

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

--Fourteenth Amendment to the US Constitution

Political decentralization and individual liberty: the two are intertwined, but the former doesn't guarantee the latter. Any American who has had to struggle with a school board or a local zoning authority knows that local government can be as oppressive as any distant sovereign. How then should libertarian political theory deal with the problem of localized tyranny? In the American context, this question translates to: What should libertarians think of the Fourteenth Amendment?

It is a difficult question, and classical liberals of good faith have found themselves on either side of the issue. Lord Acton expressed the older view when, following the Confederacy's defeat, he wrote to Robert E. Lee: "I saw in States' Rights the only availing check upon the absolutism of the sovereign will... Therefore I deemed that you were fighting the battles of our liberty, our progress, and our civilization."¹ But by the late 20th century, libertarians have come full circle on the question of states' rights and the Fourteenth Amendment. Today, libertarian orthodoxy holds that the Fourteenth Amendment perfected the Framers' design, fulfilling the promise of the Declaration of Independence. Further, the promoters of the new orthodoxy urge that the amendment be given robust application against the states, in order to secure our natural rights to life, liberty and property.

The old libertarian orthodoxy held that fragmentation of political power, even when such power is invoked in the service of our natural rights, is a surer guarantor of

¹ John V. Denson, The Costs of War, Transaction Publishers (1999); p. 495.

liberty than the goodwill of federal legislators and judges. But the new, pro-Fourteenth Amendment orthodoxy, which might be called "libertarian centralism," has largely replaced the older, decentralist outlook.

Libertarian centralism is not without its appeal. The libertarian centralists' opposition to state-and-local-level depredations of liberty is admirable. They are right to remind us that state governments are hardly reliable protectors of individual rights. And they are right to note that property and contract rights have a stronger constitutional pedigree than many other privileges found lurking in the penumbras and emanations discerned by federal courts over the last 30-odd years.

However, the prescription offered by libertarian centralists should give pause to those with a healthy skepticism about federal power. Libertarian centralists are enraptured by the vision of an all-powerful Supreme Court charged with the task of enforcing a Lockean political order at all levels of government. They are enamored of the Lochner era, that period of roughly 30 years during which the Court struck down various state laws using the Fourteenth Amendment's Due Process Clause.² But the promoters of the new orthodoxy would go further than the Lochner Court, urging a revitalization of the Fourteenth Amendment's Privileges or Immunities Clause to protect a host of "unenumerated" natural rights against states and municipalities. The libertarian centralists even seek to enlist Congress, through legislation passed pursuant to Section Five of the Fourteenth Amendment, in the cause of protecting individual rights from rapacious local officials. But given the historical record of Fourteenth Amendment activism in Congress and the Court, it's fair to ask whether the libertarian centralist project amounts to the fond hope that the wolf at our door can be housebroken.

The dangers of libertarian centralism can perhaps best be illustrated by an examination of the ideas of its principal proponents. This paper undertakes such an

² Lochner v. N.Y., 198 U.S. 45 (1905). Though economic substantive due process began before Lochner. See, e.g., Allgeyer v. Louisiana, 165 U.S. 578 (1897).

examination, reviewing the proposals of three prominent libertarian centralists: the scholar-activist Roger Pilon, prominent law professor Randy Barnett, and public-interest litigator Clint Bolick. All three view libertarian Fourteenth Amendment activism as a promising strategy for liberty. And all three have embraced interpretations of that amendment that are more likely to undermine individual liberty than promote it.

Roger Pilon and "Higher Law" Constitutionalism

When it comes to the new libertarian orthodoxy on the Fourteenth Amendment, no one is more orthodox than Roger Pilon, director of the Cato Institute's Center on Constitutional Studies. In various Cato publications, law review articles, op-eds and congressional testimony, Pilon has tied constitutional legitimacy to Lockean political theory, as embodied in the Declaration of Independence. And Pilon has repeatedly described the Fourteenth Amendment as the fulfillment of the Declaration's promise.

Consent and Legitimacy

Throughout Roger Pilon's published work, the watchword is "consent." We come out of the state of nature, so the myth runs, to better secure our natural rights. The government we institute derives its just powers from the consent of the governed. "That, and only that, is the source of their legitimacy," Pilon tells us in Economic Liberties and the Judiciary. Though Pilon concedes that unanimous consent is a fiction, he suggests that the Framers did a tolerably good job in requiring broad consent for the adoption of our Constitution and in the procedures for its amendment. In a 1998 Cato Institute Policy Analysis Paper, "Reviving the Privileges or Immunities Clause," Pilon and coauthor Kimberly C. Shankman write: "the supermajoritarian consent that was required for constitutional ratification and amendment... served, as far as practically possible, to

legitimately institute government, authorize its powers, and change those powers."³ Quite properly, given his emphasis on consent and legitimacy, Pilon has repeatedly excoriated the political branches for arrogating to themselves powers that the people never delegated through Article V's amendment process.

In their Cato paper, Pilon and Shankman apply similar scorn to the judicial branch for ignoring the Fourteenth Amendment. They recount the story of 1873's Slaughterhouse Cases⁴, which "effectively eviscerated" that amendment's Privileges or Immunities Clause. The authors spare no venom in decrying "judicial resistance to popular will," which thwarted "the course that... the American people had meant the Court to follow."

But somewhere along the way, the true history of the Fourteenth Amendment's adoption has disappeared down an Orwellian memory hole. When one reviews that history, it becomes clear why Pilon and Shankman prefer to discuss the amendment in the abstract, antiseptic terms of social contract theory. An "immaculate conception" account of ratification suits their argument better: the real story is a little too dirty for the kids.

We return to 1865. As the legally reconstituted Southern states were busy ratifying the anti-slavery Thirteenth Amendment, the Republican-dominated Congress refused to seat Southern representatives and Senators. This allowed the remaining, rump Congress to propose the Fourteenth Amendment, consistent with Article V's requirement of a two-thirds majority for sending a proposed amendment to the states. Never mind that it also clearly violated that Article's provision that "no State, without its Consent, shall be deprived of its equal suffrage in the Senate."

Though the Northern states ratified the Fourteenth Amendment, it was decisively

³ Roger Pilon and Kimberly C. Shankman, "Reviving the Privileges and Immunities Clause to Redress the Balance among States, Individuals, and the Federal Government," Cato Institute Policy Analysis No. 326 (1998). Available at <http://www.cato.org/pubs/pas/pa326.pdf>.

⁴ 83 U.S. (16 Wall) 36 (1873)

rejected by the Southern and border states, failing to secure the three-fourths of the states necessary for ratification under Article V. The Radical Republicans responded with the Reconstruction Act of 1867, which expelled the Southern states from the Union and placed them under martial law. To end military rule, the Southern states were required to ratify the Fourteenth Amendment. As one Northern Republican described the situation: "the people of the South have rejected the constitutional amendment and therefore we will march upon them and force them to adopt it at the point of the bayonet."⁵

President Andrew Johnson saw the Reconstruction Act as "absolute despotism," a "bill of attainder against 9,000,000 people." In his veto message, Johnson stated that "Such a power ha[d] not been wielded by any Monarch in England for more than five hundred years." Sounding for all the world like Roger Pilon, Johnson asked, "Have we the power to establish and carry into execution a measure like this?" and answered, "Certainly not, if we derive our authority from the Constitution and if we are bound by the limitations which it imposes."⁶

The rump Republican Congress overrode Johnson's veto. Facing permanent military occupation, the South ratified. But not before New Jersey and Ohio, aghast at Republican tyranny, rescinded their previous ratifications of the amendment. Even with the fictional consent of the Southern states, the Republicans needed New Jersey and Ohio. No matter; by joint resolution, the Congress declared the amendment valid, and thus it--you'll excuse the phrasing--"passed into law."

