THE ANTEBELLUM POLITICAL BACKGROUND OF THE FOURTEENTH AMENDMENT

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I

INTRODUCTION

Constitutions are not ciphers, and their past does not provide modern-day explorers with treasure maps. Those who frame them may wish, or foresee, or even fear certain results; but, because they frame constitutional provisions in general language, they cannot dictate results. Intentions are subjective, uncertain, and often contradictory. Different actors may foresee different results and many times the text that is enacted represents a deliberate choice to avoid troublesome questions of interpretation. Constitutions, and constitutional amendments, are not artifacts of the past to be deciphered; they are present law to be applied. They may have been intended; but in the present, they *mean*.

In discussing the viability of a progressive American constitutionalism, no question of meaning is more important than that of the Fourteenth Amendment. Alfred North Whitehead famously remarked that all of Western

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This Article is also available at http://www.law.duke.edu/journals/lcp.

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This paper was presented at the Fourth Annual Conference of the Duke Law School Program in Public Law, Durham, North Carolina, December 14, 2002. Of the many participants who offered suggestions there, I thank in particular Adrienne Davis, Pamela Karlan, Judith Resnik, and Clark Cunningham, as well as fellow panelists Richard Pildes, Michael Rappaport, and Robert Tsai. In addition, I thank these historians and legal scholars of the Fourteenth Amendment and Reconstruction, who read and commented on earlier drafts of this Article: Richard Aynes, Michael Kent Curtis, Michael F. Holt, Ward McAfee, James M. McPherson, Jack P. Maddex, Andrew Taslitz, and Michael Vorenberg. They share no responsibility for historical howlers that remain. I also thank my colleagues during my visit to Duke University School of Law in 2001-2002 for their encouragement and comments, particularly Paul Haagen, H. Jefferson Powell, Christopher Schroeder, and William Van Alstyne of the Duke faculty and William Marshall, Louis D. Bilionis, Ann Hubbard, Eric Muller, and Melissa Saunders of the University of North Carolina School of Law. I am grateful, moreover, for the guidance of Peter Wood of the Duke History Department, as well as John Hope Franklin, an ideal teacher and my hero. Thanks, too, to Lawrence Goodwyn and Spencie Love of Duke; Senior Associate Dean Richard Danner and the staff of the Duke Law library; my colleagues at the University of Oregon, particularly Rennard Strickland, Dave Frohnmayer, Jim O'Fallon, Keith Aoki, and Robert Tsai; and Judge David Schuman of the Oregon Court of Appeals. And I thank my research assistants, Kimberly Shore, Jacqueline Marks, and Emmett Soper; my editor at Henry Holt, John McCrae; and my agent, Wendy Weil. I also thank Sanford Levinson, Aviam Soifer, Peter Shane, Gerald Torres, William Forbath, Carl Tobias, John Paul Jones, Gary Leedes, Michael Gerhardt, David Garrow, Michael Dorf, Christopher Eisgruber, and Jane Harris Aiken.

philosophy is essentially a series of footnotes to Plato.[1] Likewise, much of American constitutional law, at least that part of it that concerns individual rights, consists of a series of footnotes to the Fourteenth Amendment.[2]

Consider only a small subset of the Fourteenth Amendment's constitutional consequences. The Citizenship Clause[3] guarantees that the descendants of slaves are citizens by birth; it also bestows citizenship on the children of immigrants, even if the parents are barred from acquiring naturalized citizenship,[4] or indeed have entered the country illegally.[5] The Privileges and Immunities Clause[6] protects a citizen's right to migrate from one state to another without thereby sacrificing the right to vote or to qualify for public benefit programs.[7] The Due Process Clause[8] requires the states to abide by most of the guarantees of the Bill of Rights,[9] which had previously been held to apply only to the federal government.[10] For this reason, state legislatures may not outlaw speech criticizing public officials,[11] jail those who question current economic and political arrangements,[12] forbid dissidents to meet or speak in public,[13] or outlaw the house-to-house dissemination of political or religious pamphlets.[14] The Due Process Clause also prevents state police from conducting warrantless searches of homes or vehicles except under exceptional circumstances,[15] from employing coercion or torture to obtain criminal confessions,[16] and from holding criminal suspects incommunicado.[17] State courts

1. ALFRED NORTH WHITEHEAD, PROCESS AND REALITY 39 (David Ray Griffin & Donald W. Sherburne, eds., cor. ed. 1969).

2. *See* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 1 (1988); *see also* MICHAEL KENT CURTIS, "NO STATE SHALL ABRIDGE": THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869 (1990); *and see* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998), *and* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998) (treating the Fourteenth Amendment and its framing as part of a more general discussion of constitutional theory). A classic exposition of the prehistory of the Fourteenth Amendment is found in JACOBUS TEN BROEK, EQUAL UNDER LAW (Collier Books 1965) (1951).

3. U.S. CONST. amend. XIV, § 1, cl. 1.

4. Oyama v. California, 332 U.S. 633, 644-45 (1948).

5. Acosta v. Gaffney, 588 F.2d 1153, 1157 (3d Cir. 1977).

6. U.S. CONST. amend. XIV, § 1, cl. 2.

7. Saenz v. Roe, 526 U.S. 489, 504-06 (1999).

8. U.S. CONST. amend. XIV, §1, cl. 2.

9. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 160 (1968); Albright v. Oliver, 510 U.S. 266, 273 (1994); Palko v. Connecticut, 302 U.S. 319, 323-28 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969); *cf.* AMAR, *supra* note 2, 221-22 (suggesting that the Court's tendency to apply individual clauses of the Bill of Rights to the states in their entirety is misguided).

10. Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833).

11. Hague v. Comm. for Indus. Org., 307 U.S. 496, 512 (1939).

12. Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).

13. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972).

14. Martin v. City of Struthers, 319 U.S. 141 (1943).

15. Chimel v. California, 395 U.S. 752, 768 (1969); Carroll v. United States, 267 U.S. 132, 149 (1925).

16. Townsend v. Sain, 372 U.S. 293, 309 (1963), *overruled by* Keeney v. Reyes, 504 U.S. 1 (1992); Brown v. Mississippi, 297 U.S. 278, 286 (1936).

17. Davis v. North Carolina, 384 U.S. 737, 751 (1966).

may not require criminal defendants to pay excessive bail[18] or deny them a speedy trial,[19] effective assistance of counsel,[20] trial by jury,[21] the presumption of innocence,[22] the confrontation of adverse witnesses,[23] or protection against compulsory self-incrimination.[24] State courts may not impose upon convicted offenders excessive fines[25] or cruel and unusual punishments.[26]

Beyond these rights deriving from specific constitutional text, the Due Process Clause provides a range of nontextual substantive rights, such as the right to control the education of children,[27] to buy and use contraceptives[28] and to make an uncoerced choice about abortion.[29] The Equal Protection Clause has been held to outlaw racial segregation in the selection of state juries[30] and in public schools,[31] to forbid states from maintaining systems of higher education that provide men with opportunities not open to women,[32] and to bar states from adopting constitutional provisions that designate one group of citizens as unequal to all others.[33] Perhaps most important for an open political system, the Equal Protection Clause means states may not use the legislative apportionment process to favor one group of voters over another or count citizens' votes unequally.[34]

These far-reaching effects are the results of only the first section of a five-section Amendment, which is by far the longest ever adopted through the amendment process. They do not even take into account the power bestowed upon Congress by Section 5[35] to interfere with state laws that violate the previous four sections. Nor do they include the middle three sections, which imposed unprecedented (if obsolete) federal limitations on state voting laws,

18. Schilb v. Kuebel, 404 U.S. 357, 365 (1971) ("Bail is basic to our system of law . . . , and the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment.").

19. Klopfer v. North Carolina, 386 U.S. 213, 223-24 (1967).

20. Gideon v. Wainwright 372 U.S. 335, 342-45 (1963).

21. Duncan v. Louisiana, 391 U.S. 145 (1968).

22. Estelle v. Williams, 425 U.S. 501, 503 (1976).

23. Coy v. Iowa, 487 U.S. 1012, 1019-20 (1988).

24. Kastigar v. United States, 406 U.S. 441, 444-47 (1972).

25. Stack v. Boyle, 342 U.S. 1, 4-6 (1951).

26. Trop v. Dulles, 356 U.S. 86, 100 (1958).

27. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925).

28. Eisenstadt v. Baird, 405 U.S. 438, 453-55 (1972); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

29. Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 846 (1994); Roe v. Wade, 410 U.S. 113, 153-55 (1973).

30. Strauder v. West Virginia, 100 U.S. 303, 310 (1879).

31. Brown v. Bd. of Ed., 347 U.S. 483, 493-95 (1954).

32. United States v. Virginia, 518 U.S. 515, 519 (1996).

33. Romer v. Evans, 517 U.S. 620, 626-27 (1996).

34. Reynolds v. Sims, 377 U.S. 533, 562-64 (1964).

35. U.S. CONST. amend. V, § 5 (granting Congress the power to enforce provisions of the Amendment by enacting "appropriate legislation").

qualifications for state offices, and debt-repayment schemes.[36] 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"[37] to officials who have engaged in "insurrection or rebellion" or have given "aid and comfort" to the nation's enemies.[38]

Clearly the changes the Fourteenth Amendment wrought in our system were far-reaching and profound, with implications not only for the substance and procedure of state government but also for the relationship between states and the federal government and among the branches of the national government itself. Viewing the Fourteenth Amendment in its totality, it is not too much to say that without it, the United States would not be today what we call a democracy.

But while philosophers understand that they are exploring the problems Plato set out in his dialogues some 2,300 years ago, American judges maintain an odd dual consciousness about the Fourteenth Amendment. On the one hand, they admit, over and over, that the Fourteenth Amendment changed this or that detail of our legal system. On the other hand, they seem unaware that the number of details, and the direction of the changes they represent, amount to something more than a series of isolated, almost idiosyncratic, results of the amendment process. Even in important decisions construing the Fourteenth Amendment, judges often seem to regard it as a minor editing change to the Founders' Constitution—to interpret it first and foremost through an assumption that it was not designed to change the structure and workings of the 1787 document. The resulting jurisprudence has a kind of somnambulistic quality.[39]

In the first major decision interpreting the Fourteenth Amendment, the *Slaughter-House Cases,*[40] Justice Miller explained that it was necessary to interpret the Amendment extremely narrowly, because otherwise it might be held to have changed the Constitution:

> The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to

36. *See id.* § 2 (imposing penalties in congressional representation on states denying the vote to "male inhabitants" who have not participated in rebellion or committed crimes); *id.* § 3 (barring from office former State and federal officials who participate in rebellion); and *id.* § 4 (constitutionalizing United States public debt and forbidding states or the federal government from repaying or assuming any debt incurred in support of rebellion).

37. *Id.* art. II, § 1, cl. 8.

38. *Id.* amend. XIV, § 3.

39. *Cf.* Christopher L. Eisgruber, *The Fourteenth Amendment's Constitution*, 69 S. CAL. L. REV. 47, 80 (1995) (characterizing the Court's interpretive posture as one of "peculiar[] reluctan[ce] to recognize [proper constitutional interpretation's] dependence upon the Fourteenth Amendment").

40. 83 U.S. (16 Wall.) 36 (1872).

> them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.[41]

The dismissive tone of the *Slaughter-House* majority reappears over and over in the *U.S. Reports*, and the current Supreme Court is committed to it. The tone of denial appears in *City of Boerne v. Flores*,[42] in which the Court insisted that Congress lacks the power to set a broad prophylactic rule enforcing the congressional vision of the Free Exercise Clause of the First Amendment because the language of Section 5, which appears to empower Congress, is limited by an unwritten requirement that congressional enforcement legislation be "congruen[t] and proportional[]" to the constitutional violations Congress seeks to remedy.[43] It does not seem to occur to the Court that the framers of the Fourteenth Amendment may not have reposed the same implicit trust in the wisdom of federal judges that the current Justices do.

The tone of denial appears most recently in an opinion in which Chief Justice Rehnquist explained that the Fourteenth Amendment's Enforcement Clause[44] could never be construed to allow Congress to supplement state tort law with a federal tort cause of action against perpetrators of gender-based violence:

> [T]he language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack discriminatory conduct. These limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government.[45]

In this article, I argue that the odd tone, and almost certainly wrong interpretation, of these opinions arises from an impoverished historical understanding of the Fourteenth Amendment. Some arises from the reticent tone of the legislative debates leading up to the Amendment.[46] But some also arises because contemporary interpreters read those legislative debates without a rich sense of the historical background against which the framers of the Fourteen Amendment saw the change they were making to the Constitution.

