In Defense of the Fourteenth Amendment

by Roger Pilon

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of the law." — U.S. Constitution, Article XIV, Section 1

In his "Liberty, States' Rights, and the Most Dangerous Amendment," (*Liberty*, August), Gene Healy takes me to task for my support of the Fourteenth Amendment. Sounding for all the world like a libertarian Robert Bork, he concludes with a counsel of despair: in the battle between my moderate view of the amendment and the radical views of the likes of Professor Catharine MacKinnon, the outcome has been all but foreordained, he says, thanks to the modern American legal culture. Thus, "given federal supremacy and the vast powers the Fourteenth Amendment confers on Congress and the courts, it matters little whether Roger Pilon is right about the amendment's original meaning." Healy's position, in contrast, appears to involve radical surgery: "If we can ever rid ourselves of federal supremacy, losing the Fourteenth Amendment will be no sacrifice at all."

That's a big "if," of course, about which Healy offers no counsel. Moreover, even if federal supremacy were to recede to within its constitutional bounds, we're likely to lose the Fourteenth Amendment in the fullest sense only by subsequent amendment — as with Prohibition — and the likelihood of that is rather less, I expect, than the likelihood that my views will eventually prevail. So perhaps we should learn to live with the amendment — and encourage others, especially judges, to better understand its meaning and import. At the least, let's see what there is to the dispute that Healy has brought to these pages.

Local Tyranny: An Enduring Problem

The enduring problem of local tyranny is the springboard for Healy's critique. As we all know, political decentralization in the name of liberty doesn't guarantee liberty. From the political machines that often control state and local politics to zoning boards, licensing commissions, inspection agencies, sheriff's departments, and much more, the horror stories are legion. The Fourteenth Amendment was written with local tyranny in mind: it affords a federal appeal when states or their subdivisions violate individual rights to life, liberty, and property. But things haven't always worked out that way, as we also know. In fact, no area of constitutional jurisprudence is more vexing today than that involving the Fourteenth Amendment. Often both Congress and the courts have used the amendment not to protect but to violate rights. Yet local tyranny in endless variety persists.

Thus, the question Healy poses is what should libertarians think of the Fourteenth Amendment? He answers, in effect, "not much." In fact, with seeming approval he twice invokes Lord Acton, writing to Robert E. Lee following the Confederacy's defeat: "I saw in States' Rights the only available check upon the absolutism of the sovereign will." In contrast, late 20th century libertarians "have come full circle," Healy notes: "Today, the libertarian orthodoxy holds that the Fourteenth Amendment perfected the Framers' design, fulfilling the promise of the Declaration of Independence." Those who promote the new orthodoxy urge "that the amendment be given robust application against the states, in order to secure our natural rights to life, liberty and property."

In truth, it was not the Fourteenth Amendment alone but the full set of Civil War amendments — Thirteen through Fifteen — plus the later Nineteenth and Twenty-Sixth Amendments that "perfected" the Framers' design. Nowhere is that more clear, of course, than with the Thirteenth Amendment, which erased finally the original design's oblique recognition of slavery. But the Fourteenth Amendment was crucial too in affording an important measure of protection against state and local tyranny. We all know

why the Bill of Rights applied only against the federal government, not against the states — a point the Supreme Court confirmed in 1833. Were it otherwise, the institution and practices of slavery could not have endured, and no union would ever have been formed. Upon that understanding the Constitution and, two years later, the Bill of Rights were ratified, with the hope and expectation by many that slavery would in time wither away. That didn't happen. It took a civil war to end the institution. The notorious "black codes" were soon enacted in the southern states. And the Fourteenth Amendment was the answer. In that sense, at least, the amendment "perfected" the original design.

But my case for the Fourteenth Amendment is "deeply flawed," Healy says, because (1) it ignores the circumstances of the amendment's inception, which call into question the amendment's political legitimacy, and (2) it depends, if the amendment is to be at all effective, on "a Panglossian view of judges and federal supremacy," which modern legal culture hardly supports. There's truth in both criticisms. But it's hardly fatal. Let's look more closely.

