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Equal Citizenship, Civil Rights, and the Constitution

The Original Sense of the Privileges or Immunities Clause

Christopher R. Green

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Equal Citizenship, Civil Rights, and the Constitution

"Chris Green's book on the Privileges or Immunities Clause is an outstanding contribution to the literature that offers a novel account of the meaning of the Clause. Its philosophical sophistication and historical grounding make it a must read for those interested in the subject."

—*Michael Rappaport, University of San Diego, USA*

The Privileges or Immunities Clause of the Fourteenth Amendment is arguably the most historically important clause of the most significant part of the US Constitution. Designed to be a central guarantor of civil rights and civil liberties following Reconstruction, this clause could have been at the center of most of the country's constitutional controversies, not only during Reconstruction, but in the modern period as well; yet for a variety of historical reasons, including precedent-setting narrow interpretations, the Privileges or Immunities Clause has been cast aside by the Supreme Court. This book investigates the Clause in a textualist-originalist manner, an approach increasingly popular among both academics and judges, to examine the meanings actually expressed by the text in its original context.

Arguing for a revival of the Privileges or Immunities Clause, author Christopher Green lays the groundwork for assessing the originalist credentials of such areas of law as school segregation, state action, sex discrimination, incorporation of the Bill of Rights against states, the relationship between tradition and policy analysis in assessing fundamental rights, and the Fourteenth Amendment rights of corporations and aliens. Thoroughly argued and historically well-researched, this book demonstrates that the Privileges or Immunities Clause protects liberty and equality, and it will be of interest to legal academics, American legal historians, and anyone interested in American constitutional history.

Christopher Green is Associate Professor of Law at the University of Mississippi School of Law, USA. His articles on the relationship of the Fourteenth Amendment's Equal Protection and Privileges or Immunities clauses have been cited by Justice Stevens in *McDonald vs. Chicago* and by many scholars. He has also published work on the relationship of the philosophy of language and constitutional theory, the Constitution's self-definition, the nature of corporations, and epistemology.

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For Bonnie, Hadley, Hudson, and Sebastian

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1 Introduction

Parents of more than one child quickly distinguish two sorts of duties. One sort concerns children's individual basic needs: to be fed, clothed, housed, and so on. Children often care much more, however, about a second sort of duty: fairness among siblings. Unjustified special privileges for one sibling quickly stir resentment. Children can much more readily accept a total *lack* of dessert than its unexplained or unjustified malapportionment. A violation of basic adequacy, by contrast, is exacerbated if all children suffer from it.

What goes for parents goes for states under the Fourteenth Amendment. The Supreme Court has interpreted the Due Process Clause—"nor shall any State deprive any person of life, liberty, or property without due process of law"—to protect certain individual rights, such as privacy and free speech, no matter the procedures used. Violations are aggravated, not alleviated, if other citizens' rights are also violated. On the other hand, the Court interprets the Equal Protection Clause—"nor deny to any person within its jurisdiction the equal protection of the laws"—to ban any arbitrary distinctions in state law. Unlike substantive-due-process rights, equality rights cover privileges the state *may* deny altogether, but which must be supplied evenhandedly, if at all.

Notoriously, due-process and equal-protection cases feature persistent disagreement over the proper answers and even the proper questions. Substantive-due-process cases shift erratically between four touchstones: (a) enumerated rights against the federal government, i.e., "incorporation" of the Bill of Rights,[1] (b) rights prevalent in 1868,[2] (c) natural rights or other morally-genuine rights,[3] and (d) rights prevalent in contemporary practice and traditions.[4] Equal-protection law has developed into a relatively stable tripartite scheme of strict, intermediate, and rational-basis scrutiny, but disagreement persists over which groups go where,[5] the special status of "discrete and insular minorities,"[6] and whether the entire tiers-of-scrutiny framework should be subordinated to a unitary arbitrariness standard.[7]

