Raoul Berger's Fourteenth Amendment—Abuse by Contraction vs. Abuse by Expansion

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Introduction

> All persons born or naturalized in the United States, and subject to the laws 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.[1]

If one man alone had produced the Fourteenth Amendment, we would have to judge him muddle-headed, inarticulate, and without much legal training or experience. Derived as it was from the efforts of the thirty-ninth Congress, surely its opacity reflects a noble, platonic ideal along with cross-currents of doubt, disagreement and misunderstanding as to what the great conception was to mean in mundane application. In short, the Amendment reeks of compromise.[2]

The problem facing the framers was to reconcile radical, moderate and conservative Republican political views and to achieve ratification by three-fourths of the states, with all their varied views and interests. The solution was high-blown rhetoric with minimal specific content—constitutional rhetoric which has meant all things to all judges whether on the right or on the left. Justice Field, for example, held that the

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1. U.S. CONST. amend. XIV, § 1.

2. Congressman Thaddeus Stevens, for example, said of the proposed amendment: "This proposition is not all that the committee [on Reconstruction] desired. It falls far short of my wishes, but it fulfills my hopes. I believe it is all that can be obtained in the present state of public opinion. Not only Congress but the several States are to be consulted. . . . Mutual concession, therefore, is our only resort, or mutual hostilities." CONG. GLOBE, 39th Cong., 1st Sess. 2459, 3148 (1866) [hereinafter cited as GLOBE].

Amendment incorporated "the pursuit of happiness" as found in the Declaration of 1776, which for him meant economic laissez-faire[3] but not protection for blacks.[4] Justice Bradley found it compatible with blatant male chauvinism;[5] others have seen in it the basis for equality between the sexes.[6] The first Justice Harlan discovered in the privileges or immunities and due process clauses an incorporation of the Bill of Rights.[7] Others discerned in the due process or equal protection guarantees constitutional support for liberty of contract,[8] the fair value doctrine[9] and "separate but equal" facilities for blacks.[10] Justices Black

3. *See, e.g.*, Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 757 (1884) (Field, J., concurring). There Justice Field stressed the rationale behind his *Slaughter-House Cases* dissent: the view that the right to pursue the trade or business of one's choice was an "essential element of that freedom" which is the birthright of every citizen. *Id.* at 757. He therefore believed that the exercise of a state's police power does not extend to granting the alleged monopoly. *Id.* at 758, 760.

4. *Ex parte* Virginia, 100 U.S. 339, 349 (1879) (Field, J., dissenting, joined by Clifford, J.). Justice Field here disagreed with the view that the rights of black citizens were violated by their exclusion as jurors on the grounds that only "civil" and not "political" rights were granted under the Fourteenth Amendment. *Id.* at 367. As a natural extension of criminal punishment for judges who deliberately excluded blacks from juries, which a majority of the Court upheld, he saw the possibility that equal protection would require the appointment of black judges. This prospect, he wrote, was "not in accordance with the understanding of the people as to the meaning of those terms since the organization of the government." *Id.* at 370.

5. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring in the judgment, joined by Swayne & Field, JJ.). Agreeing that women had no constitutional right to be considered for admission to the Bar, Justice Bradley stated: "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator." *Id.* at 141.

6. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973). Four Justices in *Frontiero* were willing to treat sex classifications as "suspect", a view which would require that any statute discriminating on the basis of gender be supported by a showing that the classification is necessary to achieve a compelling state interest. *Id.* at 682-83. Four other Justices were unwilling to adopt this approach, but found that the statute at issue, which allowed a woman member of the armed services to claim her husband as a dependent only upon a showing that he received over half of his support from her while not requiring male servicemen to make such a showing, was arbitrary and bore no rational relationship to a legitimate state objective. *Id.* at 691-92.

7. Twining v. New Jersey, 211 U.S. 78, 117-18 (1908) (Harlan, J., dissenting). Justice Harlan believed that the principle underlying the privilege against self-incrimination had become embodied in our common law by the time of the ratification of the Fourteenth Amendment and was therefore a privilege of national citizenship. *Id.* at 119-21. Resuscitating the privileges or immunities clause from the limbo of the *Slaughter-House Cases*, he viewed it, along with the due process clause, as a means of applying the Fifth Amendment privilege against self-incrimination to the states. *Id.* at 123-24.

8. Lochner v. New York, 198 U.S. 45 (1905). *See* notes 25-27 and accompanying text *infra*.

9. Smyth v. Ames, 169 U.S. 466 (1898). The "fair value doctrine" was the Court's response to a challenge brought by a railroad against allegedly unreasonably low intrastate

and Douglas held that section 1 "taken as a whole" incorporates the "specific," and "clearly marked constitutional boundaries" of the Bill of Rights *and no more*.[11] On the latter point Justice Douglas subsequently changed his mind.[12] Later still he insisted that due process protects a penumbral right to privacy embracing abortion[13] and the use of contraceptives.[14] The "specific" and "clearly marked . . . boundaries" of the Bill of Rights obviously had expanded.[15] Yet the newly discovered right of privacy, it seems, does not include private, consensual, adult homosexuality[16] or choice of hair styles.[17]

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passenger rates set by a state legislature. In upholding a decree restraining enforcement of the state act, the Court enunciated a formula by which "fair value" might be determined, and which would provide a supposedly fair return to the company while at the same time not extracting more from the public than the service was reasonably worth. *Id.* at 547.

