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Lecture

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Second Founding: The Story of the Fourteenth Amendment**

Thank you, Judge Schuman, for that generous introduction. Dean Paris, my colleagues, students, distinguished guests—before I begin my lecture, I want to thank Orlando and Marian Hollis and their families for their generosity to this school, which has funded the professorship I am honored to hold. That generous gift is only part of the legacy that Dean and Mrs. Hollis left. They also funded a very important program of scholarships for our students, which we desperately needed and give thanks for every day. And, of course, in a real sense, the law school itself is a legacy from Dean Hollis. Sir Christopher Wren, the architect

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who rebuilt London after the Great Fire, is buried beneath a stone bearing the inscription, *Si monumentum requiris, circumspice*—"If you seek his monument, look around you."[1] Today, in this marvelous building, we could say the same of Dean Hollis, whose tenacity ensured the survival and success of the law school during some difficult times.

One of those difficult times, of course, was the Second World War, when Dean Morse was required to relinquish his position and work for the war effort by preventing labor unrest on the docks of the West Coast ports.[2] During the war years, both students and faculty were in short supply. Dean Hollis responded by teaching, as needed, virtually the entire curriculum.[3] I once met an alumnus of the law school who had been here at that time. He told me he had arrived for the first session of trusts and estates and found a classroom containing himself and Dean Hollis. He was the sole student enrolled. Dean Hollis looked at him for a moment, opened the casebook, and said, "Mr. So-and-so, take the first case." When he stumbled through the holding of that case, Dean Hollis paused for a moment and said, "Mr. So-and-so, take the next case," and so on, through the hour.

"How awful," I said. "What did you do?"

"What could I do?" he answered. "I learned trusts and estates."

Unlike Dean Hollis, however, I do not plan to call on anyone tonight. Settle back and let me tell you a brief version of the story I tell in my new book, *Democracy Reborn*—the story of the Fourteenth Amendment and its vital role in making our Constitution truly democratic. Although I am a professor, I hope to speak for about fifty minutes so there can be questions afterward.

The National Constitution Center in Philadelphia, which opened in 2003, is a magnificent shrine to our Constitution—part museum, part library, part meeting hall. Because this is twenty-first-century America, the Center is about five times the size of Independence Hall, which is a few blocks to the south and is

[1] THE ROUTLEDGE DICTIONARY OF LATIN QUOTATIONS: THE ILLITERATI'S GUIDE TO LATIN MAXIMS, MOTTOES, PROVERBS, AND SAYINGS 205 (Jon R. Stone ed., 2005).

[2] MASON DRUKMAN, WAYNE MORSE: A POLITICAL BIOGRAPHY 99-119 (1997).

[3] Kenneth J. O'Connell, *Orlando John Hollis*, 46 OR. L. REV. 454, 454 (1967) (enumerating the contributions of Dean Hollis at the end of his career as Dean of the University of Oregon School of Law).

where the Constitution was actually written. Visitors to the Center can see exhibits, photos, and artifacts about the remarkable men who assembled in Philadelphia in 1787 to write the Constitution. And they also get to see a live theater-in-the-round presentation in which the Framers decide, in good Mickey Rooney–Judy Garland fashion, "Hey, let's put on a Constitution, we can do it in my dad's barn." "No, let's do it in this cool Independence Hall." Once the delegates assemble, they make speeches like, "Because of what we have done here today, *fomeday* there will be an Air Force, and interstate *highwayf*, and even Monday Night Football."

Okay, maybe not exactly like that, but you get the idea.

After leaving the theater, if a visitor looks carefully, he or she may find a small placard that indicates that the Constitution was ever-so-slightly changed during and after the Civil War. All three of the so-called Civil War Amendments are summarized on this one placard, and here is the entire discussion of the Fourteenth Amendment:

> The 14th defines U.S. citizenship, and includes all black Americans.

This summary represents the meaning of only twenty-eight of the Amendment's four hundred-plus words. And, at that, it does not summarize them correctly, as the Citizenship Clause, the first sentence of Section 1, contains no racial language.[4] It includes not only black Americans, but any person born on American soil and subject to American jurisdiction.[5] The Fourteenth Amendment goes on to specify a number of rights belonging to citizens and noncitizens, and the placard simply ignores this. The Fourteenth Amendment is the longest amendment ever placed in the Constitution, and, I will argue, the most important. But it is, alas, unsurprising that even those entrusted with celebrating our Constitution should be unclear about its text and its importance. Fourteenth Amendment amnesia is a national disease.

