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

Garrett Epps
ESSAY

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Orlando John & Marian H. Hollis Professor, University of Oregon School of Law. This paper grew out of a small part of a presentation I made to a faculty colloquium at the Washington College of Law of the American University. I am grateful to my small circle of friends at that fine school, of which I retain so many pleasant memories: Padideh Ala'i, Jon Baker, Susan Bennett, Susan Carle, Robert Dinerstein, Christine Farley, Claudio Grossman, Lewis Grossman, Elliott Millstein, Mark Niles, Andrew Popper, Jamin Ben Raskin and Ann Shalleck. I am also grateful for the opportunity to expand on the idea at a colloquium at Washington University School of Law in St. Louis, with particular thanks to Margo Schlanger, who invited me to speak, and to Jane Harris Aiken, Sam Bagenstos, Samuel W. Buell, Kathleen Clark, John Drobak, Barbara Flagg, Emily Hughes, Daniel L. Keating, David Konig, Stephen H. Legomsky, Troy Paredes, Laura Rosenbury, Jennifer Solomon, Neil Richards and Karen Tokarz for useful questions and comments. I thank my valued colleague at Oregon, Merle Weiner, for detailed editing suggestions; and also Daniel S. Epps, Rennard Strickland and William W. Van Alstyne for encouragement and editing help. My invaluable assistant Jill Forcier helped me meet a difficult deadline.
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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 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 § 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 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 final 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.
I.

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. Achieving that sophisticated understanding is made more difficult by the 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” has all but blinded both citizens and scholars both to the Constitution’s flaws and to the importance of the remedial measures taken by subsequent generations. 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. 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.\footnote{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 ___, at 160.}

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 persists 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 Gods and Generals,\footnote{MICHAEL SHAARA, THE KILLER ANGELS (1974) (dramatizing decisions of commanders at battle of Gettysburg).} Advise and Consent\footnote{ALLEN DRURY, ADVISE AND CONSENT (1959) (relating fictional struggle between President and Senate over controversial Cabinet nominee).} and Seven Days in May.\footnote{FLETCHER KNEBEL, SEVEN DAYS IN MAY (1962) (imagining conspiracy to overthrow elected U.S. government and replace it with a military junta).} 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, political rhetoric that combines 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\footnote{See EPPS, DEMOCRACY REBORN, supra note ___, at 247-48.}) 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. “Sometimes I feel as if one side had the best of it
and then the other."  

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, 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. 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 1865-66—conclusions that have some implications for the present-day task of interpreting and applying the Amendment to contemporary legal questions. In this essay, 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,

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10 Walt Whitman, The Correspondence, I; 1842-67, at 272-79 (2004). 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 __, at 16-17.


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 interpretations of complex legal and constitutional events, they may be accused of writing “law office history”—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. 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. This is

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13 “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. & POLITICS 809 (1997).


15 See Garrett Epps, Antebellum Political Background, supra note __, at 175 (presenting Slave Power idea as political backdrop for framing). In his sophisticated study of constitutional history, Akhil Reed Amar notes the importance of the Slave Power concept to antebellum critiques of the South. See Akhil, supra note ____ at 371-72 (2005). Professor Ackerman does not mention the Slave Power concept in his important work on the Fourteenthe
hardly surprising: much of what historians 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.

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, the power of Congress to enforce civil rights, the requirement of equality in the drawing of legislative districts, the procedural rights of criminal suspects and the status of American-born children of foreign nationals temporarily resident on American soil.


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


City of Boerne, Texas v. Flores, 521 U.S. 507.


MALTZ, supra note ____, at 118.

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.”

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. Crusoe’s attempts to explain the footprint serve as a metaphor for the difficulty of reading constitutional text. At first he imagines that the footprint is not human in origin but is the work of the devil. That hypothesis seems unlikely, though: “[t]he devil might have found an abundance of other ways to have terrified me than this of the single print of a foot.” Then he decides that he must have made the footprint himself. This theory collapses “[w]hen I came to measure the mark with my own foot [and] found my foot not so large by a great deal.” He is “filled with the belief that some man or men had been on shore there; or, in short, that the island was inhabited.” Only then can he begin to assess the maker’s intentions toward him.

