



AMERICA'S CONSTITUTION

A Biography



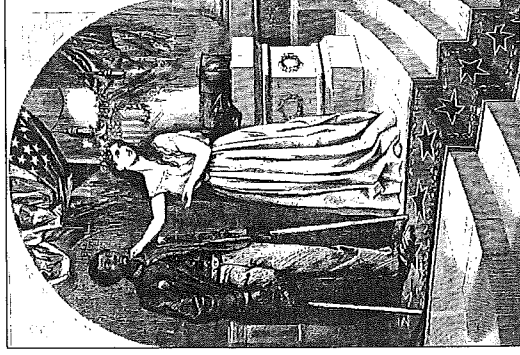
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Chapter 10

A NEW BIRTH OF FREEDOM



"SHALL I TRUST THESE MEN (left), AND NOT THIS MAN (right)?"
(August 5, 1865)

At the end of the Civil War, America—depicted here as Lady Columbia—confronted momentous questions. Under what conditions should white rebels who had taken up arms against her be restored to their civil and political rights? What new rights should be extended to loyal blacks who had devoted their lives and limbs to her defense?

*F*OUR SCORE YEARS after the Founding, a new generation arose to transform what their fathers had brought forth on the continent. In what can only be described as a constitutional revolution, the nation ended slavery, made every person born under the flag an equal citizen, guaranteed a host of civil rights to all Americans, and extended equal political rights to black men. Hard as it was to get America to make these promises, getting her to keep them would prove harder still. Full compliance would not occur until a Second Reconstruction in the late twentieth century. For women, too, the First Reconstruction would taste bittersweet, as daughters of the republic won promises of civil rights but not the key political right to vote.

"Neither slavery nor involuntary servitude"

From 1864 through 1870, Americans of all sorts—women and men, blacks and whites, civilians and soldiers, Easterners and Westerners, ex-blues and ex-grays—engaged in a massive democratic struggle over the meaning of democracy itself. The result, breaking more than a half-century of constitutional silence, was a trilogy of constitutional amendments. First, in 1865, the Thirteenth Amendment ended slavery forever. Then came the Fourteenth Amendment, proposed in 1866 and ratified in 1868, making all persons born in America—blacks no less than whites, women no less than men—full and equal citizens, and pledging to protect all fundamental civil rights against state and federal encroachment. But this package of "civil" rights purposefully omitted the "political" right to vote and kindred "political" rights to hold office and serve on juries. Hence the need for yet another amendment—the Fifteenth, proposed in 1869 and ratified the next year—guaranteeing black men precisely these "political" rights.

From a modern perspective, this trilogy might seem to form an invisible and inevitable postwar ensemble, but to Americans living through this tumultuous time, each amendment arose in its own unique historical moment; each raised its own set of issues; and in each amendment battle neither side could know whether additional battles would follow. Let us, then, begin by pondering the first of this grand trilogy, the Abolition Amendment.

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 equality. Alas, the facts do not bear out this comforting thought.

True, many framers piously hoped that one day slavery would disappear. Yet 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. In fact, the Constitution's basic structure tilted the long-run game against the forces of freedom. To recap: 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). If the long-term tendencies of this constitutional system were not evident to all in 1787, they surely were by 1804, when the document was amended in a manner that blessed its proslavery bias.

What, then, happened to derail this train and to place the nation on a different track heading in the opposite direction? In brief: Lincoln, secession, war, black arms-bearing, and victory.

ABRAHAM LINCOLN IN 1858 knew two great truths. First, slavery was wrong. As he later put it, "If slavery is not wrong, nothing is wrong."²¹ Second, it would be well-nigh impossible to right this wrong overnight, to abolish slavery immediately and everywhere. Sparring with Stephen Douglas in a series of celebrated debates across the length and breadth of Illinois, Lincoln at one point declared that if and when the nation ventured onto his own preferred path of long-term reform, "I do not suppose that in the most peaceful way ultimate extinction would occur in less than a hundred years at the least."²²

The sluggish pace at which abolition had taken place even in the North justified Lincoln's cautious assessment. Although New York had passed a gradual emancipation statute in 1799, as of 1820 the state still had over ten thousand bondsmen, ranking it alongside Missouri. In Connecticut, slavery had never been a particularly widespread practice. Nevertheless it took more than a half-century to uproot it; the state enacted its first gradual-emancipation law in 1784 and did not end all slavery until 1848.

Similarly, New Jersey, which had begun the abolition process in 1804, did not put a decisive end to slavery until 1847, and a few blacks remained unfree until the Civil War. In some places, it seemed as if abolition meant *ending slavery* as a system more than *freeing actual slaves* then in bondage.³

Although Lincoln lost his 1858 bid to oust Douglas from the U.S. Senate, in 1860 the two men again squared off, this time with two other men in the ring and the presidency at stake. As before, Lincoln stood for long-term reform: Slavery's spread into virgin territory must stop, immediately and absolutely, but in states where slavery had already insinuated itself, a different strategy was in order. Thus the 1860 Republican Party platform seemed to forswear federal abolition in the states, pledging allegiance to the "inviolable . . . right of each State to order and control its own domestic institutions according to its own judgment exclusively."