The texts of the Due Process and Equal Protection clauses offer little hope for resolving these disputes. The nouns in the clauses do particularly little

work, because due process law is not limited to literal "process," and equal protection law is not limited to literal "protection."[8] As presently construed by the Court, nothing but the word "liberty" governs substantive-due-process law, while nothing but the word "equal" governs equal-protection law. We might hope for help from history, which originalists see as ultimately authoritative, and which almost all non-originalists also see as at least important. However, those committed to the Supreme Court's basic approach to due process and equal protection will be frustrated if they want to find out what precisely the Fourteenth Amendment's text expressed in its original context. Such readings invariably leave surplus text—especially "process" and "protection"—dangling without adequate historical explanation. It is thus difficult to find any governing principles simultaneously (a) useful for current basic-rights and antidiscrimination law and (b) historically expressed in the texts of the Equal Protection and Due Process clauses.

THE PRIVILEGES OR IMMUNITIES CLAUSE: TWO NOUNS, A PREPOSITION, AND A VERB

To move ahead with historically-grounded principles to govern or at least inform the law of equality and basic rights, we must move back a clause, to the Privileges or Immunities Clause: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." This is, obviously, highly general language. Recent scholarship has documented in detail that the words "privileges or immunities" are, in this context, synonymous with "rights," "liberties," or "advantages," and not sharply distinguished from each other.[9] The chief nouns of the Privileges or Immunities Clause—the "privileges" and "immunities" that give the clause its name—are thus relatively generic, and cannot specify, on their own, exactly what the clause covers.

The key question, which receives surprisingly little explicit attention in current literature, concerns not "privileges" and "immunities," but the restrictive phrase "of citizens of the United States," especially its opening preposition "of."[10] Dictionaries are little help; one of the most common definitions of "of" is simply "related to,"[11] and only context can tell us exactly what relationship is in view. Shorn of such context, the phrase "privileges or immunities of citizens of the United States" can express a wide variety of categories. In particular—to pick readings that could support any of the various strains of today's due-process or equal-protection doctrine—a right might be "related to" citizens of the United States via presence in the Bill of Rights, via prevalence in 1868, via correspondence with such citizens' moral rights, via *national* prevalence today, or via *local* prevalence today (that is, by being given to similarly-situated fellow citizens nearby).

While "of" is the critical site for any criterion governing "privileges or immunities of citizens of the United States," this book also offers new arguments about the relationship between that phrase and our constitutional verb "abridge." The Fourteenth Amendment uses different verbs in its most important clauses: "abridge" in the Privileges or Immunities Clause, "deprive" in the Due Process Clause, "deny" in the Equal Protection Clause, and "denied . . . or in any way abridged" in the house-apportionment provision of Section 2. Such diversity in verbs is not new to the Constitution. The First Amendment uses "respecting" for establishments of religion, "prohibiting" for free exercise, and "abridging" for speech, press, and assembly and petition. The Second Amendment uses "infringed," the Fourth Amendment "violated," and the Seventh Amendment "preserved." These verbs are not all simply synonymous with "violate," especially not "abridge." In 1868, as today, to "abridge" meant to shorten.[12] *The set of "privileges or immunities of citizens of the United States" must be a set of rights susceptible to state shortening today*. That basic consideration goes a very long way in eliminating potential readings of our initial "of." While natural rights, textually-enumerated rights against the federal government, and rights prevalent in 1868 can be *violated* by state action today, they cannot genuinely be *shortened* by such action.

NEWLY-SEARCHABLE CONTEXT, THE SOBER TRUTH, AND THE SUPREME COURT

It might seem that there could scarcely be anything new to say about the Privileges or Immunities Clause as it nears its sesquicentennial. However, newly-digitized archives of books, newspapers, and congressional proceedings have made this a golden age for historical research, and these mines of material are far from exhausted. Digitization allows researchers to ask textual questions of historical material much more precisely; they can now search for phrases like "privileges or immunities of citizens of the United States" (and its close kin like "rights of citizens of the United States") over ever-larger and ever-more-finely-granulated ground. Even regarding archives with which historians have long been familiar, new results may turn up if we canvass them with new legal questions or philosophical distinctions steadily in view.

