

SELECTED SYMPOSIUM REMARKS

Does the Original Meaning of the Fourteenth Amendment Protect Economic Liberty?

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In my remarks today, I will defend the proposition that the original meaning of the Fourteenth Amendment protects “economic liberty.” To clarify the issue, let me begin by defining economic liberty. I define economic liberty as the right to acquire, use and possess private property and the right to enter into private contracts of one’s choosing. If these rights are protected by the original meaning of the Fourteenth Amendment, then we can conclude that the Amendment does protect economic liberty.

In my view, the evidence that the original meaning Fourteenth Amendment protects rights of private property and contract is overwhelming. But to say *that* the Amendment protects the rights of property and contract is not to say exactly *how* these rights are to be protected. I will return to that important topic after I discuss what the original meaning of the Fourteenth Amendment protects.

The What

After the Civil War, Republicans in Congress struggled to protect the newly freed slaves from the Black Codes that Southern states had adopted to reestablish white domination. In 1866, Congress enacted the first Civil Rights Act. This Act mandated that all citizens of the United States,

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shall have the same right...to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens. . . .¹

So, in this statute, Congress identified the civil rights of all persons, whether white or black, to include the rights “to make and enforce *contracts*, . . . to inherit, purchase, lease, sell, hold, and convey real and personal *property*.” In other words, at the very core of civil rights in 1866 was the economic liberty defined by the rights of contract and property.

But where in the Constitution did Congress find the power to enact the Civil Rights Act protecting the economic rights of contract and property against infringements by the states? It was the Thirteenth Amendment, the first section of which prohibits: “slavery [or] involuntary servitude, except as a punishment for crime.” And the second section of which gives Congress an enumerated “power to enforce this article by appropriate legislation.”

To appreciate why the Thirteenth Amendment protects the economic rights of property and contract, we must remember that slavery was, first and foremost, an economic system that was designed to deprive slaves of their economic liberty. The key to slavery was labor. The fundamental divide between the Slave Power and abolitionists concerned the ownership of this labor. Could a person be owned as property and be denied the right to refrain from laboring except on terms contractually agreed upon? Or did every person own him or herself, with the inherent right to enter into contracts by which they could acquire property in return? Republican adherents of “free labor” held the second of these views.

Therefore, by abolishing slavery, Republicans in Congress maintained that the Thirteenth Amendment ipso facto empowered them to protect the economic liberties that slavery had for so long denied: in particular, the “right . . . to make and enforce contracts, . . . to inherit, purchase, lease, sell, hold, and convey real and personal property.”

¹ Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27 (1866).

Defending the Civil Rights Act in Congress, Michigan Senator Jacob Howard noted that a slave “owned no property, because the law prohibited him. He could not take real or personal estate either by sale, by grant, or by descent or inheritance. He did not own the bread he earned and ate.” He then observed:

Now sir, it is not denied that this relation of servitude between the former negro slave and his master was actually severed by this amendment. But the absurd construction now enforced upon it leaves him without family, without property, without the implements of husbandry, and even without the right to acquire or use any instrumentalities of carrying on the industry of which he may be capable. . . .²

In sum, by abolishing the economic system of slavery, Republicans maintained that the Thirteenth Amendment empowered Congress to protect the economic system of free labor, and the underlying rights of property and contract that defined this system.

To the dismay of Congressional Republicans, President Andrew Johnson vetoed the Civil Rights Act, in part on the ground that it exceeded Congress’s power under the Thirteenth Amendment. In response to Johnson’s “state’s rights” argument, super-majorities in both the House and Senate overrode his veto. But some in Congress, such as Ohio Representative John Bingham, actually shared Johnson’s concerns. Many in Congress were also concerned that, when the Southern Democrats would resume their seats, they would repeal the Civil Rights Act as they were loudly promising to do. They thought a constitutional, rather than a statutory, constraint was needed.

So, pursuing a parallel track, Bingham worked with the Committee on Reconstruction to devise the Fourteenth Amendment to constitutionalize the rights protected by the Civil Rights Act—and more. Bingham drafted the Privileges or Immunities Clause, which reads: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”³ Just what are the privileges or immunities of citizens of the United States?

² CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

³ U.S. CONST. amend. XIV, § 1.

First, and most obviously, for the Amendment to have performed the function for which it was adopted, these privileges or immunities must include the rights enumerated in the Civil Rights Act of 1866. That is, the rights of citizens “to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property.”

These economic liberties of contract and property were, therefore, among the unenumerated privileges or immunities of citizens of the United States, that neither Congress, nor the several states, may infringe. Nor could the protection of these rights be repealed by Southern Democrats when they returned to Congress.

