over possible syntheses between liberal and communitarian theories, where the most important political question is: If communitarianism and liberalism can be shed of the "historical imagination"—that is, communitarianism purged of its historical love for hierarchy and exclusion, and liberalism viewed without its negative Marxist gloss and thereby revealed as having the potential to achieve human equality and freedom—at what point are the two philosophies in fundamental conflict? Can the idea of "liberal community" Appleby attempts to locate in the thought of the Founding Fathers rest on the common aspiration of both philosophies, at least in their contemporary forms, for equality, inclusion and freedom for all human beings? Appleby, an historian, does not even attempt to answer this question, but her evidence contributes significantly to the synthetic project by making clear that the vision of liberalism held up by post-Marxist historians excludes crucial elements which may explain its appeal not only to eighteenth-century Americans but to the twentieth-century revolutionaries of Eastern Europe and the Soviet Union. Indeed, the question of synthesis may have special significance for politicians and scholars in those countries, where the attempt to construct stable democratic institutions presents political leaders with the inescapable necessity of finding a permanent way to balance strong communitarian socialization with liberal yearnings for equality, unassailable individual rights and freedom from domination by the state.

CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869. By Earl M. Maltz.[1] Lawrence: University Press of Kansas. 1990. Pp. xiii, 198. $25.00.

Michael P. Zuckert[2]

Earl Maltz mostly has the right idea about the Fourteenth Amendment. That is no small matter in a field so fertile with scholarly squabbling as this one is. Text, history and current significance all conspire to make the Amendment one of the most pock-marked battle fields of our legal wars of the words. The language of the Amendment, it is often said, presents hardly more determinative meaning than an ink blot: large terms, full of sound and ominous boding, but signifying nothing very specific. Historical investigation has not produced much more decisive evidence about the origi-

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nal meaning of the Amendment either. Those who drafted and defended the Amendment spoke in the same large and vague terms as they wrote; moreover, most of the decisive discussion of the language of the Amendment occurred in a committee for which we lack the potentially most revealing records. Private papers help very little. Finally, so much is at stake in the Fourteenth Amendment that scholars and judges face every temptation, provocation and incentive to make of the spotty textual and historical record what they will. The history of the interpretation of the Amendment stands as a powerful comment on the wisdom of the Lord's Prayer: "Lead us not into temptation."

Maltz explicitly locates his study relative to the prevailing debate over the intended effect of the Fourteenth Amendment, and implicitly in relation to ongoing debates about originalist interpretation. On the latter subject he has written extensively and intelligently in the journals, and one can only wish that he had been more explicit in this book on its connections to these debates. Maltz has been at once one of the more outspoken and more sensible defenders of an originalist approach. He has cogently questioned what has now become a near orthodoxy in the pages of scholars like Ronald Dworkin and jurists like William Brennan, that establishment of original intent is impossible. His Fourteenth Amendment book stands as an effort at a case study showing the greatly overstated character of the Dworkin-Brennan claims. Maltz approaches his task in a fully sophisticated manner, aware of the various pitfalls critics of originalism declaim. He is especially attuned to problems of collective intention. Maltz shows that patient, thorough and imaginative analysis can indeed recapture the meanings of the historical actors in this particular set of events. In part, Maltz is the beneficiary of a long-term scholarly siege on the materials surrounding the Amendment. He is able to take advantage of the kind of process of discovery his predecessors engaged in and the sorting out of facts, concepts and interpretations that has come before.

His own contribution is not negligible, however. He attempts to pin down a meaning for the Amendment by triangulating in on it from a variety of different locations, defining thereby the space in which the discourse of framing became possible. He draws heavily on considerations of the general political context, alternative general theories about federalism, rights, and other relevant legal and political matters, extra-congressional comment on Reconstruction issues, and the much-studied congressional debates themselves. Through his method of triangulation he builds a persuasive case for almost every aspect of his substantive interpretation, and for the

general proposition that discovering the intent behind a legal enactment is not more mysterious than, say, discovering the relation between pi-mesons, quarks, and bosuns in the composition of the universe.

Maltz does not force his materials into a false pattern or find more uniformity and order than were patently present. He is able to concede what many other scholars have emphasized, that there was a good deal of disagreement among the drafters, there were indeed cases where some (at least) were confused about what they were doing, and where political considerations may have suggested open-ended vagueness as preferable to determinate clarity. Nonetheless, he argues these factors interfere far less with the interpretative effort than they are frequently taken to do. He finds the disagreement and confusion to have existed in a far more structured manner than the Dworkins of the world care to admit. There were not nearly as many understandings of the Reconstruction enactments as there were participants in the process; only a few relatively well-defined positions emerged, and those tended to persist over a number of different issues and over a long period of time.

