

University of Pennsylvania Carey Law School

## Penn Law: Legal Scholarship Repository

---

Faculty Scholarship at Penn Law

---

2011

### Plenary No Longer: How the Fourteenth Amendment "Amended" Congressional Jurisdiction-Stripping Power

Maggie Blackhawk

*University of Pennsylvania Carey Law School*

Follow this and additional works at: [https://scholarship.law.upenn.edu/faculty\\_scholarship](https://scholarship.law.upenn.edu/faculty_scholarship)



Part of the Anthropological Linguistics and Sociolinguistics Commons, Constitutional Law Commons, Courts Commons, Fourteenth Amendment Commons, Jurisdiction Commons, Legal History Commons, Public Law and Legal Theory Commons, Semantics and Pragmatics Commons, and the Supreme Court of the United States Commons

---

#### Repository Citation

Blackhawk, Maggie, "Plenary No Longer: How the Fourteenth Amendment "Amended" Congressional Jurisdiction-Stripping Power" (2011). *Faculty Scholarship at Penn Law*. 1892.

[https://scholarship.law.upenn.edu/faculty\\_scholarship/1892](https://scholarship.law.upenn.edu/faculty_scholarship/1892)

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact [PennlawIR@law.upenn.edu](mailto:PennlawIR@law.upenn.edu).

# PLENARY NO LONGER: HOW THE FOURTEENTH AMENDMENT “AMENDED” CONGRESSIONAL JURISDICTION- STRIPPING POWER

Maggie McKinley\*

*This Note proposes a solution to the long-standing debate among federal courts scholars as to where to draw the limits of congressional power to strip appellate jurisdiction from the Supreme Court and to strip original jurisdiction from the lower federal courts. Although the Supreme Court has rarely addressed the possibility of limitations on congressional jurisdiction-stripping power, the few determinative cases to go before the Court reveal an acceptance of the orthodox view of plenary power. Proponents of the orthodox view maintain that state courts, bound to hear constitutional claims by their general jurisdictional grant and to enforce the Constitution by the Supremacy Clause, would suffice as arbiters of federal constitutional rights. In contrast, this Note argues that ratification of the Fourteenth Amendment—which, as the Supreme Court acknowledged in *Fitzpatrick v. Bitzer*, implicitly amended the Eleventh Amendment—similarly amended Article III, Section 1, and the Exceptions Clause, withdrawing Congress’s plenary jurisdiction-stripping power for claims brought to vindicate Fourteenth Amendment rights.*

*Through an analysis of original intent behind the Fourteenth Amendment, this Note explores the undertheorized field of how amendments to the Constitution—an undoubtedly multigenerational text—alter the reach and meaning of the original document. The framers of the Fourteenth Amendment, an often forgotten second major framing generation, drafted and ratified the amendment just after our country emerged from its bloodiest domestic war, long after the establishment of an extensive system of federal courts and during a time of great suspicion of state forums. An examination of major Reconstruction Acts and their legisla-*

---

\* Law Clerk to the Honorable James Ware, Chief Judge of the Northern District of California; J.D., Stanford Law School, 2010. I am forever grateful to Janet Alexander for her patient, thoughtful, and vigilant mentorship throughout the development of this topic and beyond; to Pamela Karlan for profoundly helpful advice early on, as well as for her endless ability to inspire; and to Michael Caesar, Mindy LeVu, Elisabeth Oppenheimer, and the *Stanford Law Review* team for their comments and edits. Also, a very special thanks to my Native American Law Students Association cohort and to the Redman family of the Wind River Reservation for teaching me the most important lessons. Everything good in this Note I attribute to those named above. All mistakes are my own.

*tive history, alongside a textual analysis of the Fourteenth Amendment that incorporates pragmatic context, reveals clear intent that ratification of the Fourteenth Amendment would necessarily limit any plenary jurisdiction-stripping power vested in Congress at the Founding.*

INTRODUCTION.....	1214
I. REVIEW .....	1219
A. <i>The Orthodox View</i> .....	1219
B. <i>Modifications to the Orthodox View</i> .....	1220
1. <i>Internal constraint theories</i> .....	1220
2. <i>External constraint theories</i> .....	1220
C. <i>External Constraints and the Fourteenth Amendment</i> .....	1221
II. THE FOURTEENTH AMENDMENT’S LIMITATION ON CONGRESSIONAL JURISDICTION-STRIPPING POWERS .....	1222
A. <i>The Fourteenth Amendment’s “Implicit” Amendment</i> .....	1222
B. <i>The Fourteenth Amendment and Framing Intent</i> .....	1224
1. <i>The Civil Rights Act of 1866</i> .....	1225
2. <i>The Fourteenth Amendment</i> .....	1227
3. <i>The Ku Klux Klan Act of 1871</i> .....	1230
C. <i>A (Con)textualist Analysis</i> .....	1232
1. <i>An intertextualist interpretive framework</i> .....	1232
2. <i>Intertextualism and constitutional amendment</i> .....	1236
3. <i>The extrasituational context of the Fourteenth Amendment</i> .....	1237
4. <i>Contextualization cues of the Fourteenth Amendment</i> .....	1238
5. <i>Prior texts: the Bingham Amendment</i> .....	1239
6. <i>Shifted context, shifted meaning: “No State shall”</i> .....	1240
7. <i>The factual presupposition of lower federal courts</i> .....	1241
CONCLUSION.....	1242

#### INTRODUCTION

On March 15, 2011, Representative Ron Paul of Texas reintroduced the Sanctity of Life Act of 2011.<sup>1</sup> This was the fourth time Representative Paul had introduced this bill to the House in the last six years.<sup>2</sup> At each introduction the content of the Sanctity of Life Act has remained the same. According to its summary: “[H]uman life shall be deemed to exist from conception, without regard to race, sex, age, health, defect, or condition of dependency; and . . . the term ‘person’ shall include all [such] human life . . . .”<sup>3</sup> Moreover, the bill “recognizes that each State has the authority to protect lives of unborn children re-

1. H.R. 1096, 112th Cong. (2011).

2. See Sanctity of Life Act of 2009, H.R. 2533, 111th Cong. (2009); Sanctity of Life Act of 2007, H.R. 2597, 110th Cong. (2007); Sanctity of Life Act of 2007, H.R. 1094, 110th Cong. (2007); Sanctity of Life Act of 2005, H.R. 776, 109th Cong. (2005); see also Sanctity of Life Act of 1995, H.R. 2087, 104th Cong. (1995) (same bill introduced by Representative Steve Stockman).

3. H.R. 1096, § 2(b)(1)(A)-(B).

May 2011]

## JURISDICTION-STRIPPING POWER

1215

siding in the jurisdiction of that State.”<sup>4</sup> It may seem confusing that Representative Paul would expend any energy introducing a bill—numerous times, in fact—that is in fundamental conflict with a well established federal right: the Fourteenth Amendment due process right to an abortion, as defined in *Roe v. Wade*<sup>5</sup> and affirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>6</sup> Should Congress pass the bill and should a state attempt to enact legislation pursuant to its new federal authority “to protect the lives of unborn children” by banning abortion in violation of *Roe v. Wade*, the state legislation would be reviewed and overturned as unconstitutional, rendering Representative Paul’s efforts entirely futile. The answer to the puzzle of why Representative Paul would introduce such seemingly toothless legislation lies in the second half of the bill. In addition to defining the point at which human life begins as at conception and granting states the authority to protect that life, the bill also includes provisions to limit federal court jurisdiction:

Sec. 3. Limitation on Appellate Jurisdiction.

....

... [T]he Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any case arising out of any statute, ordinance, rule, regulation, practice, or any part thereof, . . . on the grounds that such statute, ordinance, rule, regulation, practice, act, or part thereof—

- (1) protects the rights of human persons between conception and birth; or
- (2) prohibits, limits, or regulates—
  - (A) the performance of abortions; or
  - (B) the provision of public expense of funds, facilities, personnel, or other assistance for the performance of abortions.

....

Sec. 4. Limitation on District Court Jurisdiction.

....

... Notwithstanding any other provision of law, the district courts shall not have jurisdiction of any case or question which the Supreme Court does not have jurisdiction to review under section 1260 of this title.<sup>7</sup>

This provision invokes Congress’s power under Article III, Section 1,<sup>8</sup> and the Exceptions Clause<sup>9</sup> to limit the jurisdiction of lower federal courts and the appellate jurisdiction of the Supreme Court, commonly known as “jurisdiction stripping.” The bill transparently attempts to limit the federal due process right to an abortion by endorsing state legislation in violation of that right and concurrently disallowing federal review to vindicate deprivation of that right.

Hypothetically, should such a bill become law, a claimant who wished to challenge state legislation depriving her of her federal right to an abortion

4. *Id.* § 2(b)(2).

5. 410 U.S. 113 (1973).

6. 505 U.S. 833 (1992).

