Scholar Exchange: Battles for Equality in America: The 14th Amendment

Briefing Document

INTRODUCTION

Big Questions

- What is the 14th Amendment all about?
- What ideas does it add to the Constitution?
- How did the 14th Amendment transform the Constitution?
- How does the 14th Amendment promote equality?
- How does the 14th Amendment protect freedom?
- What are some areas of ongoing constitutional debate?

To begin to think through the 14th Amendment's power, let's start—as we always do when interpreting the Constitution—with the Constitution's text. It's a big wall of text, but it's worth reading in full. It may be the most important text in the entire Constitution.

Read the 14th Amendment on the *Interactive Constitution.*

Let's quickly review the 14th Amendment's *four* big features—the *four* ways in which this powerful language transformed the Constitution forever.

- First, **birthright citizenship**: *Dred Scott* is overturned, African Americans *did* have rights that the white man was bound to respect, and if you're born on American soil, you're an American citizen.
- Second, **equality**: the original Constitution was silent on the issue of equality, and now the Declaration of Independence's promise (that "all men" and women "are created equal") is written into the Constitution.
- Third, **freedom**: the original Bill of Rights was limited to abuses by the *national* government, and now the Constitution protects those in the United States from abuses of key rights by the *states*—key rights like those in the Bill of Rights like free speech and religious liberty.
- And, fourth, **national power over civil rights**: Congress is now given the power to enforce the protections enshrined in the 14th Amendment. The Reconstruction Amendments are the first set of constitutional amendments to *expand* the reach of national power—rather than *restrict* it (as, for instance, the Bill of Rights did). So, Congress has *more* power than before.

Today, we're going to focus especially on the 14th Amendment's protection of freedom and equality.

- **The Big Idea—Constitutional:** The 14th Amendment wrote the Declaration of Independence's promise of freedom and equality into the Constitution. It transformed the Constitution forever. And it's at the heart of what many scholars refer to as America's "Second Founding."

- **The Big Idea—Modern:** Even so, the 14th Amendment is the focus of many of the most important constitutional debates (and Supreme Court cases) today. In many ways, the history of the modern Supreme Court is really a history of modern-day battles over the 14th Amendment's meaning. So many of the constitutional cases that you care about today turns on the text that we just read.

14TH AMENDMENT'S PROTECTION OF EQUALITY—AND ITS MODERN APPLICATIONS

Let's begin with the 14th Amendment's protection of equality.

This language is so familiar that it's easy to forget how revolutionary it was at the time. For instance, we often forget (as I mentioned earlier) that the 1787 Constitution was silent on the Declaration of Independence's promise of equality.

Not so today, and we have Ohio Representative John Bingham—among others—to thank for that.

Let's return first to John Bingham's vision for the 14th Amendment. He imagined the Equal Protection Clause and the Privileges or Immunities Clause working together to promote equality—*both* by banning discrimination against individuals (particularly, African Americans) within their own states *and* by banning discrimination between state and out-of-state citizens.

Equality was a broad concept at the time which might be best understood as equality of opportunity and basic rights/guarantees.

Here's how Bingham explained it: He sought "a simple, strong, plain declaration that equal laws and equal and exact justice shall hereafter be secured within every State of the Union," guaranteeing "equal protection" for "any person, no matter whence he comes, or how poor, how weak, how simple—no matter how friendless."

Plessy v. Ferguson

Of course, less than two decades after the 14th Amendment's ratification, the Supreme Court issued its infamous decision in *Plessy v. Ferguson* (1896).

Homer Plessy worked with a group called the Committee of Citizens. The Committee opposed Louisiana's 1890 Separate Car Act, which segregated railroad cars within the state—separating African American from white passengers.

Plessy was chosen as a "test case," so that the group could challenge the constitutionality of the act. Plessy appeared to be white and was born free, but was of mixed-race and therefore "black" under Louisiana law. Plessy and his allies hoped that his arrest would prove the arbitrary nature of the law.

But, in a 7-1 decision, Plessy lost. Justice Henry Billings Brown wrote the majority opinion upholding "separate but equal" laws. In other words, according to the Supreme Court, Jim Crow laws—enforcing segregation and racial discrimination against African Americans—were constitutional.

The Court concluded that these laws didn't violate either the 13th (abolishing slavery) or 14th Amendments (promising equality).

Brown: While the object of the 14th Amendment was "undoubtedly to enforce the absolute equality of the two races before the law, . . . in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either."

The Court argued that the law was a reasonable use of the state's "police power" to regulate the health, safety, and morals of its population.

Brown: The underlying mistake of Homer Plessy's argument was "the assumption that the enforced separation of the two races stamps [African Americans] with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because [African Americans] choose to put that construction on it."

But Justice Brown's arguments didn't go unanswered.

Justice John Marshall Harlan—a former slaveholder from Kentucky—was the lone dissenter. And his dissent is one of the most important (and powerful) opinions in Supreme Court history.

Harlan said that everyone understood the real purpose of the Louisiana law. It was not a neutral purpose to exclude white people from railroad cars occupied by African Americans, but rather to exclude African Americans from coaches occupied by whites under the "guise of equal accommodation."

