause because of the similar language, they are also likely to distinguish the rights in each clause because of the different language. The rights could be similar in nature because they relate to citizenship but different in content because they relate to different citizenships.

A persuasive response to this difference is that many read the Comity Clause as containing an "ellipsis."[114] Because the Comity Clause says "citizens in the several States," not "citizens of the several states," John Bingham, who drafted the Privileges or Immunities Clause, used an ellipsis that would read the Clause as "citizens of the United States in the several States."[115] So did Joseph Story in his commentaries.[116]

If the public understood the Comity Clause to mean the "privileges and immunities of citizens of the United States in the several states," then the language of the Privileges or Immunities Clause would still track the public understanding of the Comity Clause at the time, even without tracking its original text. That Bingham adhered to the ellipsis reading would not have much effect on the original public meaning, but that Joseph Story advocated for it would.

The ellipsis reading was not, however, universal. The *Slaughter-House* Court misquoted the Comity Clause as referring to citizens "of the several States" instead of "in the several States."[117] It was not alone in its error. Other writers in the decades preceding the Amendment also misquoted the Comity Clause.[118] These misquotations are inconsistent with the ellipsis reading because the ellipsis reading relies on the use of the preposition "in," not "of."[119] That word choice permits the reading that the "several States" refers to the location of the citizens and does not define the class of citizens protected.

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[114] *See, e.g.*, LASH, *supra* note 51, at 86.
[115] *See id.*; U.S. CONST. art. IV, § 2, cl. 1.
[116] *See* LASH, *supra* note 51, at 86–87.
[117] *See supra* note 22.
[118] *See, e.g.*, G.W.F. MELLEN, AN ARGUMENT ON THE UNCONSTITUTIONALITY OF SLAVERY 53–54 (Boston, Saxton & Peirce 1841); SAMUEL JONES, A TREATISE ON THE RIGHT OF SUFFRAGE 126 (Boston, Otis, Broaders & Co. 1842); *Congressional Summary*, 11 AM. WHIG REV. 646, 648 (1850).
[119] *See* LASH, *supra* note 51, at 86–87.

Even so, *Corfield* defines the Comity Clause rights as those "which belong . . . to the citizens of all free governments."[120] Thus, although the rights inhere in citizenship of a state, that does not mean they do so exclusively.[121] If the federal government is a free government, then its citizens are entitled to those fundamental rights. That they are also entitled to these rights as citizens of states is not a troublesome redundancy but rather one point of the federal system.

What is more, "of citizens of the United States" may define not the scope of the privileges or immunities but the class protected.[122] The privileges and immunities are those in the Comity Clause, and citizens of the United States are the people protected from the abridgment of those rights.

This reading is supported by the fact that the clauses that follow the Privileges or Immunities Clause explicitly identify who is protected.[123] If the prepositional phrase "of citizens of the United States" defines the content of the rights instead of identifying the class of persons protected, then the Clause fails to explicitly identify who is protected. This would abandon the repeated structure of the following clauses, as well as that of the Comity Clause, which separately defines the scope of the right, "all Privileges and Immunities of Citizens in the several States," and the class protected: "the Citizens of each State."[124]

Lash argues that the reference to citizens in the Clause precludes a Fundamental Rights Reading because a Fundamental Rights Reading would apply to "persons," not just to citizens.[125] He shows that Bingham held this view:

> [N]atural or inherent rights . . . are by this constitution guarantied by the broad and comprehensive word "person," as contradistinguished from the limited term citizen – as in the fifth article of amendments, guarding those sacred rights which are as universal and indestructible as the human race, that "no person shall be deprived of life, liberty, or property but by due process of law . . ."[126]

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[120] Corfield v. Coryell, 6 F. Cas. 546, 551 (Washington, Circuit Justice, C.C.E.D. Pa. 1823) (No. 3,230).

[121] *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 97–98 (1873) (Field, J., dissenting).

[122] *See* Harrison, *supra* note 31, at 1415; *see also* Hamburger, *supra* note 35, at 70.

[123] *See* discussion *supra* Part III.A.1.

[124] *See* U.S. CONST. art. IV, § 2, cl. 1; *id.* amend. XIV, § 1.

[125] *See* LASH, *supra* note 51, at 82–83.

[126] *Id.* at 82 (quoting CONG. GLOBE, 35th Cong., 2d Sess. 983 (1859)).

This portion of the speech indicates that the Privileges or Immunities Clause is an inappropriate vessel for constitutionalizing fundamental rights. The next sentence, however, strengthens the Fundamental Rights Reading. Bingham says, "And this guarantee applies to all citizens within the United States."[127] Even though the content of fundamental rights is derived from personhood, not citizenship, the Privileges or Immunities Clause allows only "citizens of the United States" to enforce those rights through the courts of the United States.[128] By using the word "person," the other clauses of Section 1 secure certain fundamental rights to all persons. Bingham thought natural law required governments to extend equality to "*all* persons and not just citizens," which is one reason he voted against the Civil Rights Act of 1866, which protected just citizens.[129]

As for the Blackstone path to the Fundamental Rights Reading, there is an objection to Blackstone generally. Although Blackstone was widely read among those involved in the law, this does not mean that he was widely read among the public.[130] If terms used in Blackstone's *Commentaries* were given another meaning in public usage through the press or addresses, then Blackstone's usage weighs less on original meaning. This may have been the case with "privileges and immunities."[131]

Additionally, the precise phrase "privileges and/or immunities" does not appear in the section on natural law. Both "privileges and immunities" and "privileges or immunities" do appear elsewhere in Blackstone.[132] They appear close together in a section on corporations and refer not to fundamental rights possessed by all humans but to select rights possessed by some artificial persons.[133] Lash argues that this reflects the antebellum usage of the phrase "privileges and immunities," which became a term of art for specially conferred rights.[134] I address this particular argument in Part III.F.

Harrison argues that the part of the Citizenship Clause that confers state citizenship is an "embarrassment" for substantive readings.[135] Since substantive readings locate both the content of the rights and the nature of the restriction in the Privilege or Immunities

[127] LASH, *supra* note 51, at 82 (quoting CONG. GLOBE, 35th Cong., 2d Sess. 983 (1859)).
[128] *See* U.S. CONST. amend. XIV, § 1.
[129] *See* LASH, *supra* note 51, at 82–83.
[130] *See* BOORSTIN, *supra* note 103, at 3–4.
[131] *See* discussion *infra* Part III.F.
[132] *See, e.g.*, 1 BLACKSTONE, *supra* note 92, at *456.
[133] *See id.*
[134] *See* LASH, *supra* note 51, at 15–16.
[135] *See* Harrison, *supra* note 31, at 1451–52.

Clause, they "ignore" the conferral of state citizenship in the first sentence of Section 1.[136] Equality-based readings can avoid rendering the state citizenship grant surplusage because they locate only the nature of the restriction in the Privileges or Immunities Clause. This leaves a role for the state citizenship provision in determining the content of the rights: "positive law civil rights."[137]

The state citizenship provision, however, is not surplusage, even under substantive readings. Prior to the Fourteenth Amendment, states denied Black people their Comity Clause rights, and Black people could not vindicate their Comity Clause rights in federal court because they were not citizens of the state in which they resided.[138]

The state citizenship provision, in concert with the Comity Clause, performed two, connected functions related to the overall goal of protecting the rights of Black people. First, it enabled Black people to receive the substantive protections of the Comity Clause. The Comity Clause protects a certain class of individuals: "[t]he citizens of each State."[139] It does not protect citizens of the United States, as such. Therefore, the federal citizenship provision alone would not secure to Black people the substantive protections of the Comity Clause. The state citizenship provision is necessary to secure these rights.

