



11350 Random Hills Road, Suite 800, Fairfax, Virginia 22030 Phone (703) 934-6101 Fax (703) 352-3678

[fff@fff.org](mailto:fff@fff.org) [www.fff.org](http://www.fff.org)

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## **Freedom and the Fourteenth Amendment**

**by Jacob G. Hornberger**

One of the long-standing debates within the libertarian movement involves the Fourteenth Amendment. Some argue that it is detrimental to the cause of freedom because it expands the power of the federal government. Others contend that the amendment expands the ambit of individual liberty. I fall among those who believe that the Fourteenth Amendment has been a positive force for freedom. Let's examine the arguments on both sides.

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 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.

The first question that arises is: Why do we need government? To protect such fundamental and inherent rights as life, liberty, property, and the pursuit of happiness from violent, anti-social people, such as murderers, rapists, thieves, burglars, and invaders, and to provide an independent forum in which people can peacefully resolve their disputes.

Once we accept the legitimacy of government, the next question arises: Why not simply vest government officials with the omnipotent power to carry out their mission? The answer was provided by John Locke and Thomas Jefferson: because when government officials are vested with omnipotent power, they inevitably misuse the power, oftentimes becoming worse than the murderers, rapists, thieves, burglars, and invaders they were charged with protecting people from.

So the problem the Framers faced was this: How do we call the federal government into existence but, at the same time, not vest government officials with omnipotent power? Their answer: use a constitution not only to bring the government into existence but also to specify and limit its powers.

It is important to constantly bear in mind that, as necessary as government is, at the same time it is the primary threat to the freedom and well-being of the citizenry. That is why government officials, even democratically elected ones, cannot be trusted with omnipotent power and why it is necessary to limit their powers with a constitution.

Thus, with respect to freedom, the more restrictions on the power of government, the greater the ambit of individual freedom of the citizenry. That's in fact why our ancestors enacted the Bill of Rights, which provide express restrictions on the power of federal officials to infringe fundamental rights of the people.

Since the Constitution was calling the federal (i.e., national) government into existence, its limitations on power applied mostly to the federal government rather than to the state governments. However, recognizing that some powers exercised by the states would be detrimental to the freedom and well-being of the general citizenry, the Framers did provide some express restrictions on state power within the Constitution. For example, the states were expressly prohibited from emitting bills of credit (i.e., paper money) or from having a non-republican form of state government (e.g., a military dictatorship).

Except for a few express restrictions, however, state governments were not restricted in their powers at the federal level. That is, Congress had no power to nullify or censor state laws, and the president could not interfere with the enforcement of state laws. The federal judiciary had no power to adjudicate the validity of state laws under the state constitution or the federal constitution. State governments had the power to enact any laws they wanted as long as such laws didn't provide for the issuance of paper money, impose a monarchy or military dictatorship, or breach any of the other few restrictions on state power in the Constitution.

For example, a state could force its citizens to fund religion, prohibit the ownership of guns, impose minimum-wage laws, enact drug laws, and establish a socialist economic system. If a citizen of that state filed suit in federal district court contending that the state was infringing his fundamental rights, the suit would be dismissed on the ground that the Constitution did not prohibit the states from infringing such rights.

Would that mean that the citizen would be without recourse in such events? No, he could still file suit in state court claiming that such laws violated the state constitution. But if the state constitution did not prohibit such actions, the citizen's only recourse would be to submit to the tyranny or move to another state.

### **State tyranny and federal courts**

The Fourteenth Amendment changed that situation dramatically, especially given the Supreme Court's interpretation that the Amendment incorporated by implication all the rights and freedoms enumerated in the Bill of Rights. While the Bill of Rights had restricted the federal government from infringing fundamental rights of the citizenry and while it had guaranteed due-

process protections in federal criminal prosecutions, it had not operated as a restriction or guarantee at the state level. The Fourteenth Amendment ultimately operated to extend protection of those rights and guarantees to the state level.

Why is that important from the standpoint of individual freedom?

