# The Fourteenth Amendment

The Civil War did not of itself affect the federal structure of the Republic. Except for the separation of West Virginia from its parent State, early in the struggle, no physical boundaries were in any way altered. When the always dubious right of secession was effectively denied, all the other, less contestable, rights of the states were inferentially reaffirmed. That the rebellious States had never actually left the Union was the magnanimous and far-sighted thesis defended by both President Lincoln and by his ill-starred successor in the White House, President Andrew Johnson. This argument of course strengthened the constitutional case for the victorious side—the war was fought to preserve the not to destroy the Union—and was given explicit confirmation by the Supreme Court in the case of *Texas v. White*, in 1869. Nevertheless, during the political aftermath of the conflict, the cause of federalism was profoundly and permanently weakened.

The major cause of this weakening concentrates in one

of the three Constitutional Amendments (Thirteenth, Fourteenth and Fifteenth) which were immediate results of the hostilities. The Thirteenth Amendment, with admirable brevity, merely abolishes slavery and "involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted. . . ." The Fifteenth Amendment with equal succinctness prohibits limitation of the franchise "by the United States, or by any State, on account of race, color, or previous condition of servitude." If the word "sex" had been added to this list there would have been no occasion for the complementary Woman's Suffrage (Nineteenth) Amendment, adopted in 1920.

In both the Thirteenth and Fifteenth Amendments, however, as well as the Fourteenth and Nineteenth, there is a brief terminal section saying, in all four cases: "The Congress shall have power to enforce this article by appropriate legislation." No such provision is to be found in the original Constitution, nor in any of the first twelve Amendments. This seemingly insignificant innovation has served to advance the power of the Congress as contrasted with that of either the executive or judiciary.

Legislation written "to enforce" the Constitution appears itself to possess a certain constitutional sanction. If the executive vetoes such legislation he can be depicted as striking at the Constitution itself, an interpretation which in effect asserts that he has violated his oath of office and is therefore properly subject to impeachment. If the judiciary strikes down a law ostensibly designed to

enforce the Constitution it too can be said to be acting *ultra vires*. All legislation passed by the Congress is presumed to be constitutional unless and until shown to be otherwise. All legislation that is constitutional necessarily "enforces" the Constitution. So there is really no place for a separate category of statutes which pretend to be especially essential to the operation of the organic law.

The balance of power among the three arms of central government was thus definitely, though unobtrusively, disturbed by this Congressional encroachment. And insofar as the Congress directly represents the people this important change was a definite step towards democratization of the American form of government. The permanence of this alteration of the traditional balance was reaffirmed when the same enforcement clause was, more than half a century later, attached to the Nineteenth Amendment.

There is little doubt that the major credit, or discredit, for this deft alteration of constitutional balance is attributable to one extremely able politician. And there is equally little doubt that this man—Thaddeus Stevens, of Pennsylvania—was much more of a political philosopher, in the direct tradition of Rousseau, than is generally realized. Whether or not Thad Stevens was an illegitimate son of Talleyrand, as legend has it, he certainly brought the leveling spirit of the French Revolution into American politics, and this at a time when the emotions stirred by the Civil War had made the country ripe for it. More than any other Congressional leader before or since, this Rep-

resentative from Lancaster regarded himself as a personification of that "general will" which necessarily becomes merciless to all who oppose it. "Had he lived in France in the days of the Terror," says Claude G. Bowers, "he would have . . . risen rapidly to the top through his genius and audacity and will, and probably have died by the guillotine with a sardonic smile upon his face. Living in America when he did, he was to . . . impose his revolutionary theories upon the country by sheer determination."[1]

The Thirteenth Amendment, abolishing slavery, had finally received Congressional approval in January, 1865, of course without votes from Southern representation since the war was then still raging. There were thirty-six states, eleven of which were or had been in the tottering Confederacy. Lincoln's opinion, based on the thesis that these eleven had never really left the Union, was that a three-fourths majority of the entire thirty-six, meaning twenty-seven States, would be necessary for ratification. States that had seceded were being readmitted under variants of the generous "Ten Per Cent Plan," whereby that percentage of the electorate of 1860, having taken a prescribed loyalty oath, could re-establish a State government which would resume its place in the Union. After Lin-

