William E. Nelson

# THE Fourteenth Amendment

*From Political Principle to Judicial Doctrine*

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# The Fourteenth Amendment

*To Greg*

# Preface

I have been privileged in more than two decades of professional work to associate with many extraordinary people, most of whom have contributed to this book. I first became fascinated with the issues raised by the history of the Fourteenth Amendment when, as law clerk to Justice Byron R. White during the October Term 1970, I observed the Court deciding the case of *Oregon* v. *Mitchell*. My observations persuaded me that scholars who had addressed Fourteenth Amendment issues had produced only advocacy history and that a need accordingly existed for a history of the amendment more finely attuned to the contours of the past.

As soon as I left the Court, I began exploring the intellectual backgrounds of those who adopted the amendment in an effort to appreciate the problems they faced and the means by which they hoped to solve them. But I found the puzzles raised by the history of the Fourteenth Amendment intractable. Fortunately, my then colleague Bruce Ackerman persuaded me not to abandon the research I had done but to redirect it instead to a study of late nineteenth century legal and political theory in general, rather than of the amendment in particular. This led first to an article, "The Impact of

the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America," published in the 1974 *Harvard Law Review,* and ultimately to a book, *The Roots of American Bureaucracy, 1830–1900*, published in 1982 by Harvard University Press.

Teaching proved more productive. My efforts to bring coherence to takings and regulation jurisprudence in the first-year property course led me to find in late nineteenth-century cases a line of doctrine differentiating between legislative efforts to promote the public good, and partisan attempts to further narrow, sometimes even private interests. When I began teaching constitutional law in the late 1970s, the same distinction emerged in several opinions of Justice White, especially in *Washington* v. *Davis*.

At that point various pieces of the Fourteenth Amendment puzzle fell into place, as I identified a historical question about the framing and ratification of the amendment that other scholars had not yet addressed. The question was whether the people who adopted the amendment in the 1860s anticipated the distinction between public good and partisan interest that animated the Supreme Court's interpretation of the amendment less than a decade later. With this in mind I began in 1981 to undertake the specific research that has led to this book.

This research has been generously supported by the John Simon Guggenheim Memorial Foundation and by the Filomen D'Agostino and Max E. Greenberg Faculty Research Fund of New York University School of Law. A Guggenheim Fellowship enabled me to extend a sabbatical leave from one to two semesters. The Greenberg Fund provided a third semester of research time. In addition, it granted me several summer stipends and financed many weeks of travel to Washington, D.C., to work at the Library of Congress.

Not unexpectedly, the data I uncovered did not answer my initial questions in a clear, unidimensional fashion. As a result, my questions and hypotheses required continual rethinking and modification. Two individuals played especially vital roles in this process. Ronald Dworkin helped bring greater conceptual clarity to my analysis by sharing with me ideas that have since appeared in his recent book, *Law's Empire;* in particular, he explained why judicial protection of equality typically leaves legislatures greater leeway in making law than does judicial enforcement of a defined set of natural rights. Robert Kaczorowski provided another invaluable sounding board.

Over a period of several years we frequently discussed his work on the Fourteenth Amendment, which came to fruition before mine and arrived at a different conclusion. In consequence of those discussions, I was frequently compelled to reframe my own hypotheses in response to the growing subtlety of Kaczorowski's.

Many people have either read the manuscript or heard me present parts of it. Michael Les Benedict, Norman Cantor, John Phillip Reid, and Harvey Rishikoff made noteworthy contributions to my thinking. I am also indebted to J. Willard Hurst, Harold Hyman, and Robert Post for their helpful critiques of the final manuscript.

Two others deserve mention even though they have not read the manuscript: Bernard Bailyn, who taught me how to write history, and Edward Weinfeld, who embodies for me the highest aspirations of American constitutionalism as they have found representation in the Fourteenth Amendment. I am also grateful to the Harvard Law School Library for permission to quote from the James Bradley Thayer (1831–1902) Papers and the Harvard Law School Student Notebooks, to the Bentley Library of the University of Michigan for permission to quote from the Thomas M. Cooley Collection, and to the New Jersey Historical Society for permission to quote from the Joseph P. Bradley Papers. Special gratitude is due the staff of the Library of Congress for its consistently courteous and professional manner of facilitating access to large portions of the manuscript and newspaper materials in its custody.

