

COMPLETING THE CONSTITUTION: THE THIRTEENTH AMENDMENT

*Michael P. Zuckert**

September 6, 1787—an apparent moment of triumph for James Madison. In less than two weeks the Constitutional Convention would complete its work, and its members would scatter to their home states. There would be a new constitution to work for, a constitution far different from what most of the delegates would have predicted before their deliberations began. More than any other man, Madison was responsible for the document which emerged from the Convention. No one in North America had spent more time or given better thought to the causes of political discontent under the Articles of Confederation. He came to Philadelphia with a well-developed plan for a new system which he persuaded his Virginia colleagues to adopt as their own and to introduce at the outset of business. The final Constitution was by no means identical to this “Virginia Plan,” but it was close enough to earn Madison the sobriquet, “Father of the Constitution.”

So September 6, 1787, was, one would think, a moment of triumph for James Madison. Yet he wrote that day to his friend Thomas Jefferson, then ambassador to France, that he considered the work of the Convention to have been essentially a failure: “[T]he plan, should it be adopted, will neither effectuate its national object nor prevent the local mischiefs which everywhere excite disgust against state governments.”¹ Madison’s pessimism derived above all from the draft constitution’s omission of a provision he believed essential: the so-called “universal negative,” which would have given Congress “a negative in all cases whatsoever on the legislative acts of the States.” Congress, in other words, would have had an absolute veto over all state legislation, a veto akin to (but stronger than) that of the President over congressional acts.

Madison saw this extraordinary, even radical, device as the capstone of his constitutional plan. It alone could solve two barriers to the effort to create a confederacy of republics. Madison and

* Professor of Political Science, Carleton College.

1. 12 THE PAPERS OF THOMAS JEFFERSON 102, 103 (J. Boyd ed. 1955).

most (if not all) of the other framers accepted the statement of the fundamentals of politics in the Declaration of Independence. Above all, that meant a commitment to the proposition that government existed to secure the inalienable rights to life, liberty, and the pursuit of happiness. Madison and the other founders believed that commitment could best, perhaps only, be fulfilled in popular republics. But popular republics had two major defects. First, republics, normally small, had a stake in confederating with other republics, but no successful principle of confederation had ever been discovered. Madison's analysis of the defects of previous confederacies was complex, but one feature was particularly relevant: the member states of confederacies had a seemingly irresistible tendency to "encroach" on each others' powers and on those of the general government of the confederacy. Second, republics regularly failed in their internal governance as well. As Madison argued in his famous *The Federalist* No. 10, republics had so far proven unable to tame the evils of majority faction—injustice and instability in their laws, producing a general "turbulence and folly."

The universal negative could solve both problems. It would arm the general government with a regular and effective instrument to fend off encroachments by the states against the center and against each other. At the same time, the "better majorities," which would form at the national level according to the mechanism of the extended sphere outlined in *The Federalist* No. 10, could check the factious majorities in the states. Both functions of the negative would serve to make republican governments in America more effective protectors of the rights for the protection of which governments existed. Without the negative, Madison feared, as he said to Jefferson, the new system would provide neither an adequate federalism nor an adequate security of rights within the states.

The Convention's failure to adopt the universal negative was unsurprising, however, for Madison's proposal recalled a power exercised over the American colonies by the British authorities before independence. But without it, Madison thought, the Constitution remained fundamentally incomplete, and therefore would be neither lasting nor just.

Madison lost at the Philadelphia Convention, but he renewed his efforts during the first Congress in 1789. The occasion had its ironies. During the debates on ratification of the new constitution, the anti-federalists, friends to greater rather than lesser power in the states, had made it one of the chief charges against the proposed charter of government that it contained no bill of rights. These proponents of a bill of rights surely sought to protect citizens against

the dangers posed by the large and distant general government. Yet Madison, when he shepherded the proposed amendments through the House of Representatives, added to those generally favored by anti-federalists one which embodied some of the protection he sought to effect in his universal negative. "No state," Madison's surprise proposal read, "shall infringe the right to trial by jury in criminal cases, nor the rights of conscience, nor the freedom of speech or of the press." If Madison had had his way, then, the most important of the Bill of Rights protections would have applied against the states as well as against the general government from the outset. But Madison was not, of course, to have his way. The Senate, more responsive to the states as states (as Madison had suspected it would be), quietly dropped his proposal. Under the conditions of the day, it is most unlikely it would have been ratified in any case.

The Constitution, even in its fundamentally incomplete state, fared much better than Madison predicted in 1787. But when in 1847, Frederick Douglass posed his forceful rhetorical question—"What country have I?"—he was responding, whether he knew it or not, to the incomplete Constitution Madison bemoaned in 1787. And what was the great crisis of 1860-61 but the rending of the constitutional order along the fault lines identified by Madison?

Madison feared that without an unequivocal device for keeping the states in a proper federal order, the centrifugal forces would overwhelm the constitutional balance, and the system would fly apart. Such happened in secession. And with no decisive expression in the Constitution of the end of government within each of the member states—justice and the security of rights—some of the members came to claim that the chief principle of the system was the absolute autonomy of each state over its internal affairs, the sole function of the general government being to serve the general and mutual interests of the states—all of them, neutrally and equally. On the basis of that premise the Supreme Court concluded that Congress could not forbid slavery in the territories, for the territories—and the Constitution itself, for that matter—existed for the sake of the interests of all the states, without any commitment of its own to the superiority of the internal principles of any state over those of others. Thus "neutral principles" required that just as the law allowed the Illinois man to take his hog into the territories, so it must allow the Mississippi man to take his slave.

By the end of the Civil War, then, the country had had much

unhappy experience of the incompleteness of the Constitution.² The major order of business after the war was "reconstruction," a term and a process packed with several dimensions of ambiguity. On one level, the seceded states required "reconstructing" before they could resume their former place in the Constitutional order; while the Constitutional order itself and as a whole required reconstructing as well. Along another dimension, the very idea of "reconstruction" lent itself to an array of interpretations. At one extreme one might identify "reconstruction" with something like mere "restoration," i.e., the re-construction of what had been before. Such a view would certainly describe dominant Southern views of reconstruction, and perhaps President Johnson's as well. At the other extreme "reconstruction" could mean a more or less complete new-modelling, i.e., making something different on the old site. Thaddeus Stevens in his desire to remake Southern society certainly held such a view with respect to reconstruction of the states.³

The extremes do not of course exhaust the possibilities. In fact it is the argument of this essay that neither pole captures very well the historic reality of reconstruction. The reconstructed Constitution was neither changed "only a little" as some argue, nor was it fundamentally transformed as others aver. The best way to grasp the constitutional reformation is in terms of Madison's concerns about the "incomplete Constitution": the framers of the reconstruction amendments aimed to complete the Constitution along much the same lines Madison unsuccessfully attempted. This essay will focus on the first part of the reconstruction of the Constitution: the thirteenth amendment.⁴

THE CONSTITUTIONALITY OF THE THIRTEENTH AMENDMENT

Congress discussed the thirteenth amendment intensively on two different occasions, once in the Thirty-Eighth Congress when

2. For an extensive survey of reflections on the inadequacy of the Constitution in the Civil War era, see H. HYMAN, *A MORE PERFECT UNION*, ch. VII (1973).

