ECONOMIC LIBERTIES AND THE CONSTITUTION: PROTECTION AT THE STATE LEVEL

Bernard H. Siegan

I. Introduction

In terms of protecting personal liberty, no provision of the Constitution is more important than the second sentence of the Fourteenth Amendment's Section 1, which states:

> 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.[1]

The importance of this sentence derives from the fact that there are few other provisions in the Constitution that protect citizens or other persons against violation of their rights by the states. The Bill of Rights, for example, applies only to the federal government.[2] Were there no Fourteenth Amendment, such commonly accepted liberties as those of speech, press, religion, and property might not be guaranteed against infringement by the states. Because most efforts to limit individual or corporate activity occur at the state or local levels, Section 1 of the Fourteenth Amendment likely is involved in more litigation than any other provision of the Constitution.

The author of the above-quoted provision was Rep. John Bingham of Ohio (described by Justice Black as "the Madison of the first section of the Fourteenth Amendment"[3]), who explained to his colleagues in the debates on the framing of the amendment that it

---

Cato Journal, Vol. 4, No. 3 (Winter 1985).

The author is Distinguished Professor of Law at the University of San Diego.

[1]U.S. Constitution.

[2]Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[3]Adamson v. California, 332 U.S. 46, 74 (1947) (Black, J., dissenting).

protected from abridgment or denial by a state "the privileges and immunities of all of the citizens of the Republic and the inborn rights of every person within its jurisdiction."[4] For Bingham, privileges and immunities encompassed all fundamental rights protected by the Constitution, and he used "inborn" as a synonym for natural rights. No speaker in the debates challenged this interpretation, which is consistent with the explanation presented by both the Senate and House managers of the joint congressional resolution proposing the amendment.[5]

History and background support Bingham's interpretation. The provision under discussion was designed to accord maximum protections for liberty at the state level. Each of its three clauses—privileges and immunities, due process, and equal protection—was directed toward this end, and collectively they constitute a formidable barrier against state excesses and oppression.

Although this general commitment is quite plain, it does not reveal what activity is safeguarded and to what extent. This inquiry may not be readily resolved for many areas, but it can be satisfied for the liberties about which this article is concerned, those relating to property and economics. In the civil area these were liberties of the highest concern to the people responsible for drafting the Fourteenth Amendment's Section 1. This concern is evident in the statute and commentaries that are most important for understanding it: the Civil Rights Act of 1866;[6] Justice Bushrod Washington's famous definition of privileges and immunities in *Corfield v. Coryell;*[7] and the commentaries of William Blackstone and James Kent. All of these emphasize the importance of property in a free society and of the liberties—such as the right of contract—required to make it meaningful. There should be little doubt that people supportive of the doctrines expounded or contained in these background materials would strive to secure economic freedoms in the Fourteenth Amendment.

Section II of this paper briefly summarizes the background materials that helped shape the Fourteenth Amendment. Section III considers the importance of due process in protecting economic liberties. Section IV discusses the antislavery, corporate, and judicial advocates of substantive due process, and Section V presents some concluding remarks. The reader should be aware that although it protects

[4]*Congressional Globe*, 39th Cong., 1st Sess. 2542 (1866).
[5]Ibid., pp. 2459 and 2764.
[6]Act of 9 April 1866, ch. 31, 14 Stat. 27.
[7]6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3, 230).

many liberties, the U.S. Supreme Court has not enforced economic rights since 1936.

II. The Fourteenth Amendment: Background

Civil Rights Act of 1866

There is little disagreement that Section 1 of the Fourteenth Amendment established the principles of the Civil Rights Act of 1866 in the Constitution so that they could not be repealed by a subsequent Congress. Section 1 of this act states:

> That all persons born in the United States, and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for a crime, whereof the party shall have been duly convicted, shall have the same right in every State and Territory to make and enforce contracts, to sue, to be sued, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to be entitled to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties and to none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding.

