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Subsidiarity and Fundamental Rights Protection in the United States

- **ABSTRACT:** *Since the middle of the last century, fundamental rights protection in the United States has largely been the domain of the federal government, and primarily its Supreme Court. Under the Fourteenth Amendment to the United States Constitution, which guarantees “due process of law,” the United States Supreme Court has assumed for itself the role of defining fundamental rights even if such rights are not specifically enumerated in any constitutional text and requiring all states to abide by such rights, a concept referred to as “substantive due process.” It has also “incorporated” the Bill of Rights in the federal Constitution against the state governments, even though such rights historically only bound the federal government.*

These doctrinal developments were likely mistakes, at least if Americans purport to be bound by the original meaning of the Fourteenth Amendment to their Constitution. “Due process of law” was not a substantive guarantee of unenumerated rights or against unreasonable legislation. In antebellum America, judicial courts did review local or municipal legislation to ensure reasonableness, but not the legislation of the states themselves except in narrow circumstances. Many American scholars believe that the “privileges or immunities” clause of the Fourteenth Amendment, instead of the due process clause, is what was intended to incorporate the Bill of Rights against the states and transfer fundamental rights protections to the federal government. This, too, is likely incorrect, as that clause was likely a guarantee merely of equality, leaving it up to the state governments otherwise to define and regulate the content of civil rights. This account, if correct, suggests that the Fourteenth Amendment, while guaranteeing the fundamental right to equality, otherwise respected the principle of subsidiarity even in the protection of fundamental rights, and provides insights for the ongoing European debate over fundamental rights protection.

- **KEYWORDS:** American constitutional law, federalism, fundamental rights, due process, subsidiarity, equality, judicial review, common values, European Union.

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1. Introduction

Today, fundamental rights protection in the United States is primarily the domain of the federal government, and particularly its Supreme Court. The Fourteenth Amendment to the United States Constitution, adopted after the Civil War and the abolition of slavery, provides that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.”² Under this injunction, the Supreme Court has developed a doctrine known as “substantive due process.” This doctrine maintains that certain rights are so fundamental that no state can deprive any person of that right no matter how much “process” it may afford, unless the government has exceptional reasons for doing so. This seems contrary to the text of the clause, which appears to permit deprivations of any right so long as “due process of law” is in fact afforded. Thus, “substantive” due process appears to be a contradiction—in the words of a famous American scholar, it is kind of like “green pastel redness.”³

In the early twentieth century, federal courts deployed substantive due process doctrine to guarantee economic liberties like contract and property rights against what the courts deemed to be unreasonable legislation. In the most famous (or infamous) of these cases, the Supreme Court struck down a democratically enacted state law that limited the number of hours bakers could work in a day.⁴ “Economic” substantive due process fell out of fashion in the progressive and New Deal eras.⁵ Starting in earnest in the second half of the twentieth century, however, courts began to enforce a “social” version of substantive due process, by which courts guaranteed certain social rights against interfering state legislation, for example the right to abortion or same-sex marriage.⁶ Additionally, although the federal Bill of Rights historically only restricted the legislation of the federal government,⁷ through substantive due process the Supreme Court has “incorporated” the Bill of Rights against the states, which are now bound by essentially all of those rights as they are interpreted by the Supreme Court.⁸ The idea is that the due process clause protects against governmental interference the most fundamental of individual rights, and there is no better indication that a right is fundamental than its enumeration in the federal Bill of Rights.

As a result of these doctrinal developments, fundamental rights discourse in the United States takes place at the federal level, and fundamental rights are defined

2 U.S. Const., amend XIV, § 1, cl. 3.

3 Ely, 1980.

4 *Lochner v. New York*, 198 U.S. 45 (1905).

5 *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

6 *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Obergefell v. Hodges*, 576 U.S. 644 (2015).

7 *Barron v. Baltimore*, 32 U.S. 243 (1833).

8 *Gitlow v. New York*, 268 U.S. 652 (1925) (assuming the First Amendment bound the states); *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating the Fourth Amendment); *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (incorporating the Second Amendment).

and protected at the federal level. Yet, as I shall argue, these doctrinal developments were both likely mistakes—not necessarily as a matter of policy, but as a matter of the Fourteenth Amendment’s original meaning.⁹ In antebellum (pre-Civil War) America, due process of law did not guarantee any rights against state deprivation or protect against unreasonable legislation; it merely required that there be established law that was violated before any person could be deprived of life, liberty, or property, and that that person’s violation of such established law was adjudicated according to judicial processes. Judicial courts in the states did often police *municipal* regulations for reasonableness on a theory that the state itself could not have intended to subdelegate power to municipalities to do unreasonable things. But what was wise policy at the state level was within the legislative wisdom (absent an express constitutional prohibition).