Finally, there is my family. Elaine has waited through this book with her accustomed patience, while Leila has appreciated its connection to the bicentennial of the Constitution. Greg remains too young yet to have appreciated the book or to have shown much patience with its drafting, but he has always been at the center of my thoughts during the research and writing. The Fourteenth Amendment offers him, despite his birth abroad under conditions of deprivation and poverty, the hope of a decent life as an American.

# The Fourteenth Amendment

# ARTICLE XIV

Section 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.

Section 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.

Section 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.

Section 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.

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

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## CHAPTER I

# The Impasse in Fourteenth Amendment Scholarship

As Judge Henry Brannon wrote in 1901, it was "almost daily, in the federal and state courts, that the Fourteenth Amendment . . . [was] appealed to. . . . The supreme importance of that Amendment . . . [was] at once evident in theory and practice."[1] Indeed, William D. Guthrie thought that the nation's "constitutional history" during the last three decades of the nineteenth century "may be said to be but little more than a commentary on the Fourteenth Amendment."[2] As Brannon added in a statement that remains true today, the amendment's "importance is not waning, but growing."[3]

As a list of the Supreme Court's Fourteenth Amendment cases suggests, Brannon and Guthrie were surely correct. By the time they had published their books at the turn of the century, the Court had already decided the *Slaughter-House Cases*,[4] upholding state zoning and regulation of the business of butchering and selling animals; the *Civil Rights Cases*,[5] holding that the amendment applies only to state action; *Plessy* v. *Ferguson*,[6] upholding racial segregation; and *Allgeyer* v. *Louisiana*,[7] limiting the regulatory power of states over business. In the next three decades, the Fourteenth Amendment provided the basis for deciding *Lochner* v. *New York*,[8] which

invalidated a New York statute setting maximum hours of work; *Muller* v. *Oregon*,[9] which sustained an Oregon statute setting maximum hours of work for women; *Coppage* v. *Kansas*,[10] which voided a Kansas act directed against "yellow dog" contracts; and *Adkins* v. *Children's Hospital*,[11] which declared a District of Columbia law setting minimum wages for women unconstitutional. In more recent decades, the Fourteenth Amendment has been implicated in *Brown* v. *Board of Education*,[12] dealing with racial segregation in public schools; in *Roe* v. *Wade*,[13] invalidating state antiabortion legislation; and in *University of California Regents* v. *Bakke*,[14] involving affirmative action for racial minorities. Most recently, however, the Court refused in *Bowers* v. *Hardwick*[15] to read the amendment as guaranteeing individuals autonomy to engage in whatever sorts of consensual sex they wish.

All these cases, along with many others applying the Fourteenth Amendment to a wide variety of legal and social issues, were highly controversial. On the one hand, claims were advanced about the need for federal judicial intervention to protect fundamental rights of individuals and minorities.[16] On the other hand, arguments were made that judges appointed to the bench with life tenure have no business overruling the policy choices of democratically elected legislatures and that the federal government has no business interfering in the internal governance of the states.[17]

Meanwhile, historians have been engaging in a debate which parallels that of the lawyers. The first full history of the amendment, by Horace E. Flack, concluded that the framers intended their handiwork to give the federal government broad powers to protect individual freedoms, including those enumerated in the Bill of Rights.[18] Almost half a century later, Jacobus tenBroek emphasized that the Republican legislators who framed and ratified the amendment had devoted two decades of their lives prior to the Civil War to the advancement of human rights and equality and implied that those legislators intended to achieve codification of their libertarian views through the Reconstruction amendments.[19] In a series of articles published at about the same time, Howard Jay Graham maintained that the Fourteenth Amendment was designed to protect equality and natural rights,[20] while in recent books Chester J. Antieau, Judith A. Baer, and Michael Kent Curtis have concluded that the amendment both applies the Bill of Rights to the states and guarantees equality

together with other unspecified rights.[21] In addition, numerous articles urge that the framers drafted their amendment with sufficient breadth to prohibit racial segregation,[22] to grant blacks the right to vote,[23] and to protect blacks against private discrimination as well as against state action.[24]