Thus the act protected against discriminatory treatment the rights of most U.S. citizens "to make and enforce contracts . . . [and] to inherit, purchase, lease, sell, hold and convey real and personal property."

The congressional debates evidence the existence of dual goals for the civil rights legislation: to secure an equality of rights for blacks as well as for most other citizens. While primarily directed to protect the emancipated blacks against discrimination, the act applied to most citizens and all of the states. Sen. Lyman Trumbull, author of the original bill and chairman of the Senate judiciary committee, viewed the bill as generally affecting state legislation. In his introductory statements Trumbull cited a note to Blackstone's *Commentaries* that liberty required an equality of the laws: "In this definition of civil liberty, it ought to be understood, or rather expressed, that the restraints introduced by the law should be equal to all, or as much so as the nature of things will admit."[8] Trumbull subsequently denied charges that the bill benefited black men exclusively:

> [It] applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights,

[8]*Congressional Globe* (1866), p. 474.

> the right to the fruit of their own labor, the right to make contracts, the right to buy and sell, and enjoy liberty and happiness. . . .[9]

The only object "is to secure equal rights to all citizens of the country."[10]

Trumbull expressed essentially the same views in his speech urging the Senate to override President Andrew Johnson's veto of the bill (which Congress did). Again he emphasized the bill's racial objectives and acknowledged its applicability to the rest of the population. The following passage from his speech suggests the bill would impose a reasonableness standard on state legislation:

> The bill neither confers nor abridges the rights of any one, but simply declares that in civil rights there shall be an equality among all classes of citizens, and that all alike shall be subject to the same punishment. Each State, so that it does not abridge the great fundamental rights belonging, under the Constitution, to all citizens, may grant or withhold such civil rights as it pleases; all that is required is that, in this respect, its laws shall be impartial.[11]

In his introductory statement, Rep. James Wilson, chairman of the House judiciary committee and the House floor manager for the bill, asserted that "the entire structure of this bill rests on the discrimination relative to civil rights and immunities made by the states" on account of race, color, or previous condition of servitude.[12] It was necessary, however, to enact the statute "to protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men."[13]

This broad approach to civil rights was consistent with abolitionist doctrine that emphasized legal equality generally and not just with respect to race. The abolitionists maintained that "slaves and free Negroes . . . must receive legal protection in their fundamental rights, along with all other human beings."[14] They had long comprehended the moral and practical problems of isolating their pleas for legal equality to one area. Because the result would be to limit the powers of government, this perspective was highly acceptable in the generally laissez-faire climate of the Republican party—the party of the antislavery movement that in 1866 held a huge majority in the Congress. The explanations of the civil rights bill by both Trumbull and

[9]Ibid., p. 599.
[10]Ibid.
[11]Ibid., p. 1760.
[12]Ibid., p. 1118.
[13]Ibid.
[14]Jacobus TenBroek, *Equal Under Law* (London: Collier Books, Collier-Macmillan, Ltd., 2d printing, 1969), p. 118.

Wilson reflected these important philosophical concerns and appealed to the vast majority of their party who shared them.

Freedmen's Bureau Bill

The 1866 Congress also passed the Freedmen's Bureau bill,[15] intended to protect for a limited period, the rights of emancipated slaves in the formerly rebellious states then controlled by the Union forces. Trumbull introduced this bill on the same day he presented the civil rights bill. President Johnson successfully vetoed it, but Congress subsequently passed a modified version, which survived against another veto. Section 7 of the Freedmen's Bureau bill protected blacks, mulattoes, and some others against deprivation of the same rights enumerated in Section 1 of the Civil Rights Act, again evidencing Congress' high priority for property and economic freedoms.