Second, it enabled Black people to vindicate these rights in federal court. As *Dred Scott*[140] proves, Black people were denied access to federal courts because they were not citizens of their states "in the sense in which that word is used in the Constitution."[141] This took away the jurisdiction of the federal judiciary because it prevented diversity: the parties could not be citizens of two different states when one party was a citizen of no state.[142]

This is easy to overlook from our modern vantage point. We are used to federal question jurisdiction and so assume that a person would be able to sue to vindicate their federal rights regardless of diversity. However, at the time of *Dred Scott*—and at the time of the passage of the Fourteenth Amendment—there was no general federal

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[136] *See id.* at 1395.

[137] *See id.* at 1416–20.

[138] *See generally* Hamburger, *supra* note 35, at 83–115 (discussing the historic denial of Comity Clause rights of Black people in the antebellum South on the grounds that they were not citizens of the United States).

[139] U.S. CONST. amend IV, § 2, cl. 1.

[140] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

[141] *See id.* at 454.

[142] *See id.*

question jurisdiction.[143] Black people needed diversity to vindicate their federal rights in federal courts, and that required that they be citizens of their states.

Thus, the state citizenship provision is not surplusage. It performs necessary functions related to specific problems of the time. There is no need to twist a provision granting citizenship in one sentence into one controlling the content of rights protected in another sentence.

D. Alternative Readings Do Not Fit Text and History as Well as the Fundamental Rights Reading

1. The Incorporation Reading

Akhil Amar argues that the "No State shall . . ." language in Article I, Section 10, offers "dramatic evidence" in favor of the Incorporation Reading.[144] In *Barron v. Baltimore*,[145] Chief Justice Marshall used the "No State shall" language to reject incorporation of the Bill of Rights.[146] In Marshall's view, the presence of the "No State shall" language in Article I, Section 10, indicates that the framers of the Constitution knew how to apply limitations to the states.[147] Since the framers separated Section 10 from the restrictions on Congress in Section 9, they knew that some limitations would apply only to the states and some only to Congress.[148] Since the Bill of Rights contained a limitation on Congress, but lacked the "No State shall" language, it was not meant to incorporate the Bill of Rights against the states.[149]

Thus, the Privileges or Immunities Clause responds to *Barron*. If the absence of "No State shall" counseled against incorporation in the first instance, then the presence of "No State shall" should counsel for it in the second. Bingham knew this and likely drafted the Clause with it in mind.[150]

Amar argues that the "make or enforce any law which shall abridge" language of the Clause also militates for incorporation by

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[143] *See Jurisdiction: Federal Question*, FED. JUD. CTR., https://www.fjc.gov/history/courts/jurisdiction-federal-question [https://perma.cc/9UY4-XQXM].

[144] AMAR, *supra* note 91, at 164.

[145] Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[146] *See id.* at 248–50.

[147] *See id.* at 248–49.

[148] *See id.*

[149] *See id.* at 248–50.

[150] *See* AMAR, *supra* note 91, at 164–65.

mimicking the language of the First Amendment.[151] The main difference—"any" instead of "no"—is explained by Marshall's emphasis on "No State shall." The Privileges or Immunities Clause had to be written in the negative to follow Marshall's directions.[152] Since "abridge" occurs nowhere in the original Constitution and occurs only in the Bill of Rights before 1866, its use in the Privileges or Immunities Clause provides more evidence that the framers of the Fourteenth Amendment were intentionally invoking the Bill of Rights.[153]

The above textual arguments are not inconsistent with the Fundamental Rights Reading. Amar (who also believes the Clause protects fundamental rights) acknowledges that the above language does not incorporate the Bill of Rights on its own.[154] As he puts it, "[i]f the Fourteenth Amendment had stated that 'No State shall make any law abridging the right to spit on sidewalks,' no one could argue with a straight face for incorporation of the federal Bill of Rights."[155]

The language of "privileges or immunities" does not rebut direct incorporation as conclusively as the "right to spit on sidewalks" would, but it more strongly invokes the fundamental rights in the Comity Clause than the federal enumerated rights in the Bill of Rights.[156]

The language of the Privileges or Immunities Clause that indicates incorporation can still serve similar purposes under the Fundamental Rights Reading. "No State shall" establishes that the Clause is a limitation on the power of states by invoking Article I, Section 10.[157] "[M]ake or enforce no law which shall abridge" establishes that the limitation concerns substantive rights by invoking the Bill of Rights.[158] The content of the rights is the "Privileges and Immunities" of the Comity Clause.[159]

Kurt Lash takes a different tack in arguing for the Incorporation Reading.[160] He deeply analyzes a wide range of sources to make a "cumulative" case for reading the Privileges or Immunities Clause as

[151] *See id.* at 165.
[152] *See id.* at 165–66.
[153] *See id.* at 165.
[154] *See id.* at 166.
[155] *Id.*
[156] *See* discussion *supra* Part III.A.1.
[157] *See supra* notes 62–65 and accompanying text.
[158] *See supra* notes 66–69 and accompanying text.
[159] *See supra* notes 80–81 and accompanying text.
[160] *See* Christopher R. Green, In*corporation, Total Incorporation, and Nothing but Incorporation?*, 24 WM. & MARY BILL RTS. J. 93, 95–96 (2015).

protecting federal enumerated rights but not fundamental rights.[161] He argues that "privileges and immunities of citizens of the United States" came to be a term of art referring to the Bill of Rights during the decades preceding the Civil War,[162] that this understanding lasted until and featured in the congressional debates on the Fourteenth Amendment,[163] and that this understanding was presented to the public during the ratification process.[164]

Lash argues that the "privileges and immunities of citizens of the United States" came to be considered a different set of rights from the Comity Clause rights.[165] He pinpoints the origin of this language to the Louisiana Cession Act of 1803, the treaty between the United States and France regarding the Louisiana Purchase.[166] The key portion of that act reads:

> The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.[167]

Later cession treaties mimicked the Louisiana Cession Act's phrase, "rights, advantages and immunities of citizens of the United States."[168] During this time, Americans used a combination of words like "rights," "advantages," "privileges," and "immunities," followed by the prepositional phrase, "of citizens of the United States," to refer to the rights inhering in national citizenship.[169] Many considered the rights inhering in federal citizenship to be those enumerated in the federal Constitution.[170]

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161 *See id.* at 95–98 (attempting nevertheless to summarize Lash's argument).
162 *See* Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, 98 GEO. L.J. 1241, 1244–45 (2010).
163 *See* LASH, *supra* note 51, at 88.
164 *See* Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1866*, 101 GEO. L.J. 1275, 1281–82 (2013).
165 LASH, *supra* note 51, at 47 (emphasis omitted).
166 *See id.* at 48.
167 Treaty Between the United States of America and the French Republic, Fr.-U.S., art. III, Apr. 30, 1803, 8 Stat. 200, 202.
168 *See* LASH, *supra* note 51, at 48–51.
169 *See id.* at 49, 56–57 (emphasis omitted).
170 *See id.* at 57–58.

