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Infinite Hope - Introduction to the Symposium: The 140th Anniversary of the Fourteenth Amendment

Elizabeth Reilly

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INFINITE HOPE

INTRODUCTION TO THE SYMPOSIUM: THE 140TH ANNIVERSARY OF THE FOURTEENTH AMENDMENT

*Elizabeth Reilly**

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We must accept finite disappointment, but we must never lose infinite hope.¹

– Martin Luther King, Jr.

I. INTRODUCTION

On July 28, 1868, Secretary of State William Seward issued the proclamation recognizing that the Fourteenth Amendment had been ratified.² From that day on, the Amendment fundamentally reconstituted our union (by becoming a part of our fundamental governing document).³

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1. See JOHN COOK, THE BOOK OF POSITIVE QUOTATIONS 44 (Steve Deger & Leslie Ann Gibson eds., 2d ed. 2003).

2. William H. Seward, United States Secretary of State, Proclamation, 15 Stat. 708 (1868).

3. In contrast with our history of having had to “amend” the Articles of Confederation by adopting an entirely new document, our Constitution permits itself to be amended even as significantly as the changes wrought in the Thirteenth, Fourteenth, and Fifteenth Amendments and still remain as the constitutive document of the country. See Joseph Blocher, *Amending the Exceptions Clause*, 92 MINN. L. REV. 971, 990-91 (2008).

In a very real sense, the need for amendment is what gave birth to the Constitution. In addition to their notorious substantive weaknesses - such as the lack of a federal taxing

This symposium celebrates the 140th anniversary of ratification.⁴ The anniversary provides us with a fruitful occasion to reflect upon the meaning of the Amendment to its Framers in Congress and as it was initially interpreted by the United States Supreme Court and the public, and to examine the lasting impacts of both conceptions. We are grateful to Richard Aynes⁵ for organizing this symposium. His work in the area of legal history, explicating the framers' intent for the Fourteenth Amendment and dismantling the early Supreme Court interpretations, has been influential in the field.⁶ He has assembled for us a truly impressive group of scholars and commentators to engage in this deeper

power - the Articles of Confederation were also structurally brittle and inflexible. They could be amended only by unanimous consent of all the states, making reform all but impossible. David Kyvig, perhaps the leading scholar of Article V and the history of constitutional amendment, writes, "[t]he requirement of unanimous state agreement to congressionally initiated proposals to amend the Articles of Confederation was, from the outset, the defining characteristic of the first government of the United States." The framers were thus forced to "amend" an unamendable document. As Kyvig puts it, "It is reasonable to argue, in fact, that the 1787 Constitution was both the first and the greatest act of U.S. constitutional amendment."

Id. (internal citations omitted) (citing DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995, at 37 (1996); DAVID E. KYVIG, ARRANGING FOR AMENDMENT: UNINTENDED OUTCOMES OF CONSTITUTIONAL DESIGN, *in* UNINTENDED CONSEQUENCES OF CONSTITUTIONAL AMENDMENT 9, 18 (David E. Kyvig ed., 2000)).

4. It is not usual to celebrate something that occurred 140, rather than, say, 150 years earlier. But in addition to the appeal of celebrating an anniversary whose number includes the number 14, a second – perhaps more whimsical – reason might be offered. One hundred forty is the product of 14 and 10. One of the most direct effects of the Fourteenth Amendment was on the meaning of the 10th Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Unquestionably, the Fourteenth Amendment delegated powers to the United States in every one of its five sections, and prohibited the states resoundingly from many actions. From Section One's "No state shall make or enforce any law . . .", to Section Two's direct reduction in apportioned representation to any state denying a male citizen of age the right to vote in a federal or state election, to Section Three's disqualification from federal or state office of those who betrayed their previous oaths of office by engaging in insurrection against the United States, to Section Four's prohibition of a state assuming or paying any debt incurred in aid of insurrection, to Section Five's grant of power to enforce these provisions, the Fourteenth Amendment leaves no doubt that the powers reserved to the states in the 10th Amendment had been radically altered. U.S. CONST. amend. XIV.

5. Professor Aynes holds the Sieberling Chair in Constitutional Law, in the Constitutional Law Center at the University of Akron, one of four centers created by Congress in celebration of the Bicentennial of the Constitution. See 20 U.S.C.A. § 4516 (West 2009).

6. See, e.g., Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627 (1994) [hereinafter Aynes, *Justice Miller*]; Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L. J. 57 (1993) [hereinafter Aynes, *John Bingham*].

exploration of one of our most cherished and frequently used constitutional provisions – the Fourteenth Amendment.⁷

The Fourteenth Amendment embodies hope. One of the Civil War/Reconstruction Amendments, it grew out of one of the most profound and nation-changing “Constitutional Moments”⁸ in our history, the Civil War, and its aftermath. Of the three, the Fourteenth has the widest scope, and hence is one of the most frequently invoked sources of protection for liberties.⁹ As noted by counsel in *Slaughter-House Cases*:

7. Consistent with the charge from Congress, when it created the University of Akron School of Law’s Constitutional Law Center in commemoration of the bicentennial of the Constitution in 1987, this symposium promotes knowledge and understanding about our Constitution, and contributes to our abilities to be better lawyers and citizens. See 20 U.S.C.A. § 4516 (West 2009).

