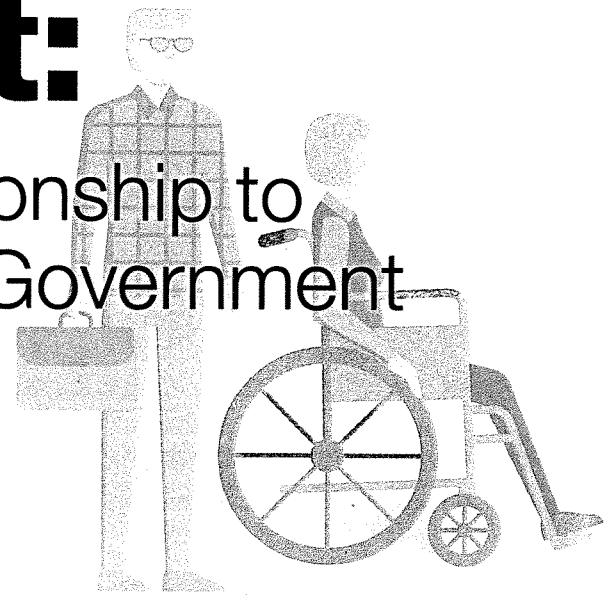


The Fourteenth Amendment:

Transforming Our Relationship to Rights and the Federal Government

»»» by Laura F. Edwards



Today, many Americans assume that it is the federal government's job to protect their rights, which they define broadly to include individual liberties and access to physical spaces, social organizations, and economic opportunities as well as equal treatment before the law. If they think about history at all, they assume that it is this way now because it was always that way. But it was not.

The legal context that so many of us now take for granted traces back to the Fourteenth Amendment, which established birthright citizenship, linked citizenship to civil rights and provided for federal oversight of those rights. In history textbooks, the amendment usually appears in the context of discussions about the extension of existing civil rights to African Americans after the Civil War, during Reconstruction. As significant as those changes were, however, the Fourteenth Amendment did much more. Its provisions meant that *all* Americans, not just African Americans, could appeal to the federal government to protect rights that used to be within

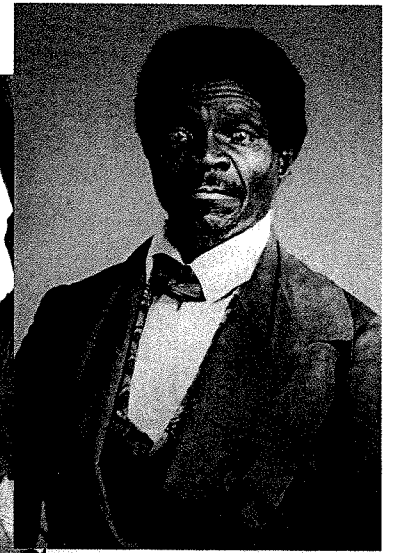
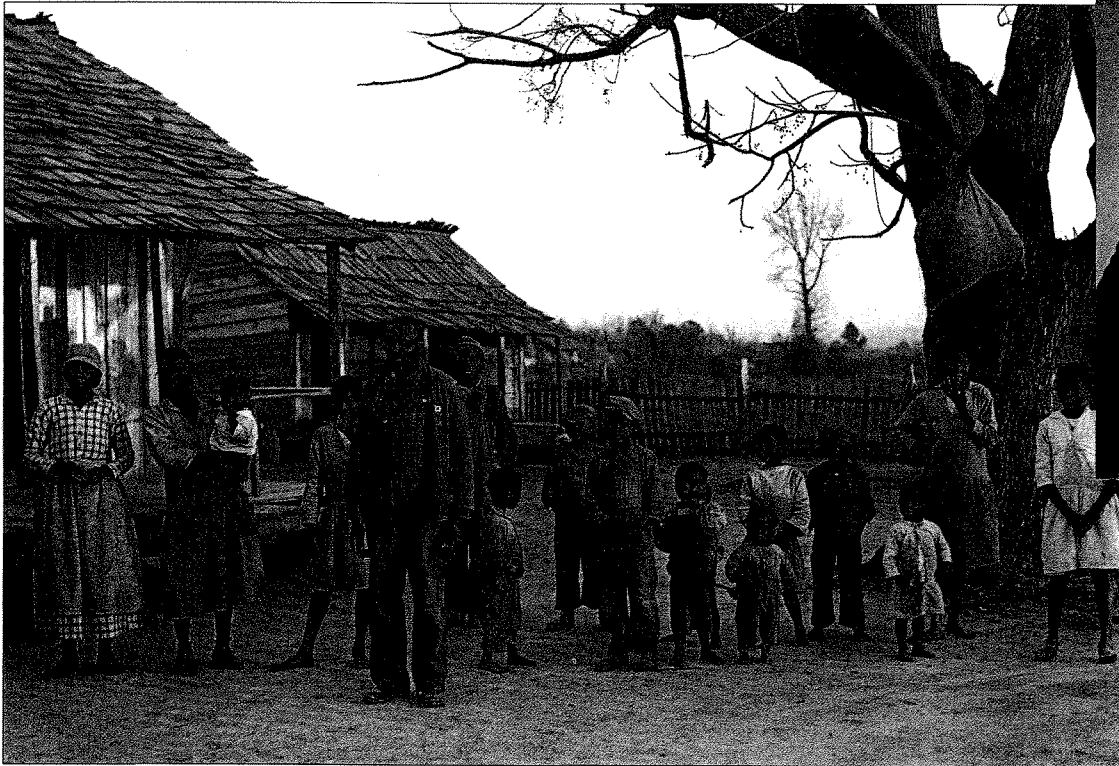
the exclusive jurisdiction of states. As people used the amendment to challenge state law, rights not only became more accessible but also acquired new meanings. The Fourteenth Amendment thus dramatically changed the legal order of the United States, transforming all Americans' relationship to rights and the federal government.