Lash's argument assumes that "privileges and immunities of citizens of the United States" has the same meaning in the context of the Fourteenth Amendment as it did in the cession treaties. Phrases can, however, have different meanings in different contexts.[171] The phrase's meaning in the context of the cession treaties is not the same as its meaning in the context of the Fourteenth Amendment. In the context of cession treaties, the language imposed upon the United States a "positive duty" to protect certain rights for inhabitants of the new territory.[172] This language addressed a "distinct problem:" determining *which* rights the inhabitants would enjoy.[173] In the context of the Fourteenth Amendment, the language imposed upon states a negative restriction not to violate certain rights.[174] This language also addressed a distinct problem: determining *who* would enjoy Comity Clause rights and *where* they would enjoy them.[175]

Furthermore, the language Lash cites that refers to federal enumerated rights does not appear in the Fourteenth Amendment.[176] If the Fourteenth Amendment prevented states from abridging "the rights, advantages and immunities of citizens of the United States," Lash's argument would be stronger.[177] But it does not use that language. It refers not to "rights, advantages and immunities" but to "privileges or immunities."[178] Not one of the many sources Lash cites uses the precise phrases "privileges and immunities" or "privileges or immunities" to refer to the Bill of Rights.[179]

It is true that the words "rights," "advantages," "privileges," and "immunities" were defined similarly and used interchangeably,[180] so the denotation of the phrases is the same. Language, however, is more than denotation; connotation matters too. A phrase's connotation can change when its language changes even if the different words are synonyms. This explains why later Senates copied the exact language of the Louisiana Cession Act in later treaties.[181] They did so to ensure the same protections would be

[171] *See* Hamburger, *supra* note 35, at 104–05.
[172] *See id.* at 105.
[173] *See id.*
[174] *See id.* at 106.
[175] *See id.* at 105–06.
[176] *See* LASH, *supra* note 51, at 48–51, 56–58.
[177] *See id.*
[178] *See id.* at 48; U.S. CONST. amend. XIV, § 1.
[179] The closest is a newspaper that summarized the Louisiana Cession Act as protecting the "immunities [and] privileges of citizens of the United States." *See* LASH, *supra* note 51, at 49.
[180] *See id.*
[181] *See id.* at 49–51.

granted to the inhabitants of each new territory.[182] Lash points out that "[t]he same Senate that [submitted] the Privileges or Immunities Clause" used the language of the Louisiana Cession Act in Alaska's cession treaty.[183] However, this counsels against the Incorporation Reading because it shows that the adopters of the Fourteenth Amendment knew what language to use to refer to the Bill of Rights and did not do so.

Just as those Senates could reasonably expect the same language to be interpreted in the same way, the framers of the Fourteenth Amendment could reasonably expect the language of "privileges or immunities" to be interpreted in the same way as it had been interpreted in another part of the document they were amending. Thus, the rights protected by cession treaties should not control the rights protected by the Privileges or Immunities Clause. They employ different words in different contexts to deal with different problems, so they have different meanings.

Admittedly, this argument could be turned against reading the Clause as referring to the Comity Clause rights. There are two textual differences between the Comity Clause and the Privileges or Immunities Clause that could bear on the content of the rights. First, the conjunction is different: the Comity Clause uses "and," while the Privileges or Immunities Clause uses "or."[184] Second, the prepositional phrase is different: the Comity Clause uses "of Citizens in the several States," while the Privileges or Immunities Clause uses "of citizens of the United States."[185]

I addressed the second difference in Part III.C.1. The rules of logic explain the first difference. When a proposition including the conjunction "and" is negated, the "and" becomes an "or" and the negation is distributed to each of the terms in the same way the 9 is distributed to the 2 and the 8 in the expression 9 x (2+8). The Comity Clause is written in the affirmative. It says that citizens are entitled to a collection of rights.[186] The Fourteenth Amendment is written in the negative.[187] It says that states shall not abridge that collection of rights.[188] As one is worded in the positive and one in the negative, the conjunction must be changed to make sure that they mean the

[182] *See* Hamburger, *supra* note 35, at 104.
[183] *See* LASH, *supra* note 51, at 51.
[184] *Compare* U.S. CONST. art. IV, § 2, cl. 1, *with id.* amend. XIV, § 1.
[185] *Compare id.* art. IV, § 2, cl. 1, *with id.* amend. XIV, § 1.
[186] *See id.* art. IV, § 2, cl. 1.
[187] For an explanation of why the Clause needed to be written in the negative, see *supra* note 152 and accompanying text.
[188] U.S. CONST. amend. XIV, § 1.

same thing. To protect both privileges and immunities, the Amendment needed to forbid the abridgment of privileges or immunities. And the drafters had to adopt the negative form of "no State shall" in light of *Barron*.[189]

2. The Anti-Discrimination Reading

The Anti-Discrimination Reading makes the Privileges or Immunities Clause parallel with the Comity Clause.[190] The Comity Clause prevents states from discriminating.[191] That is, it prevents states from denying out-of-staters the fundamental rights they protect for their citizens.[192] Under the equality view, the Privileges or Immunities Clause would accomplish much the same goal. It would also prevent states from discriminating. That is, it would prevent states from denying some of the classes of their citizens the privileges and immunities they grant to other classes.

It is true that the Comity Clause is an equality-based protection, but the equality comes not from "privileges and immunities" but from the surrounding language, which entitles the citizens of each state to the rights of citizens in other states, and from the context of Article IV, which deals with how states treat each other and the citizens of other states.[193] The surrounding language in the Privileges or Immunities Clause does not create an equality-based protection.

The "no State shall" language introducing the Privileges or Immunities Clause does not preclude the Anti-Discrimination Reading, but "make or enforce any law which shall abridge" does.[194] If the equality view is correct, then it must be the case that "abridge" means differentially treat instead of substantively violate.

No one argues that "abridge" in the First Amendment means differentially treat instead of substantively violate.[195] A federal law denying freedom of speech does not become constitutional by applying to everyone. As the Privileges or Immunities Clause uses the same word in a similar context, the word should be assumed to have the same meaning.[196]

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189 *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 248–50 (1833).
190 *See supra* note 83 and accompanying text; Hamburger, *supra* note 35, at 61–62.
191 *See* U.S. CONST. art. IV, § 2, cl. 1.
192 *See* Corfield v. Coryell, 6 F. Cas. 546, 551–52 (Washington, Circuit Justice, C.C.E.D. Pa. 1823) (No. 3,230).
193 *See* U.S. CONST. art. IV.
194 *See* U.S. CONST. amend. XIV, § 1.
195 *See id.* amend. I.
196 *Compare id.*, *with id.* amend. XIV, § 1.

Harrison answers this by saying that the equality-based usage of "abridge" in the Clause is consistent with the usage of "abridge" in Section 2 of the Fourteenth Amendment and by Congressmen at the time when they criticized the Black Codes.[197] However, Section 2 pairs "is denied" with "or in any way abridged."[198] "Den[y]" here means make entirely ineligible, so "in any way abridge[]" most likely means improperly reduce short of denying. Also, because Section 1 mimics the other language of the First Amendment, the First Amendment's usage of "abridge" should control the meaning of abridge instead of Section 2, even though Section 2 is in the same amendment as Section 1.[199] The congressional statements on the Black Codes are inconclusive because when a state denies rights from some, it both differentially treats and substantively violates, so either sense of "abridge" could apply in that context.

