"AN INESTIMABLE JEWEL": THE CIVIL WAR ERA CONSTITUTIONAL AMENDMENTS AND THEIR CONTINUED RELEVANCE

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The three constitutional amendments of the Civil War and Reconstruction era constituted a new, even revolutionary, foundation for the United States: "a new birth of freedom" in the famous words of President and lawyer, Abraham Lincoln.[1] The Fourteenth Amendment and particularly Section 1 form a "second [United States] Constitution."[2] Section 1's language and its embedded values held the promise (a promise delayed, no doubt) and a vision of moving the country toward a more perfect nation.

During the fiery trial of the United States Civil War, the Kentucky-born, Indiana-raised, Illinoisan, President of the United States, Abraham Lincoln, often spoke with and to units of the Union Army as they passed through the nation's capital of Washington, D.C.[3] On August 22, 1864, Lincoln spoke with a

[1] Address at Gettysburg, Pennsylvania (Nov. 19, 1863), *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, at 536, 536 (Don E. Fehrenbacher ed., 1989) [hereinafter SPEECHES AND WRITINGS 1859–1865].

[2] JOHN DENVIR, DEMOCRACY'S CONSTITUTION: CLAIMING THE PRIVILEGES OF AMERICAN CITIZENSHIP x (2001) (internal quotation marks omitted).

[3] An enormous volume of literature exists on Abraham Lincoln and associated Lincoln studies. Scholars, buffs, opponents, and admirers have produced so much literature that it might appear that no aspect of Lincoln's life and his age has gone uninterpreted. Lincoln scholars estimate that 16,000 books have been published on or about Lincoln from during his life to the present (3,000 of which are juvenile literature) with no end in sight. For accessible books to get started, see generally THE BEST AMERICAN HISTORY ESSAYS ON LINCOLN (Sean Wilentz ed., 2009); RICHARD CARWARDINE, LINCOLN: A LIFE OF PURPOSE AND POWER (2003); LORD CHARNWOOD, ABRAHAM LINCOLN (1917); DAVID HERBERT DONALD, LINCOLN (1995); DANIEL FARBER, LINCOLN'S CONSTITUTION (2003); DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN (2005); WILLIAM C. HARRIS, LINCOLN'S RISE TO THE PRESIDENCY (2007); HARRY V. JAFFA, A NEW BIRTH OF FREEDOM: ABRAHAM LINCOLN AND THE COMING OF THE CIVIL WAR (2000); FRED KAPLAN, LINCOLN: THE BIOGRAPHY OF A WRITER (2008); THOMAS L. KRANNAWITTER, VINDICATING LINCOLN: DEFENDING THE POLITICS OF OUR GREATEST PRESIDENT (2008); LEWIS E. LEHRMAN, LINCOLN AT PEORIA: THE TURNING POINT (2008); JAMES M. MCPHERSON, TRIED BY WAR: ABRAHAM LINCOLN AS COMMANDER IN CHIEF (2008); WILLIAM LEE MILLER, LINCOLN'S VIRTUES: AN ETHICAL BIOGRAPHY (2002); STEPHEN B. OATES, WITH MALICE TOWARD NONE: THE LIFE OF ABRAHAM LINCOLN (1977); OUR LINCOLN: NEW PERSPECTIVES ON LINCOLN AND HIS WORLD (Eric Foner ed., 2008); PHILLIP SHAW PALUDAN, THE PRESIDENCY OF ABRAHAM LINCOLN (1994); RONALD C. WHITE, JR., A. LINCOLN: A BIOGRAPHY (2009); and RONALD C. WHITE, JR., THE ELOQUENT PRESIDENT: A PORTRAIT OF LINCOLN THROUGH HIS WORDS (2005). For recent works on Abraham Lincoln as a lawyer, see generally BRIAN DIRCK, LINCOLN THE LAWYER (2007); DAVID DONALD, LINCOLN'S HERNDON (1948); JULIE M. FENSTER, THE CASE OF ABRAHAM LINCOLN: A STORY OF ADULTERY, MURDER, AND THE MAKING OF A GREAT PRESIDENT (2007); THE PAPERS OF ABRAHAM LINCOLN: LEGAL DOCUMENTS AND CASES (Daniel W. Stowell ed., 2008); JOHN T. RICHARDS, ABRAHAM LINCOLN: THE LAWYER-STATESMAN (1999); ALLEN D. SPIEGEL, A. LINCOLN, ESQUIRE: A SHREWD, SOPHISTICATED LAWYER IN HIS TIME (2002); MARK E. STEINER, AN HONEST CALLING: THE LAW PRACTICE OF ABRAHAM LINCOLN (2006); and FRANK J. WILLIAMS, JUDGING LINCOLN (2002).

unit of fellow Midwesterners—the 166th Ohio Volunteer Infantry Regiment—whose time of service had expired and consequently they were headed home.[4] Speaking informally, Lincoln told the troops that he believed they were returning to their families and friends: "For the service you have done in this great struggle in which we are engaged, I present you sincere thanks for myself and the country."[5]

Perhaps because the fall 1864 general elections loomed in the near future and Lincoln was far from certain that he would win re-election, and perhaps because the military affairs appeared stalled once again, Lincoln's mood caused him to reflect on the cause of the Union. He continued, "It is not merely for to-day, but for all time to come that we should perpetuate for our children's children this great and free government, which we have enjoyed all our lives. I beg you to remember this, not merely for my sake, but for yours."[6] Then in one of the few moments when Lincoln revealed more of the inner Lincoln as opposed to the public Lincoln, he stated, "I happen temporarily to occupy this big White House. I am a living witness that any one of your children may look to come here as my father's child has."[7] Lincoln then spoke to the values at stake in the conflict. Keeping his eye fixed on the picture of war, Lincoln pleaded to his soldier jury:

> It is in order that each of you may have through this free government which we have enjoyed, an open field and a fair chance for your industry, enterprise, and intelligence; that you may all have equal privileges in the race of life, with all its desirable human aspirations. It is for this the struggle should be maintained that we may not lose our birthright—not only for one, but for two or three years.[8]

He then summed up in notable language impressing upon the retiring soldiers, "The nation is worth fighting for, to secure such an inestimable jewel."[9] This "inestimable jewel" constituted self-government under the 1787 Constitution with the older Whig Party vision of economic success for the individual without artificial restraints restricting one's raising in the culture and economy and succeeding in the "race of life."[10] Lincoln's vision of

