

# OUR FORGOTTEN FOUNDERS: RECONSTRUCTION, PUBLIC EDUCATION, AND CONSTITUTIONAL HEROISM

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**ABSTRACT:** This Article examines a set of constitutional stories that has not been the subject of focused study by legal scholars—the constitutional stories we tell our schoolchildren. In particular, this Article focuses on portrayals of the Founding and Reconstruction in our most widely-used high school textbooks. These stories offer new clues about the background assumptions that elite lawyers, political leaders, and the wider public bring to bear when they consider the meaning of the Constitution—especially, the Bill of Rights and the Fourteenth Amendment. In the end, our textbooks tend to praise the Founding generation and canonize certain key “Founding Fathers,” while, at the same time, largely ignoring Reconstruction’s key players and underemphasizing the constitutional revolution these “Forgotten Founders” envisioned (and began to wage). Students are left with a relatively pristine view of the Founding, while receiving (at best) a “warts-and-all” account of Reconstruction. These disparate accounts (presented for decades in our classrooms) have likely played an important role in constructing (and reinforcing) a constitutional culture that reveres the “Founding Fathers,” but gives short shrift to their Reconstruction counterparts.

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## INTRODUCTION

Works on the “Founding” generation consistently inhabit national bestseller lists. For instance, David McCulloch’s *1776* placed fifth on *Publishers Weekly*’s 2005 list, beating out pop culture favorites *Blink* and *Freakonomics*.<sup>1</sup> McCulloch still trailed four self-help books—two by evangelical pastors, one by an infomercial icon, and one by a pair of doctors—but not even the mighty George Washington can be expected to compete with the public’s appetite for “diet secrets,” “natural cures,” and tips on the “good life.”<sup>2</sup> Over the last decade, other similarly successful titles have included *His Excellency* and *Founding Brothers* (both) by Joseph Ellis and *John Adams* (again) by David McCulloch.<sup>3</sup> In fact, McCulloch’s *John Adams* later became an Emmy Award-winning mini-series on HBO.<sup>4</sup> In short, Americans revere their Eighteenth Century Founders.<sup>5</sup>

At the same time, the American book-consuming public has largely ignored an important generation of leaders—leaders who, “[f]our score years after the Founding, . . . transform[ed] what their fathers had brought forth on the continent.”<sup>6</sup> These Nineteenth Century Founders<sup>7</sup> include such forgotten men as Thaddeus Stevens, Charles Sumner, and John Bingham. In antebellum America, Stevens defended fugitive slaves for free (and with much success); Sumner fought for school desegregation in Boston; and, Bingham envisioned a national government that protected the free speech rights of Southern abolitionists. Under their post-Civil War leadership, “the nation ended slavery, made every person born under the flag an equal citizen, guaranteed a

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<sup>1</sup> See Bestselling Books of the Year, 1996-2007, available at <http://www.publishersweekly.com/article/CA6540986.html>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See John Adams (TV miniseries), [http://en.wikipedia.org/wiki/John\\_Adams\\_\(miniseries\)](http://en.wikipedia.org/wiki/John_Adams_(miniseries)).

<sup>5</sup> For the remainder of this Article, I will refer to the Eighteenth Century Founders as our “Founding Fathers.” Works on Lincoln have been similarly successful, as evidenced by Doris Kearns Goodwin’s *Team of Rivals*. *Id.*

<sup>6</sup> AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 351 (2005).

<sup>7</sup> For the remainder of this Article, I will refer to our Nineteenth Century Founders as our “Reconstruction Founders.”

host of civil rights to all Americans, and extended equal political rights to black men.”<sup>8</sup> These are our Forgotten Founders.

While our bookstores are (rightly) filled with works focused on the Civil War and Abraham Lincoln (not to mention our Founding Fathers), they often include few works on Reconstruction and even fewer biographies of our Reconstruction Founders. A Library of Congress subject search of books published since 1980 reveals 1,084 works on Abraham Lincoln, 160 on James Madison, and 115 on Alexander Hamilton.<sup>9</sup> The same search yields only eighteen works on Charles Sumner, seven on Thaddeus Stevens, and one on John Bingham.<sup>10</sup> Furthermore, in searching *New York Times* articles since 1998, 1,758 refer to Abraham Lincoln, 679 to Alexander Hamilton, and 653 to James Madison.<sup>11</sup> At the same time, only twenty-four refer to Charles Sumner, six to Thaddeus Stevens, and one to John Bingham.<sup>12</sup> In the end, while Madison has emerged in the public consciousness as the “Father of the Constitution,” Hamilton as among our nation’s “Founding Fathers,” and Lincoln as the “Great Emancipator,”<sup>13</sup> Stevens, Sumner, and Bingham have been largely forgotten.

A similar disparity exists in elite legal culture. Larry Kramer describes constitutional theory as “‘Founding obsessed’ in its use of history,”<sup>14</sup> while Barry Friedman and Scott Smith chastise the legal academy for an “obsession with original meaning”<sup>15</sup> that “almost entirely ignores the intervening 200 years of constitutional history.”<sup>16</sup> This has led Keith Whittington to

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<sup>8</sup> AMAR, *supra* note 6, at 351.

<sup>9</sup> See Library of Congress Online Catalogs, available at <http://catalog.loc.gov/webvoy.htm>.

<sup>10</sup> *Id.*

<sup>11</sup> This is based on a Westlaw search in the *New York Times* database.

<sup>12</sup> *Id.*

<sup>13</sup> See, e.g., Sufjan Stevens, *Decatur, or Round of Applause for Your Stepmother!*, on ILLINOIS (Asthmatic Kitty 2005) (“Stephen A. Douglas was a great debater, but Abraham Lincoln was the ‘Great Emancipator.’”).

<sup>14</sup> Larry Kramer, *Fidelity to History—And Through It*, 65 FORDHAM L. REV. 1627, 1628 (1997).

<sup>15</sup> Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 5 (1998).

<sup>16</sup> *Id.*

warn that “America’s constitutional history is not just the history of the founding.”<sup>17</sup> A simple search of recent law journal articles provides some support for these criticisms. Over the last decade, 7,630 law journal articles refer to James Madison and 4,844 to Alexander Hamilton. Although hardly ignored, our Reconstruction Founders lag far behind—with Charles Sumner cited in 312 articles, John Bingham in 265, and Thaddeus Stevens in 153. This disparity might begin to explain the incomplete analysis in Justice Scalia’s landmark decision in *District of Columbia v. Heller*,<sup>18</sup> a decision allegedly relying on the text and history of the Constitution, but largely ignoring the Reconstruction era.

Referring to *Heller* as one of three “defining opinions” of her tenure at *The New York Times*, Linda Greenhouse described the decision as a “triumph of originalism.” She observed that, although Justices Scalia and Stevens “came to opposite conclusions,”<sup>19</sup> both “proceeded on the premise that original understanding of the amendment’s framers was the proper basis for the decision.”<sup>20</sup> Lawrence Solum added of *Heller* that “it is hard to imagine finding a clearer example of ‘original public meaning originalism’ in an actual judicial decision,”<sup>21</sup> as Justice Scalia “examined each of the operative words and phrases in the Second Amendment”<sup>22</sup> by considering the “evidence of usage from the period the Second Amendment was proposed and

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<sup>17</sup> Keith E. Whittington, “Clothed with the Legitimate Authority of the People,” 91 VA. L. REV. 2023, 2041 (2005).

<sup>18</sup> 128 S.Ct. 2783 (2008).

<sup>19</sup> Linda Greenhouse, 3 *Defining Opinions*, N.Y. TIMES, July 13, 2008, at WK4. For other celebrations of *Heller* as a landmark opinion for originalism, see Randy E. Barnett, Op-Ed., *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13 (“Justice Scalia’s opinion is the finest example of what is now called ‘original public meaning’ jurisprudence ever adopted by the Supreme Court.”); and David G. Savage, *Supreme Court Finds History Is a Matter of Opinions*, L.A. TIMES, July 13, 2008, at A14 (“This year the Supreme Court relied more than ever on history and the original meaning of the Constitution in deciding its major cases.”).

For a concise history of the debates over originalism, see Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, 31 HARV. J.L. & PUB. POL’Y 875 (2008). Other helpful overviews include Friedman & Smith, *supra* note 15; and Lawrence B. Solum, Semantic Originalism 14-28, *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120244](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244).

<sup>20</sup> Linda Greenhouse, 3 *Defining Opinions*, N.Y. TIMES, July 13, 2008, at WK4.

<sup>21</sup> Solum, *supra* note 19, at 26-27.

<sup>22</sup> *Id.*

drafted.”<sup>23</sup> Even Akhil Amar noted that “Justice Scalia’s landmark ruling merits our attention for its method as well as its result. Behold: a constitutional opinion that actually dwells on the Constitution itself!”<sup>24</sup>

Although both Scalia and Stevens probed the relevant text and history of the Second Amendment, both gave short shrift to the Reconstruction context and the Fourteenth Amendment. This oversight led Amar to conclude that neither Justice “offered a sufficiently holistic account”<sup>25</sup> in *Heller*, as both “scanted various amendments beyond the Second [that were] in fact the key to a full understanding of what ‘the right of the people to keep and bear arms’ properly means in America today.”<sup>26</sup> This is an especially odd oversight for Scalia, both because the slighted Amendments “strongly support his conclusions”<sup>27</sup> and because, as a self-professed (even if “faint-hearted”) originalist, Scalia is committed to “the original meaning of the [Constitution’s] text.”<sup>28</sup>

Instead of taking into account the Constitution’s full history, Scalia fell into the familiar trap noted above by Kramer, Friedman, Smith, and Whittington—privileging the text and history of the Eighteenth Century over later constitutional developments.<sup>29</sup> In earlier works, Scalia recognized that originalism’s “greatest defect . . . [was] the difficulty of applying it correctly.”<sup>30</sup> In originalism’s defense, Scalia countered that “the originalist at least knows what he is looking

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<sup>23</sup> *Id.*

<sup>24</sup> Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 147 (2008).

<sup>25</sup> *Id.* at 146.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 174.

<sup>28</sup> ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (1998).

<sup>29</sup> One can see hints at this myopic focus on the Eighteenth Century Founders in Scalia’s academic work explaining his methodology. *See, e.g., id.* at 38 (explaining his brand of originalism and focusing on key texts that provide a gloss on the ratification of the Constitution and the Bill of Rights). In the same work, Scalia rehearses his arguments in *Heller*, crediting the Eighteenth Century Founders with codifying a “right to self-defense” in our Constitution. *Id.* at 43.

<sup>30</sup> Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989).

for: the original meaning of the text.”<sup>31</sup> This defense of originalism ignores what can often be a more vexing pair of questions: 1) the “original meaning” of which parts of the “text?”; and, 2) whose “meaning” counts as “original?”

In an opinion spanning over 134 pages of the *United States Reports*, Scalia devotes less than two pages of his analysis to the Reconstruction Amendments and related Reconstruction-era civil rights legislation.<sup>32</sup> Although Scalia notes that “there was an outpouring of discussion of the Second Amendment in Congress and in public discourse”<sup>33</sup> after the Civil War, “[s]ince those discussions took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources.”<sup>34</sup> This is true even as Scalia concludes that “[i]t was plainly the understanding in the post-Civil War Congress that the Second Amendment protected an individual right to use arms for self-defense.”<sup>35</sup> Scalia simply ignores the possible ways in which the Fourteenth Amendment and the Reconstruction context transformed the constitutional right to gun ownership.

Scalia is hardly alone in his neglect of our Reconstruction Founders, as few Justices ever dwell on Reconstruction. In fact, in the wider context of the Court’s history, Scalia’s cursory treatment of the Reconstruction era in *Heller* is almost commendable, in that at least he pauses for a moment on this key period (and even cites Charles Sumner) before rejecting Reconstruction’s relevance.<sup>36</sup> This is in stark contrast to the Court’s habitual, myopic obsession with the “Founding.” This obsession is evident, for instance, in a quick search of the *United States Reports* for citations to Madison, Hamilton, Sumner, Stevens, and Bingham. Since the

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<sup>31</sup> SCALIA, *supra* note 28, at 45.

<sup>32</sup> For Scalia’s discussion of “Post-Civil War Legislation” in *Heller*, see 128 S.Ct. at 2809-11.

<sup>33</sup> *Heller*, 128 S.Ct. at 2809, 2810.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 2811.

<sup>36</sup> *Heller*, 128 S. Ct. at 2807 (quoting Sumner’s “The Crime Against Kansas” speech).

outbreak of the Civil War, Madison and Hamilton appear in 191 and 100 Court opinions, respectively. Our Reconstruction Founders lag far behind, with Sumner appearing in only 9 opinions (including *Heller*), Stevens in 8, and Bingham in 7.<sup>37</sup> Between Reconstruction and the 1940s, our Reconstruction Founders appear in only two cases combined, both in the late nineteenth century.<sup>38</sup> Furthermore, Bingham is completely forgotten until Hugo Black resurrects him in his landmark dissent in *Adamson v. California* in 1947.<sup>39</sup> Following Black's resignation and death in 1971, the Reconstruction Founders disappear again from the *United States Reports* until the 1990s.<sup>40</sup> Even with these tendencies in mind, Scalia's scant treatment of the debate surrounding the Fourteenth Amendment is puzzling.

The Fourteenth Amendment "proclaimed that all citizens would be protected in all their fundamental 'privileges' and 'immunities'"<sup>41</sup> against "abuses by the states."<sup>42</sup> Although the "Fourteenth Amendment did not itemize the privileges and immunities of American citizenship,"<sup>43</sup> it "invited interpreters to pay close attention to fundamental rights that Americans had affirmed through their lived experience and had memorialized in state bills of rights and other canonical texts such as the Declaration of Independence and landmark civil rights

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<sup>37</sup> These numbers are based on a simple Westlaw search.

<sup>38</sup> See *Plessy v. Ferguson* 163 U.S. 537, 544 (1896) (citing 59 Mass. (5 Cush.) 198, 206 (1849)) ("The great principle," said Chief Justice Shaw, 'advanced by the learned and eloquent advocate for the plaintiff [Mr. Charles Sumner], is that, by the constitution and laws of Massachusetts, all persons, without distinction of age or sex, birth or color, origin or condition, are equal before the law.');

The *Legal Tender Cases*, 79 U.S. 457, 517 (1870) ("Those of us who, in the words of the late Thaddeus Stevens, 'believe, as all should believe, that the judiciary is the most important department of the government, and that great, wise, and pure judges are the chief bulwark of the lives, liberty, and rights of the people,' will then, indeed, have reason to fear that the court, in reviewing this question, will, so far from having actually and finally settled the principle of constitutional law involved, the rather have unsettled it; and, in so unsettling it, have unsettled also the grounds for the confidence and submission of this people under the determination by this tribunal of constitutional questions.')

<sup>39</sup> 332 U.S. 46, 73-74 (1947) (Black, J., dissenting) ("Congressman Bingham may, without extravagance, be called the Madison of the first section of the Fourteenth Amendment.').

<sup>40</sup> The Reconstruction Founders appear in only one case during this period, *Richardson v. Ramirez*, 418 U.S. 24, 45 (1974) (noting that Bingham was "one of the principal architects of the Fourteenth Amendment and an influential member of the Committee of Fifteen.').

<sup>41</sup> Amar, *supra* note 24, at 175.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 176.

legislation.”<sup>44</sup> For our Reconstruction Founders, these “privileges and immunities” included “a ‘personal’ right to protect their ‘personal liberty’ and ‘personal security’ in their homes.”<sup>45</sup> This vision of gun ownership grew out of the Reconstruction Republicans’ post-Civil War experience, where “Southern blacks might need guns in their homes to protect themselves from private violence in places where they could not rely on local constables to keep their neighborhoods safe.”<sup>46</sup> In this, as Amar memorably notes, “[T]he poster boy of arms morphed from the Concord minuteman to the Carolina freedman.”<sup>47</sup> This supportive history presents us with a “puzzle” raised by Amar in his analysis of *Heller*: “If adding the . . . Fourteenth Amendment[] to the mix would have dramatically strengthened Justice Scalia’s opinion from an originalist perspective, then why did he omit th[is] holistic strengthener[]?”<sup>48</sup>

Amar suggests that part of the problem might be elite legal culture’s obsession with the Founding Generation. For instance, Amar observes that the “NRA pays far too much attention to 1775-91 and far too little to 1830-68.”<sup>49</sup> This focus surely shaped their litigation strategy in *Heller*. Amar notes a similar tendency in the First Amendment context, where “[a]dvocates and scholars focus all their analytic and narrative attention on the Creation, not the Reconstruction.”<sup>50</sup> In attempting to pinpoint the root of this “Founding-era” obsession among legal elites, Amar flags the “less than admirable role [Harvard has played] in educating its

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 266 (1998).

<sup>48</sup> Amar, *supra* note 24, at 177.

<sup>49</sup> AMAR, *supra* note 47, at 266. In Bruce Ackerman’s idiom, this is privileging “one-three” synthesis over “two-three” synthesis. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 140-41 (1991).

<sup>50</sup> AMAR, *supra* note 47, at 242. Like today’s NRA, “[i]n championing the rights of Communists and Jehovah’s Witnesses in the twentieth century, the American Civil Liberties Union analogized to Zenger more than to the abolitionists—who are the truer forebears of modern political and religious speakers perceived as ‘nuts’ and ‘cranks’ by the dominant culture.” *Id.* at 242-43.

students . . . about the proper meaning of the Fourteenth Amendment.”<sup>51</sup> Although Amar rightly focuses on the complicity of elite legal culture in producing Scalia’s incompletely-reasoned *Heller* opinion, I am interested in analyzing the possible role that wider constitutional culture<sup>52</sup> has played in reinforcing (or, at least, silently accepting) *Heller*-like, “Founding-obsessed” narratives. This is part of a larger project aimed at examining understudied (or completely unstudied) phenomena that importantly shape our popular constitutional culture.<sup>53</sup>

In this Article, I move beyond the familiar discussions of Felix Frankfurter, Hugo Black, Charles Fairman, William Crosskey, and Raoul Berger. Instead, I consider a factor that has been all-but-ignored in the legal academy—public education—and focus on a question that has not yet been asked by legal scholars: What role has public education played in constructing (or reinforcing) a constitutional culture that celebrates our Founding Fathers, but gives short shrift to

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<sup>51</sup> Amar, *supra* note 24, at 177. For Amar’s account of the *Harvard Law Review*’s influence on Fourteenth Amendment doctrine over the last half century, see *Id.* at 177-190. Even Reva Siegel, in her analysis of *Heller*, sets up a false dichotomy between an “originalism” that sees the Court as “merely enforcing the judgments of eighteenth-century Americans, who, in an epochal act of constitutional lawmaking, ratified a Bill of Rights that forbids handgun bans,” and “popular constitutionalism,” which see the Court as “respond[ing] to the beliefs and values of living Americans who identify with the commitments and traditions of their forbearers.” Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 192 (2008).

<sup>52</sup> Robert Post defines “constitutional culture” as “a specific subset of culture that encompasses extrajudicial beliefs about the substance of the Constitution.” Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003). Reva Siegel adds “the term ‘constitutional culture’ . . . refer[s] to the understandings of role and practices of argument that guide interactions among students and officials in matters concerning the Constitution’s meaning.” Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era*, 94 CAL. L. REV. 1323, 1325 (2006). I will draw heavily upon Post and Siegel’s conceptions of “constitutional culture” throughout this Article.

<sup>53</sup> See also Tom Donnelly, Note, *Popular Constitutionalism, Judicial Supremacy, and the Stories We Tell Our Schoolchildren*, 108 YALE L.J. 948 (2009). Since the public’s view of the Constitution has been shown to influence judicial decision-making and legal culture, we should attempt to more fully understand the phenomena that influence the political-legal socialization of average citizens. See, e.g., THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 192 (1989) (concluding that “the evidence suggests that the modern Court has been an essentially majoritarian institution” and has “reflect[ed] mass public opinion as often as do popularly elected officeholders”); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2606 (2003) (noting that the Court usually makes decisions “within a range of acceptability to a majority of the people”); Larry Kramer, *Generating Constitutional Meaning*, 94 CAL. L. REV. 1439, 1452 (2006) (“[W]here th[e] [perceived limits of the Court’s power] are located, what forms public resistance will take, and what will emerge from such resistance are critically shaped by public beliefs about who is supposed to have what authority. Judicial supremacy is an intellectual construct whose whole function and effect is to forestall popular constitutionalism and to extend how far courts can go before triggering public reaction.”).

their Reconstruction counterparts? In this, I am building upon the extensive work completed in recent years on the construction of the legal canon,<sup>54</sup> beginning with Bruce Ackerman,<sup>55</sup> and continuing through the work of Jack Balkin,<sup>56</sup> Sanford Levinson,<sup>57</sup> and Richard Primus,<sup>58</sup> among others.<sup>59</sup> These scholars have examined the lessons that our law schools are transmitting to the next generation of lawyers, including extensive analyses of the key issues and cases filling our most widely-used casebooks. At the same time, even as legal scholars are fond of citing “high school civics” notions of our Constitution and its history,<sup>60</sup> few have taken the time to consider what is actually being taught in our high school classrooms. This is a mistake.

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<sup>54</sup> See J.M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* 18-19 (1998) (“[T]he key to information is in formation; it lies in the selection of and categorization of the flux of experience into comprehensible categories, events, and narratives. In order to understand, we must establish similarities and differences, categories and narratives, canons and heuristics.”).

<sup>55</sup> 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); ACKERMAN, *supra* note 49; Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007).

<sup>56</sup> J.M. Balkin & Sanford Levinson, *Constitutional Canons and Constitutional Thought* in LEGAL CANONS 6 (J.M. Balkin & Sanford Levinson eds., 2000) (“Just as literature professors decide what poems and novels to teach, editors of casebooks decide what ‘cases and materials’ students ought to be exposed to on their intellectual journey from uninitiated laypersons to well-educated, ‘disciplined’ lawyers.”); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998).

<sup>57</sup> See *supra* note 56.

<sup>58</sup> Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243 (2000).

<sup>59</sup> See also Jerome A. Barron, *Capturing the Canon*, 17 CONST. COMMENT. 349 (2000); Philip Bobbitt, *The Constitutional Canon* in LEGAL CANONS 364 (J.M. Balkin & Sanford Levinson eds., 2000) (“There is a canon in constitutional interpretation. It is captured in major casebooks, taught in the introductory courses in constitutional law, relied upon explicitly, but more often implicitly, by judges and presidents and members of Congress.”); Suzanna Sherry, *The Canon in Constitutional Law* in LEGAL CANONS (J.M. Balkin & Sanford Levinson eds., 2000); Mark Tushnet, *The Canon(s) of Constitutional Law: An Introduction*, 17 CONST. COMMENT. 187 (2000); William M. Wiecek, *Is There a Canon of Constitutional History?*, 17 CONST. COMMENT. 411 (2000).

<sup>60</sup> A quick Westlaw search yields recent references to “high school civics” instruction in Articles in our nation’s leading law journals by some of our most eminent constitutional scholars. See, e.g., David J. Barron, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 803 (2008) (“Our detailed review is a reminder that the high school civics notion of checks and balances should not be dispensed with so quickly in this context.”); Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 636 n.9 (2000) (“Siegan’s description of the American system . . . is so uncritical that it might embarrass even the author of a high-school civics text.”); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 400 (1995) (“In Ackerman’s view, (a) the New Deal radically changed the Constitution; (b) change is justified by constitutional amendment; (c) therefore, an amendment must justify the New Deal; and high school history to one side, indeed, (d) there was a constitutional amendment, or the functional equivalent of a constitutional amendment, in the late 1930s sufficient to justify the changes of the New Deal.”); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 544 (1994) (“It is thus perhaps a bit surprising to arrive at law school and discover that this ‘high school civics’ conception of the separation of powers, particularly presidential control over execution of the laws, has for some time now been out of favor.”); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside*

In his 2006 Holmes Lectures, Ackerman argued that “the stories lawyers tell about our constitutional development will make a difference—both in shaping the perceptions of judges, legislators, and Presidents, and in framing broader public understandings of democratic possibility.”<sup>61</sup> The same may be said of the stories we tell our schoolchildren. Concededly, our schools are not alone in shaping each generation’s view of our constitutional tradition. As Lloyd Kramer and Donald Reid rightly note, “[O]ur families, neighbors, churches, politicians, and mass media offer us interpretations of historical events and narrative structures to make sense of the past.”<sup>62</sup> Even so, as Kramer and Reid quickly add, “Most people . . . receive the most complete, systematic presentation of history in the survey courses that are taught at schools.”<sup>63</sup> Furthermore, studies confirm that “for many students, [high school] is the last time they will ever study history.”<sup>64</sup>

In this Article, I consider the constitutional stories we tell our schoolchildren about the Founding and Reconstruction. To that end, I analyze the relevant sections of our most widely-used high school history textbooks, focusing particularly on the consensus narratives and constitutional heroes that emerge in these accounts. This analysis is vital to more fully understanding the background assumptions that elite lawyers, political leaders, and the wider public bring to bear when they consider the meaning of the Constitution—especially, the Bill of Rights and the Fourteenth Amendment. Ultimately, our textbooks treat our Founding Fathers

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*Article V*, 94 COLUM. L. REV. 457, 495 (1994) (“[W]e have not been taught—in high school civics, in college classrooms, in Supreme Court opinions, or even in law school casebook and law reviews, just how central James Wilson was to the Founding generation, and to the Founding itself.”); Bruce A. Ackerman, *Foreword: Law in an Activist State*, 92 YALE L.J. 1083, 1112 (1983) (“[W]e continue to tolerate a professional discussion of these matters that rarely moves beyond the banalities of high school civics.”).

<sup>61</sup> Ackerman, *supra* note 55, at 1809.

<sup>62</sup> Lloyd Kramer & Donald Reid, *Introduction: Historical Knowledge, Education, and Public Culture*, in *LEARNING HISTORY IN AMERICA: SCHOOLS, CULTURES, AND POLITICS* 1, 8 (Lloyd Kramer et al., eds. 1994).

<sup>63</sup> *Id.*

<sup>64</sup> Alice Garrett, *Teaching High School History Inside and Outside the Historical Canon*, in *LEARNING HISTORY IN AMERICA: SCHOOLS, CULTURES, AND POLITICS* 71, 72 (Lloyd Kramer et al., eds. 1994).

much more kindly than their Reconstruction counterparts. Although this disparity is even more pronounced in earlier editions, it is still evident in today's textbooks.

Our textbooks tend to praise the Founding generation and canonize certain key Founding Fathers, while, at the same time, largely ignoring Reconstruction's key players and underemphasizing the constitutional revolution our Forgotten Founders envisioned (and began to wage). Students are left with a relatively pristine view of the Founding, while receiving (at best) a "warts-and-all" account of Reconstruction. Furthermore, our students are introduced to several constitutional heroes (both major and minor) in the Founding era—from James Madison and Alexander Hamilton to Roger Sherman and William Patterson. At the same time, few of our Reconstruction Founders are mentioned (for instance, Bingham is completely ignored), and those that are mentioned (such as Stevens and Sumner) are often criticized. These disparate accounts (presented for decades in our classrooms) could be a key factor in constructing (and reinforcing) our "Founding-obsessed" culture.

To supplement this analysis, I also consider the treatment of the Bill of Rights and the Fourteenth Amendment in our high school government textbooks—focusing particularly on any mention of the Founding or Reconstruction in these accounts. Although the Court emerges as the key constitutional hero in this story, our Founding Fathers are once again treated more favorably than their Reconstruction counterparts. As selective incorporation took hold in the twentieth century, the story of the Bill of Rights and the Fourteenth Amendment was primarily portrayed in our government textbooks as a Court-centered triumph, with an important supporting role played by our Founding Fathers and their Founding-era vision. At the same time, our Reconstruction Founders (particularly Bingham) were once again ignored, even as new evidence mounted that at least some of the key framers of the Fourteenth Amendment (including

Bingham) envisioned federal protection of fundamental rights against State violations. In the end, our Reconstruction Founders deserve a more prominent place in the public's consciousness—and in the constitutional stories we tell our schoolchildren.