Harlan famously argued that under the Constitution, "in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. ... In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case."
And so *the* Plessy decision has been. Powerful—and inspiring—words.

Brown v. Board of Education

To see how the Court eventually gave the 14th Amendment's—and Harlan's—words life, let's fast forward to 1954 and to arguably the most famous Supreme Court decision in American history—*Brown v. Board of Education* (1954).

Brown combined similar challenges from a variety of locations—namely, Kansas, South Carolina, Virginia, Delaware, and Washington, D.C. These cases all involved African American students who had been denied admission to white public schools.

The challengers argued that these segregation laws violated the 14th Amendment's Equal Protection Clause and that separate could never be equal in public education.

However, as we've already discussed, in *Plessy*, the Supreme Court long ago upheld racial segregation laws that provided "separate but equal" facilities and institutions for people of different races.

In *Brown*, the Supreme Court unanimously overturned *Plessy* and concluded that school segregation—in other words, having separate schools for African American and white students—violated the 14th Amendment's promise of equality and was unconstitutional.

Chief Justice Warren: "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."

The Court concluded that even "separate but equal" facilities were, in reality, unequal, because separating the races resulted in a damaging brand of inferiority imposed on African American children.

Brown is the culmination of a long-term, decades long strategy by the NAACP and its lawyers like Thurgood Marshall to challenge Jim Crow laws.

Additional Cases

In *Brown*, they targeted the segregation of public schools. But the campaign itself was a gradual campaign to undermine segregation in other contexts like public universities and law schools before turning to segregation in public schools—a much more controversial issue.

By the time the Court issued its *Brown* opinion, the Court had already struck down other Jim Crow laws, like racial covenants, racial zoning schemes, "All White" primaries, "Grandfather Clauses," and discrimination in labor unions.

For instance, in *Powell v. Alabama*—the "Scottsboro Boys" case—the Court ordered new trials for eight African American defendants falsely accused of rape because their 14th Amendment rights to due process had been violated.

The Court ruled that a state must inform illiterate defends of the right to counsel and appointment of effective counsel with time to prepare. However, this decision was largely limited to its facts—limiting its overall reach.

For instance, in *Sweatt v. Painter* (1950)—so, four years before *Brown*—the Court already questioned the "separate but equal" doctrine of *Plessy*. Herman Sweatt was refused admission to the University of Texas Law School on the basis of race. The Court rules that this was unconstitutional under Equal Protection.

And in another case—*McLaurin v. Oklahoma*—the Court decided segregation in higher education violated Equal Protection (for a school receiving government money).

In the end, *Brown* attacked the core of the white South's Jim Crow laws and reinvigorated the 14th Amendment's promise of equality. Following *Brown*, the Supreme Court extended the reach of the Equal Protection Clause to cover discrimination in other settings.

A decade later, Congress passed the Civil Rights Act of 1965—a sweeping civil rights law promoting equality.

And in 1967, the Supreme Court struck down laws banning interracial marriage in *Loving v. Virginia*. We'll discuss that case further when we get to the 14th Amendment's promise of freedom—in just a little bit.

Tiers of Scrutiny

To analyze 14th Amendment cases, the Supreme Court has established a legal framework that lawyers call "tiers of scrutiny." That's just a fancy way of describing a pretty simple idea.

The Supreme Court will be tougher on certain sorts of laws than others.

For certain types of laws—for instance, those that separate out people by race—the Court will demand better arguments from the government. The standard is higher. It's tougher. And the Court is *much* more likely to strike down the law as unconstitutional. (Lawyers call this "strict scrutiny.")

For other types of laws—for instance, those regulating the economy, but *not* doing other things like separating people by race—the Court will accept much weaker arguments from the government. The standard is lower. It's much easier to meet. And the Court is *much* more likely to let a law stand. (Lawyers call this "rational basis" review.)

And for a final set of laws, the Court's analysis will fall somewhere in between. (Lawyers call this—appropriately enough—"intermediate" scrutiny.)

For some rights—like Second Amendment rights—it's not clear where they fall. The Court still has to hear additional cases to figure that out.

14th Amendment and Gender

We've discussed the 14th Amendment and race. What about the 14th Amendment and gender?

In earlier cases—in the late 1800s and early 1900s—the Supreme Court says that the 14th Amendment does *not* promise equality for women.

In *Bradwell v. Illinois* and *Minor v. Happersett*, leading suffragists argued that the 14th Amendment's Privilege or Immunities Clause protected their right to practice law and their right to vote. The Supreme Court rejects these arguments. (Under *The Slaughter-House Cases*.)

Justice Bradley (concurrence in *Bradwell*): "The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."

Justice Bradley (more): "Man is, or should be, women's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."

In *Mueller v. Oregon* (1908), the Supreme Court unanimously rules that the right to contract under the 14th Amendment applies differently to women than it does to men. The Court then used this to uphold labor laws that were written to protect women, in particular—laws that the Supreme Court at the time rejected when applied to men.

