A MINIMALIST APPROACH TO THE FOURTEENTH AMENDMENT

EARL M. MALTZ*

An originalist who seeks to defend a minimalist interpretation of Section 1 of the Fourteenth Amendment[1] faces two related but different problems. First, he must defend his view of the original understanding from those who take a different view of the historical evidence. Second, he must deal with critics who argue that originalism cannot be defended as a theory of constitutional interpretation. Despite the protestations of activists, neither of these arguments is fatal to the originalist-minimalist approach.

First, the historical evidence provides strong support for the minimalist view. The Fourteenth Amendment was not originally understood to outlaw racial discrimination per se, but rather to guarantee to all persons, and particularly all citizens, a limited set of absolute rights.[2] Though unclear at its margins, this set of rights was not entirely open-ended. It included basic economic rights and the rights guaranteed by the first eight amendments of the Constitution, but did not include such political rights as the right to vote, the right to hold office, and the right to serve on juries. Although Section 5[3] was intended to arm Congress with the power to enforce those rights, the precise scope of congressional enforcement authority was not entirely clear.

A number of historical facts support these conclusions. The first and most important is that, contrary to conventional wisdom, Section 1 is not couched in terms of general principles of equality and justice, but rather in legal terms of art whose meanings had been well established in the antebellum era. These terms were not exclusively used by the antislavery movement; instead, they were derived from cases in which race and slavery

* Distinguished Professor of Law, Rutgers University Law School (Camden).

1. U.S. CONST. amend. XIV, § 1 ("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.").

2. Parts of this argument are set out more completely in EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869 (1990).

3. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

were not centrally at issue.[4] The legal principles established by these authorities were easily adaptable to arguments both for and against slavery.[5]

The legal pedigrees of both the Privileges and Immunities Clause[6] and the Due Process Clause[7] are clear. The former was explicitly derived from the Privileges and Immunities Clause of Article IV,[8] and the latter had been included in both the Fifth Amendment and virtually every state constitution.[9] The relevant language had been interpreted in a wide variety of state and federal cases, and its interpretations were relatively consistent.[10]

It is the Equal Protection Clause, however, that is most often cited by proponents of expansive interpretations of the Fourteenth Amendment. Cass Sunstein's recent formulation is typical. He declares that the Equal Protection Clause "is self-consciously directed against traditional practices. It was designed to counteract practices that were time-honored and expected to endure. It is based on a norm of equality that operates as a critique of past practices."[11]

One major difficulty with arguments of this sort is that they typically ignore the antebellum legal materials that dealt with the concept of equal protection of the laws. These sources consistently give that concept an extremely narrow interpretation. They draw a distinction between equal rights and equal protection, and posit a discrete right to equal protection of whatever rights might be otherwise established by natural or positive law. Thus,

4. *See, e.g.*, Den *ex dem.* Murray v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1855) (discussing the Anglo-American historical pedigree of "due process" language). Even when slavery was the subject of an antebellum due process case, it was analyzed as an economic, rather than a political, institution. *See, e.g.*, Scott v. Sandford, 60 U.S. (19 How.) 393, 450 (1856) ("Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.").

5. *See* Earl M. Maltz, *The Concept of Equal Protection of the Laws—A Historical Inquiry*, 22 SAN DIEGO L. REV. 499 (1985); Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. LEGAL HIST. 305 (1988).

6. *See* U.S. CONST. amend. XIV, § 1.

7. *See* U.S. CONST. amend. XIV, § 1.

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

9. *See, e.g.*, JOHN H. ELY, DEMOCRACY AND DISTRUST (1980); MALTZ, *supra* note 2.

10. *See, e.g.*, ELY, *supra* note 9; MALTZ, *supra* note 2.

11. Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 3 (1994).

in *Roberts v. City of Boston*,[12] Lemuel Shaw simply was following established legal doctrine when he declared that the right to equality before the law established only the principle that "the rights of all as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security."[13]

Moreover, those who adopted Section 1 were well aware that they were drafting a provision with legal implications, and consequently paid attention to the legal significance of the language they employed. The debates are replete with references to the cases and treatises that established the parameters of the rights for which they were providing federal protection.[14] The most dramatic example is a statement by John A. Bingham, the author of Section 1. When asked by Andrew Rogers about the meaning of the Due Process Clause, Bingham shot back, "[T]he courts have settled that long ago and the gentleman can go and read their decisions."[15]

In addition, the drafting of Section 1 was controlled not by radicals and neoabolitionists such as Charles Sumner, but by more moderate conservative Republicans who were strongly influenced by an abiding concern for states' rights and a fear of unduly expanding the power of the federal government, including the power of the federal courts.[16] This group of Republicans rejected an earlier draft of Section 1 precisely because, in their view, it might have been subject to an open-ended interpretation.[17] Moreover, moderates and conservatives on the Joint Committee on Reconstruction clearly preferred the language that was ultimately adopted to a proposal that would simply have prohibited racial discrimination with respect to civil rights.[18]

Finally, the historical record is clearly inconsistent with the view that the Fourteenth Amendment was understood to protect political rights. The committee report accompanying the Fourteenth Amendment explicitly stated that the amendment would have no effect on state authority over voting rights.[19] Further-

12. 59 Mass. (5 Cush.) 198 (1850).
13. *Id.* at 206.
14. *See* MALTZ, *supra* note 2, chs. 6-7.
15. CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866).
16. *See, e.g.*, MALTZ, *supra* note 2, at 29-36.
17. *See id.* at 52-60.
18. *See id.* at 90-91.
19. *See* REPORT OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, 39th Cong., 1st Sess. 12 (1866).

more, the Joint Committee on Reconstruction considered and specifically rejected proposals that would have guaranteed blacks the right to vote.[20] Short of a disclaimer within the text of the amendment itself, it is hard to imagine more persuasive evidence of the original understanding.

The historical record thus provides compelling evidence for a narrow, rights-based view of the original understanding. Unfortunately, most commentators, including some who (unlike Sunstein) have actually examined the historical record in good faith, view this characterization of the original understanding as misguided in at least some respects.[21] Some nonoriginalists contend that the mere existence of such disagreements is fatal to originalism as a constitutional theory.[22] This argument misconceives the basic thrust of originalism. Originalism does not posit the existence of a single, uncontroversial answer to all constitutional questions. Instead it simply requires each judge to make his best good faith effort to discover the original understanding and to be bound by that estimate in reaching judicial decisions.

Nonetheless, as Gary Lawson has pointed out,[23] an originalist must articulate rules for dealing with the problem of historical ambiguity. The record will rarely be entirely consistent (although, in the case of the Fourteenth Amendment, the inconsistencies are generally overstated). Given such inconsistencies, without supplemental rules, originalism would lose much of its constraining force.[24]

In my view, the most appropriate rules are derived from a combination of the basic premises of originalism and the conditions for constitutional change itself.[25] Constitutional change—that is, changes in the legal rules established by the Constitution—can only be made with the agreement of two-thirds of the members of each house of Congress and three-fourths of the state legisla-

20. *See* BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE ON RECONSTRUCTION, 39TH CONGRESS 1865-67, at 101 (1914).

21. *See, e.g.*, JUDITH A. BAER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT (1983).

22. Much of this criticism builds on Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 204-54 (1980).

23. *See* Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL'Y 411 (1996).

24. *See, e.g.*, Mark Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

25. For further discussion of this point, see EARL M. MALTZ, RETHINKING CONSTITUTIONAL LAW: ORIGINALISM, INTERVENTIONISM, AND THE POLITICS OF JUDICIAL REVIEW 20-36 (1994).

tures. Put another way, unless there is such agreement, the content of the legal rules established by the Constitution is to remain unchanged.

From an originalist perspective, however, the content of the rules is determined not only by the language adopted, but by the original understanding of that language. An originalist therefore should enforce only those understandings shared by two-thirds of the Senate and House of Representatives and three-fourths of the state legislatures. Of course, establishing the requisite agreement with precision would be virtually impossible. Given the stringency of the supermajority requirement, however, there should be at least a strong presumption in favor of narrowly construing the original understanding of constitutional amendments.

Thus, only compelling historical evidence can justify an open-ended interpretation of Section 1. Such evidence is lacking. Indeed, as explained above, the weight of historical evidence is heavily to the contrary. An originalist judge should therefore take a minimalist view of the Fourteenth Amendment.