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

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41. *Id.* at 78.

42. 521 U.S. 507 (1997).

43. *Id.* at 520.

44. U.S. CONST. amend. XIV, § 5 (granting Congress the "power, by appropriate legislation, to enforce the provisions of this Article").

45. United States v. Morrison, 529 U.S. 598, 620 (2000).

46. NELSON, *supra* note 2, at 4-5.

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

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

My thesis is this: If in 1856 an anti-slavery politician had been asked to propose a constitutional amendment to eliminate the dangerous influence of the Slave Power, that politician would likely have produced something very much like the Fourteenth Amendment. Thus, I argue that we should pay close attention to the antebellum political arguments forged by the men who later framed the Fourteenth Amendment. This Article attempts to relate the final Amendment to antebellum politics. I do not wish by doing so to slight the influence on Northern public opinion of the Civil War itself or of the events of 1865, but I do suggest that it is extremely useful to note that the Republican response to the events of 1861-1865 flowed out of prewar political thought. In that complex of anti-slavery ideas, the idea of the Slave Power deserves a more prominent place than most legal and constitutional thinkers (though not necessarily most professional historians of the period) have heretofore given it. In fact, I suggest that we accord the theory of the Slave Power the same kind of

attention paid to the intellectual background of the framing of the Constitution itself.[47]

The Slave Power background of the Amendment gives grounds to argue for a broad interpretation of its terms, one embracing the radicalism of some of its authors, rather than the minimalizing approach of the Rehnquist Court. Justice Miller's reading in the *Slaughter-House Cases* seems untenable; somewhat closer to the mark, perhaps, would be the dissent in that case by Justice Swayne, whose words have not yet entered the constitutional law canon:

> These amendments are a new departure, and mark an important epoch in the constitutional history of the country. They trench directly upon the power of the States, and deeply affect those bodies. They are, in this respect, at the opposite pole from the first eleven. Fairly construed these amendments may be said to rise to the dignity of a new Magna Charta.[48]

The Slave Power concept is not a key to the Fourteenth Amendment's meaning; such keys do not exist. I intend chiefly to suggest that the framers of the Fourteenth Amendment were shaped by a background of political history and theory quite different from the eighteenth century history and philosophy that informed the work of framing in 1787. The Fourteenth Amendment does not incorporate all anti-slavery political thought by reference, any more than the Religion Clause of the First Amendment[49] could be considered a semiotic placeholder for John Locke's "Letter Concerning Toleration."[50] But in interpreting the First Amendment, Locke's famous discussion of religious freedom is relevant and powerfully suggestive, just as his *Second Treatise of*

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47. Without getting into the perennial quarrel between "originalists" and others, it should be noted that no substantial school of constitutional thought holds that the intent of the drafters of a constitutonal provision is *irrelevant* to the contemporary process of applying it. There is, however, a theoretical dispute about the construction of constitutional intent. Should primacy be given to the intent of a provision's drafters or to those who ratified it through a process of popular assent? H. Jefferson Powell argues that, when discussing the "original intent" of the Constitution of 1787, primacy should go to the ratifying sovereigns rather than the Framers. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 931 (1985). In the particular case of the Fourteenth Amendment, however, the primacy of the drafters is more defensible. Unlike the original Constitution, the Fourteenth Amendment was drafted by Congress over a relatively short period of time to deal with particular problems. In addition, ratification of the Amendment was more or less explicitly demanded of the Southern states as a condition of their return to full political participation in the Union; the Southern states thus had no representation at the time the Amendment was framed. *See* David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1479 (arguing that the "Civil War Amendments" should be regarded as "something in the nature of a treaty, reflecting the outcome of the war"). Thus, contrary to James Bond's argument, the Fourteenth Amendment should not be construed in line with the intent of the *Southern* ratifiers, who did not wish to see racial subordination ended or the Bill of Rights "incorporated" into requirements limiting states. *See* JAMES E. BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT 252 (1997) (arguing that Southern debates "prove" the Supreme Court has "perverted" the Amendment to "fraudulently" impose the Bill of Rights on states, weaken state "autonomy," and further give "an unwarranted imprimatur to egalitarian doctrines").

48. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 125 (Swayne, J., dissenting). Thanks to Jeff Powell for pointing this out to me.

49. U.S. CONST. amend. I ("Congress shall pass no law respecting an establishment of religion, or prohibiting the free exercise thereof.").

50. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 125 (J.W. Gough ed., Macmillan 1956) (1689).

Government is an important source for a rich understanding of the theory of American representative government.[51]

In our justified solicitude to understand the intellectual world of Philadelphia in 1787, we have neglected that of Washington in 1865 and 1866. Much research and writing could be done on the subject; the present work is intended simply as an earnest on work yet to be written and a signpost suggesting to others that they light out for this undiscovered country.

Part II.A of this Article summarizes the meaning of the term "Slave Power" as used by the practical politicians who built the Republican Party, brought it to power, and won the war against the South. It then summarizes the changes in historiography since the end of the war that first obscured the term and its meaning and are now reviving it. Part II.B demonstrates the ways in which anti-slavery politicians saw the strength of the Slave Power as flowing directly from flaws in the original Constitution of 1787, and the ways in which the antebellum political system strengthened the slaveowning interests of the South both within Southern politics and in the counsels of the nation. Part II.C discusses the original Republican program for ending Slave Power influence before Southern secession and shows its relevance to the political situation faced by the Republican members of the Thirty-Ninth Congress, who would eventually pass the Amendment. In the Conclusion, I argue that reading the Fourteenth Amendment against the political background of the Slave Power concept suggests that the somnambulists on the federal bench have misread the Amendment, both in its aim and in its scope.

II
ANALYSIS

A. The "Slave Power": Conspiracy and Historiography

The Slave Power was a term coined by abolitionists in the 1830s, but it was not taken up and widely used by mainstream politicians until the 1850s.[52] It had two related but not identical meanings.[53] The first referred to a conspiracy of slaveholders and "dough-faced" Northern politicians (Northerners who sought office and influence by cultivating Southern support) to preserve and extend the prerogatives of slaveholders.[54] The second (discussed below) referred to the political advantages conferred on slave states by the Constitution and the antebellum political system.

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51. *Id.* at 3.

52. LEONARD L. RICHARDS, THE SLAVE POWER: THE FREE NORTH AND SOUTHERN DOMINATION, 1780-1860, at 1-2 (2000).

53. *Id.* at 21-27. Richards provides the best summary of the political arguments that underlie the term "Slave Power" and the struggle against it.

54. It was this popular image that Walt Whitman evoked in his poem, "By Blue Ontario's Shore," as interrupting the onward march of American democracy: "Slavery—the murderous, treacherous conspiracy to raise it upon the ruins of all the rest." Walt Whitman, *By Blue Ontario's Shore*, *in* WALT WHITMAN, COMPLETE POETRY AND SELECTED PROSE 468, 473 (Justin Kaplan ed., 1982).

In the conspiratorial sense, the Slave Power fits with other conspiracy theories of the antebellum era—the fears of Freemasonry and Catholicism that spawned the Anti-Masonic and American (or "Know-Nothing") Parties, respectively, for example. Throughout the period, and throughout history, Americans have shown credulity toward allegations that a secretive, alien, and undemocratic group or elite was conspiring to subvert the promise of American liberty.[55] That it seems implausible today does not mean that it was not sincerely believed at the time. For example, no less a figure than Abraham Lincoln accused Stephen A. Douglas of taking part in a conscious conspiracy to nationalize slavery, a conspiracy in which the other participants were Presidents Pierce and Buchanan and Chief Justice Taney. In his famous "House Divided" speech, Lincoln suggested:

> [W]hen we see a lot of framed timbers, different portions of which we know have been gotten out at different times and places and by different workmen—Stephen [Douglas], Franklin [Pierce], Roger [Taney] and James [Buchanan], for instance—and when we see these timbers joined together, and see they exactly make the frame of a house or a mill, all the tenons and mortices exactly fitting, and all the lengths and proportions of the different pieces exactly adapted to their respective places, and not a piece too many or too few—not omitting even scaffolding—or, if a single piece be lacking, we can see the place in the frame exactly fitted and prepared to yet bring such piece in—in *such* a case, we find it impossible to not *believe* that Stephen and Franklin and Roger and James all understood one another from the beginning, and all worked upon a common *plan* or *draft* drawn up before the first lick was struck.[56]

In a draft speech for the 1858 senatorial election against Douglas, Lincoln wrote:

> I clearly see, as I think, a powerful plot to make slavery universal and perpetual in this nation. . . . The evidence was circumstantial only; but nevertheless it seemed inconsistent with every hypothesis, save that of the existence of such conspiracy. I believe the facts can be explained to-day on no other hypothesis.[57]

He repeated the charge, in somewhat more measured language, during his famous debates with Douglas, saying, "[T]here was a *tendency,* if not a conspiracy among those who have engineered this slavery question for the last four or five years, to make slavery perpetual and universal in this nation."[58]

Lincoln, a consummate politician, would of course not have made the accusation if he did not think voters would respond to it. But that does not necessarily mean he did not believe it himself; indeed scholars believe he did.[59] Nor was Lincoln alone:

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55. *See generally* RICHARD HOFSTADTER, THE PARANOID STYLE IN AMERICAN POLITICS (1965) (providing a history of conspiratorial views).

56. Abraham Lincoln, House Divided Speech at Springfield, Illinois, *in* 1 ABRAHAM LINCOLN, SPEECHES AND WRITINGS, 1832-1858, at 426, 431 (Don E. Fehrenbacher ed., 1989) [hereinafter SPEECHES AND WRITINGS].

57. Abraham Lincoln, Draft of a Speech, *in* 1 SPEECHES AND WRITINGS, *supra* note 56, at 487, 488.

58. Abraham Lincoln, First Debate: Lincoln's Reply, *in* 1 SPEECHES AND WRITINGS, *supra* note 56, at 508-16.

59. *See, e.g.*, RICHARDS, *supra* note 52, at 16; DAVID HERBERT DONALD, LINCOLN 208 (1995).

> Salmon P. Chase and Joshua Giddings, in their "Appeal of the Independent Democrats," also claimed that the [Kansas-Nebraska Bill] repealing the Missouri Compromise was "part and parcel of an atrocious plot" to extend slavery into the West. The *New York Times* portrayed it as "part of this great scheme for extending and perpetuating the supremacy of the Slave Power." The *New York Tribune* viewed it as the "first step" in "Africanizing" the American hemisphere. David Wilmot of Pennsylvania [author of the anti-slavery "Wilmot Proviso"] said it was the "precursor of a series of measures . . . to give the Slave oligarchy complete domination." Benjamin Wade of Ohio had "no doubt" that it was "but the first of a series of measures having for their object the *nationalization* of slavery."[60]

The idea of the Slave Power is relatively unfamiliar even to most educated Americans, and certainly has been little discussed by legal commentators.[61] But an educated American during the half-century after the Civil War would have understood the antebellum era differently—as a struggle between "free soil, free speech, free men" on the one hand and the aggressive Slave Power on the other.

The Slave Power's role in bringing on the war was explored in two popular and well-regarded histories published after Appomattox—Horace Greeley's *The American Conflict*[62] and the magisterial *Constitutional and Political History of the United States* by Herman von Holst.[63] Both recognized the effect the idea of the Slave Power had upon Northern leaders and public opinion; beyond that, they both concluded that the term Slave Power had a discernible and objective meaning in the structure of American politics. As Michael Les Benedict notes,[64]

> [Postbellum] histories by Republican participants [in the war] stressed issues of civil liberty. Slaveowners' devotion to "state rights" was a mere subterfuge. . . . [T]he heart of the slavery conflict lay in the "slave power's" assault on civil liberty, black and white. Slavery was more than a labor system exploiting slave labor; it was supported by a network of laws that deprived nonslaveholding southern whites of the power to challenge it. Even worse, the slave power extended its oppressive hand into the North and the territories as well.[65]

Horace Greeley's history of the Civil War era, written during Reconstruction, depicts the story as an assault on civil liberty, black and white, by the forces of the Slave Power.[66] Von Holst's account is particularly suggestive because, although he had lived in the United States from 1867 to 1872,[67] he was a German national who wrote from an academic position in Freiburg and considered himself an outsider to American civilization.[68]

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60. RICHARDS, *supra* note 52, at 13-14.