3. For contemporary usage along these lines see L. & J. COX, *POLITICS, PRINCIPLES AND PREJUDICE 1865-1866*, at 130, 134 (1969).

4. The ultimate focus of my attention is the fourteenth amendment, for it goes furthest and works with greatest clarity in this task of completing the Constitution, but the fourteenth amendment cannot be understood properly except as a part of the surge of legislative action following the war which included, most importantly, the thirteenth amendment and the Civil Rights Act of 1866 as well. See generally Farber & Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 *CONST. COMM.* 235 (1984). In truth the story of the drafting of the fourteenth amendment should be extended beyond that event also to include at least the subsequent civil rights legislation up through the Civil Rights Act of 1875; but in this paper I limit myself to the first part of the story only—the thirteenth amendment.

the amendment itself was up for consideration, and again in the Thirty-Ninth Congress when the Civil Rights Bill was debated. The two discussions were quite different in character, and therefore ought to be considered separately.⁵

To the modern eye the debates on the thirteenth amendment in the Thirty-Eighth Congress have a distinctly odd look, for the central issue which preoccupied the members of Congress was, in effect, whether the proposed amendment to the Constitution was itself constitutional.⁶ Opponents set the terms of the debate by charging that the proposal deviated from the fundamental principles of the Constitution and thus could not (or at least morally and politically should not) be adopted. Proponents responded that the amendment was indeed congruent or even in some sense demanded by the principles of the Constitution. In other words, the debate posed the question of whether the amendment was fundamentally consistent with and therefore completed the Constitution, as the proponents claimed, or rather whether it overturned the Constitution, as opponents claimed.

Garrett Davis, Democratic senator from Kentucky, for example, considered it "irreferably true, that the power of amending the Constitution does not authorize the abolition of slavery." Indeed, he denied that "the power of amending the Constitution is illimitable."⁷ Joseph Edgerton, Democratic representative from Indiana, drew the conclusion from Davis' premise: "[S]o long as the Federal Union exists there is not and should not be any political power short of the free consent of each slaveholding State that can rightfully abolish slavery in the United States."⁸

These Democrats could not deny entirely the existence of the amending power, but they believed that a sound interpretation of the document as a whole implicitly limited the amending power. These opponents of the amendment generally agreed that the line distinguishing valid from invalid exercise of the amending power was crossed when, as here, there was an effort to reach the internal structuring of the member states. Fernando Wood of New York said it very clearly: "There was an implied and solemn understanding [at the time of the adoption of the Constitution] that the local

5. Many treatments of the thirteenth amendment collapse the two discussions, much to the detriment of understanding both. *Cf., e.g.,* M. CURTIS, *NO STATE SHALL ABRIDGE* 48-49 (1986); H. HYMAN & W. WIECEK, *EQUAL JUSTICE UNDER LAW* 386-404 (1982) [hereinafter HYMAN & WIECEK]; H. MEYER, *THE AMENDMENT THAT REFUSED TO DIE* ch. 8 (1978) [hereinafter MEYER].

6. H. BELZ, *A NEW BIRTH OF FREEDOM* 122 (1976) [hereinafter BELZ].

7. CONG. GLOBE, 38th Cong., 1st Sess. 1489 (1864).

8. *Id.* at 2985.

and domestic institutions of the States should not be attempted to be interfered with in any manner so as to be drawn within the sphere of Federal authority." Without that understanding, Wood asked, "Does any one suppose . . . that the Constitution would have been ratified by any of the States?"⁹ Representative Edgerton made the same point: "The assertion of power or right in a majority of the States, either through legislation of the Federal Government or through amendments of the Constitution, to interfere with or control the domestic institutions of a State, such, for example, as slavery, essentially repudiates the principle upon which the union was formed, namely the political equality of the States."¹⁰ This amendment, said Representative Samuel Cox of Ohio, would "change the . . . form and structure of our federative system in its most essential feature."¹¹

That "most essential feature," Cox explained a week later, is "the principle of self-government over state affairs." The Union, properly understood, extends only to "three classes of functions," relations to foreign states, relations between the states, and "certain powers which . . . to be useful and effective must be general and uniform in their operation throughout the country."¹² The proposed amendment then "breaks down . . . the distinction between the spheres of the States and national governments,"¹³ a distinction implicit in the entire fabric of the Constitution and explicitly affirmed in the ninth and tenth amendments. As Fernando Wood put it:

These articles are the general rules for the construction and interpretation of the entire instrument. Powers already granted may be modified, enlarged, or taken away by an amendment, but those which are retained by the people, or reserved to them, or to the states, cannot be delegated to the United States, except by the unanimous consent of all the States.¹⁴

Their point was not, as Alan Grimes would have it, to affirm that "slavery was such an essential part of our constitutional system that to allow Congress to abolish it would be tantamount to an unconstitutional change in the form of government."¹⁵ Rather, as Senator Davis, the man whom Grimes cites to support his claim said: "[P]roperty is a matter of State or domestic institution. The Gen-

9. *Id.* at 2941.

10. *Id.* at 2985.

11. CONG. GLOBE, 38th Cong., 2d Sess. 125 (1865).

12. *Id.* at 242.

13. *Id.*

14. CONG. GLOBE, 38th Cong., 1st Sess. 2941 (1864).

15. A. GRIMES, DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION 37 (1978).

eral Government does not legitimately, and were never intended to have, any jurisdiction or authority over the subject of property. . . . That is a great and fundamental feature of our Federal and State systems of government."¹⁶

This "only reasonable construction of those articles" derived some support from the experience of the use of the amending power to that point. Madison, it will be recalled, had attempted to insert an amendment limiting the powers of the states in his proposals for the Bill of Rights, but that had failed; the two amendments adopted since then were also only limits or regulations of the powers of the federal government. In other words, in the first eighty years of the government, through twelve amendments, no change in the Constitution had purported to affect the internal ordering of the states.

