INTRODUCTION

"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."

U.S. Constitution, amend. XIV.

The standard public debate over the Fourteenth Amendment goes something like this. Critics of the Supreme Court's interpretations of the Fourteenth Amendment over the last several decades believe that the Court has used the Amendment's provisions for "due process of law" and "equal protection of the laws" as open-ended vehicles for judicial policymaking, whether on abortion or gay marriage or a host of other issues. Indeed, it is difficult for someone sympathetic to the result in the 2015 gay marriage case *Obergefell v. Hodges*[1] to read the Court's opinion and get the feeling that what the Court is doing is *law*. The case was decided under the rather nebulous concept "substantive due process": the idea that the Fourteenth Amendment's injunction that no person shall be deprived of life, liberty, or property without due process of law is not merely about process, as its terms might suggest, but also about "substance" – namely, that the clause protects unwritten, unenumerated fundamental rights or prohibits arbitrary and oppressive legislation.

The majority of the Supreme Court also seemed to believe that it was up to them to decide over time how those unenumerated, fundamental rights ought to evolve. Although "[h]istory and tradition guide

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and discipline this inquiry," they "do not set its outer boundaries." "The identification" of fundamental rights, Justice Kennedy wrote in *Obergefell* – not only their protection, but also the actual determination of what those rights are in the first place – "is an enduring part of the judicial duty to interpret the Constitution." What rights the Constitution insulates from democratic action cannot be "reduced to any formula," but rather courts must "exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect." The courts' process is "guided" by the considerations relevant to the analysis of "other constitutional provisions that set forth broad principles rather than specific requirements." The people, Justice Kennedy wrote, "entrusted to future generations a charter protecting the right of all persons to enjoy liberty as *we learn its meaning*" – by which he meant, of course, as the Court decides its meaning.[2]

Justice Kennedy's opinion echoes one of the most influential constitutional law scholars of the last century, John Hart Ely, who wrote in his famous *Democracy and Distrust* that the Fourteenth Amendment was a broad and open-ended delegation of power to future constitutional decisionmakers.[3] Ely would have disagreed with Justice Kennedy on substantive due process: Ely was quite explicit that due process of law was indeed historically about process.[4] Nevertheless, Ely argued that the privileges or immunities clause and the equal protection clause were equally broad invitations to future courts to protect new rights. For example, the privileges or immunities clause "was a delegation to future constitutional decision-makers to protect certain rights that the document neither lists, at least not exhaustively, nor even in any specific way gives directions for finding."[5] The content of the equal protection clause, Ely wrote, "will not be found anywhere in its terms or in the ruminations of its writers," but the clause nevertheless serves as "a rather sweeping mandate to judge of the validity of governmental choices."[6]

Simply put, according to Ely, the Fourteenth Amendment "contains provisions that are difficult to read responsibly as anything other than quite broad invitations to import into the constitutional decision process considerations that will not be found in the language of the amendment or the debates that led up to it."[7] Justice Cardozo echoed

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this sentiment when he spoke of the Constitution's "great generalities," whose "content and . . . significance . . . vary from age to age."[8] In light of holdings and comments such as these, critics see the Fourteenth Amendment as interpreted by the modern Supreme Court and advocated by academics as a vehicle for unbounded, undemocratic judicial lawmaking.

However, proponents of this broad and open-ended approach to the Amendment – and proponents of the notion of "living constitutionalism" more generally – consider the alternative unthinkable. Reverting to the "original meaning" of the Fourteenth Amendment would mean "excluding" women, gay Americans, and other minorities from the Amendment's protections. It is a common belief, for example, that originalism cannot support the result in *Brown v. Board of Education*,[9] the seminal 1954 decision requiring the desegregation of public schools. Eric Segall, a prominent nonoriginalist law professor, wrote in *Vox* in 2017 just before the confirmation hearings of Justice Neil Gorsuch that "*Brown v. Board of Education*, one of the most important cases of the 20th century, would have turned out the other way if the justices had accepted originalist principles."[10] He described the originalist attempts to justify *Brown* as "embarrassing."

Indeed, at least some originalist alternatives would be quite hard to swallow. In dissent in *Obergefell*, Justice Antonin Scalia wrote that "[w]hen the Fourteenth Amendment was ratified . . . it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice [the sanctioning of marriage between only a man and a woman] that remained both universal and uncontroversial in the years after ratification."[11] This, to Justice Scalia, should have ended the matter. But can that really be the answer? Are we bound to what people in 1868 would have understood about an issue to which no one at the time had put any thought? Are we consigned to interpreting the Fourteenth Amendment *either* as a broad and open-ended invitation to future judges to decide what a democratic people should not be able to do through self-government *or* as a narrow requirement for judges to strike down only those practices that would have been thought unconstitutional in 1868?