61. *See id.* at 17-18.

62. HORACE GREELEY, THE AMERICAN CONFLICT: A HISTORY OF THE GREAT REBELLION IN THE UNITED STATES OF AMERICA, 1860-64 (Hartford, Conn., O.D. Case & Co., 1864-66).

63. HERMANN VON HOLST, THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES (John J. Lalor et al. trans., Chicago, Callaghan & Co. 1881-92) (eight volumes).

64. Michael Les Benedict, *A Constitutional Crisis*, *in* WRITING THE CIVIL WAR: THE QUEST TO UNDERSTAND 154, 156 (James M. McPherson & William J. Cooper eds., 1998).

65. *Id*

66. GREELEY, *supra* note 62.

67. 1 VON HOLST, *supra* note 63, at viii.

68. *Id.* at vii-xi.

As a result of the hybrid nature of the Union, von Holst argued, two civilizations arose. The Southern, or "slavocratic," civilization was from the beginning inclined toward obtaining its way in national affairs by bullying and threatening Northern politicians into bartering sectional rights for Southern votes.[69] This pattern of bullying South and appeasing North meant "that [the North] was governed, not by the black slaves of the south, but by its own white slaves."[70] This mastery in national politics ensured that "a majority of the justices of the supreme court of the United States would profess the doctrines relative to slavery which were agreeable to the slave interest, whenever a legal question bearing on slavery arose."[71] Secession and war was caused by "the doctrine of non-coercion [of states by the federal government], the slavocratic interpretation of state sovereignty, and slavery."[72] Northern victory ensured the restoration "[o]f the Union, but not of the Union reduced to ruins under the constitution of 1789"—but instead, of a new nation purged of the constitutional influence of slavocracy.[73]

If writers and readers who had actual memory of the Civil War understood the Slave Power concept, how is it that we today have all but lost sight of it? The explanation lies in the highly politicized nature of Civil War historiography. Having lost the trial of arms, the unrepentant South won the postbellum battle of ideas.[74] From the early twentieth century until at least the mid-1960s, the general understanding of the causes of the war and the nature of Reconstruction was one provided almost entirely by pro-Southern historians. In the Southern revisionist account, the Civil War was a needless conflict, brought on by a tiny minority of fanatical and deluded abolitionists and by a "blundering generation"[75] of politicians who failed to see that compromise was always within easy reach.[76]

The image of the noble, victimized South these apologists created was difficult to square with the picture of the haughty, aggressive oligarchy depicted in the Slave Power thesis. Revisionist historian Chauncey S. Boucher attacked the thesis in an influential 1921 article in which he argued that antebellum Southern politicians had seen themselves as divided by party and subregion.[77] As historian Leonard L. Richards points out,[78] however, Boucher neglected to deal with the principal argument of the Slave Power proponents—the argument

69. *Id.* at 300.
70. 2 *id.* at 171.
71. 6 *id.* at 21.
72. 7 *id.* at 459.
73. *Id.* at 458.
74. David Brion Davis, *Free at Last; The Enduring Legacy of the South's Civil War Victory*, N.Y. TIMES, Aug. 26, 2001, § 4, p. 1.
75. J.G. Randall, *The Blundering Generation*, 27 MISS. VALLEY HIST. REV. 3 (1940).
76. *See, e.g.*, *id.* at 7-8 (arguing that Lincoln "stumbled" into war, and that the war was "needless" and "repressible").
77. Chancy S. Boucher, *In re that Aggressive Slaveocracy*, 8 MISS. VALLEY HIST. REV. 13 (1921).
78. RICHARDS, *supra* note 52, at 20-21.

that when slavery was an issue, Southern politicians tended to unite and command considerable support from Northern allies.[79]

Even if Boucher's argument deserves credence, Boucher's findings are all but irrelevant to the political preconceptions of the Republican leaders who drafted the Fourteenth Amendment and steered it to ratification. In the search for intent and meaning, the way in which legislators perceived the world is highly relevant, even if we ourselves do not fully share their perceptions.[80] My contention is not that the Slave Power existed, but that these practical anti-slavery politicians believed it did, and that their fear of the Slave Power, as a conspiracy or as a constitutional flaw, shaped the view of the world they wrote into the Fourteenth Amendment.

From that point of view, the Slave Power thesis was treated with undue harshness by liberal historian David Brion Davis in his 1969 book, *The Slave Power Conspiracy and the Paranoid Style*,[81] which strongly influenced subsequent historiography. As the title suggests, Davis was strongly influenced by Richard Hofstadter, who pioneered the idea of a "paranoid style" as a distinct feature of American political discourse.[82] Davis applied Hofstadter's idea to antebellum political thought by analyzing books and pamphlets written by fringe figures such as John Smith Dye, who wrote that the Slave Power was a tight and secretive conspiracy that had assassinated Presidents William Henry Harrison, Zachary Taylor, and Abraham Lincoln, had obtained control over President James Buchanan by poisoning him at a political gathering, and had generally manipulated every major political event of the first hundred years of the Republic.[83]

But refuting the more deranged visions of the Slave Power did not negate the influence the concept had exercised over many figures who were not marginal. Davis too easily conflated the conspiratorial rantings of Dye with the altogether more sober constitutional and political analyses of Lincoln, William Henry Seward, and Salmon P. Chase. As Richards notes, "[i]t was not the Dyes of this world . . . that made the Slave Power thesis popular[,]" but the practical politicians of the Free-Soil and Republican Parties.[84] It is less easy to dismiss these men as lunatics; after all, they took over the country, won the Civil War, and founded the last new national party to emerge in American history. If they

79. *Id*. at 20.

80. *See, e.g.*, Burnham v. Superior Court, 495 U.S. 604, 611 (1990) (Scalia, J., concurring) ("Accurate or not, however, judging by the evidence of contemporaneous or near-contemporaneous decisions, one must conclude that Story's understanding was shared by American courts at the crucial time for present purposes: 1868, when the Fourteenth Amendment was adopted.").

81. DAVID BRION DAVIS, THE SLAVE POWER CONSPIRACY AND THE PARANOID STYLE (1969).

82. *See* HOFSTADTER, *supra* note 55.

83. *See* JOHN SMITH DYE, HISTORY OF THE PLOTS AND CRIMES OF THE GREAT CONSPIRACY TO OVERTHROW LIBERTY IN AMERICA 36, 54, 91, 113 (New York, John Smith Dye 1866). Though President Buchanan was poisoned by bad oysters, Dye contends that arsenic was ground up and added to the sugar at a political gathering in Washington.

84. RICHARDS, *supra* note 52, at 2.

took the Slave Power thesis seriously, it was not because they believed someone poisoned President Buchanan.

To put it in contemporary terms, a historian writing about the twentieth century might use comic books and episodes of *The X-Files* to suggest that those who used the term "military industrial complex," or who believed that it denoted a real force in American political life, were deluded. But if the analysis failed to mention that the term had been coined by President Dwight Eisenhower[85] to denote what he considered to be a genuine phenomenon, its debunking of the term would be viewed as incomplete.

At any rate, the conspiracy theory was not the only thread of the Slave Power concept. It also functioned as a political and constitutional critique, and in that sense was at least as important as the conspiracy theory. It was particularly important politically to Free-Soil and, later, Republican politicians because it offered a critique of the South and its power that did not entail a direct attack on slavery. Most Republicans, Lincoln included, believed that only a state's own government could abolish slavery in that state.[86] Their political program forswore federal abolition of slavery where it existed as unconstitutional and undesirable. The term "anti-slavery," as affixed to these leaders, was most assuredly not a synonym for "pro-black" or even "abolitionist," and the Republican Party was not simply a moderate wing of the abolitionist movement.[87]

Republican leaders differed from abolitionists in their aims, assumptions, and tactics. Abolitionists were an important force in bringing the slavery issue to the forefront, and they helped shape Lincoln's response to the early setbacks of the Civil War.[88] They reached their zenith of influence in the immediate postbellum period, but at no time did they control the political movement against slavery and the Slave Power. That role fell to practical politicians—men like William Seward, John Sherman, Thaddeus Stevens, and Abraham Lincoln—who were far more concerned with electoral victory than moral purity, and who often did not feel even a token commitment to racial equality.[89]

The political meaning of the "Slave Power" is now enjoying a renascence in American historiography. Every major analysis of antebellum politics now

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85. *See* Charles J.G. Griffin, *New Light on Eisenhower's Farewell Address*, *in* EISENHOWER'S WAR OF WORDS 273, 277 (Martin J. Medhurst ed., 1994).

86. *See, e.g.*, Abraham Lincoln, Speech at Chicago, Illinois, *in* 1 SPEECHES AND WRITINGS, *supra* note 56, at 442-43.

87. RICHARDS, *supra* note 52, at 2-3. For a helpful discussion of the distinction between political anti-slavery and "moral anti-slavery," see William E. Forbath, *The Ambiguities of Free Labor: Labor and Law in the Gilded Age*, 1985 WIS. L. REV. 767, 774, 783.

88. *See generally* JAMES MCPHERSON, THE STRUGGLE FOR EQUALITY: ABOLITIONISTS AND THE NEGRO IN THE CIVIL WAR AND RECONSTRUCTION (1964) (detailing efforts by black and white abolitionists to influence Lincoln Administration policy).

89. *See, e.g.*, Lincoln, *supra* note 86, at 478. On the anti-black components of anti-slavery political thought, see DON E. FEHRENBACHER, THE DRED SCOTT CASE 190-91 (1978) (stating that many Republicans were more angry at the strength of slave states than at the wrong committed against slaves).

notes that many of its central players used the term to denote a political and constitutional reality.[90] This reality recently received a thorough examination by Leonard Richards.[91] As Richards notes, "[T]he notion that a slaveholding oligarchy ran the country—and ran it for their own advantage—had wide support in the years before and after the Civil War."[92] Though a few on the "lunatic fringe"[93] embraced and helped discredit the thesis, its real authors were "the Free-Soil Party of the late 1840s and early 1850s and the Republican Party thereafter."[94] These anti-slavery politicians contended that the Constitution and the political party system gave slaveholders and slave states control of the federal government:

> [S]lavemasters had far more power than their numbers warranted. In the sixty-two years between Washington's election and the Compromise of 1850, for example, slaveholders controlled the presidency for fifty years, the Speaker's chair for forty-one years, and the chairmanship of House Ways and Means for forty-two years. The only men to be reelected president—Washington, Jefferson, Madison, Monroe, and Jackson—were all slaveholders. The men who sat in the Speaker's chair the longest—Henry Clay, Andrew Stevenson, and Nathaniel Macon—were slaveholders. Eighteen out of thirty-one Supreme Court justices were slaveholders. . . .
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> . . . .
>
> [W]hile Yankees had disproportionate power in the national legislature and in northern state houses, they seldom controlled the higher offices of the national government. Slaveholders generally were in control.[95]

The idea of disproportionate power, and the corollary idea that slaveholders were conspiring to make slavery a national institution, were "the heart and soul of the Slave Power thesis."[96] This thesis united the anti-slavery political movement, and under its aegis gathered a disparate set of political thinkers, agitators, and office-seekers. Some were genuinely moved by the plight of the slave; others were indifferent or hostile. But all could agree that the slave states and the slaveowners within those states had too much power. Because of its role in uniting divergent anti-slavery views, this thesis was the primary force

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90. *See, e.g.*, DAVID HERBERT DONALD, LIBERTY AND UNION 38 (1978); DON E. FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY (Ward M. McAfee ed., 2001); ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 99-102 (2d ed. 1995); WILLIAM GIENAPP, THE ORIGINS OF THE REPUBLICAN PARTY 1852-1856, at 357-65 (1978); MICHAEL HOLT, THE POLITICAL CRISIS OF THE 1850S (1978) [hereinafter HOLT, POLITICAL CRISIS]; MICHAEL HOLT, THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR (1999) [hereinafter HOLT, THE RISE AND FALL]; RICHARD H. SEWELL, BALLOTS FOR FREEDOM: ANTISLAVERY POLITICS IN THE UNITED STATES, 1837-1860 (1976); Larry Gara, *Slavery and the Slave Power: A Crucial Distinction*, 15 CIVIL WAR HIST. 15, 15-18 (1969). An early and sophisticated discussion of the legal and constitutional implications of the Slave Power hypothesis underlies much of PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM AND COMITY (1981).