Americans know that they have constitutional rights. The Bill of Rights, the first ten amendments to the Constitution, is a source of national pride. Written by James Madison and enacted by Congress when George Washington was president, these

[4] U.S. CONST. amend. XIV, § 1.

[5] *Id.*

amendments are our national legacy and an example to the world.

But relatively few Americans understand that, without the Fourteenth Amendment, the Bill of Rights would be no help to them in most of their dealings with government. That is because, as written by Congress and interpreted by the federal courts, the Bill of Rights originally applied only to the federal government.[6] The first ten amendments barred "Congress" from abridging free speech, setting up a national religion, abridging "the right to bear arms," or requiring self-incrimination, but they left *state governments* perfectly free to do all those things, which many of them enthusiastically did.[7] For most of us today, just as in the years before the Civil War, our dealings with government power are mostly with state police, prosecutors, regulators, and courts. "For most of us," an old legal saying points out, "the Constitution is the cop on the corner"—and that cop usually draws a state paycheck.

Today, almost every provision of the Bill of Rights restricts government at all levels. That is because the Fourteenth Amendment applies them to the states.[8] In addition, the Fourteenth Amendment bars the states from discriminating unfairly between races[9] or sexes,[10] natives and newcomers,[11] or even between citizens and immigrants.[12] Anyone born in this country is a citizen—because of the Fourteenth Amendment.[13] State governments must conduct elections according to the "one per-

[6] Barron v. Mayor of Balt., 32 U.S. (7 Pet.) 243, 250 (1833) (asserting that the Bill of Rights provides refuge from federal action, but not from state or local action).

[7] Various provisions of the Bill of Rights have been applied to the states through the Fourteenth Amendment, though some remain as merely federal prohibitions. The Supreme Court first held a state law curtailing speech invalid in *Fiske v. Kansas*, 274 U.S. 380, 385, 387 (1927). Michael McConnell offers an analysis of the various ways in which states were not required to prohibit the establishment of state religions. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2109 (2003). An accused's Fifth Amendment right to avoid self-incrimination was not assured in state courts until *Malloy v. Hogan*, 378 U.S. 1, 6 (1964), and *Griffin v. California*, 380 U.S. 609, 615 (1965).

[8] *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 147-49 (1968) (summarizing case law applying various provisions of the Bill of Rights to the states through the Fourteenth Amendment).

[9] *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 492-93 (1954).

[10] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 534 (1996).

[11] *See, e.g.*, Saenz v. Roe, 526 U.S. 489, 502-03 (1999).

[12] *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 376 (1971).

[13] *See* United States v. Wong Kim Ark, 169 U.S. 649, 693-94 (1898).

son, one vote" rule—because of the Fourteenth Amendment.[14] America today is what we call a democracy—because of the Fourteenth Amendment.

Yet judges show a curious double consciousness when they apply the Fourteenth Amendment. Yes, it applies to many individual cases; recently, for example, the Supreme Court applied it to cases in which state courts award punitive damages that the Supreme Court finds excessive.[15] And yet, even as they apply the Fourteenth Amendment, judges insist that they are somehow vindicating the vision of the Framers of 1787, as if the Fourteenth Amendment did not really exist. I struggled for years to find the correct metaphor for this kind of strange, somnambulistic judicial review, until, in recent months, we learned that the sleep remedy Ambien has a curious property of causing some of those who take it to get up in the middle of the night and eat out of the refrigerator with no awareness or memory of doing so. In the morning, the cake is gone, but no one is guilty. Just so, the Constitution of 1787, with all its flaws, has been redone by the Fourteenth Amendment—but judges admit no awareness of what has happened.