Many American scholars agree with this account of due process but argue that the Fourteenth Amendment’s privileges or immunities clause was originally intended to do the work of substantive due process. That clause provides that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”¹⁰ Some scholars argue that this clause was intended to incorporate the Bill of Rights against the states; after all, the rights therein are the quintessential privileges of U.S. citizens.¹¹ Others argue that the clause incorporates the Bill of Rights, and also guarantees unenumerated, fundamental rights, similar to substantive due process involving economic and social legislation.¹² Although these views are textually plausible, they are also likely incorrect. The clause was most likely intended to be a guarantee of equality with respect to civil rights under state law. In other words, U.S. citizens have a variety of common privileges and immunities—to acquire property, to enter into contracts, to speak freely—but each state can still define and regulate these rights differently. The states must simply treat their own citizens equally, without arbitrary discrimination.

The implication is that the Fourteenth Amendment is not the libertarian, pro-national powers amendment it is sometimes thought to be, but one far more consistent with antebellum American views of federalism and subsidiarity, state power, and civil rights. The upshot for the ongoing European debates over “common values” and fundamental rights protection is that it is possible to conceive of a legal system in which certain rights or values are “common” to multiple jurisdictions, but each jurisdiction still defines and regulates those rights and values in different ways.

9 Originalism, which is likely the interpretive method adopted by a majority of the U.S. Supreme Court today, maintains that the Constitution should be interpreted with its original meaning. This interpretive theory is often contrasted with living or common law constitutionalism, which holds that the Constitution is a living, breathing document and that judges can update the meaning and content of the Constitution over time. See Wurman, 2017, pp. 11–21, 25–44, 84–96; Whittington, 2010.

10 U.S. Const. amend. XIV, § 1, cl. 2.

11 Amar, 1998, pp. 163–180; Curtis, 1986, pp. 22–25; Lash, 2014, pp. 65 and 85–108.

12 Barnett and Bernick, 2021, pp. 143–146, 168–169 and 200.

2. Due process as a procedural guarantee

The terms of the due process clause suggest that its guarantee is indeed about process. Surveying Anglo-American history from Magna Charta to antebellum American court cases and treatises, it appears that due process of law historically had two requirements.¹³ First, there had to be established law before any person could be deprived of life, liberty, or property. In other words, the government could not take away one's life, liberty, or property, if that individual had not violated any *known* law.

In the 1628 Petition of Right, the House of Commons admonished that King Charles I had directed imprisonments by his mere "Command" and "against the Laws and Free Customs of the Realm."¹⁴ Referring to the trial of five prominent nobles, the petition complained that the King had violated various statutes requiring "due process of law" because the nobles had not been "charged with any Thing to which they might make Answer according to the Law."¹⁵ In a celebrated American case in 1819, Daniel Webster argued that "the law of the land," which was synonymous with due process,¹⁶ meant "that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society."¹⁷ Thus a legislative "act" that directly deprived someone of property or directed that someone surrender his liberty would be a violation of due process of law because someone could be deprived of rights only according to already existing law. Legislative acts masquerading as judicial decrees were frequently invalidated.¹⁸

The second requirement of due process of law was intuitive: an individual's violation of some existing law had to be adjudicated according to processes known to the law. As Senator Webster also said, due process of law means a law "which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial."¹⁹ The legal theorist William Blackstone, in his *Commentaries on the Laws of England*, wrote that courts "must proceed according to the old established forms of the common law" and deprivations of liberty or property "ought to be tried and determined in the ordinary courts of justice, and by course of law."²⁰ What is striking from the early evidence is that few if any courts struck down state legislation for being unreasonable or contrary to some fundamental rights not protected by express constitutional provisions.²¹

13 Wurman, 2020, pp. 15–35; Chapman and McConnell, 2012.

14 The full text of the Petition may be found at: http://www.nationalarchives.gov.uk/pathways/citizenship/rise_parliament/transcripts/petition_right.htm.

15 Ibid.

16 Chapman and McConnell, 2012; Coke, 1642.

17 Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 581 (1819).

