Completing the Constitution: The Fourteenth Amendment and Constitutional Rights

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Although the Fourteenth Amendment has been the vehicle for a number of transformations in the protection of rights, there has been no consensus on what it means. The amendment is sometimes held to have revolutionized the Constitution, in effect replacing the traditional federal system with a more national system. It is also argued that the amendment essentially reaffirmed the prewar Constitution. The truth appears to lie with neither side: the drafters of the amendment attempted to "complete the Constitution," neither to reform it radically, nor to reaffirm it simply. In doing so, they unwittingly followed in the tracks of the original "father of the Constitution," James Madison, who believed the original Constitution to be defective in important ways. Proper attention to the context and the structure of the text of the amendment reveals just how the amendment was to "complete the Constitution." So examined, the amendment reveals itself to be a precisely stated, clearly drafted text, containing a number of new constitutional principles. Properly understood, the amendment affords constitutional protection for rights already possessed in some sense, but therefore unprotected in the old Constitution.

The Fourteenth Amendment (1868) has been, without doubt, the most dynamic part of the United States Constitution since the Civil War. In the name of liberty rights allegedly protected by the Fourteenth Amendment, for example, the U.S. Supreme Court struck down much of the legislation passed in the late nineteenth and early twentieth centuries that aimed to regulate the economy. In the name of equality rights allegedly secured by the Fourteenth Amendment, the Court initiated the remaking of race relations. In the name of procedural rights allegedly mandated by the Fourteenth Amendment (in conjunction with the Bill of Rights), the Court required major reforms in the procedures used by all states to deal with persons accused of crime.

However, neither on nor off the Court has there ever been consensus on what the Fourteenth Amendment does or should mean. At one time or another, each clause of the amendment's first section, except perhaps its opening definition of citizenship, has been controversial. One reason for that controversy is the use in the amendment of language having potentially broad implications but uncertain

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specific meaning.[1] For example, what are the "Privileges and immunities of citizens of the United States," which states are forbidden from abridging? What does "equal protection of the laws" mean?

Another reason for the controversy is the "legislative record." Much of the important deliberation on the amendment occurred in the Joint Committee on Reconstruction, a body for which we have only the sketchiest records and little explanation of what the drafters meant by their language. The debates in the Congress are frequently disappointing because they often fail to address issues of great interest today and, at times at least, appear to be somewhat inconclusive.[2] Attempts to supplement the official record through "extensive investigation of private correspondence [have] unearthed only the most fragmentary evidence."[3]

Nonetheless, it is possible to arrive at a relatively clear idea of the original meaning of the Fourteenth Amendment and of the character of its transformation of the status of rights in the constitutional order, if we keep two things in mind.

First, we must look at the amendment in terms of its context. Scholars, lawyers, and judges too often look back to the amendment with particular questions in mind, questions derived from current legal or political disputes. Such an approach produces "law office history," which, as a pundit once said, deserves the same sort of dismissal that Voltaire gave to the Holy Roman Empire—neither law nor history.[4] We must instead put our current questions aside and try to understand the amendment as it was understood by the people who framed it.

Second, we must pay attention to the text of the amendment, especially the structure of the text. This has been the most neglected clue to the meaning of the Fourteenth Amendment. Instead of attending to the structure of the amendment as a whole and its connections to the Constitution as a whole, people read it in terms of one or another isolated fragment. This habit is the single largest barrier to achieving a proper understanding of the amendment.[5]

[1]Compare John Hart Ely's judgment that the language of both the privileges and immunities and equal protection clauses is "inscrutable." *Democracy and Distrust* (Cambridge, Mass.: Harvard University Press, 1980), p. 98.

[2]Cf. *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Some claims about inconclusiveness, including Chief Justice Earl Warren's, are perhaps overstated. Cf. Alexander M. Bickel, "The Original Understanding and the Segregation Decision," *Harvard Law Review* 69 (November 1955): 1-65.

[3]Earl M. Maltz, *Civil Rights, the Constitution, and Congress, 1863-1869* (Lawrence: University Press of Kansas, 1990), p. 81. A valuable recent attempt to mine further these other sources is William E. Nelson, *The Fourteenth Amendment: From Judicial Principles to Judicial Doctrine* (Cambridge, Mass.: Harvard University Press, 1988).

[4]Cf. Alfred H. Kelly, "Clio and the Court: An Illicit Love Affair," *The Supreme Court Review, 1965*, ed. Philip B. Kurland (Chicago: University of Chicago Press, 1965), pp. 119-158; Charles A. Miller, *The Supreme Court and the Uses of History* (Cambridge, Mass.: Harvard University Press, 1969).

[5]The text continues to be slighted even while the context has received careful attention. Some recent studies that self-consciously elevate the contextual as a clue to understanding are Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Durham, N.C.: Duke University Press, 1986); Raoul Berger, *The Fourteenth Amendment and the Bill of Rights* (Norman: University of Oklahoma Press, 1989); William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge, Mass.: Harvard University Press, 1988); Robert J. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876* (New York: Oceana, 1985); Maltz, *Civil Rights*. Especially poor on context are some of the classic studies of the amendment, for example, Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," *Stanford Law Review* 2 (December 1949): 5-139.

Although many scholars have recently explored the historical context, they have not achieved any better consensus on the meaning of the amendment than before.[6] For example, on such a specific issue as whether the Fourteenth Amendment incorporates the Bill of Rights (i.e., makes the provisions of the Bill of Rights binding on the states), two such sophisticated contextualists as Michael Curtis and Raoul Berger disagree entirely. Apart from specific issues, such as incorporation, two general views about the amendment emerge in the recent literature. According to one, the framers of the Reconstruction amendments intended a thorough constitutional revolution. The old system, characterized by a noncentralized federalism, was to give way to a new nationalism, marked by the primacy of national citizenship, and a new relationship between citizens and the federal government whereby the Congress was to have primary power to secure citizen rights. Most of the new nationalists trace the inspiration for the Fourteenth Amendment and the new constitutional order to antebellum anti-slavery thought.[7]

On the other side are those who read the history of the amendment in a far more restrained way. According to them, the framers did not effect a constitutional revolution, but sought to reaffirm the essentials of the old system, changing it, at most, "only a little." They fail to find evidence for the doctrines which the nationalists tend to discover in the amendment, particularly incorporation, national custody of civil rights, broad and indefinitely defined rights, and congressional power to enforce the amendment against private persons.[8]

Although partisans on both sides might hesitate to admit it, there is good evidence for both positions. As one historian said recently, we appear to have reached "an impasse in Fourteenth Amendment scholarship."[9] There is, however, an alternative to this impasse. There is evidence favoring (and opposing) each of the two main interpretations of the amendment, because the amendment was not intended either to revolutionize or to reaffirm the old Constitution. The amendment instead was intended to complete the Constitution, which entailed substantial modification in some respects, but neither a constitutional revolution nor a simple constitutional reaffirmation.[10] Understood as a completion of the Constitution, the amendment's prescription with respect to rights also becomes clear: the new or

[6]For a discussion of the role of context in some recent studies, see Michael P. Zuckert, Review Essay in *Constitutional Commentary* 8 (Winter 1991): 149-163.

[7]Among the nationalists are: Jacobus ten Broek, *Equal Under Law* (New York: Collier, 1965); Kaczorowski, *The Politics of Judicial Interpretation*; Curtis, *No State Shall Abridge*; Robert J. Kaczorowski, "The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of *Runyon* v. *McCrary*," *Yale Law Journal* 98 (January 1989): 565-595; Harold Hyman and William M. Wiecek, *Equal Justice Under Law: Constitutional Development, 1835-1875* (New York: Harper & Row, 1982); Robert J. Kaczorowski, "Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction," *New York University Law Review* 61 (November 1986): 863-940.