The Fourteenth Amendment is, as Rep. Frederick Woodbridge of Vermont said while debating it, a “footprint[] . . . upon the rocks of the mountains.” We may not know exactly what those who made it were thinking, but if we are not to live as

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24 Id.
25 Id. at 131.
26 Id. at 134.
27 Id.
28 Id. at 135.
29 CONGRESSIONAL GLOBE, 39th Cong., 1st sess. (1866) (hereinafter CONGRESSIONAL GLOBE), at 1088.
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. 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 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 essay. 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

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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 Auschaulichen der Quantentheorischen Kinematik und Mechanik, 43 ZEITSCHRIFT FÜR PHYSIK 172 (1927), tr. in QUANTUM THEORY AND MEASUREMENT 62 (John Archibald Wheeler and Woyciech Hubert Zurek eds. 1983).
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.\footnote{See Epps, Democracy Reborn, supra note ____. at 30-31.}

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 essay, 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.” I proffer this broad reading only 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.
II.

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.” This implies that it’s easier to falsify erroneous statements than to demonstrate the truth of assuredly valid ones, so I will begin with the two Don’ts, which 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.

I. 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:

[I]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

\[Richards, \text{supra note } ____, \text{ at } 818.\]
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.\footnote{The Slaughter House Cases, 83 U.S. 36, 71-72 (1873).}

This interpretation was vigorously challenged by a dissenting Justice in that very case,\footnote{See id. at 128-29 (Swayne, J., dissenting).} and since then the Court itself has recognized that the Fourteenth Amendment contains “a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves.”\footnote{McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 296 (1976).} But the idea remains alive in the shadows\footnote{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. COMMENTARY 19 (1993).} 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 Surety & Casualty Co.,\footnote{Weber v. Aetna Surety & Casualty Co., 406 U.S. 164, 178-179 (1972) (decrying use of Equal Protection Clause to protect “fundamental personal rights”).} and it appears in decisions of lower courts as well.\footnote{See, e.g., Hudson Valley Freedom Theater v. Heimbach, 671 F.2d 702, 708 n.2 (2d Cir. 1982); (citing Slaughter House to focus Equal Protection Clause on racial classifications).} It also pops up in legal commentary\footnote{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) (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 § 1 could guarantee} and in works of popular advocacy.\footnote{See Eastman, supra note 37.}
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 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 US population that was foreign born was 9.7 percent. By 1860, it was 13.2 percent, 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 7.9 percent. By 2000, it had risen to 10.4 percent. The most recent census estimate places it at 12.4 percent. 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. 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”). In addition, Rep. 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[.]”

The framers were aware of and concerned for immigrants in part because some of them were

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17 Id.
18 Id.
20 See Epps, DEMOCRACY REBORN, supra note ____, at 235-36.
21 See Eastman, supra note ____.
22 CONGRESSIONAL GLOBE, supra note ____., at 1292.
immigrants themselves. Just as the English-born James Wilson put the case for tolerance toward the foreign-born at the Philadelphia Convention of 1787, Sen. John Connors of California, Irish by birth, took a leading part in the debate over the Citizenship Clause. Carl Schurz, a German-born American politician, contributed to the debate surrounding the Amendment, 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.

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 dissenting whites political rights and legal protection as they were to grant equal civil status to black Southerners.

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

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50 On Connors’s Irish birth, see “Connors, John,” Biographical Director of the United States Congress. On his role in the Citizenship Clause debate, see Epps, Democracy Reborn, supra note ___ at ____.
51 For a general account of Schurz’s life, see Hans Trefousse, Carl Schurz: A Biography (1982).
52 See Frank Freidel, Francis Lieber: Nineteenth Century Liberal (1948)
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.

2. 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*: “one 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.”

Charles W. Fairman, the most influential proponent of a narrow reading of the Fourteenth Amendment, wrote that “over and over in this debate the correspondence between Section One 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.” Alexander Bickel 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 constitutionality and to place it beyond the power of a later Congress to repeal.” If the

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331 U.S. 24 (1948).
Id. at 32-33 (footnotes omitted).
Charles W. Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 STAN. L. REV. 5, 44 (1949).
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 rights “to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and [to] be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.”

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, were 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.”

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. Rep. 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 time that the South and their copperhead allies obtain the command of Congress it will be repealed.”

