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EDWIN MEESE III ORIGINALISM LECTURE | DELIVERED MARCH 21, 2023

Originalism and Fixing the Fourteenth Amendment

Kurt T. Lash

KEY TAKEAWAYS

The Supreme Court's approach to Section One of the Fourteenth Amendment needs to be fixed.

The Court's current jurisprudence is built on an unpersuasive interpretation of the Due Process and Equal Protection Clauses.

This jurisprudence needs to be rebuilt to reflect the original understanding of *all* of Section One, especially the clauses on the rights of equal citizenship.

It is such an incredible honor to be here. I am standing here in front of a remarkable group of scholars, lawyers, clerks, and judges. As a kid raised by a single mother on the wrong side of the tracks in Albuquerque, New Mexico, I really don't know how this has come about.

Actually, I need to first thank my mom, who recently passed away, for all those trips to the local library when I was growing up. And I'd like to thank my wife, who raised our kids, works at a crisis pregnancy center, teaches catechism at our local Catholic Church, and reminds me daily about what is most important in life.

I am especially honored to receive an award named in honor of Attorney General Edwin Meese III. He and I actually met a long time ago. I am sure he does not remember—but I do.

About two decades ago, on June 26, 2007, the Federalist Society held a conference at the Mayflower Hotel in Washington, DC, to discuss "the Contributions of Judge Robert H. Bork."[1] I was invited speak on the opening panel on originalism and the Ninth Amendment. I was still a new scholar and was extremely nervous, all the more so because the panel was moderated by Attorney General Meese.[2]

I somehow managed to stammer through my comments, which focused on Judge Bork's famous description of the Ninth Amendment as text obscured by an inkblot. I agreed that Judge Bork had been correct about the amendment when he spoke but that since that time scholars had managed to remove a great deal of that inkblot through originalist investigation. What that history revealed was a Ninth Amendment originally understood as working in tandem with the Tenth as one of the twin guardians of federalism.

When my panel concluded, the Attorney General approached me, thanked me for my words about Judge Bork, and said some kind words about my theory of the Ninth Amendment. He also encouraged me to keep researching and writing on the original meaning of the Constitution.

I've never forgotten those words of encouragement, and I took them to heart. Since that day in 2007, I have spent my entire career researching, writing, teaching, and arguing about the original meaning of the Constitution. Along the way, it has been my honor to get to know an extraordinary community of scholars, lawyers, and judges, all of whom share the same goal of discovering the original understanding of the people who drafted and ratified our Constitution.

I cannot imagine a more fulfilling career, and I am blessed to have started down this path so many years ago—a path that has brought me here. So my deepest thanks to the Attorney General. Words of encouragement mean a lot to young scholars—to *old* scholars too. I hope I have followed and still follow your good example and have encouraged others.

For example, I'd *like* to claim to have encouraged a certain young scholar who was last year's very deserving inaugural recipient of this award. However, Professor Josh Blackman was on fire long before he met me, and he still is. Although Josh is slightly younger than me—give or take two or three decades—I am happy and honored to follow in his footsteps.

The Title of Tonight's Lecture

This evening, I'd like to say a few words about originalism and the Fourteenth Amendment. In particular, Section One of the Fourteenth Amendment.

I've titled this talk "Originalism and Fixing the Fourteenth Amendment." I recognize the hubris in the title. It suggests that the Fourteenth Amendment needs fixing and that I know how to do it. This is, of course, what law professors always claim. It's our job.

In this case, though, the title has kind of a double meaning. First of all, the title of tonight's talk can be understood as a bit of a play on words.

The first step in originalism involves identifying the original meaning of constitutional text and treating that meaning as *fixed* at the time of its adoption. The second step requires applying this *fixed* meaning in a manner than meaningfully constrains application of the amendment to current constitutional disputes. So, yes, I do claim that the meaning of the Fourteenth should be *fixed* in the sense that its meaning should be fixed at the time of its drafting and ratification.

But of course, the title is more than just a play on words. I believe—in fact, I imagine many of us believe—that there is something not quite right about the Supreme Court's jurisprudence of Section One. I am not talking about decisions that we believe are incorrect. I'm talking about a deeper problem—one that goes beyond particular outcomes in particular cases.

There is something wrong with the Court's entire approach to Section One of the Fourteenth Amendment. What I'd like to do this evening is explain why I think that is the case and make some tentative suggestions about how the Court might begin to remedy—or fix—the problem.

The Text

Let me start by simply reading the actual text of Section One:

> 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.[3]

Notice how the text elegantly distinguishes the rights of citizenship from the rights of all persons. Notice also that three of the five clauses of Section One and the majority of its words address the status and rights of citizenship. Despite this textual emphasis, the Supreme Court currently enforces only the last two clauses, the clauses that address the rights of all persons.

