The Constitution of Economic Liberty

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Professor Siegan maintained that the Constitution protects economic liberty, which he described as "the right to produce and distribute goods and services."[1] As is so often the case with the Constitution, the interesting question is not whether it pursues some desirable goal, but how it does so, and how much. I will suggest that the Constitution as drafted does indeed take many steps to ensure that the people will be able to produce and distribute goods and services in a relatively free market based on private property and freedom of contract. It does so, however, the way it pursues most of its ultimate goals, indirectly. The Constitution provides

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1. BERNARD H. SIEGAN, THE SUPREME COURT'S CONSTITUTION 41 (1987).

for the common defense, not by saying that there shall be a common defense, but through a series of much more concrete steps ranging from Congress's power to raise and support armies to limitations on the states' capacity to do so, and thereby embroil the rest of the country in war.[2] It establishes justice, not by stating that there shall be justice, but through a series of provisions that deal with the courts and judicial matters.[3] And it pursues its first goal of all, to form a more perfect Union, not by saying that there shall be one, but by forming a more perfect Union.[4] That is how the Constitution protects economic liberties.

Section I of this paper presents a positive account of the Constitution based on descriptive claims that I hope are relatively uncontroversial. It is positive in this sense: it provides an explanation of the Constitution in terms of the purposes that would have led reasonable drafters to produce it. As the topic of this symposium is the constitutional protection of economic liberty, I ask how a reasonable group of drafters, at the time the Constitution's provisions were written, could have adopted those provisions in order to foster a free economy. That produces an account of how the Constitution was designed to ensure economic freedom. The dominating theme is that the Constitution does so without taking the most obvious and direct step in that direction, which would be to provide the basic private rights that together constitute economic liberty. Instead, at a number of important points, the Constitution takes those rights for granted, as already existing under state law, and reinforces them without simply determining their content.

Section II is interpretive, making claims about the meaning of the Constitution. It takes issue with Professor Siegan, arguing that the Constitution gives economic interests hardly any protection in the form that we associate with guarantees of individuals rights. This section defends the position that the Constitution does not itself provide the legal rules that establish private rights to property and contract, nor does it strongly constrain what the states and Congress may do when they create, change, and regulate those rights. Section II focuses mainly on the Privileges or Immunities Clause of the Fourteenth Amendment, in which Professor Siegan found powerful constitutional safeguards for economic freedom, and maintains that the Clause operates indirectly, by requiring equality among citizens, and not directly on the substance of state private law.[5]

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2. *See* U.S. CONST. art. I, § 8; U.S. CONST. amend. II.
3. U.S. CONST. art. III.
4. *See* U.S. CONST. pmbl.
5. U.S. CONST. amend. XIV; SIEGAN, *supra* note 1, at 77–79.

Section III is historical and normative. It uses the country's history under the Constitution to approach the question whether it would be desirable for the Constitution to protect economic liberty more directly, or, if one agrees with Professor Siegan, whether it is desirable for the Constitution to protect economic liberty in the direct manner it does. I give some reasons to believe that it would not be.

I. THE CONSTITUTION'S INDIRECT APPROACH TO ECONOMIC LIBERTY

A. Federal and State Power and a Free Economy

By *economic liberty*, I mean a legal system in which decisions about production and consumption are made by private individuals, not collectively through government. In order for individuals to make economic decisions, they must have control over resources and be able to make agreements concerning those resources and their activities, which means that the government must protect private property and enable people to bind themselves through contracts. Property and contract are, in a manner of speaking, forms of public power. Economic liberty exists when other forms of public power, which would transfer operational control from private people to the state, are limited.

In order to decide whether there is economic liberty, and what the Constitution does about it, it is thus necessary to consider both the foundational private legal advantages of property and contract and the powers of government to impose additional controls. Under the American Constitution, the first question concerning economic freedom involves the allocation of those powers between the states and the national government.

Federalism, the Constitution's fundamental feature, has several facets. Probably the most familiar to students of constitutional law is the principle of enumerated federal power: the national government is not omnicompetent, but rather has only the particular powers granted to it.[6] Next most familiar is the political autonomy of the states. State governments are not regional departments of the national government.[7] They have their own constitutional powers derived directly from popular

6. U.S. CONST. amend. X.

7. *See, e.g.*, Printz v. United States, 521 U.S. 898, 935 (1997) (holding that Congress may not require that state officers execute federal law).

sovereignty, and the power of the national government to regulate them as such is quite limited.

