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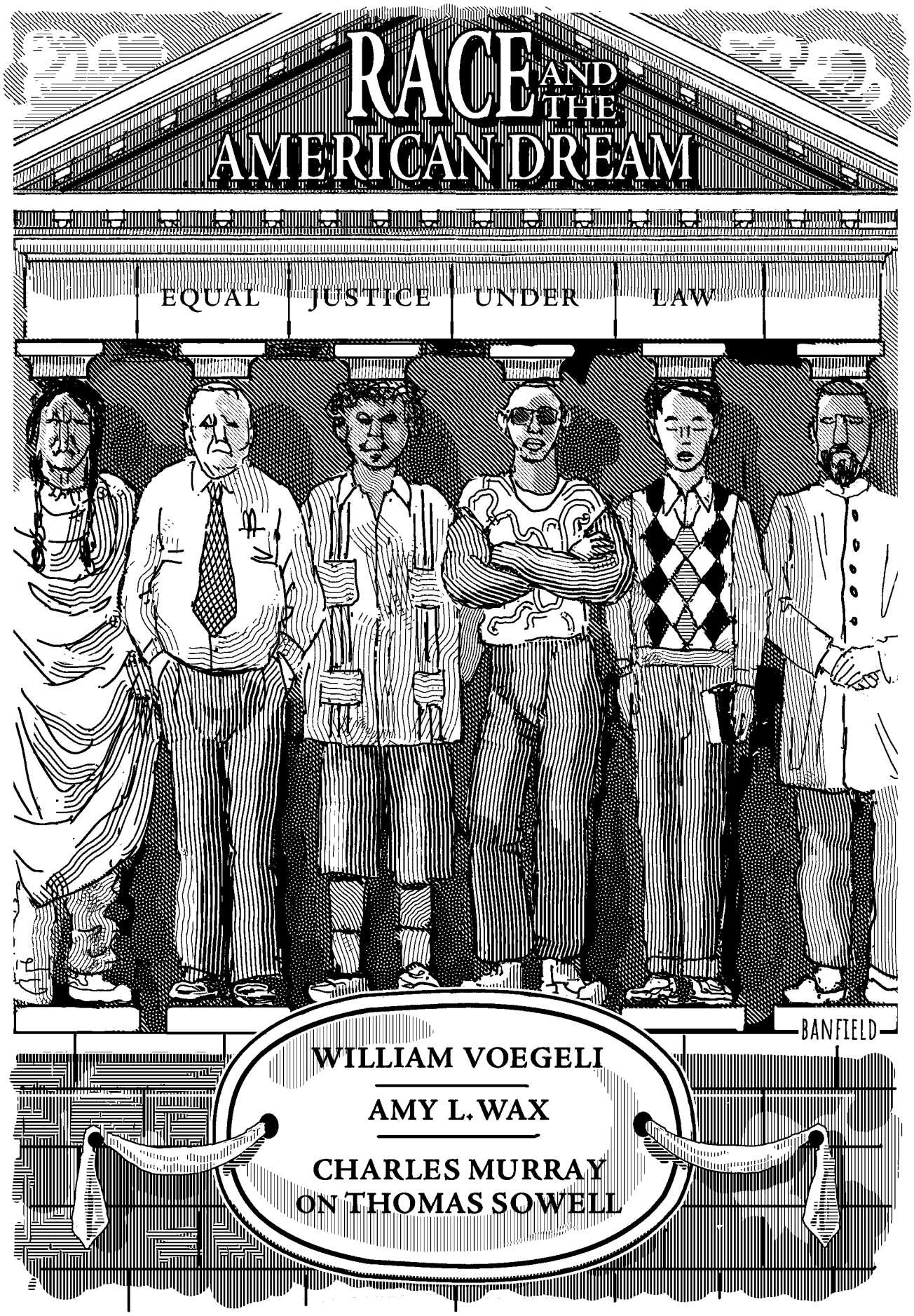

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Book Review by Michael P. Zuckert