Consent: Always a Messy Business

Throughout my published work, Healy claims, I have tied political legitimacy to consent — although not, he grants, without qualification. And quite properly, he adds, I have excoriated those who've ignored constitutional provisions brought about through consent — whether it be the political branches arrogating power to themselves (as during the New Deal) or the judicial branch either ignoring its responsibilities (the unwarranted restraint of the post-1937 Court) or exercising unauthorized power (the later activism of the Warren and Burger Courts). Yet the Fourteenth Amendment, Healy claims, was hardly the product of consent. Indeed, it was ratified "at the point of a bayonet." Because the new orthodoxy ignores that history, preferring instead the story from "immaculate conception," it is fatally flawed, he concludes.

Not so fast. Let's start with the theory of the matter, then turn very briefly to the facts. As moderns, we all believe that consent of some kind is a *sine qua non* of political legitimacy. But there, of course, is the rub. Consent of what kind? Once we press the idea of consent — sometimes even in the ordinary contractual setting, to say nothing of the social contract setting — we start to see problems, both theoretical and practical. What process shapes the issues to be decided, for example? Or how does anything short of unanimity bind dissenters? (Prior unanimous consent is of course a myth.) Even if one found unanimity, how does that bind succeeding generations? Those are but a few of the questions that bring us to the qualifications in my discussions of legitimacy that Healy simply glosses, seeing me instead, in essence, as an all but pure consent man.

Thus, when he cites me as saying that consent, and only consent, is the ground of legitimate power, he doesn't say that in the cited essay I was not so much defending that assertion as addressing the line in the Declaration of Independence that speaks to the point. And I was doing so as part of a larger effort to show how difficult it is — indeed, impossible — to locate political consent in the real world that deeply satisfies. In fact, throughout my published work I have argued that the difficulty of locating such consent is one reason for concluding that there is an air of illegitimacy that surrounds government as such. Government is, as the Founders rightly understood, a necessary evil — a forced association to which we should turn only when we must, the better to avoid the resort to force that necessarily follows. Thus, in an essay on legitimacy that appeared in the *Cato Journal* in 1992 I argued that "legitimacy" is best understood as a function not simply of consent but, more deeply, of reason, a point I went on to discuss in some detail.

Nevertheless, however problematic a phenomenon consent may be in the real world, including the consent of the ratification process, it plays an important role in determining whether a given constitution or regime or law or legal decision is at least politically legitimate, if not morally so. Constitutional ratification, for example, is the "big bang" that gets a legal regime off the ground, affording it such legitimacy as it can in an imperfect world. And other forms of consent, including the subsequent ratification of constitutional amendments, help sustain the regime, from time to time, along the way. Again, consent is far from a perfect indicator of legitimacy, given the problems noted above. And at the margin it fails, falling into circularity: for not *any* form of consent will do. But if, at the other end, immaculate conception is all that will do (a conception that respects the rights of even the last hold-out), then only anarchy will pass the test. Anarchy is more satisfying morally, I admit, but not likely to be the state of affairs that any of us enjoys in this lifetime.

In determining the legitimacy of any given measure, therefore, we have to look beyond consent to reason (about which a bit more below). We have to determine not simply what the law is, insofar as possible, but whether it is just, which is not a matter of consent, in most cases, but of reason. Once we recognize all of that, once we realize that consent and reason together enter into judgments about legitimacy, we're in a better position to judge whether any given constitution, amendment, or statute is or is not legitimate.

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Healy's first complaint about the Fourteenth Amendment, then, is that the process by which it was ratified didn't go by the book. As "legally reconstituted" southern states were busy ratifying the Thirteenth Amendment, he says, radical Republicans in Congress refused to seat southern congressmen, which allowed the "rump Congress" to propose the Fourteenth Amendment consistent with the two-thirds requirement of Article V. Then when (most) southern states rejected the amendment, which thus failed the three-fourths requirement of Article V, Congress responded with the Reconstruction Act of 1867, which effectively placed those states under martial law. It was to end military rule, Healy concludes, that southern states eventually ratified the Fourteenth Amendment, even as New Jersey and Ohio were rescinding their earlier ratifications. Nevertheless, by joint resolution, Congress declared the amendment valid.

