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Educational materials for Post-Civil War Amendments

INTRODUCTION TO POST-CIVIL WAR AMENDMENTS

In this article, Michael Zuckert sets out to provide the context, content, and implications of the Post-Civil War amendments (the [13th](#), [14th](#), and [15th](#)). The 13th amendment was adopted immediately after the Civil War and served the simple task of forbidding slavery. However, discrimination against freed slaves still continued through laws called Black Codes. In response to these Black Codes, the Civil Rights Act of 1866 and the 14th amendment were established. Among its various functions, the 14th amendment defines who citizens are, prohibits state and federal abridgment of rights without due process of law, and requires states to give equal protection of the laws to all persons. The due process and equal protection clauses, heavily influenced by [Locke](#)'s natural rights and social contract philosophy, reflect the two tasks of government, both negative and positive: not to invade citizens' rights, and to protect those rights from being violated. As a standard, equal protection provides the states and federal government with a clear criterion by which to protect citizens' rights. In contrast to the 13th and 14th amendments, the 15th amendment protects not a natural, but a political right: the right to vote. Although it forbids the denial of voting rights on the basis of race, it leaves open the possibility of that denial on other bases.



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There is no biography for this essay. Please see the other sections of the Educational Materials for more information about the Post-Civil War Amendments.



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GLOSSARY OF TERMS FOR POST-CIVIL WAR AMENDMENTS

civil right:

One of the three types of rights traditionally affirmed in the theory of American constitutionalism, especially at the time of the drafting of the post civil war amendments to the [Constitution](#). Civil rights are the basic legal protections the state provides for the fundamental natural rights of individuals in society. The post civil war generation gave their most authoritative understanding of civil rights in the Civil Rights Act of 1866, which protected such rights of individuals as the 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 legal protection for the security of person and property. (See also [CIVIL SOCIETY](#), [NATURAL RIGHT](#), [POLITICAL RIGHT](#), and [SOCIAL RIGHT](#))

civil society:

a group of individuals united by a particular human government

due process:

non-arbitrary judicial process according to established laws and principles

equal protection:

equal protection under the law; the law applied equally to all persons under the government's jurisdiction

immunities:

exemptions from violations of rights that persons possess because of being a part of a certain group in society

natural right:

an entitlement or permission, not dependent upon social or political circumstances, which a person possesses in virtue of being human

political right:

the general entitlements that individuals have, simply because they are human beings, to participate in the government of the state under which they live. The state in turn has a duty not to deny these rights, and individuals have a duty to participate in government as is appropriate to their station in society. One of three types of rights that were traditionally affirmed in the theory of American constitutionalism, especially at the time of the drafting of the post civil war amendments. Political rights are rights to share in the governance of the community. The chief political rights are the right to hold office, the right to vote, and the right to serve on juries. These are not understood to be natural rights but to be positive rights, that is, rights established by the legal authorities of the community. Of the post war amendments only the [15th](#) clearly treated political rights. To be denied political rights was not thought to be equivalent to denying rights altogether, as some recent critics appear to believe.

privileges:

certain social or political advantages that are granted to a certain group or to certain members in society

social contract:

a contract or agreement in which people in their pre-political condition give up certain liberties and rights in order to enter into a political society. Social contract theory was highly influential in shaping the Constitution.

social right:

rights pertaining to the social order of a society; distinguishable from natural right and political right, social rights arise from the social contract whereas natural rights arise from the natural law and political rights from the positive law through government. One of the three types of rights that were traditionally affirmed in the theory of American constitutionalism, especially at the time of the drafting of the post civil war amendments. Social rights are those involving normal social intercourse and were distinguished from political and civil rights. There was a general but not universal consensus that social rights, such as the right to mingle with others, were not the sort of rights that the law was to enforce. It was widely thought that the Civil Rights Act of 1875, dealing with such matters as racial segregation or restriction by private proprietors in matters such as access to opera houses dealt with social not civil rights. (see also [POLITICAL RIGHT](#), [NATURAL RIGHT](#))