The Framers of the Constitution of 1787 were not gods or even, as Jefferson called them, "demi-gods."[16] They were intelligent men, limited by their class and regional backgrounds, improvising frantically against the deadlines of contemporaneous American politics to come up with some form of government that would hold the thirteen states together a little longer. They were not, by and large, particularly far-seeing or accurate in what they predicted. My favorite example of this occurs in Madison's *Notes* for August 8, 1787, when the Convention was considering whether to write into the Constitution a requirement that there be one member of the House for every 40,000 inhabitants.[17] Madison protested that such a rule would make the House too large[18] (in fact, if it were in force today, the House would have

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[14] *See* Reynolds v. Sims, 377 U.S. 533, 568 (1964); Baker v. Carr, 369 U.S. 186, 207-08 (1962).

[15] *See, e.g.*, Philip Morris USA v. Williams, 127 S. Ct. 1057, 1063 (2007); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416-17 (2003).

[16] MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 39 (1913).

[17] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 221 (Max Farrand ed., rev. ed. 1966) (1911).

[18] *Id.*

more than 7500 members, a prospect too horrible to think about). Nathaniel Ghorum of Massachusetts in effect said, let's not sweat small stuff like this: "It is not to be supposed that the Gov[ernmen]t will last so long as to produce this effect. Can it be supposed that this vast Country including the Western territory will 150 years hence remain one nation?"[19]

The key to understanding the Fourteenth Amendment is the brute fact that for all the brilliance that went into the framing of the Constitution of 1787, it was a failure. I call it a failure not simply because it collapsed catastrophically less than seventy-five years after the Framing, leading to the worst war in American history—and one of the worst in world history to that time. I call it a failure because it never really produced what its authors hoped for—one nation. From its first day, it carried the seeds of its own destruction. These lay in the undue influence it gave to the slave states. The chief mechanism for that was the clause that gave slave states representation in the House for three-fifths of their slave population.[20] These so-called slave seats gave the South power in the electoral vote tally for the same reason; and in the Senate, the principle of equal representation—which Madison had opposed so strongly—gave them a voice equal to free states with much larger free populations. By the third decade of the nineteenth century, it was generally agreed, North and South, that the slave interest ran the country.[21] Nineteenth-century Americans called it the "Slave Power."[22] It controlled the White House and the federal courts, and called the shots in foreign affairs. The annexation of Texas, for example, was generally regarded as having the primary purpose of extending the area over which the slave system could spread, which it did.[23]

When I grew up in the South, we were taught that the war was fought over "state's rights." In a sense, that is true, but during the 1840s and 1850s, it was the free states that were desperately arguing for their rights to resist the federal juggernaut, which was

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[19] *Id.*

[20] U.S. CONST. art. I, § 2, cl. 3.

[21] LEONARD L. RICHARDS, THE SLAVE POWER: THE FREE NORTH AND SOUTHERN DOMINATION, 1780–1860, at 2-4 (2000); Garrett Epps, *The Antebellum Political Background of the Fourteenth Amendment*, LAW & CONTEMP. PROBS., Summer 2004, at 175, 188-89.

[22] RICHARDS, *supra* note 21, at 21-27 (summarizing political arguments that underlie the term "Slave Power" and the struggle against the slave interest).

[23] Epps, *supra* note 21, at 195.

wholly controlled by the Slave Power.[24]

This Slave Power theory is vital background for understanding what the authors of the Fourteenth Amendment—those whom I call the "Re-Framers" or the "Second Founders"—were doing in the winter of 1866 when they met in Congress to redo the Constitution.[25] They knew that if they did not act fast, the South would emerge from the Civil War more, not less, powerful than before.[26] They knew that in the words of Representative Eben Ingersoll of Illinois, they would "have the same old slave power, the enemy of liberty and justice, ruling this nation again, which ruled it for so many years."[27]

We begin, then, with this basic way of understanding what the Re-Framers were doing. They were out to cripple the Slave Power. But the Fourteenth Amendment is also the product of a very specific series of events in the winter and spring of 1865 to 1866. Those events are a suspense story. The proceedings of the Thirty-Ninth Congress represent, in a very serious sense, the last battle of the Civil War, and Union victory.