91. RICHARDS, *supra* note 52.

92. *Id.* at 1.

93. *Id.* at 2.

94. *Id.*

95. *Id.* at 9-10.

96. *Id.* at 4.

behind the anti-slavery struggle over the status of slavery in the territories[97] and thus served as a central feature of antebellum political thought.

It is hard to give a precise definition of the disproportionate power concept because each major political actor tended to give it his own definition. But most agreed that the Constitution as framed in 1787 gave Southern slaveholders and Southern states disproportionate political power within the Union.

The most important of these features was the famous Three-Fifths Clause, which gave slaveholding states representation in the House of Representatives for their slaves at the rate of three-fifths of the representation given to free citizens.[98] The Clause, adopted by the Constitutional Convention from the "federal ratio" prescribed by the Continental Congress for assessment of direct taxes during the period governed by the Articles of Confederation,[99] had effects probably unforeseen at the time of its adoption. The additional House seats given to the South by the Clause were known to antebellum politicians as "slave seats";[100] these excess House seats also gave the South extra electoral votes, which tipped the balance of power toward the South in presidential elections. Even in the early years of the Republic, this electoral advantage proved decisive; had electors been assigned to states solely on the basis of free population, as most free-state politicians believed they should be, the famous Jeffersonian "revolution" of 1800 would never have occurred. John Adams would have been elected to a second term, and the history of the next quarter century (marked by unbroken rule by Jeffersonian Presidents—Virginians and slaveowners all) might have been very different.[101]

But the Three-Fifths Clause was not the only feature of the Constitution that free-state politicians criticized. Their critique also encompassed a series of guarantees given to the slave states that had proved a bad bargain between the two sections of the country. The federal government was obligated to provide positive protection for slavery under the Fugitive Slave Clause,[102] which overrode the laws of the free states and required them to assist in the return of escaped slaves. Further, though it was never invoked for this purpose, anti-slavery writers were aware that the Domestic Violence Clause[103] imposed on the federal government a duty to come to the aid of Southern states in case of slave revolts.

The critics of slavery differed among themselves about why the Framers had structured the federal government that way. The abolitionists, particularly

97. *Id.* at 2-4. Richards identifies several mid-nineteenth century public figures, both Northern and Southern, who subscribed to the Slave Power thesis. Though their views on slavery were divergent, Northern politicians won power by appealing to Northerners' fear of an overly powerful slaveholding class.

98. U.S. CONST. art. I, § 2, cl. 3.

99. For an account of the adoption of the "federal ratio," see FEHRENBACHER, *supra* note 90, at 24.

100. RICHARDS, *supra* note 52, at 42.

101. *Id.* at 42.

102. U.S. CONST. art. IV, § 2, cl. 2.

103. *Id.* § 4.

those of the Garrisonian persuasion, argued that the Framers had made slavery a central feature of the new nation, and that the Constitution therefore was a "Pro-Slavery Compact,"[104] a "covenant with death" and an "agreement with Hell."[105] But the radical Garrisonians were neither the only nor the most powerful critics of the Slave Power under the Constitution. Anti-slavery politicians such as Lincoln, Seward, and Chase began during the 1850s to argue that the advantages given slavery by the Constitution were neither foreseen nor desired by the Framers, who had expected and wanted slavery to die out in the years after the adoption of the Constitution.[106] In this critique, the expansion and growth of slavery during the first half of the nineteenth century, and the exploitation by the slave states of their constitutional advantages, were signs that the Republic had strayed from its original aims, and that the Constitution was being perverted and misapplied.

The constitutional critique was not expressed, as it might be today, by a demand for amendments. As Michael Vorenberg has recently shown, amending the Constitution was, before the Civil War, a more troublesome idea than it is today.[107] After the framing and the adoption of the Bill of Rights by the first Congress, the Constitution had been changed only twice. The country had little experience with the amendment process, and politicians tended to regard the original Constitution as a kind of holy writ not to be altered by lesser, post-Founding mortals. "The deeper reason for the lack of [antebellum, proposed] antislavery amendments," Vorenberg explains, "was the widespread belief among all Americans that the constitutional text should remain static."[108]

And yet, the disgust of the Garrisonians, and the critique of more practical anti-slavery politicians, were both expressions of a pervasive unease with the political order that had grown up under the shadow of the Framer's Constitution. Though they might disagree on the appropriate cure, many thinkers in the North believed something had gone badly wrong under the Constitution of 1787.

B. Slavery and the Antebellum Political System

The sense that something was profoundly wrong was strengthened by the slave states' domination of the three branches of the federal government. The South's advantage, only marginal when the Constitution went into effect, grew during the antebellum era as the invention of the cotton gin sparked an explosion in the number of slaves in the lower South.

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104. Wendell Phillips, *The Constitution; A Pro-Slavery Compact*, *in* THE ANTI-SLAVERY EXAMINER; NO. 11 (1844), *reprinted in* THE ANTI-SLAVERY EXAMINER; NOS. 7-14 (1970).

105. WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, at 228 (1977).

106. *See, e.g.*, Abraham Lincoln, Speech at New Haven, Connecticut, *in* 2 SPEECHES AND WRITINGS, *supra* note 56, at 132, 141-42.

107. MICHAEL VORENBERG, FINAL FREEDOM 14-15 (2001).

108. *Id.* at 15.

The white populations of Southern states grew slowly, while the Northern states exploded in white immigration. The resulting imbalance was felt in the House of Representatives, in which the three-fifths rule between 1800 and 1850 consistently endowed the slave states with between fifteen and thirty "slave seats."[109] As scholar William Lee Miller notes, "[B]y 1860, the seven largest slave states, with a free population of 3,298,000, had forty-five representatives in the House, while the state of New York, with a free population of 3,831,590, had only thirty-one."[110] The overrepresentation of the free Southern population in the House also translated into overrepresentation of Southern voters in the electoral college.

Augmenting the South's national influence was the brute fact that pro-slavery politicians—with federal collaboration—had suppressed free debate and democratic politics in the slave states in a way that seemed to mock the Constitution's promise of free speech and "a republican form of government."[111] After the Nat Turner revolt, a determined and successful effort was made to suppress any criticism of slavery or talk of abolition in the Southern states. Those who questioned the pro-slavery orthodoxy were often silenced or even killed by mob violence.[112] Even more disturbing to those in the free states, Southern postmasters, with the active support of the federal government, began to exclude anti-slavery publications from the mails on the grounds that these publications might incite a slave revolt.[113] The result was that the average Southerner was increasingly isolated from even moderate Northern anti-slavery opinion by what historian Clement Eaton has called an "intellectual blockade."[114]

Many Northerners were offended at the idea that one section of the country operated under a different, less free political system.[115] But beyond the symbolic insult to the values of the Constitution, the political conformity imposed in the South had direct political effects on the national government and Northern society—effects most anti-slavery politicians and voters found threatening to their political interests and perhaps to their very liberties.

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109. RICHARDS, *supra* note 52, at 57.

110. WILLIAM LEE MILLER, ARGUING ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATES CONGRESS 49 (1996).

111. U.S. CONST. art. IV, § 4.

112. LEONARD L. RICHARDS, "GENTLEMEN OF PROPERTY AND STANDING" 14-15, 156 (1970).

113. *See* RUSSEL NYE, FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY, 1830-1860, 54-69 (1949).

114. CLEMENT EATON, FREEDOM OF THOUGHT IN THE OLD SOUTH 331 (1940). *See generally* NYE, *supra* note 113.

115. Professor Curtis quotes Representative Sidney Edgerton of Ohio. On the issue of the suppression of speech in the South, Edgerton exclaimed,

> Gentlemen of the South, the North demands of you the observance of constitutional obligations. She demands her citizens be protected by your laws in the enjoyment of their constitutional rights. She demands the freedom of speech and of the press, and if your peculiar institution cannot stand before them, let it go down.

MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE" 284 (2000).

Northerners had begun to feel uneasy about their own free speech rights during the famous controversy over the congressional Gag Rule. Under this standing congressional rule, adopted in 1836 and finally repealed after prolonged bitter controversy, the House of Representatives would not permit citizens to lodge petitions asking for the abolition or limitation of slavery.[116] Because the First Amendment guaranteed the right to "petition for redress of grievances," the collaboration of Southern lawmakers with Northern "doughfaces" to prohibit any discussion of these petitions seemed to many—even those who were not themselves abolitionists—to undermine the liberties of free citizens of the North. The leader of the opposition to the ban, former President and current representative John Quincy Adams, for the first time formulated and brought to wide attention the charge that the Constitution of 1787 was operating to grant illicit privileges to slaveowners and slave states.[117]

Beyond the gag rule, free-state citizens discerned threats to their own liberty in the mob violence increasingly used to silence abolitionists not only in the South but in the North.[118] The murder in 1837 of Illinois abolitionist editor Elijah Lovejoy, killed by a mob as he tried to defend his printing press in Alton, Illinois,[119] was a key event in the tightening of sectional tensions and the growth of the feeling that the existence of slavery threatened to destroy freedom throughout the country.[120] Beyond this extralegal pressure on free speech, pro-slavery forces began to put pressure on the Northern states to silence slavery's critics by enacting laws proclaiming abolition propaganda as "seditious libel."[121] Southern states also demanded that Northern governors extradite slavery opponents to the South, where they could be tried—and hanged—for undermining slavery.[122] Though Northern governors sometimes denounced abolitionists, none actually extradited them. Nonetheless, the very demand dramatized both the arrogance of the Slave Power and the threat it posed to Northern liberty.

Most serious of all, of course, would be the federal government's ban of anti-slavery agitation—a gross violation of even a conservative reading of the First Amendment. By 1860, presidential hopeful Abraham Lincoln was warning audiences that his likely Democratic opponent, Douglas, had introduced a "sedition act" that would make anti-slavery agitation a federal crime.[123]

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116. For an excellent general account of the Gag Rule debate, see MILLER, *supra* note 110; *see also* LEONARD L. RICHARDS, THE LIFE AND TIMES OF CONGRESSMAN JOHN QUINCY ADAMS (1986) (detailing Adams's role in the fight against the Rule).

117. RICHARDS, *supra* note 116, at 152-60.

118. CURTIS, *supra* note 115, at 227-31.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id*. at 202-04.

123. *See* Lincoln, *supra* note 106, at 128.

Once firmly in place, the South's enforced internal unity profoundly affected the two-party system. While both regions were split along party lines, after the rise of the intellectual blockade, party divisions tended to disappear when votes in Congress were important to the interests of slavery. While competition between the parties was a very real phenomenon to politicians below the Mason-Dixon line,[124] opponents of slavery experienced the South's congressional delegation as a monolith with the will and the power to block any legislation adverse to the broadest formulation of slavery's interests.[125] This regional unity was greater among federal officeholders than among state and local politicians because members of Congress tended to live and eat together at regionally specific boarding houses, or "messes," in Washington. At these messes, the most ideologically attuned members of the Southern block devoted themselves to acting as whips to enforce regional unity.[126]

A second feature of the party system augmented Southern power: the convention system of nominating presidential candidates. Until 1828, presidential candidates were usually nominated by their party's congressional caucus. In the early federal period, Southerners were a majority of the Democratic-Republican caucus and could thus choose nominees who were safe on the slavery issue. This advantage could have faded with the growth of free-state populations; but beginning in 1832, candidates were nominated by national conventions,[127] meaning any presidential candidate had to face the reality that nearly half of the delegates at his convention would be committed to a pro-slavery position. The new convention system in the Democratic Party—the nation's most powerful party—required a two-thirds vote to produce a nominee. As a result, Southern politicians could block the national hopes not only of any Democratic candidate who was anti-slavery, but even of those who were merely insufficiently pro-slavery. The most notorious example of this power was the Democrats' denial of renomination to former President Martin Van Buren in 1844. Because Van Buren opposed the expansion of slavery in new federal territories, he was excluded from the Democratic ticket.[128]

At about the same time, the Supreme Court gave what free-state politicians regarded as unmistakable evidence of its loyalty to slave states and their political interests. In the 1842 case of *Prigg v. Pennsylvania*,[129] the Court gave its first reading to the Fugitive Slave Clause.[130] *Prigg* was a dispute between

124. Boucher, *supra* note 77, at 15.

125. *See* DAVID M. POTTER, IMPENDING CRISIS 477 (Don E. Fehrenbacher ed., 1976). An exceptionally good discussion of the nature of Southern political unity on slavery issues can be found in WILLIAM W. FREEHLING, THE REINTEGRATION OF AMERICAN HISTORY: SLAVERY AND THE CIVIL WAR 197-98 (1994).