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OUTLINE OF THE ESSAY ON THE POST-CIVIL WAR AMENDMENTS

I. Introduction and background to Post-Civil War amendments

A. [13th](#), [14th](#), [15th](#) Amendments are most important amendments since the [Bill of Rights](#)

B. They were adopted successively, and were aimed at eliminating slavery and granting constitutional protection to the natural right of liberty

II. 13th and 14th amendments: background and content

A. 13th amendment banned slavery, but was not enough: discrimination still persisted

B. Black Codes disadvantaged and discriminated against freed slaves; thus the Civil Rights Act of 1866 and the 14th amendment were passed

C. 14th amendment was designed to:

1. Counter those who denied the legitimacy of the Civil Rights Act
2. Explicitly protect against laws like the Black Codes

III. The “due process” clause in the 14th amendment

A. Due process prohibits the deprivation of rights without proper legal measures

B. More importantly, though the [Constitution](#) protected against general governments rights violations, nothing protected against state violations of rights; the due process clause solved this lack of protection

C. The 14th amendment remedied incomplete protection by affirming the right to due process of “all persons,” not just “citizens.”

IV. The “equal protection” clause in the 14th amendment

A. Through the clause, equal protection must be given to all persons under states’ jurisdictions

B. This clause was influenced by [Locke](#)’s natural rights philosophy:

1. People are initially pre-political and independent creatures
2. But in this pre-political, natural state, people’s rights are not secure
3. Thus, people enter into society by means of a social contract, agreeing to give up certain rights and liberties in order to make other rights more secure

C. As a result, any legitimate government should have two complementary roles:

1. Not to violate the rights of its citizens – corresponding to due process
2. To protect the rights of its citizens – corresponding to equal protection

D. Equal protection is primarily about the protection of rights, and secondarily about the equality of that protection

E. Equal protection is a standard that is easy to enforce, whereas “full protection” is open-ended.

F. Privileges and immunities clauses, unlike due process and equal protection, apply only to citizens; not universal rights like natural rights

V. The 15th amendment and political rights

A. The 15th amendment does not protect a natural right, but rather a political one: voting

B. Under the amendment, states cannot abridge the right to vote on account of race, but they can still abridge the right to vote by other criteria

C. The permissibility of using other means to deny the right to vote was unfortunately used to

discriminate against racial minorities



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STUDY GUIDE FOR POST-CIVIL WAR AMENDMENTS

Part I. Basic Interpretation

If you are interested in the Post-Civil War Amendments after reading Zuckert's essay, please go to the [Primary Source Documents](#) to read the text of the Amendments discussed. As you go back to the primary sources, keep in mind the following questions:

1. What was the main purpose of passing the Post-Civil War amendments?
2. Zuckert mentions that these amendments are both the “most important additions” and “among the most puzzling features of the [Constitution](#).” What is puzzling about them? What makes them so important?
3. How are the amendments significant in America’s political history?
4. What is a citizen, according to the 14th amendment? What rights are guaranteed to the citizen?
5. What is the relation between the “due process” and “equal protection” clauses? How do they reinforce one another?

Part II. Connections to Other Thinkers

In order to understand the significance of these Amendments, it is important to consider them in their proper context and understand the various natural law and natural rights thinkers who most influenced the framing of the Amendments. As you look deeper into the details of the Amendments, consider these questions:

