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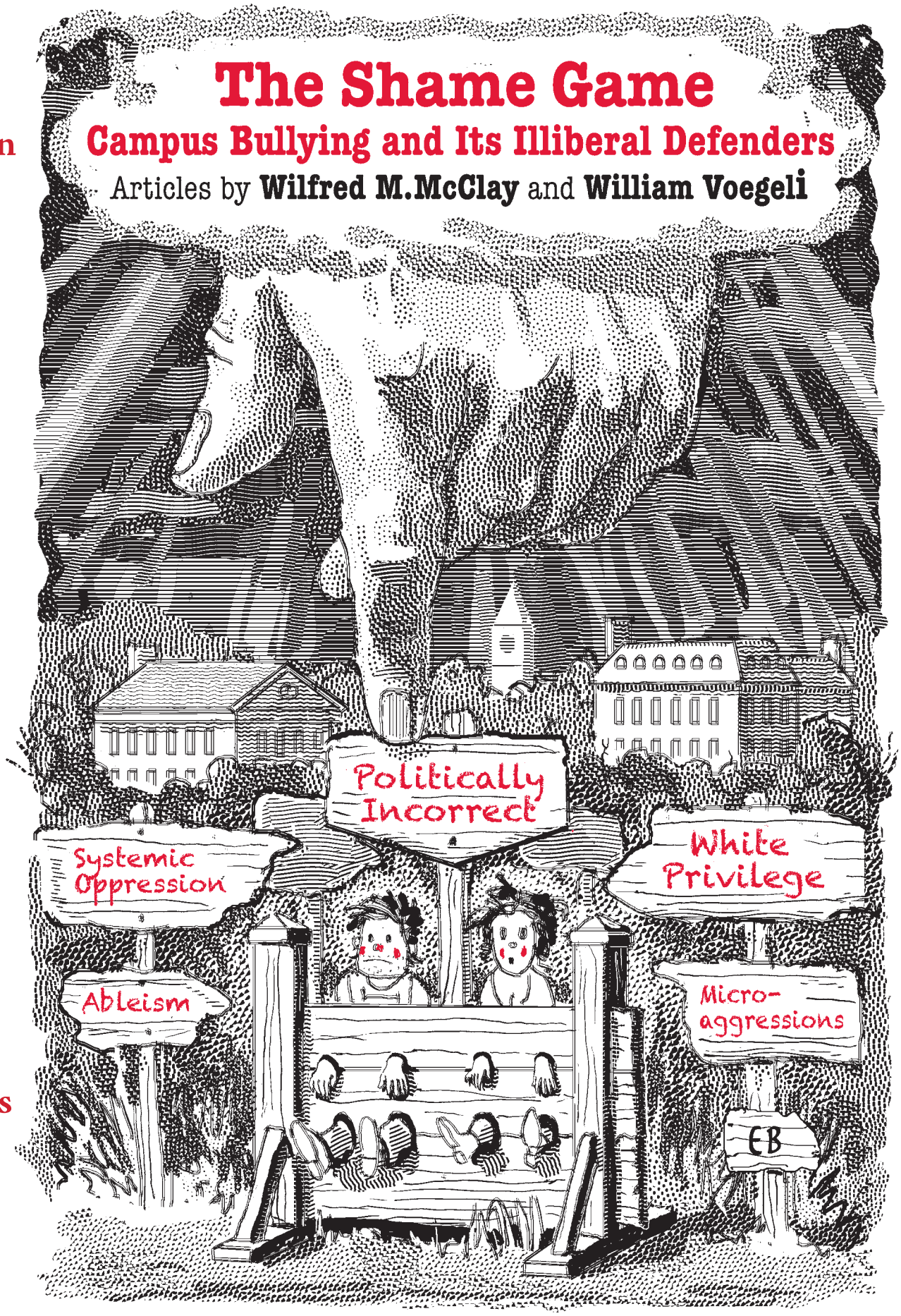

