History Resources

Reconstruction and the Remaking of the Constitution

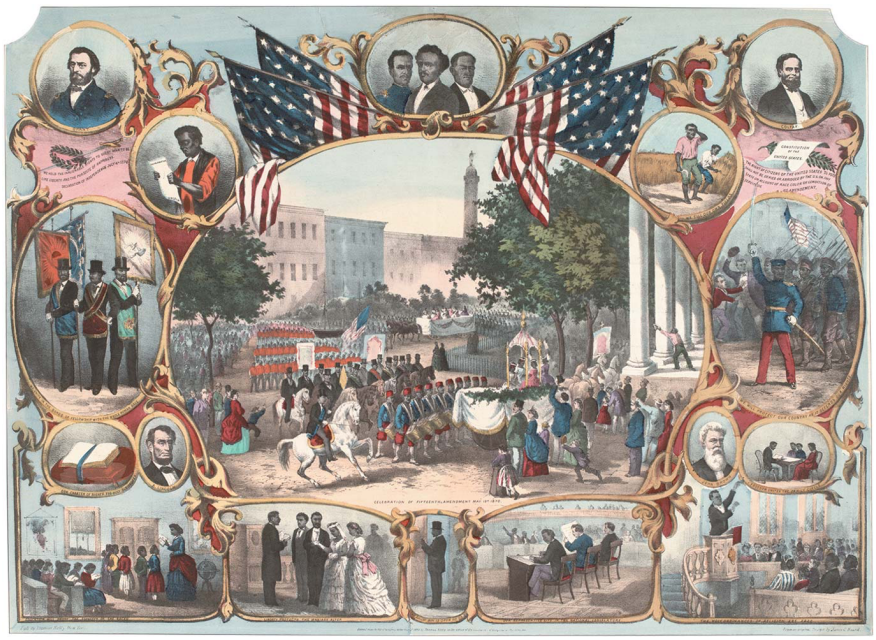
by Eric Foner

Reprinted by permission of Eric Foner from the preface to his book *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (Norton, 2019)

The Civil War and the Reconstruction period that followed form the pivotal era of American history. The war destroyed the institution of slavery, ensured the survival of the Union, and set in motion economic and political changes that laid the foundation for the modern nation. During Reconstruction, the United States made its first attempt, flawed but truly remarkable for its time, to build an egalitarian society on the ashes of slavery. Some of the problems of those years haunt American society today —vast inequalities of wealth and power, terrorist violence, aggressive racism. But perhaps the era's most tangible legacies are the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution. The Thirteenth irrevocably abolished slavery. The Fourteenth constitutionalized the principles of birthright citizenship and equality before the law and sought to settle key issues arising from the war, such as the future political role of Confederate leaders and the fate of Confederate debt. The Fifteenth aimed to secure black male suffrage throughout the reunited nation.

Together with far-reaching congressional legislation meant to provide former slaves with access to the courts, ballot box, and public accommodations, and to protect them against violence, the Reconstruction amendments greatly enhanced the power of the federal government, transferring much of the authority to define citizens' rights from the

"The Fifteenth Amendment Celebrated," lithograph, New York, 1870 (Private Collection)



individual states to the nation. They forged a new constitutional relationship between individual Americans and the national state and were crucial in creating the world's first biracial democracy, in which people only a few years removed from slavery exercised significant political power. All three amendments end with a clause empowering Congress to enforce their provisions, guaranteeing that Reconstruction would be an ongoing process, not a single moment in time. This in itself was a significant innovation. The Bill of Rights said nothing about how the liberties it enumerated would be implemented and protected. Introducing into the Constitution the words "equal protection of the law" and "the right to vote" (along with the qualifying "male," to the outrage of the era's women's rights activists), the amendments both reflected and reinforced a new era of individual rights consciousness among Americans of all races and backgrounds. So profound were these changes that the amendments should be seen not simply as an alteration of an existing structure but as a "second founding," a "constitutional revolution," in the words of Republican leader Carl Schurz, that created a fundamentally new document with a new definition of both the status of blacks and the rights of all Americans. [1]

My book, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution*, from which this essay is adapted, examines the origins, enactment, and objectives of the Reconstruction amendments and the contest over their meaning that followed ratification. The book and this essay do not purport to present a full account of Reconstruction, a task I have assayed elsewhere. [2] But to understand the constitutional changes it is necessary to have some knowledge of this period immediately following the Civil War.