[1] Claude G. Bowers, *The Tragic Era*, Blue Ribbon Books (New York 1929) p. 67. This is easily the most readable, and probably the most useful, general survey of what, in his sub-title, Mr. Bowers calls *The Revolution After Lincoln*. It covers the period from Lincoln's assassination to the end of military government in the Southern States (1865–77).

coln's assassination the same procedure was followed by Andrew Johnson, who as its Military Governor had himself brought Tennessee back into the fold. On this basis, as the fighting ended, the Thirteenth Amendment rapidly secured the necessary number of State ratifications, in the South as well as the North, the twenty-seventh and culminating act being that of Georgia, on December 6, 1865.

But to close the chapter of civil war without taking revenge on the fallen foe, and without doing more for egalitarianism than merely freeing the slaves, was far from the intent of the Radical Republicans in Congress. The national legislature had convened two days before the ratification by Georgia and its first action was a refusal even to consider the admission of Southern members chosen under the formula satisfactory to the White House. The former Confederate States, said Thaddeus Stevens, "ought never to be recognized as capable of acting in the Union, or of being counted as valid States, until the Constitution shall have been so amended . . . as to secure perpetual ascendancy to the party of the Union."[2]

It was what is now the Fourteenth Amendment that Stevens had in mind. By it he and his associates proposed to secure full citizenship for the Negroes, together with unimpeded male suffrage and what were even then called "civil rights." The undertaking was necessarily revolutionary since most of the States, Northern as well as South-

[2] Quoted, Samuel Eliot Morison and Henry Steele Commager, *The Growth of the American Republic* 4th edn., Oxford Univ. Press (New York 1956) Vol. II, p. 33.

ern, had long had laws in many ways discriminatory against even free Negroes and there was certainly no strictly constitutional way in which Congress could override these various aspects of segregation. The Thirteenth Amendment having been ratified, the initial step, indicative of tactics still to come, was to validate its Southern ratifications, but then to exclude Southern representation from consideration of the forthcoming civil rights amendment.[3] And the stated objective of "perpetual ascendancy" for the Republican Party helps to reveal Stevens' remarkable affinity for the single dominant party demanded by Rousseau's concept of the general will.

The mechanism through which this consummate politician operated was, in the first instance, the Joint Committee on Reconstruction. Here he was far too astute to tie himself down with the chairmanship, leaving that post, with mock deference, to one of his Senate henchmen. Never since Stevens' time has a majority leader of the House of Representatives been able so skillfully to control the Senate. His chief deputy there was Senator Sumner of Massachusetts, who at least rates high in the annals of political vilification for his description of President Johnson as "an insolent, drunken brute, in comparison with

[3] The classic, blow-by-blow, account is Horace Edgar Flack's *The Adoption of the Fourteenth Amendment,* The Johns Hopkins Press (Baltimore 1908). Dr. Flack's meticulously careful and comprehensive study is the more valuable because it long antedates present-day controversy over this Amendment. It has been heavily utilized in writing this chapter. Also useful is *The Framing of the Fourteenth Amendment,* Joseph B. James, Univ. of Illinois Press (Urbana, Ill. 1956).

which [*sic*] Caligula's horse was respectable."[4] The case of the Radicals against much maligned Andrew Johnson, however, was not his pathetic lapse from sobriety at his inauguration, but his resolute refusal to take any unconstitutional shortcuts along the thorny path of reconstruction.

The memory of Andrew Johnson, soon to be impeached and all but convicted of criminal conduct in the Presidential office, is still unfairly tainted by the vitriolic attacks of the Radical Republicans. But his strongest defenders admit that he played into the hands of the coldly calculated Congressional leadership. Johnson's effort to check this 39th Congress was by profuse use of the veto, which was sustained in the first bill (Freedmen's Bureau) endeavoring to eliminate racial discrimination. But that temporary check to Congress only increased the pressure to attain the Radical objectives by the constitutional amendment which Stevens and his colleagues really wanted. In May and June of 1866, after a most stormy session, the Fourteenth Amendment was approved by both Houses with well over the requisite two-thirds majorities in each. Because of the size of these majorities the President had no option other than to let it be submitted to the States for ratification or rejection. And the timing of the Radical strategy was perfect, with the elections to the 40th Congress coming up at a moment when every critic of the Amendment could be stigmatized as "pro-Rebel."