The newfound abundance of historical material produces, however, a dangerous pitfall. It is tempting to see one particular newly-unearthed piece of evidence (or piece of evidence newly seen as relevant) as *the* key to interpreting the Privileges or Immunities Clause. Only by canvassing *all* of the relevant background and historical context can we gain confidence about what the Fourteenth Amendment's text expressed in its original context.

To end the suspense, on my reading, the Privileges or Immunities Clause commands equality among citizens of the United States, either in the *same* state—requiring states to treat different citizens fairly and refrain from arbitrary or unjustified distinctions between them—or in *different* states—herding outlier states back to the mainstream tradition of American civil liberty. In short, the clause prohibits state laws from shortening the rights of citizens of the United States, relative to similarly-situated fellow citizens.[13] Arbitrarily privileging or disadvantaging one group of citizens *within* a state is thus unconstitutional, but so is the denial of rights generally given to American citizens, even if no one else in the state receives them.

Unfortunately, the Supreme Court long ago—either in 1873 with the *Slaughterhouse Cases*[14] or perhaps with *United States v. Cruikshank* in 1876[15]—killed the Privileges or Immunities Clause as support for either antidiscrimination or basic-rights law. Despite granting certiorari on a Privileges or Immunities Clause issue in *McDonald v. Chicago* in 2010, eight of the Justices declined to resurrect it, playing Elizabeth to the Clause's Darcy: "I hear such different accounts of you as puzzle me exceedingly."[16] Justice Thomas's critical fifth vote for the *McDonald* judgment relied on the Privileges or Immunities Clause, however. If Justice Thomas persists in rejecting substantive due process, future 4–4 splits among the other justices will require him to address the Privileges or Immunities Clause again. There thus seems little basis for the Elizabethan worry that "if I do not take your likeness now, I may never have another opportunity."[17] The Privileges or Immunities Clause is, perhaps, not *yet* sufficiently clear, but our need for guidance in due-process and equal-protection law supplies compelling reason to clarify it.[18] To quote Elizabeth one last time, "It is particularly incumbent on those who never change their opinion, to be sure of judging properly at first."[19] Conversely, a Court that makes mistakes on the order of *Slaughterhouse* and *Cruikshank* must be willing to change its mind.

Justice Alito's *McDonald* plurality opinion itself, in justifying its use of substantive due process to incorporate the Second Amendment, relied on Privileges or Immunities Clause evidence under the description of "the Fourteenth Amendment."[20] Privileges or Immunities Clause evidence has had, then, important effects on the law; it also seems clear that incorporation would never have had such staying power in the law had it not proceeded in the shadow of scholarship, such as Justice Black's *Adamson* dissent, relying on the Privileges or Immunities Clause.[21] Likewise, the substantive-due-process tradition stemming from *Pierce* began with the *Slaughterhouse* dissents.[22] Alan Gura, Ilya Shapiro, and Josh Blackman's comment is apt: "The *Slaughterhouse* majority might have (temporarily) gotten away with killing the Privileges or Immunities Clause, but Justice Alito's plurality suggests that like Poe's tell-tale heart, the Fourteenth Amendment's central guarantee of liberty is beating loudly under the floorboards."[23] The Privileges or

Immunities Clause is thus critical for understanding not only the Fourteenth Amendment's origin, but also its present and future.

INTEGRATING EQUALITY WITH BASIC RIGHTS

As we will see, there is a good deal of evidence that the Privileges or Immunities Clause guarantees basic individual rights and a great deal of evidence that the Clause secures equality among citizens. Conceptually, we might deal with these two partly-overlapping groups of data in six ways. I rank them by increasing plausibility by my lights.

First, we might decide that there are more, or more reliable, basic-rights data than equality data, and simply limit the Clause to basic rights, viewing equality evidence as an erroneous minority view of what the text expressed.

Second, we might do the reverse: decide that equality data trump basic-rights data, and thus limit the Clause to equal citizenship.