States, Rights, and Citizenship before the Fourteenth Amendment

Until ratification of the Fourteenth Amendment in 1868, states had the power to define and distribute rights. The Thirteenth Amendment, which abolished slavery in 1865, did not change that situation, as a group of former slaves in Tennessee knew all too well. With the abolition of slavery, they wrote, "our prayers were answered, and the secret hopes of our hearts were realized." But while "legally free," they still did not have the same rights as white Tennesseans. Tennessee, like other states of the former Confederacy, passed laws constraining Africans

Americans' basic rights after the Civil War and before the Fourteenth Amendment, limiting access to the courts and restricting property rights. "We have no where to look for protection, save to the United States Authority. . . . But we want some way of easily bringing our cases before them," they wrote.¹

In appealing to federal authority to intervene in state law, these African Americans were asking for something new. Before the Fourteenth Amendment, the federal government dealt with the rights of individuals only when those people or the legal issues in which they were involved were not within a state's jurisdiction: in the territories, in relation to Indian nations, in the District of Columbia, and in federal cases, of which there were relatively few. Even the rights enumerated in the U.S. Constitution's Bill of Rights remained out of reach for most Americans because these rights applied only in cases that involved *federal* law, not *state* law. It was impossible to appeal a case from state courts to federal courts based on a violation of the federal Bill of Rights.



The Fourteenth Amendment clarified criteria for national citizenship, especially with regard to former slaves and other African Americans. Above: Dred Scott was the plaintiff in a landmark 1858 U.S. Supreme Court decision that ruled that slaves were not U.S. citizens; and left: descendants of slaves gather at the Pettway Plantation in Gees Bend, Alabama in 1937. Both images courtesy of the Library of Congress.

The federal government did not even attach rights to citizenship. In fact, there was no clear definition of citizenship at all in federal law. The 1790 Naturalization Act did limit citizenship to those who were free and white. But that act and subsequent legislation addressed the situation of new immigrants who sought application for naturalization, not to those who were born here. When asked in 1863 to determine whether African Americans could be citizens of the United States, Attorney General Edward Bates's answer underscored the ambiguity of citizenship generally. "Who is a citizen? What constitutes a citizen of the United States?" he asked rhetorically. He found no definition in either federal legislation or judicial decisions. Even the U.S. Supreme Court's infamous decision in *Dred Scott v. Sandford* (1858), which denied citizenship to all people of African descent, did not resolve the question because it was such an outlier and generated such controversy. "Eighty years of practical enjoyment of citizenship, under the Constitution," he concluded, "have not sufficed to teach

us either the exact meaning of the word, or the constituent elements of the thing we prize so highly."²

To the extent that there was a link between U.S. citizenship and rights at all, it was at the state level, where there was a concept of state citizenship, which did establish claims to rights, as defined *within* states. States' jurisdiction over Americans' legal status was why some sanctioned slavery and others did not. And it was not just slave states that restricted Americans' rights. All states limited or negated the rights of African Americans, all women, many propertyless men, and a range of other racial, ethnic, and religious minorities as well. No free woman of any race, married or single, could claim the full array of civil rights or political rights. Many men found themselves in a similar situation. Free blacks, in particular, had very limited rights, even if they lived in free states, many of which had laws nearly identical to those imposed on the freedpeople in Tennessee in 1865.