10. Plessy v. Ferguson, 163 U.S. 537 (1896). *Plessy* held that the "separate but equal" railroad coaches required by a Louisiana statute were not in conflict with the Thirteenth or Fourteenth Amendments. Such separation did not, in the Court's opinion, impose a "badge of inferiority." *Id.* at 551.

11. Adamson v. California, 332 U.S. 46, 74-75, 91-92 (1947) (Black, J., dissenting, joined by Douglas, J.). Justice Black saw the original purpose of the Fourteenth Amendment as extending "to all the people of the nation the complete protection of the Bill of Rights." *Id.* at 89. This "clearly marked constitutional boundar[y]" would discourage the Court's tendency to "roam at will in the limitless area of their own beliefs as to reasonableness." *Id.* at 91-92. *See also* Mendelson, *Mr. Justice Black's Fourteenth Amendment*, 53 MINN L. REV. 711 (1969).

12. Poe v. Ullman, 367 U.S. 497, 516 (1961) (Douglas, J., dissenting). Justice Douglas explicitly stated: "I do not think [due process] is restricted and confined to [the first eight Amendments]." *Id.* at 516. He then embarked on defining the "emanations" from specific guarantees which gave content to the concept of "liberty." *Id.* at 516-17. This approach reached fruition in *Griswold v. Connecticut*, 381 U.S. 479 (1965). *See* note 14 *infra*.

13. Doe v. Bolton, 410 U.S. 179, 214-15 (1973) (Douglas, J. concurring). This opinion also applied to Roe v. Wade, 410 U.S. 113 (1973).

14. Griswold v. Connecticut, 381 U.S. 479 (1965). Justice Douglas' opinion for the *Griswold* Court set forth the elusive "penumbra-emanations doctrine" through which certain specific guarantees of the Bill of Rights were found to include penumbrae, rights not specifically set forth in the text of the Constitution but the existence of which could be judicially implied. The penumbras emanating from various constitutional guarantees were held to form a zone of privacy around the marital relationship. *Id.* at 484-86. A statute which forbade the use of contraceptives, thus impinged on the constitutionally protected right of privacy, in violation of the due process clause of the Fourteenth Amendment. *Id.* at 481, 485.

15. *Id.* at 482-83.

16. The Court declined to hear oral argument in Doe v. Commonwealth's Att'y for Richmond, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 985 (1976). Its summary affirmance in *Doe* served to endorse the enforcement of criminal statutes against private, consensual homosexual acts. The Court again refused to consider the constitutionality of such laws, either on their face or as applied, by denying certiorari in Enslin v. Bean, 436 U.S. 912 (1978).

17. Kelley v. Johnson, 425 U.S. 238 (1976); Olff v. East Side Union High School, 445 F.2d 932 (9th Cir. 1971), *cert. denied*, 404 U.S. 1042 (1972).

In other contexts, the equal protection guarantee has been held to authorize judicially imposed busing[18] and reapportionment,[19] the latter to save us from, *inter alia*, representation by "trees and acres" in state legislatures, although that seems quite permissible (and not troublesome) in the national Senate. Fourteenth Amendment due process eventually came to incorporate the Sixth Amendment right to a jury trial,[20] although not by the traditional jury of twelve; six would suffice,[21] but not five.[22] Moreover, the new version of trial by jury—repudiating an old tradition—permits non-unanimous convictions except, thanks to a single Justice, in federal cases.[23] Perhaps strangest of all, some rights deemed so "fundamental" as to be implicit in the due process concept are nonetheless not basic enough to require retroactive application for everyone.[24]

What many or all of these and related views have in common is make-believe, both in substance and method. At first the Court was quite direct, outspoken and dogmatic—as in *Lochner v. New York*:[25] "There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. . . . We do not believe in the soundness of the views which uphold this law."[26] No doubt mindful of what happened to *Lochner*[27] and to the "nine old men" and the debasement of the *Lochner* majority's view, neo-activists seem to have grown quite public-relations conscious. In any event their opinions seem more and more devious, sloganistic and directed to the human thirst for

18. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

19. Reynolds v. Sims, 377 U.S. 533 (1964).

20. Duncan v. Louisiana, 391 U.S. 145 (1968).

21. Williams v. Florida, 399 U.S. 78 (1970).

22. Ballew v. Georgia, 435 U.S. 223, *cert. denied* 436 U.S. 962 (1978).

23. Justice Powell concurred in the Court's approval of non-unanimity in a non-capital *state* prosecutions, Johnson v. Louisiana, 406 U.S. 356, 369 (1972) (Powell, J., separate opinion), but adhered to the view that unanimity was required in *federal* jury trials by the virtue of Sixth Amendment, Apodaca v. Oregon, 406 U.S. 404 (1972).

