

# ***THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT***

## ***ITS LETTER AND SPIRIT***

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*FOREWORD BY JAMES OAKES*

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### **PREFACE: THE LETTER**

JOSEPH P. BRADLEY, ASSOCIATE JUSTICE TO WILLIAM WOODS, DISTRICT JUDGE, NEW ORLEANS

Washington, March 12, 1871

My dear Judge,

I am sorry I could not have answered your letter of 7th last sooner. But my duties here have been so arduous that it has been impracticable. I will now attend to do so. The 6th section of the act, known as the Enforcement Act, makes it felony for two or more persons to conspire together, or to go in disguise, with intent to prevent a citizen of the U.S. from registering or voting, or to injure or intimidate him to prevent the free exercise and enjoyment of any right or privilege secured to him by the Constitution or

laws of the U.S. You ask whether the breaking up of a peaceable political meeting, by riot and murder, when committed simply for that purpose, without any defendant's intent to prevent the exercise of the right of suffrage, is a felony under this section, in view of the 1st Amendment of the Constitution, which says, that "Congress shall make no law abridging the right of the people peaceably to assemble and to petition the government for a redress of grievance"?

Supposing the 1st Amendment to embrace the right peaceably to assemble for the purpose of discussing political questions, (which I think it does) the case is within the words of the statute. The right is a right secured by the Constitution. True, it is secured only as against the action of Congress itself. But, still, it is a right that is secured. But where Congress is prohibited from interfering with a right by legislation, does that authorize Congress to protect that right by legislation? The same amendment prohibits Congress from passing any law respecting an establishment of religion, or prohibiting the free exercise thereof. Does this give to Congress the power to protect by law the people of a state in the free exercise of religion? If this is so, then, undoubtedly, Congress has a right, by appropriate legislation, to enforce and protect such fundamental rights, against unfriendly or insufficient state legislation. Is not that subject left to the discretion of the States or the people? Until the passage of the XIVth amendment this was undoubtedly so.

Does the XIVth Amendment, in giving Congress power to enforce its provisions by appropriate legislation, make any alteration in this respect?

By that amendment Sect 1. “No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the U. States, nor shall any state deprive of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

Now, the privileges and immunities of citizens of the United States here referred to, are undoubtedly those which may be demonstrated fundamental. (See *Corfield v Coryell*) 4 Wash. C.C. Rep 380 and among these I suppose we are safe in including those which the constitution are expressly secured to the people, either as against the action of the federal government, or the state government.

If this is so, then, undoubtedly, Congress has a right, by appropriate legislation, to enforce and protect such fundamental rights, against unfriendly or insufficient state legislation. I say unfriendly or insufficient for the 14th amendment not only prohibits the making or enforcing of laws which shall abridge the privileges of the citizen; but prohibits the states from denying to all persons within its jurisdiction the equal protection of the laws. Denying includes an action as well. And denying the equal protection of the laws include the omission to protect, as well as the

omission to pass laws for protection. Our controversy with England at this moment is, not only that her neutrality laws were not sufficient but that she did not properly enforce those which she had. It is a poor consolation for me to be told, "Our laws are sufficient to protect you" if those laws are not enforced, and any rights are supinely permitted to be invaded. Therefore, to guard against the invasion of the citizens fundamental rights, and to secure their adequate protection, as well against state legislation as state an action or incompetence, the amendment gives Congress power to enforce the amendment by appropriate legislation. And as it would be unseemly for Congress to interfere directly with state enactments, and it cannot compel the activity of state officials, the only appropriate legislation it can make is that which will operate directly on offenders and offenses and protect the rights which the amendment secures. ~~The extent to which Congress shall exercise this power must depend on its discretion in view of the circumstances of each case.~~ If the exercise of it in any case should seem to interfere with the domestic affairs of a state, it must be remembered that it is for the purpose of protecting federal rights; and those must be protected whether it interferes with domestic laws or domestic administration of laws.

In my judgment, therefore the case you suppose is within the law, and the law is within the legislative power of Congress.

Yours truly,

Joseph P. Bradley

P.S. I expect when our courtroom adjourns, about 1 May, to visit Savannah and mobile in succession in speed, say a week or 10 days in each plane, perhaps longer. If you will make arrangements to have cases of special importance laid over till I can appear, I will cheerfully hear them. I would a little prefer not to be bothering with jury cases unless you decide it's important. I shall probably visit Savannah first. I doubt whether I can get as far as New Orleans should you specifically wish me to hear any cases there I might perhaps go there for a short time.

*Underlining above original*

from

The introduction: *The Letter and Spirit of the Fourteenth Amendment*

In this letter, Justice Bradley summarizes, with one omission, our thesis concerning the original meaning of the 14th amendment.

- The privileges or immunities clause protects those substantive rights “which may be demonstrated fundamental” from being violated by state governments.
- These fundamental rights include the unenumerated rights discussed by Justice Bushrod Washington in the 1823 case of *Corfield V Corey* well which Bradley cites.

- They also include enumerated rights, such as those set forth in the first amendment, which Bradley firms were “expressly secured to the people.”
- The equal protection of the laws clause is not limited to barring state action but also imposes an affirmative duty on states to act. As Bradley put it, “denying includes an action as well as action.”
- A denial of the “equal protection of the laws” extends beyond the states officials failing to protect the privileges or immunities of its citizens; it extends as well to failures of the states to enact laws for their protection Or in Bradlees words the omission to protect, as well as the omission to pass laws for protection.
- Section 5 of the 14th Amendment empowers Congress to remedy the failure of the state governments to protect these rights by creating its own federal enforcement procedures. To guard against the invasion of the citizens fundamental rights, and to secure their adequate protection, as well against state legislation as state and action or incompetence, the amendment gives Congress power to enforce the amendment by appropriate legislation.
- Finally, laws enacted by Congress pursuant to its Section 5 powers will operate directly on offenders and offenses. Indeed, given that

Congress cannot commandeer or “compel the activity of state officials”, this is “the only appropriate legislation it can make.”