In law school, the second half of constitutional law is almost completely devoted to issues relating to due process and equal protection. The only thing students learn about the Citizenship Clauses is that the Supreme Court killed off the Privileges or Immunities Clause in *The Slaughterhouse Cases*.[4] Other than perhaps a brief mention about how the opening sentence overturns *Dred Scott*, the first three sentences of Section One remain unexamined. Of course, that's perfectly appropriate for lawyers in training, given that the current Supreme Court leaves these three opening clauses unexamined and unenforced.

The Court's model of Section One leaves the Citizenship Clauses on the side, like the leftover pieces of the Lego model of the space shuttle I recently tried to build with my grandson. Or like the leftover pieces of anything I buy at IKEA and try to build before my wife gets home.

But just like that Lego model or that chair from IKEA, as much as you hope that those leftover pieces weren't really necessary, the terrible truth is unavoidable when you and your grandson try to set the space shuttle upright on the table. The wing of the shuttle keeps falling off, the astronaut keeps falling out, and you—or worse, your wife—will almost certainly fall out of that IKEA chair if someone tries to sit in it.

Leftover pieces, in other words, are generally a sign that your model has a problem. Somewhere along the way you have missed a critical step—or several steps. And the result is a misshapen creation that most likely will not work as originally intended.

In the case of the Fourteenth Amendment, leaving out the Citizenship Clauses and trying to build the model entirely upon the last two sentences of Section One has produced the sadly disfigured creature known as substantive due process. Without beating this poor beast any more than others have done, let's just say that it is likely that not a single justice on the current Court believes that substantive due process is persuasive as a matter of text or original understanding.

And matters get no better when we turn to the Court's equal rights jurisprudence. Although the final clause speaks only of equal laws that protect, the Court has created a jurisprudence demanding equality in laws that provide.

An increasing number of scholars now believe that the "Equal Protection of the Laws Clause," as Professor Chris Green likes to call it, guarantees nothing more than the equal protection of the natural rights of life, liberty, and property—natural rights that belong to all persons regardless of citizenship.

This clause was not originally understood as having any application to the discriminatory denial of local civil rights and benefits. The Equal Protection Clause does not apply, in other words, to local benefits like a publicly funded education—the benefit at issue in *Brown v. Board of Education*.[5]

I would be willing to bet that a majority of scholars today do not believe that the decision in *Brown* is supported, much less required, by the original understanding of the Equal Protection Clause. This is not to say that *Brown* came to the wrong result in terms of the original understanding of Section One as a whole. In fact, by the end of this talk, I will explain how a different clause in Section One supports the court's jurisprudence of anti-discrimination in local civil rights, including the equal right to a publicly funded education.

For now, my only point is that the Court's current focus on only the last two clauses of Section One has produced a jurisprudence that lacks any identifiable relationship to the text and original meaning of the Fourteenth Amendment's Due Process and Equal Protection Clauses. And let's not even *speak* about the Court's inscrutable reasoning in *Bolling v. Sharpe*,[6] where the Court somehow managed to read 1868 equality principles back into the 1791 Due Process Clause. *Bolling* is the just the most obvious sign that something has gone very wrong in the Court's construction of Section One.

Justice Thomas's Hint

Thankfully, some justices on the current Court recognize that current Section One jurisprudence wrongly ignores the opening sentences of the Fourteenth Amendment.

Just last term, in *Dobbs v. Jackson Women's Health Organization*, Justice Alito's majority opinion recognized the possibility that the Privileges or Immunities Clause might better serve as the source of substantive Fourteenth Amendment rights.[7] In fact, scholars have long urged the Court to move the doctrine of incorporation of the Bill of Rights out of the so-called substantive due process clause and into to the Privileges or Immunities Clause.

Justice Thomas, of course, has long encouraged the Court to take another look at the Privileges or Immunities Clause as a better source of substantive rights. He said so at great length in his concurring opinion in *McDonald v. Chicago*.[8] Most recently, Justice Thomas has gone even further and encouraged the Court to *also* reexamine the opening Citizenship Clauses.

Last term, in *United States v. Madero*,[9] Justice Thomas declared that future courts and future scholarship should abandon the problematic reasoning of *Bolling v. Sharpe* and consider the possibility that the opening clauses of Section One of the Fourteenth Amendment secure the equal rights of American citizenship. This small suggestion by Justice Thomas, I believe, contains the key to fixing the Fourteenth Amendment.

In my remaining time, let me just briefly explain why I believe the history and meaning of the opening Citizenship Clauses are so important.

Citizenship and Antebellum Law

The original Constitution left both state and national citizenship undefined. Antebellum courts and commentators presumed that determining the status of state citizenship had been left to the individual states.