[8]Cf. Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?"; Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, Mass.: Harvard University Press, 1977); Berger, *The Fourteenth Amendment and the Bill of Rights;* M. E. Bradford, "Changed Only a Little: The Reconstruction Amendments and the Nomocratic Constitution of 1787," *Wake Forest Law Review* 24 (October 1989): 573-598.

[9]Nelson, *The Fourteenth Amendment,* Chap. 1.

[10]On the theme of the Reconstruction amendments and the completing of the Constitution, see Michael P. Zuckert, "Completing the Constitution: The Thirteenth Amendment," *Constitutional Commentary* 4 (Summer 1987): 259-283.

completed Constitution does not embody a new understanding of rights but only supplies a more effective security to rights already possessed by persons and citizens in the United States. In order to achieve that, the amendment required a substantial but not disruptive modification of the traditional federal system.

THE INCOMPLETE CONSTITUTION

Instead of looking at the limits of the original Constitution from a late twentieth-century perspective, as is often done, I wish to bring out those limits from a perspective far more internal to the making of the Constitution itself, indeed from the perspective of the "Father of the Constitution." By the time of the Constitutional Convention, James Madison, like many other politically active Americans, had come to appreciate the weaknesses and failures of the Articles of Confederation. Unlike many others, however, he thought about those weaknesses in more than a superficial manner. Almost everybody else came to a certain diagnosis of the chief defects of the Articles; almost everybody else came to a certain prescription for a cure—politically astute America was ready to rally around what was later introduced in the Convention as the New Jersey Plan.[11]

Madison, however, did not settle on the obvious. He concluded that the principles of federation that had been standard throughout history and had been recommended by all the leading authorities such as Montesquieu were fundamentally defective. The Articles of Confederation could never be made to work by patching them up. A more fundamental departure from prior theory and practice was required—what Madison later called "a system without a precedent, ancient or modern."[12]

He also realized that the political defects in America went well beyond the Articles of Confederation. The state constitutions, indeed the very ways in which Americans were thinking about constitutions, were also radically defective. To his newly invented brand of federalism, therefore, Madison added a newly invented kind of republicanism, built on the theoretical insights of Montesquieu and David Hume and others, but developed in great detail, comprehensiveness, and sophistication by him. Madison embodied his new insights in a series of letters, which he sent to influential fellow Virginians—George Washington, Thomas Jefferson, and Governor Edmund Randolph—before the Convention.[13] Madison convinced the

[11]For a fuller treatment of Madison's constitutional thinking at the time of the convention, see Michael P. Zuckert, "Federalism and the Founding: Toward a Reinterpretation of the Constitutional Convention," *The Review of Politics* 48 (Spring 1986): 166-210, and Michael P. Zuckert, "A System Without Precedent: Federalism in the American Constitution," *The Framing and Ratification of the Constitution*, eds. Leonard W. Levy and Dennis J. Mahoney (New York: Macmillan, 1987), pp. 132-150; Lance Banning, "The Practicable Sphere of a Republic: James Madison, the Constitutional Convention, and the Emergence of Revolutionary Federalism," *Beyond Confederation: Origins of the Constitution and American National Identity*, eds. Richard Beeman, Stephen Botein, and Edward C. Carter II (Chapel Hill: University of North Carolina Press, 1987), pp. 162-187.

[12]James Madison, "Preface to Debates in the Convention of 1787," *The Records of the Federal Convention of 1787*, vol. 3, ed. Max Farrand (New Haven, Conn.: Yale University Press, 1966), p. 539.

[13]E.g., Madison to Randolph, 8 April 1787, in William T. Hutchinson et al., eds., *Papers of James Madison* (Chicago: Charlottesville Press, 1962), vol. 9, p. 369; Madison to Washington, 16 April 1787, *Papers of James Madison*, vol. 9, p. 383.

Virginia delegation to accept in the main his reading of what was wrong and what needed to be done. When the Convention opened, they were ready to submit a plan—known as the Virginia Plan—for a new constitution, which embodied almost all of Madison's ideas—his new federalism, his new understanding of the separation of powers, and his new understanding of how government and society should interact to produce just and competent governance. The Convention did not accept everything he proposed; indeed, it adopted some things, like the famous compromise over representation, which he abhorred. Nevertheless, the main outlines, chief principles, and genius of the thing were his.

Even so, this man, who justly earned the title "Father of the Constitution," wrote a remarkable letter to Thomas Jefferson just a week or so before the Constitutional Convention was to conclude its work. To paraphrase that letter: we have been working all summer now, and much to the surprise of many, we are producing a very new constitution. But it is not very good, and it will not last very long. It does not do what we need as far as cementing a federal union of the states, and it will not succeed in producing the just rule, the proper security for rights in our internal governance.[14]

His objections were less to what was in the Constitution than to what was not in it; he believed it was well made so far as it went, but was missing a crucial organ or two, the absence of which, he thought, would prove fatal. It was nonetheless better than anything the Americans had at the time, and so, with a clear conscience, Madison worked to secure adoption of this incomplete constitution and then to help run the government created by it.

Madison found one truly important missing element: its failure to establish a power in the Congress to veto any law made by a state. This would have been a remarkable power. Just as the president can veto all bills passed by the Congress, so Congress would have been empowered to veto all laws made by the states, except that there would be no provision for overturning the congressional veto.

This power would have served two central functions, one with respect to federalism, the other with respect to republicanism. On the basis of his pre-convention studies, Madison concluded that all previous federal unions had failed because they could not control the overwhelming centrifugal force within federal systems. The member states have an irresistible tendency to encroach on the powers of the general government or on the powers and interests of their fellow members, and to resist performing their duties to the whole. "All the examples of other confederacies prove the greater tendency in such systems to anarchy than to tyranny; to a disobedience of the members than to usurpation of the federal head."[15]

The veto power, however, would allow the Congress, an agency of the government of the whole, to review all state legislation. The Congress, as an agency of the whole, would be far more likely to consider the interests and needs of the whole than would any agency of only one part. Thus, Congress' veto power would keep

[14]Madison to Jefferson, 6 September 1787, *The Papers of Thomas Jefferson*, 24 vols., ed. Julian P. Boyd (Princeton: Princeton University Press, 1950-1973), p. 102.

[15]James Madison in the Constitutional Convention, 21 June 1787, in Farrand, ed., *The Records of the Federal Convention of 1787*, vol. I, p. 356.

the states in their "proper orbits."

Important as the veto power would be for perfecting the federal union, it would be even more imperative for perfecting republican government. Madison and the other framers very much accepted the formula Thomas Jefferson later gave of the "sacred principles" of republican government: "that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression."[16] However, Madison saw the state governments regularly oppressing minorities, and passing not only unjust but unwise legislation. The states were performing so badly because their constitutions had been made badly. Madison, therefore, would have liked to have seen constitutional revision in all the states in accord with the better political principles he believed he had discovered. However, he had the opportunity only to help remake the government of the union, and through that opportunity, he attempted to achieve something of the reforms needed in the states. The veto power he favored would have allowed the Congress to promote the causes of justice, competence, and stability—qualities which the Congress was better organized to achieve than were the state legislatures.