How, then, would Lincoln's proposed bar on new slave territory achieve his ultimate goal of general emancipation? In a word: gradually. Free territories would one day ripen into free states. Southeastern slavery would eventually be surrounded. Aided perhaps by federal financial sweeteners, upper-South states such as Delaware, Maryland, Kentucky, and Missouri would eventually begin to adopt long-run systems of compensated emancipation, possibly accompanied by voluntary emigration of freedmen to Africa or Central America. Once slavery stopped growing and instead began to shrink, the state-led emancipation process might spread southward and accelerate—a compound-interest story in reverse—as local leaders began to devise smooth exit strategies. Perhaps (though candidate Lincoln never quite said so), once antislavery leaders held sway over the vast majority of the nation, they might amend the federal Constitution to provide for universal emancipation on a gradual and compensated basis.

Winning just under 40 percent of the national vote in a four-man race, Lincoln prevailed in 1860 by sweeping every free state save New Jersey and thereby capturing 180 electoral votes, compared to 123 electoral votes for the rest of the field. Even had all the popular votes cast against Lincoln gone to a single anyone-but-Abe candidate, Lincoln would still have emerged victorious thanks to his outright majorities in Northern states totaling 169 electoral votes. Still, for every two Lincoln men at the polls, three other men had voted against Lincoln. America's first openly antislavery president could hardly claim a ringing mandate. Nor would Lincoln's new party be likely to overwhelm all others in Congress, having won only about 108 out of 237 House seats and controlling roughly 30 of the 66 Senate seats.⁴

All these facts and figures point to a sobering conclusion: *Had the Slave Power simply acquiesced in the election of 1860, nothing like immediate emancipation could ever have occurred in the 1860s.* Had slavocrats continued to play the game—as they had been playing (and generally winning) it prior to 1860—they could have won or tied many more rounds in the short and intermediate run. Slavery would probably have continued for at least another half-century even had Lincoln and his new party managed to accomplish all they realistically hoped for and more in his constitutionally guaranteed four years.

But the Slave Power did not acquiesce. Before Lincoln raised his right hand on March 4, 1861, seven states had already purported to secede and to form their own Confederacy. (Several of the state-secession votes occurred in assemblies skewed by state-law variants of the federal three-fifths clause—laws that gave plantation belts undue weight in the ultimate outcome.)

To woo the Deep South back into the Union and to deter the upper South from joining the Confederacy, the lame-duck Congress on March 2, 1861, voted by the requisite two-thirds of each house to propose a new amendment to the Constitution.⁵ Despite its clumsy grammar and customary euphemism,⁶ the proposal's thrust was plain enough: If, thanks to a strategy of containment and encirclement, antislavery forces were ever to command overwhelming national majorities, these forces would be barred from amending the Constitution to give Congress abolition power over slave states. Several notable Republican congressmen voted for this measure, and Lincoln himself, in his Inaugural Address, pointedly mentioned it and expressed "no objection."

To be sure, the proposal squared with Lincoln's and the Republicans' chief campaign theme, read narrowly. Republicans had focused on slavery in the territories (and implicitly in the national seat), not in the states. Also, the very clumsiness of the written proposal made its proslavery rules potentially vulnerable to future Portias. (What if a future amendment did not *empower Congress* to abolish slavery, but *itself* abolished slavery directly?) Nevertheless, the Slave Power's muscular grip on American politics was nowhere more evident than on March 4, 1861. In what was then rightly seen as the most antislavery moment in American history, with the first inauguration ever of an openly antislavery president, that president—following the lead of his own antislavery party in Congress—blessed an amendment to make slavery in the states *forever* immune from congressional abolition.

And then came a bombshell—quite literally. When Confederate

forces began their military assault on Fort Sumter in early April, they sparked a process that brought about precisely what they sought to prevent: immediate, uncompensated, and universal abolition, something that could never have happened had they just held their fire. Rarely in history have cannons backfired so explosively.

In response to Sumter's fall, Lincoln took immediate steps to suppress the insurrection. Four upper-South states (Virginia, North Carolina, Tennessee, and Arkansas) thereupon entered the Confederacy, which now formed an eleven-state bloc boycotting the federal Congress. A handful of loyal congressmen from Confederate states nevertheless continued to serve in the Capitol, as did congressmen from the four slave states (Delaware, Maryland, Kentucky, and Missouri) that remained in the Union. Alongside them were congressmen from the nineteen free states. Ironically enough, it was secession itself that for the first time in history created a Congress dominated by antislavery statesmen.