Justice Field, who argued for the Anti-Discrimination Reading, did not use "abridge" to mean differentially treat. Concurring in *Butchers' Union*, he wrote, "I cannot believe . . . that there can be any abridgment of that right except by regulations alike affecting all persons of the same age."[200] In the context of the Privileges or Immunities Clause, he thought equal abridgments were permissible, but unequal abridgments were not. If "abridge" means differentially treat, then "equal abridgment" is a round square.

Harrison and Currie make a strong argument for the Anti-Discrimination Reading based on the Civil Rights Act of 1866 (CRA).[201] Essentially, the argument is that the CRA prohibited discrimination, and the Privileges or Immunities Clause is the constitutional ground for the CRA, so the Privileges or Immunities Clause must prohibit discrimination.[202]

Congress passed the CRA in April 1866, two months before it submitted the Fourteenth Amendment to the states.[203] The CRA prohibited states from discriminating based on race.[204] The first section read:

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[197] *See* Harrison, *supra* note 31, at 1420–22.
[198] U.S. CONST. amend. XIV, § 2.
[199] *Compare id.* amend. I, *with id.* amend. XIV, § 1.
[200] *Id.*
[201] *See* Harrison, *supra* note 31, at 1419–24; CURRIE, *supra* note 34, at 347–49.
[202] *See* Harrison, *supra* note 31, at 1419–24; CURRIE, *supra* note 34, at 347–49.
[203] Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 7, 81 (1949).
[204] *See* CURRIE, *supra* note 34, at 347.

> all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to 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 notwithstanding.[205]

For this argument to succeed, two premises must be true. The Fourteenth Amendment must have been the constitutional ground for the CRA, and the other clauses in the Fourteenth Amendment cannot ground the CRA's discrimination provisions.

First, the Fourteenth Amendment must have been the constitutional ground for the CRA. The CRA controls state law.[206] This made it constitutionally controversial.[207] Bingham doubted that the act was constitutional.[208] President Johnson vetoed the CRA.[209] When he did, he issued a statement arguing that there was no constitutional basis for Congress to enact the law.[210] Thus, some thought the CRA was unauthorized when Congress passed it. Under this view, when Congress submitted the Fourteenth Amendment, it asked the country for forgiveness rather than permission.

The language of the Fourteenth Amendment resembles the language of the CRA. The Act declared (most) persons born in the United States "to be citizens of the United States."[211] This resembles the Citizenship Clause.[212] The CRA guaranteed those citizens some of the same rights hitherto reserved for only white citizens in the

[205] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. §§ 1981–1982).
[206] *See* Harrison, *supra* note 31, at 1403–04.
[207] *See id.* at 1403.
[208] *See id.* at 1404.
[209] *See id.*
[210] *See id.* at 1404 & n.63.
[211] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. §§ 1981–1982).
[212] *See* CURRIE, *supra* note 34, at 348; U.S. CONST. art. XIV, § 1.

areas of contracts, lawsuits, property, security, and punishment.[213] These could be summarized as "privileges and immunities."[214] Thus, the Privileges or Immunities Clause is the basis for this provision of the CRA. To perform that role, it would need to be an equality-based protection because the CRA does not create substantive minimums for rights but ties them to the rights of white citizens.[215]

Lash calls the first premise—that the Fourteenth Amendment grounded the CRA—into question.[216] Bingham, the drafter of the Privileges or Immunities Clause, voted against the CRA, and he did so on more than just constitutional grounds.[217] During the debates on the Fourteenth Amendment, when a Senator suggested that Congress had passed the CRA knowing it was not constitutional, he was shut down.[218]

On the second premise, that the other clauses of the Fourteenth Amendment cannot ground the discrimination provisions of the CRA, the obvious (and anticipated) objection is that the Equal Protection Clause grounds the anti-discrimination provisions. The common view of the Equal Protection Clause is that it protects against the sort of discrimination forbidden by the CRA, and therefore, in tandem with Section 5, provides constitutional authorization for the CRA.[219] Accordingly, for the CRA argument to succeed, the common view of the Equal Protection Clause must be incorrect.

Harrison argues that the common view of the Equal Protection Clause focuses too much on "equal" and not enough on "protection."[220] If the common view is correct, "protection" is surplusage; the construction "equal laws" would accomplish everything that "equal protection of the laws" is said to accomplish.[221] Harrison argues that "equal protection of the laws" refers not to state discrimination broadly, but to a state's refusal to protect some of its citizens by refusing to enforce the laws against the private actors who tamper with rights that the state is supposed to protect.[222] Harrison provides

[213] *See* Civil Rights Act of 1866 § 1.
[214] *See* CURRIE, *supra* note 34, at 348.
[215] *See* Civil Rights Act of 1866 § 1.
[216] *See* LASH, *supra* note 51, at 174.
[217] *See id.* at 125–29.
[218] *See id.* at 172–74.
[219] *See, e.g.*, Andrew T. Hyman, *The Substantive Role of Congress under the Equal Protection Clause*, 42 S.U. L. REV. 79, 83–84 (2014).
[220] *See* Harrison, *supra* note 31, at 1433–34.
[221] *See id.* at 1434.
[222] *See id.* at 1435–37.

instances of this usage in Blackstone[223] and legislative history.[224] Harrison's reading of the Equal Protection Clause is textually plausible, but fully evaluating the original meaning of "protection of the laws" is beyond the scope of this paper.[225]

Although it is not beyond debate, the substantive readings are more persuasive than the equality-based reading. The Anti-Discrimination Reading has a pleasing symmetry with the Comity Clause, but it is textually foreclosed by the word "abridge."

Of the substantive readings, the Fundamental Rights Reading is the more persuasive. "Privileges or Immunities" is the starting point, and in the context of the Constitution, this points to the Comity Clause, which is to say, fundamental rights from *Corfield*.[226] It does not point to the cession treaties. If the Comity Clause did not exist, Lash's arguments would be compelling. But it does exist.

Admittedly, the language of the Privileges or Immunities Clause is not identical to that in the Comity Clause. The prepositional phrase, "of citizens of the United States," is difficult for the Fundamental Rights Reading.[227] That difference, however, is reconcilable through the ellipsis reading of the Comity Clause or by reading the phrase as identifying the class of citizens protected instead of modifying the content of the rights protected. On the other hand, the differences in language and in context between the Privileges and Immunities Clause and the Louisiana Cession Act are irreconcilable.

E. The Fundamental Rights Reading Can Synthesize the Other Readings

Perhaps the most powerful argument for the Fundamental Rights Reading is its potential to synthesize the three views. Synthesis is important as a matter of theory and as a matter of practice.

Synthesis is important as a matter of theory because there are strong arguments for each of the views. The Fundamental Rights Reading connects with the content of Comity Clause rights. The Anti-Discrimination Reading connects with the effect of the Comity Clause and provides a clear constitutional base for the Civil Rights Act of 1866. The Incorporation Reading fulfills the apparent

[223] *See id.* at 1436 & n.206.
[224] *See id.* at 1437.
[225] A corpus linguistics analysis like the one in Part III.F would probably be helpful to this end.
[226] *See* Corfield v. Coryell, 6 F. Cas. 546, 551–52 (Washington, Circuit Justice, C.C.E.D. Pa. 1823) (No. 3,230).
[227] *See* U.S. CONST. amend. XIV, § 1.

intentions of the drafter. If a single, coherent view of the Clause can do all these things, it might become compelling.

