

# Constitutional History and Constitutional Theory: Reflections on Ackerman, Reconstruction, and the Transformation of the American Constitution

Michael Les Benedict<sup>†</sup>

In *We The People: Transformations*, Bruce Ackerman draws attention to the radical disjuncture between the version of American constitutional history underlying formal legal theories of constitutional change and the actual history of constitutional change in the United States.<sup>1</sup> This is an observation with which any constitutional historian would agree. It is obvious to anyone studying the history of our constitutional system that the Constitution we live under today is radically different from the one Americans lived under before the Civil War and before the New Deal.

In this Article, I will discuss several issues precipitated by a reading of Ackerman's effort to fashion a new theory of constitutional change from a consideration of actual constitutional history. Part I considers the challenge constitutional history, as written in recent decades, poses to traditional theories of constitutional doctrine. It describes Ackerman's work as an effort to formulate a new theory of doctrinal change that is consistent with constitutional history. Part II discusses differences between historians' and lawyers' approaches to historical research. Part III assesses Ackerman's description of the Reconstruction era and the Framing and ratification of the Fourteenth Amendment. Part IV argues that Republicans did not see their actions as setting a precedent for "unconventional" transformations of the Constitution and that their rhetoric stressed the conservatism of the Reconstruction program. Part V posits an aspect of American constitutionalism—what might be termed a "preservation theme"—that is at odds with the radicalism of "transformative moments" and of which Ackerman must take account in developing his theory. Finally, Part VI

---

<sup>†</sup> Professor of History and Adjunct Professor of Law, The Ohio State University.  
1. 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 8-11 (1998).

discusses whether unconventional amendment may be superior to conventional amendment of the Constitution.

## I. CONSTITUTIONAL THEORY AND CONSTITUTIONAL HISTORY

Those assessing constitutional change from a legal perspective address it in terms of constitutional amendments and court decisions—especially the decisions of the Supreme Court. Amendments are perceived as the mode that the Framers formally provided for altering the Constitution; the legitimacy of constitutional changes proposed and ratified in accordance with Article V has been largely unquestioned.<sup>2</sup> Responses to changes in social, cultural, and economic conditions, or changes in ethical and philosophic concepts that have required departures from “original understandings” of constitutional provisions through judicial interpretations have been controversial. But no analyst denies that they have occurred; we have had, for good or ill, a “living Constitution.”<sup>3</sup>

As a matter of legal theory, the legitimacy of constitutional change outside the formal amendment process is a critical issue. A radical change in direction—such as the switch in time that, if it did not really save nine, did save the New Deal<sup>4</sup>—poses serious problems for theorists seeking to

---

2. During the Civil War and Reconstruction, a few conservatives argued that what became the 13th and 14th Amendments were illegitimate because they did not merely amend the existing constitutional system but fundamentally altered it, thus going beyond the intentions of the Framers. See DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995*, at 160 (1996). The “ratification” in 1992 of the 27th Amendment, originally proposed in 1791, raises the question of whether any ratification meeting the formal requirements of Article Five must be considered legitimate and effectual. The ratification of that Amendment, 200 years after its proposal by Congress, fell far short of the process that Bruce Ackerman persuasively argues underlies Article Five—intensive, reasoned debate by an energized electorate, representing an opinion so deeply and broadly held that it can overcome the obstacles the Framers purposefully put in its way. Although the same may be said of many of the prior 26 Amendments, the 27th is an extreme case. See Stewart Dalzell & Eric J. Beste, *Is the Twenty-Seventh Amendment 200 Years Too Late?*, 62 *GEO. WASH. L. REV.* 501, 503 (1994) (referring to “the Amendment’s curious history”); Christopher M. Kennedy, *Is There a Twenty-Seventh Amendment? The Unconstitutionality of a “New” 203-Year-Old Amendment*, 26 *J. MARSHALL L. REV.* 977, 978-79 (1993); Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 *CONST. COMMENTARY* 101, 102 (1994).

3. The term probably dates to the publication of HOWARD LEE MCBAIN, *THE LIVING CONSTITUTION: A CONSIDERATION OF THE REALITIES AND LEGENDS OF OUR FUNDAMENTAL LAW* (1927). Of course, the idea of a “living Constitution” can be understood narrowly to mean only that established principles are applied to new situations. This is a view with which Chief Justice Rehnquist said, “scarcely anyone would disagree.” William Rehnquist, *The Notion of a Living Constitution*, 54 *TAX L. REV.* 693, 694 (1976). It has come to mean, however, that the principles themselves change over time.

4. Compare *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941) (holding that the federal government may regulate wages and hours of employees who produce goods intended for interstate commerce, irrespective of the 10th Amendment), *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) (holding that the 10th Amendment does not limit federal taxation power), *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (holding that the federal government may regulate labor relations in any industry directly or indirectly affecting interstate commerce), and

establish principled bases for court decisions. The lines of decisions defining due process of law and federal power over interstate commerce that followed the change were logically incompatible with the decisions that preceded it. The New Deal Court dealt with the problem in the orthodox manner, by dismissing the pre-1937 lines of decisions as misguided.<sup>5</sup> Ultimately, the prior line came to be seen as the illegitimate imposition of the economic and political biases of previous courts upon constitutional decisionmaking. Reflecting the orthodox myth, Justice Black solemnly intoned in 1963 that the Court had “returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies.”<sup>6</sup>

By contrast, the Warren Court openly relied on the idea of a “living Constitution” in *Brown v. Board of Education*.<sup>7</sup> It repudiated the authority of original intent in resolving the segregation problem, explaining that “we cannot turn the clock back to 1868”;<sup>8</sup> it relied on sociological data and analyses of changes in contemporary society, insisting that “[w]e must consider public education in the light of its full development and its present

---

West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (holding that minimum-wage legislation does not deprive employers and employees of freedom of contract in violation of the Due Process Clause of the 14th Amendment), *with* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (holding that the federal government may not regulate wages and hours in employments that only indirectly affect interstate commerce), *United States v. Butler*, 297 U.S. 1 (1936) (holding that the federal government may not levy taxes to enact programs in areas reserved to the states by the 10th Amendment), *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (holding that the federal government may not enact safety and health regulations for businesses that only indirectly affect interstate commerce), *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923) (holding that minimum-wage legislation deprives employers and employees of freedom of contract in violation of the due process clause of the 5th and 14th Amendments), *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (holding that the federal government may not levy taxes to enforce programs in areas reserved to the state jurisdiction by the 10th Amendment), *and* *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (holding that the federal government may not bar goods from entry into interstate commerce to enforce programs in areas reserved to state jurisdiction by the 10th Amendment).

5. *See, e.g., Darby*, 312 U.S. at 100; *West Coast Hotel*, 300 U.S. at 379.

6. *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). This myth was reflected in the iconic status accorded the dissents that Oliver Wendell Holmes penned in the *Lochner* era—especially, his famous admonition in *Lochner* itself that “[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.” *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). Justices O’Connor, Kennedy, and Souter modified the Court’s traditional account in *Planned Parenthood v. Casey*, 505 U.S. 833, 861-2 (1992) (plurality opinion), indicating that the *Lochner* line of cases had been premised upon “fundamentally false factual assumptions” about the free market’s ability to secure human welfare. The Supreme Court placed its solemn imprimatur on the myth of a return to a correct, nationalistic understanding of federalism in *Darby*, 312 U.S. at 115, which cited the “now classic dissent of Mr. Justice Holmes” in *Hammer v. Dagenhart*, 247 U.S. 251, 277 (1918). It is a sign of the deep conflict between liberal and conservative constitutionalism on the Court that, while Justice Souter repeated the traditional account in his dissenting opinion in *U.S. v. Lopez*, 514 U.S. 549, 604-07 (1995) (Souter, J., dissenting), Justice Thomas directly challenged it in a concurring opinion, insisting that, “[i]f anything, the ‘wrong turn’ was the Court’s dramatic departure in the 1930’s from a century and a half of precedent.” *Id.* at 599 (Thomas, J., concurring).

7. 347 U.S. 483 (1954).

8. *Id.* at 492.

place in American life . . . .”<sup>9</sup> As Robert J. Harris observed: “The Court has never been more candid in basing a reversal of precedent on changing conditions and new developments alone than it was here.”<sup>10</sup> At no point in *Brown* did the Court hold that the 1896 decision sustaining segregation, *Plessy v. Ferguson*,<sup>11</sup> was wrongly decided; it was simply outmoded. Nonetheless, this approach has failed to persuade many legal analysts, who generally approve of the decision, that *Brown* advances a “neutral principle”—that is, a principle that can transcend time.<sup>12</sup> Even the Warren Court’s staunchest defenders have conceded that in *Brown* “the distinction between *judgment* and *will*, already tenuous, was honored only in the breach.”<sup>13</sup> As Arthur S. Miller later observed:

It would be perhaps . . . desirable that these changes when they do come, could be justified and explained on the basis of law as it has been received and understood, on what is sometimes called “principle.” But . . . the likelihood of such a desirable state of affairs would seem to be remote at best. The “living” Constitution carries with it attributes of fiat.<sup>14</sup>

In contrast to lawyers, historians have little problem with the idea that law changes over time in ways that legal principles and reasoning cannot explain. In general, constitutional history is no longer primarily the history of constitutional law. Most constitutional historians attend more broadly to

9. *Id.*

10. Robert J. Harris, *The Constitution, Education, and Segregation*, 29 TEMP. L.Q. 409, 431 (1956).

11. 163 U.S. 537 (1896).

