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## The Fourteenth Amendment and the Heart of the Constitution

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Image: US Supreme Court (1925)

The natural progress of things is for liberty to yield and government to gain ground.

– Thomas Jefferson, 1788.

Americans view their founding differently – some revere the United States Constitution, admire the Founders, and share their ideological belief system; others find various faults with the Revolution and the Constitution. Yet Americans of all stripes can easily identify the differences between the country in which they live today and the United States of the late-eighteenth century. Specifically, Americans are struck by

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how the country, its culture, and its Constitution have been fundamentally transformed since the late-nineteenth century.

The Civil War was a catalyst for this transformation. And the postwar Constitutional Amendments were the tool by which this transformation was accomplished. George Fletcher, a distinguished legal scholar at Columbia Law School, refers to these Reconstruction Amendments (Thirteenth, Fourteenth, and Fifteenth Amendments) as the Second American Constitution because they created a new constitutional order whose principles are “radically different from our original Constitution.” It is indeed evident that the Reconstruction Amendments – and the Fourteenth Amendment chief among them – represent a clear departure from Madison’s Constitution.

In the generations that followed Reconstruction, Americans have progressively embraced the Fourteenth Amendment’s constitutional vision over Madison’s vision. They made the Fourteenth Amendment the heart of their Constitution, and in doing so, they have purposefully altered the primary function of the Constitution. The Fourteenth Amendment has thus transformed the United States Constitution, recasting it in its own image.

### **Madison’s Constitution**

One of the American Revolution’s most vexing conundrums is why on earth would colonial America’s leading families (the Washingtons, Hancocks, Adamses, Morrisses, Jeffersons, *et al.*) lead a revolution. Why would the families that had prospered most and gained the greatest power and influence under the existing order want to change that existing order? To ask the question is to open one’s eyes to the answer: when Americans rebelled in 1775-76, they did not see themselves as agents of change, but as agents of stability; they were resisting radical new policies pushed by the imperial government and restoring the old imperial order.

The Revolutionists grew up in an empire governed by the principle of “salutary neglect” – what Americans later called “states’ rights.” Within this traditional construction of the British Empire, the central government in London did not involve itself directly in local governance in the colonies. The British Empire was a loose confederation of self-governing colonies under a weak central government. Edmund Burke coined the term “salutary neglect” to explain the economic and demographic miracle that had taken place in the colonies. As a free people, the British believed that self-government was not only politically and morally just, but also economically beneficial (salutary), because it allows communities to pursue their economic interests freely.

The settlers were attached to the traditional imperial system of salutary neglect. They complained and resisted when Parliament threatened their long-held habit of self-government in the 1750s-70s; they went to war in 1775 to reinstate the old system of imperial governance; and when they won the war, they recreated that system salutary neglect – a loose confederation of self-governing states under a weak central government, as outlined in the United States’ first constitution, the Articles of Confederation (ratified in 1781). The Articles of Confederation preserved – rather than changed – the old system of governance that Americans had long enjoyed in the British Empire. Everything that the Revolutionists had denied the British government before the war under the imperial constitution – including the power to tax the states or their citizens – they denied the new United States government.

This attachment to local government and government by consent was not uniquely American but commonly English (or British). The intense fear of centralized governance that sparked American resistance in the 1760s had already produced two major rebellions in England in the 1640s and 1680s, and two more in Scotland in the 1710s and 1740s. What was common to all these British rebellions was a conviction that centralized power invites abuse of power because it is arbitrary by its very nature. This British political mentality rested on the widespread assumption that *people with*

*power will abuse it.* The insistence on government by consent was simply the practical remedy to this very human problem.

