

DOES THE CONSTITUTION PROTECT ECONOMIC LIBERTY?

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It is my job to defend the proposition that the Court in *Lochner v. New York*¹ was right to protect the liberty of contract under the Fourteenth Amendment. I will not be defending its use of the Due Process Clause² to reach its result. As I shall explain, the Court should have been applying the Privileges or Immunities Clause.³ Nor will I be contending that the Court was correct in its conclusion that the maximum-hours law under consideration was an unconstitutional restriction on the liberty of contract.⁴ Although the statute may well have been unconstitutional, I will not take the time to evaluate that claim.

Instead, I want to focus on whether the Constitution of the United States 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 the Constitution protects these rights, then the Constitution does protect economic liberty. The evidence that the Constitution protects rights of private property and contract is overwhelming.

Let us begin with the constitutional protection afforded economic liberty at the national level. The Ninth Amendment reads, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”⁵ But what were these “other” rights “retained” by the people? The evidence shows that this was a reference to natural rights.

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1. 198 U.S. 45 (1905).
2. U.S. CONST. amend. XIV.
3. *Id.*
4. *Lochner*, 198 U.S. at 53.
5. U.S. CONST. amend. IX.

Consider an amendment drafted by Roger Sherman, who served with James Madison on the House Select Committee to draft the Bill of Rights.⁶ Sherman's second amendment begins as follows: "*The people* have certain *natural rights* which are *retained* by them when they enter into Society . . ."⁷ In this passage, Sherman uses all the terminology the committee eventually employed in the Ninth Amendment—"the people," "rights," and "retained"—and the "rights" "retained" by "the people" are then explicitly characterized as "natural rights."

But what was meant by the term "natural rights"? Sherman's draft provides some examples: "Such are the rights of Conscience in matters of religion; *of acquiring property* and of pursuing happiness & Safety; of Speaking, writing and publishing their Sentiments with decency and freedom; of peaceably assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances."⁸ The protection of property is at the heart of this list.

Sherman's rendition of natural rights was entirely commonplace. Consider some other examples. Another amendment proposed in the Senate reads: "That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity; among which are *the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.*"⁹ Similar provisions were proposed by state ratification conventions. Virginia offered an identical amendment as its first proposed amendment.¹⁰

Many state constitutions contained similar language. Massachusetts: "All people are born free and equal, and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; *that of acquiring, possessing, and protecting property*; in fine,

6. See *Roger Sherman's Draft of the Bill of Rights*, in *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* 351 app. A (Randy E. Barnett ed., 1989).

7. *Id.* (emphasis added).

8. *Id.* (emphasis added).

9. 6 *DEBATES IN CONGRESS* 320 (Gales and Seaton 1838) (emphasis added).

10. See 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787*, at 657 (Jonathan Elliot ed., 1830), available at <http://memory.loc.gov/ammem/amlaw/lwed.html>.

that of seeking and obtaining their safety and happiness.”¹¹ New Hampshire: “All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty; *acquiring, possessing and protecting property*; and, in a word, of seeking and obtaining happiness.”¹² Pennsylvania: “All men are born equally free and independent, and have certain natural, inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of *acquiring, possessing and protecting property*, and of pursuing and obtaining happiness and safety.”¹³ Vermont: “That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty; *acquiring, possessing, and protecting property*, and pursuing and obtaining happiness and safety.”¹⁴

All these provisions share the affirmation that the natural, inherent, and inalienable rights retained by the people include the rights to acquire, possess, and protect property and the right to pursue happiness and safety. Today, we would characterize the right to acquire, use, and possess property as “economic,” while characterizing the right to pursue happiness and safety as “personal.” But these provisions show that the distinction between economic and personal liberty is anachronistic as applied to the Founding when these unenumerated natural rights were considered inextricably intertwined.