It turns out that neither approach does justice to the Fourteenth Amendment and its authors. The provisions they wrote were neither so

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broad nor so narrow. Each provision of the Amendment's first section deploys a legal concept with a rich history in antebellum law or legal theory – legal concepts that, when faithfully applied, lead to both surprising and desirable results in the modern day. For example, it is astonishingly easy to defend *Brown* and desegregation on the original meaning of the privileges or immunities clause, which provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It is also possible, although not quite as easy, to arrive at the result in *Obergefell*, thereby guaranteeing the right to same-sex marriage under this clause. Whether or not the privileges or immunities clause necessarily justifies that decision, at least if the Court had justified the decision on the basis of that clause it would have appeared to all participants in the debate that the Court was making an honest attempt at doing "law" and less that it was simply making it up.

In short, the argument presented here is that the Fourteenth Amendment was written with legal terms of art – terms that were sufficiently capacious to apply to new and important contexts, but not so capacious as to be open-ended invitations to judges to import their own extratextual values into the Constitution. This short book seeks to introduce the reader to the meaning and history of the Fourteenth Amendment's three key provisions in its famous first section – the privileges or immunities clause, the due process clause, and the equal protection clause – as well as that section's grant of birthright citizenship.

My attempt here is similar to that in my book *A Debt against the Living: An Introduction to Originalism*,[12] which sought to introduce originalism to a broader audience by uncovering and elaborating the general findings and conclusions of originalist scholars over the last few decades. Very much as with that book, however, this book is not quite a "neutral" introduction. It explains the debates, provides the best arguments of the various sides, and then offers its own position. Although the book – and particularly its methodology – will certainly be of interest to scholars, my overarching objective has been to write a short book that is introductory and accessible to any and all interested in the original meaning of the Fourteenth Amendment.

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METHODOLOGY

Another word must be said about methodology. Most other books written on the original meaning of the Fourteenth Amendment focus on the debates in Congress[13] or the general antislavery and political history of the antebellum period.[14] Although legislative history can surely be consulted profitably, doing so suffers acutely from the more general problem of using legislative history to interpret statutes. In the first place, most of the framers of the Fourteenth Amendment did not think about the various applications with which constitutional litigation is concerned today and did not even think very carefully about the specific applications in their own time.[15]

Second, picking and choosing statements from the legislative history for support is, in the oft-repeated words of Judge Harold Leventhal, rather like "looking over a crowd and picking out your friends."[16] Incorporation is a classic example. Most proponents of the incorporation of the Bill of Rights against the states cite a single statement by Senator Howard when introducing the Amendment to the Senate, as well as a few stray and ambiguous statements by Representative Bingham, who was the principal author of the Amendment's first section.[17] More generally, as one correspondent put it when reporting on Congress's reconstruction efforts in 1866: "It is a Babel of opinion here – a political chaos. No two prominent men think alike."[18] A casual perusal of the congressional debates in 1866 confirms this observation.[19]

A different school of thought abandons the legislative history altogether and insists on the open-ended nature of the Fourteenth Amendment's provisions. John Hart Ely was only one of the more prominent of such scholars.[20] Those who focus on the general antislavery political history of the Amendment also claim it was a "vague charter for the future," not designed "to provide judges with a determinative text," but rather, for example, "to reaffirm the lay public's longstanding rhetorical commitment to general principles of equality, individual rights, and local self-rule."[21] Eric Foner, in his recent short treatment of the Reconstruction Amendments, asserts that "[t]he crucial first section of the Fourteenth Amendment is written

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in the language of general principles – due process, equal protection, privileges or immunities of citizenship – that cry out for further elaboration, making it inevitable that their specific applications would be the subject of never-ending contention."[22] These historians further ignore that abolitionists may have had idiosyncratic and erroneous views of the Constitution in the antebellum period, that the public did not necessarily share their understanding of the Reconstruction Amendments, and that the language they used in those Amendments often did not capture what some of them may have wanted or intended.[23]

In short, neither prevailing approach, it seems to me, is satisfactory. An approach that turns on legislative history is likely to be too narrow and too amenable to manipulation; an approach that turns on "broad invitations" to import extratextual values into the Amendment is likely to be too broad and similarly amenable to manipulation.