Coping with the 14th Amendment

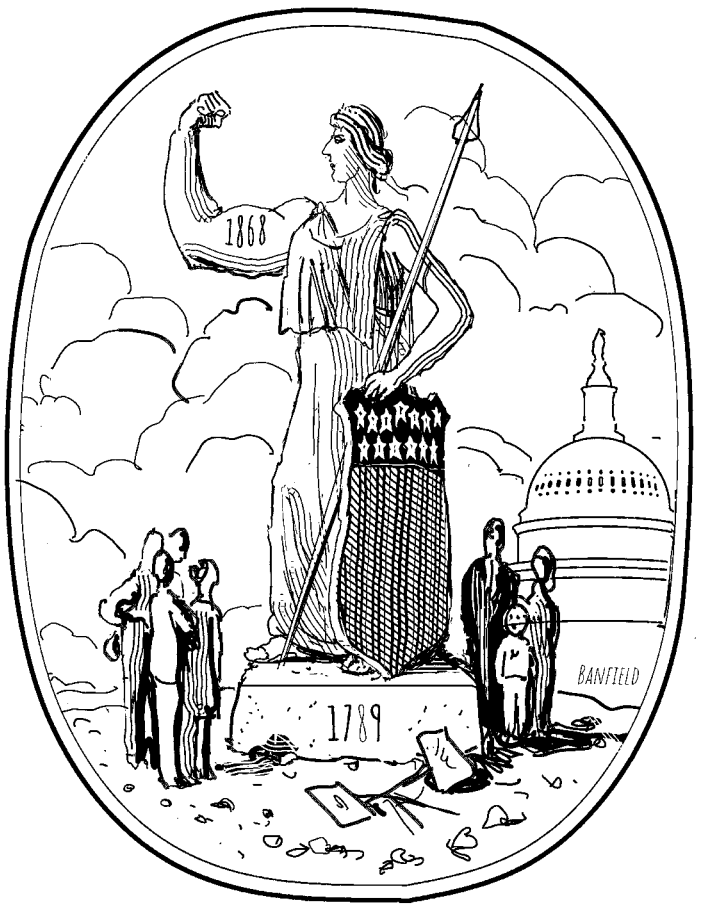
The Fourteenth Amendment and the Privileges and Immunities of American Citizenship, by Kurt T. Lash.
Cambridge University Press, 326 pages, $36.99

The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit, by Randy E. Barnett and Evan D. Bernick.
Harvard University Press, 488 pages, $35

The Reconstruction Amendments: The Essential Documents, Volume 1, edited by Kurt T. Lash.
The University of Chicago Press, 632 pages, $175

The Reconstruction Amendments: The Essential Documents, Volume 2, edited by Kurt T. Lash.
The University of Chicago Press, 704 pages, $175

The Second Founding: An Introduction to the Fourteenth Amendment, by Ilan Wurman.
Cambridge University Press, 170 pages, $19.99



The 14th amendment is back, even though it never really went away. Almost from the moment it entered the Constitution in 1868 the 14th amendment has been the most dynamic, important part of our fundamental law. Nevertheless, we have here five new or recent books centering on the amendment. Three are interpretive studies—what does the amendment really mean? The others are collections of source materials on the Reconstruction Amendments—the 13th, 14th, and 15th—with the 14th the center of attention.

It is not as though the drafting and original meaning of the amendment had suffered scholarly neglect. Yet there are two reasons for this plethora of new work. First, since the last spate of studies, many novel interpretations of it have become part of constitutional law, the right to same-sex marriage being just one example. Such new rights raised anew the question of how expansive the amendment is, with its protections for privileges and immunities of citizens of the United States, as well as its guarantees of due process of law, and equal protection of the law for all persons.

Second, alongside these legal innovations there has been a scholarly sea change regarding theories of constitutional interpretation. For most of the 20th century, scholarly debates set devotees of the "living constitution," say, Harry Blackmun and Thurgood Marshall, against "originalists" like Robert Bork

and William H. Rehnquist. Scholarly opinion has shifted in the new century: it would be an overstatement to say we are all originalists now, but the tide flows in that direction. That tide, however, has washed up several *types* of originalists, among whom those who search for "original public meaning" now dominate. The perceived need to reconsider the 14th amendment in light of this theory is mostly responsible for the appearance of these new books.