12. See, e.g., LEARNED HAND, *THE BILL OF RIGHTS* 54-55 (1958); Eugene Cook & William I. Potter, *The School Segregation Cases: Opposing the Opinion of the Supreme Court*, 42 A.B.A. J. 313, 313 (1956); Harris, *supra* note 10, at 432; H. Gifford Irion, *The Constitutional Clock: A Horological Inquiry*, 46 GEO. L.J. 443, 451 (1958); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 22 (1959). In 1971, Judge J. Skelly Wright complained that “the Warren years were marked by . . . an increasingly dissatisfied and prolific group of legal scholars.” J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 770 (1971). Nearly 25 years later, a commentator still wrote of “the seemingly endless articulation of dissatisfaction with the opinion of the Court” in the school segregation cases. Norman C. Amaker, *The Haunting Presence of the Opinion in Brown v. Board of Education*, 20 S. ILL. U. L.J. 3, 3 (1995). For examples of such commentary, see ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 74-84 (1990); J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE* 28-39 (1979); Paul F. Campos, *Forty Years in the Desert*, 20 S. ILL. U. L.J. 109 (1995); Edward J. Erler, *Sowing the Wind: Judicial Oligarchy and the Legacy of Brown v. Board of Education*, 8 HARV. J.L. & PUB. POL’Y 399 (1985); Lino A. Graglia, *Constitutional Interpretation*, 44 SYRACUSE L. REV. 631, 636-37 (1993); Earl M. Maltz, *A Dissenting Opinion to Brown*, 20 S. ILL. U. L.J. 93 (1995); and Michael J. Perry, *Brown, Bolling and Originalism: Why Ackerman and Posner (Among Others) Are Wrong*, 20 S. ILL. U. L.J. 53 (1995).

13. ALPHEUS THOMAS MASON, *THE SUPREME COURT FROM TAFT TO WARREN* 207 (rev. ed. 1968).

14. ARTHUR SELWYN MILLER, *Notes on the Concept of the “Living” Constitution*, in *SOCIAL CHANGE AND FUNDAMENTAL LAW: AMERICA’S EVOLVING CONSTITUTION* 343, 357 (1979).

constitutionalism and its manifestations in society, law, and politics. They understand constitutional change as emanating from deeper sources than court opinions and formal constitutional amendments, and view constitutional law as the formal and institutional manifestation of deeper social and intellectual structures. As a consequence, constitutional historians now seek to understand the intellectual, social, economic, and cultural context in which legal doctrines were developed and judicial decisions were handed down, although as legal scholars they recognize the powerful effect of legal training, conventions, and reasoning on shaping both doctrine and decisions.<sup>15</sup>

Acceptance of this broader perspective has made traditional legal accounts of constitutional change appear inadequate to historians. It seems to be making traditional accounts appear decreasingly adequate to legal scholars as well. In this Symposium, Stephen M. Griffin urges legal scholars to abandon legal approaches to constitutional change and to historicize fully their understanding of it.<sup>16</sup> Constitutional change is continuous and incremental, effected not only by courts but through the actions of governmental institutions to which legal scholars rarely attend. Griffin concludes that constitutional change must be explained by politics, not theory.<sup>17</sup> He concedes that such an understanding of constitutional change cannot provide a theory to guide judges, and legal academics should abandon the effort: “[T]heories of judicial review and constitutional interpretation . . . should be developed in accordance with scholarly values, not the values of lawyering or judging.”<sup>18</sup>

Ackerman aspires to do what Griffin eschews. He hopes to close the gap between legal theories of constitutional change and historical reality to find historically grounded authority for the articulation of new doctrines of constitutional law. Ackerman recognizes that the continual, incremental process of constitutional change Griffin describes cannot provide guidance for principled judicial decisionmaking. He therefore concentrates on the major “transformative” moments that affect large swaths of the law and legitimize major shifts in doctrine. Ackerman is motivated to focus on transformative moments precisely because he fears the implications of

---

15. For example, see the empathetic (not sympathetic) account of *Plessy v. Ferguson* in CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* (1987). For similarly empathetic discussions of *Lochner*-era laissez-faire constitutionalism, see HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER-ERA POLICE POWER JURISPRUDENCE* (1993); DAVID GOLD, *THE SHAPING OF NINETEENTH-CENTURY LAW: JOHN APPLETON AND RESPONSIBLE INDIVIDUALISM* (1990); and Michael Les Benedict, *Laissez Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 L. & HIST. REV. 293 (1985).

16. Stephen M. Griffin, *Constitutional Theory Transformed*, 108 YALE L.J. 2115 (1999).

17. Cf. STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* (1996) (connecting constitutional interpretation with political institutions).

18. *Id.* at 76.

simply accepting the idea that constitutional principles are historically contingent. He is as troubled as originalists at the prospect of unconstrained judges. But while originalists complain that liberal judges lawlessly write their ideology into the Constitution, Ackerman fears the consequences of unshackled judicial conservatism.

A historicized view of constitutional change undermines the legitimacy of post-New Deal liberal constitutionalism by challenging the historical myth upon which it has rested—that the Supreme Court’s post-1937 decisions embodied a correct reading of the Constitution, setting aside earlier, erroneous doctrines of laissez-faire constitutionalism and state rights that were illegitimate expressions of judges’ personal preferences. Constitutional historians have demonstrated that laissez-faire constitutionalism developed out of longstanding American constitutional commitments and reflected fundamental epistemological beliefs that prevailed in late nineteenth-century American society. The transformation of constitutional law in the New Deal did not “correct” a misguided reading of the Constitution, but rather represented the influence of new styles of reasoning and new social understandings that had triumphed more generally in the nation.<sup>19</sup>

These understandings do more than simply challenge the constitutional myth that legitimated liberal constitutionalism; the idea that changes in constitutional law reflect deeper changes in American society, culture, and ideology suggests that the present trend towards a revival of laissez-faire constitutionalism and state-rights federalism is another manifestation of the same phenomenon. These historical understandings provide no basis for

---

19. See, e.g., GILLMAN, *supra* note 15, at 10 (arguing that *Lochner*-era constitutional law was a longstanding, principled effort to distinguish valid economic legislation from invalid “class” legislation); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 9-31 (1992) (describing the structure of “classical” legal thought in the late 19th century); Benedict, *supra* note 15 (arguing that laissez-faire constitutionalism reflects a traditional American concern with avoiding class legislation); Alan Jones, *Thomas M. Cooley and ‘Laissez-Faire Constitutionalism’: A Reconsideration*, 53 J. AM. HIST. 751, 752 (1967) (arguing that Cooley’s ideas reflect the survival of the Jeffersonian conception of equal rights in a new economic environment); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970 (1975) (showing that Justice Field attempted to separate public and private sectors of life into fixed, inviolable spheres, based on Jacksonian and antislavery precepts); John V. Orth, *Taking from A and Giving to B: Substantive Due Process and the Case of the Shifting Paradigm*, 14 CONST. COMMENTARY 337 (1997) (tracing the ancient lineage of the concept underlying substantive due process of law); Stephen A. Siegel, *Joel Bishop’s Orthodoxy*, 13 LAW & HIST. REV. 215 (1995) (describing classical legal thought in the late 19th century, as reflected in the career of a leading law writer); Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition* 70 N.C. L. REV. 1 (1991) (arguing that the *Lochner*-era marked a transition from an era of treating law as the embodiment of fixed natural law and common-law concepts to one of treating constitutional law as the outcome of pragmatic interest-balancing); Calvin Woodard, *Reality and Social Reform: The Transition from Laissez-Faire to the Welfare State*, 72 YALE L.J. 286 (1962) (arguing that laissez-faire constitutionalism reflected the reality that the state’s ability to deal with social problems was severely limited in the 19th century).

saying that one set of constitutional principles is correct while another is wrong.

Ackerman is troubled on both counts. As he makes clear in his criticism of Justice Souter's opinion in *Planned Parenthood v. Casey*,<sup>20</sup> the traditional account of constitutional change that relies on the traditional story of the errors of laissez-faire constitutionalism is more fiction than historical fact and cannot impart the legitimacy law requires.<sup>21</sup> But Ackerman wants to accomplish more. Despite his careful attention to the Founding and the Reconstruction-era, Ackerman's primary purpose is to construct a theory of constitutional change that legitimizes the liberal constitutional heritage of the New Deal while denying legitimacy to conservative challengers, at least until the American people endorse it through a similar process of what Ackerman calls "higher lawmaking."<sup>22</sup>

In carrying out his project, Ackerman asks essentially legal questions of historical evidence. With regard to the Reconstruction era, he asks: What is the meaning of the events leading up to the ratification of the Fourteenth Amendment for present constitutional law? This question must be divided into two subquestions: (1) what happened; and (2) what legal or constitutional rules or principles can we derive from what happened? The first is a historical question; the second, and for Ackerman the more important, is not.

## II. LEGAL AND HISTORICAL APPROACHES TO HISTORICAL RESEARCH

People have disagreed about the purpose of historical research. From the beginning many have argued that the main reason to recount history is for the specific lessons we can learn from it. The Chinese prepared immense compilations of historical data to educate officials in the art of

---

20. 505 U.S. 833 (1992).