(Later, in *Adkins*, the Court rules that the 19th Amendment (banning gender discrimination in voting) overruled *Mueller* and that minimum wage laws for women were unconstitutional. In 1937, the Court upheld *all* minimum wage laws in *West Coast Hotel*.)

However, beginning in the 1970s, the Court reverses course—a litigation strategy developed (in part) by the late Justice Ruth Bader Ginsburg (when she was a lawyer). (This is a full century after *Bradwell* and *Happersett*!)

In a series of cases, the Supreme Court reads the Constitution to protect against gender discrimination in a variety of contexts. For instance, these cases rule that:

- The administrators of estates can't be treated differently based on sex (*Reed v. Reed*). (The law at issue chose men over women.)

- The government can't give benefits to military families differently on the basis of sex (*Frontiero v. Richardson*). (The law at issue gave more generous benefits to male breadwinners than female breadwinners.)

- Oklahoma can't treat men and women differently in its alcohol laws—men had to be 21, women only 18 to buy alcohol (*Craig v. Boren*). (So, you also can't treat men worse than women by making them

wait to buy alcohol simply because statistics suggest that men are generally more reckless/dangerous than women.)

- Intermediate scrutiny means that the government must show that the sex-based classification is substantially related to an important governmental interest or goal.

Finally, in a majority opinion in *U.S v. Virginia*, by Justice Ruth Bader Ginsburg, the Court rules that the Virginia Military Institute's male-only admissions policy violated the Equal Protection Clause.

The Court ruled that Virginia needed an "exceedingly persuasive justification" for its policy. And it concluded that offering an alternative school for women was *not* sufficient because it did not offer the same benefits, training, etc., as the well-established VMI.

Justice Ginsburg: "Sex classifications . . . may not be used, as they once were, . . . to create or perpetuate the legal, social, and economic inferiority of women."

Justice Ginsburg (More): "Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. As a plurality of this Court acknowledged a generation ago, 'our National has had a long and unfortunate history of sex discrimination.' . . . Through a century plus three decades and more of that history, women did not count among voters composing 'We the People'; not until 1920 did women gain a constitutional right to the franchise."

Let's end our discussion of the 14th Amendment's promise of equality with its ongoing application in the education context.

These are among the most contested cases in recent years. For instance, consider the use of affirmative action at public universities.

Key cases include *Bakke v. Regents of California* (1979), *Grutter v. Bollinger* (2003), and *Fisher v. Texas* (2016). These decisions have been closely contested—often splitting the Court 5-4.

They focus on the Equal Protection Clause and whether or not affirmative action programs treat students differently on the basis of race. (For public schools)

And if so, if the government—in other words, the schools—can justify them with a proper, compelling government purpose.
The Supreme Court has said that courts need to review these programs closely—striking down some and upholding others.

Or consider the recent school desegregation case—*Parents Involved v. Seattle School District* (2007). There, the schools voluntarily used racial classifications to achieve diversity.

The Court split 4-1-4, with Justice Anthony Kennedy casting the decisive vote.

Justice Kennedy concluded that public schools may not use race as the sole determining factor for assigning students to schools. At the same time, he still thought that race-conscious objectives to achieve a diverse school environment may be acceptable in certain contexts.

14TH AMENDMENT'S PROTECTION OF FREEDOM—AND ITS MODERN APPLICATIONS

Have any of you heard the word "incorporation" before?

As a reminder, the 14th Amendment's framers—and, most notably, the amendment's primary author, Ohio Representative John Bingham (a key figure that the great Justice Hugo Black would later call the 14th Amendment's James "Madison")—wrote a powerful promise of freedom into the 14th Amendment.

As I mentioned earlier, this was a *very* big deal.

When the founding generation ratified the Bill of Rights, it only applied to abuses by the *national* government.

And in 1833, the Supreme Court—in an opinion authored by Chief Justice John Marshall—confirmed this in *Barron v. Baltimore*.

So, this meant that if your home state—in my case, New Jersey—punished you for criticizing the governor, the First Amendment didn't protect you.

And many of the Southern states in pre-Civil War America *did* violate key Bill of Rights protections in their fight *against* critics of slavery—outlawing abolitionist speaking, writing, and preaching.

We needed the 14th Amendment—ratified after the Civil War and designed, in part, to curb state abuses—to reach state laws.

It's little wonder that, for Bingham, one clear purpose of the 14th Amendment was to apply the Bill of the Rights to the states through the "Privileges or Immunities Clause."

Because of the 14th Amendment, you have a right under the U.S. Constitution to—for instance—criticize your governor or your state representative.

Again, the fancy word for this is "incorporation." But that just means that key Bill of Rights protections like free speech apply as much to the president and Congress as they do to the governor or the state legislature.

That's what I meant when I said that the 14 Amendment wrote the Declaration of Independence's promise of freedom into the Constitution.

However, in early cases like *The Slaughter-House Cases* and *Cruikshank*, the Supreme Court limited the 14th Amendment's reach—rejecting early efforts to apply the 14th Amendment to abuses of key rights in the states. These decisions continued to limit the Bill of Rights to abuses by the national government.

