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Interpreting the Fourteenth Amendment: Two Don'ts and Three Dos

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INTERPRETING THE FOURTEENTH AMENDMENT: TWO *DON'TS* AND THREE *DOS*

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ABSTRACT

A sophisticated reading of the legislative record of the framing of the Fourteenth Amendment can provide courts and scholars with some general interpretive principles to guide their application of the Amendment to current legal problems. The author argues that two common legal conceptions about the Amendment are, in fact, misconceptions. The first is that the Amendment was chiefly concerned with the immediate situation of freed slaves in the former slave states. Instead, he argues, the legislative record suggests that the framers were broadly concerned with the rights not only of freed slaves but also of foreign-born immigrants in the North and the South, and of Southern Unionists and Northern migrants in the former Confederacy. The second misconception is that the central purpose of the Amendment was to "constitutionalize" the Civil Rights Act of 1866, and that section 1 can thus be interpreted as chiefly incorporating the short list of basic civil rights protected by that Act. Both the legislative record and the statements by the Amendment's sponsors during the debate over its framing demonstrate that the Amendment was an independent measure aimed at a much broader set of reforms in state institutions.

The author suggests that the record does support three positive statements about the Amendment. The first is that the Amendment was aimed at addressing systemic flaws in the Constitution of 1787. The second proposition builds on the first by suggesting that the major flaw the framers saw in the original Constitution was its

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empowerment of a complex political and social institution widely known to antebellum thinkers as the "Slave Power," a set of privileges for slavery that had permitted the slave states to dominate the federal government since at least 1800. The last proposition is that the Amendment, having been forged during an intense struggle between the executive and legislative branches, had as one of its aims to empower Congress, and that current jurisprudence that reads it as primarily concerned with empowering the federal courts misconceives the historical context from which it emerged.

Finally, the author suggests that the broad political focus of the Amendment invites current interpretations that draw on political theory about the requirements of a genuinely democratic system, and that one such theory is the idea of the "open society" proposed during the mid-twentieth century by the influential philosopher Karl Popper.

INTRODUCTION: SOLITARY FOOTPRINTS

Because so much of constitutional law involves interpreting the Fourteenth Amendment, courts and lawyers need a more sophisticated understanding of the events and ideas that produced it than legal scholarship has provided until very recently.[1] Achieving that sophisticated understanding is made more difficult by the

[1] Recent works that promise to improve the situation include BRUCE ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS 160–85 (1998); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 363–80 (2005) [hereinafter AMAR, AMERICA'S CONSTITUTION]; MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869 (1990); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988). Many current commentators owe a debt of gratitude to William W. Van Alstyne for his essay *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33.

tendency of modern Americans to regard the Amendment as a minor technical fix to the Constitution of 1787. The legend of the "Miracle at Philadelphia"[2] has all but blinded citizens and scholars both to the Constitution's flaws and to the importance of the remedial measures taken by subsequent generations.[3] The Constitution is not a marble tablet carved by the Framers in 1787, shining unscathed above the complex swirl of subsequent American history; it is a complex, fallible document that has formally been changed no fewer than twenty-seven times since its adoption and that still is riddled with contradiction, ambiguity, and unfulfilled promise.

Last year I published a book-length narrative of the framing of the Fourteenth Amendment.[4] When I first took on the project, I had few preconceived ideas. I did think that, whatever the framers may have been thinking and saying in 1866, what they did was historically significant and deserves comparison with the work of the Philadelphia Framers of 1787.[5] The research confirmed that suspicion—but more than that, it convinced me that the framing of the Fourteenth Amendment was a key part of an important and coherent story, one that flowed directly from the quarter century of anti-slavery struggle that preceded it and foreshadowed the struggle over Reconstruction that followed it. The Amendment is the hinge on which nineteenth-century American politics turned, with consequences for the struggles of African Americans, women, immigrants, and social reformers that persist to this day.

I also discovered that the events of the winter and spring of 1866 are exciting and complete in themselves—that if they were a novel, they might be a combination of *The Killer Angels*,[6] *Advise and Consent*,[7] and *Seven Days in May*.[8] The battle between President Andrew Johnson and his Democratic and Southern supporters on the one hand and the anti-slavery leadership of the Thirty-Ninth Congress on the other has (like all good political stories) elements of both classical tragedy and opera buffa, characters who are part Pericles and part Pagliacci, and political rhetoric that combines

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[2] *See* CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY TO SEPTEMBER 1787 (1966).

[3] *See* Garrett Epps, *The Antebellum Political Background of the Fourteenth Amendment,* LAW & CONTEMP. PROBS., Summer 2004, at 175 [hereinafter Epps, *Antebellum Political Background*].

[4] GARRETT EPPS, DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA (2006) [hereinafter EPPS, DEMOCRACY REBORN].

[5] In this belief I was encouraged by Professor Ackerman, who wrote that "[t]he struggle over the Fourteenth Amendment marks the greatest constitutional moment in American history." ACKERMAN, *supra* note 1, at 160.

[6] MICHAEL SHAARA, THE KILLER ANGELS (1974) (dramatizing decisions of commanders at the Battle of Gettysburg).

[7] ALLEN DRURY, ADVISE AND CONSENT (1959) (relating a fictional struggle between the President and the Senate over a controversial Cabinet nominee).

[8] FLETCHER KNEBEL & CHARLES W. BAILEY II, SEVEN DAYS IN MAY (1962) (imagining a conspiracy to overthrow the elected U.S. government and replace it with a military junta).

Athenian debate with the snake-oil salesman's spiel. It was a death struggle (literally, in the case of at least one Senator, James H. Lane of Kansas[9]) between opposing sides who both sincerely believed that they and they alone were defending the essence of the American constitutional tradition. "The contest between Congress and the President is quite exciting," Walt Whitman wrote to a friend during this period.[10] "Sometimes I feel as if one side had the best of it and then the other."[11] As Whitman's comment suggests, it was a near thing, a struggle that could easily have turned out differently, with incalculable results for American society in general and constitutional law in particular.

As a recovering novelist,[12] I have an unshakeable faith in the importance of story and parable for its own sake. "A poem should not mean / but be," wrote the poet Archibald MacLeish.[13] By the same token, the more time I spend with historical sources, the more convinced I become that history does not teach us specific cognitive lessons; it transforms our sense of ourselves and of the world we live in. I hope that as a result of my work on *Democracy Reborn* some readers will be moved to imagine America slightly differently.

Nonetheless, having told the story, I do find myself with some tentative conclusions about the meaning of the events of 1865 to 1866—conclusions that have some implications for the present-day task of interpreting and applying the Amendment to contemporary legal questions. In this Article, I provide a brief summary of my conclusions about the motivations and thought of the framers, whom I regard as having an important claim to status in constitutional history analogous to that of the Philadelphia (capital-F) Framers. The summary consists of two negative assertions—things that are widely believed but that I did not find to be supported by the record—and three positive statements—things that I conclude to be true from the record but that do not seem to have penetrated the legal consciousness. Or, to put it another way, for contemporary interpreters of the Fourteenth Amendment, I offer two *Don'ts* and three *Dos*.

Before I offer them, however, I want to address two preliminary matters—first, the conceptual problem of a lawyer writing a work of history and, second, the perennial issue of "original intent." Lawyers who venture into historical writing may find themselves whipsawed between two intellectual criticisms. If they produce new

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[9] *See* EPPS, DEMOCRACY REBORN, *supra* note 4, at 247–48 (discussing Lane's suicide).

[10] Letter from Walt Whitman to a soldier (May 16, 1866), *in* WALT WHITMAN, 1 THE CORRESPONDENCE 276–77 (Edward Haviland Miller ed., 1961). Whitman was a central observer of the turbulent Washington politics that led to the framing of the Fourteenth Amendment. *See* EPPS, DEMOCRACY REBORN, *supra* note 4, at 16–17 (chronicling Whitman's interest in Washington politics).

[11] Letter from Walt Whitman to a soldier, *supra* note 10, at 277.

[12] *See* GARRETT EPPS, THE FLOATING ISLAND: A TALE OF WASHINGTON (1985); GARRETT EPPS, THE SHAD TREATMENT (1977).

[13] Archibald MacLeish, *Ars Poetica* (1926), *reprinted in* 1 THE NORTON ANTHOLOGY OF MODERN AND CONTEMPORARY POETRY 515, 516 (Jahan Ramazani et al. eds., 3d ed. 2003).

interpretations of complex legal and constitutional events, they may be accused of writing "law office history"[14]—of preparing a historical argument as if it were a brief, designed to prove a client's position. If, on the other hand, they do not argue for a startling new interpretation, they may be accused of venturing into an alien field without adequate acquaintanceship with the literature, producing muddled work that merely repeats insights known to every professional.

If *Democracy Reborn* has a claim to originality, it lies in placing one concept, that of the Slave Power, at the center of the political thought that went into the Amendment. The concept of the Slave Power as a part of mid-nineteenth century intellectual history is well documented.[15] To the best of my knowledge, however, no legal writer has previously conceived it as the inescapable political backdrop of the framing of the Amendment.[16] This is hardly surprising: much of what historians

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[14] "By 'law-office' history," wrote Professor Alfred H. Kelly in the *locus classicus*, "I mean the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered." Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 n.13. For a sophisticated update of Kelly's thesis, charting the changes in historiography and legal academia, see Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POL. 809 (1997).