The method of this book, in contrast, is to uncover the original legal meanings of the Amendment's key provisions in antebellum law and to show how these legal concepts, when deployed in the Fourteenth Amendment, solved the general historical problems known to both the framers and the public of the era. As far as I am aware, this is only the second book to attempt an introduction to the Fourteenth Amendment in terms of the language of the law as opposed to using the legislative history or broader antislavery constitutional understandings.[24] I do not claim that the framers of the Amendment necessarily understood the full import of the legal language they deployed. What I claim is that they did use legal language, and both Representative Bingham and Senator Howard may have even expected judges to interpret the Amendment's language legally.[25]

In this book, I shall highlight the three principal constitutional questions or problems in this period relevant to the Fourteenth Amendment: whether free blacks* were "citizens of the United States" within the meaning of the Constitution, such that they were entitled to rights under the comity clause in Article IV (declaring that

* In using this term here and elsewhere, I seek to be faithful to the way in which the historical sources distinguish between enslaved and free African Americans and to the historical debate, definitively resolved by the Fourteenth Amendment itself, over whether newly freed black people were "Americans" in the sense of having citizenship.

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"[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States"); the widespread private violence against blacks, abolitionists, and later Unionists; and finally the enactment of the Black Codes in the South after the Civil War that systematically denied the newly freed men and women the same basic rights that white citizens enjoyed.

The Thirty-Ninth Congress in 1866–67 tried to rectify all of these abridgments, denials, and deprivations with three pieces of legislation: the Civil Rights Act of 1866, the Privileges and Immunities Bill, and the Second Freedmen's Bureau Act. Each of these Acts had known constitutional infirmities, and it has often been observed that the Fourteenth Amendment was intended at least to give a constitutional basis for the Civil Rights Act of 1866.[26] This book aims to show that the Fourteenth Amendment deployed the well-established legal concepts "privileges and immunities," "due process of law," and "protection of the laws," as well as birthright citizenship, to constitutionalize these various pieces of legislation. These Acts, as well as the Fourteenth Amendment itself, were intended to solve the question of the citizenship status of free blacks and their interstate comity rights, the abridgment of the intrastate rights of the newly freed men and women in the Black Codes, and the known problem of private violence and inadequate protection of the laws in the South and elsewhere.

The meaning and intended legal effect of the Amendment's provisions, in other words, become clear – perhaps even inescapable – when we consider the legal concepts the Amendment employed and the specific historical problems the Amendment was intended to solve. And this meaning is clear with minimal resort to the less reliable legislative debates in Congress. To be sure, we must resort to at least some *general* legislative history. For example, we shall refer to the fact that at least eighteen members of Congress stated that the purpose of the Fourteenth Amendment was to constitutionalize the Civil Rights Act (compared to only one or perhaps two who said anything about incorporating the Bill of Rights).

One might object to this distinction between relying on known general historical problems on the one hand and relying on specific statements from the legislative debates on the other. Yet this is exactly

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the distinction between relying on "purpose" in statutory interpretation, which originalists tend to support, and relying on "legislative history," which they do not. (That is not to say, of course, that one could not support, or oppose, the use of both.) And it is the distinction that the Supreme Court adopted in interpreting the Fourteenth Amendment over 100 years ago:

> A constitutional amendment must be agreed to, not only by Senators and Representatives, but it must be ratified by the legislatures, or by conventions, in three fourths of the states before such amendment can take effect. The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way, so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted.[27]

In short, an approach that focuses on the known legal concepts, the known historical problems, and only the most general legislative history to show awareness that the legal concepts were deployed to solve those historical problems is a far more reliable approach than one that plumbs the legislative debates for friendly but stray comments. Not only is this approach more reliable, but also the meaning and intended effect of the Fourteenth Amendment that emerge from this analysis chart a satisfying course between the overly broad approach of the modern Supreme Court and what opponents of "originalism" fear will be an overly rigid and wooden approach.[28]

THE ROADMAP

The roadmap and argument are as follows. The book is divided into three parts, covering the antebellum legal concepts, the historical problems that the Fourteenth Amendment was designed to address, and how the Amendment would apply today to key historical cases and a few salient modern ones.

Part I, comprising the first three chapters, explores the antebellum legal concepts "due process of law," "protection of the laws,"

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and "privileges and immunities of citizenship." In Chapter 1, we shall see that due process of law meant only that no person could be deprived of life, liberty, or property except according to preexisting, established laws, and that violations of those laws had to be adjudicated according to a certain minimum of common-law judicial procedures. This means that there was no "substantive" component to due process in antebellum law that protected fundamental rights, with the exception of one or two notorious cases. When antebellum authors wrote that the clause protected against "arbitrary" government acts, they did not mean that a court could review legislative acts to see if they were arbitrary on the merits. They meant arbitrary in the sense in which John Locke used the term: an *arbitrary* government act was an act made extemporaneously, contrary to promulgated, standing laws. The chapter will conclude by briefly surveying the antislavery constitutional theorists. It is often believed that they advanced a vision of substantive due process; this chapter will argue that their vision was consistent with the procedural understanding.