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[4] Speech to the 166th Ohio Regiment, Washington, D.C. (Aug. 22, 1864), *in* SPEECHES AND WRITINGS 1859–1865, *supra* note 1, at 624, 624.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *See id.*

a free government—state and national—that allowed freedom for individuals, including African-Americans by 1864, maintained and sustained Lincoln throughout the Civil War and became part of the modern United States' vision and promise. Though the promise may have been delayed, the lasting constitutional additions of that era, the Civil War amendments, signify the changed constitutional and legal world after the War, and they remain significant into the twenty-first century. Those Civil War and Reconstruction era constitutional amendments constitute the "new birth of freedom" that Lincoln had spoken about in his November 19, 1863 speech at Gettysburg, Pennsylvania.[11] With hindsight, it is clear that the first section of the 1868 Fourteenth Amendment forms a "second [United States] Constitution" that continues to challenge and to inspire all citizens and their varied public policies and politics.[12]

This paper considers the continuing importance of the Civil War constitutional amendments. It first touches upon the issue of the "original intent" of the amendments and then moves on to consider the three amendments both within their historical context while suggesting the varied manners of their continued relevance. While it cannot be a surprise that the Fourteenth Amendment constitutes the single most important constitutional amendment in U.S. history, the Thirteenth and Fifteenth Amendments have contributed to the new constitutional world after the Civil War in important ways and they too have weight and significance for moderns. It is hoped that in this—the 200th anniversary of President Abraham Lincoln's birth—that those heritages of his world and of his generation's vision, that this piece contributes to the continuing assessment and appreciation of the era of Abraham Lincoln and the constitutional amendments of Reconstruction.

The U.S. Civil War and Reconstruction constitutes the most important transformative era in the nation's history—the era that laid the roots of the modern United States.[13] Without

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[11] Address at Gettysburg, Pennsylvania (Nov. 19, 1863), *supra* note 1, at 536.

[12] DENVIR, *supra* note 2, at x–xi (internal quotation marks omitted).

[13] *See, e.g.*, Richard L. Aynes, *Refined Incorporation and the Fourteenth Amendment*, 33 U. RICH. L. REV. 289, 289 (1999) (reviewing AKHIL REED, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998)). For the standard and best one-volume interpretation of the Civil War and Reconstruction era, see James McPherson's Pulitzer Prize winning BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA (1988). Heather Cox Richardson carries the story and interpretation into the early twentieth century in her latest work, WEST FROM APPOMATTOX: THE RECONSTRUCTION OF AMERICA AFTER THE CIVIL WAR (2007).

disparaging or undervaluing the importance of the era of the Revolution and constitutional period in U.S. history and the bravery and sacrifices of the Revolutionary generation, it was the era of Abraham Lincoln and the Congresses of the 1860s and 1870s that laid the foundation for both the rise of the United States as an industrial and world power and for the promise of a "more perfect Union" of treatment of individuals and groups within the country.[14] Scholars no longer argue that Reconstruction was a failure, or in the words of constitutional historian Harold M. Hyman, Reconstruction was neither a "vision of failure" nor a "failure of vision."[15] Current scholars place African-American participation into the Reconstruction story and argue that it is not surprising that Reconstruction did not achieve all of its goals. Rather, given the historical context, it is surprising how much got done during Reconstruction, and how the efforts of the reformers during Reconstruction presaged later values, movements, and developments that came to dominate the nation's agenda in different and later historical contexts. Thus, it would take an era of a Second Reconstruction to start the process of fulfilling the constitutional values and promises of the age of Lincoln.

In order to demonstrate the continuing significance and importance of the era of the Civil War and Reconstruction for moderns in the early twenty-first century, this article argues that the Civil War amendments—the Thirteenth Amendment, the crucial Fourteenth Amendment, and the Fifteenth Amendment—encapsulated the dynamic understanding of federalism of the era and a new relationship between government generally, and especially the federal/central government, in particular, for individuals and groups. As argued by New York University School of Law Professor William E. Nelson about the Fourteenth Amendment, but applying equally to the other Reconstruction era amendments, the immediate political needs of the amendments came to be overshadowed by the judicial doctrines required to institutionalize the fundamental values embedded in the amendments.[16] Thus, if Lincoln was right and the United States

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[14] *See* ORVILLE VERNON BURTON, THE AGE OF LINCOLN 5, 9 (2007).

[15] *See* HAROLD M. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION 415 (1973); HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835–1875, at 515 (1982). *See generally* HAROLD M. HYMAN, LINCOLN'S RECONSTRUCTION: NEITHER FAILURE OF VISION NOR VISION OF FAILURE (1980).

[16] WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL

was a nation "worth fighting for, to secure such an inestimable jewel,"[17] then the Civil War Reconstruction amendments re-stated the nation's mission and vision and stated a mission and vision still applicable to moderns. Their vision of the 1860s may not be the vision of political majorities of the early twenty-first century, but the continuity between those eras is a commitment to building a more equitable political order while retaining a self-constraining constitutional government.

A word here is needed on the problem and issue of "original intent." For at least the past twenty-five years in U.S. political and constitutional history (but really much longer), scholars of all political persuasions have argued about the strengths and weaknesses of "original intent" in understanding and applying the 1787 Constitution generally, and the Fourteenth Amendment in particular. That historiography is rich and deep but not at issue in this article. Rather, as a historian, and understanding that since at least the legal realists of the 1920s and 1930s all are agreed that every decision by every policy maker—whether it be legislator, executive, administrator, judge, or political majority—changes the "constitution." Thus, instead of arguing the a-historical counterfactual issue of "What if" (What if Abraham Lincoln had lived? What if southern majorities had not resisted the minimum reforms asked of them during Reconstruction?), this article assumes change, and argues that the issue is not a breakdown from the Fourteenth Amendment Founders' standards, but an incremental change and adoption in the common law system of first principles to modern needs.[18] While

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PRINCIPLE TO JUDICIAL DOCTRINE 148–49 (1988). Nelson's 1988 book remains the single best legal and historical analysis of the Fourteenth Amendment. For a selection of other works, see JUDITH A. BAER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT (1983); RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); JAMES E. BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT (1997); GARRETT EPPS, DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA (2006); RONALD M. LABBÉ & JONATHAN LURIE, THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT (2003); EARL M. MALTZ, THE FOURTEENTH AMENDMENT AND THE LAW OF THE CONSTITUTION (2003); MICHAEL J. PERRY, WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT (1999); and JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951).