The squalid history of the Fourteenth Amendment poses serious problems for Roger Pilon. Pilon's critique of the New Deal has always included withering scorn for FDR's extraconstitutional thuggery, in the form of the infamous Court-packing scheme. As Pilon tells the story, FDR muscled the Court into approving radical constitutional changes

⁵ See Walter J. Suthon, Jr. "The Dubious Origin of the Fourteenth Amendment" 28 Tulane Law Review 22, 32 (1953). See also Felix Morley, Freedom and Federalism, Liberty Press, Chapter Six.

⁶ See Pinckney G. McElwee, "The 14th Amendment to the Constitution of the United States and the Threat that It Poses to Our Democratic Government" 11 South Carolina Law Quarterly 484, 497-98 (1959).

that could only be enacted via Article V's amendment process. The people never delegated to the federal government the powers it took for itself during the New Deal. But neither did they delegate to the federal government the powers it seized in 1868. Any New Deal aficionado who knows his history is entitled to question Pilon's selective indignation. Is Pilon serious about consent and legitimacy, or does he merely invoke those concepts against constitutional changes he dislikes?⁷

The Fourteenth Amendment in Theory and Practice

However tainted its origins, the Fourteenth Amendment is in everybody's Pocket Constitution, and it will remain there for the foreseeable future. But the above account shows that the amendment cannot be justified with a bedtime story about Lockean first principles. If libertarians are to embrace the Fourteenth Amendment, they will need to find other reasons to do so. The argument must be that the amendment has been, and will continue to be, an effective weapon in the struggle for individual liberty. But even here, the case is not nearly as strong as Roger Pilon believes it to be. In practice, the Fourteenth Amendment has often operated as a grant of legislative and executive power to judges. And that power has been used to violate the very rights that Pilon wants the amendment to secure.

⁷ Pilon has addressed the charge of "selective indignation" in two Liberty magazine pieces, "In Defense of the Fourteenth Amendment" (February 2000) and "I'll Take the 14th." (March 2000). His answer is less than satisfying. Pilon distinguishes the New Dealers' abuse of constitutional process from Radical Republican abuses in two ways: (1) unlike the New Dealers, the Radical Republicans at least made an attempt to get an amendment passed; and (2) on "the merits of the matter, ... the Reconstruction Congress got it right, substantively, whereas FDR got it very wrong." As for distinction number one, the Radical Republicans put half of the country under martial law in order to extract the fiction of consent at gunpoint. FDR merely suggested some legislation that would have violated the spirit—*not* the letter—of the Constitution. (FDR threatened to pack the Court; but Lincoln actually did it, appointing as the tenth justice Stephen Field, who, ironically enough, is the libertarian centralists' favorite Justice). Pilon's repeated invocation of the tyrant's plea—wartime necessity—gets him no closer to showing that the Fourteenth Amendment's ratification procedures were constitutional. With distinction number two, i.e., "the merits of the matter," Pilon practically admits that, in his view, observance of constitutional formalities can be pushed to the side when the government "g[ets] it right, substantively."

This is nowhere clearer than in the line of cases thought to represent the Fourteenth Amendment's finest hour: Brown v. Board of Education⁸ and its progeny. Brown has iconic status on the Left and much of the Right, because many commentators see it as furthering the first Justice Harlan's noble ideal of a "color-blind" Constitution.

But this only part of Brown's story. Equality before the law shifted effortlessly into forced equality of outcome in the space of a few short years. State resistance, massive or otherwise, was useless. In North Carolina Board of Education v. Swann⁹, the Court struck down a state statute providing that no student would be compelled to attend any school for the purpose of improving racial balance in the schools. In Washington v. Seattle School District¹⁰, the Court did the same with a statewide voter initiative preventing mandatory busing for purposes of integration. In U.S. v. Yonkers¹¹, a federal judge held the Yonkers city government, and the individual city councilmembers, in contempt, ordering them to integrate the city of Yonkers by building scattersite public housing in predominantly white areas. This line of cases reached its coercive nadir in 1990's Missouri v. Jenkins¹², when the Supreme Court held that, to further integration, a federal judge could order a local government to increase property taxes, even though the increase was barred by the state constitution.

⁸ 347 U.S. 483 (1954),

⁹ 402 U.S. 43 (1971)

¹⁰ 458 U.S. 457 (1982)

¹¹ 635 F.Supp 1577 (S.D.N.Y. 1986)

¹² 495 U.S. 33

"Well, it serves them right for setting up government schools in the first place," comes the libertarian response. But wait. Faced with a desegregation order in the early 1960s, Prince Edward County, Virginia, refused to assess school taxes and instead shut down its public education system. In 1963's Griffin v. County School Board¹³, the Court ordered Prince Edward County to levy the taxes and reopen its schools. In 1996, when the Court ended male-only admissions at the Virginia Military Institute, one of the obstacles to VMI's privatization was the threat of a Griffin-based challenge from the Justice Department.

Thus, in the wake of Brown, federal courts enforcing the Fourteenth Amendment have seized vast coercive powers, state resistance to taxation and social engineering notwithstanding. To what benefit? None, actually. As the left-leaning editors of a leading constitutional law text admit, there is "no proof... that [school integration] has aided blacks in any demonstrable fashion."¹⁴ It's true that in recent years, the federal courts have cooled somewhat to desegregation lawsuits. (Though some 500 school districts in 210 lawsuits remain under federal court desegregation orders.) But it's also true that, thanks to Missouri v. Jenkins, we're no longer protected from taxation by unelected, life-tenured federal judges. The precedent remains on the books, waiting for the next egalitarian *jihad*. In its 1868 Resolution deratifying the Fourteenth Amendment, New Jersey charged that the amendment would work a radical "enlarge[ment] of the judicial power." In fact, New Jersey suspected that the amendment itself was "made vague for the purpose of facilitating encroachment on the lives, liberties, and property of the people."¹⁵ Perhaps the Garden State was on to something.

If You Liked the Commerce Power...

Roger Pilon has also urged vigorous congressional action pursuant to Section Five

¹³ 377 U.S. 683 (1963)

¹⁴ Stone, Seidman, Sunstein and Tushnet, Constitutional Law, Little, Brown & Co. (1991) pp. 530-31.

¹⁵ See McElwee, *supra* note 6, at 501-502.

of the Fourteenth Amendment, which provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." In the Cato Handbook for the 105th Congress, Pilon declares that Congress has "often failed in its responsibility under the Fourteenth Amendment to police the states. Here is an area where federal regulation has been, if anything, too restrained."

In that piece, and a June 18, 1996 Washington Post op-ed, Pilon argued that Congress has the power under Section Five to step in and protect basic individual rights when states "fail to secure them against private violations." Astute observers will note in that constitutional theory an opening wide enough for Congress to drive through a truckload of federal hate crimes laws. And in fact, in his Cato Handbook chapter and Post op-ed, Pilon declared that the Fourteenth Amendment would allow the passage of a particularly egregious hate crime law, the Church Arson Prevention Act of 1996.