Stevens, Sumner, and Bingham struggled to “transform [a] slaveholding republic to one consistent with the Declaration's promise of liberty and equality.”<sup>65</sup> Although Reconstruction is often considered one of the most controversial periods in American history, it could also be viewed “as the last great crusade of nineteenth-century romantic reformers.”<sup>66</sup> If today's schools teach our children to revere the Founding generation by emphasizing their achievements and largely ignoring their shortcomings, our schools should (at the very least) stress the ambition of our Reconstruction Founders—even if they did not fully succeed in their efforts—and connect their incompletely-realized vision to the expansion of individual freedom and equality in the twentieth century. As Amar concludes, “[T]he Reconstruction Amendments offer Americans a more universally inclusive vision than the Founding-obsessed sagas that still hold sway in so many venues”—venues like our public schools.<sup>67</sup> In the end, our Reconstruction Founders, no less than the Reconstruction Amendments they ratified, should take “their proper place: at the center, rather than the periphery, of the unfolding American epic.”<sup>68</sup>

In Part I, I provide a brief history of American civic education and defend the use of textbooks as a proxy for what is actually taught in the classroom. In Part II, I provide a brief overview of Reconstruction historiography. In Part III, I turn to how the Eighteenth-Century Founding and Reconstruction have been taught in our American history classrooms. In particular, I focus on the consensus narratives that emerge in our most widely-used high school

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<sup>65</sup> MICHAEL LES BENEDICT, *PRESERVING THE CONSTITUTION: ESSAYS ON POLITICS AND THE CONSTITUTION IN THE RECONSTRUCTION ERA* 3 (2006).

<sup>66</sup> KENNETH M. STAMPP, *THE ERA OF RECONSTRUCTION, 1865-1877*, at 101 (1970).

<sup>67</sup> Amar, *supra* note 24, at 190.

<sup>68</sup> *Id.*

textbooks of yesterday and today.<sup>69</sup> In Part IV, I analyze how these textbooks treat key constitutional actors in both the Founding generation and the Reconstruction era.

Throughout Parts III and IV, I consider two sets of American history textbooks: the most widely-used textbooks of the 1940s and 1950s; and, the most widely-used textbooks of today. By comparing these two periods, I am able to consider how the treatment of the Founding generation and Reconstruction has changed (if at all) over the last half-century. With the collapse of the Dunning School in the second half of the twentieth century,<sup>70</sup> one would expect to find a great transformation in how Reconstruction is portrayed in today's American history textbooks—shifting from a hostile narrative in our earlier textbooks to a more balanced narrative today. Furthermore, the textbooks of the 1940s and 1950s were the dominant textbooks when a

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<sup>69</sup> It is important to note that it remains difficult to obtain lists of the most widely-used high school United States history and government textbooks, as education publishers closely guard information about volume and sales as trade secrets. Therefore, I have followed the guidance of noted education scholars in selecting the textbooks to use for this Article. In selecting the textbooks for this Article, I was guided by Professors Diane Ravitch, Meira Levinson, and John J. Patrick, as well as Dr. Frederick Hess of the American Enterprise Institute and staff members at the Center for Civic Education and the National Council on the Social Studies.

The best resource for determining today's most widely-used high school United States history textbooks is the American Textbook Council's list of "Widely Adopted History Textbooks." American Textbook Council, Widely Adopted History Textbooks, <http://www.historytextbooks.org/adopted.htm> (last visited Jan. 2, 2009). The Council has been tracking this information since 1986 by surveying "key states and large school districts annually." *Id.* They focus on Texas, California, Indiana, North Carolina, Florida, and New York. The American Textbook Council notes that the textbooks I have analyzed comprise an estimated eighty percent of the national market in United States history textbooks. *Id.*

For the most widely-used American history textbooks of the 1940s and 1950s, I relied upon a list compiled by Robert Lerner, Althea Nagai, and Stanley Rothman. For an overview of their methodology, see ROBERT LERNER, ALTHEA K. NAGAI & STANLEY ROTHMAN, *MOLDING THE GOOD CITIZEN: THE POLITICS OF HIGH SCHOOL HISTORY TEXTS* 159-61 (1995). In compiling their list of most widely-used history textbooks by decade, Lerner, Nagai, and Rothman "surveyed all state departments of education" by "requesting information regarding the high school American history textbooks most widely used throughout the state since 1940." *Id.* at 159. They also "decided to survey the 120 largest school districts in the nation, asking them what books their high schools used in the 1940s, 1950s, 1960s, and 1970s." *Id.* at 160. Although this is an imperfect method, I was unable to find a more reliable list.

<sup>70</sup> For an example of the Dunning School's scholarship, see WILLIAM DUNNING, *ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION* (1898).

majority of the current members of the Supreme Court were in high school<sup>71</sup>—not to mention countless judges, professors, and legislators.<sup>72</sup>

In Part V, I finally turn to the treatment of the Bill of Rights and the Fourteenth Amendment in various editions of *Magruder's American Government*, a widely-used textbook first published in 1917.<sup>73</sup> In particular, I focus on how its various editions accommodate (and frame) the incorporation doctrine as it developed in the twentieth century.

Our public schools importantly shape our children's early conception of American history—its grand narrative, its heroes and villains, and its transformative moments. For much of the twentieth century, Reconstruction was criticized as a colossal failure by both academic and popular historians. Today Reconstruction is often underemphasized in both the public mind and

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<sup>71</sup> These were the dominant textbooks in our high schools when Justices Breyer, Ginsburg, Kennedy, Scalia, and Souter were in high school. For the birthdates of the current Justices, see Supreme Court of the United States, [http://en.wikipedia.org/wiki/Supreme\\_Court\\_of\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Supreme_Court_of_the_United_States).

<sup>72</sup> The early textbooks would have been the most widely-read textbooks for anyone born between the ages of 1923 and 1943. This time period includes Vice President Biden, Senate Majority Leader Harry Read, Senate Minority Leader Mitch McConnell, and Senate Judiciary Committee Chairman Pat Leahy, as well as Senators Edward Kennedy, John Kerry, Joseph Lieberman, and John McCain, among others. For the relevant data, see Joe Biden, [http://en.wikipedia.org/wiki/Joe\\_Biden](http://en.wikipedia.org/wiki/Joe_Biden); and List of current United States Senators by age, [http://en.wikipedia.org/wiki/List\\_of\\_current\\_United\\_States\\_Senators\\_by\\_age](http://en.wikipedia.org/wiki/List_of_current_United_States_Senators_by_age).

<sup>73</sup> For my analysis of the treatment of the Fourteenth Amendment in government textbooks over time, I have relied upon *Magruder's American Government*, a government textbook widely considered one of the most influential texts since 1917. See, e.g., Ronald A. Banaszak, What Happened to *Magruder's American Government*? The Evolution of a Popular Textbook, 1970-1992, at 3 (Nov. 1993) (unpublished manuscript, on file with author). I rely upon this textbook both because its first edition dates back to the early twentieth century and also because there is no single list of high school government textbooks that is as authoritative as the American Textbook Council's list above. Importantly, the well-respected American Textbook Council describes *Magruder's* as "one title that's clearly No. 1 in its category," with its publisher claiming that *Magruder's* has held at least seventy percent of the high school government textbook market since its first edition was published in 1917. Rob Walker, *Magruder's American Government: American Best-Selling Civics Textbook: Poll-Tested and Super-Sized*, SLATE, Sept. 9, 2002, <http://www.slate.com/id/2070583/>. Additional evidence suggests that there is likely some truth to this claim. In 2002, Jonathan Zimmerman called *Magruder's* "America's most popular civics books," noting that it "dominated high school civics instruction" from 1917 through the 1940s and "was still used in over 70 percent of American civics classrooms in 1951." JONATHAN ZIMMERMAN, WHOSE AMERICA?: CULTURE WARS IN THE PUBLIC SCHOOLS 83, 85 (2002). By the late 1970s, *Magruder's* still "cover[ed] more than fifty per cent of the market." FRANCES FITZGERALD, AMERICA REVISED: HISTORY SCHOOLBOOKS IN THE TWENTIETH CENTURY 60-61 (1979). Even into the late 1980s, *Magruder's* sustained its position as "the leading seller among American government textbooks." Howard D. Mehlinger, *The Reform of Social Studies and the Role of the National Commission for the Social Studies*, 21 HIST. TEACHER 195, 206 n.2 (1988). In 2002, *Slate* still labeled *Magruder's* "America's most popular civics book," noting that "[b]est-selling" *Magruder's* remains "the 800-pound gorilla" among American government textbooks. Walker, *supra* note 73.

elite legal culture. This Article is an attempt to understand one possible factor in constructing a constitutional culture that has slighted our Reconstruction Founders for generations—a factor that is often ignored by legal academics—public education.

## I. Public Education and Constitutional Culture

The legal academy has largely ignored the role that public education plays in shaping our constitutional culture. In particular, few legal scholars have considered the possible influence of the constitutional stories that we tell our schoolchildren.<sup>74</sup> These stories are often the product of bureaucratic decisions that are shaped by market forces and insider arguments made by narrow, highly partisan groups. Although education scholars have considered the portrayal of race and gender in our schools' textbooks,<sup>75</sup> few (if any) legal scholars have considered these stories in any great detail. Furthermore, although many historians—both legal and non-legal—have fought over the proper portrayal of Reconstruction, no legal scholar has considered how these debates have shaped the canonical constitutional stories that we have transmitted to our schoolchildren—stories that shape their early conception of our constitutional system and its history—not to mention the role that their generation may play in shaping it.

### A. A Brief History of American Civic Education

American history courses play an important role in citizen formation—as do the American history textbooks assigned to our schoolchildren. After a few years under the (almost) exclusive care of their parents, children are usually turned over to our public schools, which take

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<sup>74</sup> For a more comprehensive analysis of the role of public education in shaping constitutional culture, see Donnelly, *supra* note 53.

<sup>75</sup> See, e.g., JAMES ALBERT BANKS, A CONTENT ANALYSIS OF ELEMENTARY AMERICAN HISTORY TEXTBOOKS: THE TREATMENT OF THE NEGRO AND RACE RELATIONS (1969); NATHAN GLAZER & REED UEDA, ETHNIC GROUPS IN HISTORY TEXTBOOKS (1983).

on an outsized role in their development as citizens. As Frances Fitzgerald notes, American history textbooks “are still the only books that many children ever read on the subject.”<sup>76</sup> The versions of history that are taught to our children “have helped to sustain the [nation’s] collective identity with stories of important past events (e.g., describing the origins of the nation) and stories of important past leaders (e.g., describing the heroic Founding Fathers).”<sup>77</sup> From this “shared history”<sup>78</sup> emerges, what Robert Post has called, our “democratic public culture,”<sup>79</sup> a culture often transmitted to our schoolchildren in the form of canonical constitutional stories that are approved for use in our classrooms—stories with consensus heroes and villains, successes and setbacks, settled issues and continuing challenges. Indeed, American history textbooks usually take the form of “nationalistic histories.”<sup>80</sup> These texts “are written . . . to tell children what their elders want them to know about their country.”<sup>81</sup> In the end, “like time capsules, the texts contain the truths selected for posterity”<sup>82</sup>—truths that are seldom questioned by secondary school teachers or their students.

The institutions that shape these canonical stories often attempt to “inculcate [important] norms in a manner that spans social divisions.”<sup>83</sup> In the case of controversial spans of American history, such as Reconstruction, we must be particularly sensitive to the compromises that are made to “span [these] divisions,” as key officials often attempt to construct a narrative that is as acceptable in Charleston, South Carolina as it is in Charlestown, Massachusetts. At the same time, key cultural forces seek to influence our canonical constitutional stories in such a way that

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<sup>76</sup> FITZGERALD, *supra* note 73, at 20.

<sup>77</sup> Kramer & Reid, *supra* note 62, at 4-5.

<sup>78</sup> Robert Post, *Between Philosophy and Law: Sovereignty and the Design of Democratic Institutions*, in *DESIGNING DEMOCRATIC INSTITUTIONS: NOMOS XLII* 209, 217 (Ian Shapiro & Stephen Macedo, eds. 2000).

<sup>79</sup> *Id.*

<sup>80</sup> FITZGERALD, *supra* note 73, at 47.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 189 (1995).

*their* groups' stories become *our* stories—immortalized in the textbooks that our schoolchildren are forced read.<sup>84</sup> This presents an interesting dynamic where the textbook industry and our school systems seek to construct canonical narratives that are broadly acceptable, while certain interest groups attempt to force their narrow, partisan vision into our broader, canonical stories.

From the earliest years of the republic, American public education has been designed to prepare young Americans for the duties and responsibilities of citizenship.<sup>85</sup> Currently, our American history and government courses are expected to play an outsized role in achieving that goal. The American history curriculum works to: 1) “develop[] a sense of perspective that allows more intelligent political decision-making”;<sup>86</sup> 2) “create[] a sense of identity with the past that deepens national loyalties”;<sup>87</sup> and, 3) “provide[] citizens with the practical knowledge necessary to function intelligently at the polls.”<sup>88</sup> Although the actual course requirements vary by state, the conventional civics curriculum includes some combination of American history and government courses. In American high schools, U.S. history is usually taught in eleventh grade,<sup>89</sup> followed by a government course in twelfth grade.<sup>90</sup> In the end, every high school student is required to take at least one course in American history, and more than seventy-five

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<sup>84</sup> As Amy Gutmann notes, “When citizens rule in a democracy, they determine, among other things, how future citizens will be educated. Democratic education is therefore a political as well as an educational ideal.” AMY GUTMANN, *DEMOCRATIC EDUCATION* 1 (1987).

<sup>85</sup> See DAVID TYACK, *SEEKING COMMON GROUND: PUBLIC SCHOOLS IN A DIVERSE SOCIETY* 41 (2003); William A. Galston, *Political Knowledge, Political Engagement, and Civic Education*, 4 ANN. REV. POL. SCI. 217, 231 (2001).

<sup>86</sup> Ray Allen Billington, *The Case for American History*, in *DEMOCRACY, PLURALISM, AND THE SOCIAL STUDIES* 169, 170 (James P. Shaver & Harold Berlak, eds. 1968).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> See Robert P. Green & Richard L. Watson, *American History in the Schools*, in *TEACHING SOCIAL STUDIES: HANDBOOK OF TRENDS, ISSUES, AND IMPLICATIONS FOR THE FUTURE* 65, 66 (Virginia S. Wilson et al., eds. 1993); DAVID JENNESS, *MAKING SENSE OF SOCIAL STUDIES* (1990).

<sup>90</sup> See RICHARD G. NIEMI & JANE JUNN, *CIVIC EDUCATION: WHAT MAKES STUDENTS LEARN* 63-67 (1998). Throughout this Article, when I refer to “civic education,” I mean the integrated curriculum that features both history and government courses.

percent of students in the United States take a course in civics or government during high school.<sup>91</sup>

In the late nineteenth century, before the birth of the modern civics curriculum, American history courses were designed for the “purposes of transmitting culture and myth, patriotisms and good citizenship.”<sup>92</sup> To that end, “[t]extbook writers wanted youths to ‘love, honor, and emulate’ a common group of heroes—Columbus and Pocahontas, Patrick Henry and Francis Scott Key, Robert Fulton and Benjamin Franklin, Daniel Webster and Daniel Boone, Abraham Lincoln and George Washington, among others.”<sup>93</sup> Following a landmark NEA Report in 1916, there was a shift in the civics curriculum to also emphasize “current issues, social problems, and recent history,” focusing largely on “the needs and interests of students”<sup>94</sup> and “fitting the child to the needs of society.”<sup>95</sup> These “needs,”<sup>96</sup> however, were still centered on “citizenship education.”<sup>97</sup> Debates about these patriotism-based and needs-based approaches persisted throughout the twentieth century and into the twenty-first, with opposing parties competing for control over the shape and substance of our schools’ civics curricula.<sup>98</sup>

The issue of race, especially as it pertains to the Civil War and Reconstruction, has served as a recurrent source of disagreement in American public education. In the late nineteenth and early twentieth century, “many states and territories banned ‘sectarian’ and

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<sup>91</sup> Carole L. Hahn, *Citizenship Education: An Empirical Study of Policy, Practices and Outcomes*, 25 OXFORD REV. POL. EDUC. 231, 236 (1999).

<sup>92</sup> RONALD W. EVANS, *THE SOCIAL STUDIES WARS: WHAT SHOULD WE TEACH THE CHILDREN?* 5 (2004).

<sup>93</sup> TYACK, *supra* note 85, at 41.

<sup>94</sup> EVANS, *supra* note 92, at 22-23. For the entire text of this landmark report, see U.S. BUREAU OF EDUC., *THE SOCIAL STUDIES IN SECONDARY EDUCATION* (1916).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 23.

<sup>97</sup> *Id.*

<sup>98</sup> For a fuller account of the development of the American social studies curriculum, see generally JENNESS, *supra* note 89; ZIMMERMAN, *supra* note 73, at 9-134; Arthur S. Bolster, *History, Historians, and the Secondary School Curriculum*, in *DEMOCRACY, PLURALISM, AND THE SOCIAL STUDIES* 212, 213-219 (James P. Shaver & Harold Berlak, eds. 1968).

‘partisan’ textbooks by law,”<sup>99</sup> as the “states did not mean to mandate just any form of history; they wanted correct history.”<sup>100</sup> When it came to the Civil War and Reconstruction, “Northern Republicans, pressured by veterans’ organizations, expected children to learn the Civil War according to the version favored by the Grand Army of the Republic,” while “Confederate veterans and Democratic legislatures [in the South] also banned partisan teaching (the northern version).”<sup>101</sup> As a result, “Confederate educators produced their own compilations of *real* history.”<sup>102</sup> This leads David Tyack to observe that, although the “South lost the War, . . . it was determined not to lose the textbook war.”<sup>103</sup>

Between 1900 and 1910, the North and South coalesced around a compromise narrative: “Southerners conceded that secession was unconstitutional and slavery was wrong, although its evils had been widely exaggerated by sly Yankee historians; northerners tempered their criticism of slavery but accelerated their attacks on Reconstruction.”<sup>104</sup> These “consensus” textbooks “did not have the white Southerners’ perspective on the Civil War—only on Reconstruction.”<sup>105</sup> As will become apparent in Parts III and IV, this “consensus narrative” still dominated the most widely-used American history textbooks in the middle of the twentieth century.

Beginning in the early twentieth century, the NAACP began arguing that “blacks were either ignored or stereotyped in textbooks.”<sup>106</sup> The NAACP particularly focused on the textbooks’ “flawed analyses of the Civil War and its aftermath.”<sup>107</sup> Through the 1940s and 1950s, “blacks attacked racist slurs and misrepresentations in high school history texts,” but

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<sup>99</sup> TYACK, *supra* note 85, at 52.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 52.

<sup>102</sup> *Id.* at 49-50 (emphasis added).

<sup>103</sup> *Id.* at 50.

<sup>104</sup> ZIMMERMAN, *supra* note 73, at 33-34.

<sup>105</sup> FITZGERALD, *supra* note 73, at 87.

<sup>106</sup> TYACK, *supra* note 85, at 40.

<sup>107</sup> ZIMMERMAN, *supra* note 73, at 32.

those attacks were largely unsuccessful.<sup>108</sup> Progress finally came with the 1960s civil rights revolution, which “would alter American textbooks forever,”<sup>109</sup> as “black activists forced the removal of numerous racial slurs”<sup>110</sup> and “blacks managed to insert a wealth of new—and overwhelmingly positive—information about African-American history and culture.”<sup>111</sup> Indeed, “[t]he texts of the sixties contain the most dramatic rewriting of history ever to take place in American schoolbooks.”<sup>112</sup>

Although controversial at first, our schools eventually reached a new consensus on race, with bureaucrats, interest groups, and parents on both sides of the aisle reaching a new compromise. Conservatives would permit the introduction of new races into the nation’s story—so long as their inclusion did not undermine that story’s patriotic arc. In short, “these . . . struggles concerned the roster of eligible patriots, not patriotism itself.”<sup>113</sup> In the end, “[b]lack activists and their white allies successfully ‘integrated’ American textbooks, which continued to portray the nation as a beacon of hope and liberty to the world.”<sup>114</sup> The “integrated” textbooks “inserted colorful new characters into American history,”<sup>115</sup> but “blocked a more critical, sophisticated analysis of the nation’s founding narrative.”<sup>116</sup> Although our textbooks “increasingly revered Frederick Douglass,”<sup>117</sup> for instance, “nowhere did history books suggest that the new set of heroes required readers to reevaluate old ones—for instance, that Douglass’s critique of slavery might tarnish the image of Washington or Jefferson.”<sup>118</sup> As Jonathan

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<sup>108</sup> *Id.* at 111.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> FITZGERALD, *supra* note 73, at 58.

<sup>113</sup> ZIMMERMAN, *supra* note 73, at 7.

<sup>114</sup> *Id.* at 10.

<sup>115</sup> *Id.* at 31.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 110.

<sup>118</sup> *Id.*

Zimmerman concludes, “The price that white America exacted for diversity in the textbooks was triumphalism in their tone.”<sup>119</sup>

This should come as little surprise. Although the thematic emphases may have changed with the overall contours of American political culture and history, the broader goal of the civics curriculum has largely remained the same—connecting young Americans to *our* Constitution—telling them *our* stories, teaching them about *our* institutions, and preparing them for *our* political system. Indeed, “[s]ince the schools are charged with helping to enculturate the young, and since history preserves collective ‘memory,’ it is natural that there should be a desire to emphasize, in school history, the national story, the American memory.”<sup>120</sup> As a result, “the locus of . . . battles [over our national story] is often the classroom, which must pass on a conception of citizenship.”<sup>121</sup>

## B. The Continuing Importance of Textbooks in American Public Education

Textbook analysis remains a common method among education scholars for a variety of reasons. Most importantly, high school teachers still rely heavily on textbooks for both the content of their classroom instruction and homework assignments.<sup>122</sup> This leads David Tyack to conclude that American history textbooks “reveal what adults thought children should learn about the past and are probably the best index of what teachers tried to teach young Americans.”<sup>123</sup> Robert Green and Richard Watson call American history textbooks “the single most influential factor in shaping the curriculum.”<sup>124</sup>

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<sup>119</sup> *Id.* at 118.

<sup>120</sup> JENNESS, *supra* note 89, at 282.

<sup>121</sup> PAUL W. KAHN, SACRED VIOLENCE: TORTURE, TERROR, AND SOVEREIGNTY 112 (2008).

<sup>122</sup> *See* EVANS, *supra* note 92, at 5.

<sup>123</sup> TYACK, *supra* note 85, at 40.

<sup>124</sup> Green & Watson, *supra* note 89, at 66.

The perceived importance of textbooks can also be observed in the various textbook adoption battles that have taken place in several states throughout the last century—including battles over the portrayal of Reconstruction outlined in Section I.A. As Tyack notes:

Even though history textbooks have been, by most accounts, very dull, they have also been highly controversial. People have wanted history texts to tell the official truth about the past. . . . Textbooks resemble stone monuments. Designed to commemorate and *re-present* emblematic figures, events and ideas—and thus to create common civic bonds—they have also aroused vigorous dissent.<sup>125</sup>

This has led Robert Lerner, Althea K. Nagai, and Stanley Rothman to conclude, “If American history and civics textbooks have become a battleground, it is because they now serve as the prayer-books of the United States’ civil religion.”<sup>126</sup> Indeed, “[s]pecial interest groups of the right and left pressure publishers to include or drop topics, especially in big states such as California or Texas.”<sup>127</sup> In this Article, textbook content serves as a proxy for the substance of high school instruction about the Founding generation and Reconstruction.

American textbooks are developed through the interplay of market forces, bureaucratic decisions, and interest group pressure. Viewed one way, “commerce play[s] an important part in deciding which historical truths shall be official,”<sup>128</sup> as “private agencies—publishing companies—create and sell textbooks.”<sup>129</sup> Fitzgerald notes that the “responsibility of [the textbook publisher] seems awesome,” as “the audiences for their products are huge,

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<sup>125</sup> *Id.* For a comprehensive account of the changes in American history textbooks through the 1970s, see generally FITZGERALD, *supra* note 73.

<sup>126</sup> LERNER, NAGAI & ROTHMAN, *supra* note 69, at 1 (1995).

<sup>127</sup> TYACK, *supra* note 85, at 59.

<sup>128</sup> *Id.* at 60.

<sup>129</sup> *Id.*

impressionable, and captive.”<sup>130</sup> Indeed, “[c]hildren have to read textbooks; they usually have to read all of each textbook and are rarely asked to criticize it for style or point of view.”<sup>131</sup>

At the same time, local and state governments importantly shape textbook content through their varied textbook adoption processes, with roughly half of the states adopting textbooks at the state level and the other half leaving those decisions to local school districts.<sup>132</sup> The adoption process itself is “somewhat unpredictable,”<sup>133</sup> as the process is often dominated by the whims of local and state officials and the narrow, highly partisan interests that actually scrutinize adoption decisions. Since the costs of researching, drafting, and printing new textbooks are often astronomical, textbook development remains a high-risk enterprise, with Texas and California (the two largest statewide adoption states) largely dictating the content of textbooks throughout the country.<sup>134</sup> Indeed, “[p]ublishers whose textbooks do not get adopted in one of these states sustain an economic blow and must struggle to sell their books to smaller states and individual districts.”<sup>135</sup>

As a result, textbooks often coalesced around a common narrative and style—“primarily chronological-forward,”<sup>136</sup> with “much material . . . separated out for topical or analytical treatment.”<sup>137</sup> Furthermore, the “relative coverage of periods and episodes is . . . quite consistent

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<sup>130</sup> FITZGERALD, *supra* note 73, at 27.

<sup>131</sup> *Id.*

<sup>132</sup> TYACK, *supra* note 85, at 60.

<sup>133</sup> *Id.*; see also Green & Watson, *supra* note 89, at 66.

<sup>134</sup> See DIANE RAVITCH, *THE LANGUAGE POLICE: HOW PRESSURE GROUPS RESTRICT WHAT CHILDREN LEARN* 98 (2003); see also FITZGERALD, *supra* note 73, at 115 (“[I]n 1961 a right-wing fringe group called Texans for America intimidated the committee, and it pressed several publishers to make substantial changes in their American-history and geography texts. Macmillan, for one, deleted a passage saying that the Second World War might have been averted if the United States had joined the League of Nations.”).

<sup>135</sup> RAVITCH, *supra* note 134, at 98.

<sup>136</sup> JENNESS, *supra* note 89, at 275; see also Lawrence E. Metcalf, *History Textbooks and Explanation*, in *DEMOCRACY, PLURALISM, AND THE SOCIAL STUDIES* 235 (James P. Shaver & Harold Berlak, eds. 1968) (“Over the years a standard content has been established in American . . . history.”).

<sup>137</sup> JENNESS, *supra* note 89, at 275.

from book to book.”<sup>138</sup> Based on publishers’ surveys, teachers prefer heavy “concentration on Civil War and slavery, the American Revolution, and colonial growth,”<sup>139</sup> with “Reconstruction, the Federalist period, Jacksonianism, industrialization and Progressivism, and particularly recent American history . . . far behind.”<sup>140</sup> In short, “there seems to be a narrative tropism to the great heroic episodes and the life-and-death crises of the national story.”<sup>141</sup>

In the end, “the hardbound textbook [remains] *the* dominant instructional tool,”<sup>142</sup> as the single, state- or district-approved textbook remains “the central instrument of . . . classroom instruction and . . . a key source of knowledge” for teachers.<sup>143</sup> Dianne Ravitch notes, “[F]or many teachers, the textbook constitutes both course and curriculum,”<sup>144</sup> as most school textbooks are the basis of “curriculum planning, course organization and day-to-day lesson planning.”<sup>145</sup> In the context of American history courses, the reason for this is simple: “[F]ew history teachers ever learned much history themselves.”<sup>146</sup> For instance, fewer than half of high school history teachers majored or minored in history.<sup>147</sup> The result is that these poorly-trained instructors must lean heavily on the textbook—especially as novice teachers.<sup>148</sup> Because of this, high school textbooks remain a suitable proxy for what is actually being taught in our classrooms.

