Criminal Law & Procedure

McDonald v. Chicago, the Meaning-Application Distinction, and "Of" in the Privileges or Immunities Clause

*By Christopher R. Green**

In *McDonald v. Chicago*,[1] the Supreme Court will consider whether the Second Amendment right of armed self-defense found in *District of Columbia v. Heller*[2] applies to states under the Fourteenth Amendment. Significantly, the question presented[3] addresses not only the Due Process Clause, but also the Privileges or Immunities Clause, which has lain mostly dormant since the *Slaughterhouse Cases* in 1873.[4] Whether armed self-defense is a privilege of citizens of the United States is, of course, an important question. But more fundamental is *why*, exactly, particular rights count as privileges of citizens of the United States. Many different answers might be used to strike down Chicago's gun ban, but with very different implications for other cases. There are four main possible reasons armed self-defense might count as a privilege of citizens of the United States: such a right (a) is in the Bill of Rights, (b) was traditionally respected in 1868, (c) is generally respected today, or (d) is a natural right. Even if these four questions—"Is it in the Bill of Rights?" "Was it widely respected in 1868?" "Is it widely respected today?" and "Is it a natural right?"—all produce a "yes" for armed self-defense, they will certainly diverge in other cases, because not all traditional liberties are listed in the Bill of Rights, the American tradition of civil liberty has changed between 1868 and today, and neither the Bill of Rights nor our traditions track natural rights perfectly.

I. Meaning v. Application, Analytic v. Synthetic

Recent originalist constitutional theory has repeatedly distinguished the original *meaning* expressed by the constitutional text—i.e., the constitutional categories that, as part of "this Constitution," bind those under the Article VI oath[5]—from originally-intended or originally-understood *application*—i.e., the set of tangible outcomes falling under those categories, which are not binding, but offer merely persuasive authority.[6] If this emphasis on original meaning is right, then originalists can and must admit that Fourteenth-Amendment founders like John Bingham or Jacob Howard could, in principle, be wrong about the *application* of the Fourteenth Amendment, even though they could not, except in very odd circumstances,[7] be wrong about the *meaning* expressed by the Fourteenth Amendment's language. Put another way, the founders' *analytic* judgments—judgments true in virtue only of the meaning of their language—are binding, but the founders' *synthetic* judgments—judgments true in part because of how the world is—are not.[8] An analytic judgment is like "all bachelors are unmarried" or "all cars are vehicles," but synthetic judgments are like "there are no bachelors on the Supreme Court" or "there are over two million cars in Mississippi." Building cars does not change the *meaning* of "car," but it can change the partly-fact-based *application* of the phrase "the cars in Mississippi." Justice Souter's retirement did not change the *meaning* of "bachelor," but it does change the partly-fact-based *application* of the phrase "the bachelors on the Supreme Court."

A simple example of founders' non-binding mistaken synthetic constitutional judgments is Article I, section 2, which apportions representatives "according to their respective Numbers." Until the first census, however, the Constitution had an interim rule, obviously reflecting the Founders' judgments of states' relative populations and expectations for the first census. As it turns out, the founders mistook the relative populations of North Carolina and Maryland—the interim rule gave North Carolina 5 representatives and Maryland 6 for the first two Congresses, but after the census North Carolina received 10 representatives and Maryland 8.[9] Obviously, the meaning expressed in the constitutional text—"according to their respective Numbers"—is binding, not the expected application.

Because the Founders' synthetic judgments are defeasible, it is not enough simply to examine whether the Founders of the Fourteenth Amendment thought that armed self-defense was a privilege of citizens of the United States.[10] That sort of evidence is important, but it is not, strictly speaking, conclusive. We must instead ask what the Founders thought the phrase "privileges or immunities of citizens of the United States" *expressed*, and then answer whether that criterion, applied to the actual facts, encompasses armed self-defense.

In assessing founding-era evidence, then, a sophisticated originalist does not simply ask how John Bingham or Jacob Howard or Thaddeus Stevens would resolve a particular controversy, but will classify some of the founders' views as non-binding, partly-fact-based synthetic judgments. In *McDonald*, the Court should consider whether privileges in the Bill of Rights are privileges of citizens of the United States analytically (just by definition) or synthetically, in virtue of some other property of those rights (because they are natural rights, or because they are deeply rooted in the American tradition of civil liberty today, or because they were deeply rooted in the American tradition of civil liberty in 1868).[11] Answering the analytic-versus-synthetic-incorporation question is critical if we are to find out exactly what a resurrected Privileges or Immunities Clause would look like.