[17] Speech to the 166th Ohio Regiment, Washington, D.C. (Aug. 22, 1864), *supra* note 4, at 624.

[18] Stanford University's distinguished historian Jack N. Rakove has produced the most sophisticated analysis of originalism and the historian's task. *See* JACK

recognizing that not everyone agrees with that argument, the approach nevertheless reflects the empirical evidence of accommodation and change regarding the Reconstruction amendments over the past one hundred and forty years or so.

I. THE THIRTEENTH AMENDMENT

On January 1, 1863, the President signed the Emancipation Proclamation and changed the nature of the United States Civil War and potentially changed race relations within the United States. First, to the original federal war goal of maintaining what the Founders had established—self-government under the rule of law and the 1787 Constitution in a Union—Lincoln's Proclamation added a second war goal to the national cause–emancipation.[19] In order to preserve the Union (and by 1863, Northerners and Westerners more and more employed the singular term "nation" instead of the plural "union"), the root problem had to be addressed: race relations organized along the lines of master and slave. Thus, Lincoln's Emancipation Proclamation constituted the second major war goal—his vow and his commitment to end the state-based institution of slavery. But as commentators then, and scholars ever since, have pointed out, the Emancipation Proclamation actually freed no one that day, even though it potentially freed everyone from slavery, blacks as well as whites, Southerners as well as Northerners.[20] What the Proclamation did was pledge the future nation (should the federal armies be successful in winning the War of course) to a new nation without the incubus of slavery sapping the strength of the South and Southerners, black and white. In Lincoln's eyes and words as he stated at Gettysburg, Pennsylvania in November 1863, "a new birth for freedom" for all lay in the nation's future. Lincoln's Emancipation Proclamation, even as tentative as it was,

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N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 3–22 (1996). For an interesting exchange of views on this issue, see RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987) and the review of this book, H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513, 1542–44 (1987).

[19] Final Emancipation Proclamation (Jan. 1, 1863), *in* SPEECHES AND WRITINGS 1859–1865, *supra* note 1, at 424, 424–25.

[20] MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 46–48 (2001). For other work on the Thirteenth Amendment, see LINCOLN AND FREEDOM: SLAVERY, EMANCIPATION, AND THE THIRTEENTH AMENDMENT (Harold Holzer & Sara Vaughn Gabbard eds., 2007) and ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AMERICAN FREEDOM: A LEGAL HISTORY (2004).

committed the nation to that new future.[21]

As important as Lincoln's Proclamation was at the time and since, it was still just a presidential proclamation based on Lincoln's war powers. What Lincoln and the Republican Party leadership all understood was that the Proclamation was not the end of slavery; only a constitutional amendment would achieve that war goal. Brown University historian Michael Vorenberg has documented the political struggles within Congress on wording and crafting a constitutional amendment to end slavery; it was not until February 1865 that Congress adopted the language of what would become the Thirteenth Amendment. Lincoln lived to see the proposed amendment pass out of Congress and go to the states for ratification, but he did not live to see the amendment ratified on December 6, 1865. Simple, perhaps even simplistic, in its wording, the Thirteenth Amendment as ratified read: "SECTION 1. Neither slavery nor involuntary servitude, expect as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[22] Then Congress added something new in the United States constitutional world, an enforcement clause: "SECTION 2. Congress shall have power to enforce this article by appropriate legislation."[23] This plain language of an enforcement clause to a federal constitutional amendment signified the new federal world, a new federalism, and a new revolutionary federalism after the Civil War. With this key clause, Congress possessed the power through a constitutional mandate to enforce the end of slavery with "appropriate legislation."[24] In effect, the enforcement clause constituted a "blank check" to Congress to act and react to the foreseeable future in order to deal with the cancer of slavery. And it was Congress, the national government, that set the standards for the treatment of individuals within states by their own states, and that relationship was something new in the constitutional relationship between the central government and the states.

From that new constitutional baseline grew another question,

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[21] Address at Gettysburg, Pennsylvania (Nov. 19, 1863), *supra* note 1, at 536. For analysis of this crucial speech, see GABOR BORITT, THE GETTYSBURG GOSPEL: THE LINCOLN SPEECH THAT NOBODY KNOWS (2006) and GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA (1992).

[22] U.S. CONST. amend. XIII, § 1.

[23] U.S. CONST. amend. XIII, § 2.

[24] *Id.*

the lawyer's slippery-slope problem: if slavery cannot exist, then what else can Congress do to enforce the Thirteenth Amendment's end of slavery? Did no limits exist to what Congress could do to end slavery? And was the enforcement clause meant only as a negative—the end of the legal institution of slavery—or was that enforcement clause to be read as a positive: that Congress had a positive duty to the freedmen and freedwomen to do more than just extinguish the legal basis of slavery? For those important rhetorical questions, no one at the time knew the answers.

Ironically, the actions of Southerners and southern states spurred Congress to action under the Thirteenth Amendment. With the end of the War in the spring of 1865, southern states started to meet and re-constitute themselves. In May 1865, President Andrew Johnson had issued a proclamation of reconstruction and amnesty.[25] Claiming to be only following the wishes of Lincoln, Johnson's plan was a mild plan of reconstruction and a presidentially directed and organized initiative. Seized upon by unreconstructed Southerners, they began re-forming their state governments and revising their state codes of law. Many of the southern states dropped "slave codes" from their state laws but replaced them with the infamous "Black Codes."[26] These codes sought to reintroduce slavery in African-American communities within the states in everything but name.[27] A device to maintain white, majority community dominance within the states, the Black Codes also sought to enter the postwar years with as little change in southern race relations as possible in spite of the outcome and the human cost of the Civil War and the Thirteenth Amendment.[28]

This form of southern resistance to emancipation did not go unnoticed by the Republican Party majorities in both Congress and the northern and midwestern voting populations. Freedom did not mean the Black Codes, and in 1866 Congress struck back against the Black Codes by employing the Thirteenth Amendment's enforcement clause.[29] On April 9, 1866, Congress passed the first civil rights act in U.S. history, the Civil Rights

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[25] Amnesty Proclamation (May 29, 1865), *in* 8 THE PAPERS OF ANDREW JOHNSON 128, 128–30 (Paul H. Bergeron et al. eds., 1989).