Yet the discovery of new protections and rights in the amendment plays its part also. The four authors of the three scholarly interpretations are interested in whether the true meaning of the amendment has any room for these new rights. At first glance, one would think not, for originalism seems a commitment to resisting constitutional innovation: the constitution means today what it meant when it was adopted. The studies under review, however, disagree on what the original public meaning of the amendment is, and they differ in their assessment of how the meaning their studies extract relates to various alleged constitutional innovations.

The attractiveness of original public meaning as a mode of constitutional interpretation is easy to see. It fits well with widespread ideas regarding what constitutions should do. They set out fundamental law, law more entrenched and fixed than normal legislated law. They set the structures, procedures, and limits to the ordinary governing institutions and their actions. Constitutions that change with fashion, fad, and current majorities do not fulfill this function. Moreover, in systems committed to the principle of popular sovereignty, originalism appears to be the only approach to the Constitution that retains legitimacy, for it is the Constitution itself that has been adopted by the people. If ordinary legislatures or (even worse) unelected judges can change the Constitution, then the tie to the source of authority, the people in their constitutive capacity, is lost.

Original public meaning is a version of originalism often contrasted with the search for original intent. Original intent is your grandmother's version of originalism, according to which one attempts to ascertain what the founders or legislators intended or meant when they adopted a constitution or law. At the extreme, we might characterize this as original *private* meaning. At one time, for example, it was fashionable to hold that the 14th amendment's framers used the word "person" in the Due Process Clause as a way to sneak in property rights protections for corporations. But secret meanings lack authority and make no part of proper law. And so public meaning is the standard.

The broader point is that a constitution in our sort of legal system derives its authority from its adoption by the people. The real meaning of the Constitution must, therefore, be what the adopting authority takes it to be, not what its drafters do. As Ilan Wurman, one of our authors, puts it, "the original public understanding version [of originalism] maintains that the meaning of a constitutional provision is the meaning the public that ratified the Constitution would have understood it to have.... It asks, how would the people have understood the written words of the Constitution they were adopting?"

So stated, specifying and verifying original public meaning appears a rather daunting task. How can we ascertain the meaning the public in 1788 or 1868 would have understood the texts to have? We cannot ask them. We may have evidence of how some individuals understood one or another of these texts, but cannot know how representative these individuals are. The practitioners of original public meaning, for the most part, eschew that sort of empirical inquiry, defining original meaning instead as "the likely original understanding of the text at the time of its adoption by competent speakers of the English language who were aware of the context in which the text was communicated for ratification," in Kurt Lash's explication. In part, then, it seems to entail consulting a dictionary from the relevant era, but there is also the need to identify competent speakers and comprehend the context in which the text was communicated for ratification. This context may include such things as the legal usage of the terms in the text, which may indeed stray from what the ordinary competent speaker of the English language understands by the relevant set of words. In practice, two of the three books under review here (excluding the source material compilations) direct the inquiry back toward the speeches and writings of the drafters of the text.

Our three main books display significant variety in how they participate in the quest for the holy grail of original public meaning. Most distant from original intention originalism is Ilan Wurman's *The Second Founding*. An associate law professor at Arizona State University, Wurman emphasizes that every key phrase in the amendment's first section—privileges and immunities, due process of law, and protection of the laws—appears in the original Constitution or in the 19th century legal culture. As standard concepts they had a meaning more or less fixed and known in preexisting legal discourse. Therefore, he concludes, the meaning of the clauses is no great mystery: they mean what they always meant.

In contrast to both the earlier literature on the making of the 14th Amendment and the other books under review here, Wurman has only a brief, 11-page chapter on the 14th amendment in the 39th Congress that drafted it. He does not go through the different versions of the amendment or the debates on them. He hardly mentions John Bingham, the Republican representative from Ohio who drafted Sections 1 and 5 of the amendment. He does not mention at all Giles Hotchkiss, Republican representative from New York, whose intervention in the debate on the amendment was responsible for a massive change in its form.