II. Why "Privileges or Immunities" is Not the Puzzle

At first glance, we might think that the key words of the Privileges or Immunities Clause are "privileges or immunities." However, a great amount of material, even from people who disagree sharply over the meaning of the clause, takes them to refer generally to rights. Consider, for instance, the February 1872 dispute between Senators Allen Thurman and John

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Sherman, the Democratic and Republican Senators from Ohio. Thurman argued against the constitutionality of what became the Civil Rights Act of 1875 by taking the incorporation-only view later championed by Justice Hugo Black, while Sherman, prefiguring Justice Goldberg's concurrence in *Griswold*, argued that the Ninth Amendment's intimation of important civil rights outside the Bill of Rights suggested that common-law or traditional rights, like the right to attend school or ride on common carriers, were also included.[12] But both Thurman and Sherman equated "privileges or immunities" with rights. Sherman referred to "privileges, immunities, and rights . . . I do not distinguish between them, and cannot do it,"[13] while Thurman said, "Every right, every privilege, every immunity that belongs to a man as a citizen of the United States is found in the Constitution."[14] Their dispute was not over the meaning of "privileges or immunities," but over the *relationship* that a right must bear to "citizens of the United States" to count—which is to say, over the meaning of "of."[15]

III. Some Key Evidence of Original Meaning

Before considering the various readings of "of" in the Privileges or Immunities Clause, I will set out four historical data points.

Corfield. First, many founders—most prominently, Senator Jacob Howard introducing the Fourteenth Amendment to the Senate in May 1866, and John Bingham, explaining the Amendment on behalf of the House Judiciary Committee in January 1871, use *Corfield v. Coryell* to explain the privileges of citizens of the United States.[16] *Corfield*, of course, was an 1823 trial-court opinion by Justice Bushrod Washington, explaining why the right to fish for oysters was not among the "privileges and immunities of citizens in the several states" protected by Article IV, section 2. Washington wrote:

> The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.[17]

This language is itself not perfectly clear. The first phrase ("which are, in their nature, fundamental") leaves open what exactly makes a right fundamental: is the inquiry moral or historical? The second ("which belong, of right, to the citizens of all free governments") suggests natural rights, while the third ("which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign") suggests an analysis of tradition and custom.[18]

In interpreting *Corfield* and its use by Fourteenth Amendment founders, we do well to keep the analytic-synthetic distinction in mind. There are three ways to reconcile the dual reference to history and to natural rights. First, we could take the "and" very seriously—a right only counts if it is *both* among those which "belong, of right, to the citizens of all free governments" *and* among those which "have, at all times, been enjoyed by the citizens of the several states." We might, however, impute to Washington the view that these two concepts pick out the same set of rights—that the American tradition protects natural rights. If such an imputation is plausible, we can then read Washington as making one analytic judgment and one synthetic judgment. We can read him as saying that "privileges and immunities of citizens in the several states" *means* "privileges belonging of right to citizens of free governments" (the analytic judgment), and that "privileges and immunities of citizens in the several states" *designates, in point of fact*, "privileges that have traditionally been enjoyed by citizens of the several states" (the synthetic judgment). Alternatively, we can read him as saying that "privileges and immunities of citizens in the several states" *means* "privileges that have traditionally been enjoyed by citizens of the several states" (the analytic judgment), and that "privileges and immunities of citizens in the several states" *designates, in point of fact*, "privileges belonging of right to citizens of free governments" (the synthetic judgment).

Incorporation. Second, both Howard (in the same May 1866 speech) and Bingham (in a speech in March 1871) refer to the Bill of Rights as a paradigm of privileges of citizens of the United States. Howard, after quoting *Corfield*, said, "To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution."[19] Bingham said in the debates leading to the Civil Rights Act of 1871 that "the privileges or immunities of citizens of the United States . . . are chiefly defined in the first eight amendments to the Constitution of the United States," which he then read.[20]

Antidiscrimination. Third, the Civil Rights Act of 1866, which Section 1 of the Fourteenth Amendment was intended to constitutionalize to some extent,[21] guaranteed racial equality in land-ownership rights for citizens, but aliens were uncontroversially (at the time) denied equal land-ownership rights on racial grounds, even though the Equal Protection Clause applied to aliens as well.[22] This evidence suggests an antidiscrimination, equal-citizenship interpretation of the Privileges or Immunities Clause, leaving the Equal Protection Clause as a guarantee of "protection of the laws," i.e., government's remedial and enforcement functions.[23]

Lack of Moral Theory by Interpreters. Fourth, the debates leading to the Civil Rights Act of 1875 do not feature moral theorizing as a means of explaining the exact content of the Privileges or Immunities Clause, but instead involve a careful examination of the common law. Charles Sumner's proposal aimed to ensure, not equality with respect to *natural* rights, but only "equal enjoyment of all institutions, privileges, advantages, and conveniences *created or regulated by law*."[24] Senator John Sherman said, "The great fountain head, the great reservoir of the rights of the American citizen is in the common law."[25] Sherman thought the proper sources for investigating the privileges of citizens were very broad, but they were all historical—"every scrap of American history"—not natural-rights theory as such.[26] The fact that advocates of a broad reading of the Fourteenth Amendment did not use moral theory as an

interpretive tool strongly suggests that they did not think the Fourteenth Amendment protected natural rights as such.