Madison had a very complex analysis of the source of injustice in republics—a part of which is well known through *Federalist* 10. Many of his fellow Americans believed that majorities were automatically just, or spoke naturally for the interests and rights of all, and thus could be trusted with political power. Madison rejected that. In principle, there was no difference between the propensity of a ruling minority and that of a ruling majority to oppress others. As Madison clearly saw, the political problem is so difficult to solve because government is both umpire to the disputes between different parts or interests in society and also captive of one or another of those interests. As Madison might have said: it is clearly not fair for any team to be referee in its own game. What is needed are truly impartial referees. That impartiality is what the states were not providing.

Madison saw that things might work out better if there were panels of referees from other teams, not the ones playing in the particular game at hand, who had a power to overrule the original referees when they improperly favored their own team. That is what the congressional veto power was to provide—a check by a majority relatively more disinterested and impartial than the majority that made the state laws.

So Madison despaired of the new Constitution because it did not provide enough for the needs of the whole as opposed to the parts, and because it did not provide adequately for the rule of justice, that is, for the security of the rights of all, within the states. A good constitution needed to go further to secure liberty and the rights of all.

Madison wished to arm the federal government with powers that could be used to produce effective and just government. However, he was not, for all that, ever

[16]Thomas Jefferson, "First Inaugural Address," *Thomas Jefferson, Writings,* selected and annotated by Merrill D. Peterson (New York: Library of America, 1984), pp. 492-493.

a simple nationalist.[17] Madison favored a grant to Congress of a negative power over state law, but never favored a plenary grant of positive legislative power to Congress to supplant the states. Madison's preferred Constitution was not, in the language of the day, "consolidationist." He remained committed to federalism, for he believed there to be an important difference between the negative power he would grant and a positive legislative power he would not. His model was the king's veto power within the British Constitution; he saw the king's power as a useful, even essential device, but he surely never would have considered it equivalent to positive legislative authority.[18] Madison's universal negative, in other words, is not a precedent for plenary powers in the Congress to secure the rights of persons and citizens.

CRISIS OF THE INCOMPLETE CONSTITUTION

Madison predicted that the Constitution would not last long. Having celebrated its 200th anniversary, however, we must remember that before the Constitution was even 100 years old, it did come apart, and only a great war saved it. Almost the entire era between the founding and the Civil War was a testimonial to Madison's diagnosis of the incompleteness of the Constitution. The Civil War was itself nearly irrefutable proof he had been correct. We cannot look at that entire history, but will look only at two moments in that crisis of the incomplete constitution as it entered its critical phase.

The first was a Supreme Court decision, the *Dred Scott* case, decided in 1857. Dred Scott, a slave from Missouri, was suing for his freedom, arguing, with some good legal grounds, that having been taken into a place where the Missouri Compromise prohibited slavery, he was in effect set free, and could not be re-enslaved.

The Court, however, disappointed Scott. It ruled that the Missouri Compromise Act was unconstitutional, and therefore that Scott was still a slave. It also held that even if he were free, and even if he were a citizen of Missouri, he could not be a citizen of the United States, entitled to the privileges and immunities of U.S. citizens, including the right to sue in U.S. courts, because the United States was a white man's country, and under the Constitution of the United States, black people had no rights that whites were obliged to respect.

Dred Scott testifies to the incompleteness of the original Constitution that so troubled Madison. Most obviously it showed (again) that the Constitution allowed this most severe deprivation of rights, slavery. Beyond that, the case crystallized a new interpretation of the nature of the American constitutional order, one version of which Stephen Douglas also promoted during his debates with Abraham

[17]Many recent scholars have seen Madison at the time of the convention as a nationalist. E.g., Martin Diamond, "What the Framers Meant by Federalism," *A Nation of States: Essays on the American Political System,* ed. Robert A. Goldwin (Chicago: Rand McNally, 1963); Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Williamsburg, Va.: Institute of Early American History and Culture and Chapel Hill: University of North Carolina Press, 1969).

[18]For discussion of the king's negative as a precedent for Madison's proposal, see Zuckert, "A System Without Precedent," pp. 145-148.

Lincoln.

This new theory of the nation contained three propositions. First, the union was a union of mostly sovereign states for a few limited purposes common to those states. Second, because the member states were sovereign, they were entirely free to order themselves internally as they saw fit. There was no supervening principle of political right, other than state sovereignty, that applied to the whole group of states. Third, the government of the union was obligated to be neutral vis-à-vis the internal principles of the states. That is, the government of the United States cannot favor the principles of one set of states (e.g., the free states) over another set of states (e.g., the slave states). The territories of the United States, therefore, must be open equally to citizens from both kinds of states. So, the Court said, just as the man from Illinois is allowed to take his hogs to the territories, so the man from Mississippi must be allowed to take his slaves.

This new theory (and practice) as crystallized in *Dred Scott* was, Madison would say, a result of an incomplete constitution. Madison wanted a constitutional order in which there was a clear commitment (and an institution to enforce it) to the idea that a common principle of political right pervaded the union and ruled within each state. The Constitution itself, through the universal negative, was to supply a way in which that principle would be made effective in the states. Madison's *completed* constitution could never be held to be neutral, never be seen to be an association of member states entirely free to define rights for themselves however they chose, because the federal government would have had a right to intervene against state injustice. For Madison, the principle of both the whole and the parts was the same—the natural and inherent rights of human beings to life, liberty, and the pursuit of happiness as announced in the Declaration of Independence.

The other major event in the pre-Civil War period is an obvious one—secession. Here was the ultimate case of Madison's centrifugal forces at work. Had his universal negative been adopted, secession could never have happened with even the slightest color of legality, nor could the theory of secession have taken root. There would have been no room for the illusion that the states were sovereign entities and the lawful judges of whether the union served their interests. That theory, Madison saw, had meant death for federations in the past.

Secession might have occurred had Madison won, but not with any show of being rightful under the Constitution. Because secession depended for its very nature on the claim to be a rightful constitutional power, the whole crisis and conflict would have unfolded very differently.

The point, however, is not that Madison's universal negative would have averted the Civil War or prevented secession. It might, in fact, have brought the struggle to a head earlier, for it would have injected the Congress more forcefully into the very center of the slavery issue. Madison saw the fault-lines clearly, and even if his solution to the deficiencies in the Constitution might not have cured the evils, he nonetheless saw the problem and pointed toward the sort of thing needed. It is possible that under antebellum conditions, no constitutional solution could have made much difference. At the very least, one can conclude this: Madison pointed to the places where the slavery issue, or any intense political conflict, would subject the system to law-breaking stress. Even if slavery was too divisive an issue to be

amenable to any form of settlement short of war, the channels in which the waters of this crisis flowed, and overflowed, pointed to the lasting needs of the system.

So the great crisis of the American constitutional order, the Civil War, was at least in part a crisis of the incomplete constitution. By the time the war came, Madison's diagnosis and prescription had been long forgotten, but the most astute of those who thought about the events leading up to the war came to see many of the same problems in terms rather similar to Madison's. After the war, attention turned to the task of "completing the Constitution."