Of course, like the rest of the Bill of Rights, the Ninth Amendment only restricts the power of the federal government. What of the States? After the Civil War, the Republicans in Congress struggled to protect the newly freed slaves in the South from the Black Codes that Southern states adopted to reestablish white domination.¹⁵ In 1866 Congress enacted the first Civil Rights Act.¹⁶ This Act mandated that:

[All citizens of the United States] of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same *right . . . to make*

11. MASS. CONST. art. I, *amended by* MASS. CONST. art. CVI (emphasis added).

12. N.H. CONST. art. II (emphasis added).

13. PA. CONST. of 1776, art. I, § 1 (emphasis added).

14. VT. CONST. of 1777, ch. I, art. I (emphasis added).

15. See generally GARRETT EPPS, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA* (2006).

16. Civil Rights Act of 1866, 14 Stat. 27.

*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*¹⁷

Congress identified the civil rights of *all* persons, whether white or black, as the rights “to make and enforce contracts, . . . to inherit, purchase, lease, sell, hold, and convey real and personal property.” At the very core of civil rights in 1866, therefore, were the economic rights of contract and property, although as with the Founding it is anachronistic to impose the modern distinction between economic and personal rights on that period.

So, 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? For many readers, the answer may be surprising: It is the Thirteenth Amendment, the first section of which prohibits “slavery [or] involuntary servitude, except as a punishment for crime”¹⁸ And the second section of which gives Congress the “power to enforce this article by appropriate legislation.”¹⁹

If the argument that the Thirteenth Amendment empowered Congress to protect the economic rights of contract and property seems strained, it is only because we today forget 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.²⁰ 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?

17. *Id.* (emphasis added).

18. U.S. CONST. amend. XIII, § 1.

19. U.S. CONST. amend. XIII, § 2.

20. See generally Stanley L. Engerman & Robert A. Margo, *Free Labor and Slave Labor*, in FOUNDING CHOICES: AMERICAN ECONOMIC POLICY IN THE 1790S at 291 (Douglas Irwin & Richard Sylla eds., 2010); Jonathan A. Glickstein, *Poverty is Not Slavery: American Abolitionists and the Competitive Labor Market*, in ANTISLAVERY RECONSIDERED: NEW PERSPECTIVES ON THE ABOLITIONISTS 195 (Lewis Perry & Michael Fellman eds., 1979).

Republican adherents of “free labor” held the second of these views.²¹ 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, and to full and equal benefit of all laws and proceedings for the security of person and property . . .”²²

This defense of the constitutionality of the Civil Rights Act under the Thirteenth Amendment can be simplified as follows: The Thirteenth Amendment prohibited slavery and *the opposite of slavery is liberty*. Any unwarranted restrictions on liberty—whether personal or economic—are simply partial “incidents” of slavery.²³ Therefore, Section 2 of the Thirteenth Amendment empowered Congress to protect any citizen from unjust restrictions on liberty.

Defending the Civil Rights Act in Congress, Michigan Senator Jacob Howard noted about a slave:

He 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

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 capable²⁴

In sum, by abolishing the economic system of slavery, 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.

21. See Michael Kent Curtis, *Two Textual Adventures: Thoughts on Reading Jeffrey Rosen's Paper*, 66 GEO. WASH. L. REV. 1269, 1285 (1998).

22. Civil Rights Act of 1866, 14 Stat. 27.

23. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 (1968).

24. CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866) (statement of Sen. Jacob Howard).

To the dismay of Congressional Republicans, President Andrew Johnson vetoed the Civil Rights Act.²⁵ In his lengthy veto message, Johnson, a Tennessee Democrat, conceded that the civil rights identified in the Act “are, by Federal as well as State laws, secured to all domiciled aliens and foreigners, even before the completion of the process of naturalization”²⁶ But he nevertheless protested that this claim of congressional power “must sap and destroy our federative system of limited powers and break down the barriers which preserve the rights of the States.”²⁷ In response to Johnson’s states’ rights argument, super-majorities in both the House and Senate overrode his veto.²⁸ Congress then proposed the Fourteenth Amendment to constitutionalize the rights protected by the Civil Rights Act—and more.²⁹

