The Abuse of the Fourteenth Amendment

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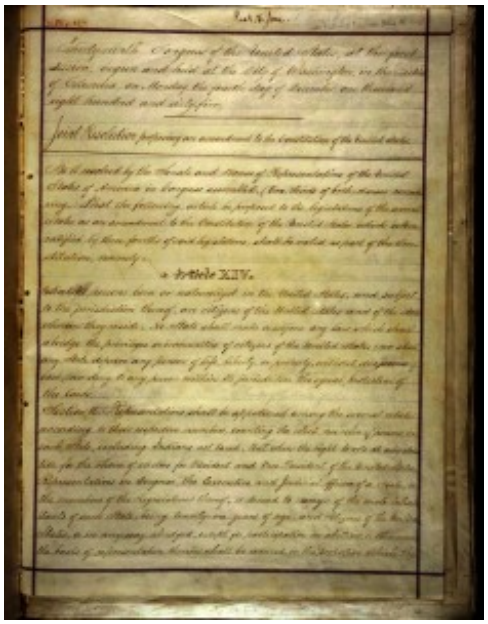

Libertarians and conservatives have never achieved widespread consensus regarding issues of federalism in American jurisprudence. The gridlock has to do with competing ideas about the proper role of the federal judiciary in protecting and preserving individual rights. On the one side are those who would empower federal judges allegedly to protect individual rights against the several states. On the other side are those who would strictly limit the powers of the federal judiciary over the several states.

This jurisprudential clash is most profound and clarifying in the context of the Fourteenth Amendment. The Due Process Clause, Equal Protection Clause, and Privileges or Immunities Clause of The Fourteenth Amendment restrict the power of the states and invest the federal government with broad license and authority. Because whole books have been written about each of these clauses, this article focuses chiefly on the Due Process Clause, which has been used to "incorporate" the Bill of Rights (the first ten amendments to the Constitution) to apply against the several states. In other words, the Constitution, which was meant to restrict only the powers of the federal government, not state and local government, has become a mechanism for the federal government, through the judiciary, to restrict the powers of the states.

The Fourteenth Amendment is one of the three "Civil War Amendments," the other two being the Thirteenth Amendment and the Fifteenth Amendment. It supplanted the U.S. Supreme Court's holding in *Dred Scott v. Sandford* and established slaves (or former slaves) as official persons; moreover, it guaranteed the citizenship of all persons born or naturalized in the United States and prohibited the states from denying citizens the equal protections of the law or from depriving citizens of life, liberty, or property without due process of law.

The Thirteenth Amendment, which abolished slavery, lacked enforcement power before the Fourteenth Amendment was ratified. As Representative John Bingham of Ohio, a framer of the amendment and the most instrumental in seeing the amendment through to its inception, stated before the amendment was ratified, "Where is the power in Congress, unless this or some similar amendment be adopted, to prevent the reenactment of those infernal statutes of banishment and confiscation and imprisonment and murder under which the people have suffered in those [Southern] States during the last four years?"

Georgia and the Carolinas at first rejected the amendment, incensing so many Northern congressman that Congress moved to include the following words in Section 5 of the Reconstruction Act: "[W]hen said State, by a vote of its legislature elected under said constitution, shall have adopted the amendment to the Constitution of the United States, proposed by the Thirty-ninth Congress, and known as article fourteen, and when said article shall have become a part of the Constitution of the United States, said State shall be declared entitled to representation in Congress." The effect of these words was to make the admission of any former Confederate state into the Union, as well as the congressional representation of any former Confederate state, conditional upon that state's willingness to ratify the Fourteenth Amendment.