7. H.R. 1096, §§ 3-4.

8. U.S. CONST. art. III, § 1.

9. *Id.* art. III, § 2, cl. 2.

would be barred from bringing a § 1983 claim—or other action—in federal court. However, she would still be allowed access to a state forum. State courts, like federal courts, are equally bound under the Supremacy Clause to apply all federal law, including Supreme Court precedent. While these forums may differ slightly in procedure and geography, the federal rights would presumably remain the same regardless of where the federal claim was brought. Yet, if these forums are truly equal under the Supremacy Clause, why would Representative Paul seek to introduce a bill that purports to limit a federal right by denying access to a federal forum? The answer is simple. The proposed legislation capitalizes on the belief that a state court, with its deeper local attachments and accountability, might not continue to enforce the federal right in the absence of federal review. If that belief is correct, without access to a lower federal court or appellate review in the Supreme Court, claimants would be left without access to a forum that would enforce their federal right against unconstitutional state laws, allowing the unconstitutional laws to stand.<sup>10</sup>

In March of 2011, the Sanctity of Life Act of 2011 was referred to the House Committee on the Judiciary, where it will likely sit until expiration.<sup>11</sup> This fourth effort at passage will likely be as unsuccessful as the first three. But the question remains: is it possible that such a flagrant attempt at circumventing federal rights could ever become law?

Under Article III, Section 1, Congress was designated with the power of creating lower courts “from time to time”;<sup>12</sup> and under Section 2, commonly known as the Exceptions Clause, Congress was granted the right to create exceptions and regulations pertaining to Supreme Court appellate jurisdiction.<sup>13</sup> The Supreme Court has yet to fully interpret this constitutional text and the scope of its grant of congressional power to control federal jurisdiction. However, the orthodox view, sprouted primarily from the academy over the last forty years, has interpreted these provisions to mean that Congress’s power to strip original jurisdiction from lower federal courts and appellate jurisdiction from the Supreme Court is plenary and virtually limitless.<sup>14</sup>

This Note proposes one possible solution to the long-standing concern of federal courts scholars as to where to draw the limits of congressional power to strip appellate jurisdiction from the Supreme Court and to strip original jurisdiction from the lower federal courts. Although the Supreme Court has rarely addressed the possibility of limitations on congressional jurisdiction-stripping

---

10. Indeed, some studies have further shown that doubts over federal-state court parity in the enforcement of federal constitutional rights may be valid. See Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

11. See *Bill Summary & Status*, LIBR. CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:H.R.1096:@@L> (last visited Apr. 10, 2011) (listing the various referrals of the bill in 2011).

12. U.S. CONST. art. III, § 1.

13. See *id.* art. III, § 2, cl. 2.

14. See *infra* Part I.A.

power, the few determinative cases to go before the Court reveal an acceptance of the orthodox view of plenary power.<sup>15</sup> Proponents of this view maintain that state courts, bound to hear constitutional claims by their general jurisdictional grant and to enforce the Constitution by the Supremacy Clause, would suffice as arbiters of federal constitutional rights. In his famous Dialogue analyzing jurisdiction stripping, Hart explains: “In the scheme of the Constitution, [the state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones.”<sup>16</sup> In response to an inquiry on whether the Constitution would guarantee a federal forum for vindication of federal rights, rather than leave the matter to a state forum, Hart exclaims:

It’s hard to see how the answer can be anything but no, in view of cases like *Sheldon v. Sill* and *Lauf v. E. G. Shinner & Co.*, and in view of the language and history of the Constitution itself. Congress seems to have plenary power to limit federal jurisdiction when the consequence is merely to force proceedings to be brought, if at all, in a state court.<sup>17</sup>

In contrast, this Note argues that the Fourteenth Amendment—an undoubted alteration of the original document in many ways<sup>18</sup>—also amended Article III, Section 1, and the Exceptions Clause, withdrawing Congress’s plenary power to strip jurisdiction from the lower federal courts and appellate jurisdiction from the Supreme Court over claims brought pursuant to the Fourteenth Amendment. Through an analysis of the original intent behind the Fourteenth Amendment, this Note explores the undertheorized field of how amendments to the Constitution affect the meaning of the original document,<sup>19</sup>

---

15. See, e.g., *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869).

16. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953).

17. *Id.* at 1363-64 (footnotes omitted) (citing *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323 (1938)).

18. See *infra* Part II.A (discussing the Fourteenth Amendment’s implicit amendment of the Eleventh Amendment and the principles of state sovereign immunity on which it stands).

19. There is one exception to this dearth of scholarly exploration into constitutional amendments’ effects on jurisdiction-stripping power, a 2008 article by Joseph Blocher exploring the First Amendment’s impact on the Exceptions Clause. See Joseph Blocher, *Amending the Exceptions Clause*, 92 MINN. L. REV. 971, 1016-23 (2008). In his article, Blocher invokes Akhil Amar’s notion of “intratextualism” to explore whether the First Amendment may have implicitly amended the Exceptions Clause. *Id.* at 998, 1017. Most importantly, through this analysis Blocher advocates for a “thickening [of] the understanding of ‘external constraints’ more generally,” with deeper reflection on how later amendments ought to impact interpretations of original constitutional text. *Id.* at 1003. In his First Amendment analysis, Blocher argues that the same widely accepted implicit logical and textual connection between the First Amendment and Article I, limiting congressional power to pass legislation in contravention of the right to freedom of speech, could extend to Article III. See *id.* at 1017. The Exceptions Clause is an additional constitutional grant of legislative power, and Blocher finds that the implicit First Amendment restriction on Article I legislative power would logically apply to all grants of legislative power throughout the Constitution. See *id.* This same analysis, Blocher posits, could be fruitful for future exploration into other amendments and their impact on the Exceptions Clause. See *id.* at 1023.

and through this analysis also defines the limits added by a second framing generation to restrict the earlier broad grant of jurisdiction-stripping power.

Part I of this Note provides a short overview of the debate surrounding Congress's jurisdiction-stripping power. Part I.A reviews the most commonly held and broadly supported "orthodox view" that congressional jurisdiction-stripping power is plenary. Part I.B reviews the two primary modifications to the orthodox view suggested by the scholarly literature, internal and external constraint theories. Finally, Part I.C explores external constraint theories derived from the Fourteenth Amendment, particularly a theory proffered by Laurence Tribe.

Part II presents three arguments in support of the theory that the Fourteenth Amendment amended Congress's power to strip jurisdiction from the federal courts, so that this power is no longer truly plenary. Part II.A presents an overview of how the Fourteenth Amendment has already been widely accepted as implicitly amending other parts of the Constitution. In particular, the Supreme Court has acknowledged the effects of the Fourteenth Amendment on the Eleventh Amendment in its assumed abrogation of state sovereign immunity and broad shift of federal-state power.<sup>20</sup> Part II.B describes the framing intent behind the passage of the Fourteenth Amendment. This second major framing generation drafted just after our country emerged from its bloodiest domestic war, during Reconstruction, long after the establishment of an extensive system of federal courts and during a time of great suspicion of state forums. Part II.C presents a textual argument supporting the notion that the Fourteenth Amendment was intended as a limit on Congress's plenary power to entrust vindication of constitutional rights solely to state courts. By incorporating context alongside the text of the Fourteenth Amendment, Part II.C argues that the framing generation assumed the availability of federal judicial oversight and intended the amendment as an obligation on both the legislature *and judiciary* to oversee state action.

---

Yet Blocher finds the Fourteenth Amendment particularly problematic as a source for Exceptions Clause amendment. In fact, his article "purposefully avoided using the Fourteenth Amendment as a point of departure" for several reasons. *Id.* First, it avoids concerns over complications caused by the incorporation doctrine and how the doctrine would impact analysis of an earlier amendment to the original Constitution. *See id.* Second, Blocher finds troublesome the notion that the Fourteenth Amendment, with its dramatic expansion of congressional power under Section 5, could also serve as a limitation on congressional power granted elsewhere in the Constitution. *See id.* at 1023-24. Third, the Fourteenth Amendment also poses a textualist concern, in that the language used to grant rights is vague and ambiguous as contrasted with the clear and explicit grant to Congress to create exceptions to jurisdiction under the Exceptions Clause. *See id.* at 1024. As a consequence, Blocher argues that the Fourteenth Amendment would be "susceptible to arguments that the clear language of the Exceptions Clause must trump penumbras or emanations from elsewhere." *Id.* Unlike the Fourteenth Amendment, Blocher proposes, the First Amendment—presumably along with others more like it—offers an example of specific text amending specific text. *See id.*

20. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

## I. REVIEW

A. *The Orthodox View*

Under the traditional or orthodox view, congressional power to strip appellate jurisdiction from the Supreme Court and original jurisdiction from the lower federal courts is plenary. Article III grants Congress the power “from time to time [to] ordain and establish” inferior federal courts.<sup>21</sup> As the Constitution provides that Congress’s decision to create lower federal courts is optional, the orthodox view argues that the Framers therefore intended to leave the allotment of jurisdiction over federal claims entirely in congressional hands. Should Congress choose to create lower federal courts and grant them jurisdiction over such claims, then federal rights can be vindicated in a federal forum. However, Congress could abstain from creating lower courts entirely, and leave protection of federal rights to state trial courts, without violating the Constitution.

Further, Article III describes the Supreme Court’s arising under appellate jurisdiction as extending “both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”<sup>22</sup> The power to create “Exceptions” has been interpreted broadly by scholars of the orthodox view. As Wechsler describes:

There is, to be sure, a school of thought that argues that ‘exceptions’ has a narrow meaning . . . . I see no basis for this view and think it antithetical to the plan of the Constitution for the courts—which was quite simply that the Congress would decide from time to time how far the federal judicial institution should be used . . . .<sup>23</sup>

A plain text reading of Article III in isolation tends to support Wechsler’s interpretation. In the few cases on this issue that have gone before the Supreme Court, the Court has nodded affirmatively toward the broad orthodox view of the Exceptions Clause.<sup>24</sup>

Together, Article III, Section 1, and the Exceptions Clause have been interpreted as a broad grant of legislative power to withdraw the Supreme Court’s appellate jurisdiction and both original and appellate jurisdiction from the lower federal courts.<sup>25</sup> The orthodox view of plenary congressional power to strip jurisdiction is limited only by the command of *Marbury v. Madison* that when jurisdiction is exercised, the court must apply the Constitution.<sup>26</sup>

---

21. U.S. CONST. art. III, § 1.

22. *Id.* art. III, § 2, cl. 2.

23. Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965).

24. *See, e.g., Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850).

25. *See* Hart, *supra* note 16; Wechsler, *supra* note 23.

26. *See* 5 U.S. (1 Cranch) 137 (1803); *see also* *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872) (holding jurisdiction-stripping legislation unconstitutional on the grounds

## B. *Modifications to the Orthodox View*

The orthodox view has inspired extensive debate and commentary, a summary of which is far beyond the scope of this Note. But one particular line of debate has engendered growing support. Scholars of this view argue that the Constitution itself, either from within Article III or in the balance of the document, serves to constrain congressional power to pass and apply jurisdiction-stripping legislation. This line of debate can be divided into two primary areas of thought: internal constraint theorists, who propose that elements internal to Article III serve to constrain jurisdiction-stripping power; and external constraint theorists, who propose that elements external to Article III located within the balance of the document serve to constrain Congress.

### 1. *Internal constraint theories*

Internal constraint theorists proffer restrictions on Article III jurisdiction-stripping power inherent to the text of Article III. Two primary areas of thought constitute the majority of internal constraint theories: first, a nontextual argument regarding the appellate jurisdiction of the Supreme Court, termed the “essential functions” theory, proposing that the Exceptions Clause legislative power must not be so broad as to swallow Article III’s judicial architecture;<sup>27</sup> and second, a textual argument regarding lower federal court jurisdiction, developed by Justice Story and reinvigorated by Akhil Amar, proposing that the framing intent behind the use of “all” in Article III implied that “all” claims must be vested in the judiciary somewhere.<sup>28</sup> While the Supreme Court has indicated some support of the orthodox view in the few jurisdiction-stripping cases that have gone before it, it has yet to acknowledge either of the internal constraint theories.

### 2. *External constraint theories*

External constraint theorists proffer that legislators and courts are still bound to interpret and apply the balance of the Constitution even when exercising broad power under the Exceptions Clause and Article III. Theorists within the external constraint camp are numerous.<sup>29</sup> However, a strong theme has

---

that it based federal jurisdiction on the merits of the case, thus driving the outcome of the decision).

27. See Hart, *supra* note 16.

28. See *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 329-30 (1816); Akhil Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205, 238-42 (1985).

29. See, e.g., Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143 (1982); Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45

emerged within the scholarship. Specifically, external constraint theorists posit that any jurisdiction-stripping legislation must be subject to the same constitutional limitations placed on any type of legislation: Congress must interpret the Constitution to determine its power and limitations to enact legislation, and the judiciary reviews the legislation and its application for violations of constitutional rights and principles.<sup>30</sup> If the legislation, jurisdiction stripping or otherwise, violates another constitutional value—free speech, for instance—then it would be deemed unconstitutional.

### C. *External Constraints and the Fourteenth Amendment*

This Note is original in developing a theory that the Fourteenth Amendment amended or withdrew congressional jurisdiction-stripping power for Fourteenth Amendment rights. However, a classic theory of external constraints on the plenary jurisdiction-stripping power also touched on the Fourteenth Amendment. Laurence Tribe is credited with establishing the most broadly supported view of external constraints as derived from the Fourteenth Amendment. Tribe argues that equal protection strict scrutiny should be applied to any jurisdiction-stripping legislation where a statute has “specific rights . . . singled out for special sacrifice.”<sup>31</sup> Tribe’s concern is that unequal treatment of particular federal rights “sends a clear signal to hostile state and local officials and makes far more difficult the task of finding a neutral, close-fitting justification.”<sup>32</sup>

However, Tribe’s concern stops short of forbidding Congress to pass jurisdiction-stripping legislation that forecloses access to any federal forum for all rights established by the Fourteenth Amendment, so long as Congress does not selectively target certain rights for exclusion from federal forums.

This is not to say that Congress is necessarily compelled to provide federal protection for fourteenth amendment rights. If Congress were to withdraw the federal shield altogether or nearly so, repealing large segments of the corpus of civil or criminal law that Congress had previously erected upon section 8 of article I and section 5 of the fourteenth amendment, it seems unlikely that the resulting jeopardy to any given right would be as great as in the case where specific rights were singled out for special sacrifice.<sup>33</sup>

---

(1975); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

30. See Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 916-22 (1982); Charles E. Rice, *Congress and the Supreme Court’s Jurisdiction*, 27 VILL. L. REV. 959, 981-84 (1982).

31. Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 145 (1981).

32. *Id.* at 145-46 (footnote omitted).

33. *Id.* at 145 (footnote omitted).

Unlike the Tribe view, this Note proposes that the Fourteenth Amendment, in amending the Constitution, withdrew the plenary grant of congressional jurisdiction-stripping power. This withdrawal of legislative power would not merely restrict congressional power in the traditional sense, as Tribe suggests, by requiring that jurisdiction-stripping legislation be reviewed under the same Fourteenth Amendment standards as other legislation. Rather, this Note proposes that after the ratification of the Fourteenth Amendment, Congress would overstep its constitutional legislative power if it disallowed a claimant access to a federal forum—or federal review—to vindicate the deprivation of Fourteenth Amendment rights. Unlike Tribe, this Note argues that Congress would not merely be limited by the Fourteenth Amendment from passing legislation stripping jurisdiction targeting specific rights, but it would not be able to strip jurisdiction from federal forums at all for any right established by that amendment.

## II. THE FOURTEENTH AMENDMENT'S LIMITATION ON CONGRESSIONAL JURISDICTION-STRIPPING POWER

### A. *The Fourteenth Amendment's "Implicit" Amendment*

A threshold question is, of course, how the Fourteenth Amendment could have amended the Exceptions Clause and Article III, Section 1, if the text of the amendment makes no reference whatsoever to federal court jurisdiction. In accord with the principle that the genre of constitutional amendment usually calls for concise drafting, many later amendments have been commonly accepted as implicitly amending prior text. Section 2 of the Fourteenth Amendment is one such example: Section 2 dictated that the number of congressmen assigned to a state should be based on population statistics, "counting the whole number of persons in each State, excluding Indians not taxed."<sup>34</sup> In so doing, Section 2 implicitly amended Article I, Section 2, simply by overwriting its provision that representatives should be apportioned based on population statistics that counted free men as whole people, but counted slaves as three-fifths of a person.<sup>35</sup> Another example of an implicit amendment involving the Fourteenth Amendment, one recognized by the Supreme Court in *Fitzpatrick v. Bitzer*,<sup>36</sup> was the effect of Section 5 of the Fourteenth Amendment on the Eleventh Amendment.

In *Fitzpatrick*, the Supreme Court addressed whether the Fourteenth Amendment—and the shift of federal and state power inherent in its passage—amended the Eleventh Amendment and the principles of state sovereign immunity for which it stands.<sup>37</sup> Justice Rehnquist, writing for the Court, wrestled

---

34. U.S. CONST. amend. XIV, § 2.

35. *See id.* art. I, § 2.

36. 427 U.S. 445 (1976).

37. *See id.* at 448.

with the question of “whether, as against the shield of sovereign immunity afforded the State by the Eleventh Amendment, Congress has the power to authorize federal courts to enter [money damages] against the State as a means of enforcing the substantive guarantees of the Fourteenth Amendment.”<sup>38</sup> An earlier case, *Edelman v. Jordan*,<sup>39</sup> had elaborated the contours of the Eleventh Amendment, and the Second Circuit had held that *Edelman* meant that sovereign immunity would bar money damages against a state.<sup>40</sup> The Court disagreed and reversed.<sup>41</sup>

Distinguishing *Edelman*, the Court held, was the fact that the present statute at issue (Title VII) was passed pursuant to Congress’s authority under Section 5 of the Fourteenth Amendment to enforce the amendment by appropriate legislation.<sup>42</sup> “[As] intended by the Framers,” the Civil War Amendments functioned as an expansion of federal “general government” power with a “corresponding diminution of the governmental powers of the States.”<sup>43</sup> Thus, as described by the Court, the Fourteenth Amendment had “carved” the right to immunity from suit pursuant to Section 5 legislation out of the states’ prior sovereign immunity.<sup>44</sup>

Consequently, the Court held “that the Eleventh Amendment, and the principle of sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.”<sup>45</sup> The Section 5 enforcement power provided the means by which the substantive provisions of the Fourteenth Amendment, “which themselves embody significant limitations on state authority,” were legislatively enforced.<sup>46</sup> Thus, when acting pursuant to its Section 5 enforcement power, Congress could “provide for private suits against States or state officials which are constitutionally impermissible in other contexts.”<sup>47</sup>

The *Fitzpatrick* Court began to define the contours by which one amendment—particularly a transformative amendment—would come to limit the impact of an earlier amendment and the original constitutional document. This second generation of framers, the Court found, did not merely alter the original Constitution by appending particular text to the end of the document, but in fact

---

38. *Id.* (citation omitted).

39. 415 U.S. 651 (1974).

40. *See Fitzpatrick*, 427 U.S. at 448.

41. *See id.*

42. *See id.* at 452-53.

43. *Id.* at 455 (citing *Ex parte Virginia*, 100 U.S. 339, 346-48 (1880)).

44. *Id.*

45. *Id.* at 456 (citation omitted).

46. *Id.*

47. *Id.*

altered earlier provisions and supplanted the framing intent behind them.<sup>48</sup> While the literal text of the Fourteenth Amendment made no specific mention of sovereign immunity or its intended impact on the Eleventh Amendment and the original document, the Court still held that the logical impact of the states' ratification of the Fourteenth Amendment after the Civil War was a "corresponding diminution of the governmental powers of the States."<sup>49</sup> And the Court read this limit broadly to include diminution of sovereign immunity, in addition to the limits on state police power that were a consequence of newfound federal rights, despite the lack of any explicit textual reference.

This same logic extends to Article III, Section 1, and the Exceptions Clause. Ratification of the Fourteenth Amendment also amended the original constitutional document by reallocating power among the states, Congress, and individuals, and effected similar limitations on congressional jurisdiction-stripping power. The *Fitzpatrick* Court rightly focused on the specific impacts of the "reach of congressional power" under Section 5, as the case before the Court dealt with the constitutionality of federal remedial legislation passed to protect Fourteenth Amendment rights.<sup>50</sup> However, a review of the framing intent behind the Fourteenth Amendment reveals not merely the intent to expand the enforcement power of Congress with Section 5 for the sake of expanding the reach of the general government vis-à-vis the states, but the intent to empower the federal government to fulfill a newfound federal responsibility to oversee state action that might run afoul of newfound Section 1 substantive rights.<sup>51</sup>

### B. *The Fourteenth Amendment and Framing Intent*

As the *Fitzpatrick* Court described, the Reconstruction Amendments, passed in the wake of the Civil War, thoroughly restructured the federalist framework architected at the Founding. These amendments, beginning with the Thirteenth, "thus marked a radical break with the antebellum federal Constitution,"<sup>52</sup> and justifiably so, as in between these two framing generations sat a bloody war and a deeply divided nation. "What the bare text does not show is the jagged gash between Amendments Twelve and Thirteen—a gash reflecting the fact that the Founders' Constitution *failed* in 1861-65. The system almost

---

48. *See id.* ("But we think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." (citation omitted)).

49. *Id.* at 455 (citing *Ex parte Virginia*, 100 U.S. 339, 346-48 (1880)).

50. *Id.* at 447, 453.

51. As described in Part II.B, the framers envisioned a neutral federal forum for review of state action that allegedly violated the Fourteenth Amendment as a primary vehicle for federal oversight.

52. AKHIL REED AMAR, *AMERICA'S CONSTITUTION* 360 (2005).

died, and more than half a million people did die.”<sup>53</sup> This massive shift in context between framing generations also included a shift in perspective on states’ ability to enforce federal policy under the Supremacy Clause. New rights were created and, moreover, a deep distrust of state institutions motivated the second framing generation to couple these rights with protectionist jurisdictional grants allowing suits to be brought, and removed, into federal forums.

The Fourteenth Amendment, in particular, was ratified by the states on July 9, 1868.<sup>54</sup> The amendment was enacted, in part, in response to a concern that the Supreme Court would overturn the Civil Rights Act of 1866 as overstepping the Thirteenth Amendment’s newly created congressional enforcement power.<sup>55</sup> The Civil Rights Act of 1866, and the Fourteenth Amendment in turn, focused on confronting the Black Codes and other Southern efforts to roll back Reconstruction and reinvigorate the slave economy after the Civil War.<sup>56</sup> This Subpart describes the context in which the new framing generation drafted the Civil Rights Act of 1866, the Fourteenth Amendment, and the Ku Klux Klan Act, arguing that these major congressional acts of Reconstruction were informed by and grounded in distrust of state action against private citizens and state institutions’ ability to protect private citizens’ individual rights from harm. As such, every congressional step to protect federal individual rights was coupled with measures to vest protection of those rights in some federal institution or, at the very least, ensure federal oversight.

### 1. *The Civil Rights Act of 1866*

The Civil Rights Act of 1866 was entitled “An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication,”<sup>57</sup> and included a broad grant of federal citizenship rights for all born within the United States borders (except Native Americans) alongside two new causes of action to enforce these newfound civil rights.<sup>58</sup> Known today by 42 U.S.C. §§ 1981 and 1982, the Act granted private citizens broad rights to a “full and equal benefit of all laws and proceedings” regardless of “race and color,” including property rights and contract rights.<sup>59</sup> Citizens of any color, the Act stipulated, “shall have the same right, in every State and Territory in the United States” as those “enjoyed by white citizens.”<sup>60</sup> Further, the Act made it a mis-

---

53. *Id.*

54. *See* U.S. CONST. amend. XIV.

55. *See* WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 48 (1988).

56. *Id.*

57. Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27.

58. *See id.* §§ 1-3.

59. *Id.* § 1.

60. *Id.*

demeanor for any person “under color of any law, statute, ordinance, regulation, or custom” to deprive a citizen of the rights granted by the Act.<sup>61</sup>

The 1866 Act also included two jurisdictional grants with which to enforce these new rights, one to the lower federal courts and another to guarantee a final appeal to the Supreme Court. Section 3 of the Act provided:

That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act . . . .<sup>62</sup>

The grant of jurisdiction to the lower federal courts, of course, presupposed the existence of federal courts to which to grant jurisdiction; for this second major framing generation, these lower courts were no doubt in existence.<sup>63</sup> By 1866, Congress had exercised its optional power under Article III, Section 1, to “from time to time ordain and establish” such inferior courts, so they were now available. They were also necessary to give substance to the agenda of the Fourteenth Amendment’s framing generation. The distrust of state institutional ability to protect individual rights, not concern for national standardization, prompted movement toward federalizing these individual rights. As Senator Lane of Indiana described during the floor debates:

What are the objects sought to be accomplished by this bill? That these freedmen shall be secured in the possession of all the rights, privileges, and immunities of freemen; in other words, that we shall give effect to the proclamation of emancipation and to the constitutional amendment. How else, I ask you, can we give them effect than by doing away with the slave codes of the respective States where slavery was lately tolerated? One of the distinguished Senators from Kentucky [Mr. Guthrie] says that all these slave laws have fallen with the emancipation of the slave. That, I doubt not, is true, and by a court honestly constituted of able and upright lawyers, that exposition of the constitutional amendment would obtain.

But why do we legislate upon this subject now? Simply because we fear and have reason to fear that the emancipated slaves would not have their rights in the courts of the slave States. The State courts already have jurisdiction of every single question that we propose to give to the courts of the United States. Why then the necessity of passing the law? Simply because we fear the execution of these laws if left to the State courts. That is the necessity for this provision.<sup>64</sup>

---

61. *Id.* § 2.

62. *Id.* § 3.

63. *See infra* Part II.B.2 (discussing the Hotchkiss Amendment); *infra* Part II.C.7 (discussing the factual presupposition of lower federal courts on which the drafters of the Fourteenth Amendment relied).

64. CONG. GLOBE, 39th Cong., 1st Sess. 602 (1866) (statement of Sen. Lane) (alteration in original). There was also concern for the rights of Northern soldiers and retaliation

Yet concerns remained over whether the Civil Rights Act of 1866 would pass muster under a constitutional challenge before the Supreme Court, and legislators feared that it would be struck down for overstepping the Section 2 legislative enforcement grant of the Thirteenth Amendment.<sup>65</sup> Many believed that the protection of civil rights still rested within the province of each state, even after the passage of the Thirteenth Amendment.<sup>66</sup> In fact, “President Andrew Johnson vetoed the proposed act, in part, he contended, because the Constitution entrusted the protection of civil rights to the states.”<sup>67</sup> Although Congress was able to overcome the veto, residual concerns motivated the framing generation to take further steps to constitutionalize the spirit of the Civil Rights Act,<sup>68</sup> and with it federal protection of individual rights dependent on the assumption of an available federal forum and federal Supreme Court review.

## 2. *The Fourteenth Amendment*

Section 1 of the Fourteenth Amendment began its life in the “Bingham Amendment” as the heart of the congressional grant of enforcement power.<sup>69</sup> An early draft of the amendment proposed that Section 1 provide:

The Congress shall have power to make all laws which shall be necessary and proper to secure to citizens of each state all privileges and immunities of citizens in the several states (Art. IV, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment).<sup>70</sup>

---

against them in Southern state courts. *See, e.g., id.* at 1526 (statement of Rep. McKee) (“This [Act] simply protects them in the courts of the United States because the State courts have refused and do refuse to give that protection to these men.”); *id.* at 1527 (statement of Rep. Smith) (“When these Union officers were arrested and carried before the court at Alexandria, they pleaded that they were only obeying orders emanating from the President of the United States and officers in command over them. That the court overruled. The second plea they made was that an appeal should be taken to the Federal court. The judge ruled that there was but one appeal known in the Commonwealth of Kentucky, and that was to the supreme court of that State. They were therefore tried in that court. The jury, all of them secessionists, all of them rebels, some of them having been in the rebel army, fined those men . . . Now, sir, it is for the protection of such men that this bill should be passed.”).

65. The Thirteenth Amendment focused on abolishing slavery, and did not explicitly address individual rights: “Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation.” U.S. CONST. amend. XIII.