[4] Morison and Commager, *op. cit.*, Vol. II, p. 39.

This political motive explains the extraordinary drafting of the Fourteenth Amendment, which not only pulls together unrelated subjects but also unhappily enshrines in the Constitution transitory issues which could have been handled far better by ordinary, easily revisable legislation. Thus, Section 2 was designed to pressure the South to grant Negro suffrage by reducing the Congressional and Electoral College representation of any State in proportion to its abridgement of the right to vote. As seen in retrospect this was a wholly unworkable formula. The admitted purpose of this section was to make people think that the election of Radical Congressmen would assure full citizenship to the emancipated slaves.[5] Its one constructive result was the elimination of that sorry compromise in Article I of the original Constitution which counted slaves and indentured servants as three-fifths of "the whole number of free persons" for purposes of national representation.

Section 3 of the Fourteenth Amendment, denying civil rights and military office to the leaders of the Confederacy, until removal of the disability by two-thirds vote of Congress, was also temporary legislation wholly out of place in the organic law. It is only of melancholy historic interest today, but in 1866 was undeniably effective election propaganda of the "Hang-the-Kaiser" type. Much the same must be said of Section 4, which voided all debts of the Confederacy while affirming those of the United States in

[5] Flack, *op. cit.*, pp. 98–9, 126 and *passim*.

language which has no current meaning. These three vindictive sections, however, had the desired and anticipated effect of diverting contemporary attention from the permanently significant first Section of the Amendment, which has had and continues to have profound effect on the federal structure of the Republic. Section 1 of the Fourteenth Amendment says:

> 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.

The first sentence of this was designed to establish, beyond any question, the full citizenship of all American Negroes in perpetuity, those who were free before the Emancipation Proclamation as well as those whose freedom was then established and confirmed by the Thirteenth Amendment. It further confirms the federal principle of dual citizenship, though now for the first time that of the nation was given constitutional primacy over citizenship in any of the States. This disarming approach, however, served largely to conceal the anti-federal, pro-national import of what follows.

The Philadelphia Convention of course confronted the question of which government—general or State—should be responsible for the protection of life, liberty and prop-

erty. And with little debate it was decided that this should be a local function. This is evidenced by the fact that internal police power, except for the F.B.I., is still out of the hands of the central government, but there is also abundant contemporary proof. Thus, in No. 45 of the *Federalist,* Madison examines the assertion that powers delegated by the States to the Union "will be dangerous to the portion of authority left in the several States." He notes first that "The State governments may be regarded as constituent and essential parts of the federal government; whilst the latter is nowise essential to the operation or organization of the former." Soon thereafter he concludes: "The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the State."

This assurance, however, was not deemed sufficient by those who with good reason feared future encroachment by the central government. So in the Fifth Amendment, as part of the Bill of Rights, it was specified that "No person shall be . . . deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation." This, as well as all the other articles in the Bill of Rights, were designed and adopted as limitations on the central government, in behalf of the States and the citizens thereof, as so clearly put in the Tenth and crowning Amendment: "The powers not delegated to the United States by the

Constitution or prohibited by it to the States, are reserved to the States respectively, or to the people."

Building on the Dartmouth College case, the first section of the Fourteenth Amendment upset this balance, giving Congress for the first time power to enforce, in all the States, rights as to which it had previously possessed no power to legislate. This was frankly and openly stated at the time. Representative John A. Bingham, an Ohio lawyer and a very able lieutenant of Thaddeus Stevens, was primarily responsible for phrasing this ominous section and made its purport clear on the floor of the House on May 19, 1866, just before that body approved the whole Fourteenth Amendment by a vote of 128 to 37, the Senate approving 33 to 11 on June 8. There was a "want" in the Constitution, said Mr. Bingham, which explained "the necessity for the first section of this Amendment." That want "is the power in the people, the whole people of the United States, by express authority of the Constitution, to do that by Congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic, and the inborn rights of every person within its jurisdiction, whenever the same shall be abridged or denied by the unconstitutional acts of any State."

