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The Fourteenth Amendment

An Introduction

Here, in full, is the text of the Fourteenth Amendment:

> 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 abridging 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.
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> Section Two. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.
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> Section Three. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same,

or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

Section Four. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section Five. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

In five succinct paragraphs, the framers of the Fourteenth Amendment set the conditions for the reconstruction of the United States. Section One announces that, henceforth, states shall not abridge certain national rights, privileges, and immunities. Sections Two, Three, and Four set the readmission conditions for the recently defeated slave-holding states. Section Five confers power on the federal government to enforce the Amendment.

Although Sections One and Five have played the most significant roles in American constitutional law, the middle three sections shed important light on the context and ultimate meaning of the Amendment as a whole. Their texts are evidence of a recent national catastrophe: Clause after clause speaks of "rebellion," "insurrection," and the betrayal of one's oath to the United States. The bitter issue that divided the country goes unmentioned until the final sentence in Section Four: *slavery*. This same sentence also suggests the overall goal of the Amendment – repairing and reconstructing the United States in the aftermath of a civil war in which the slaveholding states betrayed their oaths and rebelled against the Union in order to preserve their "peculiar institution."

Lincoln had been right. The government of the United States would not "endure permanently half slave and half free . . . It will become all one thing or all the other."[1] Not only had the national house been divided, its southern members attempted to bring the house down altogether through secession and the creation of an independent confederacy. When the Thirty-Ninth Congress met in December of 1865,[2] the rebellion had been put down and

[1] Abraham Lincoln, House Divided Speech (June 16, 1858).

[2] The Thirty-Ninth Congress met in Special Session in March 1865 and witnessed the second inauguration of Abraham Lincoln. Lincoln was assassinated the next month, on April 15, 1865. The first official session of the Thirty-Ninth Congress was gaveled into order on December 4, 1865.

the nation made wholly free but at a terrible cost. An estimated 620,000 soldiers, 2 percent of the national population, lost their lives in the conflict.[3] An equivalent percentage today would amount to 6 million men.[4] The South lay in ruins, and the nation mourned the recent assassination of a president who gave his last full measure of devotion to the cause of preserving the Union. Congress itself assembled in a room only half-full, the empty seats of the southern delegations serving as visible daily reminders of the unfinished business of rebuilding the nation.

Reconstruction was the watchword of the day.[5] The Thirty-Ninth Congress did not meet to accomplish a revolution; the revolutionaries had been put down. It was the seceding southern states that had tried to tear down the original structure and erect an entirely new nation, the Confederate States of America. The northern states, on the other hand, fought a war of preservation and (re)Union. The Union soldiers who died had been sent into harm's way so that the *existing* government "shall not perish from the earth." This bloody revolution died at Appomattox Court House, and the Thirteenth Amendment ended the evil that had torn the nation apart. The Fourteenth Amendment was about putting the nation back together again.

Today, the Fourteenth Amendment appears revolutionary. Adopted at a midpoint between the Founding and the modern age, the Amendment appears to signal a decisive break from the localism of the Founding and an embrace of the nationalism that now dominates American constitutional law. As we shall see, this is neither how most of the framers of the Amendment envisioned their task nor how they understood the text. Meeting amongst the rubble of the worst catastrophe in American history, the members of the Thirty-Ninth Congress sought to reassemble the pieces of a shattered country. The effort did not involve abandoning the original Constitution – abandonment was the sin of the seceding States. Rather, the task was to rebuild and restore the Constitution and do so in manner that ensured the States could never again claim the right to rend the fabric of the Union or deny its people their *existing* rights as American citizens.[6] Nothing about this project required abandoning the original idea of constitutional federalism. Indeed, it had been the slave

[3] Drew Gilpin Faust, This Republic of Suffering: Death and the American Civil War *xi* (2008).

[4] *Id.*

[5] One of the first actions of the Thirty-Ninth Congress was to establish the Joint Committee on Reconstruction. *See* Cong. Globe, 39th Cong., 1st Sess. 47 (1865).

