1868 and All That

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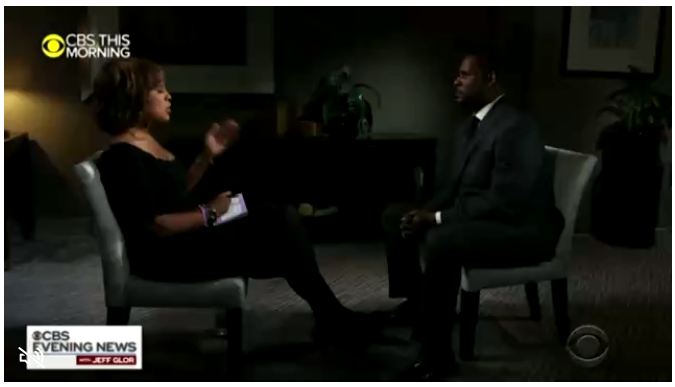
Was the 14th Amendment a new Constitution?

If getting legislation through Congress is comparable to making sausage, then the best comparison for constitutional amendments is the dropping of a nuclear bomb. Acts of Congress can be vetoed, struck down, and even neutered by executive hostility. But amending the Constitution is lengthy, unpopular, and (for most practical purposes) final. Amendments might well come with a warning label: Be careful what you wish for.

The 14th Amendment, which was ratified 150 years ago at the fever-pitch of Reconstruction, is exemplary. It is, for one thing, the longest and most oddly constructed of the Constitution's 27 amendments, since it contains not one but *five* unrelated provisions. It is also the first place where the Constitution was finally made to address a question that ought to have been of prime importance to the original Constitutional Convention in 1787—*who is a citizen of the United States*? Yet it introduced language into that definition, about the "privileges or immunities" of those citizens and their "equal protection," which has fueled judicial confusion ever since.

Ask a liberal, and you will be told that the 14th Amendment enacted "a second American constitution" that stands "in radical contrast to the Constitution drafted in Philadelphia and amended by the Bill of Rights in 1791." Ask a conservative, and you may hear that the 14th Amendment has become the Trojan horse for "living constitutionalism," while at the same time offering the best shield against affirmative action.



The 14th Amendment was the offspring of Reconstruction, and like much of what happened at the end of the Civil War to reintegrate the states of the breakaway Southern Confederacy into the federal Union, it was less of a plan and more of an improvisation. The war actually ended with a constitutional amendment—the Thirteenth, abolishing slavery—and in the euphoria that ensued over the Union's victory, it was easy for Abraham Lincoln and his triumphant Republican party to believe that this would be the "king's cure for all the evils" slavery had brought on the nation.

It wasn't. After Lincoln's murder, his vice president and successor, Andrew Johnson, allowed the Southern states to write their own rules for readmittance to the government—which they did, and in the most defiant fashion possible. They elected to Congress a solid phalanx of Southern Democrats, including 13 ex-Confederate generals, onetime members of the Confederate Congress, and the former vice president of the Confederacy. On the state level, they enacted a series of "Black Codes" to ensure that none of the freed slaves was permitted to vote, run for office, or even own firearms.

In fact, since slavery was now abolished, the three-fifths clause of the Constitution (which permitted slave states to count three-fifths of their slave populations toward determining the number of representatives they sent to Congress) ceased to operate, and the onetime Confederate states would henceforth be entitled to count *five-fifths* of their African-American populations, without conceding to them a single civil right worth the name. The same secessionists who brought on the Civil War could thus be reelected to Congress, and in greater numbers than ever before. Nervously, Republicans realized that it would not take much before these newly returned Southerners reestablished their old prewar alliances with northern Democrats, repealing wartime Republican legislation on banking, tariffs, and a transcontinental railroad, and maybe even voting for the federal government to assume the Confederacy's wartime debts.

To head them off, the Republican majority in Congress refused to seat the new Southern representatives and then began passing legislation protecting various civil rights for the freedmen, creating a new federal agency, the Freedmen's Bureau, to help implement them. But statutes are only statutes, and President Johnson unhesitatingly vetoed the Freedmen's Bureau bill and every other piece of civil rights legislation that crossed his desk. In frustration, the Republican-dominated Joint Committee on Reconstruction turned once again to the amendment weapon and proceeded to design a document that would plug the holes the 13th Amendment hadn't.

Some of the hole-plugging was relatively straightforward. When the Joint Committee reported the text of the new amendment to Congress in April 1866, it clearly banned payment by the federal government (or any state government) of "any debt or obligation incurred in aid of insurrection or rebellion against the United States." Likewise, Confederate generals, congressmen, judges, and vice presidents would be ineligible to hold federal office without an explicit congressional pardon. Above all, no Confederate state would be able to inflate its representation in Congress by counting the newly freed slaves unless those freedmen were also granted equal political participation as citizens in electing those representatives.

But what made someone a *citizen*? The term was used five times in the Constitution's text, but the usage was divided between references to citizens of the states and citizens of the United States, and without defining either. The Supreme Court's infamous *Dred Scott* v. *Sanford* decision of 1857 tried to impose a definition—*jus sanguinis*—which, like ancient Athens, established citizenship by biological descent. Hence, an African-American like Dred Scott could have no standing before the U.S. Supreme Court because, being of African descent, he was incapable of being a U.S. citizen. "A free negro of the African race, whose ancestors were brought to this country and sold as slaves," announced Chief Justice Roger Taney, "is not a 'citizen' within the meaning of the Constitution of the United States," nor could he ever be entitled "to any of the privileges and immunities of a citizen."

