

Constitution, it regulates not merely the powers of government but private conduct as well: no state may enforce slavery by law, and no private individual may hold another person as a slave. Slavery shall not “exist.”

No sooner had slavery been constitutionally banned than states and localities in the South sought to replicate the prior subjugation, insofar as possible, by enacting “Black Codes.” These restricted the rights of black citizens to own property, to engage in certain occupations, and to testify in court. They also imposed stringent labor requirements, such as a requirement that the contracts of black employees have a term of at least one year, with severe penalties for leaving employment before the contract term expired. Other crimes included “vagrancy,” “‘insulting’” speech, “‘malicious mischief,’” and “preaching the Gospel without a license.” Eric Foner, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877*, at 200 (1988). The Black Codes suggested that a large number of Southern legislators gave “‘[t]heir whole thought and time . . . to plans for getting things back as near to slavery as possible.’” *Id.* at 199 (quoting Benjamin F. Flanders). What would Congress do to respond to Southern intransigence? What would it do to protect the newly freed slaves?

[Assignment 63]

C. THE FOURTEENTH AMENDMENT

The Congressional Response

When Southern states enacted the “Black Codes” to subjugate the newly freed slaves, Congress responded with legislation. It enacted the Civil Rights Act of 1866, and it also considered—but did not enact, because of constitutional objections—the Privileges and Immunities Act of 1866. Both are presented here. As you read them, and a speech by a leading member of the House of Representatives in support of the Civil Rights Act, consider what these bills set out to accomplish and also what their constitutional basis might have been (in the Constitution as of 1866).

The Civil Rights Act of 1866

39th Cong., 14 Stat. 27 (Apr. 9, 1866)

CHAP. XXXI.—*An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, 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, and shall be subject to like punishment, pains, and penalties, and to none

other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

William Lawrence, Speech on the Civil Rights Act of 1866

Cong. Globe, 39th Cong., 1st Session 1832–1836 (Apr. 7, 1866)

. . . It is scarcely less to the people of this country than Magna Charta was to the people of England.

It declares who are citizens.

It does not affect any political right, as that of suffrage, the right to sit on juries, hold office, &c. This it leaves to the States, to be determined by each for itself. It does not confer any civil right, but so far as there is any power in the States to limit, enlarge, or declare civil rights, all these are left to the States.

But it does provide that as to certain enumerated civil rights every citizen “shall have the same right in every State and Territory.” That is whatever of certain civil rights may be enjoyed by any shall be shared by all citizens in each State, and in the Territories, and these are:

1. To make and enforce contracts.
2. To sue, to be sued, and to be parties.
3. To give evidence.
4. To inherit, purchase, lease, sell, hold, and convey real and personal property.
5. To be entitled to full and equal benefit of all laws and proceedings for the security of person and property. . . .

There is . . . a national citizenship. And citizenship implies certain rights which are to be protected, and imposes the duty of allegiance and obedience to the laws. . . .

It has never been deemed necessary to enact in any constitution or law that citizens should have the right to life or liberty or the right to acquire property. These rights are recognized by the Constitution as existing anterior to and independently of all laws and all constitutions.

Without further authority I may assume, then, that there are certain absolute rights which pertain to every citizen, which are inherent, and of which a State cannot constitutionally deprive him. But not only are these rights inherent and indestructible, but the means whereby they may be possessed and enjoyed are equally so.

We learn from Coke that—“When the law granteth anything to any one that also is granted without which the thing itself cannot be.” . . .

It is idle to say that a citizen shall have the right to life, yet to deny him the right to labor, whereby alone he can live. It is a mockery to say that a citizen may have a right to live, and yet deny him the right to make a contract to secure the privilege and the rewards of labor. It is worse than mockery to say that men may be clothed by the national authority with the character of citizens, yet may be stripped by State authority of the means by which citizens may exist. . . .

Every citizen, therefore, has the absolute right to live, the right of personal security, personal liberty, and the right to acquire and enjoy property. These are rights of citizenship. As necessary incidents of these absolute rights, there are others, as the right to make and enforce contracts, to purchase, hold, and enjoy property, and to share the benefit of laws for the security of person and property.

Now, there are two ways in which a State may undertake to deprive citizens of these absolute, inherent, and inalienable rights: either by prohibitory laws, or by a failure to protect any one of them.

If the people of a State should become hostile to a large class of naturalized citizens and should enact laws to prohibit them and no other citizens from making contracts, from suing, from giving evidence, from inheriting, buying, holding, or selling property, or even from coming into the State, that would be prohibitory legislation. If the State should simply enact laws for native-born citizens and provide no law under which naturalized citizens could enjoy any one of these rights, and should deny them all protection by civil process or penal enactments, that would be a denial of justice. . . .

This bill, in that broad and comprehensive philanthropy which regards all men in their civil rights as equal before the law, is not made for any class or creed, or race or color, but in the great future that awaits us will, if it become a law, protect every citizen, including the millions of people of foreign birth who will flock to our shores to become citizens and to find here a land of liberty and law.

But there is a present necessity for this bill which I find forcibly stated thus:

“The fact that no single southern Legislature has yet recognized the right of blacks to the civil rights accorded to every white alien, suffices to prove the need of such legislation by Congress. We believe no single southern State has yet enabled blacks to sue and be sued, to give testimony and rebut testimony on equal terms with whites. . . .

“The Cincinnati Commercial has a letter from a correspondent traveling through Mississippi, who states that the barbarous vagrant law recently passed by the rebel State Legislature is rigidly enforced, and under its provisions the freed slaves are rapidly being re-enslaved. No negro is allowed to buy, rent, or lease any real estate; all minors of any value are taken from their parents and bound out to planters; and every freedman who does not contract for a year’s labor is taken up as a vagrant. . . .”

Since this statement of the condition of southern law, I believe Georgia, by the act of March 17, 1866, has made provision for the enforcement of civil rights.

It is barbarous, inhuman, infamous, to turn over four million liberated slaves, always loyal to the Government, to the fury of their rebel masters, who deny them the benefit of all laws for the protection of their civil rights. . . .