By crossing this line, the opponents believed, the Republican majority was introducing "a revolutionary change in the Government." If this amendment can be passed, then, claimed Edgerton of Indiana, other amendments "might, with equal propriety, be aimed at any other local law or institution of a state." Amendments might, for example, abolish freedom of religion or regulate marriages. In a word, "the principle of the proposed amendment is the principle of consolidation. . . . It is absurd to call a Federal Union wherein such a principle of consolidation has been introduced into its fundamental laws a union of free and equal States."¹⁷ "Where will it end, when once begun?" asked Cox of Ohio. "Should we amend the Constitution so as to change the relation of parent and child, guardian and ward, husband and wife, the laws of inheritance, the laws of legitimacy?"¹⁸ Senator Davis of Kentucky captured the Democratic concern perfectly when he insisted that "the power of amendment as now proposed to be exercised," not so much the amendment itself, "imparts a power that would revolutionize the whole Government, and that would invest the amending power with a faculty of destroying and revolutionizing the whole Government."¹⁹

The supporters of the amendment made surprisingly little use of the argument that is probably most attractive to twentieth century constitutional lawyers.²⁰ As Anson Herrick, Democratic Congressman from New York put it, almost at the very last instant before the House vote in which the amendment passed:

16. CONG. GLOBE, 38th Cong., 1st Sess. 1489 (1864).

17. *Id.* at 2986.

18. CONG. GLOBE, 38th Cong., 2d Sess. 242 (1865).

19. CONG. GLOBE, 38th Cong., 1st Sess. 1489 (1864).

20. *Cf.* A. KELLY & W. HARBISON, *THE AMERICAN CONSTITUTION* 409 (5th ed. 1976).

By the adoption of the Constitution the States transferred to three-fourths of their number their entire sovereignty, which can be at any time exerted to augment or diminish the functions of the General Government. . . . Three-fourths of the States can, by an amendment of the Constitution, exercise throughout the United States any power that a State individually can exercise within its limits.²¹

For the most part, however, the amendment's proponents reacted more directly by attempting to show the amendment's deep consistency with the Constitution. One form that took was the argument sometimes made by pre-War abolitionists,²² but very rarely made by congressmen in 1864-65, that the Constitution already abolished slavery in the states or empowered Congress to do so. Senator Charles Sumner of Massachusetts unequivocally expressed this view on the floor of Congress in 1864-65 debates. He relied especially on the due process clause of the fifth amendment, which, he said, was "in itself alone a whole bill of rights . . . an express guarantee of personal liberty and an express prohibition against its invasion anywhere." In this last Sumner went beyond orthodox constitutional doctrine of the day which, following Chief Justice Marshall in *Barron v. Baltimore*, held that the fifth amendment only limited the general government.²³ Sumner went even further beyond orthodox interpretation when he concluded that the prohibitory language of the due process clause was "a source of power" for Congress to protect "life, liberty and property."²⁴

Even though Sumner's analysis had some currency among extra-congressional abolitionist writers, few in Congress endorsed Sumner's doctrine. The absence of any other evidence of support for the view that the thirteenth amendment was merely declaratory suggests that Jacobus ten Broek and Sidney Buchanan go too far when they suggest this was in any sense an important issue in the debates.²⁵

More significant was the effort to show that the principles of the amendment coincided with those already embodied in the Constitution, but only imperfectly realized heretofore. The amendment's proponents largely accepted the constitutional principle

21. CONG. GLOBE, 38th Cong., 2d Sess. 530 (1865).

22. For the abolitionist argument, see especially JACOBUS TEN BROEK, *EQUAL UNDER LAW* (1965) [hereinafter TEN BROEK].

23. *Barron v. Baltimore*, 7 Pet. 243 (1833).

24. CONG. GLOBE, 38th Cong., 1st Sess. 1474-82 (1864).

25. TEN BROEK, *supra* note 22, at 170-71; Buchanan, *The Quest for Freedom* (chs. 1-8), 12 *Houston L. Rev.*, 1, 321, 357, 590, 610, 844, 871, 1070 (1975) [hereinafter Buchanan, *Quest*]. ten Broek incorrectly claims that Ashley of Ohio on Jan. 6, 1865 supported the declaratory view. Compare TEN BROEK at 171 with CONG. GLOBE, 38th Cong., 2d Sess. 138 (1865).

regarding the use of the amending power as explained by Thomas Davis of New York during the House debate:

When it appears to the people that there exists in the land an institution inconsistent with that Constitution, inconsistent with the principles of our government, we . . . propose to them, in accordance with that Constitution, to determine . . . whether or not they will amend it, and thereby remove the evil, there is nothing despotic, nothing wrong . . . in that we propose nothing which is not constitutional, nothing which is not just.²⁶

Very early in the Senate debate, Republican Henry Wilson attempted to explain the inconsistency which the amendment attempted to remove:

Cannot we hear amid the wild rushing roar of this war storm the voice of Him who rides upon the winds and rules the tempest saying unto us, "You cannot have peace until you secure liberty to all who are subject to your laws?" Sir, this declaration must be heeded. It has been whispered into the ears of this nation since first we pronounced life, liberty, and the pursuit of happiness to be the inalienable rights of all men. . . .

On the basis of that pronouncement, Americans established "our free Government" with which slavery is "incompatible."²⁷ A familiar theme in Republican political thought, the primacy of the principles of the Declaration of Independence within the American political order—a theme given its consummate expression by Lincoln, but one which was widely shared in and out of Congress.²⁸ Surely the most eloquent statement of the point in these debates was by Charles Sumner, who believed "it is only necessary to carry the Republic back to its baptismal vows, and the declared sentiments of its origins. There is the Declaration of Independence: let its solemn promises be redeemed. There is the Constitution: let it speak, according to the promises of the Declaration."²⁹ Not internal self-governance or states' rights, but "the promises of the Declaration" are the ground of the American constitutional order.

The supporters went further in their efforts to prove the amendment's legitimacy. Slavery, they said, was not only "incompatible with our free Government" in that it directly countered "the great objects: for which the Constitution was established," but "it has [also] confronted the Constitution itself, and prevented the enforcement of its most vital provisions."³⁰ Senator Wilson had in mind the violation not only of the spirit of the Constitution that

26. CONG. GLOBE, 38th Cong., 2d Sess. 155 (1865).

27. CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864).

28. For a beautiful account of Lincoln and the relation between the Declaration of Independence and the Constitution, see HARRY V. JAFFA, *CRISIS OF THE HOUSE DIVIDED*.

29. CONG. GLOBE, 38th Cong., 1st Sess. 1482 (1864).

30. *Id.* at 1202.

slavery itself constituted, but also the direct violations of the Constitution's letter to which slavery led.