Synthesis is important as a practical matter because the current fractured scholarship on the Clause has played a role in the Supreme Court's refusal to undo *Slaughter-House* and restore the Clause.[228] Justice Alito's charge to unify requires synthesis.[229]

The Fundamental Rights Reading synthesizes the best parts of the other views. Lockean natural law included equal treatment under government:

> Freedom then is not . . . a liberty for every one to do what he lists . . . and not to be tied by any laws: but freedom of men under government is, to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man[.][230]

This passage is inconsistent with the distinction between equality-based and substantive protections in the context of the Privileges or Immunities Clause. According to Locke, equal treatment is one of the positive rights received in exchange for some of one's natural rights.[231] Thus, equal treatment is part of the substantive content of "privileges or immunities."[232] So the Fundamental Rights Reading would achieve Justice Field's interpretation and extend the Comity Clause's guarantee of equal treatment by a state to all citizens of the United States, including citizens of that state.[233] Therefore, even under the Fundamental Rights Reading, the Privileges or Immunities Clause could make the Civil Rights Act of 1866 constitutional.

The Fundamental Rights Reading could also make much of the Bill of Rights apply to the states. The Bill of Rights protects the rights it

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[228] *See* McDonald v. City of Chicago, 561 U.S. 742, 758 (2010) (citing Saenz v. Roe, 526 U.S. 489, 522 n.1 (1999) (Thomas, J., dissenting)).

[229] *See McDonald*, 561 U.S. at 758; discussion *supra* Part II.B.

[230] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 22 (C.B. Macpherson ed., 1980) (1690) (emphasis omitted).

[231] *See id.*

[232] *See supra* notes 100–101 and accompanying text (discussing how the natural rights reading also includes some positive rights received in exchange for one's absolute rights).

[233] *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 100–101 (1873) (Field, J. dissenting).

lists, but it did not create them.[234] They are part of the residuum of natural liberty.[235] The Ninth Amendment recognizes this.[236] It prevents the enumeration of some of the retained rights from being construed to disparage "others."[237]

The Fundamental Rights Reading thus offers a hope of synthesizing the three views. This would improve the theoretical underpinnings of an originalist analysis by collecting the strongest arguments for each interpretation under one interpretation. It would also have the practical benefit of removing one barrier that has kept the Court from adopting an originalist interpretation of the Privileges or Immunities Clause.

F. An Aside: Corpus Linguistics May Undermine the Case for the Fundamental Rights Reading

A lengthy aside: corpus linguistics, a developing tool in originalist interpretation, might eventually affect the debate over the Privileges or Immunities Clause. My very tentative application of this tool provides some support for Lash's view. I discuss what I found here purely for the purpose of identifying helpful future research.

For those who need a refresher on corpus linguistics, a corpus is a "searchable body of texts."[238] Corpus linguistics is the use of a corpus "to determine meaning through language usage."[239] Corpus linguistics offers a better approach to determine the original meaning of a phrase than dictionaries because early dictionaries did not often define phrases and because phrases often mean more than the "sum of [their] parts."[240] Corpus linguistics is a more "empirical and transparent" approach.[241] In part, that is because a corpus is a large sample composed independently of one's research.[242]

As more texts are digitized, as search algorithms improve, and as corpus administrators develop specialized tools for legal research, corpus linguistics promises to become a key tool for originalist

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[234] *See supra* notes 92–98 and accompanying text.
[235] *See supra* notes 92–98 and accompanying text.
[236] *See* U.S. CONST. amend. IX.
[237] *Id.*
[238] James C Phillips, Daniel M. Ortner & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J.F. 21, 24 (2016).
[239] *Id.*
[240] *See id.* at 23.
[241] *See id.* at 31.
[242] *See id.* at 24.

research. For now, the Corpus of Historical American English (COHA) is the most useful corpus for originalists.[243]

Lash concedes that the individual words "privileges" and "immunities" can refer to rights, including fundamental rights.[244] He argues, however, that when "privileges" and "immunities" appear not as individual words, but as the combined phrase "privileges and immunities," they connote "specially conferred" rights.[245] Fundamental rights are not specially conferred by governments, but are instead inherent in all humans apart from governments.[246] Therefore, if Lash is correct that the phrase "privileges and immunities" refers to specially conferred rights, the Fundamental Rights Reading becomes less plausible.

Since "privileges and immunities" is a phrase of disputed meaning at the center of the debate, it is a good candidate for a corpus linguistics analysis. I searched COHA for uses of "privileges and immunities" and "privileges or immunities" before 1866. I removed the results which were quotes of the Comity Clause. This left twenty-four results remaining. The sources supported many of Lash's arguments.

In most of the sources, "privileges and immunities" meant specially conferred rights. For instance, government officials stripped of their privileges and immunities were said to be "reduced to the level of private persons."[247] The proposition, "[a]ll men are born equal," was said to be inconsistent with the "pretensions of kings and nobles to exclusive privileges and immunities."[248] Another source labeled privileges and immunities "particular marks of favor."[249] They included "the first places at sacrifices."[250] They were given to "faithful servants or to favorites."[251] Favored classes were given privileges and immunities of which other classes were considered

[243] *See id.* at 26.
[244] *See* LASH, *supra* note 51, at 15.
[245] *See id.*
[246] *See* BLACKSTONE, *supra* note 92, at *119.
[247] WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 225 (Philadelphia, Philip H. Nicklin 2d ed. 1829).
[248] *See* JAMES MCHENRY, THE BETROTHED OF WYOMING 50 (Philadelphia, Principal Booksellers 2d ed. 1830).
[249] *See* 1 WILLIAM HICKLING PRESCOTT, HISTORY OF THE CONQUEST OF PERU 83 (New York, Harper & Bros. 1847).
[250] *See* 1 CHARLES EDWARDS LESTER, THE ARTIST, THE MERCHANT, AND THE STATESMAN, OF THE AGE OF MEDICI, AND OF OUR OWN TIMES 164 (New York, Paine & Burgess 1845).
[251] *See The Condition and Prospects of Canada*, 75 N. AM. REV. 261, 263 (1852).

"incapable" of possessing.[252] One source referred to the holder of privileges and immunities as the "only one endowed" with them.[253]

As Lash observed, sources put adjectives like "exclusive,"[254] "special"[255] and "great"[256] in front of "privileges and immunities."[257] This reflects the view that the phrase encompasses rights beyond the normal.