[26] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 199 (Henry Steele Commager & Richard B. Morris eds., 1988).

[27] *See id.* at 199–201.

[28] For the current interpretation of Reconstruction, see generally *id.*

[29] U.S. CONST. amend. XIII, § 2.

Act of 1866, in order to enforce the Thirteenth Amendment's command to end slavery.[30] This congressional action made clear that the end of slavery meant more than the mere end of the institution of slavery; rather, slavery's end meant at least the fundamental economic rights of all persons with the United States. Section 1 read:

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[31]

This section summed up the Republican Party vision for race relations and the country going into the future. This first section states that African-Americans are now "citizens of the United States" and as such the states cannot invade or deny the rights of national citizens.[32] Also, the fundamental rights that that generation believed important were not the civil liberties that modern audiences and students might think, but economic rights: right to contract and access to the courts to protect their property, themselves, and their families. And, as the statute made clear, the standard of what in time would be called "equal protection," would be treatment "as is enjoyed by white citizens," and no other. Not surprisingly, given the potentially sweeping changes to federalism and the constitutionalism brought about by the Thirteenth Amendment and the Civil Rights Act of 1866,

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[30] Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

[31] § 1. Section 2 of the Civil Rights Act of 1866 established the punishments for those who violated the Civil Rights Act of 1866 to be $1,000 and/or a year in prison. § 2. Section 3 authorized the removal of cases from the state courts to the federal district and circuit courts. § 3. Section 9 authorized the President to use the military or the militia to enforce the statute, and Section 10 allowed final appeal to the United States Supreme Court on issues arising from the statute. §§ 9, 10, 14 Stat. at 29. In its potential, the Thirteenth Amendment and the Civil Rights Act of 1866 constituted a sweeping change in constitutional and legal assumptions about federalism and the treatment of citizens in their localities.

[32] § 1, 14 Stat. at 27.

President Johnson vetoed the bill when it reached his desk.[33] Congress over-rode the veto, thus further separating Congress and the President on the direction and course of Reconstruction policy.

This crucial statute—the Civil Rights Act of 1866—should be read together with the Thirteenth Amendment as constituting a powerful precedent in establishing national authority over the states. Passed pursuant to the enforcement clause of the Thirteenth Amendment, the Civil Rights Act of 1866 established a federal floor of rights below which the states could not, and should not, treat national citizens. States might craft state ceilings of more rights than what the nation established, but national rights came first and established a baseline for the treatment of "citizens,"—even black Americans. While suggestive, this understanding of this image did not emerge in the 1860s, but did emerge in U.S. history during the era of the Second Reconstruction of the 1950s and 1960s.[34]

Regardless, at the time, the Civil Rights Act of 1866 struck down and voided the state Black Codes.[35] What would come next was not known; after all, the states and people who ratified the Thirteenth Amendment and enacted the Civil Rights Act of 1866 did not know that another amendment would, in time, be necessary. Further, a couple of suggestive cases occurred on the potential breadth of the Thirteenth Amendment, but were not followed-up upon in large part due to the fluid and changing quality to Reconstruction.[36] The problem for the Republican Party majorities in both houses of Congress was not that the Civil Rights Act of 1866 was incorrect policy (it was in light of having

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[33] For Andrew Johnson's veto message on the Civil Rights Act of 1866, see Veto Of Civil Rights Bill (Mar. 27, 1866), *in* 10 THE PAPERS OF ANDREW JOHNSON, *supra* note 25, at 312, 312–20.

[34] A huge and impressive body of scholarship exists on the era of the Second Reconstruction. *See generally* TAYLOR BRANCH, AT CANAAN'S EDGE: AMERICA IN THE KING YEARS, 1965–68 (2006); TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954–63 (1988); TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS, 1963–65 (1998); DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (1986); DAVID R. GOLDFIELD, BLACK, WHITE, AND SOUTHERN: RACE RELATIONS AND SOUTHERN CULTURE 1940 TO THE PRESENT (1990); HARVARD SITKOFF, THE STRUGGLE FOR BLACK EQUALITY: 1954–1980 (1981).

[35] *See* Civil Rights Act of 1866, ch. 31.

[36] *See In re* Turner, 24 F. Cas. 337, 339 (C.C.D. Md. 1867) (No. 14,247); United States v. Rhodes, 27 F. Cas. 785, 788 (C.C.D. Ky. 1866) (No. 16, 151). *See generally* HAROLD M. HYMAN, THE RECONSTRUCTION JUSTICE OF SALMON P. CHASE: IN RE TURNER AND TEXAS V. WHITE (1997) (discussing these almost forgotten, but highly suggestive decisions).

won the Civil War and the imperative of the Thirteenth Amendment), but the fear that at some point in the future (Republicans hoped in the distant future) that the Democrat Party would gain control of Congress and repeal the Civil Rights Act of 1866. Therefore, later in 1866, the House Judiciary Committee went to work crafting a new constitutional amendment to make permanent the constitutional values and legal standards of treatment of the Civil Rights Act of 1866—in time, the "second [United States] Constitution," the 1868 Fourteenth Amendment.[37]

While the constitutional and legal potentials of the Thirteenth Amendment have not been plumbed by policy-makers nor the federal courts, the Thirteenth Amendment suggests the power and reach of the national government to void state defined property (as in slavery) while possessing what, on its face, is unchecked power to affect the end of slavery through the enforcement clause. It is this symbolic quality of the potential power and reach of the nation and federal government that still infuses the Thirteenth Amendment. Thus, the Thirteenth Amendment exists as a road not taken by legislators and jurists to assert national power over states, but a road available to be taken should the situation and context arise.

Instead of following historical chronology on to the Fourteenth Amendment, a shift to the other over-shadowed Civil War constitutional amendment, the Fifteenth Amendment, is useful before returning to a discussion of the Fourteenth Amendment.