126. ROY FRANKLIN NICHOLS, THE DISRUPTION OF AMERICAN DEMOCRACY 140-41 (1948).

127. 1 HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS, 1789-1844, at 501 (Arthur M. Schlesinger Jr. & Fred L. Israel eds., 1972) [hereinafter HISTORY OF ELECTIONS].

128. *Id.* at 759-72.

129. 41 U.S. (16 Pet.) 539 (1842). *See generally* FEHRENBACHER, *supra* note 90, at 219-25; FINKELMAN, *supra* note 90, at 132-34.

130. U.S. CONST. art. IV, § 2, cl. 3.

Pennsylvania, a free state, and Maryland, a slave state, about the conduct of a Maryland slaveowner who came into Pennsylvania and "recaptured" a woman he claimed to be a runaway slave without abiding by the decision of a Pennsylvania court as to her status.

In an opinion by Justice Joseph Story, the Court unanimously held that slaveowners entering free states carried with them the law of their home states, giving them the right of "reception" of their slaves without any need to observe local state law or resort to local courts. Story wrote that the Clause in effect nationalized a policy favoring slaveowners and created "a positive, unqualified right on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control, or restrain."[131] This was true even if the state laws had been erected to ensure that free persons were not kidnapped and carried into illegal slavery. Dictum in the opinion suggested it was true even if the alleged slave had been born on free soil to a fugitive-slave mother.[132] In effect, this nationalized an all-but-absolute presumption that a black resident of the North was a slave to any Southern claimant.

Story was himself anti-slavery, and parts of his opinion did not strengthen slavery. He wrote, in a portion not joined by the remainder of the Court, that states also had no obligation to pass laws *facilitating* the return of fugitive slaves. The Constitution had entirely federalized the issue, he wrote. Many free-state politicians responded by disassociating their state courts and sheriffs from fugitive-slave rendition entirely. Nonetheless, the decision was a firm pronouncement by the Court that the Constitution had made slavery a national institution and an object of special solicitude by the federal government. It was *Prigg* that first sparked the radical, or Garrisonian, wing of the anti-slavery movement to break with the Constitution and declare itself in favor of dissolution of the Union.[133]

More moderate anti-slavery politicians were simply inspired to reflect on the fact that slaveowners dominated the Court. Jackson and Van Buren had appointed eight Justices; only one was even mildly anti-slavery. Six owned slaves as they sat on the bench, and one, Peter V. Daniel of Virginia, was so obsessively pro-slavery that he refused, during his later years on the Court, even to enter any state in which slavery had been abolished.[134]

Anti-slavery politicians, then, could have been forgiven for concluding that structural flaws in the original Constitution had allowed the South to dominate all three branches of the government, and most particularly the judiciary. Using this dominance, the South had become increasingly aggressive in pursuing

131. *Prigg*, 41 U.S. (16 Pet.) at 612.

132. *See* FINKELMAN, *supra* note 90, at 133-34.

133. FEHRENBACHER, *supra* note 90, at 223. For an elegant argument that *Prigg* represents a sophisticated attempt to apply natural rights theory to the law of fugitive slave recaption and thus does not merit the scholarly criticism it receives today, see Christopher L.M. Eisgruber, *Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism*, 55 U. CHI. L. REV. 273 (1988).

134. RICHARDS, *supra* note 52, at 95-96.

measures designed to upset the regional balance of power and harness the federal government in the service of slavery interests.

The first such measure was the annexation of Texas in 1845, which many historians view as the real beginning to the antebellum political struggle.[135] The entry of Texas had the potential to upset the numerical balance between free states and slave states.[136] But even worse, from the point of view of free-state politicians, was the provision of the admitting bill that granted Texas, at its sole option, the right to subdivide at any time into as many as five states, thereby granting Texas and the South as many as eight new senators at any time they might feel outnumbered in the federal legislature.[137]

Five years after the entry of Texas into the Union, the Compromise of 1850 produced another measure that free-state politicians and citizens saw as subordinating their interests to those of a pro-slavery federal establishment: the Fugitive Slave Law of 1850.[138] This act, far more stringent than the Fugitive Slave Law passed by the first Congress,[139] explicitly subordinated state officers and authority to federal mandates. To begin with, it overrode state personal liberty laws, denied the authority of state courts to adjudicate the cases of black residents claiming to be free, and barred habeas corpus relief for alleged fugitive slaves resisting return. Second, it required local law enforcement officials to cooperate with federal fugitive slave commissioners seeking assistance in returning alleged fugitive slaves to whites claiming to be their masters. Finally, and most galling to free-state whites, it empowered federal marshals to press ordinary citizens of free states into service as slave-catchers, on pain of imprisonment and fine for refusal to participate.[140]

Beyond their demands to silence their opponents, pro-slavery forces had begun to escalate the debate in other ways by the 1850s. Although Congress had banned the import of slaves in 1808, slave-state spokesmen began to demand that slaveowners be given access to the international market again, on the grounds that slave property was guaranteed to them by the Constitution and thus, that restrictions on the slave trade, though clearly contemplated by the

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135. *See, e.g.*, HOLT, POLITICAL CRISIS, *supra* note 90, at 39-40 (describing the polarization of Northerners and Southerners on the issue of slavery expansion).

136. MILLER, *supra* note 110, at 284; *see also* POTTER, *supra* note 125, at 24. Iowa was admitted to statehood in 1846 as part of a compromise intended to offset this imbalance.

137. J. Res. 8, 28th Cong., 5 Stat. 797 (1845). The resolution required any states formed north of the Missouri Compromise line to be free states—but this problem could be avoided by simply forming the new states from territory in which slavery was permitted.

138. Fugitive Slave Law, ch. 60, 9 Stat. 462 (1850); FEHRENBACHER, *supra* note 90, at 232. *See generally* FINKELMAN, *supra* note 90.

139. FEHRENBACHER, *supra* note 90, at 251 ("[T]he Fugitive Slave Law of 1850 was the most intrusive action ever taken by the federal government on behalf of slavery.").

140. On the provisions of the act, see FREEHLING, *supra* note 125, at 202; HOLT, POLITICAL CRISIS, *supra* note 90, at 89; HOLT, THE RISE AND FALL, *supra* note 90, at 554; BRUCE LEVINE, HALF SLAVE AND HALF FREE: THE ROOTS OF CIVIL WAR 186-87 (1992); LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860, at 248 (1961); MAYER, *supra* note 105, at 407; JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM 80 (1988); POTTER, *supra* note 125, at 131.

Framers, were incompatible with the spirit of the Union.[141] Alternatively, slave-state interests pressed for the annexation of Cuba or other parts of Latin America as sources of new slaves for Southern plantations. President Franklin Pierce, with the diplomatic help of future President James Buchanan, attempted to purchase Cuba, outraging anti-slavery politicians.[142]

Soon after the Compromise of 1850 (and despite the solemn assurances given by slave-state lawmakers that the compromise marked a definitive and binding solution to the quarrel over slavery in the territories), Illinois senator Stephen A. Douglas, with the support of Southern lawmakers, reopened the territorial question by organizing the Kansas Territory under the principle of "popular sovereignty." The Kansas-Nebraska Act[143] violated the Missouri Compromise of 1820, which had barred slavery from territory north of 36° 30'.[144] Evidence suggested that the Buchanan Administration would respect "popular sovereignty" only if it favored making Kansas a slave state. Federal officials seemed unconcerned when the new territory was invaded by mobs of "border ruffians" from neighboring Missouri—pro-slavery men who threatened and killed free-state settlers and who, with the encouragement of former Missouri senator David Atchison, openly cast fraudulent votes against anti-slavery measures and candidates in territorial elections.[145] The culmination of what Northerners saw as a pro-slavery reign of terror came in 1856 when pro-slavery vigilantes "sacked" the free-soil capital, Lawrence, driving out its elected officials and reducing the anti-slavery headquarters to rubble with dynamite and artillery.[146] After the "sack of Lawrence," an unrepresentative constitutional convention wrote a pro-slavery state constitution for Kansas. The Administration then reneged on a clear commitment to require a vote of the people to approve a state constitution and instead collaborated with the slave-state party in Kansas to impose the "Lecompton Constitution" on Kansas without a vote.

Two final events in the late 1850s convinced many politicians and voters in the North that the slave states would not be satisfied until they had imposed the slave system on the North. The first was the decision in *Dred Scott v. Sandford*,[147] in which the Supreme Court held Congress had no power to exclude slavery from the federal territories. Northern and Southern observers alike saw the decision, and the majority opinion written by Chief Justice (and former slaveowner) Roger B. Taney, as a complete triumph for Southern interests.

141. FEHRENBACHER, *supra* note 90, at 180 ("The campaign to reopen the African slave trade into the United States was launched in 1853-54. . . . [T]he movement became a major subject of discussion at the southern commercial conventions held annually in the 1850s.").

142. RICHARDS, *supra* note 52, at 198. A full account of Southern schemes for expansion, some serious, some seriocomic, appears in JOHN HOPE FRANKLIN, THE MILITANT SOUTH: 1800-1861, at 105-19 (1956).

143. Kansas-Nebraska Act, 10 Stat. 277 (1854).

144. POTTER, *supra* note 125, at 160.

145. MCPHERSON, *supra* note 140, at 1447.

146. *Id.* at 149.

147. 60 U.S. (19 How.) 393 (1856).

"Southern opinion upon the subject of southern slavery . . . is now the supreme law of the land," exulted the Augusta, Georgia, *Constitutionalist*, "and opposition to southern opinion upon this subject is now opposition to the Constitution, and morally treason against the Government."[148] Mainstream Northern anti-slavery journals agreed. "'There is such a thing as THE SLAVE POWER,' shrieked the *Cincinnati Commercial* when the decision was announced. 'It has marched over and annihilated the boundaries of the states. We are now one great homogeneous slaveholding community.'"[149]

Republicans, with an eye on the 1860 presidential election, walked a fine line between criticizing the decision and advocating equal citizenship for blacks. Many focused their critique on the idea that the decision was "incompatible with State rights and destructive of personal security."[150] Many also noted that a pending case in New York, *Lemmon v. The People*,[151] might give the Taney Court an opportunity to hold that free states were required to maintain slaves as property whenever slave-state owners should bring them onto free soil for purposes of transit, sojourn, or visitation.[152] From this holding it would have been a short jump to a rule that the Constitution required "free" states to permit slaves to be held permanently by residents who acquired them under the laws of slave states. Such a decision would have marked the culmination of the Slave Power conspiracy, the completed construction of the house whose "framed timbers" Abraham Lincoln discerned in the actions of Pierce, Buchanan, Douglas, and Taney.[153]

Dred Scott was seen as a watershed at the time it was announced, but another event loomed at least as large in the minds of free-state voters—an event that could be compared in its shock value to a contemporary cataclysm like the assassination of President Kennedy.[154] This event, which occurred on May 22, 1856,[155] gave lasting form and credibility to Northern fears that the South had the will and the power to transform the American system of government into something unrecognizable as a republic.[156]

On that date, Charles Sumner, the senior senator from Massachusetts, was nearly killed on the Senate floor by Representative Preston S. Brooks, a South Carolina representative who objected to Sumner's intemperate criticisms of the South and of Brooks's cousin, South Carolina senator Andrew P. Butler, in a

148. FEHRENBACHER, *supra* note 89, at 418 (quoting AUGUSTA CONSTITUTIONALIST, Mar. 15, 1857).

149. William E. Gienapp, *The Republican Party and the Slave Power*, *in* NEW PERSPECTIVES ON RACE AND SLAVERY IN AMERICA 51, 67 (Robert H. Abzug & Stephen E. Maizlish eds., 1986).

150. FEHRENBACHER, *supra* note 89, at 435 (quoting Platform of Ohio Republican Party, 1857).

151. 26 Barb. 277 (1857).

152. FINKELMAN, *supra* note 90, at 313.

153. *See supra* note 56 and accompanying text.