To be sure, political leaders, regardless of party affiliation, invoked rights

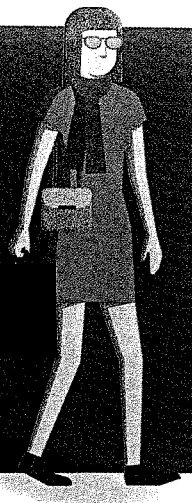
in expansive terms, often in connection to liberty, freedom, and equality, with the implication that they could accomplish those ends. But, in law, rights were neither as capacious nor as powerful as the political rhetoric suggested and were focused narrowly on matters involving the ownership and transfer of property and access to the legal venues that dealt with such matters. States did have bills of rights that were similar to the federal Bill of Rights. But the fact that states also had broad powers to regulate in the name of the public good made those rights contingent, not absolute. The application of rights, moreover, tended to preserve existing



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inequalities because they were intended to uphold the interests of those who owned property, not those without.

Fourteenth Amendment

States' authority over Americans' rights, once accepted without comment, appeared increasingly problematic after the Civil War. The complaints of former slaves, such as the Tennessee petitioners, acquired resonance because of the Republican Party's policies during the Civil War. Theirs was the nation depicted by President Abraham Lincoln in the Gettysburg Address, the one "our fathers brought forth on this continent . . . conceived in liberty and dedicated to the proposition that all men are created equal." The Fourteenth Amendment wrote that nationalizing political rhetoric into the legal order of the nation. Even so, the commitment to states' traditional powers placed definite limits on the federal government's authority.

The Civil Rights Act of 1866 foreshadowed the Fourteenth Amendment. Its formal title, "An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication" expressed the basic intent. The act clarified the vexing question of African Americans' citizenship by declaring "all persons born in the United States and not subject to any foreign power" to be citizens, although it specifically excluded Indians. It then affirmed access to those rights that had

been denied African Americans in Tennessee and in other states. All citizens, "of every race and color, without regard to any previous condition of slavery or involuntary servitude 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, as is enjoyed by white citizens. They also "shall be subject to like punishment, pains, and penalties." The act made the denial of rights a crime and prescribed penalties for convicted offenders. It also provided for the removal of such cases to federal courts, allowing defendants to bypass hostile state and local jurisdictions—what the Tennessee petitioners had requested.³

Proponents of the 1866 Civil Rights Act, however, feared that its provisions were insecure. The U.S. Supreme Court could declare it unconstitutional at any time, and Congress could gut it or even repeal it. Such concerns led to the recommendation that the act's basic provisions be written into the U.S. Constitution in the form of a new amendment.

The Fourteenth Amendment's first and most famous provision clarified the definition of U.S. citizenship: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United

States and of the State wherein they reside." In so doing, the amendment went beyond the 1866 Civil Rights Act, which affirmed the citizenship of African Americans but referred only to those people born within the United States. The Fourteenth Amendment included naturalized citizens because it was intended to offer a general definition of citizenship. In so doing, the new amendment not only asserted federal authority by applying a uniform definition of citizenship but also forged a direct connection with its citizens.

The remaining sentences of the first provision connected citizenship to civil rights, turning the 1866 Civil Rights Act's list of guaranteed rights into general promises of equity. "No State," the amendment promised, "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."

The Fourteenth Amendment then charged the federal government with the protection of those rights, although it framed that power in the passive voice. It promised that "no state . . . shall abridge" citizens' rights. The passive construction spoke volumes about contemporary political currents, particularly widespread doubts about the wisdom of extending federal authority into areas once exclusively controlled by the states. It was not until the final clause that the rhetorical curtain was lifted to reveal the enhanced authority of the federal government: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." That statement, remarkable in its brevity, nonetheless turned what might have been mere political aspirations into tangible goals by giving Congress the enforcement power.