[Representative Lawrence proceeded to read extensive evidence from military officers and government officials about the Southern states’ denial of civil rights, both to newly freed slaves and to white supporters of the Union cause. He argued that Congress had power to enforce the Privileges and Immunities Clause of Article IV “and the equal civil rights which it recognizes or by implication affirms to exist among citizens of the same State.” He then quoted various authorities on the privileges and

immunities of citizens, including Chancellor Kent, Justice Story, and Corfield v. Coryell. (Most of the passage quoted from Corfield can be found at p. 709.)—Editors]

The Constitution does not define what these privileges and immunities are; but all privileges and immunities are of two kinds, to wit, those which I have shown to be inherent in every citizen of the United States, and such others as may be conferred by local law and pertain only to the citizen of the State. . . .

NOTES

1. The first clause of the Civil Rights Act of 1866 extends United States citizenship to all persons born in the United States (except those subject to foreign powers and Indians not taxed). Is this provision a legislative reversal of the *Dred Scott* decision, which held that persons of African ancestry, “whether emancipated or not,” could not be citizens? Can Congress do that? *Dred Scott* said *no*. 60 U.S. at 417. Most members of the Thirty-ninth Congress thought *Dred Scott* was wrongly decided. But should they have waited for the Supreme Court to reverse itself before acting on this belief? Other members thought that, even if *Dred Scott* were rightly decided, it was reversed by the Thirteenth Amendment. Is that correct? Did the Thirteenth Amendment address the legal status of free persons of color?

2. Note the logical structure of the remainder of Section 1 of the Civil Rights Act. It does not require the states to extend the listed rights to anyone, but only to refrain from racial discrimination with regard to the rights they choose to extend. Nor does the provision apply to all rights, but only to the listed set. What is the unifying theme of the listed rights? All were violated by the “Black Code” provisions in some Southern states. All are basic common law rights—in fact, the rights track the traditional first-year curriculum in law school. And all were “Privileges and Immunities” of citizens protected under Article IV, meaning that they were rights that a citizen of Massachusetts would enjoy when present in the State of Ohio.

What rights are missing? Which ones does Representative Lawrence list as “political rights” that were not affected by the bill? Political rights were ones that not all citizens enjoyed. These rights of political participation were not exercised by women or by children. Moreover, they were rights that a citizen of one state could not exercise when present in another state, notwithstanding Article IV. See p. 711. Remember this distinction between “political rights” and “civil rights”—it will come up again.

3. Was this statute constitutional? Advocates of the Civil Rights Act of 1866 asserted three possible sources of congressional authority. First was the naturalization power—the power to make new citizens and define their rights. How aggressive a reading of the naturalization power is needed to make that even plausible?

Second was the argument that the 1866 Act was within the power of Congress under Section 2 of the Thirteenth Amendment to enact “appropriate legislation” to “enforce” the prohibition on “slavery and involuntary servitude.” Is that convincing? Does the abolition of slavery logically entail an equality of civil rights? Is discrimination the same thing as slavery? Even assuming it is not, may Congress decide that legislation forbidding discrimination with respect to civil rights is an “appropriate” means of abolishing slavery, or the badges or incidents of slavery? Just how far does Congress’s enforcement power under the Thirteenth Amendment go? (As we will see, this question is of continuing interest because the Fourteenth Amendment is limited to state action, while the Thirteenth Amendment extends to private action. Thus, Section 2 of the Thirteenth Amendment may be a more potent source of authority for legislation combating private discrimination, at least on the basis of race.)

A third source of authority invoked by advocates of the Civil Rights Act of 1866, including Representative Lawrence, was the Privileges and Immunities Clause of Article IV. To this there were two objections. First, the standard interpretation of this clause was that it prohibited states from discriminating against citizens of other states—not against discriminating against subsets of their own population. Does the text of the clause support that interpretation? Second, Congress was not explicitly given power to enforce the Privileges and Immunities Clause of Article IV (in contrast to the Full Faith and Credit Clause, found in the same Article). This was especially awkward for the anti-slavery members of the Thirty-ninth Congress, because many of them had been critical of the Supreme Court's decision in *Prigg v. Pennsylvania* (see p. 721), holding that Congress had an implied power to enforce the Fugitive Slave Clause, which similarly lacked an enforcement provision. For some, like Representative John Bingham, this was the principal constitutional objection to the Civil Rights Act of 1866: he believed the Act appropriately asserted the privileges and immunities of the new citizens created by emancipation, but did not think Congress had power to enact legislation enforcing those rights.

4. Representative Lawrence refers to several terms and concepts that will come up repeatedly in the following readings, and it is good to begin thinking of them here. One word he uses repeatedly is “protect.” He is drawing on a long tradition—found in Hobbes, Blackstone, the Declaration of Independence, and state constitutions—when he invokes a set of reciprocal duties: the citizen owes the state a duty of allegiance, and the state owes the citizen a duty of protection. See Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 Geo. Mason U. Civ. Rts. L. J. 1, 35–43 (2008). How does Lawrence think a state could fail to fulfill its duty of protection?

Another concept—or perhaps a tension—is the centrality of race. Who does Lawrence think the Civil Rights Act will protect? Will it protect only persons of color in the South from those who would reenslave and oppress them? Or is its application broader? On the other hand, what is the “present necessity” that motivated the bill? How is that motivation reflected in the bill itself?

Finally, Lawrence refers to the concept of “privileges and immunities.” Article IV of the Constitution requires that states grant to citizens of other states the same “privileges and immunities” they grant to their own citizens—in other words, it is a requirement of equality. But what are those privileges and immunities? Lawrence points to some as being “inherent in every citizen of the United States”—which might those be? (Does the Constitution name any privileges? Look at Article I, Section 9. What else might be a privilege or immunity?) And he points to others as “conferred by local law and pertain[ing] only to the citizen of the State,” that is, they can vary from state. What are those? Here Lawrence cites a passage from a decision called *Corfield v. Coryell*. The passage is reprinted on p. 710, and you should read it now. The passage is canonical, and it will be referenced repeatedly in the pages that follow.

A Bill to Declare and Protect All the Privileges and Immunities of Citizens of the United States in the Several States

39th Cong., 1st Session, H.R. 437 (Apr. 2, 1866)

. . . That every person, being a citizen of the United State shall, in right of such citizenship, be entitled, freely and without hindrance or molestation, to go from the State, Territory, or district of his or her residence, and to pass into and through and

to sojourn, remain and take permanent abode within each of the several States, Territories, and districts of the United States, and therein to acquire, own, control, enjoy and dispose of property, real, personal and mixed; and to do and transact business, and to have full and speedy redress in the courts for all rights of person and property, as fully as such rights and privileges are held and enjoyed by the other citizens of such State, Territory, or district; and, moreover, therein to have, enjoy, and demand the same immunities and exemptions from high or excessive impositions, assessments, and taxation as are enjoyed by such other citizens under the laws or usages of such State, Territory, or district, and to have, demand, and enjoy all other privileges and immunities which the citizens of the same State, Territory, or district would be entitled to under the like circumstances. . . .