The suspense story is not just a battle over constitutional text. I am showing my age here, but it reminds me of the 1960s novel *Seven Days in May*,[28] which was about a plot to stage a military coup in the United States. Both parties in the struggle that led up to the adoption of the Fourteenth Amendment saw themselves as being in a revolutionary battle that would determine whether the United States continued to function under the Constitution or became a kind of dictatorship.[29] The Congressional Republicans worried about an executive dictatorship; the president and his allies worried that Congress would seize power and function as a kind of "French Directory," the collective body that ran the First Republic during the Terror.[30]

On one side was Andrew Johnson. Johnson, I think, was the most accidental of all America's accidental presidents. Largely unknown outside the South, he was added to the Republican, or

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[24] *Id.* at 184, 188.

[25] *See generally id.* at 198-207.

[26] *Id.* at 204.

[27] CONG. GLOBE, 39th Cong., 1st Sess. 2403 (1866).

[28] FLETCHER KNEBEL & CHARLES W. BAILEY II, SEVEN DAYS IN MAY (1962).

[29] GARRETT EPPS, DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST–CIVIL WAR AMERICA 240-61 (2006).

[30] 2 GIDEON WELLES, DIARY OF GIDEON WELLES 410, 421-22, 434, 435, 438 (1911).

National Union, ticket in 1864 as a last-minute sop to Democrats and border states.[31] A lifelong Democrat, he was devoted to the Union, and was the only Southern Senator to remain at his post after the so-called secession of Tennessee. But he had almost nothing in common with the Republican Party. A lifelong Jacksonian, he believed that the federal government should protect property, but do little to ensure economic growth and nothing to ensure individual rights.[32] He had been a slave-owner; in the years before Fort Sumter, he had argued that neither the federal government nor any state government could ever free the slaves.[33] And he despised black Americans, free or slave, and spoke of them in terms that not only seem harsh today, but that seemed harsh even by the corrupt standards of the 1850s.[34] Now, this apostle of limited government headed the most powerful military-industrial apparatus America had ever known. This virulent racist was to be the arbiter of the future of the freed slaves. "[Y]ou have the power . . . to bless or blast us," Frederick Douglass told him in February 1866.[35] Johnson's conduct as president made clear that his preference was for blasting.

Resentment and rage were the fuels of Johnson's career. He despised the Republican members of Congress. Because they wanted to reform the American system of government to rid it of the Slave Power, he believed they were traitors as bad as or worse than Jefferson Davis.[36] In a public address in February 1866, he said of the Republican leadership—the leadership of the party that had placed him in the White House—"I look upon [them] as being opposed to the fundamental principles of the Government, and as now laboring to destroy them."[37]

He knew, too, that the Republicans would never nominate him for president in 1868.[38] Not only was he not one of them, but they had also witnessed the most disgraceful moment of his career: in March 1864, just weeks before he became president, he

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[31] EPPS, *supra* note 29, at 22.

[32] *See id.* at 23.

[33] *Id.*

[34] *See* HANS L. TREFOUSSE, ANDREW JOHNSON: A BIOGRAPHY 58 (1989).

[35] EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 52 (2d ed. 1875); EPPS, *supra* note 29, at 146.

[36] EPPS, *supra* note 29, at 139.

[37] *Id.* at 140.

[38] *Id.* at 30.

gave his vice-presidential inaugural address sloppy drunk.[39]

Because he was nervous, tired, and hungover, Johnson gulped three large glasses of brandy immediately before the speech.[40] Then, standing in front of the leaders of the government in the Senate Chamber, Johnson rambled through an account of his glorious career, and reminded the Cabinet members that they, like him, owed their eminence to the people.[41] "I will say to you, Mr. Secretary Seward, and to you, Mr. Secretary Stanton, and to you, Mr. Secretary,"—here, he paused and in an audible whisper asked a friend, "Who is the Secretary of the Navy?" "Mr. Welles," the friend whispered—"and to you, Mr. Secretary Welles, I would say, you derive all your power from the people."[42]

So he began his vice-presidential term in disgrace. But even as an accidental president with no firm base, Andrew Johnson was, in December 1865, the most powerful president in American history. He commanded a huge military.[43] He was the sole source of law in most of the Confederate states, which were still under military jurisdiction.[44] Lincoln had bequeathed him an eerily familiar "national security" system as well—suspected Confederate sympathizers were being held without charge and without access to the courts across the South.[45]

Johnson accepted this power. He believed that he was the sole legitimate representative of the American people.[46] He intended to restore the South to its full representation in Congress, and it seemed clear that he was counting on Southern support for a presidential run in 1868.[47] In early 1866, Washington and the South were aboil with rumors that Johnson would order the Army to march into Washington and break up the Republican Congress by force.[48]

Time was on his side. If he could get southern senators and representatives admitted, they would block Republican plans for

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[39] *Id.* at 26; TREFOUSSE, *supra* note 34, at 188-89.