[6] Consider again the language of Section One: "No state shall make or enforce any law abridging the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1, cl. 2. The text presumes an existing set of national privileges and immunities.

power that had abandoned federalism by insisting that all states, north and south, accept slavery, and they had demanded federal legislation to protect it from both legal and social interference.[7] Northern Republicans justifiably believed that the slave power had simultaneously violated the principles of national freedom and shredded constitutional federalism. Reconstructing the Union meant restoring both to their proper balance.[8]

The North, of course, had its own revolutionaries. Radical abolitionists like William Lloyd Garrison famously burned the Constitution, calling it a "covenant with death and an agreement with hell." John Brown led a raid on the federal armory in Harpers Ferry in a failed effort to distribute arms to slaves and trigger a general uprising. Less violently, countless individuals in the North actively flouted national law by participating in the so-called Underground Railroad, which helped escaped slaves find their way to freedom in the North. Prior to the Civil War, however, such ideas and efforts remained the exception, not the rule. Northerners generally viewed radical abolitionists like Garrison with disdain.[9] The railroad to freedom remained "underground," even in the North, for a reason – it was in violation of federal law. John Brown, of course, was hanged, without the slightest effort by northern officials to plead his case, much less intervene on his behalf.[10] It was not until after the assault on Fort Sumter that the North as a whole resorted to violence. Even then, the first northern efforts to end the Civil War not only promised the continuation of slavery in the states, but the Union expressly promised its constitutional protection.[11]

It took a war to change opinion in the North. By 1865, abolition was no longer a radical idea. Lincoln's Emancipation Proclamation ended slavery

[7] The slave states insisted on the right to carry their slaves throughout the Union, and they demanded northern states suppress the inflammatory publications of abolitionists. *See* Michael Kent Curtis, Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History 150–51 (2000).

[8] As John Bingham declared during the debates of the Thirty-Ninth Congress, "I would say once for all that this dual system of national and State government under the American organization is the secret of our strength and power. I do not propose to abandon it." Cong. Globe, 39th Cong., 2d Sess. 450 (1867).

[9] Curtis, *supra* note 7, at 129.

[10] According to William Seward's biographer, Walter Stahr, "Republicans did not support John Brown; on the contrary, Seward denounced Brown's invasion of Virginia as treason and pronounced his execution to be 'necessary and just.'" Walter Stahr, Seward: Lincoln's Indispensible Man 183 (2012).

[11] Introduced by the lame-duck Congress in 1861 as part of a final effort to prevent secession, the infamous "Corwin Amendment" would have entrenched slavery as a matter of constitutional law. *See* H.R.J. Res. 13, 36th Cong., 2d Sess. (1861) ("No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State.").

in the South and grafted the noble cause of freedom to the efforts of the Union Army.[12] Once victory was assured, Congress presented the country with the Thirteenth Amendment without even bothering to wait for Lee's signature at Appomattox.[13] Although Lincoln himself would not live to see its enactment, his vice president, Andrew Johnson, eagerly took up the cause of the Thirteenth Amendment and secured its ratification at the earliest possible moment.[14] Johnson's embrace of the Thirteenth Amendment did not represent the ascendancy of radical Republicanism. If anything, his administration's announcement in December of 1865 that the Thirteenth Amendment had been ratified was a profoundly conservative act.[15] To the consternation of radical Republicans, in determining whether the requisite number of states had ratified the Amendment, Johnson's secretary of state William Seward had counted the votes of the *still excluded* southern states. Thus, in a remarkable historical irony, the death of slavery coincided with the announcement that the southern slaveholding states had survived.[16]

Not every member of the Thirty-Ninth Congress approved. Charles Sumner famously insisted that, by seceding from the Union, the southern states had committed suicide.[17] Some Republicans argued that the southern states had cast off their status as members of the Union and should be combined into a smaller number of federally controlled districts.[18] These, however,

[12] *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 356–57 (2005).

[13] The Amendment, having been previously approved by the Senate in 1864, was approved by the House and sent to the states for ratification on January 31, 1865. *See* CONG. GLOBE, 38th Cong., 2nd Sess. 531 (1865). Lee's surrender at Appomattox Courthouse occurred on April 9, 1865. *See* HARRY HANSEN, THE CIVIL WAR: A HISTORY 633–34 (Signet Classic 2002) (1961).