Reconstruction has conventionally been dated from the war's end in 1865 to 1877, when the last southern state came under the control of the white supremacist Democratic party. Lately, scholars have been writing of a "long Reconstruction" that lasted into the 1880s and even beyond. But whatever its chronological definition, Reconstruction can also be understood as a

historical process without a fixed end point—the process by which the United States tried to come to terms with the momentous results of the Civil War, especially the destruction of the institution of slavery. One might almost say that we are still trying to work out the consequences of the abolition of American slavery. In that sense, Reconstruction never ended.

I have devoted much of my career to the study of Reconstruction, but I must acknowledge that this part of our history is unfamiliar to many, perhaps most Americans. As a result, the Reconstruction amendments do not occupy the prominent place in public consciousness as other pivotal documents of our history, such as the Bill of Rights and Declaration of Independence. But even if we are unaware of it, Reconstruction remains part of our lives, or to put it another way, key issues confronting American society today are in some ways Reconstruction questions. Who is entitled to citizenship? Who should enjoy the right to vote? Should the laws protect the rights of aliens as well as citizens? How should the "equal protection of the laws" be defined and guaranteed? What should be the balance of power between the federal government and the states? How should Americans be protected from the depredations of terrorists? All of these questions were intensely debated during Reconstruction. Every term of the Supreme Court, moreover, adjudicates cases requiring interpretation of the Fourteenth Amendment. Some of the most transformative decisions of the modern era, from*Brown v. Board of Education*, outlawing school segregation, to *Obergefell v. Hodges*, establishing the right of gay persons to marry, were based on that amendment. It is impossible to understand American society today without knowing something about the Reconstruction period a century and a half ago.

Reconstruction is also a prime example of what we sometimes call the politics of history—the ways historical interpretation both reflects and helps to shape the time in which the historian is writing. For most of the twentieth century, an account of Reconstruction known as the Dunning School, named for Columbia University professor William A. Dunning and his students, dominated historical writing and popular consciousness. These scholars, who published their major works in the 1890s and early 1900s, were among the first generation of university-trained historians in the United States, and they developed insights that remain valuable, for example, that slavery was the fundamental cause of the Civil War, and that regional and class differences within white society helped to shape Reconstruction politics. Anticipating recent scholarship, they insisted that Reconstruction must be understood in a national context, as an example of nineteenth-century nation building. The Dunning School also pioneered the use of primary sources (at least those emanating from whites) to tell the story of Reconstruction. [3]

Nonetheless, ingrained racism undermined the value of the Dunning School's scholarship. Convinced that blacks lacked the capacity to participate intelligently in political democracy, they condemned Reconstruction, in the words of Dunning's Columbia colleague John W.

Burgess, for imposing the rule of "uncivilized Negroes" over the whites of the South, inevitably producing an orgy of corruption and misgovernment. This portrait of Reconstruction became part of the Lost Cause ideology that permeated southern culture in the first part of the twentieth century and was reflected in the proliferation of Confederate monuments that still dot the southern landscape and have lately become a source of strident debate. Along with a nostalgic image of the Confederacy, the idea of the Lost Cause rested on a view of slavery as a benign, paternalistic institution and of Reconstruction as a time of "Negro supremacy" from which the South was rescued by the heroic actions of the self-styled Redeemers who restored white supremacy. This view of history reached a mass national audience in the film *The Birth of a Nation*, which had its premiere in 1915 in Woodrow Wilson's White House, and Claude Bowers's best-seller of the 1920s, *The Tragic Era*. [4]