[40] EPPS, *supra* note 29, at 26; TREFOUSSE, *supra* note 34, at 189.

[41] EPPS, *supra* note 29, at 26; TREFOUSSE, *supra* note 34, at 189.

[42] EPPS, *supra* note 29, at 26; TREFOUSSE, *supra* note 34, at 189.

[43] EPPS, *supra* note 29, at 17.

[44] *See generally* EPPS, *supra* note 29, at 28-30.

[45] MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES *passim* (1991).

[46] MCPHERSON, *supra* note 35, at 68-72; *see also* EPPS, *supra* note 29, at 135-36.

[47] EPPS, *supra* note 29, at 30.

[48] *See id.* at 79.

Reconstruction.[49] And the end of slavery meant the end of the three-fifths compromise, which would mean that the South would gain between eighteen and twenty-eight members of Congress, and electoral votes.[50] These additional representatives and electors would be elected by all-white electorates.[51] Johnson's executive orders specified that voting rights in the occupied states would be limited to whites.[52]

All over the South, former secessionists were agreed that all the South had to do was wait, and Johnson would restore it to its place of glory, at which point the Southern coalition would pass laws compensating slave-owners for the loss of their property and either repudiating the Union debt or requiring the taxpayers to pay the Confederate debt.[53] The *Richmond Examiner*, the most ultra-secessionist of Southern papers, put it this way in late 1865:

> 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.[54]

The Fourteenth Amendment was written to cripple the Slave Power, and it was written in a hurry by antislavery Republicans who knew that, unless it could be proposed by summer 1866, and ratified by the states by 1868, they would lose any chance to influence Reconstruction, and that the end of the war would be political victory for the militarily defeated Confederacy.[55]

Arrayed against Johnson was a group of antislavery thinkers and legislators. A look at the Framers of the Fourteenth Amendment shows a group with radical ideas about equality and democracy, what they would have called small "r" republicanism.[56] Men like Thaddeus Stevens and John Armour Bingham were

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[49] *Id.* at 61.

[50] *Id.* at 56-57.

[51] *Id.* at 57.

[52] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 183 (2002).

[53] EPPS, *supra* note 29, at 88.

[54] *News from Washington*, RICHMOND EXAMINER, Jan. 9, 1866, at 1.

[55] *See* EPPS, *supra* note 29, at 61, 166, 185.

[56] *See, e.g.*, *id.* at 268.

quite clear about their belief that the original Constitution had been flawed since its inception and needed a careful redoing.[57] And one of the most remarkable facts of the entire story is that the original draft of what became the Fourteenth Amendment was written by Robert Dale Owen, who was then probably the most famous political and social reformer in the country.[58] Owen was a free thinker, a feminist, a proponent of birth control and free love, and, in his later years, an abolitionist.[59] It is a bit as if a Congressional committee today were to say, "We have a new Constitutional amendment to propose to redo almost every feature of our system. We've made some changes and watered it down some, but we want to thank Professor Noam Chomsky for writing the original proposal."

What are the radical ideas that underlie the Fourteenth Amendment? They can be summed up in a phrase from a famous pre-war speech by Carl Schurz, an important antislavery thinker: "[T]he Republic of equal rights, where the title of manhood is the title to citizenship."[60] If we ignore the sexist language, this phrase alerts us first of all to the nineteenth-century idea of a republic, which is not governed by an elite, but is radically egalitarian.[61] Each citizen is seen as an independent and equal economic and political actor, and government is to be available and responsive to each of them equally.[62] In this phrase, too, is captured the idea that membership in American society is not tribal. The American nationality, Schurz said, is a nationality based on ideas and shared allegiance rather than on race or national origin.[63] There are no legal ranks among the

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[57] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 3148 (1866) (remarks of Rep. Stevens) (stating that original Constitution created "obligations the most tyrannical that ever man imposed in the name of freedom"); *id.* at 1033-34 (remarks of Rep. Bingham) (stating that "it has been the want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every State, by congressional enactment, to enforce obedience to these requirements of the Constitution").