Although his methodology is complex, the two main ideas of it can be stated rather briefly. There may have been differences among sponsors of the Reconstruction legislation, but we must be careful to find the position which could win a consensus, or enough of a consensus to gain the required majority. Thus he rejects Jacobus ten Broek's approach of relying heavily on Democratic opposition exaggeration of what the various laws would accomplish. He also rejects the approach of Hyman and Wiecek, who tend to accept uncritically the point of view of the most "advanced" advocates of the measures as definitive. Instead, he notices a dynamic whereby the moderate Republicans held the balance of power. He shows in case after case that although some wanted more (Stevens, Sumner, et al.) and others wanted less (the Democrats), the outcome was almost always defined by the position taken on an issue by the Moderates. A majority, especially a two-thirds majority, could be assembled only when the moderates went along.

The majorities that enacted the Reconstruction measures were, therefore, coalitions composed of elements not in perfect agreement on everything. But Maltz does not infer from this fact Chief Justice Warren's lame "inconclusive" assessment. The coalition members might well have sought different things in a world they controlled, but the agreement they reached was not a chaotic amalgam of disparate aims, but the position the moderates were willing to go along with. That radicals wanted more was irrelevant. In order to estab-

lish the character of the different groups and of the coalition agreements, Maltz pays sensitive attention to the different proposals under debate and develops various devices for identifying coalition and sub-group positions, including extensive use of roll-call analyses.

He supplements his more internal analyses by setting the whole in a broader political context. Far from finding the politics a source of unintelligibility, he tries to show how the politics help fix one or another interpretation as more likely. With regard to the Fourteenth Amendment itself, he is quite persuasive in showing how the political role the Amendment was to play in the congressional elections of 1866 rendered certain competing interpretations of the Amendment quite implausible. He shows, moreover, that by 1870 and 1871 the context had shifted so that positions earlier seen as political liabilities (e.g., extensive congressional authority to reach into the states), came to be seen as more attractive; he shows further how, by the time of the Fifteenth Amendment, yet further shifts had made black suffrage, theretofore a political liability, into a promising political stance.

Substantively Maltz stakes out ground between the two chief approaches to the Amendment. He is most hostile to the interpretation emanating from scholars like ten Broek, Hyman and Wiecek, and Kaczorowski to the effect that the Reconstruction Amendments worked an entire transformation in the antebellum constitutional system, traditional federalism giving way to full-scale nationalism, accompanied by a new and open-ended protection of rights, capacious enough to incorporate all and more that the Warren Court attempted to do with the amendments. He speaks as though he is much more friendly to the narrower view of what the Amendment accomplished, associated with earlier scholars like Charles Fairman and more recent ones like Raoul Berger. In fact he differs substantially from the latter group also.

He agrees, for example, with the broader interpreters that the Amendment's privileges and immunities clause does incorporate the Bill of Rights, and while he does not present such a comprehensive statement on this as Michael Curtis recently did, he adds some persuasive arguments to the brief Curtis drew up. Maltz argues that the equal protection clause is about protection of the laws, and not about equality; more formally, he argues the Amendment sought to establish a doctrine of "limited absolute equality," i.e., to establish absolute protection for a certain class of rights (natural rights, rights to governmental protection directly related to natural rights). He contrasts this to current approaches which emphasize the issue

of classification and see the Amendment as directed at prohibiting all racial classifications or see it affirming a set of germinative rights possessing the mysterious power to grow ever larger and more numerous. In other words, he rejects equally the approaches to the Amendment of the first Justice Harlan, Justice Brennan and Michael J. Perry.

Above all, he argues, the framers of the amendments, or the core group of moderate Republicans retained sufficient attachment to the principles of the federal system to restrain them from all ventures of the sort the more far-reaching interpreters attribute to them. Thus, he insists, the Amendment does embody the state action doctrine, just as the court said in *the Civil Rights Cases*, and contrary to the claim of some important Republican drafters in 1870-71. It does not, in other words, empower Congress to reach private action, much less do so of its own accord.

Had I written this book, I would surely have cast much of it in different terms, and gone about it in different ways in many places, but as should be clear I would endorse most of Maltz's conclusions. One exception to that general concurrence would be the aforementioned argument regarding the power of Congress under the Amendment. As a gesture toward "truth in reviewing" I must confess to having argued in the pages of this very journal some years ago (1986) in favor of the idea that the Amendment authorized what I called the state failure doctrine: if the states demonstrably fail to supply the protection they are obliged to supply under the equal protection clause, then Congress has the right to step in and supply it. This is neither the doctrine of state action Maltz and other narrow interpreters endorse, nor the more or less plenary power doctrine broad interpreters defend. It is a doctrine consistent with the Framers' commitment to the traditional federal system, as the plenary power doctrine is not, and with the commitment to constitutionally guarantee certain rights previously not guaranteed, as the state action doctrine is not.