Washington's Definition of Privileges and Immunities

Justice Washington's definition of privileges and immunities (as contained in Art. 4, Sec. 1 of the Constitution) was frequently cited in the debates on both the Civil Rights Act and the Fourteenth Amendment. According to Washington, in *Corfield v. Coryell*, the privileges and immunities belonging to citizens of all free governments include:

> [T]he enjoyment of life and liberty, with the right to acquire and possess property of every kind, [and with respect to citizens of one state] the right . . . to pass through, or to reside in, any other state for purposes of trade, agriculture, professional pursuits [and] to take, hold and dispose of property, either real or personal.[16]

Washington did not specifically refer to them, but contracts would be comprehended under the property rights he did mention. Contracts are a form of property in that they are an asset or acquisition (Blackstone's term) that can be purchased, held, and sold. They are requisite likewise for the acquisition, use, and transfer of real and personal property.

Commentaries of Blackstone and Kent

It is evident from the debates on the Freedman's Bureau bill, the Civil Rights bill, and the Fourteenth Amendment that the foremost

[15]*Congressional Globe* (1866), app., pp. 209–10.
[16]6 F. Cas. 546 (1823) at 551–52.

legal authorities for the Congress of 1866 were William Blackstone and James Kent, whose commentaries on the protection of life, liberty, and property were quoted. Both of these commentators had declared that the three "absolute rights" of individuals were those of personal security, personal liberty, and personal property. For Blackstone, the right of property meant the "free use, enjoyment, and disposal [by the owner] of all his acquisitions, without any control or diminution, save only by the laws of the land."[17] Kent wrote that "the right to acquire and enjoy property [is] natural, inherent, and unalienable."[18]

III. Economic Liberties and Due Process

The legitimacy of economic due process—that is, application of the due process clause to invalidate economic regulation—should be considered in light of this background. Because it incorporates the Civil Rights Act's principles, resolution of this issue should not differ under the Fourteenth Amendment's Section 1 from what it would under the 1866 statute.

Securing Freedom of Contract

Consider in this regard the most controversial of the economic due process cases, *Lochner v. New York*, which was decided by the United States Supreme Court in 1905.[19] *Lochner* involved the question whether New York's statute limiting working hours in bakeries and confectioneries to 10 hours per day or 60 hours per week violated the due process clause of the Fourteenth Amendment. The Civil Rights Act used the terminology "to make and enforce contracts" without qualification, which would therefore comprehend the employment contracts involved in *Lochner*. Moreover, the 1866 Congress had drafted the act to protect, among other things, the right of emancipated blacks to contract freely for the purchase and sales of goods and services. The legislators had sought to eliminate state laws that regulated the terms of employment for blacks because these laws discriminated against them. Such specific purposes became

[17]William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1725–1769*, vol. 1 (Chicago: University of Chicago Press, 1979), pp. 134–35.

[18]James Kent, *Commentaries on American Law*, vol. 2, reprint of the 1827 edition (New York: Da Capo Press, 1971), p. 1.

[19]198 U.S. 45 (1905). An extensive analysis of the background of the Lochner decision is given in Bernard H. Siegan, "Rehabilitating Lochner," which will appear in *University of San Diego Law Review* 22, no. 2 (March 1985). See also Siegan, *Economic Liberties and the Constitution* (Chicago and London: University of Chicago Press, 1980), pp. 113–20.

general ones applicable to other individuals and groups both under the language of the act and the Fourteenth Amendment.

Mr. Lochner complained that he and other bakery employers were the only ones denied the right to contract freely with their employees about working hours. Were the statute in *Lochner* confined to black employers, there is little question it would invite inquiry under the act. The same would be true, of course, were only black workers affected. Under the act, the state would have the burden to justify different treatment for the black employers or black workers. Being a legal equality law, the state would have the same obligation under it were a group of white persons similarly restricted, as occurred under the *Lochner* statute.

The constitutional outcome should not differ even if it is assumed that the Civil Rights Act was confined solely to racial discrimination, as some contend it was. The liberties enumerated in the statute were of most concern to the 1866 Congress or they would not have been named in both the Civil Rights bill and the Freedmen's Bureau bill. It would be most unlikely that Congress would have secured them under the statutes but not under the Constitution. It would be very odd indeed if Congress did not intend to safeguard liberty of contract under Section 1 of the Fourteenth Amendment.