## II. Reconstruction Historiography

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 275-76.

<sup>142</sup> Richard C. Remy, *Treatment of the Constitution in Civics and Government Textbooks*, in *TEACHING ABOUT THE CONSTITUTION IN AMERICAN SECONDARY SCHOOLS* (Howard D. Mehlinger, ed. 1981).

<sup>143</sup> *Id.*

<sup>144</sup> DIANE RAVITCH, THOMAS B. FORDHAM FOUND. & INST., *A CONSUMER’S GUIDE TO HIGH SCHOOL HISTORY TEXTBOOKS* 13 (2004).

<sup>145</sup> Remy, *supra* note 124.

<sup>146</sup> RAVITCH, *supra* note 144, at 13; *see also* Green & Watson, *supra* note 89, at 85.

<sup>147</sup> RAVITCH, *supra* note 144, at 13.

<sup>148</sup> All told, textbooks are used for roughly seventy percent of class time. TYACK, *supra* note 85, at 61.

Reconstruction was one of the most controversial eras in American history. It should come as little surprise that it has also been a period of great controversy among academic historians.<sup>149</sup> Part of the reason for this is obviously “the legacy of bitterness left behind by the internal conflict.”<sup>150</sup> John Hope Franklin notes that “[i]f every generation rewrites its history, . . . then it may be said that every generation since 1870 has written the history of the Reconstruction era.”<sup>151</sup> Franklin’s statement is, of course, an exaggeration. It underemphasizes the lasting influence of one generation of historians—the Dunning School—on both the public and academic accounts of Reconstruction. At the same time, even at the height of the Dunning School’s influence, dissenting voices could be heard.

Since the 1960s, the consensus account of Reconstruction has been transformed. As Eric Foner concluded in 1988, “[N]o part of the American experience has, in the last twenty-five years, seen a broadly accepted point of view so completely overturned as Reconstruction—the violent, dramatic, and still controversial era that followed the Civil War.”<sup>152</sup> In Parts III and IV, I examine the degree to which this transformation among academic historians shaped our textbooks’ accounts of Reconstruction—as I compare the content of earlier textbooks (presumably still under the thumb of the Dunning School) to that of today’s textbooks. Education scholars often note that “new scholarship trickles down extremely slowly into the school texts.”<sup>153</sup> Indeed, because of the disconnect between academic historians and the key

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<sup>149</sup> See, e.g., John Hope Franklin, *Mirror for Americans: A Century of Reconstruction History*, 85 AM. HIST. REV. 1, 7 (1980) (“Reconstruction history has been argued over and fought over since the period itself ended. Historians have constantly disagreed not only about what significance to attach to certain events and how to interpret them but also (and almost as much) about the actual events themselves.”); Armstead L. Robinson, *Beyond the Realm of Social Consensus: New Meanings of Reconstruction for American History*, 68 J. AM. HIST. 276, 276 (1981) (“The Civil War and Reconstruction era remains a center of historical controversy.”).

<sup>150</sup> Franklin, *supra* note 149, at 7.

<sup>151</sup> *Id.* at 3.

<sup>152</sup> ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, at xix (1988).

<sup>153</sup> FITZGERALD, *supra* note 73, at 43. As Robert Green and Richard Watson note, “One of the most striking academic paradoxes of the last decade has been that, during a period in which American historiography has been

players in secondary education, new trends often “proceed [indirectly] . . . by way of the college texts.”<sup>154</sup> As a result, the “the elapsed time”<sup>155</sup> between a new development among academic historians and its transmission to high school textbooks “may be fifteen years or more.”<sup>156</sup> Before turning to the accounts of Reconstruction in our textbooks, it is important to first provide a concise overview of key trends in Reconstruction scholarship.

The first wave of Reconstruction scholarship began in the early twentieth century with the work of William Dunning, John Burgess, and their disciples at Columbia University.<sup>157</sup> Their accounts “reach[ed] a mass audience” in Claude Bowers’ *The Tragic Era*.<sup>158</sup> For several decades, the Dunning School “dominate[d] the field.”<sup>159</sup> Their scholarship grew out of the “anti-Reconstruction propaganda of southern Democrats during the 1870s.”<sup>160</sup> The Dunning School offered an account of Reconstruction that was sympathetic to the white South and hostile to both African-Americans and the Radical Republicans. For the Dunning School, “Reconstruction was the darkest page in the saga of American history,”<sup>161</sup> and the “heroes of the story were President Johnson, whose lenient Reconstruction policies were foiled by the Radicals, and the self-styled ‘Redeemers,’ who restored honest government.”<sup>162</sup> Dunning “was as unequivocal as the most rabid opponent of Reconstruction in placing upon Scalawags, [African-Americans], and

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undergoing the most creative ferment in its entire lifetime, the teaching of American history in the schools has been widely perceived as sterile, moribund, and ineffective.” Green & Watson, *supra* note 89, at 65. Indeed, the “fruits of historical scholarship are [often] neglected, and single-strand interpretations are left unquestioned.” Harold J. Noah et al., *History in High-School Textbooks*, in *DEMOCRACY, PLURALISM, AND THE SOCIAL STUDIES* 238, 248 (James P. Shaver & Harold Berlak, eds. 1968). This is “strikingly evident when . . . textbooks are building wholly improbable stereotypes of, say, patriotic, unselfish Founding Fathers or of god-like superstatesman, Abraham Lincoln.” *Id.* Lawrence Metcalf further notes that “[t]he conditions surrounding textbook manufacturing practically guarantee that the textbook content will be conceptually empty.” Metcalf, *supra* note 136, at 235.

<sup>154</sup> FITZGERALD, *supra* note 73, at 43.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> FONER, *supra* note 152, at xix.

<sup>158</sup> Eric Foner, *Reconstruction Revisited*, 10 *REV. IN AM. HIST.* 82, 82 (1982).

<sup>159</sup> Franklin, *supra* note 149, at 3.

<sup>160</sup> Foner, *supra* note 158, at 82.

<sup>161</sup> FONER, *supra* note 152, at xx.

<sup>162</sup> Foner, *supra* note 158, at 82.

Northern radicals the responsibility for making the unworthy and unsuccessful attempt to reorder society and politics in the South.”<sup>163</sup> Furthermore, “Dunning’s students were more ardent than he . . . in pressing the case against Radical Republicans and their black and white colleagues.”<sup>164</sup> In the end, “[p]erhaps the most important impact of such writings was the influence they wielded on authors of textbooks, popular histories, and fiction.”<sup>165</sup>

Even in the early years of the Dunning School assault on Reconstruction, criticisms emerged from “a handful of survivors of the Reconstruction era and the small fraternity of black historians,” including A.A. Taylor and W.E.B. Du Bois.<sup>166</sup> This was the opening salvo in a long struggle among historians. By the 1950s, “there was a remarkable mixture of views of Reconstruction by historians of similar training but of differing backgrounds, interests, and commitments.”<sup>167</sup> By the 1960s, a “revisionist wave broke over the field, destroying, in rapid succession, every assumption of the traditional viewpoint.”<sup>168</sup> New accounts on the national politics of the period “portrayed Andrew Johnson as a stubborn, racist politician”<sup>169</sup> and “acquitted the Radicals—reborn as idealistic reformers genuinely committed to black rights.”<sup>170</sup> New accounts of the Republican governments in the South proved that “‘Negro rule’ was a myth and that Reconstruction represented more than” corrupt rule.<sup>171</sup> These new accounts focused on the signal achievements of the Republican governments—the “establishment of public school systems, the granting of equal citizenship to blacks, the effort to revitalize the devastated

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<sup>163</sup> Franklin, *supra* note 149, at 3-4.

<sup>164</sup> *Id.* at 4.

<sup>165</sup> *Id.*

<sup>166</sup> FONER, *supra* note 152, at xxi.

<sup>167</sup> Franklin, *supra* note 149, at 6.

<sup>168</sup> FONER, *supra* note 152, at xxii.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

Southern economy.”<sup>172</sup> Even accounts of their corruption were placed in the proper context— noting that “corruption in the Reconstruction South paled before that of the Tweed Ring, Credit Mobilier scandal, and Whiskey Rings in the post-Civil War North.”<sup>173</sup> Indeed, “[b]y the end of the 1960s, the old interpretation had been completely reversed”<sup>174</sup>: “Radical Republicans and Southern freedmen were now the heroes, white supremacist Redeemers the villains, and Reconstruction was a time of extraordinary social and political progress for blacks.”<sup>175</sup> Foner adds, “If the era was ‘tragic,’ revisionists insisted, it was because change did not go far enough, especially in the area of Southern land reform.”<sup>176</sup>

By the mid-1960s, however, “the more optimistic assumptions of many revisionist writers were challenged by those who took a skeptical view of the entire Reconstruction enterprise.”<sup>177</sup> Scholars like C. Vann Woodward and August Meier “contended that . . . racial prejudice severely compromised northern efforts to assist the freedmen”<sup>178</sup> and that, “in contrast to the Second Reconstruction, the first was fundamentally ‘superficial.’”<sup>179</sup> The 1970s and 1980s opened up additional criticisms of “the ‘conservatism’ of Republican policymakers, even at the height of Radical influence”<sup>180</sup> and the “continued hold of racism and federalism despite the extension of citizenship rights to blacks and the enhanced scope of national authority.”<sup>181</sup> These post-revisionist historians began to “question[] whether much of importance happened at all” during Reconstruction, noting the great “continuity between the Old and New South.”<sup>182</sup>

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Foner, *supra* note 158, at 83.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> FONER, *supra* note 152, at xxiii.

<sup>181</sup> *Id.*

<sup>182</sup> Foner, *supra* note 158, at 84.

Although historians still note that the “traditional narrative of the Reconstruction era tends toward intellectual incoherence,”<sup>183</sup> Eric Foner outlined a promising framework in 1988:

Over a century ago, prodded by the demands of four million men and women just emerging from slavery, Americans made their first attempt to live up to the noble professions of their political creed—something few societies have ever done. The effort produced a sweeping redefinition of the nation’s public life and a violent reaction that ultimately destroyed much, but by no means all, of what had been accomplished. From the enforcement of the rights of citizens to the stubborn problems of economic and racial justice, the issues central to Reconstruction are as old as the American republic, and as contemporary as the inequalities that still afflict our society.<sup>184</sup>

In spite of its obvious shortcomings, “Reconstruction transformed the lives of southern blacks in ways unmeasurable by statistics and in areas unreachable by law”<sup>185</sup> by “rais[ing] blacks’ expectations and aspirations, redefin[ing] their status in relation to the larger society, and allow[ing] space for the creation of institutions that enabled them to survive the repression that followed.”<sup>186</sup>

In the end, “[Reconstruction’s] legacy deserves to survive as an inspiration to those Americans, black and white alike, who insist that the nation live up to the professed ideals of its political culture.”<sup>187</sup> The question we turn to now is whether or not today’s textbooks have followed Foner’s lead—or whether remnants of the discredited Dunning School remain.

### III. The Founding and Reconstruction in Our Schools

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<sup>183</sup> Thomas C. Holt, *Reconstruction in United States Textbooks*, 81 J. AM. HIST. 1641, 1641 (1995).

<sup>184</sup> FONER, *supra* note 152, at xxvii.

<sup>185</sup> Foner, *supra* note 158, at 95.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

Public schools remain among the most coercive institutions of the state. From an early age, most students are required to sit in predetermined classrooms, read state-approved texts,<sup>188</sup> listen to state-certified teachers,<sup>189</sup> and take state-constructed exams.<sup>190</sup> The results of these state-run trials will largely determine the shape of our children’s professional and personal lives. In the context of contemporary constitutional culture, these exercises will shape the citizens of tomorrow—their trust in government, their understanding of its institutions and history, and their self-conception as citizens. If constructed properly, the official narratives taught in public schools could capture the constitutional imagination of America’s schoolchildren and continue the important process of citizen formation.

Of course, this level of influence escapes most classrooms. Most students would rather flirt with their neighbor, play ball in the schoolyard, or do just about anything rather than attend class and do their homework. Truly curious youths are rare. As Frances Fitzgerald concedes, “[T]he sight of an old textbook is much less likely to bring back the sequence of Presidents . . . than it is to evoke the scene of an eighth-grade classroom: the sight of, say, Peggy, one long leg wrapped around the other.”<sup>191</sup> Regardless, most young Americans spend the bulk of their days in the care of their public school teachers, and these days likely play an important role in their development as future citizens. As such, we should be concerned with what public schools are actually teaching our schoolchildren. Fitzgerald adds, “Amid the . . . nursery rhymes and advertising jingles that we carry around in our heads, there are often snatches of textbook

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<sup>188</sup> See, e.g., TEX. EDUC. CODE ANN. § 31.022 (2008).

<sup>189</sup> See, e.g., CAL. EDUC. CODE § 444 (2008).

<sup>190</sup> See, e.g., NY EDUC. LAW § 342 (2008).

<sup>191</sup> FITZGERALD, *supra* note 73, at 17.

history.”<sup>192</sup> Fitzgerald concludes that “what sticks to the memory from those textbooks is not any particular series of facts but an atmosphere, an impression, a tone.”<sup>193</sup>

To that end, I turn now to an important set of constitutional stories that have been told in our classrooms—stories centered on our Founding Fathers and our Reconstruction Founders.

#### A. The Baseline: Our Founding Fathers—Yesterday and Today

The textbooks of yesterday and today present the Founding Fathers as a wise and able lot—both collectively and individually. Early textbooks particularly stress the “character” of these key figures.<sup>194</sup> In introducing the First Continental Congress, one early textbook described the gathering as “some of the ablest men in America.” In both sets of accounts, the men meeting to write the U.S. Constitution were collectively referred to as “famous,”<sup>195</sup> “thoughtful,”<sup>196</sup> “energetic,”<sup>197</sup> “notable,”<sup>198</sup> “well educated,”<sup>199</sup> “very distinguished,”<sup>200</sup> and “men of good judgment”<sup>201</sup>—“fathers of the Constitution”<sup>202</sup> all. Indeed, this meeting included “the outstanding leaders in America,”<sup>203</sup> “a group of men who have not been surpassed in character and ability by any body of equal size in the world’s history.”<sup>204</sup> One early textbook did not stop there, noting that Thomas Jefferson, a Founding Father himself (though not present at the

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<sup>192</sup> *Id.* at 18.

<sup>193</sup> *Id.*

<sup>194</sup> *See, e.g.*, EUGENE C. BARKER & HENRY STEELE COMMAGER, *OUR NATION* 151 (1949).

<sup>195</sup> LEON H. CANFIELD & HOWARD B. WILDER, *THE MAKING OF MODERN AMERICA* 132 (1952).

<sup>196</sup> FREMONT PHILIP WIRTH, *THE DEVELOPMENT OF AMERICA* 190 (1943).

<sup>197</sup> DANIEL J. BOORSTIN & BROOKS MATHER KELLEY, *A HISTORY OF THE UNITED STATES* 117 (2005).

<sup>198</sup> CANFIELD & WILDER, *supra* note 195, at 132.

<sup>199</sup> WIRTH, *supra* note 196, at 191.

<sup>200</sup> DAVID SAVILLE MUZZEY, *A HISTORY OF OUR COUNTRY* 133 (1952).

<sup>201</sup> FREMONT PHILIP WIRTH, *UNITED STATES HISTORY* 104 (1955).

<sup>202</sup> DAVID SAVILLE MUZZEY, *A HISTORY OF OUR COUNTRY* 180 (1943).

<sup>203</sup> WIRTH, *supra* note 201, at 104; *see also* PAUL BOYER, *AMERICAN NATION* 145 (2005) (calling them “a remarkable collection of politicians”); GERALD A. DANZER ET AL., *THE AMERICANS* (2007) (“[The Constitutional Convention] included some of the most outstanding leaders of the time.”).

<sup>204</sup> MUZZEY, *supra* note 202, at 174.

Convention), called them an “assembly of demigods.”<sup>205</sup> In our canonical stories, even the venue has been sanctified, with one textbook calling Independence Hall “a national shrine of great beauty”<sup>206</sup> and “one of our most important national monuments.”<sup>207</sup>

Interestingly, several early textbooks also present our Founding Fathers as “conservative” men,<sup>208</sup> especially in connection with the decision to replace the Articles of Confederation with the U.S. Constitution. For these early textbooks, conservatism was a virtue—particularly the brand of conservatism that incorporated the best ideas of the past. One early textbook noted that “[s]ome of the ideas which went into the Constitution of the United States were evolved by the colonies in their struggle with Great Britain.”<sup>209</sup> Of the break with England, another textbook added that the “colonists regarded themselves not as rebels against the king but as defenders of long-established rights which the British ministers and Parliament were denying them.”<sup>210</sup> In these accounts, our Founding Fathers’ ideas and actions were rooted in the Enlightenment and defended by key British leaders and thinkers, such as Edmund Burke.<sup>211</sup> One textbook flatly rejected “the idea that the Constitution was something brand new,”<sup>212</sup> noting that the “delegates to the Constitutional Convention were far too practical to risk mere invention.”<sup>213</sup> Although not

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<sup>205</sup> *Id.* at 173. Not to be outdone, another textbook quoted George Mason as saying of the framers at the Constitutional Convention that “America has certainly, upon this occasion, drawn forth her first rate characters.” BARKER & COMMAGER, *supra* note 194, at 151; *see also* CANFIELD & WILDER, *supra* note 195, at 132-33 (quoting the same passage by Mason). The same textbook also quoted James Madison as concluding that the Constitutional Convention “contains in several instances the most respectable characters in the United States, and in general may be said to be the best contribution of talents the States could make for the occasion.” BARKER & COMMAGER, *supra* note 194, at 152.

<sup>206</sup> WIRTH, *supra* note 183, at 105.

<sup>207</sup> CANFIELD & WILDER, *supra* note 195, at 133.

<sup>208</sup> *See, e.g.*, WIRTH, *supra* note 196, at 190. This is in striking contrast to the “radicalism” of Reconstruction that these early textbooks later denounce.

<sup>209</sup> *Id.* at 194.

<sup>210</sup> MUZZEY, *supra* note 202, at 132.

<sup>211</sup> *Id.*

<sup>212</sup> CANFIELD & WILDER, *supra* note 195, at 138.

<sup>213</sup> *Id.*

viewed through the prism of conservatism, today’s textbooks similarly stress the intellectual foundations of the American Revolution and the U.S. Constitution.<sup>214</sup>

### 1. In Praise of Compromise; Or, Ignoring the Failures of Our Founding Fathers

Each of the Founding Fathers’ key undertakings—the Declaration of Independence, the American Revolution, and the U.S. Constitution—are presented in a decidedly positive light.<sup>215</sup>

I will focus particularly on the stories told about our Founders’ Constitution—including the Constitutional Convention, the ratification debates, and the Bill of Rights.

In our early textbooks, the Constitution is framed as a “wonderful achievement.”<sup>216</sup> Indeed, “[b]y the adoption of the Constitution our country passed, without revolution or military dictatorship, from weakness to strength, from anarchy to order, from death to life.”<sup>217</sup> Similarly celebratory accounts can be found in every textbook analyzed for this Article. Interestingly, both

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<sup>214</sup> For instance, one textbook has an entire section entitled, “Ideas Help Start a Revolution.” DANZER ET AL., *supra* note 203, at 103. Another has a similar section, “Ideas Behind the Revolution.” ANDREW CAYTON ET AL., *AMERICAN: PATHWAYS TO THE PRESENT* 118 (2005). One textbook explains, under a section entitled, “Revolutionary Ideology,” “The colonists still thought of themselves as British. Even though they lived an ocean away, they believed they were entitled to all the rights that British citizens had claimed over the years.” BOYER, *supra* note 185, at 117. Furthermore, “[c]olonial leaders knew the philosophy of Enlightenment thinkers such as John Locke”—indeed, “[t]he idea of natural rights was part of their revolutionary ideology.” *Id.*

<sup>215</sup> For instance, in our early textbooks, the Declaration of Independence is described as “one of the vital documents of history.” CANFIELD & WILDER, *supra* note 195, at 102. This vitality stems from the fact that “it described a new kind of liberty and applied that liberty to conditions in America.” *Id.* The “adoption of the Declaration of Independence . . . gave the Americans a definiteness of purpose which they previously had lacked” and “put spirit into the American army by giving it a cause supremely worth fighting for.” BARKER & COMMAGER, *supra* note 176, at 120; MUZZEY, *supra* note 200, at 105. Discussions of the Declaration are often accompanied by pictures of the Declaration committee, as well as key venues celebrating the Declaration, including the “marble shrine” in Washington, DC and a “beautifully designed niche” in Philadelphia. BARKER & COMMAGER, *supra* note 194, at 118, 119; MUZZEY, *supra* note 200, at 104.

Today’s textbooks are similarly celebratory. One textbook leads with a section entitled, “The Patriots Declare Independence.” DANZER ET AL., *supra* note 203, at 105. Another textbook adds, “It was not the mere announcement, but the ‘declaration’ . . . of independence that Americans would always celebrate. For Americans were proud of the reasons for the birth of their nation. These reasons gave the new nation a purpose that it would not forget.” BOORSTIN & KELLEY, *supra* note 197, at 88. Indeed, the Declaration was “an eloquent birth certificate for the new United States, which would inspire people all over the world.” *Id.* Furthermore, “like other documents that live and shape history, [the Declaration] has had the magical power to be filled with new ideas.” *Id.* at 89. In the end, “Jefferson’s document did much more than declare a nation’s independence,” “[i]t also defined the basic principles of which American government and society would rest.” CAYTON ET AL., *supra* note 214, at 121.

<sup>216</sup> MUZZEY, *supra* note 202, at 178.

<sup>217</sup> *Id.*

sets of textbooks fixate on praise from abroad, with an early textbook noting that “[w]orld statesmen have been astonished that the men who framed this document could have finished such a tremendous task in only four months.”<sup>218</sup> Other early textbooks add that our Constitution “has been widely admired”<sup>219</sup> and has served as “the model for the organization of republican governments on both sides of the Atlantic.”<sup>220</sup> Today’s textbooks similarly note that the Constitution “continues to inspire people around the world”<sup>221</sup> and “the flexibility of the U.S. Constitution made it a model for governments [worldwide].”<sup>222</sup> This “City Upon a Hill” narrative of the Constitution pervades the textbooks of yesterday and today.

Above all, the Constitutional Convention and the ratification debates are used in both sets of textbooks to teach a simple lesson: Progress requires compromise; or, as one subject heading reads, “‘Compromises Strengthen Unification.’”<sup>223</sup> This message has remained largely unchanged since the 1940s. Even today, our textbooks celebrate the series of compromises made at the Convention—beginning with the Virginia Plan, New Jersey Plan, and the “Great Compromise,” and including the other deals that helped clear the path to our Founders’ “wonderful achievement.”<sup>224</sup> In these accounts, the Constitution emerges as “a triumph of

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<sup>218</sup> CANFIELD & WILDER, *supra* note 195, at 138.

<sup>219</sup> *Id.* Some early textbooks even named names. For instance, one textbook noted the praise of “great prime minister of England,” William Pitt, who said of the Constitution, “It will be the pattern of all future constitutions and the admiration of all future ages.” MUZZEY, *supra* note 202, at 178-79. This same textbook noted that “the great English statesman Gladstone called the Constitution ‘the most wonderful work ever struck off at a given time by the brain and purpose of man.’” *Id.* at 179; *see also* CANFIELD & WILDER, *supra* note 195, at 132 (quoting the same statement by Gladstone).

<sup>220</sup> MUZZEY, *supra* note 202, at 179.

<sup>221</sup> CAYTON ET AL., *supra* note 214, at 154.

<sup>222</sup> DANZER ET AL., *supra* note 203, at 149.

<sup>223</sup> MUZZEY, *supra* note 200, at 139.

<sup>224</sup> *See, e.g.*, BARKER & COMMAGER, *supra* note 194, at 119 (“Fortunately there was a third group of delegates the members of which served as conciliators and peacemakers between the two extreme parties.”); CANFIELD & WILDER, *supra* note 195, at 136 (“The process was very difficult and often a middle ground had to be found between two extreme points of view.”); MUZZEY, *supra* note 202, at 176 (“[A]ll these disputes were settled by a series of ‘compromises,’ or bargains.”).

practical statesmanship.”<sup>225</sup> Not surprisingly, the greatest mistake these textbooks make is ignoring how one key compromise enabled the rise of the slave power in the Nineteenth Century and culminated in the Civil War—the Three-Fifths Compromise.

In our early textbooks, the Three-Fifths Compromise is simply mentioned among the other compromises that helped to bring about the Constitution.<sup>226</sup> These accounts even downplay the evil at work in the compromise itself, simply noting that “the agricultural, slaveholding states of the South were given certain concessions: . . . [including that] three fifths of the slaves were to be counted as ‘population’ in apportioning a state’s representation in the House.”<sup>227</sup>

Even in today’s textbooks, the Three-Fifths Compromise is mostly framed as an unfortunate (if immediately successful) compromise. As one textbook notes, “The Three-Fifths Compromise settled the political issue[s of taxation and representation].”<sup>228</sup> Another adds, “The final agreement . . . established that *only* three fifths of a state’s slave population would count in determining representation.”<sup>229</sup> Although today’s textbooks often explain that “[s]ome delegates spoke eloquently about including a ban on slavery in the Constitution,”<sup>230</sup> even these textbooks ignore this key flaw in our Founders’ original Constitution.

Akhil Amar provides a powerful critique of the Founding Fathers on slavery, noting, “Though the Constitution of 1787-88 did not abolish slavery, it would be nice to think that the Founding Fathers designed a document whose arc would inexorably bend toward freedom and

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<sup>225</sup> CANFIELD & WILDER, *supra* note 195, at 136. Today’s textbooks draw similar conclusion, noting that, “[a]fter nearly four months of debate and compromise, the delegates succeeded in creating a constitution that was flexible enough to last through the centuries to come.” DANZER ET AL., *supra* note 203, at 144.

<sup>226</sup> See, e.g., BARKER & COMMAGER, *supra* note 194, at 119 (noting of the Three-Fifths Clause and Fugitive Slave Clause that “[t]hese provisions met the wishes of the South”); WIRTH, *supra* note 196, at 194 (listing the Three-Fifths Clause among the “Other Compromises” made at the Convention).

<sup>227</sup> MUZZEY, *supra* note 184, at 194.

<sup>228</sup> DANZER ET AL., *supra* note 203, at 142.

<sup>229</sup> BOYER, *supra* note 203, at 145 (emphasis added).

<sup>230</sup> EDWARD L. AYERS ET AL., *AMERICAN ANTHEM* 154 (2007).

equality. Alas, the facts do not bear out this comforting thought.”<sup>231</sup> Amar concedes that “many framers piously hoped that one day slavery would disappear,”<sup>232</sup> but “they did little to hasten or guarantee that day, even when doing so might have been relatively painless—say, by constitutionally excluding slavery from all future Western territories.”<sup>233</sup> Instead, “the Constitution’s basic structure tilted the long-run game against the forces of freedom.”<sup>234</sup> Amar explains:

For every slave bought or bred (both before and after 1808) the slavocracy’s clout in Congress and the electoral college would increase, thanks to the three-fifths clause. In a process akin to compound interest, the effects of this one little number would grow exponentially as time passed, giving the Slave Power far more than its fair share of federal House seats, state legislative (and therefore federal Senate) seats, and electoral-college seats (and therefore far more chances to dominate the presidency, the cabinet, and the Court).<sup>235</sup>

Furthermore, slavery itself “led slave states to violate virtually every right and freedom declared in the Bill—not just the rights and freedoms of slaves, but of free men and women, too.”<sup>236</sup> For instance, abolitionist speech “was incendiary and had to be suppressed in southern states, lest slaves overhear and get ideas.”<sup>237</sup> “[W]riting, printing, publishing, or distributing abolitionist literature was punishable by death”<sup>238</sup> in at least one state. Overturning the original system took “Lincoln, secession, war, black arms-bearing, and victory.”<sup>239</sup>

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<sup>231</sup> AMAR, *supra* note 6, at 352.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> AMAR, *supra* note 6, at 352.