This was a portrait of Reconstruction meant to justify the times in which it was written. It provided an intellectual foundation for Jim Crow, the racial system of the South and in many ways the United States as a whole, from the 1890s until the civil rights era of the 1960s. Indeed, it had a powerful impact beyond the nation's borders as a legitimation of colonial rule over nonwhite peoples in far-flung places from South Africa to Australia. [5] Its political lessons were very clear. First, biracial democracy was impossible. Since it had been a cardinal error to give black men the right to vote, the white South was justified in taking away the suffrage around the turn of the twentieth century. Any effort to restore African Americans' political rights would lead to a replay of the supposed horrors of Reconstruction. Second, Reconstruction was imposed on the South by northerners. Some of them may have been motivated by humanitarian ideals, but the outcome proved that outsiders simply do not understand race relations in the southern states. The white South, therefore, should resist outside calls for change in its racial system. The third lesson of this view, which seems arcane today, was that because Reconstruction was brought into existence by the Republican Party, the white South should remain solidly Democratic.

During the 1930s and 1940s, as criticism of the South's Jim Crow system mounted among racial liberals within and outside the region, the "memory" of Reconstruction purveyed by the Dunning School "gave shape and meaning to white supremacist politics" in the South. In 1944, Gunnar Myrdal noted in his influential work *An American Dilemma* that when pressed about the black condition, white southerners "will regularly bring forward the horrors of the Reconstruction governments and of 'black domination.'" [6]

For many years, the outlook of the Dunning School was also incorporated into Supreme Court decisions that interpreted the Reconstruction amendments, producing a jurisprudence that allowed the white South essentially to abrogate many of the provisions of the second founding. In a dissent in a 1945 case arising from the death of a black man at the hands of Georgia law enforcement officers, Justices Owen Roberts, Felix Frankfurter, and Robert H. Jackson wrote that it was "familiar history" that

Reconstruction legislation was motivated by a "vengeful spirit" on the part of northerners. So familiar, in fact, that these justices felt no need to cite any work of historical scholarship to justify their claim. Eight years later, Jackson attributed the "race problem" in the South to whites' "historical memory" of Reconstruction and their identification of blacks with "offensive measures" of that "deplorable" era. This was not an outlook likely to produce a robust interpretation of the Reconstruction amendments as vehicles for promoting racial justice. [7]

The civil rights revolution destroyed the pillars of the Dunning School, especially its overt racism, and historians completely overhauled the interpretation of Reconstruction. If the era was tragic, we now think, it was not because it was attempted but because in significant ways it failed, leaving to subsequent generations the difficult problem of racial justice. Today most historians see Reconstruction, as W. E. B. Du Bois argued three-quarters of a century ago, as a key moment in the history of democracy and its overthrow as a setback for the democratic principle in the United States and throughout the world. This outlook casts the second founding in a different light. [8]

For the historian, seeking to understand the purposes of the Reconstruction amendments is not the same as attempting to identify, as a matter of jurisprudence, the "original intent" of those who drafted and voted on them or the original meaning of the language used. Whether the courts should base decisions on "originalism" is a political, not a historical question. But no historian believes that any important document possesses a single intent or meaning. Numerous motives inspired the constitutional amendments, including genuine idealism, the desire to secure permanently the North's victory in the Civil War, and partisan advantage. Even on its own terms, the quest for original meaning often leads to disappointment. Members of Congress during the Civil War and Reconstruction had the irritating habit of not debating at length, or at all, concerns that have driven recent jurisprudence relating to the amendments, among them school segregation, affirmative action, marriage equality, and corporate personhood. Moreover, as in all crises, the meaning of key concepts embedded in the Reconstruction amendments such as citizenship, liberty, equality, rights, and the proper location of political authority—ideas that are inherently contested—were themselves in flux. In other words, the creation of meaning is an ongoing process. Freezing the amendments at the moment of their ratification misses this dynamic quality.

