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The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition

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THE FOURTEENTH AMENDMENT: A SECOND AMERICAN REVOLUTION OR THE LOGICAL CULMINATION OF THE TRADITION?

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One of the great submerged issues in American constitutional theory is the relation between the two periods of textual constitutional change, the Founding (including adoption of the Bill of Rights) and the Reconstruction. What is the connection between the constitutional principles of these periods? How shall we integrate the Fourteenth Amendment into the principles of the Constitution as a whole? If we treat the Fourteenth Amendment as the logical culmination of the American legal tradition, we may unintentionally whitewash the past and underemphasize the importance of slavery to our constitutional experience. If we treat the Fourteenth Amendment as a revolutionary alteration in our form of government, we may underemphasize the themes of rights and equality in the original Constitution and unintentionally validate the proslavery position on constitutional interpretation. Either way there are hazards.

It would be foolish to contend that the constitutional order created by the Reconstruction Amendments (especially in the fullness of their interpretation almost 100 years after the fact) was merely a step in a smooth progression of constitutional history. The extraordinary character of the change—three significant amendments, supplemented by a series of enforcement acts that continue to be the predicate for the large majority of our constitutional and civil rights litigation—is apparent for all to see. But have we not gone too far in the other direction? One of our finest constitutional scholars argues that the post-1870 constitutional order should be seen as a Second Republic, a radically different regime from the First.[1] One of our most loved jurists has stated his opinion that the original constitutional order was so radically defective that, from the

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1. BRUCE A. ACKERMAN, WE THE PEOPLE 81-105 (1991). To be sure, Ackerman—unlike Justice Marshall, *see infra* note 2,—does not see the Fourteenth Amendment as repudiating the original Constitution; but he understands the two periods of constitutional change as embodying different and (to a significant extent) inconsistent principles, which it is the task of

vantage of the present, he can see little in it to celebrate.[2] On the occasion of the 125th anniversary of the Fourteenth Amendment, I offer this Essay as a reminder that the Amendment represented philosophical continuity as well as change. In important respects, the Fourteenth Amendment was the logical culmination of the theory of the original Constitution.

I. THE TEXT OF THE FOURTEENTH AMENDMENT DOES NOT REFLECT A RADICAL TRANSFORMATION

Consider the text. The substantive content of the Fourteenth Amendment is concentrated in its second sentence, which contains three parts. No state may "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[3] No state may "deprive any person of life, liberty, or property, without due process of law."[4] And no state may "deny to any person within its jurisdiction the equal protection of the laws."[5] Far from reflecting the revolutionary developments of a new regime, these key provisions deploy the very language of the documents of the Founding. They represent no new theory of just government but a recognition that the American principles of just government pertain to the people of all the states, even if some of the states had been less than faithful in applying them. Thus, Thaddeus Stevens was able to tell the House of Representatives in his speech introducing the measure: "I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted in some form or other, in our Declaration of organic law."[6]

The Privileges or Immunities Clause, the heart and soul of the Fourteenth Amendment, was borrowed from the first clause of Article IV, Section 2,[7] which in turn was borrowed from Article IV of the Articles of Confederation. In the original Constitution, the concept of "privileges and immunities" served to protect the fundamental civil rights of the citizens of the various states when they might be present in the jurisdic-

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the courts to integrate. See *infra* notes 69-70 and accompanying text for a further discussion of the problem of integration.

2. *See* Justice Thurgood Marshall, Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association (May 6, 1987), *reprinted in* Thurgood Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 VAND. L. REV. 1337, 1338 (1987).

3. U.S. CONST. amend. XIV, § 1, cl. 2.

4. *Id.* cl. 3.

5. *Id.* cl. 4.

6. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

7. *Compare* U.S. CONST. amend. XIV, § 1, cl. 2 *with id.* art. IV, § 2.

tion of other states. New York was not permitted to treat the citizens of Pennsylvania as if they were foreigners. Pennsylvanians, and all Americans, were fellow citizens, entitled to all the rights—the "privileges and immunities"—of citizens. The words serve a similar function in the Fourteenth Amendment; but in their new context the point was to require the states to respect the fundamental civil rights *of their own citizens*. South Carolina was not permitted to treat a portion of its own population as second-class citizens. The former slaves were entitled to all the rights of citizens of the United States.

The Due Process Clause of the Fourteenth Amendment bound the states to the same norms of legal regularity—the rule of law—that had bound the United States since adoption of the Fifth Amendment.[8] Government, according to the two Due Process Clauses, must be something more than the arbitrary will of those in power. It must operate according to "law"—to a system of settled rules. Each person would retain his natural rights to life, liberty and property, unless there were validly authorized and enacted rules of general applicability, administered according to established procedures, to the contrary. To be sure, the Fifth Amendment did not apply to the state governments, only to the federal. But this had been because the People feared the potential arbitrariness of a distant and untried continental authority. Now that experience showed that the close and familiar state governments equally (more!) threatened the rule of law, the only sensible course was to extend the constitutional protection to the states. This cannot be deemed a radical departure in political theory.