This expansive reading of the Fourteenth Amendment's framing and ratification has not, however, gone unchallenged. In what still remain two leading articles, Alexander M. Bickel and Charles Fairman argued that the Fourteenth Amendment was not intended to prohibit states from segregating blacks in public schools or to render the Bill of Rights applicable to the states.[25] In recent articles, Earl M. Maltz has suggested that the amendment was not intended to give blacks the right to vote and that the concepts in section one—privileges and immunities, due process, and equal protection—had their origins in the antebellum period not only in radical antislavery thought but in proslavery Southern thought as well.[26] The most important history of the amendment to read the intentions of its authors and ratifiers narrowly is Raoul Berger's,[27] which also takes the view that section one had a "clearly understood and narrow compass"[28] and was not intended either to grant blacks voting rights, to eliminate segregation, or to bind the states to the provisions of the Bill of Rights.

The debate among legal historians about the purposes and intentions of the Fourteenth Amendment's framers is linked, in turn, to a more general historical controversy over the nature of Reconstruction. On one view, the Republican legislators who dominated the Thirty-ninth Congress and state legislatures throughout the North were idealistic statesmen who meant to concretize in constitutional law the right to equality and other rights for which they had struggled all their lives.[29] An alternative view is that the primary concern of mainstream Republican leaders during the course of 1866 was to hold the party together, retain political power, and thereby preserve a political climate in which the North's capitalist economy could continue to flourish and grow.[30]

Voluminous evidence has been presented in support of both the expansive and the narrow readings of the Fourteenth Amendment's history. Historians who read the amendment broadly point to statements made by its proponents that the rights specified in the first eight amendments, together with the right to vote, were among

those included in the privileges and immunities of citizens that section one was designed to protect. They also point to the lifelong antisegregationist attitudes of many Republicans, as well as to the belief of the Forty-third Congress, only seven years after the Fourteenth Amendment's ratification, that the amendment gave it power to prohibit segregation in public facilities. An impressive book by Robert J. Kaczorowski shows that, throughout the late 1860s and early 1870s, federal officials in the South, acting under the authority of the Fourteenth Amendment, protected voting rights and First Amendment rights against infringement by private individuals as well as public officials.[31] Taken together, the evidence in support of a broad reading of the Fourteenth Amendment is quite substantial.

Equally cogent evidence has been mustered in favor of the narrow reading, however. Negrophobia, it has been shown, was rampant throughout the North, where, it is said, only a minority of voters truly cared about protecting black rights and guaranteeing black equality. Most Northern states maintained segregated schools, denied blacks the right to vote, and failed to give their citizens all the rights guaranteed by the Bill of Rights. Historians who read the Fourteenth Amendment narrowly point to statements made in Congress that the amendment would have no effect whatever in the North, as well as to the fact that legislatures ratified the amendment without expressing any concern that its passage would require them to change any of their practices, and to the further fact that, after the amendment's passage, no states altered their practices, apparently out of a belief that the amendment did not require them to do so.