The earlier form of the amendment as drafted by Bingham was: "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States; and to all persons in the several States equal protection in the rights of life, liberty and property." After a long, contentious House debate, Bingham redrafted the amendment to read: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Along with this change a separate section of the amendment provided: "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The two versions of the amendment are clearly related, but it would seem highly relevant to know what prompted the change in form and what difference it makes. Perhaps Wurman's method is an extreme form of the original public meaning approach. Although congressional debates are matters of public record, he treats them as not authentically valid vehicles for understanding original public meaning. In place of what the authors of the amendment were thinking he gives us the history, for example, of the use of the phrase "privileges and immunities" in treaties and other previous legal documents. He takes original public meaning to be equivalent to original *legal* meaning. The established legal meanings were the truly public meanings.

This makes a certain amount of sense, of course, but what if the people who wrote the

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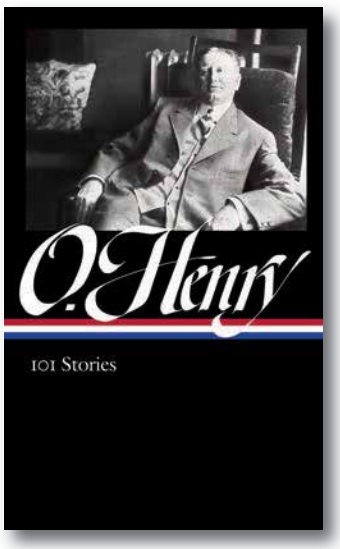

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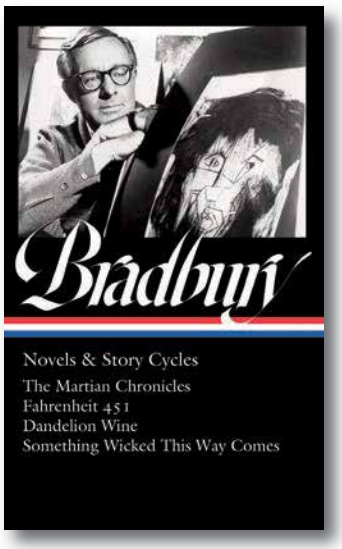

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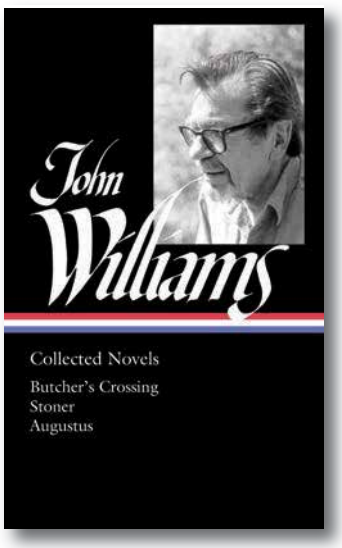

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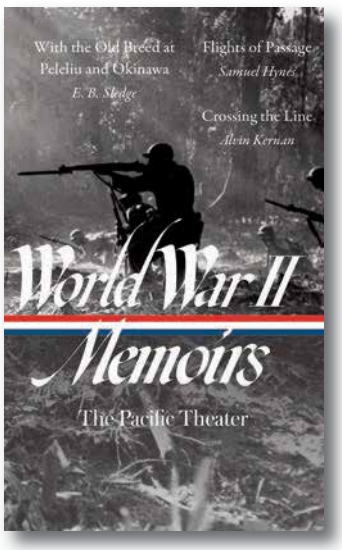

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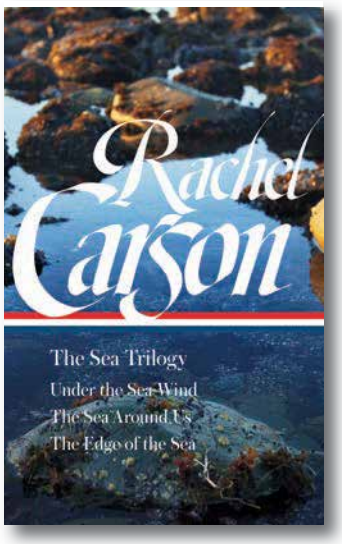