II. THE FIFTEENTH AMENDMENT

A product of the political turmoil of Reconstruction and a compromise measure between pragmatism and idealism within the Republican Party of the time, the 1870 Fifteenth Amendment had a bumpy history. In the general election of 1868, the Republicans maintained their majority in the House and Senate, and their presidential candidate, former General Ulysses S. Grant, won a solid victory in the Electoral College; but the white South scored important gains in Congress and the southern popular vote for Grant was surprisingly close.[38] Black votes in

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[37] DENVIR, *supra* note 2, at x (internal quotation marks omitted); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 958–60 (1995).

[38] *See* LIBERTY, EQUALITY, POWER: A HISTORY OF THE AMERICAN PEOPLE 547, 549 (John M. Murrin et al. eds., 4th ed. 2005); *see also* William Gillette,

the reconstructing southern states had made the difference for Grant in the popular vote.[39] In light of these political results, Republican leaders decided that guaranteeing the enfranchisement of the black male population would form a counter-weight to the rising Democratic Party. So on one hand, Republicans wanted black votes for the pragmatic and political reason to maintain their own control of the central government and to continue Congress's Reconstruction policies. At the same time, at the insistence of the radical wing of Republicans, moderates in the Republican Party also sought to protect black equal rights and voting. Thus, the Republicans sought to constitutionalize a ban on state-sanctioned racial discrimination in voting.

During the debates on the proposed Fifteenth Amendment, suggestions to ban specific state practices to deny the vote to blacks, such as literacy tests, arose, were debated, and defeated.[40] Instead, Congress approved another succinct amendment like the Thirteenth Amendment. In its final approved form, the Fifteenth Amendment reads: "SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[41] And like the Thirteenth Amendment, the Fifteenth Amendment also possessed an enforcement clause that reads: "SECTION 2. The Congress shall have power to enforce this article by appropriate legislation."[42] Ratified by enough states in February 1870, the Fifteenth Amendment became law on March 30, 1870.[43]

Historian of the Fifteenth Amendment, William Gillette, has argued that Republicans at the time considered the Fifteenth Amendment the successful capstone of Reconstruction.[44]

Fifteenth Amendment, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 338–39 (Kermit L. Hall et al. eds., 2d ed. 2005) [hereinafter Gillette, *Fifteenth Amendment*]; William Gillette, *Fifteenth Amendment (Framing and Ratification)*, *in* 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 725, 727 (Leonard W. Levy et al. eds., 1986) [hereinafter Gillette, *Framing and Ratification*]; Xi Wang, *Black Suffrage and the Redefinition of American Freedom, 1860–1870*, 17 CARDOZO L. REV. 2153, 2214–15 (1996).

[39] Gillette, *Fifteenth Amendment*, *supra* note 38, at 338.

[40] WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT 50, 54 n.35, 57 (1965) [hereinafter GILLETTE, RIGHT TO VOTE].

[41] U.S. CONST. amend. XV, § 1.

[42] *Id.* § 2.

[43] *Id.*

[44] Gillette, *Framing and Ratification*, *supra* note 38, at 727.

President Grant stated in his message to Congress that the amendment "completes the greatest civil change and constitutes the most important event that has occurred since the nation came into life."[45] Most blacks at the time believed that southern white majorities would not abridge this constitutionalized oversight of the franchise, backed by the power of the federal government.[46] Northern and midwestern whites understood the Fifteenth Amendment in a positive but different fashion. Because blacks in their localities in the South could vote and defend themselves as citizens, white Northerners and Midwesterners need not pay any more attention to the "Negro question" in the South. Anti-slavery societies disbanded, having achieved for the African-American community the end of slavery, their citizenship in the Fourteenth Amendment, and, by the Fifteenth Amendment, restrained the states from restricting blacks from voting.[47]

But as is often the case in history, the unintended consequences of reform prove, in the long-run, more important than the intended consequences of reform. The Republican vision of a bi-racial, two-party South coexisting in their localities with, at minimum, equality before the law of the states and the nation, did not materialize. This vision, this "unfinished revolution" (to borrow a phrase from distinguished historian of Reconstruction, Eric Foner) would be denied in the nineteenth century and only started to be achieved with the era of the Second Reconstruction of the 1950s and 1960s.[48]

Problems with the Fifteenth Amendment existed. Contrary to popular culture's understanding and misstatement of the purpose and even wording of the amendment both at the time and since, the Fifteenth Amendment did *not* grant the vote to anyone.[49] The tradition and custom in the United States is that voting is a local and a state issue, not a federal issue; states and localities set the standards and requirements for voting.[50] Since the Second Reconstruction, the federal government has established more

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[45] *Id.*; Special Message to the Senate and House of Representatives (Mar. 30, 1870), *in* 21 THE PAPERS OF ULYSSES S. GRANT: NOVEMBER 1, 1869–OCTOBER 31, 1970, at 130, 131 (John Y. Simon ed., 1968).

[46] Gillette, *Framing and Ratification*, *supra* note 38, at 727.

[47] *Id.*; WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION, 1869–1879, at 24 (1979) [hereinafter GILLETTE, RETREAT FROM RECONSTRUCTION]; GILLETTE, RIGHT TO VOTE, *supra* note 40, at 162; Gillette, *Fifteenth Amendment*, *supra* note 38, at 339.

[48] Gillette, *Fifteenth Amendment*, *supra* note 38, at 339.

[49] *See* U.S. CONST. amend. XV; GILLETTE, RETREAT FROM RECONSTRUCTION, *supra* note 47, at 296.

[50] *See* FONER, *supra* note 26, at 446.

guidelines and regulations, but voting still remains overwhelmingly a local and state issue as the United States discovered after the general national election of 2000.[51] Thus, as the wording of the amendment makes clear, the vote is not granted to anyone; rather, the amendment speaks in the negative—"The right of citizens of the United States to vote *shall not* be denied . . . by the United States or by any State on account of race, color, or previous condition of servitude."[52] Therefore, should states or the nation try to prevent people from voting because of their color, race, or because of their previous status as slaves, then this amendment would prevent that action. But if the locality or election officials decided to prevent people from voting because they could not pass a literacy examination, then the Fifteenth Amendment would not prohibit that test for voting because, on its face, a literacy examination was not based on race, color, or previous servitude.