Thaddeus Stevens, the most powerful member of the Joint Committee, believed he could decapitate these legal obstacles simply by adding to the proposed amendment a single sentence: "No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude." But Ohio representative John Bingham, who had made the original call for a new amendment, objected that this would actually clarify nothing, or at least nothing necessary to the fundamental problem of who was a citizen and what rights citizens were to enjoy. So the Joint Committee offered an alternative: first, define national citizenship, which it proposed to do on the basis of an entirely different rule, *jus solis*. *Jus solis* determined citizenship not by blood or biological descent, but by place of birth. Hence, "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." That would include virtually all of the freed slaves, without any further ado.

But what, exactly, would this citizenship confer on the citizen? Bingham answered that in a second clause aimed directly at any effort to strip away political participation from the freedmen through the Black Codes. "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 Senate passed the new amendment by a majority of 33-to-11 on June 8, 1866, followed by a whopping 120-to-32 margin in the House of Representatives on June 13.

Ratification, however, proved more rocky, especially since none of the former Confederate states wanted to strip itself of powers it thought Andrew Johnson had promised to protect. Even though Congress had begun installing new state governments in the South under the Reconstruction Acts of 1867, only 22 states had ratified the amendment by its first anniversary, six shy of the needed two-thirds. It took a blunt threat from Congress to refuse seating in the House or Senate to any ex-Confederate state failing to ratify the amendment to move five Southern states (and Iowa) into providing the clinching votes. (Even then, Ohio, Oregon, and New Jersey attempted to rescind their ratifications when their state legislatures passed into Democratic hands.) The final ratification came on July 9, 1868, from South Carolina's newly reconstructed Republican legislature.

For Republicans like John Bingham, the most dramatic part of the 14th Amendment was the shift in defining national citizenship from Chief Justice Taney's *jus sanguinis* to *jus solis*, followed closely by the sharp limitations on the damage resulting from the end of the three-fifths clause and the refusal to assume the Confederate debt. All modern legal argument, however, has been about the phrases Bingham wrote into the second sentence of the amendment, about privileges or immunities, due process, and equal protection.

The Constitution already contained language about "privileges and immunities" in Article IV, and about "due process" in the Fifth Amendment. But it was far from clear whether Bingham intended merely to reaffirm that usage or to introduce something new. "Privileges and immunities" was a phrase borrowed from English common law and appeared to mean nothing more than that residents of one state who did business in, or who traveled through, another state should not be denied access to the opportunities and protections of that other state. (This might seem obvious today; it was much less so before 1787, when states like New York attempted to impose tariffs on goods from other states.) In the same way, concerns about "due process" were confined to questions about correct judicial procedure, not about the substantive "fairness" of the laws.

But Bingham's language about "privileges or immunities" was different, since the 14th Amendment spoke not about state-to-state comity but about what seemed to be an entirely new category, the "privileges or immunities of citizens of the United States." Bingham offered differing explanations of what these new "privileges or immunities" were, but he thought they involved at least

some of the Bill of Rights, and perhaps even parts of Article IV, and that these overruled state laws. “That great want of the citizens and the stranger, protection by national law from unconstitutional State enactments, is supplied by the first section of this amendment,” Bingham announced.

On the other hand, there is less evidence that Bingham’s “privileges or immunities” intended to justify federal involvement in a wide range of state-based civil rights, such as voting. The amendment, Bingham explained, aimed only at enforcing “the bill of rights as it stands in the Constitution today. It ‘hath that extent—no more.’ ” Five years later, Bingham added that “the privileges and immunities of citizens . . . are chiefly defined in the first eight amendments,” but exist “contradistinguished from” the civil rights belonging to “citizens of a State.”

In the 20th century, however, the 14th Amendment became the rationale for an “incorporation” doctrine that used “privileges or immunities” and “due process” to hold state laws increasingly accountable to the Bill of Rights. The incorporation doctrine has been notorious as the foundation for much of modern “judicial activism,” beginning with *Gitlow* v. *New York* in 1925, which saw the Supreme Court consider New York’s Criminal Anarchy Law as a violation of the First Amendment, and blossoming under the hand of Justice Hugo Black. On the other hand, incorporation has also become an ally of conservative defenders of gun-ownership rights, since the two landmark cases that struck down municipal gun restrictions (*District of Columbia* v. *Heller* and *McDonald* v. *City of Chicago*) were based on the Supreme Court’s invocation of the Second Amendment. Conservatives, in fact, were infuriated when the Court failed to apply the takings clause of the Fifth Amendment in *Kelo* v. *New London*; they had more reason to rejoice last month when *Masterpiece Cakeshop* v. *Colorado Civil Rights Commission* invoked the First Amendment to overturn a state administrative ruling.

Looking back over a century and a half, it is difficult to see the 14th Amendment as a radical document, since (at least in its original intent) it made no explicit effort to federalize any broad range of civil rights. What is also true is that once the amendment was in place, it proved difficult to prevent that from happening. Perhaps the time may be at hand for the Supreme Court to clarify just how expansive it really wishes John Bingham’s amendment to be.

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