[14] Proclamation of Sect'y of State William Seward, No. 52, 13 Stat. 774 (Dec. 18, 1865); *see also* Andrew Johnson, First Annual Message, Dec 4, 1865, in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 358 (GPO 1897) (James D. Richardson, ed.).

[15] *See* BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 150–59 (1998).

[16] *Id.*

[17] In February 1862, Charles Sumner introduced a Resolution adopting what came to be known as the "state suicide theory":

> Resolved, That any vote of secession or other act by which any State may undertake to put an end to the supremacy of the Constitution within its territory is inoperative and void against the Constitution, and when sustained by force it becomes a practical abdication by the State of all rights under the Constitution, while the treason which it involves still further works an instant forfeiture of all those functions and powers essential to the continued existence of the State as a body-politic, so that from that time forward the territory falls under the exclusive jurisdiction of Congress as other territory, and the State being, according to the language of the law, felo-de-se, ceases to exist.

CONG. GLOBE, 37th Cong., 2d Sess. 737 (Feb 11, 1862); *see also* ERIC L. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 110–13 (1960); David Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1211 (2006).

[18] *See* MCKITRICK, *supra* note 17, at 99 (discussing Thaddeus Stevens' "conquered province" theory).

were the positions of a minority. Most congressional Republicans rejected the theory of "state suicide" and continued to look forward to the day when the original Union would be restored. Unlike President Johnson, however, these more moderate Republicans believed that the southern states should remain excluded until Congress could ensure southern protection of individual freedom and the establishment of republican (small "r") governments.[19] For these members, the issue became how to best balance the newly ascendant idea of national liberty with an older principle of constitutional federalism.

As had been true at the time of the adoption of the original Constitution, some influential members of the political class viewed the United States in wholly nationalist terms. In the 1790s, for example, men like Pennsylvania's James Wilson denied the idea of state sovereignty and advocated broad national authority to regulate any matter affecting the national interest.[20] At the time of the Founding, however, wholly nationalist theories like Wilson's were held by a minority. Instead, the framers adopted a federalist Constitution of limited enumerated powers with the remainder reserved to the people in the several states. In the aftermath of the Civil War, the country faced a similar choice between unmediated nationalism and a balanced system of federalism. Another James Wilson, this one hailing from Iowa, once again called for the abolition of state sovereignty and the adoption of federal power over any matter affecting civil liberties in the states.[21] But just as the Founding generation rejected Wilsonian nationalist visions of government, so moderates in the Thirty-Ninth Congress turned away every effort to erase or even significantly undermine the dualist conception of American government. This was not a revolution. This was Reconstruction.

The idea that the original Constitution established a dual or federalist system of government can be contested, of course, and has been contested from the time of the Founding. Following the adoption of the Constitution (although not before), ardent nationalists not only denied that states retained any remnant of sovereign autonomy, but they also claimed that the states had never possessed sovereign autonomy in the first place.[22] On the other side of the spectrum, some antebellum state rights advocates insisted that states

[19] *Id.* at 113–14.

[20] See Kurt T. Lash, "Resolution VI": The Virginia Plan and Authority to Resolve Collective Actions Problems Under Article I, Section 8, 87 NOTRE DAME L. REV. 2123, 2154 (2012).

[21] *See infra* Chapter Three.

[22] *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 470–71 (1793) (Jay, J.); *see also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION (1833).

retained the sovereign right to nullify federal law,[23] and others insisted that the states retained the right to leave the Union altogether.[24]

The historical plausibility of either claim, Nationalist or Nullifier, is not the subject of this book. Instead, I seek to identify the views of the Constitution by members of Congress and the public at the time of the adoption of the Fourteenth Amendment. As one might expect, these views fall along a continuum, from ardent nationalist to almost as ardent state rightist (the fully secessionist views of men like Calhoun died with the slave power). I will claim, however, that a consensus emerged around a moderate position that sought to restore the original Constitution *as the moderates understood the original Constitution*, albeit on a firmer foundation.