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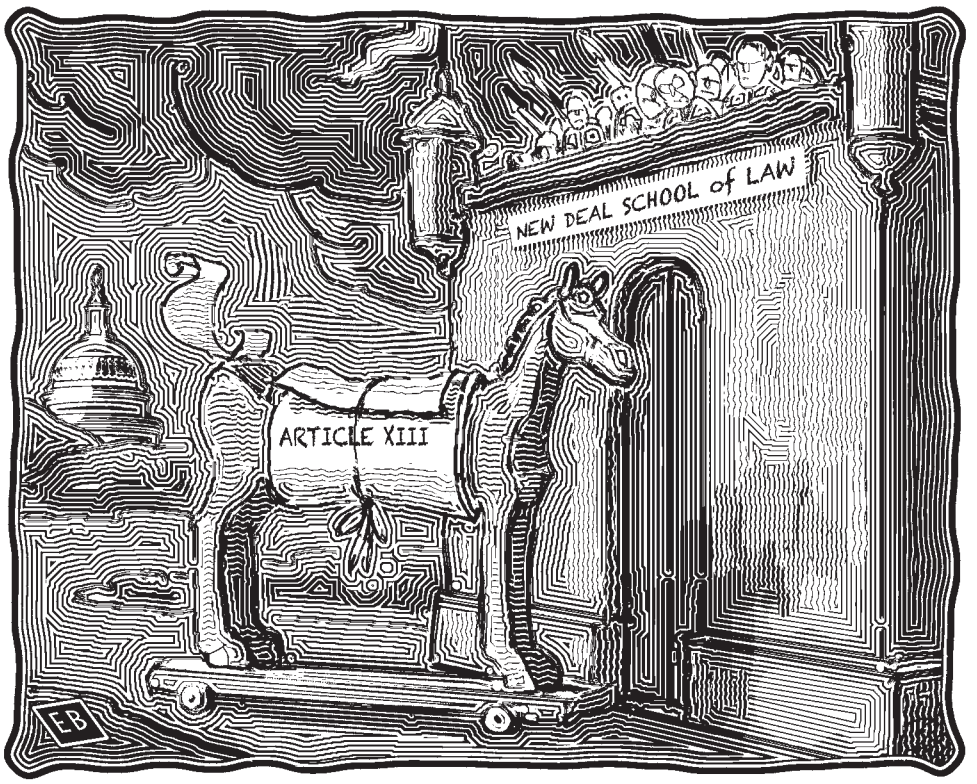
Essay by Randy E. Barnett

Free at Last



One hundred fifty years ago, on December 6, 1865, the 13th Amendment was ratified. It consists of two plain sentences. Section 1 reads: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." The other sentence, shorter and even less prepossessing, constitutes section 2. Although it seems so straightforward as to be almost boring, there is a lot to know about the 13th Amendment, and its significance extends beyond its obvious meaning and touches us even today.

Forever Free

To begin with, many americans believe the amendment basically repeated President Abraham Lincoln's Emancipation Proclamation, which went into effect on January 1, 1863, some two years earlier. Yet Lincoln's proclamation applied only to slaves in rebel states outside of Union control. It freed only those who could make it to Union lines and exempted slaves in loyal states or in Tennessee, which was nominally under Union control.

It is true, as James Oakes has recently shown in his masterly account, *Freedom National: The Destruction of Slavery in the United States, 1861–1865* (reviewed in the Summer 2013 *CRB*), that the Proclamation did more than is commonly acknowledged; it also encouraged the enlistment of black soldiers in the border states, which had the legal effect of freeing both them and their families. And contrary to the belief of many, Republicans had been freeing slaves almost from the moment they took control of Congress.

Despite all this, there was good reason for the Republicans to struggle to add the 13th Amendment to the Constitution. The antislavery activists who had formed the Liberty Party, then the Free Soil Party, and eventually the Republican Party, believed that slavery was a corrupt and economically backward institution, which survived only because of its expansion into new territories with more fertile land, and because of the outside support it received from the federal government. Since the Republic's early years, the national government had been restrained and often directed by what Republicans called the "Slave Power"—a control that was helped by several features of the Constitution, including the clause that gave white Southern voters disproportionate representation by counting three-fifths of their slaves towards representation in Congress and the Electoral College.

Unlike abolitionist constitutionalists like Lysander Spooner and Frederick Douglass, Republicans conceded that slavery was constitutional within the original slave states, and pledged loudly and often that they would not touch it there, even going so far as to propose a constitutional amendment to assuage the South. But Republicans like antislavery lawyer—and future Chief Justice—Salmon P. Chase also believed to their core that all it would take to end slavery peacefully was to erect a "cordon of freedom" around the slave states. By preventing its spread into the territories and abolishing it in the District of Columbia and other areas under federal control, the North would soon force the slave states to choke economically on their peculiar institution. The fact that the Southern states seceded from the Union before the Republicans could even take office to implement their policies suggests that they shared the Republican's assessment.