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again, if that were the test, the Constitution itself would not pass it: the delegates to Annapolis and, later, Philadelphia were not really authorized to draft a new document, after all; moreover, when it comes to consent, very few of those who were in the original position — to say nothing of the rest of us — actually consented to be bound by the new Constitution. Yet Healy rests his entire argument from consent on the ratification procedures set forth in that document. And he begins his account of the wayward process by speaking of the "legally reconstituted" southern states. In precisely what sense were those states "legally reconstituted"? Was that done with the consent of the just-freed former slaves, for example? We all know what conditions were like in the South immediately after the Civil War. If consent is a problematic touchstone for legitimacy in the best of times, in times like those it can be little more than suggestive.

Again, why did radical Republicans in Congress refuse to seat representatives sent from the South? Healy invites us to believe that, regarding the Fourteenth Amendment, it was to enable Article V's two-thirds requirement to be met. Could the story be more complicated than that? Could the scars of the war, on all sides, be too fresh to allow for "normal" procedures? Georgia, for example, sent Alexander H. Stephens, vice president of the Confederacy, to the U.S. Senate, even though he was in federal prison awaiting trial for treason. And quite apart from the absence of black suffrage, the infamous black codes, instigated by many of those same newly minted southern representatives, argued that the war was far from over. War and its aftermath, as we know, are not the conditions that encourage respect for constitutional niceties.

Finally, regarding the Reconstruction Act of 1867, the initial failure of most southern states to ratify the Fourteenth Amendment was only one factor that led to its passage — and probably not the most important. Given uncontroverted evidence that southern officials were continuing to persecute blacks, the act imposed military rule to protect the civil rights of "all persons," maintain order, and supervise the administration of justice. Those perpetrating or supporting the violence that gave rise to the act were hardly in a position to complain about procedural unfairness. The procedures that led to adoption of the Fourteenth Amendment may be troubling from some distant, purist perspective, but the immediate times were hardly pure. What should Congress have done — turn a blind eye to what was going on? We should be grateful that constitutional measures were in fact "rammed through," under trying circumstances, the better to provide us all with a measure of protection against local tyranny in the future.

That historical sketch, like Healy's, is only a sketch, of course. My purpose is not to re-fight the Civil War, from slavery to secession to war and Reconstruction. Rather, it is simply to argue that abstract moral and legal principles must be applied in complex, often uncertain, factual settings, where "second-best" is sometimes the best there is. Again, that does not mean that anything will do. Thus, Healy is mistaken when he notes that "the squalid history of the Fourteenth Amendment poses serious problems" for my critique of Franklin Roosevelt's "extra-constitutional thuggery" during the New Deal — when FDR browbeat the Court into rewriting the Constitution by threatening to pack it with six additional members. Inviting us to liken those actions to the "thuggery" of Reconstruction Republicans, Healy raises the specter of "selective indignation." Is Pilon guilty of invoking the principles of consent and legitimacy, he asks, only against constitutional changes he "dislikes"?

No, I am not. Despite my dislike of the Sixteenth Amendment, for example, I accept its political legitimacy (although there too the history of its ratification is not without controversy). The issue, in the end, is not what I or anyone else likes or dislikes. Rather, it is whether, especially under extraordinary circumstances, the process and the consent it is designed to demonstrate at least approximate what one would hope to see under ordinary circumstances. Under extraordinary circumstances, the Reconstruction Congress took significant steps to approximate a normal ratification process, which doubtless would have been easier to do had there been anything like a regular franchise, including black voters, in the defeated southern states. The final procedure was far from perfect, to be sure, but at least there was a process that, given the circumstances, came close. By contrast, FDR never even tried to amend the Constitution. He simply rammed his unconstitutional programs through a pliant Congress, then threatened the Court when it indicated it wouldn't go along. The Court got the message. There was the famous "switch in time that saved nine." And the Court began reading the Constitution in ways it had never done before — all without even a pretense at amendment.

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More recently, Yale's Bruce Ackerman has attempted to legitimate those changes by arguing that the election of 1936 amounted to a "constitutional moment." Nonsense! Article V cannot be ignored altogether. Thus, again, not *any* form of consent will do. FDR's respect for the Constitution was captured best, perhaps, in a letter he wrote to the chairman of the House Ways and Means Committee in 1935: "I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation." And his close confidant, Rexford Tugwell, one of the principal architects of the New Deal, put the matter plainly when he wrote some 30 years later: "To the extent that these [New Deal policies] developed, they were tortured interpretations of a document [i.e., the Constitution] intended to prevent them." Not much ambiguity there.