66. *See* NELSON, *supra* note 55, at 48.

67. *Id.*

68. *See id.* (“[T]he problems connected with the restoration of the South to the Union and the protection of freedmen’s rights called for yet another constitutional amendment. . . . Only some further constitutional change could resolve these matters in an acceptable way.”).

69. *See id.* at 49.

70. *Id.* at 50 (citing BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 61 (1914)).

Much of the analysis of Section 1 has focused on the ambiguous provisions encapsulated in its grant of rights—“life, liberty, or property”; “equal protection”; and “privileges and immunities.”<sup>71</sup> However, some interesting debate also surrounded the separation of “Congress shall have the power” from the grant of new substantive rights, which was later drafted separately as the Section 1 “No State shall” grant of individual rights and the Section 5 congressional enforcement grant.<sup>72</sup>

At the first session of the Thirty-Ninth Congress, on February 28, 1866, Representative Giles W. Hotchkiss of New York proposed a change to the drafted amendment.<sup>73</sup> Rather than place all power to enforce these new citizenship rights into the hands of Congress, Hotchkiss wanted to secure the Fourteenth Amendment rights in a form that would not be dependent on mere legislation.<sup>74</sup> As Representative Hotchkiss described:

Now, if the gentleman's object is, as I have no doubt it is, to provide against a discrimination to the injury or exclusion of any class of citizens in any State from the privileges which other classes enjoy, the right should be incorporated into the Constitution. It should be a constitutional right that cannot be wrested from any class of citizens, or from the citizens of any State by mere legislation.<sup>75</sup>

To this end, Hotchkiss proposed a shift in the wording of Section 1's grant to secure these rights “by a constitutional amendment that legislation cannot override,”<sup>76</sup> rather than the Bingham draft that left enforcement of these rights “to the caprice of Congress.”<sup>77</sup> In place of Section 1's “Congress shall have power,” Hotchkiss proposed the amendment provide “that no State shall discriminate against any class of its citizens; and let that amendment stand as a part of the organic law of the land, subject only to be defeated by another constitutional amendment.”<sup>78</sup> Representative Hotchkiss and others still believed that the primary enforcement mechanism behind Section 1 rights would be legislative action taken under Section 5.

Now, I desire that the very privileges for which the gentleman is contending shall be secured to the citizens; but I want them secured by a constitutional amendment that legislation cannot override. Then if the gentleman wishes to go further, and provide by laws of Congress for the enforcement of these rights, I will go with him.<sup>79</sup>

---

71. *See id.* at 51.

72. *See id.* at 55.

73. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866) (statement of Rep. Hotchkiss).

74. *See id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

However, Hotchkiss “wanted to be certain that the rights would be enforced by the judiciary even if Congress fell under Democratic control.”<sup>80</sup>

It was the wording proposed by Representative Hotchkiss that was drafted into Section 1 of the Fourteenth Amendment, which now provides:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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 law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>81</sup>

The first part of Section 1 constitutionalized the Civil Rights Act of 1866 grant of citizenship to all born within United States borders, overruling the Supreme Court’s decision in *Dred Scott*.<sup>82</sup> The second part constitutionalized the Hotchkiss proposal, removing the dependence of Fourteenth Amendment citizenship rights on congressional legislative action and allowing them to “stand as a part of the organic law of the land.”<sup>83</sup> The grant of legislative enforcement power was relocated into Section 5, which now provides separately: “The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”<sup>84</sup>

In accepting the “Hotchkiss Amendment,” the framing generation sought to take the Fourteenth Amendment’s text a step beyond the mere clarification of the power of Congress to pass the Civil Rights Act of 1866. This new text constitutionalized the rights and spirit of the Civil Rights Act of 1866, which itself leaned heavily on the Act’s second goal: to provide a neutral federal forum in which to enforce these new rights against state malfeasance and to ensure federal review of state court decisions addressing questions of federal constitutional rights.

The *Fitzpatrick* Court described Section 5’s impact on state power as a logical diminution of state sovereign immunity resulting inevitably from the enhancement of federal rights and federal enforcement of these rights.<sup>85</sup> In a similar vein, Section 1, with its grant of rights that “stand as a part of the organic law of the land,” would depend on the implicit assumption that federal review and a federal forum would be available. The framers of the Fourteenth Amendment were well aware that Southern state courts had been, and could be

---

80. NELSON, *supra* note 55, at 55.

81. U.S. CONST. amend. XIV, § 1.

82. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). Notably, even the citizenship grant of Section 1, intended to overrule *Dred Scott*, was a way, at least in part, to promote access to the federal courts. In the now-infamous decision of *Dred Scott*, the Court held that the lower federal appellate court did not have jurisdiction to hear *Dred Scott*’s case, since no descendant of a slave was a citizen for Article III purposes and, thus, no descendant could bring suit in federal court based on diversity jurisdiction. *Id.* at 403-05.

83. CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866) (statement of Rep. Hotchkiss).

84. U.S. CONST. amend. XIV, § 5.

85. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976).

in the future, one of the principal obstacles to the realization of equal rights for African Americans. They knew that to make those rights real, enforcement could not depend entirely on the state courts; a federal trial-level forum including federal Supreme Court review would have to be available. Section 1's very structure was adapted to prevent these rights from being stripped away at the "caprice of Congress" should a Southern majority form in Congress following the Southern states' readmission to the Union. If the plenary jurisdiction-stripping power remained unlimited after the ratification of the Fourteenth Amendment, then it would still have been left to the "caprice of Congress" to frustrate enforcement of these rights by leaving them in the hands of Southern state courts. It naturally follows that, to prevent such legislative caprice from essentially eviscerating the new amendment, the Fourteenth Amendment must have also amended Article III, Section 1, and the Exceptions Clause.

### 3. *The Ku Klux Klan Act of 1871*

Three years after the ratification of the Fourteenth Amendment, Congress enacted the Civil Rights Act of 1871, commonly termed the Ku Klux Klan Act.<sup>86</sup> The Act was entitled "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes."<sup>87</sup> Legislators proposed the Act at the first session of the Forty-Second Congress, partly in response to a recent message from President Grant describing growing racial unrest in the South after the Civil War:

A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt . . .<sup>88</sup>

In addition to committing acts of private violence against newly freed slaves, the Ku Klux Klan was also suspected of seizing control of many state institutions.<sup>89</sup>

---

86. Civil Rights Act of 1871, ch. 22, 17 Stat. 13.

87. *Id.*

88. CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871) (statement of President Grant).

89. *See* CONG. GLOBE, 41st Cong., 3d Sess. 579 (1871) (statement of Governor Holden) ("Unlike other secret political associations, they authorized the use of force, with deadly weapons, to influence the elections. . . . They were sworn to keep the secrets of the order, to obey the commands of the chief, to go to the rescue of a member at all hazards, and to swear for him as a witness, and acquit him as a juror. Consequently, grand juries in many counties frequently refused to find bills against the members of this Klan for the gravest and most flagrant violations of law; and when bills were found, and the parties were arraigned for trial witnesses, members of the order, would in nearly every case come forward, and, taking an oath before the court on the Holy Evangelists to tell the truth, the whole truth, and nothing but the truth, would swear falsely, and would thus defeat the ends of justice.").

May 2011]

## JURISDICTION-STRIPPING POWER

1231

The Ku Klux Klan Act was motivated by concern over capture of state institutions and the resulting inability to enforce the rule of law against racially motivated violence and reclaim control of state social institutions. During floor debates, Representative Coburn from Indiana explained:

Obviously the court of justice is the first instrument to be used in aid of the fourteenth amendment . . . . Whenever, then, there is a denial of equal protection by the State, the courts of justice of the nation stand with open doors, ready to receive and hear with impartial attention the complaints of those who are denied redress elsewhere.<sup>90</sup>

These “courts of the nation” were a better forum to enforce Fourteenth Amendment rights than state courts, according to Representative Coburn, because:

The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood; they will be able to rise above prejudices or bad passions or terror more easily.<sup>91</sup>

Enacted on April 20, 1871, the Act codified the new post-Civil War framing generation’s distrust of state institutions by providing a private cause of action against state actors for deprivation of Fourteenth Amendment rights. Specifically, the Act provided:

That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . .<sup>92</sup>

Moreover, this distrust did not stop at state enforcement and legislative institutions; it extended fully into distrust of state courts’ ability to apply state laws equally and in accord with federal constitutional rights as directed by the Supremacy Clause. The Act included a jurisdictional grant to the lower federal courts, which at the time lacked general federal question jurisdiction and were dependent entirely upon specific jurisdictional grants from Congress.<sup>93</sup> The jurisdictional grant allowed claims brought to vindicate the deprivation of federal constitutional rights “to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts.”<sup>94</sup>

---

90. CONG. GLOBE, 42d Cong., 1st Sess. 459 (1871) (statement of Rep. Coburn).

91. *Id.* at 460.

92. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13.

93. *See id.*

94. *Id.*

Through the enactment of the Ku Klux Klan Act, the general government fulfilled—at least in part—its responsibility to ensure that Section 1 of the Fourteenth Amendment, as well as the Supremacy Clause, would remain meaningful in the face of state defiance. While the original framing generation of 1787 may have believed that the state courts would function as proper enforcers of federal law, leaving lower federal courts as an optional creation for Congress, the framing generation of 1868 drafted in a very different world. As described, the intent and effect of the Fourteenth Amendment, like most amendments, was not merely to append rights and powers to the Constitution, which otherwise would simply remain unchanged. Rather, the amendment necessarily altered the reach and meaning of several portions of the original document.<sup>95</sup> The framers intended a similar alteration of Article III, Section 1, which considered the existence of lower federal courts optional, and the Exceptions Clause, which had previously allowed Congress to entrust state courts with the final arbitration of federal rights.