Maltz rejects the state failure doctrine, or as he calls it, the "supplemental protection theory," for a number of reasons I propose to review here, for they not only give a more corporeal instance of his mode of analysis, but also point to certain limits to his method. The most important piece of evidence Maltz brings forward is the congressional rejection in February 1866 of an earlier draft of the Amendment, a draft couched in language of congressional empowerment rather than prohibitions against the states as in the adopted Amendment. Maltz believes that the rejection of the

earlier draft proves the centrist Republican refusal to accept anything more than a state action Amendment.

> Republican opposition to the original proposal was based broadly on the fear it would be seen as embodying a supplemental protection theory. If they had believed that the ultimate wording of section one reflected a similar theory, conservative moderates would have been unlikely to embrace it without protest. Yet no moderate assailed section one of the Fourteenth Amendment.

Maltz's style of argument here reflects one of his chief methodological principles: "the significance of language *not* chosen cannot be overestimated."

Maltz's point here, however, is founded on at least one false factual premise: so far as Republicans opposed the earlier draft, and so far as they did so on federalism-related grounds, their concern was not with the state-failure approach, but with the plenary power approach some of them feared was authorized by that draft of the amendment. In his own restatement of the debate over the earlier draft, Maltz described as "the basic theme . . . in all of the denunciations of Bingham's proposal" the fear "that it would create a revolution in federalism by granting the federal government *plenary authority* to perform the most basic functions of government . . . the protection of life, liberty, and property." (Emphasis supplied.) Or, as Maltz summarized the debate: "The discussion of the Bingham amendment revealed that a substantial portion of the party—the more conservative moderates—would not accept an *open-ended expansion* of the authority of the federal government." (Emphasis supplied.)

Maltz concedes that many of the Republican drafters adopted a state failure interpretation of the Amendment during debates on civil rights legislation in 1870 and 1871. Maltz wonders how reliable the later debates are, however: they could well be "law office history." He finds the 1871 defenses of a state failure approach to be inconsistent with what was said in 1866 by, among others, Bingham. "Bingham consistently denied any intention of granting Congress any authority to define substantive rights of life, liberty, and property." That may be so, but the state failure doctrine does not conflict with that position. At most it gives Congress the power to supply protection to those persons a state is failing to protect at a level equal to the protection the state is supplying to others. It does not involve fresh or independent definition of rights.

More generally, some of the limits to Maltz's approach to the Amendment come to light here. He is surely correct to suggest that

the state failure doctrine was not explicitly discussed during the debates on the Amendment itself in 1866. Perhaps he is correct that had it been discussed, it would have been rejected, although this is highly speculative, and I can imagine a good argument to the contrary. The state failure theory was not discussed, not because the drafters were planting a Trojan horse in the Amendment, but because the situation posed by the Black Codes and the response taken in the 1866 Civil Rights Act filled their minds and few, perhaps, consciously thought of, much less consciously signed off on the state failure doctrine. Yet, a legal text, like many human utterances, means more than the congery of specific instances a person has in mind when making the utterance.

For example, a person giving a definition of a triangle as a three-sided enclosed plane figure may not picture to herself an obtuse triangle, and may be surprised when confronted with one. Nonetheless, she surely can rightly be said to have intended obtuse triangles in her definition, whether she knew it at the time or not. The language of the Amendment does the same. There is a logic to the conceptual structure which is present whether the drafters were fully conscious of all its implications or not. Indeed, this is one of the most commonplace of our experiences of the law; much of the judicial function turns precisely on courts having to decide how law applies in instances not obviously and consciously intended by the drafters, and yet somehow intended. Maltz does not give sufficient weight to phenomena of this sort in his treatment of the history of the Reconstruction legislation, nor in his theoretical approach to the problem of originalism. This relates, perhaps, to another characteristic of his approach. He tends not to pay sufficient attention to text, preferring to go behind text to intention as revealed in all the imaginative and helpful ways he illustrates in this book. Nonetheless, we must remember it is the text that is part of the Constitution and not the sum of all that was said about it in and out of Congress.

These comments are not, I think, mere quibbles, but yet they must not be allowed to derogate from an extremely valuable and mostly very sound book. Earl Maltz mostly does have the right idea about the Fourteenth Amendment, and that is no small matter.