But there is a second ground on which to distinguish the actions of the post-Civil War Congress from those of FDR — without having to resort to likes and dislikes — and that has to do with the merits of the matter. Quite simply, the Reconstruction Congress got it right, substantively, whereas FDR got it very wrong. We come at last, then, to the substantive issues — and thus, indirectly, to the second of Healy's arguments against the new libertarian orthodoxy, namely, that it depends on "a Panglossian view of judges and federal supremacy." Unfortunately, this leg of Healy's critique is not

as focused as the first — doubtless in the nature of the matter. Let me summarize my own views, therefore, after which I will take up Healy's criticisms in the order he presents them.

Rights and Remedies: The Fourteenth Amendment

The "promise" of the Declaration, as noted above, was that Americans would enjoy their natural rights to life, liberty, and the pursuit of happiness under governments instituted to secure those rights and do the few other things their constitutions authorized them to do. It was a vision of limited government, dedicated to securing individual freedom and to upholding principles of individual responsibility. But again, the Constitution's oblique recognition of slavery and its practices compromised that vision. After the Civil War the Thirteenth Amendment abolished slavery as a constitutionally recognized institution, but it didn't abolish other state practices — whether or not connected with slavery — that also compromised the Declaration's vision. States in most cases were not subject to federal oversight regarding how they treated their own citizens, for the Bill of Rights continued to apply only to the federal government, not to state governments. Thus, it was to afford a federal remedy for state wrongs that the Fourteenth Amendment was written.

The idea behind the Fourteenth Amendment, then, was essentially remedial. Section one defined federal and state citizenship. It then prohibited states from making or enforcing any law that abridged the privileges or immunities of citizens of the United States; from depriving any person of life, liberty, or property without due process of law; or from denying to any person within its jurisdiction the equal protection of the laws. As the debates surrounding the amendment's adoption made clear, the Privileges or Immunities Clause was meant to be the principal font of substantive rights under the amendment. Blackstone had said that the phrase "privileges and immunities" referred to our "natural liberties." It was also understood to refer to our classic common law rights, grounded in property (broadly understood) and contract, as Healy notes. And of particular importance, those who drafted and debated the clause intended it to incorporate the Bill of Rights, for the first time, against the states. By contrast, the Due Process Clause, although mentioning "life, liberty, or property," was intended primarily to protect procedural rights against state infringement. And the Equal Protection Clause, as its language makes clear, was meant to ensure that states did not discriminate in applying the law.

By implication, those rights were to be protected by the courts, state or federal, through cases or controversies that were brought before them. Thus, in the infamous *Slaughterhouse Cases* of 1873, which eviscerated the Privileges or Immunities Clause, the plaintiffs sought protection from a Louisiana statute that erected a private monopoly, the effect of which was to deprive them of their right to a lawful calling, as they phrased it. In applying the provisions of the Fourteenth Amendment, judges did not have to make any new law; they had simply to apply the law that was already there, in the amendment, to the facts before them, much in the fashion of common law judges.

But section five of the amendment gave Congress a role too: "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." The operative word there is "enforce," not "make." When it drafted the amendment, in the Reconstruction context, Congress surely had in mind the possibility that, in a given case, Congress might have to draft legislation to ensure that the rights secured by section one would be secured in fact, against obdurate state officials. In that regard, however, it is important to notice that the amendment protects not against private but against state action or omission; it is not a general police power of a kind reserved to the states. Nevertheless, if a state should deny to any person the equal protection of the laws — and especially if there should be a pattern of such denials, unaddressed or inadequately addressed by the courts, as happened during Reconstruction and, more recently, when Jim Crow laws were challenged — there is ample power in Congress to remedy those denials by "appropriate legislation." Such legislation should not create new rights, of course. Rather, its function is simply to better secure the rights we already have when states fail to do so or when states themselves violate them.

In sum, then, the role of both the courts and the Congress under the Fourteenth Amendment is relatively limited. Indeed, if states behaved as they ought to, there would be no role at all. It is only when states abridge, deprive, or deny that courts or Congress have any authority to step in. And even then, the authority is simply to take measures "appropriate" to remedying the wrong. States, in short, have the same obligations and responsibilities as ordinary people: they cannot violate rights; and they're responsible for carrying out their contractual duties to protect people equally. When they fail, there is a federal remedy, just as there is a state remedy when individuals fail in their duties toward others.