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58 14 Stat. 27 (1866).
59 MALTZ, supra note ________.
60 Id. at 109.
61 CONGRESSIONAL GLOBE, supra note _____, at 2459.
But the idea that the Act and § 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 Sen. James Doolittle, a conservative Republican seeking to defeat the proposed Amendment, and Sen. William Pitt Fessenden, the chair of the Joint Committee that wrote the Amendment and one of its most sophisticated intellectual proponents. The specific debate concerned the Citizenship Clause in § 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. 62 “The committee of fifteen, fearing that this declaration by Congress was without validity unless a constitutional amendment should be brought forward to enforce his, have thought proper to report this amendment,” Doolittle said on the Senate floor on May 30, 1866. 63

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 upon entirely different grounds.” 64 § 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 Sen. Lyman Trumbull, chair of the Senate Judiciary Committee, and came to the floor after passage by that committee. 65 Trumbull, one of the main authors and sponsors of the Thirteenth Amendment, consistently maintained in legislative debate that Congress’s power to protect a limited set of civil rights flowed from § 2 of the Thirteenth Amendment and needed no additional constitutional

62 14 Stat. 27.
63 CONGRESSIONAL GLOBE, supra note ___, at 2896.
64 Id.
65 See EPPS, DEMOCRACY REBORN, supra note ____., at 129.
justification." § 1 of the Fourteenth Amendment, by contrast, was written in the Joint Committee on Reconstruction" (and considerably revised in secret caucus when, after passage by the House, it reached the Senate floor)." The ideas within it, and most particularly within the Privileges and Immunities Clause, seem to flow most directly from the work and words of Rep. John Armour Bingham and former Rep. Robert Dale Owen, whose constitutional theories were considerably different from those of Sen. 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 Professor Michael Kent Curtis 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 that the general language of §1 was written with a broad set of political and civil rights in mind."

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"Id.
"Id. at 199-204.
"Id. at 234.
"Id. at 199-204.
71 MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE, supra note ______.
72 WILLIAM NELSON, THE FOURTEENTH AMENDMENT, supra note ______.
III.

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 interpretive dialogue, I think, may be enriched by at least considering that the historical record supports the following three interpretive principles.

1. 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, Rep. 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 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.\textsuperscript{72}

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.\textsuperscript{73}

But the second 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”—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. As reported by Madison, Morris on August 8 denounced the draft constitution as fatally solicitous of slavery:

\textsuperscript{72} Congressional Globe, supra note \texttextup{14}, at 3148 (emphasis added).
\textsuperscript{73} Congressional Globe, supra note \texttextup{14}, app. at 139 (remarks of Rep. Andrew Rogers of New Jersey).
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 a Northern freeman, will pay more tax than the whole consumption of the miserable slave. . . . On the other hand 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 in 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.

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.” Wendell Phillips, reading Madison’s Notes, denounced “that ‘compromise,’ which was made between slavery and freedom, in 1787; granting to the slaveholder distinct privileges and protections for his slave property, in return for certain commercial

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15 LINDSAY SWIFT, WILLIAM LLOYD GARRISON 307 (1911).
concessions upon his part toward the North” and claimed that “the Nation at large were fully aware of this bargain at the time, and entered into it willingly and with open eyes.” 76

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” 77—if the mischief was not to recur. 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 Morrison v. United States 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 attack discriminatory conduct,” Chief Justice Rehnquist wrote. “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.” 78

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,” a balance that had fallen into bloody ruins during the Civil War. The error is as grievous as regarding the United States Constitution as a minor adjustment in the Articles of Confederation. The Fourteenth Amendment embodies a new theory of the nation and the

77 Stevens, supra note ____.
States, and we will not be able to discern it if we blind ourselves to the necessity of looking for it.

2. **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.\(^79\) The Slave Power was a term that any politically literate American in the mid-nineteenth century would have understood.\(^80\) It referred to a combination of Southern ruthlessness and constitutional flaw 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 disproportionate political power to bludgeon the free States into acquiescence in the preservation and extension of slavery. As Akhil Amar puts it,

\begin{quote}
In the decades ramping up to the Civil War, the Deep South’s paranoid obsession with protecting its peculiar institution . . . spurred
\end{quote}

\(^79\) See Epps, Democracy Reborn, supra note ____ , at 57.
\(^80\) For a balanced account of the place of the “Slave Power” hypothesis in antebellum anti-slavery political thought, see generally Richards, The Slave Power, supra note ____.
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 white person to advocate abolition or to condemn slavery in strong language. Pulpits were silenced, presses confiscated, pamphlets burned, and abolitionist mail suppressed. 