Wilson and the other Republicans were especially concerned about the "privileges and immunities clause" of article IV, section 2. William Kelley, Republican representative from Pennsylvania, asked one of his Democratic colleagues:

Does he not know that for more than thirty years those dear friends of his, for whose institutions he and his party plead so fervently, have, notwithstanding this right so specifically guaranteed, denied not only the right of asylum, but the right of transit through their States to us, who doubted the wisdom or divinity of chattel slavery?"³¹

Not only did Southern states violate the privileges and immunities of citizens of Northern states, but they turned against their own citizens as well.

You cannot go into a State of the North [said John A. Kasson, Republican of Iowa] in which you do not find refugees from Southern States who have been driven from the States in the South where they had a right to live as citizens, because of the tyranny which this institution exercised over public feeling and public opinion, and even over the laws of those States. . . . Who does not know that we have abundant proof that numbers of men in the State of Texas, Germans who had settled there, quiet and peaceable men, have been foully murdered in cold blood because they were known to be anti-slavery in sentiment?³²

Among the privileges and immunities secured by the Constitution were not only the rights to asylum and transit, but also the rights identified in the Bill of Rights. According to Senator Wilson, these rights "belong to every American citizen . . . wherever he may be within the jurisdiction of the United States." But he asked, "How have these rights essential to liberty been respected in those sections of the Union where slavery held the reins of local authority and directed the thoughts, prejudices, and passions of the people?"³³ According to Wilson, all the rights identified in the first amendment have been dishonored in the slave states. "The Constitution may declare the right, but slavery ever will, as it ever has, trample upon the Constitution and prevent the enjoyment of the right."

The cause of this dismal record of non-respect for the Constitution was the institution of slavery. "What then shall we do?" asked Wilson. "Abolish slavery. How? By amending our national Constitution. Why? Because slavery is incompatible with free government." The amendment was necessary, said Representative Kasson, "to carry into effect one clause of the Constitution [art. IV, sec. 2]

31. *Id.* at 2984.

32. CONG. GLOBE, 38th Cong., 2d Sess. 193 (1865).

33. CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864).

which has been disobeyed in nearly every slave State of the Union for some twenty or twenty-five, or thirty years past."³⁴ The abolition of slavery then was compatible with the Constitution because it would remove the chief spur to persistent violation of the Constitution. The amendment would allow other important provisions of the Constitution to come into their own. In this sense, the abolition of slavery represented an enforcement of the original Constitution.

A CONSTITUTIONAL REVOLUTION?

Notwithstanding the insistence by the amendment's sponsors that abolition of slavery was compatible with, or even completing of the Constitution as it already was, a currently powerful line of interpretation among scholars—and on the Supreme Court³⁵—insists that the amendment was in substance and intent a constitutional revolution.³⁶ Jacobus ten Broek's version of this argument is most fully developed and has been immensely influential in the past twenty years.

ten Broek's interpretation goes something like this. The reconstruction amendments were the fruit of an unorthodox line of constitutional and political thought that emerged among abolitionists prior to the Civil War. The amendments represented the culmination of *their* hopes for the Constitution. Therefore, if we wish to understand what the amendments mean, we need to pay attention to the abolitionists' hopes, and in particular to the way they understood some of the key notions in the amendments, such as "privileges and immunities," or "protection of the law" in the fourteenth, and liberty, as the negative of slavery, in the thirteenth.

The thirteenth amendment in particular needs to be set into its own context, for our understanding of it suffers from the context in which we now view it—as the first of a sequence of amendments which progressively established greater degree of protection for the

34. CONG. GLOBE, 38th Cong., 2d Sess. 193 (1865).

35. *Jones v. Mayer*, 392 U.S. 409 (1968).

36. It is unclear which of the current views of the thirteenth amendment is dominant. The revolutionary understanding of the thirteenth amendment is by no means uniformly held by scholars, but my impression is that it is gaining in favor. It received a strong boost when adopted recently by Sidney Buchanan in his book-length monograph (Buchanan, *Quest, supra* note 25, at ch. 1). It has also been endorsed by one of the deans of reconstruction constitutional history, Harold Hyman (HYMAN AND WIECEK, *supra* note 5, at ch. 11). Of recent constitutional historians, Herman Belz has most steadily held out against the revolutionary view, and my conclusions are closest to his. (BELZ, *supra* note 6; BELZ, *EMANCIPATION AND EQUAL RIGHTS* ch. 5 (1978)). The older generation of scholars for the most part did not endorse this revolutionary view. (*Cf.* C. FAIRMAN, *RECONSTRUCTION AND REUNION 1864-1888*, Part I, ch. XIX (1971)).

freedmen.³⁷ ten Broek, on the contrary, points out that the amendment's drafters did not contemplate it as a first step, but rather saw it as the only constitutional change they needed. The thirteenth amendment thus stands as the "consummation of abolitionism broadly conceived."³⁸

Moreover, he argues, the real issue in the Congressional debates was no longer slavery itself. "With the victory of northern arms, slavery as a legal institution was at an end except in a few border states where it could not hope to survive surrounded by free institutions."³⁹ The concern for an amendment therefore must have gone beyond the mere legal existence of slavery. The amendment did go beyond abolition "narrowly conceived" toward the full scale rearranging of relations of power and responsibility in the constitutional system. That is, the amendment was meant to effect a "revolution in federalism" in which the general government took on responsibility for protecting fundamental rights. This accretion of congressional power was signalled by section 2 of the amendment, which goes beyond the prohibition of slavery and gives Congress power to enforce the prohibition contained in section 1. Since the prohibition would seem almost self-enforcing, of what use can the empowerment of section 2 be? ten Broek has an answer ready at hand: the prohibition of slavery actually establishes something positive—the status of freedom; freedom in turn requires certain legal protections which Congress, under section 2, may supply. Thus, congressional power under the amendment is quite sweeping, allowing Congress to establish the conditions of freedom, and to do so relative to threats to freedom of all sorts, whether posed by individuals or public bodies and officers. As Buchanan put it, "supporters envisioned for the amendment a scope of vast dimension."⁴⁰

The ten Broek view reverses the usual order of primacy given to the reconstruction amendments—the thirteenth represents the first and major step toward realization of the abolitionists' goals; the fourteenth amendment merely restates the intent of the thirteenth in different language. Or as Hyman and Wiecek put it, the thirteenth supplies the key to the fourteenth.⁴¹ More than that, the thirteenth supplies a very "open-ended national commitment about rights"; its greater generality makes it especially suitable to express the "dynamic relationships among liberty, rights, and federalism." The

37. Cf. MEYER, *supra* note 5, at 43-44.

38. TEN BROEK, *supra* note 22, at 157; Buchanan, *Quest*, *supra* note 25, at 8; HYMAN & WIECEK, *supra* note 5, at 388-89; CURTIS, *supra* note 5, at 15, 48ff.