At first, Lincoln and the Republicans proceeded cautiously on the antislavery front. The president's primary goal was to bring the South back into the Union with as little bloodshed as possible. Radical abolitionist measures early on would ruin any prospects for rapprochement. At its July special session, Congress endorsed a resolution, cosponsored by then-Senator Andrew Johnson, defining Union war aims narrowly. "This war is not waged . . . for any purpose . . . of overthrowing or interfering with the rights or established institutions of those States [in revolt], but to defend and maintain the supremacy of the Constitution."⁷

Lincoln also had to guard his rear flank. Any quick move against slavery in 1861 might weaken his hold over the four loyal slave states, at least two of which were geostrategically indispensable. Were Maryland to heed its secessionist elements and follow Virginia into the Confederacy—in 1860, Lincoln had won less than 3 percent of Maryland's popular vote—the District of Columbia would be surrounded and all but impossible to defend. Kentucky's position along the banks of the Ohio River also made it essential. (Lincoln had won less than 1 percent of the vote in this, his birth state.) Legend has it that Lincoln once quipped that "I hope to have God on my side, but I must have Kentucky."

As time passed, hopes of a quick victory and early re-Union faded while Lincoln's hold over the middle states improved. In mid-April 1862, the first anniversary of the Sumter affair, Republicans in Congress began to implement their modest antislavery agenda. First, the two houses enacted a suggestive but vague joint resolution, which in its entirety declared "that the United States ought to cooperate with any State which may

adopt gradual abolishment of slavery, giving to such State pecuniary aid, to be used by such State in its discretion, to compensate for the inconveniences, public and private, produced by such change of system." That same week, Congress passed a detailed statute that freed all existing slaves in the District of Columbia, barred future slavery there, and authorized government compensation—up to \$300 per slave—for loyal masters.⁸

Two months later, Congress banned slavery in all federal territory, without any provision for compensation and in direct defiance of the Taney Court's pronouncements in *Dred Scott*. Yet perhaps this move was more modest than it looked. The 1862 Act borrowed language verbatim from the Northwest Ordinance of 1787, which had been construed by the Washington Administration only to bar the bringing of new slaves into the Northwest, not to free the slaves already there. If the new act were similarly construed, or if the relatively few masters with slaves in extant territories were to remove them posthaste into a (Union) slave state, then no issue of emancipation or compensation would arise. Also, a pair of federal Confiscation Acts in 1861 and 1862 allowed federal officers to free certain slaves of individual rebels. In practice, however, these laws had rather limited emancipatory effect.⁹

In September 1862 Lincoln proclaimed his own, more expansive, emancipation plan. In all places that continued to be under rebel control on New Year's Day 1863, the Union government would cease to recognize the claims of masters, even loyalists. Slaves in these places would (if and when the Union Army arrived) be liberated. On January 1, Lincoln finalized the Emancipation Proclamation, declaring all slaves in rebel lands—some three million souls—to be "forever free."

With a stroke of the executive pen, Lincoln changed the meaning of the war and the course of American history. No longer was the struggle merely one to restore the Union as it was. Henceforth, it would be a war for Freedom alongside Union. Lacking specific statutory warrant for his Proclamation—one of the most sweeping measures ever undertaken in America—Lincoln pointed to his Article II power as America's commander in chief in a time of actual war. The war itself had destroyed or imperiled a vast amount of liberty and property, of innocent civilians as well as soldiers. Why should slave masters' property claims be regarded with extreme tenderness, if such claims interfered with the Union's ability to win the war? And emancipation would, in Lincoln's eyes, surely help win the war by encouraging Southern slaves to come to the aid of the Union Army and also by preventing the English government from entering into any diplomatic alliance with the Confederacy. If the war were

only about American union, the English might well pursue their own imperial ambitions to divide (and perhaps one day reconquer?) their former colonies. But once Lincoln's Proclamation redefined the meaning of the war, linking Union with Freedom, antislavery British public opinion would prevent any unholy alliance between Great Britain and the Confederacy.

Ironies and harmonies intermingled. Unilateral executive power, widely feared at the Founding, was now being used to secure freedom on an epic scale. True, the Proclamation itself emancipated none of the slaves in Union states and exempted certain designated Confederate lands already under Union control. Yet the very fact that the Proclamation was *not* universal reinforced Lincoln's legal authority to make it. The holes and exceptions were themselves proof that Lincoln's was indeed a *military* (and thus executive) decision as distinct from a *moral* one (which would have required express legislative backing). In the 1780s, George Washington had worked to create a union for geostrategic reasons—to push England out of the American heartland. Now, four score years later, Abraham Lincoln was redefining the meaning of that union for analogous geostrategic reasons—to *keep* England out of the heartland.

Having taken the plunge toward abolition in various states—albeit states in rebellion—Lincoln strengthened his moral standing with a plan to extend abolition to the four loyal slave states (and presumably to any future ex-Confederate state rejoining the Union). Lincoln's plan, unveiled in his December 1862 Annual Message, envisioned three new constitutional amendments. The first would guarantee federal compensation to any slave state that abolished slavery prior to 1900. Lincoln's earlier one-hundred-year notion had now shrunk to thirty-seven years, but even this was a far cry from the eventual reality of immediate universal emancipation in 1865. Lincoln's proposal should remind us that the ultimate Thirteenth Amendment solution—freedom now, forever, and everywhere—was hardly foreordained even after the Emancipation Proclamation. Lincoln's additional constitutional proposals would have provided federal compensation for all loyal masters whose slaves had been liberated by "the chances of the war" and federal subsidies for any "free colored persons" willing to emigrate to Africa, Central America, or elsewhere.