With that brief analysis by way of background, let's now return to Healy's critique of "the new orthodoxy." After arguing that the amendment cannot be justified from a consideration of its origins, he admits that by now the issue is "ancient history" and the amendment is not going away. Given what he believes about its illicit origins, however, he contends that if libertarians are to embrace the amendment, "they'll have to look for pragmatic reasons for doing so. The argument must be that the amendment has been, and will continue to be, an effective weapon in the struggle for individual liberty."

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Not so fast, again. Unlike many libertarians, Healy comes across here as a pragmatic positivist. The amendment is justified, he contends, either by consent — he believes not — or by the fact that it "works." There is a third alternative, of course, namely, that the amendment is justified because it is right — because it captures and protects (at least in principle) all and only those rights that we have to be protected. The demonstration of that point is well beyond the scope of this response, to be sure. But as a general matter the point is not at all difficult to grasp. It's what the Founders asserted in the Declaration when they listed the "self-evident" truths —

truths grounded in reason. And Healy himself seems to appreciate the point when he calls my substantive account of the amendment "strong." In truth, whatever strength my account conveys stems from the amendment itself.

Nevertheless, even if I am right in believing that the authors of the amendment got it right, Healy is surely right in arguing, by implication, that libertarians should not embrace the amendment if, by and large, it's been and continues to be used not to protect but to destroy liberty. However correct or noble our theories may be in the abstract, that is, if their application leads to destruction, we should reconsider them. We turn, then, to the record, and to the series of practical and theoretical points Healy makes regarding it, taking them in the order in which he raises them.

The Actual Record: A Mixed Bag

Before summarizing the actual record of the courts and Congress in applying the Fourteenth Amendment — and this, like Healy's, will be a selective summary at best — three preliminary points need to be made. First, as already noted, the Court got off to a profoundly poor start with the *Slaughterhouse Cases* in 1873, barely five years after the amendment was ratified. In a bitterly divided five-to-four ruling, the Court eviscerated the principal substantive clause in the amendment, the Privileges or Immunities Clause, rendering it "a vain and idle enactment," as Justice Field put it in dissent. Today, in fact, that decision is widely thought to have been mistaken. In the term just finished, interestingly, the Court took tentative steps to revive the clause — for the second time in 126 years. The fact remains, however, that Fourteenth Amendment jurisprudence has been seriously distorted by its absence.

For about half that time the Court tried to do under the Due Process Clause what should have been done under the Privileges or Immunities Clause — applying a theory of "substantive due process" that was never entirely convincing. The effort eventually collapsed under the weight of emerging ideas about social justice, although it enjoys selective currency still. The Court then turned to the Equal Protection Clause, which afforded even less substantive guidance. Indeed, under the Equal Protection Clause, treated as a font of substantive rights, one can get almost any result one wants. Thus, in its current state, Fourteenth Amendment jurisprudence is an invitation to both judicial and congressional chicanery. The wonder is that we haven't had more. That we've had a fair measure is beyond doubt: Healy is surely right in that. But he overstates the matter, as we will see, and ends in unwarranted despair.

The second preliminary point concerns the deeper reason the Court and Congress have often appeared rudderless in interpreting and applying the Fourteenth Amendment — but not that amendment alone. It is that by and large they have had no serious theory of the matter, certainly no theory that goes to the heart of it, to the classical theory of rights that stands behind the amendment and, more generally, behind the Constitution as a whole. As a result, they fall prey too often to any transient theory of justice — when they themselves are not promoting such a theory. This too is a point that Healy homes in on. But here too it leads him to a counsel of despair, which I will try to avoid when I return to the point below.

Finally, the general absence of a well-grounded theory of the Constitution, and the press of "progressive" ideas during the first third of the 20th century, culminated in the constitutional revolution of 1937 and '38, the effects of which have been far-reaching, including for the Fourteenth Amendment. Healy does not address this complex issue, but it is a factor nonetheless in the jurisprudence of the amendment. In particular, after a browbeaten Court reread the General Welfare and Commerce Clauses in 1937 to allow for a vast expansion of Congress's redistributive and regulatory powers — thus eviscerating the doctrine of enumerated powers — it turned a year later to the Bill of Rights, which in principle still frustrated that expansion. In the notorious *Carolene Products* case, the Court distinguished two kinds of rights: "fundamental," such as voting, speech, and, later, certain "personal" rights;

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and "nonfundamental," such as property, contract, and the rights involved in "ordinary commercial transactions." Thereafter, courts would give "strict scrutiny" to laws implicating "fundamental" rights, finding most unconstitutional. By contrast, they would give "minimal" scrutiny to laws implicating nonfundamental rights, finding most to be constitutional.