Less familiar, though as important as the air we breathe, is the converse of enumerated federal power and a complement to the political autonomy of the states. Each state is a complete political and legal system, at least as to internal matters, and is not dependent on a higher level of government.[8] That principle, combined with the limited grants of national power, means that the legal foundations of economic freedom are found in state law. State law, not federal law, creates the legal rules that provide basic rights of property and contract and protections thereof, for example through the law of torts.[9] To know how an individual acquires property in Virginia and makes arrangements about it with other individuals, one looks to the law of Virginia, not the United States. Moreover, the states have substantial power to regulate private economic transactions. That arrangement is secured by the Federal Constitution through the limited ability of the national government to legislate on those topics and its very limited ability to command the states in their legislation.

That structure protects economic liberty, in the sense in which I am interested, if reasonable Constitution drafters could have adopted it for that purpose. I believe that they could have and indeed to a substantial extent did.

It is tempting to think that the reason most questions concerning economic rights were left to the states by the Constitution's drafters is simply that the states already existed as complete legal systems and consolidation was not on the agenda. No one took seriously the possibility of simply replacing the states with a single government that would, among other things, prescribe the basic rules of private ownership and

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8. The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in union there could be no such political body as the United States.

Lane County v. Oregon, 74 U.S. 71, 76 (1869).

Nowhere is the theory and practice of American federalism more significantly revealed than in the constitutions of the states. These constitutions assume responsibility for dealing, and claim authority to deal, with the whole gamut of problems cast up out of the flux of everyday life in the state, save only in the particular respects in which the Federal Constitution or statutes deprive the states of any competence whatever or provide for an overriding or displacing federal law.

Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 491 (1954).

9. Hart, *supra* note 8, at 491.

trade. But there are reasons consolidation was not considered—reasons that justify the Framers' decision—that I will sketch presently.

It is also tempting to think that, in any event, the structure I have described, however it came to be adopted, simply cannot qualify as constitutional protection of economic rights. Today, it is natural to think that constitutional protection of any right simply means that the United States Constitution contains a provision, enforced by the judiciary and ultimately interpreted by the Supreme Court of the United States, that limits the governmental power of the national or state governments, or both. That is certainly the kind of constitutional protection of rights that is most discussed by contemporary scholars of constitutional law, but here as elsewhere, synecdoche is a trope and not a literal description; the part with which we are most familiar is not the whole. If a constitutional arrangement significantly increases the likelihood that certain legal advantages will be available, it protects them.

At the time of the framing, as today, the states were democracies with their own constitutions and their own legal systems based on the common law but with adaptations to local conditions. Those legal systems secured private rights of property and contract. Those constitutions established and secured democracy. The greater political entity that the states in union form, the United States, is also a constitutional democracy with a legal system that rests on private property and contract—because it is composed of the legal systems of the states. The justification of the Constitution's arrangement, with respect to the security of economic freedom, thus must be found in an argument in favor of decentralization on these topics.

That argument is straightforward and has been well known to Americans from the founding until today. Conditions, especially economic conditions, vary from state to state, and legal arrangements should vary with them. It is commonplace that legal arrangements governing water ownership and use should vary with topography, differing from the rainy East to the arid West.[10] A part of the country with much manufacturing might find it worthwhile to replace its tort system with one of workers' compensation for industrial accidents, while another that is primarily agricultural might find the additional administrative burden not worth the trouble. It is true

10. A classic statement of the common law principle of riparian rights is found in *Tyler v. Wilkinson*, 24 Fed. Cas. 472, 474 (C.C.D.R.I. 1827) (No. 14,312). Western states generally follow the principle of prior appropriation. TARLOCK, CORBRIDGE, & GETCHES, WATER RESOURCE MANAGEMENT 149 (4th ed. 1993).

that a single government can adopt varying rules from one region to another, but in doing so, it must process more information, and deal with more constituencies, than a lower level of government.[11]

While the Constitution's structure mainly leaves the question of private rights to the states, it does take one crucial step that grants some authority to a higher level government, one designed to produce a carefully calculated form of integration of the disparate parts of this Union. The Privileges and Immunities Clause of Article IV ensures that citizens of every state may do business in every other state and enjoy the same civil rights of property and contract that the state's own citizens enjoy.[12] This Clause licenses variety while leveraging the ability of democracies to make law that is congenial to those who will live under it. And it deals with the pathology of discrimination against inadequately represented outsiders by giving those outsiders the benefits that the insiders have devised for themselves. In a stroke, it produces many of the advantages of a uniform national private law without adopting one or empowering the national legislature to do so.[13]

So far, I have stressed the states' side of federalism, emphasizing the argument in favor of leaving them to make most of the law that produces a free economy. The other key component of federalism is the limited empowerment of the national government. A few rules of property and contract are to be made by the national legislature, and these exceptions show the design underlying the rule. Congress has power to create two