In the 20th century, the Supreme Court begins to reinvigorate Bingham's vision and apply key Bill of Rights protections to the states—a process that lawyers call **"selective incorporation."**

During this period, the Court applies key Bill of Rights protections like free speech and religious liberty to the states on a case-by-case basis—one constitutional right at a time.

The incorporation story could be traced to the 1897 case of *Chicago, Burlington, and Quincy Railroad v. City of Chicago*.

But scholars often argue that the Court really began the process with *Gitlow v. New York* in 1925. There, the Court applied the First Amendment's protection for freedom of speech against the states. (Uses the Due Process Clause.)

From there, the Court began a process that remains ongoing through today.

In fact, just last week, the Court incorporated the Sixth Amendment's right to a unanimous jury verdict in *Ramos v. Louisiana*. And last year in *Timbs v. Indiana*, it applied the Eighth Amendment's right against excessive fines to the states.

At the same time, there are a few rights that the Court still hasn't applied to the states—the Third Amendment (quartering of troops), the Fifth Amendment Grand Jury Right, and the Seventh Amendment Civil Jury Right.

In many ways, Justice Hugo Black was the driving force—the Court's intellectual architect—behind this push.

With the legal establishment stacked against him, Justice Black led a dissenting line of thought between the 1940s and 1960s—growing out of his own historical study of the Reconstruction founders and beginning with his dissent in *Adamson v. California* (1947). (Like Harlan in *Plessy*, this again shows the value of dissent.)

Black argued that the 14 Amendment was designed to apply the first eight amendments from the Bill of Rights to the states.

In *Duncan v. Louisiana* (1968), he argued that the Bill of Rights should be incorporated through the "Privileges or Immunities" Clause.

Black: "'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States' seem to me an eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States."

Justice Clarence Thomas is currently one member of the Court who agrees with Justice Black that incorporation should come through the Privileges or Immunities Clause. Justice Neil Gorsuch has suggested that he may as well.

In the end, the Court continues to the use the Due Process Clause in these cases. But it's important not to get tripped up by legal technicalities. Just remember the big idea: *The 14th Amendment applies key Bill of Rights protections (like free speech and religious liberty) to state abuses.*

Incorporation in Action

To see incorporation in action, consider a recent case, *McDonald v. City of Chicago* (2010).

For much of its history, the Supreme Court issued few rulings addressing the Second Amendment.

In 2008, the Supreme Court decided *District of Columbia v. Heller* (2008), holding that a D.C. handgun ban enacted by the federal government violated the Second Amendment.

Heller set a core Second Amendment principle: an individual had the right to possess a gun for purposes of protecting one's home.

By challenging a similar handgun ban in Chicago, the *McDonald* case asked key follow-up questions: Does the 14th Amendment extend the Second Amendment's key protections to state abuses? Should the Second Amendment be applied to abuses by the states?

In a divided 5-4 decision, the Supreme Court concluded that it should be.

It held that the right to keep and bear arms for the purpose of self-defense was **"deeply rooted"** in the nation's history.

And the Second Amendment was thus incorporated against the states through the 14th Amendment—meaning that the states could not infringe on that right.

So, that's incorporation. It covers rights explicitly mentioned in the Constitution.

Unenumerated Rights

When it comes to the 14th Amendment, one of the most contested areas is how the amendment applies to rights that are *not* explicitly listed in the Constitution.

Again, incorporation covers rights actually written in the Bill of Rights. Free speech. Religious liberty. The right to keep and bear arms.

But the Supreme Court has long protected rights—like the right to privacy—that are *not* directly mentioned in the Constitution. In other words, there's no Privacy Clause.

Lawyers call these **"unenumerated rights"—rights not specifically listed in the Constitution.**

What do you think? Does the Constitution protect rights not specifically listed in it—like a right to privacy?

Arguments in Favor:

- The Constitution's text points to the existence of unenumerated rights. For instance, the Ninth Amendment says that the rights listed in the Constitution don't exhaust "others retained by the people." And some scholars read the 14th Amendment's Privileges or Immunities Clause as protected certain unenumerated rights. (Although some scholars disagree.)

- The Supreme Court has long recognized unenumerated rights.

Arguments Against:

- We should stick with the rights written into the Constitution and not let judges make up new rights.

- The American people disagree over rights. These cases let judges choose some unwritten rights over others. Better to let the elected branches decide these issues—not unelected judges.

To review the history a bit, in the early 1900s, the Court protected an unenumerated "right to contract"—most notably, in a case called *Lochner v. New York*.

The Court rooted these economic rights in the "free labor" ideology of the Republican Party—concluding that the right to work is a core liberty protected by the 14th Amendment's Due Process Clause.

It struck down a New York law limiting the number of hours a baker could work.

Lawyers call this **"substantive due process"**—the idea that the Due Process Clause protects substantive rights like the right to work, as well as procedural rights like fairness—following legal procedures before jailing someone or taking away their property.

Holmes Dissent in Lochner: "The 14th Amendment does not enact Mr. Herbert Spencer's *Social Statics*. . . . A Constitution is not intended to embody a particular economic theory."