[The remaining sections defined the liability of those who deprived a citizen of the United States of any of the privileges or benefits that were secured by the act, and excluded from the protection of the act all who had engaged in or aided the rebellion, unless pardoned.—Editors]

NOTES

1. What are the rights—the “privileges and immunities”—that the proposed Privileges and Immunities Act of 1866 protected? Had the statute been enacted, would it have required that states grant those privileges and immunities? Would it have required that states grant them equally among in-staters? Or would it have required only that they be granted equally in the sense of no discrimination against out-of-staters?

2. How would the proposed Privileges and Immunities Act have gone further than the Civil Rights Act of 1866?

Drafting a New Amendment

Doubts about the scope of Congress’s powers were enough to sink the proposed Privileges and Immunities Act, but not another bill that was under consideration. On March 13, the House joined the Senate in passing the Civil Rights Act of 1866. It had the support of nearly all of the Republicans in Congress, both the “Radical Republicans” who wanted a prolonged reconstruction of the conquered South and a more robust measure of racial equality, and the “Moderate Republicans” who wanted a prompt seating of Southern senators and representatives in Congress. The president, Andrew Johnson, was a Union-supporting Democrat from Tennessee who had served as President Lincoln’s vice-president, and succeeded Lincoln after his assassination. Johnson had begun to have sharp disagreements with Congress about the military governments established in the South, but the Republicans in Congress were confident of his support for the Civil Rights Act.

But then President Johnson surprised them and vetoed the bill. In his veto message, Johnson articulated several constitutional objections, chiefly that Congress lacked power to displace state laws discriminating on the basis of race. Johnson noted that the Constitution did place limits on how states could legislate (Article I, Section 10); he also noted that the Constitution gave Congress power to “make rules and regulations” for the territories (Article IV). But he denied that Congress had any power to do the same in the states. Congress could not require “a perfect equality of the white and colored races . . . in every State of the Union over the vast field of State jurisdiction covered by these enumerated rights.” Andrew Johnson, Veto Message of

March 27, 1866, in *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897*, at 407 (James D. Richardson ed., 1897). Johnson urged gradualism in making the freed slaves citizens: “Four millions of them have just emerged from slavery into freedom. Can it be reasonably supposed that they possess the requisite qualifications to entitle them to all the privileges and immunities of citizens of the United States?” He also questioned the wisdom of conferring national citizenship upon the newly freed slaves while the Southern states were unrepresented in Congress, and warned that “[t]he tendency of the bill must be to resuscitate the spirit of rebellion and to arrest the progress of those influences which are more closely drawing around the States the bonds of union and peace.” Johnson did not, however, have the last word. Congress amended the act, removing language that could have been construed to extend to voting, and then passed it again with the two-thirds majority needed to override President Johnson’s veto. For the first time, Congress had overridden a veto to enact a major law.

The confrontation between Congress and President Jackson was to have a more lasting consequence. The Republican majority in Congress wanted a solid constitutional basis for the Civil Rights Act (and perhaps also for the proposed Privileges and Immunities Act), but they knew they needed another amendment to the Constitution. The task of proposing an amendment was taken up by the Joint Committee on Reconstruction, a powerful committee that Congress had set up to address questions about how the Southern states were to again take their place in the national government.

The Joint Committee’s first proposal was an amendment that would have denied all representation in Congress to any states that denied the right to vote because of race. The amendment would have forced the Southern states to choose: they could have political representation in the national government, or they could continue to disenfranchise their black citizens, but not both. The amendment was passed by the House but defeated by the Senate.

The Joint Committee’s next proposal was the basis for what eventually became the Fourteenth Amendment. On behalf of the committee, Congressman John Bingham submitted it to Congress on February 26, 1866:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

Cong. Globe, 39th Cong., 1st Sess. 1034 (Feb. 26, 1866). In this proposal one can see the central themes of what became Section 1 of the Fourteenth Amendment: a defense of the “privileges and immunities of citizens,” and an idea of “equal protection” with respect to rights of “life, liberty, and property.” But the proposal does not protect those things directly—instead it simply consists of a broad power for Congress to pass laws “necessary and proper” to achieve these protections.

The House did not adopt Bingham’s bill. Instead, the Joint Committee went back to work, and it produced a revised proposal. The proposal had five sections. The first laid new duties on the states with respect to “the privileges or immunities of citizens of the United States,” “due process of law,” and “the equal protection of the laws.” The second restricted representation in Congress for any states that denied adult black males the right to vote. The third denied supporters of the Confederacy

the right to vote in the next three national elections. The fourth repudiated Confederate war debts. And the fifth gave Congress the power to enforce the provisions of the first four sections. This proposal was nearly identical to what became the Fourteenth Amendment, but one more revision was required. The third section—prohibiting Confederate supporters from voting until after the 1870 election—was a nakedly political attempt by the House Republicans to preserve their majority. The Senate forced a change to that section; it now prohibited rebel oath-breakers from holding federal offices.

On June 13, 1866, the House passed the proposed amendment on a party-line vote, sending it to the states for ratification.

The Text

Now take a close look at the text of the Fourteenth Amendment as ratified and compare it with Bingham's original proposal. Start with Sections 1 and 5:

Amend. XIV, § 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

In its first sentence the amendment reversed *Dred Scott's* citizenship holding. This was no moot point; Southern political leaders continued after the Civil War to invoke *Dred Scott* as establishing that the newly freed slaves could not be citizens. Although Congress had asserted the contrary in the Civil Rights Act of 1866, this sentence made that declaration of citizenship for every freed slave part of the Constitution.

The second sentence of Section 1 is expressly addressed to states: "No state shall. . ." And what states are prohibited from doing is abridging "the privileges or immunities of citizens of the United States," failing to give "due process," and denying "the equal protection of the laws." And Section 5 gives Congress power to make laws "appropriate" (a gloss on Bingham's "necessary and proper") for enforcing these prohibitions on the states. These changes and continuities—shifting from *a power to legislate with respect to civil rights to a prohibition of what states may do in abridging civil rights, with a power to enforce that prohibition*—had significant consequences for American constitutional law.