COMPLETING THE CONSTITUTION

The Fourteenth Amendment was adopted as part of a surge of legislation following the Civil War. The Thirteenth Amendment abolished slavery, but how much more it did was uncertain.[19] Events quickly pushed the Republicans who controlled the Congress to consider just what power the Thirteenth Amendment conferred on the general government, for in the wake of emancipation the southern states began passing the laws that became known as Black Codes.[20] The Republicans saw these as a southern effort to snatch slavery from the jaws of freedom, to evade the Thirteenth Amendment, and to undo the results of the war. To Carl Schurz, on a fact-finding mission to the South, the Black Codes reflected the widespread view that "the negro exists for the special object of raising cotton, rice, and sugar *for the Whites,* and that it is illegitimate for him to indulge, like other people, in the pursuit of his own happiness in his own way." As Schurz quoted an officer of the Freedman's Bureau: "The whites deem the blacks their property by natural right, and however much they may admit that the relations of masters and slaves have been destroyed . . . they still have an ingrained feeling that blacks at large belong to the whites at large. . . . An ingrained feeling like this is apt to bring forth that sort of class legislation which produces laws to govern one class with no other view than to benefit another."[21]

The Black Codes were "class legislation" that denied many of the rights and liberties usually taken for granted as part of the free status. Special onerous provisions were set forth, applying to blacks only. For example, in one Louisiana town, blacks were forbidden to own or rent property. Blacks were also forbidden to reside there under other conditions unless they were "in the regular service of some white person or former owner."[22] Severe limits were put on the rights of blacks to engage in commerce, to receive an education, to appeal to the courts for protection, and to testify in court.

Republican outrage led to efforts to undo the Black Codes. Early in 1866, a proposal for a new amendment was discussed in the Congress, and a civil rights bill

[19]There is almost as much controversy over the scope of the Thirteenth Amendment as on the Fourteenth. See Zuckert, "Completing the Constitution: The Thirteenth Amendment."

[20]Theodore Brantner Wilson, *The Black Codes of the South* (University: University of Alabama Press, 1965).

[21]Report of Major General Carl Schurz on Condition of the South, Senate Executive Document No. 2, 39th Cong., 1st sess., p. 21.

[22]Ibid., p. 23.

was introduced at nearly the same time. These two initiatives became inextricably connected at this moment: the Civil Rights Act of 1866 prohibited the restrictive codes being adopted in the South and set penalties for all persons "acting under color of law" who attempted to enforce their provisions. Section One of the enacted bill defined citizens in much the same terms as the Fourteenth Amendment later did, and then went on to provide that

> such citizens, of every race and color, without regard to any previous condition of slavery . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.

Questions about the constitutionality of the Civil Rights Act rose immediately, however. President Andrew Johnson vetoed it because of his constitutional doubts. Even some Republicans who supported the goals of the bill believed that the Constitution nowhere authorized the Congress to pass this law. The Fourteenth Amendment became important, in part, as an answer to these doubts. If the Constitution did not supply power to adopt the bill, then the new amendment would supply the defect. Yet, many who expressed no doubts about the bill's constitutionality supported the amendment as well, not only to remove the doubts of others, but also to set into the Constitution, and thus invest with a greater permanency, the protection contained in the bill.

The Civil Rights Act provides genuinely useful guidance for understanding the Fourteenth Amendment. The rights specified in the act are clearly among those meant to be protected by the Fourteenth Amendment. We have, moreover, a solid notion of the immediate intention of the framers of the amendment—to provide a constitutional foundation for undoing the state Black Codes.

One can, however, overestimate the value of this contextual understanding. Raoul Berger, for instance, considers the two pieces of legislation to be "identical"; he and others conclude that the Civil Rights Act entirely exhausts the meaning of the Fourteenth Amendment.[23] Those who see the amendment in this way are led to a rather conservative view of it. They are prone to insist, for example, that it does not make the Bill of Rights applicable to the states because the Civil Rights Act does not explicitly do that. They insist, for example, that congressional action under the Fourteenth Amendment can only reach state action, and can, under no circumstances, ever reach the actions of private individuals because the Civil Rights Act was addressed to state action.[24] One difficulty with these and similar theses based on the putative meaning of the Civil Rights Act is that strong evidence exists to support less conservative interpretations of the original meaning of the Fourteenth Amendment. Michael Curtis, for example, has shown fairly decisively that the

[23]Berger, *The Fourteenth Amendment and the Bill of Rights*, pp. 20, 22.

[24]This last is a controversial claim, which I shall not pause to defend. Those who identify the amendment and the act almost always accept the state-action interpretation of the latter. Cf. Maltz, *Civil Rights*, pp. 70-78.

framers intended incorporation; another recent study has shown that congressional legislation reaching private actors is sometimes legitimate under the amendment.[25]

Other considerations also stand in the way of identifying the amendment and the Civil Rights Act. For one, the amendment was introduced before the Civil Rights Act. Although it was much revised before it was adopted, its original form is much closer to the final version of the amendment than the amendment is to the Civil Rights Act. It is not entirely persuasive to argue that the amendment was intended exclusively to legitimize a bill that did not yet exist.[26]

A second difficulty is that the amendment's language is distinctly different from that of the Civil Rights Act. If the amendment was meant to be nothing more than a constitutional version of the act, then its framers chose very odd language to convey that intention. They would have done better to have made Section One of the Civil Rights Act the new amendment. The language of the Fourteenth Amendment is much broader and more general than the provisions of the Civil Rights Act. The amendment is also not so clearly bound to the race issue, and to the Black Codes, as was the act. The Civil Rights Act specifies particular rights that were under attack by the Black Codes and merely forbids discrimination with regard to those rights. The amendment provides for absolute, not nondiscriminatory, protection of privileges and immunities, and its due process guarantee certainly seems broader than the comparable features of the act. Thus, the Civil Rights Act can provide some guidance, but it cannot be identified with the amendment.

Perhaps most importantly, a narrow reading of the amendment fails to take account of the broader intent animating the framers of the amendment. Just as the language of the amendment tears free from the immediate racial context of the Civil Rights Act, so many supporters of the amendment expressed a concern for evils beyond the Black Codes, affecting persons other than the freedmen. The Republicans frequently referred to what they considered outrageous behavior by southern states before the war, such as prohibiting entry into their states of abolitionists, or forbidding the printing and distribution of anti-slavery views. During the 1866 debates, proponents of the amendment also made clear that they wanted to protect loyal whites in southern states. Occasionally, they even spoke of the desire to cast the protection of the law around despised and ill-treated groups like the Mormons, whose plight had nothing to do with slavery or the Civil War.[27]

Observations like the above lead other scholars to set the Fourteenth Amendment in an altogether different and broader context. Robert Kaczorowski, for example, finds the amendment to be the vehicle for registering the meaning and

[25]Curtis, *No State Shall Abridge*, esp. chs. 3-4; Michael P. Zuckert, "Congressional Power Under the Fourteenth Amendment—The Original Understanding of Section Five," *Constitutional Commentary* 3 (Winter 1986): 123.

[26]Bingham announced the outlines of his amendment on the floor of the House of Representatives on 9 January 1866 (*Congressional Globe*, 39 Cong., 1st sess., pp. 157-158). The civil rights bill made its first appearance on the floor of Congress on 12 January 1866 (*Congressional Globe*, 39th Cong., 1st sess., p. 211). Cf. Maltz, *Civil Rights*, p. 54.

[27]Curtis, *No State Shall Abridge*, chs. 2-3, collects some of the places where the Republicans voiced such concerns.

outcome of the Civil War. The war was "a conflict between national supremacy and union on the one side, and state sovereignty and secession on the other side." The conflict was resolved, he maintains, on the battlefields in favor of national sovereignty and union, and, after the war, in congressional reconstruction in favor of the same. A corollary to the conflict over the location of sovereignty was a conflict about "where primary authority over the states and rights of individuals was located, in the nation or in the states."[28] The Fourteenth Amendment, set in this sort of context, appears to have an entirely different meaning from that attributed to it by those who focus on the Civil Rights Act. In this broader context, the amendment implies (1) the assignment of custody over fundamental natural and civil rights to the government of the United States, (2) the incorporation of the Bill of Rights, and (3) the grant of plenary power to the Congress to do whatever is needed to protect rights.