[58] EPPS, *supra* note 29, at 186-87.

[59] *Id.* at 186.

[60] 1 CARL SCHURZ, SPEECHES, CORRESPONDENCE AND POLITICAL PAPERS OF CARL SCHURZ 57 (Frederic Bancroft ed., 1913).

[61] *See, e.g.*, John A. Bingham, *Argument in Reply to the Several Arguments in Defense of Mary E. Surratt*, *in* THE TRIAL: THE ASSASSINATION OF PRESIDENT LINCOLN AND THE TRIAL OF THE CONSPIRATORS 361, 363 (Edward Steers, Jr., ed. 2003).

[62] *See* CONG. GLOBE, 37th Cong., 3d Sess. 266 (1863) (remarks of Rep. Bingham).

[63] *See* 1 SCHURZ, *supra* note 60, at 58.

people of such a republic. Citizenship, in the nineteenth-century small "r" republican vision, is *universal*.[64] Everyone born into society is a citizen. The United States is a *nation*. John Armour Bingham, the principal author of Section 1 of the Fourteenth Amendment, said that America must have "one people . . . one Constitution, and one country!"[65] Finally, a nation is not a collection of quasi-independent states with their own social policies and citizenship, or with "rights" and "sovereignty" of their own. James A. Garfield, a future president of the United States, explained this idea during the debates on the Fourteenth Amendment. "[W]hat is the meaning of the word State as applied to Ohio or Alabama?" he asked.[66] "They are only the geographical subdivisions of a State; and though endowed by the people of the United States with the rights of local self-government, yet in all their external relations, their sovereignty is completely destroyed, being merged in the supreme Federal Government."[67]

Of course, there were also some radical ideas that did not make it into the Fourteenth Amendment. The Framers were forced to compromise some of their beliefs in order to get the two-thirds of the vote needed for passage in each house.[68] Owen proposed forbidding racial discrimination in voting after 1876.[69] After they had won the 1866 Congressional elections, the Republicans enacted that proposal as the Fifteenth Amendment.[70] Another belief that was sadly compromised was that of equality between the sexes. Women had formed the heart and soul of the antislavery movement.[71] But the male framers of the Fourteenth Amendment did not dare extend the vote to them; that reform took another half century to enter the Constitution.[72]

But limited as it was, within the sphere in which it operated, the Fourteenth Amendment really was designed to change everything: to make every state live by the rules of equality and de-

[64] *See id.*

[65] EPPS, s*upra* note 29, at 96.

[66] CONG. GLOBE, 39th Cong., 1st Sess. app. 64 (1866) (remarks of Rep. Garfield); EPPS, *supra* note 29, at 133.

[67] CONG. GLOBE, 39th Cong., 1st Sess. app. 65; EPPS, *supra* note 29, at 133.

[68] *See* CONG. GLOBE, 39th Cong., 1st Sess. 3148 (remarks of Rep. Stevens) (stating that the proposed Fourteenth Amendment is "a scheme containing much positive good, as well, I am bound to admit, as the omission of many better things").

[69] EPPS, *supra* note 29, at 198.

[70] *See* U.S. CONST. amend. XV.

[71] EPPS, *supra* note 29, at 206.

[72] U.S. CONST. amend. IX (ratified 1920) (extending the right to vote to women).

mocracy, to ensure birthright citizenship for every person born in this country, to protect freed slaves and unionists in the South, and to provide legal rights for immigrants—all immigrants—and prevent what John Bingham called "the terrible enormity of distinguishing here in the laws in respect to life, liberty, and property between the citizen and stranger within your gates."[73] It was designed to produce what Carl Schurz called "a Union of truly democratic states."[74] And it was designed to give Congress, as the voice of the American people, a powerful tool to regulate civil rights and political systems in the states.[75]