8. See BRUCE ACKERMAN, *WE THE PEOPLE 1: FOUNDATIONS* (1991); BRUCE ACKERMAN, *WE THE PEOPLE 2: TRANSFORMATIONS* (1998). The constitutional moment in question has been identified as “Congress persuad[ing] the American public to accept as valid the Fourteenth Amendment, even though the constitutional processes set out in Article V had allegedly not been followed.” Steven G. Calabresi, *The Libertarian-Lite Constitutional Order and the Rehnquist Court: Reviewing The New Constitutional Order*, 93 GEO. L.J. 1023, 1023 (2005) (book review). Others identify the moment as the revolution wrought through the Civil War and the Reconstruction amendments that sought to unravel the Slave Power and lead to a rebirth of the nation’s foundational principles and structure, enshrining equality and an enhanced view of democracy. GARRETT EPPS, *DEMOCRACY REBORN* (2006).

9. Cf. Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 229 (1964) (“The Fourteenth Amendment is probably the largest source of the Court’s business.”). The Equal Protection Clause has grounded a significant body of jurisprudence that protects equal enjoyment of fundamental rights as well as status classifications. But nothing captures the essence of the claims to increased guaranteed liberties under the Amendment as does the “incorporation” debate. The current legal question revolves around whether a specific guarantee of the Bill of Rights should apply to the states, called “selective incorporation,” and uses the Due Process Clause to incorporate those rights. See *Palko v. Connecticut*, 302 U.S. 319, 328-329 (1937). The debate, reflected in many of the papers in this symposium, centers around whether or not the Amendment was designed to, or should, protect people against state deprivations of *all* of the liberties guaranteed in the Constitution and the Bill of Rights against the federal government, chiefly through the intended meaning of the Privileges or Immunities Clause. See Aynes, *John Bingham, supra* note 6 (explicating the debate about incorporation and reviewing the chief proponents on each position); Robert Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 864 n.8 (1986) (detailing the primary texts in the incorporation debate and the positions they took). Currently, the debate has been revitalized over the question of whether or not the Second Amendment right to bear arms, recognized in *District of Columbia v. Heller*, 128 U.S. 2783 (2008), applies to the states. In addition, Justice Thomas argues that the Establishment Clause of the First Amendment should not apply to the states. *Van Orden v. Perry*, 545 U.S. 677, 692-93 (2005) (Thomas, J., concurring) (upholding against an Establishment Clause challenge a Ten Commandments monument placed among other monuments intended to represent “strands in the State’s political and legal history” (at p. 678) on Texas State Capitol grounds) (“This case would be easy if the Court were willing to abandon the inconsistent guideposts it has adopted for addressing Establishment Clause challenges, and return to the original meaning of the Clause. I have previously suggested that the Clause’s text and history ‘resis[t] incorporation’

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.¹⁰

It would be hard to overestimate the importance of these Amendments,¹¹ some have called their adoption the “second founding.”¹²

Among the many reasons to enshrine the Fourteenth Amendment in a position of constitutional primacy is the fact that it was designed to have, and has had, profound effects upon all three of the structural principles undergirding the Constitution: federalism, individual rights,

against the States. If the Establishment Clause does not restrain the States, then it has no application here, where only state action is at issue.” (internal citations omitted)(alteration in original).

10. *Slaughter-House Cases*, 83 U.S. 36, 54 (1873) (summary of John Campbell’s argument for the plaintiff-in-error).

As participants in the symposium, especially Michael Ross, have pointed out, this lofty assessment is hardly without irony, as counsel for the plaintiffs was in fact a staunch opponent of the Fourteenth Amendment. He was likely using an overreaching state law to make an overreaching argument about the scope of the Amendment that would lead to rejection by the Supreme Court, and hence a limit upon the impact of the Amendment itself. Michael A. Ross, *Obstructing Reconstruction: John Archibald Campbell and the Legal Campaign Against Louisiana’s Republican Government, 1868-1873*, 49 CIV. WAR HIST. 235, 235-53 (2003) (examining the crucial role played by John Campbell, ex-Confederate and counsel to the butchers in *Slaughter-House*, in his ultimately successful legal war to destroy Louisiana’s biracial Reconstruction government) (as cited by David Bogen in this symposium) (David Bogen, *Rebuilding the Slaughter-House: The Cases’ Support for Civil Rights*, 42 AKRON L. REV. 1131, 1135 (2009)).

At first blush this might be taken as the affirmative use of the aphorism “hard cases make bad law.” But as Wilson Huhn points out in his symposium article, this was instead an easy case that could have reached a correct result without making broad and problematic readings of the Amendment that then required limiting the reach of the Amendment - proving that even easy cases can make bad law. Wilson R. Huhn, *The Legacy of Slaughterhouse, Bradwell, and Cruikshank in Constitutional Interpretation*, 42 AKRON L. REV. 1053 (2009).