C. *A (Con)textualist Analysis*

1. *An intertextualist interpretive framework*<sup>96</sup>

There is also a textualist argument to be made in support of the Fourteenth Amendment amending congressional jurisdiction-stripping power. In his recent article, Joseph Blocher proposes a textualist approach in determining the effect of the First Amendment on the Exceptions Clause.<sup>97</sup> In particular, Blocher selects Akhil Amar's intratextualist framework<sup>98</sup> as his interpretive tool of choice.<sup>99</sup> Yet Blocher also concludes that the Fourteenth Amendment presents a challenging example for limitations on congressional jurisdiction-stripping power when applying a textualist approach.<sup>100</sup> However, this conclusion could merely be a result of an improper fit between Amar's intratextualist framework and amendments added much later than the First Amendment.

Amar's intratextualism proposes a method of constitutional interpretation that uses the document as a whole to derive the meaning of particular words and phrases.<sup>101</sup> His theory advises that, rather than attempting to derive meaning from isolated words or phrases at issue in a particular case, an interpreter

---

95. See *supra* Part II.A.

96. While intertextuality is the subject of significant academic discourse in the literary theory community, it is used here as a purely legal metaphor. See RICHARD A. POSNER, *LAW AND LITERATURE* 285 (3d ed. 2009) (noting that the "legal and literary-theoretical concepts of intertextuality have nothing in common but the word").

97. See Blocher, *supra* note 19, at 997-98; see also *supra* note 19.

98. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

99. See Blocher, *supra* note 19, at 998.

100. See *id.* at 1023-24.

101. See Amar, *supra* note 98, at 791-94.

should sift through the entire Constitution to define word use from use in similar phrases, and should seek out patterns and principles from similar drafting within the document.<sup>102</sup> However, Amar himself acknowledged the weaknesses of intratextualism when used as a solitary interpretive method and introduced it as merely another tool for the interpretive toolbox.<sup>103</sup> In particular, Amar found the method an improper fit for the interpretation of clauses that may present such commonalities on their face as to appear *in pari materia*, yet when changed circumstances between the two clauses may have rendered their meanings very different.<sup>104</sup> “Paired against the notion that the same words should mean the same thing (e.g., ‘shall be vested’) is the idea that sometimes the same words should mean different things because the overall context of two clauses is different (e.g., chameleon words).”<sup>105</sup> Amar writes that without the added benefit of complementary interpretive methods, intratextualism “may be too self-referential, even autistic”<sup>106</sup> and might fail to shed light on “*intertextual* links to other documents.”<sup>107</sup>

Rather, interpretation of constitutional clauses that span diverse contexts might be better served by an interpretive theory that incorporates context and thereby pragmatic meaning. Such an interpretive method can be found in the heart of Lawrence Lessig’s translation theory,<sup>108</sup> which introduced the linguistic field of pragmatics as a way of understanding constitutional text.<sup>109</sup> As Les-

---

102. *See id.*

103. *See id.* at 799-802.

104. *See id.*

105. *Id.* at 801 n.203.

106. *Id.* at 799. Autism, often referred to as a semantic-pragmatic disorder, is an apt metaphor for an interpretive method that focuses narrowly on the semantic content of a particular text and struggles with the contextualized or pragmatic connotations of a text. *Cf.* Soile Loukusa & Irma Moilanen, *Pragmatic Inference Abilities in Individuals with Asperger Syndrome or High-Functioning Autism*, 3 RES. AUTISM SPECTRUM DISORDERS 890 (2009); Elinor Ochs & Olga Solomon, *Practical Logic and Autism*, in A COMPANION TO PSYCHOLOGICAL ANTHROPOLOGY 140 (Conerly Casey & Robert Edgerton eds., 2004).

107. Amar, *supra* note 98, at 799.

108. *See* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) (outlining an interpretive theory that changed readings of constitutional text could remain faithful to the original meaning of the text, should an interpreter translate the original meaning in accord with circumstances that may have changed since the time of drafting). Translation theory provides a rare “progressive originalism,” as it synthesizes fidelity to framing intent with support for the most celebrated Warren Court decisions. In so doing, translation theory proffers one of the most plausible answers to the most vexing problem in constitutional interpretation: how to justify changed readings of fixed text over time without allowing the interpreter unbridled discretion to alter meaning. In this case, the theory is equally helpful in explaining changed readings between texts that have changed over time (here, amendments to the Constitution), and affords insight into how originalism could incorporate multiple layers of framing intent.

109. Lessig first introduced the importance of context, the pivotal question of the field of pragmatics, to the interpretation of constitutional text in his first publication on the subject. *See* Lawrence Lessig, *Plastics: Unger and Ackerman on Transformation*, 98 YALE L.J. 1173, 1174-75 (1989) [hereinafter Lessig, *Plastics*]. However, Lessig’s acknowledgement of

sig instructed, a constitutional interpreter should never ignore context.<sup>110</sup> “Between two moments of time, contextuality tutors us to track both the change in the token and the change in the context, so as to track the change in meaning.”<sup>111</sup>

However, the crux of such a contextualized method is the same struggle that defines the entire field of pragmatics: what ought to constitute “context”<sup>112</sup> within such an intertextual method? While Lessig’s definition of “context” is often drawn with a broad brush and is, at times, internally inconsistent,<sup>113</sup> some aspects are instructive here. Generally, Lessig defines “context” from the perspective of the author as “just that range of facts, or values, or assumptions, or structures, or patterns of thought that are relevant to an author’s use of words to convey meaning.”<sup>114</sup> Within the definition of “context,” Lessig defines a subcategory of the most significant contextual elements or “presuppositions,” which are “not just relevant to an author’s use, but are indeed relied upon by the author when using the text—relied upon in just the sense that had they been other than they were when the author first used these words, then the author would have used words other than she did.”<sup>115</sup> Presuppositions could be factual, including the economic and technological reality of the time, as well as

---

the field of pragmatics came much later. See Lawrence Lessig, *What Drives Derivability: Responses to Responding to Imperfection*, 74 TEX. L. REV. 839, 843 (1996).

110. See Lessig, *Plastics*, *supra* note 109, at 1176-77.

111. *Id.* at 1177.

112. “Context” is an important analytical notion at the heart of the linguistic field of pragmatics that was first introduced in 1923 by anthropologist Bronislaw Malinowski. See Bronislaw Malinowski, *The Problem of Meaning in Primitive Languages*, in *THE MEANING OF MEANING* 306 (John Constable ed., Routledge 2001) (1923). Malinowski proposed that language itself could not be understood without taking into consideration the larger sociocultural frameworks within which the language was communicated. *Id.* at 313. Further, Malinowski put forth the idea that language should be understood as something broader than its semantic content and should, instead, be studied as a mode of practical action embedded within activities. *Id.* at 325-26. The notion of context has been developed extensively since Malinowski’s introduction by theorists such as Ludwig Wittgenstein, who used context as a centerpiece for his “language games,” as well as by a long line of sociolinguists and linguistic anthropologists. See, e.g., LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* I, 11 (G.E.M. Anscombe trans., 3d ed. 1968) (“Here the term ‘language-game’ is meant to bring into prominence the fact that the *speaking* of language is part of an activity, or of a form of life.”).

113. Compare Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 412 (1995) [hereinafter Lessig, *Fidelity and Theory*] (describing context as something cognitively recognized, but merely socially accepted “when one person’s questions about it do not raise questions in the minds of others”), with Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 973-74 (1995) (analogizing context to Bourdieu’s practice theory or *habitus*).

114. Lessig, *supra* note 108, at 1178.

115. *Id.* at 1179-80 (emphasis omitted).

legal, primarily the current state of the doctrine.<sup>116</sup> Yet without the author present to clarify which facts she relied upon—as is the case with past framing generations—this definition of context is challenging to operationalize within an interpretive method.

For a more specific definition of context and pragmatic meaning, we must return to the field of pragmatics itself,<sup>117</sup> and particularly “ethnopragmatics” as developed by linguistic anthropologist Alessandro Duranti.<sup>118</sup> Much like Lessig’s definition of context, ethnopragmatics takes as a starting point the perspective of the participants.<sup>119</sup> Further, ethnopragmatics modifies the more traditional field of pragmatics, “the study of the relationship between linguistic expressions and certain aspects of the context of their use,”<sup>120</sup> with an empirical understanding of how language and meaning are local and embedded within activities.<sup>121</sup> Thus, any definition of context, which we use to make sense of the texts of others, “must take the lead from the way the participants themselves chose to do it.”<sup>122</sup>

Although ethnopragmatics was primarily designed to study “talk-in-action,”<sup>123</sup> some dimensions of context are equally applicable (or adaptable) to textual interpretation. The first dimension is focusing analysis on the perspective of the participants themselves.<sup>124</sup> This perspective could be captured either through firsthand reports regarding the particular text and the broader practices and values surrounding the text, or through “contextualization cues,”<sup>125</sup> cues used by the participants to highlight the particular context or frame within

116. See Lessig, *Fidelity and Theory*, *supra* note 113, at 453-72 (explaining the changed readings of the Constitution around the time of the New Deal as a consequence of changed factual and legal context).