That opened the floodgates not simply for federal but for local tyranny as well, especially in the economic area. And the tyranny continues as courts "defer" not simply to the political branches of the federal government but to states and their endless, often petty and corrupt regulatory schemes. Thus are rights that were meant to be protected by the Fourteenth Amendment invaded, thanks to judicial deference. But the bifurcated Bill of Rights has led to invasions on the other side too as courts have applied "strict" scrutiny to state measures affecting "fundamental" rights. Here, however, armed with no serious theory of rights, courts have often been persuaded to find "rights" that are no part of the design — extinguishing other rights, in the process, that were meant to be protected. And here, the breakdown of the line between "private" and "public" looms large. More generally, however, it should be clear that the problems of interpretation and application that Healy points to go beyond the Fourteenth Amendment. In the end, they concern the larger state of American constitutional law.

In the Courts

But despite that larger state of affairs, the record, surprisingly, is mixed. In fact, Healy himself, after cataloguing what he takes to be the failures, has to grant that he has not been "entirely fair" to the Fourteenth Amendment — citing free speech and criminal procedure as areas in which "the amendment has been the source of some of the Court's proudest moments, some of the greatest vindications of liberty in American constitutional law." Still, his catalogue of cases calls for attention, so let's turn to it.

The first thing that strikes one about Healy's list is that

almost every example on it involves the hopelessly confused area of discrimination — and racial discrimination at that. It would not be far afield to say that we are still fighting the Civil War. In fact, think how different our jurisprudence — and nation — might be if the *Slaughterhouse Cases* had been rightly decided and the Civil Rights Act of 1866, which the Privileges or Immunities Clause was meant to constitutionalize, had been faithfully applied. Jim Crow *de jure* segregation would have been prohibited. Private *de facto* segregation, including discriminatory contracts and restrictive covenants, would have been allowed. But since nothing in that arrangement prohibits people from associating if they want to, private barriers would likely have broken down in time. More important still, the legal distinction between "private" and "public" would not have been compromised by a legal regime that prohibited private association. When Jim Crow did fall at last with the Civil Rights Act of 1964, it was easy for Congress to move from the evil of public segregation to the evil of private segregation that resulted not from private choice, necessarily, but from the force of law. The law had forced segregation, both public and private. Now the law would end segregation, even where it should otherwise be permitted.

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The moral and legal confusion over such matters is everywhere today, and it is captured in Healy's list. Thus, he begins with *Brown v. Board of Education* and argues that equality before the law "shifted effortlessly" thereafter into "forced equality of outcome." The problem with the line of cases he cites, however, is that they all involve charges of continuing *public* discrimination, where the issues — including especially the remedial issues — are far more complicated than in cases of private discrimination, where there should be no causes of action. Public institutions may not discriminate, except on grounds that are narrowly tailored to their functions. That does not mean, however, that forced busing, to say nothing of judicial taxation, both of which Healy rightly criticizes, are appropriate remedies for proven public discrimination. That courts have overreached in fashioning remedies for public discrimination cannot be doubted. It does not follow, however, that they ought not to have a power to fashion remedies for clear public sector wrongs. Thus, it is something of a stretch to say, as Healy does, that judges under the Fourteenth Amendment have seized "vast" coercive powers. *Missouri v. Jenkins*, the judicial taxation case, was an exception. What is more, as Healy himself notes, in recent years federal courts "have cooled somewhat" to desegregation lawsuits. That understates it. However uncertainly, courts today are leading us out of the mess that earlier courts led us into.