Now, we all know that the Fourteenth Amendment did not achieve its radical goals. The post–Civil War Supreme Court systematically leached it of all the radical content its framers had put into it.[76] That story could be the melancholy subject of another lecture. The radical text, however, remained, and ideas are stubborn—as stubborn, in their way, as facts. In 1776, Thomas Jefferson wrote "all men are created equal" into the very birth certificate of the United States; though it took more than a century, those words, in the end, produced an Abraham Lincoln, a Frederick Douglass, a John Bingham, an Elizabeth Cady Stanton, and a Susan B. Anthony. In the end, those words brought slavery to its knees, proclaimed liberty to the captives, and brought the Jubilee. Just so, during the dark years of segregation and empire, from 1890 to 1945, words like "due process" and "equal protection" reminded a complacent nation of promises it had made to history long before. Like yeast in a heavy mass of bread dough, the Fourteenth Amendment slowly transformed the Constitution. One by one, during the years before and after World War II, the Supreme Court "discovered" in the Amendment the rights John Bingham always said he was writing into it.[77]

Meanwhile, the idea of equal protection ate away at Southern segregation. In a trilogy of cases at the end of the nineteenth century, the Supreme Court told black Americans that they

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[73] CONG. GLOBE, 39th Cong., 1st Sess. 1292.

[74] 1 SCHURZ, *supra* note 60, at 413.

[75] *See* CONG. GLOBE, 39th Cong., 1st Sess. 2543 (remarks of Rep. Bingham).

[76] *See, e.g.*, The Civil Rights Cases, 109 U.S. 3, 23 (1883) (asserting that the Fourteenth Amendment does not apply to private invasion of individual rights, but it only assures that Congress can legislate around state violations of individual liberties if it sees fit); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) (construing the Fourteenth Amendment narrowly so as to preserve the Constitution as controlling primarily federal, not state, action).

[77] *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 147-48 (1968).

could be confined to "separate but equal" spheres of society.[78] Black Americans began demanding that the courts take the "equal" prong seriously. Over and over they went to court to point out that Jim Crow schools were not physically or educationally equal to those provided for whites; finally, in 1954, they had educated the Supreme Court to a belated realization that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[79]

Black Americans had known since Emancipation that legal separation was a tool of stigma and oppression. They had always known that, properly read, the Constitution required true equality for African-Americans. Now, the Court was on record as agreeing. In 1956, at the onset of the Montgomery Bus Boycott, the twenty-nine-year-old Martin Luther King, Jr. addressed the Montgomery Improvement Association in words that John Bingham might have uttered: "If we are wrong, the Supreme Court of this nation is wrong. If we are wrong, the Constitution of the United States is wrong," he said.[80] "If we are wrong, God Almighty is wrong."[81] Nearly a century late, the equality genie was out of the bottle, and since then, our Congress, our courts, and our people have grappled with what it truly means to have what Bingham called "one people, one Constitution, and one country!"[82]

To succeed in understanding that idea, we must educate ourselves not only about the original Framers, but also about the Second Founders, and about their notions of free labor, republicanism, and equal rights. That ignorance extends to far too many of our judges as well.

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[78] *See* Berea College v. Kentucky, 211 U.S. 45 (1908) (upholding state law requiring the maintenance of segregated educational facilities, validating the state policy of segregation); Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899) (declaring that federal authority cannot be used to direct state funds for the education of its citizens, even when a state provides for the education of white children but not black children); Plessy v. Ferguson, 163 U.S 537 (1896) (holding that policy of separate but equal is appropriate in many circumstances, specifically on a public train), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483, 488 (1954).

[79] *Brown*, 347 U.S. at 495.

[80] Martin Luther King, Jr., Address to the First Montgomery Improvement Association Mass Meeting (Dec. 5, 1955), *in* A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR. 7, 10 (Clayborne Carson & Kris Shepard eds., 2001).

[81] *Id.*

[82] EPPS, s*upra* note 29, at 96.