<sup>236</sup> AMAR, *supra* note 47, at 160.

<sup>237</sup> *Id.* at 160.

<sup>238</sup> *Id.* at 161.

<sup>239</sup> AMAR, *supra* note 6, at 352.

It is astounding that neither set of textbooks even hint at this key structural critique of our Founding Fathers' Constitution. While the early textbooks brand Reconstruction a failure and today's textbooks provide a mixed (if largely fair) appraisal of Reconstruction, the Founding Fathers escape both sets of textbooks largely unscathed.<sup>240</sup> There is little doubt that American schoolchildren should be proud of their Constitution and the Founding generation. At the same time, the disparate treatment of our Founding Fathers and our Reconstruction Founders creates a dynamic where one set of actors emerges as brilliant, ingenious, praiseworthy constitutional heroes, while the other set is either cast as constitutional villains or largely ineffective, wannabe revolutionaries (that is, if they are not ignored entirely).

## 2. The Myth of Continuity

Finally, in ignoring some of the original Constitution's most glaring defects, the textbooks succumb to the "myth of continuity"—namely, that somehow we still live in the world and under the government that the Founding Fathers envisioned, rather than one that was transformed by a bloody Civil War and Reconstruction (not to mention later constitutional developments). Kurt Lash referred to this as the "lingering belief in a constitutional big bang,"<sup>241</sup> "the idea that all of our most cherished constitutional values sprang into existence in a single moment at the Founding."<sup>242</sup> Lash added that "[t]his creation myth is not limited to the

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<sup>240</sup> Even when accepting certain criticisms of the Founders' motives (for instance, of a Beardian cast), our early textbooks gave them the benefit of the doubt. For instance, one textbook noted:

[The Founders] were, of course, benefited by the government that the Constitution created. There is therefore circumstantial evidence of selfishness, but one need not accept it as proved. On the contrary, one may well believe that those who made the Constitution endeavored to establish a government which, in the long run, would benefit every citizen of the United States.

BARKER & COMMAGER, *supra* note 194, at 162. Another added that "[t]he bitter struggle for ratification had intelligent, well-meaning people on both sides." BOORSTIN & KELLEY, *supra* note 197, at 121.

<sup>241</sup> Kurt Lash, *Two Movements of a Constitutional Symphony: Akhil Reed Amar's The Bill of Rights*, 33 U. RICH. L. REV. 485, 487 (1999).

<sup>242</sup> *Id.*

legally uninformed: The modern Supreme Court often supports its decisions by relying on the original intent of the Founding generation.”<sup>243</sup> Both sets of textbooks fall into this trap, a trap explained well by Akhil Amar:

The naked constitutional text misleads: A casual reader encounters a Thirteenth Amendment whose words seem to follow smoothly after the first seven Articles and the first twelve amendments, in one continuous constitutional tradition linking the Founders to their twenty-first-century posterity. What the bare text does not show is the jagged gash between Amendments Twelve and Thirteen—a gash reflecting the fact that the Founders’ Constitution *failed* in 1861-65. The system almost died, and more than half a million people did die. Without these deaths, the Thirteenth Amendment’s new birth of freedom could never have occurred as it did.<sup>244</sup>

Both sets of textbooks are “misled” by the “naked constitutional text.”

For instance, one of today’s textbooks marvels, “In only four months, the Philadelphia Convention produced the document that has governed the United States for more than 200 years.”<sup>245</sup> Another notes that “the basic structure of the federal government [today] remains exactly as the Framers envisioned it over 200 years ago.”<sup>246</sup> Our early textbooks include similar statements. For instance, one textbook notes that the “Constitution of the United States has stood

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<sup>243</sup> *Id.*

<sup>244</sup> AMAR, *supra* note 6, at 360.

<sup>245</sup> CAYTON ET AL., *supra* note 214, at 150.

<sup>246</sup> AYERS ET AL., *supra* note 230, at 156. Another of today’s textbooks, under the heading “A Lasting Document,” adds, “Remarkably, this written plan of government has remained basically the same for over two hundred years.” CAYTON ET AL., *supra* note 214, at 154. With this longevity in mind, one of today’s textbooks wonders, “How has a short document written over two centuries ago for thirteen struggling seaboard colonies been able to give strength and liberty to a vast, two-ocean nation of more than 250 million?” BOORSTIN & KELLEY, *supra* note 197, at 124. Still another observes, “The Constitution works as well today for an industrialized nation of 50 states and a population of more than 280 million as it did in 1790 for an agricultural nation of 13 states and fewer than 4 million inhabitants.” BOYER, *supra* note 203, at 154.

the test,”<sup>247</sup> adding that the “importance of the government set up under the Constitution can be judged from the fact that our government has survived under the Constitution from 1789 to the present day.”<sup>248</sup> Another goes even further, noting that the original Constitution “finally solved”<sup>249</sup> the “difficult problem of obtaining the proper balance between the central government and the states.”<sup>250</sup>

The myth of continuity appears to be fed (in part) by the small number of Article V Amendments that have been ratified since the original Founding. For instance, an early textbook notes that the “changes that have been made in the original work of the Constitutional delegates are remarkably few”<sup>251</sup> and the Constitution, “as [the Founders] put it together, has remained the basis of the government of a great people for a longer time than any other single written document.”<sup>252</sup> That same textbook concludes that “[i]t is a very great tribute to the Fathers of the Constitution that the system of government which they worked out . . . has endured through the many startling changes which have taken place in this nation and in the world.”<sup>253</sup>

The myth of continuity is just as striking in our textbooks’ portrayal of the Bill of Rights. The consensus account mostly falls into a related trap outlined by Amar:

The conventional narrative focuses on those present at the Creation—on the hasty oversights and omissions in the last days of a hot summer in Philadelphia; on the centrality of the (absence of a) Bill of Rights in ratification debates; and on the quick

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<sup>247</sup> WIRTH, *supra* note 201, at 107.

<sup>248</sup> *Id.* at 110.

<sup>249</sup> *Id.* at 106; *see also* BARKER & COMMAGER, *supra* note 194, at 163 (“The Constitution provided for the establishment of the government that we now have . . . It was accepted by the states, the new government that it created went into operation, and the danger of disunion was averted.”).

<sup>250</sup> WIRTH, *supra* note 201, at 106.

<sup>251</sup> CANFIELD & WILDER, *supra* note 195, at 143; *see also* CAYTON ET AL., *supra* note 230, at 154 (“Perhaps the best proof of this flexibility is the fact that the Constitution has been amended just 27 times in this nation’s history.”).

<sup>252</sup> CANFIELD & WILDER, *supra* note 195, at 143.

<sup>253</sup> *Id.*

repair work by the First Congress, fixing in place the keystone of the arch of liberty. And we lived all happily ever after.<sup>254</sup>

As Amar notes, “[This account] ignores all the ways in which the Reconstruction generation—not their Founding fathers or grandfathers—took a crumbling and somewhat obscure edifice, placed it on new, high ground, and remade it so that it truly would stand as a temple of liberty and justice for all.”<sup>255</sup> Roderick Hills adds, “[W]e under-appreciate the debt we owe to the Reconstruction generation, attributing our modern vision of the Bill of Rights to the Anti-Federalists when it is actually the product of the Republicans who drafted and ratified the Fourteenth Amendment.”<sup>256</sup>

Accounts of the Bill of Rights are similar in the textbooks of yesterday and today. They begin by noting the importance of the Bill of Rights to the anti-Federalists. For instance, as one early textbook noted, “Many people had objected to the Constitution because they felt that their rights were not sufficiently guaranteed.”<sup>257</sup> Indeed, “[u]nlike many state constitutions, the U.S. Constitution did not contain a bill of rights, or a document describing the civil liberties, or individual rights, that a government promises its citizens.”<sup>258</sup> To correct this oversight, “[the Antifederalists] wanted written guarantees that the people would have freedom of speech, of the press, and of religion. They demanded assurance of the right to trial by jury and the right to bear arms.”<sup>259</sup>

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<sup>254</sup> AMAR, *supra* note 47, at 288.

<sup>255</sup> *Id.*

<sup>256</sup> Roderick M. Hills, *Back to the Future? How the Bill of Rights Might Be About Structure After All*, 93 NW. U. L. REV. 977, 993 (1999).

<sup>257</sup> WIRTH, *supra* note 196, at 197.

<sup>258</sup> BOYER, *supra* note 203, at 147.

<sup>259</sup> DANZER ET AL., *supra* note 203, at 147. Another textbook explains, “The Constitution as originally framed did not contain a bill of rights, guaranteeing the rights of citizens and pointing out things that the government could not do. The omission was thought to be a serious defect.” BARKER & COMMAGER, *supra* note 194, at 158.

From there, our textbooks celebrate the Founding Founders' achievement. As one early textbook concludes, "[I]n the first ten amendments to the Constitution, called the Bill of Rights, . . . the citizens of the United States are guaranteed against interference by the government with some very important rights and privileges."<sup>260</sup> Another textbook adds, "The first ten amendments constitute a Bill of Rights, which guarantees some of our fundamental freedoms."<sup>261</sup> Still another notes, "The Bill of Rights has become one of the foundation stones of our American way of life."<sup>262</sup> A contemporary textbook goes further, adding, "Most of the amendments in the Bill of Rights listed things that *no* government, *state* or *federal*, could do."<sup>263</sup> Finally, one early textbook even uses the Bill of Rights to contrast American democracy with totalitarianism: "The great importance of the guarantee of these fundamental rights was made apparent to us in the events leading up to the Second World War when, in some of the countries under dictatorial rule, the people lost these rights and privileges."<sup>264</sup>

Of course, the Founding Fathers' Bill of Rights failed to protect Southern abolitionists and blacks from similar violations in antebellum America. It would take a new generation of American leaders to transform the Bill of Rights into the sacred text it has become today—our Forgotten Founders.

## B. The Reconstruction Narrative—Yesterday and Today

The last half-century has witnessed a dramatic retelling of the Reconstruction story in our textbooks, as the account has shifted from one of downright hostility in the 1940s and 1950s to a mixed account today. The Dunning School account dominated yesterday's textbooks—with

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<sup>260</sup> MUZZEY, *supra* note 202, at 179.

<sup>261</sup> WIRTH, *supra* note 201, at 109.

<sup>262</sup> CANFIELD & WILDER, *supra* note 195, at 140.

<sup>263</sup> AYERS ET AL., *supra* note 230, at 163 (emphasis added).

<sup>264</sup> WIRTH, *supra* note 201, at 110.

stories of vindictive Radicals, corrupt carpetbaggers, opportunistic scalawags, ignorant freedmen, and oppressed Southern whites. The key shift in today's account is that it is much more sensitive to the plight of the freedmen—and, as a result, more sympathetic to the Radical Republicans' cause. While earlier accounts were laced with racism and focused on the challenges facing the white South (especially in the form of lazy, ignorant freedmen), today's accounts eliminate any hint of racism and are much more critical of white Southerners.<sup>265</sup> Although the Radical Republicans are still portrayed as bitter, angry, and vindictive, today's textbooks provide a more detailed account of the underlying values that animate those feelings—namely, a genuine belief in civil and political equality for all.

In the end, although the modern account of Reconstruction is more historically accurate than the 1940s-1950s Dunning School narrative, it is also much more critical than modern accounts of the Eighteenth Century Founding. Today's textbooks leave our Founding Fathers largely unscathed, while subjecting our Reconstruction Founders to extensive criticism. Furthermore, none of the accounts sufficiently articulate our Reconstruction Founders' larger constitutional vision for a rights-enforcing, equality-producing national government—the vision that provided a constitutional foundation for the expansion of individual rights and equality in the twentieth century and beyond.<sup>266</sup>

## 1. The Enduring Power of the “But-For-Lincoln” Narrative

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<sup>265</sup> Although this shift is worthy of examination, I will focus my analysis on the treatment of the Radical Republicans and our textbooks' overall assessment of Reconstruction, limiting my discussion of race to passages particularly relevant to accounts of our Reconstruction Founders.

<sup>266</sup> As Jacobus tenBroek summarized:

[The Reconstruction Amendments'] meaning is to be gathered from the comprehensive goals of the abolitionist crusade; from the abrogation of the natural rights of men, bound and free, black and white, which were the active cause of that crusade; from the unmistakable nationalistic implications of the abolitionist movement; and from the constitutional theory which the abolitionists evolved to fit those goals, causes, and implications.

JACOBUS TENBROEK, *EQUAL UNDER LAW* 234 (1951).

One of the key Reconstruction themes in both sets of textbooks is what could be described as the “But-For-Lincoln” narrative. One early textbook’s account summarizes this view well: “There is a good chance that Lincoln—generous, patient, and with kindly feelings toward the southern states—might have been able to guide the country safely through the difficult task of reconstruction.”<sup>267</sup> Although there is little doubt that the nation would have been better-served by a President Lincoln than a President Johnson during Reconstruction, both sets of textbooks use Lincoln’s “gentleness”<sup>268</sup> as a foil for the Radical Republicans’ “harshness.”

Especially in the early accounts, this contrast is used to criticize the Radical program. For instance, in our early textbooks, Lincoln is clearly distinguished from the Radical Republicans in that he was “[f]ree from a spirit of vindictiveness toward a fallen foe.”<sup>269</sup> In his program, Lincoln would call for “gentleness and compromise,”<sup>270</sup> believing that “the South should not be punished severely.”<sup>271</sup> As such, he wanted “to restore the states to their former position as quickly as possible.”<sup>272</sup> These early textbooks do not consider any of the possible negative effects of a lenient Reconstruction program on the freedmen. Instead, they present Lincoln’s proposed program as the “logical” path to national reconciliation, portraying the Wade-Davis Bill (and Congressional Republicans’ preferred approach) as unreasonable.

Not a single early textbook cites the Congressional Republicans’ legitimate concern for the freedmen as a source of their opposition to the Lincoln program. Instead, our early textbooks simply note that the Congressional Republicans “wanted to punish the Southerners.”<sup>273</sup>

Divorced from the values animating their “harsher” program, the Congressional Republicans

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<sup>267</sup> CANFIELD & WILDER, *supra* note 195, at 322-23.

<sup>268</sup> WIRTH, *supra* note 196, at 406.

<sup>269</sup> *Id.*

<sup>270</sup> BARKER & COMMAGER, *supra* note 194, at 419.

<sup>271</sup> WIRTH, *supra* note 201, at 255.

<sup>272</sup> WIRTH, *supra* note 196, at 406.

<sup>273</sup> CANFIELD & WILDER, *supra* note 195, at 322.

emerge as irrationally angry obstructionists. Furthermore, in this case, they are obstructing the preferred path of America's martyred President, no less.<sup>274</sup> Our early textbooks frame Lincoln's assassination as "a great loss to the South,"<sup>275</sup> as "the South was at the mercy of its worst enemies."<sup>276</sup> In short, they conclude that the nation could have been spared the horrors of Reconstruction, but-for John Wilkes Booth's bullet. In a clear statement of the "But-For-Lincoln" narrative, one textbook concludes, "If Lincoln had lived to take charge of reconstruction, the South might have been spared the misgovernment forced upon it by congressional leaders."<sup>277</sup>

Although many of today's textbooks still succumb to a softer version of the "But-For-Lincoln" narrative, they all offer some context for the Radical Republicans' obstructionism. These accounts still begin with a charitable Lincoln. In fact, several textbooks frame the initial discussion of Reconstruction as a question of "forgiveness" or "punishment," beginning the relevant chapters with a section title to that effect.<sup>278</sup> In this formulation, Lincoln's plan was the path to "forgiveness," the Radical Republicans' the path to "punishment." Indeed, in these accounts, Lincoln "made it clear [before his death] that he favored a lenient Reconstruction policy."<sup>279</sup> Unlike the Radical Republicans, he "wished to make the South's return to the Union as quick and easy as possible."<sup>280</sup> By framing the discussion in this manner, these textbooks offer an implicit preference for the conciliatory approach.

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<sup>274</sup> Indeed, in these accounts, Lincoln pocket vetoes the Wade-Davis bill "because he thought it imposed terms too hard for the South to meet." BARKER & COMMAGER, *supra* note 194, at 422.

<sup>275</sup> *Id.* at 420.

<sup>276</sup> WIRTH, *supra* note 201, at 257.

<sup>277</sup> CANFIELD & WILDER, *supra* note 195, at 323.

<sup>278</sup> One of today's textbooks begins its Reconstruction unit with a chapter entitled, "To Punish or to Forgive?,"<sup>278</sup> and its first section is entitled, "With malice toward none." BOORSTIN & KELLEY, *supra* note 197, at 360, 361. Another leads with a section entitled, "Punishment or Pardon?," noting that Lincoln's "plan was forgiving to the South." CAYTON ET AL., *supra* note 214, at 425, 426.

<sup>279</sup> DANZER ET AL., *supra* note 203, at 377.

<sup>280</sup> *Id.*

Some textbooks still give a nod to the Dunning School, as well, noting that “the South had already been punished”<sup>281</sup> by the war and that “it was important to get the South back into working order.”<sup>282</sup> On this account, “Lincoln showed his greatness—and his forgiving spirit—by his plan for bringing Southerners back to the Union. He was less interested in the past than in the future.”<sup>283</sup> Lincoln “had not gone to war to destroy the South, but to preserve the Union.”<sup>284</sup> The Radical Republicans, on the other hand, rejected Lincoln’s approach and “concoct[ed] a plan of their own”<sup>285</sup> because “[t]hey could not take their eyes off the past.”<sup>286</sup> In the end, some of today’s accounts still pit Lincoln’s “lenient” vision against that of a group of Northern “avengers,”<sup>287</sup> “bitter against the Southern rebels”<sup>288</sup> and eager to “destroy the political power of former slaveholders.”<sup>289</sup>

In spite of this unfavorable framework, all of today’s textbooks (eventually) offer a sound reason for the Radical Republicans’ hostility that transcends mere sectionalism. As one textbook notes, “Most of all, [the Radical Republicans] wanted African Americans to be given full citizenship and the right to vote.”<sup>290</sup> Needless to say, most white Southerners did not share these goals. Even today’s textbooks containing remnants of the Dunning School account mention the Radical Republicans’ commitment to civil and political equality for African-Americans. Although students still must reject the sainted Lincoln and the spirit of forgiveness to overcome

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<sup>281</sup> BOORSTIN & KELLEY, *supra* note 197, at 361.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 362.

<sup>284</sup> BOYER, *supra* note 203, at 403.

<sup>285</sup> BOORSTIN & KELLEY, *supra* note 197, at 362.

<sup>286</sup> *Id.* On this account:

Under the Radicals’ scheme it would have been years before any Southern state could set up a majority government. It would have to wait until the whole Civil War generation was dead. . . . The Radical Republicans said they were in favor of liberty. But they were not willing to give it to hated white Southerners.

*Id.* at 363.

<sup>287</sup> *Id.* at 361.

<sup>288</sup> *Id.*

<sup>289</sup> DANZER ET AL., *supra* note 203, at 377.

<sup>290</sup> *Id.*

the “But-For-Lincoln” narrative, today’s accounts are a vast improvement over those of the 1940s and 1950s.

## 2. Andrew Johnson: Principled (if Annoying) Heir to Lincoln; or, Racist Scoundrel?

The accounts of Presidential Reconstruction largely track those of the “But-For-Lincoln” narrative. Although there is a shift in our textbooks’ treatment of Andrew Johnson—with sympathetic accounts in the 1940s-1950s and highly critical accounts today—Johnson’s Reconstruction policy is still tightly linked to the gentle Lincoln in both sets of textbooks. Our early textbooks concede many of Johnson’s negative (un-Lincoln-like) qualities. He was “untactful and stubborn”<sup>291</sup> and possessed a “violent temper.”<sup>292</sup> At the same time, they note that Johnson was an “honest, sincere, self-reliant, and courageous”<sup>293</sup> man—indeed, “even his severest critics testify to his integrity of purpose in all of his acts as President”<sup>294</sup> and “his great ability, honesty, and sincere devotion to the cause of justice and service to his country.”<sup>295</sup> “[L]ike Lincoln,” Johnson was “a man of humble origin and scant education,”<sup>296</sup> who “had risen from poverty through sheer force of character.”<sup>297</sup> Although a Democrat, Johnson “hated slave-owners”<sup>298</sup> and “had been the only member of Congress from the seceded states who remained in his seat at Washington in 1861.”<sup>299</sup> In the end, Johnson emerges from these early accounts as “a

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<sup>291</sup> WIRTH, *supra* note 196, at 407.

<sup>292</sup> BARKER & COMMAGER, *supra* note 196, at 422.

<sup>293</sup> CANFIELD & WILDER, *supra* note 195, at 323.

<sup>294</sup> WIRTH, *supra* note 196, at 407.

<sup>295</sup> *Id.* at 408.

<sup>296</sup> MUZZEY, *supra* note 202, at 428.

<sup>297</sup> CANFIELD & WILDER, *supra* note 195, at 323.

<sup>298</sup> MUZZEY, *supra* note 202, at 428.

<sup>299</sup> *Id.*

man of natural good sense”<sup>300</sup> (with certain flaws) stuck in a tough situation and dealing with an unreasonable foe.

Today’s textbooks are much more critical of Johnson. Although some textbooks note that Johnson was “the only senator from a Confederate state to remain loyal to the Union”<sup>301</sup> and “a supporter of abolition,”<sup>302</sup> today’s accounts seldom celebrate Johnson’s honesty and integrity. Instead, they stress that Johnson was a vulgar, former slave-owner, opposed to civil and political equality for African-Americans, and committed to white supremacy in the South. Importantly, one textbook does contain traces of the Dunning School narrative—for instance, stressing that Johnson was, like Lincoln, “a man of rock-ribbed honesty”<sup>303</sup>—but this account is the exception. Its existence speaks to the enduring legacy of the Dunning School, but it is notable only because it is so unusual in today’s accounts of Johnson.

In spite of the divergent accounts of Johnson’s character in our two sets of textbooks, both accounts tie Johnson’s Reconstruction plan to Lincoln’s lenient program.<sup>304</sup> As a result, their narratives largely track those analyzed in Sub-section III.B.1. In our early textbooks, Johnson faces the same implacable foe as Lincoln. On this view, “[i]t is certain that if Lincoln had lived . . . , he would have had on his hands the struggle with Congress he passed on to his successor.”<sup>305</sup> Whereas Lincoln may have actually succeeded, due to his superior skill and popularity, the flawed (even if well-meaning and honest) Johnson was destined to fail. Although “Johnson tried to carry out Lincoln’s humanitarian plan of reconstruction,”<sup>306</sup> he “was blocked . .

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<sup>300</sup> BARKER & COMMAGER, *supra* note 194, at 422.

<sup>301</sup> DANZER ET AL., *supra* note 203, at 376.

<sup>302</sup> *Id.*

<sup>303</sup> BOORSTIN & KELLEY, *supra* note 197, at 371.

<sup>304</sup> WIRTH, *supra* note 196, at 408 (“Johnson made known his determination to continue . . . the policy of Lincoln.”); *see also* DANZER ET AL., *supra* note 203, at 378 (including an entire section entitled, “Johnson Continues Lincoln’s Policies”).

<sup>305</sup> MUZZEY, *supra* note 202, at 428.

<sup>306</sup> CANFIELD & WILDER, *supra* note 195, at 323.

. by revengeful politicians.”<sup>307</sup> Tracking the “But-For-Lincoln” narrative above, our early textbooks conclude that “[i]f Congress had admitted [the Johnson governments], our country would have been spared a disgraceful chapter in its history.”<sup>308</sup> Once again, these early accounts ignore the potential plight of the freedmen under Johnson’s “lenient” program.

Johnson’s Reconstruction plan is also closely linked to Lincoln’s program in today’s accounts.<sup>309</sup> However, just as in their discussion of Lincoln’s plan, today’s textbooks provide a convincing explanation for the Radical Republicans’ obstructionism—an explanation that transcends mere sectionalism and power politics. In short, “[t]he Radicals were especially upset that Johnson’s plan . . . failed to address the needs of former slaves in three areas: land, voting rights, and protection under law.”<sup>310</sup> Therefore, the Radical Republicans emerge from today’s accounts as the defenders of the vulnerable freedmen—not as irrationally angry sectionalists committed to prolonging the agony of an already-defeated South.

### 3. The Radical Republicans and Congressional Reconstruction: Bitter Hostility; or, Justified Anger?

Accounts of Congressional Reconstruction have shifted from downright hostility in the 1940s-1950s to a more mixed account in today’s textbooks. I will consider each set of textbooks in turn.

#### a. Congressional Reconstruction in Our Early Textbooks

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<sup>307</sup> *Id.*

<sup>308</sup> MUZZEY, *supra* note 202, at 429.

<sup>309</sup> DANZER ET AL., *supra* note 203, at 378 (“Johnson’s plan differed little from Lincoln’s.”).

<sup>310</sup> *Id.*

In our early textbooks, the Radical Republicans are supposedly driven by animosity and power politics, resulting in political corruption, Southern anger, and regional tragedy. Early textbooks describe the Radical Republicans as a group of “extrem[ists], urged on by their bitter animosity toward the South.”<sup>311</sup> Their program is described as a “harsh” alternative to Presidential Reconstruction, driven by the Radicals’ “angry mood”<sup>312</sup> and “hat[red of] Johnson for his Southern birth”<sup>313</sup>

Although Radical leaders like Thaddeus Stevens *were* no doubt angry at the South, our early textbooks provide few explanations for the Radical Republicans’ anger—apart from their misdirected (and largely unexplained) animosity for the white South. Rather than stressing the Radicals’ commitment to racial equality and a “new birth of freedom”—and connecting their anger at the South to those commitments—our early textbooks describe the Reconstruction Founders as “bent upon a policy of revenge and punishment.”<sup>314</sup> These accounts are more likely to stress political concerns, such as “want[ing] a weak South in order to keep the Republican

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<sup>311</sup> WIRTH, *supra* note 196, at 405.

<sup>312</sup> CANFIELD & WILDER, *supra* note 195, at 324.

<sup>313</sup> MUZZEY, *supra* note 202, at 429. Needless to say, our early textbooks’ accounts of the brutality of Republican rule in the South are largely absurd. As Kenneth Stampp noted, “[R]arely in history have the participants in an unsuccessful rebellion endured penalties as mild as those Congress imposed upon the people of the South, and particularly upon their leaders. After four years of bitter struggle costing hundreds of thousands of lives, the generosity of the federal government’s terms was quite remarkable.” STAMPP, *supra* note 66, at 11. Stampp added: What, then, constituted the alleged brutality that white Southerners endured? First, the freeing of their slaves; second, the brief incarceration of a few Confederate leaders; third, a political disability imposed for a few years on most Confederate leaders; fourth, a relatively weak military occupation terminated in 1877; and, last, an attempt to extend the rights and privileges of citizenship to southern Negroes. Mistakes there were in the implementation of these measures—some of them serious—but brutality almost none.

*Id.*

Furthermore, as Foner noted of the Radical Republican’s main motivations, “Rather than vengeance, the driving force of Radical ideology was the utopian vision of a nation whose citizens enjoyed equality of civil and political rights, secured by a powerful and beneficent state.” FONER, *supra* note 152, at 230. Foner added:

For decades, long before any conceivable political benefit derived from its advocacy, Stevens, Sumner, and other Radicals defended the unpopular cause of black suffrage and castigated the idea that America was a ‘white man’s government’ (a doctrine, Stevens remarked, ‘that damned late Chief Justice [Roger B. Taney] to everlasting fame; and, I fear to everlasting fire”).

*Id.*

<sup>314</sup> WIRTH, *supra* note 196, at 408.

party . . . in power,”<sup>315</sup> than any nobler ambitions. Even black suffrage is given this political gloss.<sup>316</sup> Although political motivations surely played some role in Republican support for black suffrage, our early accounts largely ignore the long-term commitment of many Radicals to this cause. While these early textbooks tend to give our Founding Fathers the benefit of the doubt (and ignore some of their key failings), they always assume the worst of our Reconstruction Founders.