39. TEN BROEK, *supra* note 22, at 160; HYMAN & WIECEK, *supra* note 5, at 397.

40. Buchanan, *Quest*, *supra* note 25, at 2.

41. HYMAN & WIECEK, *supra* note 5, at 387-88.

thirteenth amendment, they conclude, "was now part of a mobile constitutional platform suitable for continual ascent."⁴²

While much might and ought to be said about abolitionist constitutional theory, a few words will suffice here. In the first place, ten Broek (and before him Howard J. Graham) has done a service in calling attention to this tradition of constitutional thought. It undeniably helps us understand the intellectual universe in which the amendments were drafted, being especially helpful in elucidating some of the rather idiosyncratic views (from the perspective of black-letter constitutional law) that appeared in the debates. Nonetheless, one cannot infer from some similarities between the views of the men who drafted the amendments and pre-War abolitionist constitutional thought that the latter is identical with the former in all important respects. That remains to be shown from the debates.

ten Broek and those who follow him are correct that at the time the thirteenth amendment was drafted it was not expected to be the first installment of a more comprehensive plan. Nonetheless, the inference ten Broek and the others wish to draw does not necessarily follow. The bare facts may just as well support the opposite view—on the basis of experience with the lesser remedy a perception of a need for further action emerged. Herman Belz surely makes a plausible case when he accounts for the succession of amendments in terms of a growing recognition "that the historic instrument for excluding slavery from the territories [i.e., the thirteenth amendment's adoption of the language of the Northwest Ordinance] was not apposite for uprooting it where it had long existed."⁴³ A *prima facie* case for this alternative view can be made from facts conceded by those who uphold the revolutionary interpretation. There was, say ten Broek and the others, a general (but not universal) consensus that voting rights were not included in the rights secured by either the thirteenth or the fourteenth amendments.⁴⁴ The fifteenth amendment then does go beyond the thirteenth and fourteenth in an obvious way, and therefore the later amendments go farther than the earlier. A final decision regarding the relation between the amendments must await, however, a review at a later date of the evidence surrounding the Civil Rights Act of 1866 and the drafting of the fourteenth amendment.

According to ten Broek, by the time the thirteenth amendment was being debated the question of slavery as such was already settled; the debate that occurred over the amendment was not over

42. *Id.* at 401.

43. BELZ, *supra* note 6, at 134.

44. TEN BROEK, *supra* note 22, at 169.

that already lost cause, but over "the [other] revolution which had been in progress: the revolution in federalism."⁴⁵ He implies that the thirteenth amendment had little point if the mere existence of slavery were the major issue. But even without his "revolution in federalism" there were good reasons for the amendment, reasons affirmed and reaffirmed frequently in the debates. First, the abolition that had been attained was achieved under Lincoln's Emancipation Proclamation, an executive action justified under the war powers. Now the military importance of slave labor in the South no doubt justified Lincoln's act; but in it he had declared the free slaves "thenceforward and forever, free." Should restored Southern states wish to reinstate slavery, what constitutional standing would the Emancipation have? Under the Constitution as it had been, it would presumably be within the power of a state to restore "the peculiar institution." However much slavery may have appeared to be in retreat, the desire to make abolition constitutionally secure and nationally uniform was sufficient reason for the amendment.

Moreover, ten Broek may have been confident slavery would inevitably die off in the places unaffected by the Proclamation, but the supporters of the amendment—and its opponents as well—exhibited no such certainty in the debates. True, there were movements afoot in the loyal slave states for abolition; by the time of the second House debate on the amendment in January 1865, Missouri and Maryland had abolished slavery. When the amendment was proposed none of this was certain, however, and slavery remained in Delaware and Kentucky. And of course uncertainties remained about the future in the deep South.

The mere existence of section 2 of the amendment, granting to Congress "the power to enforce this article by appropriate legislation," no more necessarily implies ten Broek's "revolution" than the other evidence we have surveyed. The "first section alone," says a ten Broek supporter, would have sufficed "simply to make slavery unconstitutional." Section 2 was needed for the further "necessary" task—"to grant freedom too, and for that the states could not be trusted."⁴⁶

Even if Congress intended a much narrower scope for the amendment, there were several reasons to include section 2. The clearest indication of what powers Congress anticipated exercising in enforcement of the amendment was contained in sections 12 and 13 of the Wade-Davis bill. That bill, like the thirteenth amendment itself a product of the Thirty-Eighth Congress, anticipated the

45. *Id.* at 160.

46. MEYER, *supra* note 5, at 43.

amendment by providing that "all persons held to involuntary service or labor in the States aforesaid are hereby emancipated and discharged therefrom." Lincoln in his veto of the bill doubted the "constitutional competency in Congress to abolish slavery in the States," a doubt which led him to endorse a "constitutional amendment abolishing slavery throughout the Union."⁴⁷ More to the point of our present discussion, however, section 12 of the bill legislated an enforcement mechanism for the declaration of freedom: "And if any such persons or their posterity shall be restrained of liberty under pretense of any claim to such service or labor, the Courts of the United States shall, on habeas corpus, discharge them." And section 13 of the bill set penalties for persons convicted of attempting to hold any freedman in "involuntary servitude or labor."

Thus, even a narrow and largely self-executing provision for emancipation requires some Congressional legislation in its support. Now the "necessary and proper" clause of article I, section 8 might be held to authorize such remedies as Congress attempted in the Wade-Davis bill even without a provision like section 2 of the amendment. Nonetheless, as Henry Meyer points out, an explicit grant of power would have been considered valuable, in light of the extensive criticism of the Supreme Court's affirmation of implied Congressional power to enforce the fugitive slave clause in *Prigg v. Pennsylvania*.⁴⁸ Indeed, the critics of *Prigg* were many of the same men who now sponsored the thirteenth amendment.

Moreover, even if the amendment were to be largely self-enforcing, it nonetheless would then be enforced in the federal courts; but the pre-War record of the federal courts on the question of slavery had been abysmal. Although Lincoln had appointed many new justices of a friendlier disposition, the old Republican distrust of the courts did not evaporate right away, and Congress could well have seen the need to establish elsewhere a power to enforce emancipation.

Finally, enforcement through courts puts a heavy burden on individuals whose rights are at stake to initiate action in defense of their rights. Individuals who are threatened by slavery are not well positioned to take this kind of initiative. Thus, Congressmen might well have thought that supplementary methods of enforcement, such as the appointment of special officers to look after the legal

47. Abraham Lincoln, A Proclamation, reprinted in J. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, VII, at 3424 (1897).

