DOUBTING THOMAS: JUSTICE CLARENCE THOMAS'S EFFORT TO RESURRECT THE PRIVILEGES OR IMMUNITIES CLAUSE

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ABSTRACT

This Article examines Justice Thomas's effort to resurrect the Privileges or Immunities Clause as the proper constitutional vehicle for discovering fundamental rights. This effort is problematic, however, for two principle reasons: (1) because a redirection of fundamental rights jurisprudence to the history and text of the Privileges or Immunities Clause alone does not adequately reveal the Founders' understanding of fundamental rights, and (2) because Justice Thomas must do more by way of explaining why his fundamental rights jurisprudence offers a superior alternative to the substantive due process approaches he identifies as prevailing in the Supreme Court today. In other words, while Justice Thomas appears to be correct that those who advanced the cause of the Privileges or Immunities Clause understood it to require the States to respect certain fundamental rights, an appeal to the history and text of the Clause, without more, cannot achieve Justice Thomas's stated goal of providing a "guiding principle" to distinguish fundamental from nonfundamental rights.

> The best defense of limited government . . . is the higher law political philosophy of the Founding Fathers. . . . [N]atural rights and higher law arguments are the best defense of liberty and of limited government. Moreover, without recourse to higher law, we abandon our best defense of judicial review—a judiciary active in defending the Constitution, but judicious in its restraint and moderation.[1]
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> It is nowhere clearer than in the field of jurisprudence how distant the Court and the political branches remain from an understanding of the principles of equality and liberty that make us one nation.[2]

INTRODUCTION

As the above quotes exemplify, there is no doubt that early in his political career Justice Thomas advanced a return to an originalist jurisprudence grounded

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1. Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment,* 12 HARV. J.L. & PUB. POL'Y 63, 63-64 (1989) [hereinafter Thomas, *Higher Law Background*].

2. Clarence Thomas, *Civil Rights as a Principle Versus Civil Rights as an Interest*, *in* ASSESSING THE REAGAN YEARS 391, 392 (David Boaz ed., 1988).

in "the higher law political philosophy of the Founding Fathers"[3] or, particularly, the natural rights principles of the Declaration of Independence.[4] More recently, Justice Thomas has undertaken a serious effort to ground fundamental rights jurisprudence in the Fourteenth Amendment's Privileges or Immunities Clause, thereby replacing substantive due process.[5] In Justice Thomas's words, "The one theme that links the Court's substantive due process precedents together is their lack of a guiding principle to distinguish 'fundamental' rights that warrant protection from nonfundamental rights that do not."[6]

One, then, might expect Justice Thomas to provide a rigorous examination of the Privileges or Immunities Clause in light of the "natural rights and higher law arguments"[7] he has so long espoused—arguments like those that Representative John Bingham[8] provided on the floor of Congress when discussing the Clause. Such a rigorous examination, however, is not forthcoming. Instead, Justice Thomas limits his argument, relying on "the Fourteenth Amendment's text and history" as the superior source for locating fundamental rights.[9]

I argue that while Justice Thomas is correct that there exists no true "guiding principle" in the Court's fundamental rights jurisprudence, his effort to supply a jurisprudential basis for engineering a resurrection of the Privileges or Immunities Clause is problematic for two principle reasons: (1) a redirection of fundamental rights jurisprudence to the history and text of the Privileges or Immunities Clause alone does not adequately reveal the Founders' understanding of fundamental rights, and (2) Justice Thomas must do more by way of explaining why his fundamental rights jurisprudence offers a superior alternative to the substantive due process approaches he identifies as prevailing in the Supreme Court today. In other words, while Justice Thomas appears to be correct that those who advanced the cause of the Privileges or Immunities Clause understood it to require the States to respect certain fundamental rights, an appeal to the history and text of the Clause, without more, cannot achieve Justice Thomas's stated goal of providing a "guiding principle" to distinguish fundamental from nonfundamental rights.

This Essay seeks to demonstrate that such a "guiding principle" requires an examination of the *reasons* why the architects of the Constitution, and the

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3. *See* Thomas, *Higher Law Background*, *supra* note 1, at 63.

4. *Id.* at 65-68.

5. *See* McDonald v. City of Chi., 130 S. Ct. 3020, 3058-88 (2010) (Thomas, J., concurring in part and concurring in judgment).

6. *Id.* at 3062.

7. *See* Thomas, *Higher Law Background*, *supra* note 1, at 63.

8. Representative John Bingham of Ohio was the principle draftsman and public defender of Section One of the Fourteenth Amendment. *See, e.g.*, Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329, 332-35, 341 (2011).

9. *McDonald*, 130 S. Ct. at 3058-59 (Thomas, J., concurring in part and concurring in judgment).

Privileges or Immunities Clause in particular, found certain rights, and not others, to be fundamental in nature.[10] Unless and until Justice Thomas makes this case, his appeal to the Privileges or Immunities Clause likely will be met with the same response accorded to him by his conservative colleague, Justice Samuel Alito. Justice Alito effectively dismissed Justice Thomas's extended argument with the following brief statement: "Nor is there any consensus on [the scope of the rights protected by the Privileges or Immunities Clause] among the scholars who agree that the *Slaughter-House Cases*' interpretation is flawed. We see no need to reconsider that interpretation here."[11]

If Justice Thomas has any hope of persuading Justice Alito and his other conservative colleagues,[12] he must show that his originalist jurisprudence offers an account of fundamental rights that is faithful to the Constitution's text and represents a superior understanding of its principles. In other words, a true originalist understanding of the Constitution necessarily requires a natural law jurisprudence—a sounder interpretation than the current approaches adopted by both the conservative and liberal sides of the Court. To accomplish this, Justice Thomas must demonstrate that the Court's current approaches are unmoored from the concepts of natural justice that undergird the Constitution and, as such, are ultimately incapable of adequately securing fundamental rights.

It is unlikely that scholarly disagreement over the scope of the rights intended to be protected by the Privileges or Immunities Clause is the only cause for the current Court's general resistance to the Clause's revitalization. As this Article will discuss, theoretical misgivings regarding a natural rights understanding of fundamental rights is likely the deeper, if unspoken, reason for dismissing Justice Thomas's project.[13]

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10. For a truly successful examination, the fundamental principles lying behind the *entire* Constitution must be used as a guide to achieve broader fundamental rights jurisprudence. As will be discussed in Part III, *infra*, the battle over the meaning of fundamental rights primarily turns on how "liberty" and "equality" are understood.

11. *McDonald*, 130 S. Ct. at 3030 (plurality opinion) (citing Saenz v. Roe, 526 U.S. 489, 522 n.1 (1999) (Thomas, J., dissenting)). Justice Breyer, joined by Justices Ginsburg and Sotomayor, was even more dismissive, stating, "*First*, the Court today properly declines to revisit our interpretation of the Privileges or Immunities Clause." *Id.* at 3132 (Breyer, J., dissenting).

12. As of August 2012, the current members of the Court are John G. Roberts, Jr., Antonin Scalia, Anthony M. Kennedy, Clarence Thomas, Ruth Bader Ginsburg, Stephen G. Breyer, Samuel Anthony Alito, Jr., Sonia Sotomayor, and Elena Kagan. *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE U.S., http://www.supremecourt.gov/about/biographies.aspx (last visited Apr. 9, 2013).

13. Justice Thomas's reputation as an advocate of the Declaration of Independence's natural law reasoning has been known by the legal academic community since his confirmation hearing. *See The Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearings on S. 102-1084 Before the S. Comm. on the Judiciary*, 102d Cong. (1991). Not only was Justice Thomas subjected to questions on the subject at his hearing, his views on the matter elicited a memorandum written and signed by a number of law professors opposing his nomination because of his position on natural rights. *See* Barbara Allen Babcock et al., *Judge*

It may be that Justice Thomas's colleagues on the bench are wary of his efforts to resurrect the Privileges or Immunities Clause, insofar as they fear it constitutes an effort by him to return to the natural rights jurisprudence he once espoused—particularly when it comes to future cases involving *unenumerated* rights.[14] Indeed, as will be shown, the Academy, major political figures, and Supreme Court Justices have long harbored deep misgivings about natural rights concepts.[15]

Justice Thomas entirely avoids using the words "natural law" or "natural right(s)" throughout his concurrence in *McDonald* when speaking in his own name,[16] perhaps because of his awareness of the general antipathy toward natural rights concepts or because he sees it as beyond the proper role of judging. Thus, we have the interesting case of a Justice, long-known for advocating natural rights, who is unwilling to embrace the language of natural rights. When speaking in his own name, he does employ the term "inalienable right(s)" on at least eleven occasions to describe fundamental rights.[17] In other words, Justice Thomas offers a tepid embrace of the Declaration's principles, while simultaneously asking the Court to change more than one hundred years of substantive due process jurisprudence by arguing that there exists a better historical and textual argument in favor of the Privileges or Immunities Clause.

Other than cursory references to the principles of equality, government by consent, and inalienable rights, Justice Thomas's approach fails to offer any true jurisprudential basis for distinguishing between fundamental and nonfundamental rights.[18] Almost all the personal liberties guaranteed in the Bill of Rights have

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Clarence Thomas' Views on the Fundamental Right to Privacy: A Report to the United States Senate Judiciary Committee, *in* 22 BLACK SCHOLAR 138, 143 (1992).

14. In fact, Justice Thomas signals as much early in his *McDonald* concurrence: "As was evident to many throughout our Nation's early history, slavery, and the measures designed to protect it, were irreconcilable with the principles of equality, government by consent, and inalienable rights proclaimed by the Declaration of Independence and embedded in our constitutional structure." *McDonald*, 130 S. Ct. at 3059 (Thomas, J., concurring in part and concurring in judgment). Justice Stevens's dissent in *McDonald* signals his awareness of Justice Thomas's effort to return to some form of a natural rights' jurisprudence: "It is no secret that the desire to 'displace' major 'portions of our equal protection and substantive due process jurisprudence' animates some of the passion that attends this interpretive issue." *Id*. at 3089 n.3 (Stevens, J., dissenting) (quoting *Saenz*, 526 U.S. at 528 (Thomas, J., dissenting)).

15. *See infra* Part II.

16. Justice Thomas does reference natural law and natural rights on several occasions in his concurrence, but only when quoting founding sources. *McDonald*, 130 S. Ct. at 3080 (Thomas, J., concurring in part and concurring in judgment) (noting that "Lysander Spooner championed the popular abolitionist argument that slavery was inconsistent with constitutional principles," and that he cited "as evidence the fact that it deprived black Americans of the 'natural right of all men 'to keep and bear arms' for their personal defence'" (quoting LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY 98 (1860))).

17. *Id.* at 3059, 3060, 3064 (twice), 3065, 3066, 3068, 3079, 3083, 3085, 3087.

18. *See generally id.* at 3059.

been incorporated against the States, such that, only unenumerated fundamental rights remain to be decided.[19] Thus, future decisions regarding unenumerated rights are the only game in town, and Justice Thomas's text-based analysis offers no reason for the other Justices to abandon such a long precedential history.[20] Indeed, as Justice Stevens argued in *McDonald*, it is likely that the most important battle for the future of the Court's interpretation of unenumerated fundamental rights will come down to the definition of "liberty" that the Court decides to adopt.[21] With this in mind, a return to the history and text of the Privileges or Immunities Clause, without more, fails to provide a superior "guiding principle to distinguish 'fundamental' rights that warrants protection from nonfundamental rights that do not."[22]

This Article first considers Justice Thomas's contention that "natural rights and higher law arguments"[23] have a firm basis in the Founders' understanding of the first principles supporting the American form of government. Part II examines how the understanding of natural rights has fared over time, concluding with a discussion of the Supreme Court's more recent attitude toward that understanding. Part III considers the prevailing substantive due process tests employed by the Supreme Court today. Part IV reviews Justice Thomas's argument for revitalizing the Privileges or Immunities Clause, including his critique of the current state of substantive due process jurisprudence. Part V concludes this Article with an examination of how the Fathers of the Constitution and the Privileges or Immunities Clause, James Madison and Representative John Bingham, respectively, provide a "guiding principle" for distinguishing fundamental from nonfundamental rights that Justice Thomas has yet to embrace.

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19. In addition to the right to keep and bear arms (and the Sixth Amendment right to a unanimous jury verdict), the only rights not fully incorporated are (1) the Third Amendment's protection against quartering of soldiers; (2) the Fifth Amendment's grand jury indictment requirement; (3) the Seventh Amendment's right to a jury trial in civil cases; and (4) the Eighth Amendment's prohibition on excessive fines. The Court has never decided whether the Third Amendment or the Eighth Amendment's Excessive Fines Clause applies to the States through the Due Process Clause. *See* Browning–Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276 n.22 (1989) (declining to decide whether the excessive-fines protection applies to the States).

20. Justice Thomas argues that "[b]ecause this case does not involve an unenumerated right, it is not necessary to resolve the question whether the Clause protects such rights, or whether the Court's judgment in *Slaughter-House* was correct." *McDonald*, 130 S. Ct. at 3086 (Thomas, J., concurring in part and concurring in judgment). It is necessary, however, to explain why the Privileges or Immunities Clause offers a superior "guiding principle"—beyond history and text—to the prevailing substantive due process jurisprudence that he decries.

21. *Id*. at 3091 (Stevens, J., dissenting) ("The second principle woven through our cases is that substantive due process is fundamentally a matter of personal liberty.").

22. *Id.* at 3062 (Thomas, J., concurring in part and concurring in judgment).

23. *See* Thomas, *Higher Law Background*, *supra* note 1, at 63.