IV. "Of": Six Possible Basic Meanings

So, what relationship *does* a right need to bear to "citizens of the United States" to be protected under the Privileges or Immunities Clause? I will isolate six basic readings of "of" before considering combinations.

Basic Option (A): "Possessed in virtue of the Union by." This is the *Slaughterhouse* theory—privileges "which owe their existence to the Federal government, its National character, its Constitution, or its laws."[27] In *Cruikshank*, the Court noted that general rights of armed self-defense did not count under this test, because the right *not to be disarmed by the federal government*, which the Second Amendment protected, was distinct from a right *not to be disarmed by states*, which did not depend on citizens' relationship to the federal government.[28] The oft-noted fatal flaw with this theory is that it renders the Privileges or Immunities Clause largely or entirely superfluous; rights that really exist in virtue of the existence of the federal government or its national character were already binding on the states by Article VI. *Slaughterhouse* lists the right to visit the capital protected before the Fourteenth Amendment by *Crandall v. Nevada*,[29] the right to federal protection on the high seas, and dormant-commerce-clause-style rights to use navigable waterways.[30] Even if there are *some* such non-superfluous rights—the right against new-residency welfare-benefits discrimination in *Saenz v. Roe*[31] might count—they are utterly unlike any historic explanation of the Fourteenth Amendment by its proponents.

Basic Option (B): "Possessed under the Constitution against the federal government by." This is analytic incorporation. As noted above, Senator Thurman adopted it as an exclusive reading in 1872, as did Justice Hugo Black in his *Adamson* and *Griswold* dissents and *Duncan* concurrence.[32]

Basic Option (C): "Generally possessed under state constitutions, statutes, and common law by." As noted above, Senator Sherman criticized Senator Thurman by urging that the common law, not just the federal constitution, is the great source of the privileges of citizens of the United States; the Privilege or Immunities Clause protects the "common privileges of every English subject and American citizen, however humble he may be."[33] Sherman, however, thought that the Bill of Rights was an important expression of common-law liberties.[34] Further, the earliest prominent arguments for incorporation of the Bill of Rights rely on a common-law definition as primary, seeing the Bill of Rights as an application of such a standard. J. Randolph Tucker's 1887 argument in *Spies v. Illinois* argued that the rights in the Bill of Rights were incorporated against states because they were common law rights:

> Though originally the first ten Amendments were adopted as limitations on Federal power, yet *in so far as they secure and recognize fundamental rights—common law rights—of the man*, they make them privileges or immunities of the man as citizen of the United States, and cannot now be abridged by a State under the Fourteenth Amendment . . . . [A]ll the declared privileges and immunities in these ten Amendments *of a fundamental nature and of common law right*, not in terms applicable to Federal authority only, are privileges and immunities of citizens of the United States, which the Fourteenth Amendment forbids every State to abridge.[35]

Basic Option (D): "Generally possessed in 1868 under state constitutions, statutes, and common law by." This variation on option (C) would freeze the privileges of citizens of the United States in 1868 amber. Earl Maltz, Steven Calabresi and Sarah Agudo each suggest such a view,[36] and *Slaughterhouse* suggested that it was the main alternative to (A).[37]

Basic Option (E): "Possessed as a matter of natural right by." A natural-rights "moral reading"[38] of the Privileges Fourteenth Amendment could build on the natural-rights parts of *Corfield* and other material suggesting natural-rights definitions of the privileges of citizens. In such a case, the Privileges or Immunities Clause delegates to future interpreters, such as the judiciary, the task of assessing natural rights as such. Under such a reading, interpreters should cite philosophers who best assess our natural rights (John Locke, Immanuel Kant, John Rawls, or Robert Nozick, say), rather than the legal theorists most representative of the Anglo-American tradition (Edward Coke, William Blackstone, Joseph Story, or Thomas Cooley, say), as would be proper under a tradition-based definition like (C) or (D). Of course, a constitution might say more or less explicitly, "No state shall invade citizens' natural rights," even if such a provision would expand federal judicial power far beyond its traditional scope.

Basic Option (F): "Possessed locally by." This sort of interpretation makes the Privileges or Immunities Clause an anti-discrimination provision, allowing the Equal Protection Clause to be limited, as its text says, to "protection of the laws." John Harrison, building on evidence such as that in my fourth point above, defends such a view,[39] as do I in my work on the Equal Protection Clause.[40] The idea is that the Privileges or Immunities Clause may allow states to refuse to provide certain privileges to any of its citizens—a law school, for instance, or certain recreational facilities—but once it provides such privileges to citizens in general, it may not make such privileges whites-only. As Matthew Carpenter put it, "the privileges and immunities of all citizens must be the same."[41]

V. Disjunctive and Conjunctive Theories of "Of," and the Anti-Gruesomeness Principle

To these six possibilities we must add their combinations. A right might count as a privilege of citizens of the United States, for instance, if it is *either* in the Bill of Rights *or* a natural right;[42] a right might count if it is *both* a natural right *and* customarily recognized. Such disjunctive or conjunctive theories are one way to accommodate multiple data historical points—a (B)-or-(C)-or-(F) view that the privileges of citizens of the United States are (a) traditional privileges, plus (b) privileges in the Bill of Rights, plus (c) locally-given privileges, for instance, would accommodate the four main data points above (on a tradition-as-primary reading of *Corfield*). Indeed, because none of the six basic options can alone accommodate all four basic historical data points—*Corfield*, incorporation, antidiscrimination, and

the absence of moral theory among early interpreters—we must combine them to some extent.

