The 14th Amendment Doesn't Make America Freer

ALLEN MENDENHALL

A point of contention among libertarians is the Fourteenth Amendment, in particular its first and fifth sections. Section One includes the Citizenship Clause, the Privileges or Immunities Clause, the Due Process Clause, and the Equal Protection Clause; Section Five grants the U.S. Congress the power to enforce the amendment by legislation.

It would require volumes to describe these clauses and the jurisprudence emanating from them. Suffice it to say, as a result of the Civil War (and at the height of Reconstruction), these clauses were meant to empower the increasingly centralized national government to regulate state laws.

Supreme Court decisions since the amendment's ratification have expanded federal power over the states, as well as over local businesses and communities, and have vested that power in the federal judiciary, which is peopled by unelected judges with lifetime appointments.

The question for libertarians is whether the expanded scope of federal power as a result of the Fourteenth Amendment is justified if it reduces discriminatory practices and policies in the states. I submit no. The federal government is neither the only nor the best means for countermanding discrimination.

Libertarian criticisms of the Fourteenth Amendment should not be mistaken as endorsing the discriminatory ideologies the amendment has targeted. Nor should such criticisms be interpreted as excusing the unequal treatment of minorities by states. They should, instead, be a reminder that libertarians favor nongovernmental and decentralized approaches to neutralizing discriminatory institutions and practices.

As a threshold matter, the question must be raised whether the Fourteenth Amendment was legitimately enacted.

Its ratification was made a condition for former Confederate states to reenter the Union and secure congressional representation. Any originalist interpretation of the amendment must account for the fact that the amendment's adoption—and hence its validity—has been called into question. On this issue, I recommend Raoul Berger's *Government by Judiciary*. I also believe, contrary to current fashion, that the *Slaughterhouse Cases* (1873) correctly refused to expand the Privileges or Immunities Clause to a context having nothing to do with the liberties of former slaves. The Privileges or Immunities Clause having become, in effect, dead-letter, the Supreme Court improperly began to use the Due Process Clause to incorporate the Bill of Rights to apply against the states—again for purposes unrelated to the rights of former slaves. A sustained study of the Civil Rights Act of 1866, the Black Codes, the Thirteenth Amendment, and the 39th Congress reveals that the purpose of the Fourteenth Amendment was to guarantee that freed slaves possessed citizenship and substantive rights as well as procedural due process and access to courts. To treat the Fourteenth Amendment as anything more is to cheapen its meaning.

The Supreme Court and inferior federal courts have used the Equal Protection Clause and the Due Process Clause to regulate activities at the local level that otherwise would have fallen outside the jurisdiction of the federal judiciary. Although these clauses are aimed at state action, they have been used to interfere with the activities of private citizens and businesses and, ironically, to validate inherently discriminatory affirmative action programs.

Due process has been used to nationalize allegedly fundamental rights, yet what constitutes a "right," let alone a fundamental one, is a philosophical question best left to philosophers, not judges. Because "right" is a slippery signifier susceptible to appropriation, scholars on the left (Erwin Chemerinsky, Charles Black, Peter Edelman, Frank Michelman) have argued for a more robust application of the Due Process Clause and a more expansive denotation of "rights" to include "rights to subsistence," i.e., rights to government-supplied food, healthcare, and a minimum wage. If these scholars had their way, state governments failing to provide these goods and services would violate the Fourteenth Amendment.

Placing faith in federal judges to secure more liberty for citizens by way of the Fourteenth Amendment presupposes that such judges are inclined toward liberty. If the federal judiciary were peopled with capitalists versed in the tradition of classical liberalism and free-market economics, the Fourteenth Amendment might advance liberty. But the federal judiciary is peopled by former lawyers, who, for the most part, are not trained in economics or philosophy and are not sympathetic to capitalism. If that comment seems hyperbolic, consider the fact that the federal judiciary consists of individuals whose salaries come from taxpayers and who were nominated by the President and confirmed by professional politicians (i.e., senators), who also live off the American taxpayer. We do not need the federal judiciary to secure rights because Section Five grants Congress

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of tribunals (the federal courts) to enforce those rights, the net effect of the Fourteenth Amendment has plainly been to make America freer.

Thus, when Klansmen and nativists in Oregon sought to outlaw private schools and force Catholic children to attend Protestant public schools in 1922, it was the Fourteenth Amendment that prohibited it. When police arrested Mildred and Richard Loving for violating Virginia's anti-miscegenation law, it was the Fourteenth Amendment that kept them out of jail and forced the state to recognize the validity of their marriage. And when Alabama tried to hound the NAACP out of the state during the civil rights era, it was the Fourteenth Amendment and the U.S. Supreme Court that said no.

History makes clear that those results would not have occurred without the Fourteenth Amendment and the federal judiciary's commitment to enforcing it. Would state courts suddenly have become vastly more protective of liberty had the Fourteenth Amendment not been ratified? That is an extraordinary claim that requires extraordinary evidence. I have never seen any. Has Section Five of the Fourteenth Amendment, which authorizes Congress to enforce its provisions "by appropriate legislation," so empowered the federal government as to offset the manifold protections of liberty achieved by Section One? That too would be an extraordinary claim requiring extraordinary proof. Again, I am not aware of any.

Did the Fourteenth Amendment make America freer? It certainly did for Mildred and Richard Loving. Oh, and that anti-Chinese laundry ordinance upheld by the California Supreme Court? The U.S. Supreme Court struck it down under the Fourteenth Amendment.

Clark Neily is a senior attorney at the Institute for Justice and Director of the Institute's Center for Judicial Engagement. He is the author of the forthcoming book Terms of Engagement: How Our Courts Should Enforce the Constitution's Promise of Limited Government.

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that authority. Congress can pass amendments to the U.S. Constitution (the Fourteenth Amendment was itself enacted to strengthen the Civil Rights Act of 1866) or pass laws remedying denials of fundamental rights in the states. Because members of Congress can be voted out of office, whereas federal judges and Supreme Court justices enjoy life tenure, Congress is the appropriate vehicle for such action.

If libertarians were to defend federal intrusion into state affairs on consequentialist grounds—i.e., on grounds that the results of intervention were good—such a defense could be extended to justify the intervention of powerful governments into the business of less powerful states and communities. Is not the celebration of federal intervention into local affairs on consequentialist grounds a close step toward asserting that libertarianism is fundamentally wrong because a centralized, paternalistic power is better at advancing liberty than decentralized government?

Opposition to broad interpretations of the Fourteenth Amendment, including its vigorous application against the states, is not necessarily about "states' rights" or "state sovereignty." It is about limited government and decentralization of power. Expansive, creative interpretations of the Fourteenth Amendment have conferred federal jurisdiction over local matters that ought to be outside the province of central planners. Since 1950, the number of federal appeals judges alone has more than doubled. Yet nothing in the Constitution specifically authorizes federal judicial review of legislative acts. The only federal court required by the Constitution is the Supreme Court; Congress may create other federal courts pursuant to Articles I and III of the Constitution, but it is unlikely that the framers of these articles had in mind the massive federal judiciary that exists today. This federal judiciary—the "least dangerous branch"—has grown to overwhelming proportions. It has become a Leviathan unto itself, and the Fourteenth Amendment is part of the problem.

Allen Mendenhall is a writer, managing editor of Southern Literary Review, *staff attorney to Chief Justice Roy S. Moore of the Supreme Court of Alabama, adjunct professor at Faulkner University Thomas Goode Jones School of Law, and a doctoral candidate in English at Auburn University. His forthcoming book is* Literature and Liberty: Essays in Libertarian Literary Criticism.