What did the change from Bingham's original proposal mean in practical terms? Does Congress's legislative power under the Fourteenth Amendment directly include a power to regulate the actions of private individuals (such as discrimination by private persons, groups, or businesses)? May Congress determine that such legislation is "appropriate" to carrying into execution a prohibition on *state* action? If the answer to these questions is *No*, then the amendment is narrower in that respect than the original Bingham proposal. Indeed, that appears to have been one of the purposes of the change: moderates feared that Bingham's proposal would give

Congress too sweeping a power to legislate concerning local matters, thus upsetting the balance between the national government and the states.

Another significant consequence of the restructuring of Bingham's proposal was to make the amendment more than just a grant of power to Congress to pass civil rights laws—laws that might be repealed by a subsequent Congress. Rather, because Section 1 of the Fourteenth Amendment is a direct prohibition, the amendment *itself* constrains the states. This change entrenched the protection of civil rights in Section 1 against congressional backsliding in the future—a concern that some of the amendment's backers had about the original Bingham proposal. Representative (and future President) James Garfield expressed the concern this way:

The civil rights bill is now a part of the law of the land. But every gentleman knows it will cease to be a part of the law whenever the sad moment arrives when that gentlemen's party comes into power. It is precisely for that reason that we propose to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it.

Cong. Globe, 39th Cong., 1st Sess. 2462 (May 8, 1866). The Fourteenth Amendment as finally adopted thus allows judicial enforcement of the prohibitions contained in Section 1, with or without further implementing legislation by Congress pursuant to its powers under Section 5.

Should Congress or the courts have primacy in interpreting and enforcing the Fourteenth Amendment? The historical context suggests that Congress was expected to have the primary role. After all, one reason for the Fourteenth Amendment was the desire of members of Congress to provide a more secure constitutional basis for the civil rights legislation they had already passed, such as the Civil Rights Act of 1866. In addition, recent experience with the Supreme Court had not always instilled confidence in its ability to faithfully interpret the Constitution. The drafters remembered *Dred Scott*. Yet the Republicans in Congress also expected the courts to enforce the amendment, even as they saw themselves as the primary expositors of the amendment's broad terms. Do their expectations matter?

Sandwiched between Section 1's prohibition and Section 5's enforcement power, several provisions of the Fourteenth Amendment addressed residual questions about slavery and the Civil War while also raising new questions about voting rights:

§ 2: Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

The Thirteenth Amendment had effectively repealed the Three-fifths Clause of the original Constitution. One implication was that the Southern states—without

giving the freedmen the right to vote—would have far more representation in Congress than they did before the War. (Can you see why?) Section 2 was the answer. If a state discriminated against black voters, its representation in Congress would be diminished commensurately. If a state entirely denied its black citizens the right to vote, it would receive for them *zero-fifths* representation in Congress (rather than the old three-fifths).

For the Republicans in Congress this section was a matter of political survival; they wanted to avoid being swamped by a newly empowered South. It was also a matter of constitutional principle, because they questioned whether a state had a “Republican Form of Government” (as required by Article IV) if it denied the right to vote to a huge swath of its free male citizens. Indeed, Congress would soon invoke the Guarantee Clause to refuse to seat representatives from states that initially refused to ratify the Fourteenth Amendment. (One embarrassment was that some Northern states also denied the right to vote to swathes of their male citizens, forcing the Republicans to make legalistic and sometimes awkward distinctions between the Northern and Southern governments.)

What does the existence of Section 2 of the Fourteenth Amendment imply about the scope of Section 1? Did Section 1 prohibit racial discrimination in voting requirements? If so, why would Section 2 even exist? But why would voting not be a “privilege or immunity” or a matter of “equal protection”? In thinking about that question, remember that the drafters and ratifiers of the amendment recognized—some of them with deep regret—that the established meaning of “privileges and immunities” did not include political rights such as voting, standing for election, and serving on juries. It was understood that a citizen of Massachusetts who happened to be in Ohio on election day would not be permitted to vote in Ohio. Nor was equality in voting considered a matter of equal *protection* of the laws. A final, decisive consideration is the existence of the Fifteenth Amendment. If the Fourteenth prohibited racial discrimination in voting, the Fifteenth would have been unnecessary.

But push a little further on this question. Does the text *say* that voting is not among “the privileges or immunities of citizens of the United States”? Was “privileges [and/or] immunities” a term of art? Was the term of art “privileges and immunities of citizens” (i.e., civil rights, the rights of citizens)? Or did the text need to be read with the background of previous judicial interpretation in mind? Or did the text need to be read in its historical context? Or in light of structural arguments from Section 2 of the Fourteenth Amendment, and from the existence of the Fifteenth Amendment? Should these other considerations and arguments inform our reading of the text? Or is that exactly backwards?

§ 3: No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

The penultimate draft of Section 3, which prohibited all Confederate supporters from voting in the next three national elections, was certain to have been the most explosive part of the entire amendment in the South. Not coincidentally, for some of the Radical Republicans, it was the most important part of the amendment. Yet even the final version of Section 3—“only” a prohibition on office-holding—could still plausibly be called the most divisive part of the amendment. Why did it matter so much to both sides?

Reconstruction Republicans feared the survival of the political order of the former Confederacy, including the prospect of former rebel leaders returning to Congress. They heard from Union military commanders and other correspondents in the South about the threats to the life, liberty, and property of the freed slaves. They knew that the Southern states could not be counted on to protect their black citizens. Whether those states had even been “reconstructed” at all seemed an open question. For these reasons, the punitive first sentence of the section was key. It prevented the Southern states from sending *en masse* to Washington the very political leaders who had taken them into secession.

The South was certain to chafe at this restriction on its choice of senators and representatives—but that prospect, to some of the Radical Republicans, was not undesirable. They thought Section 3 would prove unacceptable to the Southern states, preventing them from promptly ratifying the amendment. As long as they would not ratify the amendment, Congress would not seat their senators and representatives. And as long as the Southern members of Congress were not seated, the Radical Republicans would keep control of Congress.