24. *See, e.g.*, Linkletter v. Walker, 381 U.S. 618 (1965). *Linkletter* held that the exclusionary rule adopted in Mapp v. Ohio, 367 U.S. 643 (1961), would not be applied retroactively to decisions which were final prior to the date of the *Mapp* opinion. 381 U.S. at 639.

25. 198 U.S. 45 (1905).

26. *Id.* at 57, 61.

27. *Lochner's* substantive due process approach has been roundly criticized and was explicitly disavowed by later Courts. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1962): "We refuse to sit as a 'superlegislature to weigh the wisdom of legislation,' and we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' " *Id.* at 731-32 (footnotes omitted).

fairytales—which is to say that modern Supreme Court opinions are often quite inept as legal documents. In this new genre the Douglas effort in *Griswold v. Connecticut*[28] is a classic. Some of us may be excused for thinking Justice Douglas was far too astute to be taken in by his own ploy. Surely his purpose was to obscure (for lesser minds) a raw exercise of judicial fiat. Make-believe, it seems, is activism's concession to the Rule of Law. Never again have activist judges dared to be as forthright as they were in *Lochner*.[29]

Behind the verbal ambiguity of the Fourteenth Amendment lay a problem of morality. On one basic issue the North and South were largely in agreement: blacks were generally considered inherently inferior beings.[30] Yet the Civil War had cost the North dearly, and this sacrifice was not to be forgotten. The South had erred; indeed in the view of many it had sinned. But even in defeat she was defiant: witness the Black Codes,[31] the bloody anti-Negro riots in Memphis and New Orleans, lesser ones elsewhere and the election of Confederate leaders to high post-bellum state and national offices. As James G. Blaine observed: "If the Southern men had intended, as their one special and desirable aim, to inflame public opinion of the North . . . , they would have proceeded precisely as they did."[32] Finally, Lincoln's murder was thought by many to have sprung from a southern conspiracy.

All in all the North was deeply troubled, if not altogether outraged. It saw in President Johnson's lenient Reconstruction a risk of losing the peace after winning the war—a risk of continued slavery under a new name. Southern laws on vagrancy and breach of labor contracts had already established a kind of peonage in several southern states.[33] The problem was not only that the North might lose the peace; it might also lose control of Congress.[34] Reestablishment of the potent,

28. 381 U.S. 479 (1965). *See* note 14 *supra.*

29. For a brief survey of periods of activism on the Supreme Court, see Mendelson, *Separation, Politics and Judicial Activism*, 52 IND. L.J. 313 (1977).

30. *See* R. BERGER, GOVERNMENT BY JUDICIARY 10-15 (1977) [hereinafter cited as GOVERNMENT BY JUDICIARY] and authorities cited therein.

31. The Black Codes established restrictions on blacks with regard to litigation, labor, property ownership and many other aspects of life. Representative Black Codes are collected in 1 FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 273-312 (1906) and in MCPHERSON, HISTORY OF THE RECONSTRUCTION 29-44 (1871).

32. See 2 S.E. MORRISON, ET. AL., A CONCISE HISTORY OF THE AMERICAN REPUBLIC 334 (1977).

33. *See* note 32 *supra.*

34. Section 2 of the Fourteenth Amendment, in extending full citizenship to blacks, threatened to upset the electoral balance that had been maintained under art. I, section 2, of the Constitution (the "three-fifths" clause).

pre-war West-South agrarian political alliance was a real possibility and not a negligible threat to northern industrial well-being.

In this context of "sin" and politico-economic danger, it was, perhaps, inevitable that radical Republicanism might carry the North further than it really cared to go. Reconstruction involved a kind of moral taxation without effective representation. Slavery and the black population after all were concentrated largely in the South. The great migrations still lay far in the future. Millions of Americans in the North and West had never even seen a black; millions more had never had any significant relationship with one—and never would. In such circumstances, legal or moral Reconstruction necessarily entailed a built-in double standard. The onus of reform had to fall far more heavily upon one region and one group than upon any other. As a practical matter, the problem was "reform thy neighbor"—always more attractive than reforming one's self. Most or many who supported the Civil War Amendments must have found in them a great moral imperative which would cost them nothing. Some obviously believed that southern "sin" required atonement by suffering and humiliation.[35] Despite its broad language, the Fourteenth Amendment apparently seemed to many, perhaps most, of its supporters to be a lash more applicable to others (sinners) than to themselves. Thus, contemporaneously with ratification of their new Amendment, the Republicans could write a double standard into their 1868 party platform:

> The guaranty by Congress of equal suffrage to all loyal men at the South was demanded by every consideration of public safety, of gratitude, and of justice, and must be maintained; while the question of suffrage in all loyal [non-Southern] States properly belongs to the people of those States.[36]

Only after achieving political security in the 1868 presidential election victory of Grant did the radicals begin their all-out fight for nationwide black suffrage. How different its anticipated impact in the North, with relatively few blacks, vis-à-vis what might be expected in Dixie, where in many areas ex-slaves constituted a majority or at least a sizeable bloc.