11. Even Charles Fairman hailed its primacy, considering the Fourteenth Amendment and the Commerce Clause “the two most important passages in the entire Constitution.” Charles Fairman, *What Makes A Great Justice?*, 30 B.U. L. REV. 49, 50 (1950), as cited in Aynes, *Justice Miller*, *supra* note 6, at 627 n.2. A Westlaw search performed on March 26, 2009, requesting United States Supreme Court cases that included the terms “Fourteenth Amendment” and “Constitution” returned 3833 documents.

12. *E.g.*, Garrett Epps, *Second Founding: The Story of the Fourteenth Amendment*, 85 OR. L. REV. 895 (2006). *See also Symposium on America’s Constitution: A Biography*, 59 SYRACUSE L. REV. 31, 41 (2008) (comments of Akhil Amar) (stating that because of the pro-slavery original Constitution, we have had “two Constitutions,” the second beginning with the Thirteenth, Fourteenth, and Fifteenth Amendments).

and separation of powers.¹³ It is commonplace to refer to these three as the great underlying themes of our constitutional order. Yet the original document, as written, interpreted, and lived did not save us from – some may say it even led us to – the Civil War.¹⁴ As the 39th Congress struggled with correcting the wrongs that had placed the Union in jeopardy before, during, and after the Civil War, altering the constitutional understanding of each of these principles was important.

In its stunning opening phrases in Section One – “All persons born or naturalized . . . are citizens of the United States and of the State . . .” and “No State shall make or enforce any law . . .” – the Amendment clearly recasts state and national power and the individual’s place within it. It continues with sweeping evocations of individual rights – “privileges or immunities of citizens of the United States . . . , due process of law . . . , the equal protection of the laws” – now guaranteed to all, and protected from state governments. In the first Supreme Court

13. See Garrett Epps, *The Antebellum Political Background of the Fourteenth Amendment*, 67 LAW & CONTEMP. PROBS. 175, 177-78 (Summer 2004) (noting the change to national and state relations and individual rights, but to separation of powers with respect to the pardoning power specifically: “Section 3 also changes the separation of powers created by the original Constitution, transferring 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.”).

14. *Symposium on America’s Constitution: A Biography*, *supra* note 12, at 39-40 (comments of Akhil Amar) (arguing that the 1787 Constitution failed because of the compromise with slavery: “[W]e didn’t get rid of slavery because the genius of the founding fathers put it on the Lincolnian path of ultimate extinction. We got rid of slavery because our Constitution failed. It broke, and there’s a great Civil War That’s why we get our egalitarian, anti-slavery, Thirteenth, Fourteenth, and Fifteenth Amendments Constitution. It wasn’t the genius of the founding fathers, their system broke. It was actually pro-slavery; it was getting increasingly pro-slavery as the decades went on.”); *id.* at 51-55 (comments of Paul Finkelman) (arguing that the 1787 Constitution was not drafted to make slavery wither away, and hence it would not have ended naturally: in looking at “the Revolution of 1865 to 1870, which rewrites the Constitution, it is important to understand what those framers were trying to get rid of.”); Epps, *supra* note 12, at 900 (“The key to understanding the Fourteenth Amendment is the brute fact that for all the brilliance that went into the framing of the Constitution of 1787, it was a failure. I call it a failure not simply because it collapsed catastrophically less than seventy-five years after the Framing, leading to the worst war in American history - one of the worst in world history to that time. I call it a failure because it never really produced what its authors hoped for – one nation. From its first day, it carried the seeds of its own destruction. These lay in the undue influence it gave to the slave states. The chief mechanism for that was the clause that gave slave states representation in the House for three-fifths of their slave population. These so-called slave seats gave the South power in the electoral vote tally for the same reason; and in the Senate, the principle of equal representation - which Madison had opposed so strongly – gave them a voice equal to free states with much larger free populations. By the third decade of the nineteenth century, it was generally agreed, North and South, that the slave interest ran the country.”); Epps, *supra* note 13 (expounding upon the Slave Power that had led to Southern control of much of the national government and the Northern states’ desire to break free of that control as important to interpreting the meaning of the Fourteenth Amendment).

case to interpret the Amendment, the infamous *Slaughter-House Cases*, Justice Miller for the Court stated that claims made invoking Section One raised “questions . . . far reaching and pervading in their consequences, . . . profoundly interesting to the people of this country, and . . . important in their bearing upon the relations of the United States, and of the several States to each other and to the citizens of the States and of the United States”¹⁵

Excellent historical work, some of it done in a previous symposium on John Bingham and the Origins of the Fourteenth Amendment, and published in Volume 36 of *Akron Law Review*, exhaustively details what the Framers meant to accomplish in their statement of the rights of individuals to citizenship, the privileges and immunities of citizenship, due process, and equal protection.¹⁶ Scholars have also painstakingly revealed the intended shift in power from the states to the federal government to define and enforce those rights.¹⁷

15. 83 U.S. at 67.