I. THE FOUNDERS AND NATURAL RIGHTS

While scholars continue to debate the meaning or relevance of natural law and natural rights, there is a growing scholarly recognition that natural law and natural rights did, in fact, form the theoretical basis for the political philosophy of the Founding Fathers.[24] The continuing disagreement among scholars and Supreme Court Justices as to the meaning or relevance of natural law and natural rights, however, constitutes a very real challenge to Justice Thomas's efforts to revitalize the Privileges or Immunities Clause. The following review of the historical role played by natural law and natural rights during the Founding era confirms, as historical fact, that natural law and natural rights were the foundation upon which the new nation was erected.

An examination of state constitutions and accompanying declarations of rights in existence during the Founding era reveals that the fundamental principles those state governments were erected upon were grounded in natural rights concepts. As these documents demonstrate, the founding generation distinguished between natural rights and positive law, decrying the latter when it violated the natural rights of life, liberty, property and conscience:

1. The Massachusetts Declaration of Rights, adopted in 1780, maintained that the right of "acquiring" property as a means of seeking happiness was one of the "unalienable" rights with which all human beings are born: "All men are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness."[25]

2. New Hampshire's Bill of Rights stated that "[a]ll men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness." [26]

3. George Mason drafted the Virginia Declaration of Rights, which was adopted by the Virginia Constitutional Convention on June 12, 1776 and is currently codified in the state's constitution:

> [A]ll men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.[27]

4. Pennsylvania's Constitution of 1776 stated,

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24. *See, e.g.*, RANDY E. BARNETT, CONSTITUTIONAL LAW: CASES IN CONTEXT 3-16 (Vicki L. Been et al. eds., 1st ed. 2008); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 914, 918-24 (1993).

25. MASS. CONST. pt. 1, art. 1.

26. N.H. CONST. pt. 1, art. 2.

27. VA. CONST. art. 1, § 1.

> [A]ll men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.
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> [And t]hat all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding . . . .[28]
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> [A]ll government ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals who compose it to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man; and whenever these great ends of government are not obtained, the people have a right, by common consent to change it, and take such measures as to them may appear necessary to promote their safety and happiness.[29]

5. The New Jersey Constitution of 1776 read as follows:

> And whereas George the Third, king of Great Britain, has refused protection to the good people of these colonies; and, by assenting to sundry acts of the British parliament, attempted to subject them to the absolute dominion of that body; and has also made war upon them, in the most cruel and unnatural manner, for no other cause, than asserting their just rights—all civil authority under him is necessarily at an end, and a dissolution of government in each colony has consequently taken place.[30]

6. Maryland's Constitution of 1776 stated,

> [W]herefore no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights . . . .[31]

7. North Carolina's Constitution of 1776 stated, "[A]ll men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences."[32]

8. The Vermont Constitution of 1777 provided the following:

> That all men are born equally free and independent, and have certain

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28. PA. CONST. art. 1, §§ 1-2 (1776).

29. *Id.* at pmbl.

30. N.J. CONST. pmbl. (1776).

31. MD. CONST., DECLARATION OF RIGHTS art. XXXIII (1776).

32. N.C. CONST., DECLARATION OF RIGHTS art. XIX (1776).

> natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty; acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.[33]
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> [A]ll government ought to be instituted and supported, for the security and protection of the community, as such, and to enable the individuals who compose it, to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man; and whenever those great ends of government are not obtained, the people have a right, by common consent, to change it, and take such measures as to them may appear necessary to promote their safety and happiness.[34]

These individual state constitutions reflected the common voice of the American people as similarly expressed in the Declaration of Independence. In declaring their independence from Great Britain, the American Revolutionaries appealed to the "Laws of Nature and of Nature's God," and referenced the "unalienable Rights" with which human beings are "endowed by their Creator."[35] This dual reference to natural law and natural ("unalienable") rights demonstrates the connection between natural law and natural rights: the latter are derived from the former. As is evident from Jefferson's statements in the Declaration of Independence, natural rights are those particular claims—assertions of principle—that humans not only may rightly make against government authority, but that also form the basis upon which a just government is established. As such, the only true, just form of government is one which seeks "to secure these rights," which is why "[g]overnments are instituted among Men."[36] Indeed, the failure to secure mankind's fundamental natural rights leads to the right to revolution—"the Right of the People to alter or to abolish it."[37]

It is highly noteworthy that Jefferson wrote the Declaration, and its natural law and natural rights teaching, with the belief that it reflected the understanding of the American people, not a mere ideological or political tract.[38] Jefferson

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33. VT. CONST. ch. I, art. 1 (1777).

34. *Id.* at pmbl.

35. THE DECLARATION OF INDEPENDENCE paras. 1-2 (U.S. 1776).

36. *Id.* at para. 2.

37. *Id.*

38. *See generally id.* Jefferson also made this clear in a letter to Henry Lee some forty-nine years later:

> All American Whigs thought alike on these subjects. When forced, therefore, to resort to arms for redress, an appeal to the tribunal of the world was deemed proper for our justification. This was the object of the Declaration of Independence. Not to find out new principles, or new arguments, never before thought of, not merely to say things which had never been said before; but to place before mankind the common sense of the subject, in terms so plain and firm as to command their assent . . . . Neither aiming

never wavered in his dedication to natural rights as the cornerstone of republican government, stating that "[e]very species of government has its specific principles. Ours perhaps are more peculiar than those of any other in the universe. It is a composition of the freest principles of the English constitution, with others derived from natural right and natural reason."[39] For Jefferson, natural rights were not contingent upon discrete historical periods, or changing human mores.[40] For him, "Nothing then is unchangeable but the inherent and unalienable rights of man."[41]

In language strikingly similar to Jefferson's, John Adams wrote that the principles of the American Revolution "are the principles of Aristotle and Plato, of Livy and Cicero, and Sidney, Harrington, and Locke; the principles of nature and eternal reason; the principles on which the whole government over us now stands."[42]

In The Federalist Number 43, James Madison complements his discussion of constitutional powers with a reference to the Declaration's invocation of natural law: "to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed."[43]

George Washington spoke of the American people as having the right "to applaud themselves" for having given to mankind an example of just rule:

> at originality of principle or sentiment, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind . . . . All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc.

Letter from Thomas Jefferson to Henry Lee (May 8, 1825), *in* 16 THE WRITINGS OF THOMAS JEFFERSON 117, 118-19 (Library ed. 1904) [hereinafter WRITINGS OF THOMAS JEFFERSON]. Jefferson's reference to natural law and natural rights principles as an "expression of the American mind" serves as his advance rejoinder to those who view natural law thinking as but one ideology among the many. *See id.*

39. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 93 (New ed. 1853).

40. *See* Letter from Thomas Jefferson to Major John Cartwright (June 5, 1824), *in* 16 WRITINGS OF THOMAS JEFFERSON, *supra* note 38, at 42, 45-48.

41. *Id.* at 48.

42. JOHN ADAMS, *Novanglus: Addressed to the Inhabitants on the Colony of Massachusetts Bay, No. I*, *in* THE POLITICAL WRITINGS OF JOHN ADAMS 26 (George W. Carey ed., 2000); *see also* THE FOUNDERS ON RELIGION 132 (James H. Hutson ed., 2005) ("To him who believes in the Existence and Attributes physical and moral of a God, there can be no obscurity or perplexity in defining the Law of Nature to be his wise benign and all powerful Will, discovered by Reason. A Man who disbelieves the Being of a God, will have no perplexity or obscurity in defining Morality or the Law of Nature, natural Law, natural Right or any such Things to be mere Maxims of Convenience, to be Swifts pair of Breeches to be put on upon occasion for Decency or Conveniency and to be put off at pleasure for either." (footnote omitted) (quoting Letter from John Adams to Thomas Boylston Adams (Mar. 19, 1794))).

43. THE FEDERALIST NO. 43, at 279 (James Madison) (Clinton Rossiter ed., 1961).

> It is now no more that toleration is spoken of as if it were the indulgence of one class of people that another enjoyed the exercise of their inherent natural rights, for, happily, the Government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens in giving it on all occasions their effectual support.[44]

Alexander Hamilton made his natural law principles clear early in his career, stating, "[N]atural liberty is a gift of the beneficent Creator . . . . *Civil liberty is only natural liberty, modified and secured by the sanctions of civil society.*"[45] Hamilton, similar to Jefferson and Adams, emphasized the centrality of natural rights to a just regime of liberty:

> The principal aim of society is to protect individuals in the enjoyment of those absolute rights which were vested in them by the immutable laws of nature, but which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these *absolute rights* of individuals.[46]

Moreover, Hamilton made it clear that natural rights needed positive laws in order to "be preserved," but that such rights are not dependent upon, but pre-exist any such positive laws: "The sacred rights of mankind are not to be rummaged for among *old parchments or musty records*. They are written, as with a sunbeam, in the whole volume of human nature, by the Hand of the Divinity itself, and can never be erased or obscured by mortal power."[47]

Supreme Court Justices writing during the early years of the Republic resorted to principles of natural justice in their opinions in order to elucidate fundamental principles underlying particular legal disputes. Just nine years after the Framers reformed our nation under a new Constitution, in a case involving ex post facto laws, Justice Samuel Chase wrote,

> There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; . . . An ACT of the Legislature (for I cannot call it a law) contrary to the great

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44. Letter from George Washington, U.S. President, to the Hebrew Congregation in Newport, Rhode Island (Aug. 1790) (available at http://www.pbs.org/georgewashington/collection/other_hebrew_congregation.html).

45. ALEXANDER HAMILTON, THE FARMER REFUTED (1775), *reprinted in* 1 THE WORKS OF ALEXANDER HAMILTON IN TWELVE VOLUMES 53, 87 (Henry Cabot Lodge ed., Fed. ed. 1904) [hereinafter WORKS OF ALEXANDER HAMILTON].

46. *Id.* at 63-64 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 120 (1765)).

47. *Id.* at 113 (emphasis added).

> first principles of the social compact, cannot be considered a rightful exercise of legislative authority.[48]

In his concurring opinion, Justice Iredell did not dispute the existence of natural justice, but warned against using it as a vehicle to declare void laws that were passed pursuant to lawfully delegated powers:

> If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice.[49]

To the extent that he accurately characterized Justice Chase's position, Justice Iredell was surely right: a jurisprudence of natural right is not a license to overturn laws one considers unjust but is instead a vehicle to interpret the Constitution as written.

Justice Joseph Story also invoked natural law in a case involving a dispute over property rights: "As to the compact of 1789, between Virginia and Kentucky, it is a treaty for good faith; a mere recognition of the principles of natural law and morality."[50] Four years after Justice Story penned his words, Chief Justice Marshall wrote the following in *Ogden v. Saunders*[51] when deciding whether a state bankruptcy law applying to contracts made after the law's passage violates the Obligation of Contracts Clause in the Constitution:

> Independent nations are individuals in a state of nature. Whence is derived the obligation of their contracts? They admit the existence of no superior legislative power which is to give them validity, yet their validity is acknowledged by all. If one of these contracts be broken, all admit the right of the injured party to demand reparation for the injury, and to enforce that reparation if it be withheld. He may not have the power to enforce it, but the whole civilized world concurs in saying, that the power, if possessed, is rightfully used.
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> In a state of nature, these individuals may contract, their contracts are obligatory, and force may rightfully be employed to coerce the party who has broken his engagement.[52]

In evaluating the conduct of the Georgia legislature in the famous contracts case of *Fletcher v. Peck*,[53] Marshall was again willing to look to first principles:

> If the legislature of Georgia was not bound to submit its pretensions to

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48. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798).
49. *Id*. at 399 (Iredell, J., concurring).
50. Green v. Biddle, 21 U.S. 1, 34 (1823).
51. 25 U.S. (12 Wheat.) 213 (1827).
52. *Id.* at 346 (Marshall, C.J., assenting).
53. 10 U.S. (6 Cranch) 87 (1810).

> those tribunals which are established for the security of property, and to decide on human rights, if it might claim to itself the power of judging in its own case, yet there are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded.[54]

The willingness of Supreme Court Justices to appeal to principles of natural justice endured until the turn of the century. For example, in 1893 Justice David Brewer addressed a Takings Clause issue and upheld the right to compensation in the case, finding that "in this there is a natural equity which commends it to every one."[55] Justice Brewer also noted that the principles of the Declaration of Independence were a valid source for constitutional decision-making, but that in the case before the Court it was not "necessary to look through the constitution to the affirmations lying behind it in the Declaration of Independence, for in this fifth amendment there is stated the exact limitation on the power of the government to take private property for public uses."[56]

Four years later, Justice John Harlan considered another Takings Clause issue, finding,

> The requirement that the property shall not be taken for public use without just compensation is but "an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. . . ."[57]

Even as late as 1939, Justice Owen Roberts candidly acknowledged that natural rights jurisprudence was once the norm in America:

> At one time it was thought that [the Privileges and Immunities Clause] recognized a group of rights which, *according to the jurisprudence of the day*, were classed as "natural rights"; and that the purpose of the section was to create rights of citizens of the United States by guaranteeing the citizens of every State the recognition of this group of rights by every other State. Such was the view of Justice Washington.[58]

I contend that arguments based on natural law and natural rights disappeared from the opinions of the Supreme Court because they were subjected to withering theoretical critiques. Moreover, any effort to revitalize the first principles of the Founders must recognize the degree to which they have been attacked and be prepared to respond to those attacks.

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54. *Id.* at 133.

55. Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893).