This explication of a broader intention is helpful also in understanding the meaning of the Fourteenth Amendment. It makes visible how limited and limiting is the understanding of the amendment derived from an exclusive focus on the narrower context of the Civil Rights Act of 1866. Yet the broader focus, if taken by itself, can also be misleading. Those who see the amendment in terms like these tend to take a rather expansive view of the amendment. They are prone to argue not only that the amendment incorporates the Bill of Rights, but also that it protects natural rights. Not possessing a very well defined understanding of what the framers understood natural rights to be, however, those who hold this view tend to see the amendment as the constitutional support for virtually any constitutional innovation they want and which they can clothe in the magic word "rights." Seeing that the amendment was intended to give the Congress power to secure rights, those who focus exclusively on this broader context tend to see the amendment as a roving commission to the Congress (or the courts) to legislate directly or control the states on any matters considered fundamentally important.

The broader reading has difficulty jibing with the very precise language of the amendment. It speaks of privileges and immunities of U.S. citizens, a term which had come to have a well defined meaning by the time of Reconstruction. The amendment speaks, in the due process clause, of the rights of life, liberty, and property, and not of vaguer formulas, such as civil rights or fundamental rights. Likewise, those who read the amendment in explicit reference to this broad intention tend to have great difficulty making good sense of the text's reliance on prohibitions against the states. The amendment definitely does not support those who see it as simply authorizing congressional custody over fundamental rights, a custody that would amount to a complete refashioning of the federal system. Among other things, reading the amendment in terms of the broad context cannot account for the fact that the Congress considered a draft amendment not cast in terms of prohibitions against the states, but rather cast as a direct authorization to the Congress to secure rights. This version was not adopted.

Indeed, leading Republicans in the Congress understood the broader intention of

[28]Kaczorowski, *Judicial Interpretation*, pp. 1-3.

their work in the postwar amendments in rather different terms. Thaddeus Stevens expressed the general point early in 1866, in language clearly echoing Lincoln's prewar rhetoric:

> Sir, our fathers made the Declaration of Independence; and that is what they intended to be the foundation of our Government. If they had been able to base their Constitution on the principles of that declaration, it would have needed no amendment during all time, for every human being would have had his rights; every human being would be equal before the law.

According to Stevens, the original founding document of the American constitutional order was the Declaration of Independence. To ground a government on the Declaration means, above all, that "each man would have his rights." That is, the failure of the original constitution was that it did not guarantee, as a matter of constitutional right, the natural rights affirmed in the Declaration. Amendments were required to remedy this lack. Stevens is explicit about why the original constitution failed to embody the Declaration:

> But it so happened when our fathers came to reduce the principles on which they founded this Government into order, in shaping the organic law, an institution from hell appeared among them. . . . It obstructed all their movements and all their actions, and precluded them from carrying out their own principles, into the organic law of this union.

Of course, slavery was the "institution from hell." However, it was not merely the existence of slavery in the union that was the problem, it was also the failure to secure the rights affirmed by the Declaration in the Constitution. The mere undoing of slavery is not a sufficient embodiment of the principles of the Declaration. "Our fathers had been compelled to postpone the principles of their great Declaration, and wait for their full establishment till a more propitious time. That time ought to be present now [through the adoption of the Fourteenth Amendment]."[29] John Bingham, the drafter of the amendment, made the same point: "I am perfectly confident" that the provisions of the proposed amendment "would have been [in the original constitution] but for the fact that [their] insertion . . . would have been utterly incompatible with the existence of slavery in any state."[30] Like Madison, the drafters of the Fourteenth Amendment concluded that the Constitution was incomplete, not only because it had allowed slavery, but also because it failed to provide sufficiently for the security of rights. The Thirteenth Amendment undid the cause of the incompleteness, but the Fourteenth Amendment was to do the completing.

Although the framers believed slavery to be the cause of the imperfect embodiment of rights in the original constitution, the defectiveness of the original was not limited to slavery and was not limited to blacks. A more adequate constitutional order would secure the rights of all, a security that was lacking before because of

[29] *Congressional Globe*, 39th Cong., 1st sess., p. 536.
[30] Ibid., p. 1090.

slavery. Thus, the Fourteenth Amendment is not, as some would have it, merely an anti-discrimination amendment.

The intent to complete the Constitution accounts for the partial support—and partial refutation—that both the other theories of intent find in the materials. More was intended than merely constitutionalizing one piece of legislation. The idea that the amendment was to complete the Constitution receives thorough confirmation if we shift our attention from its context to its text. Contrary to the view of some historians, it is, after all, the text of the amendment, not the sum of the comments made about it, which is part of the Constitution. The rejoinder to the call for a more text-based approach, of course, is the commonplace that the language of the amendment is opaque. Its key terms are mere projective devices to elicit from the interpreter what he or she brings to the text. The difficulties posed by the text make it foolish to dismiss this rejoinder. Nonetheless, a fuller appreciation of the structure of Sections 1 and 5 can go a long way toward revealing what the amendment meant to its drafters, and how it represented a completing, rather than an overturning or a mere affirming, of the original constitution.

THE FOURTEENTH AMENDMENT: A STRUCTURAL READING

Structure, or internal context, supplies determinate meaning for phrases and clauses which, without structural interpretation, might indeed be nothing but ink-blots. Structurally, the amendment operates in terms of five pairs of concepts, each of which elucidates the others, and each member of which delimits and defines the other. These structural pairs provide the key to the amendment's meaning.

The first sentence defines two citizenships—citizens of the United States and citizens of the states.[31] The text then contrasts "citizens of the United States" and "persons." Associated with citizens are "privileges and immunities"; associated with persons are certain other matters, the most easily identified being the famous triad of rights, "life, liberty, and property." A fourth pair of terms relates to the two clauses that deal with persons: states are prohibited from depriving persons of the above rights without due process of law, and states are forbidden to deny persons equal protection of the laws. Finally, a fifth pair contrasts the prohibition against the states from doing certain things with the empowerment (in Section 5) of the Congress to "enforce" the amendment.

To summarize the five pairs:

- citizens of the United States - citizens of states
- citizens - persons
- privileges and immunities - rights
- due process of law - protection of the laws
- prohibition against state action - congressional powers

[31]I realize that it is a widely accepted view that the distinction between the two citizenships (or the privileges and immunities thereof) is an invention of the Supreme Court in the *Slaughterhouse Cases*. Although much of what the Court said in *Slaughterhouse* was erroneous, this distinction is warranted both by the text and by the history of the amendment. On the latter, consider Bingham's theory of privileges and immunities, as presented in the debate on the admission of Oregon to statehood, 11 February 1859 (*Congressional Globe*, 35th Cong., 2nd sess., pp. 982-985). The distinction goes back even further. It figures importantly in Chief Justice Taney's opinion in *Dred Scott* v. *Sandford*, 19 How. 393 (1857).

The amendment opens by setting off two kinds of citizenship. Given that it goes on to speak of privileges and immunities of United States citizens, but not those of state citizens, we are justified in drawing two conclusions. First, there is a difference between the privileges and immunities inherent in each citizenship; otherwise, the amendment could have proceeded without any need to distinguish which sort of citizenship and which sort of privileges and immunities were of concern. Second, the amendment limits itself to the privileges and immunities of United States citizens; other than defining who state citizens are and distinguishing the two kinds of citizens from each other, the amendment has no further concern to secure the privileges and immunities of state citizens. The Fourteenth Amendment thus contemplates the continued existence of a dual, or federal, system. As part of the constitution for the general government, the amendment sensibly limits itself to the privileges and immunities inhering in citizenship in the government of which it is the constitutive document.