Lochner was an interpretation of the due process clause. The charge that *Lochner* was a lawless construction of that clause is in part grounded on the theory that due process in the 1860s related only to procedure and not to substance. However, there is no indication in the relevant debates that Bingham and his fellow Republicans so confined it. Bingham's perspective was much different; for him and his colleagues, particularly the many Republicans active or involved in the antislavery movements, due process meant essentially protection against all government oppression, which could take many forms.

Bingham on the Inviolability of Property Rights

According to Bingham, the due process guarantee of the Fifth Amendment secures natural rights for all persons, requires equal treatment by the law, and comprehends the highest priority for ownership. Note in the quotes that follow his statement that no one shall be deprived of property "against his consent," a stronger affirmation of property rights than contemplated in the Fifth Amendment, which contains no such qualification. Consider some of Bingham's opinions on these subjects:

> [N]atural or inherent rights, which belong to all men irrespective of all conventional regulations, are by this constitution guarantied

> by the broad and comprehensive word "person," as contradistinguished from the limited term citizen—as in the fifth article of amendments, guarding those sacred rights which are as universal and indestructible as the human race, that "no person shall be deprived of life, liberty or property but by due process of law, nor shall private property be taken without just compensation."[20]
>
> . . . .
>
> Who . . . will be bold enough to deny that all persons are equally entitled to the enjoyment of the rights of life and liberty and property; and that no one should be deprived of life or liberty, but as punishment for crime; nor of his property, against his consent and without due compensation?[21]
>
> . . . .
>
> It must be apparent that the absolute equality of all, and the equal protection of each, are principles of our Constitution, which ought to be observed and enforced in the organization and admission of new States. The Constitution provides, as we have seen, that *no person* shall be deprived of life, liberty, or property, without due process of law. It makes no distinction either on account of complexion or birth—it secures these rights to all persons within its exclusive jurisdiction. This is equality. It protects not only life and liberty, but also property, the product of labor. It contemplates that no man shall be wrongfully deprived of the fruit of his toil any more than of his life. . . .[22]

The foregoing are excerpts from speeches that Bingham delivered in 1857 and 1859. The due process guarantee was no less important to him in 1866. Delivered in his oratorical style, the following passage from a speech urging adoption of an early version of Section 1 of the Fourteenth Amendment reveals Bingham's commitment to a natural rights perspective holding due process to embody the highest reaches of justice:

> Your Constitution provides that no man, no matter what his color, no matter beneath what sky he may have been born, no matter in what disastrous conflict or by what tyrannical hand his liberty may have been cloven down, no matter how poor, no matter how friendless, no matter how ignorant, shall be deprived of life or liberty or property without due process of law—law in its highest sense, that law which is the perfection of human reason, and which is impartial, equal, exact justice; that justice that requires that every man shall have his right; that justice which is the highest duty of nations as it is the imperishable attribute of God of nations.[23]

[20]*Congressional Globe*, 35th Cong., 2d Sess. 983 (1859).
[21]Ibid., p. 985.
[22]*Congressional Globe*, 34th Cong., 3d Sess., app. 140 (1857).
[23]*Congressional Globe* (1866), p. 1094.

IV. Advocates of Substantive Due Process

Antislavery Advocates

While they may not have expressed themselves so passionately, most Republican congressmen, with their antislavery backgrounds, held views similar to Bingham's. Interestingly, Rep. Wilson (chairman of the House judiciary committee) asserted that the Civil Rights Act merely applied the protections of the Fifth Amendment's due process clause to the states.[24]

Due process was an often-used term before, during, and after the Civil War. Both sides of the slavery controversy employed it to further their own causes. Proslavery forces contended that slaves were property and therefore owners were protected against loss without due process. In contrast, beginning in the mid-1830s, antislavery activists thought of the due process guarantee as "constitutionalizing" their natural rights beliefs in the sanctity of life, liberty, and property. They repudiated any notion that a person could be someone else's property; people possessed property in their own selves and the due process clause obligated the national government to secure it in the territories.

