

FEDERALISM AND THE ORIGINAL FOURTEENTH AMENDMENT

KURT T. LASH*

This essay focuses on the creation of the Fourteenth Amendment and its impact on the founding principles of constitutional federalism. My conclusion, in brief, is that although the Fourteenth Amendment dramatically expanded the list of rights the citizens can assert against the states, it does so in a manner perfectly consistent with the principles of Madisonian federalism. In fact, the man who drafted Section One of the Fourteenth Amendment insisted that those federalist principles be preserved as the country moved forward.¹

The story of the Fourteenth Amendment begins on December 4, 1865, the opening day of the 39th Congress.² The Civil War was over,³ the Thirteenth Amendment was moments away from ratification,⁴ and representatives from the former rebel states stood before the Clerk of the House, waiting for their names to be called and to be readmitted to the seats that they had abandoned four years before.⁵ Their names were never called and they were left there—literally standing on the floor

* E. Claiborne Robins Distinguished Chair in Law, University of Richmond School of Law.

1. KURT T. LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP* 125–26 (2014).

2. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1 (1865).

3. Although effectively over at this point, the Civil War did not legally end until 1866. *See* J.G. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* 50 (Univ. of Ill. Press rev. ed. 1951) (1926).

4. *See* NANCY ERICKSON, S. HIST. OFF., S. PUB. 112–17, *THE SENATE'S CIVIL WAR* 24, <https://www.senate.gov/artandhistory/history/resources/pdf/SenatesCivilWar.pdf> [<https://perma.cc/DS8N-8BHF>] (last visited Sept. 10, 2018) (noting that the Thirteenth Amendment was ratified on December 6, 1865); *see also* THOMAS MCINTYRE COOLEY, *GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 202 n.1 (Boston, Little, Brown, & Co. 1880) (noting that the Thirteenth Amendment was officially adopted on Dec. 18, 1865).

5. *See* CONG. GLOBE, 39th Cong., 1st Sess. 3–5 (1865) (detailing the debate over whether to reinstate the representatives from the former Confederate States).

of the House.⁶ Defying the President of the United States, the Republicans in Congress refused to readmit the representatives of the former rebel states.⁷ Instead, the Republicans went about trying to determine when the southern states could be safely readmitted to the Union.⁸ There were two big problems that needed to be solved before the southern representatives could retake their seats.

First, the freedmen in the South needed to be protected from the infamous “Black Codes” that had denied freed men the equal rights of citizenship and the equal protection of person and property.⁹ But second and even more importantly, Congress had to prevent southern Democrats from taking over Congress once they were readmitted to the Union.¹⁰ This was a distinct possibility, ironically enough, because of the passage of the Thirteenth Amendment.¹¹

Under the original Constitution, slaves counted as three-fifths of a person for the purposes of slave state representation.¹² Now that those slaves were free, they would count as a full five-fifths of a person, and automatically increase the political power of the traitors of the Union.¹³ Congress could not let that happen.¹⁴ So in addition to protecting the rights of the freedmen, Republicans had to find some way to constrain the

6. *See id.* at 3–6.

7. *Id.*; *see also* ERICKSON, *supra* note 4, at 5, 27–28 (noting President Johnson’s desire to grant immediate representation to the former Confederate States).

8. To this end, Congress created the Joint Committee of Fifteen on Reconstruction to determine if, and under what conditions, Congress would readmit representatives from the former confederate states. *See* BENJAMIN B. KENDRICK, JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION: 39TH CONGRESS, 1865–1867, at 37–38 (1915).

9. *See* WILLIAM H. BARNES, HISTORY OF THE THIRTY-NINTH CONGRESS OF THE UNITED STATES 99, 146–47, 261–262 (New York, Harper & Bros. Publishers 1868) (discussing examples of “Black Codes” that existed during this period and the resulting gross deprivation of basic rights).

10. *See id.* at 312 (discussing the dangers of granting full representation to the former confederate states).

11. *See id.*; *see also* LASH, *supra* note 1, at 68.

12. *See* U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2.

13. *See id.* amend. XIV, § 2; *see also* LASH, *supra* note 1, at 68.