The Fourteenth Amendment, then, presents a double embarrassment: an ambiguous edict adopted by men who knew that its real-life impact must be at best grossly uneven, and that in any event it would not be uniformly applied. The latter supposition is supported by his-

35. *See, e.g.*, GLOBE, *supra* note 2, at 631, 833, 1159, 2773. Various speakers inveighed against the barbarity of Southern treatment of blacks.

36. *See* C. VANN WOODWARD, THE BURDEN OF SOUTHERN HISTORY 98 (1961).

tory. The new law was not enforced in the North. It was soon found too revolutionary, too subversive of accepted ways of life to be enforced in the South without troops. Yet extended military occupation was out of the question. When that ended by mutual consent, the Fourteenth Amendment became with respect to blacks little more than a tabled promise. Almost a century later, spurred perhaps by Nazi racism, the nation came to see that the South had not been alone in error and that the Civil War Amendments apply to everyone. The old, futile policy of regional Reconstruction gave way to national Reconstruction. Meanwhile an enigmatic basic law calculated to promote fair treatment of blacks was made to serve quite different purposes: at first economic laissez-faire,[37] and later that unique experiment in government by judges called Warren Court activism.[38] Against this background I now offer an approach to section 1 of the Fourteenth Amendment which seems to me more compatible with the Rule of Law, and consent of the governed, than the Supreme Court has given us for many years. I offer first some general observations on constitutional construction, then a revised opinion for the Court in the *Slaughter-House Cases*,[39] the Court's first brush with the Fourteenth Amendment. This is by way of agreement and disagreement with Raoul Berger's *Government by Judiciary*.

I. Constitutional Construction

In *Marbury v. Madison*[40] the Court made much of the fact that ours is a "written Constitution." Such language occurs at least seven times in Chief Justice Marshall's unanimous opinion. It expresses the premise of his holding that neither Congress *nor the Supreme Court* may go beyond the mandate of the written words.[41] What is involved,

37. *See, e.g.*, Wolff Packing Co. v. Industrial Court, 262 U.S. 522 (1923); Lochner v. New York, 198 U.S. 45 (1905).

38. *See, e.g.*, Kramer v. Union Free School Dist., 395 U.S. 621 (1969) (right to vote in school district elections); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception); Reynolds v. Sims, 377 U.S. 533 (1964) (reapportionment). *See generally* Mendelson, *The Politics of Judicial Activism*, 24 EMORY L.J. 43 (1975): "Reapportionment and a new national code of criminal case procedure, for example, were instigated by judicial fiat without any significant political discussion. An inverse relationship between Court and [political] party power may not be a peculiarity of our day, however. It seems rather a peculiarity of our system. In fact judicial pretension appears to have thrived only in periods of unusual weakness in our political processes; at other times it has been effectively rebuffed. In short 'government by judges' seems no more possible than flaws in the party system permit it to be." *Id.* at 43-44.

39. 83 U.S. (16 Wall.) 36 (1873).

40. 5 U.S. (1 Cr.) 137 (1803).

41. The Marshall Court's broad view of national, *i.e.* congressional, power in McCul-

of course, is the principle of government by law as distinct from government by men. The Marshall Court subsequently ran into an ancient problem: writing does not insure clarity in communication. Faced with this difficulty in *Gibbons v. Ogden*,[42] the Chief Justice called up a centuries-old aid to construction: the Rule in Heydon's Case.[43] This holds that a clue to the meaning of ambiguous language in a formal document can often be found in the circumstances that begot the document and the language at issue. As Chief Justice Marshall put it:

> If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well-settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself [to form a more perfect union], should have great influence in the construction. We know of no reason for excluding this rule from the present case.[44]

The result was an expansive reading of the national commerce power.[45] In the same case, however, when the Court found the Constitution less than clear with respect to state authority vis-à-vis interstate commerce—as to which the application of Heydon's Rule yielded no clue—Marshall, eschewing broad nationalism, bypassed the matter by deciding the case on another ground.[46]

Twenty-five years later, the Taney Court recognized that an issue must be deemed nonjusticiable, and left for resolution by the political processes, if there are no judicially discoverable standards to guide ad-

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loch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), was anticipated in THE FEDERALIST No. 33, No. 44 (A. Hamilton), and is indeed based on the written words of the Constitution, U.S. CONST. art. I, § 8. Moreover, the power in question is a *legislative* power limited by the electoral process and a tripartite (Senate, House, Executive Branch) system of checks and balances. This is a far cry from the *Court's* claim to power, for example, in *Lochner, Smyth, Linkletter* and *Swann*. *See* notes 8, 9, 18, 24 and accompanying text *supra*.

42. 22 U.S. (9 Wheat.) 1 (1824). The issue in *Gibbons* centered on the interpretation of the commerce clause. In order to decide whether a state could grant an exclusive privilege to navigate state waters for passenger trade, the Court found it necessary to define virtually every term of the clause.

43. 3 Co. Rep. 7a, 76 Eng. Rep. 637 (Exch. 1584).

44. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 188-89 (1824).

