THE SECOND FOUNDING

In *The Second Founding: An Introduction to the Fourteenth Amendment*, Ilan Wurman provides an illuminating introduction to the original meaning of the Fourteenth Amendment’s famous provisions “due process of law,” “equal protection of the laws,” and the “privileges or immunities” of citizenship. He begins by exploring the antebellum legal meanings of these concepts, from Magna Carta, the Statutes of Edward III, and the Petition of Right to William Blackstone and antebellum state court cases. The book then traces how these concepts solved historical problems confronting the framers of the Fourteenth Amendment, including the comity rights of free blacks, private violence and the denial of the protection of the laws, and the notorious abridgment of freedmen’s rights in the Black Codes. Wurman makes a compelling case that if the modern originalist Supreme Court were to interpret the Amendment in “the language of the law,” it would lead to surprising and desirable results today.

**Ilan Wurman** is Associate Professor of Law at the Sandra Day O’Connor College of Law at Arizona State University, where he teaches constitutional law. He is the author of *A Debt against the Living: An Introduction to Originalism* (Cambridge University Press, 2017), and he publishes on administrative law and constitutional law in the nation’s leading law journals.
The Second Founding

AN INTRODUCTION TO THE FOURTEENTH AMENDMENT

Ilan Wurman

Sandra Day O’Connor College of Law at Arizona State University
To the members of the Thirty-Ninth Congress; 
may your work not be forgotten.
CONTENTS

Acknowledgments ................................................................. page viii
Note on the Cover ................................................................. x

Introduction ................................................................. 1

PART I   ANTEBELLUM LAW ....................................................... 13
1 Due Process of Law ......................................................... 15
2 Protection of the Laws ...................................................... 36
3 The Privileges and Immunities of Citizenship ................... 48

PART II   FROM ABRIDGMENT TO WAR AND RATIFICATION .... 69
4 Abridgment of Rights before and after the Civil War ....... 71
5 The Fourteenth Amendment .............................................. 93
6 Privileges, Immunities, and Incorporation ...................... 104

PART III   THE MODERN ERA .................................................. 121
7 The Past and Future of the Fourteenth Amendment ........... 123

Notes ................................................................. 145
Index ................................................................. 186
ACKNOWLEDGMENTS

This is my second book. I am extremely fortunate to have an editor at Cambridge University Press, Matt Gallaway, who has now taken a chance on a young scholar not once but twice. I could not be more grateful for his faith in this project and my work.

I also owe thanks to Earl Maltz, Julian Mortenson, David Upham, and William Wiecek, who read earlier versions of the entire manuscript and some of whom disagreed with much of what it says. Engaging in good spirit with the scholars with whom one disagrees is the most important part of our profession. David Bernstein and Andy Koppelman also provided valuable feedback. I owe a special thanks to Christopher Green, who may know more about the history and drafting of the Fourteenth Amendment than any other scholar. He read my manuscript with a fine-toothed comb, pointing out several errors and corresponding with me on issues large and small. Any errors that remain are, of course, my own. I am also indebted to four anonymous reviewers whose comments helped to improve the book tremendously.

Thanks also go to Ze’ev Wurman and Chase Kassel, two of the most important nonlawyers in my life, who also read the manuscript; the reader has them to thank for improvements to the readability and accessibility of this short volume. And thanks to Jessica Kemper and Emiley Pagrabs, both first in their respective classes at the Sandra Day O’Connor College of Law at Arizona State University, for truly tremendous research assistance. Finally, thanks to Kevin Wang, a precocious undergraduate at Washington University in St. Louis, for perceptive comments and questions on an earlier draft.

viii
But perhaps the most thanks go to the members of the Thirty-Ninth Congress, those framers of the Fourteenth Amendment: they gave us an improvement to the eternal firmament of the U.S. Constitution, without which the Constitution would have had to be abandoned long ago. We today are truly indebted to their achievement.
NOTE ON THE COVER

The image, published in *Harper’s Weekly* in 1867, illustrates the first time the newly freed men voted after the abolition of slavery. Although the Fourteenth Amendment did not guarantee their right to vote—only the Fifteenth Amendment, ratified in 1870, would so guarantee—these newly freed men were instrumental in electing and serving as delegates to new state constitutional conventions under the reconstruction governments in the South. The new state legislatures constituted under these new constitutions would supply the final votes needed for ratification of the Fourteenth Amendment.