Infinite Hope and Finite Disappointment
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The Story of the First Interpreters of the Fourteenth Amendment

Edited by Elizabeth Reilly

The University of Akron Press
Akron, Ohio
Infinite Hope and Finite Disappointment: the story of the first interpreters of the Fourteenth Amendment / edited by Elizabeth Reilly.—1st ed.

Summary: "Infinite Hope and Finite Disappointment details the hopes and promises of the 14th Amendment in the historical, legal, and sociological context within which it was framed. Part of the Reconstruction Amendments collectively known as "The Second Founding," the 14th Amendment fundamentally altered the 1787 Constitution to protect individual rights and altered the balance of power between the national government and the states. The book also shows how initial Supreme Court interpretations of the amendment’s reach hindered its applicability. Finally, the contributors investigate the current impact of the 14th Amendment. The book is divided into three parts: "Infinite Hope: The Framers as First Interpreters," "Finite Disappointment: The Supreme Court as First Interpreter," and "Never Losing Infinite Hope: The People as First Interpreters.""—Provided by publisher.

Includes bibliographical references and index.

ISBN 978-1-935603-00-9 (pbk.)

KF45584.4TH 354 2011
342.73029—dc22

2011008195


Infinite Hope and Finite Disappointment was designed and typeset by Amy Freels, with assistance from Zac Bettendorf. The typeface, Stone Print, was designed by Sumner Stone in 1991. Infinite Hope and Finite Disappointment was printed on sixty-pound natural and bound by BookMasters of Ashland, Ohio.
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Constitution of the United States

PREAMBLE
We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

FOURTEENTH AMENDMENT
Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the
United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE IV

Section 2, Clause 1. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Section 2, Clause 2. A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

Section 2, Clause 3. No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3, Clause 2. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.
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The 14th Amendment embodies hope. An outgrowth of the Civil War and its aftermath, the Amendment profoundly reconstituted “the People of the United States” and redefined what it meant “to form a more perfect Union, establish Justice, insure domestic Tranquility . . . promote the general Welfare, and secure the Blessings of Liberty.”¹

The importance of the 14th Amendment is hard to overestimate; some have called its adoption the “second founding.” The Amendment has a wide scope and is one of the most frequently invoked sources of protection for individual liberties.²

Among the many reasons to enshrine the 14th Amendment in a position of Constitutional primacy is the fact that the Amendment was designed to have, and has had, profound effects upon all three of the structural principles undergirding the Constitution: federalism, individual rights, and separation of powers. As the 39th Congress struggled with correcting the wrongs that had divided the Union before, during and after the Civil War, altering the constitutional understanding of each of these principles was essential. The vast reach of this enterprise was not lost on the Amendment’s framers or on the American people.

From its stunning opening phrases through to its final section on congressional power, the Amendment recast national and state power and the individu-
ual’s place within the governing structure. After decreeing that “All persons born or naturalized ... are citizens of the United States,” Section 1 limited state power to infringe individual rights—“No State shall make or enforce any law” to “abridge the privileges or immunities of citizens,” or to “deprive any person of life, liberty or property without due process of law” or to “deny to any person” the “equal protection of the laws.” To emphasize the national power to protect those rights, Section 5 explicitly granted Congress the power to enforce all of the provisions of the Amendment. The 14th Amendment left no doubt that the powers reserved to the states were altered and that the powers granted to the national government were expanded.

The Amendment also tackled significant questions of the terms of reunification. Section 2 directly reduced apportioned representation in any state that denied a male citizen of age the right to vote in a federal or state election. This section negated the excess allocation of representatives to slave states that had been accomplished through the infamous Three-Fifths Clause, and counted freedpeople only if they were also granted the right to vote. Section 3 disqualified from federal or state office all of those who betrayed their previous oaths of office by engaging in insurrection against the United States and granted the pardoning power over this disability to the Congress, not the President. Together, Sections 2 and 3 prevented the antebellum Slave Power structure from reasserting itself in the readmitted states and in the branches of the federal government. Section 4 prohibited the nation or any state from assuming or paying any debt incurred in aid of insurrection, prevented claims for compensation based upon emancipation of the slaves and validated national debt incurred in preserving the Union. Thus, Section 5 both placed Congress in charge of the reconstruction, and expanded its role in the constitutional system of government.