14. *See* BARNES, *supra* note 9, at 312 (noting the dangers of the South’s increased representation).

political power of the southern states before granting them re-admission.¹⁵

These two problems eventually would be solved by Section One and Section Two of the Fourteenth Amendment.¹⁶ But first, Congress had to decide whether an amendment was needed at all. Radical Republicans insisted that Congress enjoyed unlimited power to reconstruct the country.¹⁷ They rejected the theory of federalism and dismissed the Tenth Amendment as irrelevant in a post-Civil War world.¹⁸ According to their view, Congress had no need to go to the people to ask for a new amendment granting Congress new powers.¹⁹ Congress could move immediately, and do so by way of legislation, like the Civil Rights Act of 1866.²⁰

Not everyone in the 39th Congress, however, accepted the Radical Republicans' nationalist view of the Constitution.²¹ Moderate and conservative Republicans agreed that Congress needed to act, but they insisted that the Constitution, properly interpreted, constrained the powers of the national government.²² Before Congress could act, the people had to grant Congress the power to do so by adding a new amendment to the Constitution. One of these moderate Republicans was John Bingham, the author of Section One of the Fourteenth Amendment.²³ Bingham agreed with the goals of civil rights legislation, but insisted that in pursuing those goals, Congress had to pass a new amendment.²⁴ And until that happened, he believed

15. *See id.* at 324–25, 330 (discussing the importance of the representation issue and debating different approaches to a solution).

16. Section One included the Equal Protection Clause. U.S. CONST. amend. XIV, § 1. Section Two provided the new basis for representation, including protections against voting discrimination. *See id.* amend. XIV, § 2.

17. *See LASH, supra* note 1, at 78–79, 116; *see also BARNES, supra* note 9, at 366 (radical Republican Thaddeus Stevens arguing that “no amendment is necessary” for Congress to protect the rights of freedmen).

18. *See LASH, supra* note 1, at 78–79 (“[T]he radical [Republicans’] position rejected the idea of state autonomy in any form and viewed the national government as having general oversight powers over any matter affecting civil liberties in the states.”).

19. *See id.*

20. *See id.* at 115–16.

21. *See id.* at 78–81, 116, 125–29.

22. *See id.* at 78–79, 125–29.

23. *See id.* at 81–85, 152.

24. *See id.* at 126–29.

the Tenth Amendment prohibited the very legislation that Congress was trying to pass.²⁵

Speaking to his colleagues in the House of Representatives, Bingham insisted that Congress follow the principles of James Madison, and he quoted to his colleagues the Federalist Papers No. 45: “The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the state.”²⁶

This Madisonian principle, declared Bingham, was written into “the very text of the Constitution itself” through the Tenth Amendment.²⁷ In support of this statement, he quoted the amendment to his colleagues: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.”²⁸ Bingham believed in a constitution of enumerated national powers and enumerated national rights.²⁹ All non-enumerated subjects were reserved to the people in the states.³⁰ And what the Constitution lacked, Bingham insisted, was a clear statement requiring the states to respect the enumerated rights of national citizenship, particularly those listed in the Bill of Rights.³¹ Although applying the Bill of Rights against the states would have the effect of expanding the list of subjects listed in Article One, Section Ten, which were already constraining the states, neither Bingham nor any of the other moderate Republicans wanted to transform the basic federalist structure of the original Constitution.³²

25. *See id.* at 129.

26. CONG. GLOBE, 39th Cong., 1st Sess. 1093 (1865) (quoting THE FEDERALIST, NO. 45 (James Madison)).

27. *Id.*

28. *Id.*

29. *Id.* at 1291 (Speaking in opposition to the Civil Rights Act because of the lack of enumerated authority in the Constitution, Bingham stated, “I should remedy [the States’ abuses of power] not by an arbitrary assumption of power, but by amending the Constitution of the United States, expressly prohibiting the States from any such abuse of power in the future.”).

30. *See id.*

31. *Id.* at 1093–94 (“[B]ut where is the express power to define and punish crimes committed in any State by its official officers in violation of the rights of citizens and persons as declared in the Constitution?”).

32. *Id.* at 1292 (“I have advocated here an amendment which would arm Congress with the power to compel obedience to the oath, and punish all violations

The federal government would remain a government of limited enumerated powers, and it was precisely because of their continued belief in the federalist constitution that moderates like Bingham and the other Republicans insisted that an amendment was necessary in the first place.³³ Bingham therefore proposed an amendment³⁴—one empowering Congress to enforce the privileges and immunities of American citizenship, and the equal due process rights of all persons.³⁵ His proposal ultimately became Sections One and Five of the Fourteenth Amendment.³⁶

Those amendments would solve one problem, but more was needed to be done before it was safe to readmit the southern states. Other members, therefore, proposed an additional amendment that would prevent the incoming rebel Democrats from taking over Congress.³⁷ Representation in the House would be based on all persons in a state, black and white, but only if the state agreed to give both blacks and whites the right to vote.³⁸ If a state refused to enfranchise the freedmen, its representation would be proportionally reduced.³⁹ Then additional proposals were added—one that prevented rebel oath breakers from holding political office, and another one that prohibited slave owners from receiving compensation for their emancipat-

by State officers of the bill of rights, but leaving those officers to discharge the duties enjoined upon them"); see also Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329, 344–349 (2011).

33. CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1865) (statement of Rep. Bingham) (discussing that while the states were bound to follow the Bill of Rights, the federal government had no mechanism to enforce these enumerated rights; such enforcement mechanism needed to be granted through the Fourteenth Amendment).

34. *Id.* at 14.

35. *Id.*

36. See Kurt T. Lash, *Enforcing the Rights of Due Process: The Original Relationship Between the Fourteenth Amendment and the 1866 Civil Rights Act*, 106 GEO. L.J. 1389, 1450 (2018).

37. CONG. GLOBE, 39th Cong., 1st Sess. 142 (1865) (statement of Rep. Blaine) (“[The amendment] conclusively deprives the southern States of all representation in Congress on account of the colored population so long as those States may choose to abridge or deny to that population the political rights and privileges accorded to others.”).

38. *Id.*

39. *Id.*

ed slaves.⁴⁰ All of these proposals were gathered together into a five-section amendment, namely the Fourteenth Amendment.⁴¹

At the time of proposal Bingham insisted that this amendment maintain the basic principles of constitutional federalism.⁴² In fact, as the amendment went before the states for ratification, Bingham continued to fight for the equal rights of the states.⁴³ Midway through ratification, Radical Republicans led by Thaddeus Stevens tried to convince their colleagues that the proposed amendment was not actually necessary, and that Congress had full power to control the internal laws of the southern states, even to the point of kicking out of the Union any readmitted state that later misbehaved.⁴⁴

Once again, it was John Bingham who stood up for the principles of limited national power and independence of the states from federal control. He condemned Stevens' effort to "fling aside" the proposed amendment as "a violation of the letter and spirit of the Constitution of the country."⁴⁵ Quoting the Tenth Amendment, Bingham declared:

Under [the Constitution] the rights of the States are as sacred as those of the nation; its express provision is that—"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In strange conflict with this is the proposition of this bill, that if the State organized and admitted under it exercise the essential powers of local State government thus reserved to the people, contrary to the provisions of this act, the State shall lose its right to be represented in Congress. The equality of the States and the

40. U.S. CONST. amend. XIV, §§ 3, 4; CONG. GLOBE, 39th Cong., 1st Sess. 2286 (1865) (statement of Rep. Stevens).

41. U.S. CONST. amend. XIV.

42. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1865) (discussing how the amendment would not change the federal structure because it would only allow the federal government to prevent States from actions they were never originally allowed to do).

43. See John A. Bingham, Speech at Bowerston (Aug. 24, 1866), in CINCINNATI COMMERCIAL, SPEECHES OF THE CAMPAIGN OF 1866, IN THE STATES OF OHIO, INDIANA, AND KENTUCKY 19 (1866).

44. See CONG. GLOBE, 39th Cong., 2d Sess. 250 (bill proposed by Rep. Stevens including a provision declaring: "If the provisions of this section should ever be altered, repealed, expunged, or in any way abrogated, this act shall become void, and said State lose its right to be represented in Congress.").

45. *Id.* at 501, 504.

equality of men in the rights of persons before the law is what the Constitution enjoins and the people demand.⁴⁶

Bingham's view prevailed. A congressional majority rejected the radicals' proposal by standing with Bingham's proposed Fourteenth Amendment and its vision of limited national power.⁴⁷ By the summer of 1868, a sufficient number of states had ratified the Amendment and on July 28, 1868, Secretary of State William Seward declared that the Amendment was now part of the federal Constitution.⁴⁸

Not long afterwards, Congress quietly re-passed the Civil Rights Act.⁴⁹ This time they had constitutional power to pass such legislation,⁵⁰ and this time John Bingham supported the bill.⁵¹ In the end, the country received an amendment that not only radically transformed the nature of the Bill of Rights, but also preserved the original vision of constitutional federalism.⁵² Henceforth, the enumerated rights of citizens, including those listed in the first eight amendments, were protected against state abridgment.⁵³ In addition, Congress's enumerated powers were expanded to secure those rights.⁵⁴ Non-enumerated rights remained under the control of the people in the several States, so long as they conformed to the basic principles of due process and equal protection.⁵⁵

46. *Id.* at 504.