16. See, e.g., Aynes, *Justice Miller*, *supra* note 6; Aynes, *John Bingham*, *supra* note 6; Michael Kent Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45 (1980); Michael Kent Curtis, *The Fourteenth Amendment and the Bill of Rights*, 14 CONN. L. REV. 237 (1982); William Crosskey, *Charles Fairman, ‘Legislative History’ and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); but see RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); Raoul Berger, *Incorporation of the Bill of Rights: A Reply to Michael Curtis’ Response*, 44 OHIO ST. L.J. 1 (1983); Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435 (1981); Charles Fairman, *A Reply to Professor Crosskey*, 22 U. CHI. L. REV. 144 (1954); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949). Also, note William J. Rich in the symposium, urging that the meaning of the Privileges or Immunities Clause was less about drastically altering federal-state relations and more about authorizing Congress to participate in identifying the prerequisites to equal citizenship and identifying “privileges or immunities” through the laws of the United States. William J. Rich, *Why “Privileges and Immunities”? An Explanation of the Framers’ Intent*, 42 AKRON L. REV. 1113 (2009)). He argues the Framers were more likely to have been concerned about the role of Congress in defining those rights that would be enforceable against the states. *Id.*

17. Aynes, *Justice Miller*, *supra* note 6; Aynes, *John Bingham*, *supra* note 6; Epps, *supra* note 12; Epps, *supra* note 13; Kaczorowski, *supra* note 9, at 916 (“The framers understood the fundamental rights of citizenship to be the privileges and immunities of United States citizens, and therefore believed Congress could proffer a change in the Constitution that would fundamentally redefine the nature of American federalism.”). Kaczorowski notes this intended restriction of state powers to be guaranteed by federal protection of the rights, but also notes it was not a nationalization that overrode a federal character to the union. *Id.* at 885-90 (detailing the antebellum political theory of national citizenship and the rights it guaranteed, and noting that Taney’s acceptance of that theory required him in *Dred Scott* to find that blacks could not be citizens; the actions taken pursuant to that decision [denying national citizenship and the protection of rights] led to the Republican commitment to the Fourteenth Amendment and the Civil Rights Acts as necessary to supplant state power with national power in order to protect national rights through national citizenship and congressional authority); *id.* at 939-40 (“Because they believed that

The participants in this symposium will extend that work to look at how early interpretations of the Amendment altered its reach and power, in both the Court and the polity. Our participants especially examine three of the Supreme Court's earliest forays into applying the Fourteenth Amendment: *Slaughter House Cases*,¹⁸ *Bradwell v. Illinois*,¹⁹ and *Cruikshank v. United States*.²⁰ Those forays succeeded in cramping the Amendment's majesty and power in contravention to its design, intent, and language. Although our participants disagree about the extent to which the Court intended to or needed to be read as having eviscerated its meaning,²¹ all seem to agree that the propulsive force of the Amendment for legal change withered in the aftermath of those decisions.²² Several authors explore how the Amendment was

the thirteenth and fourteenth amendments directly secured the civil rights of United States citizens, federal legislators, judges, and attorneys understood that these amendments conclusively established that the national government possessed both primary authority over civil rights and ultimate responsibility for safeguarding citizens' civil rights. *Despite this view, Republican legislators retained dual sovereignty and eschewed restructuring the United States into a unitary state. . . .* [T]he states were expected to safeguard citizens' rights. But the national government was committed to protecting and enforcing citizens' rights as the need arose. This *concept of federalism was radically different from the states' rights-centered theory* espoused by Southerners and conservative Democrats, and ultimately adopted by the Supreme Court in the *Slaughter-House* decision. . . . This new system was founded upon the old one. But, in developing it, *Congress knowingly and purposely acted to revolutionize the structure of the federal union.*") (emphasis added).

See Slaughter-House Cases, 83 U.S. 36, 82 (1873) ("[W]e do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation.").

18. 83 U.S. 36 (1873).

19. 83 U.S. 130 (1873).

20. 92 U.S. 542 (1876).

21. Rich, *supra* note 16; Bogen, *supra* note 10.

22. After the end of Reconstruction as a political force, which occurred following the election of Rutherford Hayes in 1876 and the addition of Court rulings striking down key civil rights statutes passed by the Reconstruction Congresses, the Amendment was placed in a state approaching dormancy for the remainder of the nineteenth and much of the beginning of the twentieth century.

See, e.g., Kazcorowski, supra note 9, at 938 ("The Court's interpretation of the fourteenth amendment [in *Slaughter-House*] revived states' rights by reading into the Constitution the Democratic Conservative ideology of states' rights. The Supreme Court thus emasculated the fourteenth amendment's citizenship and privileges and immunities clauses, diminished the amendment's scope, and destroyed the national government's authority to secure directly citizens' fundamental rights. The Court's *Slaughter-House* decision rejected the legal theory under which the Department of Justice and the federal courts had acted to secure citizens' fundamental rights in the 1870s. The Court thus precluded the national government from protecting citizens in the South during the 1874 revival of political terrorism, and from preventing the establishment of a pattern of

incorporated into the public consciousness and used by citizens to reimagine the fabric of American life in ways that carried forward the promise of the Amendment. The symposium participants detail what those promises were, and how the first Court interpretations of the Amendment's reach stymied those promises on all three dimensions.²³ They also demonstrate the opportunities left open to the people²⁴ and to later generations to use unaffected clauses to accomplish those goals.²⁵

Despite its high purpose and its structural changes to the constitutional framework, the Fourteenth Amendment was not universally embraced as a vehicle for accomplishing its guarantees. The

domination by Southern Conservative Democrats and white supremacists over Southern blacks and white Republicans. The end result of this decision, as reflected in public policy, was the reduction of Southern blacks to peonage, the creation of Jim Crow, and the demise of the Republican Party in the South." (footnotes omitted)); Huhn, *supra* note 10 (noting the effectiveness of the cases in limiting 14th Amendment application and even being taken as an invitation to white on black violence); Rebecca E. Zeitlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and The Limits of Federalism*, 62 U. PITT. L. REV. 281, 317 (2000) ("The Court's ruling in the Slaughter-House Cases is universally recognized as taking the bite out of the Privileges or Immunities Clause of the Fourteenth Amendment." (citing Aynes, *Justice Miller, supra* note 6 at 627.)).