For libertarians and conservatives whose opposition to centralized power is consistent and principled, the terms of the amendment seem dangerous. For libertarians who champion temporary solutions to longstanding problems or who are willing to concede power to a centralized authority if doing so generates civil liberties, the terms of this amendment seem promising. My own sympathies are with those who fear the Fourteenth Amendment for the reason Paul Gottfried mentions in the Summer 2013 issue of *The Salisbury Review*:

> *States' rights have been whittled away and even eviscerated throughout my life, and there is no reason to believe this process will stop. The source of most of the mischief is the infinitely elastic Fourteenth Amendment, which was imposed on the defeated Confederate states by the triumphant Union and the acceptance of which was made essential for the eventual re-entry of the discomfited side into the political arrangement it had tried to leave.*

Section 1 and Section 5 are the most controversial provisions of the Fourteenth Amendment:

> ***Section 1.*** *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.*
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> ***Section 5.*** *The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.*

By way of the due process clause of Section 1 (underlined above), the federal judiciary has claimed the power to regulate certain state laws and even private business activities and to apply the Bill of Rights to the states —and thereby to invalidate state and local laws. Although this judicial prerogative is said to have protected certain liberties such as freedom of contract during the so-called "Lochner Era," it also has drastically enlarged the power of the federal judiciary and transferred the duty of legal hermeneutics from the state courts and legislatures to a centralized Supreme Court and its arteries in the inferior federal courts.

According to a purely textual and historical understanding of the Fourteenth Amendment, however, Section 1 applied only to state government rather than private action and was enforceable, pursuant to Section 5, only by the congressional enactment of legislation targeting state government actions. In other words, the Fourteenth Amendment was not enforceable by the federal judiciary. Nevertheless, the scope of the amendment has expanded such that even private individuals would be subject to the enforcement power of the federal judiciary (not just of Congress) if their actions appear to undermine a broad, amorphous, and mostly undefined notion of liberty and equality that the amendment allegedly protects. For instance, the amendment has been used to prevent private shopping centers from chasing away protestors who were picketing on private property.

At the time of its ratification, such an elastic and expansive reading of the Fourteenth Amendment would not have been conceivable; to suggest that the amendment was meant to encompass private (rather than government) action would have been to kill the amendment by altogether preventing its ratification. The Joint Committee on Reconstruction, in fact, rejected certain language, which Congressman Bingham had proposed, on the grounds that courts could interpret it as investing the federal government with sweeping if not absolute power to regulate life, liberty, and property.

The framers of the amendment feared investing the federal judiciary with such sweeping power, and evidence

that the framers did not intend to transfer such power to the federal judiciary includes the fact that no framers of the amendment lobbied for or anticipated the sudden invalidation, upon ratification of the amendment, of all state laws not in keeping with the Bill of Rights, as well as the fact that no states after ratification attempted to alter their local laws to conform to the Bill of Rights. Moreover, after ratification, Congress approved some state constitutions in the former Confederate states even though they did not completely comport with the Bill of Rights. If the Fourteenth Amendment had been intended to incorporate the Bill of Rights to restrict the power of the states, would not Congress have invalidated these state constitutions in the reconstructed states?

Section 5 of the Fourteenth Amendment enabled Congress, not the federal courts, to exercise enforcement power (i.e., to apply of the Bill of Rights to the States). As Representative Bingham declared, "The proposition pending before the House is simply a proposition to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the constitution today. It hath that extent—no more." The enforcement power was strictly limited to Congress because the amendment would not pass if such powers went beyond that scope. But, alas, the amendment has become a go-to remedy for the federal courts, which do not have the elective accountability of a legislature.

It seems that most libertarians have adopted the position that the Fourteenth Amendment justifiably enables the federal judiciary to insert itself into state matters that allegedly threaten the guarantees of some (though not all) of the Bill of Rights. I believe this is a dangerous position.