18 Wurman, 2020, pp. 31–33.

19 Dartmouth College, *supra* at 581.

20 See: Blackstone, 1765.

21 To be sure, some legal thinkers in this period argued that a law inconsistent with natural right was no law at all. See, e.g., Germain, 1761. ("Nor it is not to be understood of a law made by man commanding or prohibiting any thing to be done that is against the law of reason, or the law of

Several American scholars have argued, however, that states were limited to reasonable exercises of the “police power” to regulate for the health, safety, welfare, and morals of the people, and that courts could enforce such limits.²² I have shown in prior scholarship,²³ however, that although courts reviewed *municipal* legislation for reasonableness, they did not review the legislation of the states themselves. The courts did review municipal legislation because municipal corporations only exercised power specifically delegated by the state, and courts presumed that the legislature did not intend to delegate power to act unreasonably.²⁴ Additionally, the courts subjected municipal corporations to the common law of corporations and, at the time, courts could void corporate acts if they were unreasonable, contrary to the general good of the corporation, or in restraint of trade.²⁵ Neither rationale applied, nor did courts apply them, to acts of the state legislatures themselves.²⁶ At most, courts might use “substantive due process” as a kind of rule of statutory construction: they would *presume* that the legislature did not intend to violate natural rights or the fundamental principles of free government.²⁷ But if the legislature did expressly act unreasonably, there was nothing a court could do to stop it, unless the legislature violated some express constitutional prohibition.

State legislatures were, however, limited to reasonable exercises of the police powers in two narrow circumstances where state power might come into potential collision with federal constitutional requirements. For example, on the assumption that the federal commerce power was exclusive, federal courts sometimes invalidated state legislative acts affecting interstate or foreign commerce if they were not genuinely for a police-power purpose. If the legislation was not for a legitimate police-power

God. For if any law made by him, bind any person to any thing that is against the said laws, it is no law, but a corruption, and manifest error.”). But this was a minority view. By Blackstone’s time, parliamentary supremacy was the rule. See: Helmholz, 2009, p. 328. As Blackstone wrote, “[I]f by any means a misgovernment should any way fall upon it [Parliament], the subjects of this kingdom are left without all manner of remedy.” See: Blackstone, 1765, p. 157.

22 Gillman, 1993; Mayer, 2009a, p. 284; Mayer, 2009b, p. 571; Bernstein, 2011; Barnett and Bernick, 2019, p. 1638.

23 Wurman, 2020b.

24 Wurman, 2020b, pp. 826–829.

25 Wurman, 2020b, pp. 829–831.

26 For example, a prominent nineteenth-century treatise on municipal corporations had an entire subsection on “Legislative Authority to Adopt Unreasonable Ordinances,” and specifically concluded that “what the legislature distinctly says may be done cannot be set aside by the courts because they may deem it unreasonable.” See: Dillon, 1872.

27 One state supreme court explained that “we cannot presume that the legislature intended to ratify an unreasonable and oppressive contract, but only such as was in accordance with the purposes for which the charter had been granted, and not those which were opposed to the design of creating such bodies.” *City of Chicago v. Rumpff*, 45 Ill. 90, 98-99 (1867). And in the most prominent constitutional law treatise of the era, the author explained that it “must be presumed that the legislature designed to depart as little as possible from this fundamental maxim of government,” and that the state is “presumed” to bestow no favors, and therefore “discriminations against persons or classes . . . as a rule of construction are always to be leaned against as probably not contemplated or designed.” See: Cooley, 1868.

purpose, it was not considered a regulation of police, but rather a regulation of interstate commerce prohibited to the states.²⁸ Similarly, the Constitution prohibited states from impairing contractual obligations,²⁹ but courts often held that states could enact generally applicable laws that *incidentally* altered ongoing contractual obligations so long as the state had a genuine police-power purpose.³⁰ These limits on state power did not, however, apply to acts of state legislatures regulating solely internal commerce or local matters or which affected no existing contracts.

I have argued elsewhere that it appears that the Supreme Court, after the adoption of the Fourteenth Amendment, conflated these doctrines to fashion a general police-power limitation on the states. In a series of cases in the 1870s and 1880s, the Supreme Court assumed that the individual states were limited to reasonable exercises of the police power and that courts could, in theory, adjudicate such questions.³¹ In so holding, the Court cited to municipal corporations cases, contracts clause cases, and commerce cases interchangeably, never recognizing that these doctrines did not imply that courts could *generally* review state legislation for reasonableness.³²

In sum, the early economic version of substantive due process, which culminated in that case striking down a state law limiting the number of hours bakers could work in a day, is not supported by the text of the due process clause of the Fourteenth Amendment. Neither is the modern doctrine, in its social legislation and incorporation variations, supportable under that clause.