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11. Students of the American constitutional system will immediately respond to this argument in favor of decentralization by thinking of THE FEDERALIST NO. 10 (James Madison), and Madison's famous argument that a territorially larger government will more fully secure private rights than will a smaller, less extended polity. THE FEDERALIST NO. 10 (James Madison). Those who believe Madison should rest easy, and perhaps think that the Framers who rejected his scheme for a national veto were foresighted. Madison's argument is about pure, not relative, scale. He maintained that a larger country would have more contending factions to counteract one another, and more individuals of virtue to manage them, than would a smaller country. Madison believed, or at least had to claim, that this country in 1787 was large enough to accomplish his goal. The United States in that year had less than half the population of the City of New York today. Even small governmental units have long since become large enough to satisfy his requirements.

12. Article IV provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1. "Derived, like the Commerce Clause, from the fourth of the Articles of Confederation, the Privileges and Immunities Clause was intended to create a national economic union. It is therefore not surprising that this Court repeatedly has found that 'one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.'" Supreme Court of N.H. v. Piper, 470 U.S. 274, 279–80 (1985) (citation omitted).

13. Of course, this approach does not achieve all the advantages of uniformity. But it makes possible the advantages of non-uniformity, while leaving the states free to obtain the benefits of pure coordination voluntarily, as they have often done.

specified forms of intellectual property: patents and copyrights.[14] The Constitution thereby enlists a national market to provide incentives for art and invention while avoiding the difficulties and possibilities for local exploitation that would arise were every work of art to need a copyright, or every invention a patent, in every state. Without such national power, Rhode Island could become a haven for infringers without violating its obligations under the Privileges and Immunities Clause, allowing citizens and noncitizens alike to publish pirated works and duplicate patented devices. Even without bad behavior, authors and inventors would be deterred by the prospect of complying with the laws of each state separately.

Congress also has some authority with respect to contract law—and economic affairs more broadly—authority that once again illuminates the many areas in which Congress has none. The commerce power extends to commercial relations that cross lines of sovereignty, be they those of a state, of the United States, or of the quasi-sovereign Indian tribes—some of which were more than just quasi-sovereign when the Constitution was adopted.[15] It enables Congress to provide uniform rules of commercial law—though exactly how far it reaches in that respect is unclear—but the commerce power's more important function is to eliminate a collective action problem that the states otherwise would have. Left to their own devices, they would be tempted to impose restrictions on importation and exportation, and possibly on businesses conducting such commerce out of state, in order to prefer local production and business. Congress can replace or simply override laws that discriminate in that fashion. Commercial laws of New York that discriminate between Albany and Rochester, by contrast, are left to the voters of New York.

Congress also has power over contracts at the back end, as it were, power that once again illuminates the larger design. It can adopt uniform rules of bankruptcy, and thereby coordinate the claims of creditors, who may be from any state or another country, and enable discharges that will be respected throughout the United States.[16] Once again, this power yields the benefits of uniformity—purchased with its costs—and bars

14. U.S. CONST. art. I, § 8, cl. 8.

15. Article I provides that Congress has the power to regulate commerce with foreign nations, among the states, and with the Indian tribes. U.S. CONST. art. I, § 8, cl. 3.

16. U.S. CONST. art. I, § 8, cl. 4.

some forms of state defection. States would be tempted to favor their own, be they debtors or creditors, by granting bankruptcy relief generously for debtors or refusing to recognize it against creditors. A state with disproportionately many members of one group might adopt a nondiscriminatory approach to bankruptcy that nevertheless is hostile to outsiders.

Free economies need a stable currency in addition to rules of property and contract. The Constitution authorizes Congress to supply one by giving it the exclusive power to coin money and the preemptive power to specify the dollar value of coin.[17]

As that last observation reminds us, the Constitution goes beyond forming the states into a federal union and creating a general government with certain specified powers.[18] It also imposes explicit restrictions on the states, restrictions in addition to those imposed by their own constitutions.[19] Some of those restrictions complement affirmative grants of power to the national government by making those grants exclusive or partly so. Only the President and Senate may enter into a commercial treaty, not New Jersey alone, because states are forbidden from making treaties.[20] They may not intrude into that national sphere, just as they may not confuse matters by coining their own money.[21]

Other restrictions on the states, however, are of the kind especially familiar to constitutional practice today, and limit government power rather than allocating it only to one level. States may not make anything other than gold or silver coin a tender in payment of debts, nor may they impair the obligation of contracts.[22] They are thus sharply limited in their ability to adopt debtor relief legislation. The ban on tender laws attacks one well-known tool to that end, while the more general Contracts Clause secures existing contractual obligations against legislative alteration.[23]

In doing so, the Contracts Clause adopts the Constitution's characteristic strategy of protecting nonconstitutional private rights without creating them itself. The Constitution does not determine which contracts, if any,

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17. Congress has power to coin money and regulate the value thereof and of foreign coins, and the states are forbidden to coin money. U.S. CONST. art. I, § 8, cl. 5; U.S. CONST. art. I, § 10, cl. 1.