Historical scholarship on the adoption of the Fourteenth Amendment is now at an impasse. The conflicting interpretations, all of them supported by impressive arrays of evidence, have left historians and lawyers wondering whether the Republicans who pushed the amendment through Congress and the state legislatures had any clearcut intentions as to what it should mean. Legal historians with viewpoints as divergent as Earl Maltz and Judith Baer agree only that the historical "evidence . . . is not entirely consistent" and often "is simply ambiguous;"[32] that "[c]onfusion and contradiction abound;" and that "the guarantees found" in section one of the amendment "are so broad and general that they could be used to support almost anything."[33]

Not only has this impasse in Fourteenth Amendment scholarship impoverished our understanding of constitutional history; it has also transformed the judicial search for framers' intentions into a sort of game, in which judges search for historical tidbits to support preconceived positions grounded in contemporary policy choices. Virtually everyone who plays this interpretivist game knows that specific intentions compelling judges to reach a particular result rarely exist in Fourteenth Amendment cases; historical arguments usually can be made in support of any result. Nonetheless judges and lawyers continue to search for specific intentions, with the perverse consequence that interpretivism has been transformed from a method for controlling discretion and dictating results into a device freeing judges to decide cases on whatever bases they prefer.

This study attempts to move historical scholarship on the Fourteenth Amendment beyond this present impasse. My argument proceeds in two obvious fashions: by examining primary source materials that most previous historians have ignored, and by asking questions about the sources that previous historians have not asked.

First, the sources. Nearly all the scholarship dealing with the adoption of the amendment which is addressed to lawyers[34] is based on a single set of source materials: the debates of Congress as reported in Benjamin B. Kendrick's *The Journal of the Joint Committee of Fifteen on Reconstruction*[35] and in the *Congressional Globe*. Only occasional references are made to other sources such as newspapers. Although historians like tenBroek and Wiecek, who have studied the antislavery antecedents of the amendment, and Kaczorowski, who has studied the enforcement of the amendment in Southern localities during the decade after its enactment, have looked outside the confines of the congressional materials, legal scholars who have examined the passage of the amendment itself have generally not done so.[36] This is not surprising. The debates of Congress recorded in the *Journal* and the *Globe* are an unusually extensive and rich body of materials; it is impossible to examine these materials without spending a great deal of time and obtaining a good deal of insight. But it is essential to move beyond the familiar sources. Accordingly I have also examined the state ratification debates, the private papers of congressmen, and some one hundred newspapers during the period when the Fourteenth Amendment was under consideration in Congress and in the states, as well as court cases and professional legal

commentary during the years when the amendment was first being construed by the judiciary.

It is even more important to ask new questions than to examine more sources. The present impasse has resulted largely from the persistence of scholars in asking questions of twentieth-century significance that cannot be answered by historical inquiry, such as, for example, whether the framers intended section one to preclude states from enacting antiabortion legislation[37]—a question that never occurred to the Reconstruction generation and hence cannot be answered by examining records of its actual thought. More commonly, scholars have inquired about how the framers would have resolved issues they did consider but in fact never resolved. A classic issue of this sort concerns the impact of the amendment on voting rights—a question discussed incessantly during the congressional and ratification debates but never decided by either Congress or the state legislatures. In an effort to resolve it historians have tallied up the evidence and tried to identify the dominant or weightier view, but it is not surprising that different historians who have examined varying packages of evidence and assigned uneven weights to them have reached opposite conclusions. The problem, of course, is that history can never tell us how the framing generation would have resolved inconsistencies that it did not, in fact, resolve. The present impasse in Fourteenth Amendment scholarship results from continued efforts to accomplish this impossible task. If historical scholarship is to move forward, it must turn instead to identifying the meaning which the amendment had for its proponents, even if that meaning is not dispositive of the issues pending in the courts today.

I can best illustrate my difficulty with most of the existing scholarship by examining what I find to be the best single article yet written on the Fourteenth Amendment—the classic article on segregation by Alexander Bickel.[38] After considering the congressional debates—in which he found no evidence that anyone proposed to end segregation—together with the widespread existence of segregated schools and public facilities in the North, Bickel wrote that "[t]he obvious conclusion to which the evidence . . . leads is that section 1 . . . was meant to apply neither to jury service, nor suffrage, nor antimiscegenation statutes, nor segregation." He added that "[t]he evidence of congressional purpose [was] as clear as such evidence is likely to be."[39] My difficulties with this conclusion are twofold. One