45. Commercial divisiveness among the states and inadequate central authority to deal with it were major problems under the Articles of Confederation. The constitutional response was the commerce power granted to Congress by article I, section 8. In this light, the Marshall Court concluded the Founders must have meant the commerce power to be as extensive as the problems it was calculated to cure.

46. Although the *Gibbons* Court seemed explicitly to favor the exclusive, or nationalist, view, 22 U.S. (9 Wheat.) at 197, 199-200, it did not so hold, apparently for want of any indication that such was the purpose of the Founders. Instead, the Court held that the New York law granting exclusive steamship privileges was inconsistent with an act of Congress authorizing licensed steamboats to pursue the coastal trade.

judication.[47] As Chief Justice Hughes put it when the Court refused to decide whether a proposed constitutional amendment had expired because it had not been ratified within a "reasonable" time: "Where are to be found the criteria for such a judicial determination?"[48] What these cases teach is simply this: even Supreme Court Justices owe allegiance to the Rule of Law, to say nothing of their special obligations in a polity based on the diffusion of power and the consent of the governed. Judicial edicts derived from standards not discernible in statute or Constitution is government by judges.

On these premises I offer a revised opinion of the Court for the *Slaughter-House Cases*,[49] wherein the Fourteenth Amendment got off to a bad judicial start. The Court's decision upheld a state regulation of the slaughtering industry which had been challenged as unconstitutional under the Thirteenth and Fourteenth Amendments.[50] Reaching the same result, I will confine my opinion to that part of the case which concerns the meaning of the privileges or immunities, due process and equal protection clauses of the Fourteenth Amendment.[51] I agree with

47. Luther v. Borden, 48 U.S. (7 How.) 1 (1849). *Luther* involved a struggle between two political factions in the state of Rhode Island, each of which claimed to be the established government.

48. Coleman v. Miller, 307 U.S. 433, 453 (1939).

49. 83 U.S. (16 Wall.) 36 (1873).

50. The Louisiana statute was aimed at protecting the health of the inhabitants of New Orleans. It specified certain areas where slaughtering would be permitted, and chartered a corporation to provide appropriate slaughter-houses. All butchers could use these facilities upon payment of state approved fees; the corporation was granted a twenty-five year monopoly on the slaughter-house operation. The statute was challenged on Thirteenth and Fourteenth Amendment grounds. Mr. Justice Miller, writing for a five-four majority, read the privileges or immunities clause as granting United States citizenship to all persons born or naturalized in the United States, and state citizenship to such persons in their state of residence. *Id.* at 74. But the clause was construed as extending only those privileges or immunities which were incident to *federal* citizenship, not those incident to state citizenship. In determining which privileges or immunities were conferred by state citizenship, Justice Miller relied primarily on Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230). In *Corfield*, Justice Washington enumerated certain fundamental privileges which citizens enjoyed by virtue of state citizenship under article IV, section 2 of the Constitution: "Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety. . . . The right of a citizen of one state to pass through, or reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the citizens of the other state . . . ." *Id.* at 551-52.

Since the privilege claimed in the challenge to the Louisiana statute could arguably be derived from those privileges enumerated in *Corfield*, Justice Miller concluded that it was not protected by the Fourteenth Amendment's privileges or immunities clause.

51. The following revised opinion for the *Slaughter-House Cases* does not explicitly

Raoul Berger that the two latter provisions have been savagely abused by judicial "interpretation." However, I question his view that they were meant merely to be adjuncts for implementing the privileges or immunities clause,[52] and that the latter "had [a] clearly defined and narrow compass" revealed in the "rights . . . enumerated" in the Civil Rights Act of 1866.[53] Raoul Berger's response to abuse by expansion seems to me to constitute abuse by contraction.

II. The *Slaughter-House Cases*—Revised Opinion

1. The Privileges or Immunities Clause

Petitioners' main contention is that the Louisiana statute as applied to them violates the constitutional mandate that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."[54] What are the "privileges or immunities" of American citizenship? Nowhere in the Constitution or any act of Congress do we find a definition. Nor are we aware of any common law, or other tradition or usage, or any dictionary, that elucidates this inherently obscure and enigmatic terminology. It is in a word unintelligible. Where then are we to discover criteria for judicial determination of the issue before us?

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address the problem of racial segregation. Neither did the congressional discussion of the proposed Fourteenth Amendment; indeed the matter was hardly mentioned. The reason seems clear: racial segregation had not yet become the vicious, all-pervading thing that it would be a generation later. *See* C.V. WOODWARD, THE STRANGE CAREER OF JIM CROW (1960). The Court apparently first faced them question of segregation a few months after the *Slaughter-House* decision. Congress had chartered a railroad and provided that "no person shall be excluded from [its] cars on account of color." Act of Mar. 3, 1863, 12 Stat. 805. The Court found that this enactment was not satisfied by the provision of cars assigned exclusively to people of color, though such cars were as good as those assigned exclusively for white persons. Railroad Co. v. Brown, 84 U.S. (17 Wall.) 445 (1873). The Court noted that Congress had enacted the statute in response to existing discrimination, not in response to the exclusion of blacks from railroad cars. In interpreting the statute as demanding equal access to all cars, the Court noted the railroad's "ingenious attempt to evade a compliance with the obvious meaning of the requirement." *Id.* at 452. In short, "separate but equal" was not permissible under the Act of Congress. Surely the *Slaughter-House* Court would have reached the same result *a fortiori* in an analogous case arising under the Fourteenth Amendment.