154. FONER, *supra* note 90, at 199-200.

155. DAVID HERBERT DONALD, CHARLES SUMNER AND THE COMING OF THE CIVIL WAR 290-92 (1960).

156. WILLIAM E. GIENAPP, THE ORIGINS OF THE REPUBLICAN PARTY, 1852-1866, at 301-03 (1987).

widely publicized speech on the Kansas-Nebraska issue. Brooks's premeditated assault, carried out with a rattan cane while the victim was pinned in his seat and unable to resist, was made more alarming by the widespread acclaim Brooks received from Southern politicians, editors, and crowds.[157]

The attack by "Bully Brooks," which occurred on the same day as the "sack" of Lawrence, seemed to Northerners to symbolize the intention of the South to behave toward the North as a master does to slaves. "Has it come to this, that we must speak with bated breath in the presence of our Southern masters?" poet and editor William Cullen Bryant wrote. "Are we to be chastised as they chastise their slaves? Are we, too, slaves, slaves for life, a target for their brutal blows, when we do not comport ourselves to please them?"[158]

The rhetoric was telling. In the wake of these events of the late 1850s, many Northerners had come to believe that the South intended to make slavery national, and would curb or eradicate the civil liberties enjoyed in the North, replace republican institutions of government with an aristocracy, and reduce the free white population of the North to "slavery." As historian Michael Holt notes, to most Americans, "slavery" was an important concept not restricted to racialized chattel slavery.[159] From the time of the American Revolution on, Americans had been taught to fear "slavery" as a state of subjection to political tyranny and the antithesis of self-government. Americans had fought the Revolution to avoid being "slaves" of a monarch across the sea;[160] now they were threatened with subjection by their own countrymen.

C. Republican Ideology, "States' Rights," and Federal Power

In January 1861, Ohio representative John Bingham, later one of the most important framers of the Fourteenth Amendment, summarized the offenses of the Slave Power against the Union and the people of the North:

> the repeal of laws for the protection of freedom and free labor in the Territories; the conquest of foreign territory for slavery; the admission into the Union of a foreign slave State; the rejection by this sectional party of the homestead bill; the restriction of the right of petition; the restoration of fugitive slaves at the national expense; the attempt to reward slave pirates for kidnapping Africans; the attempt to acquire Cuba, with her six hundred thousand slaves; the attempt to fasten upon an unwilling people a slave constitution [in Kansas]; the attempt to enact a sedition law, thereby restricting the freedom of the press and the freedom of speech, in direct violation of the Constitution . . . and the attempt, by extra-judicial interference[,] to take away from

157. DONALD, *supra* note 155, at 304-07.

158. MCPHERSON, *supra* note 140, at 150 (quoting N.Y. EVENING POST, May 23, 1856).

159. HOLT, POLITICAL CRISIS, *supra* note 90, at 190-91.

160. *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 119 (1967).

> the people and their Representatives the power to legislate for freedom and free labor in the Territories.[161]

Running through Bingham's litany was a fear of the federal government as an instrument of the Slave Power, a political juggernaut that, having illegitimately seized control of the Republic, was attempting to use it to reduce free states to subjection and slavery.

The growing concern in the North between 1850 and 1860 about Southern control of the federal government illuminates the complex issue of "states' rights" as a feature of the sectional quarrel. During the early federal period, Southern statesmen had championed "states' rights," beginning with Jefferson and Madison and progressing through John C. Calhoun.[162] But by 1850, the South had become more confident in its hold over the federal government. Southerners began to address the nation in sternly nationalistic tones about their duties to the federal government, and the concern for states' rights became a Northern, and Republican, concern.[163] The Republican message was that the Slave Power, or the "slavocracy," was bent on using the federal machinery to take over the free states and impose a slave system on them.

In 1858, Senate candidate Abraham Lincoln used strong states' rights language, warning audiences that his opponent, incumbent senator Stephen A. Douglas, was part of a Slave Power conspiracy to nationalize slavery through federal power—to force slavery, and thus, black people, into a state that wanted no part of either:

> [W]hat is necessary to make the institution [of slavery] national? Not war. There is no danger that the people of Kentucky will shoulder their muskets and with a young nigger stuck on every bayonet march into Illinois and force them upon us. There is no danger of our going over there and making war upon them. Then what is necessary for the nationalization of slavery? It is simply the next Dred Scott decision. It is merely for the Supreme Court to decide that no *State* under the Constitution can exclude it, just as they have already decided that under the Constitution neither Congress nor the Territorial Legislature can do it. When that is decided and acquiesced in, the whole thing is done.[164]

Lincoln was not unusual among Republicans in expressing fear for free-state sovereignty against the federalized Slave Power behemoth. William E. Gienapp notes that Gideon Welles, a prominent Connecticut Democrat who became a Republican stalwart and later a member of Lincoln's Cabinet, abandoned his original party out of "states' rights conservatism" in 1856, and

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161. CONG. GLOBE, 36th Cong., 1st Sess. 1840 (1860). Bingham's speech is quoted in Michael Kent Curtis, *John A. Bingham and the Story of American Liberty: The Lost Cause Meets the "Lost Clause,"* 36 AKRON L. REV. 617, 641-42 (2003). I thank Professor Curtis for sharing this article with me. It is only one of his innumerable courtesies.

162. *See generally* FORREST G. MCDONALD, STATES' RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, 1776-1876 (2000) (detailing the development of the "states' rights" argument).

163. *Id.* at 165-66. McDonald argues that "everything the federal authority did" during the 1850s was favorable to the South and that many Southerners approved of the "constitutional views of John Marshall," "while northerners were adopting a Jeffersonian and Jacksonan suspicion of the federal government and the Supreme Court."

164. Abraham Lincoln, First Debate, Mr. Lincoln's Reply, *in* 2 SPEECHES AND WRITINGS, *supra* note 56, at 508, 524.

proclaimed that Republicans must stand for "the rights of man, the rights of the state, a strict construction of the constitution, opposition to the nationality and extension of slavery, and to the aggressive measures and unauthorized assumption of powers by the federal government."[165] The Republican Party's national platform in 1860 demanded that "the Federal Constitution, the Rights of the States, and the Union of the States, must and shall be preserved."[166] The platform went on to guarantee "the maintenance, inviolate, of the Rights of the States, and especially of the right of each State to order and control its own domestic institutions according to its own judgment exclusively."[167]

Obviously some of this was election rhetoric, designed to reassure border-state voters that the anti-slavery GOP was not, as its Democratic opponents charged, an "abolition party," bent on abolishing slavery by federal statute (a course that almost every practical politician of any party believed to be forbidden by the Constitution). But it was by no means empty rhetoric. The federal government, as they saw it, had become the instrument of the Slave Power, and was engaged in war against the free states.[168] Republicans as late as 1860 had no program for federal abolition of slavery in the states where it existed. Their program was opposition to the extension of the institution into federal territories and to the admission of new slave states. This opposition was not based solely or even primarily on zeal for the welfare of the black slave population, but upon concern that extension of slavery would subvert the republican institutions of the free states, change the nation from a republic to an aristocracy, and end by enslaving the whites of the North.[169] This concern was the core of anti-slavery politics in the antebellum period, and the concept of the Slave Power was the embodiment of those fears.

Lincoln is the best example of the narrow contours of political anti-slavery in the decade before Fort Sumter. He repeatedly forswore any belief in or

165. GIENAPP, *supra* note 156, at 276 n.10 (quoting Gideon Welles, "The Repeal of the Missouri Compromise, Its Effect on Connecticut," typescript essay in the Welles papers at the Connecticut Historical Society).

166. National Republican Platform, Adopted by the Chicago Convention (May 17, 1860), *in* 2 THE AMERICAN PARTY BATTLE, ELECTION CAMPAIGN PAMPHLETS, 1828-1876, at 121 (Joel H. Silbey ed., 1999).

167. *Id.* at 122.

168. The most ringingly nationalistic opinion to come out of the U.S. Supreme Court after the death of Chief Justice Marshall was Chief Justice Taney's opinion in *Ableman v. Booth*, 62 U.S. (1 How.) 506 (1858), which sternly denied the power of state courts to interfere with a federal prosecution of a free-state citizen who "aided and abetted . . . the escape of a fugitive slave" from a U.S. marshal seeking to return him to slavery. *Id.* at 507. Taney's opinion is certainly correct in its holding that federal statutes and courts are supreme over state attempts to obstruct them. Professor Maltz comments that *Ableman*, written three years after *Dred Scott*, is "one of [Taney's] most famous and well-respected decisions." MALTZ, *supra* note 2, at 3. But while that is true today, some free-state politicians must surely have noted the irony that Taney, a faithful Jacksonian advocate of states' rights, took a narrow view of Congress's power to *limit* slavery in *Dred Scott*, but insisted on the widest possible scope for its power to *restore* fugitive slaves to their masters.

169. *See* SEWELL, *supra* note 90, at 294-94.

desire for Negro equality with whites;[170] his solution to the problem of slavery was that slaves should be freed gradually.[171] Even as late as December 1, 1862, one month before the final Emancipation Proclamation, Lincoln was advocating a program of constitutional amendments that would have freed the last bondsmen only in 1900.[172] And Lincoln and many other Republicans believed (at least in the antebellum and early war years) that after freedom the former slaves should be induced, voluntarily or otherwise, to emigrate to Africa or Haiti.[173] Lincoln's 1862 amendments, in fact, prescribed that all persons of African descent would be removed from the United States. To the extent that practical anti-slavery politicians like Lincoln "opposed" slavery, it was because of its negative impact on the freedom of Northern whites and the political power of free states.

It is in order, therefore, to ask how Lincoln and those around him expected to deal with the Slave Power when he won election as President in 1860. Lincoln and the other Republican leaders in 1860 had not expected the South to secede—the fire-eaters of the slave states had threatened disunion so often since 1820 that their rhetoric had come to be seen as a combination of boilerplate and bluff.[174] Before the secession winter of 1861, Lincoln had expected to take office as a minority President. Henry Wilson, an anti-slavery senator who became Grant's vice president, later explained how Republicans saw their political prospects in late 1860:

> [T]houghtful Republicans realized that their victory was incomplete. They were in a minority of nearly a million, they had failed to carry the House of Representatives, the Senate was still overwhelmingly against them, and the Supreme Court was completely under the domination of the Slave Power.[175]

The Republican strategy had been to purify the federal government from the Slave Power, and then, without moving directly against slavery in the states, to use the power of the purified federal government to build a Republican Party and a democratic society like that of the North in the slave states. Henry Wilson explained the program:

> Armed with the power and clothed with the patronage of the national government, he could successfully appeal to Southern men. Freedom of speech and of the press would take the place of a long and enforced silence of tongue and pen. Emancipationists would spring up among themselves. Men, with new aspirations and higher purposes, would soon build on the ruins of their warring power.[176]

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170. *See, e.g.*, Abraham Lincoln, Speech on Kansas-Nebraska Act, *in* 1 SPEECHES AND WRITINGS, *supra* note 56, at 316.

171. *See, e.g.*, Abraham Lincoln, Message to Congress, *in* 2 SPEECHES AND WRITINGS, *supra* note 56, at 307.

172. VORENBERG, *supra* note 107, at 30.

173. *See, e.g.*, Abraham Lincoln, Message to Congress, *in* 2 SPEECHES AND WRITINGS, *supra* note 56, at 395.

174. MCPHERSON, *supra* note 140, at 234; DONALD, *supra* note 59, at 260-61.

175. 2 HENRY WILSON, A HISTORY OF THE RISE AND FALL OF THE SLAVE POWER IN AMERICA 704 (8th ed. Boston, J.R. Osgood & Co. 1872-1877) (1874).

176. *Id.*

As free government and free speech were restored below the Mason-Dixon line, states would freely choose to abolish the "peculiar institution." As they did so, their own newly opened political systems would abate the danger of undemocratic capture of the federal government. The events of Reconstruction suggest that the antebellum Republicans were overoptimistic about their ability to create a new, moderate Southern leadership.[177]

Lincoln never had the opportunity to try his plan; but the leadership of the Thirty-Ninth Congress saw not only the opportunity but the necessity to do something very similar. In fact, the Republican leadership found itself facing the political situation Lincoln had expected to face in 1861—attempting to govern a nation that included a significant minority of states whose political systems deliberately excluded Republican ideas and officials from public office and debate.