This conclusion is strongly supported by a widely-publicized speech delivered by the Senate sponsor of the Fourteenth Amendment, Michigan Senator Jacob Howard. In his speech, Howard explained that the substance of these privileges or immunities fell into two buckets. In the first bucket were the substantive rights that were protected by the Privileges and Immunities Clause of Article IV which says that “the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”⁴

Howard explained that, under Article IV, “citizens of the United States . . . are, by constitutional right, entitled to these privileges and immunities, and may assert this right and these privileges and immunities, and ask for their enforcement whenever they go within the limits of the several states of the Union.”⁵ However, Article IV was limited to protecting U.S. citizens solely from being discriminated against with respect to these rights when sojourning in another state. Laws that equally restrict the rights of home state citizens and sojourners alike do not violate Article IV.

In contrast, unlike Article IV, the Privileges or Immunities Clause is not solely a bar on discrimination; it also prohibited state legislatures from restricting everyone’s rights equally. But *which* rights of U.S. citizens were protected from such discrimination under Article IV and now absolutely protected under Section 1 of the Fourteenth Amendment?

⁴ U.S. CONST. art. IV, § 2.

⁵ CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

To answer this question, Howard quoted from a lengthy passage of *Corfield v. Coryell*, an 1823 Circuit Court opinion interpreting Article IV by Justice Bushrod Washington—who was George Washington’s nephew. At the core of Justice Washington’s description of the substance of “privileges and immunities” was this:

What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, *with the right to acquire and possess property of every kind*, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.⁶

Washington was here quoting from the canonical formulation of natural rights that was originally drafted by George Mason for the Virginia declaration of rights. Mason’s draft language was then incorporated into state constitutions. In Massachusetts the Supreme Court relied on this language to hold that slavery was unconstitutional in that commonwealth. As explained by Massachusetts Chief Justice William Cushing:

⁶ *Id.* (emphasis added) (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230)).

[W]hatever sentiments have formerly prevailed . . . a different idea has taken place with the people of America, more favorable to the natural rights of mankind, and to that natural, innate desire of Liberty, with which Heaven (without regard to color, complexion, or shape of noses—[or] features) has inspired all the human race. And upon this ground our Constitution of Government, by which the people of this Commonwealth have solemnly bound themselves, sets out with declaring that all men are born free and equal—and that every subject is entitled to liberty, and to have it guarded by the laws, as well as life and property—and in short is totally repugnant to the idea of being born slaves. This being the case, I think the idea of slavery is inconsistent with our own conduct and Constitution⁷

So the language cited by Justice Washington in *Corfield v. Coryell* protected the fundamental economic “right to acquire and possess property of every kind.” After quoting from *Corfield*, Senator Howard then continued: “To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution”⁸

After specifying the enumerated individual rights guarantees in the first eight amendments, Howard ended with this summary: “here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution.”⁹

Howard then explained that the Privileges or Immunities Clause of the Fourteenth Amendment was needed because “there is no power given in the Constitution to enforce and to carry out any of these guarantees” from state infringement. “The great object of the first section of this amendment is, therefore, to restrain the

⁷ *Instructions to the Jury in the Quock Walker Case, Commonwealth of Massachusetts v. Nathaniel Jennison (1783)*, NAT’L CONST. CTR., <https://constitutioncenter.org/the-constitution/historic-document-library/detail/william-cushing-instructions-to-the-jury-in-the-quock-walker-case-commonwealth-of-massachusetts-v-nathaniel-jennison-1783> [<https://perma.cc/N4JV-7T3X>] (last visited Apr. 22, 2025).

⁸ CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

⁹ *Id.*

power of the States and compel them at all times to respect these great fundamental guarantees.”¹⁰ In his notes for his speech, Howard referred to these privileges or immunities as the “fundamental civil rights of citizens.”¹¹

The How

Having identified the language in the Fourteenth Amendment that protects economic liberty from abridgement by states, let me now turn the separate question of how the Constitution protects these liberties. To understand this, we must set aside the modern conception of constitutional rights in which rights are viewed as “trumps” that can never be touched by legislation.

On the modern view, if one has a right, then legislatures can do nothing whatsoever to restrict its exercise. But this was not the conception of constitutional rights held by the Founders or by the generation that ratified the Fourteenth Amendment. For them, an “absolute” constitutional right was one that was protected across-the-board, not merely from discrimination. But the conduct or liberty protected by such absolute rights were *regulable*. So economic liberty—like all liberty—may be reasonably regulated to achieve a purpose within the competency of government. But the requirement that such regulations of conduct be reasonable imposes a limit on the legislative power.

As Justice Joseph Bradley explained in his dissenting opinion in the Slaughter-House Cases:

¹⁰ *Id.*

¹¹ Randy E. Barnett, *Three Keys to the Original Meaning of the Privileges or Immunities Clause*, 43 HARV. J. L. & PUB. POL’Y 1, 7 n.38 (2020).