In Congress

The power of courts aside, what of the power of Congress under section five of the Fourteenth Amendment? On this issue, Healy seems to think that he makes his most telling points against my views. He begins, however, by overstating them. Thus, he has me arguing that Congress should "routinely" invoke section five to strike down state violations of individual rights; and he quotes me as saying that Congress can step in when states "fail to secure [rights] against private violations." I don't believe I've ever said the first; the second is taken out of context, as Healy later seems to acknowledge. But given that overstatement, I'm not surprised to find myself charged, in the case of Congress too, with opening the door to "vast federal power," with encouraging Congress to invoke section five to criminalize everything from school gun possession to carjacking to violence against women.

The issues here are complex, so let's sort them out carefully. As noted earlier, enforcement under the Fourteenth Amendment falls primarily to the courts, through cases or controversies brought before them by private parties. But if states should abridge, deprive, or deny — especially if there should be a denial of equal protection, and there should be a pattern of such denials, unaddressed or inadequately addressed by the courts — then clearly, Congress has the power "to enforce, by appropriate legislation, the provisions of [the] article." As a practical matter, that hardly amounts to a power to "routinely" strike down state violations or omissions: however much Congress may have papered the nation with law for the better part of a century, it simply cannot move that quickly or "routinely." That's one reason why case-by-case enforcement by the courts is the norm, congressional enforcement the exception.

But there are deeper reasons too, which go to the very structure and function of the Constitution. The operative principle of the Constitution, captured by the doctrine of enumerated powers, takes the form of a presumption: most power is reserved to the states or the people. The Tenth Amendment, the final documentary evidence of the original understanding, makes that clear. And, by way of illustration, it helps us to see why most of what Congress does today under the Commerce Clause is unconstitutional. That clause was written to enable Congress to regulate — or "make regular" — commerce among the states. It was meant to ensure the free flow of goods and services among the states, especially in light of the protectionist measures states were erecting under the Articles of Confederation. Thus, it was largely a defensive measure — put there to protect free trade. Since 1937, however, the Commerce Clause has been read as authorizing Congress to regulate, for any purpose, anything that "affects" interstate commerce, which in principle is everything. That transforms the clause from a shield to a sword. And it contradicts the very idea of a government of limited powers. Indeed, if the Framers had meant for Congress to be able to do virtually anything it wanted under the commerce power, why would they have enumerated Congress's other powers — or defended the doctrine of enumerated powers throughout the *Federalist Papers*? In sum, the larger, background presumption helps us to understand the clause and apply it properly.

The Fourteenth Amendment should be read and applied in the same way. To be sure, it gave a greater measure of power to the federal government — and greater security against state violations — but it did not fundamentally overturn the original design — including, in particular, the original presumption. Thus, an individual's first avenue of recourse against state violations, assuming efforts at the state level fail, is modest: it is with the courts. Only if that fails, or is otherwise inappropriate (perhaps because the cases are too

numerous or the issues too large), may Congress step in under a presumption against congressional action. But that doesn't mean that Congress need create a "federal crime," as Healy suggests. In fact, properly read, section five does not authorize Congress to create federal crimes, or even federal causes of action against private parties. Rather, it authorizes Congress "to enforce" provisions that obligate *states* to not abridge, deprive, or deny. Of those three modalities, the first two present few problems, at least in principle: if remediation through the courts should prove unavailing, for whatever reason, Congress can legislate to prohibit states from abridging or depriving, and the executive branch can enforce those provisions against the state officials doing the abridging or depriving. The third modality — which is where section five often arises — is a bit trickier. How should Congress enforce the obligation of states to apply the law equally? That means compelling states not simply to stop what they're doing but to do, affirmatively, what they've not been doing. In the extreme, as during Reconstruction, one imagines federal officials taking over state institutions that administer justice. Short of such extraordinary circumstances, however, Congress has authority to compel state officials, through whatever means may be necessary, to apply the law equally.

Properly read, then, section five does not grant Congress "vast" powers. Given the background presumption, moreover, occasions to use the powers section five does grant arise infrequently and only when the resources of the courts prove insufficient — as after the Civil War or when the nation decided to end Jim Crow in more than a piecemeal way. Thus, when I chided Congress in the *Washington Post* for using the Commerce Clause rather than section five when it enacted the Church Arson Prevention Act in 1996, I said, as Healy notes, that Congress would have had "ample authority" under section five "if the facts had warranted it." Right there, of course, is the crucial qualification. As Healy adds: "Reading between the lines, I surmise that [Pilon] doubts that the facts warranted it." Absolutely. On the facts, there was no denial of equal protection of a kind that would have authorized Congress to act under section five. Congress's power, like the courts' power under section one, is remedial. As such, it must rest on some factual predicate. Thus, not only was the act unauthorized by the Commerce Clause; it was not authorized under section five either.