The common antebellum practice in terms of white Americans was to treat local state residents as citizens of the state. White citizens of a state, in turn, were presumed to be citizens of the United States.

The situation for black Americans was quite different. Enslaved black Americans held no legal rights whatsoever, but even free black Americans often lacked the same rights of citizenship as those conferred upon white citizens.

Free black residents in slaveholding states were denied the status of citizenship or denied the equal rights of citizenship in a variety of matters. They lacked the right to vote and often faced racially restrictive laws on the ability to buy and sell property, contract for labor, or engage in protected expression and religious exercise. Free black sailors from northern states faced imprisonment upon sailing into southern ports.

Even in the North, states often denied free black Americans equal civil rights, including suffrage rights and even, occasionally, the right to immigrate into the state.

Dred Scott and Republican Theories of Citizenship

In *Dred Scott*,[10] of course, the Supreme Court pointed to this long history of discriminatory treatment and concluded that black Americans were not and could not become citizens of the United States. That decision helped inflame an already divided country and helped trigger a civil war.

Republicans, of course, never accepted Chief Justice Taney's reasoning in *Dred Scott*. As far as they were concerned, every person born on United States soil was a citizen of the United States and of their state of residence. When Republicans passed the Thirteenth Amendment in 1865, they did so with the expectation that emancipated black Americans would automatically enjoy the status of national and state citizenship.

Unfortunately, southern Democrats had other ideas. Instead of granting the status and rights of equal citizenship, the former rebel states enacted the Black Codes. These codes not only denied free black residents equal civil

rights in a variety of matters, but also imposed draconian vagrancy laws which allowed for the arrest of unemployed black Americans who could then be sold into a system of convict labor.

In response, Republicans in the 39th Congress passed the 1866 Civil Rights Act. The opening line of that act declared 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."[11] The act then went on to demand that states provide black citizens the same local rights of property contract and labor as white citizens.

The problem was that it was not at all clear whether Congress had the constitutional authority to pass such an act. Even if Congress had the authority to define national citizenship, the substantive provisions of the Civil Rights Act addressed matters relating to the status and rights of local residents. Even Justice Curtis, who had dissented in *Dred Scott*, noted that the Constitution reserved to the states the power to confer or deny the status of state citizenship to local residents. It was quite possible federal courts would rule that the Civil Rights Act was unconstitutional and that states retained the right to decide issues relating to state citizenship.

Nor was this potential problem with the Civil Rights Act solved by the initial draft of the Fourteenth Amendment, proposed a few weeks later by the Joint Committee on Reconstruction. The opening section of that initial draft, authored by John Bingham, contained only three clauses: one protecting the privileges or immunities of national citizenship and two others protecting the right of all persons to due process and the equal protection of the laws. The draft left national citizenship undefined and said nothing at all about the status and rights of state citizenship.

Adding the State Citizenship Clause

When Joint Committee member Senator Jacob Howard presented the proposed amendment to the Senate, Senate Republicans immediately recognized the problem and began to offer amendments to Bingham's draft. By the end of the day, Republicans had decided to leave the Senate chamber and meet in a series of private caucuses away from the Capitol.

When they returned, Jacob Howard announced a proposed addition to Bingham's draft. The Fourteenth Amendment would now begin with language defining and securing the status of national and state citizenship. The first clause echoed the Civil Rights Act. The second was brand new: "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."[12]

Henceforth, persons born on American soil were citizens of the United States, regardless of race, and these citizens were equally citizens of their state of residence. The third Citizenship Clause then ensured that no state could make or enforce any law denying or abridging their new constitutionally secured status as equal state citizens.

When the final draft was passed and sent to the states for ratification, Americans North and South recognized the meaning and importance of these three opening clauses, especially the new state citizenship clause. Here is how a black American newspaper in New Orleans described the proposed Fourteenth Amendment's opening clauses:

> Let us only consider the first section: "All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside."... This doctrine is the correct one. It was absurd to tell a man, "you are a citizen of the Republic at large, but you have no rights in your own State; you are not even a citizen there."...
>
> Every man of African descent is not only declared to be a citizen of the state wherein he resides, but he will be entitled to the *same* privileges and immunities as any other citizen. In other words, all classifications among citizens must fall....
>
> [L]egislation must consider all classes of citizens as forming one single mass, for which all laws must be equal. No discrimination can be made in the future either on account of color or on account of naturalization and origin.... Every title of citizenship is declared to be of like value, and to confer the same rights.[13]

Years later, Justice John Marshall Harlan would describe the Citizenship Clauses in the same way. In the *Civil Rights Cases* dissent, Harlan explained:

> But what was secured to colored citizens of the United States—as between them and their respective States—by the national grant to them of State citizenship?... There is one, if there be no other—*exemption from race discrimination in respect of any civil right belonging to citizens of the white race in the same State*.... Citizenship in this country necessarily imports at least *equality of civil rights among citizens of every race in the same State.* It is fundamental in American citizenship that, in respect of such rights, there shall be no discrimination by the State, or its officers, or by individuals or corporations exercising public functions or authority....[14]

Harlan was right, and right as a matter of original meaning and public understanding of the Citizenship Clauses.