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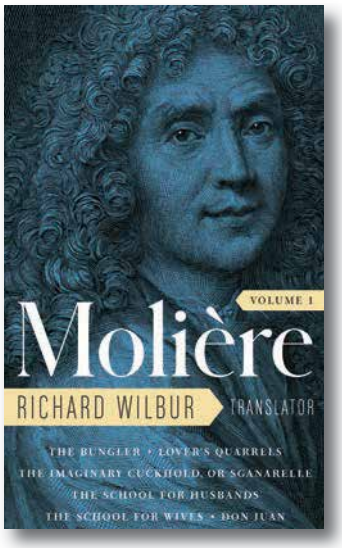

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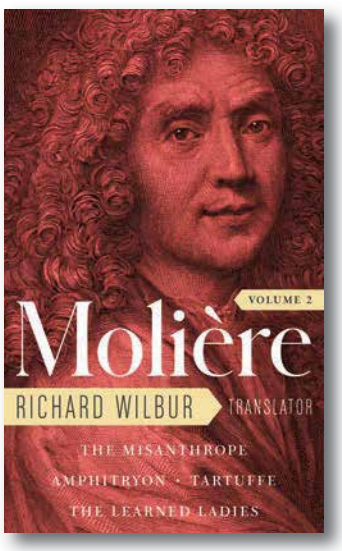

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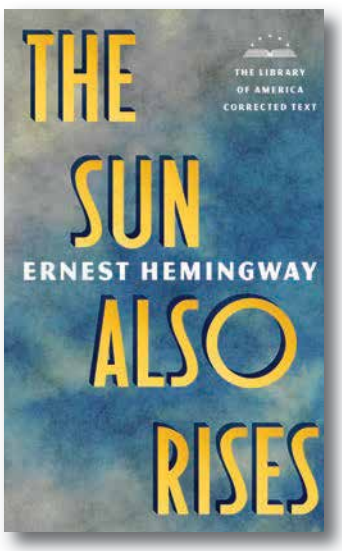

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amendment did not understand the pre-existing legal materials as Wurman does, as actually is the case? Do the meanings its authors imparted to it have no bearing on its "meaning"? Is the meaning of, say, "privileges and immunities" as used in treaties dating from 1803, 1821, and 1848 that formalized the acquisition of new territories for the U.S. more likely to give us the meaning the public that ratified it would have understood it to have than debates in Congress contemporaneous with the public ratifiers?

A very different version of original public meaning methodology appears in Kurt Lash's *The 14th Amendment and the Privileges and Immunities of American Citizenship*. As his title suggests, Lash, a law professor at the University of Richmond, is concerned almost exclusively with the Privileges and Immunities Clause. Published in 2014, his book is older than the other two, a relevant fact because in more recent writings he has changed his mind on several things where, in my opinion, he was mistaken eight years ago. But my remit is this book and I will limit myself to it.

Even before Wurman, Lash was probing treaties and other antebellum sources on the concept of privileges and immunities. So, part of his method is the same. But, proving that original public meaning is not an exact science, he drew very different conclusions from his survey of these materials. Quite unlike Wurman, he devotes the longest chapter of his book to the congressional debates, producing an account of the debates rather like earlier studies, the chief innovation being an explanation for a purported change of mind by Bingham about privileges and immunities.

This part of the book seems very traditional. Lash moves back toward the public meaning theme in a long chapter on the public debate, which makes an effort to establish what the public might actually have understood the draft amendment to accomplish. Similarly, he has a chapter on post-adoption commentary, with a similar aim but that results in demonstrating that much of that later commentary, especially Supreme Court cases, did not match what he takes to be the Amendment's original public meaning.

Lash pursues, then, a hybrid strategy: part original intent study, part original public meaning. The need to supplement the public meaning approach with original intent seems to have been driven in Lash's case by his awareness of the context in which the text was communicated and, I would add, drafted. Common sense and an 1860 dictionary may not be enough to establish original public meaning.