Now read carefully the last sentence of Section 3. If it was a matter of constitutional principle that those who had broken their oath to support the Constitution could not return to Congress, then why allow Congress itself to forgive the transgression? Again the design was careful. Congress was giving itself a valuable bargaining chip that it could trade for Southern concessions: Section 3’s last sentence “would afford the opportunity later on to offer an inducement to the Southern leaders—those proscribed by the section—in the way of amnesty as a return for aid given to the party in power.” Horace Edgar Flack, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 133 (1908). Something like that happened: six years later, when an unexpectedly strong Democratic candidate ran for president, the Republican Congress chose conciliation with the Amnesty Act of 1872, which removed the effect of Section 3 for nearly all the former Confederates.

One concluding question about Section 3: if a Southern state sent to Congress a rebel oathbreaker, and Congress refused to seat him (before the 1872 amnesty act), would Congress be violating *Section 1*? Can you see why not? Would holding a federal office be either a “privilege or immunity” or a matter of “protection”? Would it instead be a political right? Moreover, whom does Section 1 restrict? Does it restrict Congress? The context has changed, but as you will soon see, questions like the ones you just answered remain important in constitutional law today.

§ 4: The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any

claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

After a major war there is always the question of how to settle accounts. (After the Revolutionary War, there was the Assumption Controversy, p. 610). Section 4 of the Fourteenth Amendment is a selective guarantee and a selective repudiation. On the one hand, the Union's Civil War debt "shall not be questioned." On the other hand, any debt incurred "in aid of insurrection or rebellion against the United States" was repudiated, and no slave-owner could be paid "for the loss or emancipation of any slave."

This section was the least controversial in the amendment. No one expected Congress to pay Confederate debts; it would only encourage secession if Congress picked up the tab. Nor was the refusal to compensate slaveowners particularly controversial in 1866. In England, emancipation had been accompanied by compensation, and in the United States a number of abolitionists had supported compensation. But that was before the War. The Republican Congress would certainly not pay slaveowners, and so the effect of Section 4 was to block any payments that might be made in the future by a Southern-dominated Congress, or by more sympathetic states. (This provision might also be considered a clarification of, or amendment to, the Takings Clause, which had sometimes been thought to require compensation for emancipation.)

Although Section 4 might seem to be of only historical interest, notice that its first sentence secures the validity of the public debt *permanently*, not just for the War. It drew attention in 2011, when Congress and President Obama could not agree on the terms of a debt-ceiling increase and it appeared possible the United States might not have sufficient funds to make interest and principal payments on the national debt. Some scholars argued that the president has authority under Section 4 to borrow money to prevent a default. Their argument was that a default would violate the provision that the federal debt "shall not be questioned" and that the president has authority under the Take Care Clause to prevent that unconstitutional result. Others argued that having insufficient funds to pay the national debt does not mean that its "validity" is "questioned," and that only Congress can authorize the issuance of debt. Does either interpretation of Section 4 persuade you?

Debate and Ratification

The proposed Fourteenth Amendment was the subject of intense public debate. Members of Congress gave myriads of speeches for it and against it around the country. President Johnson was understood to be an opponent of the amendment, and he toured the country speaking against the Reconstruction policy of the Republican Congress. The nation was awash in newspaper editorials, printed sermons, and pamphlets that variously praised or denounced the amendment. Only a tiny sliver of the debate can be printed here, and what is given is, admittedly, not even-handed. All four of the speakers here supported the amendment, and they all spoke about what it would do (and sometimes spoke, with regret, about what it would not do). The first two speeches were made by members of the Joint Committee on Reconstruction, Representative Thaddeus Stevens and Senator Jacob Howard, when they presented the proposed amendment in Congress. Next are two speeches from the public debate when the amendment was being considered for ratification by the states: one by Speaker of the House Schuyler Colfax, and the other by Benjamin

Butler, a general in the Union Army and a future governor and U.S. representative. The Colfax and Butler speeches were printed by *The Commercial*, a Republican newspaper in Cincinnati, Ohio, and widely distributed during the ratification debates. (The speeches are not censored; one speaker uses the N-word when quoting a racist charge from opponents of the amendment.)

As you read these speeches, ask yourself what the speakers see as the major defect in the existing Constitution. What do they expect the Fourteenth Amendment to accomplish? What do they expect that it will not accomplish? How central is race to their understanding of the amendment? Finally, how do they understand the great phrases of Section 1—“privileges or immunities of citizens of the United States,” “equal protection of the laws,” and “due process of law”?

Thaddeus Stevens, Speech Presenting the Proposed Amendment in the U.S. House

Cong. Globe, 39th Cong., 1st Sess. 2459–60 (May 8, 1866)

... The first section prohibits the States from abridging the privileges and immunities of citizens of the United States, or unlawfully depriving them of life, liberty, or property, or of denying to any person within their jurisdiction the “equal” protection of the laws.

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 or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford “equal” protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same. These are great advantages over their present codes. Now different degrees of punishment are inflicted, not on account of the magnitude of the crime, but according to the color of the skin. Now color disqualifies a man from testifying in courts, or being tried in the same way as white men. I need not enumerate these partial and oppressive laws. Unless the Constitution should restrain them those States will all, I fear, keep up this discrimination, and crush to death the hated freedmen. Some answer, “Your civil rights bill secures the same things.” That is partly true, but a law is repealable by a majority. And I need hardly say that the first time that the South with their copperhead allies obtain the command of Congress it will be repealed. . . .

The second section I consider the most important in the article. It fixes the basis of representation in Congress. If any State shall exclude any of her adult male citizens from the elective franchise, or abridge that right, she shall forfeit her right to representation in the same proportion. The effect of this provision will be either to compel the States to grant universal suffrage or so to shear them of their power as to keep them forever in a hopeless minority in the national Government, both legislative and executive. . . .

I admit that this article is not as good as the one we sent to death in the Senate. In my judgment, we shall not approach the measure of justice until we have given every adult freedman a homestead on the land where he was born and toiled and suffered. Forty acres of land and a hut would be more valuable to him than the immediate right to vote. Unless we give them this we shall receive the censure of mankind and the curse of Heaven. That article referred to provided that if one of the injured race was excluded the State should forfeit the right to have any of them represented. That would have hastened their full enfranchisement. This section allows the States to discriminate among the same class, and receive proportionate credit in representation. This I dislike. But it is a short step forward. . . .