18. U.S. CONST. art. I, § 8.

19. U.S. CONST. art I, § 10.

20. U.S. CONST. art. I, § 10, cl. 1.

21. *See id.*

22. *Id.*

23. The Constitution's provisions concerning state legal tender laws and related legislation are discussed in *Craig v. Missouri*, 29 U.S. (4 Pet.) 410, 417–18 (1830), and the Contracts Clause is discussed in *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 123 (1819).

have legal obligation.[24] More generally, it does not prescribe a law of contracts. Rather, it assumes that the states will have one, and blocks a dangerous mode of changing it. It thus uses a nonconstitutional baseline, here one located in time, in order to secure economic liberty without directly legislating on the topic.

Through selective grants of power to Congress, and limitations on the states that still leave them with very broad discretion as to the content of private rights, the Constitution was set up to promote a free and successful national economy while saying hardly anything about the content of the legal infrastructure that would support it.

Congress is not the only branch of the national government, and its powers are not the entire story of that government's role in supporting a free economy. Even the best rules of property and contract will produce disputes, so the quality and impartiality of dispute resolution is important to economic liberty. Article III, which sets out the jurisdiction of the federal courts, can in large measure be justified on the grounds that it too fosters economic liberty.[25] Much of the Article III jurisdiction is implicitly about trade. The admiralty jurisdiction overwhelmingly is so, and diversity jurisdiction applies to disputes between citizens of different states, or between Americans and foreigners, that are very likely to arise from interstate and international business dealings.[26] Such cases would tempt state courts to misbehave, favoring their own against outsiders, and thereby threatening either the harmony of the Union or its relations with foreign countries.

Here too the Constitution's approach is more modest than it could be. One way to deal with such bias would be to take the substance of the law out of the hands of the states, by restricting them or empowering Congress or even directly adopting the substance of the law in the Constitution. Instead, the drafters of Article III took for granted a

24. Ogden v. Saunders, 25 U.S. 213, 215 (1827) (finding that state law, not the Constitution, creates the obligation that contracts may not be impaired).

25. *See* U.S. CONST. art. III.

26. Article III extends the judicial power of the United States to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to all Cases of admiralty and maritime Jurisdiction; . . . to Controversies . . . between Citizens of different States . . . and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects." U.S. CONST. art. III, § 2, cl. 1. The particular treaty that the Framers most had in mind with the treaty-based jurisdiction, the Treaty of Peace with Great Britain, was important mainly because of its clause protecting the rights of British creditors in the United States. Definitive Treaty of Peace, U.S.-Gr. Brit., art. IV, Sept. 3, 1783, 8 Stat. 80.

relatively benign lawmaking process, and dealt with possible bias in adjudication by providing unbiased adjudicators.[27] They provided for the creation of federal courts staffed with life-tenured judges selected by the national government—and with no participation by the only directly elected part thereof, the House of Representatives.[28] Article III enables Congress to give those courts extensive jurisdiction over cases implicating economic transactions, but the grant of jurisdiction to the federal courts did not entail a grant of law-making power either to those courts or to Congress.

II. SUBSTANTIVE PROTECTION OF ECONOMIC RIGHTS AND THE PRIVILEGES OR IMMUNITIES CLAUSE

As I have described it, the Constitution's protection of economic liberty is real, but in an important sense, indirect. Not only does the Federal Constitution not itself contain the fundamental rules of property and contract that are the foundation of economic activity and interaction, it allows the states enormous leeway in deciding what their rules on those topics shall be. And while it gives Congress only limited powers in this area and others, it leaves the national legislature with very broad policy discretion in the exercise of those powers.

My description of the Constitution, and the justification I have suggested, involves very little of what most people today would think of as constitutional protection: affirmative restrictions in favor of the interest being served—here private property and free markets. That omission reflects the fact that the extent to which the Constitution contains such limitations is a matter of controversy, and so a description of well-accepted aspects of the system cannot assume their existence.