Some combination of privileges or immunities and due process intimated a more far-reaching change: to apply most of the provisions of the Bill of Rights to the states.[9] But even this was less revolutionary than it looked. Most of the truly important provisions of the Bill of Rights already were included in the various state constitutions, so that the main effect of this change was institutional: it made the federal courts, rather than the state courts, the interpreters of constitutional rights. We have

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8. Arguably, the principle of due process was implicit in the original Constitution, even before the Due Process Clause was added by amendment. Under Article I, the most powerful branch of government, the legislative branch, is authorized to act only through the medium of "law." *See* U.S. CONST. art. I. Under Article II, the executive branch is bound to "take Care" that the "law" be "faithfully executed." *Id.* art. II, § 1, cl. 8. Moreover, Article I, Sections 9 and 10 bar both states and the federal government from passing ex post facto laws and bills of attainder. *Id.* art. I, §§ 9-10. These represent important norms of legality, independent of the explicit due process provision.

9. For an excellent analysis of the incorporation of the Bill of Rights, see Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. (forthcoming 1992).

no way to know how this institutional change may have affected the content of the rights. For most of our history, the federal courts have taken a more expansive view, but recent experience shows that the opposite is also possible.[10]

The Equal Protection Clause is the only part of the Fourteenth Amendment that had no equivalent in the original Constitution or the Bill of Rights. As John Farnsworth of Illinois commented: "[T]here is but one clause in [Section 1 of the Fourteenth Amendment] which is not already in the Constitution."[11] But was the Equal Protection Clause wholly without prefiguration in the original Constitution? Might it not be thought that a freedom from arbitrary, hostile or unreasonable classification is implicit in the idea of due process? This is more than an idle question. There is no constitutional provision explicitly binding the federal government to the equality norm (the Equal Protection Clause applies only to the states); so unless the principle of due process implies some degree of equal protection, the federal government is free to discriminate as it chooses (within the bounds of the rule of law).

The Supreme Court has held that the Due Process Clause of the Fifth Amendment implicitly contains an equality requirement "precisely the same" as that of the Equal Protection Clause.[12] If that is true, then the Equal Protection Clause is surplusage and thus no innovation at all. If equal protection radically departs from the original constitutional scheme, the federal nondiscrimination cases were wrongly decided.[13] Unfortunately, it is difficult to tell whether the Supreme Court's holding on this issue is correct because it has offered so little explanation for its position.[14]

Neither answer to this question is wholly implausible. To be judged by the color of one's skin is the antithesis of fair process; it would be better to have no hearing, or a biased judge, or standardless discretion,

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10. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495-98 (1977).

11. CONG. GLOBE, 39th Cong., 1st Sess. 2439 (1866). Farnsworth went on to say that the principle of equal protection should be uncontroversial. *Id.*

12. Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975).

13. From the point of view of the modern Civil Rights movement, that might not be all bad. If the federal nondiscrimination cases were wrong, then Congress would be free to authorize affirmative action programs, without the pesky problem of skeptical judicial review.

14. The first such holding was in Bolling v. Sharpe, 347 U.S. 497 (1954), a companion case to Brown v. Board of Education, 347 U.S. 483 (1954), involving the District of Columbia public schools. As a matter of judicial statecraft, the imperative in *Bolling* was clear: If the Court had allowed the federal government to continue to segregate its schools the apparent hypocrisy would have made *Brown* all the more unenforceable. The opinion in *Bolling* consisted of little more than the statement that "it would be unthinkable" that the "same Consti-

than racist categorization. In this respect, to treat racial discrimination as a due process problem makes sense, at least if we assume that the categorization is being used as a substitute for individuated judgment. But the equation of due process with equal protection obscures important differences between the issues of rights and equality.[15] It is possible for an egalitarian regime to violate the rule of law and for a law-governed regime to indulge in class legislation.[16] These are two different problems. While in some cases the two concepts are complementary, for the most part they take their bearings from entirely different considerations.

Due process judgments turn on whether government action accords with the established customs and procedures of our legal system, while equal protection represents a break from the discriminatory norms of the past. Due process is conservative and equal protection is transformative.[17] What does it mean to say that the latter is included in the former? Of course, even the confusion of rights and equality (if it is confusion) can be understood as the legacy of the Founding: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness."[18] There is a complex connection in the political theory of the Founding between equality and liberty,[19] which should make us hesitant to say that the Equal Protection Clause is too radical a departure.