The due process concept was a major verbal weapon for the abolitionists. Howard Jay Graham (the respected Fourteenth Amendment scholar) observed that due process "was snatched up, bandied about, 'corrupted and corroded', if you please, for more than thirty years prior to 1866. For every black letter usage in court, there were perhaps hundreds or thousands in the press, red schoolhouse, and on the stump. Zealots, reformers and politicians—not jurists—blazed the paths of substantive due process."[25]

Thus the political parties committed to eradicating slavery used the term "due process" to advance this position. In 1843 the Liberty Party platform declared that the Fifth Amendment's due process clause legally secured the inalienable rights referred to in the Declaration of Independence.[26] The 1848 and 1852 platforms of the Free Soil Party contended that the clause served both as a restraint on the federal government and as an obligation on the government to enforce the inalienable rights set forth in the Declaration.[27] More significantly, according to the 1856 and 1860 platforms of the Republican

[24]Ibid., p. 1294.

[25]Howard Jay Graham, *Everyman's Constitution* (Madison, Wisc.: State Historical Society of Wisconsin, 1968), p. 250.

[26]tenBroek, *Equal Under Law*, p. 139.

[27]Ibid., pp. 140–41, n. 3 and n. 4.

party, the clause denied Congress the power to allow slavery to exist in any territory in the Union: "[I]t becomes our duty to maintain [the due process provision] by legislation against all attempts to violate it."[28] Some of those involved in the drafting or consideration of the Republican platforms would probably later, as members of Congress or in other political roles, be responsible for framing or adopting the Fourteenth Amendment. In the 1856 political campaign, "due process of law" was a leading catch phrase of Republican orators.[29]

Corporate Advocates

Due process advocacy was not confined to the antislavery movement. At the time the Fourteenth Amendment was being framed, insurance and other corporations submitted large numbers of petitions to Congress that were permeated with due process of law reasoning, urging federal relief from state legislation depriving them of property and economic freedoms.[30] Commentators have noted the commonality of interests between corporate and civil rights groups: Each group thought it would benefit from the imposition of due process, just compensation, and privileges and immunities restraints on the states.[31] Both accordingly lobbied for these positions. The abolition of slavery eliminated the argument over ownership of the person, and all sides could thereafter promote personal freedom under the same reasoning.

Judicial Advocates

This layman's perception of due process was reflected to a considerable degree in the courts. While the contours of due process are never precise, it was a definable legal concept in 1866, and to this extent the framers of the Fourteenth Amendment spoke with clarity, obviating the need to inquire into their intentions. By then it was accepted that due process required certain processes and procedures in civil and criminal law. In this respect due process was a substantive restraint on state legislatures, forbidding them from passing these kinds of oppressive laws. There was also considerable precedent that due process of law went much further and that it protected ownership. In 1857 Chief Justice Taney invoked substantive due process as one basis for his decision in the *Dred Scott* case. Taney held that Congress had no power to prohibit slavery in specified areas because

[28]Ibid., p. 141, n. 5 and n. 6.
[29]Graham, *Everyman's Constitution*, p. 80.
[30]Ibid., pp. 83–88.
[31]Ibid., p. 81.

the "powers over person and property . . . are not granted to Congress, but are in express terms denied, and they are forbidden to exercise them." Taney explained this "express" limitation as follows:

> And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who has committed no offense against the laws, could hardly be dignified with the name of due process of law.[32]

Substantive due process was a very viable concept among Supreme Court justices at the time the Fourteenth Amendment was framed and ratified. In a federal circuit court case in 1865, Supreme Court Justice Grier held that a Pennsylvania statute repealing a railroad corporation charter violated the due course of law provision of the state constitution.[33] The first high court ruling on due process after framing of the amendment was *Hepburn v. Griswold*, delivered February 7, 1870[34] by a court then consisting of seven members, all appointed prior to Congress' action. For the majority of four, Chief Justice Chase held (among other matters) that holders of promissory contracts entered into prior to the effective date of the Legal Tender Act of 1862 were deprived by that act of the right to receive payment in gold or silver coin in violation of the Fifth Amendment's due process guarantee. Justice Grier was then no longer a member of the Court, but had been when the case was decided in conference on November 27, 1869, at which time he concurred with the majority.