In some of these, Mr. Bingham continued, "Contrary to the express letter of your Constitution, 'cruel and unusual punishments' have been inflicted under State laws within this Union upon citizens, not only for crimes com-

mitted, but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none."[6]

Alleged violation of the Eighth Amendment, prohibiting "cruel and unusual punishments," by some State governments was cited by Mr. Bingham, a few minutes prior to the favorable House vote, as evidence for "the necessity" of the Fourteenth Amendment. If this gave the central government hitherto denied authority with respect to enforcement of the eighth article of the Bill of Rights, "it would apply equally to the other seven" preceding articles.[7] Mr. Bingham later said he had phrased the first section of the Amendment not only to protect the freedmen but also—in defiance of Madison—to put all civil rights under national rather than State protection.[8]

As the subsequent Senate debate further demonstrated, the underlying purpose of the Fourteenth Amendment was to nullify the original purpose of the Bill of Rights, by vesting its enforcement in the national rather than in the State governments. The latter, since 1868, have exercised these powers not by constitutional guarantee but by sufferance of Congress. And consequently the strength of the Ninth and Tenth Amendments has also been vitiated.

The full effect of this revolutionary change was not contemporaneously advertised. Indeed it was consistently

[6] *Congressional Globe*, 39th Cong., 1st Sess. pp. 2542–3.

[7] The point is made by Dr. Flack, *op. cit.*, p. 80.

[8] Cf. Charles A. Beard, *The Rise of American Civilization*, The Macmillan Co. (New York 1927) Vol. II, pp. 112–4.

played down by Thaddeus Stevens and his associates. As Dr. Alfred H. Kelly notes: "Political strategy called for ambiguity, not clarity."[9] Nevertheless the wording of the first section of the Fourteenth Amendment necessarily reveals the substance of the change which it effected. The States are pilloried as those governments likely to "abridge the privileges or immunities" of their own citizens. The national government assumes the role of guardian, not merely over the States which had practiced slavery, but over all of them, present and future—Alaska as much as Alabama. And thus the ultimate control over all matters affecting the condition of freedom was taken from the localities and vested in Washington.

It remains to note that not only the substance, but also the scandalous adoption procedure of the Fourteenth Amendment, has proved invidious to the strength of federalism in the United States. The founding fathers had given careful thought to the amending process, deciding, logically enough, that in this the States should play the dominant role. Therefore they evolved the alternative procedures set forth in Article V of the original Constitution. The Congress may "propose Amendments," by a two-thirds vote of both Houses, which become "part of this Constitution when ratified by the legislatures of three-fourths of the several States." Alternatively, on application by the legislatures of two-thirds of the States, the Congress "shall call a convention for proposing amendments"

[9] "The Fourteenth Amendment Reconsidered," *Michigan Law Review,* Vol. 54, No. 8, June 1956, p. 1084.

which likewise become valid when ratified by subsequent State conventions "in three-fourths thereof."

Under both procedures the role of Congress is made definitely subordinate to that of the States. In the first case Congress may propose, but the States dispose. In the second case, Congress is only a master of ceremonies and can even be forced to accept an amendment which it has itself refused to consider. Walter J. Suthon, Jr., professor of Civil Law at Tulane University, has presented further evidence which proves conclusively that the intent was to give Congress a secondary role in the amending process.[10]

In promoting the Fourteenth Amendment, however, the Congress usurped power in a manner explicable only by the Radical exploitation of post-war emotionalism and excusable from no viewpoint. What happened was that the Southern States, with the single exception of Tennessee, within eight months flatly rejected the Amendment as certified to them in June, 1866. In several cases these rejections were by unanimous vote of both Houses; in all, by heavy majorities. Faced with this seeming impasse, and the collapse of all their plotting, the Stevens junta quickly prepared the infamous Reconstruction Act, adopted March 2, 1867. Although it was then almost two years since the complete collapse of the Confederacy, this Act defined its States as "rebel," declared that "no legal State government" existed in that area, placed these States