[15] *See, e.g.*, DAVID HERBERT DONALD, LIBERTY AND UNION 38 (1978); DON E. FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY (Ward M. McAfee ed., 2001); ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 73–102 (2d ed. 1995); WILLIAM E. GIENAPP, THE ORIGINS OF THE REPUBLICAN PARTY, 1852–1856, at 357–65 (1987); LEONARD L. RICHARDS, THE SLAVE POWER: THE FREE NORTH AND SOUTHERN DOMINATION, 1780–1860 (2000); Larry Gara, *Slavery and the Slave Power: A Crucial Distinction*, 15 CIV. WAR HIST. 5, 15–18 (1969). An early and sophisticated discussion of the legal and constitutional implications of the Slave Power hypothesis underlies much of PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY (1981).

[16] *See* Epps, *supra* note 3 (presenting the Slave Power idea as a political backdrop for framing the Fourteenth Amendment). In his study of constitutional history, Akhil Reed Amar notes the importance of the Slave Power concept to *antebellum* critiques of the South. AMAR, AMERICA'S CONSTITUTION, *supra* note 1, at 371–72. Professor Ackerman does not mention the Slave Power concept in his important work on the Fourteenth Amendment. ACKERMAN, *supra* note 1. A small number of constitutional historians have made sophisticated use of the concept generally in discussing the evolution of anti-slavery thought. *See, e.g.*, Richard L. Aynes, *The Antislavery and Abolitionist Background of John A. Bingham*, 37 CATH. U. L. REV. 881, 917 (1988); Michael Kent Curtis, *The 1859 Crisis over Hinton Helper's Book*, The Impending Crisis: *Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 CHI.-KENT L. REV. 1113, 1129 (1993). Professor Andrew Taslitz of Howard University School of Law has written two especially provocative articles using the Slave Power concept to inform the application of the Fourteenth Amendment specifically to current legal issues. *See* Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. Rev. 1283 (2000); Andrew E. Taslitz, *Slaves No More!: The Implications of the Informed Citizen Ideal for Discovery Before Fourth*

now know about the immediate post-bellum period has simply not made its way into the legal literature. New legal insights can be generated from applying this work to the kinds of questions lawyers like to consider.[17]

The second preliminary question is that of intent. Widely varied claims have been made about the "intent" of the framers and ratifiers of the Fourteenth Amendment on such issues as school segregation,[18] the power of Congress to enforce civil rights,[19] the requirement of equality in the drawing of legislative districts,[20] the procedural rights of criminal suspects,[21] and the status of American-born children of foreign nationals temporarily residing on American soil.[22]

It is virtually impossible to interpret a constitutional provision without lapsing into the language of intention. One naturally finds oneself stating that "the Fourteenth Amendment was *designed* to cripple the Slave Power," or that "the Citizenship Clause was *intended* to confer citizenship on children born in the United States even when the civil and immigration status of their parents was ambiguous or extralegal." The human mind cannot meaningfully interact with the work of other human beings without ascribing to it some intention. This is a general instance of the pervasive problem philosophers call "Other Minds."[23] Any verbal formulation comes to us, in terms of certain evidence, as bare and stark as the footprint that revealed to Robinson Crusoe that he was not alone.[24] Crusoe's attempts to explain the footprint serve as a metaphor for the difficulty of reading constitutional text. At first he imagines

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Amendment Suppression Hearings, 15 GA. ST. U. L. REV. 709 (1999). *See generally* ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868 (2006) (applying the concept of the Slave Power to the task of interpreting the Fourth Amendment's protections against unreasonable search and seizure as applied to the states by the Fourteenth Amendment).

[17] This intellectual lag is being reduced as more and more trained historians move into the legal academy. See Richards, *supra* note 14, for a discussion of the flowering of legal and constitutional history as a rigorous legal sub-specialty.

[18] *See* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

[19] *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

[20] *See* Baker v. Carr, 369 U.S. 186, 301–02 (1962) (Frankfurter, J., dissenting) (arguing that the Fourteenth Amendment "provides no guide for judicial oversight of the representation problem"); John Harrison, *Forms of Originalism and the Study of History*, 26 HARV. J.L. & PUB. POL'Y 83, 85 (2003) (postulating that apportionment had historically not been a constitutional problem).

[21] *See* MALTZ, *supra* note 1, at 118.

[22] *See* John C. Eastman, *Politics and the Court: Did the Supreme Court Really Move Left Because of Embarrassment over* Bush v. Gore*?*, 94 GEO. L.J. 1475, 1490 (2006) (arguing that the intent of the framers bars extending the former slaves' guaranteed right of citizenship in the Fourteenth Amendment to the children of those in the United States illegally).

[23] *See, e.g.*, Norman Malcolm, *Knowledge of Other Minds*, 55 J. PHIL. 969 (1958).

[24] DANIEL DEFOE, ROBINSON CRUSOE 130 (L. J. Swingle ed., Barnes & Noble Classics 2003) (1719).

that the footprint is not human in origin but is the work of the devil.[25] That hypothesis seems unlikely, though: "[T]he devil might have found out abundance of other ways to have terrified [him] than this of the single print of a foot . . . ."[26] Then Crusoe decides that he must have made the footprint himself. This theory collapses "[w]hen [he] came to measure the mark with [his] own foot [and] found [his] foot not so large by a great deal."[27] He is "filled with the belief that some man or men had been on shore there; or, in short, that the island was inhabited."[28] Only then can he begin to assess the maker's intentions toward him.[29]

The Fourteenth Amendment is, as Representative Frederick Woodbridge of Vermont said while debating it, a "footprint[] . . . upon the rocks of the mountains."[30] We may not know exactly what those who made it were thinking, but if we are not to live as solitary Crusoes, we must allow ourselves the conceit that we comprehend what our Fridays are up to.

The inevitable assumption of provisionally discernible intent, however, is not identical with the constitutional claim of an "originalist" method—that is, with the claim that there exists some dependable mechanism for discerning *the* overriding, singular "intent" of a group of people that can be meaningfully applied to produce reproducible, falsifiable, dispositive answers. That's true even when the specific questions relate to matters the legislators or framers actually may have thought about; when they relate to matters that did not exist at the time of the framing—say, the citizenship of children of "illegal aliens" or free expression on the Internet—the question becomes incoherent. While one may think about the Fourteenth Amendment in terms of intentions, "original intent" in the sense proposed by "originalists" cannot be discovered by any intelligible method.

To believe that something cannot be known with precision, however, is not the same as saying that information about it is meaningless—just ask Werner Heisenberg.[31] Information about the thoughts and influences operating on the framers and ratifiers of a constitutional provision is always relevant and suggestive. That the Framers of 1787 understood Locke, Hume, Montesquieu, and Blackstone, for example, does not mean that one can decode their thought by reference to those authors, but it does mean that a knowledge of their work can both enrich an interpreter's sense of the possibilities

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[25] *Id.*

[26] *Id.* at 131.

[27] *Id.* at 134.

[28] *Id.*

[29] *Id.* at 135.

[30] CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866).

[31] Heisenberg's Uncertainty Principle states that the more precisely an observer ascertains the position of a subatomic particle, the less precisely the same observer can determine the particle's momentum. *See* Werner Heisenberg, *Über den anschaulichen Inhalt der quantentheorischen Kinematik und Mechanik*, 43 ZEITSCHRIFT FUR PHYSIK 172 (1927) (F.R.G.), *translated in* QUANTUM THEORY AND MEASUREMENT 62 (John Archibald Wheeler & Wojciech Hubert Zurek eds. & trans., 1983).

contained in constitutional text and constrain her freedom to project contemporary meanings into it.

One last preliminary matter remains: a quick summary of the story is a necessary backdrop for my conclusions later in this Article. In summary, it begins with the near-simultaneous collapse of the Confederacy and the assassination of Abraham Lincoln in the spring of 1865. Northern Republicans had to face a newly reunified country without their leader and master tactician. They had few plans for how to "reconstruct" the South's politics, economy, and labor system so as to make it a safe and loyal part of the Union.

At the same time, the presidency passed to a Southern slaveholder, Andrew Johnson, whose plans quickly became apparent: he would restore the South with no internal reform and no legal protection for the former slaves. The Southern states would be ruled by the same white elite that had controlled them before the war, and that elite would use its monopoly on power to reward Johnson with the White House in 1868. The Republicans who had won the war would be an irrelevant regional rump group. The game would be played for the stake of future domination of the Republic.[32]

The way this story played out, I think, does offer us a rich new source of interpretations for contemporary application of the Fourteenth Amendment. The conclusions that follow are only the first I hope to tease out of it. Briefly put, I see two propositions that—though regrettably widespread—are falsified by the historical record and three others that interpreters could usefully understand as correct.

In Part II of this Article, I lay out the *Don'ts*—interpretive errors that remain common in caselaw and some commentary even though, I think, the record belies them. In Part III, I offer my *Dos*. Part IV suggests my own theory of interpretation of the Amendment, one that regards its framers as having "intended" that we the living use its text as an invitation to think broadly about the political values indispensable to republican self-government. I accept this invitation by relating the Amendment's values to what the twentieth-century Austrian-English philosopher Karl Popper called "the open society."[33] I proffer this broad reading as an invitation to the reader to bring forth her own, limited only by an agreement that the Fourteenth Amendment is an important and transformative part of the contemporary Constitution.

