

BOOK REVIEW

REARRANGING THE APPLE CART: GOOD-FAITH ORIGINALISM AND THE FOURTEENTH AMENDMENT

Reviewing Randy E. Barnett and Evan D. Bernick. *The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit*. Harvard University Press, 2021.

*by Daniel Coble**

Ask any constitutional law professor about how judges should or do interpret the Constitution, and you will likely hear an answer that ends in “ism.” In their latest book, Professors Randy Barnett and Evan Bernick discuss an “ism” that is found in our nation’s highest court, state courts, and academia: originalism.

Why another book on originalism and why should other “isms” take notice? Barnett and Bernick’s originalism does not stand in stark contrast to other forms of originalism and how the Fourteenth Amendment has been interpreted in the past; however, their book does seem to present some views that have not been commonly associated with originalism. These views even seemed to surprise a well-known legal realist, Eric Segall, in his review of the book.¹ With six of the nine Supreme Court Justices (and perhaps a seventh in Justice Jackson) adhering to some form of originalism, and with the authors’ notoriety and influence within the originalism school of thought, this book sheds light on perhaps a shift in where originalism is going and what might be a new original meaning of originalism.

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1. Eric Segall, *A New (Read Old) and Improved 14th Amendment? Reviewing Barnett and Bernick’s “The Original Meaning of the 14th Amendment”* DORF ON LAW BLOG (Jan. 18, 2022), <http://www.dorfonlaw.org/2022/01/a-new-read-old-and-improved-14th.html?m=1>

I. INTRODUCTION

The main thesis of this book is that the original meaning of the Fourteenth Amendment not only altered how federalism had been thought of before its ratification, but it also extended the authority of the federal government to protect certain fundamental rights. The Thirteenth Amendment did not go far enough, and thus the “moral legitimacy of the Constitution . . . required a Fourteenth Amendment.”²

What do the authors use to determine this original meaning? Well, they look to “antislavery constitutionalism that was developed by abolitionists in the decades between the Revolution and Civil War[.]”³ Most of the book is thick with historical papers, writings from courts, and other documents that lead the authors to several conclusions about the original meaning of the Privileges or Immunities Clause, Due Process Clause, and Equal Protection Clause, as well as how these provisions are enforced. And in the authors’ own words, the Fourteenth Amendment “was meant to be sweeping, and that even today the court’s interpretation of it is in some ways too cramped.”⁴

II. FRAMEWORK

The authors have written previously that they believe in “good-faith” constitutionalism.⁵ And for them, this type of constitutional interpretation first entails finding a “defensible theory of originalism.”⁶ The first step needed for a defensible theory was to shift from original intention to original public meaning: “[Justice] Scalia admonished the attorneys to abandon their quest to discover the original intentions of the Framers and to pursue instead the original public meaning of the text.”⁷ The second step is the point of this book: the interpretation and construction of the text (in this case, the Fourteenth Amendment). “The ‘letter’ of the Constitution consists of the meaning that it originally conveyed to the public. The ‘spirit’ of the Constitution consists of the ends, purposes, goals, or objects that the Constitution was adopted to accomplish—its

2. RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT* 376 (2021).

3. *Id.* at xi.

4. Tunku Varadarajan, *The Amendment That Remade America*, WALL ST. J., Oct. 29, 2021, <https://www.wsj.com/articles/fourteenth-amendment-states-civil-rights-federalism-originalism-abortion-dobbs-jackson-11635535364>

5. Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018).

6. *Id.* at 10.

7. BARNETT & BERNICK, *supra* note 2, at 4.

design functions.”⁸ The authors make clear that the “spirit should not be used to override the letter; when the letter is clear, it controls.”⁹ Overall, the authors contend that judges must act in good faith when interpreting the Constitution:

Our theory of constitutional construction draws upon a familiar common-law concept long used in contract and fiduciary law to handle the problem of opportunistic abuse of discretion: the duty of good faith. We contend that judges who take an oath to “support this Constitution” enter into a fiduciary relationship with private citizens—a relationship characterized by discretionary powers in the hands of judges and a corresponding vulnerability in the citizenry. As fiduciaries, judges are morally and legally bound to follow the instructions given to them in “this Constitution” in good faith. This means that judges engaging in constitutional construction (or “implementation”) must seek to give legal effect to both the Constitution’s “letter” (its original public meaning) and its “spirit” (the original function or purpose of the particular clauses and general structure of the text).¹⁰

So where do the Framers come into this methodology? The Framers are to be thought of as designers or architects. When they created the Constitution, it was a “product of deliberate human design[.]”¹¹ By thinking of the Framers as the designers, today’s judges should use them in an evidentiary role to help reconstruct the text and interpret the spirit of the passage (assuming the letter is not clear).

The authors lay out a three-part approach for handling the interpretation and construction of a constitutional issue: 1) *The Letter*—Make a good-faith effort to determine the original public meaning of the text; 2) *The Spirit*—If the letter is not ascertainable, identify the original function, goal, or spirit of the provision; and 3) Create a rule that can be used for future cases that is consistent with parts one and two.

Parts one and three are the perilous steps where the authors readily admit that this is the place where originalism takes its biggest critiques from both fellow originalists and living constitutionalists (“Some thoughtful critics of originalism have claimed that the recognition of the activity of constitutional construction renders originalism highly indeterminate.”).¹² With this three-step method, the authors make clear that if the letter, or original public meaning, is clearer and more evident,

8. *Id.* at 9.

9. *Id.* at 17.

10. Barnett & Bernick, *Letter*, *supra* note 5, at 1.

11. BARNETT & BERNICK, *supra* note 2, at 14.

12. *Id.* at 15.

then the spirit and construction zone is smaller—and thus there is less need for the indeterminacy of a judge.

And this in turn leads the authors to the main objective of their book—examining the letter and spirit of the Fourteenth Amendment. The authors believe that they are prepared to lay out a much thicker understanding of the original meaning and letter of the Fourteenth Amendment. And they are also willing to provide doctrines based on the spirit of this amendment in order to give it legal effect. While the authors proclaim that this “is going to upset some apple carts[,]” they quickly follow up with what most readers might find instead—a rearranging of the apple carts (“we do not believe that adopting the original meaning of the Fourteenth Amendment as a whole would lead to results that differ radically from those that current doctrine would produce.”).¹³

III. PRIVILEGES OR IMMUNITIES CLAUSE

It is not surprising that the authors’ first critical issue with the Privileges or Immunities Clause is that it has been completely underused and devalued since its inception. The most significant case that has placed the Privileges or Immunities Clause to the side is *The Slaughter-House Cases*.¹⁴ The majority opinion of this case essentially held that the clause applied narrowly and had “‘one pervading purpose’ of protecting the freedom of enslaved people from the states.”¹⁵ So, if the Supreme Court has gutted this clause since the beginning, then what is the proper understanding and interpretation of it? The authors devote a chapter to the “competing originalist interpretations” of this clause before diving into their own interpretation. These theories about what exactly the privileges or immunities in this clause are include: rights associated with citizens’ interactions with the national government; enumerated rights only; equality only; rights from a particular date; and an open set of widely-recognized rights.

Obviously, the authors disagree with these prevailing interpretations of the clause and propose their own theory. How does the Privileges or Immunities Clause fit into this amendment and what does their theory really change with the current Supreme Court doctrine? From the thirty-thousand-foot view, it seems that the authors have merely taken the analysis and Supreme Court case law from the Due Process Clause and shifted it over to the Privileges or Immunities Clause (and yes, this

13. *Id.* at 19.

14. *Slaughter-House Cases*, 83 U.S. 36 (1873).

15. BARNETT & BERNICK, *supra* note 2, at 175.

includes the doctrine of substantive due process which the authors somewhat incorporate into their theory—*no pun intended*). They believe that the Privileges or Immunities Clause protects substantive and fundamental rights. The question then, is what are those rights and how are they determined?

The Privileges or Immunities Clause houses two types of civil rights and can be thought of as providing both a floor and ceiling of these protected rights. The floor contains the natural rights that protect one's liberty (i.e., John Locke). The ceiling contains post-political rights that the state has decided to create. Similar to a substantive due process evaluation, the authors believe that the courts must determine if a right is fundamental (or has become fundamental) in order to be protected (but protected under this clause not due process). And this where the authors' originalist interpretation comes into play: "To determine whether a post-political right is fundamental, we ask whether it was in 1868 or is today the object of a stable national consensus."¹⁶

The authors stress that judges do not get to raise this ceiling (post-political rights), but only that judges may find that the polity has raised the ceiling. Legal realists and other critics might find this command to be circular and reinforce the indeterminate critique of judicial application to this or any "ism" of constitutional interpretation ("Even some originalists have been skeptical about acknowledging a place for constitutional construction."¹⁷ But to combat this critique, the authors follow up their *letter* by creating a specific formula for judges to use when entering this "construction zone."

With the letter (i.e., interpretation) in place, the authors then turn to the spirit of the clause (i.e., the construction). They propose a four-part rule to guide judges and legislators when considering "privileges or immunities of Republican citizenship." The test includes: 1) Enumerated rights in the Constitution around 1868; 2) Enumerated rights in the Civil Rights Act of 1866; 3) Subsequent enumerated rights; and 4) Unenumerated rights.

And it is this fourth part of the rule that so closely resembles "substantive due process" and places it under the "privileges or immunities" purview. The authors readily (and somewhat reluctantly) admit that their new approach follows one of the current substantive due process rubrics founded in the Supreme Court case *Washington v.*

16. *Id.* at 24.

17. *Id.* at 15.

*Glucksberg*¹⁸ (“deeply rooted in this Nation’s history and tradition and given a careful description.”).¹⁹ But the authors go one step further in specificity of their new construction—they suggest that if individual citizens have for at least a generation—thirty years or more—been entitled to enjoy a right as a consequence of the constitutional, statutory, or common law of a supermajority of the states, it is presumptively a privilege of U.S. citizenship.”²⁰ Category four also includes “the unenumerated right not to be unfairly treated by public institutions.”²¹

At the beginning of the book, the authors warned that they might be overturning the apple cart with their new proposal. But as far as their view on the Privileges or Immunities Clause, it seems more likely that they have rearranged the apples: (“Shifting the protection of unenumerated rights to the Due Process of Law Clauses due to fear of the Privileges or Immunities Clause has been a cure that is worse than the disease.”).²²

IV. DUE PROCESS CLAUSE

The vast majority of this book focuses on the Privileges or Immunities Clause. Parts II and III of the book detail the original meaning of the Due Process Clause and Equal Protection Clause. As seen in the previous part of the book, the authors believe that the Due Process Clause has not been properly used under Supreme Court doctrine. However, they do not necessarily agree with some of their fellow originalists on how it should be interpreted (“The dominant originalist view has long been that ‘due process of law’ is solely a procedural guarantee that does not constrain the substance or content of legislation.”).²³

Under their rubric of the Due Process Clause, the authors believe that this clause includes both a procedural part and a substantive part. However, they make sure to let the readers know that their view on the substantive guarantee of due process is distinct from “substantive due process” in its current form. To determine if a statute violates a substantive guarantee, the authors look to whether or not the government had the authority to enact that legislation. In the case of the federal government, the “legislation must be within one of the delegated powers of Congress” including those that fall under the Necessary and Proper Clause.²⁴ In the

18. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

19. BARNETT & BERNICK, *supra* note 2, at 234.

20. *Id.* at 247.

21. *Id.* at 249.

22. *Id.* at 257.

23. *Id.* at 31.

24. *Id.* at 262.

case of the state government, the legislation must fall within the Police Powers.

Their view does differ from “substantive due process” because they would look to the substance of the statute and if the legislator had the authority to enact it (i.e., arbitrary power); and under substantive due process, the courts are looking at the statute to identify substantive fundamental rights that might be infringed by the statute. But remember, the authors have made clear that the determination of whether an unenumerated right is fundamental has been placed within the Privileges or Immunities Clause—rearranging the apple cart.

In order for the judiciary to determine if the legislator violated the Due Process Clause with their legislative act, the authors believe that the courts should employ a two-part test: 1) If a person makes a threshold showing that they could be deprived of life, liberty, or property, then the government must make an evidentiary showing for why it enacted the legislation; 2) After this, the courts should determine if the government acted in good faith to achieve a constitutionally proper end goal.