Revolutionary Americans' fear of government officials was rooted in the expectation that people with power will abuse it. Everything associated with Anglo-American political culture flows from that dark understanding of human nature – political institutions, legislative protocols, the arcane procedures in British and American legislatures, the attachment to local government and to local jury trials, procedures in courts of law, and the fear of concentrating power in one person or in one institution. It is in this context that Thomas Jefferson made his stoic observation that “the natural progress of things is for liberty to yield and government to gain ground.” James Monroe likewise noted humanity's difficulties throughout history “to preserve their dearest rights and best privileges, impelled as it were by an irresistible fate of despotism.”

Once independent, Americans eyed the United States government with the same suspicion and vigilance. With salutary neglect – or states' rights – as their constitutional guide, they crafted a constitution (the Articles of Confederation) that created an emasculated central government unable to impose its will on local communities. When Federalists tried to replace the Articles of Confederation with a new constitution that promised to strengthen the central government and curtail local communities' ability to govern themselves, it resuscitated pre-Revolutionary fears and suspicions about centralized and arbitrary power. But the debates over the proposed constitution did not reflect philosophical or ideological differences between Federalists and Anti-Federalists – both sides shared a negative view of human nature. Both sides believed that people with power will abuse it. Both sides were convinced that governments are necessary but also extremely dangerous.

James Madison explained that because the powers of government are wielded by humans, one must expect abuses of power, arbitrary government, lawlessness, and tyranny. Similarly, when George Washington warned that occupants of public offices love power and are

prone to abuse it, he was not suggesting that the people who are drawn to government offices are power-hungry knaves. Rather, he expressed the widely held Anglo-American understanding that *all* people – good and bad – gravitate toward abuse of power when they acquire power.

Anti-Federalists saw this as a problem that cannot be solved. Thus, since corruption and abuse in high places were inescapable facts of life, the most any society can do is to do away with the high places. Like the Revolutionists of 1776, they preferred to endure small local abuses from small local governments than endure great abuses from a powerful central government.

By contrast, Federalists tried to find a clever solution to the problem of human nature. Madison's formulation of a central government splintered into separate branches, and strictly limited to a set of *enumerated* powers, was a plan to cheat history. Federalists believed that the Federal Government's internal divisions would pit competing interest groups against one another within this splintered structure of the Federal Government, thus counteracting the gradual and natural concentration of power that had characterized all previous governments in human history, both monarchical and republican. This "separation of powers" within the government itself (between the legislative, executive, and judicial branches of the Federal Government, and between the two houses of Congress) was going to act as an *internal* structural guardrail against the consolidation of power in the central government. Additionally, this internal structural guardrail was buttressed by an external (though theoretical) guardrail – Madison's *insistence* that the new central government was limited, restricted by law, courts, local governments, and public opinion to exercising only certain *enumerated* powers, *and no others*.

The ratification contest revealed that the American people were more skeptical than Madison. To address Anti-Federalists' concerns, Federalists agreed to add to the Constitution, as a third guardrail, explicit prohibitions against the Federal Government. These prohibitions – the ten Amendments of the Bill of Rights – thus reflect the fears of eighteenth-

century Americans that future Federal legislators, executives, and judges might not be mindful of Madison's safeguards. Americans feared that the separation of powers and the doctrine of *enumerated* powers were insufficient to interrupt what Jefferson called "the natural progress of things."

In this respect, the Bill of Rights is an Anti-Federalist document given that it addressed Anti-Federalist warnings that the new powerful central government could, in time, threaten self-government in the states and wield arbitrary power, just as Parliament had done in the 1760s and '70s. The Bill of Rights offered the First Amendment to answer those who feared the central government might establish a national Church, regulate speech, or break up public gatherings; it offered the 2nd Amendment to those who feared the new government might restrict Americans' ability to possess firearms; it offered the Fifth, Sixth, and Seventh Amendments to those who feared the central government might do away with jury trials; and so on and so forth.

Federalists did not have serious reservations about these prohibitions against Federal activism because they too feared centralized power. They never envisioned a central government that would reach into the states to govern them directly. What they imagined was a large country characterized by regional pluralism, in which localities with different circumstances, interests, and cultures produced different governmental systems and arrangements. Seeing government coercion as a necessary evil, Federalists wished to resort to centralized power as a last resort. Believing that local governments are more consensual, more accountable, and less powerful than central governments, they wanted governance to be primarily local.