I. TWO *DON'TS* OF FOURTEENTH AMENDMENT INTERPRETATION

Historian and legal scholar Neil Richards once suggested that a scholar might usefully assume that "although historical 'truth' may be ephemeral, historical 'falsity' is not."[34] This implies that it is easier to falsify erroneous statements than to demonstrate the truth of assuredly valid ones, so I will begin with the two *Don'ts*, which

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[32] *See* EPPS, DEMOCRACY REBORN, *supra* note 4, at 30–31.

[33] *See* KARL R. POPPER, THE OPEN SOCIETY AND ITS ENEMIES (1950) [hereinafter POPPER, OPEN SOCIETY].

[34] Richards, *supra* note 14, at 818.

are more prevalent in the thinking of scholars and, more particularly, judges, than one would like. Certain ideas about history are called sharply into question by recent scholarship, but they live on, like a bad hangover, in the consciousness of lawyers and judges who learned their history a generation ago.

A. Do Not Regard the Fourteenth Amendment as Aimed Solely at Providing a Minimum Set of Rights for the Freed Slaves

In its first, and in many ways most grossly erroneous, construction of the Fourteenth Amendment, the Supreme Court lumped it together with the Thirteenth and Fifteenth as being aimed at one group and one group only—the freed slaves in the wake of the Civil War:

> [O]n the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.[35]

This interpretation was vigorously challenged by Justice Noah Haynes Swayne in that very case.[36] "The protection provided [by the Civil War Amendments] was not intended to be confined to those of any particular race or class," Swayne wrote, "but to embrace equally all races, classes, and conditions of men."[37] Since then, the Court itself has recognized that the Fourteenth Amendment contains "a broader principle

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[35] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71–72 (1873). For useful discussions of Justice Miller's role in interpreting the Amendment, see Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the* Slaughter-House Cases, 70 CHI.-KENT L. REV. 627, 659–60 (1994) (contrasting Justice Miller's views with those of John Bingham, arguing that Miller was not committed to racial equality despite his antislavery views); Rebecca E. Zietlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism*, 62 U. PITT. L. REV. 281, 318 (2000) [hereinafter Zietlow, *Belonging*] (suggesting that Miller's majority opinion in the *Slaughter-House Cases* "may have been a compromise" intending to retain protection for federal civil rights).

[36] *See Slaughter-House Cases*, 83 U.S. (16 Wall.) at 128–29 (Swayne, J., dissenting).

[37] *Id.* at 129.

than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves."[38] But the idea remains alive in the shadows[39] and is frequently deployed by judges and scholars who find that too broad a principle of equality makes them anxious. Then-Justice Rehnquist adopted this language as authoritative in his dissent in *Weber v. Aetna Casualty & Surety Co.*,[40] and it appears in decisions of lower courts as well.[41] It also pops up in legal commentary[42] and in works of popular advocacy.[43]

This idea robs the Amendment of a rich set of meanings that might directly apply to current constitutional controversies. If its framers' concerns were limited to the specific problems of chattel slaves recently freed by constitutional amendment, we need never fear encountering the crisis that gave rise to the Amendment again and thus need not make it central to our theories of constitutional interpretation. It is backward-looking, not prospective. The record suggests, however, that the framers were creating a broader set of rules for state politics and law; and further, that, while

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[38] McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 296 (1976).

[39] On the idea that the Constitution has a "shadow" composed of interpretations that, though authoritatively rejected, retain power over the legal imagination, see Garrett Epps, *The Littlest Rebel: James J. Kilpatrick and the Second Civil War*, 10 CONST. COMMENT. 19 (1993).

[40] 406 U.S. 164, 178–79 (1972) (Rehnquist, J., dissenting) (decrying the use of the Equal Protection Clause to protect "fundamental personal rights").

[41] *See, e.g.*, Hudson Valley Freedom Theater, Inc. v. Heimbach, 671 F.2d 702, 708 n.2 (2d Cir. 1982), *cert. denied*, 459 U.S. 857 (1982) (citing the *Slaughter-House Cases* to focus the Equal Protection Clause on racial classifications).

[42] *See* Eastman, *supra* note 22, at 1490 (stating, as if unexceptionable, that "the framers of the Fourteenth Amendment [were] seeking to guarantee the right of citizenship to the former slaves" and that the very idea that section 1 of the Amendment could guarantee the citizenship of children of foreign nationals on U.S. soil "is simply too absurd to be a credible interpretation").

[43] *See* DAVID BARTON, ORIGINAL INTENT: THE COURT, THE CONSTITUTION, AND RELIGION 198 (2000) (stating that "the intent of Congress" in the Fourteenth Amendment was solely "to make recently freed slaves citizens of the State in which they resided," and that any non-racial application of the Amendment at all is "a totally revised and foreign interpretation"). It would be easy to dismiss Barton's work as beneath discussion; he spends several pages, for example, demonstrating that the musical comedy *1776* is not a factual depiction of the events surrounding the Declaration of Independence, but instead a product of a sinister conspiracy employing "a process by which historical fact is intentionally ignored, distorted, or misportrayed in order to maneuver public opinion toward a specific political agenda or philosophy." *Id.* at 279, 307–08. One is hard pressed to decide whether this humorless pseudo-scholarship is the work of a crackpot or a charlatan. But both crackpots and charlatans have often had influence far beyond their merits. Barton was, in 2004, selected and funded by Republican campaign officials to represent their party in meetings around the country with Protestant ministers designed to instruct them in the proper role of religion and churches in the American constitutional system. *See* Garrett Epps, *Some Animals Are More Equal than Others: The Rehnquist Court and "Majority Religion,"* 21 WASH. U. J.L. & POL'Y. 323, 343 n.102 (2006).

the concerns of the freed slaves were quite present in the minds of those debating the Amendment, those same debates concerned themselves with other groups and problems as well—most particularly immigrants, Southern Unionists, and Northern migrants to the South, all of whom were facing discrimination and social proscription.

The question of immigrants and of the integration into society of the foreign-born was one of the central problems of Northern antebellum society. In sheer numbers, mid-nineteenth century Americans faced an influx of immigrants fully comparable to the one affecting us today. In 1850, the percentage of the U.S. population that was foreign born was 9.7 percent.[44] By 1860, it was 13.2 percent,[45] and the percentage had surely risen by 1866. How does that compare with our situation today? In 1997, according to U.S. census figures, the percentage of foreign-born residents was 9.7 percent.[46] By 2000, it had risen to 10.4 percent.[47] The most recent census estimate places it at 12.4 percent.[48] In other words, Americans in 1866, particularly those in the North, were at least as aware of immigration as we are today, when the issue is central to the domestic policy debate.

In addition, the debates in Congress show a keen awareness that the Amendment's provisions would affect the status and rights of immigrants, including some, such as the Chinese and the Gypsies, whom many opponents of the Amendment regarded as inferior to native-born Americans and white immigrants.[49] The Citizenship Clause was written with non-racial language, thus removing any textual basis for regarding it as limited to "seeking to guarantee the right of citizenship to the former slaves."[50] In addition, Representative John Armour Bingham, principal author of the Equal Protection Clause, noted that it was worded in terms of "persons" rather than "citizens" (as was the Privileges and Immunities Clause) in order to prevent "the terrible enormity of distinguishing here in the laws in respect to life, liberty, and property between the citizen and stranger within your gates."[51]

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[44] Campbell J. Gibson & Emily Lennon, *Historical Census Statistics on the Foreign-Born Population of the United States: 1850–1990*, tbl. 13 (Population Div., U.S. Bureau of the Census, Working Paper No. 29, 1999), *available at* http://www.census.gov/population/www/documentation/twps0029/tab13.html.

[45] *Id.*

[46] *Id.* § 1, *available at* http://www.census.gov/population/www/documentation/twps0029/twps0029.html.

[47] LISA LOLLOCK, U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS: MARCH 2000, THE FOREIGN-BORN POPULATION IN THE UNITED STATES (2001), http://www.census.gov/prod/2000pubs/p20-534.pdf.

[48] Pew Hispanic Ctr., *A Statistical Portrait of the Foreign-Born Population at Mid-Decade*, tbl. 1 (Oct. 17, 2006), http://pewhispanic.org/reports/foreignborn/ (drawing on U.S. Bureau of the Census figures).

[49] *See* EPPS, DEMOCRACY REBORN, *supra* note 4, at 235–36.

[50] *See* Eastman, *supra* note 22, at 1490.