Revisiting and enforcing the original meaning of all three Citizenship Clauses offers a way out of the Court's currently misguided jurisprudence of the Due Process and Equal Protection Clauses.

Brown v. Board was right to demand that states provide equal civil rights to resident American citizens, regardless of race. But this is not because of the "Equal Protection of the Laws Clause." It is because states may not deny their citizens equal civil rights on the basis of race.

Bolling also was right to declare that the federal government may not deny its citizens equal education benefits on the basis of race—not because of the Due Process Clause, but because of the National Citizenship Clause, which prohibits dividing American citizens on the basis of race.

Finally, the Court has correctly interpreted the Fourteenth Amendment as making the Bill of Rights enforceable against the states—not because of the Due Process Clause, but because Americans in 1868 understood the Bill of Rights as declaring the privileges or immunities of American citizenship.

Conclusion

In closing, it is time we admitted that our model of the Fourteenth Amendment is in need of repair. Public acceptance of the legitimacy of the Court's decisions requires a convincing account of how those decisions reflect the actual sovereign will of the people—in this case, the sovereign will of the people who gave the last full measure of their devotion in saving the Union and securing equal rights regardless of race.

Fixing the Fourteenth Amendment means revisiting the text and history of Section One and rebuilding the resulting jurisprudence—this time using *all* of the pieces.

Kurt T. Lash is E. Claiborne Robins Distinguished Chair in Law at the University of Richmond.

Endnotes

1. The Federalist Society, "A Conference Discussing the Contributions of Judge Robert H. Bork," June 26, 2007, https://fedsoc.org/conferences/a-conference-discussing-the-contributions-of-judge-robert-h-bork#agenda-item-judicial-philosophy-originalism-the-tempting-of-america-the-political-seduction-of-the-law (accessed April 13, 2023).
2. In 1985, Attorney General Edwin Meese delivered a speech to the American Bar Association on what he characterized as "a Jurisprudence of Original Intention." See Edwin Meese III, "Speech to the American Bar Association," July 9, 1985, https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/07-09-1985.pdf (accessed April 13, 2023). See also Edwin Meese III, "Speech to the D.C. Federalist Society Lawyers Division on a Jurisprudence of Original Intention," November 15, 1986, https://www.americanrhetoric.com/speeches/edwinmeeseDCfederalistsociety.htm (accessed April 13, 2023).
3. Constitution of the United States, Amendment XIV, Section 1, https://www.archives.gov/founding-docs/amendments-11-27 (accessed April 13, 2023).
4. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), https://tile.loc.gov/storage-services/service/ll/usrep/usrep083/usrep083036/usrep083036.pdf (accessed April 13, 2023).
5. *Brown v. Board of Education of Topeka et al.*, 347 U.S. 483 (1954), https://tile.loc.gov/storage-services/service/ll/usrep/usrep347/usrep347483/usrep347483.pdf (accessed April 13, 2023).
6. *Bolling v. Sharpe*, 347 U.S. 497 (1954), https://tile.loc.gov/storage-services/service/ll/usrep/usrep347/usrep347497/usrep347497.pdf (accessed April 13, 2023).
7. *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ____, 15, n.22 (2022), https://supreme.justia.com/cases/federal/us/597/19-1392/case.pdf (accessed April 13, 2023).
8. *McDonald v. City of Chicago*, 561 U.S. 742 (2010), https://tile.loc.gov/storage-services/service/ll/usrep/usrep561/usrep561742/usrep561742.pdf (accessed April 13, 2023).
9. *United States v. Vaello Madero*, 596 U.S. ____ (2022), https://www.supremecourt.gov/opinions/21pdf/20-303_6khn.pdf (accessed April 13, 2023).
10. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), https://supreme.justia.com/cases/federal/us/60/393/ (accessed April 13, 2023).
11. Civil Rights Act of 1866, Section 1, 14 Stat. 27–30, https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=014/llsl014.db&recNum=058 (accessed April 13, 2023).
12. Constitution of the United States, Amendment XIV, Section 1.
13. "Equality Before the Law," *New Orleans Tribune*, June 16, 1866, p. 1.
14. *Civil Rights Cases*, 109 U.S. 3, 48 (1883), https://tile.loc.gov/storage-services/service/ll/usrep/usrep109/usrep109003/usrep109003.pdf (accessed April 13, 2023). Emphasis added.