56. *Id.*

57. Chi., B. & Q. R. Co. v. City of Chi., 166 U.S. 226, 236 (1897) (quoting Joseph Story).

58. Hague v. Comm. for Indus. Org., 307 U.S. 496, 511 (1939) (emphasis added).

II. THE DEMISE OF NATURAL LAW AND NATURAL RIGHTS

Perhaps the most sophisticated and direct critique of the Founders' natural rights understanding of the first principles of government was made by Progressive-era thinkers at the turn of the twentieth century. Prominent scholars and politicians increasingly came to embrace the tenets of Progressivist theory and their concomitant rejection of the Founders' natural rights philosophy.[59] As Professor Thomas West observed, "[t]he Progressives repeatedly repudiated natural rights and natural-law as unjust, ignoble, and untrue."[60]

The noted Progressive era sociologist William Graham Sumner wrote, "There are no dogmatic propositions of political philosophy which are universally and always true; there are views which prevail, at a time, for a while, and then fade away and give place to other views."[61] Frank Johnson Goodnow, the first president of the American Political Science Association, also maintained that the Founders' understanding was outdated, specifically because it predated "the theory of evolutionary development."[62] In particular, "[n]atural rights being conceived of as eternal and immutable, the theory of natural rights did not permit of their amendment in view of a change in conditions."[63]

Assessing the scholarly landscape of the time, Charles Merriam[64] noted, "The present tendency . . . in American political theory is to disregard the once dominant ideas of natural rights and the social contract, . . . rights are considered to have their source not in nature, but in law."[65] In 1920, Merriam contended that this triumph of positivism over natural law had become well-nigh complete, stating that the "natural law and natural rights" of the Founders had been discarded by intellectuals "with practical unanimity."[66] Instead, "[t]he state . . . is the creator of liberty."[67] The influential scholar John Dewey ridiculed the

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59. *See, e.g.*, AMERICAN PROGRESSIVISM (Ronald J. Pestritto & William J. Atto eds., 2008); CHALLENGES TO THE AMERICAN FOUNDING: SLAVERY, HISTORICISM, AND PROGRESSIVISM IN THE NINETEENTH CENTURY (Ronald J. Pestritto & Thomas G. West eds., 2005).

60. Thomas G. West, *The Universal Principles of the American Founding*, *in* THE AMERICAN FOUNDING: ITS INTELLECTUAL AND MORAL FRAMEWORK 64 (Daniel N. Robinson & Richard N. Williams eds., 2012).

61. WILLIAM GRAHAM SUMNER, *The Mores of the Present and the Future*, *in* WAR AND OTHER ESSAYS 162 (Albert Galloway Keller ed., Yale Univ. Press 1911) (1885); *see also* HERBERT CROLY, THE PROMISE OF AMERICAN LIFE 182 (1909) (attacking the Founders' understanding of rights on similar grounds).

62. Frank J. Goodnow, *The American Conception of Liberty*, *in* AMERICAN PROGRESSIVISM, *supra* note 59, at 62.

63. *Id.*

64. Charles Edward Merriam was a professor of political science at the University of Chicago and an advisor to several U.S. Presidents. *Charles Edward Merriam*, ARLINGTON NAT'L CEMETERY, http://www.arlingtoncemetery.net/cemerriam.htm (last visited Apr. 16, 2013).

65. C. EDWARD MERRIAM, A HISTORY OF AMERICAN POLITICAL THEORIES 311 (1903).

66. *Id.* at 307-09.

67. *Id.* at 313.

natural rights thinking of the Founding generation as follows: "Natural rights and natural liberties exist only in the kingdom of mythological social zoölogy."[68] As these comments indicate, Progressivist scholars were convinced that the natural rights understanding of the Founding generation had been superseded by more advanced theories of social organization, theories grounded in positivism and evolution. In other words, positive law and not nature, then, represents the ultimate ground of all rights, including fundamental rights.

Presidents such as Theodore Roosevelt, Woodrow Wilson, and Franklin D. Roosevelt also proclaimed themselves adherents of Progressivism.[69] Woodrow Wilson, for example, insisted that unlike the physical universe, the political universe contains no immutable principles or laws. "[G]overnment . . . is a living thing . . . accountable to Darwin," explained Wilson.[70] The Constitution, therefore, "must be Darwinian" as well; it too must grow and evolve.[71] These progressive ideas were deeply absorbed by the American intelligentsia and continue to represent a profound theoretical challenge to the natural rights understanding of political first principles of the founding generation.[72]

A helpful starting point in considering the High Court's philosophical departure from the founding era is the common law and how it was understood by one of the preeminent Founders, on the one hand, and a prominent twentieth century Supreme Court Justice, on the other. Alexander Hamilton located "the great body of the common law" in "[n]atural law and natural reason applied to the purposes of society."[73] Oliver Wendell Holmes found this philosophical association between natural law and the common law worthy of ridicule, maintaining, "The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact."[74] Thus, while Hamilton associated the common law with natural law principles, Holmes associated it purely with the positive law. Holmes could be even more direct in expressing his contempt with the idea of natural law: "The jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere."[75] In

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68. JOHN DEWEY, LIBERALISM & SOCIAL ACTION 17 (Capricorn Books 1963) (1935).

69. *See* AMERICAN PROGRESSIVISM, *supra* note 59, at 1-2.

70. WOODROW WILSON, THE NEW FREEDOM (1913), *reprinted in* RONALD J. PESTRITTO, WOODROW WILSON: THE ESSENTIAL POLITICAL WRITINGS 121 (2005).

71. *Id.*

72. *See generally* AMERICAN PROGRESSIVISM, *supra* note 59.

73. ALEXANDER HAMILTON, *Speech in the Case of Harry Croswell*, *in* 8 WORKS OF ALEXANDER HAMILTON, *supra* note 45, at 387, 421.

74. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting), *superseded by statute*, Longshore and Harbor Workers' Compensation Act, Pub. L. No. 92-576, 86 Stat. 1251, 1265 (1972) (codified as amended at 33 U.S.C. § 903 (2006)), *as recognized in* Dir., Office of Workers' Comp. Programs v. Perini N. River Assocs., 459 U.S. 297 (1983).

75. Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918).

private correspondence, Holmes was even more forceful: "All my life I have sneered at the natural rights of man . . . ."[76]

Other prominent Supreme Court Justices came to embrace Holmes's disparagement of natural law. Justice Douglas did so explicitly:

> We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment "dose not enact Mr. Herbert Spencer's Social Statics." Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights.[77]

Justice Hugo Black was even more forthright:

> [T]he "natural law" formula which the Court uses to reach its conclusion in this case should be abandoned as an incongruous excrescence on our Constitution. I believe that formula to be itself a violation of our Constitution, in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power.[78]

More recently Justice William Brennan put the matter somewhat more delicately but no less clearly:

> We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.[79]

Brennan's contemporary, Justice Thurgood Marshall, shared his colleague's disapproval of natural law:

> The men who gathered in Philadelphia in 1787 could not have envisioned

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76. Letter from Oliver Wendell Holmes to Harold Laski (Sept. 15, 1916), *in* 1 HOLMES-LASKI LETTERS 762 (Mark DeWolfe Howe ed., 1953).

77. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 669 (1966) (quoting Lochner v. New York, 198 U.S. 45, 75 (1905)).

78. Adamson v. California, 332 U.S. 46, 75 (1947) (Black, J., dissenting), *overruled in part by* Malloy v. Hogan, 378 U.S. 1 (1964).

79. William J. Brennan, Jr., Assoc. Justice of the U.S. Supreme Court, Address at the Georgetown University Text and Teaching Symposium: Constitutional Interpretation (Oct. 12, 1985) (transcript available at http://teachingamericanhistory.org/library/index.asp?document=2342).

> these changes. They could not have imagined, nor would they have accepted, that the document they were drafting would one day be construed by a Supreme Court to which had been appointed a woman and the descendent of an African slave. 'We the People' no longer enslave, but the credit does not belong to the framers. It belongs to those who refused to acquiesce in outdated notions of "liberty," "justice," and "equality," and who strived to better them.[80]

By 1986, Justice William Brennan could easily dismiss the Founders' understanding of the Constitution out of hand because it belonged "in a world that is dead and gone."[81] Justice David Souter has noted not only his own disagreement with notions of natural justice but also its historical eclipse as a mode of interpreting the Constitution:

> This position was no less in conflict with American constitutionalism in 1798 than it is today, being inconsistent with the Framers' view of the Constitution as fundamental law. . . . [T]he idea that "first principles" or concepts of "natural justice" might take precedence over the Constitution or other positive law "all but disappeared in American discourse." It should take more than references to "background principle[s]," and "implicit limitation[s]," to revive the judicial power to overcome clear text unopposed to any other provision, when that clear text is in harmony with an almost equally clear intent on the part of the Framers and the constitutionalists of their generation.[82]

Contrary to the belief of many law students, "liberal" Justices do not hold a monopoly on natural-rights bashing; rather, it appears that the natural law principles of our Founding Fathers are somewhat lost on many of our "conservative" Justices as well. Chief Justice William Rehnquist wrote,

> Beyond the Constitution and the laws in our society, there simply is no basis other than the individual conscience of the citizen that may serve as a platform for the launching of moral judgments. There is no conceivable way in which I can logically demonstrate to you that the judgments of my conscience are superior to the judgments of your conscience, and vice versa. Many of us necessarily feel strongly and deeply about our own moral judgments, but they remain only personal moral judgments until in some way given the sanction of law.[83]

Likewise, Justice O'Connor testified before the Senate Judiciary Committee

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80. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 5 (1987).

81. ENCYCLOPEDIA OF THE SUPREME COURT 53 (David Schultz ed., 1st ed. 2005).

82. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 167-68 (1996) (Souter, J., dissenting) (third and fourth alteration in original) (internal citations omitted).

83. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 704 (1976).

"that she favored judicial deference to the legislature and a positivist conception of judicial review, according to which constitutional provisions should be interpreted with reference to the text and the intent of the [F]ramers but not with reference to concepts of natural law or natural rights."[84] Justice Antonin Scalia, meanwhile, affirms the existence of the natural law, to be sure, but he denies that federal judges are authorized to consult it as a part of their decision-making:

> [M]aybe my very stingy view, my very parsimonious view, of the role of natural law and Christianity in the governance of the state comes from the fact that I am a judge and it is my duty to apply the law. And I do not feel empowered to revoke those laws that I do not consider good laws. If they are stupid laws, I apply them anyway, unless they go so contrary to my conscience that I must resign.
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> But the alternative is not to do what is good or apply the law. The alternatives are: apply the law or resign. Because the law is what the people have decided. And if it is bad, the whole theory of a democratic system is [that] you must persuade the people that it is bad. I cannot go around and—with respect to the Nuremberg laws, I would have resigned. But I would certainly not have the power to invalidate them because they are contrary to the natural law. I have been appointed to apply the Constitution and positive law. God applies the natural law.[85]

Professor Hadley Arkes has pointed out the following regarding those on the right, like Scalia, who fear liberal judicial activism:

> [They] have been so offended by the performance of activist judges, that they would rather take the path of doing legislative history, or getting tangled in arguments over the reading of the historical record, if that will have at least the effect of diverting people from getting lured into the mirage of natural law.[86]

Like Justice Scalia, other members of the contemporary Court reject the idea

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84. Donald Elfenbein, *The Myth of Conservatism as a Constitutional Philosophy*, 71 IOWA L. REV. 401, 453 (1986). True to her word, Justice O'Connor stated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,

> Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.

505 U.S. 833, 850 (1992).

85. Antonin Scalia, Assoc. Justice of the U.S. Supreme Court, Rome Address at the Gregorian University: The Common Christian Good (May 2, 1996), (transcript available at http://www.catholicnews.com/data/stories/cns/960613.htm).

86. Hadley Arkes, *A Natural Law Manifesto or an Appeal from the Old Jurisprudence to the New*, 87 NOTRE DAME L. REV. 1245, 1265 (2012).

that natural rights or natural law philosophy has any usefulness in analyzing constitutional questions. Justice Ruth Bader Ginsburg, delivering a speech in South Africa in 2006, stated,

> The notion that it is improper to look beyond the borders of the United States in grappling with hard questions, as my quotation from Chief Justice Taney suggested, is in line with the view of the U.S. Constitution as a document essentially frozen in time as of the date of its ratification. I am not a partisan of that view. U.S. jurists honor the Framers' intent "to create a more perfect Union," I believe, if they read the Constitution as belonging to a global 21st century, not as fixed forever by 18th-century understandings.
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> A key 1958 plurality opinion, Trop v. Dulles, makes just that point. At issue in that case, whether stripping a wartime deserter of citizenship violated the Eighth Amendment's ban on "cruel and unusual punishments." "The basic concept underlying the . . . Amendment," the opinion observed, "is nothing less than the dignity of man." Therefore the Constitution's text "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." [87]

As Jeffrey Rosen has noted, Justice Stephen Breyer has adopted a pragmatic judicial philosophy that is both devoted to legal positivism and suspicious of natural law.[88] Justice Elena Kagan, too, has stated that she has no "view of what are natural rights, independent of the Constitution."[89] During his confirmation hearing for the U.S. Court of Appeals for the D.C. Circuit bench, Chief Justice John Roberts rejected the notion that he might "bring a coherent, universal approach that applies across the board to all the provisions of the Constitution."[90] In fact, the Chief Justice went so far as to say that he did not believe "that it's the best approach to have an all-encompassing philosophy."[91] Similarly, Justice Sonia Sotomayor, quoting Professor Martha Minnow, has noted that "there can

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87. Ruth Bader Ginsburg, Assoc. Justice of the U.S. Supreme Court, Address at the Constitutional Court of South Africa: "A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication (Feb. 7, 2006) (alteration in original) (transcript available at http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_02-07b-06.html).

88. Jeffrey Rosen, *Justice Shalt Thou Not Pursue: Why the Supreme Court's Rejection of "Justice" Is a Good Thing*, IN CHARACTER (Sept. 1, 2006), http://incharacter.org/archives/justice/justice-shalt-thou-not-pursue-why-the-supreme-courts-rejection-of-justice-is-a-good-thing/.

89. *Kagan: 'No View on Natural Rights*,*'* WND (July 6, 2010, 10:46 PM), http://www.wnd.com/2010/07/175705/.

90. Carolyn Lochhead, *Brilliant Legal Mind, Inconclusive Record*, SFGATE (July 20, 2005, 4:00 AM), http://www.sfgate.com/politics/article/BRILLIANT-LEGAL-MIND-INCONCLUSIVE-RECORD-2654387.php.