21. See 2 ACKERMAN, *supra* note 1, at 400-01.

22. 2 *id.* at 389-400. For a similar conclusion, see Rogers M. Smith, *Legitimizing Reconstruction: The Limits of Legalism*, 108 YALE L.J. 2039 (1999). New Deal constitutionalism is being challenged vigorously by "takings" doctrines that echo the due-process-of-law doctrines central to laissez-faire constitutionalism and by doctrines of "federalism" that echo pre-New Deal dual federalism. For the former, see *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which held that a requirement that a business turn over land for use as a bicycle path in return for a redevelopment permit constitutes a "taking" in violation of the Fifth Amendment as applied through the Fourteenth Amendment, and RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985). There remain echoes of dual federalism. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 845 (1995) (Thomas, J., dissenting) (arguing that the 10th Amendment reserves to the people of each state the power to set term limits for representatives to the United States Congress); *New York v. United States*, 505 U.S. 144 (1992) (holding that federal government cannot compel states to "take title" to radioactive waste); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985) (Powell, J., dissenting) (arguing that the federal government cannot regulate state and local employees carrying out traditional state and local functions).

governing. Indeed, the great Ssu-ma Kuang called his monumental history of China from the fifth century B.C. to the tenth century A.D. *Comprehensive Mirror for Aid in Government*.<sup>23</sup> Plutarch described history as a “looking-glass, in which I may see how to adjust and adorn my own life,” by selecting from the actions of men and women in the past “all that is noblest and worthiest to know.”<sup>24</sup> It became a well-known aphorism that history was “philosophy learned from example.”<sup>25</sup> History taught moral lessons; this, in turn, required historians to make moral judgments about the conduct of historical actors. “Opinions alter, manners change, creeds rise and fall, but the moral law is written on the tablets of eternity,” said the great historian Lord Acton in his inaugural lecture as Regius Professor of Modern History at Cambridge in 1895.<sup>26</sup> In sum, historians often sought to identify permanent lessons that seemed to be timeless, beyond the contingencies of immediate context.

Acton issued his article of faith in response to new ideas already entering history and other disciplines investigating the human condition. Historians came to perceive that forces played a greater role than individuals in history. Along with the practitioners of new social sciences like sociology and anthropology, historians began to treat moral codes as imbedded in particular cultures and therefore mutable. “Where history is concerned . . . there are no universal standards,” the eminent twentieth-century historian Henry Steele Commager explained in 1965, and thus no grounds for moral judgment.<sup>27</sup> “If history ‘tells us’ anything, it tells us that standards, values, and principles have varied greatly from age to age and from society to society.”<sup>28</sup> The consequence of such new understandings was to redefine the purpose of doing history. The purpose of historical research is no longer to determine what is timeless but rather to analyze what is transient and especially to explain how and why things change. It is within the context of these changes in the purpose of history that constitutional historians have developed their more sophisticated understandings of the nature of constitutional change.

---

23. William G. Beasley & E.G. Pulleyblank, *Introduction to HISTORIANS OF CHINA AND JAPAN* 7 (William G. Beasley & E.G. Pulleyblank eds., 1961). The notion persists. See, e.g., RICHARD E. NEUSTADT & ERNEST R. MAY, *THINKING IN TIME: THE USES OF HISTORY FOR DECISION-MAKERS* at xi-xxii (1986) (showing how policymakers can benefit from historical knowledge).

24. PLUTARCH, *LIVES OF THE NOBLE GREEKS* 204 (Edmund Fuller ed., 1959).

25. BARTLETT'S *FAMILIAR QUOTATIONS* 100 (16th ed. 1992) (attributing the aphorism to Dionysius of Halicarnassus, c. 54-7 B.C.).

26. John Emerich Edward Dalberg-Acton (Lord Acton), *The Study of History*, in 2 *SELECTED WRITINGS OF LORD ACTON: ESSAYS IN THE STUDY AND WRITING OF HISTORY* 504, 551 (J. Rufus Fears ed., 1985).

27. HENRY STEELE COMMAGER, *THE NATURE AND STUDY OF HISTORY* 66 (1985).

28. *Id.*

Although some nineteenth-century historians were swept up by the hope that “social science” would tell us immutable truths about human behavior, the ultimate result of the intellectual revolution of the turn of the twentieth century was to reinforce what is now known as “historicism” — the idea that one studies history for its own sake, for the general self-knowledge and vicarious experience we derive from humane studies. Within the American historical academy, this justification has become predominant.

Despite modern historians’ skepticism, it is still common to be told that history teaches some definite lesson or justifies some specific prediction. Some subfields of history are particularly likely to raise such possibilities, and constitutional history is one of them. History can provide strong authority for a legal argument, and it is intimately bound up with the search for legal precedents, legislative intent, and original understandings of constitutional provisions. Nonetheless, legal questions are not the sort of questions historians normally put to historical evidence. They generally ask what happened, why it happened, and what were the historical consequences of its happening. Professor Ackerman, in contrast, is asking a question that stands outside of time: What is the permanent legal or constitutional principle that we can extract from an analysis of individual episodes of change? At the same time, however, Ackerman does want to make a contribution to our historical understanding of Reconstruction. He succeeds.

Ackerman joins a long line of eminent historians and legal scholars who have addressed the role the Constitution played in Reconstruction and the role Reconstruction played in American constitutional history. The seceding states’ anomalous situation at war’s end precipitated a powerful debate over how to understand the constitutional relations between the Union and the ex-Confederate states at war’s end. The struggle over Reconstruction led to the first impeachment of a President and to deep strains between Congress and the Supreme Court. The ex-Confederate states were twice required to refashion their state Constitutions. All sides employed constitutional arguments as central elements of their appeals for popular support. Thus, people’s understanding of constitutional requirements played a crucial role in the struggle over Reconstruction policy. Much of the history of Reconstruction has been constitutional history.<sup>29</sup>

---

29. See, e.g., JOHN W. BURGESS, *RECONSTRUCTION AND THE CONSTITUTION, 1866-1876* (1902); WILLIAM ARCHIBALD DUNNING, *The Constitution of the United States in Reconstruction*, in *ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION, AND RELATED TOPICS* 63 (1898). Later, “revisionist” historians, like Howard K. Beale, concluded that economic issues lay under the Reconstruction struggle, dismissing the constitutional rhetoric of the time as mere “claptrap.” See, e.g., HOWARD K. BEALE, *THE CRITICAL YEAR: A STUDY OF ANDREW JOHNSON AND*

If constitutional arguments affected the course of Reconstruction, so too did the needs of Reconstruction affect the Constitution. Among the consequences of the struggle were three constitutional amendments, one of which—the Fourteenth—has been immensely fruitful and controversial in its applications. As such it has attracted the attention not only of historians whose main interest is in chronicling American constitutional development, but of legal scholars whose main interest is in discerning the original meaning of the Amendment in order to determine how it should be applied in contemporary constitutional law.<sup>30</sup>

In any kind of investigation, the research question determines what evidence is relevant. Furthermore, the research question can affect the research method. The problem with doing historical research to answer legal questions is that the legal researcher needs to arrive at relatively unambiguous answers, which historical research does not usually provide. This need for clear answers often affects how the question is conceived. For example, the legal researcher might ask, was the Fourteenth Amendment intended to make segregation unconstitutional? The historian would be more likely to ask, how did different Americans understand the impact of the Fourteenth Amendment on racial segregation at the time it was ratified? It is a difference of tone rather than of substance, but the second version invites ambiguity, while the first seeks specificity. It would not at all trouble the purely historical researcher that Americans had mixed or unclear understandings. On the contrary, that is what a historian would expect to find. But for the purpose of using history as present-day legal authority,

---

RECONSTRUCTION 8-9 (1930). But the “neo-revisionists” of the 1960s and 1970s once again stressed constitutional issues. *See, e.g.*, HERMAN BELZ, EMANCIPATION AND EQUAL RIGHTS: POLITICS AND CONSTITUTIONALISM IN THE CIVIL WAR ERA (1978); HERMAN BELZ, RECONSTRUCTING THE UNION: THEORY AND PRACTICE DURING THE CIVIL WAR (1969); MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863-1869 (1974) [hereinafter BENEDICT, COMPROMISE]; MICHAEL LES BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON (1973); HAROLD M. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION (1973); ERIC L. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION (1960); JAMES E. SEFTON, ANDREW JOHNSON AND THE USES OF CONSTITUTIONAL POWER (1980).