The Fourteenth Amendment did not give the federal government *direct*

authority over civil rights, even though many congressional Republicans had argued for that. In fact, the amendment did not grant rights to anyone at all, not even African Americans. It gave the federal government a negative power: to *prohibit* states from *discriminating* on the basis of race or previous servitude. That situation left states with the authority they traditionally held to determine the rights of American citizens. African Americans could only claim the same rights that their states gave—or not—to others. Only later in the twentieth century was the Fourteenth Amendment reinterpreted to allow Americans to challenge state laws by claiming rights specified in the U.S. Constitution.

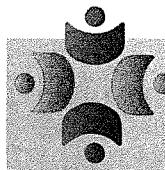
The Legal Legacy

The Fourteenth Amendment linked citizenship to rights but did not define the rights of citizens. In that sense, it captured the political conflicts of the time and preserved them in legal amber: What were the privileges and immunities of citizens? What constituted due process of law and equal protection? Under what circumstances would the federal government intercede? How would it do so, given the hostility of state governments and without the necessary administrative support? After all, the justice department was only a bare-bones operation, with a handful of lawyers in the late nineteenth century. In fact, there were no clear answers to those questions then, and they remain contested today.

The conflicts surrounding the Fourteenth Amendment were evident in the assault on African Americans' rights after Reconstruction. In 1867, congressional Republicans required Confederate states to pass the Fourteenth Amendment for readmission to the United States, which forced them to reframe their constitutions and laws to recognize African Americans' civil rights. Conservative white lawmakers, however, found ways around the

amendment when they regained political power in the 1870s. The federal government—the legislative, executive, and judicial branches—all failed to circumvent those efforts. While some in the federal government remained committed to the Fourteenth Amendment, they faced an uphill battle in realizing its promises, a struggle made more difficult by continued resistance, even within the federal government, to the use of federal power to override state policy, even for flagrant violations of African Americans' rights.

The Fourteenth Amendment, nonetheless, provided the means by which Americans could, in theory, access federal power. It did not take them long to do so, as evidenced in *Bradwell v. State* and *The Slaughter-House Cases*, both of which were heard by the U.S. Supreme Court in 1873. Myra Bradwell played an influential role in Illinois legal circles as editor of the *Chicago Legal News*, the publication on which many lawyers in the state depended to keep current on the law. It was, then, deeply ironic when the Illinois state legislature—filled with lawyers who read her publication—refused to consider her application to the bar. Not one to be cowed, Bradwell challenged the decision, making creative use of the Fourteenth Amendment. She admitted that the opportunity to apply to the bar was not, in itself, a right. Even so, it was connected to her right to pursue her livelihood and her property interests—issues of central importance to women, who lost property rights when they married because of the laws of coverture. The state, she argued, had violated the Fourteenth Amendment by denying rights to her that were granted to other (male) citizens. The U.S. Supreme Court rejected the first part of the argument, which focused on what qualified as a protected right, thereby evading the second part, which dealt with Fourteenth Amendment's application to women. Still, her use of the amendment illustrates the broader transformation underway.⁴



Discussion Questions

1. Why did lawmakers think the Fourteenth Amendment was necessary, following the Civil War?
2. How was the Fourteenth Amendment “transformative,” according to the author? What implications has the transformation had for individual rights?
3. What new questions did the Fourteenth Amendment raise in courts? What questions did it answer? What questions are still unanswered, and what do you think they mean for Americans?



Suggested Resources

- Laura Edwards, *A Legal History of the Civil War and Reconstruction: A Nation of Rights*, Cambridge University Press, 2015.
- Garrett Epps, *Democracy Reborn: The Fourteenth Amendment and the Fight for Equal Rights in Post-War America*, Holt Paperbacks, 2007.
- Eric Foner, *Reconstruction Updated Edition: America's Unfinished Revolution, 1863-1877*, Harper Perennial Modern Classics, 2014.

It is difficult to imagine stranger legal allies than Myra Bradwell and the New Orleans butchers in the *Slaughter-House Cases*. The butchers were challenging a local ordinance that regulated the slaughtering of meat, regulations that were not particularly unusual. But the butchers in New Orleans had a particular beef (so to speak) with their government: they were white men, mostly Democrats, who characterized the regulation as overreach on the part of the Republican Party, then in control of the city. With the backing of their party's leadership, they reached for the laws of their political opponents and used the Fourteenth Amendment to protect

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