The Federal Constitution therefore preserved tremendous autonomy for states and localities to govern themselves and shape different policies on religious worship, official state churches, slavery, freedom of speech, freedom of assembly, guns, criminal procedures, and the like. States could do what they wished on all these fronts under the Articles of

Confederation, and this remained the case under the Constitution and Bill of Rights. The Bill of Rights simply reinforced this pluralism through explicit and *absolute* prohibitions against Federal interference in these realms.

Even a casual reading of the Bill of Rights reveals that it does not guarantee to Americans the various rights and freedoms it discusses. It does not proclaim that Americans can speak freely, worship freely, bear arms at will, or be safe from arbitrary arrest; it merely denies the newly established Federal Government powers that were widely understood to belong to local governments – the power to tell inhabitants what they may and may not say, the power to establish an official Church, the power to outlaw certain religious practices, and the power to restrict the use or ownership of guns.

The language of the Bill of Rights is absolutist on religion, speech, and guns not because eighteenth-century Americans were absolutists on these issues; they were not. The authors of the Constitution and of the Bill of Rights believed that people's various liberties (such as speech, assembly, religious worship, and gun ownership) can and *should* be curtailed by their governments in various ways. They insisted, however, that the United States' central government have no role in such curtailments. It was universally understood that the prohibitions in the Bill of Rights applied exclusively to the Federal Government.

The citizens of the various states thus remained as free as they had been under the Articles of Confederation (and under Britain's old imperial system) to restrict speech, establish an official Church, outlaw certain religious practices, enact gun control measures, and determine their own criminal court procedures. Thus, some states retained established state Churches well into the nineteenth century; it was not unconstitutional, and when these state Churches were eventually dismantled, it was done not by the authority of the Bill of Rights but by the legislatures or courts of those states.

The absolutist prohibitions in the Bill of Rights are not evidence that Americans were absolutists on those issues. They are evidence that Americans were absolutists about barring the Federal Government – and the Federal Government alone – from acting on those local matters. This is why citizens and non-citizens enjoyed the same protections under the Bill of Rights. The Bill of Rights does not list the people, or categories of people, who may speak freely, bear arms, assemble freely, or worship freely. It only lists the one government – the Federal Government – that was prohibited from restricting these activities.

### **The transformation of the Federal Constitution**

The notion that the Bill of Rights instructs local governments on what they can and cannot do with regard to speech, religion, guns, and criminal-court procedures is a twentieth-century novelty. That is how Americans read the Constitution today, but it was not how the people who wrote the Constitution wrote it and understood it in the eighteenth century. And it is not how Americans read and understood the Constitution throughout the nineteenth century.

In the twentieth century, Americans devised a new way to read the Constitution, a new way to apply it to their daily lives. This innovation in Constitutional jurisprudence has been pivotal in the transformation of the United States from a federated republic in which local communities governed themselves, into a modern managerial nation-state that is governed from the center.

The key to this transformation was the Fourteenth Amendment, enacted in the aftermath of the Civil War. The Fourteenth Amendment was a product of unique postwar circumstances, and it was ratified with the purpose of empowering the Federal Government to “reconstruct” the defeated South; that is, to reshape political institutions, practices, and culture in the Southern states as they prepared to re-enter the Union.

When the United States tried to reconstruct Germany and Japan as liberal democracies after World War II, it was done with the expectation that if Germany and Japan became democratic like the United States, then they would not start another world war. After the Civil War, the Northern states likewise hoped that by remaking the South in their own image, they would put an end to the longstanding intersectional friction that had intensified steadily since the 1790s.