Jacob Howard, Presenting the Proposed Amendment to the U.S. Senate

Cong. Globe, 39th Cong., 1st Sess. 2765–66 (May 23, 1866)

One result of [the joint committee's] investigations has been the joint resolutions for the amendment of the Constitution of the United States now under consideration. After most mature deliberation and discussion, reaching through weeks and even months, they came to the conclusion that it was necessary, in order to restore peace and quiet to the country and again to impart vigor and efficiency to the laws, and especially to obtain something in the shape of a security for the future against the recurrence of the enormous evils under which the country has labored for the last four years, that the Constitution of the United States ought to be amended; and the project which they have now submitted is the result of their deliberations upon that subject.

The first section of the amendment they have submitted for the consideration of the two Houses relates to the privileges and immunities of citizens of the several States, and to the rights and privileges of all persons, whether citizens or others, under the laws of the United States. It declares that—

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.

It will be observed that this is a general prohibition upon all the States, as such, from abridging the privileges and immunities of the citizens of the United States. That is its first clause, and I regard it as very important. . . .

[It] relates to the privileges and immunities of citizens of the United States as such, and as distinguished from all other persons not citizens of the United States. It is not, perhaps, very easy to define with accuracy what is meant by the expression, "citizen of the United States," although that expression occurs twice in the Constitution, once in reference to the President of the United States, in which instance it is declared that none but a citizen of the United States shall be President, and again in reference to Senators, who are likewise to be citizens of the United States. Undoubtedly the expression is used in both those instances in the same sense in which it is employed in the amendment now before us. A citizen of the United States is held by the courts to be a person who was born within the limits of the United States and subject to their laws. . . . [T]o put the citizens of the several States

on an equality with each other as to all fundamental rights, a clause was introduced in the Constitution declaring that “the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.”

The effect of this clause was to constitute *ipso facto* the citizens of each one of the original States citizens of the United States. They are, by constitutional right, entitled to these privileges and immunities, and may assert this right and these privileges and immunities, and ask for their enforcement whenever they go within the limits of the several States of the Union.

It would be a curious question to solve what are the privileges and immunities of citizens of each of the States in the several States. I do not propose to go at any length into that question at this time. It would be a somewhat barren discussion. But it is certain the clause was inserted in the Constitution for some good purpose. It has in view some results beneficial to the citizens of the several States, or it would not be found there; yet I am not aware that the Supreme Court have ever undertaken to define either the nature or extent of the privileges and immunities thus guaranteed. Indeed, if my recollection serves me, that court, on a certain occasion not many years since, when this question seemed to present it self to them, very modestly declined to into a definition of them, leaving questions arising under the clause to be discussed and adjudicated when they should happen practically to arise. But we may gather some intimation of what probably will be the opinion of the judiciary by referring to a case adjudged many years ago in one of the circuit courts of the United States by Judge Washington. . . . [*Senator Howard next read a passage from Coryfield v. Coryell, most of which is printed at p. 710.—Editors*]

Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.

Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution; and it is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guaranteed by the Constitution or recognized by it, are secured to the citizen solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon State legislation. States are not affected by them, and it has been repeatedly held that the restriction contained in the Constitution against the taking of private property for public use without just

compensation is not a restriction upon State legislation, but applies only to the legislation of Congress. . . .

The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees. How will it be done under the present amendment? As I have remarked, they are not powers granted to Congress, and therefore it is necessary, if they are to be effectuated and enforced, as they assuredly ought to be, that additional power should be given to Congress to that end. This is done by the fifth section of this amendment, which declares that "the Congress shall have power to enforce by appropriate legislation the provisions of this article." Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution.

The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. Is it not time, Mr. President, that we extend to the black man, I had almost called it the poor privilege of the equal protection of the law? Ought not the time to be now passed when one measure of justice is to be meted out to a member of one caste while another and a different measure is meted out to the member of another caste, both castes being alike citizens of the United States, both bound to obey the same laws, to sustain the burdens of the same Government, and both equally responsible to justice and to God for the deeds done in the body?

But, sir, the first section of the proposed amendment does not give to either of these classes the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a despotism. . . .

It is very true, and I am sorry to be obliged to acknowledge it, that [the second] section of the amendment does not recognize the authority of the United States over the question of suffrage in the several States at all; nor does it recognize, much less secure, the right of suffrage to the colored race. I wish to meet this question fairly and frankly. . . . But, sir, it is not the question here what will we do; it is not the question of what you, or I, or half a dozen other members of the Senate may prefer in respect to colored suffrage; it is not entirely the question of what measure we can pass through the two Houses; but the question really is, what will the Legislatures of the various States to whom these amendments are to be submitted do in the premises; what is it likely will meet the general approbation of the people who are to elect the Legislatures, three fourths of whom must ratify our propositions before they have the force of constitutional provisions? . . .

Schuyler Colfax on the Proposed Amendment

Speech in Indianapolis, Indiana (Aug. 7, 1866), reprinted in CINCINNATI COMMERCIAL, SPEECHES OF THE CAMPAIGN OF 1866: IN THE STATES OF OHIO, INDIANA, AND KENTUCKY 14 (1866)

. . . The first section of this Constitutional Amendment is very much denounced by our opponents—very much misrepresented and perverted. [Mr. C. here read the first section of the proposed amendment.] I stand by every word and letter of it: it's going to be the gem of the Constitution, when it is placed there, as it will be, by this American people. [Applause.] I will tell you why I love it. It is because it is the Declaration of Independence placed immutably and forever in our Constitution [Applause.] What does the Declaration of Independence say?—that baptismal vow that our fathers took upon their lips when this Republic of ours was born into the family of nations. It says that all men are created equal, and are endowed by their Creator with certain inalienable rights, among which are life, liberty, and the pursuit of happiness; *and that to secure these rights governments were instituted among men.* That's the paramount object of government, to secure the right of all men to equality before the law. So said our fathers at the beginning of the Revolution. So say their sons to-day, in this Constitutional Amendment, the noblest clause that will be in our Constitution. It declares that every person—every man, every woman, every child, born under our flag, or naturalized under our laws, shall have a birthright in this land of ours. High or low, rich or humble, learned or unlearned, distinguished or obscure, white or black, born in a palatial residence or born in the humblest cabin in the land, this great Government says “the ægis of protection is thrown over you; you can look up to this flag and your country, and say they are yours.” [Applause.]