30. Classic examples are Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5 (1949); and Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955). Remaining influential today are RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); CHARLES FAIRMAN, 6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-88: PART ONE (1971); EARL MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869 (1990); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992); and Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986).

such ambiguity renders the answer to the legal researcher's question useless, as the Supreme Court famously found in *Brown*.<sup>31</sup>

For the historian, the important question would be how and why understandings of the Fourteenth Amendment's relationship to segregation changed over time. To a legal researcher seeking historical authority for contemporary law, such changes in understandings would be legally irrelevant, no matter how historically interesting they are. To arrive at a legally useful answer, the legal researcher must reduce the ambiguity that historians expect to find in any investigation. She either has to determine whether she can identify a *best* answer, or she must concede that history cannot provide one. As the eminent legal historian John Phillip Reid has put it, "The search for authority, the need to find 'the law' or 'the right law' is the main reason lawyers speak of the legal past in terms different from the historian's."<sup>32</sup>

One can see the problem by looking at influential work that law-oriented legal historians, such as Charles Fairman, Raoul Berger, Earl Maltz, and Michael Kent Curtis, have undertaken on Reconstruction. In each case, a primary purpose of their research has been to discover the original intent or understanding of the Framers of Reconstruction-era legislation and constitutional amendments, and they have used a variety of techniques to distill clear answers from murky evidence. For example, in his concise and informed study, Maltz limited his research to the public record, eschewing private correspondence, diaries, and similar sources, on the principle that the Framing and ratification of the Constitution was a public process.<sup>33</sup> He interpreted arguments within the framework of the legal culture of the time, assuming the language reflected contemporaneous legal meanings.<sup>34</sup> He thus privileged legal over general understandings of language.<sup>35</sup> He stressed the importance of language that appeared to have been rejected in the course of Framing the Amendment as a guide to what the final language meant.<sup>36</sup> He suggested that a lack of opposition to a provision implied a restrictive understanding of it, since expansive proposals precipitated resistance.<sup>37</sup> Finally, he implicitly, but clearly, indicated that since the Amendment could not have passed without the support of conservative Republicans, who articulated the most restrictive interpretation of its scope, their views carried special weight.<sup>38</sup> One may disagree with some or all of them, but these are reasonable tests to bring to

---

31. *Brown v. Board of Educ.*, 347 U.S. 483, 489 (1954).

32. John Phillip Reid, *Law and History*, 27 *LOY. L.A. L. REV.* 193, 196 (1993).

33. *See* MALTZ, *supra* note 30, at xi.

34. *See id.*

35. *See id.*

36. *See id.*

37. *See id.* at 104-05.

38. *See id. passim.*

bear if one is searching for the best answer from ambiguous and contradictory evidence. After applying them, Professor Maltz was gratified that he could discern “a relatively clear picture of the original understanding of the Reconstruction amendments.”<sup>39</sup>

Both Fairman and Berger weighed evidence by the logical coherence of the arguments that appear in the sources, and by the legal acumen of their authors. Finding “a degree of imprecision . . . throughout the deliberations” on the Civil War-era amendments, Fairman found a “need to distinguish between sanguine prophecies and cold propositions about legal consequences.”<sup>40</sup> He relied on the latter and dismissed the former, although the main difference was that the “sanguine prophecies” suggested a broader meaning for the amendments than the “cold propositions.”<sup>41</sup> Both Fairman and Berger scouted the legal acumen of Senator Jacob M. Howard and Representative John A. Bingham, key Framers of the Fourteenth Amendment, and therefore discounted the evidentiary value of their statements.<sup>42</sup> Fairman dismissed Bingham, who was, after all, merely the *author* of the first Section of the Fourteenth Amendment, as follows: “When one studies Bingham carefully one learns that many of his utterances cannot be accepted as serious propositions.”<sup>43</sup> Michael Kent Curtis, asking similar questions, has trenchantly criticized Fairman and Berger’s conclusions. Using a wider array of sources and denouncing narrowly legalistic analyses of them, Curtis admitted that “absolute certainty is impossible” in historical research.<sup>44</sup> But in the end, he presented something pretty close to it—what “the history of those years shows, as clearly as history shows anything.”<sup>45</sup>

All researchers need to group discrete phenomena in coherent categories that enable one to make generalizations. Asking different questions of the data, historians and lawyers group discrete phenomena into different categories. Ackerman’s work illustrates the differences. His purpose is to discover a process characteristic of transformative moments in general. He categorizes events as signaling, triggering, and consolidating constitutional transformations. This serves his legal purpose, but it does not

---

39. *Id.* at xii.

40. FAIRMAN, *supra* note 30, at 1134-35.

41. See Michael Les Benedict, *Review: Fairman, History of the Supreme Court of the United States: Volume VI, Reconstruction and Reunion, 1864-88: Part One*, 39 U. CHI. L. REV. 862, 866 (1972) (book review).

42. See RAOUL BERGER, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 128-42 (1989); BERGER, *supra* note 30, at 145, 219; FAIRMAN, *supra* note 30, at 1275, 1287-89, 1291-95; Fairman, *supra* note 30, at 30-37, 54, 55-58.

43. FAIRMAN, *supra* note 30, at 1289.

44. CURTIS, *supra* note 30, at 16.

45. *Id.* at 220.

relate to the kind of questions most historians would ask. His categories are therefore not those historians would likely find useful or compelling.

To most professional historians, both clarity and categorization are the result of a researcher's principles of selecting and assessing evidence; they are not inherent in the evidence itself. Historians, not asking such questions of the evidence, not expecting clear answers and under no compulsion to provide them, simply do not use the criteria legal researchers do to sift it. Historians, especially historians of law and constitutionalism, appreciate many of these analyses for their intellectual power, and for their suggestive insights and illuminating new information. But they are often critical of them *as histories*, because of their tendency to simplify and reduce the evidence according to principles that historians do not generally find appropriate in their own research. They see the necessary effort to reduce ambiguity as oversimplification.

### III. ACKERMAN, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT

One of the attractions of Ackerman's work for a historian is that he is not mining the historical evidence for a definite understanding of specific constitutional provisions. He takes a genuinely historical approach to the historical part of his question—the question of what happened during Reconstruction. His account of events corresponds closely to those of leading historians. But, as is true of any history, his research question shapes his perspective. He is interested in what happened primarily for what it tells us about how Americans have amended their Constitution—a story that he rightly insists goes beyond the conventional one that stresses the formal processes of Article V. He selects which events to describe and then discusses and categorizes them almost entirely within that context. The result is a powerful new interpretation of the proposal and ratification of the Thirteenth and Fourteenth Amendments that nonetheless focuses so tightly on that subject that it obscures the larger context—for the real story of the development of national Reconstruction policy is the triangular struggle among President Andrew Johnson and his supporters, conservative and centrist Republicans, and Radical Republicans. The issue was how far the federal government would go to change the balance of power in the restored central government and to what extent it would change political, social, and economic power relationships in the Southern states. Whether and how to secure the ratification of the Fourteenth Amendment was merely a part of that story, as Ackerman well understands.

By concentrating so closely on the Fourteenth Amendment, Ackerman implies that it was the heart of the postwar settlement. All the maneuvering, he indicates, was over its ratification. But that account distorts the situation.

The Fourteenth Amendment was the heart of the first settlement that Republicans offered the South. As Ackerman indicates, centrist Republicans at first resisted further Reconstruction measures.<sup>46</sup> Forced by Southern recalcitrance to move forward, some of them hoped to keep the Amendment the centerpiece of the program. Most of them joined more Radical Republicans, however, to require Southern states to frame new constitutions enfranchising African Americans. Thus, the passage of the Reconstruction Acts instituted a second Reconstruction program that went considerably further than the first. While ratification of the Fourteenth Amendment was an important element of that program, most Republicans considered the enfranchisement of African Americans, not the ratification of the Fourteenth Amendment, as the most important accomplishment of Reconstruction—"the capstone of the edifice—the keystone of the arch," in the words of the *Chicago Tribune*.<sup>47</sup> Not only did enfranchisement symbolically incorporate African Americans fully into the American nation, it promised a fundamental restructuring of power in the South, something the Fourteenth Amendment made no pretense of doing. The initial Republican program, of which the Fourteenth Amendment was the centerpiece, had been designed primarily to accomplish the restoration of the Union. Its delegation of power to the federal government to protect civil rights was merely a vague promise, particularly shaky in light of the federal government's traditional impotence in protecting the rights of racial minorities. It was a promise made precisely *because* the first Republican program left black Southerners without political power in their states. Only black enfranchisement, in the words of the *Chicago Tribune*, would "terminate forever the long disturbance of the public peace over the civil and political *status* of the black man."<sup>48</sup> That proved a false hope, but then so did any expectation that the Fourteenth Amendment would do the job.

Despite this undue stress on the importance of the Fourteenth Amendment in Reconstruction, *We the People: Transformations* provides important insights. No historian before has recognized the implications of the language of Secretary of State Seward's announcements of the ratification of the Thirteenth and Fourteenth Amendments. No historian has so clearly indicated the importance of what Ackerman calls the "constitutional calendar"—the pressure imposed on Republicans by the regular cycle of elections. No historian has better explained President

---

46. See 2 ACKERMAN, *supra* note 1, at 193-98.

47. *The Suffrage Amendment*, CHI. TRIB., Mar. 2, 1869, at 2; see also BENEDICT, COMPROMISE, *supra* note 29, at 210-43 (detailing the development of congressional Reconstruction legislation and black suffrage).

48. *The Suffrage Amendment*, *supra* note 47, at 2.

Andrew Johnson's strategy.<sup>49</sup> Johnson emerges from Ackerman's account not as a blind and stubborn obstructionist, but as a clever tactician cannily exploiting the advantages he held in the fight over the Fourteenth Amendment and over Reconstruction in general.