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tution" (putting aside the fact that two quite different clauses were involved) would impose "a lesser duty on the Federal Government" than on the states. *Bolling*, 347 U.S. at 500.

Bolling expressly denied that due process and equal protection "are always interchangeable phrases." *Id.* at 499. But ever afterward, the Court has treated them as such, and has never seen fit to explain its rationale.

Bolling could have been predicated on a structural argument that in its capacity as general local government for the District of Columbia and the territories, Congress is bound by the same constitutional norms that bind the states. *Compare* Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572 (1976) (applying heightened scrutiny to discrimination against aliens by territorial or District of Columbia governments) *with* Matthews v. Diaz, 426 U.S. 67 (1976) (applying rational basis scrutiny to national legislation discriminating against aliens). This would not explain the later cases applying equal protection to national legislation.

15. On the difference between equality and substantive rights, see generally Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 539-40 (1982) (defining equality as proposition that "people who are alike should be treated alike" and defining substantive rights as "claims to power").

16. The People's Republic of China might be an example of the former and the Union of South Africa an example of the latter.

17. *See* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988).

18. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

19. *See* Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1518-23 (1989).

This is not to say that the Fourteenth Amendment made no important changes in the constitutional structure, but only that those changes did not reflect a radical transformation of the political theory that underlay the original Constitution. The Fourteenth Amendment *did* reflect two very important subsidiary changes in constitutional theory. First, it established the federal government, rather than the states, as the principal protector of individual rights. Second, it took major steps toward the eradication of the official inequality that was the principal vestige of the slave system. Let us consider how radical these changes were.

II. FEDERAL GOVERNMENT ESTABLISHED AS PRINCIPAL PROTECTOR OF RIGHTS

The Fourteenth Amendment invests the federal government with the authority and responsibility to protect each individual's civil rights from invasion by the state governments. In the words of the principal author of the amendment, John Bingham of Ohio, it "protect[s] by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State."[20] The Privileges or Immunities Clause, which required the states to respect the fundamental civil liberties of their own citizens, was to be the main instrument of protecting rights. This clause was emasculated by the *Slaughter-House Cases*[21] but its essential protections have been enforced by the modern Court in the guise of due process and equal protection.[22] By contrast, under the original Constitution the powers of the various states over their own citizens were subject (as a matter of federal constitutional law) to only a few limitations listed in Article I, Section 9. There would be no ex post facto laws, bills of attainder or laws impairing the obligation of contracts. All else was left to state law. The transfer of power over rights from the state to the federal level was (along with the end of slavery) the greatest change wrought by the Civil War.

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20. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).

21. 83 U.S. (16 Wall.) 36 (1873). The Court held that the Privileges or Immunities Clause, instead of protecting the fundamental civil rights to which the phrase "privileges and immunities" referred in Article IV, instead protected a narrow range of rights arising specifically from federal citizenship. *Id.*

22. Much of the modern law of substantive due process and of equal protection reflects the original understanding of privileges or immunities. The main effect of this clause-switching has been to eliminate the distinction between the class of rights that pertained to "all persons" and the class of rights that pertained only to "citizens of the United States." It may also have lent plausibility to results-based theories of equality, in place of the equal rights principles of the Privileges or Immunities Clause.

But before we conclude that this shift of power, momentous though it was at a practical level, was equally a change in constitutional theory, we should revisit the debates over adoption of the original Constitution. The debate over ratification of the Constitution hinged on one essential question: Was the proposed federal government so powerful as to threaten our liberties? As the debate began, the advocates of the Union concentrated on the need for a government large and energetic enough to deal with problems of international relations and internal commerce. Opponents of the Union concentrated on the question of liberty. In his extraordinary speech before the Virginia ratifying convention, Patrick Henry exhorted his listeners: "You are not to inquire how your trade may be increased, nor how you are to become a great and powerful people, but how your liberties can be secured; for liberty ought to be the direct end of your Government."[23] And could they not "plainly see" that "our rights and privileges are endangered" by the proposed plan of Union? "The rights of conscience, trial by jury, liberty of press, all your immunities and franchises, all pretensions to human rights and privileges, are rendered insecure, if not lost, by this change so loudly talked of by some, and inconsiderately by others."[24] It was to the states, the Anti-federalists argued, that the people "look up for the security of their lives, liberties & properties."[25] No government over so extensive a territory as the United States, so distant from the people, with the full range of powers vested in it by the proposed Constitution, could be trusted or controlled. "[S]uch a government will degenerate to a despotism," wrote one opponent of ratification.[26] "[T]his system must be far too formidable for any single State, or even for a combination of the States, should an attempt be made to break and destroy the yoke of domination and tyranny which it will hereafter set up," said another.[27]

Advocates of the Constitution were not content to see the debate framed in these terms: energy versus liberty. James Madison, the finest theoretician among the Federalists, urged instead a powerful new con-

23. Patrick Henry, Speech to the Virginia Ratifying Convention (June 5, 1788), *in* 1 THE FOUNDERS' CONSTITUTION 288, 289 (Phillip Kurland & Ralph Lerner eds., 1987). The liberties that concerned the Anti-federalists included both republican rights of self-government and liberal rights of individual freedom.