Huhn concludes that the baneful influences have been substantially overcome. Huhn, *supra* note 10. However, recent restrictions of the Commerce Clause power, enabling states to claim immunity and restricting noneconomic regulations, coupled with the restriction of the Section Five power, limit the ability of Congress to implement the Amendment on key power issues with respect to enhancing constitutional liberties. *See, e.g., Alden v. Maine*, 527 U.S. 706 (1999) (Eleventh Amendment sovereign immunity precludes Congress from using the Commerce Clause in the Fair Labor Standards Act to authorize suits against states in state courts); *United States v. Morrison*, 529 U.S. 598 (2000) (Commerce Clause does not give power to enact a federal civil rights remedy for victims of domestic violence despite findings of economic effects on interstate commerce); *United States v. Lopez*, 514 U.S. 549 (1995) (Congress's power to regulate intrastate matters pursuant to the Commerce Clause is narrowly restricted); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (restricting Congress's Section Five power). *But see Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 740 (2003) (Souter, J., concurring) (stating that the Family and Medical Leave Act is "undoubtedly valid legislation" and is constitutional when applied to the States). *See* Laurence H. Tribe, *Saenz sans Prophecy: Does the Privileges or Immunities Revival Portend the Future – Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 155 (1999) (concluding that the Court's recent view of state sovereignty leaves Section Five of the Fourteenth Amendment as the only congressional power to trump it, and that the Court is also eroding congressional power under Section Five).

23. Huhn, *supra* note 10; Richard L. Aynes, *The 39th Congress (1865-1867) and the 14th Amendment: Some Preliminary Perspectives*, 42 AKRON L. REV. 1021 (2009); Gwen Hoerr Jordan, "Horror of a Woman": Myra Bradwell, the 14th Amendment, and the Gendered Origins of Sociological Jurisprudence, 42 AKRON L. REV. 1207 (2009); Bogen, *supra* 10; Rich, *supra* note 16; James Fox, *Fourteenth Amendment Citizenship and the Reconstruction-Era Black Public Sphere*, 42 AKRON L. REV. 1253 (2009).

24. Jordan, *supra* note 23; Fox, *supra* note 23; C. Ellen Connally, *The Use of the 14th Amendment by Salmon P. Chase in the Trial of Jefferson Davis*, 42 AKRON L. REV. 1169 (2009).

25. Rich, *supra* note 16; Bogen, *supra* note 10; Jordan, *supra* note 23.

United States Supreme Court promptly eviscerated the meaning of being a “citizen of the United States,” especially with respect to having rights, privileges or immunities;²⁶ rendered the privileges and immunities of a U.S. citizen into a nearly meaningless nullity;²⁷ truncated citizenship and due process in ways that recreated the pre-existing state/national power balance;²⁸ and ignored equality as a principle in ordering the relationships between states and their citizens.²⁹ *Cruikshank*, which struck down convictions for violating the Enforcement Act of 1870, a congressional statute,³⁰ also introduced both the narrowing of congressional power to enforce rights and the state action limitation. It thus signaled limitations not simply upon promoting individual rights with federal power, but also on recognizing enhanced congressional prerogative to protect those rights. In the *Civil Rights Cases*, the Court used the state action limitation to strike down significant provisions of Congress’s exercises of power to protect civil rights.³¹ Other cases completed the task by severely restricting the reach of the Section Five power, striking down the laws passed pursuant to that power.³² By 1883, the Amendment lay in desuetude.³³

26. *Slaughter-House Cases*, 83 U.S. 36, 77-79 (1873); *Bradwell v. Illinois*, 83 U.S. 130, 138-39 (1873).

27. *Slaughter-House Cases*, 83 U.S. at 79.

28. *Id.* at 81 (preserving state power, while failing to limit that power to state legislation that furthered the purposes of the amendment, i.e., acts of the Louisiana reconstruction legislature); see MICHAEL A. ROSS, *JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA* 202 (2003) (“When placed within the context of Louisiana politics, Miller’s majority opinion in *Slaughter-House* seems hardly a racist attempt to retreat from Reconstruction. On the contrary, it was a vote of confidence for a biracial Reconstruction government then struggling to overcome the forces of reaction.”); *Cruikshank*, 92 U.S. at 555; *Minor v. Happersett*, 88 U.S. 162 (1875) (finding that status of citizenship does not include requiring states to grant women right to vote as a privilege or immunity).