The third study under review here, *The Original Meaning of the 14th Amendment*, is by Randy Barnett, Georgetown University Law Center professor, and Evan Bernick, assistant professor of law at Northern Illinois University. Closer in method to Lash than to Wurman, their book considers the treaties and other precedents Lash does, considers the debates in detail, then touches on the public debate and discussion of the amendment. Where they differ most strikingly from Lash is in their quest for the original public meaning of both "the letter" and "the spirit" of the amendment's chief clauses. The originalist project in general, whether original intent or original public meaning, seems hostile to the idea of the "spirit of the text." Originalism is to give us the original and presumably lasting meaning of the text; it is to give us a relatively fixed and stable Constitution, constraining both legislatures and judges. It is definitely biased toward letter over spirit.

Barnett and Bernick define spirit as "the ends, purposes, goals, or objects that the Constitution was adopted to accomplish." Thus, we must attend to the "particular ends or goals that were deemed normatively desirable when they were ratified into law. Truly understanding the original meaning of the text may require an understanding of those original functions." Where the letter gives uncertain guidance on what to do, construction or application requires turning to the spirit of the law in search of greater guidance.

Originalists normally stay away from things like spirit, lest a much larger intrusion of subjective judgment and interpretive discretion place us on a slippery slope to a living Constitution. Barnett and Bernick seem to believe that establishing spirit deploys the same tools as establishing letter: "to identify the concepts that most members of the ratifying public associated with the words and phrases that constitute the Constitution." That enterprise involves some notion of what the words used, "the letter," are trying to accomplish. Letter and spirit are intertwined.

The notion of spirit, our authors know, can lead to a freewheeling practice of interpretation that they attempt to constrain through a practice they call "good-faith construction," for which they supply some rules and examples in their effort to identify rights that have come under the protective umbrella of the amendment but were not included in the original "letter."

It should now be evident that original public meaning is more a project and aspiration than a fixed method or achievement. Here we have three conscientious efforts to engage in the quest for original meaning that proceed in quite different ways, interpret the common data they examine in mostly different ways, and come to quite different conclusions about the meaning and application of the amendment. As a project it aims to produce something like objectivity in interpretation and a method that constrains discretion. Let the reader judge whether it succeeds.

The three studies also come to quite different conclusions about the meaning of the amendment and the validity of the constitutional innovations instituted under it. Lash puts forward the most constrained interpretation. His study of the Privileges or Immunities Clause culminates in the conclusion that the amendment has only a "limited scope." The only genuinely substantive part of Section 1 is the Privileges or Immunities Clause. He accepts the idea that the amendment, or its chief author, John Bingham, meant to offer protection to the natural rights of persons with the Due Process and Equal Protection clauses, but he understands these to be purely procedural protections.

The substantive protections offered in the amendment are themselves limited in various ways. First, there is a clear distinction between privileges and immunities of United States citizenship and those of state citizenship. The amendment affirms only the former. Second, the amendment does not mean to overturn the traditional federal system and so offers no protection to rights whose protection fell to the states in the antebellum Constitution. Third, the amendment aims to protect only enumerated personal rights and no non-enumerated rights. Fourth, the chief source of enumerated personal rights is the first eight amendments to the Constitution, and these then are in the main the protected privileges and immunities of citizens of the United States.

In sum, the 14th amendment incorporates the Bill of Rights, applying the prohibitions and commands therein to the states, as was not the case in the antebellum Constitution. The Supreme Court already has incorporated these rights provisions, but it has done so in a haphazard and textually unsatisfying way. Lash provides a historically defensible and far more textually cogent path to incorporation. Another great strength of his book is his appreciation, perhaps over-appreciation, for the amendment's moderation with respect to federalism. Although he does not explicitly dwell on it, his stance toward innovative 14th Amendment jurisprudence is quite negative. He gives us a narrow, fixed, and constrained amendment with no room for rights beyond

those expressly mentioned in the Constitution. In some law review articles since this book, however, Lash retreats from this position and identifies the Due Process Clause as a source of unwritten fundamental rights.