117. Specifically, the field of so-called neo-Gricean pragmatics is particularly suited for an interpretive theory, as it would incorporate Amar’s intratextualist method of interpreting semantic meaning or “sentence-meaning” alongside other levels of meaning, including “speaker-meaning” or “utterance-token[]” meaning and “utterance-type[]” meaning. See STEPHEN C. LEVINSON, *PRAGMATICS* 17-19 (1983).

118. See ALESSANDRO DURANTI, *FROM GRAMMAR TO POLITICS* 11 (1994).

119. See *id.* at 168-69.

120. *Id.* at 11.

121. *Id.* at 167.

122. *Id.* at 169.

123. See *id.* at 11 (noting that primary methods should be ethnographic in order to analyze speech).

124. See Charles Goodwin & Alessandro Duranti, *Introduction* to *RETHINKING CONTEXT* 1, 4 (Alessandro Duranti & Charles Goodwin eds., 1992) (“What analysts seek to describe is not what they consider context, for example their map of the city in which the blind man finds himself, but rather how the subject himself attends to and organizes his perception of the events and situations that he is navigating through.”).

125. See John J. Gumperz, *Contextualization Conventions*, in *SOCIOLINGUISTICS* 139, 140 (Christina Bratt Paulston & G. Richard Tucker eds., 2003) (describing contextualization cues as the “constellations of surface features of message form” that are “the means by which speakers signal and listeners interpret what the activity is, how semantic content is to be understood and *how* each sentence relates to what precedes or follows”).

which an activity is taking place for each other.<sup>126</sup> The second dimension is the larger setting and activity within which the text is embedded (e.g., legislating in a representative democracy or amending the Constitution).<sup>127</sup> “[A]s a coin can mean one thing when offered to a storekeeper after taking a candy bar, and quite another when used to replace a missing piece in a game of checkers, so the same utterance can mean quite different things when it is embedded within different natural activities.”<sup>128</sup> The third dimension is the behavioral environment of the text or how attention is organized around the text, which could include the layout of the text and how the text is used.<sup>129</sup> The fourth dimension is the features of the text itself that are not properly described as semantic, such as the genre to which the text belongs (e.g., fiction, nonfiction, a menu in restaurant, the Bible).<sup>130</sup> Last is the extrasituational context of the text, including the larger sociocultural, geographic, and temporal context in which the text was created and intended to be read and applied.<sup>131</sup> This latter aspect of context is generally identified, for speech at least, through “ethnographic methods that could give us the richest documentation of the on-going situation and its temporal and spatial surroundings.”<sup>132</sup>

## 2. *Intertextualism and constitutional amendment*

Shifted context between constitutional amendments and the original text can be thought of as a function of the likelihood of changed circumstances simplified as time. The greater the amount of time between the original text’s drafting and when amendments were ratified, the greater the chances for changed meaning between two tokens—words or phrases—that may appear similar on their faces, and the greater the need to contextualize an interpretation of the text. For example, these two phrases may look identical devoid of context: “That’s great” and “That’s great.” However, the meaning behind the phrases can shift wildly based on context. If, one evening, a woman takes a bite of her dinner and says “That’s great,” we know that she means to affirmatively express her enjoyment of the food. However, if the same woman, running late for work the next morning, walks out to her car and notices she has a flat tire, her “That’s great” can take on a very different meaning. The more time that has passed between utterances (or clauses), the more likely it is that the context has

---

126. See Goodwin & Duranti, *supra* note 124, at 6-7.

127. See *id.*

128. *Id.* at 16-17.

129. See *id.* at 7.

130. See *id.* at 7-8.

131. See *id.* at 8-9.

132. ALESSANDRO DURANTI, LINGUISTIC ANTHROPOLOGY 272 (1997). Equally applicable is anthropologist Clifford Geertz’s notion of “thick description.” See CLIFFORD GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture*, in THE INTERPRETATION OF CULTURES 3 (1973).

shifted between texts and the greater the chance of misinterpreting meaning if text is analyzed without context.

Further, a later-added amendment could actually serve to implicitly transform earlier constitutional text. This process in interpretive theory is known as “synthesis.”<sup>133</sup> When interpreting a “multigenerational text”<sup>134</sup> like the U.S. Constitution, synthesis requires that “[l]ater parts . . . must be synthesized with earlier parts, and this synthesis can change the reading of what went before.”<sup>135</sup> An example of synthesis can be found in the sister case to *Brown v. Board of Education*.<sup>136</sup> In *Bolling v. Sharpe*, the Court held that the Fourteenth Amendment’s Equal Protection Clause equally limited the federal government’s segregation of public schools through the Fifth Amendment Due Process Clause.<sup>137</sup> In so doing, the Court found that the changed reading of the Fifth Amendment was not a consequence of changed text. Nowhere did the framers of the Fourteenth Amendment address public school segregation in the District of Columbia. Rather, “what *Bolling* describes is a changed reading that . . . must turn on implications drawn indirectly from a changed text.”<sup>138</sup>

In his article, Blocher applies Amar’s intratextualist framework aptly to the First Amendment, added just a few short years after the original document’s drafting.<sup>139</sup> However, Amar himself writes of the “jagged gash between Amendments Twelve and Thirteen,” a gash that the “bare text” of the Constitution does not reveal.<sup>140</sup> The Fourteenth Amendment, as a Reconstruction Amendment, is paradigmatic of changed context from the original document, demanding not only a comparison of word use intratextually, but an examination of word use within a dramatically altered context, intertextually. An intertextual interpretive method for such amendments would take into consideration the contextual distance between these texts when attempting to derive meaning from particular words or phrases used in separate parts of the document, and when discerning patterns and principles from highly disparate portions of the Constitution.

### 3. *The extrasituational context of the Fourteenth Amendment*

The Fourteenth Amendment’s framing generation, as described above, drafted and ratified at a time of deep distrust of state institutions, including state courts. In 1866, *Harper’s New Monthly Magazine* included a report by General

---

133. See Lessig, *Fidelity and Theory*, *supra* note 113, at 408 (“Within a tradition of written constitutions, a question of synthesis gets raised with every amendment.”).

134. *Id.* at 443.

135. *Id.* at 408.

136. 347 U.S. 483 (1954).

137. 347 U.S. 497, 500 (1954).

138. Lessig, *Fidelity and Theory*, *supra* note 113, at 410.

139. See Blocher, *supra* note 19, at 997-99.

140. AMAR, *supra* note 52, at 360.

Terry, a Unionist, about relations in Virginia after the Civil War.<sup>141</sup> General Terry reported that “[t]he feeling on the part of Secessionists toward Unionists, whether Virginians or from other States, is hostile. . . . I do not think Unionists are secure in the enjoyment of their rights in a Secession community; they could not rely upon the State Courts for justice.”<sup>142</sup> The attitude toward newly freed slaves was no better. General Terry warned that the military should not withdraw, otherwise the freedmen “would not receive from the people or from the courts protection for their rights of person and property, and they would be persecuted through the machinery of the courts as well as privately.”<sup>143</sup> Recalcitrance by state institutions was rampant, especially in their treatment of African Americans.<sup>144</sup> It was in the context of this distrust and the availability of federal forums to enforce federal policies that the Fourteenth Amendment’s text was drafted and ratified.

#### 4. *Contextualization cues of the Fourteenth Amendment*

Another method of capturing the relevant context for particular texts is to identify ways in which the participants, both drafters and ratifiers, mark the contextual frame within which they intend the text to be interpreted.<sup>145</sup> One such contextualization cue used by participants is to mark the text as intended for a particular audience. For example, if a father writes a letter to his child at college, telling the child to stop staying out late, we understand the father to mean that the child should exercise self-control. However, if the same father wrote a letter to the child’s dormitory manager, informing the manager that the child should stop staying out late, we understand the father to intend to impart an obligation on the manager to oversee the child, as well as intending the child to obey. The father’s intentions are rendered all the more plain if it is well known that the child has frequently disobeyed and the father does not trust the child to comply.

As applied to the Fourteenth Amendment and its effect on the congressional grants of jurisdiction-stripping power embodied in the Exceptions Clause and Article III, Section 1, an intertextualist interpretation would begin by noting a distinct contextualization cue inherent in the drafting of the Fourteenth Amendment, one much more salient in 1868 than 1787: that the U.S. Constitution is an inherently federal document. It is, in effect, a letter to the federal government, more akin to the father’s letter to the dormitory manager rather than to the child. As a document created to architect the powers and responsibilities of

---

141. *Monthly Record of Current Events*, 32 HARPER’S NEW MONTHLY MAG. 805, 808 (1866).

142. *Id.*

143. *Id.*

144. *See supra* Part II.B.

145. *See supra* note 125.

the federal government, drafting an amendment including the Section 1 text “No State shall” and “nor shall any State” bears a very distinct meaning—unlike if the same phrase were drafted into a state constitution. Hypothetically, and presumably with some assistance from the Guarantee Clause,<sup>146</sup> the drafters of the Fourteenth Amendment could have attempted to draft a provision obligating states to include the Section 1 language—barring violation of individual rights—into their own state constitutions. But the Reconstruction framing generation decided instead to direct the states through a federal document, creating a parallel obligation of federal oversight of individual rights. Of course the amendment addressed the states and prohibited violative state action through the Supremacy Clause; however, it also added to the responsibilities of the federal government to ensure that “[n]o State shall” burden those newfound federal rights.