Let's assume that people live in a state in which there is religious, intellectual, and economic freedom. Let's also assume that the state constitution prohibits the state legislature from enacting any law abridging freedom of religion and of the press and abridging economic liberty.

So far, so good. The citizens of that state, all other things being equal, are free.

Now let's assume that there is a shift in public opinion within the state. Let's assume that 75 percent of the citizenry decide that it would be a good thing if the state required people to fund their local churches, banned libertarian books, and required employers to pay their employees a minimum wage of \$20 per hour. Let's assume that the people lobby their legislators, who enact laws to that effect.

What could a citizen do if he opposed those laws? He could file suit in state court, claiming that the laws violated the state constitution. He could appeal an adverse decision to the state court of appeals and then to the state supreme court. If he prevailed in having the law declared in violation of the state constitution, not only would his ambit of individual freedom be restored, so would everyone else's in the state, because the court's ruling would, as a practical matter, knock out the state's entire enforcement of the laws.

Thus, from a libertarian perspective, we would say that that's a good thing, even if 75 percent of the people within the state supported the laws.

Let's assume, however, that those favoring the laws follow the procedure for securing amendments to the state constitution and that they succeed in securing such amendments.

What recourse does the individual have then? The answer is that, without the Fourteenth Amendment, he has no recourse. If he files suit in state court, he cannot claim that the laws are invalid under the state constitution because the new amendments to the state constitution expressly permit the enactment of such laws. He cannot file suit in federal court because the Bill of Rights applies to the federal government, not to the state governments. He must submit or move.

Not so with the Fourteenth Amendment in place! The Amendment provides the individual citizen who is being oppressed by a tyrannical law enacted and enforced by public officials in his state — officials who might well be supported by a majority of the people — with an additional means to get the oppressive law knocked out. The Fourteenth Amendment effectively gives each and every citizen in every state two bites at the freedom apple — one under his state constitution and one under the U.S. Constitution — when officials within his state attempt to infringe his freedom.

Let's return to our example where the state constitution has been amended to grant state officials the power to require people to fund churches, ban libertarian books, and impose a minimum wage on employers.

With the Fourteenth Amendment in place, the citizen has an additional means by which to knock out the oppressive state laws. He can now file suit in federal district court, contending that the laws violate the U.S. Constitution. His contention will be that, since the U.S. Constitution prohibits the states from enacting laws that infringe religious, intellectual, and economic liberty, the Court must declare the state laws unconstitutional under the U.S. Constitution.

If the citizen prevails in having the laws declared in violation of the U.S. Constitution, as a practical matter the decision benefits not only him but also everyone else within that state.

A good example of the power of the Fourteenth Amendment occurred in the 1905 Supreme Court case of *Lochner v. New York*. In that case, the appellate courts of the state had upheld Lochner's criminal conviction for violating the state's "maximum-hours" law, which made it a criminal offense for employers to require employees to work more than 60 hours a week.

The Supreme Court held that the New York law, by interfering with the right of employers and employees to contract on mutually agreeable terms, violated the Fourteenth Amendment. In the absence of the amendment, the law would have stood.

Thus, how can it be a bad thing when citizens are provided the additional means supplied by the Fourteenth Amendment to knock out bad, oppressive, and tyrannical state laws? From the standpoint of individual freedom, people are better off with this additional method to challenge oppressive laws within their state.

### **Arguments in opposition**

So why do some libertarians oppose the Fourteenth Amendment? One reason is that they say that it provides the federal government with the power to "censor" state laws, thereby tending to damage or destroy our federal system. The fallacy in their argument, however, is that they fail to recognize the constitutional principle of "separation of powers" by failing to distinguish judicial power from legislative and executive power. Instead, they tend to conflate the powers of the three branches by referring simply to the "federal government" in their analysis.

The power that the judicial branch has to declare a law unconstitutional is a unique power. First, the judicial power is negative in nature. That is, a judge cannot enact a law and impose it on the citizenry, no matter how beneficial he thinks it might be. Instead, he can only determine whether a particular law is unconstitutional. Second, a judge has no power to simply issue rulings declaring laws unconstitutional. Instead, he must wait until someone actually files suit in his court before he can make that determination. If no one ever files suit challenging the law, no judge can ever declare the law unconstitutional.