The Reconstruction amendments can only be understood in terms of the historical circumstances and ideological context in which they were enacted. These include how they were approved by Congress and the states; what those who framed, debated, and ratified them hoped to accomplish; and how other Americans understood and attempted to use them. My purpose is not so much to identify the one "true" intent of the Reconstruction amendments, but to identify the range of ideas that contributed to the second founding; to explore the rapid evolution of thinking in which previously distinct categories of natural, civil, political,

and social rights merged into a more diffuse, more modern idea of citizens' rights that included most or all of them; and to suggest that more robust interpretations of the amendments are possible, as plausible, if not more so, in terms of the historical record, than how the Supreme Court has in fact construed them.

The crucial first section of the Fourteenth Amendment is written in the language of general principles—due process, equal protection, privileges or immunities of citizenship—that cry out for further elaboration, making it inevitable that their specific applications would be the subject of never-ending contention. Indeed, the very "indefiniteness of meaning," as George Boutwell, a key member of Congress, put it, was a "charm" to Congressman John A. Bingham of Ohio, who, more than any other individual, was responsible for that section's wording. [9] The Thirteenth Amendment did not clearly define "involuntary servitude" and the Fifteenth did not explain how to judge whether a state's voting restrictions were enacted "on account of race."

Congress built future interpretation and implementation into the amendments. But this ran the risk that their purposes could be defeated by narrow judicial construction or congressional inaction. That is what in fact happened in the decades between Reconstruction and the civil rights era. At the same time, unanticipated outcomes ended up subverting some of the amendments' purposes. [10] The Thirteenth allows involuntary servitude to survive as a punishment for crime, seemingly offering constitutional sanction to the later emergence of a giant system of convict labor. The Fourteenth can be understood as protecting citizens' rights against violations by the states but not by private individuals (although this is not the only possible interpretation of its language). The Fifteenth leaves the door open to forms of disfranchisement that while not explicitly based on race, bar most blacks from voting.

The very fact that the amendments were compromises means that they are inherently contested, open to what one member of Congress called "conflicting constructions." But rather than lamenting this ambiguity we should, in the spirit of John A. Bingham, embrace it. Ambiguity creates possibilities. It paves the way for future struggles, while giving different groups grounds on which to conduct them. Who determines which of a range of possible meanings is implemented is very much a matter of political power.

Abolitionists and many Republicans saw the second founding as the beginning of an even deeper transformation—what today would be called "regime change," the substitution of a regime committed to the idea of equality for the previous proslavery one. Over the course of the century and a half since their ratification, however, with a range of interpretations available, the Supreme Court has too frequently chosen a narrow reading of the amendments, with little thought about the practical consequences of their decisions. This began during Reconstruction itself as the Court (and nation) retreated from the ideal of equal citizenship and the empowerment

of the federal government. These early decisions created a series of precedents later reinforced by judicial adherence to the Dunning School view of Reconstruction. Historical interpretation has changed dramatically, but earlier decisions resting in part on a now repudiated understanding of the era remain embedded in established jurisprudence. The recent history of the amendments reveals their ongoing expansion to protect the rights of new groups—most recently, gay men and women, and gun owners—yet a restricted application in questions involving race. This reflects, in part, the enduring impact of earlier decisions limiting the amendments' scope and enforcement. [11]