In these early accounts, Northern support for Congressional Reconstruction is built upon deception and misunderstanding. Moderate Northerners go along with Congressional Reconstruction because of “[s]everal unfortunate and grossly misinterpreted occurrences.”<sup>317</sup> These “misinterpreted occurrences”<sup>318</sup> include the election of high Confederate officials (said to be “the result of a sincere desire to be represented by the most able men”<sup>319</sup>) and the passage of the “so-called”<sup>320</sup> Black Codes (meant to deal with the “[m]any negro freedmen [who] positively refused to work”<sup>321</sup>). These early accounts of the Black Codes are particularly striking—describing them as “necessary measures of social protection”<sup>322</sup> and laws intended to “deal with the problem”<sup>323</sup> of “wandering and unemployed freedmen.”<sup>324</sup> In short, these laws were necessary because “few of the liberated slaves had any sense of responsibility.”<sup>325</sup> The Northerners simply refused to empathize with the legitimate challenges facing the white South.

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<sup>315</sup> WIRTH, *supra* note 201, at 256.

<sup>316</sup> In the early accounts, black suffrage is presented as the “surest plan for the Republicans to keep power [in the South].” WIRTH, *supra* note 196, at 410. Indeed, these textbooks note that the Radical Republicans especially pushed for black suffrage only after Grant’s narrow victory over Seymour, when these results “warned . . . how necessary it was to retain the colored vote.” MUZZEY, *supra* note 202, at 435.

<sup>317</sup> WIRTH, *supra* note 196, at 409.

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> MUZZEY, *supra* note 202, at 430.

<sup>323</sup> CANFIELD & WILDER, *supra* note 195, at 322.

<sup>324</sup> *Id.*

<sup>325</sup> MUZZEY, *supra* note 202, at 430.

Instead, they supported the early measures offered by Congressional Republicans—measures intended to overturn the Black Codes, punish the Southern rebels, and promote black suffrage.

Our early textbooks stress the harshness and overall ineffectiveness of these measures. In these accounts, Congressional Reconstruction “develop[s] gradually, growing harsher as it unfold[s] step by step.”<sup>326</sup> These accounts provide pointed criticisms each step along the way. For instance, they criticize the Freedman’s Bureau for “pursu[ing] a policy so unwise and discriminatory that [local officials] won for the bureau the ill will of the white people of the South.”<sup>327</sup> In addition, while our early textbooks are not nearly as critical of the Civil Rights Act of 1866, they tend to cheapen its historic significance by stressing its limitations rather than its achievements—for instance, noting that the Act “did not . . . give [blacks] the privilege of voting and holding office.”<sup>328</sup>

Most importantly, in the hands of these early textbook authors, the Fourteenth Amendment becomes just another harsh measure offered during Congressional Reconstruction, as these accounts emphasize the Amendment’s punitive sections over the “new birth of freedom” offered by Section One. In these accounts, Section One is often dispensed with in a single sentence—usually stressing that it was designed to “remov[e] doubts about the constitutionality of the Civil Rights Act.”<sup>329</sup> Although black citizenship is almost always mentioned, *Dred Scott* is not. Furthermore, both due process and the “privileges or immunities” of U.S. citizenship are (largely) ignored—and with them John Bingham’s vision of federally-protected fundamental freedoms.<sup>330</sup> At the same time, these accounts dwell on Sections Two through Four as

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<sup>326</sup> BARKER & COMMAGER, *supra* note 194, at 425.

<sup>327</sup> WIRTH, *supra* note 196, at 410.

<sup>328</sup> BARKER & COMMAGER, *supra* note 194, at 426.

<sup>329</sup> WIRTH, *supra* note 196, at 411.

<sup>330</sup> *Id.*; see also BARKER & COMMAGER, *supra* note 194, at 426. *But see* CANFIELD & WILDER, *supra* note 195, at 321 (“The amendment . . . proceeded to safeguard the civil and political rights of citizens.”); MUZZEY, *supra* note

“harsh,”<sup>331</sup> “obnoxious”<sup>332</sup> measures designed to punish the South. As such, early accounts of the Fourteenth Amendment leave students with little sense of the constitutional revolution that our Reconstruction Founders were attempting—as well as how radical a departure this Amendment was from the Founding Fathers’ vision.

Needless to say, Congressional Reconstruction emerges in this earlier era as an unprincipled, harsh program, driven largely by sectional anger and power politics. Congressional Reconstruction is largely rehabilitated in today’s accounts.

#### b. Congressional Reconstruction in Today’s Textbooks

Although the Radical Republicans are still described as “angry” in today’s textbooks, contemporary accounts provide a noble explanation for their anger—the Radicals’ genuine commitment to racial equality. In these accounts, the perceived “harshness” of Congressional Reconstruction is not merely a means of punishing the South for its own sake; rather, some of its harsher elements are required to promote black equality. For instance, unlike earlier accounts, where the Radicals sent troops to the South to avenge the Civil War and punish secession, today’s textbooks note that the Radical Republicans designed their Reconstruction program to promote “sweeping political change in the South.” Union troops were sent into the South for a good reason—not merely to irrationally punish the South—but also because the Radicals “believed [that sweeping political change] would only occur with the strong presence of Union

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200, at 326 (noting that the Fourteenth Amendment “forbade any state to deprive them of their privileges as citizens”).

<sup>331</sup> MUZZEY, *supra* note 202, at 432.

<sup>332</sup> WIRTH, *supra* note 196, at 411.

troops.”<sup>333</sup> In short, in today’s account, Congressional Reconstruction emerges mostly as a reasonable, noble plan.

Even so, many of today’s textbooks couple Congressional Reconstruction’s commitment to racial equality with an equal desire to punish the rebels. In fact, many lead their description of Congressional Reconstruction with the goal of vengeance. For instance, one of today’s textbooks notes that Congressional Reconstruction was “designed to punish the former Confederate states, to increase Republican power in the South, and to create conditions that would promote economic development and racial equality in the South.”<sup>334</sup> Another adds that Congressional Reconstruction “would combine revenge, idealism, and political opportunism.”<sup>335</sup> In this sense, Radical Republican anger, which was so prominent in the Dunning School narrative, does not disappear in today’s accounts of Reconstruction. Instead, our Reconstruction Founders’ anger is often balanced against their nobler goals.

There is also a major shift in how today’s textbooks treat early Northern support for Congressional Reconstruction. While our early textbooks credit Republican deception for early Northern support, today’s textbooks take Northerners’ concerns about Southern white repression seriously. With the racist assumptions of the earlier accounts entirely removed from today’s textbooks, the Black Codes become a canonical act of evil by white Southerners—an attempt to “severely restrict[] the rights of newly freed African Americans”<sup>336</sup> and “establish[] virtual slavery.”<sup>337</sup> For many Northerners, these laws indicated “that the South had not given up the

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<sup>333</sup> GARY B. NASH, *AMERICAN ODYSSEY: THE 20<sup>TH</sup> CENTURY AND BEYOND* 186 (2004).

<sup>334</sup> *Id.*

<sup>335</sup> BOORSTIN & KELLEY, *supra* note 197, at 369.

<sup>336</sup> NASH, *supra* note 333, at 185.

<sup>337</sup> CAYTON ET AL., *supra* note 214, at 430. Another textbook similarly notes, the Black Codes “all aimed to prevent African Americans from achieving social, political, and economic equality with southern whites.” BOYER, *supra* note 203, at 405. Indeed, one textbook notes, “Because the Black Codes helped retain a familiar way of life, local sheriffs and Civil War veterans supported and enforced these laws,” “invad[ing] African American homes and seiz[ing] guns and other property.” AYERS ET AL., *supra* note 230, at 412.

idea of keeping African Americans in bondage.”<sup>338</sup> In addition to the Black Codes, in today’s accounts, the Northerners are rightly disappointed when the Johnson governments send to “Washington nine Confederate generals, two Confederate cabinet members, and Alexander Stephens, the vice president of the Confederacy.”<sup>339</sup> In these accounts, the election of former Confederate leaders is not an indication of the South’s genuine desire to send their best leaders to Congress—rather it is an act of Southern defiance. In short, Northern support for Congressional Reconstruction emerges in today’s accounts as both reasonable and justified.

In addition, today’s accounts are more favorable to various features of Congressional Reconstruction, including the Freedman’s Bureau, the Civil Rights Act of 1866, and the Fourteenth Amendment. Instead of framing the second Freedman’s Bureau Bill and the Civil Rights Act of 1866 as purely “radical” measures, today’s textbooks emphasize that these policies received broad support, as “moderate Republicans joined with Radicals to override the president’s vetoes.”<sup>340</sup> Instead of focusing on Southern resentment for the alleged corruption of the Freedmen’s Bureau, today’s textbooks call it “the first major federal relief agency in United States history”<sup>341</sup> offering “clothing, medical supplies, and millions of meals to both black and white war refugees.”<sup>342</sup> Instead of downplaying the historic importance of the Civil Rights Act of 1866, today’s textbooks note that it is was “the first civil rights law in the nation’s history,”<sup>343</sup> “designed . . . to overturn discriminatory laws and the Supreme Court’s 1857 *Dred Scott* ruling.”<sup>344</sup>

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<sup>338</sup> DANZER ET AL., *supra* note 203, at 379.

<sup>339</sup> AYERS ET AL., *supra* note 230, at 411.

<sup>340</sup> DANZER ET AL., *supra* note 203, at 379.

<sup>341</sup> CAYTON ET AL., *supra* note 214, at 429.

<sup>342</sup> *Id.*

<sup>343</sup> BOYER, *supra* note 203, at 410.

<sup>344</sup> *Id.*

Finally, and most importantly, Section One takes center-stage in today’s accounts of the Fourteenth Amendment, as the Amendment is described as “a turning point”<sup>345</sup> whose “effects have echoed throughout American history.”<sup>346</sup> Today’s textbooks note that the Fourteenth Amendment “made ‘all persons naturalized in the United States’ citizens of the country;”<sup>347</sup> declared “[a]ll were entitled to equal protection of the law, and no state could deprive any person of life, liberty, or property without due process of law;”<sup>348</sup> and, “forbade any state from depriving citizens of their rights and privileges.”<sup>349</sup> Indeed, in these accounts, we can see the outlines of Bingham’s vision (though he is never mentioned by name), as today’s textbooks conclude that the Fourteenth Amendment “granted the nation’s citizens rights—enjoyed equally by all—that could be enforced by the federal government.”<sup>350</sup> Although the Privileges or Immunities Clause is never explicitly mentioned (or its implications fully explained), today’s textbooks provide a fairly robust account of the Reconstruction Founders’ vision of U.S. citizenship.

Furthermore, some of today’s textbooks even note the Supreme Court’s complicity in undermining our Reconstruction Founders’ vision.<sup>351</sup> This is a major shift from our early textbooks, which used the Supreme Court’s decisions in *Cruikshank* and *The Slaughterhouse Cases* to “raise[] doubt[s]”<sup>352</sup> about the constitutionality of Reconstruction. Today’s textbooks largely set the record straight, lamenting the Supreme Court’s “role in bringing about the end of Reconstruction.”<sup>353</sup> In these accounts, “[a]lthough Congress. . . passed important laws to protect the political and civil rights of African Americans, the Supreme Court began to take away those

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<sup>345</sup> CAYTON ET AL., *supra* note 214, at 431.

<sup>346</sup> *Id.*

<sup>347</sup> DANZER ET AL., *supra* note 203, at 379.

<sup>348</sup> *Id.*

<sup>349</sup> BOORSTIN & KELLEY, *supra* note 197, at 368.

<sup>350</sup> BOYER, *supra* note 203, at 410.

<sup>351</sup> For a concise account of the Court’s role in Reconstruction, see Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction’s Political Court*, 91 GEO. L.J. 1 (2002).

<sup>352</sup> BARKER & COMMAGER, *supra* note 194, at 429.

<sup>353</sup> CAYTON ET AL., *supra* note 214, at 444.

same protections”<sup>354</sup> in a series of decisions “that undermined both the Fourteenth and Fifteenth Amendments.”<sup>355</sup> After these rulings, “the Supreme Court . . . had narrowed the scope of these amendments so much that the federal government no longer had much power to protect the rights of African Americans.”<sup>356</sup> Although the Court is only mentioned in four of the six modern accounts analyzed for this Article (and treated extensively in only two of them), these accounts further emphasize the external forces working against the noble ambitions of our Reconstruction Founders.<sup>357</sup>

In spite of the positive shift mentioned above, certain textbooks still contain traces of the Dunning School account—particularly in the form of passages stressing the “vindictive”<sup>358</sup> motives of the Radical Republicans.<sup>359</sup> For instance, one textbook notes that Union soldiers were sent to the South so “nobody would be allowed to forget”<sup>360</sup> that they were a “conquered province.”<sup>361</sup> Another textbook questions whether “the presence of federal troops was necessary to bring about political and social changes in the South,”<sup>362</sup> noting the “more astute”<sup>363</sup> (and contrary) view of General Sherman that “[n]o matter what change we may desire in feelings and

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<sup>354</sup> DANZER ET AL., *supra* note 203, at 398.

<sup>355</sup> *Id.* These decisions included *The Slaughterhouse Cases* (holding that the Fourteenth Amendment did not protect “most of Americans’ basic civil rights”), *United States v. Cruikshank* (concluding that the “Fourteenth Amendment did not give the federal government the right to punish individual whites who oppressed blacks”), and *United States v. Reese* (proclaiming that the “Fifteenth Amendment did not ‘confer the right of suffrage on anyone’”). *Id.*

<sup>356</sup> DANZER ET AL., *supra* note 203, at 398.

<sup>357</sup> See also AYERS ET AL., *supra* note 230, at 425; CAYTON ET AL., *supra* note 214, at 444; NASH, *supra* note 333, at 191.

<sup>358</sup> BOORSTIN & KELLEY, *supra* note 197, at 369.

<sup>359</sup> Importantly, some textbooks continue to stress the political motivations for black suffrage above all else. For instance, one textbook notes that Grant’s close election in 1868 “made the Republicans more eager than ever to control the Southern governments and hold the black vote. With these political ambitions in mind, they proposed the Fifteenth Amendment to the Constitution.” *Id.* at 372.

<sup>360</sup> *Id.* at 369.

<sup>361</sup> *Id.*

<sup>362</sup> NASH, *supra* note 333, at 185.

<sup>363</sup> *Id.*

thoughts of people South, we cannot accomplish it by force.”<sup>364</sup> In one of the most pro-Southern, backward-looking passages in any of today’s accounts, one textbook adds:

Worst of all was the Radical refusal to forgive or forget. They denied leading citizens of the Old South the right to vote or to hold any office in state or local government. Hungry for power, the Radicals wanted to rule the South through their own friends. . . . They said that they loved liberty, but really they were afraid of it. They were afraid to give political liberty to their old enemies.<sup>365</sup>

Concededly, this passage is found in the most pro-Southern of today’s textbooks, but it suggests the enduring influence of the Dunning School.

In spite of these scatters passages that hearken back to the Dunning School narrative, today’s textbooks primarily focus on the key constitutional advancements made during Congressional Reconstruction, achievements that “increased the rights and freedoms of African-Americans.”<sup>366</sup> Although our Reconstruction Founders do not receive treatment that matches the Founding Fathers, their program of Congressional Reconstruction is treated much more favorably today than it was half a century ago.

#### 4. The Johnson Impeachment—No Longer Tragic (But Still a Regrettable Affair)

Both sets of textbooks are critical of the Johnson impeachment. In the early accounts, the impeachment of Andrew Johnson is a tragic episode in Reconstruction—the villainous Republicans, led by Thaddeus Stevens, looking for a “pretext”<sup>367</sup> to remove a principled (if annoyingly stubborn) President. In the hands of our early textbook writers, it becomes the

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<sup>364</sup> *Id.*

<sup>365</sup> BOORSTIN & KELLEY, *supra* note 197, at 369.

<sup>366</sup> NASH, *supra* note 333, at 185.

<sup>367</sup> CANFIELD & WILDER, *supra* note 195, at 326.

pinnacle of Radical Republican overreaching and the “climax”<sup>368</sup> of the “feud between President Johnson and the radical Republicans.”<sup>369</sup> In this account, the Radical Republicans’ “handling of the case was marked by political hostility rather than open-minded justice,”<sup>370</sup> as they “were determined to get rid of Johnson and make room for one of their own group in the Presidency.”<sup>371</sup> Johnson was ultimately acquitted, as “seven Senators were honorable enough to place justice before partisan hatred,”<sup>372</sup> in spite of “desperate efforts on the part of the President’s enemies to secure [a conviction] by bribery and intimidation.”<sup>373</sup> In the end, “the country was saved from the disgrace of using a clause of the Constitution as a weapon for personal and political vengeance against the highest office in the land.”<sup>374</sup> Regardless, our early textbooks conclude that Johnson’s impeachment was “one of the most farcical and deplorable episodes in American history.”<sup>375</sup>

Today’s textbooks still criticize the Radical Republicans for the Johnson impeachment. Indeed, some of today’s accounts are indistinguishable from the milder narratives of the 1940s and 1950s. For instance, one textbook notes that “the Radicals were out to ‘get’ Johnson,”<sup>376</sup> since “[t]hey could not bear the idea of a President who was not in their pocket.”<sup>377</sup> Most, however, were critical without becoming hostile. These accounts begin by stressing that “[t]he

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<sup>368</sup> *Id.*

<sup>369</sup> *Id.*

<sup>370</sup> *Id.* at 327.

<sup>371</sup> *Id.*

<sup>372</sup> MUZZEY, *supra* note 202, at 434.

<sup>373</sup> WIRTH, *supra* note 196, at 413.

<sup>374</sup> MUZZEY, *supra* note 202, at 434.

<sup>375</sup> WIRTH, *supra* note 196, at 412.

<sup>376</sup> BOORSTIN & KELLEY, *supra* note 197, at 370.

<sup>377</sup> *Id.* One textbook even connected its criticism of the Radicals to its reverence for the Founding Fathers—noting that “[t]he framers showed their special wisdom when for such a drastic act [as impeachment] they required the support of *two-thirds* of the members present.” *Id.* at 371. This textbook concluded that Johnson’s “only ‘crime’ had been that he believed it his duty to obey the Constitution as he saw it.” *Id.* Furthermore, “[t]he strength of the Constitution and the American system was upheld when the President’s bitter enemies accepted the result.” *Id.*

case against Johnson was weak from the start.”<sup>378</sup> At the same time, in today’s textbooks, the episode does not serve as a paradigm case of Radical thuggery. Indeed, one textbook even takes seriously the Radicals’ claims, noting that “Radical leaders felt President Johnson was not carrying out his constitutional obligation to enforce the Reconstruction Act.”<sup>379</sup> In the end, most of today’s accounts use the episode as a cautionary tale about Congressional overreaching and a lesson on the proper scope of the impeachment power, noting that “Johnson . . . escaped by the closest of margins,”<sup>380</sup> and “[t]he crisis set the precedent that only the most serious crimes, and not merely a partisan dispute with Congress, could remove a President from office.”<sup>381</sup> Overall, today’s textbooks appear satisfied with the result of this episode—a chastened group of Radicals and a weakened President Johnson.<sup>382</sup>

## 5. Republican Rule in the South: A Den of Corruption and Incompetence; or, A Mixed Bag?

One of the great transformations in our textbooks occurred in the consensus accounts of the Republican governments in the South.

### a. Republic Rule in the South: Yesterday’s Textbooks

Our early textbooks provide highly critical accounts of Republican rule in the South. In particular, they provide stinging critiques of the carpetbaggers, scalawags, and newly-enfranchised African-Americans. For instance, each early textbook presents the myth of the carpetbagger as fact, noting that “they were said to have brought all of their possessions with

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<sup>378</sup> BOYER, *supra* note 203, at 412.

<sup>379</sup> DANZER ET AL., *supra* note 203, at 381.

<sup>380</sup> CAYTON ET AL., *supra* note 214, at 433.

<sup>381</sup> *Id.*

<sup>382</sup> For extensive treatment of how the Johnson impeachment helped “construct” the proper scope of the impeachment power and shape the relationship between Congress and the Presidency, see KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 113-157 (2001).

them in carpetbags,”<sup>383</sup> even as “many of them returned a few years later loaded with the wealth they had extorted from their former enemies.”<sup>384</sup> Furthermore, the scalawags are said to have partnered with the carpetbaggers “in the hope of sharing in the booty,”<sup>385</sup> and as such, were “[e]ven more despised by the white people in the South.”<sup>386</sup>

These early textbooks stress the carpetbaggers’ pernicious influence on the newly-empowered African-Americans. These “rascally”<sup>387</sup> Northerners “poison[ed] [the freedmen’s] minds against the only people who could help them to get a start in their new life of freedom”—Southern whites.<sup>388</sup> From there, the carpetbaggers, scalawags, and African-Americans united to form among the most corrupt, extravagant, ineffective governments in Southern history. These Southern governments were “sorry affairs, . . . supported by Northern bayonets.”<sup>389</sup> Their “extravagance and corruption . . . stagger[ed] belief,”<sup>390</sup> with key criticisms centering on their rampant spending and high taxes,<sup>391</sup> which were unsurprising, since “the [financial] responsibility [did not] rest heavily upon their shoulders.”<sup>392</sup> Rather than focusing on the public investments made by these governments (in infrastructure and public education, for instance), these early accounts focus on examples of ridiculous personal expenditures. South Carolina (the state with the highest percentage of African-American representatives) is often presented as the

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<sup>383</sup> WIRTH, *supra* note 196, at 413.

<sup>384</sup> *Id.*

<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

<sup>387</sup> MUZZEY, *supra* note 202, at 430.

<sup>388</sup> *Id.* One textbook even connected the carpetbaggers to certain “violent methods,” including instances where “Democratic white leaders were robbed and even murdered, or their houses and barns were burned.” WIRTH, *supra* note 196, at 415.

<sup>389</sup> MUZZEY, *supra* note 202, at 433.

<sup>390</sup> BARKER & COMMAGER, *supra* note 194, at 433.

<sup>391</sup> For instance, one early textbook noted, “[I]t was in the management of the financial affairs of the state that they made the most pitiful showing.” WIRTH, *supra* note 196, at 414.

<sup>392</sup> *Id.*; *see also* MUZZEY, *supra* note 202, at 433 (“Two thirds of the members paid no taxes at all, and the rest only trifling amounts; yet they spent the people’s money lavishly, voting themselves large salaries, installing expensive furnishing in the capitol, and wasting millions on projects for railroads, canals, and public works, from which they reaped large sums in graft.”).

paradigm case of self-centered government spending.<sup>393</sup> One textbook's account is representative: "Extravagant sums were appropriated from the public funds for fine desks, upon which the negroes put their feet; French mirrors; china spittoons; and the most lavish furnishing for the Capitol and the quarters of some of the members."<sup>394</sup> Furthermore, "[t]he same story was repeated, with variations, in the other reconstructed states."<sup>395</sup>

In the early accounts, these governments could force their will upon the Southern whites only because "regiments of Northern military forces [were] on hand to enforce the acts of these governments."<sup>396</sup> As a result, "the white people of the South were powerless to stop such extravagance and corruption."<sup>397</sup> These accounts express sympathy for the Southern whites, noting that "it is not difficult to understand the resentment of southern people, or their determination to regain control of their states."<sup>398</sup> The South, "[d]eprived of any legal means of defense against such iniquitous government, . . . naturally resorted to intimidation."<sup>399</sup> It is in this context that the Ku Klux Klan is often introduced.<sup>400</sup> From there, our early textbooks tend to

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<sup>393</sup> See, e.g., BARKER & COMMAGER, *supra* note 194, at 422 ("In South Carolina the capitol was refurnished at enormous expense.").

<sup>394</sup> *Id.*

<sup>395</sup> MUZZEY, *supra* note 202, at 433.

<sup>396</sup> WIRTH, *supra* note 196, at 414.

<sup>397</sup> *Id.*

<sup>398</sup> BARKER & COMMAGER, *supra* note 194, at 434.

<sup>399</sup> MUZZEY, *supra* note 202, at 433.

<sup>400</sup> Early accounts of the Klan were fairly sympathetic. In the consensus narrative, the Klan begins as a "social club," "derived from the Greek word 'kuklos,' meaning a band, or a circle." WIRTH, *supra* note 196, at 415. It was led by an "outstanding military hero," General Nathan Bedford Forrest. WIRTH, *supra* note 201, at 261. Each textbook noted that the Klan garb was intended to take "advantage of the Negroes' superstition and fear to force them back into a position of social and political obscurity." MUZZEY, *supra* note 202, at 433-34. These textbooks added that "the original purpose of the order was merely to discipline the criminally inclined negroes and 'carpetbaggers,'" though even they conceded that "a baser element had crept into the Klan, and . . . had been guilty of conduct which was a discredit to the organization." WIRTH, *supra* note 196, at 415. Because of this development, Klan leaders ordered it disbanded; however, a few groups "refused to disband and continued their program of violence." *Id.* Even then, "[e]xaggerated reports of these deeds of violence were spread through the North and used by the radical politicians to justify the tightening of military rule in the South." MUZZEY, *supra* note 202, at 434. One textbook even noted that the Republican party "made special connections with press correspondents who went South to report race disturbances and race friction, and thus keep the North alive to all the brutalities which they claimed were being practiced against Negroes south of the Potomac River." BARKER & COMMAGER, *supra* note 194, at 427.

celebrate the collapse of Republican rule in the South by emphasizing economic gains made under the “Redeemer” governments and downplaying acts of violence against African-Americans.<sup>401</sup> In many of our early textbooks, Southern resentment arose, not from racism, but from frustration over corrupt Republican governments and anger at the continuing Union occupation.<sup>402</sup> Finally, “‘alien’ rule [eventually] collapsed” in almost all of the Southern states,<sup>403</sup> as the Southern governments “declared the issues of slavery and secession . . . ‘settled for all time.’”<sup>404</sup> Furthermore, once Rutherford B. Hayes (“a man of unquestioned honesty”<sup>405</sup>) pulled the remaining federal troops, “the remaining ‘carpetbagger’ governments immediately collapsed.”<sup>406</sup> This marked the “end of the reconstruction era,”<sup>407</sup> as the “government came now into the hands of men who saw the necessity of laying aside the old issues of ‘rebellion’ and grappling with the problems of politics and economics raised by the marvelous expansion of our country’s industries since the war.”<sup>408</sup>

In their criticisms of Republican rule in the South, our early accounts entirely ignore the achievements made under these governments and completely downplay the challenges these governments faced in the form of Southern violence. Today’s textbooks largely correct these distortions.

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According to these accounts, the truth was that “[t]he great mass of the southern people deplored such violence, but the radicals made the most of it in the North to win support for their policies.” *Id.* This resulted in the Ku Klux Klan Acts, which “were rigidly enforced by the Federal troops,” even as they “were later declared unconstitutional” and “encouraged further strife and bloodshed in the South.” MUZZEY, *supra* note 202, at 435; WIRTH, *supra* note 196, at 416.

<sup>401</sup> Rather than dwelling on white violence in the South or emphasizing efforts to disenfranchise African-Americans, these accounts frequently noted that “more and more of the negroes absented themselves from the polls,” only mentioning in passing the fact that “in most cases, probably, because of intimidation by whites.” WIRTH, *supra* note 196, at 416.

<sup>402</sup> For instance, Republican rule collapsed as voters, “[d]isgusted by the corruption of the Republican administration, . . . came to support the Democratic nominees in the Congressional elections.” *Id.*

<sup>403</sup> *Id.*

<sup>404</sup> MUZZEY, *supra* note 202, at 436.

<sup>405</sup> *Id.* at 447.

<sup>406</sup> WIRTH, *supra* note 196, at 416.

<sup>407</sup> MUZZEY, *supra* note 202, at 449.