48. *Prigg v. Pa.*, 16 Peters 539 (1842); MEYER, *supra* note 5, at 42.

rights of the freedmen as provided in the Freedmen's Bureau Act, would be necessary.

ten Broek put special weight on the concerns of the amendments's opponents. They believed that

[T]he measure constituted an unwarrantable invasion of the rights of the States and a corresponding unwarrantable extension of the power of the central government. In fact, so unwarrantable was the invasion and extension as to violate the basic conditions of the federal compact, destroy the federal character of the government, and subvert the whole constitutional system.⁴⁹

One objection to ten Broek's argument concerns the logic of his heavy reliance on opponents. In parliamentary debates opponents have an incentive to overstate the consequences of measures in order to arouse fear and further opposition. Although the claims of the opposition must be taken seriously, they cannot be given the level of authoritativeness ten Broek grants them.

As we have already seen, the opponents did allege a revolution in federalism, but that revolution consisted of the novel use of the amending power to reach into the states. For the most part, they did not make the further argument, which ten Broek attributes to them, that the thirteenth amendment in itself inaugurated any additional constitutional revolution. The debate was over the amending power primarily, and only secondarily over this amendment.

Some, it is true, did go further, but ten Broek presents their position misleadingly. For example, William Holman, a Democrat from Indiana, began his speech on June 15, 1864, with the usual litany of opposition concerns about the amending power: "You propose to invade the domestic policy of States so solemnly guaranteed by the Constitution and without which the Union would never have been formed, and abolish African slavery, a subject foreign to the Constitution, for it has no relation to domestic concerns of a State."⁵⁰ So far, just the same as the other opponents we have already seen. The amendments transgresses in abolishing slavery alone, without need for further transference of power to Congress.

But, Holman argues, "the amendment goes further."⁵¹ ten Broek quotes the following from Holman's explanation of the further depredation on the old Constitution: "[The amendment] confers on Congress the power to invade any state to enforce the freedom of the African in war or peace. What is the meaning of all that? Is freedom the simple exemption from personal servitude? No Sir." At this point, however, ten Broek elides Holman's key

49. TEN BROEK, *supra* note 22, at 160; *cf.* Buchanan, *Quest, supra* note 25 at 6-7.

50. CONG. GLOBE, 38th Cong., 1st Sess. 2961 (1864).

51. *Id.* at 2962.

claim, without ever indicating the fact of an omission. But here is what Holman said in the immediate sequel: "No sir; in the language of America it [freedom] means the right to participate in government, the freedom for which our fathers resisted the British empire."⁵²

This statement undermines ten Broek's argument in two different ways. Holman saw the broader implications of the amendment not as those comprehended in ten Broek's revolution in federalism, i.e., the grant of congressional power to "protect a wide range of national constitutional rights,"⁵³ but in arming blacks with political power in their own states. He assumed that power to deal with the "wide range of rights" would remain in the states as politically restructured through the addition of a black electorate. Secondly, the broader implication Holman identified in the amendment was most certainly not there. ten Broek himself finds little evidence that the drafters of either the thirteenth or fourteenth amendments intended to confer the suffrage. Sidney Buchanan, who largely follows ten Broek, is even more emphatic: "Democratic spokesman often insisted that black enfranchisement was the ulterior aim of Republican leadership in seeking adoption of the thirteenth amendment. . . . This end was never admitted by even the most extreme of Republican radicals. If such a purpose was entertained by those who supported the amendment, it belongs in the category of secret intentions."⁵⁴ That is, there is no reason to credit Holman's claims about broader implication in the amendment.

ten Broek contends that "many of the consequences of the amendment forecast by the opponents, far from being denied or minimized by the sponsors, were espoused as the very objects desired and intended to be accomplished by the measure."⁵⁵ If he means that the proponents accepted the contention that the amendment worked a "revolution" in the Constitution, then he is, as we have seen, quite incorrect. The brunt of arguments favoring the amendment went to showing just the contrary: how the amendment completed rather than overturned the Constitution.

On the other hand, since ten Broek has misconceived much of the opposition to the amendment, he is correct to notice that its supporters spent little time responding to the view he (incorrectly) attributes to the opposition.

So far as supporters of the amendment did address themselves

52. *Id.*

53. TEN BROEK, *supra* note 22, at 173.

54. Buchanan, *Quest*, *supra* note 25, at 11.

55. TEN BROEK, *supra* note 22, at 159.

to issues such as those in ten Broek's "revolution in federalism," they tended to reject the broad claims he and his followers say they espoused. Congressman Scofield, for example, asked, "[W]hat connection is there between centralization and emancipation?"⁵⁶ John Kasson of Iowa made Scofield's point clearer when he called attention to the distinction between "consolidation" of the Union and the "centralization" of the government. "Centralization means when you take the power from the state and give it to the United States. But when you take it both from the States and from the United States there is not a particle of centralization of power."⁵⁷ And that, added Kasson, "is what this amendment does." It does not establish in the federal government major new responsibilities and powers; the amendment is negative and prohibitory, and thus must be understood to address slavery in the narrow sense. George Yeaman of Kentucky affirmed quite clearly that "in passing the amendment we do make sure the final extinction of slavery, but so far from endorsing the radical abolition party, we rob them of their power."⁵⁸ But it was precisely the "radical abolition party" that the emerging scholarly consensus on the thirteenth amendment says carried the day.

Now it is not that ten Broek (and Buchanan following him, and Hyman and Wiecek following Buchanan) have no evidence from supporters to underwrite their interpretation. But they have systematically misunderstood the evidence they find. ten Broek directly quotes and paraphrases seven proponents as witnesses for his revolutionary thesis. He gives most space to James Wilson of Iowa, chair of the House Judiciary Committee, who made a long and obviously important speech introducing and explaining the draft amendment to the House. ten Broek follows Wilson's recital of the myriad ways in which slavery violated the spirit (and sometimes the letter) of the Constitution, both in its own character, and in further acts to which the defense of slavery led the Southern states. It is a long list—the privileges and immunities clause, the first amendment's religion clause, its free speech and press clause, its guarantee of a right of free assembly. As ten Broek quotes Wilson: "It is quite time, Sir, for the people of the free States to look these facts squarely in the face and provide a remedy which shall make the future safe for the rights of each and every citizen."⁵⁹ And ten Broek comments on this passage as follows: "That remedy, thus

56. CONG. GLOBE, 38th Cong., 2d Sess. 146 (1865).

57. *Id.* at 239.

58. *Id.* at 171.