When the judiciary declares a law unconstitutional, it isn't operating as a censor of state legislation, as opponents of the Fourteenth Amendment sometimes assert. That is, the court isn't reviewing all the laws that have been enacted and deciding which ones are good and which ones are bad. Instead, its power is limited simply to deciding whether the law in a particular case is consistent with the powers provided in the Constitution.

When opponents of the Fourteenth Amendment claim that it gave the federal government too much power over the states, all too often they are referring to positive powers exercised by Congress or the president rather than the negative power of the judicial branch to declare state laws in violation of the Constitution.

A good example involves the Interstate Commerce Clause. The fact that the Supreme Court has misinterpreted that clause to permit the wrongful extension of *federal* power into the states is separate and distinct from its power to declare *state* laws in violation of the U.S. Constitution under the Fourteenth Amendment. That is, since the Interstate Commerce Clause involves a power granted to the Congress in the original Constitution, its misinterpretation has nothing to do with the judicial power to declare state laws unconstitutional under the Fourteenth Amendment.

Sometimes the opponents of the Fourteenth Amendment point to school bussing as an example of where the federal judges have misused the Fourteenth Amendment to interfere with how the states run their schools. The critics fail to note, however, that bussing wasn't imposed as some sort of fairness law that the judges thought would be a good way to run the public schools, but rather as a judicial remedy to enforce compliance with a federal court ruling.

Since the Fourteenth Amendment prohibits state officials from depriving people of equal protection of the laws, and since public schools are state institutions, the federal courts were simply saying that, as long as the state maintains public schools, it must provide them equally regardless of race. Therefore, once the state governments persisted in maintaining their "separate but equal" policies in public schools in violation of the Supreme Court's ruling, the courts were faced with fashioning a remedy to enforce compliance with that ruling. While it could be argued that bussing wasn't the ideal remedy — and, in fact, may have been quite damaging to everyone involved — it cannot be denied that it was nonetheless a remedy that was part of enforcing a judgment in a federal case, not some sort of general law enacted and imposed on public schools by the judiciary. In fact, if the state had abolished public schooling entirely, the issue of bussing would have disappeared.

Another criticism of the Fourteenth Amendment is that it provided the government with the power to enforce anti-discrimination laws against private individuals and businesses. But that criticism is also misplaced. Again, those were federal laws enacted by Congress, not rules imposed by the federal judicial branch. They were upheld by the federal courts not on the basis of the Fourteenth Amendment (which restricted state, not congressional, power) but rather, again, on a misinterpretation of the Interstate Commerce Clause, which applies to Congress.

To be consistent, opponents of the Fourteenth Amendment would have to oppose all restrictions on state power in the U.S. Constitution, including those in the original document. That would mean that state governments would then be empowered to begin issuing their own paper money, establish military dictatorships, erect trade and immigration controls against other states, enter into treaties with foreign countries, and wage war against other nations.

In fact, to be truly consistent, supporters of full and complete “states rights” would have to concede that the Thirteenth Amendment, which outlawed slavery, would be just as objectionable as the Fourteenth Amendment. That would mean that the states would then have the power to reestablish slavery within their respective jurisdictions, leaving slaves with no other recourse than to escape to a nonslave state — and then hope that their new state would not return them.

How can anyone argue that all such restrictions on the powers of the states in the federal Constitution are a bad thing, at least with respect to protecting the ambit of individual freedom? How can such restrictions on state power be considered harmful when it comes to the freedom of individual citizens? How can it be a bad thing when an individual has resort to both the state and federal constitutions to knock out an oppressive, tyrannical law?

Prior to the passing of the Fourteenth Amendment, citizens had the right to contest state and local laws only on the basis of their respective state constitutions. The Fourteenth Amendment gave them one more means — the U.S. Constitution — to contest those same laws. That’s why the Fourteenth Amendment, from the standpoint of individual freedom, was a good thing.

*Jacob Hornberger is founder and president of The Future of Freedom Foundation.*

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