Remarks on Jeffrey Rosen's Paper

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Let me speak briefly about one important question raised by Jeff's brilliant, provocative paper, and by the conference he has organized, which is whether textualism, however understood, can lead to both fidelity and restraint in interpretation of the Constitution. His focus on Section 1 of the Fourteenth Amendment raises this question most sharply. Because the [literal] text of the Fourteenth Amendment itself is written with such an unrestrained sweep, that provision constitutes the great challenge to the simultaneous pursuit of both fidelity to text and judicial restraint.

The *Slaughter-House Cases* did not cause this problem. Although *Slaughter-House* was wrong, I have never agreed with the many scholars who believe that its fundamental error was that it eliminated the correct clause for the national protection of individual rights (the Privileges and Immunities Clause) thereby "forcing" later interpreters to rely upon the wrong clause (the Liberty/Due Process Clause). *Slaughter-House* may well have been wrong about the Privileges and Immunities Clause and in failing to offer greater protection to economic liberties. But the error of forcing subsequent courts to turn to the wrong clause seems to be more of interest to a compiler of head notes than to citizens and scholars. Having the Due Process Clause do the work intended for the Privileges and Immunities Clause may be awkward, but it is not a constitutional tragedy.

Although I hesitate to disagree with scholars such as Charles Black and John Hart Ely, I am not as fully persuaded as they seem to be that the Due Process Clause is an altogether inhospitable textual location for the protection of national rights against state interference. It is clever to say that substantive due process is oxymoronic and that, like the concept of a "sweet, red lemon" it makes no sense. But I am not persuaded that the textual language of the Due Process Clause—that no state shall deprive any person of life, liberty, or property without due process of law—is incapable of doing the work intended for Section 1 of the Fourteenth Amendment.

To insure that a person's liberty is taken away only in a manner that affords due process can be seen as having an irreducibly "substantive" content. Construing that phrase as [only] protecting procedural defense rights such as the assistance of an attorney, the right to notice of the charges, the right to call and cross-examine witnesses, while placing no restrictions whatsoever on the substantive content, renders the procedural guarantees themselves worthless. That is to say, if you allow me to determine unrestrainedly the substance of a legal prohibition, then you have no procedural rights worth observing. If I can [substantively] outlaw "Looking Like Professor Jeff Rosen" or "Owning Too Much Property" there is no benefit to having a Dream Team of defense lawyers and every other procedural right. Providing

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Jeff Rosen an attorney to cross-examine the police and challenge other evidence about whether Jeff Rosen in fact looks like Jeff Rosen when that is the only element of a crime is meaningless. As is the right to notice if the authorities have to prove [only] that they in fact believe that you have more property than you need. Can denial of liberty following such a proceeding comport with any coherent notion of due process of law?

It thus seems possible, in my view, to read a text mandating that no person shall be deprived of liberty without due process of law as including the idea that a deprivation of liberty comports with Due Process only if there is some neutral, public-regarding purpose to the liberty-limiting provision in question.

Reading the text of the Fourteenth Amendment to guarantee basic [substantive] protection of rights against government is consistent with the core of American constitutionalism. I once attempted to express that core in two sentences. The first sentence was simply: "Before the government deprives you of a liberty, it has to provide a reason." That sounds self-evident and obvious, but for many countries now and for most of the history of the world it wasn't true that the government had to give you an explanation of how its limitation on your liberty might plausibly advance the public welfare. Those governments could instead simply respond, as we inadequate parents sometimes do, "just because I said so, that's why." But American constitutionalism essentially holds that when the government deprives you of a liberty it has to have a reason.

The second sentence is a corollary of the first: *"If the liberty being denied is fundamentally important, then the government has to provide a very good reason indeed."* This reflects the fundamental rights jurisprudence that leads us to such cases as *Griswold v. Connecticut* and *New York Times v. Sullivan.* The general requirement—that the government have and provide a sufficient explanation of why the public good requires such a restriction on liberty—can be understood as part of the process that is due to a person whose liberty is being constricted.