Sources frequently referred to government-conferred rights when using "privileges and immunities." American colonists argued they "were entitled to all privileges and immunities, granted by charter, or secured by their several codes of provincial laws."[258] Privileges and immunities were "given by the king,"[259] dispensed by legislators,[260] and secured by charters.[261]

Some writers followed "privileges and immunities" with a prepositional phrase beginning with "of" to specify what the content of the rights was. The sources referred to "the privileges and immunities of the clergy,"[262] "of a star,"[263] "of British subjects,"[264] "of a regularly established western merchant,"[265] "of a near connection, in the family."[266]

Blackstone used the phrases "privileges or immunities" and "privileges and immunities" only in connection with artificial persons (specifically corporations).[267] The foregoing examples show that privileges and immunities could refer to natural persons as well as artificial ones, but the phrase was also used as Blackstone used it, in

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[252] *See The Southern Apostasy*, 12 NEW ENGLANDER 627, 630 (1854).
[253] *E Pluribus Unum*, 7 ATL. MONTHLY 235, 240 (1861).
[254] MCHENRY, *supra* note 248, at 50.
[255] *E Pluribus Unum*, *supra* note 253, at 240.
[256] LESTER, *supra* note 250, at 271.
[257] *See* LASH, *supra* note 51, at 18–19.
[258] *See* HENRY BALDWIN, A GENERAL VIEW OF THE ORIGIN AND NATURE OF THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES 26 (Philadelphia, John C. Clark 1837).
[259] *See The Condition and Prospects of Canada*, *supra* note 251, at 263.
[260] Henry S. Randall, A Special Report on Common School Libraries, *in* S.S. RANDALL, MENTAL AND MORAL CULTURE, AND POPULAR EDUCATION 176, 211 (New York, Boston, C.S. Francis & Co. 2d ed. 1844).
[261] *See* REUBEN ALDRIDGE GUILD, LIFE, TIMES, AND CORRESPONDENCE OF JAMES MANNING 227 (Boston, Gould & Lincoln 1864); LESTER, *supra* note 250, at 171; F. BYRDSALL, THE HISTORY OF THE LOCO-FOCO, OR EQUAL RIGHTS PARTY 27 (New York, Clement & Packard 1842).
[262] *Politics of Mexico*, 31 N. AM. REV. 110, 133 (1830).
[263] 2 AN AMATEUR, CRAYON SKETCHES 180 (Theodore S. Fay ed., New York, Conner & Cooke 1833) (emphasis omitted).
[264] 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 196 (Boston, Hilliard, Gray & Co. 1833).
[265] LUKE SHORTFIELD, THE WESTERN MERCHANT 187 (Philadelphia, Grigg, Elliot & Co. 1849).
[266] AUGUSTUS BALDWIN LONGSTREET, MASTER WILLIAM MITTEN 35 (Macon, Burke, Boykin & Co. 1864).
[267] *See* 1 BLACKSTONE, *supra* note 92, at *456.

reference to artificial persons. They were given by governments to medical societies[268] and Baptist societies.[269] One author objected to a proposal to confer privileges and immunities on these grounds, saying "[o]nly unite half a dozen men in a corporation, and then they are, in the opinion of many, entitled to privileges and immunities which none would be willing to allow them in their individual capacity."[270]

Lash ultimately argues that "privileges and immunities" refers to federally enumerated rights, especially the Bill of Rights.[271] However, none of the sources directly supports that reading.

This analysis is troublesome for the Fundamental Rights Reading but not fatal. The best argument for the Fundamental Rights Reading is based on its connection to the Comity Clause and its precedent. The corpus linguistics analysis suggests that Justice Washington's broad, fundamental rights-driven view of the Comity Clause was mistaken, but that does not change the fact that the drafters of the Fourteenth Amendment relied on it in crafting the Privileges or Immunities Clause. Moreover, even if "privileges and immunities" refers only to positive-law protections, that would not preclude the Fundamental Rights Reading. Some have read "privileges" and "immunities" as used by Blackstone to refer to positive-law protections of fundamental rights.[272]

IV. STATE CONSTITUTIONAL LAW OFFERS A PRACTICAL WAY FOR FEDERAL COURTS TO ENFORCE THE PRIVILEGES OR IMMUNITIES CLAUSE

Subject to future corpus linguistics research, I have argued that the Privileges or Immunities Clause protects fundamental rights, deriving from social contract political philosophy, namely the "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."[273] I have also argued that this view unites the best features of the divided scholarship around the meaning of the Privileges or Immunities Clause. Thus, the Fundamental Rights Reading provides the answer to Justice

[268] *See Medical Societies*, 27 N. AM. REV. 43, 43 (1828).
[269] *See* GUILD, *supra* note 261, at 227.
[270] *See Resumption of Specie Payments*, 2 U.S MAG. & DEMOCRATIC REV. 211, 212 (1838).
[271] *See* LASH, *supra* note 51, at 65.
[272] *See* BARNETT & BERNICK, *supra* note 102, at 49.
[273] *See* 1 BLACKSTONE, *supra* note 92, at *125.

Alito's first charge in *McDonald*: to identify the substance of the Privileges or Immunities Clause.[274]

I turn now to his second charge: what limiting principles attach to the Privileges or Immunities Clause?[275] How should federal courts go about actually enforcing the Clause?

In this Part, I argue that federal courts should look to state constitutional law for help in answering these questions. State constitutional law provides an appropriate general attitude for judicial review under the Privileges or Immunities Clause: federal courts should adopt a deferential standard of review of both challenged state actions and of federal congressional attempts to enforce the Privileges or Immunities Clause. State constitutional law can also provide a specific metric for identifying which unenumerated privileges and immunities federal courts may enforce under the Clause: for rights not enumerated in the federal Constitution, federal courts should enforce only those rights that appear in three-fourths of our state constitutions. I conclude this Part by giving concrete examples of how this approach would work.

A. Following the Lead of Early State Courts, Federal Courts Should Apply a Deferential Standard of Judicial Review under the Privileges or Immunities Clause

Although the "conventional account of judicial review starts with a U.S. Supreme Court case, *Marbury v. Madison*," it "in truth starts with the state courts and the state constitutions."[276] State courts were doing judicial review before the federal courts even existed.[277] But judicial review looked quite different in founding-era state courts than it looks in today's federal courts.

Founding-era state courts "rarely invalidat[ed]" laws as unconstitutional.[278] They only did so when a law proved "*irreconcilably* contradictory to the [state's] Constitution."[279] In other words, they adopted a deferential form of judicial review that required a showing of a "clear conflict."[280]

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[274] *See* McDonald v. City of Chicago, 561 U.S. 742, 758 (2010).
[275] *See id.*
[276] JEFFREY S. SUTTON, WHO DECIDES?: STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 31 (2022).
[277] *See id.*; *see also* Moore v. Harper, 143 S. Ct. 2065, 2080 (2023).
[278] *See* SUTTON, *supra* note 276, at 65.
[279] *See id.* at 42.
[280] *See id.* at 56.