91. *Id.*

never be a universal definition of wise."[92]

Finally, in writing the opinion in a case involving the Eleventh Amendment, Justice Anthony Kennedy suggested that neither the Constitution itself, nor the Founders' understanding of the Constitution, is connected with natural law:

> Despite the dissent's assertion to the contrary, the fact that a right is not defeasible by statute means only that it is protected by the Constitution, not that it derives from natural law. . . . By the same token, the contours of sovereign immunity are determined by the Founders' understanding, not by the principles or limitations derived from natural law.[93]

Not only did Justice Kennedy find natural law principles irrelevant to constitutional analysis, he also found the dissent's attempt to associate his reasoning with such principles to be in the nature of a smear campaign: "In an apparent attempt to disparage a conclusion with which it disagrees, the dissent attributes our reasoning to natural law."[94]

An interesting study could be made of the theoretical influences on these Supreme Court Justices who came to reject natural rights at the advent of the twentieth century and continuing to today, but it is clear that positivism was a dominant influence. Because the critique of natural rights offered by progressivist thinkers was embraced by prominent Supreme Court Justices, Justice Thomas's critique of the current doctrines supporting substantive due process would be strengthened by highlighting how those doctrines are the intellectual heirs of progressivism.

III. THE PREVAILING SUBSTANTIVE DUE PROCESS TESTS

The deep misgivings concerning natural rights has led to a Supreme Court that, for decades, has ignored or denied the relevance of natural rights as a legitimate source for understanding fundamental rights. The Court has instead adopted tests for distinguishing fundamental from nonfundamental rights that rely on differing assessments of the importance of history and historical change. The High Court's refusal to acknowledge any place for natural rights in considering constitutional first principles may have led Justice Thomas to remark, "It is nowhere clearer than in the field of jurisprudence how distant the Court and the political branches remain from an understanding of the principles of equality and liberty that make us one nation."[95]

In his plurality opinion in *McDonald*, Justice Alito continues to adhere to the Court's reliance on the Fourteenth Amendment's Due Process Clause as the locus for fundamental rights jurisprudence ("substantive due process").[96] He concluded that the Due Process Clause protects the Second Amendment as a fundamental

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92. Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002).

93. Alden v. Maine, 527 U.S. 706, 734 (1999).

94. *Id*. at 758.

95. Thomas, *supra* note 2.

96. McDonald v. City of Chi., 130 S. Ct. 3020, 3026-3050, 3046 (2010) (plurality opinion).

right against state infringement.[97] Justice Alito relies on the Due Process Clause even though he does not attempt to defend it on the basis of the text of the Constitution.[98] Instead, he relies on the test that emerged from *Duncan v. Louisiana*[99] and *Washington v. Glucksberg*.[100] Pursuant to these two cases, as Justice Alito contends, the test is whether a right is "fundamental to *our* scheme of ordered liberty" or "deeply rooted in this Nation's history and tradition."[101]

Justice Alito's reliance upon rights that are "fundamental to *our* scheme of ordered liberty" or "deeply rooted in this Nation's history and tradition" continues the substantive due process jurisprudence that conservative members of the Court have come to embrace in recent decades.[102] History and tradition, and not any reference to higher law principles, have become the sources for identifying fundamental rights.

The liberal Justices, on the other hand, seek freedom from history and tradition in the final analysis,[103] preferring a jurisprudence that they believe recognizes historically evolving notions of justice.[104] This liberal jurisprudence was once best captured in the phrase first coined in *Trop v. Dulles*: "evolving standards of decency that mark the progress of a maturing society."[105] Justice Brennan's following phrase best articulates the current judicial attitudes towards the Due Process Clause in today's jurisprudence: "[I]ndividuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty."[106] *Planned Parenthood of Southeastern Pennsylvania v. Casey* elaborated on the phrase, which was reemphasized in *Lawrence v. Texas*:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of

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97. *Id.* at 3031.

98. *See id.* at 3031-32.

99. 391 U.S. 145, 149 (1968).

100. 521 U.S. 702, 721 (1997).

101. *McDonald*, 130 S. Ct. at 3036.

102. *Id. See, e.g.*, *Glucksberg*, 521 U.S. at 720-21; Bowers v. Hardwick, 478 U.S. 186, 191-94 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003); Palko v. Connecticut, 302 U.S. 319, 325-27 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).

103. Of course, when history and tradition can be safely reconciled with the liberal Justices' notions of evolving mores, it serves a useful purpose and is relied upon to that extent in their opinion. *See McDonald*, 130 S. Ct. at 3097-99 (Stevens, J., dissenting).

104. *Id.* at 3112-14.

105. 356 U.S. 86, 101 (1958).

106. Roberts v. U.S. Jaycees, 468 U.S. 609, 619 (1984).

personhood were they formed under compulsion of the State.[107]

Thus, we see the conservative members attempting to identify rights that are "fundamental to *our* scheme of ordered liberty" or "deeply rooted in the nation's history and traditions[,]" while the liberal members look to the future and a concept of liberty that is arguably more in the nature of existential self-definition. Indeed, Justice Stevens candidly summarized the battle for the heart of substantive due process as coming down to a victory either for *Glucksberg* or for *Lawrence*, not a peaceful reconciliation of the two.[108]

Justice Thomas is fully aware of this divergence in fundamental rights jurisprudence between the conservative and liberal wings of the Court but fails to provide a "guiding principle to distinguish 'fundamental' rights that warrant protection from nonfundamental rights that do not."[109] Furthermore, he does not explain why the Court's two substantive due process positions fail to provide a "guiding principle," other than to say that the Due Process Clause itself was never intended to bear analytical fruit concerning fundamental rights.[110]

Instead, Justice Thomas might, for instance, plausibly argue that identifying rights as "fundamental to *our* scheme of ordered liberty" only begs the question when there is no analysis of why, or in what manner, such rights are properly denominated as such. Justice Thomas might also argue that the history and tradition model relied on by conservative Justices suffers a fatal flaw in that it lacks a discriminating principle—it cannot distinguish between those historical traditions (even deeply rooted ones) that have been unjust as opposed to those that served justice.[111] In short, a fundamental rights jurisprudence that is constitutionally indifferent to the distinction between justice and injustice should be abandoned.

Justice Thomas might just as plausibly argue that the model relied on by the liberal Justices suffers from an equally fatal flaw. This argument would begin by asking what evolving notions actually means, and where to locate those evolving notions. There is no readily apparent answer to this question, and none has been offered by those members of the Court who advance this model. Similarly, if freedom means facilitating each individual's ability "to define one's own concept

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107. Lawrence v. Texas. 539 U.S. 558, 574 (2003) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)). Justice Rehnquist acknowledged the concept while also seeking to limit it in a manner that conforms with the history and tradition standard championed by the conservative members of the Court in *Glucksberg*. 521 U.S. at 720-21, 735. Justice Stevens, however, recognizes the continuing theoretical tension between the two concepts. *McDonald*, 130 S. Ct. at 3097-98 (Stevens, J., dissenting).

108. *McDonald*, 130 S. Ct. at 3096 n.16 (Stevens, J., dissenting) ("As between *Glucksberg* and *Lawrence,* I have little doubt which will prove the more enduring precedent.").

109. *Id.* at 3062 (Thomas, J., concurring in part and concurring in judgment).

110. *Id.*

111. In this regard, Justice Stevens actually provides a more powerful critique of the conservatives' historical approach to fundamental rights jurisprudence than does Justice Thomas. *Id.* at 3116-17 (Stevens, J., dissenting).

of existence, of meaning, of the universe,"[112] we are left rudderless with respect to locating underlying principles of justice. The very meaning of self-definition belies locating principles outside of oneself and reduces to a form of relativism. Such an understanding cannot support a distinction between fundamental and nonfundamental rights.

Indeed, Justice Thomas might ask of Justice Stevens's defense of *Lawrence* the very same question Justice Stevens posed to the conservative Justices' history test when he asked, "By what standard will that proposition be tested?"[113] "Evolving notions" of morality, after all, are not readily reconcilable with standards of an enduring character. Eschewing such arguments, Justice Thomas limits his argument in favor of revolutionizing fundamental rights jurisprudence to text and history alone, focusing specifically on the text and history of the Privileges or Immunities Clause.[114]

IV. THE PRIVILEGES OR IMMUNITIES CLAUSE

The search for the true meaning of the Privileges or Immunities Clause has produced volumes of scholarship, and while broad areas of agreement exist, there is considerable disagreement regarding the Clause's core meaning.[115] Justice Hugo Black famously championed the idea that the Clause incorporated the first eight amendments.[116] But, in the words of one prominent scholar of the Privileges or Immunities Clause regarding the question of incorporation, "An immense amount of scholarship followed, decade after decade. It never seems to die. . . . The evidence is sketchy, inconclusive, and subject to various plausible interpretations. The riddle will not go away because no one has solved it."[117]

In efforts to solve the riddle of the meaning of the Privileges or Immunities Clause, the conclusions of major scholars are as follows: (1) it was meant to incorporate the first eight amendments alone (following Hugo Black);[118] (2) it only incorporated those rights in the first eight amendments that are fundamental

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112. *Casey*, 505 U.S. at 851.

113. *McDonald*, 130 S. Ct. at 3116 (Stevens, J., dissenting).

114. *Id.* at 3062 (Thomas, J., concurring in part and concurring in judgment).

115. The central question preoccupying scholars who share Justice Black's argument is whether the Clause was intended to incorporate the Bill of Rights (or at least the first eight amendments) against the states.

116. 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 . . . an eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States.").

117. George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal,* 68 OHIO ST. L.J. 1627, 1628 (2007) (footnote omitted) [hereinafter Thomas, *Riddle*].

118. 2 WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1089-95 (1953).

in nature;[119] (3) it includes the first eight amendments, other personal rights contained in the Constitution (such as habeas corpus), and other fundamental rights;[120] (4) there was no intent to incorporate; it was only an anti-discrimination provision;[121] (5) it simply ensured the enforcement of the Privileges or Immunities Clause in Article IV, Section 2;[122] (6) it meant to incorporate

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119. *See* Timothy Sandefur, *Clarence Thomas's Jurisprudence Unexplained*, 4 N.Y.U. J. L. & LIBERTY 535, 550 (2009) ("At the very least, it is clear that the Amendment protects the 'privileges or immunities of citizens of the United States' against interference by state government, and that these privileges or immunities would include at least some of the substantive guarantees of the Bill of Rights, such as freedom of speech. It is difficult to imagine what else that Clause could possibly mean except that traditionally recognized rights of Americans should also be guaranteed against state interference.").

120. *See generally* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986) (arguing that Section One of the Fourteenth Amendment selectively incorporated the Bill of Rights); *see also* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1197 (1992) (advancing a theory of interpreting Section One of the Fourteenth Amendment that he calls "refined incorporation," by which he means identifying (and incorporating) those rights which are "a privilege or immunity of individual citizens rather than a right of states or the public at large"). "Refined incorporation" also requires assessing the particular right in question in light of the historical demands and changes that necessitated the Fourteenth Amendment in the first place (i.e., the treatment of the newly freed slaves in the Southern States). *Id*. Dale E. Ho acknowledges that the Privileges or Immunities Clause was intended to incorporate the first eight amendments, and that, "[f]rom a textual and historical perspective, . . . the case for incorporation under the Privileges or Immunities Clause seems clear." Dale E. Ho, *Dodging a Bullet:* McDonald v. City of Chicago *and the Limits of Progressive Originalism*, 19 WM. & MARY BILL RTS. J. 369, 388 (2010). Ho, however, is more concerned with advancing his ideological agenda than he is with textual and historical accuracy and fears that a revival of the Privileges or Immunities Clause as the locus for identifying substantive rights would lead to a diminishment of those rights he supports, such as abortion. *See id.* Ho is also concerned that a revitalized Privileges or Immunities jurisprudence would resuscitate *Lochner*, asserting that "[a] return to that original, robust understanding of property rights is probably not desirable." *Id.* at 414.

121. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 342-51 (1985) (arguing that the actual content of the privileges and immunities of United States citizens is given by the positive law at the state and national level, rather than by the Fourteenth Amendment, and that the Clause was intended to insure the equal enjoyment of the rights conferred by those positive laws); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1388 (1992) ("The main point of the [C]lause is to require that every state give the same privileges and immunities of state citizenship—the same positive law rights of property, contract, and so forth—to all of its citizens.").

122. Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61, 61-62 (2011) ("Long-forgotten evidence clearly shows that the [Privileges or Immunities] Clause was an attempt to resolve a national dispute about the Comity Clause rights of free blacks. In this context, the phrase 'the privileges or immunities of citizens of the United States' was a label for Comity Clause

principles drawn from the natural law and natural rights tradition;[123] and (7) it may have no discernible meaning at all.[124]

This vast area of disagreement among scholars allowed the plurality in *McDonald* to dismiss revisiting the Privileges or Immunities Clause. Justice Thomas, however, makes a powerful case that the extent of this disagreement may be overstated.[125] Nevertheless, with the excuse of scholarly disagreement in hand, not only do these Justices not have to contend with Justice Thomas's serious historical and textual arguments in favor of the Clause, but they do not have to risk involving themselves with possible natural rights arguments that lie beneath the history and text of the Privileges or Immunities Clause.

While the riddle of what the Privileges or Immunities Clause was meant to bring about may never be fully decided, that does not mean we are left adrift with regard to critical aspects of the Clause's meaning, and Justice Thomas has provided a thoughtful account of that meaning. As will be noted after reviewing his account, however, Justice Thomas is strangely silent concerning critical aspects of what "the Framers of the Privileges or Immunities Clause . . . understood . . . to include in the minimum baseline of federal rights that the Privileges or Immunities Clause established in the wake of the War over

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rights, and the Fourteenth Amendment used this phrase to make clear that free blacks were entitled to such rights." (footnote omitted)).