The next two pairs are intimately connected; citizens of the United States have privileges and immunities, and persons have rights.[32] This too makes sense. Privileges or immunities are special, not things possessed by everyone as a matter of right. A privilege is something over and above the normal; an immunity is freedom from some burden. On the other hand, the Declaration of Independence says rights belong to "all men," or in more legal language, to all persons. These natural or universal rights are not "privileges" or "immunities"; they are not special to some, not exceptions in any way. The rights of persons—life, liberty, and property—are natural rights because all human beings possess them independently of any human law. Natural rights predate government, which came into existence solely to protect these rights.[33]

The rights identified in the amendment are the familiar natural rights, but what are the "privileges and immunities of citizens of the United States?" Because privileges and immunities belong to citizens of the United States, and because the fundamental document governing the United States is the Constitution, it would seem reasonable to conclude that the privileges and immunities are special rights enjoyed by the citizens of the United States by virtue of the Constitution. As opposed to natural rights, the privileges and immunities are conventional or constitutional rights.

Where does the Constitution establish the constitutional rights of United States citizens? It does so in several places, though most clearly in the Bill of Rights. The

[32]Some scholars have denied the significance of the distinction between "citizen" and "persons." Apart from the argument presented here, the historical record makes clear that the distinction was intentional. See, e.g., *Congressional Globe*, 35th Cong., 2nd sess., p. 983.

[33]For an explication of nature and natural rights, see Michael P. Zuckert, "Thomas Jefferson on Nature and Natural Rights," *The Framers and Fundamental Rights*, ed. Robert Licht (Washington, D.C.: American Enterprise Institute Press, 1991). For testimony to the widespread acceptance of the natural rights philosophy by the framers of the amendment, consult the index to Alfred Avins, *The Reconstruction Amendments' Debates: The Legislative History and Contemporary Debates in Congress on the 13th, 14th, and 15th Amendments* (Richmond, Va.: Commission on Constitutional Government, 1967), under the headings of "natural rights" and "Declaration of Independence." My reading of the congressional debates suggests that Avins' index, itself substantial, much understates the evidence on the acceptance of the natural rights philosophy.

Bill of Rights lists some of the rights possessed by citizens of the United States, for example, freedom of speech, the right to a jury trial, and the right to be free from the threat of cruel and unusual punishment (i.e., an immunity). However, the rights identified in the Bill of Rights are not the only privileges and immunities of citizens of the United States. In *Dred Scott,* for example, Chief Justice Roger Taney identified the right to sue in federal court as a privilege of United States citizenship. The right to participate in the government of the United States, as regulated by law, is another privilege of United States citizenship. Article I, Sections 9 and 10 of the Constitution list a series of prohibitions against the Congress and the states respectively, which would also qualify, it seems, as privileges or immunities of United States citizens.[34]

Privileges and immunities are over and above natural rights. The former are not natural and universal because they are incidents of citizenship; that is, they depend for their existence on the prior existence of government, which is itself an artificial thing. Thus, Justice Bushrod Washington, in the most extended early judicial explication of privileges and immunities, emphasized their connection to government: privileges and immunities are matters "which belong of right to the citizens of all free governments; and which have at all times been enjoyed by the citizens of the several states which compose this union."[35] Privileges and immunities depend on the variable character of government. They have at least an element of the purely conventional, for they are defined in the laws, customs, and constitutions of specific states and nations.

Some privileges and immunities have the character of specifications of rights. For example, persons have a natural right to property. Once government comes into existence, persons may be deprived of their property only under certain conditions and if done under due process of law. For example, a person accused of violating a law must be able to know the charges and to present evidence before an impartial judge. In the Anglo-American legal system, certain conventions have grown up as to what qualifies as proper procedures, many of which are spelled out in the Bill of Rights. Although these procedures protect natural rights, they do not have the same status as natural rights themselves. Moreover, it would be difficult to say that they are uniquely required in order to secure rights. They are the specific, but conventional procedures that have arisen within a polity, but some other procedures could do as well or nearly so. They are thus the privileges and immunities possessed by citizens of this polity. Other privileges and immunities center around sharing in the governance of "free societies." These cannot be natural, strictly speaking, for government is not natural. These must be over and above the natural rights because there can be no natural right to govern an entity that does not exist in nature.

The original Constitution vested or recognized certain special rights in citizens of the United States, and set out a legal requirement that the government of the United States must respect these rights. For the most part, however, the original

[34]There were, therefore, privileges and immunities of U.S. citizenship prior to adoption of the Bill of Rights. This is an important observation vis-à-vis the critique of the constitutional theories of John Bingham mounted by critics like Raoul Berger. Cf. Berger, *The Fourteenth Amendment and the Bill of Rights*, pp. 75, 87-88, 92-93, 95, 97-99, 100-103.

[35]*Corfield* v. *Coryell*, 4 Wake. C.C. 380.

Constitution did not say that the states must respect these special rights. In the famous *Barron* v. *Baltimore,* the Supreme Court had confirmed that point—the Bill of Rights did not hold against the states.[36] That was part of the incompleteness of the Constitution.

The privileges and immunities clause of the Fourteenth Amendment was meant to remedy this situation. The special rights of U.S. citizens were now to be protected against adverse actions by the states. The Fourteenth Amendment's privileges and immunities clause was intended, in other words, to incorporate the Bill of Rights, and to secure other privileges and immunities against the states.

Whereas citizens of the United States possess special privileges and immunities, all "persons" are to be given certain protection in their universal or natural rights. Of course, all persons "possessed" these rights prior to the Fourteenth Amendment, but they did not possess them as constitutional rights. To take the most blatant example: slaves had a natural right to life and liberty, but the Constitution did not secure them that right. It did not directly deny them the right, but it did not prevent the states from denying them that right. The Fourteenth Amendment meant to correct that, and this was probably its most important intended achievement. The amendment was to provide a new constitutional right (a civil right) to one's natural rights.

The provision of constitutional rights is a somewhat complex matter in itself, and is extraordinarily complex in a federal system. That double complexity is what underlies the next two pairs of concepts in the amendment. Let us first think of the problem as it would appear in a unitary system of government.

Government exists, said the Declaration of Independence, in order to secure the inalienable rights of human beings. Government's relation to these rights, however, is twofold. The primary task of "securing rights" is to *supply* protection to the rights. This means that government must do something positive and active—make laws that secure rights, define the terms of the rights, and supply police, courts, and the like. To do this properly, governments cannot act according to mere whims, however. They must announce in advance what the rules of life are, how things are to be done, and what behavior by persons will call down the force of the community upon them. That is, governments must operate according to what John Locke called "known and settled standing law." The law exists for the sake of securing rights; it does so by providing protection to persons. Thus, this positive task of government in securing rights can be stated in terms of the duty of governments to supply "protection of the laws." This is what the Fourteenth Amendment means in its famous equal protection clause. States have a duty to supply equal protection of the laws, that is, to all classes as much protection in rights as the most favored class gets in the protection of its rights.