The majority concluded that the due process clause protects holders of contracts to the same extent that it does owners of real property. According to Chase, the clause (as well as other provisions of the Fifth Amendment) operates "directly in limitation and restraint of the legislative powers conferred by the Constitution." Justice Miller, for the minority of three, did not deny that the clause was a substantive limitation on the legislature. He objected that the effect on holders of contracts was incidental to the purpose of the Congress to further the war effort. President Grant subsequently appointed two justices who on May 1, 1871 in *Knox v. Lee*[35] joined with the three dissenters to reverse *Hepburn*. Writing for the majority in *Knox*, Justice Strong applied the same analysis to the due process issue as Miller had, and Chase followed his prior interpretation.

[32]Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 450 (1857).

[33]Baltimore v. Pittsburgh and Conellesville Railroad, 2 F. Cas. 570, No. 827 (C.C.W.D. Pa. 1865).

[34]75 U.S. (8 Wall.) 603 (1870).

[35]79 U.S. (12 Wall.) 457 (1871).

One of the dissenting justices in *Hepburn* was Swayne, and he and newly appointed Justice Bradley voted with the majority in *Knox*. Neither should be considered antagonistic to substantive due process. On the contrary, both contended in their dissents in the *Slaughter-House Cases*,[36] which was decided the following year, that the Fourteenth Amendment's due process clause secured property and economic interests. On the issue of protecting vested property interests, these two justices would probably have agreed with the four who had made up the majority in *Hepburn*. In *Knox*, Bradley filed a concurring opinion, arguing that Congress had full power to enact the disputed legislation. He did not discuss due process directly. Presumably Swayne agreed, although he did not file a separate opinion in either case.

At the state level, due process clauses were also applied to strike down legislative interferences with property. A leading pre-Civil War decision on due process at the state level was *Wynehamer v. People*,[37] an 1856 New York case involving a state penal statute forbidding the sale of intoxicating liquors owned at the time of enactment (except for medicinal and religious purposes) and requiring the destruction of such as were intended for sale. *Wynehamer* declared that the statute violated the state constitution's due process clause. New York's highest court held that the clause protected the prerogatives of ownership; that is, while some regulation is possible, said one of the justices, "where [property] rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away."

The most influential commentator in the period following the ratification of the Fourteenth Amendment, Justice Thomas Cooley of the Michigan Supreme Court, also asserted that due process secured property rights. In the first edition of his famous book on constitutional limitations, published in 1868, he concluded that government can violate due process by the limitations it imposes

> and not [by] any considerations of mere form. . . . When the government, through its established agencies, interferes with the title to one's property, or with his independent enjoyment of it, and its act is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional defense which have become established in our system of law, and not by any rules that pertain to forms of procedure merely. . . . Due process of law in each particular case means, such an exertion of the powers of government as the settled maxims of

[36]83 U.S. (16 Wall.) 36 (1872).
[37]13 N.Y. 378 (1856).

> law sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.[38]

Cooley conceded that private rights to property may be interfered with by any branch of government:

> The chief restriction is that vested rights must not be disturbed; but in its application as a shield of protection, the term "vested rights" is not used in any narrow or technical sense, as importing a power of legal control merely, but rather as implying a vested interest which it is equitable the government should recognize, and of which the individual cannot be deprived without injustice.[39]

He went on to discuss those property interests protected by due process (or its equivalent, law of the land) clauses. Thus, according to this authoritative commentator, due process at the time the Fourteenth Amendment came into being provided substantive safeguards for property interests; Cooley rejected the view that due process had no more than procedural significance in civil matters. As previously indicated, this position was probably accepted by a majority of the U.S. Supreme Court then and in many subsequent years.