Here I will advance the interpretive claim that in fact the Constitution contains very little by way of restrictions on government in favor of economic rights. In particular, I believe that neither Congress nor the states are subject to a general requirement that their laws governing economic rights and activity, or any of their other laws, be reasonable. States may severely limit freedom of contract and choose the extent to which property shall be held privately or by the government itself. Congress may exercise its regulatory powers, for example, over interstate business transactions, in a way that gravely restricts those transactions.

Students of Professor Siegan's work will recognize that here I part company with him, and with Professor Richard Epstein, another contributor to this symposium and the foremost exponent today of the position that

27. U.S. CONST. art. III.
28. U.S. CONST. art. III, § 1.

he shares with Professor Siegan and that I do not.[29] Professor Siegan believed in particular that Section One of the Fourteenth Amendment imposes strong limits on the discretion of the states with respect to rights of property and contract. Of Section One's components, the most plausible vehicle for the imposition of such limits is the Privileges or Immunities Clause, as it is the part that refers most directly to rights of property and contract. Those rights were routinely referred to as privileges and immunities of citizens in the nineteenth century, and are protected from discrimination by the Privileges and Immunities Clause of Article IV.[30]

As David Currie explained, the Privileges or Immunities Clause was originally understood to perform the function now attributed to the Equal Protection Clause.[31] By requiring that every state accord all of its citizens the same civil rights, it was thought to forbid discriminatory legislation like the southern Black Codes and to write into the Constitution the anti-discrimination rule of the Civil Rights Act of 1866.[32] If that is correct, the Fourteenth Amendment follows the now familiar strategy of identifying a nonconstitutional baseline of private rights. Indeed, its Privileges or Immunities Clause closely resembles Article IV's Privileges and Immunities Clause. Both extend to a less favored group the civil rights that the nonconstitutional law accords to a more favored group. Article IV gives Americans from other states the rights of state citizens.[33] The Fourteenth Amendment gives citizens who have been discriminated against, paradigmatically blacks and freed slaves, the rights of those who are not discriminated against because they make the laws, paradigmatically free white citizens.[34] Neither provision requires that the Constitution itself say what those civil rights are, yet each protects them, and the economic liberty they provide.

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29. Professor Siegan's views were set out most fully in BERNARD H. SIEGAN, THE SUPREME COURT'S CONSTITUTION (1987). Those of Professor Epstein are found in many works, most notably RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

30. A classic discussion by Justice Washington on circuit of the Privileges and Immunities Clause, and the legal advantages it protects, is found in *Corfield v. Coryell*, 6 Fed. Cas. 546, 549 (C.C.E.D. Pa. 1823) (No. 3230).

31. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888, at 347–51 (1985); *see also* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1387 (1992).

32. Harrison, *supra* note 31, at 1402–04, 1414–24.

33. U.S. CONST. art. IV.

34. U.S. CONST. amend. XIV.

It is thus true that the Privileges or Immunities Clause protects economic liberty, and indeed rights of property and contract. Those are indeed the stuff of citizenship. But it does not do so the way the First Amendment protects the freedom of speech.[35] It does so in a way consistent with both federalism and the capacity of nonconstitutional decisionmakers to change legal rules to adjust to changing circumstances.

Professor Siegan did not share this view of the Fourteenth Amendment.[36] He believed not only that it protects rights of property and contract, but that it goes beyond equality and substantively constrains state law. It seems likely to me that he reached that conclusion by combining a widely shared but erroneous premise with a correct premise. The widely shared but erroneous assumption, adopted by the Supreme Court in the *Slaughter-House Cases*, is that the provision is substantive like the First Amendment.[37] The correct assumption is that the privileges and immunities that it shields include economic rights. Put those two together and you have a plausible but incorrect interpretation.

Despite that argument's appeal, it is unlikely that the Clause has a substantive aspect insofar as it relates to economic rights in general.[38] The Clause forbids the states from abridging the privileges or immunities of citizens of the United States. The most common textual route to a substantive reading is to argue that whatever else it does, the Clause protects rights of distinctively national citizenship, as even *Slaughter House* agrees.[39] Next comes the more adventurous move: to say that United States citizenship brings with it the most basic rights, including, for example, the right to earn a living.

But it does not, because of American federalism and the related principle of enumerated federal power. As I have emphasized, the Constitution left basic questions of property and contract, and indeed bodily integrity and self ownership, to the states and their law.[40] The

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35. U.S. CONST. amend. I.

36. For example, Professor Siegan endorsed the level of protection of contract rights associated with *Lochner*. SIEGAN, *supra* note 1, at 81.

37. The Court in the *Slaughter-House Cases* found that the Clause provides substantive protection, but only to the rights of distinctively national citizenship. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 74 (1873). An example of a substantive reading of the Clause in which its protections are not so limited is John C. Eastman, *Re-evaluating the Privileges or Immunities Clause*, 6 CHAP. L. REV. 123 (2003).