47. *Id.* at 813–17.

48. Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1866*, 101 *GEO. L.J.* 1275, 1330 (2013).

49. *CONG. GLOBE*, 41st Cong., 2d Sess. 3884 (1870) (re-passage of the Civil Rights Act on May 27, 1870); Lash, *supra* note 36, at 1454.

50. Lash, *supra* note 36, at 1457.

51. *Id.* at 1465–66.

52. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877*, at 242 (1988) (“[The Republicans] accepted the enhancement of national power resulting from the Civil War, but did not believe the legitimate rights of the states had been destroyed, or the traditional principles of federalism eradicated. Nor did they agree that the Constitution’s guarantee clause authorized endless national intervention in state affairs.”).

53. See *CONG. GLOBE*, 35th Cong., 2d Sess. 982 (1859) (John Bingham discussing how constitutionally guaranteed rights imposed limitations on state power).

54. U.S. CONST. amend. XIV, § 5 (“Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”); see also FONER, *supra* note 52, at 242 (discussing how moderate Republicans accepted the enhancement of national power following the Civil War).

55. See Lash, *supra* note 36, at 1440, 1467.

One question that still remains today is whether the Fourteenth Amendment's Privileges or Immunities Clause was linked to the Civil Rights Act. It was believed that the Civil Rights Act was linked to Article IV's Comity Clause⁵⁶ and that Article IV's Comity Clause was related to *Corfield v. Coryell*.⁵⁷ In *Corfield*, Justice Bushrod Washington listed all of the fundamental rights that had to be equally extended to visitors as they went from state to state.⁵⁸ In his list of fundamental rights, Justice Washington included the right to pursue happiness and the right to vote as subject to certain residency rules established by Congress.⁵⁹ Democrats and opponents of the Civil Rights Act raised *Corfield v. Coryell* to suggest that Republicans supported the electorally unpopular possibility of giving black Americans the right to vote.⁶⁰ As a result, Congress abandoned the holding of *Corfield v. Coryell* and went on to promulgate different understandings of Article IV.⁶¹ Thus, the Civil Rights Act cannot be properly linked to the Privileges or Immunities Clause. The Civil Rights Act was about equal protection of certain interests to persons and property.⁶² John Bingham, along with other moderate Republicans, repeatedly described the Civil Rights Act as an effort to enforce the Due Process Clause.⁶³ How he and other moderate Republicans viewed the right to vote is a complicated issue, but the Republicans cer-

56. See U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states").

57. See 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230); Lash, *supra* note 36, 1391–92.

58. *Corfield*, 6 F. Cas. at 551–52 (listing the fundamental rights that had to be equally extended to visitors as they went from state to state).

59. *Id.*

60. LASH, *supra* note 1, at 122 ("[Democrat Andrew Jackson Rogers] also turned to [Representative] Wilson's use of *Corfield* against him. Wilson had denied the Act would give black people the political right of suffrage and then had selectively quoted from Washington's opinion for examples of the civil rights that would be protected under the Act At this point in the Reconstruction debates, any bill that opened the door to black suffrage was doomed to fail.").

61. See Lash, *supra* note 36, at 1422–23 (discussing how [Congressman] Trumbull agreed with his opponents that the Comity Clause, relied upon in cases like *Corfield*, "did nothing more than protect out-of-state citizens, and that the Civil Rights Bill protected an altogether different set of rights").

62. See CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. Wilson); Lash, *supra* note 36, 1392–93, 1417–18.

63. CONG. GLOBE, 39th Cong., 1st Sess. 1117–18 (1866) (statement of Rep. Wilson); CONG. GLOBE, 39th Cong., 1st Sess., 1088, 1291 (1866) (statements of Rep. Bingham).

tainly were not trying to grant the right to vote.⁶⁴ That is why they eventually moved away from *Corfield*.⁶⁵

Another interesting question concerns the meaning of the Citizenship Clause—an excruciatingly difficult topic that was under-theorized and under-discussed at the time of the drafting of the Fourteenth Amendment.⁶⁶ Of course, the main concern behind the Citizenship Clause was to make sure that the former slaves were going to be citizens of the United States and of the state in which they resided.⁶⁷ But Congress also needed to make sure that they had power to draft legislation like they drafted in the Civil Rights Act,⁶⁸ which provided that all people born in the United States were citizens.⁶⁹ As a result, they added the Clause to the Fourteenth Amendment at the last minute.⁷⁰ It was the last addition to Section One,⁷¹ and it was not something that Bingham had originally included in his proposed amendment.⁷² The Citizenship Clause got some last-minute conversation that primarily dealt with the Clause's impact on Native American tribes,⁷³ and more specifically how the Fourteenth Amendment would affect the status of those in treaty agreements with Native Americans.⁷⁴ A few congressmen were concerned about how the Amendment would apply to the population of Asian immigrants, especially those immi-

64. See CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. Wilson); CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866) (statement of Sen. Trumbull).