Despite Union victory over the South, the Party of Union was still desperately weak in the restored nation. Republicans had never commanded a majority of the voters. The Party had won the 1860 election with a minority of the vote, had not captured Congress, and had lost ground legislatively in 1862.[178] The Party had won congressional majorities in 1864, but only because the Southern states did not take part in the election. In 1864, a Republican President had won reelection only by leading the Party into a fusion movement called the "National Union Party," and by dropping the reliably anti-slavery Hannibal Hamlin from the ticket in favor of Southern Democrat and former slaveowner Andrew Johnson.[179] Even that presidential victory had been uncertain; until the Union victories at Mobile Bay, Atlanta, and Cedar Creek, Lincoln had taken his defeat as a foregone conclusion.[180] Republicans in 1865 could reasonably worry that their party could win only when the Democrats were divided.

Because Andrew Johnson had been Lincoln's running mate, however, even the victory in 1864 was problematic. Johnson was a lifelong Democrat, and he had little in common with the Republican leadership. They had sought to woo him as an ally after the assassination of Lincoln,[181] but by the time Congress convened, they realized their efforts had failed, and many correctly suspected Johnson was actively working to restore the South in ways that might permit him to run for a full term as President in 1868 on something like the Democratic ticket.[182] Johnson was building his own potential power base by claiming the

177. *See* DAN T. CARTER, WHEN THE WAR WAS OVER: THE FAILURE OF SELF-RECONSTRUCTION IN THE SOUTH, 1865-1827, at 32-33 (1985) (laying out the persistent belief of Northern unionists in a sizeable unionist constituency in ante- and postbellum South).

178. 2 HISTORY OF ELECTIONS, *supra* note 127, at 1117, 1163; *see also* GABOR S. BORITT, WHY THE CIVIL WAR CAME 87 (1996).

179. LAWANDA COX & JOHN H. COX, POLITICS, PRINCIPLE, AND PREJUDICE, 1865-1866: DILEMMA OF RECONSTRUCTION AMERICA 32 (1963).

180. *See* 2 HISTORY OF ELECTIONS, *supra* note 127, at 1170.

181. *See* MCPHERSON, *supra* note 88, at 314-18.

182. *See* COX & COX, *supra* note 179, at 66.

executive power to restore the Confederate States to the Union after ratification of the Thirteenth Amendment, and by using his pardon power to allow the antebellum leadership to assume control of the restored states.[183] Under Johnson's proclamations, seceded states were allowed to elect legislatures and members of Congress under their prewar constitutions using all-white, restrictive prewar voting systems.[184] The results, predictably, were state governments that seemed reluctant to give any but grudging support to the outcome of the war. And in fact, the states restored by presidential order had elected members of the Thirty-Ninth Congress who, if seated, would have permanently altered the balance of power in the federal government.

The Thirty-Ninth Congress featured solid Republican majorities in both houses. In the House, Republicans numbered one hundred forty-five to a mere forty-six Democrats, while the Senate had thirty-nine Republicans to only eleven Democrats.[185] But in December 1865, to Republican leaders like House Speaker Schuyler Colfax, Representative Thaddeus Stevens, and Senators Henry Wilson and John Sherman, the nose count must have seemed somewhat less favorable. The official historical totals do not include the delegations sent by the states readmitted by Johnson's order; when those numbers were added, the partisan picture must have looked a good deal chancier. In early 1865, the Southern states sent fifty-five claimants to the House of Representatives, and twenty putative senators.[186]

Elected by all-white voters, these presumptive delegations were made up either of conservative Southern unionists who had opposed secession but otherwise resisted any change in Southern society, or of outright secessionists and former Confederate officials. They included at least nine former officers in the Confederate Army, seven former members of the Confederate Congress, and three former members of Southern secession conventions. Their natural leader was Alexander H. Stephens, senator-elect from Georgia, who had until a few months before been vice president of the Confederate States of America.[187]

Had these officials, or even a significant minority of them, been added to the legislative mix, the partisan alignment would have looked far different. Consider the eventual votes on adoption of the Fourteenth Amendment, which passed in the Senate by thirty-three to eleven, and in the House by one hundred thirty-eight to thirty-six. Had every Southern representative been seated, proponents of the Fourteenth Amendment would have needed forty-six votes to pass it in the Senate, and one hundred sixty-three votes to pass it in the House. The Fourteenth Amendment itself was a compromise measure, much

183. *Id.* at 65.

184. ERIC L. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 49-50 (1960).

185. For the party affiliation and biography of each member, see WILLIAM H. BARNES, HISTORY OF THE THIRTY-NINTH CONGRESS OF THE UNITED STATES 577-624 (New York, Harper & Brothers 1868).

186. EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION, 1865-1870, at 107-09 (Da Cape Press 1972) (1871).

187. *Id.* at 107.

weaker than many of its proponents had hoped. Even so, it failed to attract the votes of every Northern Republican and would have been unlikely to attract any additional votes from the South. In effect, congressional efforts to influence Reconstruction would have been stymied by the addition of these Southern members of Congress.

The prospect of the Slave Power's return to its former influence in Congress was a subject of general discussion during the months before Congress assembled. Former Confederates no less than Republicans were keenly aware of the potential increase in their power. Early in 1866, any unionists uneasily sojourning in Richmond, the former rebel capital, could have read the following confident analysis in the "News from Washington" column of the *Richmond Examiner,* a newspaper that during and after the War gave voice to the views of the most irredentist of secessionists:

> Universal assent appears to be given to the proposition that if the States lately rebellious be restored to rights of representation according to the Federal basis, or to the basis of numbers enlarged by the enumeration of all the blacks in the next census, the political power of the country will pass into the hands of the South, aided, as it will be, by Northern alliances. The South claims that this will be the fact, and the North does not dispute it.[188]

Nor did there seem to be much prospect of mounting effective electoral challenges to the conservative Southern governments Johnson was recognizing. As noted above, none allowed freed slaves to vote. In fact, the "reconstructed" state legislatures quickly focused on enacting laws to keep former slaves in a state of subordination. Deep South states like Mississippi, Florida, South Carolina, and Alabama tended to adopt harsher codes than did border states,[189] but most the codes shared key common features. Freed slaves were required to maintain employment, often evidenced by a written contract, to avoid arrest for vagrancy. Black "vagrants" were to be auctioned off as contract laborers to white employers who paid their fines.[190] Public whipping was the penalty for a wide variety of offenses by blacks, including "intrud[ing]" into public assemblies of whites or entering vehicles designated for whites only.[191] Freed slaves were forbidden to own or carry firearms or knives.[192] Authorities could seize children of freed slaves and force them into apprenticeship if a court concluded that their parents were unable to support them.[193]

The legislatures were made up of former Confederates or conservative Southern unionists. The two groups were united in their conviction that subordination of blacks was essential to the proper functioning of the Southern economy and society. Even a firm unionist like Tennessee's Governor, W.G. "Parson" Brownlow, explained that "if there is anything a loyal Tennessean

188. *News from Washington*, RICHMOND EXAM., Jan. 9, 1866, at 1 (dateline Jan. 7, 1866).
189. *See, e.g.*, THEODORE BRANTNER WILSON, THE BLACK CODES OF THE SOUTH 72 (1965).
190. *Id*. at 68.
191. *Id.* at 98.
192. *Id.*
193. *Id.* at 67.

hates more than a rebel, it is a nigger."[194] Many of them believed their "Black Codes" were forward-looking reforms because they yielded to freed slaves the same legal rights free blacks had possessed before secession.[195] But many Northerners, even those of moderate opinion, viewed the Black Codes as a defiant means designed to produce "a condition which will be slavery in all but its name."[196] Immediately before the assembly of the Thirty-Ninth Congress, national readers of the *New York Tribune* could read the provocative headline, "South Carolina Re-establishing Slavery."[197] The congressional Republicans acted quickly to block the Black Codes by enacting the Civil Rights Act of 1866. But concern remained that a future pro-Johnson Congress might repeal it or that the federal courts might invalidate it as unconstitutional.

The new system of labor in the former Confederacy seemed a continuation of slavery, this time as a social and political institution rather than as a system of property. Thus, the war seemed to have done nothing to bring a free labor system to the South; slowly but surely, the Slave Power seemed to be reassembling itself.

If the reassembly had been successful, the Slave Power would have been made more, not less, powerful by the war. The ratification of the Thirteenth Amendment, days after the Thirty-Ninth Congress met, had rendered the Three-Fifths Clause a dead letter. Beginning with the reapportionment of 1870, the Southern states would receive full representation for each freed slave rather than a mere sixty percent, a change that would give the region thirteen more House seats and electoral votes[198] without the extension of minimal political rights, much less the franchise, to the freed slaves who formed the basis of the representation. It would be the "slave seats" problem all over again.

This meant that the Republicans, despite having won the war, might be unable to prevent a coalition of Northern and Southern Democrats from giving away the peace. If the Southern members were seated, their numbers in the Thirty-Ninth Congress would make it all but impossible to block Johnson's presidential reconstruction. Moreover, their power in Congress would give them decisive influence over the Democratic presidential nomination in 1868. Finally, the electoral vote windfall given by nullifying the Three-Fifths Clause might even enable the South to swing the White House to their chosen nominee. Obviously, Johnson hoped to be the beneficiary of this Southern powerhouse; but as early as December 1865, rumors began to flood the country,

194. *Id.* at 111.
195. *Id.* at 105.
196. *Id.* at 101 (quoting General Alfred Terry).
197. *Id.* at 116 (quoting N.Y. TRIB., Nov. 14, 1865).
198. CONG. GLOBE, 39th Cong., 1st Sess. 74 (1869) (remarks of Representative Stevens).

North and South, that the next Democratic presidential nominee would be not Johnson but a popular war hero—Robert E. Lee.[199]

Once safely back in control of the federal government, the former slavemasters could recreate some new institution resembling slavery; they could also use the federal treasury to pay off the debts owed by the Confederacy to Southern and European bondholders, or conversely to repudiate bonds issued by the Union to finance the war effort.

In short, the Republicans in late 1865 needed both a short-term and a long-term strategy to prevent the complete reascendancy of the Slave Power—political domination of the federal government by skewed representation, one-party rule in the South, and subordination in economic policy of the needs of the industrial North. In the short term, the Republicans solved their political dilemma with a desperate expedient: using their control of the House Clerk's Office, they simply refused to recognize any representatives from the presidentially reconstructed states.[200] This tactical move ensured Republican political dominance was maintained until the next election. But obviously a longer term solution was needed—a mechanism that would check the recrudescence of the Slave Power so that Lincoln's original plan could go into effect.

Advanced thinkers in the Party and the abolition movement favored giving the vote to the freed slaves. But black suffrage had never been an important part of the Republican program. It was an unpopular idea in the North, and only five Northern states allowed free blacks to vote in 1865.[201] Republicans were deeply concerned about physical violence and legalized subordination of the freed slaves, but their commitment to black Southerners as full members of the political order was more equivocal. For conservative Republicans, the vision was still of a white man's country, but one that lived by open debate and republican values.

The long-term fix would need to prevent conservative forces in the South from reimposing the "intellectual blockade" over public discussion.[202] It would permit not only free debate but genuine political competition between the parties. At the same time, it would need to prevent Southern leaders from

199. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 252 (1988). Obviously there would have had to be a swing in Northern states to produce a Democratic victory in 1868; the South, even with its additional votes, would not have been able to overcome the Republicans if the GOP could hold together the coalition that elected Lincoln in 1860. But that victory had come in large part because the Democrats had split three ways. A unified Democratic Party might deny the GOP some key Northern states. It is of course fanciful to imagine a divisive candidate like Lee could have done so. But many Republicans considered the Democratic Party the "party of treason," and in their minds—probably unfairly—there was little difference between a rebel like Lee or a pro-Confederate Northern "Copperhead" like Clement Vallandigham and the actual nominee of the party in 1864, General George McClelland.

200. CONG. GLOBE, 39th Cong., 1st Sess. 3-5 (1869). For an account that explains that the Clerk's Office had in fact previously been used for an attempted coup, see Herman Belz, *The Etheridge Conspiracy of 1863: A Projected Conservative Coup*, 36 J. S. HIST. 549 (1970).

201. *See* MCPHERSON, *supra* note 88, at 333.