38. By putting it that way, I mean to exclude the question of incorporation of the Federal Bill of Rights against the states; the first eight Amendments do deal with property rights, but that is not what I am concerned with here.

39. Slaughter-House Cases, 83 U.S. 36, 74 (1873).

40. It may seem that I am arguing in a circle and that the question is whether the Fourteenth Amendment makes rights of property and contract into rights of national citizenship. There is an argument, but no circle. In fuller form, my reasoning is as follows: Absent the Fourteenth Amendment, the Constitution allocates to the national

most striking sign of this is the limited grant of powers to Congress, a grant that does not include, for example, authority to adopt a national law about the acquisition and transfer of real estate. In a system of federalism like this one, rights of national citizenship are those that are either granted by the national constitution or about which the national legislature may legislate. Patents and copyrights are associated with national citizenship, but real estate is not.

As the example of intellectual property points out, to say that basic economic rights come with national and not state citizenship would imply that the states may not legislate about them at all, not that state legislation is somehow limited. Patent holders have the rights that Congress gives them, no matter what state law may provide.[41] If the Fourteenth Amendment somehow transforms all property rights into accompaniments of national citizenship, then it strips the states of any control over them. This point is the flip side of Justice Field's argument in *Slaughter House* that the protection of distinctively national rights could not have been the point of the Amendment, because the Supremacy Clause already accomplishes that goal; Field was right about that.[42] It does not, however, empower Congress to supply the missing legal content. Section Five authorizes the national legislature to enforce the prohibition on the states; it does not provide for the creation of a national code of private law, nor does the Constitution do so elsewhere.

Americans have two citizenships, as the Fourteenth Amendment itself recognizes.[43] The allocation of individual rights between those two citizenships reflects the allocation of legislative authority between the two levels of government. When Justice Miller, to the amusement of

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government very little power concerning basic civil rights, and so leaves the vast bulk of that power with the states. In referring to privileges and immunities of citizens of the United States, the Privileges or Immunities Clause does not purport to create any new rights; it points to those that otherwise exist. It has no language conferring or defining rights and refers to a body of legal advantages that exist without it.

41. U.S. CONST. art. VI, § 2.

42. Justice Field argued that if the Privileges or Immunities Clause was limited to protecting rights of distinctively national citizenship, it was pointless because state interference with such rights already was forbidden by the Supremacy Clause of Article VI. "With privileges and immunities thus designated or implied [by national citizenship] no State could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and the laws of the United States always controlled any State legislation of that character." *Slaughter-House Cases*, 83 U.S. at 96.

43. U.S. CONST. amend. XIV.

subsequent readers, listed access to the navigable waters of the United States as a privilege of national citizenship in *Slaughter House*, he was not seeking to mock the plaintiffs' argument or give them cold comfort.[44] He was giving an example of a subject matter governed by national legislative power—maritime commerce—private rights as to which were therefore likewise national. More broadly speaking, Miller's list reflects his understanding of the allocation of sovereignty between the states and the United States. National citizenship and national sovereignty go together, as state citizenship and state sovereignty go together.

Faced with the Constitution's allocation of most private rights to state authority, proponents of the claim that the Privileges or Immunities Clause imposes substantive constraints on the state law of private rights may adopt a different approach, one that begins by agreeing that property rights are mainly matters for state law, state sovereignty, and state citizenship. The next step then would be to say that the national Constitution, to some extent, determines the legal rights that come with state citizenship, while not associating those rights with national citizenship. Although that might seem a strange way of going about things, it is not simply inconceivable. The Constitution takes steps to ensure that state legislatures will remain republican without thereby turning them into Congress.[45]

Although the Constitution could do that, the text of the Privileges or Immunities Clause does not. Its structure is parallel to similar provisions that deal with abridgements by the states of rights under state law, including the provisions about voting like the Nineteenth Amendment.[46] It refers to a body of legal advantages found in state law, the privileges and immunities of (state) citizenship and directs that the states not abridge them. The Nineteenth Amendment forbids the states from abridging the right of citizens of the United States to vote on account of sex.[47] One important feature of the Constitution is that it does not prescribe the qualifications of voters generally, and in particular, does not prescribe the qualification of voters for state office. Rather, it takes those qualifications so much for granted that it uses them as the measure of voting in federal elections: voters for the House, and now for the Senate, are those who are qualified to vote for the most numerous branch

44. *Slaughter-House Cases*, 83 U.S. at 79.