Government's relation to securing rights can be complex. Government can fail in two ways—in not supplying protection (e.g., standing by while thugs shoot innocent people) or in itself being a threat to rights. Governments have duties not only of a positive sort (to supply protection of the laws), but of a negative sort as

[36] 7 Pet. 243 (1833).

well, not to oppress, or to act against citizens only with due process of law. Government can deprive a citizen of things to which he or she has natural rights—life, liberty, and property—only if the person has violated a law and the government has properly established that fact—before an independent judge, in a setting where the accused person has a right to challenge the government's claim, and so on. The due process clause of the Fourteenth Amendment secures to all persons a constitutional right to this sort of "negative" protection of their natural rights against the states.

Hence, the due process and the equal protection clauses perfectly complement each other; each provides a constitutional right to one aspect of the security of natural rights, the negative and positive aspects respectively.

Now we can add in the last dimension of complexity, the one that results from the federal system, and the one that relates to the fifth pair of concepts. The Fourteenth Amendment established a constitutional right to one's natural rights, but it did so in the form of prohibitions against actions by the states. This signals a very important intention in the amendment—not to overturn, but only to correct the traditional federal system. In the traditional federal system, the states did the bulk of governing. The government of the United States had relatively few (though very important) tasks assigned to it. The Fourteenth Amendment did not mean to change this. The great bulk of rights-protecting was to continue to occur in the states. They were to do this, however, in accordance with the limits imposed on them by the amendment.

In the first instance, those limits—the privileges and immunities clause, the due process clause, and the equal protection clause—impose a moral and quasi-legal duty on all officers of the state to follow the dictates of the amendment. But the amendment does not leave matters there. Enforcement measures are built in. The first line of enforcement is the court system. Just as the courts had the power to enforce limitations against the states in the original Constitution, so courts would have this power under the Fourteenth Amendment. Article I, Section 10, for example, had said that no state shall pass any "law impairing the Obligation of Contracts." Under this clause, the Supreme Court had, prior to the Civil War, held quite a few state laws to be unconstitutional. Under the Fourteenth Amendment, the courts would do the same with state actions that violated the amendment.

Section 5 of the Fourteenth Amendment empowers the Congress as another agency of enforcement. Congress' power in the first instance is the power to enforce the prohibition against the states. It can, for example, pass laws punishing state officers who deprive persons of life, liberty, or property without due process of law. The amendment gives the Congress a power to supervise the states in their exercise of their primary powers.

However, there is another and potentially farther-reaching enforcement power under the Fourteenth Amendment. If a state fails to protect natural rights, then the Congress may enforce the constitutional right to protection of the laws by supplying that protection itself. An example occurred shortly after ratification of the Fourteenth Amendment. The Ku Klux Klan arose in many southern states and committed acts of violence and intimidation against blacks. These acts were committed often in collusion with state officials; the states would not or could not

curb the Klan. Thus, the Congress, when it was convinced the states had failed to provide protection of the laws, intervened to provide protection against the Klan. So long as Congress waited to see that there was a real failure by the state to do its duty, this was perfectly constitutional under the meaning and intent of the Fourteenth Amendment.

One can summarize the achievement of the Fourteenth Amendment in three shorthand doctrines: (1) incorporation of the Bill of Rights through the privileges and immunities clause; (2) establishment of new constitutional rights to natural rights through the due process and equal protection clauses and, thereby, a constitutional duty in the states to secure the preexisting natural rights of persons within their jurisdictions; and (3) the "state-failure doctrine" of congressional power to enforce rights.

Although the Fourteenth Amendment employed a very different device than Madison's universal negative, the Fourteenth Amendment's connection to his perception of the direction in which the Constitution needed to be supplemented is fairly clear. The amendment established the principle that the federal government possesses a general supervisory power over the states with respect to the most important matters. It left no room for the idea that the states are sovereign or autonomous. It established the two orders of government as *one system* where the states are not superior to the federal government, while the federal government is not simply and totally superior to the states either. If the states performed properly, there would be little or no actual transference of governing activity from the states to the federal government, but there would be a clear establishment of constitutional devices for keeping the states in orbit.

Likewise, the Fourteenth Amendment directly established the protection for rights in the states that Madison had sought in 1787. Instead of the political device of a congressional veto, we have a legalistic device, but nonetheless a device intended to achieve something similar to Madison's veto.

This interpretation of the text converges very well with the dual contexts already discussed. The narrow version of context supplies a focus that controls the seemingly boundless implications of the broad version. The evidence is clear, for example, that the framers of the amendment did not seek to undo the traditional federal system. Although they also saw the amendment as securing both the natural rights of all persons and the constitutional rights of United States citizens, they saw these rights in a relatively controlled way and did not believe that legislatures were thereafter to lack all power to legislate in regard to them. When thinking about their intentions, we should not read our own Bill of Rights interpretations, or the more freewheeling speculations about "fundamental rights" characteristic of some recent legal thought, into their intentions. The framers of the Fourteenth Amendment wished to apply the Bill of Rights to the states, but they did not consider this to be radical or revolutionary because they believed most of the states already conformed to the requirements of the Bill of Rights. As many of them frequently said, the amendment would require little or nothing of northern states.

As to the content of the rights, the Civil Rights Act listed rights, which in the view of the framers, required protection by the amendment. These rights involved, for the most part, the security of person and property, which in turn implies rights to

protection from and access to public authorities, especially courts, in order to achieve such security. Moreover, the civil rights bill was framed as a corrective to state legislation, to set certain standards, for example, for equality between whites and blacks in laws touching the rights enumerated. The bill was careful not to provide for direct federal protection in place of state protection.

Nevertheless, both the text and its broader context lead to the conclusion that neither the rights enumerated nor the approach taken to their protection in the civil rights bill exhausts the Fourteenth Amendment's possibilities. The overall understanding that holds text and context together is something like the following: The core of the American political order, for the Republican majority, was the commitment to the principles of the Declaration of Independence (i.e., that government exists to protect natural rights). Such a commitment, they believed, was present in the original Constitution and was reaffirmed in the Fourteenth Amendment. At the same time, the American republic was a federal republic, a system of divided authorities in which the states conducted the greatest amount of governing, including rights protection. The Republicans, contrary to President Johnson's fears, valued this federal system as much as they sought to put rights protection on a more secure footing. In 1871, when the Congress considered a bill to extend the powers of the general government farther into the states than they had ever gone before, John Bingham said:

> Do gentlemen say that by so legislating we would strike down the rights of the states? God forbid. I believe our dual system of government essential to our national existence. . . . The nation cannot be without the state governments to localize and enforce the rights of the people under the Constitution. . . . No right reserved by the Constitution to the states should be impaired.[37]

Bingham's conception of the relation between rights of persons, the states, and the general government was thus complex, but complexity must not be mistaken for confusion. As we have seen, the principles of right, both natural and legal, in this regime are national, and the federal government must be armed with power to make those principles effective. This did not mean, however, that the national power must supplant the states in their ordinary custody of these national principles. He did not believe it would be good for the states to cease making and enforcing the laws that secure and regulate the privileges and immunities of citizens and the life, liberty, and property of persons. Even so, the claims of the states to these areas of legislation are not absolute. When the system faces an unavoidable choice between rights protection and federalism, the Fourteenth Amendment mandates the primacy of rights.

RESTORATION OF THE ORIGINAL CONSTITUTION

The next part of the story can be quickly told. In a series of decisions running from about 1873 to 1886, the U.S. Supreme Court systematically and deliberately

[37] *Congressional Globe*, 42nd Cong., 1st sess., H. P. app. 84-85 (1871), reprinted in Avins, *The Reconstruction Amendments' Debate*, pp. 510-511.

attacked the Fourteenth Amendment, clause by clause and doctrine by doctrine until there was little left.