Given the historical context of the late nineteenth century with northern and midwestern populations' waning interest in the problems of the South, generally, and the black population, in particular, the retreat from Reconstruction by the federal government, and the emergence of white dominance of southern and border states, it is also not surprising that states and localities resorted to such devices as literacy examinations to limit and, in time, eliminate black voting. And the federal courts approved of these developments. In cases such as *United States v. Reese* (1876), the United States Supreme Court held that the use of literacy tests did not violate the Fifteenth Amendment and the Supreme Court held that poll taxes as well did not violate the Fourteenth Amendment in *Williams v. Mississippi* (1898).[53] For

[51] For the best historical and interpretative work on the disputed election of 2000, see CHARLES L. ZELDEN, BUSH V. GORE: EXPOSING THE HIDDEN CRISIS IN AMERICAN DEMOCRACY 66–67 (2008).

[52] U.S. CONST. amend. XV, § 1 (emphasis added).

[53] Williams v. Mississippi, 170 U.S. 213 (1898); United States v. Reese, 92 U.S. 214 (1876). *Reese* helped to undermine voting rights: the Court narrowly interpreted sections of the Act of May 31, 1870, 16 Stat. 140, which attempted to prohibit all forms of infringement of the right to vote, including poll taxes and literacy tests, by rejecting its provisions on punishments. *Reese*, 92 U.S. at 215–17, 221. The Court reasoned that "the Fifteenth Amendment does not confer the right of suffrage upon any one," and that deference to the Legislature is required to avoid judicial law making. *Id.* at 218–20. In *Williams*, the Court found that sections of Mississippi's Constitution and Code of Laws, both of which allowed literacy tests and poll taxes, did not discriminate between races, and thus did not deny equal protection of the law, secured by the Fourteenth Amendment of the U.S. Constitution. *Williams*, 170 U.S. at 219–22.

practical purposes, the Fifteenth Amendment had all but disappeared. Only in the now-famous decision of *Guinn v. United States* (1915) did the Supreme Court hold that Oklahoma's "grandfather clause" was unconstitutional.[54] This clause had exempted from Oklahoma's literacy test descendants of 1867 voters; the Supreme Court struck that clause down, but left intact the Oklahoma literacy test requirement for voting.[55] While not much, this decision suggested that the Fifteenth Amendment could reach both blatant and more subtle forms of discrimination.

Yet it would take a sea change of cultural values in the United States about the treatment of racial minorities by political and racial majorities before the potential gravitas of the Fifteenth Amendment could be weighed. That sea change occurred in the wake of World War II in post-war United States and the era of the Second Reconstruction. In a series of cases dealing with a variety of voting issues including the Texas all-white primary run by an allegedly "private" Texas Democrat Party, the Supreme Court of the United States rediscovered the Fifteenth Amendment with their decision in *Smith v. Allwright* (1944).[56] The *Smith* majority advanced the "public function" doctrine wherein actions that the state governments had performed could be deemed to be state action even if "private" persons performed those functions.[57] With the Civil Rights Acts of 1957, 1960, and 1964, but especially the Voting Rights Act of 1965, Congress acted to suspend the state and local literacy examinations and character examinations placed on voting that kept blacks from voting and placed federal examiners in localities to register blacks to vote where they had been previously denied the vote.[58]

In 1870, President Grant was correct in pointing out the dramatic transformations that the Fifteenth Amendment represented and symbolized in its potentials for altering the political and voter landscape of the United States; Grant's error was in believing that such dramatic changes would or could occur

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[54] Guinn v. United States, 238 U.S. 347, 363 (1915).

[55] *Id.* at 357, 363, 366.

[56] 321 U.S. 649, 651–52 (1944).

[57] *Id.* at 662–64; *see* WARD E. Y. ELLIOTT, THE RISE OF GUARDIAN DEMOCRACY: THE SUPREME COURT'S ROLE IN VOTING RIGHTS DISPUTES, 1845–1969, at 55, 85 (1974); DARLENE CLARK HINE, BLACK VICTORY: THE RISE AND FALL OF THE WHITE PRIMARY IN TEXAS 219–20 (1979); CHARLES L. ZELDEN, THE BATTLE FOR THE BLACK BALLOT: SMITH V. ALLWRIGHT AND THE DEFEAT OF THE TEXAS ALL-WHITE PRIMARY 4 (2004).

[58] Voting Rights Act of 1965, 42 U.S.C. § 1973(a) (2006); Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241; Civil Rights Act of 1960, Pub. L. 86-449, 74 Stat. 86; Civil Rights Act of 1957, Pub. L. 85-315, 71 Stat. 634.

during his administration. Yet he was not entirely off the mark—the Fifteenth Amendment does possess enormous potential as recent changes demonstrate. Together with the 1868 Fourteenth Amendment, the Fifteenth Amendment has established the federal floor high for the treatment of citizens by their states and localities in access to the voting booth and access to political power. While late, these political advancements in the treatment of citizens cannot be denied nor their importance diminished, and their origins lay in the vision and values in the era of Abraham Lincoln.

III. THE FOURTEENTH AMENDMENT

None of the Civil War and Reconstruction era constitutional amendments had greater political influence or transformative effect on the U.S. federal system and worked as much of a revolution (exactly the word) in the fundamental constitutional structure as the 1868 Fourteenth Amendment. Commonly referred to as the "second [United States] Constitution,"[59] the Fourteenth Amendment constitutes the constitutional basis for modern industrial and post-industrial United States and it encapsulates and institutionalizes Lincoln's vision of a nation (not a Union) with "a new birth of freedom."[60] The amendment wrought a new balance in federalism and did so without extinguishing the states or mandating a consolidated, all-powerful, all-consuming central government.

The Fourteenth Amendment achieves this balance in language that is narrow enough to be accessible to lay persons and broad enough for the lawyers and judges to adapt and adjust the constitutional rules and doctrines to the changing economic, political, cultural, and social contexts of the United States. Its language allows for both change and continuity: change with the historical contexts while maintaining continuity with the fundamental values of its era and the fundamental values of the United States. Thus, it is not a stretch to say that when modern politicians and/or the U.S. public speak about the virtues and some short-comings of the "Constitution," what they are really speaking about is not the 1787 Constitution, but the 1868 Fourteenth Amendment, its legislative and judicial interpretations, and their concomitant ripple effects. It is the

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[59] DENVIR, *supra* note 2, at x (internal quotation marks omitted).
[60] Address at Gettysburg, Pennsylvania (Nov. 19, 1863), *supra* note 1, at 536.