Thus, unlike the ten amendments that comprise the Bill of Rights, the Fourteenth Amendment did not contain prohibitions against the Federal Government but prohibitions against *state* governments. In the context of the multitude of liberated slaves in the South, the Fourteenth Amendment did the following things:

- (1) established the Federal Government as the arbiter of citizenship in the United States.
- (2) conferred citizenship on the freed slaves.
- (3) prohibited states from curtailing the rights and privileges (that is, liberties) of American citizens without due process of law, or denying any of their residents “the equal protection of the laws.”

The clash between the pre-Civil War Constitution and the Fourteenth Amendment is thus easily apparent. The Constitution provides the structure for limited government by constraining Federal authority. To buttress these restrictions, the Bill of Rights provides explicit limitations on Federal power. The Fourteenth Amendment, by contrast, provides the structure for the opposite type of government – it *empowers* the central government to act within local jurisdictions on a vast spectrum of issues, ranging from the most public (elections, policing, criminal law, public education) to the most private (commerce, religion, housing, medicine, home defense, marriage, family life, nutrition, sports, civic associations...).

Whereas the pre-Civil War Constitutional Amendments envisioned the states as the defenders of the people against Federal encroachment and abuse, the Fourteenth Amendment did the opposite. With the South’s new

black citizens in mind, the Fourteenth Amendment not only identified the *state* governments as potential threats to the citizenry, it empowered the Federal government to monitor, curtail, and correct abusive or predatory conduct by local governments.

The Northerners who won that war at such a high cost needed these former slaves to become active and effective *citizens* of the Southern states for those states to be “reconstructed” the way the North wanted them reconstructed. Thus, in contrast to the pre-Civil War Constitution and Bill of Rights, which limited Federal power and jurisdiction within the states, the Fourteenth Amendment created new jurisdictions and new powers for the Federal Government in the states. It is no surprise, therefore, that when one traces the process by which the Federal Government has extended its authority and reach into the localities in the twentieth and twenty-first centuries, one finds that most of the centralizing reforms have been accomplished through reference to, reliance on, and application of the Fourteenth Amendment.

The post-Civil War Constitution was thus a house divided against itself. As Abraham Lincoln pointed out on another matter altogether, a house divided against itself cannot stand; it must “become all one thing, or all the other.” And indeed, in the century and a half that followed the Civil War, the Fourteenth Amendment established itself at the heart of the Constitution and remade it in its own image. This transformation took place in the early-twentieth century, when Federal courts began citing the Fourteenth Amendment (specifically, its due-process and equal-protection clauses) to “incorporate” – that is, to apply – the Bill of Rights to state and municipal governments.

Whereas until then it was universally understood that the Bill of Rights restricted the Federal Government alone, the courts used the “incorporation doctrine” to apply the prohibitions of the Bill of Rights also to state and local governments. By the late-twentieth century, the incorporation doctrine had become a firmly entrenched orthodoxy in American legal and political culture. It placed the Federal Government

(Federal courts first and foremost) as a guarantor of civil rights in every locality in America. The incorporation doctrine thus invited the Federal Government to supervise, police, and correct local governments in matters that had long been understood as purely local and beyond the jurisdiction of the central government.

“Incorporation” thus allowed the Fourteenth Amendment to create the kind of strong central government that Madison’s Constitution had explicitly aimed to prevent – a central government that is empowered to govern the states and towns of America. The incorporation doctrine has even turned the Bill of Rights on its head, transforming it from a document that plainly and explicitly *prohibited* the Federal Government from acting *in any way* in various realms of American life into a document that not only allows the Federal Government to act in these realms but indeed *compels* it to act. It *compels* the Federal Government to intervene if a municipality establishes an official Church, punishes a citizen for speaking his/her mind, confiscates a citizen’s guns, or searches his/her trunk without a warrant.

The incorporation doctrine itself is the ultimate proof that the Fourteenth Amendment indeed clashes with Madison’s Constitution. The many jurists who invented the incorporation doctrine, and the multitudes of jurists who have embraced and expanded it since then, all sensed this incompatibility. They understood that to adhere to the Fourteenth Amendment, Federal authorities needed a mechanism to hurdle the Constitution’s barriers against Federal power.