Congress passed the Church Arson Prevention Act in June 1996, in response to national furor over a purported wave of black church burnings in the South. In the Post and the Cato Handbook, Pilon chided Congress for relying on the Commerce Clause in enacting the anti-arson statute. Instead, he argued that Congress should have federalized the crime of church-burning pursuant to its authority under Section Five of the Fourteenth Amendment. "If the facts had warranted it," he wrote, Congress would have had "ample authority" under Section Five to pass the Church Arson Prevention Act.¹⁶

Pilon's choice of words hinted that he did not believe that "the facts warranted it." And indeed they did not. In fact, the church arson scare of 1996 was a race-baiting hoax, a shameful Blood Libel against Bubba. In a three-day series starting June 28, 1996, USA Today reporters tossed cold water on media reports of a racist conspiracy to burn black churches. Contrary to previous reports suggesting that the bulk of church fires had taken place in the South, the USA Today series showed that of 780 church fires since 1995, only

¹⁶ Pilon, "Congress, the Courts, and the Constitution" in Cato Handbook for the 105th Congress. Available at <http://www.cato.org/pubs/handbook/hb105-3.html>

144 had taken place in the 11 South Atlantic states. Of those 144, 80 were predominantly white churches. Moreover, "analysis of the 64 [black church] fires since 1995 shows only four can be conclusively shown to be racially motivated." In the July 15, 1996 issue of the New Yorker, Michael Kelly noted that church arsons had decreased precipitously since 1980, and that the number in 1994 was the lowest in 15 years. On July 5, Fred Bayles of the Associated Press put the point forcefully: there was "no evidence that most of the... black-church fires recorded since 1995 can be blamed on a conspiracy or a general climate of racial hatred."

These reports surfaced only after Pilon's op-ed appeared in the Washington Post. Yet in successive Cato Handbook chapters, he repeated his views on the constitutionality of the Church Arson Prevention Act, without ever pausing to mention that the act was the product of a pernicious fraud. If adopted, Pilon's interpretation of the Fourteenth Amendment would bring us the likes of the Church Arson Prevention Act with some regularity, much to the detriment of the federal order and our liberties. Pilon's view virtually invites Congress to federalize crimes according to the Atrocity of the Week, real or imagined. If adopted, it would reverse the tentative trend toward restriction of federal authority that began when the Court struck down the Gun Free School Zones Act in U.S. v. Lopez.¹⁷ The only check on congressional power to federalize crimes would be the federal courts' willingness to overturn legislative findings of fact. Given that we operate with a real-world Congress, susceptible to political pressure, and a real-world judiciary reluctant to make what it sees as political judgments, that comes perilously close to no check at all.

Congress generally does not invoke Section Five when it regulates private individuals. This is so for two reasons: (1) Congress already has the power to do almost anything it wants under current Commerce Clause jurisprudence; and (2) current Section Five jurisprudence limits Congress to regulating "state action." But this can change. The

¹⁷ 514 U.S. 549 (1995)

"state action" doctrine has proved a rather porous barrier to Congress's power to regulate private actors. The first Justice Harlan, whom Pilon and Shankman view as some kind of Lockean fellow traveller, opposed the doctrine as an unreasonable limitation on Congress's power to regulate businesspeople¹⁸; so too did six members of the Warren Court at one point in the 1960s. Though the state action doctrine has remained nominally intact, the Court has found "state action" in situations such as enforcement of private, racially restrictive covenants; enforcement of racially neutral trespass statutes against lunch counter sit-ins; and racial discrimination by private businessmen leasing property from the state.¹⁹ The doctrine is eminently capable of giving way to a general regulatory power. If the Supreme Court gets serious about restraining congressional abuses of the Commerce Power, look for Congress to use Section Five to reenact and extend modern antidiscrimination laws. And look for the Court to cave.

Indeed, Pilon unwittingly encourages this result when he writes that Congress has the power under Section Five to redress not only state action, but also state "omissions." Regulating state omissions—stepping in when a given state didn't do something Congress thinks it should have—is equivalent to regulating private acts. If Congress can legislate directly against private violence, like a church burning, in the absence of affirmative state action, then why can't it also legislate against private racial discrimination? If the state action requirement is gone, then the public-private distinction is gone, and discriminatory hiring at Denny's is as open to regulation as discriminatory hiring of cops.

¹⁸ The Civil Rights Cases, 109 U.S. 3 (1883), Harlan, J. dissenting.

¹⁹ Shelley v. Kramer 334 U.S. 1 (1948); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961)

Pilon would doubtless answer that we have a right to be protected from violence, but not from other people's refusal to associate with us. That is certainly true as a matter of classical liberal rights theory. But the Supreme Court has not often understood these philosophical subtleties. Consider, for example, Reitman v. Mulkey²⁰, in which the Court struck down California's "Proposition 14." That amendment to the California Constitution, enacted by California's voters, forbade the state from denying "the right of any person [to] decline to sell, lease or rent [property] to such person or persons as he, in his absolute discretion, chooses." But according to the Court, a state constitutional provision that guarantees property rights would have "impermissibly involved the state in acts of private discrimination." The congruence of libertarian rights theory and the Fourteenth Amendment has not, historically, been readily apparent to the Court. That disconnect is something that libertarian centralists ought to take into account before urging expansive new interpretations of the amendment.

To his credit, Pilon has recently recanted his support for an interpretation of Section Five that would allow for either the federalization of local crimes or direct regulation of state "omissions." In a piece in the March issue of Liberty magazine, "I'll Take the 14th," Pilon disavows his earlier interpretation of Section Five, admitting that he "wrongly implied" that that provision permits Congress to federalize crimes. He now argues instead that "Congress is authorized, if necessary, to compel states to provide equal protection of the laws." What exactly that entails, and how it can be squared with the Court's revitalized Tenth Amendment jurisprudence, Pilon leaves unstated.²¹

²⁰ 387 U.S. 369 (1967)

²¹ *See, e.g., New York v. U.S.*, 505 U.S. 144 (1992) (Congress may not commandeer the legislative processes of the states by forcing them to enact laws); *Printz v. U.S.*, 521 U.S. 898 (1996) (state executive officers may not be "dragooned" into administering federal law).

Randy Barnett and the Constitutional "Presumption of Liberty"

The most prominent libertarian centralist in legal academia is Boston University Law Professor Randy E. Barnett. Yet in one sense, it's unfair to apply the “centralist” label to Barnett. Barnett's credentials as a free-market anarchist are well established, and free-market anarchism is the antithesis of centralism.²² But Barnett's published work on the Ninth and Fourteenth Amendments fits uneasily with his preference for a polycentric legal order. Moreover, it fits uneasily with our Constitution.

Power Without Delegation

In his influential work on the Ninth Amendment, Barnett argues, in effect, that the Fourteenth Amendment incorporates the Ninth, establishing a constitutional "presumption of liberty" that the courts should observe when reviewing state and local legislation. As Barnett puts it, "given that the Fourteenth Amendment extends the protection of constitutional rights to acts of state governments, the Ninth Amendment stands ready to respond to a crabbed construction that limits the scope of this protection to the enumerated rights."²³ Barnett's constitutional "presumption of liberty" allows a federal court reviewing state legislation to look beyond those portions of the first eight amendments that the Court has seen fit to incorporate via the Fourteenth Amendment's due process clause, and strike down statutes that violate "unenumerated" natural rights.

Barnett's constitutional argument essentially proceeds as follows:

- The Framers did not believe that the Bill of Rights specifically enumerated all the natural and procedural rights that we have. Indeed, they viewed such a project as impossible.
- The Ninth Amendment reflects that belief.
- The Fourteenth Amendment conferred federal jurisdiction over a broader range of

²² See, e.g., “Whither Anarchy: Has Robert Nozick Justified the State?” Barnett, 1 Journal of Libertarian Studies 15 (Winter 1977). Available at <http://www.libertarianstudies.org/journals/jls/jlstoc.asp>

²³ Randy Barnett, “Reconceiving the Ninth Amendment,” 74 Cornell Law Review 1, 42 (1988)

state-level rights violations than did the original Constitution.

- Thus, federal courts, via the Ninth and Fourteenth Amendments, have the power to invalidate state and local legislation that violates natural rights.