Ackerman avoids the risk of oversimplification by eschewing any effort to explain exactly what the specific provisions of the Fourteenth Amendment meant to its Framers or the people of the United States who ratified it. He is concerned with the process, not with the specific provisions. But can he avoid the problem of original meaning this way? Ackerman's main point is that the American people can amend their Constitution in ways other than those specified by Article V, and his purpose is to establish the legitimacy of such changes. But to what end? He indicates that judges and other legal actors must accept the changes thus made. This must mean that they are bound to render judgments in accordance with them. But Ackerman is content with generalized statements about what exactly changed. He never details the provisions of the Amendment, analyzes its language, assesses the legal meaning of its terms, or delves into the origins of its concepts. The most important effect of the Fourteenth Amendment, he indicates, was to declare the primacy of national over state citizenship, and even here he stresses more the nationalistic process by which it was enacted than its language.<sup>50</sup> Does this assessment of the Amendment's purpose provide enough specificity to guide and constrain lawmakers and judges?

It may be that Ackerman offers no more definitive meaning of the Fourteenth Amendment because the process he describes did not provide any. He is certainly correct that the conflict between the President and Congress over Reconstruction triggered a greater public engagement in politics and policymaking than usual. Anyone who looks at the private correspondence of public figures will be struck by the number of letters they received on the subject. As one who is researching national Reconstruction policy after 1868, I can assure readers that the volume trails off dramatically.<sup>51</sup> The congressional elections of 1866, which Ackerman says were a central event in the ongoing process of "higher lawmaking,"<sup>52</sup> reflected this interest. The median voter turnout in the Northern and border

---

49. Perhaps most similar in its portrayal of Johnson as a cunning political tactician is HANS L. TREFOUSSE, *IMPEACHMENT OF A PRESIDENT: ANDREW JOHNSON, THE BLACKS, AND RECONSTRUCTION* (1975).

50. See 2 ACKERMAN, *supra* note 1, at 198-205.

51. For my book *A COMPROMISE OF PRINCIPLE*, *supra* note 29, I researched over 155 collections of correspondence at over 25 repositories. A list may be found in *id.* at 450-53.

52. 2 ACKERMAN, *supra* note 1, at 178-83. Ackerman uses the term "higher lawmaking" throughout the book.

states was higher than any other non-presidential year congressional election in the Civil War/Reconstruction era.<sup>53</sup>

Voters were not energized, however, over the specific content of the Fourteenth Amendment, but over the general issue of how quickly and under what conditions to restore the Union. As Stephen A. Hurlbut, a leading southern Illinois politician and later congressman, reported to Thaddeus Stevens as the Thirty-Ninth Congress organized in December 1865, “The people care little for Constitutional hair splitting as to the legal status of rebelldom & its communities. They care much as regards their admission to political power in their existing frame of mind & prejudices.”<sup>54</sup> The Fourteenth Amendment became a central element of the controversy, and, as Ackerman reports, the principal issue of the critical congressional elections of 1866.<sup>55</sup>

But rarely—indeed, one might say never—in the months that Congress framed the Amendment or during the canvass of 1866 did newspapers or campaign speakers carefully dissect it. Never did they explain exactly what due process of law or equal protection meant. They probably did not know. Representative George S. Boutwell, who served on the committee that framed the Amendment, remembered how persistently Bingham pressed for the inclusion of his due process and equal protection language. “Its euphony and indefiniteness of meaning were a charm to him,” Boutwell recalled.<sup>56</sup> As William E. Nelson has pointed out, “The framers of the Fourteenth Amendment simply never took advantage of the many opportunities they had to specify its precise boundaries.”<sup>57</sup> Their purpose was not to provide future judges with clear guidelines for its application but, in Nelson’s words again, “to reaffirm the lay public’s longstanding rhetorical commitment to general principles of equality, individual rights,

---

53. The estimated median turnout in the Northern and border states was 61.2% in 1866, compared to 56.4%, 57.9%, and 57.3% in the congressional elections of 1862, 1870, and 1874. The figures are based upon election and census data obtainable from the Inter-University Consortium for Political and Social Research, Ann Arbor, Michigan. See Walter Dean Burnham et al., *State-level Congressional, Gubernatorial and Senatorial Election Data for the United States, 1824-1972*, available in <<http://www.icpsr.umich.edu/cgi>>; Walter Dean Burnham et al., *State-level Presidential Election Data for the United States, 1824-1972*, available in <<http://www.icpsr.umich.edu/cgi>>. Walter Dean Burnham found the 1866 turnout in Ohio the highest in the state’s history. See Walter Dean Burnham, *Constitutional Moments and Punctuated Equilibria: An Outsider Looks at Bruce Ackerman’s We The People*, 108 YALE L.J. 2248 (1999).

54. Letter from Stephen A. Hurlbut to Thaddeus Stevens (Dec. 25, 1865), in 2 SELECTED PAPERS OF THADDEUS STEVENS 58 (Beverly Wilson Palmer ed., 1998).

55. See 2 ACKERMAN, *supra* note 1, at 178-83.

56. 2 GEORGE S. BOUTWELL, REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS 42 (1902).

57. NELSON, *supra* note 30, at 7. In what is recognized as the standard study of Reconstruction, Eric Foner agrees: “Republicans rejected calls to define these [specific provisions of the Amendment] with precision.” ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877, at 257 (1988).

and local self-rule.”<sup>58</sup> Or, I would say, to confirm the national government’s power to intervene when state policy violated or encouraged the violation of those general principles.

#### IV. THE CONSERVATIVE RHETORIC OF RADICAL RECONSTRUCTION

Giving the national government that vaguely articulated power raised powerful opposition, strong enough, as Ackerman demonstrates, to have defeated a constitutional amendment for that purpose in ordinary times. Of course, as Ackerman so eloquently demonstrates, the times were not ordinary. But in what way were they extraordinary? Ackerman stresses that they were extraordinary in that the American people and their political leaders had gone into a “higher lawmaking” mode.<sup>59</sup> Ackerman sees such higher lawmaking as a rare but regular element of the American constitutional system, with the unconventional events of Reconstruction setting a precedent for similar unconventional amendments of the Constitution in the future. But that is certainly not how Republicans themselves saw it. Searching for constitutional justifications of their actions, Republicans ultimately rejected those that relied upon permanent, peacetime provisions of the Constitution, such as the Guarantee Clause.<sup>60</sup> Instead, they relied on a principle that promised to make their reliance on extraordinary measures a one-time event. They justified the extraordinary requirement that ex-Confederate states ratify constitutional amendments as a price of restoration by claiming that it was the legitimate consequence of the war. As Richard Henry Dana put it in his influential analysis of the constitutional position, “The conquering party may hold the other in the grasp of war until they submit to such reasonable terms of peace as we may demand.”<sup>61</sup>

Ackerman scouts the notion that the Grasp-of-War doctrine is the best framework in which to understand the forced ratification of the Fourteenth Amendment, saying flatly that it is “bad history.”<sup>62</sup> It is not clear what he means by this. As the historian who has argued most strongly that the Grasp-of-War doctrine was the theory most widely accepted among Republicans,<sup>63</sup> I have a special interest in knowing. After calling it “bad

58. NELSON, *supra* note 30, at 8.

59. See 2 ACKERMAN, *supra* note 1, at 3, 207.

60. U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government.”).

61. Richard H. Dana, Jr., Speech at the Meeting in Faneuil, Boston (June 23, 1865), in N.Y. TIMES, June 24, 1865, at 8, reprinted in RICHARD HENRY DANA, JR., SPEECHES IN STIRRING TIMES AND LETTERS TO A SON 243-59, 246 (Richard Dana III ed., 1910).

62. 2 ACKERMAN, *supra* note 1, at 115.

63. See Michael Les Benedict, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction*, 61 J. AM. HIST. 65, 72-76 (1974).

history,” Ackerman says that the Grasp-of-War theory is the result of a “misguided jurisprudence which restricts our choices to a sharp dichotomy” between formalistic commitment to Article V or a process in which “force reigned.”<sup>64</sup> This is one of Ackerman’s rare opaque sentences. If he means that historians relied on a jurisprudential analysis to demonstrate that Republicans relied on the Grasp-of-War theory, he is plainly wrong. That most Republicans relied on the Grasp-of-War theory to justify their Reconstruction program emerges from an analysis of *what* they said, not the jurisprudential persuasiveness of the argument.<sup>65</sup>

What Ackerman probably means is that, no matter what Republicans believed, his account provides a more persuasive constitutional justification than the Grasp-of-War doctrine. “[T]he entire point of this book is to reject this dichotomy between legalistic perfection and lawless force,” he says.<sup>66</sup> He may very well have succeeded, but that does not change the fact that Republicans themselves saw it differently. I do not mean that they saw themselves as exercising “lawless force.” On the contrary, the Grasp-of-War doctrine provided a legal justification, based on the laws of war, for conditioning peace upon ratification of constitutional amendments. Moreover, it appeared to be a more conservative justification than alternatives that posited the destruction of the Southern states and their remission to territorial status, or that authorized permanent federal supervision of state political institutions under the Guarantee Clause.<sup>67</sup>

Republican efforts to present a moderate face to the electorate raise a significant problem for Ackerman’s thesis. He characterizes the Reconstruction Act as “a revolutionary act of constituent authority.”<sup>68</sup> He refers to those pressing for the sorts of fundamental constitutional change he is describing as “revolutionary reformers.”<sup>69</sup> Throughout, Ackerman stresses the radicalism, the “unconventionality”<sup>70</sup> of Republican Reconstruction. It is central to his thesis that Reconstruction worked a “transformative” change—another term that appears consistently in his text.<sup>71</sup> For Ackerman, the essence of that transformation was what he calls a

64. 2 ACKERMAN, *supra* note 1, at 116.