<sup>408</sup> *Id.*

b. Republican Rule in the South: Today's Textbooks

Today's textbooks stress many of the achievements of Republican rule in the South, while also lamenting the collapse of the Republican governments. These governments were far from perfect, but they were hardly the dens of corruption that emerge in our early textbooks. Rather, the coalition of carpetbaggers, scalawags, and African-Americans was filled with idealists and opportunists, self-promoters and humanitarians, adventurers and egalitarians. In today's accounts, the carpetbaggers and scalawags are no longer villainous opportunists, polluting the minds of the freedmen. Although some carpetbaggers "were the dishonest businesspeople whom the Southerners scorned,"<sup>409</sup> many were "Freedmen's Bureau agents, teachers, and ministers who felt a moral duty to help former slaves."<sup>410</sup> Although some scalawags surely hoped "to enrich themselves,"<sup>411</sup> many "honestly thought that a Republican government offered the best chances for the South to rebuild and industrialize."<sup>412</sup> Most "were small farmers who want[ed] to improve their economic and political position and to prevent the former wealthy planters from regaining power."<sup>413</sup> Even one of the most critical textbooks directly challenges the Dunning School account: "The 'myth' of Black, or Carpetbag, Reconstruction is that these governments were dominated by foolish blacks, who were manipulated by a few evil whites, that the governments were corrupt and extravagant, and that the South suffered under them for a decade. The reality is quite different."<sup>414</sup>

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<sup>409</sup> DANZER ET AL., *supra* note 203, at 385.

<sup>410</sup> *Id.*

<sup>411</sup> *Id.*

<sup>412</sup> *Id.*

<sup>413</sup> *Id.*

<sup>414</sup> BOORSTIN & KELLEY, *supra* note 197, at 372.

Turning to the governments themselves, today's textbooks present a similarly balanced account, stressing that some of the Republican governments were, indeed, corrupt, but correcting many of the distortions offered by our early textbooks. Most importantly, today's textbooks emphasize the political advances made by African-Americans in the South, as many blacks voted and held office for the first time. Indeed, the first wave of Southern elections during Reconstruction, "swept Republicans, including hundreds of freedmen, into public office in the South."<sup>415</sup> Altogether, "[m]ore than 600 African Americans were elected to state legislatures,"<sup>416</sup> and some African-Americans were even elected to Congress.<sup>417</sup>

In addition to these political advances, today's textbooks stress the many public investments that the Republican governments made, as they attempted to rebuild the South. The Republican governments "built roads, bridges, and railroads and established orphanages and institutions for the care of the mentally ill and disabled. They also created the first public school systems that most Southern states had ever had."<sup>418</sup> Even one of the more critical textbooks notes that these governments "provided a wide range of social welfare programs new to the Southern states."<sup>419</sup> These accounts concede that the Republican governments' efforts led to higher taxes, but unlike the early accounts, today's textbooks link these higher taxes primarily to worthwhile projects. Furthermore, as was noted above, today's textbooks concede that there was "some truth to the charge"<sup>420</sup> of rampant corruption," but quickly add that in "those days corruption was not peculiar to South."<sup>421</sup> Only one textbook hints at the old Dunning School consensus, noting that "many of the Northerners involved in local Southern administrations were

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<sup>415</sup> CAYTON ET AL., *supra* note 214, at 434.

<sup>416</sup> *Id.*

<sup>417</sup> *Id.* at 434-35.

<sup>418</sup> DANZER ET AL., *supra* note 203, at 384.

<sup>419</sup> BOORSTIN & KELLEY, *supra* note 197, at 372.

<sup>420</sup> *Id.* at 373.

<sup>421</sup> *Id.*

inexperienced and even corrupt.”<sup>422</sup> Even this account is a great distance from the damning passages found in earlier textbooks.

Finally, today’s textbooks focus on the white violence that swept through the South and led to the collapse of Republican rule. For instance, one textbook notes, “Between 1868 and 1871, the Klan and other secret groups killed thousands of men, women, and children, and burned schools, churches, and property.”<sup>423</sup> Another adds, “In 1871 alone, in a single county in Florida, 163 blacks were murdered, and around New Orleans the murders came to over 300.”<sup>424</sup> In the end, each textbook cites a similar statistic, stressing the extent of white violence. Unlike earlier accounts, today’s textbook never offer even a hint of support for white violence.<sup>425</sup>

In addition, while earlier accounts stressed the repressive nature of federal efforts to protect the freedmen (like the Enforcement Acts), today’s accounts note that “President Grant was not aggressive in his use of the power given to him by the Enforcement Acts.”<sup>426</sup> In today’s accounts, the “virtual disappearance” of the Klan in the South was not the result of federal efforts, but of the “Klan’s success,”<sup>427</sup> since “by 1880, terrorist groups had managed to restore white supremacy in the South.”<sup>428</sup> As such, “[t]he Klan no longer needed such organized activity to limit the political and civil rights of most African Americans.”<sup>429</sup> From there, today’s accounts correct the excesses of our early textbooks’ descriptions of the “Redeemer” governments, stressing that the new Southern governments “passed laws that restricted the rights

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<sup>422</sup> NASH, *supra* note 333, at 190.

<sup>423</sup> DANZER ET AL., *supra* note 203, at 394.

<sup>424</sup> BOORSTIN & KELLEY, *supra* note 197, at 374.

<sup>425</sup> For instance, one textbook notes, “Some Southern governments refused to enforce the Fourteenth and Fifteenth Amendments, and some white Southerners used violence to prevent African Americans from voting.” DANZER ET AL., *supra* note 203, at 382. Therefore, “[i]n response, Congress passed the Enforcement Act of 1870, giving the federal government more power to punish those who tried to prevent African Americans from exercising their rights.” *Id.*

<sup>426</sup> DANZER ET AL., *supra* note 203, at 395.

<sup>427</sup> *Id.*

<sup>428</sup> *Id.*

<sup>429</sup> *Id.*

of African Americans, wiped out social programs, slashed taxes, and dismantled public schools.”<sup>430</sup> Although these accounts note that the “Redeemers” were driven (at least in part) by “what they viewed as a decade of mismanagement by Northerners, Republicans, and African Americans,”<sup>431</sup> today’s textbooks mostly emphasize the negative aspects of “home rule.”

## 6. The Legacy of Reconstruction: The “Tragic Era”; Or, Unrealized Promise?

In the end, there has been a colossal shift in the overall assessment of Reconstruction’s legacy—from an account largely consistent with the “tragic era”<sup>432</sup> narrative of the Dunning School in our early textbooks to a balanced account today. Our early textbooks viewed Reconstruction as a “distressing drama”<sup>433</sup> (at best) and a “crime”<sup>434</sup> (at worst), with one textbook dramatically concluding that the “ten years of reconstruction were worse for the South in some respects than the war had been.”<sup>435</sup> These accounts typically framed Reconstruction as a lost opportunity to quickly cast aside the hard feelings that followed the Civil War. As one representative textbook noted, “The South emerged from the war without any special resentment toward its conquerors, and was fully resigned to the resumption of its former place in the Union; but the excesses of reconstruction aroused a sectional bitterness which has not yet entirely disappeared.”<sup>436</sup>

Furthermore, most early accounts stressed the degree to which Reconstruction delayed Southern recovery from the Civil War, holding them back “for at least a generation.”<sup>437</sup> By

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<sup>430</sup> *Id.* at 399.

<sup>431</sup> *Id.*

<sup>432</sup> *See, e.g.,* CANFIELD & WILDER, *supra* note 195, at 321 (calling Reconstruction “a tragic time in American history”).

<sup>433</sup> MUZZEY, *supra* note 202, at 436.

<sup>434</sup> CANFIELD & WILDER, *supra* note 195, at 330.

<sup>435</sup> BARKER & COMMAGER, *supra* note 194, at 449.

<sup>436</sup> WIRTH, *supra* note 196, at 416.

<sup>437</sup> CANFIELD & WILDER, *supra* note 195, at 330.

“Southern recovery,” these accounts meant Southern *white* recovery. One textbook lamented the “plight of the South”<sup>438</sup> after Reconstruction, noting that “the time and energy which the Southerners should have had to devote to their economic recovery was absorbed in the struggle to wrest political control from the carpetbaggers and keep the Negroes in their social place.”<sup>439</sup> Another added that “[a]fter the native whites regained control of their states, the South resumed progress and became again a productive part of the nation.”<sup>440</sup> Furthermore, the “Negroes had begun to learn that emancipation did not free them from the necessity of earning bread by the sweat of the brow.”<sup>441</sup>

Even the Reconstruction Amendments were viewed critically in our early textbooks, with one account explaining that the Amendments “unloosed the fetters from the slaves, but they did not solve the racial problem, which now became more serious.”<sup>442</sup> In fact, Reconstruction is even blamed for lingering hostility between the races in future decades, as the political advances (only made possible by Northern occupation) “delayed settlement of the economic and social problems existing between the races.”<sup>443</sup> Indeed, the lesson of Reconstruction was that “the difficult question of racial adjustments would have to be worked out by the peoples who were most directly concerned,”<sup>444</sup> as they tried to solve “the riddle of racial compatibility.”<sup>445</sup> In short, in these early accounts, Reconstruction was a complete failure.

Today’s accounts provide a more balanced assessment of Reconstruction. Even so, every end-of-chapter, “final assessment” section leads with criticisms of the Reconstruction era—with the space devoted to criticism usually outstripping the space devoted to our Reconstruction

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<sup>438</sup> MUZZEY, *supra* note 202, at 437.

<sup>439</sup> *Id.*

<sup>440</sup> BARKER & COMMAGER, *supra* note 194, at 437-38.

<sup>441</sup> *Id.*

<sup>442</sup> WIRTH, *supra* note 196, at 417.

<sup>443</sup> CANFIELD & WILDER, *supra* note 195, at 330.

<sup>444</sup> WIRTH, *supra* note 196, at 417.

<sup>445</sup> *Id.*

Founders' achievements. Most accounts conclude that, in an immediate sense, Reconstruction was a failure. These accounts lament that, "[d]espite the efforts of African Americans and many Radical Republicans, Reconstruction ended without much real progress in the battle against discrimination,"<sup>446</sup> as "the South remained as it had been before the Civil War."<sup>447</sup> In short, "[i]n many ways, Reconstruction did not accomplish its goals."<sup>448</sup>

Furthermore, these accounts tend to lead with the specific failures of the Radical Republicans themselves. One textbook provides a particularly sharp critique:

First, [the Radical Republicans] assumed that extending certain civil rights to freed persons would enable them to protect themselves through participation in government, especially lawmaking. However, Congress did not adequately protect those rights, and the Supreme Court undermined them. Second, the Radicals balked at distributing land to former slaves. . . . Finally, the Radicals did not fully realize the extent to which deep-seated racism in society would weaken the changes that Congress had tried to make.<sup>449</sup>

Other textbooks offered similar criticisms.<sup>450</sup> Of course, these same textbooks ignored the failures of our Founding Fathers' Constitution, including the complicity of the Three-Fifths Clause in the rise of the slave power.

Although more space is usually devoted to criticism, today's textbooks usually conclude their accounts by stressing the constitutional, political, and social foundations laid by African-Americans (especially) and our Reconstruction Founders during this controversial era. For

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<sup>446</sup> DANZER ET AL., *supra* note 203, at 400.

<sup>447</sup> AYERS ET AL., *supra* note 230, at 427.

<sup>448</sup> BOYER, *supra* note 203, at 419.

<sup>449</sup> DANZER ET AL., *supra* note 203, at 400-01.

<sup>450</sup> For instance, one textbook adds, "The failure of land-reform efforts allowed white planters to maintain control over many southern institutions. Southern African Americans saw little economic improvement . . . . They also achieved few lasting civil and political rights." BOYER, *supra* note 203, at 419. Another simply noted, "If the Civil War was fought to settle the issue of states' rights, the experience of Reconstruction showed that it failed to do so." AYERS ET AL., *supra* note 230, at 427.

instance, the Republican governments made some advances at the state and local level—for instance, they introduced “free education for whites as well as blacks.”<sup>451</sup> More importantly, today’s textbooks stress key constitutional achievements, including the abolition of slavery through the Thirteenth Amendment<sup>452</sup> and the “constitutional foundation”<sup>453</sup> for the twentieth century civil rights movement provided by the Fourteenth and Fifteenth Amendments and the Civil Rights Act of 1866.<sup>454</sup>

In the end, although our Reconstruction Founders are not as revered as our Founding Fathers in today’s textbooks, most contemporary accounts of Reconstruction end with an image of that controversial era’s promise. In short, in today’s accounts, “Reconstruction was not a complete failure.”<sup>455</sup>

#### IV. Constitutional Heroism

The Founding Fathers emerge from both the textbooks of yesterday and today as constitutional heroes—both collectively and individually. In fact, today’s accounts may provide even more support for the constitutional heroism of individual Founding Fathers, since they include more biographical information and also single out many key figures for “Biography Boxes”—an honor that was largely absent in earlier textbooks. In contrast to the constitutional heroism of individual Founding Fathers, individual Reconstruction Founders are either ignored in our textbook accounts (i.e. John Bingham) or emerge as conflicted personalities (at best) or as irrationally angry and vindictive characters (at worst). In today’s textbooks, Thaddeus Stevens

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<sup>451</sup> BOORSTIN & KELLEY, *supra* note 197, at 382.

<sup>452</sup> DANZER ET AL., *supra* note 203, at 401.

<sup>453</sup> *Id.*

<sup>454</sup> Indeed, “[a]lthough they were rarely enforced for almost a century, the Civil Rights Act of 1866 and the Fourteenth and Fifteenth Amendments provided an important legal framework that enabled later civil rights leaders to win back voting rights for African Americans and to end legal segregation.” BOYER, *supra* note 203, at 419.

<sup>455</sup> DANZER ET AL., *supra* note 203, at 401.

takes on added prominence, and the textbooks provide a greater explanation for his motives, but Bingham is still entirely ignored and Sumner is still mostly remembered for being caned by Preston Brooks. Even Stevens emerges as a more complicated (and less sympathetic) hero than our Founding Fathers—even when compared to more controversial Founders like Hamilton.

#### A. “Portraits” and “Boxes” in Our American History Textbooks—Yesterday and Today

Many individual Founding Fathers are celebrated in both the earlier period and today.<sup>456</sup> One early textbook provides a portrait of the Constitutional Convention and instructs the students to “[i]dentify as many of the people shown here as you can.”<sup>457</sup> This textbook follows with individual portraits of “[s]ome of the great men who founded our nation,”<sup>458</sup> including Benjamin Franklin, George Washington, William Paterson, Edmund Randolph, James Wilson, Robert Morris, John Dickinson, James Madison, John Adams,<sup>459</sup> and Alexander Hamilton. The same textbook offers similar portraits of Reconstruction leaders Charles Sumner, Thaddeus Stevens, and Edwin Stanton. In the caption below their portraits, it notes that these men “favored harsh treatment for the South after the war”<sup>460</sup> and asked students how “their views differ[ed] radically from those of President Lincoln”<sup>461</sup> and “[f]or what ill-feeling between the two sections of our country were the radicals largely responsible.”<sup>462</sup> Although today’s textbooks are more subtle, there is a similar disparity in the treatment of these two generations.

In Sections IV.B and IV.C, I will focus on portrayals of key Founding Fathers (Madison and Hamilton) and Reconstruction Founders (Stevens, Sumner, and Bingham) in our American

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<sup>456</sup> Noah et al., *supra* note 153, at 241 (“[T]he legend of the Founding Fathers, who could do no wrong, coming to the rescue of a sick and dying country, still pervades the high-school history textbooks.”).

<sup>457</sup> WIRTH, *supra* note 201, at 107.

<sup>458</sup> *Id.* at 108-09.

<sup>459</sup> Indeed, Adams was included even though he did not sign the Constitution.

<sup>460</sup> WIRTH, *supra* note 201, at 257.

<sup>461</sup> *Id.*

<sup>462</sup> *Id.*

history textbooks. Before turning to those individual analyses, I will first consider which Founding Fathers and Reconstruction Founders our textbooks chose to honor with portraits and “Biography Boxes.” This is intended as a rough way of examining which key historical figures our textbooks have chosen to canonize as genuine constitutional heroes and which receive less honorific treatment.

Turning first to yesterday’s textbooks, our Founding Fathers fared much better than our Reconstruction Founders in receiving the “portrait treatment.” As was mentioned above, our early textbooks were less likely than today’s textbooks to feature key figures in separate “Biography Boxes.” Indeed, only one textbook featured such boxes, and only our Founding Fathers merited the honor of a “Biography Box”—three of them, to be precise (Washington, Hamilton, and Jefferson). Even so, our early textbooks featured separate portraits for key figures. Again, generally, our Founding Fathers outstripped our Reconstruction Founders. George Washington and Thomas Jefferson merited portraits in all six of the early textbooks analyzed for this Article. Alexander Hamilton received a portrait in four of the six textbooks, John Jay in three, and John Adams and James Madison in two. Patrick Henry, Benjamin Franklin, William Paterson, Edmund Randolph, James Wilson, Gouverneur Morris, John Dickinson, and Charles Cotesworth Pinckney each had one portrait. Key Reconstruction Founders were much less likely to be featured in separate portraits. Thaddeus Stevens led the way, with two portraits, followed by Charles Sumner and Edwin Stanton, each with one.<sup>463</sup> John Bingham was not included in any of the earlier textbooks.

Generally speaking, today’s textbooks include a greater number of separate portraits and are also much more likely to feature “Biography Boxes.” Even so, the Founding Fathers still

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<sup>463</sup> Though he was not considered a “Reconstruction Founder” for the purposes of this Article, Andrew Johnson was also featured in two portraits.

greatly outstrip our Reconstruction Founders. Again, all six textbooks include portraits of George Washington and Thomas Jefferson. Today, every textbook also includes a portrait of James Madison, and five out of six include a portrait of Alexander Hamilton. Interestingly, four textbooks include portraits of Roger Sherman, followed by three with portraits of Patrick Henry and John Jay, two with portraits of John Adams and Benjamin Franklin, and one each of Richard Henry Lee, James Wilson, John Hancock, John Dickinson, Benjamin Rush, and Samuel Adams. Turning to the “Biography Boxes,” Washington and Madison are featured in five of the six textbooks, with Jefferson in four, and one each for Roger Sherman and Alexander Hamilton.

Again, the Reconstruction Founders are largely slighted, with only Thaddeus Stevens receiving multiple portraits, with four—the same number as Roger Sherman.<sup>464</sup> Several Reconstruction figures receive one portrait each, including Charles Sumner, Hiram Revels, Ulysses S. Grant, Frederick Douglass, and Blanche Bruce. No Reconstruction figure received multiple “Biography Boxes,” with Stevens, Revels, Douglass, Grant, and Bruce each receiving one.<sup>465</sup> Charles Sumner was snubbed. Furthermore, even as James Madison took on greater prominence in today’s accounts, John Bingham still was not featured in any of today’s textbooks.

## B. Our Founding Fathers—Madison and Hamilton in Our Textbooks

Turning first to portrayals of key Founding Fathers, Madison and Hamilton emerge from both sets of textbooks as constitutional heroes. Accounts focus on the key achievements and praiseworthy characteristics of each Founding Father, while largely overlooking possible negative characteristics. Hamilton is remembered as Washington’s deputy and one of the key authors of *The Federalist*, not as a controversial crypto-monarchist. Madison is simply presented

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<sup>464</sup> Andrew Johnson received three.

<sup>465</sup> Andrew Johnson received one.

as the erudite “Father of the Constitution.” Although there are subtle shifts in the two sets of textbooks, both celebrate these constitutional heroes—perhaps today’s textbooks even more so than yesterday’s.

James Madison emerges as an even greater constitutional hero in today’s accounts than in the accounts of the 1940s and 1950s. Both sets of accounts present Madison as one of the most learned men in our Founding generation. In addition to his important work at the Constitutional Convention, “Madison enjoyed a distinguished political career, during which he helped draft Virginia’s state constitution and served as a member of the Continental Congress.”<sup>466</sup> Today’s textbooks also introduce him as “an early leader in the independence movement.”<sup>467</sup> He is variously referred to as “a profound student of government and history”<sup>468</sup> and the “best-informed man at any point in the debate,”<sup>469</sup> “impress[ing] his colleagues with his exact knowledge upon every important subject of debate”<sup>470</sup> at the Constitutional Convention. In addition to his intellect, Madison had a “quiet, modest demeanor,”<sup>471</sup> which “disarmed antagonism, even when a member disagreed with him.”<sup>472</sup> These praiseworthy qualities made him “one of the most influential members”<sup>473</sup> of the Constitutional Convention and the early republic.

At the Convention, he is credited with crafting the “highly influential”<sup>474</sup> Virginia Plan,<sup>475</sup> which “resulted from extensive research on political systems that he had done before the

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<sup>466</sup> BOYER, *supra* note 203, at 143.

<sup>467</sup> CAYTON ET AL., *supra* note 214, at 151.

<sup>468</sup> WIRTH, *supra* note 201, at 104.

<sup>469</sup> CAYTON ET AL., *supra* note 214, at 151.

<sup>470</sup> BARKER & COMMAGER, *supra* note 194, at 152.

<sup>471</sup> *Id.*

<sup>472</sup> *Id.*

<sup>473</sup> WIRTH, *supra* note 196, at 192; *see also* BARKER & COMMAGER, *supra* note 194, at 152 (“Madison was probably the most influential members of the Convention.”).

<sup>474</sup> AYERS ET AL., *supra* note 230, at 151.

<sup>475</sup> *See, e.g.*, BARKER & COMMAGER, *supra* note 194, at 153 (“It was chiefly the work of Madison.”).

convention.”<sup>476</sup> Furthermore, his “brilliant political leadership”<sup>477</sup> and “eloquent support of the Constitution in *The Federalist* helped bring about ratification.”<sup>478</sup> Finally, Madison would also draft the Bill of Rights, which was “designed to protect citizens’ rights.”<sup>479</sup> Because of these contributions, most early textbooks refer to him as “one of the most important framers”<sup>480</sup> and the “Father of the Constitution.”<sup>481</sup> Today’s textbooks are similarly celebratory, concluding that “[h]istory remembers James Madison as the Father of the Constitution because of his central role at the Constitutional Convention.”<sup>482</sup> Indeed, one of today’s textbooks actually sets off a section for Madison, entitled “The Father of the Constitution.”<sup>483</sup>

Alexander Hamilton also emerges as a key figure in the development and ratification of our Constitution in both sets of textbooks. One early textbook notes, “During the Revolutionary War and the critical years that followed, America profited greatly from the talented services and patriotism of Alexander Hamilton.”<sup>484</sup> Early in his life, “Hamilton’s brilliance and his ability to learn attracted attention.”<sup>485</sup> It is for this reason that he became “President Washington’s most trusted advisor.”<sup>486</sup> Today’s textbooks are similarly reverential, noting that, “[d]uring the war General George Washington, recognizing Hamilton’s brilliance, made him his close adviser and gave him the job of organizing military headquarters.”<sup>487</sup>

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<sup>476</sup> DANZER ET AL., *supra* note 203, at 141.

<sup>477</sup> *Id.*

<sup>478</sup> AYERS ET AL., *supra* note 230, at 151.

<sup>479</sup> CAYTON ET AL., *supra* note 214, at 162.

<sup>480</sup> MUZZEY, *supra* note 200, at 192.

<sup>481</sup> WIRTH, *supra* note 196, at 192.

<sup>482</sup> AYERS ET AL., *supra* note 230, at 151.

<sup>483</sup> CAYTON ET AL., *supra* note 214, at 151.

<sup>484</sup> CANFIELD & WILDER, *supra* note 195, at 149.

<sup>485</sup> *Id.*

<sup>486</sup> BOYER, *supra* note 203, at 192.

<sup>487</sup> BOORSTIN & KELLEY, *supra* note 197, at 116.

In the context of the Constitutional Convention and the ratification debates, Hamilton is described as “bold”<sup>488</sup> and “brilliant.”<sup>489</sup> Discussing the Annapolis Convention, one of today’s textbooks notes, “Even when Hamilton was only 29 years of age, he saw that the thirteen states would never prosper until they formed a strong union. He demanded that the states send delegates at once to a larger meeting to see what could be done.”<sup>490</sup> This textbook concludes, “If Hamilton had never lived another day, his courage and vision at the Annapolis convention would entitle him to a place in American history.”<sup>491</sup> Furthermore, Hamilton is widely praised for his work on *The Federalist*—variously described as a “remarkable set of essays,”<sup>492</sup> “the greatest book ever written about the Constitution,”<sup>493</sup> and “the classic statement of why freedom-loving people need a strong central government.”<sup>494</sup> These accounts also stress that Hamilton’s “tireless work”<sup>495</sup> and “driving leadership”<sup>496</sup> were the key to the Constitution’s “narrow victory” in New York. Although one of today’s textbooks notes that Hamilton was controversial, even that account was almost entirely positive: “Hamilton was one of the most brilliant—and often controversial—of the nation’s founders,”<sup>497</sup> further noting that “[t]hrough his writings and political involvements, he exerted almost as great an influence on the young republic as the early presidents did.”<sup>498</sup>

In short, the Founding Fathers emerge from these accounts as praiseworthy heroes, with few (if any) flaws. The Reconstruction Founders are accorded much less respect.

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<sup>488</sup> *Id.*

<sup>489</sup> CANFIELD & WILDER, *supra* note 195, at 132.

<sup>490</sup> BOORSTIN & KELLEY, *supra* note 197, at 116.

<sup>491</sup> *Id.*

<sup>492</sup> MUZZEY, *supra* note 202, at 178.

<sup>493</sup> BARKER & COMMAGER, *supra* note 194, at 160.

<sup>494</sup> BOORSTIN & KELLEY, *supra* note 197, at 123.

<sup>495</sup> MUZZEY, *supra* note 202, at 177.

<sup>496</sup> BARKER & COMMAGER, *supra* note 194, at 161.

<sup>497</sup> BOYER, *supra* note 203, at 192.

<sup>498</sup> *Id.*

### C. Our Reconstruction Founders—Stevens, Sumner, and Bingham in Our Textbooks

While accounts of our key Founding Fathers tend to be extensive and almost entirely celebratory, our Reconstruction Founders are either ignored or more highly criticized. Although today's textbooks provide more extensive and balanced accounts of Reconstruction than those in the 1940s and 1950s, it is striking how much more favorably even they treat the Founding generation than our Reconstruction Founders. The only Reconstruction Founder receiving extensive treatment in our early textbooks (Thaddeus Stevens) was portrayed as one of history's villains. Today's textbooks provide a more balanced account of Stevens, although they still completely ignore John Bingham and focus more on the caning of Charles Sumner than his lifelong commitment to racial equality. In the end, even today's (much-improved) textbooks are more critical of our Reconstruction Founders than our Founding Fathers.

#### 1. Thaddeus Stevens

Thaddeus Stevens emerges in both sets of textbooks as the paradigmatic Reconstruction Founder. In earlier accounts, he is portrayed as an angry, vindictive villain. In today's accounts, he emerges as a more complicated figure, as most of today's textbooks attempt to explain some of the sources of his anger—sources that transcend the pure sectionalism that animated the Dunning School portrait of Stevens. In our early textbooks, Stevens is simply described as being driven by his “bitter hatred toward the Southern secessionists.”<sup>499</sup> He is viewed as a “grim,”<sup>500</sup> “vindictive man of seventy-three, who believed that the South should be severely punished for its

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<sup>499</sup> WIRTH, *supra* note 201, at 258.

<sup>500</sup> CANFIELD & WILDER, *supra* note 195, at 324.

‘rebellion.’”<sup>501</sup> Several textbooks note his “harsh”<sup>502</sup> theory that the Southern states had become “conquered provinces, subject to the laws of war.”<sup>503</sup> Under this theory, Stevens “would not even grant the former southern states the standing of territories.”<sup>504</sup> Stevens is described as having “ruled the House of Representatives with a rod of iron”<sup>505</sup> and is presented as the architect of Johnson’s “farcical and deplorable”<sup>506</sup> impeachment.