In *The Second Founding*, I devote considerable attention to debates in Congress that focused directly on the language and implications of the amendments and to subsequent court decisions interpreting the newly revised Constitution. But constitutional meaning also arises from sites outside Congress and the courts, including popular conventions, newspapers, and actions in the streets. The protagonists included ordinary Americans of all backgrounds. For example, the Fourteenth Amendment was only ratified by a sufficient number of states because Congress had mandated the implementation of black male suffrage throughout the South, resulting in the election of legislatures that included black members for the first time in American history. Without black suffrage in the South, there would be no Fourteenth Amendment. Yet since no blacks served in Congress when the amendment was approved, the ways black Americans understood its provisions are almost never considered when "intent" is discussed and were consistently ignored by the Supreme Court during and after Reconstruction. To take another example, the campaign for the adoption of the Thirteenth Amendment was initiated by the Women's Loyal National League, founded by Elizabeth Cady Stanton and Susan B. Anthony, who firmly believed that abolition was the route to civil and political equality for blacks and all women. "A true republic," they insisted, would "surely rise from this shattered Union." [12] Even though they would be sorely disappointed, their intentions, as well as those of the broad abolitionist movement that embraced their proposal, constitute one dimension of the amendment's original purposes.

In her memoirs written in the 1890s, Stanton recalled that Reconstruction "involved the reconsideration of the principles of our government and the natural rights of man. The nation's heart was thrilled with prolonged debates in Congress and state legislatures, in the pulpits and public journals, and at every fireside on these vital questions." These debates threw open to question traditional conceptions of citizenship, property rights, democracy, state and national sovereignty, and the connections between public power and individual liberty. They unleashed an upsurge of claims to new rights by all sorts of Americans. The era's "popular constitutionalism" must form part of our understanding of the Reconstruction amendments. And that understanding changed over time as Americans sought to use the amendments for their own purposes and to expand their impact, often in ways not anticipated by those who wrote them. The second founding made it possible for movements for equality of

all kinds to be articulated in constitutional terms. And demands that proved unsuccessful not only provide insights into grassroots political outlooks, but sometimes laid the groundwork and established the agenda for subsequent efforts that eventually prevailed. [13]

Shortly after the ratification of the Fifteenth Amendment, Carl Schurz summarized the meaning of the second founding. The "constitutional revolution," he declared, "found the rights of the individual at the mercy of the states . . . and placed them under the shield of national protection. It made the liberty and rights of every citizen in every state a matter of national concern. Out of a republic of arbitrary local organizations it made a republic of equal citizens." Unfortunately, a retreat soon followed, in which Schurz himself participated. By the turn of the century, a new regime of inequality took the place of the old, and full enjoyment of citizens' rights was indefinitely postponed. But not everything achieved after the Civil War could be taken away. The families, schools, and churches established and consolidated during Reconstruction survived, springboards for future struggles. The amendments remained in place, "sleeping giants" to borrow a phrase from Charles Sumner, that continued to inspire those who looked to the Constitution to support their efforts to create a more just social order. [14] Decades later they would be awakened to provide the constitutional foundation for the civil rights revolution, sometimes called the Second Reconstruction. It is worth noting that no significant change in the Constitution took place during the civil rights era. The movement did not need a new Constitution, it needed the existing one enforced.

More recently, we have experienced a slow retreat from the ideal of racial equality. We live at a moment in some ways not unlike the 1890s and early twentieth century, when state governments, with the acquiescence of the Supreme Court, stripped black men of the right to vote and effectively nullified the constitutional promise of equality. "Principles which we all thought to have been firmly and permanently settled," Frederick Douglass observed, were "boldly assaulted and overthrown." [15] As history shows, progress is not necessarily linear or permanent. But neither is retrogression.

By themselves, the constitutional amendments that emerged from the Civil War cannot address all the legacies of slavery. Sumner remarked of the Thirteenth Amendment that rewriting the Constitution was not an end in itself but "an incident in the larger struggle for freedom and equality." But the Reconstruction amendments remain, in the words of one Republican newspaper, "a declaration of popular rights." They retain unused latent power that, in a different political environment, may yet be employed to implement in new ways the Reconstruction vision of equal citizenship for all. [16]

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[1] *Congressional Globe*, 41st Congress, 2d Session, 3607.

[2] Eric Foner, *Reconstruction: America's Unfinished Revolution 1863–1877*,

rev. ed. (New York: Harper Perennial, 2014). For a collection of essays surveying current scholarship on Reconstruction, see John David Smith, ed., *Interpreting American History: Reconstruction* (Kent, Ohio: Kent State University, 2016).