On the other hand, the more complicated a definition becomes, the less likely it was really expressed by the little word "of" when the Fourteenth Amendment was enacted. Philosophers have devoted a great deal of attention to explaining how, exactly, we manage to use the same concepts even though two different concepts might equally cover all of the same past data points. For instance, Nelson Goodman proposed "grue," defined as "green and discovered before time *t*, or blue and discovered after time *t*," and noted that, on certain superficially-plausible accounts of confirmation, "all emeralds are grue" is just as well-confirmed as "all emeralds are green."[43] Saul Kripke discusses the "quus" function, which means the same as "plus," but only for previously-encountered numbers; for previously-unencountered numbers, the function returns an answer of five.[44] Part of the answer to these puzzles is to point out the natural human tendency to eschew overly-complicated concepts—"gruesome gerrymanders," as David Lewis's pun puts it.[45] Not just complication, but heterogeneity—a big difference between the basic nature of the different disjuncts or conjuncts—counts heavily against an interpretation.

Which of the six basic options should make the cut? Only basic option (F) can accommodate the antidiscrimination reading of the Privileges or Immunities Clause which a duty-to-protect-based reading of the Equal Protection Clause requires; while it is of course controversial, (F) has to be an ingredient of the proper definition of "of." Basic option (A), of course, explains nothing. While there is some evidence of the natural-rights reading of (E), the absence of such a reading among proponents of the Civil Rights Act is telling, as well as the *prima facie* implausibility that the founders meant for judicial interpretations of the privileges of citizens to examine natural rights and moral reality, as such, to assess such privileges. Accordingly, one could accommodate *Corfield* evidence with either basic reading (C) or (D).

Two questions remain: whether to include (B), and whether to pick (C) or (D).

The inclusion of (B) may make our resulting definition too heterogeneous. Because at least the vast bulk of rights in the Bill of Rights would also qualify as privileges under (C) or (D), those readings can accommodate much of the pro-incorporation evidence without making incorporation analytic. Future-Justice Woods's 1871 trial opinion in *United States v. Hall*, for instance, saw incorporation as the application of a *Corfield* standard.[46] Further, if we include reading (F)—*local* privileges—it would be odd for the fact that a right is in the federal bill of rights, protected against infringement by the *federal* leviathan, to be particularly significant. (B)'s attraction is that it fits with the distinction made in *Slaughterhouse* between state and federal citizenship, reading the Privileges or Immunities Clause to protect only the latter. But if the clause already protects local minorities' rights to things like law schools or municipal parks, that distinction is untenable; (F) undermines the main selling point of (B). Finally, Bingham's use of *Corfield* in January 1871 does not mention incorporation as a separate way to qualify as a privilege of citizens of the United States; the *Corfield* standard there stands alone as an account of the substantive privileges protected by the Privileges or Immunities Clause. I therefore take the *Corfield* definition as analytic, and incorporation as synthetic.

There are three reasons to favor (C) over (D). First, there is no explicit time reference in the Privileges or Immunities Clause. The Constitution refers at one point, for instance, to states "now existing,"[47] but does not protect only "*current* privileges or immunities of citizens of the United States." Second, even Justice Scalia has understood the tradition-based requirements of procedural due process not to be fixed for all time in 1791 or 1868, but to allow emergent constitutional rights: "Nothing we say today prevents individual States from limiting or entirely abandoning the in-state service basis of jurisdiction. And nothing prevents an overwhelming majority of them from doing so, with the consequence that the 'traditional notions of fairness' that this Court applies [with Scalia's approval] may change."[48] Third, a time-bound protection for substantive rights seems too different from the local-right antidiscrimination (F) component to be components of the single word "of." Because *local* privileges protected against discrimination cannot sensibly be embedded in 1868 amber—a state that founded its law school in 1880 could not make it whites-only—it would unduly awkward if national-tradition-based privileges were so embedded.

The (C)-or-(F) reading would protect rights that states generally give to citizens, either locally, as in (F), or nationally and historically, as in (C). While disjunctive, such a reading of "of" in the Privileges or Immunities Clause has had adherents.[49] If followed in *McDonald*, such an interpretation would require an analysis very like the Ninth Circuit's approach in *Nordyke v. King*.[50] Incorporation would not be automatic, but, given the place of armed self-defense in the American tradition of civil liberty, it would be very likely.

Endnotes

1 130 S.Ct. 48 (2009).

2 128 S.Ct. 2783 (2008).