If the Fourteenth Amendment could live in harmony with Madison’s Constitution, there would be no need to invent the incorporation doctrine. The incorporation doctrine harmonizes between two competing constitutional visions by ordaining that the Fourteenth Amendment’s vision shall govern and Madison’s vision shall yield.

The process of granting the central government powers that the Constitution had withheld (or explicitly prohibited) started long before

the Civil War and the Fourteenth Amendment. It started, in fact, as soon as the ink dried on the pages of the Bill of Rights. The incorporation doctrine should therefore be seen in the context of a Federal Government that was slowly, incrementally, *but consistently* gathering more powers within the states and over the states in the seventy years that preceded the Civil War. The incorporation doctrine was merely the boldest and most explicit method that Americans have devised over the centuries to *liberate* their national government from the straitjacket imposed on it by the framers of the Federal Constitution.

Madison's Constitution featured two "parchment barriers" – mere words scribbled on parchment – against the growth of Federal power. The first of Madison's parchment barriers was the doctrine of enumerated powers (articulated explicitly in the Constitution's Article 1, Section 8, and again in the Ninth and Tenth Amendments of the Bill of Rights). This doctrine stated that the Federal Government was authorized to perform only a limited set of tasks that were plainly listed – *enumerated*, itemized – in the pages of the Federal Constitution.

The second parchment barrier was the remainder of the Bill of Rights – Amendments one through eight. Even before the ink on the Bill of Rights was dry, however, both these obstacles were overcome by creative reading of the Constitution.

When Thomas Jefferson and James Madison cited the doctrine of enumerated powers, and the ninth and tenth Amendments, to oppose Alexander Hamilton's Bank Bill in 1791, Hamilton countered that the Constitution's "necessary and proper" clause actually granted Congress *implied* powers beyond the explicit powers enumerated in the Constitution. Both Congress and President Washington affirmed Hamilton's expansive reading of the Constitution, as did the Supreme Court years later (*McCulloch vs. Maryland*, 1819).

The story of the 1791 Bank Bill thus offers a guide to the future course of American Constitutional history. It reveals to historians, as it did to

Jefferson and Madison at the time, that the parchment barriers and backstops in the Constitution and Bill of Rights were too weak to counteract “the natural progress of things.”

In the decades that followed, Federal officials and judges continued to find additional *implied* powers not only in the Constitution’s “necessary and proper” clause but also in its “commerce clause” and “general welfare clause.” In this way, the Federal Government’s field of jurisdiction expanded gradually, but progressively, well before the Fourteenth Amendment. But this incremental and slow process went into overdrive when the Fourteenth Amendment and the incorporation doctrine completely transformed the national government into a government of *innumerable* powers and responsibilities.

### **The transformation of the Federal Government**

Ruth Bader Ginsburg once explained that laws and constitutions are just words on parchment; what gives meaning and force to these words are the legal and constitutional beliefs of the people. When examining the fundamental transformation of the United States Constitution over time, it is evident that the citizens’ Constitutional beliefs changed first. America’s law schools and courts followed the citizens’ lead. From the founding of the Federal Government – long before the Fourteenth Amendment, but increasingly thereafter – Americans demanded Washington solutions to problems that in the past had been understood as local: weighty concerns such as slavery, poor relief, and racial discrimination, and less weighty matters such as college football, pollution, diet, crime, education, and wages. Federal officials responded by vigorously tackling these various issues. American law schools and courts likewise responded to this public demand – by interpreting the supreme law of the land in ways that allowed these Federal interventions (executive, legislative, and judicial) to stand as Constitutional.

Madison’s most effective and lasting barrier against Federal activism in American life, therefore, was not the Bill of Rights. The Bill of Rights was

always just a piece of paper, a parchment barrier. Madison's most effective and lasting barrier against Federal activism in the localities where Americans live has always been the structure of the Federal Government itself.