One early textbook did note Stevens’s commitment to “social and political equality of the two races.”<sup>507</sup> But, nowhere in these early accounts is Stevens’s anger sufficiently balanced by his idealism. Indeed, Stevens “was an outstanding and successful lawyer,”<sup>508</sup> who “defended fugitive slaves without fee and with considerable success.”<sup>509</sup> As a Pennsylvania politician, Stevens “battled for a system of free public education and the prevention of the disenfranchisement of the [African-Americans].”<sup>510</sup> Indeed, Stevens “participated in the Pennsylvania constitutional convention but would not sign the document, saying it disenfranchised free blacks.”<sup>511</sup> Driven by his commitment to racial equality, Stevens “took a leading role in the formation of the Republican party,” speaking “with eloquence and simplicity on behalf of blacks,” including his failed (but “farsighted”) project “to provide freed slaves with forty acres and a mule.”<sup>512</sup> During the Civil War, Stevens “argued for immediate emancipation.”<sup>513</sup> As a “preeminent Republican . . . , chairman of the Ways and Means

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<sup>501</sup> MUZZEY, *supra* note 202, at 429.

<sup>502</sup> CANFIELD & WILDER, *supra* note 195, at 324.

<sup>503</sup> *Id.*

<sup>504</sup> *Id.*

<sup>505</sup> MUZZEY, *supra* note 202, at 429.

<sup>506</sup> WIRTH, *supra* note 196, at 412.

<sup>507</sup> WIRTH, *supra* note 201, at 258.

<sup>508</sup> MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 85 (1986).

<sup>509</sup> *Id.*

<sup>510</sup> STAMPP, *supra* note 66, at 103.

<sup>511</sup> JULIAN E. ZELIZER, *THE AMERICAN CONGRESS: THE BUILDING OF DEMOCRACY* 237 (2004).

<sup>512</sup> CURTIS, *supra* note 508, at 85.

<sup>513</sup> ZELIZER, *supra* note 511, at 237.

Committee, and a consistent Radical,”<sup>514</sup> Stevens was committed to a Reconstruction program that would “give [African-Americans] perfect equality before the law and . . . ‘overcome the prejudice and ignorance and wickedness which resisted such reform.’”<sup>515</sup> In short, these early accounts ignore the man who “[b]y his own wish . . . was buried in a black cemetery.”<sup>516</sup> And, the man who proclaimed, “[O]ur Fathers had been compelled to postpone the principles of their great Declaration and wait for their full establishment until a more propitious time. . . . That time ought to be present now.”

Of course, Stevens was far from perfect. Stevens was “a master of Congressional infighting, parliamentary tactics, and blunt speaking.”<sup>517</sup> Indeed, Stevens’s “quick tongue and sarcastic wit were legendary.”<sup>518</sup> Furthermore, Stevens “had an overpowering political ambition and was a faithful servant of the manufacturing and railroad interests.”<sup>519</sup> And, even today, Stevens is often “[r]emembered as an ideologue and powermonger who spearheaded the impeachment of President Andrew Johnson and [is] blamed . . . for many of the failures of Reconstruction.”<sup>520</sup> At the same time, as Foner notes, “[e]ven those who disagreed with his policies could not avoid a grudging admiration for the man and his honesty, idealism, and indifference to praise and criticism—qualities not altogether common among politicians.”<sup>521</sup> Even this complicated portrait escapes our early textbooks—replaced by a one-dimensional, bitter, irrational ideologue. Today’s textbooks are more evenly balanced—although are still disproportionately critical, when viewed against the pristine portraits of the Founding generation that still comprise our textbooks.

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<sup>514</sup> CURTIS, *supra* note 508, at 85.

<sup>515</sup> STAMPP, *supra* note 66, at 88.

<sup>516</sup> CURTIS, *supra* note 508, at 85.

<sup>517</sup> FONER, *supra* note 152, at 229.

<sup>518</sup> *Id.*

<sup>519</sup> STAMPP, *supra* note 66, at 103.

<sup>520</sup> ZELIZER, *supra* note 511, at 236.

<sup>521</sup> FONER, *supra* note 158, at 229.

Today's textbooks still note Stevens's bitterness towards the South, calling him a "Radical avenger"<sup>522</sup> and noting that he "viewed white southerners as 'conquered rebels.'"<sup>523</sup> One textbook even leads with a section heading, "*Why was Thaddeus Stevens so angry?*," noting that "Stevens's strong, controversial opinions left him deeply hated—and deeply admired."<sup>524</sup> One textbook even begins its account of Stevens by noting that he is "one of the strangest men in American history."<sup>525</sup> Indeed, Stevens's anger (not his idealism) is still the primary focus of our Reconstruction narrative. At the same time, today's textbooks provide a fairer, more balanced portrait of this complicated man.

The key shift is that today's textbooks actually mention the sources of Stevens's anger, as they connect his bitterness towards the South to his commitment to racial equality. For instance, one textbook notes, "Very early in life Stevens took up the great cause of abolishing slavery. He never abandoned that cause. Nor did he ever forgive men who had held slaves or who had been entangled in the web of slavery."<sup>526</sup> Another textbook adds, "Stevens hated slavery and in time came to hate white southerners as well. He declared, 'I look upon every man who would permit slavery . . . as a traitor to liberty and disloyal to God.'"<sup>527</sup> This textbook adds that Stevens "defended runaway slaves"<sup>528</sup> early in his life and, "[a]fter Stevens died, at his own request he was buried in an integrated cemetery, because he wanted to show in death 'the principles which I advocated throughout a long life: Equality of Man before his Creator.'"<sup>529</sup>

Even largely positive portraits, however, are quickly clouded by some of his negative qualities. For instance, one textbook notes that "[h]e was sometimes called 'a humanitarian

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<sup>522</sup> BOORSTIN & KELLEY, *supra* note 197, at 367.

<sup>523</sup> AYERS ET AL., *supra* note 230, at 410.

<sup>524</sup> *Id.*

<sup>525</sup> BOORSTIN & KELLEY, *supra* note 197, at 362.

<sup>526</sup> *Id.*

<sup>527</sup> DANZER ET AL., *supra* note 203, at 377.

<sup>528</sup> *Id.*

<sup>529</sup> *Id.*

without humanity”<sup>530</sup> and “seemed to use up all his good feelings on large and noble causes, so that he had very little left for individuals.”<sup>531</sup> Furthermore, his bitterness was portrayed as personal and deep:

When the Confederate army invaded southern Pennsylvania in 1863, they destroyed and burned Stevens’s ironworks. . . . After Appomattox, Stevens made it his purpose in life to punish all ‘traitors.’ . . . At the age of 75 he boasted that he would spend his remaining years inventing new ways to make the hated Southern rebels suffer.<sup>532</sup>

Indeed, “[j]ust as Lincoln inspired love and respect, Stevens inspired fear.”<sup>533</sup>

In the end, Stevens still emerges from today’s textbooks as a bitter, angry man—but, a bitter, angry man with a (largely) noble purpose.

## 2. Charles Sumner

Charles Sumner was usually treated less extensively, but somewhat more favorably, than Stevens. In both sets of textbooks, accounts of Sumner tend to stress both his idealism and his inflexibility—although these accounts rarely include more than a sentence or two. One early textbook notes that Sumner “fought constantly and uncompromisingly for the extension of suffrage to the freedmen.”<sup>534</sup> Another adds that he was “an ardent believer in Negro equality.”<sup>535</sup> From there, Sumner is generally tagged as a “leader” of the Radical Republicans and, therefore, tied to overall evaluations of Congressional Reconstruction. Therefore, in the early textbooks, Sumner is connected to the perceived failures of Reconstruction; in today’s textbooks, he is tied

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<sup>530</sup> BOORSTIN & KELLEY, *supra* note 197, at 362.

<sup>531</sup> *Id.*

<sup>532</sup> *Id.*

<sup>533</sup> *Id.*

<sup>534</sup> WIRTH, *supra* note 196, at 408.

<sup>535</sup> MUZZEY, *supra* note 202, at 429.

to Reconstruction's mixed legacy. One of today's textbooks does provide a full paragraph on Sumner's background, noting:

As early as 1862 [Sumner] had begun to fight for equal rights for blacks. He was a proud, vain man, bitter against white Southerners and intolerant of all opposition. But in the Senate he was the conscience of the North. And he was just as bitter against the white South and just as concerned about black Southerners as Thaddeus Stevens.<sup>536</sup>

This account provides a balanced portrait of a complicated man—a portrait that is more positive than the consensus image of Stevens, but hardly as pristine as those of the Founding Fathers.

Since Sumner was rarely treated extensively in either set of textbooks, students are robbed of his prescience on issues of equality. Sumner was “a man of burning intellect.” Early in his career, he “ardently supported numerous reform movements: world peace, temperance, women's rights, prison reform, and, of course, abolitionism.”<sup>537</sup> Furthermore, Sumner's “passionate belief in legal equality led him to argue, over a century before *Brown v. Board of Education*, that school segregation violated ‘that fundamental right of all citizens, Equality before the Law,’ because it branded ‘a whole race with the stigma of inferiority.’”<sup>538</sup> Sumner was “one of the first congressional leaders to urge abolition, and he worked tirelessly to convince President Abraham Lincoln to issue the Emancipation Proclamation.”<sup>539</sup>

During Reconstruction, Sumner showed a “similar devotion to the radical cause, [when] he demanded civil and political rights for [African-Americans].”<sup>540</sup> Sumner believed that “[t]he South . . . must be reconstructed in accordance with the principles of the Declaration of

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<sup>536</sup> BOORSTIN & KELLEY, *supra* note 197, at 362.

<sup>537</sup> STAMPP, *supra* note 66, at 103.

<sup>538</sup> Daniel A Farber & John E. Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMMENT. 235 (1994) (quoting W. PEASE & J. PEASE, *THE ANTISLAVERY ARGUMENT* 288 (1965)).

<sup>539</sup> ZELIZER, *supra* note 511, at 222.

<sup>540</sup> STAMPP, *supra* note 66, at 103.

Independence, with government founded upon the consent of the governed.”<sup>541</sup> Sumner’s specialty was “lengthy, erudite speeches in which he expounded the recurrent theme of his political career: the principle of equality before the law.”<sup>542</sup> Over time, “Sumner’s uncompromising stance on black rights . . . caused many Republicans to reassess their own opinions.”<sup>543</sup> Indeed, “abolitionists . . . considered him *their* politician,”<sup>544</sup> as “did ordinary blacks, North and South, who deluged him with requests for advice and accounts of their grievances.”<sup>545</sup> Finally, “[a]t the time of his death, [Sumner] was trying to secure the passage of a far-reaching civil rights bill, which would have prohibited discrimination in schools, transportation, and public accommodation.”<sup>546</sup> If the cursory treatment of Sumner deprives students of many of the Senator’s noble qualities, it also underplays his smugness. As Eric Foner noted, Sumner was “[d]isliked by Senate colleagues for egotism, self-righteousness, and stubborn refusal to compromise.”<sup>547</sup> Indeed, Sumner “acted as though he were the voice, the embodiment, of the New England conscience.”<sup>548</sup> In the end, students are left with little sense of this key historical figure.

Instead, students are more likely to remember Sumner as the victim of an assault on the Senate floor than for anything he said or believed. The caning of Sumner—or, as one of today’s textbooks cleverly describes the episode, “Bleeding Sumner”<sup>549</sup>—has been one of the key narratives in our textbooks for many generations. It was mentioned in every textbook analyzed for this Article, and has long been used as a symbol for growing sectionalism leading up to the

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<sup>541</sup> *Id.* at 88.

<sup>542</sup> FONER, *supra* note 152, at 230.

<sup>543</sup> *Id.*

<sup>544</sup> *Id.*

<sup>545</sup> *Id.*

<sup>546</sup> ZELIZER, *supra* note 511, at 222.

<sup>547</sup> FONER, *supra* note 152, at 230.

<sup>548</sup> *Id.*

<sup>549</sup> CAYTON ET AL., *supra* note 214, at 364.

Civil War. Most accounts of the episode comprised between one-third of a page and a page. Each account comprised its own sub-section within the chapter, most including an accompanying picture.

The early accounts tend to emphasize the harshness of Sumner's speech that provoked the attack. These accounts describe Sumner's speech as "abounding in personal abuse"<sup>550</sup> and "scathing in his denunciation of proslavery men."<sup>551</sup> Furthermore, Sumner "went out of his way to slander Senator Butler of South Carolina"<sup>552</sup> and "singled [him] out for his venomous onslaught."<sup>553</sup> Senator Butler was portrayed sympathetically, as "ill at the time and absent from his seat."<sup>554</sup> In these accounts, Sumner was beaten by Butler's first cousin, Preston Brooks, who was outraged by the speech. Brooks does not quite emerge as a hero in these accounts, but the caning is portrayed as (at least) somewhat justified, with Sumner cast as an angry blowhard, attacking an absent, ill old man.

Modern accounts still frame Sumner's speech as "angry,"<sup>555</sup> directing "bold insults"<sup>556</sup> and his "most vicious remarks at South Carolina's Andrew Butler, who was absent from the Senate"<sup>557</sup> at the time of the speech. Sumner "ridiculed"<sup>558</sup> and "verbally attacked his colleagues"<sup>559</sup> for two days, "sneering at [Senator Butler] for his proslavery beliefs and making fun of his impaired speech."<sup>560</sup> At the same time, some of the modern accounts provide additional context for why Sumner was as angry as he was—including more critical accounts of

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<sup>550</sup> MUZZEY, *supra* note 202, at 229.

<sup>551</sup> WIRTH, *supra* note 196, at 208.

<sup>552</sup> CANFIELD & WILDER, *supra* note 195, at 289.

<sup>553</sup> MUZZEY, *supra* note 200, at 280.

<sup>554</sup> *Id.*

<sup>555</sup> AYERS ET AL., *supra* note 230, at 332.

<sup>556</sup> CAYTON ET AL., *supra* note 214, at 364.

<sup>557</sup> AYERS ET AL., *supra* note 230, at 332.

<sup>558</sup> BOYER, *supra* note 203, at 356.

<sup>559</sup> DANZER ET AL., *supra* note 203, at 316.

<sup>560</sup> *Id.*

slavery and Southern racism—and more positive descriptions of Sumner’s speech itself (for instance, describing it as “impassioned”<sup>561</sup>). Today’s accounts also stress the brutality of the caning, noting that “Congressman Preston Brooks of South Carolina entered the nearly empty Senate chamber”<sup>562</sup> and brutally beat Sumner, leaving him incapacitated for several months. In the end, the vivid image of a “bleeding Sumner” is likely to outweigh the limited information on Sumner’s nobler commitments that are sprinkled in our textbooks.

### 3. A Truly Forgotten Founder: John Bingham

Rather than being tarred or misunderstood, John Bingham is simply ignored in our textbooks. Jack Rakove was stating the obvious when he noted that “John Bingham is something less than a household name.”<sup>563</sup> Unlike the Declaration of Independence (which canonized Jefferson) and the U.S. Constitution (which canonized Madison), Section One of the Fourteenth Amendment failed to canonize John Bingham (its primary architect), who is never mentioned in any of our textbooks. Indeed, even as Madison takes on added prominence in today’s textbooks as the “Father of the Constitution” and primary author of the Bill of Rights, our textbooks ignore the Reconstruction Founder who most attempted to realize the promise of Madison’s Bill. Furthermore, even as lesser Eighteenth Century Founders have become consistent characters in our national story (ie. William Paterson with his New Jersey Plan)—and received extended treatment (ie. Roger Sherman with his Great Compromise)—Bingham remains unmentioned. As a result, our high school students are likely never introduced to this “respected lawyer and congressman,”<sup>564</sup> “member of the Joint Committee on Reconstruction,”<sup>565</sup> and “principle author

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<sup>561</sup> *Id.*

<sup>562</sup> NASH, *supra* note 333, at 171.

<sup>563</sup> Jack N. Rakove, *Two Foxes in the Forest of History*, 11 YALE J.L. & HUMAN. 191, 191 (1999).

<sup>564</sup> Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 96 (1993).

of Section One of the Fourteenth Amendment.”<sup>566</sup> In addition, our students are left with an incomplete understanding of the Reconstruction Founders’ vision for Section One, a provision of “enormous importance today.”<sup>567</sup>

Bingham had a “deep and emotional respect for the Bill of Rights,”<sup>568</sup> and he “intended to use the Privileges or Immunities Clause of the Fourteenth Amendment to enforce [at least some of] the Bill of Rights against the states.”<sup>569</sup> His overall constitutional theory grew out of “the constitutional heritage of a century of abolitionism.”<sup>570</sup> Jacobus tenBroek described “[t]he work of Bingham [as] the meeting ground, in a sense that the work of no other individual was, of the three concepts and clauses that came to constitute the first section of the amendment,” an “amalgamation of natural rights, due process, and equal protection.”<sup>571</sup> Furthermore, as Akhil Amar noted, Bingham “helped change the vocabulary of legal discourse—and ultimately changed its substance and structure.”<sup>572</sup> Amar explained, “[B]efore the adoption of the Fourteenth Amendment, the Supreme Court never—not once—referred to the 1791 decalogue as ‘the’ or ‘a’ ‘bill of rights.’ Yet within a few years of John Bingham’s odes to the Bill, the Court began to adopt Bingham’s terminology.”<sup>573</sup> Indeed, as Amar concluded, “John Bingham . . . placed the Bill of Rights at the center of his thinking about constitutionalism; his speeches in the Thirty-ninth Congress are far more inspired, and perhaps more inspiring, than Madison’s in the

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<sup>565</sup> CURTIS, *supra* note 508, at 120.

<sup>566</sup> Aynes, *supra* note 564, at 58.

<sup>567</sup> Farber & Muench, *supra* note 538.

<sup>568</sup> CURTIS, *supra* note 508, at 59.

<sup>569</sup> Aynes, *supra* note 564, at 74. As Bingham himself noted, “The proposition pending before the House is simply a proposition to arm the Congress . . . with power to enforce the Bill of Rights as it stands in the Constitution today.” CONG. GLOBE, 39th Cong., 1st sess., at 1088. Bingham added elsewhere, “Hereafter the American people cannot have peace, if, as in the past, States are permitted to take away freedom of speech, and to condemn men, as felons, to the penitentiary for teaching their fellow men that there is a hereafter, and a reward for those who learn to do well.” CURTIS, *supra* note 508, at 145. Bingham concluded, “The great want of the citizen and stranger, protection by national law from unconstitutional state enactments, is supplied by the first section of this amendment.” *Id.* at 123.

<sup>570</sup> TENBROEK, *supra* note 266, at 145.

<sup>571</sup> *Id.*

<sup>572</sup> AMAR, *supra* note 47, at 284.

<sup>573</sup> *Id.*

First.”<sup>574</sup> Furthermore, as Steven Calabresi added, “Our modern understanding of the Bill of Rights developed [more] out of the thinking of John Bingham . . . than of James Madison.”<sup>575</sup> Perhaps John Bingham does not deserve the reverential treatment that Madison has received. Even so, Bingham deserves to be (at least) a minor character in our nation’s story.

Having considered the portrayal of Reconstruction in the most widely-used American history textbooks of yesterday and today, I will now turn to one of most widely-used government textbooks of the last century and its evolving account of our Reconstruction Founders’ crowning achievement, the Fourteenth Amendment.

## V. The Bill of Rights and the Fourteenth Amendment in Our Classrooms

The Fourteenth Amendment was the cornerstone of the Reconstruction revolution. As Michael Kent Curtis notes, “The history out of which the Fourteenth Amendment grew was that of slavery, sectional conflict, secession by the South, victory by the North, abolition of slavery, and the problem of the status of the newly freed blacks and the rebellious southern states.”<sup>576</sup> Akhil Amar adds, “The Fourteenth Amendment proposed nothing less than a comprehensive blueprint for Reconstruction—the Re-Constitution—of a nation torn asunder by the Civil War.”<sup>577</sup> The Amendment repudiated *Dred Scott* by opening U.S. citizenship to all natural born Americans, gave U.S. citizenship meaning by defending the “privileges” and “immunities” of U.S. citizens against violations by the States, affirmed the principle of equality before the law, and reinforced the Fifth Amendment’s commitment to due process.

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<sup>574</sup> AMAR, *supra* note 47, at 289.

<sup>575</sup> Steven G. Calabresi, *We Are All Federalists, We Are All Republicans: Holism, Synthesis, and the Fourteenth Amendment*, 87 GEO. L.J. 2273, 2281 (1999).

<sup>576</sup> CURTIS, *supra* note 508, at 26.

<sup>577</sup> AMAR, *supra* note 47, at 103.

In Part V, I consider how the Fourteenth Amendment has been treated in a prominent high school government textbook (*Magruder's American Government*) from its first edition in 1917 through today. Throughout, I focus on the relationship between the Bill of Rights and the Fourteenth Amendment—particularly how these textbooks treat the development of the incorporation doctrine, especially from the 1950s onward. Do they treat incorporation as realizing the Reconstruction Founders' (particularly John Bingham's) vision, or as a Court-driven, Court-focused expansion of freedom?

I first provide a brief chronology of the incorporation controversy before turning to *Magruder's* treatment of the Fourteenth Amendment.

#### A. A (Very) Brief Overview of the Incorporation Controversy

The story of the Bill of Rights, the Fourteenth Amendment, and the incorporation doctrine is well-known. The original debate centered on the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment, which reads, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” This Clause was greatly weakened (if not “rendered a nullity”<sup>578</sup>) by the first case to consider the Fourteenth Amendment—*The Slaughterhouse Cases*.<sup>579</sup> In a five-to-four opinion, the Court held that “privileges and immunities . . . are left to the State governments for security and protection, and not by this article placed under the special care of the federal government.”<sup>580</sup> This decision “foreclosed”<sup>581</sup> the use of the Privileges or Immunities Clause as a means of incorporating (at least some of) the Bill of Rights against the States.

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<sup>578</sup> ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 496 (2006).

<sup>579</sup> 83 U.S. 36 (1873).

<sup>580</sup> *Id.* at 498.

<sup>581</sup> CHERMERINSKY, *supra* note 578, at 494.

Over time, the Court gradually incorporated several key provisions of the Bill of Rights against the States, using the Due Process Clause of the Fourteenth Amendment. In 1925, the Court incorporated key protections associated with the First Amendment against the States, holding that “we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the States.”<sup>582</sup> For many decades, debates raged between judges and legal scholars over the proper interpretation of the Fourteenth Amendment, the relationship between that Amendment and the Bill of Rights, and the Court’s incorporation doctrine.<sup>583</sup> Much of the debate focused on the Fourteenth Amendment’s ratification history.

On the Court, the key dispute over incorporation involved Justices Hugo Black and Felix Frankfurter in the 1947 case of *Adamson v. California*.<sup>584</sup> In spite of the familiar holding in *The Slaughterhouse Cases*, Justice Black reached his own conclusion about incorporation after studying the Fourteenth Amendment’s ratification history for years. Justice Black concluded that the Privileges or Immunities Clause was “an eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States.”<sup>585</sup> In reaching this conclusion, Black relied heavily on the speeches of John Bingham.<sup>586</sup> Frankfurter rejected Black’s analysis, noting that “judicial opinions contemporaneous with or just subsequent to ratification more reliably indicated the meaning of the Amendment than [r]emarks of a particular proponent of the Amendment, no matter how influential.”<sup>587</sup> In spite of rejecting Black’s reading of the

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<sup>582</sup> *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

<sup>583</sup> CHEMERINSKY, *supra* note 578, at 500.

<sup>584</sup> 332 U.S. 46 (1947).

<sup>585</sup> *Duncan v. Louisiana*, 391 U.S. 145, 166 (1968) (Black, J., dissenting).

<sup>586</sup> Aynes, *supra* note 564, at 64.

<sup>587</sup> *Id.* (quoting *Adamson*, 332 U.S. (Frankfurter, J., concurring)).

Privileges or Immunities Clause, the Court eventually found almost all of the provisions of the Bill of Rights to be incorporated against the States through the Fourteenth Amendment’s Due Process Clause.<sup>588</sup>

The key legal scholar in this early debate was Harvard Law School Professor Charles Fairman, Felix Frankfurter’s former student. Fairman analyzed the historical evidence that Frankfurter refused to consider in *Adamson*<sup>589</sup> and rejected Black’s reading of the ratification history. For decades, Fairman’s view largely prevailed in academia, as his work came to be viewed as a “classic,”<sup>590</sup> shaping much of the incorporation debate “in the . . . years since its first publication.”<sup>591</sup> Indeed, Fairman’s Article became “one of the most cited law review articles written since World War II”<sup>592</sup> and remained largely unchallenged by other scholars for decades.<sup>593</sup> Furthermore, Raoul Berger took Fairman’s conclusions even further, “agree[ing] with Fairman that the framers of the Fourteenth Amendment did not intend to enforce the Bill of Rights against the states,”<sup>594</sup> but also “reject[ing] . . . selective incorporation.”<sup>595</sup>

Other scholars eventually emerged to defend the vision of our Reconstruction Founders, beginning with Michael Kent Curtis in 1980.<sup>596</sup> Curtis defended the coherence of John Bingham’s constitutional theory and “concluded that the Fourteenth Amendment applied the Bill of Rights against the states.”<sup>597</sup> Although Curtis’s work was praised in some circles, Richard Aynes still noted in 1993 that “Fairman’s view—that Bingham was a confused man and that his

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<sup>588</sup> For a summary of the key provisions that have been incorporated against the States, see CHEMERINSKY, *supra* note 578, at 503-04.

<sup>589</sup> CURTIS, *supra* note 408, at 5.

<sup>590</sup> Aynes, *supra* note 564, at 58.

<sup>591</sup> *Id.*

<sup>592</sup> *Id.* at 59.

<sup>593</sup> The exception was William Crosskey. Aynes notes that “[a]s late as 1968, the exchange between Professors Fairman and Crosskey remained the only full-dress discussion of the [incorporation debate] in legal periodicals and was far more comprehensive than any of the United States Supreme Court cases on that point.” *Id.* at 60.

<sup>594</sup> *Id.*

<sup>595</sup> *Id.*

<sup>596</sup> *Id.*

<sup>597</sup> *Id.*

views provide no guidance when attempting to interpret the Fourteenth Amendment—continues to pervade legal scholarship.”<sup>598</sup> In 1998, Akhil Amar emerged with his novel theory of “refined incorporation,” noting the deficiencies in the both the Black and Frankfurter-Fairman-Berger approaches. Amar argued that the “[d]isciples of Black and Brennan posit an essentially mechanical process that denies the need to reshape 1789 doctrines to fit the 1866 vision, and followers of Frankfurter insist that, strictly speaking, there is no logical relationship at all between the Bill and Fourteenth Amendment.”<sup>599</sup> In effect, Amar concluded, the Fourteenth Amendment “incorporated core elements of the Bill of Rights while at the same time refining and redefining the Founders’ text.”<sup>600</sup> In the end, the debate continues, with even the strongest advocates of incorporation conceding that the strength of their conclusions are weakened by the relatively incomplete record available to contemporary historians.<sup>601</sup>

I will refrain from considering the relative merits of each position in any greater detail here, as it is beyond the scope of this Article. Suffice it to say that, following the work of Akhil Amar,<sup>602</sup> Michael Kent Curtis,<sup>603</sup> and Richard Aynes,<sup>604</sup> (not to mention the earlier work of Harold Hyman,<sup>605</sup> William Wiecek,<sup>606</sup> and William Crosskey<sup>607</sup>, among others), we have come to a more complete understanding of our Reconstruction Founders—and their transformational Amendments. In the case of the Fourteenth Amendment, there appears to be sufficient evidence

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<sup>598</sup> *Id.* at 61.

<sup>599</sup> AMAR, *supra* note 47, at 225.

<sup>600</sup> AMAR, *supra* note 6, at 390.

<sup>601</sup> *See, e.g.*, CURTIS, *supra* note 508, at 15 (noting that the key historical evidence available for Section One of the Fourteenth Amendment, beyond statements “partially hidden in generalizations,” is two “very direct statements from . . . leading congressional Republicans” and no statements denying that the Fourteenth Amendment would “require the states to obey the Bill of Rights”).

<sup>602</sup> *See, e.g.*, AMAR, *supra* note 6; AMAR, *supra* note 47.