The right of a State to regulate the conduct of its citizens is undoubtedly a very broad and extensive one, and not to be lightly restricted. But there are certain fundamental rights which this right of regulation cannot infringe. It may prescribe the *manner* of their exercise, but it cannot *subvert* the rights themselves.”¹²

The same is true, as Jud Campbell has shown, for the enumerated rights protected by the First Amendment.¹³ The fact that the Constitution recognizes and protects the natural rights of speech, press, and assembly does not entail that these liberties may never be reasonably regulated. To the contrary, then and now, the courts routinely uphold time, place and manner regulations of speech. Rather than conceiving rights as trumps, this view conceives rights as *regulable liberties*.

On the other hand, the power to regulate these constitutionally protected liberties is not unlimited or wholly discretionary. The fact that these rights are fundamental privileges or immunities of citizens entails that courts must be on the lookout for unreasonable or arbitrary regulations that are designed to make the exercise of these liberties more costly, or to stigmatize and deter their exercise. In other words, they must be on the lookout for legislative efforts to subvert these rights, rather than reasonably regulating their exercise.

It is the province of the judiciary to smoke out such illicit motives. As Chief Justice John Marshall wrote in *M’Culloch v. Maryland*, “should Congress . . . under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal . . . to say, that such an act was not the law of the land.”¹⁴

This brings us to the Due Process of Law Clause in Fourteenth Amendment, which stipulates that no person may be deprived “of life, liberty, or property, without due process of law.”¹⁵ The Due

¹² *Slaughter-House Cases*, 83 U.S. 36, 114 (1872) (Bradley, J., dissenting).

¹³ Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 306 (2017).

¹⁴ *M’Culloch v. Maryland*, 17 U.S. 316, 424 (1819).

¹⁵ U.S. CONST. amend. XIV, § 1.

Process of Law Clause constitutionally guarantees a judicial process before a legislature can deprive any person of their life, liberty, or property. This judicial process includes an assessment by an impartial judiciary that the law that is being applied to the individual is within the proper power of a legislature to enact.¹⁶

We have become accustomed to thinking of there being “First Amendment challenges” or “Commerce Clause challenges” to a Congressional enactment. But, while the First Amendment and Commerce Clause may provide the *substance* of such challenges, it is the Due Process of Law Clause that assures a *process* that includes an impartial judicial assessment of whether a Congressional enactment is within its proper powers before any person can be deprived of her life, liberty or property.

Just as the Fifth Amendment’s Due Process of Law Clause authorizes courts to ensure that Congress is not acting pretextually in asserting its enumerated powers, so too does the Fourteenth Amendment’s Due Process of Law Clause authorize federal and state court judges to assess critically assess whether a state law restricting the privileges or immunities of property or contract are good faith exercises of a state’s police power to protect the health, safety, and public morals of the community. Or whether a state legislature’s assertion of a health and safety rationale is a mere “pretext”—to use John Marshall’s term—to pursue some other end that is not entrusted to state legislators, like that of enriching themselves or some favored faction or special interest group.

I should stress that, under current Supreme Court doctrine, all restrictions on liberty—including economic liberty—are supposed to be “rationally related” to a legitimate state interest. But since the 1955 Warren Court case of *Williamson v. Lee Optical*,¹⁷ such “rational basis scrutiny” is satisfied if a judge can imagine any conceivable reason for the restriction. Such “conceivable basis review” is a denial of the due process of law, which requires a meaningful or realistic assessment of whether a

¹⁶ See RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT* 261-298 (2021) (maintaining that the original meaning of “due process of law” included a judicial assessment of whether a legislative act was a *law* within its powers to enact).

¹⁷ See generally *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483 (1955).

legislative act is within the legislative power, before any person can be deprived of their life, liberty or property.

Of course, there is much more to say about how such judicial inquiries should be conducted so as to protect the rights, privileges, and immunities of the people without impeding the ability of legislatures to reasonably regulate to protect the health, safety, and public morals of the people and without creating a “government by judiciary.”¹⁸ But, at this point, I am afraid my time is up.

To conclude: By effectively eliminating the Privileges or Immunities Clause from the Constitution—and then by employing a “conceivable basis” review of restrictions on any liberty that the Justices do not deem to be “fundamental”—the Supreme Court has undermined the rights of all Americans “to make and enforce contracts” and “to inherit, purchase, lease, sell, hold, and convey real and personal property”—the rights that both define and protect our economic liberty. But, if there is a will to protect these liberties, there is a way that is both practical and grounded in the original meaning of the Fourteenth Amendment.

¹⁸ *See generally* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (2d ed. 1997).