This clear-conflict rule emerged from the general approach to cases taken by state courts.[281] They sought to determine only what law governed a particular case.[282] That required applying certain, well-known conflict-of-laws principles: namely, an on-point source of lower law would provide the law of the case unless a higher form of law clearly displaced it.[283] Just as a contract would govern the case unless a statute clearly displaced it, a statute would govern the case unless the state's constitution clearly displaced it.[284]

What did state courts require before determining that a state constitution clearly displaced an on-point statute? State courts viewed their constitutions as law and interpreted them according to the rules of interpretation that governed statutes.[285] But if, after applying those rules, room for reasonable disagreement remained, the statute would provide the law for the case before the court.[286] It would not be invalidated.[287]

If this process sounds familiar, it should. Early courts applied the same approach when deciding whether to overturn precedents.[288] Previous cases interpreting statutes or constitutions would stand unless the later court could say that the earlier case was not only wrong, but wrong beyond the realm of reasonable debate.[289] And federal courts today apply similar approaches in several contexts: when reviewing an agency's interpretation of a statute under *Chevron*,[290] when reviewing a state court's application of federal law under AEDPA,[291] and when deciding whether a factual dispute should go to a jury under Federal Rule of Civil Procedure 56.[292]

But this familiar, deferential approach does not describe judicial review in federal courts today. Federal courts do not ask whether a law of Congress comports with a *reasonable interpretation* of the Constitution. They instead ask whether a law comports with the *best*

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281 *See id.* at 55–56, 64.
282 *See id.* at 55.
283 *See id.* at 57–58.
284 *See id.*; *see also* John O. McGinnis, *The Duty of Clarity*, 84 GEO. WASH. L. REV. 843, 881–85, 901 (2016); PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 618 (2008).
285 *See* SUTTON, *supra* note 276, at 64.
286 *See id.* at 56.
287 *See id.*
288 *See* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV 1, 15–20 (2001); Gamble v. United States, 139 S. Ct. 1960, 1982–83 (2019) (Thomas, J., concurring).
289 *See* Nelson, *supra* note 288, at 15–20.
290 *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984).
291 *See* 28 U.S.C. § 2254(d)(1).
292 *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986).

interpretation of the Constitution, as determined by the court.[293] Increasingly, this means the best interpretation according to the principles of originalism: text, history, and tradition.[294]

This difference perhaps arises from the different role federal courts have long asserted for themselves. Instead of simply determining the law that should govern a particular case, federal courts, and especially the U.S. Supreme Court, have asserted a power and duty to "expound" the Constitution, to determine and announce rules of constitutional interpretation that broadly govern future cases.[295]

Whatever the merits of the no-deference approach in other contexts, it should not supply the governing approach for judicial review under the Privileges or Immunities Clause. When the Court shifts to protecting fundamental rights, enumerated or otherwise, it should take that opportunity to reconsider its approach to judicial review and to adopt a deferential form of review like the one taken by early state courts. Doing so would alleviate many of the practical problems that serve as an impediment to the path of privileges or immunities. I offer four reasons, rooted in text, history, and tradition, to adopt a deferential form of judicial review in this context.

First, the federal Constitution contains no "Judicial Review Clause" explaining precisely how judicial review should work. The details must instead be inferred from the broad language of "judicial Power" or from the structure of the document.[296] Either way, the natural place to look for the original understanding of text and context is how state courts conducted judicial review under state constitutions, something that had been going on before *Marbury* and continued independent of it. If the power of judicial review at the founding carried a certain limitation on court power, such as a requirement of showing a clear conflict, that limitation should apply to federal courts today.[297]

Second, the nature of the rights protected by the Privileges or Immunities Clause puts identifying new privileges and immunities beyond the ken of federal judges. The rights protected flow from political philosophy, not from law. Courts are not equipped to answer, as a matter of political theory, what residuum of liberty is

[293] *See, e.g.*, *Gamble,* 139 S. Ct. at 1982–84 (Thomas, J., concurring).

[294] *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2135 (2022); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

[295] *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *Gamble*, 139 S. Ct at 1984 (Thomas, J., concurring).

[296] *See* U.S. CONST. art. III, § 1.

[297] *See supra* notes 279–282 and accompanying text.

owed to the people of our republics, nor which privileges must be provided to recompense natural liberty lost. That distinguishes the Privileges or Immunities Clause from the Due Process Clause and the Equal Protection Clause.

Third, Section 5 of the Fourteenth Amendment expressly empowers Congress to enforce the Privileges or Immunities Clause.[298] As Barnett and Evan Bernick explain, this suggests that there was to be a joint effort in identifying privileges or immunities and enforcing the Clause.[299]

Fourth, a less hands-on approach by the judiciary fits with the historical context. The current approach of judicial supremacy seems hard to square with the relevant constitutional history. It would be odd if, one decade after the U.S. Supreme Court necessitated the Reconstruction Amendments with its decision in *Dred Scott*, and one decade before it gutted them in decisions like *Slaughter-House*, there existed a golden decade in which the American people trusted the Supreme Court to protect treasured rights and to resolve all the hard questions of unenumerated rights. Much more likely is that they placed that faith in the hands of the federal Congress, who drafted Reconstruction-era statutes and amendments.

These last two points, by the way, show that more judicial restraint does not equal less protection of rights. That's again because of the enforcement power located in Section 5.[300] Just as the federal courts should hesitate before halting state action allegedly in violation of the Privileges or Immunities Clause, so too should they hesitate before halting congressional action enforcing the Clause.

B. Applying this Deferential Approach Shows How Judicial Review under the Privileges or Immunities Clause Might Look in Practice

1. Enumerated Rights

As explained above, the Fundamental Rights Reading of the Privileges or Immunities Clause would bar the states from violating the rights enumerated in the federal Constitution's Bill of Rights. And adopting a deferential form of judicial review would not change that: enumerated rights like the freedom of speech and the free exercise of religion qualify as privileges or immunities of citizens of the United States and there is no doubt that federal courts may

[298] *See* U.S. CONST. amend. XIV, § 5.
[299] *See* BARNETT, *supra* note 48, at 193–94.
[300] *See* U.S. CONST. amend. XIV, § 5.

enforce those enumerated rights against the states. Even so, judicial review under the Privileges or Immunities Clause should not look exactly the way it looks under the incorporation doctrine today. Courts should instead apply this deference-rooted rule: when the historical evidence is essentially in equipoise—when it would be reasonable to read the text and historical evidence either way—the Court should not halt state action.

An example of a case that would likely come out differently under this principle is *McIntyre v. Ohio Elections Commission*.[301] That case asked whether the First Amendment, incorporated through the Fourteenth, protected anonymous political speech.[302] The historical evidence in either direction was scant.[303] There had been a few founding-era controversies in which private or public actors had sought to compel an anonymous pamphleteer to reveal his identity.[304] And although those incidents had generated backlash, it was difficult to discern whether those objections were based on constitutional grounds or moral ones.[305] Further complicating matters was the potential that viewpoint discrimination had motivated the disclosure.[306] Each approaching the question from an originalist perspective, Justices Thomas and Scalia reached different answers, with Justice Thomas providing the decisive vote in favor of the pamphleteers.[307] Justice Thomas later noted that the case was one that admitted "honest disagreement,"[308] his standard for deciding whether to adhere to an earlier decision under stare decisis.

In cases like *McIntyre*, where Justices applying originalist methods can reasonably disagree about whether a state law runs afoul of the enumerated protections in the federal Constitution, courts should decline to exercise judicial review. They should simply say that the state statute provides the governing law in the case because it is not in clear conflict with the federal Constitution.

In doing so, the courts would not be announcing once and for all that a given right—in *McIntyre*, anonymous political speech—is not protected under the Privileges or Immunities Clause.[309] Instead, they would be announcing their judgment in a given case that the

[301] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).
[302] *See id.* at 336.
[303] *See id.* at 367 (Thomas, J., concurring in judgment); *id.* at 374 (Scalia, J., dissenting).
[304] *See id.* at 361–66 (Thomas, J., concurring in judgment).
[305] *See id.* at 361–66; *id.* at 373 (Scalia, J., dissenting).
[306] *See id.* at 373–74.
[307] *Compare id.* at 361–71 (Thomas, J., concurring in judgment), *with id.* at 371–385 (Scalia, J., dissenting).
[308] *See* Gamble v. United States, 139 S. Ct. 1960, 1986 (2019) (Thomas, J., concurring).
[309] *See McIntyre*, 514 U.S. at 336.

historical evidence did not show a clear conflict. Later evidence in later cases might reveal the clear conflict missing in an earlier case. To hold that the Constitution does not *clearly* protect a right is not to hold that the Constitution does not protect a right.