29. *Bradwell*, 83 U.S. at 137-139 (opinion of the Court), 141 (Bradley, J. concurring); *Cruikshank*, 92 U.S. at 554-55; *Minor*, 88 U.S. at 170.

30. The Enforcement Act of 1870, 16 Stat. 140 (1870) (originally entitled “An Act to enforce the rights of citizens of the United States”). The Court’s reasoning could also be read to cast other acts into question. See Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified at 42 U.S.C. §§ 1981-1982 (2000)) (originally entitled “An Act to protect All Persons in the United States in Their Civil Rights, and furnish the Means of their Vindication”); Ku Klux Klan Act of 1871, ch. 22, §2, 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1985, 18 U.S.C. § 241 (2000)) (originally entitled “An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes”); Civil Rights Act of 1875, ch. 114, §§3-5, 18 Stat. 336, 337 (1875) (codified at 42 U.S.C. § 1984 (2000)) (originally entitled “An act to protect all citizens in their civil and legal rights”).

31. *Civil Rights Cases*, 109 U.S. 3 (1883) (finding the Civil Rights Act of 1875 was an unconstitutional exercise of power to reach conduct other than state action).

32. See Huhn, *supra* note 10 at 1079, text and note 131 (citing *Harris v. United States*, 106 U.S. 629, 640 (1883) (declaring provision of Ku Klux Klan Act unconstitutional, as “directed

The fact that we came back from that devastation is testament to the power of the ideals both in the Amendment and in the national consciousness.

II. SYMPOSIUM ARTICLES

The symposium begins with general historical reviews of the Amendment in Congress, the public context against which it was enacted, its early application in the Supreme Court, and the impact of those narrowing decisions upon the Amendment. It moves to an exploration of the doors that the early cases may have left ajar for future use to reinvigorate the promises of the Amendment and achieve its framer's goals. Although the main focus of our authors is upon legal arguments, they also examine the force of political expediency to support legal arguments or to prevent their being made in ways that might destabilize the fragile union. The third segment of the symposium looks much more directly at the impact of the actual public response to the Amendment and its meaning, and how that public response shaped the Amendment as well as keeping alive its potential to revise the fabric of American life and law. Although most of the participants focus primarily or exclusively on Section One of the Amendment, one explicates the impact of Section Three and the intrigue accompanying its application against Jefferson Davis and another examines Section Five as an alteration to separation of powers as well as federalism principles.

Professor Aynes opens the symposium by detailing the context within which the Framers of the 39th Congress wrote and adopted the language of the Amendment, and their likely understandings of its

exclusively against the action of private persons, without reference to the laws of the States, or their administration by [the] officers [of the state]"); *The Civil Rights Cases*, 109 U.S. 3 (1883) (striking down federal Civil Rights Act of 1875); *Baldwin v. Franks*, 120 U.S. 678 (1887) (following *Harris* in finding the Ku Klux Klan Act to be unconstitutional insofar as it applies to private action); *Hodges v. United States*, 203 U.S. 1, 14 (1906) (overturning convictions of a group of individuals for interfering with the civil rights of other individuals in violation of Civil Rights Act of 1866, in part because the statute could not be grounded upon the Fourteenth Amendment because "no action on the part of the state is complained of").

33. Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. Rev. 1, 4 (1996) ("The destruction of the Privileges or Immunities Clause and the development of an excessively broad state action doctrine had a profound impact on American history. They represented a one-two punch that did much to eliminate the Fourteenth Amendment as an effective protector of individual rights and democracy. Both were motivated in part by considerations of federalism, and in both cases the judicial solution was far broader than necessary.").

meaning.³⁴ He emphasizes the historical record and goals in order to urge accurate use of the legislative debates and activity surrounding the Amendment and other Reconstruction statutes. Noting the congressional elections of 1866 created a resounding message of public support for the changes the Amendment would make to constitutional society, he also argues the ratification of the Amendment was proper and popularly supported. He ends by showing how key rights and their method of protection were central to achieving the overriding goal of securing the future peace, how equality was always meant to trump racism and restrictions upon and access to rights, and how in the end, the Framers consciously wrote in our highest and best ideals and aspirations for the singular purpose of “perfecting our Constitution.”

Professor Wilson Huhn reviews the early three cases in which the Supreme Court expounded upon the reach and meaning of the Amendment, in all three cases restricting its scope unnecessarily.³⁵ He demonstrates how those readings were both contrary to the intent of the Framers and led to truncated legal understandings of the Amendment, limiting Congress’s ability to use it against state power outside the narrow area of direct state conduct restricting racial equality. He also shows how those decisions stripped African-Americans of legal protections in the eyes of white mobs, who acted as if empowered by the decisions, further contradicting the primary impact the Amendment sought to achieve. Huhn argues that the enduring legacy from *Slaughter-House*, *Bradwell*, and *Cruikshank* was the acceptance of the theme from each: narrowly construing the fundamental liberty rights of citizens, defining equality by reference to unequal traditions and religious teachings, and prohibiting Congress from protecting the civil rights of blacks and others especially when the state proved unable or unwilling to do so. He demonstrates the recurrence of those themes in 20th and 21st century rights-constricting decisions. But he also notes how those decisions were either circumvented or rejected to lead to a current environment in which he argues the “baneful influences” of those restrictions have been practically overcome.