But Barnett's ladder to the "presumption of liberty" is missing a few rungs, as the following example may help illustrate. A libertarian decentralist might, following Barnett, just as easily argue his way to the constitutional enshrinement of his favored political principle of decentralization. That argument would proceed as follows:

- The Framers believed in subsidiarity and decentralized government.
- The Fourteenth Amendment provides for broader federal review of state legislation.
- The Fourteenth Amendment incorporates the Tenth Amendment, which "stands ready" to vindicate the principle of decentralization against those urging a broader view of state powers.
- Thus, the constitutional "presumption of decentralization" allows the federal courts to veto any state-level legislation that improperly overrides the decisions of subordinate governing bodies.

With that in mind, consider the 1996 Supreme Court case of Romer v. Evans²⁴. In that case, the Supreme Court struck down a Colorado constitutional amendment that would have prevented any political subdivision within the state from extending antidiscrimination protection to homosexuals. Amendment Two, the provision at issue, would have protected Colorado employers' and landlords' right to refuse to associate with homosexuals if they so chose. But the Court held that Amendment Two violated the Fourteenth Amendment's Equal Protection Clause.

The Court's decision in Romer was roundly criticized as lacking a basis in either the Fourteenth Amendment or even the Court's prior decisions applying the rational basis

²⁴ 517 U.S. 620 (1996)

test for groups, like homosexuals, that do not constitute a specially protected category. But using the constitutional "presumption of decentralization" outlined above, we can get to the result in Romer in a way that will please both gay rights activists and Jeffersonian democrats. The rationale is as follows: the state of Colorado violated local sovereignty by overturning Aspen, Denver, and Boulder's decisions to extend antidiscrimination benefits to homosexuals. With the constitutional presumption of decentralization, the Supreme Court can put it right.²⁵

The problem with this scenario is that it bears no relationship to the Constitution we actually have. Unless one can show that the ratifiers actually understood the Fourteenth Amendment to incorporate the Tenth, or that such is the necessary implication of the Fourteenth Amendment's text, then the "presumption of decentralization" is an exercise in constitutional mythmaking. Barnett's "presumption of liberty" stands on no firmer ground.

²⁵ Of course, one would be ill-advised to attempt to promote decentralization by expanding federal jurisdiction.

It is true that the Framers did not imagine the Bill of Rights to enumerate all of our rights. It is equally true that the framers of the Fourteenth Amendment intended that amendment to provide a measure of protection against state-level coercion. But piling those premises atop one another does not establish an open-ended grant of federal power to enforce unenumerated rights at all levels of government. As Raoul Berger put it in a trenchant critique of Barnett: "Identification of the unenumerable retained rights would not automatically confer jurisdiction on a federal court to enforce them. Federal jurisdiction is peculiarly a creature of grant, [and] all intendments preclude an implied grant."²⁶ Barnett makes no serious attempt to show that either the framers or the ratifiers of the Fourteenth Amendment understood it to confer federal jurisdiction over each and every natural rights violation committed at any level of government. Indeed, Barnett sounds almost cavalier about the subject, as when he writes: "If the Privileges and Immunities Clause of the Fourteenth Amendment is viewed as establishing the same constitutional presumption in favor of individual and associational liberty against the states as the Ninth Amendment established against the federal government, then whether the unenumerated rights retained by the people are seen as protected by one provision or the other may be immaterial."²⁷ That is a substantial "if," and it begs for more argument than Barnett has devoted to it.

An Invitation to Abuse

As suggested above, Barnett's attempt to incorporate the Ninth Amendment via

²⁶ Berger, "The Ninth Amendment, as Perceived by Randy Barnett," 88 Northwestern University Law Review 1508, 1510 (Summer 1994).

²⁷ Barnett, *supra* note 23 at 41-42.

the Fourteenth is of dubious constitutional merit. Moreover, as a practical matter, Barnett's judicial "presumption of liberty" is more likely to undermine liberty than secure it. Justice Hugo Black's version of incorporation--which provided for wholesale application of the first eight amendments to the states--at least had the merit of confining the justices to a text. Barnett's approach invites a more open-ended inquiry, and one particularly susceptible to abuse.

How are judges to discern what our unenumerated natural rights are? Barnett discusses three approaches. The first, which Barnett calls "the originalist method," is the least open-ended. Using it, the Court consults historical materials contemporaneous with the passage of the amendment, such as the rights "expressly stipulated by state constitutions at the time." Presumably, if a proposed right lacks a well-developed historical pedigree, it is not a candidate for protection under this approach. The conservative members of the current Court have adopted an analogous approach with regard to liberties protected by the Fourteenth Amendment's due process clause. For example, in declining to establish a constitutional "right to die" in Washington v. Glucksberg, Justice Rehnquist held that only unenumerated rights "deeply rooted in this Nation's history and tradition" would be deemed fundamental.²⁸

²⁸ 117 S.Ct. 2302 (1997)

Barnett, however, is not willing to be confined by such a test. He supports the constitutionalization of a right to assisted suicide, a right that can hardly be said to be deeply rooted in our history and tradition. He further intimates that drug laws violate the Ninth and Fourteenth Amendments, and urges judges to ask whether it is "really necessary to criminalize the sale and use of intoxicating substances?"²⁹ One can surely answer "no" without embracing the absurdity of a constitutional right to smoke crack. But Barnett suggests that such rights can be derived by either the "constructive method," whereby judges "try to construct a coherent conception of rights," or the "presumptive method," whereby judges adopt "a general constitutional presumption in favor of individual liberty."³⁰ It is difficult to accept that any of the Fourteenth Amendment's ratifiers understood the amendment to delegate decisionmaking authority over virtually every contentious moral issue that arguably intersects with individual rights to the most distant, least democratic body in the American political system. If they had, one would have expected a clearer statement to that effect than what we actually have in the text of the Fourteenth Amendment.

²⁹ Barnett, Intro to The Rights Retained by the People, (1993) p. 17.

³⁰ Barnett, *supra* note 23 at 32-39.

In addition to its constitutional infirmities, Barnett's interpretation of the Fourteenth and Ninth amendments clears a path for left-wing activism in the service of "welfare" rights. What would prevent wholesale abuse of the incorporated Ninth Amendment by willful judges pursuing the mirage of social justice? Barnett offers little in the way of reassurance. "The problem of judicial abuse," he writes, "is best addressed at the level of general constitutional theory by strongly insisting on two formal constraints on judicial power and by using the structural constraints that are available to control judicial abuse." The two formal constraints Barnett offers are: (1) that "substantive constitutional rights are negative, not positive"; and (2) that judicial power, in essence, is merely negative, the power to "veto": "Judges may only say 'no'--and judicial negation is not legislation."³¹

The problem with these formal constraints is just that: they are merely formal. The distinction between positive and negative rights is a theoretical, and ephemeral, barrier to judicial adventurism. The Supreme Court has, in living memory, come to the brink of constitutionalizing certain positive or welfare rights via the Fourteenth Amendment. In 1970's Goldberg v. Kelly³², the Court held that an elaborate, trial-type hearing was required before a citizen's welfare benefits could be taken away: "Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. [Public] assistance, then, is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.'" In 1982's Plyler v. Doe,³³ the Court held that a Texas statute that authorized local school districts to deny free public education to illegal aliens violated the Fourteenth Amendment's equal protection clause. In his dissent, Chief Justice Burger charged that the Court was treating public education under a "quasi-fundamental rights analysis."

³¹ *Id.* at 39.