But they shudderingly say, on the other side, “This is going to protect a nigger as a citizen.” [Laughter.] Who is it that most needs protection from the law in this land? It is not the rich man; it is not the man of great intellect; it is not the influential man; but it is the weak and the obscure man; it is the down-trodden, the degraded and the oppressed; and the greatest glory of a free land is that it will stretch out its arm and protect the obscurest man under its flag. [Applause.] But they say there is negro suffrage in that. Well, they ought to know whether there is or not. They have been hunting around for many a long year. They dream of it, and their waking hours have been harassed for years with this chimera and hobgoblin of negro suffrage. The second section expressly leaves this matter to the States, but bankrupt of all legitimate argument, our opponents bring up this old, worn-out, thread-bare charge, and try to prove that under this section of the Constitution there is going to be negro suffrage. It happens they have omitted one thing in all their arguments. We passed a bill on the ninth of April last, over the President's veto, known as the Civil Rights Bill, that specifically and directly declares what the rights of a citizen of the United States are—that they may make and enforce contracts, sue and be parties, give evidence, purchase, lease and sell property, and be subject to like punishments. That is the last law upon the subject. The Democrats haven't found that out yet. They have been hunting up a new edition of Webster's dictionary to find the meaning of the word citizen. Why didn't they go a little further, and find out, in the same dictionary, what a Copperhead was? I grant that the man who votes has the right to be called a citizen, but it don't follow that every citizen has a right to vote. A ship is a vessel, but all vessels are not ships. Women and children have been citizens from the very organization of the Government. They haven't voted yet, and yet Mr. Seward, Secretary of State, will give Mrs. Amelia Smith, or whatever her name is, a passport

that will entitle her to protection as an American citizen all over the world. But she don't take that passport and vote on it; if she did we would have a larger majority for the Union ticket at the coming election than we have. [Applause.] . . .

Benjamin Butler on the Proposed Amendment

Speech in Toledo, Ohio (Oct. 2, 1866), reprinted in CINCINNATI COMMERCIAL,
SPEECHES OF THE CAMPAIGN OF 1866: IN THE STATES
OF OHIO, INDIANA, AND KENTUCKY 41 (1866)

. . . Now then, Congress, after making full inquiry, and being moved by a spirit of magnanimity, such as never before was exhibited toward rebels, offered that these rebels, these camps of paroled prisoners of war, might be re-instated in the Union; might have their property back; might have a share in the Government, provided they agreed to amend the Constitution in certain important particulars. The first was that every citizen of the United States should have equal rights with every other citizen of the United States, in every State. Why was this necessary? It was because the President, in vetoing the Civil Rights Bill, said that it was unconstitutional to pass a law that every citizen of the United States should have equal rights with every other citizen in every state of the Union. To render that certain, which we all supposed up to that hour was certain, Congress said: "Well, we will put it in the Constitution so it shall be there forever." [A voice, "That's the place to have it."] Just exactly. The next thing was the subject of representation. Under the old agreement in the Constitution, the master was allowed to count three-fifths of his slaves in representation. That was one of his rights. But one of his obligations was that he was to pay three-fifths of the taxes for them. When emancipation took effect, and there were no more slaves, then the negroes stood to be counted like other citizens; and if there were no changes made in the Constitution, and these slave States were allowed to come back, then the masters would represent not only three-fifths of the negroes, but five-fifths—two-fifths more than they did before. Nay, more: the negro having become a citizen, and being counted as such, the taxes assessed must be paid by himself, and the master would shirk three-fifths of the taxation; so that if we did not make change in the Constitution the masters would gain two-fifths in representation and three-fifths in taxation. Now what is the practical effect of that? It would be to give the master in South Carolina, where there are about the proportion of 250,000 white men to 350,000 black men, from two and a fourth to two and a half more power than you of Ohio have; so that South Carolina, by going out of the Union, if she is allowed to come back under the Johnsonian plan of restoration, without any amendment to the Constitution, will have gained, by her rebellion, two and one-fourth times as much political power as she had before. . . .

What was the next thing we asked of them? That hereafter no man who had perjured himself by swearing to support the Constitution of the United States, and then abjuring it, should ever have a chance to perjure himself again. Most, if not all of us, think this is too lenient. Let us see what this means. All of you that have fought against the Union; all of you that have starved our prisoners in Belle Isle, Libby, Salisbury, may come back and take a share in the Government with us, except those who have heretofore held office. . . .

I told you that there was another portion of the constitutional amendment with which I did not agree. . . . In putting the proposition of representation, Congress said

to the South [*in Section 2 of the proposed amendment—Editors*], “If you will agree that negroes shall vote when they are fit for it, then when they do vote they shall be counted in your representation.” This was a sort of bribe to allow the negro to vote. Now, I am not in favor of negro suffrage, or any other suffrage but impartial suffrage. [Applause] In order that I may be understood, allow me to state my position. . . .

Now, then, I propose rather that the qualification of suffrage must be in every State a just qualification, something which every man can attain to. In the olden time, down to 1835, in North Carolina, every black man and every white man voted equally, provided he owned fifty acres of land—and there was land enough there for every body to own fifty acres of land—and there was land enough there for every body to own fifty acres, and a great deal more, and not be very rich at that. (Laughter.) But if the States say that nobody shall vote who has not blue eyes, as every body can’t have blue eyes, it may disfranchise a majority. That’s a qualification to which men can not attain. If reading and writing are required, that may be very well, because every body can attain to that. . . .

Nobody pretends that Congress shall interfere with the States in the Union, but I do claim that Congress has a right to fix the rules and regulations by which the camps of paroled prisoners of war shall be governed. [Applause.] Therefore I would say to each Southern State, fix your standard where you please, provided it be a standard to which every man can attain. . . .

NOTES

1. What is the defect in the existing Constitution that the supporters of the Fourteenth Amendment were trying to remedy? Was the defect more in the definition of the rights protected by the original Constitution, or in the inability of Congress to enforce those rights against the states?