To explain why the Thirteenth through Fifteenth Amendments that America in fact enacted from 1865 to 1870 differed so sharply from the Thirteenth through Fifteenth Amendments that Lincoln was dreaming of in late 1862 (and also from the Thirteenth Amendment that Lincoln

had tentatively blessed in March 1861), we must turn away from the words of whites and attend to the deeds of blacks. We must also venture beyond the elected leaders in Washington, D.C., to ponder the voters in the (loyal) states.

Black Americans reacted to the Proclamation by making it their own and taking freedom into their own hands. Emancipation would not merely be given by one white, but also earned by countless blacks. In the South, slaves fled plantations and flocked toward Union Army lines in droves, crippling the Confederate economy while pledging their allegiance to Lincoln. The Proclamation had promised that slaves fleeing rebel soil would "be received into the armed service of the United States," and thousands of such men poured into the Union ranks. Thrilled by the promise of freedom for their Southern kinsmen, Northern free blacks likewise rushed to volunteer in Lincoln's army. In Kentucky, more than half of the male slaves of fighting age signed up, spurred by federal promises of freedom for all such enlistees, and later, promises of freedom for their families as well. All told, roughly 180,000 blacks served in blue—more than 20 percent of all African American males of military age.¹⁰

After blacks voted for Lincoln with their feet and arms, whites did so with their ballots. Without some good news from the battlefield (thanks in no small measure to blacks), Lincoln might well have lost his 1864 bid for reelection, and emancipation might have been stopped in its tracks or even rolled back. Had Democratic nominee George McClellan prevailed at the polls, might he have ended the emancipation process by allowing the Confederacy to take its remaining slaves and leave the Union? Might he have gone even further? What if, as America's new commander in chief, he tried to repeal his predecessor's Proclamation as applied to any slave whose Confederate master sought to reclaim him? Lincoln's thumping victory, with 212 electoral votes to McClellan's 21, made all such questions moot. Lincoln's allies also gained ground in congressional elections, with Republicans looking forward to controlling more than two-thirds of the seats in each house of the Thirty-ninth Congress.

In its 1864 platform, Lincoln's party had pledged to amend the Constitution so as to effect the "utter and complete extirpation" of slavery from "the soil of the Republic," and in the afterglow of their November triumph, Republicans moved quickly to redeem this promise. On January 31, 1865, the lame-duck Thirty-eighth Congress voted for a resoundingly abolitionist Thirteenth Amendment, which received the support of two-thirds of the non-seceding true-blue states in July and two-thirds of all states, including the former Confederacy, in December. The speedy

ratification process in true-blue states highlighted the link between Lincoln and this amendment: First to say yes was Lincoln's home state of Illinois, and the three states that had gone against Lincoln in 1864—New Jersey, Delaware, and Kentucky—all declined to ratify.¹¹ By mid-1865, the latter two were the Union's only remaining slave states. Maryland and Missouri had freed their slaves in late 1864 and early 1865 respectively, and West Virginia had been required to adopt an abolition plan as part of its 1863 admission to the Union.

THE THIRTEENTH AMENDMENT blended traditional language with transformative substance. The specific wording banning "slavery [and] involuntary servitude" derived from the Confederation Congress's Northwest Ordinance of 1787 and had also appeared in subsequent congressional statutes, including the Territorial Act of 1862. But the 1787 law had been applied only to bar carrying new slaves into the West, not to emancipate those already there. The 1862 law may have swept further, but not much, and emancipation in the District of Columbia had operated only over a minuscule area. In sharp contrast, the Thirteenth Amendment freed everyone—immediately and without compensation—unlike all prior federal laws and most antebellum state emancipation statutes. And of course, the amendment promised a *permanent* end to America's slavery system: Neither states nor the federal government would be allowed to revive slave codes, import new slaves, or otherwise permit bondage to creep back onto American soil (save as a criminal punishment, subject to due process).

The old words of the Northwest Ordinance had also expanded along another dimension in the intervening decades. If a man agreed to sell himself into servitude for a number of years and then later changed his mind and tried to walk away, could courts compel him to perform what he had promised, or should judges merely require him to pay damages for his contractual breach? In the early nineteenth century, courts tended to look at the moment of initial consent and deem various indentures to be *voluntary*—at least if these service agreements did not extend beyond seven years. By the 1860s, courts looked instead to the hour of breach. Under the new liberationist view, to hold a man to service who wanted *at that moment* to leave was indeed to impose an impermissible *involuntary* servitude.