Fourteenth Amendment that drives the legal and constitutional debates and arguments of the modern day and the Fourteenth Amendment that looms as the most significant of the three Civil War and Reconstruction era constitutional amendments.

This new constitutional order is summed up in two sentences: the first sentence structured in a straight-forward manner and the second sentence constructed in a compound manner. Section 1 of the Fourteenth Amendment reads:

> 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.[61]

With key ideas, values, and broad language such as "citizens," "privileges and immunities," "life, liberty, or property," "due process," and "equal protection of the laws," the debate started in Congress, in the federal and state courts, and among the general population about the meaning and purpose of this most key section in this key constitutional amendment.

In all, the Fourteenth Amendment contains this first section, three other substantive sections, and Section 5, an enforcement clause. At the time of its drafting and eventual ratification, it was Sections 2, 3, and 4 that caused the most debate both in Congress and in the states.[62] Complicating the debates on a new constitutional amendment to raise to constitutional permanence the values of the Civil Rights Act of 1866 was, unexpectedly, the

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[61] U.S. CONST. amend. XIV, § 1.

[62] *See generally* HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (William S. Hein & Co., Inc. 2003) (1908). The Fourteenth Amendment's ratification history is not as clear-cut as modern readers might expect. Once Congress completed its long and hard work on the wording of the amendment and passed it and sent it to the states for ratification, the amendment's progress slowed. *See id.* at 55. In 1866, five of the states had ratified the proposed Fourteenth Amendment and eleven more ratified in 1867, which left the need for six more to ratify to enable the amendment to become part of the Constitution. *See id.* at 161–67. That number was met by July 1868, but two states, New Jersey and Ohio, for their own internal political reasons, tried to withdraw their earlier consent to the amendment. *See id.* at 189–90. As a result, Congress ruled that ratification of a constitutional amendment survived later efforts to over-turn their assent and thus those state votes to withdraw consent were void and the states' original consents were still valid. On July 28, 1868, the Secretary of State, William Seward, announced that the Fourteenth Amendment had received sufficient assent from the states and thus was added to the Constitution. *See* JOSEPH B. JAMES, THE RATIFICATION OF THE FOURTEENTH AMENDMENT 296–97 (1984).

Fourteenth Amendment. Because of the Fourteenth Amendment, the three-fifths rule in counting the slave population for representation purposes was over-ridden—African-Americans could be counted as full persons.[63] But because the bulk of the black population lived in the previously seceded states, counting African-Americans as full persons increased the representation and voting power of the South in Congress! Worse, to many in the North and Midwest, it was bad enough that the South's representation in Congress would increase by counting African-Americans as full persons yet the states of the South would deny those same persons the right to vote because all whites assumed that the newly enfranchised blacks would vote for the Republicans and not for the traditional political party of the South, the Democrats. Accordingly, the South would have started and lost the rebellion and then afterwards been rewarded for this rebellion by increasing their seats and voting strength in Congress without allowing blacks to vote. Public opinion in the North and Midwest and the majority party—the Republicans—was not about to allow such an outcome.

In 1866, in order to fix this problem, the House Judiciary Committee, the Senate Judiciary Committee, and the Joint Committee on Reconstruction went to work. Key players throughout the legislative drafting process were John A. Bingham (R-OH) and Thaddeus Stevens (R-PA) on the House side, and William Pitt Fessenden (R-MA) and Jacob M. Howard (R-MI) on the Senate side.[64] After a complicated committee and legislative history, Congress adopted language that reduced the representation of any state that denied the vote to male citizens over twenty-one years old.[65] Crucial (for the historical context of the time) Section 2 of the Fourteenth Amendment reads:

> 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

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[63] JAMES, *supra* note 62, at 68–69.

[64] FLACK, *supra* note 62, at 60 & n.20.

[65] CHARLES K. BURDICK, THE LAW OF THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT 424 (4th ed. 1929); *see* William E. Nelson, *Fourteenth Amendment (Framing)*, *in* 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, *supra* note 38, at 757, 759; *see also* U.S. CONST. amend. XIV, § 2.

> 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.[66]

In this fashion, the Republicans in Congress hoped to both punish the disloyalty of the white majority population in the southern states and protect the right to vote of the now enfranchised African-American population.[67] This section crafted a creative solution to a thorny problem that advanced access to the ballot box while punishing those who had rebelled.

Like Section 2, Section 3 of the Fourteenth Amendment sought to punish southern disloyalty during the Civil War. In April 1866, the Joint Committee had recommended to the Congress to deny the vote in federal elections prior to 1870 to all persons who had voluntarily supported the rebellion.[68] Instead, Congress eventually adopted the Senate's softer position of barring from federal office-holding those Confederate supporters who had previously taken an oath to support the Constitution of the United States.[69] As passed by Congress and ratified by the states, Section 3 reads:

> 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.[70]

With Sections 2 and 3, the Republicans fused both a commitment to social justice via protecting African-American voting in the states and their own self-interest by accurately assuming that the

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[66] U.S. CONST. amend. XIV, § 2.

[67] *See* Nelson, *supra* note 65, at 758; Mark S. Scarberry, *Historical Considerations and Congressional Representation for the District of Colombia: Constitutionality of the D.C. House Voting Rights Bill in Light of Section Two of the Fourteenth Amendment and the History of the Creation of the District*, 60 ALA. L. REV. 783, 822–23, 846 (2009).

[68] Nelson, *supra* note 65, at 759.

[69] For reading on the use and importance of oaths in the nineteenth-century United States, see HAROLD M. HYMAN, ERA OF THE OATH: NORTHERN LOYALTY TESTS DURING THE CIVIL WAR AND RECONSTRUCTION 125 (1954) and HAROLD M. HYMAN, TO TRY MEN'S SOULS: LOYALTY TESTS IN AMERICAN HISTORY 264 (1959).

[70] U.S. CONST. amend. XIV, § 3.

black population would vote Republican. Additionally, they continued the hard hand of war after the federal victory by punishing those Southerners who had violated their pre-War oaths to support the United States by denying those persons the opportunity to hold federal office. Section 2 and Section 3 embodied immediate pragmatic politics and larger justice issues.