[51] CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866). For Bingham's view of the Citizenship Clause, see Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John*

The framers were aware of and concerned for immigrants in part because some of them were immigrants themselves. Just as the English-born James Wilson put the case for tolerance toward the foreign-born at the Philadelphia Convention of 1787,[52] Senator John Conness of California, Irish by birth, took a leading part in the debate over the Citizenship Clause.[53] Carl Schurz, a German-born American politician, contributed to the debate surrounding the Amendment,[54] while an early proposal for amending the Constitution to cripple the Slave Power came from Francis Lieber, a German-born immigrant scholar who lived first in the Slave South and then in the industrial North and was an important legal adviser to the Lincoln administration.[55]

The concern for internal fairness in the states, however, was not limited to the problems of the foreign-born any more than to the problems of newly freed slaves. The framers were also well aware that Southern Unionists and Northerners moving to the South were facing political exclusion and violent intimidation at the hands of former Confederate supporters. Republicans hoped to form a Southern Republican Party around these two groups and were well aware from press commentary that the new provisional governments inaugurated in the South by presidential decree were as reluctant to guarantee political rights and legal protection to dissenting whites as they were to grant equal civil status to black Southerners.[56]

If the Amendment's framers were in fact concerned with ensuring equal protection for immigrants and political rights for dissenting political minorities, then many current controversies—from the attempts by states and localities to stigmatize and proscribe "illegal aliens" within their limits to the systematic partisan gerrymandering of legislative districts—directly implicate the Amendment and should be addressed by putting the Amendment at the center of the question rather than treating it as of peripheral relevance.

Bingham's Theory of Citizenship, 36 AKRON L. REV. 717, 734 (2003) [hereinafter Zietlow, *Congressional Enforcement*] (arguing that the Amendment was intended to create a uniform system of civil rights for citizens); Zietlow, *Belonging*, *supra* note 35, at 309 (2000) (arguing that the Citizenship Clause represented a drastic restructuring of the federal system wherein the framers intended to shift "the balance of power in favor of the federal government").

[52] *See* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 420–21 (Adrienne Koch ed., 1966).

[53] On Conness's Irish birth, see Conness, John, Biographical Directory of the United States Congress, http://bioguide.congress.gov/scripts/biodisplay.pl?index=c000695 (last visited Sept. 10, 2007). On his role in the Citizenship Clause debate, see EPPS, DEMOCRACY REBORN, *supra* note 4, at 235–36.

[54] For a general account of Schurz's life, see HANS L. TREFOUSSE, CARL SCHURZ: A BIOGRAPHY (1982).

[55] *See generally* FRANK FREIDEL, FRANCIS LIEBER: NINETEENTH-CENTURY LIBERAL (1947) (emphasizing Lieber's advocacy of emancipation).

[56] *See, e.g.*, Garrett Epps, *The Undiscovered Country: Northern Views of the Defeated South and the Political Background of the Fourteenth Amendment*, 13 TEMP. POL. & CIV. RTS. L. REV. 411, 421–22 (2004) (recounting Northern reporters' summaries of the political persecution directed at whites who supported the Republican Party).

B. Do Not Regard the Fourteenth Amendment as the Civil Rights Act of 1866 in Constitutional Dress

One of the most common statements to be found in the legislative debates over the proposed Fourteenth Amendment is that its framers intended it as a constitutional foundation for the Civil Rights Act of 1866, which was unconstitutional when passed. These statements are almost uniformly made by *opponents* both of the Amendment and of the Civil Rights Act that preceded it. Unfortunately, they have come to be accepted by many interpreters as a constitutional truism, first enunciated by the Supreme Court in *Hurd v. Hodge*:

> [O]ne of the primary purposes of many members of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guaranties of the Civil Rights Act of 1866 in the organic law of the land. Others supported the adoption of the Amendment in order to eliminate doubt as to the constitutional validity of the Civil Rights Act as applied to the States.[57]

Charles W. Fairman, the most influential proponent of a narrow reading of the Fourteenth Amendment, wrote, "Over and over in this debate, the correspondence between Section I of the Amendment and the Civil Rights Act is noted. The provisions of the one are treated as though they were essentially identical with those of the other."[58] Raoul Berger wrote that "the Amendment was designed to '*constitutionalize*' the Act, that is, to 'embody' it in the Constitution so as to remove doubt as to its

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[57] Hurd v. Hodge, 334 U.S. 24, 32–33 (1948) (citations omitted).

[58] Charles W. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 44 (1949). Recent scholarship has shown that Fairman's reputation as an authoritative expositor of the Amendment rests on shaky ground. A useful summary is found in Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 CHI.-KENT L. REV. 1197 (1995). Dean Aynes details Fairman's early biography of Justice Miller and suggests that a biographer's adulation of his subject may have biased Fairman's view of the ratification debates. "Even where Fairman recognized that Miller may have had personal views and interests which predisposed him to take one point of view, Fairman's respect for Miller's 'candor and intellectual integrity preclude[d] any facile assumption that he wished to twist the law' to that point of view." *Id.* at 1212 (quoting CHARLES FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 352 (1939)). Aynes also discusses Fairman's lack of neutrality when analyzing the framers of the Fourteenth Amendment, including his silence on John Bingham and his subtle derisive attacks on the framers' intelligence. *Id.* at 1233. As Dean Aynes notes, Justice Black rejected Fairman's Fourteenth Amendment scholarship, stating, "I now think of Mr. Fairman as an advocate, not a historian, and I would not rank him at the top of advocates of the world." *Id.* at 1236.

constitutionality and to place it beyond the power of a later Congress to repeal."[59] If the Fourteenth Amendment was hurriedly passed to legitimize the Civil Rights Bill, then we can parse the meaning of phrases like "privileges and immunities" and "due process" by simply substituting the highly specific and sharply limited set of concerns addressed by the bill:

> [The right] to make and enforce contracts, to sue, be parties, and give evidence . . . and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and [to] be subject to like punishment, pains, and penalties, and to none other.[60]

Earl M. Maltz, a sophisticated exponent of a narrow reading of the Amendment, phrased it thus in his important book, *Civil Rights, the Constitution, and Congress, 1863–1869*:

> The [privileges and immunities] clause was perceived as guaranteeing a relatively small set of rights which, though somewhat unclear at the margins, was nonetheless fixed for all time in 1866. Given the intention to secure a fixed set of rights, the key question becomes what interests were to be protected by the privileges and immunities clause. Clearly, the rights enumerated in the Civil Rights Act were to be guarded, but the status of other rights is less certain.[61]

It is important to distinguish the sophisticated and reductive claims about the relationship between the Amendment and the Act. If the statement is merely that one reason Republican legislators supported the draft Amendment was to prevent a permanent erasure of civil rights by a subsequent repeal of the Act, that is unexceptionable and indeed was freely stated at the time by one of the Amendment's chief sponsors. Representative Thaddeus Stevens said during the debate on the Amendment, "Some answer, 'Your civil rights bill secures the same things.' That is partly true, but a law is repealable by a majority. And I need hardly say that the first

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[59] RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 23 (1977). A more recent example of this analysis is found in John Harrison, *State Sovereign Immunity and Congress's Enforcement Powers*, 2006 SUP. CT. REV. 353, 364 ("[O]ne purpose of the Fourteenth Amendment was to put the substantive rule of the Civil Rights Act into the Constitution and to ensure that Congress had power to adopt the act . . . .").

[60] Civil Rights Act of 1866, ch.31, § 1, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981 (2000)).

[61] MALTZ, *supra* note 1, at 109.

time that the South with their copperhead allies obtain the command of Congress it will be repealed."[62]

But the idea that the Act and section 1 are one and the same relies on a two-step argument: (1) the Amendment was offered as a post hoc "constitutionalization" of the Act, and thus, (2) the Amendment embodies and is limited to the set of concerns in the Act. There is little evidence that (1) was actually the motive behind the drafting and adoption of the Amendment.

The debate over the Fourteenth Amendment includes one striking exchange between Senator James Doolittle, a conservative Republican seeking to defeat the proposed Amendment, and Senator William Pitt Fessenden, the chair of the Joint Committee that wrote the Amendment and one of its most sophisticated intellectual proponents.[63] The specific debate concerned the Citizenship Clause in section 1 of the Amendment, which related to—though it used more expansive language than—the declaratory provision of the Act making "all persons born in the United States and not subject to any foreign power" citizens of the United States.[64] "[T]he committee of fifteen, fearing that this declaration by Congress was without validity unless a constitutional amendment should be brought forward to enforce it, have thought proper to report this amendment," Doolittle said on the Senate floor on May 30, 1866.[65]

Fessenden immediately responded that "[t]here is not one word of correctness in all that he is saying, not a particle, not a scintilla, not the beginning of truth. . . . It was placed on entirely different grounds."[66] Section 1 of the Fourteenth Amendment was written by different people, at different times, and for different ends than was the Act. The record shows that the Civil Rights Act was written by Senator Lyman Trumbull, chair of the Senate Judiciary Committee, and came to the floor after passage by that committee.[67] Trumbull, one of the main authors and sponsors of the Thirteenth Amendment, consistently maintained in legislative debate that Congress's power to protect civil rights flowed from section 2 of the Thirteenth Amendment and needed no additional constitutional justification.[68] Section 1 of the Fourteenth Amendment, by contrast, was written in the Joint Committee on Reconstruction[69] (and considerably revised in secret caucus when, after passage by the House, it reached the Senate floor).[70] The ideas within it, and most particularly within the Privileges and Immunities

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[62] CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

[63] *Id.* at 2896.

[64] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.

[65] CONG. GLOBE, 39th Cong., 1st Sess. 2896 (1866).

[66] *Id.*

[67] *See* EPPS, DEMOCRACY REBORN, *supra* note 4, at 128–29.