To date, historical accounts of the Fourteenth Amendment have tended to emphasize the voices of those members of the Thirty-Ninth Congress whose views seem most like the view of the post-New Deal Supreme Court. From that perspective, the speeches of radical Republicans like Thaddeus Stevens, Charles Sumner, Lyman Trumbull, and Samuel Shellabarger seem almost prophetic in their broad vision of national power and individual liberty. In fact, men like these were revolutionaries.[25] By saying so, I do not mean to suggest that their views were so unacceptably out of the mainstream that they were not taken seriously. Indeed, had events transpired in only a slightly different manner, for example by forestalling consideration of the Fourteenth Amendment until after the Republican gains in the fall elections of 1866, there is reason to think that the Radical Republican agenda might have succeeded.

As events actually transpired in the spring of 1866, however, radical Republicans were forced into a tactical retreat. The final versions of the Fourteenth Amendment and the Civil Rights Act of 1866 were shaped by Republican moderates. Accordingly, the content and original understanding of these texts are altogether different from that which would have been the case had the radical Republicans prevailed. The text of the Fourteenth Amendment, in particular, reflects a view of the American constitutional republic as remaining neither wholly national nor wholly federal.[26] Whether their ideas

[23] *See* South Carolina, Ordinance of Nullification (Nov. 24, 1832), *available at* http://avalon.law.yale.edu/19th_century/ordnull.asp.

[24] *See* Secession Speech of Judah P. Benjamin, CONG. GLOBE, 36th Cong., 2d Sess. 212 (1860) (statement of Sen. Benjamin).

[25] MCKITRICK, *supra* note 17, at 118 ("[T]here were men who, in their less guarded moments, blurted out that as far as they were concerned the country *was* in a state of revolution and that the constitution had nothing to do with the case.").

[26] *See* EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869, at 30 (1990) ("[The task of Reconstruction] was further complicated by the Republicans firm attachment to the basic structure of federalism."); WILLIAM E. NELSON, THE FOURTEENTH

about liberty and national power reflected an accurate understanding of the original Constitution, the moderates successfully translated their vision of constitutional government properly conceived into enduring constitutional text.

By claiming that Republican moderates committed to preserving a federalist Constitution controlled the legislative and constitutional outcomes of the Thirty-Ninth Congress, I am saying nothing particularly new. Historians have made this same observation for decades.[27] What has not been recognized, however, is the degree to which federalism played a role in shaping the language and original meaning of the Fourteenth Amendment. The moderate Republicans of the Thirty-Ninth Congress chose certain words and phrases that, if applied according to their original meaning, both protect individual liberty and preserve a constitutional balance of power.

One such phrase declares "the privileges or immunities of citizens of the United States." From a distance, this phrase looks very much like its lexicographical cousin, the so-called Comity Clause of Article IV, which protects the "privileges and immunities of citizens in the several states." As we shall see, however, these two provisions are not the same; they reflect different legal concepts and protect different kinds of rights.

AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 27–39 (1988) (discussing the continued commitment to principles of federalism in the Reconstruction Congress).

[27] According to Eric Foner, moderates "accepted the enhancement of national power resulting from the Civil War, but they did not believe the legitimate rights of the states had been destroyed, or the traditional principles of federalism eradicated." ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 242 (1988); *see also* MALTZ, *supra* note 26, at 60 ("The disposition of the Freedmen's Bureau Bill and the apportionment amendment demonstrated that only those civil rights measures that received virtually unanimous support from mainstream Republicans could be adopted."); NELSON, supra note 26, at 114 ("Most Republican supporters of the [Fourteenth] amendment, like the Democrat opponents, feared centralized power and did not want to see state and local power substantially curtailed."); Michael Les Benedict, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction*, 61 J. AM. HIST. 65, 67 (1974) ("[M]ost Republicans [during Reconstruction] never desired a broad, permanent extension of national legislative power.").

