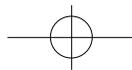
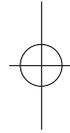
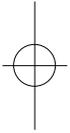
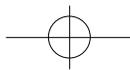
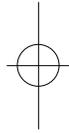
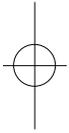


The Fourteenth Amendment and the Law of the Constitution





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Earl M. Maltz

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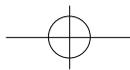
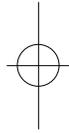
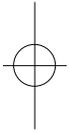
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Preface

The late nineteenth century was a critical period in the development of American constitutional law. During this period, the Supreme Court faced the task of interpreting a Constitution that had been altered by the addition of the Thirteenth, Fourteenth, and Fifteenth amendments during the early Reconstruction era. These amendments had the potential to dramatically reconfigure the structure of American constitutional jurisprudence. Against this background, the decisions reached by the late-nineteenth-century Court provided the basic premises that would govern American constitutional law well into the twentieth century, and in some cases they still have considerable influence today.

Scholarly assessments of the Court's performance during this period have varied widely. Commentators such as Pamela Brandwein, Robert J. Kaczrowski, and Harold M. Hyman and William M. Wiecek have excoriated the Court for abandoning what they see as the basic principles underlying the Reconstruction amendments in order to advance a conservative political agenda. By contrast, Michael Les Benedict has argued that many of the more conservative decisions, while perhaps not as sensitive to racial equality as one might like, were at least consistent with the basic theory of federalism shared by many of the Republicans who were responsible for drafting these amendments. However, all of these scholars proceed from the same methodological premise. Either implicitly or explicitly, they see the Republican ideology of the early Reconstruction era as the benchmark

against which the performance of the Court should be measured.¹

The difficulty with this premise is that neither the drafters nor the ratifiers of the Reconstruction amendments had the authority to enact an ideology. Instead, they simply changed the law by adding new language to the Constitution. Moreover, the language that they chose was not just political rhetoric, as William E. Nelson has contended. Nor was it distinctly associated with the antislavery movement in the nineteenth century, as Kaczrowski, Hyman and Wiecek, and Jacobus tenBroek have argued. Rather, the drafters of the amendments in general, and of section 1 of the Fourteenth Amendment in particular, took care to choose language with a well-settled meaning in American legal thought that predated the dispute over slavery and had been borrowed by both sides in that dispute.²

This reality informs the basic methodology of this book. Focusing on the idea that the Reconstruction amendments are in fact law, the book seeks to measure the work of the late-nineteenth-century Court against the principles of distinctively legal analysis rather than Republican ideology. The book begins with a detailed discussion of the use of Fourteenth Amendment con-

1. Pamela Brandwein, *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth* (Durham, N.C., 1999); Robert J. Kaczrowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights* (New York, 1985); Harold M. Hyman and William M. Wiecek, *Equal Justice under Law: Constitutional Development, 1835–1875* (New York, 1982); Michael Les Benedict, “Preserving Federalism: Reconstruction and the Waite Court,” in Phillip B. Kurland and Gerhard Casper, eds., *The Supreme Court Review, 1978* (Chicago, 1979), pp. 39–80.

2. William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge, Mass., 1988); Robert J. Kaczrowski, “Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction,” *New York University Law Review* 61 (1986): 863–939; Hyman and Wiecek, *Equal Justice under Law*; Jacobus tenBroek, *The Antislavery Origins of the Fourteenth Amendment* (Berkeley, 1951).

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cepts in the antebellum era. An examination of the drafting process itself follows, documenting the claim that the drafters did indeed understand that they were choosing language with an established legal import. Finally, subsequent chapters explore the ways in which the case law of the late nineteenth century departed from these established meanings.

This project could never have come to fruition without the skills of the able secretarial staff at Rutgers Law School in Camden, New Jersey, particularly Celia Hazel and Kaeko Jackson. It was improved immeasurably by the copyediting prowess of Sherry Wert. Finally my wife, Peggy, and children, David, Elizabeth, and Jonathan are constant sources of joy and support.

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