45. The Guarantee Clause charges the United States with ensuring that every state has a republican form of government, but does not do so by consolidating the states into the Republic that the Constitution creates. U.S. CONST. art. IV, § 4.

46. The Nineteenth Amendment forbids states and the United States from abridging citizens' right to vote on the basis of sex, but it does not purport to confer the right to vote. U.S. CONST. amend. XIX.

47. *Id.*

of the state legislature.[48] If the Constitution dictated the content of the right to vote for state legislatures, it would not proceed in so roundabout a fashion. The Nineteenth Amendment thus takes for granted that there is a body of state law about voter qualifications, a body of law that gives rise to something called the right to vote.[49] It does not confer on anyone the right to vote; state law does that. The Nineteenth Amendment does constrain state law in one respect, providing that the right to vote as defined thereby may not be denied to U.S. citizens on account of sex.

Under the equality-based reading, the Privileges or Immunities Clause takes just this approach. The Federal Constitution refers to, but does not determine the content of, rights under state law. If the Clause were designed to tell the states the content of their law, a very serious step in a federal system, it would be formulated more affirmatively. It might say, for example, each state shall secure the right to contract. But in keeping with basic assumptions about the role of the states and the nation, including the national Constitution, it does not do so.

III. THE DECLINE OF LIMITED FEDERAL POWER TO REGULATE ECONOMIC ACTIVITY

So far my discussion of the Constitution has had two features. First, it has been mainly descriptive—in Section II, argumentatively so as the description I urge is not universally agreed with. I have discussed how the Constitution pursues a particular goal, not how well it does so, and so have been descriptive rather than evaluative. Second, this description has been of the system one can read from the text with some historical context, not of the system that is actually in place.

Those questions, about efficacy and change over time, are related to one another. On the question of evaluation, a symposium dedicated to the legacy of Professor Siegan naturally invites the question: would a constitution better pursue its goal—in particular, the goal of protecting economic liberty—more directly? Would it be better for the Constitution simply to dictate basic rules about property, contract, and economic interactions, with perhaps a little bit of flexibility, than to pursue the highly indirect strategy I have attributed to the text?

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48. U.S. CONST. art. I, § 2, cl. 1 (discussing the qualifications for electors for House); U.S. CONST. amend. XVII, § 1 (discussing the qualifications for electors for Senate).

49. U.S. CONST. amend. XIX.

Probably not, I think. Constitutions are, by design, strongly entrenched; they are quite hard to change, and are supposed to be hard to change. In this country, the courts play a large role in enforcing the Constitution, which means that they give content to constitutional standards. Sometimes they even give content to constitutional rules, but I think, and hope, that happens less often.

Combine those facts and you have a dilemma for any policy of constitutionalization. Rules are relatively clear in their application, but they purchase their clarity by a rigidity that has serious drawbacks. Rules interact with the world to produce results. They must therefore be based on assumptions about how the world will respond, and the less flexible the rule, the more it depends on the accuracy of those assumptions. If the world changes, the rule may produce unintended results. The Constitution's designers were prepared to tolerate some deviation from the political equality of citizens in the interest of state sovereignty. The compromise in the voting rules for the House and Senate demonstrates this.[50] But today we have a much greater deviation: California has the same number of Senators as Wyoming, and more than seventy times the population.[51] As times change, inflexible rules are likely to produce results at odds with the purposes they serve.

One natural solution to the need for flexibility is to replace rules with standards. Instead of adopting the law of contract as it stood in 1787, the Constitution could have said something more general but still designed substantially to constrain subordinate lawmakers. Standards are delegations to future lawmakers and, with respect to the Constitution, the future lawmakers are frequently the courts.[52] To the extent that it constitutionalized the law of contract, for example, the Constitution would have been giving the courts the power to make the law of contract, subject to little or no revision by the legislature.

Delegating power in that fashion would not, of course, eliminate political controversies over the content of the law of contract. It would only displace them from legislatures to courts, and therefore increase the importance of policy considerations in the selection of judges. Anyone who thinks it would be a good idea for the Supreme Court of the United

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50. Representation in the House of Representatives is based on population, U.S. CONST. art. I, § 2, cl. 3 (now modified by U.S. CONST. amend. XIV, § 2), while each state has two Senators, U.S. CONST. art. I, § 3.

51. UNITED STATES DEPARTMENT OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 2008, at 17 (noting that California's population in 2006 was approximately 36,458,000; Wyoming's was approximately 515,000).

52. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 139–41 (William N. Eskridge & Phillip Frickey eds., 1994) (discussing the difference between rules and standards).

States to be the legislature for the private law of this country, and hence, for example, the legislature for the law of medical malpractice, should think about what Supreme Court confirmations would be like if that were true. Hot button social issues are one thing; multibillion-dollar distributional struggles are another.