2. In modern case law, there are sharp distinctions between “privileges or immunities,” “equal protection,” and “due process.” But those distinctions may not have been as sharp at the time the Fourteenth Amendment was ratified. Consider each in turn, but also consider how they might overlap.

a. What are the “privileges or immunities of citizens of the United States”? What does Senator Howard say? What does Speaker Colfax say? What sorts of enactments or practices would abridge a privilege or immunity?

b. What is “equal protection of the laws”? What sorts of enactments or practices does Representative Stevens say would deny an equality of protection? Is there any theme that ties together the denials that he lists?

c. What is “due process of law”? Do the speakers define it? Note that when Representative Bingham was asked in a debate in the House what he meant by “due process of law,” he said: “I reply to the gentleman, the courts have settled that long ago, and the gentleman can go and read their decisions.” Cong. Globe, 39th Cong., 1st Sess. 1089 (Feb. 28, 1866). On antebellum precedents on “due process of law,” see p. 1480.

3. How close is the relationship between Section 1 of the Fourteenth Amendment and the Civil Rights Act of 1866? Was everything in Section 1 already covered by the Civil Rights Act? What does Stevens mean when he says, “That is partly true”?

4. Why do Stevens and Colfax invoke the Declaration of Independence in support of the amendment? Was the Declaration legally binding? Were its principles already reflected in the Constitution? (All of them?)

5. Why does Stevens consider Section 2 of the Fourteenth Amendment “the most important”? Do you agree? Why does General Butler say he disagrees with Section 2? What would he have proposed instead?

6. What do these speeches tell you about the process of drafting a constitutional amendment? You now have a sense of some of the aims of leading Republicans in Congress—coming to the aid of the newly freed slaves; ensuring that all persons, black and white, would equally have their rights and their lives protected; wresting control of Reconstruction from President Johnson; and preserving their majority in Congress. In trying to achieve these aims, they also thought about what was politically feasible—ratification would happen only if the amendment proved satisfactory to state legislatures that were controlled not by Radical Republicans but by moderates. Keeping in mind these aims and this political constraint, try your hand at drafting a better Fourteenth Amendment. What would it say? What difficulties do you encounter?

7. In June 1866, Congress sent the proposed Fourteenth Amendment to the states for ratification. Within five weeks, three states had ratified it: Connecticut, New Hampshire, and Tennessee (a Southern state with an unusually large number of Union supporters, which then promptly had its senators and representative seated in Congress). Northern states slowly began to ratify the amendment; the other states of the former Confederacy rejected it. But the Republicans in Congress had leverage: they refused to seat the senators and representatives of the remaining Southern states until they met several requirements, including ratification of the amendment. (Could Congress do that? See p. 800.) In the summer of 1868, five Southern states ratified it. By that point, though, Ohio and New Jersey had rescinded (or tried to rescind) their ratifications. (Could they do that? See p. 802.) Between the coercion of the South and the rescinded ratifications in the North, the question has been asked whether the Fourteenth Amendment was even validly ratified under Article V. See, e.g., 2 Bruce Ackerman, *WE THE PEOPLE: TRANSFORMATIONS* (1998) (answering *no*); John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. Chi. L. Rev. 375 (2001) (answering *yes*); see also Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 N.W. U. L. Rev. 1627 (2013).

As Reconstruction continued, there were fierce conflicts between the Republicans in Congress and President Johnson, culminating in Johnson’s impeachment and acquittal by a single vote. See p. 350. In Congress, the debate over the meaning of the Fourteenth Amendment did not end when it was ratified. Between 1870 and 1875, Congress considered a number of bills enforcing the Fourteenth Amendment, exercising its power under Section 5. For an account of some of the congressional debates, including their potential significance for understanding the historical context of the Fourteenth Amendment, see p. 1361.

Meanwhile, a great issue that the Radical Republicans had set aside to secure the Fourteenth Amendment—black suffrage—took on new importance. Increasingly, white Republicans supported it, sometimes for reasons of principle and sometimes for reasons of political expediency, as they saw black enfranchisement and rebel disenfranchisement as critical to their continued control of Congress. In 1869 Congress proposed the Fifteenth Amendment, prohibiting the denial or abridgment of the right to vote “on account of race, color, or previous condition of servitude.” It was ratified in 1870. See p. 1662. Black suffrage combined with protection from federal troops led to the election of Reconstruction governments in the South that sought a clean break with the Confederate

past. Hundreds of former slaves became legislators across the South, a majority of the state legislators in South Carolina were black, and Louisiana elected a black governor. But this “new birth of freedom” would soon be challenged. See p. 1344.

No change to the U.S. Constitution has been more consequential than the Fourteenth Amendment. Most of the modern cases arising under the amendment involve Section 1’s second sentence—the modified language of Bingham’s original proposal. The breadth and seeming ambiguity of some of Section 1’s terms have given rise to enduring controversies in constitutional law. What are the “privileges or immunities of citizens of the United States” that states may not abridge? What is meant by “due process of law”? By “the equal protection of the laws”? In Bingham’s original proposal, the broad language was essentially a delegation of power to Congress. But with the transformation of Bingham’s proposal into a direct constitutional prohibition on state action, is the broad language now a similarly broad delegation to the judiciary? As you will see, the Fourteenth Amendment has become the basis for much of modern constitutional law—and for much of the controversy over the appropriate role of the judiciary in interpreting the Constitution.

The rest of this chapter is arranged this way: It begins with the *Slaughter-House Cases*, a famous decision in which the Supreme Court first interpreted Section 1 of the Fourteenth Amendment. Next are several cases on the Fourteenth Amendment’s structure and logic—on how it “works” in actual operation. These cases consider both the “state action” doctrine and the scope of Congress’s Section 5 enforcement power. After that are the complicated and challenging modern doctrines derived from the Equal Protection Clause: racial classifications (including discussion of disparate impact and affirmative action), sex classifications, and other possibly suspect classifications of persons. Finally, there is a lengthy consideration of the Due Process Clause and the doctrine of substantive due process, including famous cases such as *Lochner*, *Roe*, and *Obergefell*.

[Assignment 64]

D. THE EARLY CASES

Slaughter-House Cases

83 U.S. (16 Wall.) 36 (1873)

■ MR. JUSTICE MILLER delivered the opinion of the court.

These cases . . . arise out of the efforts of the butchers of New Orleans to resist the Crescent City Live-Stock Landing and Slaughter-House Company in the exercise of certain powers conferred by the charter which created it, and which was granted by the legislature of that State. . . .

The statute thus assailed as unconstitutional was passed March 8th, 1869, and is entitled “An act to protect the health of the city of New Orleans, to locate the stock-landings and slaughter-houses, and to incorporate the Crescent City Live-Stock Landing and Slaughter-House Company.”