59. CONG. GLOBE, 38th Cong., 1st Sess. 1199 (1864).

aimed at the broad objective of making 'the future safe for the rights of . . . every citizen,' was the seemingly narrow prohibition on slavery and involuntary servitude contained in the thirteenth amendment."⁶⁰ But, implies ten Broek, if the amendment was to be such a remedy as all that, it must obviously not be the "narrow prohibition" it seems to be. We have already seen exactly how Wilson saw the amendment as a remedy for all these violations: the abolition of slavery would remove the irritant which had driven the slaveholders to these many Constitutional violations. He gives no evidence here of contemplating any further "revolution."

Most of ten Broek's other witnesses made the very same point. He quotes E. L. Ingersoll of Illinois at some length, "waxing rhapsodic" on the effects of the amendment in securing rights. But it is clear from the remainder of his speech that Ingersoll intended the same point as Wilson did—the existence of the institution of slavery led to the failure to respect the rights and interests of men; its fall would lead to a reversal of that melancholy situation. Consider what he said of the amendment's effect on the poor whites in the South:

Slavery has kept them in ignorance, in poverty, and in degradation. Abolish slavery and school houses will rise upon the ruins of the slave mart, intelligence will take the place of ignorance, wealth of poverty, and honor of degradation; industry will go hand in hand with virtue, and prosperity with happiness, and a disenthralled and regenerated people will rise up and bless you and be an honor to the American Republic.⁶¹

Now surely Ingersoll did not mean that the amendment established these broader goods as rights or as powers in Congress. These are predictions—very sanguine predictions it turned out—of the almost spontaneous benefits of the disappearance of slavery. Yet both ten Broek and Buchanan lean heavily on Ingersoll to support their interpretation. ten Broek also quotes from James Ashley of Ohio. But Ashley, too, was only making what is now a familiar argument. As he says, "for more than thirty years past there is no crime known among men which [slavery] has not committed under the sanctions of law." And does it follow that Congress is to now acquire the powers to deal with every "crime known among men"? No, the remedy for Ashley is exactly what it was for the others: "If slavery is wrong and criminal . . . it is certainly our duty to abolish it."⁶² Destroy the cause and the crimes will disappear in its wake. Subtract all those who foresaw broader consequences as a result of

60. *Id.* at 164.

61. CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864).

62. CONG. GLOBE, 38th Cong., 2d Sess. 138 (1865).

the abolition of slavery narrowly conceived, and precious few remain who can legitimately be adduced as supporters of the ten Broek and Buchanan reading of the debates.

There was some support expressed for two broader views of the amendment's meaning. But both views were more limited than those reviewed above, and neither was so widely held or uncontested as to indicate that a consensus had formed around them. Both broader positions in effect concluded that the abolition of slavery implied or involved the establishment of something positive, either the full substantive rights of liberty, or the claims of equality.

According to ten Broek: "[S]lavery in its narrowest and strictest sense—slavery as legally enforceable personal servitude—would thus be forever 'put down and extinguished'—this much the amendment would certainly do." But that, says ten Broek is not all the amendment would do, for "the opposite of slavery is liberty." The amendment would not only remove the lack of liberty, which is slavery, but establish the positive status which is possession of liberty. Perhaps the clearest statement of such a view in the debates was by radical Congressman William D. Kelley of Pennsylvania:

This proposed Amendment is designed to accomplish the very purpose with which they charged us in the beginning, namely the abolition of slavery in the United States and the political and social elevation of Negroes to all the rights of white men.⁶³

As Hyman and Wiecek succinctly put the point: "Freedom was much more than the absence of slavery."

The power of this argument was revealed during the subsequent debates on the meaning of the thirteenth amendment when Congress deliberated over the Civil Rights Act of 1866. But hardly anything like this was said in the Thirty-Eighth Congress when it pondered the adoption of the amendment. The absence of explicit evidence makes it impossible to conclude that congressmen consciously entertained such a view. But that does not settle the issue of whether the amendment means this broader establishment of freedom nonetheless. A full treatment of that perhaps paradoxical claim must wait for a discussion of the 1866 debates on the Civil Rights Act, but we might notice here that the issue turns on a theoretical question of some difficulty and interest: What is slavery? Is slavery something established, whether implicitly or explicitly by state law, or is it rather a condition constituted by the absence of certain legal protections which non-slaves enjoy? Might the removal of explicit slave codes leave one in a state in which one is not a

63. *Id.* at 165-66.

slave, in that the state will not endorse and make its various legal and police machinery available to enforce claims to one's labor and liberty, but on the other hand does not extend the full range of rights that others enjoy? Or alternatively, does the enjoyment of the status of non-slave imply necessarily the full protection of laws for security of liberty and enjoyment of the full range of privileges of civil life? Are there three statuses in effect—slavery, emancipation, full legally secured freedom—or only two—slavery and full freedom?⁶⁴

Some clearly took for granted the narrower understanding. Anson Herrick, for example, in an important speech near the end of the debate asserted without hesitation that "the institution of slavery is purely a creation of law. . . ."⁶⁵ John Henderson, Republican senator from Missouri, was quite unequivocal. "So in passing this amendment we confer upon the Negro no right except his freedom, and leave the rest to the states."⁶⁶ And Northerners were perfectly familiar with the intermediate situation which the narrower view of abolition implied, for free blacks lived in Northern states in just such a condition, not slave, yet not enjoying all the rights of the community.⁶⁷

Some important actions by leading congressional radicals suggest that if any view of the amendment prevailed it was the narrower one. After the amendment was adopted Thaddeus Stevens introduced a new amendment: "All national and state laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race or color."⁶⁸ Apparently, Stevens did not believe such "equal application" of the law was mandated by the thirteenth amendment itself.

A more significant incident occurred during the short Senate debate on the thirteenth amendment. Charles Sumner rose to express dissatisfaction "with the form of expression" used in the proposed amendment. He preferred other language:

All persons are equal before the law, so that no person can hold another as a slave; and the Congress shall have power to make all laws necessary and proper to carry this declaration into effect everywhere within the United States and the jurisdiction

64. The issue really parallels quite closely that ultimately raised almost one-hundred years after Reconstruction when the Supreme Court declared state established segregation unconstitutional. Is the opposite of state supported segregation, integration, or is it non-segregation?

65. CONG. GLOBE, 38th Cong., 2d Sess. 525 (1865).

66. CONG. GLOBE, 38th Cong., 1st Sess. 1465 (1864).

67. See L. LITWACK, *NORTH OF SLAVERY* (1965).

68. See W. BROCK, *AN AMERICAN CRISIS, CONGRESS AND RECONSTRUCTION 1865-1867*, 100 (1966), for a discussion of Stevens's proposal.

thereof.⁶⁹

Sumner defended his version in narrow linguistic terms, but there is a clear substantive difference between the two drafts. Where the amendment as proposed and adopted established that “neither slavery nor involuntary servitude . . . shall exist within the United States,” Sumner’s version added the claim about “the equality of all persons before the law,” and granted explicit congressional power to assure that equality. Sumner’s proposal was met with resounding indifference, and where not indifference, clear opposition.