123. Douglas G. Smith, *Natural Law, Article IV, and Section One of the Fourteenth Amendment*, 47 AM. U. L. REV. 351, 358 (1997); *see also* Trisha Olson, *The Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 48 ARK. L. REV. 347, 420 (1995). Olson is surely right when she maintains that "[t]o grasp what constitutes national privileges, one must follow the 39th Congress in asking what is the essence of an American republican form of government." *Id.* (internal quotation marks omitted). Beyond reflection on the answer to that question, which is essential to understanding privileges and immunities, the hope for finality in arriving at a discrete set of privileges and immunities—beyond life, liberty, property and equality—is a hope that will not be realized. For there will always remain the question of working through the relationship between rights that are fundamental and those that are not. Madison understood this when he spoke as he did of the right to trial by jury. CONG. GLOBE, 39TH CONG., 1ST SESS. 1090 (1866). Olson goes astray when she adopts her critique of natural rights, which she claims at bottom share the same theoretical foundation with positivism. Both positivism and natural rights, she maintains, share "[t]he belief that the power of individual choice precedes moral definition of the group (positivism) or of the person (natural rights) is the bridge that joins these two schools." Olson, *supra*, at 434. Olson fails to recognize that natural (or "unalienable") rights are derived from the "Laws of Nature and Nature's God," and thus are specific formulations of the Natural Law understood to inform (or, if need be, restrain) governmental authority. *See also* John C. Eastman, *Re-Evaluating the Privileges or Immunities Clause*, 6 CHAP. L. REV. 123, 124 (2003).

124. *See* Thomas, *Riddle*, *supra* note 117; ROBERT H. BORK, THE TEMPTING OF AMERICA 166 (Touchstone 1991) (1989); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5, 139 (1949) (acknowledging that the Clause may have been intended to protect some rights contained in the Bill of Rights).

125. McDonald v. City of Chi., 130 S. Ct. 3020, 3086 (2010) (Thomas, J., concurring in part and concurring in judgment).

slavery."[126] As will be discussed, Justice Thomas does not address the numerous references by Bingham and others to the centrality of natural rights as a critical component of their understanding of privileges and immunities.

Justice Thomas's account of the development of the Privileges or Immunities Clause begins with an account of the manner in which privileges and immunities were understood at the time of Reconstruction, tracing their meaning all the way back to Magna Carta.[127] This account delves into the meaning given those terms by English subjects, including scholars, such as the great William Blackstone, American colonists, American jurists, and various writers alive near the time of Reconstruction.[128] Justice Thomas concludes that "the terms 'privileges' and 'immunities' had an established meaning as synonyms for 'rights.'"[129] Consistent with the express language of the Privileges or Immunities Clause, Justice Thomas makes it clear that these rights applied only to American "citizens."[130] Finally, Justice Thomas states that these privileges and immunities were fundamental or "inalienable" rights.[131]

According to Justice Thomas's argument, then, the historical meaning of privileges and immunities came to be understood as inalienable rights by Americans at the time of the founding and beyond. Many of these rights were set forth in the Bill of Rights. However, Chief Justice John Marshall, writing for the Court in *Barron v. Mayor of Baltimore*,[132] ruled that the Bill of Rights was enforceable against the federal government alone, and not the states.[133]

Justice Thomas turns next to an examination of the meaning of the Privileges and Immunities Clause of Article IV of the Constitution because its wording "resembles the Privileges or Immunities Clause, and it can be assumed that the public's understanding of the latter was informed by its understanding of the former."[134] As Justice Thomas points out, the Framers intended the Privileges and Immunities Clause of Article IV primarily to be a comity provision that would guarantee citizens of each state the fundamental rights of citizens of other states should they travel to those other states.[135] These guarantees of the equal enjoyment of rights among citizens of different states, then, did not extend to each and every right that a state guaranteed to its own citizens, and this left open the question of what were the "Privileges and Immunities of Citizens in the several States"[136] that Article IV referenced.

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126. *Id.* at 3088.

127. *Id.* at 3063-66.

128. *Id.*

129. *Id.* at 3063.

130. *Id.* at 3064.

131. *Id.*

132. 32 U.S. (7 Pet.) 243 (1833).

133. *McDonald*, 130 S. Ct. at 3066 (Thomas, J., concurring in part and concurring in judgment) (citing *Barron*, 32 U.S. (7 Pet.) at 250-51).

134. *Id.*

135. *Id.* at 3067.

136. U.S. CONST. art. IV., § 2, cl. 1.

To answer this question, Justice Thomas follows the lead of so many who have searched for the meaning of the Privileges and Immunities Clause in turning to the famous opinion of Justice Bushrod Washington in *Corfield v. Coryell*.[137] As Professor David Upham has pointed out, Justice Washington

> was no doubt aware of the original understanding of the clause. He had studied law with James Wilson (whom he replaced on the Supreme Court in 1798) and had been a member of the Virginia ratifying convention, where he had voted with James Madison, John Marshall, and others in favor of the Constitution.[138]

In *Corfield*, a citizen of Pennsylvania maintained that a New Jersey law prohibiting him from harvesting oysters from New Jersey's waters violated the Privileges or Immunities Clause because New Jersey citizens were allowed to harvest those same oysters.[139] Justice Washington ruled that the Pennsylvania citizens did not enjoy that particular privilege because the Clause only applied to those rights "which are, in their nature, fundamental [rights]."[140] Justice Thomas then quotes Justice Washington's enumeration of those fundamental rights:

> 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.[141]

Justice Thomas is on solid ground in directing us to this quote, as Justice Washington's definition was repeatedly quoted by members of the Thirty-Ninth Congress in their statements explaining the meaning of the Privileges or Immunities Clause.[142] According to Justice Washington, states should respect the

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137. 6 F. Cas. 546, 55-52 (E.D. Pa. 1823).

138. David R. Upham, Note, Corfield v. Coryell *and the Privileges and Immunities of American Citizenship*, 83 TEX. L. REV. 1483, 1483 (2005).

139. *Corfield*, 6 F. Cas. at 551.

140. *Id.*

141. *Id.* at 551-52, *cited in* McDonald v. City of Chi., 130 S. Ct. 3020, 3067 (2010) (Thomas, J., concurring in part and concurring in judgment).

142. *See, e.g.*, CONG. GLOBE, 39TH CONG., 1ST SESS. 475 (1866) (statement of Sen. Trumbull)

following fundamental rights: (1) the right to "[p]rotection by the government"; (2) the rights to life, liberty and property; (3) the right to travel and reside in other states without having any fundamental rights infringed; (4) the right to the benefit of habeas corpus and, more generally, "to institute and maintain actions of any kind in the courts of the state";[143] (5) the right not to be subjected to higher taxes than the citizens of the states to which others have travelled; and (6) the right to vote, but only "as regulated and established by the laws or constitution of the state in which it is to be exercised."[144] Notably, Justice Washington does not limit the fundamental rights that should be protected to the rights specified in the *Corfield* decision: "These, and many others which might be mentioned, are, strictly speaking, privileges and immunities . . . ."[145]

While Justice Washington gave a general account of what rights were intended to be comprehended by the Privileges and Immunities Clause, he did not answer the question as to whether or not Article IV required states to recognize these fundamental rights. Justice Thomas contends that "the weight of legal authorities at the time of Reconstruction indicated that Article IV, § 2 prohibited States from discriminating against sojourning citizens *when recognizing* fundamental rights, but did not require States to recognize those rights and did not prescribe their content."[146] It is safe to say, then, that prior to the Civil War and ratification of the Fourteenth Amendment, states had greater latitude in determining which rights were to be deemed fundamental, and which were not. But, once the states had made their determination, their decisions were binding with respect to their treatment of citizens of other states.

Justice Washington's elaboration of those fundamental rights that should be respected by all states pursuant to the Privileges and Immunities Clause, however, evidences his influential understanding of what limits the states should observe regarding those rights—even prior to the Civil War.[147] As has been mentioned and will be discussed at greater length later, the South's failure to respect the fundamental rights of the newly freed slaves necessitated a Privileges and Immunities Clause with bite; that bite came in the form of the Privileges or Immunities Clause.

With regard to the content of those fundamental rights that belong to citizens of the United States as comprehended by the Privileges and Immunities Clause,

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(invoking *Corfield*); *id.* at 1117-18 (statement of Rep. Wilson) (same); *id.* at 1835 (statement of Rep. Lawrence) (same); *id.* at 2765 (statement of Sen. Howard) (same).

143. *Corfield*, 6 F. Cas. at 552.

144. *Id.*

145. *Id.*

146. *McDonald*, 130 S. Ct. at 3067-68 (Thomas, J., concurring in part and concurring in judgment) (emphasis added).

147. David Upham's analysis of Corfield is quite persuasive. Upham concludes that Justice Washington identified the rights covered by the Privileges and Immunities Clause as those fundamental rights "defined with reference both to the universal, natural rights of citizenship—according to the Founders' social compact theory—and the particular instantiation of these rights through the Anglo-American legal tradition." Upham, *supra* note 138, at 1528.

Justice Thomas also examines important treaties (such as that with France resulting in the Louisiana Purchase), significant commentaries, the arguments of leading statesmen such as Daniel Webster, and, finally, the debates in Congress surrounding the adoption of the Fourteenth Amendment.[148] Justice Thomas concludes that the privileges and immunities of American citizenship were at least meant to include the "rights set forth in the Constitution."[149] As Justice Thomas argues, this "public understanding" of the meaning of the Privileges and Immunities Clause did in fact inform the public's understanding of the Privileges or Immunities Clause.[150]

Turning to Justice Thomas's examination of the Privileges or Immunities Clause, by way of general background, the Fourteenth Amendment[151] was proposed in 1866 and ratified in 1868. It is generally agreed that the amendment's most immediate task was to make newly freed slaves full and equal citizens in the post-Civil War republic in light of the continuing abuses against the former slaves by many Southern States.[152] This task was made necessary because there was no constitutional vehicle by which state, as opposed to federal, violations of the rights protected under the Bill of Rights could be addressed. Without the Fourteenth Amendment, the most basic of rights—such as the right to possess property or firearms for self-defense, the right to speak freely, and the right to be a husband or parent—were withheld from former slaves.[153] The Fourteenth Amendment also superseded the Supreme Court's pre-Civil War decision in *Dred Scott v. Sanford*,[154] holding that the Constitution did not recognize blacks equal to whites, and, as such, blacks could not be considered citizens under the United States Constitution.[155]

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148. *McDonald*, 130 S. Ct. at 3068-71 (Thomas, J., concurring in part and concurring in judgment).

149. *Id.* at 3071.

150. *Id.* at 3070-71.

151. U.S. CONST. amend. XIV ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."). *Id.* § 1.

152. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872) (holding the Fourteenth Amendment "is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other").

153. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 160 (1998); *see also* CONG. GLOBE, 39TH CONG., 1ST SESS. 504 (1866) (statement of Sen. Howard) ("He had not the right to become a husband or father in the eye of the law, he had no child, he was not at liberty to indulge the natural affections of the human heart for children, for wife, or even for friend.").

154. 60 U.S. (19 How.) 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amends XIII & XIV.

155. *Id.* at 454.

Justice Thomas began his examination of the meaning of the Privileges or Immunities Clause by turning to the debates leading to its adoption.[156] Justice Thomas focused on three speeches by major political figures involved in those debates: Representative John Bingham, the primary draftsman of Section 1 of the Fourteenth Amendment; Senator Jacob Howard, who introduced the final draft of Section 1 on the Senate floor; and Representative Robert Hale, who delivered a major speech against the adoption of Section 1.[157] Justice Thomas's review of those speeches, in addition to the understanding that continuing abuses against former slaves by many Southern States had to be corrected, supports his conclusion "that [Section] 1 was understood to enforce constitutionally declared rights against the States, and they provide no suggestion that any language in the section other than the Privileges or Immunities Clause would accomplish that task."[158]

Justice Thomas concludes his historical review with an examination of the Civil Rights Act of 1871, as well as other post-ratification interpretations of the Privileges or Immunities Clause found in speeches by members of Congress, treatises, and lower court opinions.[159] In light of this analysis of the historical record, there is much to support Justice Thomas's conclusion that the Privileges or Immunities Clause was intended to adopt the fundamental rights understanding of the Privileges and Immunities Clause and, in particular, the rights specifically set forth in the Constitution, but in such a manner as to provide the federal government with the power to enforce those rights against the States.[160]

Justice Thomas concludes his concurrence in *McDonald* by examining the Supreme Court cases that interpreted the Privileges or Immunities Clause in the years following the ratification of the Fourteenth Amendment—in particular the decisions in the *Slaughter-House Cases* and *United States v. Cruikshank*.[161] Justice Thomas's analysis echoes that of many scholars who have concluded that the *Slaughter-House Cases* and *Cruikshank* eviscerated the proper understanding of the Privileges or Immunities Clause.[162]

In particular, the *Slaughter-House Cases* drew a sharp distinction between rights that belong to *state* citizenship and those that belong to *federal* citizenship.[163] After drawing this distinction, the *Slaughter-House* Court assigned the kinds of rights set forth in *Corfield* as belonging to state citizenship, while limiting those belonging to federal citizenship to a few remaining rights

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156. McDonald v. City of Chi., 130 S. Ct. 3020, 3072 (2010) (Thomas, J., concurring in part and concurring in judgment).

157. *Id.* at 3072-74.

158. *Id.* at 3074.

159. *Id.* at 3075-77.

160. *See id.* at 3075.

161. *Id.* at 3084-87 (discussing United States v. Cruikshank, 92 U.S. 542, 548-49, 551-53 (1875); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 74 (1872)).

162. *See*, *e.g.*, Timothy Sandefur, *Privileges, Immunities, and Substantive Due Process*, 5 N.Y.U. J.L. & LIBERTY 115, 120-21 (2010).