Despite its high purpose and its structural changes to the constitutional framework, the 14th Amendment was not universally embraced. The United States Supreme Court promptly eviscerated much of the meaning of Section 1’s guarantees of citizenship, privileges and immunities, due process, and equal protection. In short order, the Court also limited Congress’s power to enforce rights and narrowed the federal power to protecting the rights in the Amendment only from state action, not the actions of private parties like the Ku Klux Klan. By 1883, the Supreme Court’s interpretations appeared to render the Amendment all but impotent. The precedental impact of that legacy continues to haunt constitutional law.

The Amendment regained some of its power when the twentieth-century Court began using the Due Process Clause to incorporate guarantees of the Bill
of Rights and make them applicable to the states. Congress resurrected the Amendment as a source of the equal protection principle during the Civil Rights era of the 1960s, using the Commerce Power to support its legislation. The Supreme Court upheld those statutes, and began to articulate an interpretation of Section 5 (and its companion Section 2 of the 15th Amendment) that accorded Congress the power to guarantee rights through far-reaching legislation. But citizen activism kept the spirit and promise of the Amendment alive during the intervening century.

This book grew out of a symposium held in October 2009 at the University of Akron School of Law celebrating the 140th anniversary of the ratification of the 14th Amendment. Anniversaries provide fruitful occasions to reflect. The book seizes upon that opportunity to ask a central interpretive question: How did the First Interpreters of the 14th Amendment interpret and use the Amendment and thereby affect its meaning?

In addressing this question, several subsidiary questions become important. First, how did the framers and adopters of the Amendment, the 39th Congress, interpret their work? Second, how did the Supreme Court initially interpret the Amendment, and how did their interpretation affect future cases and readings? Third, how did the American people interpret and use the Amendment? The chapters in this book examine different aspects of these questions, explicating the initial interpretations by the Congress, the United States Supreme Court and the public, and examining their lasting impacts.

The 39th Congress labored on the Amendment from December 1865 until June 1866. Ratification occurred during and after the critical 1866 elections, which functioned as a referendum on the Amendment and clarified the strength of public support for it. On July 28, 1868, Secretary of State William Seward issued the proclamation recognizing that the 14th Amendment had been ratified.

The work of interpreting the Amendment began as soon as the 39th Congress began framing it. The senators and representatives were well aware of the importance of their work. The framers crafted the Amendment to achieve the critical goals of securing immediate and long-term peace and Union. The succeeding Congresses took seriously their role to effectuate the Amendment. In response to the abuses of rights being practiced in the former slave states, those Congresses passed a significant number of measures to make rights real and provide protection for their exercise. Federal prosecutors and judges between 1866 and 1876 interpreted and applied the Congressional statutes consistently with their understanding of
the Amendment. Their enforcement had a positive impact on conditions in the South, an impact that collapsed after the Supreme Court intervened. The Supreme Court’s first occasion to interpret the Amendment came in 1873. Although cognizant of the consequences its interpretation would have on the future of the nation, the Court, unfortunately, seemed to be overwhelmed by the potential breadth of the Amendment. Into the early twentieth century, the Court acted repeatedly to limit the Amendment’s scope, opining that “we do not see in those amendments any purpose to destroy the main features of the general system.” The early Court decisions derailed the propulsive force of the Amendment for legal change, and the Amendment remained nearly impotent for seventy years.

Even as the Court limited the scope of the Amendment and of Congress’s power pursuant to it during the 1870s and 1880s, the people engaged in interpreting the Amendment’s guarantees through their own civic and political actions. The rebirth of the Amendment’s legal force is a testament to the power of the ideals embodied in the Amendment and embraced as a key part of the national consciousness.

Interpretation matters. This collection of work elucidates the interpretations of those who created the 14th Amendment, as well as those charged with applying it initially. Those first interpretations are significant because they influenced later interpretations. As both Garrett Epps and Richard Aynes point out, despite the many competing theories of how to interpret the Constitution, none reject the relevance of the history of the framing of that constitutional provision or the likely meaning it held to the framers or others at the time of framing. As Wilson Huhn notes, no theory rejects the use of Supreme Court precedent in interpretation.

Interpretation differs from intent. Interpretation is a public process of giving and explaining meaning, of representing meaning by actions taken pursuant to events and words. Interpretation is directed toward others. Interpretation translates and applies principle; it fleshes out the principle in action. Interpretation is capable of being collective, more forward-looking and external. To determine interpretation, we examine text, contemporaneous action pursuant to text, and the political and historical background of text and action.