³² 397 U.S. 254 (1970)

³³ 457 U.S. 202 (1982)

And indeed, things might have gone much worse for those who believe that “positive” or “welfare” rights are oxymoronic. As George Mason University law professor David Bernstein noted in a Cato Institute Policy Analysis urging Fourteenth Amendment activism on behalf of economic liberty: "During the Warren Court era, liberal legal scholars hoped that the Supreme Court would even find a right to a minimum income in the Fourteenth Amendment. Had it not been for the Nixon administration's appointment of several new, more conservative justices, the Supreme Court might very well have entrenched the American welfare state in the morass of modern constitutional law."³⁴

Barnett and other advocates of a “strong” Fourteenth Amendment view that amendment's Privileges or Immunities Clause as the sword in the stone that, once freed, can be used to strike down meddlesome state and local laws that inhibit economic and personal freedom. But surely the Left will be eager to wield that sword, using it as a weapon for social engineering and redistribution. As Justice Thomas noted in his Saenz dissent, the majority's decision raised "the specter that the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by 'the predilections of those who happen at the time to be Members of this Court.'"

Given that the formal constraints Barnett discusses are insufficient to address the kind of concerns raised by Justice Thomas, structural constraints are all the more important. But Barnett merely treats such constraints in passing, mentioning "judicial nomination by an elected president and confirmation by an elected Senate, and impeachment by an elected House." And, of course, he explicitly repudiates the most important and effective structural constraint: limitations on federal jurisdiction.

Moreover, the distinction Barnett draws between judicial negation and legislation is more apparent than real. Under the Fourteenth Amendment, judges have more than the power to say “no.” Witness Brown v. Board's coercive, centralizing progeny, discussed

³⁴ Bernstein, “Equal Protection for Economic Liberty: Is the Court Ready?” Cato Institute Policy Analysis No. 181, Cato Institute (1992). Available at <http://www.cato.org/pubs/pas/pa-181.html>.

above. And, depending on what the Court is “negating,” judicial negation can have the effect of legislation, and, in many cases, the effect of redistributive legislation. Three comparatively recent examples illustrate the point. First, in Romer v. Evans, discussed above, the Supreme Court essentially reenacted Denver, Aspen, and Boulder’s extension of coercive antidiscrimination laws to cover homosexuals. In that case, judicial negation had the effect of a legislative override of freedom of association. Second, the legal battle over California’s Proposition 187, in which the federal courts have prevented the implementation of California’s “anti-immigration” ballot initiative, has in effect mandated that social services go to noncitizens, much to the chagrin of the taxpayers expropriated to provide them.³⁵ Finally, when the Court dusted off the Privileges and Immunities Clause last term in Saenz v. Roe³⁶, it was not to vindicate economic liberty, but rather to frustrate welfare reform in California. In an effort to ameliorate the “welfare magnet” effect of its relatively high benefit payments, California had limited new migrants to the state for one year after their arrival to the benefits they would have received in their prior state of residence. The Court, invoking the same Privileges or Immunities clause that the libertarian centralists see as a potential fount of economic liberties, held that California’s parsimony violated the “right to travel” protected by that clause. In its practical effect, the Court’s decision was indistinguishable from a legislatively mandated increase in welfare spending.³⁷

The Problem of Power

In his work on the Ninth and Fourteenth Amendments, Barnett proposes

³⁵ The National Academy of Science study The New Americans puts the cost of providing services to illegals at \$1200 a year per native-born Californian family.

³⁶ 1999 WL 303743

³⁷ Roger Pilon, in a Liberty magazine piece entitled “I’ll Take the 14th,” embraced the Saenz decision, writing that it “ensure[d] equal protection of the laws.” This is an odd position for a libertarian to take, particularly a libertarian, like Pilon, who has complained about the Court’s free-wheeling equal protection jurisprudence. “People who moved to California from out of state” are not a suspect classification for Equal Protection Clause analysis, and California has an eminently rational, non-invidious reason for distinguishing among its citizens on that basis.

dramatically strengthening the Supreme Court as a means of controlling the abuse of power by state and local officials. As suggested above, that solution is unlikely to solve the problem it addresses, and promises instead to create further abuses of power.

Interestingly, at some level Barnett recognizes this. In his recent book The Structure of Liberty, Barnett criticizes the “Single Power Principle,” which he defines as the “belief in the need for a *coercive monopoly of power*.” (Emphasis in original).³⁸ Proponents of the Single Power Principle see a coercive monopoly of power as necessary to prevent corruptible human beings from violating each others’ rights. But, as Barnett notes, this solution is doomed to failure because of the very flaw in human nature it attempts to combat. The Single Power Principle, according to Barnett, is plagued the problem of enforcement abuse, which is characterized by four subsidiary problems:

1. *The Selection Problem*: how do we ensure that those given power are less corrupt or corruptible than those whose rights they are supposed to secure?
2. *The Capture Problem*: how do we “keep the people who will abuse their power from eventually wresting control of the monopoly from the good?”
3. *The Corruption Problem*: “the mere possession of power itself—with its privileged status and ability to control and seduce others—is addictive.” Even if power has initially been allocated to “good” people, how do we keep them from proving Acton’s dictum about the corrupting effects of power?
4. *The Legitimacy Problem*: “Because many good people will hesitate to oppose the legitimate or ‘duly constituted authority,’ the halo effect created by the perception of legitimacy severely exacerbates the problem of enforcement abuse.” How do we prevent the perception of legitimacy from increasing “the potential for corruption and advantage-taking”?³⁹

³⁸ Barnett, The Structure of Liberty, Oxford University Press (1999), p. 240.

³⁹ *Id.*, at 245-47.

Like any other Single-Power solution to the problems posed by human nature, the Supreme Court is susceptible to each of these facets of the problem of enforcement abuse, particularly Problems One and Four.⁴⁰ Though Barnett does not specifically apply this analysis to the Supreme Court, his argument underscores the futility of libertarian centralism:

The Single Power Principle cannot by itself solve the selection, capture, corruption, and legitimacy problems without setting up a kind of infinite regress of power. Although the weakness of human beings is exacerbated by a centralized monopoly of power, there is no other species that can be put in control of the monopoly. Therefore, one must forever propose “higher” authorities to correct the ills of “lower” authorities and ensure that subordinate authorities remain honest...Trying to control the abuse of a centralized monopoly of power hierarchically or vertically is futile, though this is not to deny that some schemes are better than others. No matter how high you build your hierarchy of power, there is simply no one to put on top who will not himself be potentially corrupt.⁴¹

⁴⁰ See Rothbard's discussion of the legitimizing function of judicial review, “a method by which the government can assure the public that its expanding powers are indeed ‘constitutional,’” in For a New Liberty, Fox and Wilkes (1996 ed.), pp. 65-67.

⁴¹ Barnett *supra* note 38, at 247.

Given Barnett's hostility to the Single-Power Principle and dedication to the project of polycentric law, his desire to make the Supreme Court even more powerful than it is, is baffling. Barnett's "presumption of liberty" would create federal jurisdiction over each and every rights violation committed by any level of government--whether it be a municipal recycling program or a local zoning ordinance--thus turning the Court into a sort of Politburo of Liberty. Once the Court is captured by "bad" people, or those with a mistaken notion of rights, the ability to exit—to escape the Court's jurisdiction—is dramatically reduced. The notion that such aggressive centralization will bring us any closer to anarcho-capitalism is as puzzling as the Marxian view that we must pass through the dictatorship of the proletariat before the state can wither away.⁴² Far preferable is the approach Barnett touches upon briefly in The Structure of Liberty: checking abuse of centralized power via secession. As Barnett notes, "a right by individuals, associations and regions to secede would be an important potential constraint on the abuse of power if it were more effectively available than it is today." In this Barnett is surely right, but this solution to the problem of Power—fragmenting Power through secession, and thereby increasing the ability to exit—is in sharp tension with the solution which has occupied much of Barnett's academic writing: the relentless expansion of federal jurisdiction.