While the Thirteenth Amendment clearly condemned traditional forms of unfree labor—chattel slavery itself, debt peonage, and so on—the antebellum experience had also dramatized a variety of other, less obvi-

ously economic forms of degradation, dehumanization, and unfreedom. While slave men had been worked against their will in the fields, paradigmatic slavery for women and children had taken other forms above and beyond field work—sexual exploitation and child abuse, for example. By banning *all* forms of “slavery [and] involuntary servitude,” the Thirteenth Amendment cast a wide net not merely over the nation’s economy but also over its social structure and its domestic institutions.¹²

Government-sanctioned slavery was forever prohibited, but the amendment went even further, condemning various types of private domination perpetrated in the absence of formal legal authority or in the teeth of formal legal prohibition. Whenever one person improperly held another in bondage, the amendment applied: “slavery [and] involuntary servitude . . . shall [not] exist.” Hence, as soon as a state became aware of the existence of *de facto* slavery within its borders, the state had an obligation to end it.

Despite its seemingly traditional language, the Thirteenth Amendment thus marked a radical break with the antebellum federal Constitution. That prewar document had imposed few limits on what a state could do to its own inhabitants, whereas the Thirteenth pulverized bedrock legal principles and practices in more than one-third of the states and imposed new affirmative federal obligations on every state. The old Constitution had insulated property-holders from uncompensated takings, but the new one ratified and extended the largest redistribution of property in American history.¹³ Slaves were worth more than any other capital asset in the nation except land. In 1860, human chattel represented about three times as much wealth as the entire nation’s manufacturing and railroad stock, yet the Thirteenth made no provision for compensation, even of loyal masters in true-blue states. (Section 4 of the Fourteenth would go even further, prohibiting any federal or state compensation of slave masters.) A structurally proslavery Constitution became, in a flash, stunningly antislavery.¹⁴

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.

“Congress shall have power”

America’s first eleven amendments had all aimed to limit the federal government, and the Twelfth had neither added to nor detracted from federal authority. By contrast, the Thirteenth expanded the federal government’s role in broad language, borrowed from some of the most sweeping passages of the Philadelphia document and antebellum case law.

Here, too, it is worth juxtaposing the Thirteenth Amendment as enacted in 1865 with the would-be Thirteenth Amendments that Congress proposed in 1861 and that Lincoln floated in 1862. The 1861 proposal would have forever forsworn congressional power over slavery in the states, and the 1862 plan likewise left the abolition issue to the several states (this time, with a federal financial sweetener). But the Thirteenth Amendment that prevailed at the end of the war reflected the spirit of nationalism that had been summoned up by the war itself. Not only did the amendment’s opening words impose large duties on states, obliging them to prohibit slavery now and forever, but the amendment’s closing words explicitly conferred new powers upon Congress: “Congress shall have power to enforce this [amendment] by appropriate legislation.”*

Whereas the Founders’ first successful amendment told Congress that it could “make no law” over a certain domain (religion), the Reconstruction’s first successful amendment told Congress that it could indeed make many laws over a different domain (emancipation). While the Founders’ opening amendment had cleverly inverted the final paragraph of Article I, section 8 (“Congress shall have Power . . . To make all Laws which shall be necessary and proper . . .”), the Reconstruction’s opening amendment essentially echoed this sweeping Article I language. Article I said that Congress would have all “proper” power; the Thirteenth Amendment said that Congress would have all “appropriate” power.

But why, we might wonder, did the amendment use a synonym (and etymological cousin) rather than track Article I’s sweeping clause verbatim? Most likely because Congress preferred to use the language that the Supreme Court had itself used in construing congressional power broadly. In John Marshall’s classic opinion in *McCulloch v. Maryland* (whose lan-

*Building on the foundations laid by the Thirteenth Amendment, seven of the fourteen subsequent amendments have featured similarly worded congressional enforcement clauses. See U.S. Const. amends. XIV, XV, XVIII, XIX, XXIII, XXIV, XXVI. Three other post-Reconstruction amendments have conferred new powers on Congress, but in rather different language. See U.S. Const. amends. XVI, XX, XXV.

guage about a "government of the people, . . . by them, . . . and for their benefit" would find its way into Lincoln's Gettysburg Address), the great chief justice had, in a famous passage, construed the necessary-and-proper clause to permit all congressional laws "which are appropriate."¹⁵ *McCulloch* was read in the nineteenth century as providing a generous understanding of congressional power. In the antebellum period, no Court opinion—with the arguable exception of the malodorous Taney opinion in *Dred Scott*—had ever held that a congressional statute flunked *McCulloch*'s deferential test of congressional power. Reconstructors pointed in particular to one case, *Prigg v. Pennsylvania*, where the justices had shown notable deference to Congress in upholding federal power to legislate under the *McCulloch* test of "appropriateness." Republicans relished the irony that this language, which had long been used to support proslavery congressional laws (like the law at issue in *Prigg*) would henceforth authorize a wide assortment of antislavery congressional laws.

In particular, Reconstructors insisted that the Abolition Amendment's "appropriate" clause allowed Congress to legislate not merely against slavery itself, but against all the "badges" and relics of a slave system.¹⁶ In 1866, Congress passed an expansive Civil Rights Act protecting the civil rights of blacks in every state, North and South. The act prohibited race discrimination even in states that had never known slavery, on the theory that such forms of discrimination were vestiges of slavery. Critics objected that Congress lacked authority to intrude so deeply into traditionally state-law issues, and Andrew Johnson vetoed the bill.