My contribution examines the historical purposes and political meanings of Section Five in the view of the Framers.³⁶ The article notes the importance of incorporating political and legal theory at the time of

34. Aynes, *supra* note 23.

35. Huhn, *supra* note 10.

36. Elizabeth Reilly, *The Union as it Wasn't and the Constitution as it Isn't: Section Five and Altering the Balance of Powers*, 42 AKRON L. REV. 1083 (2009).

the original framing and at the time of the framing of the Fourteenth Amendment as a method for understanding how it alters separation of powers with respect to the rights protected by the Amendment. Section Five is a mechanism for incorporating historical purpose and public construction of the guarantees of the Amendment into later statutes.

In the second portion of the symposium, the authors reject the traditional and canonical readings of the early cases, especially *Slaughter-House*, urging that the history of that opinion reflects a more nuanced attempt by Justice Miller to preserve the goals of Reconstruction and racial equality by hinting at alternative methods to achieve the fundamental rights goals of the Amendment.³⁷ They look beyond the acknowledged actual effects of the cases in foreclosing the use of certain guarantees or national powers to explore the doors left open for achieving the intended goals of the Amendment.

Professor William Rich writes that Justice Miller's position in *Slaughter-House* on the meaning of federal privileges and immunities has been misunderstood and underappreciated. Although denying their usefulness for enforcing many rights and interests, Justice Miller did not foreclose a significant avenue for using the clause for good.³⁸ Professor Rich argues that we have been lulled into a continuing failure to underappreciate the positive meaning of federal privileges and immunities post-*Slaughter-House*. He contends that the academic focus on reading the Privileges or Immunities Clause as the vehicle for applying the Bill of Rights to the States, which is no longer necessary because of the impact of the selective incorporation doctrine read into the Due Process Clause, has distracted us from recognizing that privileges and immunities were meant to include rights drawn from federal legislation generally. It thus means more than the Bill of Rights and should reach state compliance with federal law broadly.

To highlight the possibilities left open in Justice Miller's opinion, Professor David Bogen urges a reading sensitive to its complicated context.³⁹ Drawing from Professor Michael Ross's historical work, he notes that Miller was trying to avoid undercutting state Reconstruction legislatures by preserving state prerogatives from becoming generally nationalized. Because the butchers' lawyer was John Campbell, a former Justice in the majority in *Dred Scott*, a member of the Confederate government and a fierce opponent of Reconstruction and

37. Rich, *supra* note 16; Bogen, *supra* note 10.

38. Rich, *supra* note 16.

39. Bogen, *supra* note 10.

the Amendment, Miller was concerned that a ruling for the plaintiffs would have played into the hands of opponents of the guarantees – especially of racial equality – in the Amendment. Whereas Professor Huhn argues that an appropriate standard of deference to legislative action (be it state or federal) would have preserved the Amendment’s promise more surely and faithfully, Professor Bogen contends that the broad protection of state legislation and reassertion of state power empowered Reconstruction legislatures. He urges a return to the vision he attributes to Justice Miller: the use of federal power to protect federal and state political processes. He also claims that the consequent lack of a vital Privileges or Immunities Clause led to more breadth being read into the Equal Protection Clause. But Professor Bogen is most interested in demonstrating what he finds as either explicit preservations of avenues to achieve the goals of the Amendment crafted into Justice Miller’s opinion, or suggesting unthought-of avenues that remained available to counteract the chafing limits of *Slaughter-House*’s reading of privileges and immunities.

Whereas Professors Rich and Bogen reinterpret *Slaughter-House* to focus on the doors left open for achieving the goals of the Amendment, historian Ellen Connally’s contribution forms a bridge between this section of the symposium and the next.⁴⁰ Her work shows how the language of Section Three left a door open to interpretation that enabled extra-legal political and social decisions that may have been critical to securing a lasting peace and reintegration of the Union. She explains the importance of the question of whether Section Three was a disability or a penalty, because the penalty interpretation created an argument that double jeopardy prevented trying Confederate officers for treason. She details the tremendous stakes of prosecuting Jefferson Davis for treason. Such a prosecution was potentially devastating whatever its outcome. An acquittal would have amounted to an acceptance of his legal argument that secession was constitutionally permitted, jeopardizing the Union position against secession and the meaning of the horrendous bloodshed in pursuit of that position. Yet, if he were convicted and hung – in contravention to Lincoln’s firm stance on the issue – he could have been a southern martyr, interfering with the ability of the Union to meld together as one healing nation. Her work bridges this section into the third because it relies on contemporary legal interpretation with a court in mind, but demonstrates the sociological pragmatism of the main

40. Connally, *supra* note 24.

actors – especially Salmon P. Chase – to achieve the wider goals of the framers of the Amendment in securing lasting peace.

The third section of the symposium looks behind and beyond Congress and the Supreme Court to explore the vital importance of how American citizens themselves interpreted and advanced the rights secured in the Amendment.