In the late 1800s/early 1900s, the Court strikes down a handful of laws under this right (*e.g.*, state laws regulating the working hours of bakers and laws regulating the hours of women). And the Court upholds others.

The Supreme Court reverses course and overrules *Lochner* in 1937. From there, economic rights get "rational basis" review.

Critics argue that the idea of "substantive due process" has its roots in the *Dred Scott* decision. There, Chief Justice Taney ruled that the Missouri Compromise was unconstitutional because it violated the Fifth Amendment's right to due process as to the property rights of slaveholders.

However, the Supreme Court extended substantive due process beyond economic rights. In the 1920s, the Supreme Court recognized the unenumerated, fundamental rights of parents to teach their children a foreign language—in that case, German—in *Meyer v. Nebraska* (1923) and struck down a compulsory public school education law in *Pierce v. Society of Sisters* (1925).

In *Meyer*, the Court concluded that the "liberty" protected by the Due Process Clause "[w]ithout doubt ... denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

As a result, parents and teachers have the liberty to teach a foreign language. In other words, learning a foreign language by itself cannot be considered dangerous by a state and prohibited under its police powers.

In *Pierce*, the Court argued that children are not "mere creatures of the state," and that the responsibility and choice of education belongs to parents as a liberty protected by the 14th Amendment (thus, homeschooling and private schooling are protected).

Together, *Pierce* and *Meyer* suggest a "right to privacy," cited by Justice William O. Douglas in *Griswold v. Connecticut* (1965), which struck down a state law denying the right to contraception.

Where did the Court find this right?

Justice Douglas drew it out of the **"penumbras"**—the shadowy edges—of rights that *are* listed in the Constitution like the First Amendment Assembly Right, the Third Amendment (protecting against soldiers in our homes), the Fourth Amendment's protection against unreasonable search and seizure, etc.

At the same time, the Court has rejected other claims—for instance, the right to physician-assisted suicide (in effect, a right to die) in *Washington v. Glucksberg*.

The Court would build on *Griswold* and the "right to privacy" in *Roe v. Wade* (1973).

In *Roe*, a Texas woman—"Jane Roe"—sought an abortion. However, a Texas law banned abortions except in instances in which a woman's life was endangered.

"Jane Roe" challenged the Texas law, arguing that it was unconstitutional.

In a 7-2 decision, the Court held that the right to an abortion fell within the right to privacy previously established in *Griswold v. Connecticut* (1965).

In *Roe*, the Court established a trimester framework for analyzing the constitutionality of abortion regulations.

While there could be no restrictions on abortion in the first trimester of a pregnancy, government could begin to place restrictions on abortion in the second trimester—the point at which the Court concluded the fetus was viable (or could live outside its mother's womb) without extraordinary medical assistance.

While the Supreme Court reaffirmed the core of *Roe* in *Planned Parenthood v. Casey* (1992), it moved away from Roe's trimester framework and established an "undue burden" test for evaluating a government's attempt to regulate abortion after fetal viability.

In *Casey*, the Court described an undue burden as follows: "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."

Casey is the decision that controls abortion cases now—not *Roe*.

Under the "undue burden" test, laws that create an "undue burden" on the right to an abortion will be struck down. Otherwise, states can regulate the practice.

The Court upheld *Casey* as recently as 2016, but also upheld "partial birth abortion" laws in recent years.

Scholars, justices, and judges still debate whether *Roe* was rightly decided and, if so, how to justify it. (For instance, scholars argue for a variety of justifications: the right to privacy, the right to reproductive freedom, and the equality rationale offered by Ruth Bader Ginsburg.)

Critics argue that abortion isn't mentioned in the Constitution. And the Reconstruction generation never would have envisioned the 14th Amendment protecting reproductive rights.

The Court has also applied the right to privacy to strike down laws violating the rights of members of LGBTQ community. (*Lawrence v. Texas* (2003) overruling *Bowers v. Hardwick*.)

Importantly, the Court has also protected a right to marry under the 14th Amendment.

The key case is *Loving v. Virginia* (1967). In *Loving*, the Court struck down state bans on interracial marriage.

While the laws went back to the 1800s and 16 states still had such laws on the books in 1967, the Court ruled that these laws violated the 14th Amendment's Equal Protection and Due Process Clauses.

The Court concluded that these laws unquestionably discriminated based on race. However, they also violated the right to marry. (In other words, Mildred and Richard Loving had a right to marry.)

Warren: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the 14th Amendment, is surely to deprive all the State's citizens of liberty without due process of law."

More recently, the Court struck down state laws banning same-sex marriage in *Obergefell v. Hodges* (2015).

The Court again recognized a right to marry under the 14th Amendment's Due Process and Equal Protection Clauses. In *Obergefell*, it extended those protections to same-sex marriage.

The Court reasoned that state laws banning same-sex marriage caused "substantial" and continuing harm to same-sex couples by denying them marriage licenses—and, in turn, access to the institution of marriage.

CONCLUSION

As a reminder, the 14th Amendment transformed the Constitution in (at least) *four* ways.