The privileges or immunities of citizens protected by the Fourteenth Amendment were not limited to the natural rights enumerated in the Civil Rights Act; they also included the personal rights of American citizens enumerated in the original Bill of Rights.³⁰ Further, the Fourteenth Amendment did not adopt the Civil Rights Act’s anti-discrimination language.³¹ Instead, the Amendment protected the privileges or immunities of *any* citizen, whether white or black, male or female, from any abridgment whatsoever, not merely from discrimination. And because Democrats in southern states, who viciously attacked the Civil Rights Act, were eventually going to resume their seats in Congress, Republicans sought

25. President Andrew Johnson, Veto of the Civil Rights Bill (Mar. 27, 1866), available at http://wps.prenhall.com/wps/media/objects/107/109768/ch16_a2_d1.pdf.

26. *Id.*

27. *Id.*

28. See WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 233 (1988).

29. See *id.* at 70–71. But cf. EPPS, *supra* note 15, at 164–83 (explaining how the legislative origin and movement of a constitutional amendment paralleled rather than succeeded the origin and movement for the Civil Rights Act). According to this chronology, each initiative employed a different means to accomplish the same end of protecting the fundamental rights of freedman and Republicans in the South. Still, Epps does not deny that the passage of the Fourteenth Amendment was motivated, at least in part, by the need to respond to Johnson’s veto.

30. See *McDonald v. Chicago*, 130 S. Ct. 3020, 3058–88 (2010) (Thomas, J., concurring in the judgment). See generally MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1987).

31. Compare U.S. CONST. amend. XIV, with The Civil Rights Act of 1866, 14 Stat. 27.

to place these guarantees beyond the power of any future Congress to repeal.³²

But what the Republicans in Congress giveth, the Supreme Court taketh away. Just five years after the Fourteenth Amendment's enactment, the Court in *The Slaughter-House Cases*³³—by a vote of five-to-four—effectively gutted the Privileges or Immunities Clause by limiting its scope to purely national rights, such as the right of a citizen to be protected while traveling on the high seas; it also adopted Andrew Johnson's narrow reading of the Thirteenth Amendment.³⁴ Ever since, the economic liberties protected by the Constitution have been questioned by those who would put the economic powers of the slaveholder into the hands of Congress and state legislatures.

Of course, these constitutionally protected economic liberties can still be reasonably regulated. After all, even the First Amendment's rights of freedom of speech and assembly are subject to reasonable "time, place, and manner" regulations.³⁵ As Justice Bradley explained in his dissenting opinion in *Slaughter-House*, "[t]he 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."³⁶

By eliminating the Privileges or Immunities Clause, while distorting the meaning of the Due Process and Equal Protection Clauses—along with ignoring the original meaning of the Ninth Amendment—the Supreme Court has deprived Americans of these express protections of *all* their natural rights, including their rights "to make and enforce contracts" and "to inherit, purchase, lease, sell, hold, and convey real and personal property."³⁷ But thanks to the foresight of men like Virginia's James Madison, who conceived the Ninth

32. See EPPS, *supra* note 15, at 164–83.

33. 83 U.S. 36 (1872).

34. *Id.* at 69–70, 79.

35. See *Cox v. New Hampshire*, 312 U.S. 569, 575–76 (1941).

36. *Slaughter-House*, 83 U.S. at 114 (Bradley, J., dissenting) (emphasis added).

37. Civil Rights Act of 1866, 14 Stat. 27.

Amendment,³⁸ and Ohio's John Bingham, who drafted the Privileges or Immunities, Due Process and Equal Protection Clauses of the Fourteenth Amendment,³⁹ these protections of our natural rights—both personal *and* economic—remain a part of the written Constitution of the United States. They can be denied, they can be disparaged, and they can be abridged, but they have not been repealed.

38. See generally RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 235–42 (2005).

39. See EPPS, *supra* note 15, at 164–83.