2

On Antebellum Privileges and Immunities

I. ON THE NATURE OF RIGHTS AT THE TIME OF THE FOUNDING

Having inherited a conception of rights rooted in medieval English common law,[1] American legal theorists at the time of the Founding faced the task of translating common law terms and ideas into the political and legal context of post-Revolutionary America.[2] In the middle to late eighteenth century, most Englishmen embraced the general Whig understanding of rights as running against the crown.[3] From the Magna Carta, to the Petition of Right, to the English Bill of Rights, the perceived danger was one of arbitrary and unconstrained executive (royal) power.[4] Although some of the more radical Whig writing warned about the dangers of the legislative branch as much as the executive,[5] most Englishmen in the mid-eighteenth century were not as concerned about the powers of Parliament as they were about the prerogatives of the King. Parliament, after all, stood as the body representing the people of England – why should the people constrain themselves?[6] Accordingly, English rights in the mid-eighteenth century were thought best protected

[1] Gordon S. Wood, *The History of Rights in Early America*, *in* THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND233, 233 (Barry Alan Shain ed., 2007).

[2] For example, the first major American edition of *Blackstone's Commentaries* was a self-conscious effort by the author to translate English common law into the context of American constitutionalism. *See* ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND THE LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES, AND THE COMMONWEALTH OF VIRGINIA (Phila., Birch & Small 1803).

[3] *See* John Phillip Reid, *The Authority of Rights at the American Founding*, *in* The Nature of Rights of the American Founding and Beyond 67, 68 (Barry Alan Shain ed., 2007); *see also* Edmund S. Morgan, Inventing the People: The Rise of Popular Sovereignty in England and America 101–21 (1988).

[4] Wood, *supra* note 1, at 235.

[5] Gordon S. Wood, The Creation of the American Republic 1776–1787, at 14–15 (1969).

[6] Wood, *supra* note 1, at 235–36.

through mechanisms that ensured that life, liberty, and property would not be arbitrarily denied but regulated only by way of laws enacted by the people's representatives in Parliament.[7] As time went on, this deference to the English legislative assembly evolved into the general idea of Parliamentary supremacy.[8]

Americans, on the other hand, were drawn to the more radical Whig tradition that saw all branches of government as potential sources of tyranny and abuse. The self-serving and sometimes corrupt actions of the post-Revolutionary state governments fueled the emergence of a particular strain of popular sovereignty that viewed the people as both sovereign and distinct from their institutions of government, including the legislative branch.[9] As Gordon Wood has chronicled, the idea of popular sovereignty maintained that governments lawfully exercised only those powers delegated to them by the people themselves through a written constitution.[10] These constitutions not only described the general structure of state government, they also usually included a written declaration of rights to ensure that certain actions and activities fell beyond the unenumerated police powers of state governments.[11]

The proposed Federal Constitution, on the other hand, was presented by its advocates as granting the federal government only certain enumerated powers.[12] This is why, the Federalists explained, the document's drafters in

[7] John Locke, Two Treatises of Government and a Letter Concerning Toleration §§ 138–40, at 161–63 (Ian Shapiro ed., Yale Univ. Press 2003) (1689) (discussing the rights to freedom from arbitrary government and deprivation of property only by consent of the people's representatives); 1 William Blackstone, Commentaries *137–38 (discussing the necessity of courts to protect against arbitrary executive deprivations of life, liberty, and property, and to ensure the enforcement of the law of the land).

[8] Wood, *supra* note 1, at 235–36.

[9] Wood, *supra* note 5, at 372–89.

[10] *Id.*

[11] *Id.*

[12] *See, e.g.*, The Federalist No. 39 (James Madison) ("In this relation then the proposed Government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects"); The Federalist No. 45 (James Madison) ("The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite"); James Madison, Virginia Ratifying Convention (June 15, 1788), *in* 3 Debates in the Several State Conventions on the Adoption of the Federal Constitution 455 (Jonathan Elliot ed., 2d ed. 1836) ("With respect to the supposed operation of what was denominated the sweeping clause, the gentleman, he said, was mistaken; for it only extended to the enumerated powers. Should Congress attempt to extend it to any power not enumerated, it would not be warranted by the clause."); Alexander Hamilton, New York Ratifying Convention (June 28, 1788), *in* 2 Elliot's Debates, *supra* this note, at 362 ("[W]hatever is not expressly given to the federal head, is reserved to the members. The truth of this principle must strike every intelligent mind."); *see also* Calder v. Bull, 3 U.S. (3 Dall.) 386, 387 (1798) (Chase, J.) ("[T]he several State Legislatures retain all