24. *Id.*

25. Luther Martin (June 20, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 341 (Max Farrand ed., 1966).

26. *Letters of Agrippa,* MASS. GAZETTE, Dec. 3, 1787, *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST 75, 75-77 (Herbert J. Storing ed., 1981).

27. John Smilie, Speech at Pennsylvania Ratifying Convention (Nov. 28, 1787), *in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 23, at 263-64.

ception of the relation between federalism and rights.[28] The fallacy in the Anti-federalists' argument, he said, is that it assumes that the threat to liberty comes from government officials not sufficiently controlled by the People. In a democratic republic, however, the more serious threat comes from the ability of one faction of the People to oppress the others. This is most likely to take place in small jurisdictions:

> The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.[29]

The larger Union, rather than being a threat to liberty, was thus a more secure guarantor of liberty:

> Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be most difficult for all who feel it to discover their own strength, and to act in unison with each other.[30]

By this logic, the states are more dangerous than the federal government, and there is an even greater need for constitutional safeguards against state power than against federal power. Accordingly, Madison devoted much of his effort at the Convention to securing a federal veto over state law, and after that effort proved unsuccessful, he sought to impose "Bill of Rights" provisions on state governments. During the debates in the First Congress over constitutional limitations on the federal government, Madison moved for an amendment that "no State shall infringe the equal rights of conscience, nor the freedom of speech or of the press, nor of the right of trial by jury in criminal cases."[31] He explained that this was "the most valuable amendment in the whole list. If there were any reason to restrain the Government of the United States from infringing upon these essential rights; it was equally necessary that they should be secured against the State Governments."[32] This position

28. The argument is spelled out in THE FEDERALIST No. 10 (James Madison).

29. *Id.* at 48 (James Madison) (Henry Cabot Lodge ed., 1888).

30. *Id.* at 58-59.

31. 1 ANNALS OF CONG. 783 (Joseph Gales ed., 1789).

32. *Id.*

followed from the theory of *Federalist No. 10*.[33] If smaller jurisdictions are more likely to have oppressive majority factions than large, extended republics, then the "most valuable" constitutional constraints would be those upon the states.

Madison won some and lost some. His argument for the Union prevailed, but the popular fear of the new federal government was sufficiently strong that opponents were able to extract the promise of a Bill of Rights to limit federal power. Madison's proposal for a Bill of Rights for the states passed the House of Representatives by a narrow margin[34] and failed in the Senate by a similarly narrow margin.[35]

When the Fourteenth Amendment was adopted, it can be said that the Constitution assumed its complete Madisonian form. Now for the first time, the federal government was recognized as the protector of rights, and states as the probable oppressors. Congress, which is the most reliable of republican institutions under the Madisonian theory, was expressly charged by Section 5 of the Fourteenth Amendment with the power to enforce its measures against the states.[36] The most profound practical change wrought by the Fourteenth Amendment, therefore, was not a radical alteration in the theory of the Constitution, but the fulfillment of that theory. With the Fourteenth Amendment the Anti-federalists' rearguard action against federal power was finally defeated. The proponents of the Constitution had triumphed over its opponents, bringing us both the blessing and the curse of a more centralized regime.

Admittedly, the account in the preceding paragraphs has an element of exaggeration. The Federalists were far from wholehearted nationalists; they continued to respect state sovereignty and feared unlimited federal power. Madison's full argument was that the Constitution's division of governmental authority between state and federal levels, which would "control each other," provides "a double security" to the rights of the people.[37] But the belief in states' rights (in their place) was an element of Reconstruction constitutional theory as well. Proponents of the Fourteenth Amendment, too, respected states' rights (while rejecting the extreme Southern doctrine of exclusive state sovereignty) and attempted to confine federal power to that necessary to achieve their goal of protecting rights.[38] Typical was radical Republican Richard Yates's declaration

33. THE FEDERALIST No. 10 (James Madison).

34. *See* 1 ANNALS OF CONG., *supra* note 31, at 767.

35. *See* 2 *id.* at 78.