1. Zuckert’s article highlights the way in which the Post-Civil War amendments were influenced by the natural rights theory of [John Locke](#). In Locke’s view, people are essentially separate from society, but only enter into society to secure their rights through the protection that government brings. Thus people give up certain rights and liberties in order to preserve other, more important ones. What rights do people in contemporary society give up?
2. For [Hobbes](#), in order to secure their rights, people grant total political control to an absolute monarch who will take whatever steps necessary to secure the peace and order of society. Hobbes thinks that this is the only way that rights can really be safeguarded from violation. This seems to differ from the American model, where the power is in the hands of the people, and the organization of government into executive, legislative and judicial branches works to inhibit the total power of any one branch. Compare these two methods of securing rights (monarchy versus republican democracy). Which seems more effective?
3. In the Post-Civil War amendments, one can already see the shift away from natural law and towards natural rights. Compare this emphasis on natural rights with [Aquinas](#)’ focus on natural law as the ground of morality.
4. According to [Oliver Wendell Holmes](#), there are no absolute standards of right and wrong. Therefore, legislation is not based on some natural law, but rather on the current sentiments of the people or judges. Many people, however, would argue that the Constitution is in fact founded upon principles of natural law, and not upon mere sentiments. But the very fact that the Constitution can be amended appears to break down the notion of the Constitution’s natural lawfulness, for the Constitution can in fact be changed to reflect the will and sentiments of the people. Which is the more proper understanding of the Constitution? Can natural law be reconciled with the changeability of the Constitution?
5. In what ways did [Lincoln](#) prepare the way for the post-Civil War amendments? Compare the rights included in the 13th, 14th, and 15th amendments with Lincoln’s arguments for the

emancipation of America's slave population. Although convinced of the immorality of slavery on natural law grounds, Lincoln himself did not advocate for civil or social equality for blacks. What would Lincoln have thought of these amendments?

6. In what ways has the trend of increased civil rights, such as through the Post-Civil War amendments, influenced contemporary liberal thinkers such as Rawls and Dworkin?

Part III. Critical Analysis

With a basic understanding of the Post-Civil-War amendments, let us examine them more critically. Can we expand upon the intention of the amendments to determine how they would impact issues they did not directly address? Use the questions below as your guide:

1. There seems to be something quite contradictory about the [14th amendment](#). On the one hand, it says that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." But immediately after that statement, the amendment proclaims that no state may "deprive any person of life, liberty, or property, without due process of law." What is contradictory and perplexing is that the first statement seems to indicate that states cannot take away citizens' rights at all, while the latter statement seems to contend that states can take away citizens' rights, though only by the proper legal means. But if we rightly consider "privileges and immunities" to be different from "life, liberty, and property," the matter becomes even more puzzling, for in such a case the amendment would seem to say that political rights (given by the state) cannot be taken away, while natural rights (which are not given by the state) can be taken away. Is there a resolution to this apparent contradiction, or is the amendment inherently conflicted?
2. According to the [14th amendment](#), the government must not "deny to any person within its jurisdiction the equal protection of the laws." Does this entail, however, that persons outside of the United States' legal jurisdiction (such as foreigners in America on vacation, for instance) must have equal protection of the laws, as well? In terms of the law, then, should illegal immigrants be treated with less equality than ordinary U.S. citizens?
3. One difficulty of the [13th amendment](#) is that, while it defines a citizen as "all persons born or naturalized in the United States, and subject to the jurisdiction thereof," it fails to define the concept of a person. While one may think that the concept of a person in contemporary society is agreed upon, and that therefore the amendment's silence on the matter does not have that much importance, many current debates (such as those relating to abortion and embryonic stem cell research) revolve around precisely what a person is. Consider how this applies to modern society. Since the amendment does not define the nature of a person, does that mean that each citizen can define what a person is for himself? If not, by what standard would the government judge that a citizen interpreted the Constitution's concept of a person correctly?
4. From the Post-Civil War amendments, it is clear that the government has a duty to preserve the rights of its citizens from being violated. But what duty do individual citizens have to preserve the rights of their fellow citizens? For instance, consider a case in which someone observed a child being attacked by a wild animal. While the child's right to life is certainly being violated by the animal, does that mean that the person observing the attack is obliged to step in and fend off the animal? Although the observer is not violating the child's right to life, is he nevertheless compelled (under the Constitution) to preserve the child's right to life? Or is that task of preservation only the government's domain?
5. As Zuckert notes, while the 15th amendment forbids discrimination on the basis of race, it still allows for discrimination for other reasons. Is this just a legislative oversight? Should the legislators of the amendment have explicitly condemned other forms of discrimination, such as by gender, economic status, etc.?

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