[3] John David Smith and J. Vincent Lowery, eds., *The Dunning School: Historians, Race, and the Meaning of Reconstruction* (Lexington: The University Press of Kentucky, 2013).

[4] John W. Burgess, *Reconstruction and the Constitution, 1866–1876* (New York: Charles Scribner's Sons, 1902), 217; Claude G. Bowers, *The Tragic Era: The Revolution after Lincoln* (Cambridge: Houghton Mifflin Company, 1929).

[5] Marilyn Lake and Henry Reynolds, *Drawing the Global Colour Line: White Men's Countries and the International Challenge of Racial Equality* (Cambridge and New York: Cambridge University Press, 2008), 6–10, 50–65.

[6] Jason Morgan Ward, "Causes Lost and Found: Remembering and Refighting Reconstruction in the Roosevelt Era," in Carole Emberton and Bruce E. Baker, eds., *Remembering Reconstruction: Struggles over the Meaning of America's Most Turbulent Era* (Baton Rouge: Louisiana State University Press, 2017), 37–39; Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* (New York: Harper & Brothers, 1944), 446.

[7] Eric Foner, "The Supreme Court and the History of Reconstruction—and Vice Versa," *California Law Review* 112 (November 2012), 1585–1608; David M. O'Brien, *Justice Robert H. Jackson's Unpublished Opinion in Brown v. Board: Conflict, Compromise, and Constitutional Interpretation* (Lawrence: University Press of Kansas, 2017), 124.

[8] W. E. B. Du Bois, *Black Reconstruction in America* (New York: Harcourt, Brace and Company, 1935).

[9] George S. Boutwell, *Reminiscences of Sixty Years in Public Affairs*, 2 vols. (New York: McClure Phillips & Company, 1902), 2:42.

[10] David E. Kyvig, ed., *Unintended Consequences of Constitutional Amendments* (Athens: University of Georgia Press, 2000).

[11] *Congressional Globe*, 39th Congress, 1st Session, 2466–2467; Barry Friedman, "Reconstructing Reconstruction: Some Problems for Originalists (And Everyone Else, Too)," *University of Pennsylvania Journal of Constitutional Law* 11 (July 2009), 1707. See also Jamal Greene, "Fourteenth Amendment Originalism," *Maryland Law Review* 71 (2012), 979–984.

[12] Faye E. Dudden, *Fighting Chance: The Struggle over Woman Suffrage and Black Suffrage in Reconstruction America* (Oxford and New York: Oxford University Press, 2011), 51.

[13] Elizabeth Cady Stanton, *Eighty Years and More (1815–1897): Reminiscences of Elizabeth Cady Stanton* (New York: European Publishing Company, 1898), 241; Elizabeth Beaumont, *The Civic Constitution: Civic Visions and Struggles in the Path toward Constitutional Democracy* (Oxford and New York: Oxford University Press, 2014), xv–xvi, 2–4; Laura F. Edwards, *A Legal History of the Civil War and Reconstruction: A Nation of Rights* (Cambridge and New York: Cambridge University Press, 2015), 6; Hendrik Hartog, "The Constitution of Aspiration and 'The Rights That Belong to Us All,'" *Journal of American History* 74 (December 1987), 354; Catherine A. Jones, "Women, Gender, and the Boundaries of Reconstruction," *Journal of the Civil War Era* 8 (March 2018), 116.

[14] *Congressional Globe*, 41st Congress, 2d Session, 3607; Foner, *Reconstruction*, 232.

[15] David W. Blight, *Frederick Douglass: Prophet of Freedom* (New York: Simon & Schuster, 2018), 743.

[16] Michael Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment* (Cambridge and New York: Cambridge University Press, 2001), 60; *Philadelphia North American and United States Gazette*, June 8, 1866.

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