In a way, the most important of the cases was the very first—the so-called *Slaughterhouse Cases,* in which the Court considered whether a monopoly in slaughtering granted by the Louisiana legislature violated the amendment.[38] This issue was, to be sure, relatively distant from the kind of case the framers had in mind, and that may have had something to do with the way the Court treated it. The focus of the Court's attention was on the privileges and immunities clause. The Court ruled that establishment of such a monopoly did not violate the privileges or immunities of United States citizens. More significantly for the fate of the amendment, it went on to ask what these protected privileges and immunities might be, and suggested they were relatively minor matters deriving from the existence within the federal system of the national government. The best example the Court could give was the right to travel to the seat of the national government.

More broadly and decisively, the Court asserted that the Reconstruction amendments all "disclose a unity of purpose"—to deal with the institution of slavery and its aftermath. Hence, the Court announced its intention to treat the new parts of the Constitution as limited to that purpose. A broader interpretation of the amendments "would constitute this court a perpetual censor upon all the legislation of the states." The Court found "these consequences" to be "so serious, so far-reaching and pervading" that it could not endorse them. The consequences would be even more serious, the Court insisted, if one considered Section 5 of the amendment, which empowers the Congress to enforce the amendment.

In a case decided soon after,[39] the Court drew more specific implications: the privileges and immunities of citizens of the United States did *not* include the rights affirmed in the Bill of Rights. The Court based this conclusion on its general interpretation of the limited purpose of the amendment to protect former slaves. Thus, by 1876, the original meaning of the privileges and immunities clause was clearly and unequivocally rejected by the Supreme Court.

The *Cruikshank* case also carried forward the rejection of the original meaning of the equal protection and due process clauses. The Court suggested in passing that the protection of natural rights of persons belonged not to the federal government, but to the states, and that the Reconstruction amendments had not changed that arrangement in the slightest. This point was made official Court doctrine only a few years later in *U.S.* v. *Harris* (1883).[40] That case quashed indictments under the Enforcement Act of 1871, which had been a pure effort to enforce the equal protection clause by extending the protection of federal law to persons who had been unprotected from the Klan by the states.[41] So, by 1883, the Court unequivocally rejected the second of the three chief innovations of the Fourteenth Amend-

[38] *Slaughterhouse Cases*, 16 Wall. 36 (1873).

[39] *U.S.* v. *Cruikshank*, 92 U.S. 542 (1875).

[40] 106 U.S. 629 (1883). On this and other Waite Court cases, see Michael Les Benedict, "Preserving Federalism: Reconstruction and the Waite Court," *The Supreme Court Review, 1978,* eds. Philip B. Kurland and Gerhard Casper (Chicago: University of Chicago Press, 1979), p. 39.

[41] For an analysis of the act and the constitutional debate at the time of its passage, see Zuckert, "Congressional Power Under the Fourteenth Amendment," 147-155.

ment—the constitutional right to natural rights. The Court returned the Constitution on this issue to exactly where it had been before the amendment was adopted: there was no such constitutional right. The states had custody of natural rights, and were not obliged by the U.S. Constitution to do anything about them.

Both lines of decisions pointed to the conclusion regarding congressional power under the Fourteenth Amendment which the Court formalized in 1883 in the famous *Civil Rights Cases.*[42] In the law at stake there, the Civil Rights Act of 1875, the Congress had attempted to outlaw racial discrimination in various public accommodations. The Court declared this law unconstitutional on the ground that while the Congress had power to enforce the amendment, the amendment only forbade certain actions by states and state officials. There was no authority to reach the discriminatory action of private parties, as the Congress had attempted here. This conclusion was made possible, even required, by the earlier result in *Harris,* where the Court subverted the meaning of the equal protection clause. Therefore, for the doctrine of congressional power originally contained in the Fourteenth Amendment (viz., the state-failure doctrine), the Court substituted what came to be called the state-action doctrine. The Congress could legislate under the Fourteenth Amendment only to reach actions by the states or by state officials.

The story is more or less complete by 1883, but one further piece should be told. In 1896, the Court made its famous decision in *Plessy* v. *Ferguson.*[43] Not only did the Court uphold segregation laws in this case, but it also gave a new interpretation to the equal protection clause, an interpretation that has come to be dominant (in revised form). Recall that in *Harris*, the Court rejected the authentic meaning of the clause, but did not give an alternative reading of its meaning. In *Plessy,* the Court concluded that the equal protection clause was essentially a test of the classifications made in laws. Laws could classify so long as they were equal; thus, the formula "separate but equal" came into constitutional law. The Court began its practice of treating the equal protection clause as though "equal" were the key word in it, rather than the word on which the text puts its emphasis, "protection."

The Court, therefore, systematically disassembled the Fourteenth Amendment's attempt to "complete the Constitution." It did so out of deference to the "traditional federal system." Whereas the amendment had been drafted to repair the fundamental flaws in the traditional system, flaws which even James Madison had acknowledged, the Court refused to accept the repairs. The Court was willing to accept repairs that promised to aid the ex-slaves (though only to a degree), but refused to accept anything more.

The Court's treatment of the amendment was an example of judicial activism. The question naturally arises: what could justify the Court's rampage of constitutional revision? The Supreme Court, being a court, never did admit to what it had done, but gave only a muted and indirect defense of its behavior. That defense was presented, for the most part, in the *Slaughterhouse Cases,* where the Court raised two objections to the Fourteenth Amendment. First, it questioned the legitimacy of the amendment. The amendment was able to acquire a sufficient number of

[42]109 U.S. 3 (1883).
[43]163 U.S. 537 (1896).

ratifying states only because ratification was required of the southern states as a condition for their return to the union. The southern states did not freely consent to the amendment. This, the Court suggested, undermined its status.

The Court's second reason for rejecting the amendment was its conviction that the amendment was a mistake, adopted in the heat of passion after the Civil War and needlessly disruptive of the federal system. Perhaps the Court succumbed too much to the myth of the perfect Constitution, which had grown up shortly after the adoption of the original Constitution. The very high regard in which the Constitution came to be held was of course a great political good, but it cannot mask the power of Madison's judgment about its incompleteness.

CONCLUSION

By 1883, then, the Fourteenth Amendment was almost as a dream. Little of what its framers intended remained as binding law, and the Constitution reverted almost to what it had been. That did not remain true for long, of course, but the story of the resurrection of the amendment is both long and oft-told, and not essential to our chief concern here: what change did the Fourteenth Amendment (attempt to) make in the status of rights in the Constitution? The only fair answer is that the amendment changed much—and little. It was not premised on a fundamentally new conception of rights, either natural or constitutional. The chief points of reference for the framers of the amendment were the rights doctrines of the original framers as expressed in the Declaration of Independence, the Bill of Rights, and similar places.

The significant change to be wrought by the amendment concerned not so much rights themselves, but the relation of the various governments in the federal system to rights. The amendment's framers did indeed change an important part of the federal system when they attempted to make the general government the ultimate guarantor of the natural and civil rights of all citizens. But even here, their caution and moderation must be noted. The framers did not attempt to replace the federal system with a purely national system possessing a Congress armed with plenary legislative powers. Instead, they sought to complete the system by affirming constitutional protection for rights already possessed in some sense, but theretofore unprotected in the old constitution. That they plausibly can be seen as fulfilling Madison's hopes for the constitution underscores their moderation and continuity with the past even in their most innovative moment.