Intent, conversely, is an internal process of “directing the mind,” the “state of one’s mind at the time one carries out an action.” Discerning “intent” is an attempt to parse the motives and understandings of individual participants. Intent, therefore, is limited to the understanding of the drafters (assuming one
can divine it), which is inevitably located in a single context, including the inability to foresee the various futures the text is designed to address. The synonym for interpret is explain and for intend is mean. Explicating interpretation is an objective inquiry, whereas revealing intention is a subjective inquiry.\(^\text{10}\)

Interpretation is a public act of witness and requires full context. This book is dedicated to enriching the historical context within which we examine the 14th Amendment, an historical context that is intrinsically fascinating.

The context within which the Amendment was drafted reveals how the framers interpreted their own history and times and incorporated their understanding into the language and structure of the Amendment. Garrett Epps details the fear and suspicion that surrounded the Republican framers as they sought to behead the hydra of the Slave Power “conspiracy” by reshaping the Constitution at its most fundamental levels. Paul Finkelman investigates the nascent progressive movements toward racial equality in the North that formed the political milieu that influenced the key framers of the Amendment. He also recounts the horrendous practices in the South that the Joint Committee on Reconstruction responded to in framing the Amendment and legislation pursuant to it. Richard Aynes leads us into the halls and chambers of the 39th Congress, revealing the framers themselves; their aspirations both to secure a peace to end the ongoing unrest and also to fashion a Union where specific rights would guarantee future peace; and their resolve in the face of serious obstacles during the drafting process.

Equally compelling are the stories of the Amendment’s first interpreters after ratification. Michael Ross transports us to the streets of New Orleans, where the public health legislation to restrict butchers to using a slaughterhouse located away from the city and below its water supplies spawned the first interpretive challenge to reach the United States Supreme Court. He reveals the underlying tensions among the butchers, the city and the lawyers in the case, as well as the influences on Justice Miller, whose interest in protecting the public health led to his majority opinion which supported local reconstruction legislative initiatives by limiting the impact of the Amendment. Ellen Connally recounts the prosecution of Jefferson Davis, the president of the Confederate States. She explains the inherent dangers in trying Davis for treason, and the creativity of the lawyers and judges who sought to preserve the fragile peace without either vindicating secession or claiming victory by making Davis a martyr. The interpretations of these judges and lawyers were heavily influenced by the political realities they confronted, both as individuals and on behalf of a
nation struggling to understand the permanency of “union” and the meaning of the cataclysmic bloodshed of the Civil War. Gwen Jordan documents how Myra Bradwell and the women’s movement claimed that the equal protection guarantee of the Amendment applied to women. She shows how Bradwell carried that struggle to the courts, creating not only arguments about the reach of equal protection but also an entire interpretive method that continues to influence the application of the 14th Amendment. James Fox points out the importance of the African American conventions, which infused vitality into the concept of national citizenship. He explains how the newly created and recognized Black citizens emphasized the primacy of suffrage for defining citizenship and helped shape the meaning of civil and political rights.

Supreme Court interpretation profoundly affects constitutional meaning. Supreme Court precedents often control the impact that constitutional guarantees have on the people, leading some to argue that the high court’s interpretation carries too much weight. My contribution details the importance of pre-Civil War Supreme Court precedents and the impact of those precedents and their ideological basis on the framers of the Amendment. It also illuminates the framers’ purpose to increase congressional power. David Bogen reanalyzes the Court’s initial interpretation in *Slaughter-House Cases*, arguing that later Court decisions misread that precedent. He contends that a more accurate reading of the decision opens up possibilities for expanding the Amendment’s reach. William Rich argues that the 39th Congress interpreted “privileges or immunities” as encompassing rights created by congressional legislation, and demonstrates that his interpretation is not inconsistent with early Court interpretations. Wilson Huhn carefully parses the first three Supreme Court interpretations of the Amendment and the effect of those rulings at the time they were made. He shows how those decisions became the starting point for further interpretation, eclipsing the starkly contrasting interpretations of the framers and their direct congressional descendants.