<sup>603</sup> *See, e.g.*, CURTIS, *supra* note 508.

<sup>604</sup> *See, e.g.*, AYNES, *supra* note 564.

<sup>605</sup> *See, e.g.*, HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875 (1982).

<sup>606</sup> *See, e.g., id.*

<sup>607</sup> *See, e.g.*, WILLIAM WINSLOW CROSSKEY, 2 POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953).

to suggest that at least Bingham (the primary architect of Section One) intended the Fourteenth Amendment to incorporate at least some of the fundamental freedoms contained in the Bill of Rights against the States. As Akhil Amar noted:

[T]he Fourteenth Amendment was designed to revive an idea that Madison had repeatedly put forth, unsuccessfully in Philadelphia: Both Congress and the Court should have authority to keep states in line, with states generally held to standards set by whichever enforcer had the more generous understandings of the individual right in question.<sup>608</sup>

Indeed, as Amar concluded, “Just as the price of peace and union in 1789 was a bill of rights against center, so the price of peace and (re)union in 1866 was a bill of rights against the periphery.”<sup>609</sup>

## B. The Bill of Rights and the Fourteenth Amendment in Our American Government Classrooms: 1917 to Today

The Bill of Rights and the Fourteenth Amendment are treated in each edition of *Magruder’s* from 1917 until today—however, the account predictably changes as the jurisprudence associated with the Fourteenth Amendment evolves throughout the twentieth century. Although the Fourteenth Amendment is closely associated with the growth of individual rights from the middle of the twentieth century onward, there is no hint in *Magruder’s* that this expansion of freedom was at all associated with the Reconstruction Founders’ original vision. Instead, the expansion of rights becomes a Court-centered narrative—loosely connected to the initial vision of our Founding Fathers, but not at all rooted in the vision of Bingham and

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<sup>608</sup> AMAR, *supra* note 6, at 390.

<sup>609</sup> AMAR, *supra* note 47, at 192.

our Reconstruction Founders. Although omission of Bingham (and other key Reconstruction Founders) is excusable in early editions of *Magruder's*, similar omissions are simply not justified today, following the widespread acceptance of the Amar-Curtis-Aynes account of the Fourteenth Amendment in the late 1990s and early twenty-first century.<sup>610</sup>

In the first edition of *Magruder's*, discussion of the Bill of Rights and the Fourteenth Amendment falls within a chapter entitled, “Civil Rights,” which includes accounts of other key constitutional rights, such as habeas corpus and bans on bills of attainder. The Bill of Rights is presented under the section heading “Civil Rights Beyond the Control of Congress.” This discussion explains that the Bill of Rights “restricts Congress alone,”<sup>611</sup> noting that “[t]his fact cannot be too strongly emphasized, because most people think that these restriction apply to the States as well as to the United States.”<sup>612</sup> This section ends with a clear statement of the original intent of the Bill of Rights—namely that “Congress may not take away any of the liberties set forth in these amendments, but through legislation the States may deprive their citizens of many of these liberties without violating the Constitution of the United States.”<sup>613</sup>

The “Civil Rights” chapter also discusses the Due Process Clause of the Fourteenth Amendment, as well as its Equal Protection Clause. In these discussions, there is no mention of the Reconstruction Founders’ vision to protect certain fundamental rights, including certain provisions of the Bill of Rights, against state violations. The discussion of the Due Process Clause begins with a standard account of procedural due process, noting that “[*d*]ue process of law means a legal procedure which hears before it condemns and which renders judgment only

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<sup>610</sup> See *supra* Section V.A.

<sup>611</sup> FRANK ABBOTT MAGRUDER, *AMERICAN GOVERNMENT: A CONSIDERATION OF THE PROBLEMS OF DEMOCRACY* 208 (1917).

<sup>612</sup> *Id.* at 208-09.

<sup>613</sup> *Id.* at 209.

after a fair trial.”<sup>614</sup> This edition also begins to develop an account of substantive due process, noting that “[*d*]ue process of law also means *reasonable law*. Therefore, if Congress or a State legislature enacts a law which, in the opinion of the United States Supreme Court, deprives a person of his life, liberty, or property unreasonably, such a law cannot be enforced.”<sup>615</sup>

The discussion of the Equal Protection Clause begins with a conventional account of “equal protection,” namely that “no State may enact laws which discriminate unreasonably between persons or classes of persons.”<sup>616</sup> The 1917 edition omits the historical evils that the Clause was designed to confront and provides economic examples of its application rather than examples rooted in race. For example, one sample application explains that “Illinois could not prohibit all combinations to fix prices or restrict competition ‘except farmers and stock raisers.’ A State could not require railroads ‘alone’ to pay court costs when defeated in a suit.”<sup>617</sup>

The 1917 account remains largely unchanged in the 1920s edition of *Magruder’s*.<sup>618</sup> Unlike previous editions, the 1930s edition explicitly links the Fourteenth Amendment to the Civil War experience, noting that it was “added to the Constitution primarily to insure justice to the freed slaves”<sup>619</sup>—although even this discussion fails to mention the Reconstruction Founders’ specific concern with incorporating certain fundamental provisions of the Bill of Rights, as well as other “privileges” and “immunities” of U.S. citizenship. In addition, the 1930s edition offers a new gloss on the Due Process Clause, asking the students “what good could proper procedure do [the freed slaves] if they were tried under unjust laws.”<sup>620</sup> This question, taken alone, suggests a deficiency in the constitutional text and (implicitly) the vision of the

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<sup>614</sup> *Id.* at 207.

<sup>615</sup> *Id.*

<sup>616</sup> *Id.* at 210.

<sup>617</sup> *Id.*

<sup>618</sup> FRANK ABBOTT MAGRUDER, *AMERICAN GOVERNMENT: A CONSIDERATION OF THE PROBLEMS OF DEMOCRACY* (1928).

<sup>619</sup> *Id.* at 346.

<sup>620</sup> *Id.*

constitutional actors who ratified it. From there, the 1930s edition ignores the “new birth of freedom” the Reconstruction Founders intended under Section One (especially the Privileges or Immunities Clause) and notes the emergence of substantive due process under the wise guidance of the U.S. Supreme Court. Indeed, our students learn that the Supreme Court recognized the deficiency of procedural due process (our Reconstruction Founders’ flawed vision) and, therefore, “construed due process to mean not only a fair procedure but also a fair law.”<sup>621</sup> From there, the Court extended those rights not only to African-Americans (as our flawed Founders intended), but to “all individuals.”<sup>622</sup> Indeed, “if a fair law was good for the new freedman it was good for all individuals, and it was good for groups of individuals, or corporations.”<sup>623</sup>

Summarizing substantive due process for our students, the 1930s edition concludes:

*From the Substantive Viewpoint the due process clause of the Fifth Amendment protects individuals or minority groups against Acts of Congress which are unjust, and the Fourteenth Amendment protects them against Acts of State and laws of local legislative bodies if unjust. The Supreme Court will declare unconstitutional any Act appealed to them if they consider it unjust.*<sup>624</sup>

Needless to say, this account both ignores the Supreme Court’s complicity in restricting the freedoms protected by the Fourteenth Amendment shortly after their birth—and the expansive vision of our Reconstruction Founders. This flawed account survives through the 1940s edition.<sup>625</sup>

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<sup>621</sup> FRANK ABBOTT MAGRUDER, *AMERICAN GOVERNMENT: A CONSIDERATION OF THE PROBLEMS OF DEMOCRACY* 346 (1932).

<sup>622</sup> *Id.*

<sup>623</sup> *Id.*

<sup>624</sup> *Id.*

<sup>625</sup> FRANK ABBOTT MAGRUDER, *AMERICAN GOVERNMENT: A CONSIDERATION OF THE PROBLEMS OF DEMOCRACY* (1946).

By the 1950s edition, civil rights are even more tightly connected with the actions of the Court. Instead of a simple chapter, entitled “Civil Rights,” a new “Civil Rights and Liberties” chapter is subsumed under a Unit entitled, “The Judiciary and Civil Rights.” Although the account of the Bill of Rights is unchanged from earlier editions, the 1950s edition provides an extended account of *Barnette*. This account does not explicitly describe *Barnette* in the context of incorporation, but its inclusion is an implicit recognition of the Court incorporating the First Amendment against the States. After providing the facts of *Barnette*, the 1950s edition notes that “the Supreme Court declared that compelling one to salute the flag is in violation of the liberty clause of the Fourteenth Amendment (restricting the States) in light of the purpose of the freedom of religion clause of the First Amendment.”<sup>626</sup> This account of *Barnette* would serve as a model for future editions, which focus more on the incorporation of the Bill of Rights against the states and court-protected rights.

Indeed, the 1960s edition provides a completely revamped (and expanded) gloss on “civil rights” in the United States. It provides a new unit, entitled “Rights of a Free People,” with a chapter committed to “Civil Rights.” This new account, however, does not emphasize the fact that the expansion of individual rights in the twentieth century was consistent with the Reconstruction Founders’ vision under Section One of the Fourteenth Amendment. Instead, the new chapter opens by paying homage to our Founding Fathers. The chapter leads with a Jefferson quote: “*The God who gave us life, gave us liberty at the same time.*”<sup>627</sup> The 1960s edition then salutes the Founding generation, noting that the “United States was born out of a struggle for freedom,”<sup>628</sup> and that the “men who founded this nation loved liberty above all

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<sup>626</sup> WILLIAM A. MCCLENAGHAN, *MAGRUDER’S AMERICAN GOVERNMENT* 406 (1952).

<sup>627</sup> WILLIAM A. MCCLENAGHAN, *MAGRUDER’S AMERICAN GOVERNMENT* 100 (1965).

<sup>628</sup> *Id.*

earthly possessions.”<sup>629</sup> Indeed, “[f]or them, freedom for their country and freedom for the individual were the greatest blessings Providence could bestow.”<sup>630</sup>

On this account, our Founding Fathers’ commitment to freedom is why the “Constitution is literally studded with guarantees of personal freedom and prohibitions against governmental action.”<sup>631</sup> This discussion is accompanied by a picture of the First Congress, with a caption that praises the Bill of Rights:

In Boston, in 1788, John Hancock urged that a Bill of Rights be added to the proposed Constitution of the United States. Many of the other leading figures of the day, including Thomas Jefferson, joined him in arguing that an explicit list of the rights guaranteed to the people must be added to the new document.<sup>632</sup>

This account does (at least) hint at the role the Reconstruction Amendments played in the expansion of American freedom, generally, noting that “[l]ater Amendments, especially the 13<sup>th</sup> and 14<sup>th</sup>, have added to the freedoms guaranteed by the Constitution,”<sup>633</sup> but this is only one sentence and it comes only after extensive mythologizing of our Founding Fathers. This simply does not do justice to the constitutional revolution that Section One of the Fourteenth Amendment intended to initiate—a revolution that was very much the original vision of Bingham and our Reconstruction Founders, not of the twentieth century Supreme Court (as *Magruder’s* implies).

The remainder of the new “Civil Rights” chapter is mostly a gloss on recent Court doctrine. The 1960s edition begins by noting that “[i]n the United States the courts, especially the Supreme Court of the United States, stands as the principal guardian of individual

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<sup>629</sup> *Id.*

<sup>630</sup> *Id.*

<sup>631</sup> *Id.*

<sup>632</sup> *Id.* at 101.

<sup>633</sup> *Id.* at 102.

liberties.”<sup>634</sup> Again, this edition’s account of incorporation—more extensive than in previous editions—implies that the incorporation of the Bill of Rights against the States was the result of the Court’s vision—not that of our Reconstruction Founders. The 1960s edition adds that “the Supreme Court has lessened the complicated effects of federalism on our system of civil rights through a broadening interpretation of the 14<sup>th</sup> Amendment.”<sup>635</sup>

From there, the chapter includes a new section entitled, “The 14<sup>th</sup> Amendment and the ‘Nationalization’ of Civil Rights.” This section never mentions the Reconstruction Founders and further implies that the Court expanded the Fourteenth Amendment beyond its original vision, noting that the Due Process Clause of the Fourteenth Amendment was “originally designed to guarantee Negroes and others a fair trial in State courts,”<sup>636</sup> but, since then, it “has come to have a much broader meaning.”<sup>637</sup> That “much broader meaning” was derived from “a long series of cases since 1925,”<sup>638</sup> in which “the Supreme Court has held the word ‘liberty’ in the 14<sup>th</sup> Amendment *includes within its meaning all of the provisions of the 1<sup>st</sup> Amendment.*”<sup>639</sup> The 1960s edition then notes the expansion of the Fourteenth Amendment’s scope, adding:

Within the past few years, the Court has enlarged the scope of the 14<sup>th</sup> Amendment still further. In 1961 it ruled that the 4<sup>th</sup> Amendment’s prohibition of unreasonable searches and seizures restricts the States, too, through the 14<sup>th</sup> Amendment. In 1962 it gave the same coverage to the 8<sup>th</sup> Amendment’s ban on cruel and unusual punishments; in 1963 to the 6<sup>th</sup> Amendment’s guarantee of assistance of counsel for persons accused of crime; and in 1964 to the 5<sup>th</sup> Amendment’s ban on self-incrimination.<sup>640</sup>

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<sup>634</sup> *Id.*

<sup>635</sup> *Id.* at 103.

<sup>636</sup> *Id.*

<sup>637</sup> *Id.*

<sup>638</sup> *Id.*

<sup>639</sup> *Id.*

<sup>640</sup> *Id.*

The 1960s edition concludes, “[I]n effect, the Court has ‘nationalized’ these basic freedoms. Their meaning and application has become uniform throughout the nation—and much of the effect of federalism on our civil rights system has been sharply reduced.”<sup>641</sup> Indeed, the 1960s edition emphasizes that incorporation has been a selective, court-centered process: “*But*, notice, the 14<sup>th</sup> Amendment’s word ‘liberty’ *does not* cover the other provisions of the Bill of Rights. It includes *only those the Court has found* ‘basic or essential to the American concept of Liberty.”<sup>642</sup> Needless to say, the Reconstruction Founders are entirely ignored in this account. From there, the 1960s edition provides a court-centered gloss on the rights that have been incorporated.<sup>643</sup>

In addition to its new discussion of incorporation, the 1960s edition also mentions African-Americans for the first time in the context of the Equal Protection Clause, noting that “[m]ost ‘equal protection’ cases have involved Negroes.”<sup>644</sup> The 1960s edition even provides a brief history of segregation in the South, noting that “the Supreme Court established the ‘separate-but-equal’ doctrine when it upheld a Louisiana law requiring the segregation of Negroes in rail coaches”<sup>645</sup> and that the “‘separate-but-equal’ doctrine was later extended to other fields as a constitutional justification for racial segregation.”<sup>646</sup> The 1960s edition then provides a heroic summary of the Court’s redemptive acts in *Brown* and its progeny:

In an historic decision in 1954, however, the Supreme Court reversed itself and held segregation of the races in education to be unconstitutional. Said the unanimous Court: ‘Separate education is inherently unequal.’ In several recent cases over the past few

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<sup>641</sup> *Id.*

<sup>642</sup> *Id.*

<sup>643</sup> *See, e.g., id.* at 109-114.

<sup>644</sup> *Id.* at 119.

<sup>645</sup> *Id.*

<sup>646</sup> *Id.* at 120.

years, the Court has also abandoned the ‘separate-but-equal’ rule in other fields, including public transportation and such public recreational facilities as parks, beaches, swimming pools, golf courses, and the like.<sup>647</sup>

The 1960s accounts of incorporation and equal protection, though expanded in later editions, provide the basic framework for each edition’s discussion of civil rights up until today. The 1970s and 1980s editions are largely the same, containing the same mythologizing of our Founding Fathers, a similar account of incorporation, and a similar account of equal protection. The main change is organizational, with the “civil rights” discussion separated into two chapters—one dealing with incorporation (“Civil Rights: Basic Freedoms”) and another dealing with equal protection (“Civil Rights: Equal Justice Under the Law”).

In the 1990s edition, the “civil rights and liberties” discussion is once again subsumed under the judiciary, in a unit entitled, “The Judicial Branch.” While the equal protection discussion still encompasses a single chapter (“Civil Rights: Equal Justice Under Law”), “civil liberties” are divided into two chapters—“Civil Liberties: First Amendment Freedoms” and “Civil Liberties: Protecting Individual Freedoms.” Unlike the previous three decades, the 1990s edition leads with Court-centered stories, not our Founding Fathers: “Have you ever heard of Walter Barnette? Probably not. How about Toyosaburo Korematsu? Dollree Mapp? Clarence Earl Gideon? Almost certain, the same answer: No.”<sup>648</sup> From there, however, the 1990s edition returns to a celebration of our Founding Fathers, under the heading, “Rights and Liberties in American Political Thought.”<sup>649</sup> The 1990s edition notes that “[a] commitment to personal freedom is deeply rooted in America’s colonial past,”<sup>650</sup> adding that the “Revolutionary War was

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<sup>647</sup> *Id.*

<sup>648</sup> WILLIAM A. McCLENAGHAN, *MAGRUDER’S AMERICAN GOVERNMENT* 485 (2000).

<sup>649</sup> *Id.*

<sup>650</sup> *Id.* at 486.

fought to preserve and expand the rights of the individual against government”<sup>651</sup> and the “Framers of the Constitution repeated that justification for the existence of government in the Preamble of the Constitution.”<sup>652</sup>

The discussion of incorporation is largely unchanged from the 1960s court-centered, Reconstruction-free narrative. The discussion opens by noting that “the provisions of the Bill of Rights apply against the National Government only. This does *not* mean, however, that the States can deny basic rights to the people.”<sup>653</sup> The 1990s edition adds that “[i]n part, the States cannot do that because each of their own constitutions contains a bill of rights. Also, they cannot because of the 14<sup>th</sup> Amendment’s Due Process Clause.”<sup>654</sup> Again, the Fourteenth Amendment’s expansion of individual rights is associated with the Court’s actions, rather than the Reconstruction Founders’ vision: “In a long series of cases, the Court has ruled that most of the protections set out in the Bill of Rights are also within the meaning of the 14<sup>th</sup> Amendment, and so apply against the States.”<sup>655</sup> The 1990s edition then provides more extended accounts of Court doctrine in a variety of areas, including freedom of religion,<sup>656</sup> freedom of speech and the press,<sup>657</sup> freedom of expression and national security,<sup>658</sup> freedom of assembly and petition,<sup>659</sup> freedom and security of the person,<sup>660</sup> and the rights of the accused.<sup>661</sup> Furthermore, the account of the equal protection clause is largely the same, though it becomes more doctrinal, with a

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<sup>651</sup> *Id.*

<sup>652</sup> *Id.*

<sup>653</sup> *Id.* at 488.

<sup>654</sup> *Id.*

<sup>655</sup> *Id.*

<sup>656</sup> *See id.* at 490-97.

<sup>657</sup> *See id.* at 499-505.

<sup>658</sup> *See id.* at 506-08.

<sup>659</sup> *See id.* at 508-11.

<sup>660</sup> *See id.* at 521-26.

<sup>661</sup> *See id.* at 528-39.

discussion of the rational basis test<sup>662</sup> and strict scrutiny.<sup>663</sup> There is still a full account of Jim Crow, *Brown*, and *Brown*'s progeny,<sup>664</sup> as well as extended discussions of gender discrimination<sup>665</sup> and federal civil rights laws.<sup>666</sup>

Finally, today's account is almost identical to the 1990s edition. The key addition is that the 2000s edition is the first to explicitly mention "incorporation," noting that "the Court engaged in what has come to be called the process of incorporation. It has incorporated—merged, combined—most of the guarantees in the Bill of Rights into the 14<sup>th</sup> Amendment's Due Process Clause."<sup>667</sup> Again, this account remains Court-centered, with no mention of the Reconstruction Founders' vision.

### C. A Lost Clause?: The "Privileges or Immunities" of U.S. Citizenship

Not only are the Reconstruction Founders largely ignored in the accounts of the Fourteenth Amendment in *Magruder's*, but so is their Privileges or Immunities Clause—the key provision intended to incorporate (at least some of) the Bill of Rights against the States. It appears that David Gans and Douglas Kendall were correct in their recent report, noting that the "story of the creation and destruction of the Privileges or Immunities Cause is page-turning history, filled with American heroes and villains, hope and bitter disappointment, which has never fully gotten its due in our history books."<sup>668</sup>

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<sup>662</sup> *See id.* 551.

<sup>663</sup> *See id.*

<sup>664</sup> *See id.* at 551-54.

<sup>665</sup> *See id.* at 554-55.

<sup>666</sup> *See id.* at 556-59.

<sup>667</sup> WILLIAM A. McCLENAGHAN, *MAGRUDER'S AMERICAN GOVERNMENT* 535 (2007).

<sup>668</sup> DAVID H. GANS & DOUGLAS T. KENDALL, CONSTITUTIONAL ACCOUNTABILITY CENTER, *THE GEM OF THE CONSTITUTION: THE TEXT AND HISTORY OF THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT*, at vi (2008).

As the discussion in Section V.A outlined, the Privileges or Immunities Clause has been a source of controversy since the beginning of the incorporation debate, even as it was effectively nullified by the Court in *The Slaughterhouse Cases*. Several scholars and legal advocates have recently called for a revival of the Clause. Gans and Kendall call for “an historic ruling that would overrule portions of . . . *The Slaughterhouse Cases*, and establish the Privileges or Immunities Clause as a stronger and less controversial foundation for the protection of fundamental American rights.”<sup>669</sup> Richard Aynes notes that “providing the correct reading of the Privileges or Immunities Clause . . . [would] lead[] to several important changes in the current constitutional landscape,”<sup>670</sup> as the discovery of unenumerated rights (a potential element of the Reconstruction Founders’ vision) “cannot begin properly without an adequate and correct reading of the ideas of John Bingham concerning the Fourteenth Amendment.”<sup>671</sup>

Turning to *Magruder’s*, the Privileges or Immunities Clause is never mentioned in the main text of any edition. Furthermore, it is never associated with the incorporation of the Bill of Rights against the States. From the first edition of *Magruder’s* in 1917 until the 1950s edition, the Privileges or Immunities Clause is only mentioned in a footnote in the annotated Constitution at the back of the textbook. The footnote provides a restricted account of what the Clause was intended to cover, with no hint of our Reconstruction Founders’ vision:

*Privileges and immunities* have never been defined, but courts have named many things which are and are not a denial of such privileges and immunities. For example, it is not a denial to prohibit marriage between whites and blacks; nor to provide separate schools for these races; nor to provide separate coaches for the races; nor to close business places during certain hours or on Sunday. It is a denial for a State to prohibit the employment of

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<sup>669</sup> *Id.* at viii.

<sup>670</sup> Aynes, *supra* note 564, at 103.

<sup>671</sup> *Id.* at 104.

a particular nationality; or to pass an act excluding persons from jury service because of their color or race.<sup>672</sup>

Furthermore, the index to the 1917 edition lists the Privileges or Immunities Clause under the entry for “Privileges and immunities . . . of State citizens.”<sup>673</sup> The Clause is treated in an identical way in the 1920s, 1930s, 1940s, and 1950s editions of *Magruder’s*.

The 1960s edition explicitly ties the Privileges or Immunities Clause of the Fourteenth Amendment to the Comity Clause, thus further obscuring its intended application. The relevant passage in the 1960s edition reads: “Article IV, Section 2, Clause I. This provision is reinforced in the 14<sup>th</sup> Amendment,”<sup>674</sup> adding that the Comity Clause “means that a resident of one State will not be discriminated against *unreasonably* by another State.”<sup>675</sup> Indeed, the Privileges or Immunities Clause becomes tied to the concept of “interstate citizenship.”<sup>676</sup> An identical account is offered by the 1970s and 1980s editions. The 1990s and 2000s edition provide similar accounts, as well, adding of the Comity Clause that it “means that no State may draw *unreasonable* distinctions between its own residents and those of other States.”<sup>677</sup>

In the end, these accounts ignore the core of the Privileges or Immunities Clause of the Fourteenth Amendment by conflating the rights it was intended to guarantee with the rights of “*interstate equality of citizenship*”<sup>678</sup> associated with the Comity Clause. The Reconstruction Founders “promised much more”<sup>679</sup> than “interstate equality of citizenship.”<sup>680</sup> They promised

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<sup>672</sup> MAGRUDER, *supra* note 611, at 449 n.54.

<sup>673</sup> *Id.* at Index 13.

<sup>674</sup> MCCLENAGHAN, *supra* note 627, at 75 n.19.

<sup>675</sup> *Id.* at 75.

<sup>676</sup> *Id.* at 76.

<sup>677</sup> MCCLENAGHAN, *supra* note 648, at 91.

<sup>678</sup> AMAR, *supra* note 6, at 391.

<sup>679</sup> *Id.*

<sup>680</sup> *Id.*

“*full and equal in-state citizenship*”<sup>681</sup>—namely, “Every Massachusetts and South Carolina citizen would be entitled to claim a host of fundamental rights and freedoms (including the right to equality) against his or her own *home* state.”<sup>682</sup> This vision escapes mention in any of the textbooks analyzed for this Article.

## CONCLUSION

In the end, our most widely-used high school American history and government textbooks celebrate our Founding Fathers, but give short shrift to our Reconstruction Founders. Although American schoolchildren should be proud of Jefferson, Madison, and Hamilton, they should also be aware of the key contributions of their Forgotten Founders—Thaddeus Stevens, Charles Sumner, and John Bingham, among others. Furthermore, they should learn an account of the Fourteenth Amendment that focuses as much on their Reconstruction Founders’ nineteenth century vision as the Supreme Court’s twentieth century actions.

Near the end his *Bill of Rights: Creation and Reconstruction*, Akhil Amar asked a question that helped prompt this Article:

What, in the end, are we to make of the pervasive ways in which our stock stories have exaggerated the Creation and diminished the Reconstruction? If this book is right, then many of us are guilty of a kind of curiously selective ancestor worship—one that gives too much credit to James Madison and not enough to John Bingham, that celebrates Thomas Jefferson and Patrick Henry but slights Harriet Beecher Stowe and Frederick Douglass. Great as men like Madison and Jefferson were, they lived and died as

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<sup>681</sup> *Id.*

<sup>682</sup> *Id.*

slaveholders, and their Bill of Rights was tainted by its quiet complicity with the original sin of slavery.<sup>683</sup>

Reconstruction was a controversial period in American history—an era filled with great promise and great peril. Not surprisingly, historians have struggled for generations to make sense of its various features. Mistakes were certainly made by our Reconstruction Founders, and these mistakes should not be ignored by our textbooks. At the same time, if our textbooks dwell on the mistakes made by our Reconstruction Founders, they should similarly stress the flaws in the Founders’ original Constitution—eighteenth century flaws that contributed to many of the nineteenth century challenges that the Reconstruction Founders struggled (and, at times, failed) to overcome. Our textbooks should also note the great debt we owe to our Reconstruction Founders for the freer and more equal America we live in today. Although our Reconstruction Founders’ vision was largely rejected by the next generation, it held out the promise of a more perfect union. As Kenneth Stampp noted, after Reconstruction:

[African-Americans] could no longer be deprived of the right to vote, except by extralegal coercion or by some devious subterfuge. They could not be deprived of equal civil rights, except by deceit. They could not be segregated in public places, except by the spurious argument that this did not in fact deprive them of the equal protection of the laws. Thus [African-Americans] were no longer denied equality by plain language of the law, as they had been before radical reconstruction, but only by coercion, by subterfuge, by deceit, and by spurious legalisms.<sup>684</sup>

In the end, Stampp probably had it right, when he concluded:

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<sup>683</sup> AMAR, *supra* note 47, at 293.

<sup>684</sup> STAMPP, *supra* note 66, at 215.

The Fourteenth and Fifteenth Amendments, which could have been adopted only under the conditions of radical reconstruction, make the blunders of that era, tragic though they were, dwindle into insignificance. For it was worth a few years of radical reconstruction to give [African-Americans] the ultimate promise of equal civil and political rights.<sup>685</sup>

A nineteenth-century promise more fully realized a century later.

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<sup>685</sup> *Id.*