It was understood to be a great virtue of the language proposed that it derived from the Jeffersonian language of the Northwest Ordinance. Jacob Howard of Michigan pressed the point hardest. “I prefer . . . to go back to the . . . language employed by our fathers in the Ordinance of 1787, an expression which has been adjudicated upon repeatedly, which is perfectly well understood both by the public and by judicial tribunals. . . .”⁷⁰ According to Herman Belz, who has made the most complete survey of the legal meaning of the Northwest Ordinance, the accepted meaning was the narrow one, not extending so far as Sumner’s “equal before the law.”⁷¹ By contrast Howard was quite insistent that “in a legal and technical sense that language [‘equal before the law’] is utterly insignificant and meaningless as a clause of the Constitution,” and he challenged Sumner “to say what effect this would have in law in a court of justice.”

Significantly, Sumner failed to take up the challenge, backing off at the first sign of opposition from fellow Republicans. Howard made a somewhat cryptic remark which suggested the substantive underpinning to his concerns.

Besides, the proposition speaks of all men being equal. I suppose before the law a woman would be equal to a man. . . . A wife would be equal to her husband . . . before the law.

Now there is a certain ambiguity to Howard’s remark, but his point, I think is this: even though men and women, or husbands and wives have different legal statuses, they are nonetheless “equal before the law.” The phrase therefore does little or nothing by way of defining legal status beyond the bare prohibition of slavery, and alternatively, if it does do more, Howard seems prepared to oppose it for that reason.

So far as Sumner attempted to commit the country explicitly to

69. CONG. GLOBE, 38th Cong., 1st Sess. 1482 (1864).

70. *Id.* at 1489.

71. BELZ, *supra* note 6, at 125-26.

a constitutional guarantee of a broader sort than mere emancipation, that effort must be said to have been rebuffed. The friends of the amendment saw the need neither to accept Sumner's more far-reaching version of an amendment nor to claim the amendment they had already accomplished what Sumner sought.

THE THIRTEENTH AMENDMENT—A DEFECTIVE COMPLETION

The supporters and opponents of the thirteenth amendment joined issue on the question of whether it completed or overturned the Constitution. As is the case with all genuine constitutional disputes, there was something serious to be said on both sides, but those who argued for the amendment had the stronger case. The original Constitution did not simply embody state autonomy respecting all matters of internal governance and ordering. The original Constitution was never so narrow and crabbed as Samuel Cox's list of three functions would suggest. One need think only of article I, section 10 which set limits on the powers of the states, for example, to make *ex post facto* laws or to impair the obligations of contract. These express limits were in fact the transformed and truncated version of Madison's proposed universal negative. Also significant is the provision in article IV guaranteeing to each state "a republican form of government," a clear indication of national concern over how the states are ordered internally. At the same time, that commitment was sharply limited, and the internal autonomy of the states clearly was the rule to which these provisions were exceptions.

From James Madison's perspective the aspiration to "complete the Constitution" is even more clearly legitimate. Indeed, there was a remarkable parallel between Madison's perception of what the system required and what the amendment's framers attempted to supply. Madison saw his universal system serving two purposes: making rights secure in the states, and guarding against encroachments by states on each other and on the federal government. The thirteenth amendment was intended to improve the security of rights in the states by directly forbidding the most blatant violations of rights by the states, and by removing the goad that prompted them to intrude on the rights of citizens of other states, on the prerogatives of other states, and on the powers of the federal government.

Yet the amendment differed greatly from Madison's proposal. Madison attempted to institute a political process that would operate as a matter of course to review every action by the states; the

amendment proceeds instead more according to the model adopted in the original constitution as a substitute for Madison's process—an explicit constitutional limit to be enforced by the courts and, at least in this case, by Congress as well. The Constitution as adopted, and as amended, is much more legalistic than Madison thought desirable. The solution adopted in the amendment also went nowhere near as far as Madison's negative—unless one interprets the amendment in the way ten Broek and company do. Even then its scope would fall considerably short of Madison's negative on “all laws whatsoever.”

On the other hand, the amendment goes beyond the negative in two respects. Congressional power under the amendment is not necessarily limited only to a negative, or disallowing power. And in committing the entire nation against slavery, the amendment has a clearer substantive commitment than did Madison's procedural solution. Indeed, it remains a case for great speculation as to how the negative would have been used regarding slavery if adopted, and it is an intriguing question what Madison himself anticipated on this score.

Although the amendment parallels in several ways Madison's favored device, it must be judged inadequate as a completing of the Constitution. Immediate subsequent history—two further amendments adopted hardly before the ink was dry on the certificates of ratification for the thirteenth—shows that clearly enough. The chief failing of the amendment lay in the lack of proper thought given to the meaning and implications of the commitment to emancipation.

There were two key questions which few men in the Thirty-Eighth Congress recognized. The first question concerned the issue we have discussed already—what, if any, positive rights or claims follow from the abolition of slavery? Is there something between slave status and full citizen status? As we have seen, the framers of the amendment tended to take for granted a narrower view of the implications of emancipation, but without evidence of having thought very much about the question. That thoughtlessness derived in part at least from the sanguine, not to say extravagant, expectations of the amendment's supporters about its indirect effects.

Since America was a federal system, a second question arose. In a unitary system it would be enough to settle what positive rights flowed from emancipation; but in the dual constitutional system of the United States, the further question existed of which government had responsibility to provide for those rights. The framers hardly considered this second question because they hardly confronted the

first. Expecting all good things to flow nearly spontaneously from abolition, they could avoid the hard choices about American federalism the second question posed. For if emancipation had positive implications, then it might not be possible to leave responsibility for securing such rights where it had been—with the states. And if that responsibility were transferred to the federal government, that would indeed make for the revolution ten Broek identified. But the amendment's drafters hadn't seen this far and certainly in 1864-65 never made any such commitments.

An adequate completing of the Constitution would have required at least that the two questions be confronted. In 1866, during debate on the Civil Rights Act, the first question rose to an urgency and received some very fine analysis indeed, analysis ultimately carried to its peak by John Bingham of Ohio, a man who had not served in the Thirty-Eighth Congress. The debate on the Civil Rights Act pushed the federalism question forward, but it received adequate resolution only in the later debates on the fourteenth amendment.⁷² Thus both strands converged on the later amendment, and it alone can truly make the claim of having completed the Constitution. But how those questions were answered in the fourteenth amendment—that too is a long story.

72. Cf. Zuckert, *Congressional Power Under the Fourteenth Amendment*, 3 CONST. COMM. 123 (1986).