Third, we might combine the two sorts of evidence so that we have two independent *requirements* to be a privilege of citizens of the United States. On such a reading, the Privileges or Immunities Clause prohibits discrimination, not generically, but *only with respect to certain basic rights*, and safeguards basic rights, not generically, but *only with respect to discrimination.* Simultaneous basic-rights and equality violations—"free speech for me, but not for thee"[24]—is the Clause's concern on this reading.

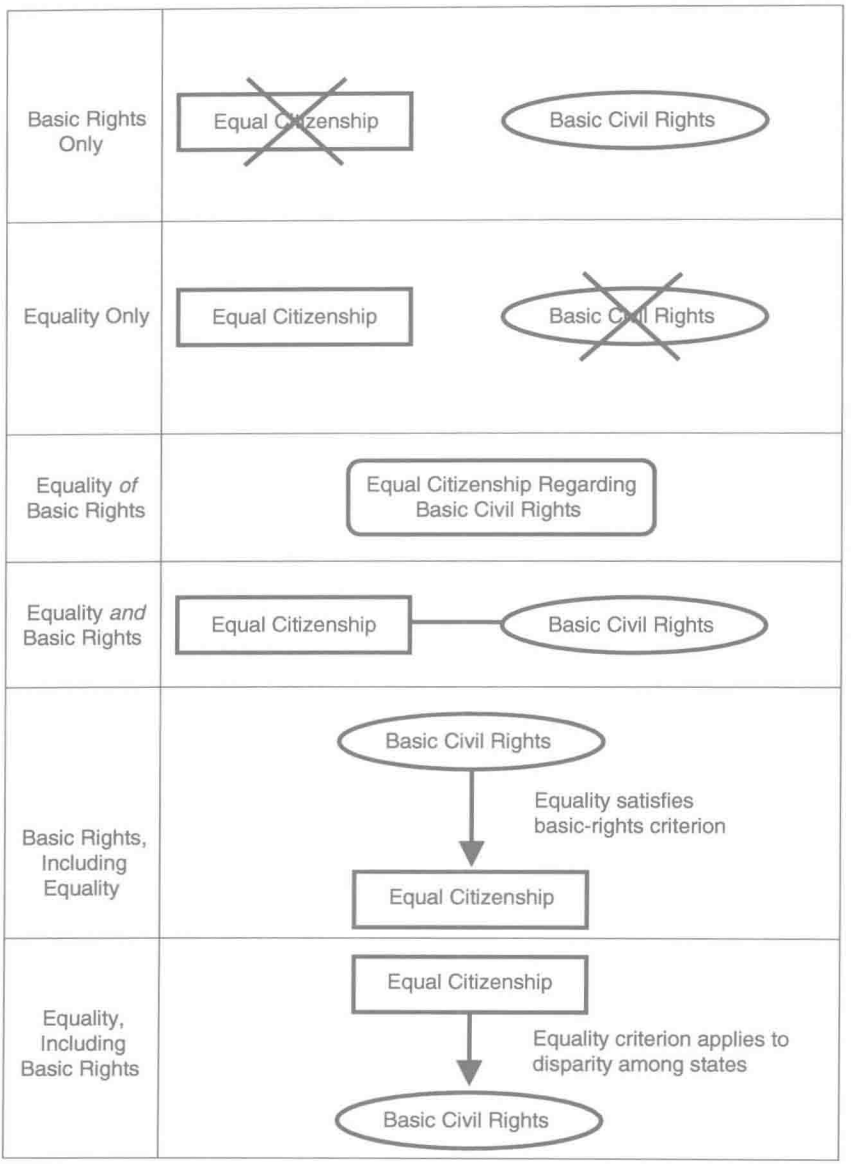
Fourth, we might view equal citizenship and basic rights as two independent *ways of being* a privilege of citizens of the United States. On this view, the Privileges or Immunities Clause has distinct equality and basic-rights aspects, each expressed in the same text. *Either* inequality *or* basic-rights violations violate the Clause.