Interpretation of the meaning of the Amendment, especially in the Supreme Court, has often started with these early 14th Amendment decisions. Sometimes, the Court has relied on precedents and constitutional provisions that predate the 14th Amendment to constrict its meaning. The modern tendency to treat the Court as both the “first” and the final interpreter ignores the primacy of the framers as interpreters and reads the framers’ interpretations only through the narrow lens of subsequent Court interpretations. This Supreme Court-centric focus overlooks the value and impact of those who first breathed life into the
guarantees of the Amendment—succeeding Congresses, federal prosecutors and judges, and participants in powerful social movements inspired by the promises of the Amendment.

This book contributes to the explosion of work that illuminates the early history of the adoption and use of the 14th Amendment by telling the stories of its very earliest interpreters. The contributors make no sweeping claims as to the precise role that the first interpretations should play in the modern interpretive enterprise. However, each chapter explores one or more of the first interpreters within their historical and ideological context to produce a more accurate and accessible understanding of their interpretations of the Amendment. The importance of historically accurate understandings as a guide to applying the Amendment was foreshadowed by counsel for the butchers in *Slaughter-House Cases*:

> The comprehensiveness of this amendment, the natural and necessary breadth of the language, the history of some of the clauses; their connection with discussions, contests, and domestic commotions that form landmarks in the annals of constitutional government; the circumstances under which it became part of the Constitution, demonstrate that the weighty import of what it ordains is not to be misunderstood.  

Part I of the book examines how the 39th Congress interpreted its own work. First, that Congress had to interpret the past and present events that led to the necessity for the Amendment. What problems in the original constitutional framework needed to be addressed? What solution would uproot those problems and prevent them from recurring? Second, the framers had to interpret the structure and language of the proposed Amendment. Were both adequate, comprehensive and clear enough to accomplish their goals?

The framers were both interpreters of what they wanted and needed to say and interpreters of what they had said in the Amendment. They shared a well-developed political ideology of the constitutional inadequacies that had led to the Civil War and needed to be eradicated. As the framers drafted and adopted the Amendment, they interpreted their present circumstances in order to address them effectively. After ratification, the framers enacted legislation to implement the Amendment, giving early and nearly contemporaneous interpretations of the Amendment’s ability to address new and continuing inequities.

Parts II and III examine how the early interpretations of others, including the Supreme Court and the polity, affected the reach and power of the Amendment.

Part II closely examines the infamous *Slaughter-House Cases*, the Court’s initial interpretation of the Amendment. The Court interpreted Section 1 of the
Amendment narrowly with the avowed purpose of preserving the existing framework of government. This work’s contributors disagree about the extent to which the Court intended to eviscerate the Amendment’s meaning; later Court decisions and legislation used alternative paths including the Due Process and Commerce Clauses, respectively, to reinstate virtually all of the rights or powers withheld by the earliest Court interpretations. The authors note that the early Supreme Court decisions blocked some interpretive paths but either opened another interpretive trail or, at the very least, left openings later used to reinvigorate the promises of the Amendment and achieve its framers’ goals.

Part III looks directly at how the public response to the Amendment shaped its meaning. The contributors investigate how public movements kept alive the Amendment’s potential to revise the fabric of American life and law. For instance, lawyers and judges interpreted Section 3 of the Amendment to achieve overriding goals like maintaining peace, stability and reconciliation while protecting the constitutional theory of Union that prevailed with the North’s victory in the Civil War. Even though the Supreme Court ignored the Equal Protection Clause when upholding Illinois’ refusal to admit Myra Bradwell to the practice of law, Bradwell and the women’s movement continued to invoke the Amendment and equal protection to further civil rights. Bradwell’s interpretive strategies still affect the concept of equal protection as used today. The black conventions illustrate the importance of political participation in defining constitutional meaning. This movement enabled the freedpeople to participate in the political life of the country and use their personal experiences to define citizenship and infuse meaning into the broad guarantees of Section 1 of the Amendment. These social movements wove the Amendment’s promises into the public consciousness, keeping its ideals alive despite the initial Supreme Court rulings and the end of Reconstruction.

The story of the 14th Amendment is one in which the infinite hopes of its framers became finite and bitter, disappointments in the hands of the Court. Yet, the spirit of hope in the Amendment survived. Ultimately the fate of hopes for liberty and equality rests, and always has rested, with people who make the Constitution a force in their lives.