But suppose Congress acts anyway, notwithstanding the absence of any factual predicate. Public choice theory predicts it will, Healy believes. If it does, and "if the only check against federalization of crime is to be found in the judiciary's willingness to overturn congressional findings of fact, then that's no check at all," he says. First, as I've argued above, federalization of crime is never authorized under section five. But second, regarding what might be authorized, Healy is right about the reluctance of courts to challenge congressional findings of fact. That may be changing, however. And it should change, for the practice bespeaks the kind of judicial deference to the political branches that came out of the New Deal, which reduced the judiciary to a less than equal branch. Thus, in a recent administrative law decision, the Court of Appeals for the District of Columbia Circuit took the EPA to task on its factual findings. And in the 1995 *Lopez* case, which limited Congress's commerce power for the first time in nearly 60 years, the Supreme Court was not at all reluctant to challenge Congress's implicit assertion (made by the solicitor general on behalf of Congress after Congress neglected to make such findings itself) that guns at school affected interstate commerce. Those are but two examples of an apparently growing willingness by the courts to get back into the business of, well, judging.

Restoring the Judiciary

And that brings me to what Healy seems to believe is his clincher, the inadequacy of the judiciary. I quite agree that despite the judiciary's many successes in applying the Fourteenth Amendment, as noted above, both the courts and Congress have abused it. Courts have ignored rights that were meant to be protected, found "rights" that were never there to be found, and fashioned remedies that were both inadequate and, more often, beyond their power. And Congress has sometimes done the same, with the sanction of the courts. But as Healy cites me as saying, the answer to bad judging is better judges and better judging. Yet he calls that answer "profoundly unsatisfying" — and calls me "a dreamer." In a striking admission, however, he himself says: "I don't have a more practical answer." Given that, let's look more closely at mine.

Today, there are a number of judges who are rediscovering those simple truths. Given the larger winds in the culture, they are often all that stand between us and tyranny. Given the vagaries of those winds, I want them to continue to stand until their numbers can be swelled by the Gene Healys of the world.

Early on in his essay Healy had said that my case for the Fourteenth Amendment was "deeply flawed" because, in part, it depended on "a Panglossian view of judges and federal supremacy." I believe I've answered the federal supremacy part: under the Fourteenth Amendment, properly understood, federal supremacy is not as vast as Healy has made it out to be. Regarding the judges part — and the "properly understood" caveat — there's no question that the amendment deserves better judging than it's had over the past 130 years, starting with the *Slaughterhouse Cases*. But as already noted, it's not the Fourteenth Amendment alone that has suffered at the hands of less than well-trained or well-intentioned judges. Thus, is it the Fourteenth Amendment alone that Healy would abandon? Perhaps it is the Constitution itself.

Regardless of the answer to that, the problem of errant judges is tied in part to the political process through which judges are selected. But that amounts to saying that the issues are rooted in the larger culture, which is also true. And the issues are rooted especially, as Healy notes, in that part of the culture that trains future judges, the law schools of the nation. That is not a uniform world, to be sure, but there is no question that it leans considerably in one direction, especially at the nation's more elite law schools. And Healy is right also in his contention that among many in those schools the classical theory of rights that stands behind

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the Constitution, and the Fourteenth Amendment in particular, "has the intellectual status of phrenology and creation science." "To which a good libertarian can answer," as Healy says in a closely related context, "'So what?'" Intellectual fashions come and go, especially in law schools, even the best of which are still trade schools. The beauty of law school is that, if you keep your nose clean, you'll eventually get out — into the real world. There you find that certain simple truths, like those in the Declaration of Independence, keep coming back as true. The theory of natural rights is not an arcane mystery, accessible only to the initiated. For centuries it has been the stuff of ordinary common law judges. Today, there are a number of judges who are rediscovering those simple truths. Given the larger winds in the culture, they are often all that stand between us and tyranny. Given the vagaries of those winds, I want them to continue to stand until their numbers can be swelled by the Gene Healys of the world who are asking questions that weren't even asked a decade or two ago. By my reading, the winds are blowing in the right direction. ❑