65. See BENEDICT, COMPROMISE, *supra* note 29, at 125-26; Benedict, *supra* note 63, at 72.

66. 2 ACKERMAN, *supra* note 1, at 116. In his endnotes, Ackerman cites Laurence Tribe as “flirt[ing] with this view,” rather than citing historians who have discussed the influence of the Grasp-of-War doctrine. *Id.* at 446 n.46 (citing Laurence H. Tribe, *Taking Text and Structure Seriously*, 108 HARV. L. REV. 1221, 1294 (1995)). This suggests that he is arguing with the jurisprudential concept rather than the historical fact that it was widely accepted.

67. See Benedict, *supra* note 63, at 73-74.

68. 2 ACKERMAN, *supra* note 1, at 198.

69. 2 *id.* at 13.

70. Ackerman stresses the importance of the “unconventionality” of the higher lawmaking process in the introductory discussion of his revised understanding of constitutional change, 2 *id.* at 10-15, and refers to “unconventional” processes regularly in his narrative and argument.

71. See 2 *id.* at 207, 385, 393.

“re-founding” of the United States<sup>72</sup>—the replacement of the incompletely nationalized polity established in 1788 with a fully nationalized polity. Ackerman’s description of how the Reconstruction Act and legislation supplementary to it nationalized the unconventional amending process is brilliant and compelling.<sup>73</sup>

Ackerman’s emphasis on the radicalism of Reconstruction places him in good company. It was once a historical axiom that Reconstruction had been imposed on the South by radical extremists, led by the vengeful Representative Thaddeus Stevens and the fanatical Senator Charles Sumner. In the 1960s and 1970s, historians debunked that idea, absolving Stevens and Sumner of the canards and demonstrating that centrists like Bingham and Senators William Pitt Fessenden and Lyman Trumbull, the Chairmen of the Joint Committee on Reconstruction and the Senate Judiciary Committee, exercised greater influence.<sup>74</sup> Harold M. Hyman and his students argued that Reconstruction was a constitutionally conservative response to the problem of restoring the Union and protecting the rights of African Americans, designed to preserve the basic contours of the federal system.<sup>75</sup> As noted previously,<sup>76</sup> William E. Nelson too perceived “local self-rule” as among the principles reaffirmed by the Fourteenth Amendment, as has Earl Maltz.<sup>77</sup> Ackerman joins Robert J. Kaczorowski, David E. Kyvig, and Eric Foner in challenging that view. Indeed, Kaczorowski, like Ackerman, perceives the Republicans’ purpose in Reconstruction to have been “to begin the nation anew.”<sup>78</sup> Kyvig denominates the Reconstruction era “The Second American Constitutional Revolution” in his history of constitutional amendments,<sup>79</sup> while Foner refers to the legislation of the era as “a radical departure, a stunning and

72. 2 *id.* at 198.

73. *See id.* at 198-205, 209.

74. *See, e.g.*, BENEDICT, COMPROMISE, *supra* note 29; JOHN H. COX & LAWANDA COX, POLITICS, PRINCIPLE, AND PREJUDICE, 1865-1866: DILEMMA OF RECONSTRUCTION AMERICA 206 (1963); MCKITRICK, *supra* note 29.

75. *See* HYMAN, *supra* note 29, at 435-45, 543-53; Benedict, *supra* note 63, at 76; PHILLIP S. PALUDAN, A COVENANT WITH DEATH: THE CONSTITUTION, LAW, AND EQUALITY IN THE CIVIL WAR ERA 47-54 (1975). Prior to these publications, William R. Brock and Eric McKittrick had alluded briefly to the constitutional conservatism of the Republican program. *See* WILLIAM R. BROCK, AN AMERICAN CRISIS: CONGRESS AND RECONSTRUCTION, 1865-1867, at 271-73 (1963); MCKITRICK, *supra* note 29, at 117-19. Alfred H. Kelly first posited the argument in a comment on an early Hyman paper that stressed the radicalism of Republican constitutionalism. Alfred H. Kelly, *Comment on Harold M. Hyman’s Paper*, in NEW FRONTIERS OF THE AMERICAN RECONSTRUCTION 40 (Harold M. Hyman ed., 1966).

76. *See supra* text accompanying note 58.

77. *See* MALTZ, *supra* note 30, at 157.

78. Kaczorowski, *supra* note 30, at 863; Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War*, 92 AM. HIST. REV. 45, 47 (1987); *see also* Kaczorowski, *supra* note 30, at 863 (arguing that, despite their racism, congressional Republicans believed in national citizenship so strongly that they favored aggressive Reconstruction).

79. KYVIG, *supra* note 2, at 154-87.

unprecedented experiment in interracial democracy.”<sup>80</sup> While he concedes more than Kaczorowski and Ackerman by noting that “few Republicans wished to break completely with the principles of federalism,”<sup>81</sup> Foner too opines that “[i]n establishing the primacy of a national citizenship whose common rights the states could not abridge, Republicans carried forward the state-building process born of the Civil War.”<sup>82</sup>

No historian familiar with the legal position of African Americans before the Civil War can deny that Reconstruction radically altered it. And giving the federal government the power to intervene to protect civil and political rights where the state infringed them, or possibly when it failed to assure them, would have worked a fundamental change in the federal system. But the fact is that Republicans agonized over the choices they had to make between preserving federalism and protecting black rights. Faced with the choice, they opted to protect rights, but they did so in such a way as to preserve as much as possible of the traditional, state-centered system. Refusing to transfer primary responsibility for ordinary protection of the law from the states to the federal government, they mandated essentially that such protection be provided by the states equally, regardless of race.<sup>83</sup>

Whatever they did, Republicans never spoke in the terms Ackerman uses. Never did they admit that their actions made the ratification of the Civil War amendments “unconventional.” Republicans indicated that the radical transformation, if any, would be in the status of African Americans. Never did they concede that they were revolutionizing the federal system. When they described the effect of the Civil Rights Act and the Fourteenth Amendment on federalism, they stressed its conservatism.<sup>84</sup> The Civil Rights Bill “may be assailed as drawing to the Federal Government powers that properly belong to States;” Trumbull acknowledged, “but I apprehend, rightly considered, it is not obnoxious to that objection. It will have no operation in any State where the laws are equal, where all persons have the same civil rights without regard to color or race.”<sup>85</sup> The Fourteenth Amendment too left states with the primary authority over ordinary municipal legislation. As the arch-conservative Republican governor of Ohio, Jacob D. Cox, explained as he endorsed it:

If these rights are in good faith protected by State laws and State authorities, there will be no need of federal legislation on the subject, and the power will remain in abeyance; but if they are

---

80. FONER, *supra* note 57, at 278.

81. *Id.* at 259.

82. *Id.* at 258.

83. See generally Benedict, *supra* note 63, at 65 (arguing that Republicans did not wish to expand dramatically the power of the national government).

84. *Id.* at 76-80.

85. CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866) (internal quotation marks omitted).

systematically violated, those who violate them will be themselves responsible for all the necessary interference of the central government.<sup>86</sup>

Of course, the second clause carries a significant kicker. But the point is that when Republicans sought the support of “We the People,” they sought to minimize the radicalism of the change that they were working. In the congressional elections of 1866, Republicans consistently stressed how little they asked of Southerners—“hardly anything not approved by the President,” former Governor William Dennison of Ohio insisted.<sup>87</sup>

Newspapers that had sustained Johnson acknowledged “the liberal terms offered by Congress as the price of Reconstruction.”<sup>88</sup> As the Democratic *National Intelligencer* complained: “There never was a canvass conducted by any party so entirely upon false pretenses as the one just concluded . . . . By the obscurities of the much-talked-of constitutional amendment, . . . they . . . conceal[ed] the real objects of the congressional faction.”<sup>89</sup> Since Ackerman claims it is the mandate of the people, given in the higher lawmaking context of intensified attention and participation, that legitimizes constitutional transformations, the Republican strategy of minimizing the transformative potential of the Amendment raises the problem of interpreting just how far “We the People” thought the transformation went.<sup>90</sup>

86. Fairman, *supra* note 30, at 96 (quoting Cox, Ohio Exec. Doc., Part I, 282 (1867)). Cox vigorously supported Johnson until he vetoed the Civil Rights bill; he continued to urge reconciliation with Johnson until he rejected the 14th Amendment. See BENEDICT, COMPROMISE, *supra* note 29, at 114, 158-70.

87. William Dennison, Speech at Columbus, Ohio (Aug. 1866), in CLEVELAND HERALD, Aug. 13, 1866, at 2; see Jacob D. Cox, Speech at the Soldiers and Sailors Convention (Sept. 25, 1866), in N.Y. TIMES, Sept. 26, 1866, at 1; Jacob D. Cox, Speech at Columbus (Aug. 21, 1866), in CINCINNATI COMMERCIAL, SPEECHES OF THE CAMPAIGN OF 1866, IN THE STATES OF OHIO, INDIANA AND KENTUCKY 17 (1866); M.F. Force, Speech at Chillicothe (Sept. 22, 1866), in CINCINNATI COMMERCIAL, *supra* at 34; James A. Garfield, Speech at Warren, Ohio (Sept. 1, 1866), in 1 THE WORKS OF JAMES ABRAM GARFIELD 216, 240-41 (Burke A. Hinsdale ed., 1882); John Sherman, Speech at Mozart Hall (Sept. 28, 1866), in CINCINNATI COMMERCIAL, *supra* at 39. Republicans worked feverishly to prevent the Southern Loyalists Convention, called to bring attention to ex-Confederate control in the ex-Confederate states, from undermining the conservative theme by endorsing black suffrage and other radical measures. See BENEDICT, COMPROMISE, *supra* note 29, at 200-02.