52. GOVERNMENT BY JUDICIARY at 166-220.

53. *Id.* at 18, 36. The rights delineated in section 1 of the Civil Rights Bill of 1866 were: "That there shall be no discrimination in civil rights or immunities . . . on account of race . . . but the inhabitants of every race . . . shall have the same right 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, and shall be subject to like punishment . . . and no other." GLOBE, *supra* note 2, at 474.

54. U.S. CONST. amend. XIV, § 1.

We find no help—indeed only more confusion—in the proceedings of the thirty-ninth Congress which proposed the Fourteenth Amendment. Mr. Fellows in an able brief for the petitioners has traced more than a little of the legislative history of the troublesome term. There can be no doubt of his diligence and high ability. His efforts confirm what our own indicate: the "intention" of Congress is as obscure as its language. Even the views of the three chief congressional sponsors of the measure are mutually contradictory. Congressman John Bingham, the James Madison of the Fourteenth Amendment, observed in his final summation in the House:

> [t]here remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is it? It is the power in the people . . . to do that by Congressional enactment which hitherto they have not had the power to do . . . that is to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person . . . whenever the same shall be abridged or denied by the [already] unconstitutional acts of any State.
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> Allow me . . . in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power. . . .[55]

Thus in Congressman Bingham's view, the privileges or immunities and related clauses entailed no *new* constitutional prohibition whatsoever; they merely authorized *congressional enforcement* of prohibitions already contained in the Constitution.

Congressman Thaddeus Stevens, a major force in congressional Reconstruction, introduced the proposed amendment in the House on behalf of the Joint Committee on Reconstruction (May 8, 1866). He agreed with his colleague Bingham that the measure would correct the "want" of congressional enforcement power. But for him the theme of section 1 (he did not distinguish one clause from another) was racial *equality*:

> 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

55. GLOBE, *supra* note 2, at 2542.

> 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. . . . 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. . . . I need not enumerate these partial and oppressive laws. Unless the Constitution should restrain them those States will . . . 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.
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> * * *
>
> Our fathers had been compelled to postpone the principles of their great Declaration, and wait for their full establishment till a more propitious time. That time ought to be present now. . . .[56]

Thus unlike his colleague Bingham, Congressman Stevens thought the privileges or immunities and related clauses did indeed add new prohibitions to the Constitution, prohibitions calculated to achieve the ideal of equality adumbrated in the Declaration of Independence but not in the pre-1868 Constitution—and only partly in the Civil Rights Act of 1866.

Senator Jacob Howard, who introduced the proposed amendment in the Senate (May 23, 1866) on behalf of the Joint Committee, agreed with Messrs. Bingham and Stevens as to the congressional enforcement power, but differed from each of them concerning the nature of the prohibitions Congress would have power to enforce against the states:

> It would be a curious question to solve what are the privileges and immunities of citizens of each of the states. . . . It would be a somewhat barren discussion. But it is certain the clause was introduced in the Constitution [article IV, sec. 2][57] for some good purpose. . . . I am not aware that the Supreme Court has ever undertaken to define either the nature or the extent of the privileges and immunities thus guaranteed. . . . But we may gather some intimation of what probably will be the opinion of the judi-

56. *Id.* at 2459.

57. Article IV, § 2, cl. 1 of the Constitution provides that: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

ciary by referring to [*Corfield v. Coryell*].[58]

After quoting at length from *Corfield*, Senator Howard continued:

> 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 . . . by the first eight amendments of the Constitution. . . .[59]

Other views were also expressed.[60] At the end of the debates Senator Hendricks observed: "I have not heard any Senator accurately define, what are the rights and immunities of citizenship."[61] Senator Reverdy Johnson, one of the great constitutional lawyers of his day, remarked:

> I am decidedly in favor of the first part of the section which defines what citizenship shall be, and in favor of that part of the section which denies to a State the right to deprive any person of life, liberty, or property without due process of law, but I think it quite objectionable to provide [the privileges and immunities clause], simply because I do not understand what will be the effect of that.[62]

Apart from Senator Howard, Congressman Andrew Rogers is the only one who, during the entire congressional debate, offered more than a few, limited generalities on the privileges or immunities clause. An opposing Democrat, he found that "it consolidates everything":

> What are privileges and immunities? Why, sir, all the rights we have under the laws of the country are embraced under the definition of privileges and immunities. The right to vote is a privilege. The right to marry is a privilege. The right to contract is a privilege. The right to be a juror is a privilege. The right to be a judge or President of the United States is a privilege. I hold if that ever becomes a part of the fundamental law of the land it will prevent any State from refusing to allow anything to any-

58. GLOBE, *supra* note 2, at 2765 (referring to Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1825) (No. 3,230)). *See* note 50 *supra*.