Understandably, due process did not remain limited to securing vested interests. Deciding the issue on a case-to-case basis, as is typical of American jurisprudence, the Supreme Court enlarged the protections of the due process clauses to include, by 1897, the liberty to contract for the production, distribution, and sale of goods and services. In *Allgeyer v. Louisiana,* Justice Peckham explained the unanimous ruling:

> The liberty in [the Fourteenth Amendment's due process clause] means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties: to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.[40]

The Court thus eliminated the dubious distinction between property and contract rights, a distinction that cannot be supported in terms of either personal freedom or public welfare.

[38]Thomas M. Cooley, *A Treatise on the Constitutional Limitations,* reprint of 1868 edition (New York: Da Capo Press, 1972), p. 356.

[39]Ibid., pp. 357–58.

[40]Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).

V. Conclusion

Due process does not bar all governmental restraints in the area it impacts; it forbids unjustified restraints. This is consistent with long-held Anglo-American conceptions about the limits of governmental powers. Thus Blackstone defined civil liberty as "no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public."[41] Similarly, Justice Washington asserted in *Corfield* that the fundamental liberties he designated belonged by right to citizens of all free governments, but were "[s]ubject nevertheless to such restraints as the government may justly provide for the general good of the whole." Rep. Bingham accepted these views but likely would have demanded that a very high burden of proof be borne by the government in justifying a restraint.

The inquiry usually conducted by the U.S. Supreme Court in the economic due process cases between 1897 and 1937 was consistent with the Framers' understanding of the due process clause of the Fourteenth Amendment. It was also a logical progression of American law on the subject. By 1897 the technical definition of due process, in the normal course of adjudication, had gone from the inclusion of vested property rights (in the 1860s) to comprehending contracts of employment. This development was not antagonistic to the basic rationale of due process nor to an unrealistic extension in meaning. Constitutional adjudication does not preclude sensible movement in interpretation. Thus, when *Lochner* was decided in 1905, the constitutional outcome should have been the same, whether the interpretation relied on the judicial or the Framers' meaning of due process. In either case, it is clear that economic liberties are firmly rooted in the due process clause of the Fourteenth Amendment.

[41]Blackstone, *Commentaries*, vol. 1, pp. 121–22.

ECONOMIC AFFAIRS AS HUMAN AFFAIRS

Antonin Scalia

The title of this article—Economic Affairs as Human Affairs—is derived from a phrase I recall from the earliest days of my political awareness. Dwight Eisenhower used to insist, with demonstrably successful effect, that he was "a conservative in economic affairs, but a liberal in human affairs." I am sure he meant it to connote nothing more profound than that he represented the best of both Republican and Democratic tradition. But still, that seemed to me a peculiar way to put it—contrasting economic affairs with human affairs as though economics is a science developed for the benefit of dogs or trees; something that has nothing to do with human beings, with their welfare, aspirations, or freedoms.

That, of course, is a pernicious notion, though it represents a turn of mind that characterizes much American political thought. It leads to the conclusion that economic rights and liberties are qualitatively distinct from, and fundamentally inferior to, other noble human values called civil rights, about which we should be more generous. Unless one is a thoroughgoing materialist, there is some appeal to this. Surely the freedom to dispose of one's property as one pleases, for example, is not as high an aspiration as the freedom to think or write or worship as one's conscience dictates. On closer analysis, however, it seems to me that the difference between economic freedoms and what are generally called civil rights turns out to be a difference of degree rather than of kind. Few of us, I suspect, would have much difficulty choosing between the right to own property and the right to receive a Miranda warning.

Cato Journal, Vol. 4, No. 3 (Winter 1985).

The author is Circuit Judge for the U.S. Court of Appeals, D.C. Circuit. This paper is an edited version of the author's remarks delivered at the Cato Institute's conference "Economic Liberties and the Judiciary," 26 October 1984.