65. Lash, *supra* note 32, at 382 & n.251, 393.

66. See Garrett Epps, *The Citizenship Clause: A "Legislative History"*, 60 AM. U. L. REV. 331, 352, 359, 359 n.114 (2010) (explaining the limited nature of sources on the drafting of the Citizenship Clause, because the draft of Fourteenth Amendment adopted by the House of Representatives did not address citizenship).

67. See *Oforji v. Ashcroft*, 354 F.3d 609, 620–21 (7th Cir. 2003) (Posner, J., concurring) ("The purpose of the rule was to grant citizenship to the recently freed slaves . . .").

68. See CONG. GLOBE, 39th Cong. 1st Sess. 1291 (1866) (statement of Rep. Bingham).

69. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (reenacted by Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144 (1870)) (codified as amended at 42 U.S.C. §§ 1981–1982 (2012)).

70. See Epps, *supra* note 66, at 359 & n.114.

71. See CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (proposal of Sen. Howard to add Citizenship Clause to the draft of the Fourteenth Amendment).

72. See *id.* at 813 (Rep. Bingham's initial proposal for the Fourteenth Amendment).

73. See *id.* at 2890–97.

74. See *id.*

grants coming to California.⁷⁵ Others were concerned with how the Amendment would affect gypsies.⁷⁶ But these issues received only perfunctory discussion during the deliberating period, and then no discussion during the ratification period.⁷⁷

Importantly, one non-enumerated right that remained under state control even after the Fourteenth Amendment was the right to vote.⁷⁸ States remained free to deny freedmen the franchise, so long as the state was willing to accept reduced representation in Congress.⁷⁹ To men like Frederick Douglass, a former slave and a statesman, that was unacceptable: if the unenumerated subjects of local municipal law were left to the voting people in the States, then the voting people in the states should include both black and white voters.⁸⁰ But even as Douglass called for a Fifteenth Amendment giving blacks the right to vote, he nevertheless recognized the need to preserve a federalist constitution that limited the power of the national government:

The Civil Rights Bill and the Freedmen's Bureau Bill and the proposed constitutional amendments, with the amendment already adopted and recognized as the law of the land, do not reach the difficulty, and cannot, unless the whole structure of the government is changed from a government by States to something like a despotic central government, with power to control even the municipal regulations of States, and to make them conform to its own despotic will. While there remains such an idea as the right of each State to control its own local affairs,—an idea, by the way, more deeply rooted in the minds of men of all sections of the country than perhaps any one other political idea,—no general assertion of human rights can be of any practical value. To change the character of the government at this point is nei-

75. *See id.* at 2890–92.

76. *See id.*

77. *See Epps, supra* note 66.

78. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. Wilson) (“[S]uffrage is a political right which has been left under the control of the several States, subject to the action of Congress only when it becomes necessary to enforce the guarantee of a republican form of government.”).

79. *See id.*

80. *See* Frederick Douglass, *A Treacherous President Stood in the Way* (1866), reprinted in *THE ATLANTIC* (Aug. 16, 2017), <https://www.theatlantic.com/politics/archive/2017/08/a-treacherous-president-stood-in-the-way/537066/> [<https://perma.cc/EWZ9-GSXQ>].

ther possible nor desirable. All that is necessary to be done is to make the government consistent with itself, and render the rights of the States compatible with the sacred rights of human nature.⁸¹

Douglass believed this could be accomplished by giving every loyal citizen the elective franchise.⁸² Douglass got his wish when Congress passed the Fifteenth Amendment.⁸³ Together, the Reconstruction Amendments expanded individual freedom while preventing the creation of a “despotic central government.”⁸⁴

81. *Id.*

82. *Id.* (“This unfortunate blunder must now be retrieved, and the emasculated citizenship given to the negro supplanted by that contemplated in the Constitution of the United States, which declares that the citizens of each State shall enjoy all the rights and immunities of citizens of the several States,—so that a legal voter in any State shall be a legal voter in all the States.”).

83. U.S. CONST. amend. XV, § 1 (“The rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

84. FONER, *supra* note 52, at 242.