

The Breakfast Club

Constitutional Minute for 17 May 2022

The 14th Amendment; Wait, Wait There's More

I was initially going to stop our exploration of the 14th Amendment with [last week's Due Process Clause](#), but there is still a lot more to the amendment you should understand; so let's keep going a bit.

We haven't yet fully explored the "why" of the 14th. Yes, it was necessary to give freed slaves their full civil rights as citizens when freedom alone proved, at least in the Democrat-controlled Southern states, to be insufficient. Freed blacks were treated as second-class citizens if that. Congress observed how blacks were being treated and tried at first to fix that with simple legislation. The [Civil Rights Act of 1866](#) was passed by Congress on March 13, 1866. Section 1 of the ten-section bill began by stating:

"That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States;..."

Sound familiar? Many features of the bill ultimately ended up in the 14th Amendment, but let's not get ahead of ourselves. The bill was vetoed by President Andrew Johnson fourteen days after it was passed (there is no record of when it was actually presented to the President, which would have started the "10-day clock" of the Presentment Clause). Johnson concluded his veto message by stating:

"In all our history, in all our experience as people living under Federal and State law, no such system as that contemplated by the details of this bill has ever before been proposed or adopted. They establish for the security of the colored race safeguardsⁱ which go infinitely beyond any that the General Government has ever provided for the white race. In fact, the distinction of race and color is by the bill made to operate in favor of the colored and against the white race. They interfere with the municipal legislation of the States, with the relations existing exclusively between a State and its citizens, or between inhabitants of the same State—an absorption and assumption of power by the General Government which, if acquiesced in, must sap and destroy our federative system of limited powers and break down the barriers which preserve the rights of the States. It is another step, or rather stride, toward centralization and the concentration of all legislative powers in the National Government. The tendency of the bill must be to resuscitate the spirit of rebellion and to arrest the progress of those influences which are more closely drawing around the States the bonds of union and peace." (Emphasis added)

Congress overrode the President's veto on April 9th, becoming the first Congress to ever override a presidential veto, and the bill became law.

But then doubt set in. President Johnson had alluded to the unconstitutionality of the Act in his veto message and Ohio Republican Senator John Bingham and others began to question whether Congress

really had the constitutional power to enact such sweeping, fundamental changes to the American political landscape by simple legislation. Conferring rights, particularly something as fundamental as citizenship, was seen by some as a constitutional act, beyond the power of simple legislation. Congress decided a new amendment was required.ⁱⁱ

So, the 14th Amendment was drafted, passed by the required 2/3 vote in each chamber, and sent to the states for ratification – where it promptly ran smackdab into a roadblock called “the Southern states.” As Wikipedia relates: “State legislatures in every formerly Confederate state, with the exception of Tennessee, refused to ratify it. This refusal led to the passage of the [Reconstruction Acts](#). Ignoring the existing state governments, military government was imposed until new civil governments were established and the Fourteenth Amendment was ratified. It also prompted Congress to pass a law on March 2, 1867, requiring that a former Confederate state must ratify the Fourteenth Amendment before “said State shall be declared entitled to representation in Congress.” As Wisconsin Senator James Doolittle put it, “The people of the South have rejected the constitutional amendment and therefore we will march upon them and force them to adopt it at the point of the bayonet” and rule them with military governors and martial law “until they do adopt it.”ⁱⁱⁱ Seeing this blatantly hostile attitude in Congress, New Jersey, Oregon and Ohio legislatures voted to rescind their previous ratification of the Amendment.

The amendment required the ratification of 28 states to become part of the Constitution. North Carolina, Louisiana, and South Carolina chose ratification over continued martial law. This completed the necessary 28 ratifications, but not if those of New Jersey, Oregon and Ohio had been rescinded. No problem, Congress declared the rescissions “scandalous” and on July 10, 1868, the amendment was declared a part of the Constitution, with the three recessions summarily ignored.

So why all the hubbub over what would seem to be an administrative detail? Just as “elections have consequences,” so do constitutional amendments, even well beyond the drafters’ intent. [As lawyer Mark Pulliam reminds us](#): “The 14th Amendment...has been “interpreted” to protect abortion rights, same-sex marriage, welfare rights, LGBT rights, pornography, flag burning, procedural rights for criminal defendants, and [much more](#),” and, I might add: incorporate nearly the entire Bill of Rights against the states (not necessarily a bad thing, but who’s Constitution is it?). If the 14th Amendment was not legally ratified, all its various interpretations would obviously be void.

Yes, you guessed it; there is still more to learn about the 14th Amendment; stay tuned.

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ⁱ To understand these other “safeguards” Johnson refers to, you should read the entirety of the Act.

ⁱⁱ Congress proposed the amendment before the Supreme Court could be presented with a case that would allow them to decide the constitutionality question.

ⁱⁱⁱ <https://www.historyonthenet.com/fourteenth-amendment-ratified>