[68] *Id.* at 172–74. On the Civil Rights Act generally, see MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863–1869, at 147 (1974).

[69] *See* EPPS, DEMOCRACY REBORN, *supra* note 4, at 90, 199–204.

[70] *Id.* at 234.

Clause, seem to flow most directly from the work and words of Representative John Armour Bingham and former Representative Robert Dale Owen,[71] whose constitutional theories were considerably different from those of Senator Trumbull.

To regard the two measures as embodying each other requires an assumption that the framers of the Amendment deliberately resorted to Aesopian language when they had at hand a concise and specific statement of the rights to be protected—namely, the language of the Act itself. Given that Bingham had throughout his career been accustomed to using broad language to describe what he saw as the rights inherent in American citizenship, it makes more sense, I submit, to conclude with Professors Michael Kent Curtis,[72] Akhil Reed Amar,[73] and others that the Amendment was designed to incorporate all of the guarantees of the Bill of Rights (as its proponents explicitly said it would) and, beyond that, to conclude with Professor William Nelson[74] that the general language of section 1 was written with a broad set of political and civil rights in mind.

II. TOWARDS CONTEXTUAL CLARITY: THREE *DOS*

Because it is easier to refute old ideas than to defend new ones, I want to make clear that the three positive propositions below are offered, for the time being, as thought experiments or provisional hypotheses for the interpreter. Our doctrinal sense of the Amendment and how to read it has remained essentially frozen for quite a while. The dialogue, I think, may be enriched by at least considering that the historical record supports the following three interpretive principles.

A. Do Read the Fourteenth Amendment as an Attempt to Fix Systemic Problems in the Constitution of 1787

In his final speech during the debate on the proposed Fourteenth Amendment, Representative Thaddeus Stevens, one of the most important members of the Joint Committee of Fifteen, expressed his regret that the proposed amendment did not more thoroughly remodel the Constitution of 1787:

> In my youth, in my manhood, in my old age, I had fondly dreamed that when any fortunate chance should have broken up for awhile the foundation of our institutions, and released us from *obligations*

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[71] *See id.* at 199–204.

[72] *See* CURTIS, *supra* note 1.

[73] *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 183 (1998) [hereinafter AMAR, THE BILL OF RIGHTS].

[74] *See* NELSON, *supra* note 1, at 68–71, 126–27 (noting the historical arguments concerning whether the Fourteenth Amendment should include absolute citizenship rights).

> *the most tyrannical that ever man imposed in the name of freedom*, that the intelligent, pure and just men of this Republic, true to their professions and their consciences, would have so remodeled all our institutions as to have freed them from every vestige of human oppression, of inequality of rights, of the recognized degradation of the poor, and the superior caste of the rich. In short, that no distinction would be tolerated in this purified Republic but what arose from merit and conduct.[75]

This is extraordinary language for an American politician to use about the product of the Philadelphia Convention of 1787. We are much more used to pious praise of this sort:

> I am for the Union, the indivisible Union, the Union of our fathers, the Union made by Washington, by Jay, and by Jefferson; the Union that has given to us peace, happiness, greatness, grandeur, and glory such as never belonged to any other nation since the foundation of the civilized world.[76]

But the latter quotation above, like most of the speeches in the Thirty-Ninth Congress praising the Framers, is from one of the Fourteenth Amendment's *opponents*. Stevens's description of the flaws of the original Constitution is characteristically blunt—"obligations the most tyrannical that ever man imposed in the name of freedom"[77]—but the critical spirit it conveys was far from unusual. To anti-slavery politicians, the original Constitution had enshrined slavery and placed it at the very heart of the American Republic, to its lasting moral shame and political disadvantage.

The critique of the Constitution espoused by the anti-slavery and Abolition movements was not new. At the Philadelphia Convention itself, Gouverneur Morris had denounced the three-fifths provision and other guarantees offered to the slave states in almost equally intemperate language.[78] As reported by Madison, Morris on August 8, 1787, denounced the draft constitution as fatally solicitous of slavery:

> What is the proposed compensation to the Northern States for a sacrifice of every principle of right, of every impulse of humanity[?] They are to bind themselves to march their militia for the defence of the S[outhern] States; for their defence ag[ainst] those very slaves of whom they complain. . . . [T]he bohea tea used by

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[75] CONG. GLOBE, 39th Cong., 1st Sess. 3148 (1866) (emphasis added).

[76] *Id.* app. at 139 (remarks of Rep. Andrew Rogers of New Jersey).

[77] *Id.* at 3148.

[78] *See* MADISON, *supra* note 52, at 411.

> a Northern freeman, will pay more tax than the whole consumption of the miserable slave. . . . On the other side the Southern States are not to be restrained from importing fresh supplies of wretched Africans, at once to increase the danger of attack, and the difficulty of defence; nay they are to be encouraged to it by an assurance of having their votes in the Nat[ional] Gov[ernment] increased in proportion . . . . He would sooner submit himself to a tax for paying for all the negroes in the U[nited] States, than saddle posterity with such a Constitution.[79]

Abolitionists of the Civil War generation were scathing in their amplification of this critique. William Lloyd Garrison called the Philadelphia Constitution "a covenant with death and an agreement with hell."[80] Wendell Phillips, reading Madison's *Notes,* denounced "that 'compromise,' which was made between freedom and slavery, in 1787; granting to the slaveholder distinct privileges and protection for his slave property, in return for certain commercial concessions on his part toward the North."[81] He also claimed that "the Nation at large were fully aware of this bargain at the time, and entered into it willingly and with open eyes."[82]

The framers of the Fourteenth Amendment, and the generation of political thinkers from which they sprang, regarded the Civil War as flowing directly out of compromises or mistakes that were made in Philadelphia as part of the Framers' determined effort to placate the slave states. Because of these mistakes, the Constitution needed systematic remediation—"remodel[ing of] all our institutions [to] free[] them from every vestige of human oppression, of inequality of rights, of the recognized degradation of the poor, and the superior caste of the rich"—if the mischief was not to recur.[83] This background militates in favor of a relatively broad reading of the Fourteenth Amendment and against any reading that would regard it as a limited or technical fix to a Constitution that otherwise should be interpreted in light of the genius of its original Framers.

Chief Justice Rehnquist's opinion in *United States v. Morrison*[84] offers a nice example of this kind of interpretive error. "[T]he language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may

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[79] *Id.* at 411–12. For a brilliant discussion of "Morris's Prophecy," see RICHARDS, *supra* note 15, at 28–51.

[80] LINDSAY SWIFT, WILLIAM LLOYD GARRISON 307 (1911).

[81] WENDELL PHILLIPS, THE CONSTITUTION A PRO-SLAVERY COMPACT: SELECTIONS FROM THE MADISON PAPERS 5 (Anti-Slavery Examiner No. 11, 2d ed. 1845).

[82] *Id.* at 5–6.

[83] CONG. GLOBE, 39th Cong., 1st Sess. 3148 (1866) (statement of Rep. Thaddeus Stevens); *see also* AMAR, THE BILL OF RIGHTS, *supra* note 73, at 203 (arguing that the Amendment was a blueprint for Reconstruction and a remaking of the nation after the Civil War).

[84] 529 U.S. 598 (2000).

attack discriminatory conduct," Chief Justice Rehnquist wrote.[85] "These limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government."[86]

There are many ways to parse the Fourteenth Amendment, but it is astonishing to view it as something not intended to thoroughly overhaul "the Framers' carefully crafted balance of power between the States and the National Government,"[87] a balance that had fallen into bloody ruins during the Civil War.[88] The error is as grievous as regarding the United States Constitution as a minor adjustment to the Articles of Confederation. The Fourteenth Amendment embodies a new theory of the nation and the states, and we will not be able to discern it if we blind ourselves to the necessity of looking for it.

B. Do View the Amendment as a Whole, in Relation to the Concept of the "Slave Power"

In the judgment of the antebellum anti-slavery thinkers, the mistakes at Philadelphia, by giving the slave states disproportionate power in the federal government, had created and empowered a complex political-social institution that the antebellum generation called the Slave Power, which transcended the institution of chattel slavery and was thus not abolished or even necessarily limited by the passage of the Thirteenth Amendment.[89] The Slave Power was a term that any politically literate American in the mid-nineteenth century would have understood.[90] It referred to a combination of Southern ruthlessness and constitutional flaws that had given the slave states effective control of the federal machine, both as an engine of domestic policy and as a dominant influence on matters of diplomacy, war, and peace.

It was understood to arise from the arguably pro-slavery portions of the Constitution, which gave the slave states representation for their slave "property," and from the failure of the Constitution to require that states observe the rudiments of civil liberty and republicanism in their internal institutions. The South, by censoring the mails and using legal and extra-legal coercion to prevent criticism of the slave system by its own people, had forged a political monolith that relentlessly used its

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[85] *Id.* at 620.

[86] *Id.*

[87] *Id.*

[88] *See* LES BENEDICT, *supra* note 68, at 123 (noting that preservation of the existing federal system would leave the national government with the same problems it had had before the Civil War).

[89] *See* EPPS, DEMOCRACY REBORN, *supra* note 4, at 57 (highlighting how, ironically, abolition of slavery gave Southern states more House seats and, thus, greater power with which to implement oppressive policies).