59. GLOBE, *supra* note 2, at 2765.

60. Several supporters of the proposed amendment referred approvingly to the natural law dicta in Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1825) (No. 3,230), with respect to the meaning of the words "privileges and immunities" in article IV, section 2, of the Constitution. Apart from the vagueness of natural law itself, and the fact that the *Corfield* language is only trial court rhetoric, there is this difficulty: as used in article IV (unlike its use in the Fourteenth Amendment), the term "privileges and immunities" is largely self-defining, as indeed it was where similarly used in the Articles of Confederation. Article IV, section 2 simply means that whatever benefits a state affords its own citizens, the same must be afforded to visiting citizens of sister states. It is, in sum, a comity provision.

61. GLOBE, *supra* note 2, at 3039. *See also id.* at 2934.

62. *Id.* at 3041.

> body embraced under this term of privileges and immunities. . . . It will result in a revolution. . . .[63]

Obviously even the chief sponsors of the proposed amendment were at odds as to the meaning of the privileges or immunities clause. Others, including the measure's chief opponents, recognized and stressed its ambiguity. The fact is that, apart from what we have just quoted, there was virtually no discussion of this provision in the Congress that proposed it. Apparently differing views, hopes and fears were "reconciled" by the device of ambiguity in a sounding phrase.

There can be no doubt that many who spoke on the matter in Congress recognized that an immediate purpose of the proposed *amendment* was to constitutionalize section 1 of the Civil Rights Act of 1866, which had just been enacted over a presidential veto (based in part on constitutional grounds). Considering the language of the privileges or immunities clause (vis-à-vis that of the Civil Rights Act) and the views of Messrs. Stevens, Bingham, Howard, Hendricks, Johnson and Rogers, we cannot accept the [Berger] view that *its* intended function was simply to incorporate the substance of the 1866 statute into the Constitution. Indeed the phrase "privileges or immunities of citizens of the United States" would be a strange, irrational way of referring to the "rights" covered by that legislation. The making of contracts, the acquisition and conveying of property, for example, are state law matters that have nothing to do with national citizenship. Congress, composed largely of lawyers, could hardly have thought otherwise. Nor have we found in the leading news journals of the day even a hint of evidence which suggests that the ratifying public thought the "*privileges*" clause was a shorthand reference to the civil "*rights*" legislation of 1866. The racial equality which the Civil Rights Act explicitly mandates in contractual and conveyancing matters is covered presumably by the equality clause of the amendment in question.

Our function is to enforce constitutional mandates, not to make them. The term "privileges or immunities" does not provide, and so must be given, content. We are not a constituent assembly; to give meaning to this meaningless phrase would be to act as though we were one. If it be argued that the privileges or immunities clause is an embodiment of natural law, the answer is clear: our concern is manmade legal rules, not amorphous moral postulates. Nor is it our function to

63. *Id.* at 2538. For a study of contemporary views of the scope of the Fourteenth Amendment, *see* Cerney, *Appendix to the Opinion of the Court*, 6 HASTINGS CONST. L. Q. 455 (1979) (printed *infra*).

enforce as law clumsy, all-things-to-all-men political slogans (if that is what is here involved).

We conclude that the privileges or immunities clause of the Fourteenth Amendment is non-justiciable, because it provides no judicially discoverable or manageable standards for adjudication.[64] Whether it is altogether void for vagueness, or rather presents political questions for resolution by the democratic process is not now before us. That is a problem for another day. Meanwhile we do not suggest the privileges or immunities clause is utterly without significance. For to grant citizenship to all on grounds of birth within the domain and to decree, however inarticulately, the inviolability thereof is an exercise in egalitarianism. It fortifies our view below as to the meaning of "equal protection."

2. The Equal Protection Clause

Taken literally and alone, it may be that the equal protection clause of the Fourteenth Amendment is too obscure for judicial enforcement. For surely the legislative process must virtually cease if only those statutes are permissible which literally give all persons "equal protection." Much, if not quite all, legislation as we know it puts differing people in separate categories and thereby treats them differently. In sum, classification is indispensable to the legislative process. The equal protection clause, then, must have a narrower meaning than its bare words may suggest.

We know what all men know: the Black Codes were the South's response to the Thirteenth Amendment; Congress sought to undercut them with the Civil Rights Act of 1866; and in the face of doubts as to the Act's constitutionality, Congress proposed the Fourteenth Amendment to achieve what in principle the 1866 Act sought to do: namely, to give citizenship to blacks and to insure at least that they were to have, in the words of the Act, "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens."[65] Read in this context, surely there is more than an intimation of equal treatment for all races in the equal protection clause. This reading becomes unmistakable, we think, when the clause is seen as part of a common pattern immanent in the three Civil War

64. *See* Luther v. Borden, 48 U.S. (7 How.) 1 (1849). Even some quite precise provisions of the Constitution are not subject to judicial enforcement. *See, e.g.*, Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861).