⁴² Unless Barnett envisions a libertarian Supreme Court that will judicially "veto" legislative attempts to shut down competing private protection agencies, and thereby, in a sort of Brown v. Board of Education for the libertarian anarchist, vault us into a polycentric utopia. But of course Barnett is far too intelligent to embrace a scenario that would strain credulity even if it appeared in one of L. Neil Smith's libertarian science fiction novels.

Clint Bolick and "Grassroots Tyranny"

Despite the flaws in his ambitious reading of the Ninth and Fourteenth Amendments, Randy Barnett has often written eloquently on the dangers of concentrating legal authority in any one person or governmental entity. It cannot be said that he is blind to the problem of centralized power. However, that *can* fairly be said of Clint Bolick, perhaps the most effective popularizer of libertarian centralism. Bolick, litigation director of the libertarian public-interest law firm the Institute for Justice, compares his crusade for economic liberty to the civil rights movement. Unfortunately, like the civil rights crusaders of old, Bolick seeks to combat local abuses through dangerous increases in federal authority.

The "Economic Liberty Act"

On June 7, 1995, Bolick ascended Capitol Hill to advocate a dramatic expansion of federal power. Congress, Bolick declared in his testimony before the House Small Business Committee, should strike a sweeping blow for economic liberty with Section Five of the Fourteenth Amendment. As Bolick put it: "Congress has the power to enforce the 14th Amendment through appropriate legislation. It should use this power to enact an Economic Liberty Act. The provisions are simple. Any federal or state law that restrains entry into a business or occupation must be narrowly tailored to a legitimate public health, safety, or public welfare objective."⁴³

Restricting state governments' ability to regulate to narrowly confined public-good objectives is certainly a laudable goal. Would that all governments everywhere were thus confined. But Bolick's proposal was seriously misguided. By ceding to Congress the power not only to "enforce," but effectively to define what our privileges and immunities

⁴³ Testimony of Clint Bolick before the House Small Business Committee, Federal News Service (June 7, 1995).

are, it would give the national legislature the ability to rewrite the Constitution at will. And if Congress has the power to redefine and enforce our Fourteenth Amendment rights at all levels of government, then woe betide the Republic when it elects a Congress with a more modern, positive-rights orientation than that of the libertarian centralists. An Economic Security Act is a distinct possibility.

In the 1997 case City of Boerne v. Flores, the Supreme Court reviewed and rejected a sort of analog to the Economic Liberty Act: the Religious Freedom Restoration Act (RFRA). Passed pursuant to Section Five of the Fourteenth Amendment, RFRA sought to "enforce" the First Amendment's Free Exercise Clause essentially by redefining that clause and forcing the federal courts to enforce by that redefinition. Under RFRA, no federal, state, or local government body could pass any law, whether facially neutral or not, that would have the effect of "substantially burdening" a person's exercise of religion, unless that law was the least restrictive means of securing a compelling government interest. In striking down the statute, the Supreme Court commented on the dangers represented by an interpretation of Section Five that would allow Congress to turn itself into a permanent constitutional convention: "If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' [quoting Marbury v. Madison]... Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V."⁴⁴

The astounding thing is that anyone with a passing familiarity with public choice theory (or, for that matter, anyone who has observed Congress) would seek to invest Congress with such power. Consider what Congress actually does with Section Five of the Fourteenth Amendment. That provision is most often invoked in the service of modern notions of equality, providing private rights of action against discrimination. Among the

⁴⁴ 117 S.Ct. 2157 (1997). The irony here is that the Court itself functions as a permanent constitutional convention, particularly so in a centralized constitutional order with a large role for judicial review.

statutes that have been upheld under Section Five are the speech-restrictive Freedom of Access to Abortion Clinics Act, the Americans with Disabilities Act, the sex discrimination provisions of Title IX of the Civil Rights Act, and the Age Discrimination in Employment Act. With regard to the latter three, Section Five has been interpreted to allow Congress to abrogate state governments' Eleventh Amendment immunity from suit in federal courts.⁴⁵ Congress, with the help of the federal courts, has used Section Five to allow extortionate lawsuits against state governments, agencies, and schools.⁴⁶ Given Congress's record with Section Five, Bolick's faith in centralized power resembles Oscar Wilde's characterization of a second marriage: the triumph of hope over experience.

⁴⁵ See, e.g., Franks v. Kentucky School for the Deaf, 142 F.3d 360 (6th Cir. 1998); Doe v. University of Illinois, 138 F.3d 653 (7th Cir. 1998); EEOC v. County of Calumet, 519 F.Supp. 195 (E.D. Wisc. 1981)

⁴⁶ But recently the Court has significantly curtailed Congress's ability to do so. See Kimel v. Board of Regents, January 11, 2000, holding that the ADEA is not "appropriate" legislation under Section Five of the Fourteenth Amendment. The Court seems to be moving in a promising direction with its Section Five jurisprudence, the decentralist thrust of which is entirely contrary to what the libertarian centralists would urge upon the Court.

Bolick Contra Devolution

But Bolick has demonstrated that kind of hope before. Alone among libertarian commentators, he hailed the Supreme Court's decision in Romer v. Evans as a triumph for individual liberty. In Romer, as discussed above, the Court invalidated Colorado's Amendment Two, which itself overturned local statutes extending antidiscrimination protections to gays and lesbians. Amendment Two was largely a response to ordinances passed by Aspen, Boulder, and Denver that barred discrimination against homosexuals in housing and employment. Bolick praised the decision and argued that Romer might be used to protect economic liberty: "[Romer] is very important in restricting all kinds of government actions. This is not about gay rights, it's about individual rights."⁴⁷ One might have thought that freedom of association was an important individual right, and that one's ability to rent to or hire whomever one chooses was an important facet of economic liberty. Yet Bolick saw the decision as a vindication of libertarian values and a defeat for mean-spirited state officials.

It is difficult to explain Bolick's embrace of Romer v. Evans in terms of constitutional theory or libertarian political preferences. It seems rather to lie in his reflexive hostility to local governments and preference for centralized power. That preference is evident in Bolick's 1993 book Grassroots Tyranny.⁴⁸ In that 195-page paean to the Fourteenth Amendment, Bolick makes the claim that "local government in its various forms is today probably more destructive of individual liberty than even the national government." This seems extravagant, particularly in a book published in the year of the Waco massacre.

But Bolick means it. He rightly criticizes conservatives who romanticize local

⁴⁷ "Homosexuals: A Victory for Rationality" The Economist, May 25, 1996.

⁴⁸ Bolick, Grassroots Tyranny, Cato Institute (1993). So hostile is Bolick to local authorities that he finds it ominous that "in the 1970s alone 2,000 new local government units were created." (pp. 6-7). Bolick seems oblivious to the idea that, insofar as these units do not overlap each other, this development could represent the division of sovereignty and thus a potential increase in individual liberty. In Bolick's view, a statistic showing that thousands of local jurisdictions were consolidated would represent a positive development, despite the attendant increase in exit costs.

governments and assume that those governments are somehow organic extensions of the people they so often oppress. But Bolick's viewpoint is the mirror image of that flawed perspective. His narrative of federalism echoes the modern Hollywood version in movies like "Mississippi Burning": federal power, rooted in righteousness, must be used to thwart malevolent local officials.⁴⁹

Clint Bolick's work, far more than Pilon's or Barnett's, suggests the danger represented by libertarian centralism. The libertarian centralists' laudable fear of local tyranny could, when and if libertarian centralism's adherents gain political power, translate itself into a generalized hostility toward decentralization. An exaggeration? Perhaps. But consider the counsel offered by Clint Bolick to the G.O.P. majority back in the days when one could still use the phrase "Republican Revolution" without irony. In a December 18, 1995 cover story in the Weekly Standard, "Leviathan in the Suburbs," Bolick warned against "the one-size-fits-all solution" of political devolution. Bolick picked as his example of local government run amok his home town, the D.C. suburb of Alexandria, Virginia: "Republicans who have caught devolution fever ought to pause long enough to cast a southward glance across the Potomac to the city of Alexandria, Virginia. There they will find that despite their best intentions big government is not disappearing; it's merely moving to the suburbs."