36. U.S. CONST. amend. XIV, § 5.

37. THE FEDERALIST No. 51, at 325 (James Madison) (Henry Cabot Lodge ed., 1888).

38. *See* HAROLD M. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION 438-40 (1973); WILLIAM E. NELSON,

that "I would be the first to resist all attempts upon the part of the Federal Government to interpose tyrannical usurpation of power in controlling the legislation. The States are sovereign in every sense in which it is desirable they should have sovereignty."[39]

At each stage, the victors positioned themselves not at an extreme, but in favor of a certain balance, in which federal and state power would both be important. At each stage, however, the victors were those who tilted in favor of greater federal and less state power. A more nuanced account of the federalism principles of the Federalists and the Reconstructionists does not, therefore, detract from the similarity in their constitutional principles. The advocates of the Fourteenth Amendment stood in the shoes of the advocates of the Constitution of 1787.

III. LEGALLY SANCTIONED INEQUALITY ABOLISHED

The other great change wrought by the Fourteenth Amendment was to introduce a constitutional prohibition against invidious discrimination. This commitment stood in marked contrast to the prior system, in which half the nation had as its "cornerstone"[40] the enslavement of many hundreds of thousands of persons of African descent. Those who were not racists themselves were remarkably insouciant about the issue of race. So central to the social and legal system of the antebellum period was the subordination of the African race, and so marked a departure was the period of Reconstruction that Justice Thurgood Marshall said the original Constitution did not "survive[ ] the Civil War."[41] The original Constitution, said Marshall, was "defective from the start."[42]

To what extent did the endemic racism of the white population at the time of Founding find its way into the original Constitution itself? The Constitution contained no mention of race. If the common racism of the Founding period was incorporated into the Constitution, it must be seen in its treatment of slavery. The Constitution contained three eu-

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39. Governor Richard Yates, Annual Message to the Illinois Legislature (Jan. 1885), *in* 1 REPORTS TO THE GENERAL ASSEMBLY OF ILLINOIS, 24TH SESS. 28, *reprinted in* Maltz, *supra* note 38, at 233-34.

40. Confederate Vice President Alexander Stephens's term, not mine. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 14 (1988) (referring to slavery as cornerstone of Confederacy).

41. Marshall, *supra* note 2, at 1340.

42. *Id.* at 1338.

phemistic references to slavery[43] and many other provisions that could have a bearing on the slavery question. Was the original Constitution a pro-slavery document? Or did it—if properly interpreted—contain the seeds of destruction of the institution of slavery?

This is not a new dispute. During the 1850s, both sides in the slavery controversy maintained that their position was enshrined in the very language of the Constitution. The Southern doctrine, most ably articulated by sometime Senator and Vice President John C. Calhoun, maintained that slavery was entitled to the full protection of the federal Constitution and was constitutionally insulated from federal interference. Note that this theory was not based on a consistent states' rights position. Calhoun and the Southerners were happy to insist that federal power be employed against the free states when necessary to protect their "peculiar institution."

The contrary position, articulated by such distinguished figures as Frederick Douglass and future Supreme Court Chief Justice Salmon P. Chase, maintained that men and women of African descent were recognized by the Constitution as "persons." By virtue of the Due Process Clause, they could not be deprived of "liberty" in areas under federal control, and by virtue of the Privileges and Immunities Clause they could, if free, travel throughout the United States and enjoy all the fundamental rights accorded to white citizens.[44] In sum: "Freedom is national; slavery only is local and sectional."[45] This argument has considerable logical force. If a deprivation of liberty under color of law can be effectuated only with due process of law, then outside of those jurisdictions in which slavery is supported by positive law, slavery is unconstitutional. And once a person is free, he becomes entitled to all the privileges and immunities of free persons; the Constitution recognizes no intermediate status between slave and free. Slavery is confined to the slave states, and even they must respect the rights of those freed, either by manumission or by the operation of the laws of other states.

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43. *See* U.S. CONST. art. I, § 2, cl. 3 (counting slaves as three-fifths of person for purposes of apportioning representatives and levying taxes among states); *id.* art. I, § 9, cl. 1 (allowing states to admit through migration or importation before 1808 such persons as they think proper to admit); *id.* art IV, § 2, cl. 3 (requiring delivery of escaped slaves upon claim of owner).

44. For a summary of the Abolitionist constitutional theory, see ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 75-77 (1970).

45. CONG. GLOBE, 31st Cong., 1st Sess. 2076 app. at 474 (1850); *see also* Randall Kennedy, *Comment*, 47 MD. L. REV. 46 (1987) (discussing black abolitionist theories based on constitutional text).