On April 9, 1866, Congress overrode, in a dramatic vote that made headlines and indeed made history: Never before had any Congress ever surmounted a president's veto of a major bill. The two-thirds vote in each house on this bill foreshadowed the eventual two-thirds votes on the Fourteenth Amendment later that spring. In fact, as all at the time understood, the linkage between the enacted Civil Rights Act and the proposed Civil Rights Amendment was even tighter than this: One of the main purposes of the amendment was to provide an incontrovertible constitutional foundation for the act, which Johnson and his allies persisted in labeling unconstitutional even after its passage in April.

As most Reconstruction Republicans viewed the matter, since antebellum Congresses had been allowed to promote a slave system, postwar Congresses should have equal latitude to destroy all remnants of that system. Illinois Senator Lyman Trumbull argued that if a narrow view of the Abolition Amendment's "appropriate" clause were to prevail,

the trumpet of freedom that we have been blowing throughout the land has given an "uncertain sound," and the promised freedom is a delusion. . . . I have no doubt that under this provision . . . we may destroy all these discriminations in civil rights against the black man. . . . It was for that purpose that the second clause of that amendment was adopted, which says that Congress shall have authority, by appropriate legislation, to carry into effect the article prohibiting slavery. Who is to decide what that appropriate legislation is to be? The Congress . . . [which may] adopt such appropriate legislation as it may think proper.¹⁷

Whatever we might think of Trumbull's words and Congress's votes in isolation, we must understand that they did not stand alone. In emphatic response to critics who resisted broad congressional legislation under the "appropriate" clause of the Thirteenth Amendment, Congress, as noted, promptly proposed a *Fourteenth* Amendment with its own "appropriate" clause calling for sweeping congressional enforcement. In debates over this proposed Civil Rights Amendment, congressmen repeatedly quoted the language and the deferential approach of *McCulloch* and *Prigg* as exemplifying the spacious view of congressional power they were espousing. An early draft of the Fourteenth in fact copied Article I verbatim: "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities . . . and to all persons in the several States equal protection in the rights of life, liberty, and property."¹⁸ Later, this draft language gave way to revised language of "appropriate" congressional enforcement legislation, plainly patterned on the phrasology used at the end of the sibling Thirteenth Amendment.

And—here is the key point—the American people ratified the Fourteenth Amendment, with evident understanding of the breadth of its, and also the Thirteenth's, language authorizing "appropriate" federal legislation. Knowing full well that Congress believed that this language authorized transformative new federal statutes to uproot all vestiges of unfreedom and inequality—and having seen with their own eyes that Congress had already acted on a similar belief in connection with the Thirteenth Amendment—Americans said yes. We do.

"Amendment"

But exactly who was the "We" who did this deed? And how did We "do" it? Who counted, and who did not—and why—in the very enactment of the Thirteenth and Fourteenth Amendments? Who opposed this transformation, and why?

These are questions close to the heart of Professor Bruce Ackerman's epic work-in-progress, *We the People: Foundations, Transformations, Interpretations*. No serious student of America's Constitution can disregard Ackerman's provocative agenda. To understand the full meaning of Reconstruction, twenty-first-century Americans must come to grips with the acts of amendment alongside the texts of amendment. We must ask not simply *what* the words of the key constitutional clauses meant in the 1860s and mean today, but also *how* these words came to become part of America's supreme law. Nevertheless, we should resist some of the specific answers that Ackerman gives to the important questions that he poses. As he tells the story, the Reconstruction Amendments emerged from a process akin to civil disobedience, with amenders thrusting aside the letter and spirit of Article V. Though Ackerman ultimately proclaims America's Reconstruction to be legitimate, he does so on the basis of his own ingenious theory of permissible constitutional change. This theory, which he mints more than a century after the events in question, repudiates much of what the Reconstruction Republicans claimed to be doing during the amendment process itself—namely, *complying* with Article V as best they could in the uniquely tumultuous and utterly unprecedented circumstances created by the Civil War.

Here are Ackerman's main objections to, quarrels with, and questions concerning the orthodox view that the Reconstruction Amendments in fact emerged from a process generally faithful to Article V's letter and spirit:

1. In December 1865, the very month in which the Thirteenth Amendment came to be ratified, the Reconstruction Congress refused to seat House members and senators purporting to represent the defeated Southern states. Yet these states were, in legal contemplation, part of an indivisible union. After all, such was Lincoln's theory justifying the federal government's forceful resistance to the South's attempted secession. Indeed, the ex-Confederate states were explicitly counted in tallying the various ratifications of the Thirteenth Amendment, which, under the rules of Article V, needed the approval of three-fourths of

the state legislatures. How could ex-Confederate states be both in the union for Article V purposes and out of it for Article I purposes?

2. Congress continued to operate without widespread Southern representation until mid-1868. (Some defeated Southern states did not regain their seats until 1870.) In 1866 a rump Congress proposed the Fourteenth Amendment by a two-thirds vote of each house, but that Article V hurdle would never have been cleared had the eighty excluded Southern members been present. The Senate's exclusions marked a particularly large break with traditional constitutional principles, which had placed each state's right to equal Senate representation in a privileged position, immune even from ordinary Article V amendment.