First, relying upon the federal government in general or the federal judiciary in particular to recognize and validate fundamental rights sets a dangerous precedent. By ceding extraordinary power to the State and its federal judicial arm, libertarians who employ rights-based arguments in support of their policy positions undermine those very positions by suggesting that only the State confers rights by approval. The implication is that the State is the creator and sustainer of rights at its sole and arbitrary discretion. This is not the case and ought not to appear to be the case, lest what we call "rights" become contingent upon political largesse and lobbyist clout. The other problem is that the federal judiciary may create alleged rights (if they were truly rights, they would need recognition, not creation) that subvert the free market: the right to a minimum wage or to other government benefits, for instance.

Among others, Erwin Chemerinsky, Charles Black, Peter Edelman, and Frank Michelman have argued that the Constitution ought to protect a fundamental right to subsistence, i.e., to government provided food, shelter, and healthcare; these men have embedded their arguments in the textual record so that federal judges might cite those arguments in the future to justify federal judicial intervention into state matters. In Chemerinsky's own words, "history shows that the academic scholarship of one generation can shape the constitutional doctrines in the next. . . Contemporary scholarship will have future effects, and among them can be directing the Court towards finding a constitutional right to basic subsistence." These men have sought to establish scholarly precedent that could be used against libertarians who champion the very constitutional jurisprudence that would enable progressive and statist ideas such as a fundamental right to subsistence to take effect. These men would use the Fourteenth Amendment to force the states to provide food, clothing, shelter, and a minimum wage to all adults within the several states.

Second, libertarians who favor an expansive reading of the Fourteenth Amendment presuppose that judges will use their power to enable rather than restrain economic liberty. It is quixotic to believe that the federal judiciary will ever be peopled by limited government proponents having vested and reliable interests in protecting or enabling individual freedom as against government power. The federal judiciary is not an elected body, but is made up of individuals who serve life tenure without having to be made accountable to the citizens through elective processes. By acquiescing to the power grabs and flexible hermeneutics of activist federal judges, indeed by advocating for such power grabs and flexible hermeneutics, libertarians will, in the long run, witness the gradual erosion of freedom rather than the flourishing of liberty. If the federal judiciary were peopled by infallible gods unconditionally committed to anti-statism, then no doubt an expansive reading of the Fourteenth

Amendment would be justified insofar as it would ensure the protection of rights and freedoms as against state tyranny and oppression. But federal judges tend to be statists who rather enjoy their broad powers.

Third, although the Fourteenth Amendment at first blush appears to have advanced certain economic liberties such as freedom of contract, there are other, better ways to secure these liberties. Just as the Fourteenth Amendment was brought about, so other amendments may be brought about. Short of that, Congress can enact laws to remedy a denial of fundamental rights on the state level. That is precisely what Congress did when it enacted the Civil Rights Act of 1866 before the Fourteenth Amendment was passed. Seventeen Amendments have been added to the Constitution since the states approved the Bill of Rights in 1791. Libertarians and conservatives ought to be pleased rather than discouraged by the slow and painstaking process of passing an amendment because it restrains Congress from moving too quickly to implement policies that would be unfavorable to liberty. The framers designed the Constitution to make the process arduous in order to curb arbitrary action that might seem promising at the time but that would lead to future problems.

Fourth, the logic that a superpower (in this case, the federal government) validly may intervene in the affairs of an inferior power (a state) on the grounds that the latter allegedly has violated fundamental rights will come to justify the actions of other superpowers seeking to intervene in the affairs of inferior powers. If, say, the U.S. federal judiciary may impose its beliefs about fundamental rights onto the several states, why can't the U.S. government do the same in other nations, and why can't supranational bodies—say, the United Nations—intervene in the affairs of the United States if we are deemed to have violated supposedly fundamental rights?

Gottfried noted in his article that his "conventionally conservative Republican acquaintances. . .would rush to tell me that I'm being unnecessarily harsh on the Fourteenth Amendment." These acquaintances and anyone who agrees with them ought seriously to consider the above warnings about the Fourteenth Amendment. The federal judiciary is often the most dangerous branch precisely because it is considered to be the least dangerous one.

Books mentioned in this essay may be found in The Imaginative Conservative Bookstore.

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