Chapter 2 will explore the use of the phrase "protection of the laws" in antebellum legal theory and demonstrate that it referred to specific kinds of laws: those that protected one's existing rights in life, liberty, or property. These were the laws that protected against physical harms and threats to liberty, as well as threats to and intrusions on private property, from other private citizens. This was the "flip side" of due process: due process of law established the rules by which the government could deprive a person of life, liberty, or property, and the protection of the laws was the protection the government had to provide against private interference with these rights. We shall here discuss the political theory of the American Founding to show that a government had to provide this protection for it to be legitimate and worthy of obedience.

Chapter 3 will turn to the antebellum legal concept of the privileges and immunities of citizenship. It will show how privileges and immunities clauses in antebellum law, including in treaties, state constitutions, and the original U.S. Constitution, were generally nondiscrimination provisions. The comity clause of Article IV of the U.S. Constitution, for example, meant that whatever privileges and

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immunities a state *chose* to grant its citizens as a part of their citizenship, it had to grant those same privileges and immunities (with certain obvious or at least inherent exceptions) to citizens of other states sojourning within its jurisdiction.

Part II – comprising the next three chapters – will show that the problem the Fourteenth Amendment's authors sought to solve was the systematic exclusion of blacks from the benefits of all of these privileges and rights. Chapter 4 will describe the three fundamental problems that the Fourteenth Amendment would eventually address: whether free blacks were "citizens of the United States" such that they were entitled to the privileges and immunities of other citizens under the comity clause when engaging in interstate travel; the problem of private violence against blacks, abolitionists, and later Unionists, and the concomitant denial of the protection of the laws; and, finally, the systematic exclusion of the newly freed people from the civil rights enjoyed by white citizens under the infamous postbellum Black Codes.

Chapter 5 will go through the legislation of the Thirty-Ninth Congress: the Civil Rights Act of 1866, the Privileges and Immunities Bill, and the Second Freedmen's Bureau Act. It demonstrates that these Acts would have directly addressed these three problems of interstate comity rights, private violence and the denial of the protection of the laws, and the abridgment of civil rights in the Black Codes. It will further demonstrate that the constitutional basis for these Acts was generally contested and that the Fourteenth Amendment constitutionalized them by deploying birthright citizenship and the antebellum legal concepts discussed in Part I.

The very first sentence of the Amendment declared that the now-freed blacks were "citizens of the United States," therefore settling once and for all their rights to interstate comity (and other constitutional rights). The prohibition on denying the protection of the laws, and the corollary prohibition on depriving any person of life, liberty, or property without due process of law, would allow Congress and the federal courts to step in to prevent private violence. And the privileges or immunities clause – declaring that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States – did for *intra*state discrimination what the comity clause

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did for *inter*state discrimination: it abolished the Black Codes and required equality in civil rights.

The privileges or immunities clause, in other words, was almost certainly an antidiscrimination provision. It likely was not intended to guarantee any fundamental rights at all, but rather to ensure fundamental equality in the provision of any civil rights a state accorded its citizens. Chapter 6 will take a deeper dive into the evidence about and debate over the privileges or immunities clause. It will tack away from our affirmative story and show why the principal alternatives to this antidiscrimination reading are likely incorrect.

Chapter 7 wraps up the book as Part III. It gives a quick overview of the history of the interpretation of the Fourteenth Amendment: how the Supreme Court effectively wrote the privileges or immunities clause out of the Amendment and had to warp the meanings of the equal protection and due process clauses to fix its own mistake. This chapter will then show how *Brown v. Board of Education* is an easy case under the privileges or immunities clause. *Obergefell v. Hodges* is also an easier case under privileges or immunities than under substantive due process (or under equal protection), although it is by no means foolproof. This chapter will also show how the clause likely prohibits extreme economic favoritism, but probably does not prohibit the mine run of modern economic legislation. It will suggest that prohibitions on discrimination in public accommodations are likely constitutional. It will end with some brief comments on the enforcement power of the Fourteenth Amendment's fifth section.

In each of the chapters to come, we will see that originalists disagree among themselves about the various issues. I hope I have adequately surveyed the various positions, and the reader may, of course, consult the notes for further reading along interesting lines of inquiry. Yet the historical concepts and problems that this book aims to uncover and convey make a compelling case for the vision of the Fourteenth Amendment presented here – a vision whose contemporary appeal is as compelling as its historical one.

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