Future generations of Americans could choose their own path when confronting the Constitution's parchment barriers – they could apply those prohibitions selectively or universally, interpret them loosely or strictly, understand them figuratively or literally, ignore them altogether, or revise them with new Constitutional Amendments. But these future generations had no choice but to occupy the Federal institutions of government bequeathed to them by the framers of the Constitution.

By creating wholly separate branches of government – legislative, executive, and judicial – and by splitting the Congress into two separate legislatures, the framers hoped to compel future generations to observe their strictures against the concentration of power. These built-in fractures within the central government were to create competing powers within it, with different institutions checking and obstructing others. The byproduct of such a divided and internally conflicted government was liberty for the citizenry.

Yet, even on this front, Americans have proved too ingenious for the Founders. While the Federal Government still features the same internal structural divisions the framers had instituted in 1787, Americans have coalesced around political parties whose function it is to paper over and mitigate these institutional divisions between House, Senate, White House, and Federal Court. Thus, when these four institutions are controlled by the same party, the party in power is able to get these different institutions to work together harmoniously, like a team, something Madison's Constitution meant to prevent.

The purpose of a written constitution is to compel future generations to live by rules set for them by a previous generation. Given that Americans have the world's oldest written constitution still in use, it is

understandable that they have chafed under the restrictions imposed on them by a generation of Americans long dead.

The country's founding generation was animated by a conviction that people with power will abuse it. This was the underlying belief at the heart of English political culture in the early-modern era. It manifested itself in the great events of that era – the English Civil War, Glorious Revolution, Jacobite rebellions, and American Revolution. And it manifested itself in the way English communities governed themselves daily in their localities. This conviction about human nature shaped the rules and procedures Anglo-Americans instituted in their courts of law, churches, civic associations, and local and central governments.

The framers of the Federal Constitution shared this conviction about human nature and human governments, and thus tried to prevent the concentration of governmental power in the central government that they were creating at the Federal Convention in 1787. They believed that “the greater the power, the more dangerous the abuse.” They were not seeking, therefore, to remove roadblocks and impediments from the path of the powerful national government they created; quite the contrary. Like the framers of the *English* Bill of Rights, the framers of the American Constitution designed a system in which local communities governed themselves and were shielded from the central government. They feared the central government just as the Anti-Federalists did. So when Anti-Federalists warned that the new Federal Government would stretch and break the constitutional boundaries created for it by the 1787 Constitution, the framers agreed to add a Bill of Rights as a bulwark against such Federal aggrandizement.

But just as America's founding generation gave political form to *its* convictions about human nature and human governments in the Constitution and Bill of Rights, modern Americans have given political form to their *own* political and philosophical beliefs – with the Fourteenth Amendment, the incorporation doctrine, and the doctrine of the “living

Constitution.” These three new elements reflect a transformation in the way Americans view their national government.

Americans have learned over the course of the nineteenth and twentieth centuries to trust the Federal Government, identify with it, bond with it emotionally, look to it for moral and political leadership, and to expect numerous services and protections from it. This reflects a philosophical sea-change in Americans’ understanding of human nature – they are no longer convinced that people with power will abuse it – and it explains Americans’ frustration with life under an *eighteenth*-century Constitution animated by distrust and fear of central governance. This change in how Americans view their national government explains their continual efforts to empower and liberate it from the Constitutional constraints placed on it by Madison and his colleagues.

The Founders would doubtless have been pleasantly surprised that their construction of limited government survived the citizens’ impulses for as long as it did – more than a full century (from 1789 to roughly 1900). After all, the failure of the Constitution to prevent the concentration of power in the central government was not only predictable, it was predicted as the natural progress of things.

Guy Chet is Professor of American History at the University of North Texas, and author of [\*The Colonists’ American Revolution: Preserving English Liberty, 1607-1783\*](#) (Wiley, 2019). Portions of this essay are drawn from the book, with Wiley’s permission.