3. Privileges and immunities of U.S. citizens

Although I have not taken a survey, it is my impression that most originalist scholars today agree that substantive due process is inconsistent with the text of the U.S. Constitution. The general consensus appears to be that, rather, the Fourteenth Amendment's privileges or immunities clause, which provides that no state shall "abridge the privileges or immunities of citizens of the United States," was intended, at a minimum, to incorporate the Bill of Rights against the states.³³ Some more libertarian scholars also argue that the clause was intended to guarantee a fundamental floor of civil rights such as contract and property rights, very much as in the New York baker case.³⁴ In other words, many accept that substantive due process is likely a judicial invention, but argue that the work of substantive due process would have been accomplished anyway under

28 Wurman, 2020b, pp. 837–845.

29 U.S. Const. art. I, § 10.

30 Wurman, 2020b, pp. 845–847.

31 Wurman, 2020b, pp. 865–869.

32 Wurman, 2020b.

33 See sources cited in note 10.

34 *Lochner v. New York*, 198 U.S. 45 (1905). For the most recent and prominent example of scholars making this argument, see Barnett and Bernick, 2021.

a proper understanding of the privileges or immunities clause if the Supreme Court had not eviscerated that clause in the infamous *Slaughter-House Cases*.³⁵

At a surface level, these accounts have some plausibility. The Bill of Rights surely contains privileges and immunities of American citizenship. And it is plausible to read the word “abridge” and conclude that, under the Fourteenth Amendment, the states cannot violate those rights. This superficial plausibility dissolves, however, upon a moment’s reflection: citizens of the United States have privileges and immunities by virtue of the federal Constitution, to be sure, but they *also* have numerous privileges and immunities by virtue of federal statute law, by state constitutions, by state statute law, and by the common law. If Americans have privileges and immunities by all those sources of law, it does not make sense to *limit* the phrase “privileges or immunities of citizens of the United States” to federally enumerated constitutional rights.

In my prior work,³⁶ I described an understanding of the privileges or immunities clause that is much more consistent with the historical evidence: the clause guarantees equality with respect to civil rights under state law. If I am right about this, then it would mean that New York can impose whatever safety regulations that it thinks is reasonable upon bakers. It would mean that California can ban handguns. And it would mean that Texas need not require the suppression of evidence when police conduct an unlawful search. It would mean that a state can experiment with rights, so long as it does not arbitrarily discriminate against some of its citizens. This reading would keep rights definition and protection largely at the state level, with the federal government ensuring only that a state treat its citizens equally.

The argument for such a reading goes as follows. The original Constitution contained a clause in Article IV, Section Two, which provided that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States.”³⁷ This privileges *and* immunities clause (not to be confused with the clause in the Fourteenth Amendment) required that State A give to a citizen of State B, when that citizen was travelling through or residing in State A, the same civil rights—the same privileges and immunities—that State A accorded to its own citizens. In other words, the states of the Union were not to treat citizens of other states as aliens or foreigners. The clause “was always understood as having but one design and meaning, viz., to secure to the citizens of every State, within every other, the privileges and immunities

35 In those cases, the Supreme Court held that the privileges or immunities clause guaranteed only federal rights like the right of interstate travel or navigation, or the right to petition Congress for a redress of grievances. In so doing, the Supreme Court rendered what was the crown jewel of the Fourteenth Amendment into a clause that barely did any work whatsoever. 83 U.S. (16 Wall.) 36 (1872). If the Supreme Court had held that those rights include those found in the Bill of Rights, which now applied to the states, at least the clause would have accomplished something. But the Court held in two subsequent cases that the Bill of Rights bound only the national government. *United States v. Cruikshank*, 92 U.S. 542 (1875); *The Civil Rights Cases*, 109 U.S. 3 (1883).

36 Wurman, 2020a.

37 U.S. Const. art. IV, § 2.

(whatever they might be) accorded in each to its own citizens.”³⁸ Hence the clause was often called the “comity clause.”

Importantly, the clause did not require a state to give *all* rights to citizens of other states. In the words of a famous case from 1825, the clause extended only to “fundamental” rights, that is, rights “which belong, of right, to the citizens of all free governments.”³⁹ It did not, however, require a state to give the same *political* rights (to vote, to hold office, to sit on juries), or the same *public privileges* (such as welfare benefits) to citizens of other states. The idea was that civil rights, which are just natural rights as modified by the rules of civil society, are fundamental to citizens everywhere, and should not be denied to any citizen. Political rights and public privileges were not fundamental because they were not natural rights; they depended on the existence of political society. It is also important to note that civil rights varied from state to state; each regulated contracts, property, and gun rights (to take a few examples) a bit differently. But whatever privileges and immunities a state accorded to its own citizens, it had also to accord to citizens of other states when travelling or residing in the state under the same rules and regulations.