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

The concept of the Slave Power is well known to contemporary American historians. The idea of the

81 AMAR, supra note ___, 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).

82 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.


83 See supra note ____ (listing sources).
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.

In fact, the “Slave Power” in one sense was strengthened by that Amendment, which abolished the three-fifths rule and thus would provide the former slave States with between 18 and 28 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.1

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 clauses 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 to exercise a broader political supervision of the States. In addition, it was not merely pro-federal,

1 See, e.g., Epps, Democracy Reborn, supra note ____, at 197.
or even pro-Congress; it was, in certain important senses, actively anti-State as well, and should be read as such.

3. 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 §5 lodges power in Congress to enforce and expand the rights guaranteed by §1. The Rehnquist Court has taken an aggressively narrow view of the §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.” In its most extended disquisition on the extent of Congress’s power, City of Boerne, Texas v. Flores, 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,” and that for this reason, any Congressional statute passed under §5 must undergo a relatively intrusive judicial scrutiny to determine whether, in the courts’ 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.”

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 has 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.

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85 City of Boerne v. Flores, 521 U.S. 507.
86 Id. at 519.
87 Id.
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’ approval. But since 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.

The Congressional leaders were already determined to push back when Congress convened in December 1865. On December 18, Rep. 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. The executive had no power to declare the former Confederate states “restored” to their full privileges in the Union, Stevens said. “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. 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.”

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 Feb. 19, 1866. In that message, Johnson expressed the view that, since the former Confederate states were not represented in Congress, that body was illegitimate. “The principle is firmly fixed in the

88 CONGRESSIONAL GLOBE, supra note ___, at. 73.
89 Id. at 74.
minds of the American people, that there should be no taxation without representation," he wrote. "At present all the people of eleven States are excluded—those who were most faithful during the war not less than others." 90

Because of Congress' refusal to seat members from the South, Johnson argued, plenary authority over Reconstruction rested with him and him alone. "Each member of Congress is chosen from a single district or State," he said. "The 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." 91

As Bruce Ackerman writes, this message "launched a frontal assault on the legitimacy" of the Thirty Ninth Congress. 92 Even as moderate a Republican as Sen. 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. 93 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." That language questioned the legitimacy of anything the Thirty Ninth Congress might do, Fessenden said. "I decline to give my assent to any such proposition." 94

It's important to recognize this conflict among the branches in construing how the Amendment in general, and § 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

90 Edward McPherson, Political History of the United States During the Period of Reconstruction 68-72 (1870).
91 Id.
92 See Ackerman, supra note ____, at 170.
93 Congressional Globe, supra note ____, at 981-82.
94 Id. at 985-86.
period seen as a stronghold of the Slave Power; the most significant use of the power of constitutional judicial review in their lifetimes had been the grotesquely pro-slavery decision in Dred Scott v. Sandford. 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, and that some members feared that the Supreme Court would invalidate all 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.

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.

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. This thesis would strengthen the usefulness of proposition # 2, above, that the Fourteenth Amendment should be read as a whole, and in the light of the Slave Power hypothesis.

\footnote{See Richards, The Slave Power, supra note \ldots, at 94-96.}
\footnote{60 U.S. (19 How.) 393 (1856).}
\footnote{71 U.S. 2 (1866).}
\footnote{Ex parte Milligan, 74 U.S. 506 (1868).}
\footnote{See Ackerman, supra note \ldots, at 162.
IV.

Conclusion: The Fourteenth Amendment and the Open Society

My reading of the Fourteenth Amendment and the history of its framing suggest 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 § 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? and Is the Congressional power asserted under § 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. 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. 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. One of Schurz’s earliest important political statements was a speech in 1857 called “True Americanism,” in which he attacked nativist proposals to greatly lengthen the period of time during which naturalized citizens would be ineligible to vote.

In order to discredit the idea of a second-class political status for immigrants, Schurz reimagined the American nationality as a product not of racial or ethnic identity but of allegiance to ideals of liberty and universal equality. Speaking in Boston’s Faneuil Hall, Schurz traced the history of European settlement of North America. Not just the English had come here, but also the French, the Dutch, the Norwegians and the Germans; “all the social and national elements of the civilized world are represented in the new world” 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.”

The disparate elements, Schurz said, represented not one people or one race, but the hopes and aspirations of all people everywhere. In “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.”