[10] "The Dubious Origin of the Fourteenth Amendment," *Tulane Law Review*, Vol. XXVIII, 22–44, December 1953, pp. 24–26. The entire article deserves the most careful study.

under military rule, and added the blackmailing provision that this tyranny would continue until new and compliant legislatures "shall have adopted the Fourteenth Amendment." Only thereafter would any recalcitrant Southern State "be declared entitled to representation in Congress."

President Johnson promptly vetoed this "Reconstruction Act" as completely and obviously unconstitutional and many suits against it were brought in the courts. But the Radicals overrode the veto, brought impeachment proceedings against the President "for high crimes and misdemeanors" and further threatened impeachment of the Supreme Court justices, who thereupon supinely bowed themselves out of the picture on the curious reasoning (*Georgia v. Stanton*) that the issues aroused by the Act were political and not justiciable. They surely were political. The clear objective of Stevens was to change the form of government into that of a parliamentary democracy with the President—Senator Ben Wade was tapped to succeed Johnson—wholly subordinate to a Congress in which the Radicals would be a permanently dominant party. But if that revolutionary design was not justiciable then there is no such thing as constitutional law.

Under military occupation the South perforce caved in. Compliant legislatures, composed for the most part of Negroes and Northern carpetbaggers, were installed and promptly adopted the previously rejected Fourteenth Amendment, though even then with opposition which under the circumstances was remarkable. The procedure was almost too preposterous for Secretary of State Seward,

who on July 20, 1868, issued a very tentative proclamation of ratification. This pointed out that the legislatures of Ohio and New Jersey had, on sober second thought, repudiated their earlier ratifications, and that in Arkansas, Florida, North Carolina, Louisiana, South Carolina and Alabama, in that order, alleged ratifications had been given "by newly constituted and newly established bodies avowing themselves to be, and acting as legislatures. . . ."

Such back talk was not acceptable to the free-wheeling Radicals. The following day they jammed through a concurrent resolution asserting that the Amendment had been ratified by twenty-nine States, including those questioned by Seward, and ordering him to promulgate it as a part of the Constitution. On July 28, the Secretary of State did so, in a statement which made clear he was acting by command of Congress. And as a highly dubious part of the Constitution the Fourteenth Amendment has remained there ever since.[11]

Ironically, the triumph was too late to bring pleasure to its architect. Old Thaddeus Stevens died on August 12, at the age of 76, in the modest apartment close to the Capitol which he had dominated the past three years. Probably only his adamant will had kept him alive that long, for he had been sinking since the Senate, three months earlier,

[11] In his *Personal Memoirs* (Vol. II, p. 523) General Ulysses S. Grant admits that "much of" the Reconstruction legislation to which he gave military administration "no doubt was unconstitutional; but it was hoped that the laws enacted would serve their purpose before the question of constitutionality could be submitted to the judiciary and a decision obtained." As noted in this chapter, the Supreme Court ducked that responsibility.

had by the margin of a single vote declared President Johnson "not guilty" of the impeachment charges which Stevens had framed. To the last he echoed the doctrines of Rousseau, urging the House in his final major address to "fling away ambition and realize that every human being, however lowly or degraded by fortune, is your equal." Although a Republican by party, democracy was to Thaddeus Stevens far more important than the Constitution. Had he been twenty years younger when his hour came, with Lincoln's untimely death, the Federal Republic might never have survived his assault on its foundations.

On the momentum of the Fourteenth Amendment, which was really the momentum of Thaddeus Stevens, its postscript in the Fifteenth was carried through Congress in the immediately ensuing months. This too was approved by the puppet Southern legislatures and was added to the Constitution early in 1870. Another seven years were to pass, however, before the last of the army of occupation was withdrawn and self-government restored to the South.