But this prediction proved wrong. Slavery was far more socially entrenched and economically stable than abolitionists believed. The South was able to sustain a lengthy military

campaign against the richer, more populous North; and until the very end of hostilities, Northern Democrats were calling for peace based on "the Union as it was," which would have perpetuated slavery. Notwithstanding four years of almost unimaginable bloodshed, once the Southern Democrats were allowed to rejoin their Northern brethren in Congress, there was nothing to stop them from reimposing slavery. Perhaps those slaves who had been emancipated and declared "forever free" would remain free—or perhaps not. Given that Lincoln had justified the Proclamation as a war measure, Republicans could not assume that the courts would find that the effect of military emancipation survived the end of hostilities for those slaves never actually freed. (Moreover, there were still many slaves in the border states who had been untouched by the Proclamation.) What was stopping the Southern states from continuing slavery once the troops had been withdrawn? Under the Republicans' reading of the Constitution, nothing much that could be counted on.

In short, even widespread emancipation did not equal abolition. Despite the Emancipation Proclamation, it was not until the 13th Amendment that the institution of slavery was actually abolished in the United States. While that alone makes its adoption historic, the 13th Amendment has an important role to play in understanding the Constitution even today.

Limited Power

Our republican constitution limits government power in two ways. The first, and most important, is the structural constraints it imposes on the powers of the national and state governments. The second is by its express prohibitions on government powers and its affirmative protections of individual rights. The 13th Amendment has an important interpretive bearing on each.

Let's start with the structural constraints. In addition to its internal checks and balances, our Constitution originally adopted a federal system that expressly limited the legislative power of the national government, leaving the people and their states with all other powers not delegated. The first sentence of Article I reads: "All legislative powers *herein granted* shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." This is a clear statement that any power exercised by Congress must be expressed in the text of the written Constitution. The powers of the president and judiciary are not so qualified.

In the early 20th century, when progressives were objecting to Supreme Court rulings upholding limits on Congress's commerce power, they took to claiming that "our fathers" had a much more capacious view of national power. For example, in their 1937 tract, *The Power to Govern: The Constitution—Then and Now*, economist Walton Hamilton and historian Douglass Adair smugly accused the Supreme Court of violating the original meaning of the Constitution: "Commerce was then more than we imply now by business or industry. It was a name for the economic order, the domain of political economy, the realm of a comprehensive public policy." Commerce, they claimed, "was the only word which could catch up into a single comprehensive term all activities directly affecting the wealth of the nation."

Their relatively short book was followed up in 1953 by University of Chicago law professor William Crosskey's three-volume magnum opus, *Politics and the Constitution in the History of the United States*, in which he made the same claim. But by this time, having succeeded in completely taking over the Court, progressives—now calling themselves "liberals"—had embraced the "living constitution" and were no longer interested in making claims about original meaning. So poor Crosskey's lifework fell into much-deserved obscurity.

The 13th Amendment is important evidence that progressives' originalist claims are false. If, at the founding, Congress really did have power over "all activities directly affecting the wealth of the nation," it would certainly have had power over slavery within the several states. Yet, though some might have imagined this, it was certainly not the prevailing public meaning of Congress's power over "commerce…among the several states." Neither would it have been justified under the Necessary and Proper Clause, which grants Congress the power "to make all laws which shall be necessary for carrying into execution" its power to regulate interstate commerce.

Antebellum abolitionists were a veritable font of creative constitutional arguments against slavery. Yet as I have studied "constitutional abolitionists," including Theodore Dwight Weld, Alvan Stewart, Charles Dexter Cleveland, William Goodell, Lysander Spooner, Salmon Chase, Benjamin Shaw, James Birney, Joel Tiffany, Horace Mann, Lewis Tappan, Gerrit Smith, Byron Paine, and Frederick Douglass, I found not a single one bold, creative, or desperate enough to assert that the Commerce Clause gave Congress power over slavery *within* a state.

Section 2 of the 13th Amendment is a testimony to these limits on national power. It established that "Congress shall have power to enforce this article by appropriate legislation," thereby adding to the legislative powers "herein granted" by the written Constitution. No such grant would have been necessary if progressives were right in their historical claims about the original meaning of the Commerce Clause. Nor, in the next century, would Section 2 of the 18th Amendment have needed to say that "Congress and the several states shall have concurrent power to enforce" the prohibition on the manufacture and sale (but not possession) of alcohol "by appropriate legislation."

Progressive law professors still teach that the pre-New Deal Supreme Court had it completely wrong in how it interpreted the scope of federal power. Yet the 13th Amendment stands as a rebuke to those such as Yale law professor Jack Balkin, who claims in his book *Living Originalism* (2011) that the original meaning of "commerce" included all "social interaction." If so, then Congress always had the power to abolish slavery in the states—which not even the most radical abolitionist thought resided in the Commerce Clause. In short, the need to enact the 13th Amendment is important evidence against the notion that the pre-New Deal Supreme Court was somehow making up the limits on national power. But that's not all.