202. *See* EATON, s*upra* note 114.

using black populations (which in 1865 meant only Southern states) as a non-voting basis for disproportionate representation; states with large black populations would have to choose between black suffrage and loss of representation. In addition, the solution would need to proscribe the reascendance of disloyal conservative leaders of the Slave South, permitting a new leadership to emerge under federal patronage and protection. And it would need to empower Congress, the only branch of the federal government under firm Republican control, to override both the executive and the judiciary, and the Southern state governments, in setting the terms of political life.

In short, the long-term fix for the danger of a new Slave Power looks remarkably like the Fourteenth Amendment.

III

CONCLUSION

Of course, the Slave Power was not the only political current that powered Republicanism during the antebellum and immediate postwar periods. The ideology of "free labor," with its economic vision of independence and integrity as an individual value, also powerfully affected the Republican view of the world.[203] In addition, many of those who took part in framing the Fourteenth Amendment (even some known to history as radicals) were men of profoundly conservative instincts who, while they wished to preserve the result of the Civil War, wished also to preserve key features of the Republic they had known before the war.[204] Finally, the political vagaries of 1866 shaped the specifics of the Fourteenth Amendment's text. As Eric Foner notes:

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203. *See generally* FONER, *supra* note 90 (summarizing the free labor view).

204. For this reason, arguments based on the Slave Power idea are not intended to invalidate other interpretations based upon the more conservative trends that flowed into post-war Reconstruction theory. Michael Les Benedict has constructed a powerful argument that "most Republicans [during Reconstruction] never desired a broad, permanent extension of national legislative power." Michael Les Benedict, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction*, 61 J. AM. HIST. 65, 67 (1974). No doubt part of what animated anti-slavery Republican thinkers was a concern that the Slave Power would use its control over the federal government to suppress the republican institutions of free states. *See supra* notes 109-159 and accompanying text. Thus, their concern over state authority was real, and the Slave Power reading does not suggest that even the most radical framers desired to overthrow the federal system and impose a central government. Benedict's research has been long and deep, and I differ with him largely in emphasis. He argues that congressional Republicans sought a theory of Reconstruction that "sanctified 'the federal system as it was.'" Benedict, *supra*, at 76. Undoubtedly some Republicans did feel such a nostalgia, particularly those who had come to the new party from the faltering Jacksonian Democracy. However, "the Union as it was" was a *Democratic* slogan; many Republicans wanted to restore a federal union of republican states not as it *had been* but as it *should have been* had what they considered the republican ideas of the Framers been achieved. This purified republic would retain the power to ensure that the states within it remained republican, and both sides of the equation—state and federal—would retain means to defend themselves against capture by oligarchies such as a reconstituted Slave Power. In an article arguing that the Waite Court faithfully interpreted the Fourteenth Amendment and vindicated national power, Benedict sensitively discusses the "states' rights" aspect of anti-slavery thought and contrasts it with Calhoun's argument for "state sovereignty." *See* Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39.

> [T]he aims of the Fourteenth Amendment can only be understood within the political and ideological context of 1866: the break with the President, the need to find a measure upon which all Republicans could unite, and the growing consensus within the party around the need for strong federal action to protect the freedmen's rights, short of the suffrage.[205]

But the Slave Power thesis also played an important role in shaping an ideological response to the immediate needs of 1866—a response that was, in the Freudian sense, "over-determined," a result of multiple forces flowing together. Political actors must often react to events without adequate time to think; they always operate against a set of assumptions and beliefs, which are shaped both by the practical concerns of the moment and by the ideological lessons they have absorbed during their careers. In our own time, we can see how Republican politicians sincerely believe that almost any policy challenge—recession or prosperity, deficit or surplus, peace or war—is the occasion for the abolition of the capital-gains and estate taxes.[206] Democrats tend to see any civic challenge—medical care, education, energy shortage, or terrorism—as requiring a new federal government agency.[207]

It is easy for those who disagree with the underlying political philosophy thus expressed to conclude that this insistence must be the result of simple hypocrisy and bad faith. But political life is rarely that simple. We confront new problems with the tools we have learned to use, and this is true whether those tools are weapons or political ideas. In the case of the Fourteenth Amendment, the events of 1865-1866 posed a complex question. The answer the Thirty-Ninth Congress constructed resembles, not coincidentally, the antebellum solution to the problems of the Republic: Cripple the Slave Power.

Read against a Slave Power background, an overriding aim of the Fourteenth Amendment seems to have been predominantly defensive: to protect the federal government against former slave states, to ensure that the new government forged during the Civil War would be supreme in any future confrontation, and to require that reconstructed state governments of the South run their internal politics by the North's republican rules.

Though the Slave Power thesis has been revived by historians, it has so far made few inroads into legal scholars' interpretations of the Fourteenth

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205. FONER, *supra* note 199, at 256-57.

206. *See, e.g.*, James Mayer, *Lawmakers' Deal Spares Schools More Big Cuts*, OREGONIAN, Sept. 19, 2002, at A-1 (detailing the Republican response to a $482 million state deficit as including abolition of estate taxes).

207. *See, e.g.*, Garrett Epps, *The Creation of Energy*, WASH. POST MAG., May 20, 1979, at 1 (detailing the belief within the Carter Administration that reshuffling agencies into a new Cabinet department was the appropriate way to deal with an energy "crisis").

Amendment.[208] I believe this thesis and its history provide a fertile ground for scholars reading the congressional debates.[209] A reading of the Fourteenth Amendment as a measure against the Slave Power would also confound certain assumptions of current jurisprudence. To begin with, since the *Slaughter-House Cases,* courts and commentators have tended to take for granted that the Equal Protection Clause of Section 1, and perhaps all of Section 1, were aimed specifically at the situation of the freed slaves.[210] There is ample warrant in the history of anti-slavery thought to cast doubt on that interpretation. The Fourteenth Amendment may be better seen as a source of political values than of specifically legal, formal guarantees.[211] In light of the Slave Power thesis, the Privileges and Immunities, Due Process, and Equal Protection Clauses can be seen as guaranteeing a free and open society for all Southerners, white and black, with free speech and free elections (perhaps all white at first, but very soon open to voters of both races), and as reaffirming the interpretation of the Guaranty Clause that anti-slavery politicians had sought to advance before the Civil War.

The political background of the Fourteenth Amendment suggests that it was designed to operate powerfully on the internal life of the states—to impose the nationalist vision implied by Madison's argument for an "extended republic," impervious to the claims of "faction," as the best guarantee of self-rule and liberty.[212] State governments were dangerous, not only to their own people but to the purified democratic republic forged on the anvil of Civil War. The normative preference for states as the political shapers of society that some claim to discern in the Constitution of 1787 would thus be negated or perhaps even reversed, with a new preference for national values of equality, participation, and open debate. The Fourteenth Amendment thus read would be a fertile source of arguments over the essential components of such an open

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208. Professor Andrew Taslitz has used the history of the Slave Power concept to construct a sophisticated argument about the meaning of the First Amendment as incorporated and applied to the states by the Fourteenth, Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1283, 1374-79 (2000), and has also linked it to concepts of privacy as embodied in the incorporated Fourth Amendment, Andrew E. Taslitz, *Slaves No More!: The Implications of the Informed Citizen Ideal for Discovery Before Fourth Amendment Suppression Hearings*, 15 GA. ST. U. L. REV. 709, 743-45 (1999). Michael Kent Curtis has honed in on the Slave Power thesis as an element of antebellum ideas about free speech and thus, a key element in Section 1 of the Fourteenth Amendment. *See* Michael Kent Curtis, *The 1859 Crisis Over Hinton Helper's Book, The Impending Crisis: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 CHI.-KENT L. REV. 1113, 1114-18, 1128-29 (1993); *see also* CURTIS, *supra* note 115; CURTIS, *supra* note 2. Professor William E. Forbath has made sophisticated use of the Slave Power concept in appraising the free-labor ideology of the postbellum Republican Party. *See* Forbath, *supra* note 87, at 816.

209. *See* Garrett Epps, *Second Founding: The Fourteenth Amendment and 1787* (unpublished work in progress).

210. *See, e.g.*, The Slaughter-House Cases, 83 U.S. 36, 113 (1872) (Bradley, J., dissenting).

211. This analysis coincides to some extent with the conclusion Professor Nelson reaches by analyzing a different set of historical materials. *See* NELSON, *supra* note 2, at 61-62. I differ with him, however, in believing that the Slave Power reading impels a reader strongly toward something like the "total incorporation" theory, which reads Section 1 as imposing the Bill of Rights directly on the states.

212. *See* THE FEDERALIST NO. 10 (James Madison).

society, in which political decisions are made by an informed process of critical discourse among free, equal citizens.[213]

The Slave Power reading also casts doubt on any argument that the purpose of the Fourteenth Amendment was primarily to empower the federal judiciary and strengthen its role as arbiter of constitutional rights.[214] The framers vividly remembered the capture of the judiciary by the Slave Power, and they feared it had not yet fully freed itself.

In fact, it seems much more probable Congress intended to grant itself a co-equal role with the courts in the clearly political work of defining what constitutes "privileges and immunities," "due process of law," and "equal protection of the laws." Congressional statutes might set the goals; the courts would enforce them. Both branches might be involved, but the Court's current vision of itself at the center, with Congress relegated to an occasional role as an auxiliary enforcer of court decisions, seems far from what Slave Power–minded framers intended.

Finally, the Slave Power reading calls into question any vision of American federalism inspired by the structure of the 1787 Constitution. The framers of the Fourteenth Amendment surely believed they were making a far-reaching and significant change to that original design.

For example, one of the most startling recent opinions in the *U.S. Reports* is the five-four decision in *United States Term Limits, Inc. v. Thornton*,[215] which concerned the attempt of a political majority in Colorado to disqualify congressional candidates from appearance on the ballot if they had served more than a set number of years in office.[216] The majority, in an opinion by Justice Souter, held that such restrictions, whether imposed by state legislatures or by voters through initiative or referendum, violated the Qualifications Clause of the United States Constitution.[217] The conservative minority, in a dissent by Justice Thomas, argued states have retained the power to designate who among their citizens can run for federal office.[218]

Both the majority and the dissent took for granted that the terms of the debate are limited to discerning the intentions of the Framers of 1787 about the relationship between state governments and federal elections. Each thus spent much time discussing the implications of various statements in *The Federalist*—as if that pamphlet, written as an anonymous polemic to garner public support for ratification of the Constitution, constitutes not only an authoritative

213. *See* KARL R. POPPER, THE OPEN SOCIETY AND ITS ENEMIES (rev. ed. 1950) (providing a definition of "open society").

214. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 519-20 (1997) (holding that Congress has no power under Section 5 of the Fourteenth Amendment to define new substantive rights without an antecedent decision by the Supreme Court establishing those rights).

215. 514 U.S. 779 (1995).

216. *Id.* at 779.

217. *Id.*

218. *Id.* at 845.

legislative history of the Framing but a guide to the Constitution's contemporary meaning.

Nowhere in the majority or dissenting opinions does any Justice give serious consideration to the idea that the state-federal relationship was fundamentally altered by the adoption of the Fourteenth Amendment. It is understandable that the case was not decided on the basis of the Fourteenth Amendment—the question does not clearly seem to implicate either "due process" or "the equal protection of the laws" (though a properly invigorated "privileges or immunities" clause might have more bearing on the right of voters to choose any eligible candidate for federal office). But I do think the question implicates Fourteenth Amendment *values*; if one aim of the Fourteenth Amendment was to defend the national government against control by transient majorities or undemocratic factions in the states, the suggestion that states could eliminate from the ballot persons eligible for office under the Constitution would seem profoundly antithetical to its overall theory.

"[W]e must never forget," wrote Chief Justice John Marshall in 1819, "that it is a *constitution* we are expounding."[219] Similarly, we must not forget that in construing the Fourteenth Amendment, we are expounding an *amendment*, a change, one that is "to all intents and purposes"[220] as much a part of the Constitution as any of the original clauses. The Fourteenth Amendment was drafted at the end of a terrible war that transformed almost every feature of American life. It seems entirely logical to believe that the Amendment was intended to render permanent those changes. The burden thus should rest on those who wish to argue that the Amendment did not change "the Framers' carefully crafted balance of power between the States and the National Government"[221] because the record suggests that those who drafted it saw not just the glory of what was written at Philadelphia but its flaws as well.

219. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).
220. *See* U.S. CONST. art. V.
221. United States v. Morrison, 529 U.S. 598, 620 (2000).