With an eye on the future when the Democrats might again control Congress and might then repudiate the debt the United States accumulated in order to win the Civil War, the Republicans wanted to constitutionalize their financial efforts in the War.[71] Further, Congress wanted to punish those who had lent money to the so-called Confederacy, and thus they wanted to repudiate the Confederacy's debt and deny that the United States would pay any of that indebtedness.[72] And lastly, the Republicans wished to make clear that no compensation would be forthcoming from the United States for the loss of property in persons because the South lost the War.[73] These varied sentiments became encapsulated in Section 4 of the Fourteenth Amendment, which reads:

> 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.[74]

The funding of rebellion and the financial losses from the end of slavery will not be tolerated, stated this fourth section of the Fourteenth Amendment, and the debts of the United States were valid, would be paid, and could not be ignored by any future majorities in Congress.

Like its predecessor, the Thirteenth Amendment, Section 5 of the Fourteenth Amendment was an enforcement clause. It reads, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[75] And like the Thirteenth Amendment's enforcement clause, this clause lacks

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[71] Nelson, *supra* note 65, at 758 ("Something had to be done to insure that the war did not increase the political power of the disloyal groups that had brought the war about.").

[72] *Id.*

[73] *Id.*

[74] U.S. CONST. amend. XIV, § 4.

[75] *Id.* § 5.

specificity; therefore, in effect, Section 5 constitutes a blank check to future Congresses to enforce the Fourteenth Amendment as they might think reasonable and necessary. As this fifth section enforcement clause makes clear, the authors of the Fourteenth Amendment anticipated that Congress might have to legislate in order to achieve the numerous goals of the four substantive sections of the Fourteenth Amendment.

In the short-term, Sections 2, 3, and 4 of the Fourteenth Amendment contained the political goals of the Republican majorities in Congress and the Republican majorities in the country. But in the long-term, Section 1 and its broad, unspecific, suggestive language has outlived the other sections of the Fourteenth Amendment, and has proven to be the revolutionary, longest-lived, most debated, and analyzed section of the Fourteenth Amendment. Justices, judges, legislators, lawyers, law professors, political scientists, all imaginable varieties of interest groups, and, of course, historians have built their interpretations of Section 1. Starting in 1873, with the 5–4 decision in the first interpretation by the Supreme Court of the United States in the *Slaughter-House Cases*,[76] Section 1 has been interpreted and re-interpreted in order to fit the needs and speak to the concerns of a variety of historical contexts. A review of the history of Section 1 is beyond the scope of this article, but it is not too extreme to say that the history of Section 1 is a gloss on the constitutional, legal, and even political history of the United States since 1868.

Lumping key areas of the interpretive disputes together in the analysis of Section 1, three particular areas of contention emerge. First, did the first section of the Fourteenth Amendment protect voting rights of the newly enfranchised African-Americans, thus shifting oversight for voting rights away from its traditional location in the states to the federal government? Second, did Section 1 overrule *Barron v. Baltimore* (1833),[77] thereby making the states abide by the fundamentals listed in the federal Bill of Rights as opposed to only the states' own Bill of Rights? And third, did the Fourteenth Amendment's definition of citizenship, its statement on the primacy of federal citizenship over state citizenship, and its listing of the rights of national citizens that the states must not abridge, prohibit race-based segregation?

Although all of these questions are important, even crucial, in

[76] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 126 (1872).
[77] Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250–51 (1833).

the history of the United States since the Fourteenth Amendment's ratification, as William E. Nelson has argued, these questions "can never be answered confidently."[78] He continued, "All that the person who inquires into the historical record in search of an answer can do is make a guess—a guess more likely to reflect his political beliefs than to reflect the state of the historical record."[79] Thus, asking questions about what the drafters and those who ratified the amendment originally might have thought about a modern contentious issue such as abortion, gay marriage, the incorporation of the federal Bill of Rights, mandatory federal health insurance, or racial segregation would be to ask the wrong questions. Those questions are intriguing, but ultimately they constitute the wrong questions because those questions do not address the short-term and long-term political and cultural values and goals that the majorities in Congress and the states debated during Reconstruction regarding the Fourteenth Amendment.

Nevertheless, the central place of Section 1 of the Fourteenth Amendment shows no sign whatsoever of slipping from being the primary focus of the Supreme Court of the United States, and thus, constitutional interpretation. It continues to perform as the key language for constitutional interpretation of the ever-changing legal disputes brought to the federal and state courts. Through their judicial interpretations, the Supreme Court keeps U.S. constitutional values in touch with the current historical contexts and issues. While not perfect, and while a time-lag exists between the perception of a social or economic problem and that issue reaching the state and federal courts, Section 1 constitutes the driving force of this most important of Civil War constitutional amendments—the single most important part of the modern U.S. Constitution.

When President Lincoln spoke on August 22, 1864 to the 166th Ohio Volunteer Infantry Regiment, he told them: "The nation is worth fighting for, to secure such an inestimable jewel."[80] In part, Lincoln spoke about the constitutional world he knew and worked within as President, but he was also speaking about what values his generation wanted to leave to future generations of American citizens. Self-government under law, but on a new basis, "a new birth of freedom," of a constitutional order of balanced national

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[78] Nelson, *supra* note 65, at 760.

[79] *Id.*

[80] Speech to the 166th Ohio Regiment, Washington, D.C. (Aug. 22, 1864), *supra* note 4, at 624.

strength without collapsing the states, of national citizenship and a new treatment of all persons by all levels of government in the federal system on a more egalitarian and equal manner. It is this complicated bundle of fundamental values that constitutes the revolutionary quality of Section 1 of the Fourteenth Amendment. While the historical record demonstrates that that potential and promise of the Fourteenth Amendment became deferred and delayed, Lincoln's "inestimable jewel" came to be encapsulated in the Thirteenth, Fourteenth, and Fifteenth Amendments, and particularly into the language of Section 1 of the Fourteenth Amendment. Meeting the challenge of the Fourteenth Amendment's mandates about citizenship, privileges and immunities, life, liberty, and property, due process, and equal protection constitutes the inestimable jewel to be weighed, assessed, admired, analyzed, and preserved of this current generation of Americans and into the future.