3. In 1867, the rump Congress enacted legislation purporting to outline the terms under which the defeated states would be readmitted into Congress and allowed to resume internal self-government. In effect, Congress conditioned each state's readmission upon that state's prior ratification of the Fourteenth Amendment. As with the Thirteenth Amendment, this process counted various states for Article V while excluding them from Article I. In fact, the process featured a double standard within Article V itself. If the Southern state assemblies ratifying the Thirteenth and Fourteenth Amendments were valid "legislatures" for Article V purposes, how could the federal assembly excluding these states count as a proper "Congress" for Article V purposes?

4. The combination of congressional carrots and sticks obviously coerced the affected states, tainting the Southern yes votes that emerged from the ratification process. Congress's actions amounted to a "naked violation[] of Article V," which presumed that states would have a truly free choice to say yea or nay to any proposed amendments.

5. The above-noted points are not merely the product of modern constitutional sensibilities. Rather, these and related arguments were voiced loudly by Old Guard critics in the 1860s, especially President Andrew Johnson. Yet the Reconstruction Congress reacted to critics by threatening them with the same aggressive tactics it was using against the defeated states. In particular, the Congress impeached and almost convicted Johnson for his defense of a traditional understanding of the constitutional ground rules, and the legislature took steps to restrict Supreme Court review of Reconstruction laws.¹⁹

So saith Ackerman. Yet at the end of the day, he deems the irregular process of Reconstruction to be constitutionally legitimate. On his view, although the Reconstruction Republicans "played fast and loose" with the

Founding document and acted in ways that "simply cannot be squared" with the Constitution's text, the amenders nonetheless won the support of the American electorate, albeit in ways wholly outside Article V.²⁰

There is, however, another, more orthodox account of the amendment process that better fits the understandings of the amenders themselves, who denied that their actions were "naked violations" of the Constitution, and who never claimed that they were in fact pursuing some non-Article V mode of amendment. On this orthodox view, Reconstruction Republicans plausibly acted within the general Article V framework, even as they repeatedly found themselves obliged to improvise, interpolate, and make commonsensical judgment calls to resolve many difficult legal issues that were arising for the first time in the mid-1860s (and that have never recurred).

LET'S BEGIN WITH the fact that when the Thirty-ninth Congress met for the first time, on December 4, 1865, both the House and Senate refused to seat members from the former rebel states. Even if these refusals plainly violated the Constitution—in fact, they did not, but let's bracket that issue for now—none of this would undermine the legality of the Thirteenth Amendment. Assuming that, as of December 1865, all ex-Confederate states should be counted in the amendment calculus, the United States consisted of thirty-six states, twenty-seven of which would be needed to ratify any amendment under Article V's rule of three-quarters. Even before Congress convened, twenty-five states had ratified the amendment. On December 4 and December 6—the first and third days of the new congressional session—North Carolina and Georgia added their respective assents, thus giving the abolition amendment the needed twenty-seven state ratifications. In what sense were the various state ratification decisions—almost all of which had occurred long before the Thirty-ninth Congress had said a single word or done a single thing—tainted by the seating decisions?

Perhaps it might be said that North Carolina and Georgia ratified only because of the illegal coercion/exclusion that began on December 4. But this is hard to swallow. Congress had said nothing at this point to suggest that a state, merely by ratifying the amendment, would thereby gain admission. In fact, the House and Senate had refused to seat *any* of the ex-rebel states, even the ones (Virginia, Louisiana, Tennessee, Arkansas, South Carolina, and Alabama) that *had* already ratified the Thirteenth. In any event, Oregon and California, both of which were eligible to sit in

Congress from the outset, said yes to the amendment, on December 8 and 19, thus putting it over the top regardless of North Carolina and Georgia.

Nor is there any constitutional embarrassment in the fact that the Confederate states were not generally represented in the *Thirty-eighth* Congress, which proposed the Thirteenth Amendment in a lame-duck session in January 1865, shortly after Lincoln's triumphant reelection. Article I, section 5 provided that a simple majority of each house "shall constitute a Quorum to do Business," including the business of proposing constitutional amendments, even if one or more states chose to boycott or otherwise failed to send properly elected congressmen. Longstanding practice dating back to the Washington Administration confirmed that this section meant what it said. In the First Congress, New York's senators had failed to show up until late July 1789, yet in their absence Congress enacted several statutes, all duly signed into law by Washington. When Congress proposed the Bill of Rights later that year, the union consisted of a different group of states than the ones that later ratified the Bill. (The proposing group excluded, while the ratifying group eventually included, North Carolina, Rhode Island, and Vermont.)

