

subtopic

Post-Civil War Amendments

NATURAL RIGHTS *and the* POST-CIVIL WAR AMENDMENTS

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The three amendments added to the [Constitution](#) after the Civil War—the [13th](#), [14th](#), and [15th](#) but especially the 14th—have been the most important additions to the Constitution since the original [Bill of Rights](#). They—and especially the 14th—have also been among the most puzzling features of the Constitution. Seeing them in the light of their connection to natural rights helps to make sense of the amendments.

The three amendments were not adopted all at once, but in succession. The 13th Amendment was adopted in the immediate wake of the Civil War and had the simple and relatively straightforward task of forbidding slavery anywhere in the United States. The original Constitution contained no constraints on the power of the states to institute (or not to institute) slavery and the amendment took that power away from the states. It was an attempt to give constitutional embodiment to the central natural right—the right to liberty.

The Congressional Republicans who pushed the amendment through did not conceive of it as the first in a series, but expected it to suffice. However, there were several severe legislative challenges from the defeated former slave states that required the Republicans to revisit the issue. A series of laws called Black Codes was passed in most of the former confederate states, which laws did not in so many words return the freedmen to the state of slavery, but did clearly discriminate against and disadvantage them. The 13th Amendment contained a clause empowering Congress to enforce its provisions by appropriate legislation, and a debate arose in Congress over whether legislation overturning the Black Codes was appropriate legislation under the Amendment. The result of the debate was the passage of the Civil Rights Act of 1866 and the adoption by Congress of a new draft amendment—the 14th Amendment. The amendment was thought to be desirable for two reasons: first, there were those who had their doubts about the constitutional legitimacy of the Civil Rights Act under the 13th Amendment. But, second, many thought it desirable to build directly into the Constitution express protection against laws like the Black Codes.

The relevant parts of the 14th Amendment had five main clauses: (1) a clause defining who are citizens; (2) a clause providing protection against state abridgements of “the privileges or immunities of citizens of the United States”; (3) a clause forbidding the states to deny to any person life, liberty, or property without due process of law; (4) a clause imposing a duty on states not to deny “equal protection of the laws” to any person within their jurisdictions; and (5) a provision granting Congress the power to enforce the amendment.

The due process clause provides the best initial insight into the role of natural rights in the amendment. It prohibits the deprivation by states of “life, liberty, or property” without due process of law. The list of things protected is, not by coincidence, identical to the standard list of the natural rights of the person. Prior to the 14th Amendment, there had been a due process clause in the Fifth Amendment, which had been authoritatively held by the Supreme Court in the case of *Barron v. Baltimore* to place a limit on the powers of the general government when dealing with these natural rights, but not to limit the states of the union in any way. In other words, the Constitution provided protection for natural rights against the general government’s violation of them, but no protection against a state’s violation of them. Natural rights were thus only partially protected by the original Constitution; the Constitution was “incomplete” in that it did not extend protection to natural rights against all governmental entities that might

threaten them.

The 14th Amendment began to remedy that situation of incomplete protection for natural rights by extending its prohibition of violations of rights to include states as well as the general government. The language of the amendment makes the connection to natural rights clear when it extends due process protection to all “persons,” not just “citizens,” who are the beneficiaries of the privileges or immunities clause. Natural rights belong to persons, all human beings considered as legal agents regardless of their citizenship, i.e., membership (or not) in any particular political community.

The equal protection clause is clearly connected to the due process clause by virtue of the punctuation in the text and by virtue of the application to persons also. The Constitution provides that states shall not deny equal protection to persons within their jurisdiction. The natural rights philosophy again makes clear what this clause is attempting to accomplish. According to that philosophy of government as formulated by [John Locke](#), human beings should be thought of as initially living without any political connection or any political authority over them. They are equal by virtue of possessing rights and of the fact that no individual possesses a claim by nature or by divine grant to rule any other person. Rights in this situation are insecure, however. The solution is the social contract, whereby previously politically unconnected and free individuals establish government to make their rights more secure. Government has two complementary tasks in its rights-securing function. On the one hand, it should not itself threaten or invade the rights of its citizens (or of anybody, for that matter); on the other hand, it must do something positive—it has a duty to supply protection to the rights of persons within its territory.

The first of these two tasks is addressed by the due process clause; the second by the equal protection clause. Just as the original Constitution set no duty on the states not to infringe rights, so it set no duty on states to protect rights either. States were legally free, as far as the Constitution was concerned, to deny rights by their own actions, or by failing to prevent others from doing so.

As should be clear, the equal protection clause is in the first instance about protection of rights by law. It is secondarily about equality of protection. There must be some standard to assess whether the states are supplying sufficient protection, for unlike the duty not to deny rights, the duty to protect rights is open-ended. At first Congress considered language requiring “full protection of the laws,” but it soon became apparent that this was not a reliable standard, for one can always imagine yet more protection by states (such as more policemen or a larger budget for rights-protection). “Equal protection” provided a far more manageable standard, for it requires states to supply to all classes or groups in the community the same level of protection that it supplies to its most favored members. In enforcing this provision, both Courts and Congress would then have a standard they could apply.

The privileges and immunities clause obviously does not provide for natural rights. It applies to citizens, not persons, and it protects special kind of rights, “privileges” and “immunities,” that by their nature lack the universality of natural rights. Likewise, the 15th Amendment does not protect a natural right; it casts the Constitution’s protection around the right to vote, but merely (and uniquely in the three amendments) denies the States the right to abridge the right to vote on the basis of race. States may abridge the right to vote on any other standard but race. The distinction between the natural rights protected by the 13th and 14th Amendments and the voting right protected by the 15th was a common one in the rights thinking of 19th-century political philosophy. In the 19th century, four different types of rights were regularly identified—natural, civil, social, and political—which have different statuses and claims to protection. While all human beings without exception possess natural rights, political rights such as the right to vote, (i.e., rights to share in the governance of the community) are not natural and universal but are, it was thought, subject to the deliberate decision by the community about who should possess the power to share in community governance. The 15th Amendment expresses the judgment of the community that race is not a valid basis on which to premise the right to vote but it leaves open the legitimacy of denying that right on the basis of other criteria, e.g., literacy. As it happened, the intention of the amendment was for a long time circumvented by clever use of the openings for denying voting rights on other bases, high-jacking them to deny rights of racial minorities.

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