163. *The Slaughter-House Cases*, 83 U.S. at 74.

associated with the federal government, "such as the 'right of free access to [federal] seaports,'" or the "protection of the federal government while traveling 'on the high seas.'"[164] Justice Thomas, concluding to the contrary, completes his concurrence in *McDonald* with the following observation:

> In my view, the record makes plain that the Framers of the Privileges or Immunities Clause and the ratifying-era public understood—just as the Framers of the Second Amendment did—that the right to keep and bear arms was essential to the preservation of liberty. The record makes equally plain that they deemed this right necessary to include in the minimum baseline of federal rights that the Privileges or Immunities Clause established in the wake of the War over slavery.[165]

Justice Thomas declines to examine unenumerated rights that might be implicated by the Privileges or Immunities Clause, arguing that the status of the Second Amendment's right to bear arms is the only issue before the Court.[166] He does, however, indicate that the Clause is the proper text for locating such rights and rejects Justice Stevens's claim that doing so will create "special hazards" for substantive due process jurisprudence by inviting the Justices to write their own personal views into the Constitution: "But I see no reason to assume that such hazards apply to the Privileges or Immunities Clause. The mere fact that the Clause does not expressly list the rights it protects does not render it incapable of principled judicial application."[167] As to test Justice Stevens's (and his liberal colleagues') application of the to the substantive due process analysis, Justice Thomas curtly notes, "[H]is celebration of the alternative—the 'flexibility,' 'transcend[ence],' and 'dynamism' of substantive due process—speaks for itself."[168]

In identifying the correct textual source for locating fundamental rights, Justice Thomas contends there will be less opportunity for judicial mischief in the form of a jurisprudence of personal preference.[169] But even more importantly, and unlike substantive due process, the Privileges or Immunities Clause provides a "guiding principle to distinguish 'fundamental' rights that warrant protection from nonfundamental rights that do not."[170] Another look at the debates over the Privileges or Immunities Clause reveals, however, that such a distinguishing "principle" requires more than Justice Thomas's textual and historical approach provides.

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164. *McDonald*, 130 S. Ct. at 3084-85 (Thomas, J., concurring in part and concurring in judgment) (alteration in original) (quoting *The Slaughter-House Cases*, 83 U.S. at 79 and citing Corfield v. Coryell, 6 F. Cas. 546, 552 (E.D. Pa. 1823)).

165. *Id.* at 3088.

166. *Id.* at 3086.

167. *Id.*

168. *Id.* at 3086 n.21 (second alteration in original).

169. *Id.*

170. *Id.* at 3062.

V. A FRESH LOOK AT THE DEBATES LEADING TO THE ADOPTION OF THE FOURTEENTH AMENDMENT

As Justice Thomas suggests, the debates in Congress over the adoption of the Fourteenth Amendment reveal that the Privileges or Immunities Clause was understood by others—similar to those who adopted Washington's definition of "privileges" and "immunities"—as encompassing broad protections for fundamental rights.[171] And, as Justice Thomas notes, Ohio's Representative John Bingham's understanding is particularly significant because he was the principal drafter of Section 1 of the Fourteenth Amendment.[172]

Justice Thomas references Bingham's February 28, 1866 speech on the floor of Congress introducing his first draft of Section 1 of the Fourteenth Amendment.[173] In that speech, Bingham argued that—in light of the holding in *Barron v. Mayor of Baltimore*[174]—the Amendment was necessary in order to empower Congress to enforce "these great canons of the supreme law, securing to all the citizens in every State all the privileges and immunities of citizens."[175] Justice Thomas does not mention Bingham's reference to the equal protection of privileges and immunities as part and parcel of the guiding principle of the Revolution itself.[176] With respect to that guiding principle, Bingham quoted Madison as saying, "Let it be remembered that the rights for which America has contended were the rights of human nature . . . ."[177]

Bingham elaborated on the first principles of the American regime only two years into his career as a congressman in an 1857 speech before Congress.[178] Bingham made two other major speeches in 1859[179] and 1871[180] that shed light on his overall theory of fundamental rights and privileges and immunities. Together, these four speeches reveal how Bingham's understanding of the Privileges or Immunities Clause encompassed the fundamental principles of the American Revolution, as set forth in the Declaration of Independence and the Constitution.[181]

Bingham identified three primary categories of rights concerning the nature of privileges and immunities in his speeches in 1859, 1866, and 1871: (1)

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171. *Id.* at 3072.

172. *Id.*

173. *Id.*

174. 32 U.S. (7 Pet.) 243, 251 (1833).

175. CONG. GLOBE, 39TH CONG., 1ST SESS. 1089-1090 (1866) (statement of Rep. Bingham).

176. *Id.*

177. *Id*. at 1090 (referencing the actual words of James Madison: "Let it be remembered finally that it has ever been the pride and boast of America, that the rights for which she contended were the rights of human nature." RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 119 (1971)).

178. CONG. GLOBE, 34TH CONG., 3D SESS. app. at 139-40 (1857).

179. CONG. GLOBE, 35TH CONG., 2D SESS. 981-985 (1859).

180. CONG. GLOBE, 42D CONG., 1ST SESS. 83-86 (1871).

181. *Id.*; CONG. GLOBE, 39TH CONG., 1ST SESS. 504 (1866); CONG. GLOBE, 35TH CONG., 2D SESS. 981-985 (1859); CONG. GLOBE, 34TH CONG., 3D SESS. 139-40 (1856).

fundamental natural rights, which no person or State was free to abridge; (2) fundamental rights of national citizenship, which no person or State was free to abridge, although states could regulate these; and (3) purely conventional rights, which were dependent upon local circumstances and the decision-making authorities within each state.[182] It is the interrelationship of these three categories, he contended, that allows us to understand the manner in which the Privileges or Immunities Clause protected the fundamental rights of American citizenship against abuses by the States.[183] Moreover, it is in Bingham's articulation of these basic principles, and not the history and text of the Privileges or Immunities Clause per se, that one discovers the true meaning Bingham assigned to the Clause he drafted and defended.[184] Bingham's 1859 speech will be considered first, as it involved his understanding of the Privileges and Immunities Clause of Article IV.[185]

During the debates in 1859 over whether to admit Oregon as a state, Bingham consistently maintained that there are certain paramount natural rights that all persons residing in the United States should enjoy.[186] While Justice Thomas does not reference Bingham's arguments in those debates,[187] they are helpful in understanding Bingham's view of the Privileges and Immunities Clause, out of which his understanding of the Privileges or Immunities Clause developed. In that year, Bingham had objected to the provision of the Oregon Constitution on two principle grounds: (1) that it provided to aliens who had lived in the United States for one year and in Oregon for six months the right to vote, and (2) that it denied free blacks the right to live or hold property in the State and the right to a jury trial.[188] In effecting these things, the Oregon Constitution, Bingham maintained, was repugnant to the Federal Constitution, for "whenever the Constitution guaranties to its citizens a right, either natural *or conventional*, such guarantee is in itself a limitation upon the States."[189] It was Bingham's understanding of the overlapping, but distinct, character of the rights of American citizens as partaking both of natural and conventional rights that are critical to his understanding of privileges and immunities.[190]

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182. *See* sources cited *supra* note 181.

183. *See* sources cited *supra* note 181.

184. *See* sources cited *supra* note 181.

185. CONG. GLOBE, 35TH CONG., 2D SESS. 981-85 (1859).

186. *Id.*

187. McDonald v. City of Chi., 130 S. Ct. 3020, 3071-74 (2010) (Thomas, J., concurring in part and concurring in judgment).

188. CONG. GLOBE, 35TH CONG., 2D SESS. 982-85 (1859).

189. *Id.* at 982 (emphasis added) (statement of Rep. Bingham). Bingham believed that the Supremacy Clause in Article VI gave the federal government authority, at least in theory, over the states when it came to protecting fundamental rights. *Id*. He later came to acknowledge the fact that *Barron v. Baltimore* limited any such federal authority, at least in practice, and that this necessitated the ratification of the Fourteenth Amendment. *See* CONG. GLOBE, 39TH CONG., 1ST SESS. 1089-1090 (1866).

190. CONG. GLOBE, 35TH CONG., 2D SESS. 982 (1859).

Bingham first addressed the alien suffrage issue, noting that the right to vote is a conventional or "political" right, as opposed to a natural right, strictly speaking.[191] This is because participating in the making of laws by electing representatives is an act of sovereignty belonging only to citizens, as opposed to all human beings: "What is the elective franchise, which you propose to give to aliens? It is the sovereignty of America, secured by the Constitution to the people . . . ."[192] Aliens cannot participate in acts of the sovereign because they are neither "born and domiciled within the jurisdiction of the United States," nor have yet to dedicate themselves through the oath and ceremony of the naturalization act to the Constitution.[193] Citizens "are those, and those only, who owe allegiance to the Government of the United States," and who "support and defend, if need be with his life, the Constitution of his country."[194] Thus citizens stand in contradistinction "to aliens, who owe no allegiance to our Constitution . . . ."[195]

In other words, one cannot participate in the sovereignty of a nation—one cannot be a citizen—without having dedicated oneself to the nation's principles, as embodied in the Constitution.[196] Allegiance to the Constitution, whether implicitly by birthright or explicitly by naturalization oath, Bingham argued, enabled one to enjoy the privileges and immunities of citizenship, which are additional to those natural rights enjoyed by all people.[197] In so arguing, Bingham distinguished the Due Process and Takings Clauses of the Fifth Amendment from provisions specifically protecting citizenship rights, as these Clauses protect the natural rights of all people:

> I invite attention to the significant fact that natural or inherent rights, which belong to all men irrespective of all conventional regulations, are by this constitution guarantied by the broad and comprehensive word 'person,' as contradistinguished from the limited term citizen—as in the fifth article of amendments, guarding those sacred rights which are as universal and indestructible as the human race, that 'no person shall be deprived of life, liberty, or property but by due process of law, nor shall private property be taken without just compensation.' And this guarantee applies to all citizens within the United States. That these wise and beneficent guarantees of political rights to the citizens of the United States, as such, and of natural rights to all persons, whether citizens or strangers, may not be infringed . . . .[198]

Thus, according to Bingham, natural rights such as life, liberty, and property

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191. *Id.* (statement of Rep. Bingham).
192. *Id.* at 983 (statement of Rep. Bingham).
193. *Id.* (statement of Rep. Bingham).
194. *Id.* (statement of Rep. Bingham).
195. *Id.* (statement of Rep. Bingham).
196. *Id.*
197. *Id.*
198. *Id.* (statement of Rep. Bingham).

belong to all people by virtue of their humanity, but important conventional or political rights, such as the right to vote, belong only to those who have dedicated themselves to the Nation's principles, and who can practically participate in acts of the sovereign.[199] Thus, citizens, having dedicated themselves to the nation's fundamental principles, enjoy both natural rights and additional rights attached to citizenship, while aliens enjoy only the former.[200] Oregon's Constitution was flawed, Bingham maintained, because it failed to recognize this crucial aspect of citizenship when it granted aliens—who have no loyalty to the Constitution and the principles it embodies—participation in "the sovereignty of America."[201] Natural rights are well and good, Bingham argued, but the additional rights of citizenship are available only to those who consciously dedicate themselves to a regime based on those fundamental natural rights.[202]

The Oregon Constitution had a "still more objectionable feature than alien suffrage" in its denial to free blacks the right to come into the State, or hold property therein, or have access to its courts if found in the State.[203] Immediately after reading the Privileges and Immunities Clause aloud, Bingham argued that

> citizens of the United States[ ] shall be entitled to "all privileges and immunities of citizens in the several States" . . . not to those constitutional rights and immunities which result exclusively from State authority or State legislation; but to "all privileges and immunities" of citizens of the United States . . . .[204]

Bingham acknowledged nonfundamental rights of state citizenship, and that principles of federalism allow the states to deny them to citizens of other states.[205] This is entirely consistent with Justice Washington's refusal to grant a citizen of Delaware the right to fish the oyster beds of New Jersey.[206] However, the Oregon Constitution denied free blacks both their natural rights, as well as those privileges and immunities that result from United States' citizenship.[207] By virtue of this denial, the Oregon Constitution was "in its spirit and letter . . . injustice

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199. *Id.* at 983-85. Practical considerations identified by Bingham that can limit political rights include the lack of "capacity" of children and other "such limitations as the majority see fit to impose." *Id.* at 985.

200. *Id.* at 983. This interpretation of Bingham's understanding of citizenship rights is consistent with David Upham's assessment of Justice Washington's conclusions on the same subject: "It seems that any right was a privilege of citizenship if it was membership in the political community that conferred an *entitlement* to such a right." Upham, *supra* note 138, at 1496 (emphasis added).

201. CONG. GLOBE, 35TH CONG., 2D SESS. 983 (1859).

202. *Id.*

203. *Id.* at 984 (statement of Rep. Bingham).

204. *Id.* (statement of Rep. Bingham).

205. *Id.*

206. Corfield v. Coryell, 6 F. Cas. 546, 551 (E.D. Pa. 1823).

207. CONG. GLOBE, 35TH CONG., 2D SESS. 984 (1859).

and oppression incarnate."[208]

While Bingham argued that aliens *should not* be given political rights such as the right to vote, he did not argue that all United States citizens *should* be given the vote in each state to which they traveled.[209] Oregon was not even required to provide all of its own citizens equal political rights.[210] "[T]he elective franchise is a political right," and could be "limited to some citizens to the exclusion of others."[211] These political rights, unlike natural rights, are privileges that are subject to control by majority rule.[212] In Bingham's own words, "Political rights are conventional, not natural; limited, not universal; and are, in fact, exercised only by the majority of the qualified electors of any State, and by the minority only nominally."[213] The enjoyment of such political rights are a privilege of citizenship but may be restricted when the majority decides certain citizens have not yet achieved "the capacity" to properly exercise those rights.[214]

Where the Oregon Constitution attempted to deny free blacks basic natural rights, however, Bingham declared that it violated the principle of just majority rule.[215] He declared that he could not

> consent that the majority of any republican State may, in any way, rightfully restrict the humblest citizen of the United States in the free exercise of any one of his natural rights; those rights common to all men, and to protect which, not to confer, all good governments are instituted.[216]

Just majority rule, then, may restrict certain citizenship rights when it considers

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208. *Id.*

209. *Id.* at 985.