In 1997, for example, the Rehnquist Court held that the courts, not Congress, had "primary authority" for determining how to protect minority rights in the states.[83] Nothing in the Amendment's history or text supports this, but it is a handy doctrine for conservative judges who want to make sure equality does not go too far. In 2000, the Court held that the Fourteenth Amendment did not authorize Congress to allow federal lawsuits by women victimized by gender-based violence.[84] Congress had amassed a mass of evidence of "pervasive bias" against female victims by local law enforcement authorities.[85] The evidence, the Court said, was simply irrelevant, because such lawsuits would trench on state's rights.[86] Chief Justice Rehnquist wrote that it might upset "the Framers' carefully crafted balance of power between the States and the National Government"[87]—for all the world as if that "carefully crafted balance of power" had not fallen into bloody ruins in 1861 and been reworked completely by the Fourteenth Amendment. In 2001, the Court held that Congress could not use its enforcement power under the Fourteenth Amendment to allow disabled state employees to sue their employers.[88] Congress may have thought that discrimination against the disabled was a problem, but the Justices, in their wisdom, thought that discrimination against the disabled is perfectly rational.[89] And in 2004, remarkably, the Court held that there is no constitutional problem when state legislatures deliberately redraw election districts to deprive voters of a real choice of candidates; in other words, the political majority in a state can simply change the rules to maintain itself in power.[90] Justice Antonin Scalia delivered that opinion, in words rather than hand gestures. "Fairness," he sniffed, "does not seem to us a judicially manageable standard."[91]

Cases like these represent a seemingly willed failure of memory. Contemporary judges do not wish to admit that our eight-

[83] City of Boerne v. Flores, 521 U.S. 507, 524 (1997).

[84] United States v. Morrison, 529 U.S. 598, 627 (2000).

[85] *Id.* at 619-20.

[86] *Id.* at 625-26.

[87] *Id.* at 620.

[88] *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 372-75 (2001).

[89] *See id.* at 367-68, 372-75 (applying rational basis review to strike down right for disabled employees to sue their employers that was promulgated under the Fourteenth Amendement).

[90] Vieth v. Jubelirer, 541 U.S. 267, 291 (2004).

[91] *Id.*

eenth-century Constitution now contains the nineteenth-century values of equality, openness, and rule of law for all. This crabbed conception of the Fourteenth Amendment robs our society of democratic values that would enrich it and make it stronger.

In my reading of the text and record, the Fourteenth Amendment mandates for our nation the kind of freedom that the philosopher Karl Popper called the "open society"—a society where no value, no practice, and no group are beyond challenge and critique, and a society where membership is not based on race or blood or country of origin, but on simple shared humanity.[92]

Too many of our states fall far short of this ideal; too many of our judges believe that, as *The Nation* once said of the old South, "the local majority is absolute."[93] Too many politicians choose the local majority over the open society, and as a result, "state sovereignty" and "states' rights," ideas that died at Gettysburg, still rule us from their graves.

All of us have a role to play in correcting this. The American Constitution is not a fixed set of rules; it is an invitation to a national dialogue about concepts like due process, equal protection, citizenship, and democracy. The voices of the Second Founders should be heard in that contemporary dialogue. I do not claim that I know their "original intent." Distrust anyone who does. Two things on earth are not given us to know: one is the fate of the living, and the other is the intentions of the dead.

But to paraphrase Lincoln at Gettysburg, it is for us, the living, to dedicate ourselves to finishing the work our Second Founders began.[94] The words of the Second Constitution may not always be clear; nonetheless, like America itself, they are both a prophecy and a promise to history. Today, as in 1868, Americans often hesitate in front of claims of true equality. True human equality is a frightening idea, for it means sharing power with those we consider below us, with those we hate, and with those we fear.

And yet the idea of human equality was written in the American sky by the Second Founders. And still it goes before us, a cloud by day, a pillar of fire by night. It summons us to walk toward a truly democratic union of truly democratic states.

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[92] 1 KARL R. POPPER, THE OPEN SOCIETY AND ITS ENEMIES (Harper & Row 1962) (1945).

[93] *The Latest Version of the New Orleans Affair*, NATION, Aug. 30, 1866, at 172-73.

[94] *See* KENT GRAMM, NOVEMBER: LINCOLN'S ELEGY AT GETTYSBURG 150-51 (2001).

That path may be long; that path may be steep; that path may take us in the dry and the stony places. We may be hungry and sore and afraid, and we may be tempted—and we are tempted—by the idols of race and sex privilege, of authoritarianism, and of empire and official lawlessness.

But there is water in the rock, and there is manna on the grass if we but seek it. The Second Constitution marks our true path. In seasonable time, We the People will walk it.