By 1856 the antislavery constitutional theory was part of the platform of the Republican Party, and—at least in moderate form—was widely accepted in the North.[46] Moreover, the Fourteenth Amendment was framed largely by statesmen who adhered to the abolitionist constitutional theories of the antebellum period. Thus, if Douglass, Chase and their fellow Republican constitutionalists were correct, the Fourteenth Amendment was not radically discontinuous from the original Constitution, but should be understood as its ultimate fulfillment. Slavery, according to their view, was abhorrent to the fundamental principles on which this nation was founded; it was tolerated by the Founders only because of pressing necessity; it was extended only because of the strength of the slaveocracy; Reconstruction was a return to original principles.[47]

Of course the Supreme Court in *Scott v. Sandford*[48] (*Dred Scott*) rejected virtually every element in the Republican constitutional theory. In its stead, the Court embraced Calhoun's doctrine that slavery enjoys the special protection of the Constitution. The only power the federal government was given with respect to slavery, according to *Dred Scott*, was "the power coupled with the duty of guarding and protecting the owner in his rights."[49] If *Dred Scott* was an authentic reading of the original Constitution, then the thesis that the Fourteenth Amendment was a radical departure gains plausibility.

Chief Justice Taney's opinion in *Dred Scott* contains two independent holdings, both of which contradicted essential elements of Republican constitutional theory. The first was that a free person of African descent is not, and cannot be, a "citizen" of the United States for purposes of bringing suit in federal court.[50] This has two implications, one practical and one theoretical. The practical implication is that former slaves would forever be consigned to second-class status in the United States—a status barely superior to that of a slave.[51] They would not be free to travel about the Nation, to transact business, or to protect their rights in court, all of which were rights of citizens under Article IV. The slaveholding South was thus protected against one of the greatest threats

46. FONER, *supra* note 44, at 83, 85.

47. For a recent articulation of this thesis, see GEORGE ANASTAPLO, THE CONSTITUTION OF 1787: A COMMENTARY 11 (1989).

48. 60 U.S. (19 How.) 393 (1857).

49. *Id.* at 452.

50. *Id.* at 404.

51. On the status of free blacks in Virginia, see A. Leon Higginbotham, Jr. & Greer C. Bosworth, *"Rather than the Free": Free Blacks in Colonial and Antebellum Virginia*, 26 HARV. C.R.-C.L. L. REV. 17 (1991).

to the maintenance of slavery: the presence of free black citizens, whose very existence and legal status would undermine the moral authority of slavery.

The theoretical implication of the first *Dred Scott* holding is that the difference in status between slave and free person is not simply one of the positive law of the slave states, but grounded in nature. The opinion treated the difference in status as one of race rather than as one of condition of servitude. Even if a slave's position under the positive law is changed—either by change in the law or by moving to a free state—his race cannot be changed, and his inferior legal status is ineradicable. By the Constitution of the United States, according to *Dred Scott,* the black person could never become a citizen.

Dred Scott's second holding was that Congress lacks the power to exclude slavery from the territories west of the Mississippi.[52] This holding is no less important than the first. If Congress lacked the power to exclude slavery from the territories, then slavery would spread. According to common beliefs of the day, slavery and free labor were incompatible: free workers cannot flourish in a society in which labor has been reduced to property.[53] Moreover, as slavery took root in the West, the free states would become increasingly outnumbered and politically impotent. On these points there was no disagreement between South and North. The future character of the Nation, all agreed, would be determined by the character of Western development. When Lincoln declared that the Nation could not long endure "half slave and half free"[54] he was not making a moral point (as if he had said that the Nation "ought not" so to endure) but a prediction: one constitutional ideology or the other—slavery or freedom—would eventually prevail. The outcome would hinge upon the question of Western expansion.

Perhaps more insidiously, the second holding of *Dred Scott* undermined the very lawfulness of antislavery statutes of the northern states. The core of Chief Justice Taney's reasoning was that it is a violation of "due process of law" to deprive a slaveholder of his property in slaves—even if the slaveholder takes his slaves into a jurisdiction in which slavery is abolished, and even if he remains there for a period of years:

> [T]he rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived

52. *Dred Scott,* 60 U.S. at 452.

53. FONER, *supra* note 44, at 58-61.

54. Abraham Lincoln, "House Divided" Speech at Springfield, Illinois (June 16, 1858), *in* LINCOLN: SPEECHES AND WRITINGS, 1832-1858, at 432 (Don E. Fehrenbacher ed., 1989).

> of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.[55]

If taken seriously, this would mean that slavery could be extended throughout the Union, and that the northern states lacked any lawful power to prevent its spread. An assertion of such power "could hardly be dignified with the name of due process of law." To be sure, such an assertion of power by an antislavery state government would not violate the Fifth Amendment, which applied only to the federal government; but it would violate cognate provisions of the state constitutions. The federal courts would not have authority to enforce this interpretation; but if *Dred Scott* is taken seriously, enforcement of antislavery laws in the North would be an act of lawlessness—so declared by the Supreme Court of the United States.