210. *Id.*

211. *Id.* (statement of Rep. Bingham).

212. *Id.*

213. *Id.* (statement of Rep. Bingham).

214. *Id.* By implication at least, Bingham seems to be arguing that once citizens did achieve "the capacity" to exercise certain political rights, they have the right to exercise such rights. Moreover, Bingham was speaking at a time when the threat of Civil War was hanging over the nation. It is reasonable to assume that this prospect tempered his remarks, and he did not contend that free blacks should universally enjoy the right to vote. *Id.* It is noteworthy, however, that immediately after his concession that free blacks did not universally enjoy such a right, he cites approvingly those states who allowed all free citizens suffrage. *Id.* He further notes that "[t]he fact is notorious that, at the formation of the Constitution, but few of the States made color the basis of suffrage[.]" *Id.* Bingham may well have thought that the right to vote was more in the nature of a fundamental than a nonfundamental right, but the time was not right to make such an argument.

215. Bingham did not directly address the question of whether the principle of just majority rule was violated when a State denied certain citizens fundamental rights of United States' citizenship. Given his discussion of the Privileges and Immunities Clause, it seems that the principle would be violated in such instances as well.

216. CONG. GLOBE, 35TH CONG., 2D SESS. 985 (1859) (statement of Rep. Bingham).

the practical realities attending a "stab[le] . . . government."[217] These realities include evaluating the abilities of certain citizens to responsibly exercise those rights, but a majority ceases to be just when it denies to anybody the enjoyment of their natural rights.[218]

In addition to life, liberty, and property, Bingham contended that Oregon's denial to free blacks the right to a trial by jury violated a fundamental right of citizenship protected by the Privileges and Immunities Clause.[219] But it was also, he maintained, "a flagrant violation of the law of nature."[220]

Bingham concluded his description of those natural rights that are included within the privileges and immunities that all states must respect as including "the right to know; to argue and to utter, according to conscience; to work and enjoy the product of their toil, is the rock on which [this] Constitution rests."[221] The constitutional difficulty facing the nation on the eve of civil war in 1859 involved Congress's inability to force the states to abide by these privileges and immunities that are fundamental rights by virtue of their being natural rights, as well as rights of United States citizenship.[222]

Bingham viewed the Fourteenth Amendment as the constitutional cure needed for the injustices attending the (mostly southern) states' continuing denial of fundamental natural rights, as well as fundamental rights of United States citizenship, even after the conclusion of the Civil War.[223] In particular, the Privileges or Immunities Clause was designed to ensure national protection for "the privileges and immunities of all the citizens of the Republic and the inborn rights of every person . . . whenever the same shall be abridged or denied by the unconstitutional acts of any State."[224]

For Bingham, the "baseline of rights" secured by the Privileges or Immunities Clause begins with a recognition of the natural rights enjoyed by all human beings.[225] Understanding what was enjoyed by citizens beyond those natural rights required an appreciation of what was peculiar to United States citizenship, which, for Bingham, required a dedication to the principles of a regime founded

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217. *Id.*

218. *Id.* Bingham's frank assessment of the need to limit citizenship rights when practical considerations so dictated was shared by most in his day. *See* AMAR, *supra* note 153, at 135-54. Characteristically, Justice Washington stated that individuals enjoy their rights "subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole." Corfield v. Coryell, 6 F. Cas. 546, 552 (E.D. Pa. 1823).

219. CONG. GLOBE, 35TH CONG., 2D SESS. 985 (1859).

220. *Id.* (statement of Rep. Bingham).

221. *Id.* (statement of Rep. Bingham).

222. CONG. GLOBE, 39TH CONG., 1ST SESS. 1089-1090 (1866); *see also* McDonald v. City of Chi., 130 S. Ct. 3020, 3072 (2010) (Thomas, J., concurring in part and concurring in judgment).

223. CONG. GLOBE, 39TH CONG., 1ST SESS. 2542 (1866).

224. *Id.* (statement of Rep. Bingham).

225. *Id. See McDonald*, 130 S. Ct. at 3077 (2010) (Thomas, J., concurring in part and concurring in judgment).

on the protection of "the rights of human nature."[226] But, these additional rights of national citizenship, such as the right to vote, were also subject to the majority's practical decisions regarding who had "the capacity" to responsibly exercise those citizenship rights.[227] Finally, majority rule itself is circumscribed by fundamental principles, protecting "the humblest citizen of the United States in the free exercise of any one of his natural rights."[228] Thus, for Bingham, privileges and immunities—both in the Privileges and Immunities Clause and in the Privileges or Immunities Clause—include natural and fundamental rights of United States' citizenship.[229]

In 1871, three years after the adoption of the Fourteenth Amendment, Bingham explained how the fundamental rights protected by the "Privileges or Immunities" clause included the Bill of Rights: "[T]he privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States. Those eight amendments are as follows."[230] Bingham then proceeded to read the first eight amendments word for word. "These eight articles I have shown never were limitations upon the power of the States, until made so by the [F]ourteenth [A]mendment."[231]

Bingham was careful, however, to use the word "chiefly" because it made clear what his earlier comments in his 1859 speech had emphasized: "privileges" and "immunities" included fundamental natural rights beyond those enumerated in the Bill of Rights. The fundamental natural rights to life, liberty, and property were the most important of the "privileges" and "immunities" identified by Bingham in 1859 during the battle over the Oregon Constitution.[232] As noted, however, Bingham simultaneously identified unenumerated rights, such as "the right *to know*; to argue and to utter, according to conscience; [and] *to work and enjoy the product of [one's] toil*."[233] Twelve years later, while explaining to

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226. CONG. GLOBE, 39TH CONG., 1ST SESS. 1090 (1866).

227. *Id.* at 2542.

228. CONG. GLOBE, 35TH CONG., 2D SESS. 985 (1859) (statement of Rep. Bingham).

229. *Id.* The natural rights background espoused by Bingham was shared by Representative Woodbridge who asked, "What is the object of the proposed amendment? It merely gives the power to Congress to enact those laws which will give to a citizen of the United States the natural rights which necessarily pertain to citizenship." CONG. GLOBE, 39TH CONG., 1ST SESS. 1088 (1866) (statement of Rep. Woodbridge). Foremost among these, Woodbridge stated, are "the inalienable rights" of life, liberty and property. *Id*. Representative McClurg of Missouri declared that the purpose of the Fourteenth Amendment was the "natural and personal rights" of citizens. *Id*. at 1032 (statement of Rep. McClurg). For Rep. Schuyler Colfax, Speaker of the House in 1866, the Fourteenth Amendment would be "the gem of the Constitution . . . because it is the Declaration of Independence placed immutably and forever in our Constitution." *See* CINCINNATI DAILY COMMERCIAL, Aug. 9, 1866, at 2, col. 3, *quoted in* Fairman, *supra* note 124, at 73.

230. CONG. GLOBE, 42D CONG., 1ST SESS. app. at 84 (1871) (statement of Rep. Bingham).

231. *Id.* (statement of Rep. Bingham).

232. CONG. GLOBE, 35TH CONG., 2D SESS. 983-84 (1859).

233. *Id.* at 985 (emphasis added). Of course, the right to "argue and to utter" is protected

recalcitrant members of the Forty-Second Congress what the Privileges or Immunities Clause had been intended to secure, Bingham used language quite similar to the language he used in 1859: "Liberty, our own American constitutional liberty, is the right 'to know, to argue, and to utter freely according to conscience' [and] to work in an honest calling and . . . be secure in the enjoyment of the fruits of your toil."[234]

This quoted language forms part of Bingham's overall argument by which he concluded his 1871 speech explaining what he meant to achieve through the Fourteenth Amendment, and the Privileges or Immunities Clause in particular. In his concluding remarks, Bingham identifies the principles connecting the privileges and immunities of "citizens of the United States," with the principles of the Declaration of Independence and the U.S. Constitution.[235] Bingham paraphrases the Declaration as follows: "'All men are created equal and endowed by their Creator with the rights of life and liberty' . . . 'to protect these rights' (not to confer them) 'governments are instituted among men.'"[236] These principles of the Declaration, Bingham contends, were "incorporated by its makers in the Constitution," most notably in the concepts of justice and liberty set forth in the Preamble to the Constitution.[237]

Fourteen years earlier, in 1857, Bingham made a similar argument before Congress with regard to the connection between fundamental rights, the foundational principle of human equality set forth in the Declaration of Independence, and states' rights.[238] The issue before Congress was the merits of President Franklin Pierce's presidential address, which advocated protection of slave-owners' rights in the territories.[239] President Pierce contended that the doctrines of popular sovereignty and states' rights supported his position.[240] Bingham strongly disagreed:

> The Constitution is based upon the EQUALITY of the human race. In the words of Washington, "It is completely free in its principles." A State formed under the Constitution, and pursuant to its spirit, must rest upon this great principle of EQUALITY. Its primal object must be to protect each human being within its jurisdiction in the free and full enjoyment of his natural rights.[241]

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under the First Amendment.

234. CONG. GLOBE, 42D CONG., 1ST SESS. app. at 86 (1871) (statement of Rep. Bingham). Bingham's identification of the fundamental natural rights guaranteed by both the Privileges and Immunities Clause and the Privileges or Immunities Clause reinforces the observation that his understanding of the former Clause deeply informed his understanding of the latter Clause.

235. *Id*.

236. *Id.* (statement of Rep. Bingham).

237. *Id.* (statement of Rep. Bingham).

238. CONG. GLOBE, 34TH CONG., 3D SESS. app. at 139 (1857).

239. *Id.*

240. *Id.*

241. *Id.* (statement of Rep. Bingham).

Whether the issue is a territorial government seeking admission as a new state, or what right the Privileges or Immunities Clause protects,[242] the same principles apply: the State must "protect each human being within its jurisdiction in the free and full enjoyment of his natural rights."[243] A new state must not embrace slavery because it contradicts the principle of equality according to which no man is the natural ruler of another.[244] This is a precept of natural law. It follows that each person's equal enjoyment of his "natural rights" is likewise a precept of natural law. These foundational principles of the Declaration and Constitution are the ultimate "baseline of rights" that should resolve constitutional issues of first importance, and Bingham consistently referenced them when confronting the difficult issues of the day.[245]

Bingham's final speech in 1871 on the meaning of the Privileges or Immunities Clause draws attention to the peculiar nature of the rights of American citizens and how they can only be understood in light of the character of the American regime, as set forth in the U.S. Constitution and informed by the principles of the Declaration of Independence.[246] In this regard, it adds a significant layer of analysis to his 1857 speech, as it focuses on those citizenship rights that flow from a dedication to the principles of the American regime of liberty.[247] Distinguishing privileges and immunities that are fundamental from those that are not requires an appreciation of natural rights as well as the principles that define American citizenship. Those that are included in the Bill of Rights are readily identified, but Bingham makes clear that there are other rights that may be deemed fundamental that are not specifically enumerated in the Constitution, such as the rights "to know" and "to work."[248]

It is an interesting question whether Bingham considered the right to work as a natural right, like the right to property, or as a right peculiar to citizenship that could be denied to aliens. Since Bingham's discussion of the rights identified in

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242. Bingham did not directly address the question of privileges and immunities in his 1857 speech.

243. CONG. GLOBE, 34TH CONG., 3D SESS. app. at 139 (1857).

244. Bingham clearly distinguished the principle of equality from more radical concepts of egalitarianism: "Was it not because all are equal under the Constitution; and that no distinctions should be tolerated, except those which merit originates, and no nobility except that which springs from the practice of virtue, or the honest, well-directed effort of brain, or heart, or hand?" *Id.* at app. at 140. In his 1792 *Lectures on Law*, James Wilson made the distinction even more succinctly: "When we say, that all men are equal; we mean not to apply this equality to their virtues, their talents, their dispositions, or their acquirements." JAMES WILSON, *Lectures on Law: Of Man, As a Member of Society*, ch. VII (1792), *in* 1 COLLECTED WORKS OF JAMES WILSON, pt. 2 (Kermit L. Hall & Mark David Hall eds., 2007).

245. McDonald v. City of Chi., 130 S. Ct. 3020, 3077 (2010) (Thomas, J., concurring in part and concurring in judgment). *See* CONG. GLOBE, 39TH CONG., 1ST SESS. 2542 (1866).

246. *See* CONG. GLOBE, 42D CONG., 1ST SESS. app. at 86 (1871).