In any event, the question in the antebellum period was what to do with the free blacks who were citizens of several Northern states. When travelling to other states, their citizenship in other states would seem to entitle them to the privileges and immunities of *citizens* of those other states, even if free blacks were not citizens of those states. Many western states, however, sought to exclude free blacks from travelling to their states at all, and in a series of statutes several Southern states provided that free black seamen from Northern states would be imprisoned in Southern ports until their ships left port. All of these statutes and exclusions would appear to violate the comity clause. The Southern states argued that free blacks, however, although citizens of some Northern states, were not citizens of *the United States* such that they were entitled to the benefit of any clause in the federal Constitution.⁴⁰ The Supreme Court cemented this reasoning in the notorious case of *Dred Scott v. Sandford*, in which Chief Justice Taney held that any person of African descent could never be a citizen of the United States.⁴¹ The Fourteenth Amendment resolves this constitutional problem with its first sentence, declaring that “[a]ll 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.”⁴² Thus, all black persons were now American citizens, entitled to the privileges and immunities of citizens in whatever state they were travelling to or residing.

That did not, however, solve the problem of discrimination against black Americans *within* particular states. After abolition, the southern states adopted a series of “Black Codes” that systematically denied civil rights to their black residents. The newly

38 *Lemmon v. People*, 20 N.Y. 562, 599–600, 626–27 (1860) (Wright, J., concurring).

39 *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1825).

40 These debates are described in Wurman, 2020a, pp. 72–83.

41 *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 403–07 (1857).

42 U.S. Const. amend. XIV, § 1, cl. 1.

freed people, for instance, could not carry arms, could not assemble, could not own real property, and could not testify in many states; they also had to enter into certain kinds of agricultural contracts by a particular day in January each year lest they be deemed vagrants and subjected to forced labor or imprisonment.⁴³ These statutes did not violate the comity clause because that clause required only that the state not discriminate against citizens from *other* states. Hence the Thirty-Ninth Congress enacted the Civil Rights Act of 1866, which declared:

That 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 . . . *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 persons 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.⁴⁴

It is important to observe what this statute did *not* do. It did not guarantee any fundamental rights at all. It presumed the civil rights would still be defined by state law. It merely required that those civil rights be given *equally* to all citizens. It also declared all persons to be “citizens of the United States” and provided that *such* citizens—that is, these citizens *of the United States*—were entitled to equality in the privileges and immunities defined by state law.

There was no obvious federal power to enact the Civil Rights Act of 1866, and leading members of the Thirty-Ninth Congress believed that an amendment was necessary both to supply a constitutional basis for the Act, and to enshrine the principles of the Act in the fundamental law to ensure future Democratic Congresses would not roll back the progress made by the Republicans during Reconstruction.⁴⁵ The obvious

43 These Black Codes are described in Wurman, 2020a, pp. 91–92.

44 Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (emphases added).

45 See Wurman, 2020a, pp. 95–97. For example, as the then-representative and future president James Garfield argued, the Civil Rights Act “will cease to be a part of the law whenever the sad moment arrives when” the Democrats come to power, and therefore it was necessary “to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution.” Cong. Globe, 39th Cong., 1st sess. 2462 (1866) (Garfield). For other statements to this effect, see *ibid.* at 2459 (Stevens) (noting that the Fourteenth Amendment was necessary because the Civil Rights Act “is repealable by a majority” and “the first time that the South with their copperhead allies obtain the command of Congress it will be repealed”); *ibid.* at 2465 (Thayer) (Fourteenth Amendment necessary so “the principle of the civil rights bill” will be “forever incorporated in the Constitution”); *ibid.* at 2498 (Broomall) (similar).

clause that does this work is the privileges or immunities clause. Just as with the Civil Rights Act itself, the first sentence of the Fourteenth Amendment declares all persons born in the United States to be citizens *of the United States*. Then the privileges or immunities clause provides, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”

The text of the clause does the necessary work because the word “abridge” was often used when one class of individuals received fewer rights than another.⁴⁶ And the American scholar John Harrison has observed that we can speak meaningfully of “abridging” a right without having to define the content of that right. Section Two of the Fourteenth Amendment provides that a state that denies “or in any way abridge[s]” the right of a male citizen over 21 years of age to vote will have its representation in Congress proportionally diminished. Yet the states themselves still determined the content of the right to vote. A state could still decide whether to have elections every two years, or three years, or four years. Moving from a two-year system to a four-year system of elections would not “abridge” the right to vote. The right to vote is “abridged” only when a lesser set of voting rights is given to any male citizen over 21 years of age.⁴⁷

Additionally, as noted, the term privileges or immunities of “citizens of the United States” applies to civil rights under state law because, as the Civil Rights Act itself acknowledged, such civil rights are privileges of American citizens just as much as are those rights in the federal Bill of Rights.