These are the holdings of *Dred Scott*. If they constitute an authentic reading of the original Constitution, then the Fourteenth Amendment was indeed a radical break, and the appellation "a second American Revolution" would not be out of place. But contrary to the recent trend in constitutional commentary,[56] neither of *Dred Scott*'s holdings is remotely plausible and no objective reader of the original Constitution can subscribe to them.

Were free persons of color "citizens"? The term "citizen" is not defined in the Constitution, but Taney's approach to the question begins reasonably: "The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives."[57] This did not mean, of course, that to be a "citizen" one had to vote, for women and minors could not vote but

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55. *Dred Scott*, 60 U.S. at 450.

56. Professor Ackerman states that "[w]hile recognizing *Dred Scott* for the moral evil that it is, the modern judge is perfectly capable of considering that Chief Justice Taney might have had a legally plausible case for his morally notorious decision." ACKERMAN, *supra* note 1, at 64. Justice Marshall accepts *Dred Scott* as an authentic reading of the "original intent." Marshall, *supra* note 2, at 1340. Interestingly, a leading constitutional law casebook, in listing various "possibilities" about why Taney's opinion is "wrong," does not mention the possibility that it misread the Constitution. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 480-81 (2d ed. 1991).

57. *Dred Scott*, 60 U.S. at 404.

were nonetheless "citizens." It meant that one was represented, either actually or virtually. Curiously, however, Taney did not then consult the provision of the Constitution that most directly addresses the question of representation in the national legislature: Article I, Section 2. According to Article I, Section 2, representatives are to be apportioned among the states in accordance with "their respective Numbers, which shall be determined by adding to the whole Number of free Persons, . . . three fifths of all other Persons."[58] This indicates that the Constitution distinguished for purposes of determining representation not between white and black, but between slave and free. A free person of color is represented fully in Congress (whether or not he is given the right to vote); a slave is not. That means (according to Taney's own definition) he is a citizen. Moreover, the term "citizen" in the Privileges and Immunities Clause was adopted from a similar provision in the Articles of Confederation, which applied to all "free inhabitants."[59] There is no reason to believe that the change in language was intended to exclude free persons of color. Thus, the best conclusion based on the actual text of the Constitution was that free persons of color are citizens.

Chief Justice Taney did not, however, refer to this textual evidence. Instead he treated the issue as an historical question: "[W]ho were citizens of the several States when the Constitution was adopted?"[60] This could also have been a reasonable way of approaching the issue. But instead of consulting actual historical sources to determine whether free persons of color were deemed citizens of the states, Taney relied instead on broad generalizations, which he declared "too plain to be mistaken," that all persons of African descent "had for more than a century before been regarded as beings of an inferior order."[61] Had he consulted actual sources, as did his colleague Justice Benjamin Curtis, Taney would have discovered that no fewer than five of the original thirteen states at the time of formation of the Union not only recognized free persons of color as citizens, but accorded them the vote.[62] That blacks were deemed socially and politically inferior did not mean they were not entitled to the fundamental rights of citizens.

Dred Scott's second holding is no more firmly grounded. The first clause of Article I, Section 9 expressly recognized Congress's power to prohibit the slave trade immediately in all areas outside of the thirteen

58. U.S. CONST. art. I, § 2, cl. 3.

59. ARTICLES OF CONFEDERATION art. IV (1778).

60. *Dred Scott*, 60 U.S. at 407.

61. *Id.*

62. *See id.* at 572-75 (Curtis, J., dissenting).

original states, and in the rest of the country after 1808.[63] Article IV expressly vested governing authority over the territories in Congress, with no reservations of power about slavery or anything else.[64] The First Congress barred slavery from the Northwest Territories by an overwhelming vote, and subsequent Congresses barred slavery from other territorial lands in a series of compromise acts, invariably passed with Southern support.[65] If there had been the slightest reason to think that these acts violated the Constitution, some member of Congress would have pointed this out. Moreover, each of the northern states had abolished slavery within its own jurisdiction, and no one had contended that this violated due process. The notion that Congress lacked the power to restrict the spread of slavery, or that the abolition of slavery was a violation of due process, had no textual support and was contradicted by consistent historical practice.