65. Act of Apr. 9, 1866, ch. 21, 14 Stat. 27 (1868).

Amendments,[66] the Civil Rights Acts of 1866,[67] 1870,[68] 1871,[69] 1875,[70] the five Reconstruction Acts,[71] the Freedmen's Bureau measures[72] and the history that preceded them.

In the long view, surely these measures, like Jefferson's Declaration and Lincoln's Address at Gettysburg, are but steps toward the ideal of equality implicit in the Fatherhood of God and the Brotherhood of Man—an ideal we do not always honor, yet never quite forget. The history, the pattern of response, the abiding dream all indicate to us beyond the possibility of doubt an overriding purpose: to secure for all races each of the state-given benefits which the numerically dominant race enjoys. The Fourteenth Amendment bestows American citizenship by virtue of birth within this country regardless of race; it enjoins (clumsily) state interference therewith; it forbids the states to deny anyone due process or the equal protection of the law; it authorizes Congress to enforce these mandates. What is this but a declaration that the laws of a state shall be the same for each and every race; that all persons regardless of race shall stand equal before the law; and that no state shall classify or discriminate on grounds of race?

It is true that section 2 of the Fourteenth Amendment merely penalizes and does not forbid suffrage discrimination.[73] That quirk in the otherwise uniform thrust of equal treatment in the measures just men-

66. In addition to the Fourteenth Amendment, invoked in the case presently before this Court, the Thirteenth and Fifteenth Amendments were passed in the years following the Civil War.

The Thirteenth Amendment provides that: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

The Fifteenth Amendment provides that: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

Congress was given power to enforce each of these amendments by appropriate legislation.

67. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (1868).

68. Act of May 31, 1870, ch. 114, 16 Stat. 140 (1871).

69. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (1873); Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 (1871).

70. Act of Mar. 1, 1875, ch. 114, 18 Stat. 335 (1875).

71. Act of Dec. 22, 1869, ch. 3, 16 Stat. 59 (1871); Act of Mar. 11, 1868, ch. 25, 15 Stat. 41 (1869); Act of July 19, 1867, ch. 30, 15 Stat. 14 (1869); Act of Mar. 23, 1867, ch. 6, 15 Stat. 2 (1869); Act of Mar. 2, 1867, ch. 153, 14 Stat. 428 (1868).

72. The Bureau was created by Act of Mar. 3, 1865, ch. 90, 13 Stat. 507 (1866).

73. Section 2 provides for the reduction in the number of a state's representatives in the House according to the proportion of male inhabitants of the state who are over the age of twenty-one and citizens of the United States whose right to vote is denied or abridged.

tioned was immediately removed by the Fifteenth Amendment.[74] By treating suffrage separately and differently in section 2, those who gave us the Fourteenth Amendment made clear their purpose to exclude voter problems from the equal protection and related clauses of section 1. In short, the Fifteenth Amendment makes good the omission of suffrage rights in section 1 and the merely partial protection thereof in section 2 of the earlier amendment.

3. The Due Process Clause

If as a matter of grammar and rhetoric the due process clause of the Fourteenth Amendment is less than obvious, some six hundred years of history since Magna Charta save it from unintelligibility. "Due process of law" long ago became a term of art. As such it was included in the Fifth Amendment and is defined by, as we have said,

> those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.[75]

Obviously the due process language of the Fourteenth is the due process language of the Fifth Amendment. To incorporate the words is to incorporate their traditional meaning, and no more—at least in the absence of any potent evidence to the contrary, of which we find none. It may be well to indicate that we repudiate as totally mistaken the unfortunate language in *Dred Scott v. Sandford*,[76] which may be read as giving due process an alien, substantive content. Let that disaster stand for all time as warning to judges who—unmindful of their proper role—attempt to impose extra-constitutional policies upon the community under the guise of interpretation. We will not in this case extend the *Dred Scott* lapse by purporting to find substantive meanings in a long-settled procedural term of art. Due process means a fair hearing and nothing more. We need not now decide whether that concept, having been written into the Constitution, has lost its ancient potential for (non-substantive) growth via the judicial process.

Lest these words be deemed more expansive than we intend, we

74. *See* note 67 *supra*.

75. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 277 (1856).

76. 60 U.S. (19 How.) 393, 450 (1857). The *Dred Scott* decision held that an act of Congress prohibiting ownership of slaves north of a certain boundary violated due process in that slaves were property, and that to deprive their owners of property rights merely because they traveled beyond the statutory boundary deprived the owners of rights under the Fifth Amendment.

add a few more. As we have said following Lord Coke: "The words 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in Magna Charta."[77] In the context of the pervading thrust of all the Civil War Amendments and accompanying legislation, we understand due process of law to mean this: each person charged with crime is entitled to fair accusatory and trial process in accordance with the general "law of the land" as it is understood in the several states. This is to say, no one may be subjected to any extraordinary procedure or denied fair procedure because of his race. We are not aware of anything in the background or legislative history of the Fourteenth Amendment which suggests it was calculated to give Congress or federal courts general supervisory control over state judicial proceedings. The amendment, as we have said, was aimed at racial injustice.

Affirmed.

77. 2 EDWARD COKE'S INSTITUTE 50, *quoted in* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) at 276.