This last point explains why, under a deferential approach, the story would not end there. Recall that courts owe the same degree of respect to Congress's laws enforcing the Privileges or Immunities Clause as they owe state laws allegedly violating the Privileges or Immunities Clause. Thus, when the historical evidence is essentially in equipoise—when it would be reasonable to read the text and historical evidence either way—the Court should not halt congressional action either. Returning to *McIntyre*, Congress could pass a law protecting anonymous political speech because the Constitution reasonably can be read as protecting that speech.

An example of a case that would likely come out differently under this principle is *City of Boerne v. Flores*,[310] which involved religious exemptions to general laws.[311] In an earlier case, *Employment Division v. Smith*,[312] the Court held that the Free Exercise Clause did not require states to grant religious exemptions to their general laws.[313] Congress, acting under its power to enforce the Due Process Clause against the states, responded by passing the Religious Freedom Restoration Act, which required states to grant religious exemptions to general laws.[314] The Supreme Court ruled that Congress could not do that.[315] Once the Court had determined that the First Amendment (incorporated through the Due Process Clause) did not protect a right to a religious exemption, Congress lost the power to protect the right to a religious exemption under the enforcement clause.[316] Congress, in short, cannot enforce rights that the Fourteenth Amendment, as definitely interpreted by the Court, does not protect.

Although *City of Boerne* makes sense under the Court's best-interpretation approach to judicial review, it proves difficult to square with a more deferential approach. Under that approach, *Smith* would not have resolved the question of whether the Free Exercise Clause guarantees the right to a religious exemption. *Smith* would only have resolved whether a state could reasonably read the

[310] City of Boerne v. Flores, 521 U.S. 507 (1997).
[311] *See id.* at 537 (Stevens, J., concurring).
[312] Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872 (1990).
[313] *See id.* at 890.
[314] *See Flores*, 521 U.S. at 512–13, 515–17.
[315] *See id.* at 536.
[316] *See id.* at 533–35.

Free Exercise Clause as not requiring religious exemptions. Answering yes would not resolve the question in *City of Boerne*: whether Congress could reasonably read the Free Exercise Clause as requiring religious exemptions.[317] And given the originalist research that has been conducted after *Smith*,[318] it is likely that the Clause can reasonably be read to require religious exemptions, which would make the Religious Freedom Restoration Act constitutional.

2. Unenumerated Rights

Protecting unenumerated rights under a deference framework proves to be a much more difficult task. Return to the key passage of *Corfield*. Privileges or immunities refer to rights that

> are . . . fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective

[317] *See id.* at 517.

[318] *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision,* 57 U. CHI. L. REV. 1109, 1114–20 (1990).

> franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.[319]

This description presents several challenges for establishing a clear-cut, judicially enforceable standard. There is plenty of room for reasonable disagreement about which rights "belong of right to the citizens of all free governments," and even where all agree that a right exists there is plenty of room for reasonable disagreement about the "restraints . . . the government may prescribe" on that right "for the general good of the whole."[320] And although *Corfield* lists many rights, some are very broad ("to pursue and obtain happiness and safety") and others were contested.[321] By the time of the Fourteenth Amendment, the right to vote was not generally considered a privilege or immunity that belonged to all citizens of all free governments but instead a "political right."[322]

Yet, once again, state constitutional law can provide guidance for the federal courts. The substantive protections in state constitutions offer one way to identify judicially enforceable privileges or immunities. Other scholars, sometimes discussing the Due Process Clause, sometimes discussing the Privileges or Immunities Clause, have suggested that if three-fourths of state constitutions protect a right not enumerated in the federal constitution, that right should be enforceable in federal court.[323] (That number that comes from the Constitution's requirement for amending the Constitution.[324]) That rule comports with the Fundamental Rights Reading of the Privileges or Immunities Clause. Under the understanding of rights that prevailed in the nineteenth century, when the people of a state protect a right in their constitution, they are not creating a new right, but rather declaring that the right already exists and that their

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[319] Corfield v. Coryell, 6 F. Cas. 546, 551–52 (Washington, Circuit Justice, C.C.E.D. Pa. 1823) (No. 3,230).

[320] *See id.*

[321] *See id.*

[322] *See* BARNETT & BERNICK, *supra* note 102, at 106.

[323] *See* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition*, 87 TEX. L. REV. 7, 16–17 (2008); A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 508–09, 513 (1999) (arguing that rights unenumerated in the federal Constitution but present in a supermajority of state constitutions should be enforceable against the federal government but not against the states); *c.f.* Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 348 (2011); SUTTON, *supra* note 276, at 135–38.

[324] Calabresi & Agudo, *supra* note 323, at 16.

government must respect it.[325] When the people of enough states protect a right in their constitutions, it suggests that all legitimate governments owe that right to their citizens. The high bar of three-fourths is also consistent with the clarity requirement that should guide judicial review under the Privileges or Immunities Clause.

If the federal courts were to adopt the three-fourths rule for identifying unenumerated rights, something less would be required for congressional protection of unenumerated rights. Under deference principles, the courts would ask only whether Congress reasonably could conclude that a particular unenumerated right qualified as one that "belong[s], of right, to the citizens of all free governments."[326] Without the textual hook of Article V, it seems arbitrary to impose a numerical requirement, such as a simple majority. A more sensible approach would mirror the one taken by the Court in *Mapp v. Ohio*,[327] which federalized the exclusionary rule based on its widespread and growing acceptance among the states, rather than a particular numerical formula.[328]

V. CONCLUSION

In *Slaughter-House*, the Supreme Court adopted an overly narrow interpretation of the Privileges or Immunities Clause.[329] That decision sapped some of the life force of the Fourteenth Amendment, and it forced work that the Privileges or Immunities Clause should have done onto clauses whose text cannot bear the weight of such work. Yet the modern Court has hesitated to change course, citing lingering uncertainty as to what the Privileges or Immunities Clause means and the need to discern limiting principles.[330] In this Article, I have attempted to address the first concern by explaining why the Fundamental Rights Reading proves more plausible than other readings and indeed offers the possibility of synthesizing the various readings. I have attempted to address the second concern by explaining how state constitutional law can provide limiting

[325] *See id.* at 88.
[326] Corfield v. Coryell, 6 F. Cas. 546, 551 (Washington, Circuit Justice, C.C.E.D. Pa. 1823) (No. 3,230).
[327] Mapp v. Ohio, 367 U.S. 643 (1961).
[328] *See id.* at 659–60; Calabresi & Agudo, *supra* note 323, at 58.
[329] *See* discussion *supra* Part II.A.
[330] *See* McDonald v. City of Chicago, 561 U.S. 742, 758 (2010) (citing Saenz v. Roe, 526 U.S. 489, 522 n.1 (1999) (Thomas, J., dissenting)).

principles to judicial review under the Privileges or Immunities Clause.