- First, birthright citizenship.
- Second, equality.
- Third, freedom.
- And fourth, national power over civil rights. Congress has *more* power than before.

In John Bingham's own time, the 14th Amendment's text was meant primarily to provide new protections that would address the abuses of the former rebels and set important constitutional baselines for generation to come.

More broadly, he envisioned a U.S. Constitution that would protect the freedom and equality of all Americans—a vision added to the Constitution once the amendment was ratified in 1868.

In our own time, the Supreme Court has read the 14th Amendment to protect both:

- Substantive rights (like free speech and religious liberty) and procedural rights (like the right to a jury trial).
- Equality for *both* African Americans *and* other groups like women and members of the LGBTQ community.

- Those explicitly written in the Constitution (like those in the Bill of Rights) and those that are not (like the right to privacy).
- Those that apply in the political realm (like the right to vote) and those that have nothing to do with voting (like the rights of minors).

In the end, if I could leave you with one final thought, it would be this: The 14th Amendment transformed our Constitution forever.

Big Idea—Constitutional: The 14th Amendment wrote the Declaration of Independence's promise of freedom and equality into the Constitution. And it's at the heart of what many scholars refer to as America's "Second Founding."

Big Idea—Modern: Even so, the 14th Amendment is the focus of many of the most important constitutional debates (and Supreme Court cases) today. In many ways, the history of the modern Supreme Court is really a history of modern-day battles over the 14th Amendment's meaning. So many of the constitutional cases that you care about today turns on the best reading of the 14th Amendment.

ADDITIONAL MATERIAL ON THE 14TH AMENDMENT'S HISTORY

14th Amendment's History

Before turning to the Supreme Court's approach to the 14th Amendment—including some of the leading modern cases—let's review some of the 14th Amendment's founding history.

The 14th Amendment was drafted and ratified during the Reconstruction era—the period *after* Union victory in the Civil War. With the Confederacy defeated, political leaders looked to set new constitutional baselines—new constitutional fundamentals—for post-Civil War America.

Following the Civil War, our nation confronted a series of vexing questions.

- What was the meaning of the Civil War—a bloody, bloody war killing 750,000 people—and what should be the terms of a lasting peace?
- How should our nation answer the Declaration of Independence's prophetic call for freedom and equality?
- How should we define what it means to be a U.S. citizen?
- How broadly should the right to vote sweep?
- And what role—if any—should the federal government play in protecting (and defining) the civil and political rights of all?

Of course, the post-Civil War push to transform the Constitution began with the abolition of slavery.

Slavery tore the nation apart—leading to Southern secession and a bloody Civil War. The 13th Amendment abolished it.

Following a long battle in Congress—and with much pressure from President Lincoln and his allies—Congress approved the 13th Amendment on January 31, 1865.

And to reenter the Union, Confederate states had to accept and ratify the amendment.

The amendment was eventually ratified on December 6, 1865—Shortly after Congress approved the 13th Amendment, John Wilkes Booth assassinates President Lincoln on April 14, 1865.

Vice President Andrew Johnson becomes president. He pursues his own program of Reconstruction. Ex-Confederates must accept the 13th Amendment and take an oath of allegiance to the nation, but that's about it.

It's a very lenient approach to Reconstruction—with Johnson allowing the ex-Confederates to reenter the Union as quickly as possible. This even allows the ex-Confederates to elect new Members of Congress—set to take their seats in December 1865.

And the ex-Confederate states begin to pass the Black Codes—in many cases, reducing many African Americans to conditions that resembled slavery.

Northerners may have won the war, but congressional Republicans—the party of Lincoln and the Party of Union—feared that they might well lose the peace.

The Republican Congress pushed back and tried to secure a new vision of freedom and equality for African Americans.

In December 1865, Congressional Republicans refused to seat the ex-Confederate Members of Congress.

It then established the Joint Committee on Reconstruction. The body was tasked with studying the conditions in the post-Civil War South and recommending a congressional response—one that might counter President Johnson, rally the Republican Party, and provide a new blueprint for Reconstruction.

In March 1865, Congress establishes the Freedmen's Bureau to aid displaced African Americans/war refugees. By early 1866, Congress extends the bureau—funding it for the first time and authorizing agents to investigate Southern abuses.

Furthermore, as various ex-Confederate states passed the Black Codes, Congress invites testimony from Freedman's Bureau officials and African Americans in the South.

Because it was apparent that the Black Codes created slavery in another name by attacking the rights of African Americans—for instance, by forcing them into labor contracts that they could not legally get out of—Congress pushed for the first major civil rights law in American history.

The Civil Rights Act of 1866 did two things. It recognized the citizenship of all born within American jurisdiction—so, everyone except for groups like foreign nationals (*e.g.*, the children of diplomats) or Native Americans. And it protected the basic rights of citizenship—contract, property rights, the right to bear arms, etc.—in order to protect African Americans against the Black Codes.

Some Republicans, however, worried that Congress didn't have constitutional power to pass the act and that Southerners, once they gained political power again, would rescind the act.

This made them push for the passage of the 14th Amendment.

That's a bit of the background context. Let's turn now to the 14th Amendment itself.

