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Economic Liberty and the Constitution, Part 5

by Jacob G. Hornberger

In the *Slaughterhouse Cases* (1872), the U.S. Supreme Court, in a 5-4 decision, upheld the constitutionality of the Louisiana law that granted a monopoly to a group of butchers to operate the only slaughterhouse in the city of New Orleans. The majority held that the recently enacted Fourteenth Amendment did not enable the Court to declare the Louisiana statute unconstitutional.

Recall that under the Constitution, the federal government was limited to exercising the powers enumerated in the Constitution itself. That is, if a power was not enumerated, the federal government could not exercise it.

The presumption was different, however, with the state governments. The state governments were able to exercise any powers they wanted unless the exercise of the power was expressly prohibited by the U.S. Constitution or their own constitutions.

Rejecting the notion that the U.S. Supreme Court had the power to declare the Louisiana statute unconstitutional, Justice Samuel F. Miller, writing for the majority, held that such a power would

“constitute this court a perpetual censor upon all legislation of the States, on the civil rights on their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment.... When ... these consequences are ... so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the theory of the relations of the State and Federal governments; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt”

The significance of the *Slaughterhouse Cases*, however, lay not with the majority decision but rather with the four dissenters. For they laid the legal foundation for what would ultimately culminate in the biggest constitutional battle in American history, one that pitted the growing socialist movement in the United States against those who were fighting to maintain economic liberty in America.

The dissenters argued that while the Court had previously lacked the power to declare the Louisiana monopoly statute unconstitutional, the recently enacted Fourteenth Amendment (1865) had dramatically altered that situation. Here's how the Fourteenth Amendment reads in part:

“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 and immunities of citizens of the United States ... without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

But their argument never gained ground in the succeeding years. The argument that would begin influencing later generations of lawyers and judges involved the Fourteenth Amendment's Due Process clause. The argument was that the Louisiana statute deprived the plaintiffs of liberty without due process of law.

Liberty, the justices pointed out, involves more than the absence of physical restraint. It also includes the right to pursue an occupation or profession. Justice Joseph P. Bradley wrote,

“This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right.... Their right of choice is a portion of their liberty; their occupation is their property.”

Justice Noah H. Swayne wrote,

“Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property, and as such merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies to a large extent at the foundation of most other forms of property, and of all solid individual and national prosperity.”

Here is how legal scholar Bernard H. Siegan described the import of the dissenting opinions in the *Slaughterhouse Cases* in his book *Economic Liberties and the Constitution* (1980):

“Thus four Supreme Court Justices believed that the Fourteenth Amendment safeguarded from state limitations the production and distribution of goods and services. For them the amendment meant that the federal judiciary would have the power to perpetuate individual liberties by the exercise of a veto over state economic regulation. They saw the amendment as achieving a free society’s goals of maintaining liberty at a maximum and removing restraints that impede individuals from fulfilling their rightful ambitions. Under this view the amendment would have codified the libertarian foundations of American constitutional government.”

Substantive due process

There was one big problem with the due-process analysis, however. Recall that the term “due process of law” stretched all the way back to Magna Charta. Historically, the term had connoted procedural protections, such as notice, hearing, and trial. For example, in civil actions due process requires that before the state takes a person’s property from him, it must accord him notice, a judicial hearing, and a trial at which he can dispute the state’s evidence and put on his own evidence in defense. Or in a criminal proceeding, due process requires that before a state could incarcerate a person, it had to formally charge him (i.e., indict him), grant him a jury trial, and permit him to confront and cross-examine witnesses.

But what did these procedural protections have to do with the plaintiffs in the *Slaughterhouse Cases*? The monopoly law had been duly enacted by the Louisiana legislature. The plaintiffs had been duly notified that the law had been enacted. So how could they argue that they had been deprived of due process of law?

The answer is that “due process of law” developed into two separate but related concepts: “procedural due process” and “substantive due process.”

Procedural due process pertained to the traditional concerns involving procedural protections.

But substantive due process was something completely different. It held that there are certain inherent and fundamental rights of man that could never be legitimately taken away by government, even if all the traditional legal procedures were followed. Because they were “substantive” in nature, any law that infringed upon them automatically deprived a person of life, liberty, or property without due process of law.

Economic liberty

The dissenters in the *Slaughterhouse Cases* argued that the word “liberty” encompassed the right to sustain one’s life through labor by pursuing an occupation or profession. Later, others

would argue that it also encompassed the right to enter into mutually beneficial economic exchanges with others — a legal concept that became known as “liberty of contract.” The economic aspects of liberty were so substantive that the state could not deprive people of economic liberty without running afoul of the Fourteenth Amendment.

Here’s how Justice Stephen J. Field, one of the *Slaughterhouse Cases* dissenters, put it:

“No privilege was more fully recognized or more completely incorporated into the fundamental law of the country than that every free subject in the British Empire was entitled to pursue his happiness by following any of the known established trades and occupations of the country, subject only to such restraints as equally affected all others. The immortal document which proclaimed the independence of the country declared as self-evident truths that the Creator had endowed men ‘with certain inalienable rights.’

To reinforce his view that the right to labor was one of these inalienable rights, Field quoted from Adam Smith’s *Wealth of Nations*:

“The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property.”

Justice Bradley made the same point:

“In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property.”

In the late 1800s, socialist and interventionist ideas began creeping into the American economic system, first at the state level and later at the federal level. Advocates of economic liberty battled the collectivist forces not only on the intellectual and political fronts but also in the courts. The principal legal weapon on which they relied, both at the state and federal level, was the concept of substantive due process.

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