247. *See id.*

248. *Id.*

the previous chapter follows from his reference "to the provisions of the Constitution guarantying [sic] rights, privileges, and immunities to citizens of the United States," it would appear that it is a fundamental right of national citizenship.[249]

Bingham, then, appears to be arguing that all people should enjoy natural rights, but there are certain rights, or "privileges" and "immunities," that are more fully developed forms of natural rights. Only citizens may lay claim to these "privileges" and "immunities" as a result of their dedication to the principles underlying the Declaration of Independence and the U.S. Constitution. These more fully developed natural rights also deserve protection as fundamental rights because they partake of the status of natural rights, but in a manner peculiar to one's status as a citizen. Thus, an alien may properly assert his right to own property in the broad sense, but only a United States citizen may lay claim to the broad natural right of property ownership, as well as the additional privilege of the right to work, as a more fully developed form of the underlying natural right to property.[250]

It also seems to follow that states may not deny the right to work to sojourning citizens from other states (while they may deny that right to aliens) but may attach conditions and limitations on that right—just as Justice Washington did to the citizen from Delaware.[251] Bingham "sought to effect no change" in leaving "the care of [the rights of] the property, the liberty, and the life of the citizen" in the states.[252] Thus, for instance, a State could not arbitrarily deprive an American citizen of owning property, of free labor, or entering into contracts, but a State could regulate certain uses of property, just as Justice Washington had suggested with regard to oyster beds.[253] Bingham's appreciation of the role of states in defining and regulating property laws was "dependent exclusively upon the local law of the States."[254]

In short, Bingham understood the difference between (1) fundamental natural rights, which no person or state was free to abridge; (2) fundamental rights of national citizenship, which no person or state was free to abridge, although states could regulate these; and (3) purely conventional rights, which were dependent upon local circumstances and the decision-making authorities within each state. Only this last category of rights was outside the protection of the Privileges or Immunities Clause.

Bingham's understanding of the Privileges or Immunities Clause, as expressed in the four major speeches considered in this Article, was consistently expressed within the context of the broader principles of the revolution,[255] and to

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249. *Id.*

250. *Id.*

251. Corfield v. Coryell, 6 F. Cas. 546, 551 (E.D. Pa. 1823).

252. CONG. GLOBE, 39TH CONG., 1ST SESS. 1292 (1866).

253. *Corfield*, 6 F. Cas. at 551.

254. CONG. GLOBE, 39TH CONG., 1ST SESS. 1089 (1866).

255. Bingham's understanding of the constitutional need to balance protection of fundamental rights and principles of federalism was widely shared among the members of the Thirty-Ninth and

this end, he found it essential to examine those principles in order to decipher what was meant by the "privileges" and "immunities" of American citizenship.

It is fitting that Bingham quoted James Madison when expressing his understanding of fundamental privileges and immunities.[256] Madison also dealt with the question of fundamental rights on June 8, 1789, when he defended the adoption of the Bill of Rights against critics such as Alexander Hamilton, who thought such a Bill would lead to an increase in the powers of government. Bills of rights, Madison noted, may state the "absolute truth" of the "equality of mankind."[257] But, in addition to expressing this principle of human equality and declaring natural rights, Madison noted

> other instances, [in which] they specify positive rights, which may seem to result from the nature of the [social] compact. Trial by jury cannot be considered as a natural right, but a right resulting from a social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature.[258]

Madison hereby indicates that there are certain positive rights—such as the right to a jury trial—that are so closely connected to an underlying natural right, here, the natural right to liberty, that they may be deemed fundamental.[259] As discussed above, Bingham also argued that there are certain positive rights—such as the right to work—belonging to United States citizens that are so closely connected to the underlying natural right—the right to property—that they may be deemed fundamental in nature.[260] And, as fundamental rights, they should be included within those rights protected by the Privileges or Immunities Clause.

Bingham also appears to have shared Madison's evaluation of the right to trial by jury. In his 1859 speech discussing the privileges and immunities of United States citizens, he criticized the Oregon Constitution for denying free blacks the right to "trial by jury" and the right to general access to the courts of the state.[261] In this respect, Bingham states the

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Fortieth Congresses. *See, e.g.*, CONG. GLOBE, 40TH CONG., 3D SESS. 1003 (1869) (statement of Sen. Edmunds) ("Every lawyer knows . . . that it is one thing to have a right which is absolute and inalienable, and it is another thing for the body of the community to regulate . . . the exercise of that right."); *see* also CONG. GLOBE, 39TH CONG., 1ST SESS. 1832 (1866) (statement of Rep. Lawrence) ("The bill does not declare who shall or shall not have the right to sue, give evidence, inherit, purchase, and sell property. These questions are left to the States to determine, subject only to the limitation that there are some inherent and inalienable rights, pertaining to every citizen, which cannot be abolished or abridged by State constitutions or laws.").

256. CONG. GLOBE, 39TH CONG., 1ST SESS. 2542 (1866).

257. 1 ANNALS OF CONG. 454 (1789) (Joseph Gales ed., 1834).

258. Robert A. Goldwin, *Congressman Madison Proposes Amendments to the Constitution*, *in* THE FRAMERS & FUNDAMENTAL RIGHTS 75, 80 (Robert A. Licht ed., 1992) (reproducing Madison's Speech to the House of Representatives on June 8, 1789).

259. *Id.*

260. *See supra* discussion accompanying notes 248-49.

261. CONG. GLOBE, 35TH CONG., 2D SESS. 985 (1859) (statement of Rep. Bingham).

> provision, . . . which denies a fair trial in the courts of justice, excludes the same class of our fellow-citizens, native born, forever from the territory of that State. This is not only a violation of [the 14th Amendment], . . . but it is, I maintain, a fragrant violation of the law of nature.[262]

Both Madison and Bingham, it appears, considered the right to trial by jury to be a positive right of citizenship, but one so closely connected to an underlying natural right of liberty that it should be considered fundamental in nature. For Bingham, this meant that certain rights of United States' citizenship, such as the right to work and to a trial by jury, are sufficiently fundamental as to come under the protection of the Privileges or Immunities Clause.[263] For both the Father of the Constitution and the Father of the Privileges or Immunities Clause, it seems, fundamental rights are to be determined by the degree of proximity the particular right in question bears to "the rights of human nature[.]"[264]

In the Senate debates on the Fourteenth Amendment, Senator Jacob Howard, who spoke on behalf of the Joint Committee responsible for the language in the Fourteenth Amendment, distinguished between two categories of "privileges and immunities of citizens of the United States as such."[265] The first were those "privileges and immunities of citizens of each of the States in the several states," to which Article IV, Section 2, refers.[266] With respect to this first category, Howard quoted in its entirety the relevant passage of Justice Washington's opinion in *Corfield*, including Washington's reference to fundamental natural rights.[267]

Howard then spoke of a second category of privileges or immunities that should be added to the first category, and these consisted of "the *personal rights* guarantied [sic] and secured by the first eight amendments of the Constitution."[268] On this category, he concluded as follows: "The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."[269] The combination of Justice Washington's reference to fundamental natural rights—those rights "which are, in their nature, fundamental"[270] —and the specific fundamental rights listed in the first eight amendments to the Constitution shows Howard's general agreement with Bingham that the first eight amendments contained some, but not all, of the fundamental natural rights which all states must observe. For Howard, as much as for Bingham, the "privileges or

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262. *Id.*

263. *Id.*

264. CONG. GLOBE, 39TH CONG., 1ST SESS. 1090 (1866) (statement of Rep. Bingham).

265. *Id.* at 2765 (statement of Sen. Howard).

266. *Id.*

267. *Id.* (quoting Corfield v. Coryell, 6 F. Cas. 546 (E.D. Pa. 1823)).

268. CONG. GLOBE, 39TH CONG., 1ST SESS. 2765 (1866).

269. *Id.* at 2766.

270. *Corfield*, 6 F. Cas. at 551.

immunities" clause was intended to ensure that these rights were operative against the states.

CONCLUSION

As Justice Thomas points out, many scholars have concluded that Justice Miller's narrow reading of the Privileges and Immunities Clause in *The Slaughter-House Cases* was mistaken.[271] They have continued, however, to hotly debate the question of whether the Clause was intended to incorporate the Bill of Rights.[272] But, as Bingham, his colleagues in the Reconstruction Congress, and Justice Thomas, make clear, this debate misses the most important point: the Privileges or Immunities Clause was meant to guarantee to all American citizens certain rights that are fundamental in nature. The determination of what rights are fundamental, in turn, depends on the extent to which they reflect natural, as opposed to political or conventional, rights.

As the foregoing discussion suggests, members of the Reconstruction Congress, and John Bingham in particular, followed the lead of Justice Washington in *Corfield v. Coryell* in maintaining that there are fundamental rights beyond those set out in the Bill of Rights that belong to citizens of the United States.[273] Some of these additional fundamental rights are natural rights per se. Some, however, are those rights—such as the right to work, or the right to trial by jury—that builds upon natural rights, and are so closely connected with the underlying natural right that they may be considered fundamental in nature. In the words of James Madison, they are not pure natural rights, but "result from the nature of the . . . social compact . . . [and are] as essential to secure the liberty of the people as any one of the pre-existent rights of nature."[274] This represents the "baseline of rights" Justice Thomas is seeking.

In his textual and historical argument in favor of redirecting fundamental rights jurisprudence to the Privileges or Immunities Clause, Justice Thomas neglects this deeper level of analysis so central to the leading architects of the Clause. He does so, to be sure, in the name of judicial restraint.[275] But, as noted

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271. McDonald v. City of Chi., 130 S. Ct. 3020, 3084-86 (2010) (Thomas, J., concurring in part and concurring in judgment).

272. *See, e.g.*, discussion *supra* note 120. Amar has the stronger argument.

273. *See supra* notes 137-45 and accompanying text.

274. 1 ANNALS OF CONG. 454 (1789) (Joseph Gales ed., 1834).

275. In this regard, Justice Thomas follows his colleague, Justice Scalia. Justice Scalia consistently eschews the Supreme Court Justices' willingness to import their own views into the Constitution and argues that the decisions concerning unenumerated fundamental rights should be referred to the legislative branches. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 999-1002 (1992) (Scalia, J., concurring in judgment in part and dissenting in part); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 300 (1990) (Scalia, J., concurring). While it is beyond the scope of this Article to address this question in detail, one obvious response to this formulation of judicial restraint is that a primary reason for the existence of the Constitution is to restrain the legislative power, and tyrannical majorities in particular. Hence the determination of why and

above, he thereby allows those on the liberal side of the Court who advance a novel definition of fundamental rights to go unanswered. Moreover, he foregoes the example set by those Supreme Court Justices who, in the face of questions of first importance, were willing to go beyond the history and text of the Constitution and reflect upon the deeper principles supporting that history and text. Justice Thomas's ambitious effort to redirect fundamental rights jurisprudence away from over one hundred and thirty years of Supreme Court precedent upholding substantive due process would seem to be a question of first importance.

In the end, the history and text of the Privileges or Immunities Clause will offer little by way of "guidance" for future Court decisions on fundamental rights issues involving abortion, sodomy laws, the legal status of the marital union, and the right to privacy, in general, for the history and text of the Clause is silent on these matters. In short, the Privileges or Immunities Clause, on its own terms, will supply little guidance for future fundamental rights jurisprudence. As noted, the members of the Thirty-Ninth Congress, like the Founding Fathers, did not shy away from arguing that rights were deserving of being considered fundamental to the extent that they coincided with natural rights. Justice Thomas's historical and textual approach eschews this deeper level of analysis. As a consequence, when it comes to unenumerated rights, he cannot supply the "guiding principle" to fundamental rights jurisprudence that he claims will follow the resurrection of the Privileges or Immunities Clause.

As discussed, natural law and natural rights are viewed by the Academy and the Supreme Court with extreme skepticism; natural rights are perceived as ghosts of a bygone age, "exist[ing] only in the kingdom of mytholog[y]."[276] Justice Thomas once dismissed his embrace of natural law jurisprudence as the musings of "a part-time political [philosopher]."[277] And, although he has referred to the principles of the Declaration of Independence on numerous occasions while on the Supreme Court, he avoids referring to natural law or natural rights when speaking in his own name in his concurrence in the *McDonald* decision.[278] He does, however, continue to employ the language of the Declaration of Independence by referring to the "inalienable rights" of all people.[279] Justice Thomas may have simply decided that directly embracing natural law jurisprudence has no realistic chance of success in today's intellectual climate. This approach requires Justice Thomas to speak of the Declaration's reference to "unalienable rights," while at the same time ignoring its more general reference

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when certain rights are fundamental, and some are not, cannot be turned over to the legislative branches.

276. DEWEY, *supra* note 68. *See also* MERRIAM, *supra* note 65, at 313.

277. *See The Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearings on S. 102-1084 Before the S. Comm. on the Judiciary*, 102d Cong. 116 (1991) (statement of Judge Clarence Thomas).

278. McDonald v. City of Chi., 130 S. Ct. 3020, 3059-86 (2010) (Thomas, J., concurring in part and concurring in judgment).

279. *See, e.g.*, *id.* at 3065.

to the "laws of Nature and of Nature's God."[280] But, to the Founders and men such as John Bingham, natural rights were the only coherent basis for understanding fundamental rights.

Focusing on the Privileges or Immunities Clause is valuable to the extent that it requires thoughtful consideration of whether and to what extent American citizens are entitled to natural rights by virtue of their being members, or citizens, of the American body politic. Neither the federal nor state governments, then, can deny these fundamental natural rights or principles that flow, of logical necessity, from those natural rights that have been embodied in the American regime: "Let it be remembered that the rights for which America has contended were the rights of human nature[.]"[281] But, in the final analysis, whether located in the Privileges or Immunities Clause or the Due Process Clause—or for that matter in any other clause of the U.S. Constitution—"life, liberty and property" are differently defined depending upon whether they are understood as permanent truths within the Natural Law tradition, or evolving concepts within the tradition of Historicism and Progressivism. It is then less important to identify *where* in the U.S. Constitution our fundamental rights come from, than *how* we are to understand those fundamental rights wherever they are located.[282] Unless and until Justice Thomas makes this argument, his critics on the left and right will likely continue doubting Thomas.

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280. THE DECLARATION OF INDEPENDENCE, paras. 1-2 (U.S. 1776).

281. CONG. GLOBE, 39TH CONG., 1ST SESS. 1090 (1866).

282. Justice Stevens made this point quite forcefully in his M*cDonald* dissent: "Whether an asserted substantive due process interest is explicitly named in one of the first eight Amendments to the Constitution or is not mentioned, the underlying inquiry is the same: We must ask whether the interest is 'comprised within the term liberty.'" 130 S. Ct. at 3092 (Stevens, J., dissenting).