The Joint Committee on Reconstruction's most enduring legacy is Section 1 of the 14th Amendment, and this critical text was written largely by Ohio Rep. John Bingham.

Scholar Gerard Magliocca has called the Joint Committee a "Second Constitution Convention."

And the great Justice Hugo Black would later call Bingham the 14th Amendment's James "Madison."

Big Idea: The 14th Amendment is arguably the most important language added to the Constitution after the Founding era. As I mentioned above, Bingham's 14th Amendment wrote the Declaration of Independence's commitment to freedom and equality into our Constitution.

Bingham himself believed that the Bill of Rights always applied to the states, but this was an uncommon view.

The Supreme Court in *Barron v. Baltimore* ruled otherwise.

For Bingham, one clear purpose of the 14th Amendment was to apply the Bill of the Rights to the states through the "Privileges or Immunities Clause."

In a famous speech on the floor of the Senate, Senator Jacob M. Howard—a Republican from Michigan—said that the clause was difficult to define, but included "the personal rights guaranteed and secured by the first eight amendments of the Constitution."

What does the amendment do?

The Citizenship Clause overrules *Dred Scott*, declares that all persons born or naturalized in the United States and legally subject to its jurisdiction are U.S. citizens.

The amendment forced states to respect the "privileges or immunities" of U.S. citizens (generally, a substitute for the word "rights"), to ensure that citizens not be denied "equal protection of the laws," and assured that their rights could not be taken away without due process

We're not going to discuss the 14th Amendment's Section 2 at any length, but it was important to John Bingham and to his colleagues.

It attacked the white South's refusal to grant voting rights to African Americans.

If a state kept any eligible person from voting, it would be penalized with a reduction in representation.

In the end, the Reconstruction generation understood that they were framing (and ratifying) language to amend "our fundamental law" and were "making history and laying foundations for our future nation building."

Congress approved the amendment in June 1866.

President Johnson then toured the country opposing it. The 14th Amendment was *the* issue in the 1866 midterm elections—with Republicans fighting for the amendment and President Johnson and his allies fighting against it. The Republicans won in a landslide.

The amendment was finally ratified in July 1868.

We'll discuss the 14th Amendment's protection of freedom and equality in a bit. But first let's complete this historical interlude.

In 1867—so, *after* Congress approved the 14th Amendment, but *before* it was ratified—Congress began a policy of military Reconstruction throughout the former Confederacy.

In March 1867, Congress passed the Reconstruction Act. It divided the South into five military districts.

The act required the ex-Confederate states to allow African Americans to vote. This eventually led to the election of many African American state and local officials. And the African American vote would play a key role in the ratification of the 14th Amendment itself.

Bottom line: African Americans were voting in the ex-Confederate states even before the ratification of the 15th Amendment (which banned racial discrimination in voting) in February 1870.

The act also meant the presence of military governors and the army throughout the South—primarily, to enforce the Civil Rights Act and other key legislation and, importantly, to protect African Americans trying to vote.

Military Reconstruction lasted until 1876, when the army finally left the South as part of the compromise that brought Rutherford B. Hayes into the White House.

And example of the effects of military Reconstruction: Approximately one-third of the Louisiana state legislature was African American—pro-Reconstruction Republicans.

This was one of the strongest biracial legislatures in existence.

That legislature adopted a host of Reconstruction reforms. For example, Louisiana passed a new constitution that desegregated education, prohibited racial discrimination in public places, and prohibited former Confederates from voting.

It also guaranteed newly freed African Americans' rights with Louisiana's first bill of rights.

Violence in the South

This was also a period of extensive violence in the South.

In 1866, the Ku Klux Klan was formed.

White terrorism was an important part of the Reconstruction period, with a white Southern backlash against Reconstruction and rights protections for African Americans.

This violence targeted not only African Americans, but their white political allies.

In particular, they used violence and murder to stop African Americans from voting.

After the 14th amendment was ratified, Congress passed the Enforcement Acts in 1870 and 1871 with the KKK in mind. This allowed the national government to enforce the rights protected under the 14th Amendment against even the private actions of the KKK.

More on Supreme Court Cases

Finally, the Supreme Court was also an important figure in Reconstruction, reading the Reconstruction Amendments quite narrowly. In other words, the Court weakened those protections.

The Slaughter-House Cases

In *The Slaughter-House Cases*, the Supreme Court all-but read Bingham's beloved Privileges or Immunities Clause out of the Constitution.

This case came from a suit by 400 butchers against a slaughterhouse monopoly in New Orleans. They argued that this state-created monopoly violated their 14th Amendment rights—namely, their right to make a living in their chosen profession.

The Court—in a 5-4 decision—concluded that the 14th Amendment didn't radically alter the American constitutional system.

The majority feared that—if read broadly—the 14th Amendment would allow the national government to take on too many duties (and powers) that traditionally went to the states.

Justice Miller's Majority Opinion: The Reconstruction Congress didn't want the 14th Amendment to "transfer the security and protection of all...civil rights….from the states to the Federal Government" and thereby to "fetter and degrade the state governments by subjecting them to the control of Congress" and "destroy the main features of the general system of American government."