3 The question presented is "Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses." The Supreme Court did not rewrite the question presented, as it did, for instance, in *Heller* itself. *See* District of Columbia v. Heller, 552 U.S. 1035 (2007).

4 83 U.S. 36 (1873). *Slaughterhouse* was followed by three decisions following its analysis and finding against Second-Amendment incorporation: *United States v. Cruikshank*, 92 U.S. 542 (1876), *Presser v. Illinois*, 116 U.S. 252 (1886), and *Miller v. Texas*, 153 U. S. 535 (1894). Some scholars and some of the briefs in *McDonald* have argued that the standard anti-incorporationist readings of *Slaughterhouse*, and even of *Cruikshank*, *Presser*, and *Miller*, are wrong or are dicta. Briefly, the suggestions are that *Slaughterhouse*'s reference to privileges "which owe their existence to the Federal government, its National character, its Constitution, or its laws," 83 U.S. at 79, might include privileges in the Bill of Rights, *see, e.g.*, 2009 WL 4099517, *24 (amicus brief of Arms Keepers); 2009 WL 4099513, *11-*13 (amicus brief of American Civil Rights Union), *Cruikshank* had an alternative no-state-action holding, because during the Colfax massacre, a private mob was disarming freedmen, not the state of Louisiana, 92 U.S. at 553, *Presser* held against a right of a militia to drill corporately in public, which could be consistent with individual gun rights, 116 U.S. at 264-65, and the claim in *Miller* was not preserved in the trial court, 153 U.S. at 538-39.

The Privileges or Immunities Clause has only been deployed twice by the Supreme Court. *Saenz v. Roe*, 526 U.S. 489 (1999), used the Privileges or Immunities Clause to house the new-residents-discrimination line of cases begun in *Shapiro v. Thompson*, 394 U.S. 618 (1969). *Colgate v. Harvey*, 296 U.S. 404 (1935), used the clause to protect the interstate sale of insurance, but was overruled in *Madden v. Kentucky*, 309 U.S. 83 (1940).

5 For an argument that "this Constitution" in Article VI refers to the textual expression of meaning (in philosophical guise, Gottlob Frege's "sense" or *Sinn*, Rudolph Carnap's "intension," or John Stuart Mill's "connotation"), rather than the founders' expected application (Fregean "reference" or *Bedeutung*, Carnapian "extension," or Millian "denotation"), see Christopher R. Green, *"This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 Notre Dame L. Rev. 1607, 1648-56 (2009).

6 For my contribution, drawing on the philosophy of language, see Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 St. Louis U. L. Rev. 555 (2006); *see also id*. at 567-69 n.36 (listing many people making similar distinctions); Mitchell N. Berman, *Originalism and its Discontents (Plus a Thought Or Two About Abortion)*, 24 Const. Comm. 383, 385-89 (2007) (providing a compelling refutation of Jack Balkin's assertion that originalists "have tended to conflate two different ideas—the expected application of constitutional texts, which is not binding law, and the original meaning, which is"); *Euclid v. Ambler Realty*, 272 U.S. 365, 387 (1926) ("[W]hile the meaning of constitutional guaranties [sic] never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise . . . . [A] degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles . . . ."); *Ex Parte Professional Engineers' Association*, 107 C.L.R. 208, 267 (Austl. 1959) ("We must not, in interpreting the Constitution, restrict the denotation of its terms to the things they denoted in 1900. The denotation of words becomes enlarged as new things falling within their connotations come into existence or become known. But in the interpretation of the Constitution the connotation or connotations of its words should remain constant. We are not to give words a meaning different from any meaning which they could have borne in 1900. Law is to be accommodated to changing facts. It is not to be changed as language changes.").

7 These would be cases in which a speaker uses a term idiosyncratically, or is somehow unaware of the exact meaning that others use a term to express.

8 The coherence of the meaning-application distinction thus depends on the coherence of the analytic-synthetic distinction, which some philosophers have questioned, *e.g.*, W.V.O. Quine, *Two Dogmas of Empiricism*, 60 Phil. Rev. 20 (1951). For two of the many responses to Quine, see H.P. Grice & P.F. Strawson, *In Defense of a Dogma*, 65 Phil. Rev. 141 (1956); Hilary Putnam, *The Analytic and the Synthetic*, 3 Minn. Stud. Phil. Sci. 358 (1962). A recent survey of philosophers by Australian philosophers David Chalmers and David Bourget finds a sizable majority (604 of 931 target faculty, or 64.8%, and 1886 of 3226 total respondents, or 58.4%) either accept the distinction or lean toward it. *See* http://philpapers.org/surveys/results.pl.

9 *See* Green, *supra* note 5, at 1623 n.41.

10 *See, e.g.,* Freedmen's Bureau Act, 14 Stat. 173, 176 (July 16, 1866) (referring to "all laws and proceedings for the security of person and estate, including the constitutional right to bear arms").

11 The distinction between analytic incorporation and synthetic incorporation is not quite the same as the debate between "total incorporation" and "selective incorporation" in cases like *Adamson v. California*, 332 U.S. 46 (1947). *Compare id.* at 65 (Frankfurter, J., concurring) (noting that history suggests "merely a selective incorporation of the first eight Amendments into the Fourteenth Amendment") *with id*. at 71-72 (Black, J., dissenting) ("[O]ne of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states."). Analytic incorporation would be *one* way to accomplish total incorporation, but not the only way. Synthetic incorporation would make room for total incorporation *if* the criterion for privileges of citizens of the United States were in fact satisfied by all of the rights in the Bill of Rights.

12 *See* Cong. Globe, 42nd Cong. 2nd Sess. app. 25-30 (1872) (Thurman's incorporation-only view); *id*. 842-46 (Sherman's tradition-based definition); *id.* app. 26 (Sherman interrupting Thurman to make Ninth Amendment argument); Griswold v. Connecticut, 381 U.S. 479, 487-99 (1965) (Goldberg, J., concurring); *id*. at 507-27 (Black, J., dissenting).

13 Cong. Globe, 42nd Cong. 2nd Sess. 844 (1872).

14 *Id*. app. 26.

15 The only explcit discussion of "of" I have seen is Larry Solum, *Incorporation and Originalist Theory*, 18 J. Contemp. Leg. Issues 409, 424-28 (2009).

16 *See* Cong. Globe, 39th Cong. 1st Sess. 2765 (1866); H.R. Rep. No. 41-22, at 2 (1871) (response by Bingham on behalf of the House Judiciary Committee to Virginia Woodhull's petition for women's suffrage); *see also* Cong. Globe, 42nd Cong. 2nd Sess. 844 (1872) (Senator Sherman indicating his agreement with Bingham's report). Reconciling Bingham's January report and March speech is difficult. Bingham said in January, "The clause of the Fourteenth Amendment . . . does not, in the opinion of the committee, refer to privileges and immunities of citizens of the United States other than those privileges and immunities embraced in the original text of the Constitution, article 4, section 2." H.R. Rep. No. 41-22, at 1. But he said in March, after discussing the very same authorities he cited in the January report (*Corfield*, Webster's argument in *United States v. Primrose* (a companion to *Bank of Augusta v. Earle*, 38 U.S. 519 (1839)), and Story's commentary), "Is it not clear that other and different privileges and immunities than those to which a citizen was entitled are secured by the [Privileges or Immunities Clause]?" Cong. Globe, 42nd Cong. 1st Sess. app. 84 (1871). One imperfect attempt at reconciliation of January's "not . . . other" with March's "other and different" is that the underlying basic rights might be the same, but different rules might apply to them (for Article IV, interstate comity, but for the Privileges or Immunities Clause, absolute protection). The privileges are the same in one sense, and different in another. Bingham does not say so explicitly, though.

17 Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.Pa. 1823). Washington continued:

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

Id.

18 With most of those who use *Corfield* to interpret the Fourteenth Amendment, I take "all" with a grain of salt. If Article IV required utter, complete unanimity for a right to be protected, a single instance in which a single state failed to protect a right would render it non-fundamental. But because Article IV is to be enforced against states who fail to provide the relevant privileges, that reading cannot be right. Similarly in the Fourteenth Amendment context, a single state's actions in failing to provide a right at a particular time cannot be fatal to a claim under the Privileges or Immunities Clause. There will, of course, be difficult borderline cases in deciding exactly how many states must protect a right to render it fundamental, but the general inquiry under a tradition-based reading seems clear enough.

19 Cong. Globe, 39th Cong. 1st Sess. 2765 (1866).

20 Cong. Globe, 42nd Cong. 1st Sess. app. 84 (1871). It is worth pointing out that John Bingham's 1866 references to the "Bill of Rights" were an explanation of an earlier proposal—"The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several states equal protection in the rights of life, liberty, and property"—*not* the Fourteenth Amendment itself. *See, e.g.*, Cong. Globe, 39th Cong. 1st Sess. 1088 (1866) ("The proposition pending before the House is simply a proposition to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today."). This language, called the Bingham Amendment, was discussed in February 1866, and its Globe page numbers are in the low 1000s, while the Fourteenth Amendment itself was discussed in May and June, and its page numbers are in the mid- and late 2000s and low 3000s. Many of the *McDonald* briefs have assumed that Bingham was talking about the Fourteenth Amendment itself. *See, e.g.,* 2009 WL 3844394, *45-*46 (brief by nominal respondent NRA); 2009 WL 4099512, *8-*9 (anti-Charles-Fairman-and-Raoul-Berger brief by CalGuns Foundation); 2009 WL 4099522, *12 n.4 (Paul Clement on behalf of majority of Congress); 2009 WL 4049145, *3 (Maryland Arms Collectors); 2009 WL 4099518, *25, *28 (Academics for the Second Amendment, first applying Bingham's February speech to the Fourteenth Amendment, then suggesting that the change in language is significant); 2009 WL 4099513, *31 (American Civil Rights Union).

21 For a summary of the evidence approximating Section One with the Civil Rights Act of 1866, noting that it generally did not indicate whether the Equal Protection or Privileges or Immunities Clause accomplished that result, see Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 Geo. Mason U. Civ. Rts. L.J. 1, 24-27 (2008).

22 *See* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1442-47 (1992); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 Geo. Mason U. Civ. Rts. L.J. 219, 266-70 (2009). Not all aliens were denied the right to own land on racial grounds, but those who were racially ineligible to become citizens were.

23 Other important evidence of an antidiscrimination reading of the Privileges or Immunities Clause is the fact that it alone—*not* the Equal Protection Clause—was invoked in early antidiscrimination disputes over black voting, women practicing law, women voting, and school segregation. Green, *supra* note 22, at 271-77. For other equal-citizenship readings of the Privileges or Immunities Clause, *see, e.g.*, Cong. Globe, 39th Cong. 1st Sess. 2511 (Representative Thomas Eliot) (restating Privileges or Immunities Clause as banning "State legislation discriminating against classes of citizens"); *id*. 3034 (Senator John Henderson) (quoting Alexander Stephens) ("Their conclusions are right if their premises are; they assume that the negro is equal, and hence conclude that he is entitled to equal privileges with the white man."); *id*. 2891 (Senator John Conness) (citizens are "entitled to equal civil rights with other citizens of the United States"); Cong. Globe, 42nd Cong., 1st Sess. app. 71 (1871) (Rep. Samuel Shellabarger) ("This provision requires that the laws on their face shall not 'abridge' the privileges or immunities of citizens. It secures equality toward all citizens on the face of the law. It provides that those rights shall not be 'abridged;' in other words, that one man shall not have more rights upon the face of the law than another man. By that provision equality of legislation, so far as it affects the rights of citizenship, is secured."); *id*. 505 (Representative Daniel D. Pratt) ("[T]his humble race is raised by the supreme decree of the nation to the full level of civil and political equality. We cannot, if we would, discriminate against them by law. Their privileges and immunities can never be abridged."); Cong. Globe, 42nd Cong. 2nd Sess. 385 (1872) (Senator Charles Sumner) (saying of the freedmen, "Our rights are his rights; our equality is his equality; our privileges and immunities are his great possession."); *id*. 762 (Senator Matthew Carpenter) ("If no State can make or enforce a law . . . to abridge the rights of any citizen it must follow that the privileges and immunities of all citizens must be the same."); Slaughterhouse Cases, 83 U.S. 36, 100 (Field, J., dissenting) (Privileges or Immunities Clause provides "protection of every citizen of the United States against hostile and discriminating legislation against him in favor of others"); *id*. at 113 (1873) (Bradley, J., dissenting) ("Citizenship of the United States ought to be, and, according to the Constitution, is, a sure and undoubted title to equal rights in every State in this Union"); *cf*. Civil Rights Cases, 109 U.S. 3, 48 (1883) (Harlan, J., dissenting) ("But what was secured to colored citizens of the United States—as between them and their respective states—by the grant to them of state citizenship? With what rights, privileges, or immunities did this grant from the nation invest them? There is one, if there be no others—exemption from race discrimination in respect of any civil right belonging to citizens of the white race in the same state."); Plessy v. Ferguson, 163 U.S. 537, 538 (1896) (argument of petitioner) (Homer Plessy "was entitled to every recognition, right, privilege, and immunity secured to the citizens of the United States of the white race by its constitution and laws."); *id*. at 559 (Harlan, J., dissenting) ("Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.").

24 Cong. Globe, 42nd Cong. 2nd Sess. 381 (1872).

25 *Id*. 843.

26 *See id*. 844 ("There may be sometimes great dispute and doubt as to what is a right, immunity, or privilege conferred upon a citizen of the United States. That right must be determined from time to time by the judicial tribunals, and in determining it they will look first at the Constitution of the United States as the primary fountain of authority. If that does not define the right they will look for the unenumerated powers to the Declaration of Independence, to every scrap of American history, to the history of England, to the common law of England, the old decisions of Lords Mansfield and Holt, and so back to the earliest recorded decisions of the common law. There they will find the fountain and reservoir of the rights of American as well as English citizens.").

27 83 U.S. at 79.

28 92 U.S. 542 (1876).

29 73 U.S. 35 (1867).

30 83 U.S. at 79-80.

31 526 U.S. 489 (1999).

32 Adamson v. California, 332 U.S. 46, 91 (1947) (Black, J., dissenting) ("[T]o pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; to invalidate statutes because of application of `natural law' deemed to be above and undefined by the Constitution is another."); Griswold v. Connecticut, 381 U.S. 479, 525 (1965) (Black, J., dissenting) (quoting this passage from *Adamson* dissent); Duncan v. Louisiana, 391 U.S. 145, 166 (1968) (Black, J., concurring) ("[T]he words 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States' seem to me an eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States.").