Bolick's cautionary tale comes complete with what he apparently considers chilling examples of local despotism. Among them: an Alexandria couple harassed by local

⁴⁹ This perspective is evident in Bolick's enthusiastic embrace of the federal government's actions in U.S. v. Yonkers, 635 F.Supp 1577 (S.D.N.Y. 1986). In that infamous case, Judge Leonard Sand found the city guilty of discrimination in housing and education, and ordered city officials to build hundreds of units of public housing in middle-class, mostly white neighborhoods. When the city councilmen refused, Judge Sand imposed an exponentially increasing fine on Yonkers that would have bankrupted the city in 22 days. He also imposed personal fines on the city councilmembers—and threatened to throw them in jail. Bolick offers not a word of criticism for the imperious Judge Sand in his account of the Yonkers case in Grassroots Tyranny. Instead, he reserves all his ire for the city of Yonkers: "the brazen actions of the Yonkers city government to perpetuate segregation would have made the southern white supremacists of yesteryear proud. In a sense, though, the Yonkers government was worse than its predecessors who were avowed racists, for it sought to hide its true motivations behind a façade of concern over property values and the city's well being." p. 171. (Bolick, then a Justice Department attorney, argued the federal government's case against Yonkers when the city appealed to the Second Circuit.)

administrators for building a backyard gazebo without a permit (the city eventually decided to permit the gazebo), and syndicated columnist Cal Thomas's struggles with Alexandria's property-tax assessors. Now, surely it can be conceded that such actions by officious local bureaucrats are vexing, even oppressive infringements on property rights. But are they really persuade us that moving power out of Washington may not be a good idea? Bolick's concern with local abuse of power and his quest for a *deus ex machina*—in the shape of the Court or Congress—that can rescue all the Cal Thomases across the fruited plain, has seriously skewed his priorities. He thus typifies a problem endemic to libertarian centralism.

The Originalist's Fourteenth Amendment

The above analysis of the ideas put forth by Pilon, Barnett, and Bolick suggests that libertarians should have their doubts about centralism as a strategy for liberty. They should also have their doubts about the libertarian centralist project as a matter of constitutional law. The broad interpretation of the Fourteenth Amendment propounded by the libertarian centralists cannot be justified by our Constitution. This so for at least two reasons.

First, any expansive interpretation of the Fourteenth Amendment breaks faith with the U.S. Constitution, and with constitutionalism in general. As discussed above, the ratification procedures for that amendment flagrantly violated the letter and spirit of Article V. If constitutionalism means anything, it must mean that constitutional provisions brought about by brute force are invalid. The Fourteenth Amendment is a contract signed at gunpoint, and thus no contract. By reading the amendment to confer extensive powers on Congress and the courts, libertarian centralists violate provisions of the Constitution that were properly ratified, in favor of a provision that was not. Specifically, libertarian centralists transgress the principle of enumerated powers and the Tenth Amendment, which enshrines that principle. The federal powers Pilon, Barnett, and Bolick advocate—

to review state-level legislation for conformity with unenumerated natural rights, and to legislate generally on the subject of those rights⁵⁰—were never "delegated to the United States." If those powers exist anywhere in our political system, they are "reserved to the States respectively."⁵¹

Second, leaving aside any questions about the Fourteenth Amendment's constitutional status, and assuming *arguendo* that its ratification was pristine, the amendment, as originally understood, did not confer upon the federal government the vast powers Pilon, Barnett, and Bolick now invoke in the amendment's name. Radical though they were, the Radical Republicans were a most unlikely source for constitutional changes that would make the judiciary the most powerful branch of government, a "perpetual censor" over the states.

⁵⁰ This last may not fairly be attributable to Barnett, as he has not made clear his views on Section Five. Pilon has in the past written that Congress has "the power to negate state actions that deny citizens the privileges and immunities of citizens of the United States." See http://www.cato.org/pubs/policy_report/pr-nd-rp.html. Given that he reads "privileges" and "immunities" to encompass our natural rights *in toto*, that would seem to provide a lot of work for Congress under Section Five. However, Pilon appears to have backed off of this position. See "I'll take the 14th," *Liberty* magazine (March 2000).

⁵¹ Whether it would be prudent for a sitting Justice to proclaim the invalidity of the Fourteenth Amendment is a different question. For example, government fiat currency is almost certainly unconstitutional, but, as Robert Bork has put it, "if a judge today were to decide that paper money is unconstitutional, we would think he ought to be accompanied not by a law clerk but by a guardian." Robert Bork, *The Tempting of America*, The Free Press (1990) at 155. If the judiciary is to avoid irrelevance, it must pick its fights judiciously.

The Republicans' view of the judiciary was formed by their experiences with Chief Justice Roger Taney, who not only authored the infamous Dred Scott⁵² opinion, but, in a prouder moment, also sought to restore due process of law and the protections of habeas corpus in the Merryman⁵³ case, much to the chagrin of G.O.P. authoritarians. Indeed, to neuter the Court and protect Reconstruction legislation, the Radical Republicans enacted statutes shrinking both the Court's appellate jurisdiction and the Court itself. As Raoul Berger notes, "[John] Bingham [the Fourteenth Amendment's drafter], [Rep. Thaddeus] Stevens, 'and others were among the severest critics of the Supreme Court and judicial review... [and] viewed it with a profound and ever growing mistrust.'"⁵⁴

What powers then does the Fourteenth Amendment grant the courts and the federal government in general? That is an issue that will not be settled here. There is a great deal of evidence that both the framers and the ratifiers of the Amendment saw it as preventing invidious discrimination among citizens across a narrow range of fundamental rights—specifically, those enumerated in the Civil Rights Act of 1866, which the Amendment was designed to constitutionalize.⁵⁵ There is also considerable evidence for an alternative interpretation: selective incorporation of the Bill of Rights⁵⁶ But both of these readings, which frame the bounds of plausible interpretation, are rather narrower than what Bolick, Pilon, and Barnett espouse.

Indeed, it is interesting to note that the constitutional theorist whom Bolick, Pilon, and Barnett invoke most frequently in the service of a "strong" Fourteenth Amendment, Michael Kent Curtis, utterly repudiates their idea that the amendment protects economic

⁵² 60 U.S. (19 How.) 393 (1857)

⁵³ (1861) 17 Fed.Cas. 144, 148 (C.Ct.Md.), No. 9487

⁵⁴ Berger, Government by Judiciary, p. 247.

⁵⁵ See, e.g., David Currie, The Constitution in the Supreme Court, Vol. I, p. 348: "That the [Privileges or Immunities Clause] is merely a guarantee of equal treatment is strongly suggested by the choice of the language of article IV, which the Court had already so construed." Currie also notes that "the existence of the due process clause in the amendment provides another argument against incorporation: it suggests that when the drafters of the amendment meant to make bill of rights provisions apply to the states, they said so." p. 346. See also Berger, *supra* note 53.