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

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100 For a general account of Schurz’s life, see HANS TREFOUSSE, CARL SCHURZ: A BIOGRAPHY (1982).
101 SCHURZ, 1 SPEECHES CORRESPONDENCE AND POLITICAL PAPERS 54 (emphasis in original). 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. Id. But those elements seem more forensic than essential to his argument. I am indebted to Neil Richards for this insight.
102 Id. at 57 (emphasis in original).
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.” 103 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,” Sen. Thomas Hendricks of Indiana said during the debate over an early proposed constitutional amendment that later appeared, slightly changed, in the text of the Fourteenth Amendment. 104 “[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 Sen. Garrett Davis of Kentucky in a long speech opposing Trumbull’s Civil Rights Bill. 105 During the debate on the draft Amendment itself, Rep. 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,” he said. “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!” 106

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 in his influential book Government by Judiciary 107 that “[t]he key to an understanding of the Fourteenth Amendment is that the North was shot through with Negrophobia” 108 and that § 1 should be read narrowly

104 CONGRESSIONAL GLOBE, supra note ______, at 833.
105 CONGRESSIONAL GLOBE, supra note ______, at 575.
106 Id. at 2538.
108 Id. at 10.
as the product of this racist mindset. Berger overreads the evidence of monolithic racism; 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. 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, Sen. 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.” The new American community would include 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.

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.* Popper’s work was inspired by the Twentieth Century

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109 See, e.g., id. at 10–11, 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 really have meant what he was saying in 1866.

110 Arguing that generalized racial attitudes form an unwritten limit to the Amendment is somewhat similar to quoting the frequent and vulgar public expressions of racism current 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.

111 *CONGRESSIONAL GLOBE*, supra note _____, at 2891.


struggle against totalitarianism generally 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. The Greeks of that era, whom Popper calls “the Great Generation,”114 were, he says, “the first to make the step from tribalism to humanitarianism.”115 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.”116 Such a society provides a sense of belonging and moral security to its members, he writes.117 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 and must formulate their values and norms in terms of abstract ideas rather than concrete relationships.118 This change gives rise to what Popper calls “the strain of civilization . . . the strain 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.”119 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. 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 spirit of tribalism.

114 Id. at 180.
115 Id. at 167.
116 Id. at 169.
117 Id. at 168.
118 Id. at 171-172.
119 Id. at 172.
It is the expression of, and an ardent appeal to, the sentiments of those who suffer from the strain of civilization." \(^{120}\)

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. \(^{121}\) 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, \(^{122}\) the mere repetition of phenomena cannot prove that they are produced by physical laws. Instead, Popper argued, science (and knowledge generally) proceed by falsification; scientists formulate hypotheses and then design experiments that could prove them false. Knowledge advances not by the valid synthesis of truth, but by the undeniable destruction of falsehood. 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.

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. The history of the Fourteenth Amendment’s framing turns very 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.” And they powerfully advocated 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

\(^{120}\) Id. at 194.

\(^{121}\) See generally KARL Popper, LOGIK DER FORSCHUNG (1934), revised and published in English as THE LOGIC OF SCIENTIFIC DISCOVERY (1959).

\(^{122}\) David Hume, An Enquiry concerning Human Understanding (1748).
the personal rights guaranteed 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 bear arms; the right to be exempted from the quartering of soldiers 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.

But they were most assertive in their statements that the Amendment must require the States to permit free speech and assembly, what Rep. John Armour Bingham called “the right to know; to argue and to utter, according to conscience.” 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

123 Cong. Globe, supra note ____, at. 2765 (statement of Sen. Jacob Howard of Michigan, floor sponsor of the Amendment, introducing it on the Senate floor).

124 JACOBUS TEN BROEK, EQUAL UNDER LAW, pp. 331, 339-40.
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 § 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.” But the offense may be lessened by 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 § 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

\[^{125}\text{Walt Whitman, ”Song of Myself,” in WHITMAN, supra note ___., 675, 737.}\]
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, during the public debate over ratification of the Amendment, “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.” 126 If my theory does not satisfy, then give me yours: “For every atom belonging to me as good belongs to you.” 127

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 thoughts 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 ever fail.

126 SCHURZ, I SPEECHES, supra note ____, at. 404, 412-413.
127 “Song of Myself,” WHITMAN, supra note ____, at 675.