So *Dred Scott* was wrong, plainly wrong, not just as a moral matter, but as a legal decision. That does not, however, make Douglass's and Chase's antislavery constitutional argument correct; both extremes could be wrong. It would be much more difficult, however, to demonstrate that the antislavery argument was incorrect than that *Dred Scott* was incorrect. It is true that most of the relevant actors during the early years of the Republic acted as if the antislavery interpretation were incorrect (most obviously, by allowing slavery into some of the territories, in violation of a plausible construction of the Due Process Clause). But, of course, many of them had powerful reasons of interest and of state for so acting. The worst that can be said, I think, is that the Constitution was neutral toward slavery, and by its failure to act against slavery, to some extent complicitous; but the better view is that the Constitution tolerated slavery, for a while, as the price of union, while leaving the antislavery position open for argument. Under this view, the Thirteenth and Fourteenth Amendments were important, but not because they brought us radical change: they were important as fulfillments of the original promise.

IV. CONCLUSION

Because the Fourteenth Amendment overturned the decision, it may not seem to matter for modern interpretation whether *Dred Scott* was

63. U.S. CONST. art. I, § 9, cl. 1.

64. *Id.* art. IV, § 3.

65. For a discussion of federal legislation regarding slavery in the territories, see DON E. FEHRENBACHER, SLAVERY, LAW AND POLITICS: THE *Dred Scott* CASE IN HISTORICAL PERSPECTIVE 41-71 (1981).

wrongly or rightly decided. Yet it does matter, both for our Nation's vision of itself and for our approach to constitutional interpretation. Two stories can be told about the Nation's progress toward eradication of slavery and its vestiges. Under one account, the principle of slavery is embodied in the original Constitution, in accord with the racist desires and presuppositions of the Founders. The struggle against slavery was profoundly countercultural, even subversive. It was a struggle against the Constitution. Progress, under this account, is achieved only by confrontation with and repudiation of the past. This story is consistent with Justice Marshall's conclusion that the Fourteenth Amendment was a radical break from "the outdated notions of 'liberty,' 'justice,' and 'equality,' " of the original Constitution.[66]

The other story is that slavery was antithetical to the deepest principles of the Constitution, tolerated only because of a combination of practical necessity and an over-optimistic belief that it would fade away as a result of its own inefficiency. The Fourteenth Amendment, under this account, was "revolutionary" only in the etymological sense of the word: it was a "turning back" to the original principles of the Founding, which had been corrupted and obscured by the power of the slaveocracy. Thus Abraham Lincoln could claim that "four score and seven years ago" the Nation had been "dedicated to the proposition that all men were created equal," and that the Civil War presented a test of the "endur[ance]," not the transformation, of that principle.[67]

Under one account, the heroes are those who struggle against the Constitution. Under the other, the heroes are those who appreciate the Constitution's real meaning and seek to return to its authentic principles. Since the one thing a written constitution cannot supply is a justification for following the written constitution, it is not too much to say that the force of American constitutionalism is affected by the telling of these stories. If our history shows that a frequent recurrence to the fundamental principles of the Constitution has been a force for justice, it provides an answer to the question: why be guided by the dead hand of the past? But if our history shows that the achievement of justice requires a willingness to struggle against the Constitution and to substitute new principles of governance in its place, then constitutionalism as a normative principle will be seriously jeopardized.

The relation between the Fourteenth Amendment and the original Constitution also has importance for our interpretive method. Under the

66. Marshall, *supra* note 2, at 1341.

67. Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865, at 536 (Don E. Fehrenbacher ed., 1989).

"continuity" thesis, the Fourteenth Amendment made two basic changes in the constitutional system: (1) It federalized the authority for enforcement of individual rights (while leaving the content of those rights essentially intact);[68] and (2) it introduced a new constitutional principle of equality before the law, which is consistent with but not explicit in the principles of the original Constitution. So understood, the integration of the Fourteenth Amendment into the original Constitution does not—with the exception of a few of the provisions of the Bill of Rights[69]—present inordinately difficult problems of integration and interpretation. Traditional methods of construction should be adequate for the task of interpretation. But if, as others contend, the principles of the Fourteenth Amendment are radically discontinuous from those of the original Constitution, then the problems of integration are immense, and the courts must exercise great ingenuity in making sense out of the combined document.[70] Indeed, so intricate is the task of integration and interpretation, under this view, that the judges will face endless permutations and possibilities, with little danger that anyone can say they erred.

These issues of historical judgment thus have bearing on many of today's constitutional controversies. To what extent can we understand American constitutional origins as normative for today? To what extent can traditional interpretive methodology be employed in the interpretation of the Constitution? There is an increasing tendency in the academic literature to answer these questions on the presupposition that the Fourteenth Amendment was a radical break from the tradition. It is important not to forget the other side of the debate.

68. This is not to say that the *application* of those principles in the modern world are unchanged.

69. *See* Mary A. Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 479-92 (1991) (discussing difficulties of applying Religion Clause of First Amendment to states).

70. This is the burden of Professor Ackerman's book. *See* ACKERMAN, *supra* note 1.