88. N.Y. HERALD, Sept. 25, 1866, at 3. For a similar perspective from a congressman who had supported Andrew Johnson’s Reconstruction policy, see *The Civil Rights Bill in Congress—Note from R.S. Hale*, N.Y. TIMES, Oct. 3, 1866, at 4 (conceding the conservatism of the proposed 14th Amendment).

89. DAILY NATIONAL INTELLIGENCER (Washington), Nov. 10, 1866, at 2.

90. Ackerman’s thesis does not require Republicans to share his understanding of the theoretical implications of their actions. It only requires that his account of their actions and the context in which they took place be accurate, and that his interpretation of what they mean for constitutional theory be persuasive. While he points out with regularity and pleasure occasions when the actors’ views coincide with his, he never argues that Republicans or their opponents consciously acted on the theory of constitutional change he delineates. I am less certain if the same is true of his discussion of the Founding, because Ackerman implies that the Framers did not

V. TRANSFORMATIVE MOMENTS AND THE PRESERVATION THEME IN  
ANGLO-AMERICAN CONSTITUTIONAL HISTORY

The ambiguity of “transformative constitutional moments” goes beyond Reconstruction. It is one of the paradoxes of Anglo-American constitutional history that proponents of radical change have regularly portrayed themselves as conservators rather than transformers. The English Revolution of the 1640s was fought to preserve “the Ancient Constitution.”<sup>91</sup> As Michael Landon has described the Glorious Revolution of 1688, the “concern was the preservation . . . of the privileges and power of Parliament . . . , local liberties, franchises, and immunities, and the rights and liberties of individuals” according to “‘the laws of the kingdom’ handed down from the remotest English ancestors.”<sup>92</sup> The American revolutionaries themselves claimed to be defending the established constitution of the Empire and the rights of Englishmen against tyrannical innovations. They claimed rights “sanctified by long usage, a uniformity of principle and practice from ages past.”<sup>93</sup> Custom, often from time immemorial, was central to oppositionist British and American understandings of liberty. John Phillip Reid wrote that “the principle of custom was involved in every aspect of the American whig case,”<sup>94</sup> as he described what a reviewer called “the articulate legalistic-constitutionalist attitude of those backward-looking 18th-century American whigs (and their British sympathizers) who claimed to see the American Revolution as a historic act of constitutional conservation.”<sup>95</sup> The Framers of the Constitution denied Anti-Federalist charges that they were violating the principles of the American Revolution. As Gordon Wood explained in his classic study, the Framers “appropriated and exploited the language that more rightfully belonged to their opponents,” and they attempted “to confront and retard the thrust of the Revolution with the rhetoric of the

---

intend Article V to be the exclusive mode of altering the Constitution. See 2 ACKERMAN, *supra* note 1, at 15, 72-75.

91. See GLENN BURGESS, *THE POLITICS OF THE ANCIENT CONSTITUTION: AN INTRODUCTION TO ENGLISH POLITICAL THOUGHT, 1603-1642*, at 3, 230-31 (1993); J.G.A. Pocock, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* 30-69, 255-305 (2d ed. 1987).

92. MICHAEL LANDON, *THE TRIUMPH OF THE LAWYERS: THEIR ROLE IN ENGLISH POLITICS, 1678-1689*, at 242-43 (1970); see also POCOCK, *supra* note 91, at 229-40 (arguing that the Glorious Revolution was sustained by appeals to a largely mythical past).

93. Joseph Hawley, *To the Inhabitants of Virginia* (Apr. 13, 1775), in 2 AMERICAN ARCHIVES: FOURTH SERIES (1839).

94. JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* 19 (abr. ed. 1995).

95. Stephen A. Conrad, *The Constitutionalism of “the Common-Law Mind,”* 13 L. & SOC. INQUIRY 619, 623 (1988). That Americans understood themselves to be preserving traditional liberty from tyrannical innovation emerges clearly from the classic work of BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (enl. ed. 1992).

Revolution.”<sup>96</sup> The Jeffersonian Republican “revolution” of 1800 relied on the traditional rhetoric of British liberty to preserve the principles of the American Revolution against Federalist corruption.<sup>97</sup> Antebellum Republicans claimed to reflect the antislavery intentions of the American Founders, which had been subverted by the slave power. Lincoln, the master of masking radical policies in conservative rhetoric, urged: “Let us [re]turn slavery . . . to the position our fathers gave it; and there let it rest in peace. Let us re-adopt the Declaration of Independence, and with it, the practices, and policy, which harmonize with it.”<sup>98</sup> In all these cases, the actual change was radical; the rhetoric was often conservative. We are not transforming the Constitution, proponents of change insisted, we are returning to or preserving its original perfection.

The problem posed by such rhetoric appears clearly when assessing the role of the judiciary in converting the people’s mandate into constitutional law. Considering its scope for the first time in the *Slaughter-House Cases*,<sup>99</sup> the Supreme Court asked, did Americans intend the Amendment “to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal Government? . . . [W]as it

96. GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 562 (1969).

97. See LANCE BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* 17, 92-125 (1978). Joyce Appleby has challenged Banning’s conclusion that Jeffersonian Republicans articulated traditional republican ideology, insisting that their ideas embodied what became known as liberalism. See JOYCE APPLEBY, *CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790S*, 18-23 (1984); see also Cathy Matson & Peter Onuf, *Toward a Republican Empire: Interest and Ideology in Revolutionary America*, 37 *AM. Q.* 496 (1985) (arguing that the American revolutionary generation reconciled republican ideology with individualistic entrepreneurial activity). Banning responded effectively in a colloquy with Appleby. See Lance Banning, *Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republic*, 43 *WM. & MARY Q.* 3 (1986). But see Joyce Appleby, *Republicanism in Old and New Contexts*, 43 *WM. & MARY Q.* 20 (1986). Rowland Berthoff concluded that Americans continued to utilize traditional republican rhetoric well into the 19th century, despite acting on the principles of liberalism. See Rowland Berthoff, *Independence, Virtue, and Interest: From Republican Citizen to Free Enterpriser, 1787-1837*, in *UPROOTED AMERICANS: ESSAYS IN HONOR OF OSCAR HANDLIN* 97-124 (Richard L. Bushman et al. eds., 1979).

98. Abraham Lincoln, Address at Cooper Institute, New York City (Feb. 27, 1860), in 3 *COLLECTED WORKS OF ABRAHAM LINCOLN* 522 (arguing that the Framers tended to oppose the extension of slavery; insisting that limiting slavery geographically was not tantamount to abolishing it); Abraham Lincoln, Speech at Peoria, Ill. (Oct. 16, 1854), in 2 *COLLECTED WORKS OF ABRAHAM LINCOLN* 247, 276 (Roy P. Basler ed., 1953); Kenneth M. Stampp, *Lincoln’s History*, in “WE CANNOT ESCAPE HISTORY”: *LINCOLN AND THE LAST BEST HOPE OF EARTH* 17, 22 (James M. McPherson ed., 1995) (noting that Lincoln believed, probably incorrectly, that the signatories to the Declaration of Independence intended the document to apply to blacks). Salmon P. Chase was generally credited with developing the Republican constitutional argument, the central tenet of which was the original intention of the Framers to divorce the federal government completely from slavery, requiring it to promote freedom while slavery remained entirely a local institution. See ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 73-102 (2d ed. 1995).

99. 83 U.S. (16 Wall.) 36 (1873).

intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?"<sup>100</sup> Only five years after Republicans had minimized the radicalism of their Reconstruction program, the Court could plausibly deny it. "We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them."<sup>101</sup>

Scholars who, like Ackerman, stress the radical, even revolutionary, nature of Reconstruction legislation, have considered the Supreme Court decisions of the 1870s and 1880s betrayals of the constitutional mandate.<sup>102</sup> Kaczorowski has concluded that the "revolutionary impact" of the Civil War and Reconstruction on the American constitutional system was cut short "due to conscious choices made by the . . . Supreme Court to . . . curtail federal authority to secure civil rights," as the Court "emasculat[ed] the Reconstruction civil rights program."<sup>103</sup> Professor Ackerman's emphasis on the nationalizing aspect of the Reconstruction transformative moment suggests that unlike most of these critics, he may consider the Court's creation of a national body of property rights and commercial law, and its general endorsement of expanded congressional authority over interstate commerce, to have been logical consequences of the Reconstruction-era transformation.

Those like myself, who have argued that Republicans' continued commitment to federalism circumscribed the radicalism of Reconstruction, see the Supreme Court's restrictive decisions in a different light. Twenty years ago, I noted that Republicans like Thaddeus Stevens certainly meant the Fourteenth Amendment to have a broader application than the Supreme Court articulated in the *Slaughter-House Cases*. "But," I added, "Stevens would have been just as incredulous to learn that he had given Congress or the Supreme Court the power to nullify Louisiana's regulations of slaughterhouses."<sup>104</sup> The ultimate consequences may have been tragic for African Americans and the nation, but the Court merely "carried over to the judicial arena Republicans' reluctance to alter fundamentally the federal

---

100. *Id.* at 77.