[90] For a balanced account of the place of the "Slave Power" hypothesis in antebellum anti-slavery political thought, see generally RICHARDS, *supra* note 15.

disproportionate political power to bludgeon the free states into acquiescence in the preservation and extension of slavery.[91] As Akhil Amar puts it:

> In the decades ramping up to the Civil War, the Deep South's paranoid obsession with protecting its peculiar institution . . . spurred countless acts of tyranny and intolerance. The result was an arc of Southern unfreedom spiraling outward. At the spiral's center, slaves of course suffered brutal deprivations of life, liberty, and property. Then came serious repression of free blacks . . . and then, increasingly, repression of whites themselves, both in the South and beyond. Several Southern states made it a crime—in some places, a capital offense—for a free white person to advocate abolition or to condemn slavery in strong language. Pulpits were silenced, presses confiscated, pamphlets burned, and abolitionist mail suppressed.[92]

Because of this enforced internal unity, the Southern elite was able to reward pro-slavery Northern politicians with office and to punish those who did not protect the interests of slavery and the slave system.[93]

The concept of the Slave Power is well known to contemporary American historians.[94] The idea of the Slave Power was not chiefly concerned with the harms of chattel slavery; it was more widely focused on the political consequences of permitting some states to maintain autocratic internal systems and to receive undue political influence from their own rigidity. In that sense, the Thirteenth Amendment had done nothing to address the Slave Power.

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[91] *See id.*

[92] AMAR, AMERICA'S CONSTITUTION, *supra* note 1, at 371–72. Another term for Professor Amar's "arc of unfreedom" was coined more than half a century ago by historian Clement Eaton, who dubbed the censorship and thought-control system of the South the "intellectual blockade." CLEMENT EATON, FREEDOM OF THOUGHT IN THE OLD SOUTH 331 (1940); *see also* AMAR, THE BILL OF RIGHTS, *supra* note 73, at 190–92 (discussing effects of tyrannical government within states).

[93] It is this kind of political control of the government that Walt Whitman lamented in his early poem, *Song for Certain Congressmen*:

> We are all docile Dough-Faces,
> They knead us with the fist,
> They, the dashing southern lords,
> We labor as they list;
> For them we speak—or hold our tongues,
> For them we turn and twist.

Walt Whitman, *Song for Certain Congressmen* (1850), *in* WALT WHITMAN: THE COMPLETE POEMS 661 (Francis Murphy ed., 2004).

[94] *See* sources cited *supra* notes 15–16.

In fact, the Slave Power was actually strengthened by that Amendment, which abolished the three-fifths rule and thus would provide the former slave states with between eighteen and twenty-eight additional members of Congress and electoral votes that would reflect the will of their all-white electorates unless the Constitution was changed to ensure free speech, political openness, and a two-party system in the South.[95]

Keeping the concept of the Slave Power in mind has many interpretive advantages. For one thing, it permits a reader to see the Amendment as a whole, tying the representation clause, the disfranchisement clause, the debt clause, the pardon clause, and other parts of the Amendment together into a coherent, if less vigorous than might have been hoped, assault on the undemocratic social system of the South and its influence on the nation. If we read the Amendment as a whole, we discover an overwhelming concern with politics—with how representation is to be allocated in Congress, with who is to be allowed to vote, with the debate over the national debt, and with how Congress is to relate to the executive. Such a holistic reading enables us to infer that the framers aimed to reach deeply into the political life of the states to ensure that it would meet republican standards.

The Slave Power theory also permits another inference: the Amendment was not only designed to protect citizens within the states from overreaching majorities or undemocratic elites, but also to protect the federal government against what today we would call "capture" by states that did not honor the spirit of republican government. In other words, it was designed to empower Congress not merely to protect a limited set of personal rights, but also to exercise a broader political supervision of the states. In addition, it was not merely pro-federal, or even pro-Congress; it was, in certain important senses, actively *anti-state* as well, and should be read as such.

C. Do Understand the Inter-branch Struggle that Motivated and Constrained the Framers

One of the most intense controversies about the Fourteenth Amendment centers on the extent to which section 5 lodges power in Congress to enforce and expand the rights guaranteed by section 1. The Rehnquist Court took an aggressively narrow view of the section 5 power, consistently holding that the Amendment gives Congress power only to enforce the decisions of the courts as to the specific rights encompassed by "privileges and immunities," "due process," and "equal protection."[96] In its most extended disquisition on the extent of Congress's power,

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[95] *See, e.g.*, EPPS, DEMOCRACY REBORN, *supra* note 4, at 197; *see also* LES BENEDICT, *supra* note 68, at 136 (discussing the dangers of strengthening Southern power).

[96] *See, e.g.*, Tennessee v. Lane, 541 U.S. 509, 520 (2004) ("Congress' § 5 power is not . . . unlimited. While Congress must have a wide berth in devising appropriate remedial and preventative measures for unconstitutional actions, those measures may not work a 'substantive change in the governing law.'" (quoting City of Boerne v. Flores, 521 U.S. 507,

City of Boerne v. Flores,[97] the Court majority, in an opinion by Justice Kennedy, engages in a somewhat idiosyncratic parsing of the debates of the Thirty-Ninth Congress to conclude that Congress "has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation,"[98] and that for this reason, any congressional statute passed under section 5 must undergo a relatively intrusive judicial scrutiny to determine whether, in the Court's opinion, the statute meets a judicially created test of "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[99]

I find it remarkable that the Court's *Boerne* opinion makes no reference at all to the context of interbranch conflict that surrounded the Amendment's framing. Few historical moments, and few Congresses, have been as dominated by the competing claims of the executive and legislative branches as was the period of the Thirty-Ninth Congress. If we are seriously interested in understanding what produced the text we are interpreting, it behooves us to understand the extent to which the leaders of that Congress were defending the authority and, indeed, even the legitimacy of the institution itself.

The Civil War, and Lincoln's resoluteness in pursuing victory, had transformed the presidency from a relatively modest chief magistracy into something recognizably like the dynamic office it is today, exercising the power of life or death over foreigners and citizens alike, and seeking legal authorization, if at all, only after the assertion of power. Republicans had occasionally chafed at Lincoln's assertions of authority, even though he was a President they trusted and even though he was always suitably deferential in seeking Congress's approval. But since Lincoln's assassination on Good Friday, 1865, the Republican majority had found itself in a very uneasy situation—the powerful office Lincoln had forged was in the hands of a President they barely knew: a pro-slavery Democrat who was not a product of the Republican party or even of anti-slavery politics and who was openly contemptuous of Congress.[100]

The congressional leaders were already determined to push back when Congress convened in December 1865. On December 18, Representative Thaddeus Stevens (chief tactician though not intellectual leader of the Joint Committee that later produced the Fourteenth Amendment) delivered a major address outlining a theory of Reconstruction that would displace the central role Johnson had claimed for the executive branch.[101] The executive had no power to declare the former Confederate

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519 (1997))); Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001) ("Congress' § 5 authority is appropriately exercised only in response to state transgressions.").

[97] 521 U.S. at 507.

[98] *Id.* at 519.

[99] *Id.* at 508.

[100] ACKERMAN, *supra* note 1, at 137–38 (discussing Andrew Johnson's strategy upon becoming President).

[101] CONG. GLOBE, 39th Cong., 1st Sess. 73 (1866).

states "restore[d]" to their full privileges in the Union, Stevens said.[102] "Congress alone can do it. But Congress does not mean the Senate, or the House of Representatives, and President, all acting severally. Their joint action constitutes Congress," he said.[103] In order to underline the point more fully, Stevens stated that "[i]t is time that Congress should assert its sovereignty, and assume something of the dignity of a Roman senate."[104]

This claim of legislative centrality was made before the war between the branches truly heated up, with Johnson's veto of the Freedmen's Bureau Bill on February 19, 1866.[105] In that message, Johnson expressed the view that, since the former Confederate states were not represented in Congress, that body was illegitimate.[106] "The principle is firmly fixed in the minds of the American people, that there should be no taxation without representation," he wrote.[107] "At present all the people of eleven States are excluded—those who were most faithful during the war not less than others."[108]

Because of Congress's refusal to seat members from the South, Johnson argued, plenary authority over Reconstruction rested with him and him alone.[109] "Each member of Congress is chosen from a single district or State," he said.[110] "[T]he President is chosen by the people of all the States. As eleven States are not at this time represented in either branch of Congress, it would seem to be his duty, on all proper occasions, to present their just claims to Congress."[111]

As Bruce Ackerman wrote, this message "launched a frontal assault on the legitimacy" of the Thirty-Ninth Congress.[112] Even as moderate a Republican as Senator William Pitt Fessenden, chair of the Joint Committee, found himself obliged to support a measure barring either House from seating Southern members until both Houses should have approved representation from that state.[113] Congress needed to close ranks, Fessenden said on the Senate floor, because Johnson had suggested in his veto message that "Congress . . . has no right to pass any bill affecting the interests of the late confederate States while they are not represented in Congress."[114] That

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[102] *Id.*

[103] *Id.*

[104] *Id.* at 74.

[105] Andrew Johnson, *Veto of the Freedmen's Bureau Bill* (Feb. 19, 1866), *in* THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 68 (Edward McPherson ed., 1871).