Economic Liberties

Let's turn now to the second limit on government power: the explicit protection of individual liberties. Even earlier, the progressives had sharply criticized the Court for invoking the 14th Amendment's Due Process Clause to protect such individual liberties as freedom of contract. This progressive belief is still popular among many of today's judicial conservatives. For example, in his dissenting opinion in last year's gay marriage case, *Obergefell v. Hodges*, Chief Justice John Roberts, quoting Judge Learned Hand, reiterated the progressive critique of the 1905 case of *Lochner v. New York*: "By empowering judges to elevate their own policy judgments to the status of constitutionally protected 'liberty,' the *Lochner* line of cases left 'no alternative to regarding the court as a…legislative chamber.'"

According to Roberts's hoary narrative, *Lochner* was a wholly "unprincipled" opinion that elevated what he termed the justices' "naked policy preferences" above the legislature's. In particular, he disparagingly quotes Justice Rufus Peckham, who wrote the majority opinion in *Lochner*, affirming "the general right of an individual to be *free in his person* and in his power to contract in relation to his own labor" (emphasis added by Roberts). Were yesterday's progressives—and some of today's conservatives—correct that the Court in *Lochner* was making up the right of freedom of contract? The 13th Amendment again holds the key.

Even after a punishing war, the legal abolition of slavery did not end the subordination of freed blacks. Southern states responded with "black codes" reducing former slaves to second-class citizens, and local authorities looked the other way as freedmen were brutalized and intimidated. In response to the continued legal and extralegal persecution of free blacks (and white Republicans) in the South, Republicans in Congress enacted the Civil Rights Act of 1866. The act mandated that

> such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude…shall have the same right…to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens…any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Notice how Congress defined the civil rights of all persons, whether white or black, as including the rights "to make and enforce contracts…to inherit, purchase, lease, sell, hold, and convey real and personal property." In other words, at the very core of civil rights were the economic rights of contract and property, though characterizing these rights as "economic" is narrowing and anachronistic.

The 13th Amendment shows that the pre-New Deal Supreme Court was not making up the limits on national power.

Today, the claim that the 13th Amendment empowered Congress to protect the rights of contract and property from infringement seems strained, but this is largely because we take the injustice of slavery for granted in ways the old critics of slavery didn't. Though the case against slavery was multifaceted, at its core was the idea of natural rights, in particular the right of property that each person has in himself or herself—self-ownership—as well as the liberty of each person to exchange his or her labor for wages and other mutually agreeable terms—"free labor." The fundamental divide between the Slave Power and abolitionists concerned the rights of property and contract. Could a person be owned as property, and denied the right to refrain from laboring (except on terms contractually agreed upon) if a state legislature said so? Or did every human being own himself, with the inherent right to enter into contracts by which he or she could acquire property, which no legislature could arbitrarily restrict?

That today we think of these rights as "economic" should not be surprising. After all, slavery was, first and foremost, an economic system designed to deprive slaves of their economic rights. The key to slavery was labor. Restrictions imposed on what we would consider personal "liberties"—such as the freedom of slaves to speak or to read—were often instrumental to enabling the Slave Power to keep blacks working in bondage, and perpetuate the notion that they were inferior beings whose labor could be exploited without their consent.

The Slave Power considered these "economic" arguments of abolitionists to be so insidious that Southern states made it a crime for anyone—whether white or black, free or slave—to publish or speak them. The legal punishment for communicating the ideas of self-ownership and free labor was whipping or even death. And mobs meted out their own punishments, including tarring and feathering. While today we consider the freedoms of speech, press, and assembly to be personal, back then these rights were denied specifically when it came to advocating that enslaved blacks had the right to their own labor, along with the right to own property and freely enter into contracts. By abolishing slavery, the 13th Amendment was thought by congressional Republicans, therefore, to have *ipso facto* empowered them to protect the economic liberties that slavery had for so long denied. The Civil Rights Act's inherent constitutionality can be explained as follows: The 13th Amendment prohibited slavery, and the opposite of *slavery* is *liberty*. Any unwarranted restrictions on liberty that were imposed on emancipated slaves were simply partial "incidents" of their previous conditions of servitude. And Section 2 of the 13th Amendment empowered Congress to protect any citizen from such unjust restrictions on his liberty.

To the dismay of the Republicans in Congress, President Andrew Johnson vetoed the Civil Rights Act. Johnson, a "War Democrat" from Tennessee, denied that the power to protect these rights was properly "incident" to Congress's power to enforce the 13th Amendment. "Slavery has been abolished," he wrote, "and at present nowhere exists within the jurisdiction of the United States; nor has there been, nor is it likely there will be, any attempt to revive it by the people or the States." In response, supermajorities in both the House and the Senate overrode the president's veto.