101. *Id.* at 78.

102. See CURTIS, *supra* note 30, at 171-96; ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS 135-66, 173-93 (1985); see also FONER, *supra* note 49, at 529-31 (arguing that the Supreme Court, responding to public opinion, "moved a long way toward emasculating the postwar amendments" in the 1870s); KYVIG, *supra* note 2, at 182-87 (arguing that the ambiguously worded Reconstruction amendments "provided less protection than intended" because of narrow interpretation by the Supreme Court). William E. Nelson, who stresses the ambiguity of the meaning of the 14th Amendment, nonetheless portrays the Court's interpretations as "flatly inconsistent with the history of its framing . . ." NELSON, *supra* note 28, at 163.

103. KACZOROWSKI, *supra* note 102, at xiii, 227.

104. Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39, 59.

system.”<sup>105</sup> Philip S. Paludan likewise has concluded that the Court rested its opinions “on that same devotion to federalism which had pervaded Reconstruction debate.”<sup>106</sup> Indeed, given the general persistence of dual federalism during the Reconstruction-era, I have argued that what was remarkable was not the Court’s circumscription of Reconstruction legislation, but that the Justices went so far in articulating constitutional doctrines that would have sustained broad federal authority to protect rights if the political will to exercise it had persisted.<sup>107</sup>

Professor Ackerman promises to assess how well the Court preserved the “spirit of 1866” in volume three of *We The People*.<sup>108</sup> In this volume, he is concerned “not [with] substance but process”<sup>109</sup> and alludes to the *Slaughter-House Cases* only to point out that they manifested the Justices’ unanimous confirmation of the legitimacy of the Fourteenth Amendment, despite its unconventional ratification.<sup>110</sup> It is an insightful and perhaps unprecedented observation.

But how should the Justices have interpreted the constitutional mandate? If the legitimacy of constitutional amendments is derived not from having satisfied the requirements of Article V but from the will of the people acting in a higher lawmaking capacity, then may the Court have been correct in interpreting the Amendment restrictively, reflecting the limited impact on federalism that Republicans told the voters it would have? It was Andrew Johnson and the Democrats who regaled voters with exaggerated claims of the Amendment’s radicalism. Note that in his article for this Symposium, Professor Foner quotes Johnson’s denunciation of Reconstruction legislation as evidence of its radicalism.<sup>111</sup> Should the post-Reconstruction era Supreme Court have done likewise? Perhaps it should have. While Johnson exaggerated and the Republicans minimized the Amendment’s potential impact, the voters clearly chose to risk the potential radicalism when they backed it. Professor Ackerman consistently points to the important role the opponents of constitutional transformation play in upping the stakes. Are they equally important in clarifying the issues?

---

105. Benedict, *supra* note 63, at 67.

106. PALUDAN, *supra* note 75, at 56.

107. See Benedict, *supra* note 75, at 57-59.

108. 2 ACKERMAN, *supra* note 1, at 251.

109. 2 *id.* at 245.

110. See 2 *id.* at 244-47.

111. See Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 YALE L.J. 1999, 2002 (1999)

## VI. CONVENTIONAL VERSUS UNCONVENTIONAL CONSTITUTIONAL AMENDMENTS

The Supreme Court's narrow reading of the Fourteenth Amendment in the decades following Reconstruction raises a question about the effectiveness of "unconventional" constitutional amendment. In his history of constitutional amendments, *Explicit and Authentic Acts*,<sup>112</sup> David Kyvig argues for the superiority of conventional over unconventional amendment. He claims that the failure of New Deal Democrats to incorporate their constitutional transformation into the text of the document was a crucial error and argues that "[t]he consequence of this lapse of formal constitutional redefinition was a reduced long term impact for the innovations of the 1930s."<sup>113</sup> It took fifty years, but when the political coalition that supported New Deal liberalism disintegrated, conservatives "had a far easier time . . . turning the policies and practices of the United States in a contrary direction" than they would have had they faced a constitutional text mandating redistributive social welfare policies.<sup>114</sup> In sum, Kyvig writes, "without explicit and authentic acts of amendment, any constitutional construction remain[s] fundamentally insecure."<sup>115</sup>

Imagine the same presidential and Southern resistance to the Republican Reconstruction program and the same process of overcoming it, but without Republican reliance on the Fourteenth Amendment. Instead, suppose that they had relied on the Civil Rights Act of 1866, the Reconstruction Acts of 1867, and a series of laws justified as enforcing the Thirteenth Amendment and the Privileges and Immunities Clause of Article IV, Section 2.<sup>116</sup> After all, as Howard Jay Graham and others have pointed out, in the opinion of many if not most Republicans, the Fourteenth Amendment was merely "declaratory" of the correct law of American

---

112. KYVIG, *supra* note 2.

113. *Id.* at 481.

114. *Id.* at 482.

115. *Id.* at 483 (discussing *United States v. Lopez*, 514 U.S. 549 (1995)).

116. Reliance on the Privileges and Immunities Clause of Article IV, Section 2 would have required it to be construed as referring to a general set of rights held by all American citizens. Many Republicans held this view. James F. Wilson, the chairman of the House Judiciary Committee and manager of the Civil Rights Bill of 1866 in the House, explicitly relied on the old Privileges and Immunities Clause to justify the measure's constitutionality. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1117-18 (1866). John A. Bingham, the author of the first Section of the 14th Amendment, interpreted the clause similarly, although he denied that Congress had the power to enforce the provisions of Article IV. He intended the 14th Amendment specifically to secure that power. *See, e.g.,* CURTIS, *supra* note 30, at 62-64; Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 69-71 (1993). Both Wilson and Trumbull, the manager of the Civil Rights Bill in the Senate, relied on Section Two of the 13th Amendment for the constitutional authority to enact it. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1118-19 (1866) (statement of Sen. Wilson); *id.* at 474-75 (1866) (statement of Sen. Trumbull).

citizenship and the national duty to protect the rights associated with it.<sup>117</sup> If they had done so, the parallel between Reconstruction-era transformation and that of the New Deal would be even closer and more compelling. Like New Deal Democrats, Reconstruction-era Republicans would have claimed that the constitutional interpretations of the previous decades had departed from correct doctrines and that no constitutional amendment was necessary.

What might the effect have been on the Supreme Court's interpretation of federal power to protect civil rights? Ackerman has already described how the Supreme Court resisted the Republican Reconstruction process and finally acquiesced in it.<sup>118</sup> Would the resistance have extended to ruling federal civil rights legislation unconstitutional, with an even greater constitutional confrontation between the Court and Congress ensuing? As matters actually turned out, the Supreme Court gave way on the Reconstruction process and signaled its acceptance of the Fourteenth Amendment, acquiescing in the nationalization inherent in the unconventional process Ackerman has described. But it then placed a narrow construction on the Amendment that limits federal power to define and protect rights to this day.<sup>119</sup>

On one hand, the fact that the Fourteenth Amendment was explicitly embedded in the Constitution permitted the Supreme Court to revitalize its protections of civil rights and liberty in the 1950s and 1960s in what has many of the hallmarks of another constitutional transformation. Surely, that transformation would have been immensely more difficult to achieve without the Amendment in the text. On the other hand, would the transformation of the 1950s and 1960s have been necessary had the Court been forced to sustain broad federal power to protect rights in the 1860s? If rights are largely what courts say they are, is not the establishment of robust legal doctrine more important than the addition of mere words to the constitutional text? This counterfactual proposition also begs the question of whether, in light of the transformation, the Court would have reinterpreted constitutional provisions, such as parts of the Bill of Rights, to apply directly to the states, so that the protection of rights against state infringement would not have depended solely on congressional action.

---

117. See HOWARD JAY GRAHAM, *Our 'Declaratory' Fourteenth Amendment*, in EVERYMAN'S CONSTITUTION: HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE "CONSPIRACY THEORY," AND AMERICAN CONSTITUTIONALISM 295 (1968).

118. See 2 ACKERMAN, *supra* note 1, at 223-27.

119. Besides attending to the classic line of post-Reconstruction cases discussed by the works cited *supra* note 102, recall that the Supreme Court sustained the Civil Rights Act of 1964 not as an exercise of Congress's power to enforce the 14th Amendment under Section Five, but as an exercise of its power to regulate interstate commerce. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 300 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 257 (1964). Consider, in this light, *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), in which the Supreme Court repudiated Congress's claim of authority under Section Five of the 14th Amendment to define fundamental rights.

## VII. CONCLUSION

Whatever questions one might raise about the implications of Professor Ackerman's theoretical propositions, the fact remains that he has done more than any prior theorist to reconcile the legal theory of constitutional change with the historical reality of constitutional change. Much of what he says rings true. Whether or not one accepts his conclusions, he has demolished the conventional legal account. Widespread recognition that orthodox understandings of constitutional change are irreconcilable with history may undermine the central effort of American constitutional theory—the separation of constitutional law from ordinary politics—thus weakening the maintenance of something more than political sanctions for constitutional violations. Constitutional theorists must reconcile constitutional theory with historical reality if we are to remain a nation under law. Others may offer alternative resolutions, but it will be quite an accomplishment if they do so with the panache and brilliance of this pioneering effort.