[106] *Id.* at 71.

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *See* ACKERMAN, *supra* note 1, at 170.

[113] CONG. GLOBE, 39th Cong., 1st Sess. 981–82 (1866).

[114] *Id.* at 985.

language questioned the legitimacy of anything the Thirty-Ninth Congress might do, Fessenden said.[115] "I decline to give my assent to any such proposition."[116]

It is important to recognize this conflict among the branches in construing how the Amendment in general, and section 5 in particular, were designed. Congress's attention was mostly fixated on reclaiming its prerogatives against aggressive overreaching by an accidental President. In addition, the congressional majority were men who had little reason to trust or cede authority to the federal courts. The Supreme Court was for most of the antebellum period seen as a stronghold of the Slave Power;[117] the most significant use of the power of constitutional judicial review in the Justices' lifetimes had been the grotesquely pro-slavery decision in *Dred Scott v. Sandford*.[118] Though Lincoln had appointed a few Justices to the Court, anxiety remained. Some historians have suggested that the entire congressional session took place in the shadow of *Ex parte Milligan*,[119] and that some members feared that the Supreme Court would invalidate all of the provisions of law under which Reconstruction was being conducted. And the next Congress, led by many of the leaders of the Thirty-Ninth, distrusted the Court enough to pass legislation divesting it of jurisdiction over certain habeas corpus actions by persons detained under the authority of federal law in the occupied South.[120] This context imposes a heightened burden of proof on anyone who asserts that Congress intended the Amendment primarily to empower the courts, with itself playing a subordinate secondary role.[121]

A second conclusion can be drawn from the interbranch background: this desperate struggle, by convincing the leaders that they would have one and only one chance to rewrite the rules of political engagement, forced them to create a multi-part, compromise amendment whose parts are best understood as forming a whole that, while not entirely coherent, does have a certain underlying congruence of concern.[122]

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[115] *Id.* at 986.

[116] *Id.*

[117] *See* RICHARDS, *supra* note 15, at 94–96 (describing the antebellum Supreme Court as composed almost exclusively of slaveholders and Southern sympathists).

[118] 60 U.S. (19 How.) 393 (1856).

[119] 71 U.S. (4 Wall.) 2 (1866) (limiting jurisdiction of military courts post-Civil War by holding that military courts could not try civilians if civil courts were available, even during times of war).

[120] *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869) (discussing the effects of Congress's decision to repeal an act giving the Supreme Court jurisdiction to grant writs of habeas corpus).

[121] The specific rights of citizenship today therefore cannot and should not be limited to what the framers intended them to be. Nor is it possible to determine what those specific rights would have been. However, what is possible to discern is that Bingham and the others intended Congress to have broad power to define the rights of citizenship over time and to enact legislation to protect those rights.

Zietlow, *Congressional Enforcement*, *supra* note 51, at 756.

[122] *See* ACKERMAN, *supra* note 1, at 162.

This thesis would strengthen the usefulness of the proposition in Part II.B, above, that the Fourteenth Amendment should be read as a whole and in the light of the Slave Power hypothesis.[123]

CONCLUSION: THE FOURTEENTH AMENDMENT AND THE OPEN SOCIETY

My reading of the Fourteenth Amendment and the history of its framing suggests that it properly forms a broad charter of "small-r" republican values by which states in the "purified republic" were to live, and that its framers expected future Congresses and courts to parse the open-ended language of section 1 in a prospective fashion, asking themselves questions such as: *Is the asserted right necessary for the maintenance of an open and equal political system in the states? Does the challenged state law, policy, or practice threaten internal or external consequences analogous to those that flowed from the institutions that maintained the Slave Power? Is the congressional power asserted under section 5 of the Amendment appropriate for the sovereign body representing the American people in pursuit of a vision of national freedom and equality?*

Constitutional law needs broader debate about the meaning of the Fourteenth Amendment. In the interest of furthering such a debate, I am moved to offer my own expansive interpretation. By this point I have pretty clearly eschewed any claim to understand *the* underlying meaning of the Amendment or the "intent" of its framers.[124] My proposed interpretation instead derives from the intellectual history of the period leading up to the framing. Anyone who makes such a study, I submit, cannot fail to be struck by the stark modernity of some of the ideas that were being debated during the entire Civil War era.

To be sure, a great deal of dialogue remained mired in antebellum modes of thought, and a great deal of both pro- and anti-slavery constitutionalism was as narrowly legalistic as anything written by judges or commentators today. Yet there are flashes of political insight that prefigure ideas that would not gain currency until the twentieth century. One of these springs from the struggle over immigrant rights and citizenship mentioned above.[125] One of America's most famous immigrant leaders during the 1860s and beyond was Carl Schurz, the German revolutionary who came to the U.S. in the 1850s and became by turns an important politician, an American diplomat, a Civil War general, and (eventually) a United States Senator and then Secretary of the Interior.[126] One of Schurz's earliest important political statements was a speech in 1859 called "True Americanism," in which he attacked

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[123] *See supra* Part II.B.

[124] *See supra* notes 18–31 and accompanying text.

[125] *See supra* Part I.A.

[126] For more information on Carl Schurz, see TREFOUSSE, *supra* note 54.

nativist proposals to greatly lengthen the period of time during which naturalized citizens would be ineligible to vote.[127]

In order to discredit the idea of a second-class political status for immigrants, Schurz reconceived the American nationality as a product not of racial or ethnic identity, but of allegiance to ideals of liberty and universal equality.[128] Speaking in Boston's Faneuil Hall, Schurz traced the history of European settlement of North America.[129] Not just the English had come here, but also the French, the Dutch, the Norwegians, and the Germans: "[A]ll the social and national elements of the civilized world are represented in the new land" where "their peculiar characteristics are to be blended together by the all-assimilating power of freedom. This is the origin of the American nationality, which did not spring from one family, one tribe, one country, but incorporates the vigorous elements of all civilized nations on earth."[130] The disparate elements, Schurz said, represented not one people or one race, but the hopes and aspirations of all people everywhere: "[I]n the colony of free humanity, whose mother-country is the world, they establish *the Republic of equal rights, where the title of manhood is the title to citizenship*."[131]

The statement is a startlingly contemporary view of the meaning of American citizenship—one that stands in sharp contrast with many views of American nationality, North and South, during the years before the Civil War. Many Americans believed that American citizenship was in fact racial or tribal. The most famous exposition of this view was the remark credited to Andrew Johnson by a Missouri newspaper: "This is a country for white men, and by God, as long as I am President, it shall be a government for white men."[132] Opponents of the Fourteenth Amendment and other civil rights legislation often placed their opposition squarely on the grounds that it would destroy America's tribal character. "I am not in favor of giving the colored man a vote, because I think we should remain a political community of white people," Senator Thomas Hendricks of Indiana said during the debate over an earlier proposed constitutional amendment that later appeared, slightly changed, in the text of the Fourteenth Amendment.[133] "[T]he fundamental, original, and universal principle upon which our system of government rests, is that it was founded by and for white men," argued Senator Garrett Davis of Kentucky in a long speech opposing

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[127] Carl Schurz, *True Americanism* (April 18, 1859), *in* 1 SPEECHES, CORRESPONDENCE AND POLITICAL PAPERS OF CARL SCHURZ 48 (Frederic Bancroft ed., 1913).

[128] *Id.*

[129] *Id.* at 53–54.

[130] *Id.* at 54. There is, of course, a slight ring of Herbert Spencer in this evocation of "vigorous elements," and Schurz was very gingerly in his reference to equality for black Americans, but those elements seem more forensic than essential to his argument. I am indebted to Neil Richards for this insight.

[131] *Id.* at 57.

[132] HANS L. TREFOUSSE, ANDREW JOHNSON: A BIOGRAPHY 236 (1989).

[133] CONG. GLOBE, 39th Cong., 1st Sess. 880 (1866).

Trumbull's Civil Rights Bill.[134] During the debate on the draft amendment itself, Representative Andrew Rogers of New Jersey said:

> I want it distinctly understood that the American people believe that this Government was made for white men and white women. . . . God save the people of the South from the degradation by which they would be obliged to go to the polls and vote side by side with the negro![135]

Statements like those above have given rise to an influential "Negrophobia" hypothesis—a theory that, whatever its text may suggest, the Amendment cannot possibly embody ideas of multiracial democracy because racism was so general in post-bellum America, North and South. The most influential proponent of this view is the late Raoul Berger, who argued in his influential book *Government by Judiciary* that "[t]he key to an understanding of the Fourteenth Amendment is that the North was shot through with Negrophobia"[136] and that section 1 should be read narrowly as the product of this racist mindset. Berger overreads the evidence of monolithic racism,[137] but no one can deny that even anti-slavery politicians were affected by Northern prejudice against black Americans. The record can, however, with greater plausibility, be read the other way: given the pervasive racialism of nineteenth-century America, what is remarkable is not that these views were so crudely expressed, but that, during the drafting and ratification of the Fourteenth Amendment, they were so completely overcome. Viewed this way, the argument that generalized racial attitudes form an unwritten limit to the Amendment would be like quoting the frequent and vulgar public expressions of racism during the early 1960s as evidence that the Civil Rights Act of 1964 could not really have been intended to reach into the daily life of the nation and remove racial discrimination. In fact, in the congressional debates, the proponents enunciated a view close to Schurz's—a philosophy that today would be called multiculturalism. During the debate on the final amendment, Senator Conness explained his earlier vote for the Civil Rights Bill and his current support for the Citizenship Clause: "I voted for the proposition to declare that the children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States, entitled to equal civil rights with other citizens of the United States."[138] The new American community would include

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[134] *Id.* at 575.