Privileges and Immunities

Although it is often claimed that Congress then enacted the 14th Amendment to constitutionalize the Civil Rights Act, this is an oversimplification of what happened. As Garrett Epps explains in his book *Democracy Reborn* (2007), the initiative in Congress to protect the rights of free blacks and Republicans in the South by means of a constitutional amendment had begun even before the introduction of the Civil Rights Act and was promoted by different members. But the goal of these parallel initiatives was the same.

While Senator Lyman Trumbull of Illinois devised and promoted the Civil Rights Act under the auspices of the 13th Amendment, Representative John Bingham of Ohio was the moving force behind the 14th Amendment. Because the Southern states were eventually going to resume their seats in Congress, Bingham sought to place these guarantees beyond a future Congress's power to repeal. To accomplish this, Bingham proposed the language that became part of Section 1 of the 14th Amendment: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." But what were these "privileges or immunities"?

Consider the explanation of Section 1 offered by Jacob Howard of Michigan, the designated sponsor of the amendment in the Senate, in which he clearly identified two categories of "privileges or immunities." The first was the rights to which the Constitution's already-existing Privileges and Immunities Clause (in Article IV) referred: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

To identify these "privileges and immunities of citizens," Senator Howard, like many others in the House and Senate, quoted a lengthy passage from a circuit court opinion in an 1823 case called *Corfield v. Coryell*. The opinion was authored by Supreme Court Justice Bushrod Washington—George Washington's nephew—while he was "riding circuit," hearing appeals of local cases, as Supreme Court justices did back then. In the middle of the lengthy quote, Justice Washington offers this summary of "privileges and immunities":

> What these fundamental principles are it would, perhaps, be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the Government, *the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety*, subject nevertheless to such restraints as the Government may justly prescribe for the general good of the whole. [Emphasis added.]

Justice Washington is here merely repeating verbatim the canonical formulation of natural rights that was penned by George Mason for the Virginia Declaration of Rights, and which was then replicated in four other state constitutions and in the Virginia ratification convention's proposed amendments to the U.S. Constitution:

> That all men are born equally free and independent, and have certain inherent natural rights, of which they cannot, by any compact, deprive or divest their posterity; among which are, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

It was upon this language in the Massachusetts constitution that the Massachusetts Supreme Judicial Court based its ruling in 1783 that slavery was unconstitutional in that state.

According to Senator Howard, and the many others in Congress who quoted *Corfield*, these very same rights were "privileges or immunities of citizens of the United States," which Section 1 of the 14th Amendment said no state shall abridge (and which Section 5 now empowered Congress to protect). But then to these "*Corfield* rights" Senator Howard immediately added another category of privileges or immunities: "To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution," which the Supreme Court in *Barron v. Baltimore* (1833) had previously held did not apply to the states.

Thus the same Congress that proposed the 14th Amendment also enacted the Civil Rights Act of 1866 under the auspices of the 13th Amendment; this provides strong evidence that, in addition to the express guarantees of the Bill of Rights, such as the "enumerated" rights of freedom of speech and to keep and bear arms, "the privileges or immunities of citizens" was thought also to include the "unenumerated" economic liberties "to make and enforce contracts" and "to inherit, purchase, lease, sell, hold, and convey real and personal property" enumerated in that Act. Indeed, after the 14th Amendment, Congress repassed the Civil Rights Act just to be sure.

Therefore, contrary to the progressives, and to modern judicial conservatives like Chief Justice Roberts, who learned the progressive catechism in law school, the Supreme Court in *Lochner v. New York* was hardly imposing its own "naked policy preferences." It was instead protecting one of the privileges and immunities of Joseph Lochner, an American citizen, who, as part of the "due process of law," was entitled to his day in court, to deny that a law restricting the working hours of his bakers was within the proper power of a state legislature to enact. Because the Court in *Lochner* found that this provision was not a genuine health and safety law, it was held to be beyond the police power of the state of New York. The Court in *Lochner* was not claiming a judicial *power* to impose its own policy preferences, but rather its judicial *duty* to ascertain whether the legislature was acting in good faith when it restricted the liberties of the people.

That the 13th Amendment was vital to finally abolishing slavery in the United States is reason enough to celebrate its adoption. Yet the Republicans in the 38th and 39th Congresses gave us more: they altered our system of federalism in order to empower the citizen to challenge state laws that irrationally or arbitrarily restricted his or her liberty, whether economic or personal. On the 13th Amendment's 150th anniversary, it is high time to rediscover the republican (and Republican) Constitution that progressives have long sought to obscure and supplant.

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