Wurman's original public meaning is altogether different. He rejects Lash's interpretation of the treaties and the other antebellum legal sources to which Lash appeals. Most importantly, Wurman rejects at length Lash's chief claim that the Privileges or Immunities Clause incorporates the Bill of Rights. In my opinion, the most forceful of his six arguments against incorporation is the observation that Lash's reading does not explain how the 14th Amendment could constitutionalize the Civil Rights Act of 1866; it was very widely understood at the time that it would at least do that much. The rights protected in the Civil Rights Act, rights such as the "same right, in every State and Territory in the United States, to make or enforce contracts," or "to inherit, purchase, lease, sell, hold, and convey real and personal property," are not the rights secured by the Bill of Rights. If the amendment is only about the Bill of Rights, it would not seem to constitutionalize the Civil Rights Act.

The one point where Wurman explicitly agrees with Lash is that the major work of Section 1 of the amendment is done by the Privileges or Immunities Clause. This, of course, is ironic because that is the clause that the Supreme Court stripped of nearly all meaning early in its history of dealing with the amendment in its decisions in the *Slaughter-House Cases* (1873) and *United States v. Cruikshank* (1876). Almost all the bite of the amendment has come instead from the Due Process and Equal Protection clauses. Wurman strongly opposes the substantive readings of these clauses that have dominated constitutional history. The Due Process Clause provides, he claims, only that "no individual may be deprived of life, liberty, or property without first having violated existing, established law and without the benefit of the critical procedures historically used for determining the violation of such laws." In a parallel way, the equal protection of the laws requires only that "the government provide legal protection against private interference for our exercise and enjoyment of our existing rights to life, liberty, and property as defined by law." It does not set substantive standards of protection that the law must meet.

Wurman agrees with Lash that the Privileges or Immunities Clause does most of the work in the amendment but he disagrees entirely about what work it does. It "would impose certain fundamental equality provisions upon the state governments," Wurman argues. "Whatever privileges and immunities a state accorded some of its citizens, it had to accord to all equally without arbitrary discrimination." The clause protects not privileges and immunities of United States citizenship, as Lash maintains, but those of state citizenship, as Lash strongly denies. One problem with Wurman's reading is that John Bingham also strongly denied that the clauses protect rights of state citizenship, a point simply ignored by Wurman because of his method. His reading of the clause as an equality provision is odd in the further sense that this seems far more the province of the equal protection clause.

One consequence of Wurman's interpretation, however, is that he can justify many 20th- and 21st-century 14th Amendment innovations. Finding marriage to be a privilege of state citizenship, for example, he asks whether denial of the right of same-sex marriage abridges a gay person's rights. It seems not, because gay individuals are still free to marry someone of the opposite sex. But, he rejoins, being gay is not a choice, and so gay citizens are effectively being denied the same freedom to marry that a state accords its heterosexual citizens. In this way, Wurman goes far beyond Lash in finding room for an expansive 14th amendment.

Barnett and Bernick have authored the most comprehensive study of the three. They treat all the major clauses of the amendment, examining both the debates and surrounding materials. All things considered, they present the most complete account of the amendment. There is, however, something deeply paradoxical in their rendition. "On the one hand," they say, "nearly everything that currently comprises the conventional wisdom about the meaning of the most salient clauses of the…Amendment is wrong." But they have another hand: "we do not believe that adopting the original meaning of the…Amendment would lead to *results* that differ radically from those that current doctrine would produce." This paradox resolves in their identification of "compensating misinterpretations" of various clauses that "lead to results that are often consistent with what the original meaning of the whole amendment would warrant." Thus, as they see it, the Due Process and the Equal Protection clauses have been distorted to do much of the work originally meant to be done by the Privileges or Immunities Clause. Restoring their true 14th Amendment would not greatly disrupt current constitutional law.

In that case, we might ask whether their version of the amendment matters very much.

I think it does. Apart from the value of getting it right (if they do), they identify two resulting departures from current doctrine: stronger protection for economic liberty than now available, and "recognition of an affirmative duty on the part of states to provide protection against violence by 'private' actors." Moreover, I would add, their particular doctrines of fundamental rights and the "spirit" of the text would inevitably open the Constitution to the recognition of new rights protections.