This decision severely limits the "Privileges or Immunities" Clause to the rights which owe their existence to the federal government, those in the Constitution like the right to petition the government or for protection on the high seas.

It doesn't reach many of the other core Bill of Rights protections that Bingham and his colleagues envisioned.

Furthermore, the Court thought that the 13th and 14th Amendments were written to protect the rights of newly freed African Americans and had to do with racial classifications—discrimination against black Americans—not the violation of the rights of white Unionists/Republicans in the South or, in this case, white butchers.

The four dissenters argued that the majority got the purpose of the 14th Amendment wrong. They thought the Court's reading was too restrictive—limiting rights protections.

For instance, Justice Noah Swayne—in dissent and in direct conflict with Justice Miller's majority opinion—says that the Reconstruction Congress *did* want to completely alter the constitutional system and transfer protection of the Bill of Rights to the national government.

Cruikshank v. United States

In *Cruikshank v. United States* (1876), the Supreme Court once again read the Reconstruction Amendments narrowly—in this case, letting alleged murderers go free.

This case arose out of one of the largest—if not *the* largest—incidents of white violence against African Americans during Reconstruction, the Colfax Massacre in April 1873.

The incident takes place in Louisiana. In March, a local African American militia leader took control over the courthouse in Colfax.

The militia began arming and drilling—with many African Americans armed with the rifles they had carried as Union soldiers. This infuriated local whites.

A murder of African American citizens three miles to the east had caused African Americans to flee to courthouse.

A group of 150 white people later attacked the courthouse and eventually drove African Americans out of the building by setting fire to it.

More than 100 African Americans were shot and killed as they fled the fire.

William Cruikshank and others are prosecuted for these murders under the Civil Rights/Enforcement Act of 1870. They were charged with infringing on the First (right to assembly), Second (right to bear arms), Fifth (due process), and 14th Amendment rights of the African American victims.

The Court unanimously rules that the suit was improper.

Chief Justice Waite says that the federal government does not have duty or power to protect against Bill of Rights violations by *private*—as opposed to government—actors.

After all, the 14th Amendment says "No state shall . . ." not "No one shall . . ." (Lawyers call this the "state action" requirement.)

Waite: "Sovereignty, for this purpose, rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself."

On equality, the Court says that the equality of rights is the key to a republican government.

Governments are duty bound to protect all of their citizens in the enjoyment of this principle, if that's within their power.

But that duty originally rested with the states and remained there.

A state must act ("state action") to deny the rights before the national government may have a role in protecting them.

So, the 14th Amendment *did* apply to states, but the Court said there was no "Due Process" or "Equal Protection" issue here because the state did not act, private individuals did.

The Civil Rights Cases

In *The Civil Rights Cases (1883)*, the Court struck down the 1875 Civil Rights Act.

The Civil Rights Act of 1875 was the final action of Reconstruction Republicans before they lost the U.S. House of Representatives to the Democratic Party.

It outlawed racial discrimination by private individuals in public accommodations—hotels, restaurants, etc.

Nearly 100 years later, the Civil Rights Act of 1964 was modeled on the 1875 Act.

The Court's ruling was 8-1—with the majority opinion written by Justice Joseph Bradley.

The Court concluded that the 13th Amendment "merely abolishes slavery."

And that the 14th Amendment did not give Congress the power to outlaw private acts of racial discrimination. (Again, lawyers call this the "state action" requirement—the state itself or its officials needed to act or be involved enough in private action for the 14th Amendment to apply.)

Bradley: "It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to guests he will entertain, or as to the people he will take into his coach or cab or car; or admit to his concert or theater, or deal with in other matters of

intercourse or business. Innkeepers and public carriers, by the laws of all the states, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them. If the laws themselves make any unjust discrimination, amenable to the prohibitions of the 14th Amendment, congress has full power to afford a remedy under that amendment and in accordance with it."

Justice John Marshall Harlan—a former slaveholder from Kentucky—issues a powerful dissent for himself alone. In fact, Justice Harlan wrote his dissent using the same pen that Chief Justice Roger Taney used to write *Dred Scott*.

Harlan believed that the majority ignored the spirit of the 13th and 14th Amendments and the Civil Rights Act and allowed states to ignore their obligation to defend the rights of African Americans.

Harlan: "No state, nor the officers of any state, nor any corporation or individual wielding power under state authority for the public benefit or the public convenience, can, consistently either with the freedom established by the fundamental law, or with that equality of civil rights which now belongs to every citizen, discriminate against freemen or citizens, in their civil rights, because of their race, or because they once labored under disabilities imposed upon them as a race."

Harlan: "The rights which congress, by the act of 1875, endeavored to secure and protect are legal, not social, rights. The right, for instance, of [an African American] citizen to use the accommodations of a public highway upon the same terms as are permitted to white citizens is no more a social right than his right, under the law, to use the public streets of a city, or a town, or a turnpike road, or a public market, or a post-office, or his right to sit in a public building with others, of whatever race, for the purpose of hearing the political questions of the day discussed."

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