As I indicated, the preceding observation is related to the point that the Constitution one reads is not the Constitution we have. Most important among the changes is that the national legislature, at least when it comes to economic questions, is not one of enumerated powers. It has general authority to regulate the economy, and to redistribute the economy's fruits through taxation and expenditure.

That there should have been so much change may or may not be good, but it should not be surprising. The enumeration of the powers of the national government is the most substantive part of the Constitution. Most of the rest is about the selection and tenure of officials, the relations between different branches of government, and so forth. The enumerated powers are also fairly rule-like, identifying pretty specific matters as to which Congress may legislate, like intellectual property and post offices.

Imperfectly, that list of powers implements a theory of what should be decided centrally in an extended republic, as of 1787. I say *imperfectly*, because the list is somewhat haphazard, derived in part from historical accidents as much as anything. That is not to say that it is just a hodgepodge, but it is to say that it reflected only limited thinking about the basic problem. The Federal Convention looked at the problems that had arisen under the Articles, mainly national insolvency, national military weakness, and conflicts among the states about trade policy—internal and external—and came up with powers aimed at those specific problems.[53] That is usually how constitutions are made.

Then over the decades, lots of things changed, and lots of people came to believe that the old list did not make as much sense as it once had. What happens in a democracy when large and stable majorities decide that they do not like the provisions of the Constitution? If they have the time and are willing to make the effort, they will change the Constitution's text. But our Constitution presents a tempting alternative. Formal

53. Rakove discusses the deficiencies of the Articles that gave rise to the Federal Convention. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 23–34 (1996). The Framers' response with respect to the powers of the new government are found primarily in U.S. CONST. art. I, § 8.

amendments are difficult because of the required super majorities at the state level.[54] It can be a lot easier to cut out the states as such, and simplify the process, by operating entirely inside the national government. Stable majorities in Congress and the presidency can adopt legislation that seems desirable and appoint judges who will approve it.

The process by which the country has come to the current principles governing federal power, however, has serious weaknesses. Because that process has operated through the adoption and judicial endorsement of statutes creating new federal programs, and not through the adoption of a constitutional amendment that would codify new views concerning the desirable role of the federal government, particular questions of policy have been bound up with the more general question of the allocation of authority among levels of government. It is entirely possible that if Congress deliberated on a constitutional amendment that would bring federalism into the twenty-first century, it would produce a text more restrictive than the current de facto Constitution. Certainly such an amendment would authorize social security, but it might well give the states more autonomy with respect to environmental policy.

There is reason to believe, then, that the Framers' judgment about the proper malleability of the Constitution was wrong, or is no longer correct, at least with respect to the allocation of power between the states and the national government, which is the aspect of the Constitution that bears most directly on economic liberty. Precisely because the most desirable higher order rules on that subject change with changes in the economy, the extremely strong entrenchment that the Constitution provides leads not to inflexibility, but to flexibility that operates through the ordinary legislative process and the process of appointing judges and Justices. That is undesirable.

Quite possibly the best constitutional arrangement would provide for multiple levels of entrenchment, with some rules that are highly resistant to change and others, probably including those governing the allocation of power between the levels of government, that are substantially sticky but not as much as Article V makes the Constitution.[55] That way, each generation could adapt the Constitution to its own needs with rules that would be stable for decades but change over the centuries, and could do so through explicit acts of popular sovereignty, not dodgy mechanisms

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54. Constitutional amendments must be ratified by three-fourths of the states. U.S. CONST. art. V. As Keith Whittington points out, President Franklin Roosevelt was well aware of both the ease with which state level minorities could block constitutional amendments and the power of changes in judicial attitudes to change constitutional doctrine. KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 47–48, 63–64 (2006).

55. U.S. CONST. art. V.

involving judicial validation of doubtful statutes. The Earth belongs to the living, and so does the Constitution.

That document as I have described it, an essentially structural instrument that regulates a ramified legal and governmental system that it largely takes for granted, could be called Henry Hart's Constitution. In addition, some of it, I think, and one important aspect of it, I know, can be described as David Currie's Constitution. Appeals to authority are common in law, and often appropriate, and I will without hesitation appeal to the late Professor Currie's authority. John Heminge and Henry Condell, editors of the First Folio of Shakespeare's plays, gave advice that also applies with respect to Currie: "Read him, therefore; and again, and again."[56] Because David Currie, like Henry Hart, was—almost—always right.

56. THE NORTON FACSIMILE OF THE FIRST FOLIO OF SHAKESPEARE 7 (2d ed. 1996) (spelling modernized).