##### 5. *Prior texts: the Bingham Amendment*

An intertextual interpretation of the Fourteenth Amendment would also take into consideration the impact of prior texts, particularly prior texts considered and rejected by the drafters of that clause. In this case, the framers of the Fourteenth Amendment drafted the phrase “No State shall” into a separate section from the Section 5 grant of congressional enforcement power, in a form that appears “self-executing.”<sup>147</sup> This distinctive drafting, read against the background of the original 1787 framing context—in which the Framers intentionally structured the document to architect a limited federal government and preserve residual states’ rights—could be read to mean that this second generation of framers merely intended the amendment to restrict state action in violation of the U.S. Constitution through the Supremacy Clause. However, this is where the change in context of an intertextual analysis becomes important. This phrase was drafted, and intentionally phrased as self-executing, at a time where distrust of state institutions’ willingness to follow federal directives was at its peak. Representative Bingham, when introducing the original amendment draft, described the necessity of the Fourteenth Amendment to the process of reconstruction in this era of deep distrust.<sup>148</sup> Bingham warned that “some [state] officials would violate their oaths as they have heretofore done and clothe themselves with perjury as with a garment in order to sweep away the rights of loyal men.”<sup>149</sup> He acknowledged that the army had successfully kept the Southern states in check thus far, but expressed deep concern that this would not be suf-

---

146. U.S. CONST. art. IV, § 4.

147. *See supra* Part II.B.2 (addressing the Hotchkiss Amendment).

148. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1094 (1866) (statement of Rep. Bingham); *see also* *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) (“As enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing.”).

149. CONG. GLOBE, 39th Cong., 1st Sess. 1094 (1866) (statement of Rep. Bingham).

ficient when the states were brought back into the Union.<sup>150</sup> “But the point I desire to make clear is, that unless you put them in terror of the power of your laws, made efficient by the solemn act of the whole people . . . , they may defy your restricted legislative power when reconstructed . . . .”<sup>151</sup>

The post-Civil War framing generation intended the amendment to have force against defiant state institutions and retain force if Southern states were to seize Congress once reconstructed—and logically so. If states were already rejecting the Supremacy Clause’s command to apply federal law to such a degree that the first Civil Rights Act of 1866 required protectionist federal jurisdiction grants, then the mere drafting of the same rights into a constitutional amendment—without the coextensive federal jurisdiction grants—would be no more helpful. The rights would still be left to the “caprice of Congress” to withdraw if Congress retained the power to foreclose all manner of federal court review. As Representative Hotchkiss described, the Fourteenth Amendment necessarily established “a constitutional right that cannot be wrested from any class of citizens, or from the citizens of any State by mere legislation.”<sup>152</sup> To this end, the Fourteenth Amendment must have also necessarily amended Article III, Section 1, and the Exceptions Clause grants of plenary legislative jurisdiction-stripping power, power that would wrest these rights from citizens by “mere legislation.”

#### 6. *Shifted context, shifted meaning: “No State shall”*

As Amar noted, an intratextual reading that focuses too narrowly on semantic meaning could often mistakenly correlate clauses that appear identical on their faces to the detriment of a potentially more accurate interpretation that includes an understanding of pragmatic meaning.<sup>153</sup> With an intertextual reading, even clauses that appeared on their face as *in pari materia* could be read as having distinct meanings should the context behind the two clauses have shifted between draftings. As previously outlined here, the difference in context between earlier constitutional text and the Fourteenth Amendment was vast. Particularly, in the context in which the amendment was drafted, if Congress retained full power under the Exceptions Clause and Article III, Section 1, to strip lower court jurisdiction and the Supreme Court’s appellate jurisdiction, it would have the ability to immediately render the prohibitive language of “No State shall” effectively toothless. Not only does this reading violate one of the central interpretive canons dictating that a plain meaning reading not render portions of the text meaningless, it would also leave this second highly transformative framing generation—one that was deeply concerned that Fourteenth

---

150. *See id.*

151. *Id.*

152. *Id.* at 1095 (statement of Rep. Hotchkiss).

153. *See Amar, supra* note 98, at 799-801.

May 2011]

JURISDICTION-STRIPPING POWER

1241

Amendment substantive rights withstand congressional caprice<sup>154</sup>—looking rather silly. An Amar-derived intratextual reading of the phrase “No State shall” against other seemingly identical uses of “No State shall”—as found in Article I, Section 10<sup>155</sup>—and similar methods of addressing constitutional obligations to a particular entity elsewhere in the Constitution—“Congress shall pass no law,” for instance—would argue that it merely placed an obligation on the states through the Supremacy Clause. However, the first generation of framers drafted at a time without the same distrust of state institutions, and when the U.S. Constitution was focused on merely defining the contours of the federal government.

In contrast, an intertextual reading of the directive “No State shall,” with the background of deep suspicion toward the willingness of states to implement federal policy, renders the meaning of this particular directive quite different. The Fourteenth Amendment directive of “No State shall” must be read against the suspicion of state institutions at the time of drafting. The framers, distrustful of the ability of the states to enforce federal policy, intended the phrase “No State shall” as a directive toward the federal government to police state action for violations of the Fourteenth Amendment. This policing would only have been secured through an amendment of Congress’s jurisdiction-stripping power. Without such a limitation, Congress could strip away the force of the Fourteenth Amendment and render its command of “No State shall” effectively meaningless by leaving the enforcement of such rights to hostile state courts.

### 7. *The factual presupposition of lower federal courts*

Finally, an intertextual interpretation would incorporate the background factual context that the drafters and ratifiers took for granted when formulating a constitutional clause. This is salient in the particular context of the Fourteenth Amendment’s drafting era. Article III, Section 1, states that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish,”<sup>156</sup> which has been interpreted within the orthodox view to mean that the Framers intended to give Congress the choice of whether to create lower federal courts and, accordingly, to give Congress unfettered power over their jurisdiction.<sup>157</sup> However, the orthodox view neglects the factual presuppositions that this later Fourteenth Amendment framing generation took for granted. Specifically, during their time, lower federal courts were already in existence. Congress had ex-

---

154. *See supra* Part II.B.2.

155. U.S. CONST. art. I, § 10, cls. 1-3. Arguably, a reading of earlier clauses, including these earlier-drafted clauses of “No State shall,” could be affected by synthesis in that, following ratification of the Fourteenth Amendment, these earlier clauses could have been “amended” to reflect the distrustful gloss laid over the latter “No State shall.”

156. *Id.* art. III, § 1, cl. 1.

157. *See supra* Part I.A.

exercised its option to create these courts, on which it heavily relied to implement and enforce federal civil rights policy.<sup>158</sup> Without them, the Civil Rights Act of 1866 and the Ku Klux Klan Act would have been empty policy against the Southern states. It is against this presupposed factual reality that this second generation of framers amended the Constitution and enacted a huge shift in the federal-state balance of power. Without these taken-for-granted federal forums, the newly established rights in Section 1 of the Fourteenth Amendment would have been rendered meaningless.

Consequently, the existence and availability of lower federal courts at the time of the Fourteenth Amendment's drafting should be treated as a "factual presupposition" of the framing generation. That presupposition implies that, had the facts been different at the time of drafting, the framing generation would have drafted a different, more functional Fourteenth Amendment.

#### CONCLUSION

This Note proposes a new strain of external constraint theory: that the Fourteenth Amendment limited the broad grant of congressional jurisdiction-stripping power under Article III, Section 1, and the Exceptions Clause. Unlike the orthodox view of Congress's jurisdiction-stripping power, a theory that the Fourteenth Amendment amended congressional jurisdiction-stripping power would place clear limits on a power now theorized as plenary. This approach is distinct from prior external constraint theories in that it argues for a complete removal of congressional power to enact jurisdiction-stripping legislation denying a federal forum and federal review for rights granted by the Fourteenth Amendment, rather than a mere review of the jurisdiction-stripping legislation for constitutional compliance.

This theory would inevitably result in legislation like the Sanctity of Life Act of 2011<sup>159</sup> being deemed an unconstitutional overstep of Congress's legislative powers, which the Fourteenth Amendment has limited. Indeed, this limitation would serve the same function today as the framers intended it serve at the time of ratification: it would provide a neutral federal forum and federal review of state action that violates citizens' Fourteenth Amendment rights. And, as Representative Paul's efforts have illustrated, the belief that state courts might not enforce these rights in the absence of federal review is still very real over a hundred years later.

The orthodox view has too long based its expansive view of jurisdiction-stripping power solely on the original intent behind the Exceptions Clause and

---

158. *See supra* Part II.B; *see also* EVERETTE SWINNEY, SUPPRESSING THE KU KLUX KLAN 195 (1987) ("By the end of 1870, 271 enforcement cases were pending in southern district and circuit courts; this increased to 879 in 1871, to 1,890 in 1872, and to 1,960 in 1873.").

159. H.R. 1096, 112th Cong. (2011).

May 2011]

*JURISDICTION-STRIPPING POWER*

1243

Article III, Section 1, despite extensive modifications to the Constitution over the last two hundred years. Ignoring the impact of these later amendments inevitably leads to an overly simplistic view, incorporating solely the intent of the original framing generation to the exclusion of later, highly transformative, framing generations and the contexts in which they drafted. This Note presents a possible theory by which the limits of this power can finally be ascertained.

1244

*STANFORD LAW REVIEW*

[Vol. 63:1213