I would like to thank Richard Aynes, Wilson Huhn, and Sarah Cravens for their comments and assistance on earlier drafts, and Ellen Lander and Christy Wesig for their editorial assistance. If any historical or other errors appear, they are solely my responsibility.
I: Infinite Hope

THE FRAMERS AS FIRST INTERPRETERS
For the viability of a progressive American constitutionalism, no question of meaning is more important than that of the 14th Amendment. Much of American constitutional law, at least that part of it that concerns individual rights, consists of a series of footnotes to the 14th Amendment.¹

The Amendment was the work of a particular group of practical politicians, the Republican congressional majority in the 39th Congress, a group concerned with their own political futures, the future of their party, and the rights and desires of their constituents, as well as the future course of American society.

The 39th Congress that framed the 14th Amendment was not a “Reconstruction Congress,” but one overwhelmingly shaped by the practical concerns of the Civil War. The 39th Congress, which opened its deliberations in December 1865 and the draft Amendment in June 1866, had been elected in late 1864 as part of the same wartime election cycle that reelected President Abraham Lincoln. Though the framers of the 14th Amendment had reacted to specific events in the South after the surrender at Appomattox, their sense of the issues facing the nation was that of the Northern Republican leadership that fought the war.

Specifically, the framers were operating on the assumption that the cause of the Civil War was neither the institution of slavery itself, nor Northern moral disapproval of it, but a complex political institution called the “Slave Power”—a political term that referred not only to Southern whites who owned slaves but...
to constitutional provisions and political practices that gave them disproportionate power in the federal government. As antebellum free-soil and antislavery politicians saw it, the complexity of the Slave Power meant that the war’s aims could not be realized by merely freeing the slaves and guaranteeing their freedom in the 13th Amendment. Because the chief threats of the Slave Power lay in its negative effect on national politics and the rights of white citizens outside the South, eliminating it would require far-reaching changes in the state–federal balance, the federal separation of powers, and the internal political systems of the individual Southern states.

My contention is that if, in 1856, an antislavery politician had been asked to propose a constitutional amendment to eliminate the dangerous influence of the Slave Power, an amendment very much like the 14th Amendment would have been produced. In this regard, I argue that we should pay close attention to the antebellum political arguments forged by the men who later framed the 14th Amendment. Their ideas are essential to understanding the interpretation given by them to the words and structure of the Amendment they adopted.

In relating the final Amendment to antebellum politics, I do not wish to slight the influence on Northern public opinion of the Civil War itself or of the events of 1865, but I do suggest that it is extremely useful to note that the Republican response to the events of 1861–1865 flowed out of prewar political thought. In that configuration of antislavery ideas, the idea of the Slave Power deserves a more prominent place than most legal and constitutional thinkers (though not necessarily most professional historians of the period) have heretofore given it. In fact, I suggest that we grant the theory of the Slave Power the same kind of attention paid to the intellectual background of the framing of the Constitution. The framers of the 14th Amendment were shaped by a background of political history and theory quite different from the eighteenth-century history and philosophy that informed the work of framing in 1787.

The five-section Amendment is by far the longest ever adopted through the amendment process. Much scholarship and caselaw refers to the far-reaching effects on individual rights that resulted from the Citizenship Clause, the Privileges and Immunities Clause, the Due Process Clause, and the Equal Protection Clause. In addition, there is power bestowed upon Congress by Section 5 to interfere with state laws that violate the previous four sections. The middle three sections imposed unprecedented (if now obsolete) federal limitations on state voting laws, qualifications for state offices, and debt-repayment schemes. Section 3 also changed the separation of powers created by the original Constitution, transfer-
ring from the President to Congress the power to grant “reprieves and pardons for offenses against the United States” to officials who have engaged in “insurrection or rebellion” or have given “aid and comfort” to the nation’s enemies.³

The changes the 14th Amendment wrought in our system were profound, with implications not only for the substance and procedure of state government, but also for the relationship between states and the federal government and among the branches of the national government. In many ways, the totality of the 14th Amendment has shaped American democracy to this day.

Much of the interpretive work on the 14th Amendment has occurred in the courts and, while the reach of the Amendment is quite expansive, its judicial interpretation has often relied on a decidedly crabbed vision of its meaning. American judges maintain an odd dual consciousness about the 14th Amendment. On the one hand, they admit, over and over, that the 14th Amendment changed many details of our legal system. On the other hand, they seem unaware that the number of details, and the direction of the changes they represent, amount to something more than a series of isolated, almost idiosyncratic, results of the amendment process. Even in important decisions construing the 14th Amendment, judges often seem to regard it as a minor editing change to the Founders’ Constitution—interpreting it first and foremost through an assumption that it was not designed to change the structure and workings of the 1787 document.⁴