If that were not enough on its own, neither of the other two provisions of the Fourteenth Amendment is sufficient to constitutionalize the Civil Rights Act. As noted in the previous section, due process of law does not guarantee any rights at all, equal or otherwise. It merely requires that whatever rights one happens to have by law, the state will not take those rights away without established law and judicial processes. The obvious candidate is the only remaining clause of the Fourteenth Amendment’s first section that has yet to be discussed: the equal protection clause, which provides that “No State shall . . . deny to any persons within its jurisdiction the equal protection of the laws.”⁴⁸ This is in fact the clause that does most of the equality work under modern Fourteenth Amendment doctrine. It cannot supply a constitutional basis for the Civil Rights Act, however, because, like due process, it does not require equal civil rights. It merely requires equal *protection of the laws*, which was a narrower concept related to due process of law. The protection of the laws was the protection the government had to afford individuals against *private interference* with the exercise and enjoyment of their rights, whatever those rights happened to be.⁴⁹ The principal requirements were protection against private violence and judicial remedies when private rights were

46 Green, 2015, pp. 30, 32, 45 and 84–86.

47 Harrison, 1992, pp. 1420–1422.

48 U.S. Const. amend XIV, § 1, cl. 4.

49 As I argue in Wurman, 2020a, pp. 36–47.

invaded.⁵⁰ The quintessential violation of the protection of the laws was mob rule and lynchings, which were endemic against black Americans and abolitionists both before and after the Civil War.⁵¹

It is certainly possible to read the privileges or immunities clause as a fundamental rights provision incorporating the Bill of Rights, but there is little evidence in the historical record for that view. For example, against all the evidence just described, the only unequivocal evidence for the incorporation of the Bill of Rights against the states is a statement by Representative John Bingham, the principal drafter of the Fourteenth Amendment's first section, from 1871—five years after he drafted the amendment.⁵² Senator Jacob Howard did mention the first eight amendments as being among the privileges and immunities of U.S. citizens when he introduced the amendment in the Senate, although it is not entirely clear what was his purpose in doing so given that he also mentioned the traditional civil rights under state law including contract and property rights.⁵³ If the clause incorporated the Bill of Rights against the states, then the word “abridge” would be a fundamental rights provision with respect to the Bill of Rights, but an equality provision with respect to state civil rights—an odd result.

It could be that the clause is a fundamental rights provision with respect to *both* the Bill of Rights and other civil rights. That is, it could be that the clause was intended to give Congress and the federal courts a power to define a minimum content of contract, property, and other civil rights that were traditionally defined by state law. Presumably that would mean the states could discriminate against citizens with respect to any rights or privileges above the floor (wherever that is) of fundamental rights. But there is essentially no evidence for this possibility, either.⁵⁴ It would have been an entirely radical proposition to say that the federal government could define such rights. If it could, what limits were there to federal power? The enumeration of power in Article I, Section 8 of the Constitution would have become obsolete. And no statement in the historical record until 1871—again, five years after drafting—suggests that anyone thought either before or

50 For example, William Blackstone explained that the “remedial part of the law,” or the “method of recovering and asserting those rights, when wrongfully withheld or invaded,” is “what we mean properly, when we speak of the protection of the law.” Blackstone, *supra* at 55-56. And Chief Justice John Marshall wrote, “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

51 Wurman, 2020a, pp. 85–91.

52 Cong. Globe, 42d Cong., 1st Sess. 84 app. (1871) (statement of Rep. Bingham) (explaining that he had intended that the “first eight amendments” should be incorporated by the privileges or immunities clause). As I have explained, although Bingham referenced enforcing the bill of rights against the states in 1866, the bill of rights was not a term of art referring to the first eight amendment to the United States Constitution until the twentieth century, and Bingham himself defined the bill of rights differently: his definition included only due process of law and the comity clause. Wurman, 2020a, p. 111.

53 Cong. Globe, 39th Cong., 1st Sess. 2765–66 (1866) (statement of Sen. Howard).

54 I examine the evidence for a fundamental rights reading in a forthcoming work. Ilan Wurman (2021) *Making Sense of Nineteenth Century Fundamental Rights Discourse* (paper on file with author) (reviewing Barnett and Bernick, 2021).

after the Civil War that the problem of discrimination against blacks should be resolved by transferring the power to define fundamental rights to the federal government. The solution was always to require the states to treat black citizens *equally*—not to define contract and property rights at the national level. Not a single statement denied that it was up to the states to define and regulate the content of civil rights.⁵⁵

If the United States courts were to return to the original meaning of the Fourteenth Amendment, the implications for modern doctrine would be immense. Many modern equality cases would of course transfer to the privileges or immunities clause, where they belong. (In fact, *Brown v. Board of Education*, the famous American case requiring the desegregation of public schools, can be supported by the original meaning of the Fourteenth Amendment only if I am correct in my conclusions.) Substantive due process cases involving economic or social legislation would have to be overturned, unless those cases could be reconceptualized as equality cases under the privileges or immunities clause. And the Bill of Rights would not be incorporated against the states.

This may sound like a shocking result, but it is not. Most states already guarantee the same rights in their own state constitutions as the federal Bill of Rights guarantees in the federal Constitution. (In fact, another reason to doubt the incorporation thesis is that all of the state constitutions as of 1866 guaranteed most of the same rights.) Under the view I advance, states would be free to experiment with their own state constitutions and with their own civil rights. Some states could deny free speech rights to “corporations” or could prohibit handguns. Others could experiment with criminal procedure and do away with *Miranda* warnings,⁵⁶ the exclusionary rule,⁵⁷ and perhaps even the requirement that the government must pay for an indigent defendant’s lawyer.⁵⁸ (Of course, many of these cases reflect good policy, and I expect most states would require them as a matter of state legislation.) The states would serve as laboratories of democracy when it comes to fundamental rights protection, with the only requirement being that they not arbitrarily discriminate against classes of their own citizens.

4. Insights for European discourse

The insights for European fundamental rights discourse should be evident, particularly for central European countries. There has been movement in recent years to allow European courts to define a set of rights and values that are “common” to all member states of the European Union, and to enforce those common values directly in individual rights cases, or more generally against those states that are perceived as “backsliding”

55 Ibid.

56 *Miranda v. Arizona*, 384 U.S. 436 (1966).

57 *Mapp v. Ohio*, 367 U.S. 643 (1961).

58 *Gideon v. Wainwright*, 372 U.S. 335 (1963). It is possible this requirement is compelled by the procedural understanding of due process, however.

on democracy or rule of law.⁵⁹ These efforts are rooted in Article 2 of the Treaty on European Union (TEU), which provides that “[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights,” and that “[t]hese values are common to the Member States.” Additionally, Article 51(1) of the Charter of Fundamental Rights (CFR) independently limits member states’ actions “when they are implementing Union law.” As a general matter, Article 2 TEU is understood to be nonjusticiable, along the lines of the American “political question” doctrine. And Article 51(1) CFR applies very much like the Bill of Rights used to apply in the United States when it only bound the federal government.⁶⁰

Some European scholars have advocated untethering fundamental rights from the implementation of EU law and rooting them instead in EU citizenship itself.⁶¹ In a case called *Ruiz Zambrano*, the Court of Justice of the European Union (CJEU) held that EU citizenship “precludes national measures which have the effect of depriving citizens of the Union of . . . the substance of the rights conferred by virtue of their status as citizens of the Union”⁶² regardless of whether any implementation of EU law is involved. It appears, however, that this decision was widely criticized and the European courts have retreated from this approach because it undermines the federal structure of the Union.⁶³ Additionally, some liberals worry that tethering fundamental rights to citizenship would be “exclusionary” of those who are not EU citizens, itself an idea that “could oppose the EU’s very own values.”⁶⁴

The parallel to the American experience is the incorporation of the Bill of Rights against the states. These rights, although historically binding only on the federal government, through the doctrine of substantive due process now bind the state governments, too. As a result, the states are bound by the same fundamental guarantees. The central problem, however, is not only that this shift was likely a judicial invention, but additionally that centralizing fundamental rights protection means that all the states are bound by erroneous interpretations and applications of those rights (or even correct but controversial interpretations). Does the freedom of speech require that hate speech be permitted? That corporations enjoy speech rights? What gun regulations are permissible under the Second Amendment? Does the Fourth Amendment require the exclusion of unlawfully obtained evidence? And so on. It is hardly clear that reducing the diversity in fundamental rights protection and adjudication in the United States has been an overall good.

Another insight from the American experience is the distinction between persons and citizens. Recall that the privileges or immunities clause protects *citizens*. That is, no state can discriminate in the provision of civil rights when it comes to their

59 I am not a scholar of European Union law, and the following discussion relies heavily on Spieker (2019), which I found very helpful in understanding the ongoing European debates.

60 *Barron v. Baltimore*, 32 U.S. 243 (1833).