Thus, I have never thought that what was most wrong with *Slaughter-House* was that it rejected the correct clause (Privileges and Immunities) and led us to seek protection of liberties against state government authority under the wrong clause (Due Process). The more fundamental error of *Slaughter-House* was its failure fully to recognize that the nation fought a great Civil War and in its aftermath changed the fundamental law of the republic. *Slaughter-House* erred by resurrecting antebellum presuppositions of state primacy and state autonomy that had been the justifications of the Confederacy. That mistake dwarfs for me any concern about which clause the Court got wrong.

Justice Swayne understood the magnitude of the *Slaughter-House* error. In his neglected dissenting opinion he barely mentions the privileges and immunities issue itself. He notes that these amendments are all consequences of the late Civil War. In his view, the public mind had become satisfied that there was less danger of tyranny in the central government, the head, than of anarchy and tyranny in the members, the states. He points out to us that the language employed is unqualified in its scope.

The *Slaughter-House* majority had argued (you will recall) that an ample reading of the sweep of the prohibitions of the Fourteenth Amendment would render the Supreme Court Justices into "perpetual censors" of the states. It is objected by the majority, Swayne says, that the power is novel and large. The answer, Swayne responds, is that the novelty was known and the measures deliberately adopted nonetheless. The power is beneficent in its nature and therefore cannot be abused, he says; it should exist in every well-ordered polity. Where could it be more perfectly lodged but in the hands in which it is confined? [Swayne is referring to the national Congress.] It is necessary to enable the government of the nation to secure to everyone within its jurisdiction the rights and privileges enumerated, which, according to the plainest consideration of reason and justice and the fundamental principles of the social compact, we are all entitled to enjoy. Without such authority, he argues, any government claiming to be national is glaringly defective. He says the majority turns what was meant to be bread into stone. Liberty is freedom from all restraints, but such as are justly imposed by law; Swayne writes. Note that does not refer to those restraints imposed by law, but only to those *justly* imposed by law. Beyond that line lies the domain of usurpation and tyranny. And that is the fundamental sense in which laws that are not justified by the advancement of a public good are in the domain of usurpation and tyranny.

Finally, Swayne draws his readers' attention to the text itself: "The first section of the Fourteenth Amendment is alone involved in the consideration of these cases. No searching analysis is necessary to eliminate its meaning." Interesting Freudian slip. He says, literally, no searching analysis is necessary to "eliminate" its meaning, which the majority has done. He certainly must have meant "illuminate," but it is an understandable slip, given what the majority does to the sweeping language of the Amendment. Its language is intelligible and direct, Swayne writes. Nothing can be more transparent. Every word employed has an established signification. He concludes by saying, in words directly relevant to this conference, that there is no room for construction, there is nothing to construe.

What would the Framers and Ratifiers of the Fourteenth Amendment have thought about Swayne's reading of the text? What was their "interpretive intent"? My colleague, Jefferson Powell has explored a similar question about the interpretative understanding of the Framers of the original 1787 Constitution in his article *The Original Understanding of Original Intent.* In this article, Jeff tries to place us back in 1787, and to think about what the Framers would have thought about the interpretative principles that would be brought to bear upon the text they were drafting in the summer of 1787, and the Bill of Rights they were drafting in the First Congress. Consider now how different an interpretative world we are in by the time the Thirty-ninth Congress meets to draft the Fourteenth Amendment. By the time the Fourteenth Amendment's great phrases are proposed for addition to the Constitution, those who are engaged in that enterprise, unlike the earlier Framers, are fully aware of a half a century of actual interpretation of the Constitution, as Robert Cottrol's writings have taught us.

Those who framed the Fourteenth Amendment did not write upon an interpretive blank slate. They were well aware of the great cases that put them fully on notice as to how constitutional phrases could and would be interpreted by Congresses and courts applying them in the future. Unlike their Federalist forebears, they had seen the Constitutional text actually applied in *Marbury v. Madison*, *McCulloch v. Maryland*, *Gibbons v. Ogden*, *Fletcher v. Peck*, *Swift v. Tyson*, and *Dred Scott v. Stanford*. They were fully on notice of how broadly constitutional phrases could be construed and applied, and yet they added to the Constitution limitations on the power of the States drafted in broad terms.