For instance, in the first major decision interpreting the 14th Amendment, the Slaughter-House Cases, Justice Miller explained that it was necessary to interpret the Amendment extremely narrowly, because otherwise it might be held to have changed the Constitution:

The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.⁵
The dismissive tone of the *Slaughter-House* majority reappears over and over in the United States Reports, the official record of the U.S. Supreme Court, and the current Supreme Court is committed to it. In *City of Boerne v. Flores*, the Court insisted that Congress lacks the power to set a broad prophylactic rule enforcing the congressional vision of the Free Exercise Clause of the 1st Amendment because the language of Section 5, which appears to empower Congress, is limited by an unwritten requirement that congressional enforcement legislation be “congruen[t] and proportional” to the constitutional violations Congress seeks to remedy. Perhaps, the Court does not realize that the framers of the 14th Amendment may not have reposed the same implicit trust in the wisdom of federal judges that the current justices do.6

The tone of denial is succinctly captured by Chief Justice Rehnquist in an opinion explaining that the 14th Amendment’s Section 5, Enforcement Clause could never be construed to allow Congress to supplement state tort law with a federal tort cause of action against perpetrators of gender-based violence:

> [T]he language and purpose of the 14th Amendment place certain limitations on the manner in which Congress may attack discriminatory conduct. These limitations are necessary to prevent the 14th Amendment from obliterating the Framers’ carefully crafted balance of power between the States and the National Government.

7

I maintain that the odd tone and almost certainly wrong interpretation of these opinions arises from an impoverished historical understanding of the 14th Amendment. Some misunderstandings arise from the reticent tone of the legislative debates leading up to the Amendment.8 However, some confusion also arises because contemporary interpreters read those legislative debates without a rich sense of the historical background against which the framers of the 14th Amendment based the change they were making to the Constitution.

The Slave Power background of the Amendment gives grounds to argue for a broad interpretation of its terms, one embracing the radicalism of some of its authors, reflected in the dissent in *Slaughter-House* by Justice Swayne:

> These amendments are a new departure, and mark an important epoch in the constitutional history of the country. They trench directly upon the power of the States, and deeply affect those bodies. They are, in this respect, at the opposite pole from the first eleven. Fairly construed these amendments may be said to rise to the dignity of a new Magna Charta.9
In order to put the Amendment into proper context, I will summarize the meaning of the term “Slave Power” as used by the practical politicians who built the Republican Party, brought it to power, and won the war against the South. I go on to demonstrate the ways in which antislavery politicians saw the strength of the Slave Power as flowing directly from flaws in the original Constitution of 1787, and the ways in which the antebellum political system strengthened the slaveowning interests of the South both within Southern politics and in the counsels of the nation. I then discuss the original Republican program for ending Slave Power influence before Southern secession and show its relevance to the political situation faced by the Republican members of the 39th Congress, who would eventually pass the Amendment. In the conclusion, I argue that reading the 14th Amendment against the political background of the Slave Power concept suggests that the somnambulists on the federal bench have misread the Amendment, both in its aim and in its scope.

I. ANALYSIS
A. The “Slave Power”—Conspiracy and Historiography

The Slave Power was a term coined by abolitionists in the 1830s, but it was not taken up and widely used by mainstream politicians until the 1850s. It had two related but not identical meanings. The first referred to a conspiracy of slaveholders and “dough-faced” Northern politicians (Northerners who sought office and influence by cultivating Southern support) to preserve and extend the prerogatives of slaveholders. The second (discussed below) referred to the political advantages conferred on slave states by the Constitution and the antebellum political system.

In the conspiratorial sense, the Slave Power fits with other conspiracy theories of the antebellum era—the fears of Freemasonry and Catholicism that spawned the Anti-Masonic and American (or “Know-Nothing”) Parties, respectively, for example. Throughout the period, and throughout history, Americans have shown credulity toward allegations that a secretive, alien, and undemocratic group or elite was conspiring to subvert the promise of American liberty. That it seems implausible today does not mean that it was not sincerely believed at the time. For example, no less a figure than Abraham Lincoln accused Stephen A. Douglas of taking part in a conscious conspiracy to nationalize slavery, a conspiracy in which the other participants were Presidents Pierce and Buchanan and Chief Justice Taney. As Lincoln summarized his thoughts in a draft speech for the 1858 senatorial election against Douglas: