I'll take the 14th — Since Gene Healy has now granted some of my arguments in defense of the Fourteenth Amendment, yet still casts me among "the forces of centralization," let me take a moment to address just a few of the confusions that remain between us. (See his "Roger & Me," responding to my "In Defense of the Fourteenth Amendment," both in February's *Liberty*. The latter was a lengthy response in turn to Healy's earlier critique of my views, "Liberty, States' Rights, and the Most Dangerous Amendment," which ran in August's *Liberty*.) To frame this response, like many modern libertarians, I support the Fourteenth Amendment as a protection against state and local tyranny, despite its over and under utilization by both courts and Congress. Properly understood and applied, the amendment grants courts and Congress *limited* power to protect individual rights, not the expansive power Healy rightly condemns. By contrast, we see in his latest effort that Healy would "make common cause with decentralist conservatives" in the short term, then would "work toward restoring the good name of secession and states' rights" in the longer term. His concern, plainly, is with federal tyranny. It's not at all clear what he would do about state and local tyranny. Nor is it clear, as a practical matter, how we would get from here to there. As I urged last month, it may be wiser, in both the short and long terms, to come to grips with the true meaning and import of the Fourteenth Amendment.

Responding to my arguments supporting the amendment, Healy again homes in on the question of legitimacy: the amendment is illegitimate, he says, because it was rammed through after ratification efforts failed. Again, I quite agree that the amendment was not the product of immaculate conception; but as I wrote, to one degree or another that point applies to all government, and to the Constitution itself, including the ratification procedures on which Healy's complaint rests. Thus, looking only to consent, we're left to argue about degrees of legitimacy, which is why I've never grounded claims about legitimacy on consent alone but have always said that substance matters too. It's important to ask, that is, not only whether those in the original position consented but whether they "got it right"—substantively. Since the answer to the first question can never be deeply satisfying, we look for the best we can find there; then we turn to the substantive question.

Regarding that first question, I believe I made a fairly

compelling case that we needed to put in perspective the initial failure of the southern states to ratify the amendment just after the Civil War concluded: those states, at that time, were hardly exemplars of representative democracy. Indeed, the very fact that Congress deemed it necessary to impose military rule, through the Reconstruction Act of 1867, speaks volumes about the aftermath of the war. Thus, when Healy chides me for discounting those rejections, or the illegitimacy of the Reconstruction Act, he invites us to believe that once the war "ended," it was back to constitutional normalcy. Would that the world were that neat. As for the contrast with FDR's machinations, where constitutional consent was never even sought, I'm afraid that Healy's contention that consent *might* have been given rings hollow. This is not the place to detail the differences between the two periods, but I do believe those differences support my contention that the post-Civil War efforts "came close" to satisfying the constitutional requirements that the New Deal crowd simply ignored.

Nevertheless, given the infirmity of consent under even the best of circumstances, we have to look to substance to buttress arguments for legitimacy. Here, unfortunately, Healy raises a host of questions, the effect of which is to come close to saying that I'm "willing to let moral theory trump constitutionalism." Let me state unambiguously that that is *not* my view, as my remarks about the Sixteenth Amendment should have made clear. Nevertheless, drawing upon both text and history, moral theory and constitutionalism must be put together in such a way as to do justice to both, insofar as possible. Obviously, that is a *very* complex and often subtle undertaking, well beyond my scope here. I've written about it extensively elsewhere.

Regarding Healy's second line of argument, that the Fourteenth Amendment confers "vast powers" on courts and the Congress, here too he misstates my views in certain respects, although in one case understandably. Taking the courts first, my remark that almost every example in Healy's "parade of horribles" involved the hopelessly confused area of race discrimination was meant to serve a larger point, as a careful reading of the relevant passage should show: Jim Crow laws, and our subsequent efforts to remedy them, have seriously compromised the distinction between private and public. Thus, Healy's analogy invoking British socialism and class simply misses the point.

But so does his contention that *Brown v. Board of Education* led to "a massive judicial power grab." Judicial overreaching and abuse did indeed follow *Brown*, as I fully granted. But the decision in that case, setting aside its rationale, was necessary to rectify the judicial *abdication* that occurred in *Plessy v. Ferguson*. I grant that judicial overreaching is no better than judicial abdication. But abuse of a power, in either direction, is no justification for abandoning it. The power must stand or fall on its own merits, except when abuses become so numerous or serious as to suggest that it *cannot* be rightly exercised. I do not believe we've reached that point here. Thus, I support reviving the Privileges or Immunities Clause, even though judges might abuse it, because in the end I am a constitutionalist — and the clause is right there, in the Constitution. Healy would ignore the clause. Indeed, he criticizes the Court for invoking it recently in the *Saenz* case because it was misused, he believes, "to frustrate welfare reform in California." No, it was used to ensure equal protection of the laws.

Turning to the role of Congress in enforcing the Fourteenth Amendment, here I need to clarify something. I do *not* believe that "Congress has the power to 'enforce' our natural rights at all levels of government," as Healy suggests in a note. I can understand how he might have thought that, however, because in an essay in Cato's *Handbook for the 105th Congress* I wrongly implied, as he observes, that some federalization of crime might be authorized under section 5 of the Fourteenth Amendment. The issues here are vexing, to say the least, and I admit that I have still not thought them out fully — nor, of course, has the Court. In brief, our natural rights against each other are enforced under the police power, which belongs to the states, not to the federal government. Section 1 of the Fourteenth Amendment ensures those rights against *state* violation only: "No *state* shall abridge, deprive, or deny." Ordinary enforcement of those guarantees is through the courts, state and federal alike. But Congress *also* has the power, in section 5, "to enforce" those guarantees against the states. But how? A strict, textual reading, which I am inclined toward, directs Congress's remedies against the *states*. That raises many questions, especially regarding the Equal Protection Clause. A broader reading allows Congress to create federal remedies when states fail to provide adequate remedies for private wrongs. That reading, I believe, is wrong, because the provisions of section 1 that Congress is authorized to enforce speak only of *state* wrongs, even though those wrongs may concern private wrongs a state may have failed to remedy.

Having clarified that ambiguity — which was drawn from the *Handbook* article, not from the *Liberty* response — I want to note that it should be clear also that I do *not* want to repeal or even weaken the state action doctrine, as Healy charges. He bases that contention on my view that the Fourteenth Amendment protects against both state *actions* and state *omissions* (as in equal protection cases). "Protecting against state 'omission,'" he writes, "is equivalent to protecting against private action." True, but not directly, and therein lies the crucial difference. If the narrow, textual reading is right, Congress is authorized, if necessary, to compel states to provide equal protection of the laws (I leave open just how, which is no small matter). It is *not* authorized to substitute and exercise its own general federal police power, which it does not have (except in federal territory). Indeed, that is just the issue at stake in the *Morrison* case the Supreme Court heard in January, which Healy mentions, in which Cato and the Institute for Justice filed a brief setting forth that position.

Thus, to conclude, I would take strong exception to Healy's conclusion that libertarians should promote a "narrow" reading of the Fourteenth Amendment because it's smart and because "the original meaning of that amendment doesn't matter much." As his entire argument makes clear, especially his defense of *Slaughterhouse*, Healey's "narrow" reading is tantamount to ignoring the amendment altogether. If protection against state and local tyranny matters, then the original meaning of the amendment matters too, and the smart thing to do is to rediscover it. Federal tyranny is a problem, to be sure, but it is not the only problem we face.

—Roger Pilon