Gwen Jordan examines the underlying story of the *Bradwell* case to reveal how women interpreted the grant of equal rights and citizenship.⁴¹ She shows that Myra Bradwell always understood her case as raising issues under the Equal Protection Clause, and used that clause in her arguments to the Illinois Supreme Court. Bradwell understood her case to be about securing legal equality through affirmative rights claims that would achieve full citizenship for women through the Fourteenth Amendment. She argued the Amendment's Equal Protection Clause applied to women, a conclusion not reached by the Supreme Court until a century later. Ironically, her arguments were not made by her own attorney, the representative of the City of New Orleans in *Slaughter-House Cases*, who instead adopted his opponent's argument in that case with respect to privileges and immunities. Professor Jordan shows how Bradwell's position eventually prevailed, but more importantly how Bradwell and other feminists used this belief about the scope of the citizenship rights the Amendment secured to animate the broader social movement for women's suffrage as well as wider equality. In this way, women were active participants in defining the meaning of equality in citizenship that is enshrined in the Amendment. Professor Jordan argues that this use of the law and legal reasoning is the forerunner of sociological jurisprudence, which recognizes the power of law as an instrumental force for social change.

James Fox continues exploring the impact of the public, particularly African-Americans, in infusing real meaning into the guarantees and lofty language of Section One. He focuses on the often-overlooked Citizenship Clause that ringingly introduces the entire Amendment.⁴² Professor Fox examines the meaning of citizenship as seen through the eyes and actions of black Americans during the Civil War and Reconstruction. He details the number of civic societies formed by blacks to make them active participants in civil society and the public sphere. Through those groups, African-Americans both demonstrated and helped to define what citizenship meant to them, while

41. Jordan, *supra* note 23.

42. Fox, *supra* note 23.

engaging in activities essential to democratic citizenship. Importantly, they also used their understandings of the rights of citizenship to argue for the critical necessity of voting rights as a foundation to secure civil liberties and access to social citizenship. Their understandings transformed the wider public's grasp on what citizenship entailed as well. By forming their own public sphere in which to work out issues of citizenship important to them, African-Americans both imagined and helped create an idea of citizenship that was more expansive and ultimately richer than that envisioned without their input. Professor Fox argues that African-Americans created a concept of citizenship that radically joined traditional ideas of legal rights with emerging ideas of suffrage rights, and put forth a newly formed and still underdeveloped idea of the necessity of positive rights to access to spheres of civil society in order to achieve true equal citizenship for all.

The rich and diverse views expressed in this symposium far from exhaust an understanding of the importance and history of the Fourteenth Amendment. But they do provide for us some new windows into what the Amendment was designed to accomplish, how those purposes were acted upon by Congress before being unduly narrowed and denied in the Supreme Court, how those purposes survived with potential legal arguments to undo the damage from the Court's interpretations, and how those purposes were kept alive by the people who embraced them as realities, as well as promises.

III. CONCLUSION

As it took from 1776 until 1868 for the “self-evident” “truth”⁴³ of equality to be enshrined in our Constitution, the early cases in which the United States Supreme Court dealt with the Fourteenth Amendment created a similar lapse of time into the twentieth century before its guarantees began to be recognized and enforced meaningfully – many date it to 1954 and *Brown v. Board of Education*.⁴⁴ And, as with the abolitionists in the antebellum period, the understandings and actions of the people with respect to the reach of its guarantees profoundly influenced its legal as well as cultural meaning.

43. THE DECLARATION OF INDEPENDENCE (U.S. 1776) (“We hold these truths to be self evident: that all men are created equal . . .”).

44. 347 U.S. 483 (1954); *see also* *Brown@50*, www.brownat50.org (last visited Mar. 30, 2009) (“For all men of good will May 17, 1954, came as a joyous daybreak to end the long night of enforced segregation It served to transform the fatigue of despair into the buoyancy of hope.”) (excerpt from a 1960 address to the National Urban League in response to the decision in *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954) by Martin Luther King, Jr.).

The development and meaning of the Amendment, even for contemporary and future use, is intimately related to the past. We cannot avoid continuing to ask vital questions and seek answers to them. What the Amendment meant in the past and how it has been interpreted and applied throughout its 140 years of existence have resonance today. Whatever one's interpretive stance toward the Constitution, one important facet of interpretation is looking to original intent, original meaning, and public understanding of a constitutional provision.

Therefore, our participants explicitly discuss applying their understanding of history to the modern implications of the Fourteenth Amendment and current law. Understanding the Amendment, especially because of its early reception by the Court, requires looking at law, history, political science, and sociology, among other disciplines, to try to get a full view. Through this variety of prisms, we can look at what the framers and ratifiers were trying to accomplish, compare and contrast them with each other and with the response of the Supreme Court, and seek to provide insights for judges, lawyers, academics, and students.

We hope that this symposium places the development of the Fourteenth Amendment into context by bringing law, history, sociology, and political science to bear to examine its drafting, early treatment, and meaning to the Court and society. Those early days still influence what the Amendment can and cannot accomplish. Our goal is to explore how a grounded and historically informed understanding of the Amendment might assist us in addressing the problems to which we apply it today.

An Anniversary is always an occasion to celebrate, but also to assess. By looking backward, we today attempt to find positive ways for moving forward to achieve the great aspirations bequeathed to us by those who framed and ratified our Fourteenth Amendment.