61 Spieker, 2019, pp. 1189–1191.

62 ECJ, Case C-34/09, *Ruiz Zambrano*, ECLI:EU:C:2011:124, Judgment of 8 Mar. 2011, para. 42.

63 Spieker, 2019, pp. 1190–1191.

64 Spieker, 2019, p. 1191.

citizens. Aliens, in contrast, were historically denied certain rights, in particular real property rights. All persons, citizens or not, however, are entitled to the guarantees of due process and equal protection of the laws. Those clauses specifically apply to “persons” and not merely to citizens. Thus, it is up to the state to decide what rights non-citizens should have, but *all* such persons must have the benefit of due process and the protection of the laws.

An even more radical proposal in the European debate has been to make the “common values” of Article 2 TEU judicially enforceable. This would go far beyond fundamental rights adjudication to matters involving separation of powers, judicial independence, and the like.⁶⁵ The idea here is that although political diversity should be preserved, Article 2 can be seen as “establishing . . . a regime of ‘red lines,’” which would determine negatively what could *not* be done (without establishing what must be done), and that would only apply in “exceptional” situations.⁶⁶ Article 2 cannot require any “detailed obligations upon the Member States, because this would ignore the actually existing constitutional pluralism in the Union,”⁶⁷ but it could impose a minimal, fundamental floor.

The parallel to the American experience is to those scholars who argue that the privileges or immunities clause creates a fundamental floor of civil rights, including property and contract rights. (To be sure, under this reading the privileges or immunities clause would still be focused on fundamental rights as opposed to the broader target of this European proposal, which would reach separation of powers and rule of law more generally.) What I want to point out is that in antebellum American discourse, the various civil rights protected by the comity clause *were* understood to be “common” to citizens in the several states, *even though* each state regulated and defined their content a bit differently.

In the most famous antebellum case (mentioned above) interpreting the comity clause, Justice Bushrod Washington—nephew of President George Washington and the inheritor of his papers and estate—held that the comity clause did not require that a state give out-of-state citizens the same access to its natural resources that it gave its own citizens. Justice Washington explained that the clause only applies to “fundamental” rights, that is, rights “which belong, of right, to the citizens of all free governments.”⁶⁸ As noted, such fundamental rights were described by other antebellum courts as *civil rights*—that is, natural rights as modified by the rules of civil society.⁶⁹ The important point is these rights belonged to citizens of all free governments and to the citizens of all the states, but that did not mean that their definition and regulation were uniform. Each right was “subject . . . to such restraints as the government may justly prescribe for the general good of the whole.”⁷⁰ Each government protected civil rights but in different

65 Spieker, 2019, pp. 1198–1213.

66 Spieker, 2019, p. 1211.

67 Spieker, 2019, p. 1210.

68 *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1825).

69 As explained, for example, by Bouvier’s antebellum legal dictionary. See: Bouvier, 1860, p. 484.

70 *Corfield*, supra at 552.

ways. Indeed, each state had its own bill of rights, which largely protected similar rights as the federal Bill of Rights, but there were certainly variations.⁷¹

As briefly mentioned, “public privileges” like welfare or access to natural resources were not covered by the comity clause. In 1876, the United States Supreme Court explained that “the reason” for this exclusion “is obvious”: because access to natural resources “is not a privilege or immunity of general but of special citizenship. It does not ‘belong of right to the citizens of all free governments,’ but only to the citizens of [a particular state] on account of the peculiar circumstances in which they are placed.”⁷² This once again confirmed that fundamental rights could be common to “citizens in the several states,” but the precise regulation of each was still left entirely up to the state. A further lesson for the European context is that public privileges—like welfare benefits, immigration benefits and status, and public education—are not “fundamental,” at least in the sense that such public privileges do not belong to the citizens of all free governments. A state may legitimately refuse to create such rights in the first place,⁷³ or to reserve such rights to its own citizens or to foreign persons of its choosing.

To conclude, perhaps the lesson for European discourse is that the American experiment in nationalizing fundamental rights adjudication was contingent, maybe a mistake under its founding document, and possibly not good as a matter of policy. At least in the American context, the national government’s fundamental concern was with *equality* given the history of discrimination and subordination in the several states. Whatever path the European Union chooses to pursue will of course be up to its members. But if the experience of the United States is to be assessed, it should be assessed in its full historical context.

71 Calabresi and Agudo, 2008, p. 72.

72 *McReady v. Virginia*, 94 U.S. 391, 396 (1876)

73 Perhaps a state could never refuse to protect natural rights by denying such fundamental rights altogether, but if this is the fundamental rights work of the privileges or immunities clause then it hardly does any work at all. I suppose such a circumstance might arise if a state totally abolished private property, or prohibited anyone from entering into contracts.

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