V. EQUAL PROTECTION CLAUSE

The final part of the book is dedicated to the Equal Protection Clause as well as Section 5 (The Enforcement Clause) of the Fourteenth Amendment. While the Privileges or Immunities and Due Process Clauses deal with state action, the Equal Protection Clause may be applied to state inaction. The authors believe that the original meaning of the Equal Protection Clause “requires the state to act to protect the rights of all persons from being violated by others—including by private actors.”²⁵ It is not that the states must simply refrain from violating people’s rights, but that this clause will protect them from private actors.

But how would the federal government handle state inaction? This brings up the important doctrine of “state action” and Section 5 of the Fourteenth Amendment, which gives Congress the power to enforce the amendment. According to the authors, Supreme Court precedent has limited Congress’ authority when it comes to the Equal Protection Clause and the actions of private parties (or the inaction of the government). Here though, the authors believe that because the original meaning of the Equal Protection Clause requires an impartial enforcement of the laws, then Congress should be given wider authority to act when states do not.

25. *Id.* at 34.

One remedy is access to federal courts, better known as a private right to action. Would this overturn cases like *United States v. Morrison*, which held that the Violence Against Women Act was unconstitutional under the Commerce Clause and also that Section 5 of the Fourteenth Amendment did not allow Congress to “regulate private parties”?²⁶ The authors agreed that the Commerce Clause was not the proper constitutional area for Congress to act. But based on the original meaning of the Equal Protection Clause, they believe that states have an affirmative duty “to act to protect the rights of all persons from being violated by others—including by private actors.”²⁷ The authors don’t express an opinion as to that outcome, rather they believe that the Court should have considered a different reading of the Equal Protection Clause and thus a different reading of Section 5.

Other remedies under Section 5 that the authors suggest include judicial remedies such as writs of mandamus and tort liability for states. The authors acknowledge that Congress is most likely better suited to enforce this equality, as long as it is tailored to the spirit of equal protection.

V. CITIZEN

What about the distinction between citizen and person that is used throughout Section 1 of the Fourteenth Amendment? The authors state that the Privileges or Immunities Clause applies to citizens and is a ceiling of rights created by the government. And the Due Process and Equal Protection Clauses establish a floor that is guaranteed to every person. The authors note that this is an issue that must be addressed.

Any interpretation of the Fourteenth Amendment that purports to be faithful to its text must somehow come to grips with the textual distinction between “citizens” and “persons.” We believe ours is the first conceptual scheme to make sense of both the text and the available evidence of original meaning.²⁸

Whether or not they have answered or begun to answer is an ongoing question—throughout the book the authors refer to citizenship in the abstract or academic sense, but this view of citizenship will change when applied to specific legal cases.

26. *United States v. Morrison*, 529 U.S. 598 (2000).

27. BARNETT & BERNICK, *supra* note 2, at 34.

28. *Id.* at 28.

VI. CONCLUSION

Overall, the authors acknowledge that much of the current Supreme Court jurisprudence on the Fourteenth Amendment would not significantly change. The current equal protection black-letter law? Well, a “great deal of it may be relocated to other clauses.”²⁹ The 1964 Civil Rights Act? Well, that would move from the Commerce Clause jurisdiction to Section 5 jurisdiction. The determination of unenumerated fundamental rights? Well, that is moved to the Privileges or Immunities Clause. Incorporation of the first eight amendments? That would happen under the Privileges or Immunities Clause rubric. The right to counsel under *Gideon v Wainwright*?³⁰ Well, the authors aren’t sure if that is a protected right, but they do disagree with Justice Thomas and Justice Gorsuch about where to look in making that determination. The Justices look to the Sixth Amendment while the authors of this book would look to the Fourteenth Amendment and the Equal Protection Clause.

No matter which constitutional interpretation “ism” that one follows, this book provides an intimate and historical view of what two leading originalist scholars believe is the original meaning of the Fourteenth Amendment. And while Barnett and Bernick do focus specifically on the Fourteenth Amendment, their book delves deep into historical documents to paint a fuller picture of how they see the entire Constitution being interpreted. What is the original originalism and which originalism is going to be utilized in constitutional interpretation? Well, only nine people can tell us that. But with the current Supreme Court makeup, this book is likely on several of the justices’ bookshelves.

29. *Id.* at 369.

30. *Gideon v. Wainwright*, 372 U.S. 335 (1963).