[135] *Id.* at 2538.

[136] RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 11 (2d ed. 1997).

[137] *See, e.g., id.* (citing racist statements by Charles Sumner made in 1834, three decades before the Amendment debate, to suggest that even this most aggressive and principled proponent of racial equality must not have really meant what he was saying in 1866).

[138] CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866).

African Americans, Chinese Americans, and even Gypsies, who were the nearest equivalent in the popular imagination to the threatening "illegal immigrants" of the twenty-first century.[139]

This new vision—whether boldly asserted by Schurz or more hesitantly endorsed by Republican officeholders—bears a striking resemblance to the political community envisioned eighty years later by the Austrian-born philosopher Karl Popper in his seminal work, *The Open Society and Its Enemies*.[140] Popper's work was inspired by the twentieth-century struggle against totalitarianism in general and racially based German fascism in particular. He traces the ideas underlying totalitarianism to the vision espoused by Plato in *The Republic* and relates Plato's vision of an organic society, led by a specially trained caste of philosopher-kings, to the anxieties gripping Athens in the sixth century B.C.E.[141] The Greeks of that era, whom Popper calls "the Great Generation,"[142] were, he says, "the first to make the step from tribalism to humanitarianism."[143] Greek society to that point, like all tribal or closed societies, he argues, "resemble[d] a herd or a tribe in being a semiorganic unit whose members [were] held together by semibiological ties—kinship, living together, sharing common efforts, common dangers, common joys, and common distress."[144] Such a society provides a sense of belonging and moral security to its members, he writes.[145] But the sense of magical certainty and belonging cannot survive the population explosion brought about by agricultural progress, the rise of commerce, and the creation of empires that govern many different tribal groups, so the society must formulate its values and norms in terms of abstract ideas rather than concrete relationships.[146]

This change gives rise to what Popper calls "[t]he strain of civilization . . . created by the effort which life in an open and partially abstract society continually demands from us—by the endeavor to be rational, to forego at least some of our emotional social needs, to look after ourselves, and to accept responsibilities."[147] The totalitarian impulse, Popper argues, springs from a rejection of the ambiguity and anxiety inspired by being forced to accept the full humanity of people to whom a dominant group has no concrete, or tribal, ties.[148] This rejection gives rise to a desire to return to an imagined simpler time. Plato's vision in *The Republic*, "[t]his dream of unity and beauty and perfection, this aestheticism and holism and collectivism," Popper writes, "is the product as well as the symptom of the lost group spirit of

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[139] *See* EPPS, DEMOCRACY REBORN, *supra* note 4, at 235–36.

[140] POPPER, OPEN SOCIETY, *supra* note 33.

[141] *Id.* at 165–66.

[142] *Id.* at 180.

[143] *Id.* at 167.

[144] *Id.* at 169.

[145] *Id.* at 168.

[146] *Id.* at 171–72.

[147] *Id.* at 172 (emphasis omitted).

[148] *Id.*

tribalism. It is the expression of, and an ardent appeal to, the sentiments of those who suffer from the strain of civilization."[149]

Against the "closed society," with its mock-organic tribalism, magical thinking, and religious view of knowledge and morality, Popper pictured the "open society" as a site of abstract relations, class struggle, individual responsibility, and constant corrosive social critique. The latter is perhaps the most important. Popper's original philosophical work was in the philosophy of science.[150] In this work, he argued that scientific enquiry never seeks to *prove* the truth of any factual statement; as David Hume had shown in his *Enquiry*,[151] the mere repetition of phenomena cannot prove that they are produced by physical laws. Instead, Popper argued, science (and knowledge generally) proceeds by *falsification*; scientists formulate hypotheses and then design experiments that could prove them false.[152] Knowledge advances not by the valid synthesis of truth but by the undeniable destruction of falsehood.[153] Thus, for Popper, society as well as science depended upon the ability of its members to question received truth and demonstrate its falsehood without fear of punishment or exclusion.[154]

Two vital principles of the open society, then, are its rejection of tribal (what we today would call racial or ethnic) identity and its embrace of free enquiry about even the most deeply held social beliefs.[155] The history of the Fourteenth Amendment's framing turns powerfully upon both these concepts. As noted above, its proponents accepted what its enemies deplored—that it would substitute for an Anglo-Saxon nation a new America based around some version of Schurz's notion of the "colony of free humanity."[156] And they argued that no government could be republican in form without permitting free discussion of even its fundamental institutions. The Amendment's sponsors were quite clear in their expectation that its enactment would require the states to observe

> the personal rights guaranted [sic] and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers

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[149] *Id.* at 194 (citation omitted).

[150] *See* KARL POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY (1959) [hereinafter POPPER, LOGIC].

[151] DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING AND OTHER WRITINGS (Stephen Buckle ed., Cambridge Univ. Press 2007) (1748).

[152] POPPER, LOGIC, *supra* note 150.

[153] *Id.*

[154] *Id.*

[155] *See* POPPER, OPEN SOCIETY, *supra* note 33.

[156] *See* Schurz, *supra* note 127, at 57.

> in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.[157]

But they were most assertive in their statements that the Amendment must require the states to permit free speech and assembly, what Representative John Armour Bingham called "the right to know; to argue and to utter, according to conscience."[158] Their debates seem to envision a multicultural republic where reason and free discussion, not government authority or private terror, would determine the course of public affairs.

One can argue that the Civil War era marks for American society what Popper saw the sixth century B.C.E. as marking for the Greeks—a turn away from tribalism and the closed society and toward an abstract, cosmopolitan social order marked by a commitment to public reason and free discussion. This perceived similarity tempts me to suggest an expansive theory by which to interpret the Fourteenth Amendment, one that neither depends on divining the will of the dead nor declares the living completely independent of their stated intentions.

It might be profitable for commentators, lawyers, and judges to ask themselves whether a challenged legal practice is consonant with the operation of an "open society." Which interpretation of section 1, they could ask, moves us most directly toward such a state of affairs? Is an "open society" characterized by genuine racial and sexual equality, or by a reluctance to disturb prejudices ingrained by institutional or social practice? Is it marked by genuine neutrality among and equal respect for religious beliefs, or by a privileged status for local religious majorities? Is it marked by a commitment to free and equal elections, or by attempts by temporary political majorities to alter voting and election practices in order to extend their own ascendancy as long as possible? Is it marked by acceptance that inequality of wealth marks inequality of political influence, or by a commitment to equal as well as free deliberation?

This view of the Amendment's meaning and its proper application is, of course, both contested and contestable. And beyond that, it seems to betray the promises of epistemological modesty I made at the outset of this Essay. "Do I contradict myself? / Very well then . . . . I contradict myself."[159] But the offense may be lessened by

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[157] CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Senator Jacob Howard of Michigan, floor sponsor of the Amendment, introducing it on the Senate floor).

[158] JACOBUS TENBROEK, EQUAL UNDER LAW, app. D at 339–40 (1965).

[159] Walt Whitman, *Song of Myself*, *in* WHITMAN, *supra* note 10, 675, 737.

noting that I do not offer my meaning as *the* meaning, or the "original intent" of the framers (who of course lived before Popper, even if they partook of the influences that would later inspire his work).

I do claim that it complies with their intent in one important respect: by creating the general language of section 1, and the complex structure of the Amendment as a whole, they must have intended that those who came after them would engage in the task of interpretation and elucidation—that we would come forward to offer our own views of the minimum requirements of the "privileges and immunities" of American citizenship, of "equal protection" and "due process" of law, of republican civic life and membership in what Carl Schurz called "a Union of truly democratic States; a Union capable of ripening to full maturity all that is great and hopeful in the mind and heart of the American people; a Union on every square foot of which free thought may shine out in free utterance."[160] If my theory does not satisfy, then give me yours: "For every atom belonging to me as good belongs to you."[161]

One of the intellectual pleasures of being an American is the endless dialogue over the meaning of our Constitution, over the wisdom or lack thereof of those who framed it and those who have altered and interpreted it. At its most exhilarating, that pastime involves not discrete and technical parsing of specific clauses shorn of context, but bold imagination of the situation and values of those who came before us, and reconstruction of the ways we are knit with them into a complex tapestry of foresight and triumph, myopia and shame. Countless popular and scholarly books testify to the persistent appeal of this great game. Far too much of the time, however, the players have occupied only part of the field, that part marked "Philadelphia 1787." Boldness and imagination should be deployed in our encounter with the Thirty-Ninth Congress and the great public that ratified its remodeling of the original Republic.

If we are brave as constitutional thinkers, we may differ, and we may err, but we can never fail.

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[160] Carl Schurz, *The Logical Results of the War* (Sept. 8, 1866), *in* SPEECHES, CORRESPONDENCE AND POLITICAL PAPERS OF CARL SCHURZ, *supra* note 127, at 377, 413.

[161] Whitman, *supra* note 159, at 675.