The Framers of the Fourteenth Amendment know far more clearly than those who had framed the 1787 Constitution that judicial review could play a significant role in the interpretation and application of the Constitution. They knew this because they were fully familiar with *Marbury v. Madison*. They knew because of *McCulloch* that powers granted to the national government could be broadly construed, for it is "a Constitution we are expounding." They know that a phrase like "commerce" over which the power of Congress is given in the original Constitution can be construed to mean that commerce which concerns more states than one because they were aware of the decision in *Gibbons v. Ogden*.

Knowledge of these cases was not limited to a small set of law professors. Great public controversies had led to *Marbury v. Madison*, *McCulloch v. Maryland* and *Gibbons v. Ogden*. (Lincoln assumed in 1858, for example, that crowds attending the Lincoln-Douglas debates in small towns in Illinois were generally familiar with *McCulloch*.). Of all the cases that have shaped the understanding of the Framers of the Fourteenth Amendment on how the text of that amendment might be construed, none is more important than *Fletcher v. Peck*. *Fletcher* would have been most familiar to Congress because it dealt with the question of what to do with the vast western lands of Georgia, an issue that Congress debated for decades. In overturning an act of the Georgia legislature, Chief Justice Marshall gave a very broad reading to the phrases of Article I, Section 10, the clause of the original Constitution prohibiting states from passing ex post facto laws, bills of attainder or laws impairing the obligation of contracts. *Fletcher*'s broad judicial reading of a provision that begins "No State shall . . ." puts the subsequent Reconstruction Congress on notice of how broadly later interpreters might view the text of an amendment provision also beginning "No State shall . . ." but followed by phrases [Privileges and Immunities, Equal Protection, Liberty] of far greater sweep than phrases such as bills of attainder or obligation of contracts.

Thus, when drafters fully familiar with *Fletcher v. Peck* wrote language that says "[n]o state shall abridge the privileges [or] immunities of citizens of the United States" nor "deprive any person of life, liberty, or property without the due process of law," they did so against a tradition of a half century of how language of that kind is read and interpreted. And that tradition is: very broadly. For better or worse, as Swayne noted in his *Slaughter-House* dissent, those who drafted the text of the Fourteenth Amendment knew what they were doing.

That leaves us with a problem. If textualism leaves the Fourteenth Amendment open to this extraordinarily expansive doctrine, where do we find sources of restraint in constitutional decisionmaking? One method would be to read the Constitution as a whole, and to assume that changes made at one time (like the adoption of the Fourteenth Amendment) were not intended wholly to obliterate deliberative judgments made at an earlier time (such as the postulates of Federalism). Restraint also [comes] from judges who follow the admonition of Justices Harlan and Powell to exercise caution and restraint in the application of the Fourteenth Amendment to invalidate state practices.

The Framers of the Fourteenth Amendment would likely have thought that there was another source of restraint in the application of the broad text of that amendment: the central institution the Reconstruction Framers assumed would apply the broad terms of the amendment would be Congress, a body necessarily restrained in their interpretation of the broad clauses of the Fourteenth Amendment by the powerful check of democratic accountability to the people. If Congress was to be the body principally entrusted with the application of the broad phrases of the text to actual state practices then a politically accountable, majoritarian-responsive legislature would be entrusted with this broad textual delegation to decide in the future what are the privileges and immunities and what are the contours of equal protection that are good against state and local governments.

The Framers of the Fourteenth Amendment were certainly aware that the phrase "no state shall" made such provisions capable of being applied directly by the judiciary to invalidate state laws. But because the Court with which they were most familiar was the *Dred Scott* Court, they may well have assumed that the protections of the Fourteenth Amendment would in fact be implemented by Congress. It is ironic that recent rhetoric from the Supreme Court [*City of Boerne v. Flores*], at least in dicta, places the Court in the central role of interpreting the Fourteenth Amendment, but the text of the Amendment seems to allocate [that role] to Congress. Even if the result in *Boerne* itself is correct, some of the language of the majority opinion seems to turn upside down the anticipated roles of Court and Congress in enforcing the Fourteenth Amendment.

PANEL V

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