Barnett and Bernick agree with Lash that the Privileges or Immunities Clause makes the first eight amendments apply against the states, but, as noted, they strongly disagree with him about unenumerated rights. Unlike the other two authors, they put great weight on the natural rights foundation of the amendment and appreciate its federalism-preserving character. More than the other authors, they pay attention to Section 5's empowerment of Congress. Insofar as they present a theory of the "spirit" of the amendment, from which they derive rights protections not within the original public meaning, they, like Wurman, merge originalism and living constitutionalism. But where Wurman sees the amendment working via equality considerations, they see it working via fundamental rights.

Barnett and Bernick provide in some ways the most satisfying, but still imperfect, of the three accounts of the 14th amendment. Their treatment is the most inclusive, not only in its focus on all parts of Sections 1 and 5, but in its more capacious acceptance of various suggested sources for the amendment's provisions. For example, they advance the claim that the amendment embraces the list of privileges and immunities in Justice Bushrod Washington's opinion in the 1823 Circuit Court case *Corfield v. Coryell*, the most authoritative interpretation of the idea of privileges and immunities of citizenship prior to the 14th Amendment. Lash strongly disagrees with that conclusion, using as important evidence the clear rejection of it by John Bingham, the amendment's chief author. Barnett and Bernick, however, reject Bingham's statement as "unreliable." Lash, I believe, has the better of the argument here.

Where are we then on the amendment? We have three more and less impressive instances of legal scholarship, producing three different versions of the amendment. One of them might be correct even if all three cannot be. Despite these three admirable efforts, however, work still needs to be done to capture the true original meaning of the amendment—if such exists.

Here are two ways toward a better grasp of the amendment's original meaning. First, neither these authors nor their predecessors pay sufficient attention to the amendment's text. Read structurally, as it should be, it has more power to supply meaning than is normally realized. Second, the actual dynamic of the amendment's formation requires a different sort of attention than it normally gets. The 14th amendment is a co-product of John Bingham, its "author," and the Congress that debated and adopted it. Like many products of legislative assemblies, not all those who contributed to it understood its various clauses in the same way. A promising method under the circumstances would be to begin with Bingham, with his presumably clear and coherent understanding of the text, then examine the other legislators' contributions and understandings. The resulting question becomes whether the Congress that adopted the amendment understood it as Bingham did, or at least came close enough that we can reliably accept his version as the authentic congressional version. If not, was there (a) an equally cogent congressional consensus, (b) some sort of structured disagreement, or (c) no clear authoritative meaning at all? Clarity on that question would make the subsequent investigation of the 14th amendment's public meaning possible and productive.

The other two volumes under review, collections of source documents edited by Lash, are exactly what scholars need for a good start on the task just outlined. One volume contains documents on the antebellum constitution and the 13th Amendment; the other on the 14th and 15th Amendments. They are huge, almost 700 pages each. The documents are selected with an eye to the original public meaning agenda, especially the version Lash himself pursued. They contain, for example, the various treaties on which Lash relies for his interpretation of privileges and immunities. For each of the three reconstruction amendments there is a section on the drafting and another on the ratification to give an idea of how the amendments were understood by the broader public. These volumes remind one of nothing so much as that magnificent collection *The Founders' Constitution* (1987), assembled by Philip Kurland and Ralph Lerner.

Like the Kurland and Lerner volumes, these are beautiful books, eminently readable and a treasure house of source material. One finds, for example, most of the important speeches delivered on the amendments, newspaper reports, some records of ratification deliberation, and, as they say on TV, much, much more. Large as the books are, choices had to be made on what to include and no doubt readers will decry omissions. I, for one, was sorry to see that James Madison's essay "Vices of the Political System of the United States" was not included, or that the selection from Bingham's speech on the Oregon constitution was incomplete. Nonetheless, this will be an invaluable collection for all scholars who work in constitutional law or Reconstruction history. Every research library should have them.

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