Fifth, we might view equality as one basic right among others: that is, to see a basic-rights criterion expressed in the Privileges or Immunities Clause and to derive equality as only an application of that criterion. For instance, the proper criterion for basic rights (be it 1868, natural rights, or prevalence today) might apply to free speech, gun rights, privacy, *and equality.*

Sixth—my view—we might do the reverse, and view basic rights as the expression of an equality norm. Equality is the fundamental requirement expressed in the text of the Clause, but a state-to-state application of that equality criterion would protect basic rights entirely denied by a particular state if too far from the mainstream of American civil liberty.

The next page puts our six-fold menu pictorially.

Obviously, not just any equality requirement can be paired with just any basic-rights requirement in the last four of these interpretations. On the fifth option, for instance, if our basic-rights criterion is limited to rights circa 1868, or only bans outliers, then our equality requirement will likewise be limited to 1868's conception of equality. The sixth option only works for a



basic-rights option revolving around outliers, not one rooted in incorporation, natural rights, or 1868. Chapter 5 fleshes out these details.

ORIGINAL TEXTUALLY-EXPRESSED MEANING

How are we to decide which of these six pictures is the right one? What does it even *mean* for a reading of the Constitution to be "right"? Most

originalists take the meaning originally expressed in the constitutional text as binding for constitutional interpretation, while non-originalists, many of whom analogize constitutional law to common law, do not. Almost all common-law constitutionalists and other non-originalists, however, will place significant, if not dispositive, weight on original textually-expressed meaning.[25] Even if the Constitution is an intergenerationally-authored chain novel,[26] that novel's first chapter is obviously particularly crucial.

Forms of originalism and the living constitution are views about the *truthmakers for constitutional claims*. If we say that "restricting free speech violates *the Fourteenth Amendment*," our constitutional theory specifies what we mean by "the Fourteenth Amendment": the thing or event in virtue of which such a statement can be true or false. The textualist originalist thinks the Constitution of which the Fourteenth Amendment is a part consists of *meanings expressed by the constitutional text at the time of its adoption*. The truthmaker is a particular historical event: the expression of meaning by the words "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" at the time of their adoption. Non-originalists, by contrast, use intergenerationally-extended constitutional truthmakers, while non-textualist originalists use either original purposes or original expected tangible applications. All of these alternative theories represent different uses of the term "Fourteenth Amendment."

Beyond such disagreement on constitutional *theory* lies disagreement on constitutional *metatheory*, i.e., how to justify constitutional theories.[27] For my part,[28] it seems that "this Constitution"—made binding on officials per Article VI and of which amendments are made "part" per Article V—refers to a textual and non-intergenerational event. Officials oath-bound to uphold "this Constitution" may assert that "the Constitution" authorizes particular exercises of power only on the basis of the actual Constitution, which the phrase "this Constitution," in context, defines as textual and temporally confined.

This view is thus mostly based on the Constitution's self-description, but the oath adds a critical normative kick. While my earlier work has examined the context of the phrase "this Constitution" in great detail, considerably more can be said on the ethics of oaths. The ethical tradition against mental reservations demands adherence to the text seen from the perspective of the mind of the oath-*imposer* (the *animus imponentis*), not that of the oath-*taker* (the *animus jurantis*).[29] A key issue under this approach is whether today's oaths are genuinely imposed by Article VI itself, or simply by current legal culture, which may have drifted away from its moorings and embraced a different constitutional ontology. This is the *quis imposuit*—who imposes?—issue. Those who think they are taking the same oath George Washington took—as, for instance, Gerald Ford asserted on becoming President—are submitting to Article VI itself, not just present legal culture. Non-originalism can become legitimate, on this

argument, only if Ford's understanding of the present oath were to become idiosyncratic.

FOUR METHODOLOGICAL POINTS

Ethical considerations aside, a few key distinctions will be important to understand my description of history in the rest of this book: we will look for principles, require persuasive textual explanations even from framers, allow for fuzzy edges, and seek simplicity.