⁵⁶ See, e.g., Akhil Amar, The Bill of Rights, Yale University Press (1998).

rights associated with laissez-faire. Professor Curtis makes his views on constitutional "liberty of contract" abundantly clear in a Boston College Law Review article with the ungainly title "Resurrecting the Privileges or Immunities Clause and Revising the Slaughterhouse Cases without Exhuming Lochner: Individual Rights and the Fourteenth Amendment." According to Curtis, invoking the Fourteenth Amendment to prevent economic regulation would be a violation of everything the amendment's Radical Republican drafters stood for: "It would be ironic to read [the amendment] as denying workers the minimum standards of compensation essential to the dignity and independence so many Republicans found essential." For this reason, Curtis argues, not only was Lochner wrong, but in fact, "the Fourteenth Amendment, properly interpreted, does not prohibit most government regulations of the economy." Alas, so hostile is Professor Curtis to the idea of constitutionally protected capitalist activities that he feels compelled to use quotation marks when referring to the "free" market and economic "liberties."⁵⁷

Does Curtis's opposition to constitutional "liberty of contract" stem from close analysis of the Fourteenth Amendment or left-wing political bias? A bit of both, perhaps. But his Boston College Law Review article certainly highlights a problem that seems to be endemic to Fourteenth Amendment: politically motivated scholars and activists tend to see in the Amendment the reflection of their every political preference. That is a tendency from which the libertarian centralists are by no means immune.

Toward a Jeffersonian Jurisprudence

In their eagerness to promote an expansive and constitutionally dubious interpretation of the Fourteenth Amendment, libertarian centralists have paid insufficient attention to the Problem of Power. In their system (the institutional framework for which—federal supremacy—already exists) ideological infections are able to spread

⁵⁷ Curtis, "Resurrecting the Privileges or Immunities Clause and Revising the Slaughterhouse Cases without Exhuming Lochner: Individual Rights and the Fourteenth Amendment," 38 Boston College Law Review 1, 95 –101 (December 1996).

rapidly through the country. In contrast, in the decentralist framework (the institutional structure for which hasn't existed since the civil war), the right to exit serves as a check on political actors' ability to reshape America according to their will. In a decentralized system, utopian statist have their work cut out for them: taking over 50 state legislatures and judicial branches one by one. From this perspective, Justice Brandeis's rationale for federalism—that it permits the states to serve as “laboratories of democracy”—gets it precisely backwards. The point of decentralization is that it makes it easier for us rats to escape the Skinner Box.

Libertarians used to understand the importance of dividing sovereignty. According to Lord Acton, the singular merit of the antebellum constitutional order was that "centralization [found] a natural barrier in the several State governments."⁵⁸ And well into the 20th century, stalwarts of the classical liberal Old Right such as Albert Jay Nock and Felix Morley viewed centralization in the name of liberty with admirable skepticism.

In this, they followed Thomas Jefferson, who, in a phrase that presaged Acton's, considered the states "the true barriers of our liberty in this country." Jefferson, who is often invoked by supporters of the libertarian centralist agenda, had a view of the federal judiciary utterly at odds with libertarian centralism. Rather than viewing federal judges as the surest guarantors of our liberty, he saw them as a "subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric."

⁵⁸ John E. Dalberg-Acton, "The Civil War in America" in Essays on Modern History.

Those remarks, made in 1820, presaged Jefferson's reaction to an historic Supreme Court case, 1821's Cohens v. Virginia⁵⁹. The controversy surrounding that case underscores the vast difference between libertarian jurisprudence old and new. Appellants Philip and Mendes Cohen had been convicted under a Virginia statute banning the sale of unauthorized lottery tickets; they offered as a defense that the tickets, for the District of Columbia lottery, had been authorized by a federal statute. Though the state courts had rejected this defense, the Cohens appealed to the federal Supreme Court, claiming that the federal judiciary had the power to overturn the decisions of state judicial tribunals. Chief Justice Marshall agreed with the Cohens' jurisdictional claim, forcefully asserting federal judicial supremacy over state courts.

Surprisingly enough, upon learning of the Court's decision, Jefferson did not respond by welcoming Marshall's assertion of jurisdiction, and urging him to protect our natural right to sell lottery tickets. Instead, he bitterly denounced Marshall's opinion as an encroachment on the reserved powers of the states. Jefferson understood what the followers of the new libertarian orthodoxy ignore: that who makes the decision is often as important as what is ultimately decided. The federal judiciary, Jefferson warned, was "advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped from the States, and the government of all be consolidated into one."⁶⁰

⁵⁹ 19 U.S. (6 Wheat.) 264 (1821).

⁶⁰ For Jefferson's reaction to Cohens v. Virginia, and Jefferson's judicial philosophy in general, see David N. Mayer's excellent The Constitutional Thought of Thomas Jefferson, University Press of Virginia (1994).

We live under the government that Jefferson feared: a massive unitary state dedicated to crushing the independence of any subsidiary locus of governmental or social authority. It will not do to suggest, as the libertarian centralists do, that the way to restore our liberties is to make that unitary state work for us. The solution, rather, is to work toward reestablishing the kind of constitutional order that Jefferson advocated. That will involve a radical devolution of power, until the federal government returns to its proper role, as the tool of the confederated states, and neither the Supreme Court nor the federal government as a whole serves as the final arbiter on constitutional questions. (How we might get there from here is beyond the scope of this paper.⁶¹)

Jefferson's constitutional vision is more truly polycentric--and more truly libertarian--than that offered by modern libertarian constitutional theorists. Entirely too much of the modern libertarian vision depends on the words "properly construed." Far better to decentralize power and divide jurisdiction than to promote an expansive, pro-liberty interpretation of the Fourteenth Amendment, and then hope that expansive interpretation isn't hijacked by the Left.

Murray Rothbard well understood the fragility of parchment barriers to state power, and the futility of the hope that clever constructions of the Constitution might secure our liberties.⁶² In For A New Liberty, he wrote of "the inherent tendency of a State to break through the limits of its written Constitution." Rothbard quoted States' Rights champion John Calhoun to make the point: "it is a great mistake to suppose that the mere insertion of provisions to restrict and limit the powers of the government... will be sufficient to prevent the major and dominant party from abusing its powers."⁶³ To prevent that, power needs to be kept as close to home as possible.

⁶¹ Contrary to Jefferson's expectations, in the short term, the Supreme Court may actually help the process of devolution along. See Michael Greve, Real Federalism: Why It Matters, How It Can Happen, AEI Press (1999). In the longer term, one hopes that secession and/or nullification will play the role they once played before the Civil War.

⁶² Though Rothbard once briefly explored the idea of Fourteenth Amendment activism. See Editorial "Discovering the Ninth Amendment," Left and Right Volume 1, No. 2; (Autumn 1965) Available at http://www.libertarianstudies.org/journals/lar/leftright_1_2.asp: "Thus, Justice Oliver Wendell Holmes,

Rothbard's maxim was "universal rights, locally enforced."⁶⁴ That phrase succinctly sums up the perspective of the Antifederalists, the postcolonial era's truest libertarians⁶⁵. The old libertarian vision—the Antifederalist vision—is the correct vision for libertarianism in the 21st Century. And the antistate movement will benefit immeasurably if the enduring vitality of the old vision is rediscovered by adherents of the new.

when he sneered at the activist judges of his own day for allegedly enshrining the social philosophy of Spencer's Social Statics in the Constitution, did not realize that the last laugh may well be on him: for that is just about what the Ninth Amendment does imply."

⁶³ Rothbard, *supra* note 40, at 48-49.

⁶⁴ See Joseph Stromberg, "Rothbard vs. Rothbard: A False Dilemma", Spintech Magazine, February 12, 2000. Available at <http://www.spintechmag.com/0002/js0200.htm>

⁶⁵ Though Jefferson was not an Antifederalist, in his preference for a decentralized constitutional order and fear of consolidation he later came to echo themes sounded by the Antifederalists during the Ratification debates.