At first glance, John Bingham's speeches in 1866 and 1871 might seem to support this view as well. However, his 1866 speech concerned an earlier proposal, not the Fourteenth Amendment. *See supra* note 20. Bingham's March 1871 speech, in which he quotes the entire Bill of Rights, says only that privileges of citizens of the United States are *chiefly* defined in the Bill of Rights, a critical qualification. Finally and most decisively, *Corfield*, which Bingham used to explain the Privileges or Immunities Clause in January 1871, plainly goes beyond the Bill of Rights.

33 Cong. Globe, 42nd Cong. 2nd Sess. 843 (1872).

34 *Id*. 844 (for privileges of citizens of the United States, interpreters should "look first at the Constitution of the United States").

35 Spies v. Illinois, 123 U.S. 131, 151-52 (1887) (argument of counsel) (emphasis added). Tucker's argument in *Spies* was later adopted by Justices Field, Harlan, and Brewer in *O'Neil v. Vermont*, 144 U.S. 323, 361 (1892) (Field, J., dissenting); *id.* at 370 (Harlan, J., dissenting).

36 *See* Earl M. Maltz, Civil Rights, the Constitution, and Congress 1863-1869, at 109 (1990) ("[T]he privileges or immunities clause . . . was perceived as guaranteeing a relatively small set of rights which, though somewhat unclear at the margins, were nonetheless fixed for all time in 1866."); Steven Calabresi & Sarah 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, 13 (2008) ("[I]f one assumes . . . that the Fourteenth Amendment protects only those rights that are deeply rooted in history and tradition, then one plausibly good place to look for such rights is in state constitutions in 1868"); *id*. at 14 ("Focusing on *current* state constitutional law to determine what rights are deeply rooted in our history and tradition as a matter of substantive due process would clearly be mistaken"); *see also* Josh Blackman & Ilya Shapiro,

Opening Pandora's Box? Privileges or Immunities, The Constitution in 2020, and Properly Incorporating the Second Amendment, 8 Geo. J. L. & Pub. Pol'y 1, 8 (2010) (placing focus on "how privileges or immunities were understood in 1868"). Clint Bolick's amicus brief in *McDonald* suggests another version of the fixed-in-1868 theory, according to which rights embedded in federal statutes in 1868 (as well as federal constitutional rights) count. *See* 2009 WL 4247970, *23 (amicus brief of Goldwater Institute) (arguing that the Privileges or Immunities Clause protects "explicit guarantees of personal rights found in federal law when the Fourteenth Amendment was adopted on July 9, 1868").

37 *See* 83 U.S. at 78 (stating that reversal "would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, *as they existed at the time of the adoption of this amendment*") (emphasis added).

38 *Cf.* Ronald Dworkin, Freedom's Law: The Moral Reading of the Constitution 7 (1996) (asserting that constitutional provisions "refer to abstract moral principles and incorporate these by reference").

39 *See* Harrison, *supra* note 22.

40 *See* Green, *supra* note 21; Green, *supra* note 22.

41 Cong. Globe, 42nd Cong. 2nd Sess. 762 (1872).

42 The McDonald petitioners, for instance, suggest such a theory. Brief of Petitioners, McDonald v. Chicago, 2009 WL 4378912, *7 (2009) ("the pre-existent natural rights of the sort identified in *Corfield* and the personal rights guaranteed by the Bill of Rights").

43 Nelson Goodman, Fact, Fiction, and Forecast (1955).

44 Saul Kripke, Wittgenstein on Rules and Private Language (1980).

45 David Lewis, *Attitudes De Dicto and De Se*, *in* 1 Philosophical Papers 135 (1983).

46 26 Fed. Cas. 79, 81 (C.C.S.D.Ala. 1871) ("What are the privileges and immunities of citizens of the United States here referred to? They are undoubtedly those which may be denominated fundamental; which belong of right to the citizens of all free states, and which have at all times been enjoyed by the citizens of the several states which compose this Union from the time of their becoming free, independent and sovereign. [*Corfield*.] *Among these* we are safe in including those which in the constitution are expressly secured to the people, either as against the action of the federal or state governments. Included in these are the right of freedom of speech, and the right peaceably to assemble.") (emphasis added).

47 *See* U.S. Const. art. I, § 9, cl. 1 ("Migration or Importation of such Persons as any of the States *now existing* shall think proper to admit"); for an argument that the existence of this clause compellingly disproves intergenerational constitutional authorship, see Green, *supra* note 5, at 1662-64.

48 Burnham v. Superior Court, 495 U.S. 604, 627 (1990) (Scalia, J., plurality opinion).

49 Justices Bradley, Field, and Harlan all seemed to wed a tradition-based approach to protecting common-law rights with an equal-citizenship local-rights approach. *See supra* notes 23 and 35.

50 Nordyke v. King, 563 F.3d 439, *vacated*, 575 F.3d 890 (9th Cir. 2009) (considering whether a right to armed self-defense satisfies the tradition-based standard for substantive due process in *Washington v. Glucksberg*, 521 U.S. 702 (1997)).