First, I'm looking for textually-expressed principles, not merely purposes or particular applications. Forms of originalism might be put in terms of different questions we might ask of the historical materials when we step out of our time machine into 1866. My precise question is: "what did this text express in this context?" Textually-expressed meaning is just what the Fourteenth Amendment *is*. Two other questions are also important, but importantly distinct: "what were the framers' goals?" and "how would the framers resolve particular disputes?" If the Fourteenth Amendment consisted of goals or specific dispute resolutions, those would be proper ultimate touchstones—proper constitutional truthmakers—but, as I read the Constitution's self-definition and our obligation to follow it, it doesn't.

The Republicans' broad goals were justice for freedmen and southern Unionists, of course, but they did not bind us to their goals in those words in the Constitution. They had lots of views on how the Fourteenth Amendment would resolve particular issues, but applying principles to particular situations requires knowledge of the facts, which framers could get wrong. Further, the framers were, like anyone, "capable of asserting principles inconsistent with those on which they were acting."[30] A simple example of such inconsistency lies in the interim rules for apportioning the House of Representatives, which give Maryland more representatives than North Carolina, inconsistently with their "according to their respective numbers" principle.[31] Applications of such principles require facts which interpreters must determine for themselves.

My title's reference to the original *sense* of the Privileges or Immunities Clause builds on earlier work explaining my textualism in terms of the sense-reference distinction of Gottlob Frege.[32] Building cars changes the *reference* of "car"—the set of cars in the world—but not its *sense*—the meaning expressed by the term. The sense-reference and analytic-synthetic distinctions are close kin. Analytic truths like "all bachelors are unmarried" are true in virtue of meaning (or sense) alone, but synthetic judgments like "there are no bachelors on the Supreme Court" are true or false partly in virtue of contingent facts about the world. On my view, the framers' *analytic* judgments are binding, but not their *synthetic* ones. Judgments about

particular applications of the Fourteenth Amendment generally represent synthetic judgments, true in part because of the speaker's evaluation of the facts, rather than analytic judgments, i.e., pure claims about the meaning expressed in the Fourteenth Amendment's text. This will be an especially important move when we consider particular passages from Jacob Howard and John Bingham.

Plato memorably distinguished textually-expressed ideas from particular applications or examples in the Euthyphro, whose title character gave an example when asked by Socrates for a definition. Socrates rebuked him:

> Remember that I did not ask you to give me two or three examples of piety, but to explain the general idea which makes all pious things to be pious. Do you not recollect that there was one idea which made the impious impious, and the pious pious? [Euthyphro: "I remember."] Tell me what is the nature of this idea, and then I shall have a standard to which I may look, and by which I may measure actions, whether yours or those of any one else, and then I shall be able to say that such and such an action is pious, such another impious.[33]

We are after the textually-expressed "standard" or "general idea" that makes something a privilege of citizens of the United States, not just *examples* of particular privileges of citizens of the United States. It is sometimes tempting to slide from an example to a general category, but such "abduction" is frequently indeterminate, and we must be tentative when we lack explicit evidence about the category itself.[34]

A second methodological point relates to the nature of originalist evidence. While the Fourteenth Amendment itself was a textual event that occurred during Reconstruction, we can gain access to its nature by hearing what various people have to say about that event—that is, what they say about the Fourteenth Amendment's meaning. These statements are only *evidence* of original meaning, rather than *constituting* it. The precise constitutional author was not John Bingham, who proposed the key language of Section 1 to the Joint Committee on Reconstruction on April 21, 1866, but the collective group of congressmen and state ratifiers. This precise author spoke nothing other than the constitutional text itself.[35] Any other statements about constitutional meaning are not interpretively binding the way the meaning expressed in the constitutional text is. In the language of administrative law, they get only *Skidmore* deference: "[such interpretations,] while not controlling upon [later interpreters] by reason of their authority, do constitute a body of experience and informed judgment to which [such interpreters] may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power