Granted, the Thirteenth Amendment had won only the support of two-thirds of the voting members in each house, as distinct from two-thirds of the total membership, including absent and excluded members. But the same thing was true of the Twelfth Amendment. In proposing and ratifying the Twelfth, each house and several states had explicitly considered and rejected critics' contention that two-thirds of a quorum did not suffice. In fact, in 1789 the Bill of Rights was itself certified only to have received the support of two-thirds of the House members who voted on it, and House records failed to indicate whether it had cleared any higher bar.²¹

Thus far, we have been assuming that after Appomattox, all defeated states should be counted in both the (ratifying-states) numerator and the (total-states) denominator of Article V. But the Thirteenth Amendment would also be valid if we instead treated all eleven state governments in the former Confederacy as having lapsed, and thus not properly included in either numerator or denominator. On this view, only twenty-five true-blue state governments were in fact constitutionally operative in 1865, with nineteen needed to ratify under Article V. Long before December 4, nineteen true-blue states had indeed ratified the abolition amendment. So whichever way we count, the Thirteenth Amendment plainly cleared the Article V bar. As for the Fourteenth Amendment, the necessary nineteen true-blue states said yes as of mid-February 1867.²²

Although several leading Republicans, including Senator Charles Sumner and Representative John Bingham, endorsed a true-blue-only approach to Article V, this approach was never the official policy of the Reconstruction Congress.²³ But neither did Congress (or individual Republican leaders, for that matter) claim to be nakedly violating Article V or amending the Constitution outside Article V, à la Ackerman.²⁴ So if forced to choose which aspects of these Amenders' approach to toss overboard in order to save the rest, modern readers could simply adopt a true-blue-only interpretation of Article V. Ackerman claims that anyone who accepts such an account necessarily repudiates Lincoln and the Unionists' general theory of indivisible nationhood, but in fact this claim blurs important legal distinctions.

BEFORE TURNING TO these distinctions, let's try to understand more precisely why the House and Senate refused to seat representatives and senators purporting to speak for the defeated states. One problem was plain to see: *The ex-Confederate elections had excluded all, or virtually all, blacks.*²⁵ Under the explicit language of Article I, section 5, each congressional house was made "the Judge of the Elections [and] Returns . . . of its own Members." If the state elections from the former Confederacy were constitutionally defective, then Congress had every right to refuse to seat the alleged victors. And if, under the best—or even a plausible—reading of the Article IV republican-government clause, no truly "republican" state circa 1865 had the right to disenfranchise a quarter or more of its adult free male population, then the House and Senate could indeed properly find that the Southern elections were defective.

Old Guard critics charged that Congress was acting in an unprincipled manner when it chose to count ex-Confederate-state yes votes on the Thirteenth Amendment while simultaneously denying that these states had genuine republican governments. But if all-white Southern elections were not truly republican, then of course the victors should not be rewarded with congressional seats. At the same time, it would seem perverse—an affront to common sense and basic fairness—to throw out these all-white governments' yes votes on a pro-black amendment.²⁶ Had free blacks been allowed to vote in the Southern congressional elections, the results might have been vastly *different*: A diametrically opposed set of candidates might have prevailed. But had free blacks been allowed to vote on the Thirteenth Amendment, they would surely have voted yes. Thus in any state where the whites-only government had already voted yes, the re-

sults would have been the *same*. (More precisely, in a fair election counting freedmen, there would have been an even wider margin of support for abolition.)²⁷ Hence Congress could indeed with a straight face "count these white governments when they said Yes on the Thirteenth Amendment but . . . destroy these governments in 1867 when they said No [to the Fourteenth]."²⁸

As an analogy, consider a simple hypothetical in which congressional candidate A has received ten thousand more votes than B, but thirty thousand votes were destroyed before being counted. If the lost votes came from B's hometown and were destroyed by A's political cronies, then Congress might properly refuse to seat A. But if, instead, B's allies had destroyed ballots in A's stronghold, Congress should surely be permitted to let the election stand and to let A sit, since A managed to win even without counting all the additional votes he presumably racked up in his home base. For B's party to insist that the election that they in fact lost must be set aside thanks to their own misconduct would be sheer chutzpah.²⁹

Whether or not a court of law or equity in the 1860s could properly have made these sorts of mixed legal-political calculations in deciding a contested election, the Constitution allowed each house to consider commonsense practicalities in judging congressional elections and returns. (A similar blend of law and politics applied when Congress sat judicially in the impeachment process.) Even the nineteenth-century judiciary, in applying the "de facto government" doctrine in various situations, generally rejected an all-or-nothing approach. Rather, courts declared themselves willing to uphold certain actions of a legally imperfect regime—issuances of marriage licenses, recordings of property deeds, and so on—while denying effect to other actions more strongly tainted by the regime's underlying legitimacy deficit.³⁰

In fact, the judicial decisions on the books in 1865 lent considerable support to the Reconstruction Congress's approach. The pivotal precedent, ironically enough, was an 1849 Supreme Court opinion authored by slaveocrat Roger Taney. The case, *Luther v. Borden*, arose out of a brief civil war in Rhode Island known as Dorr's Rebellion, whose underlying origins lay deep in Rhode Island history. During the American Revolution, when every other state except Connecticut adopted a new constitution, Rhode Islanders continued to operate under a charter of government initially granted by King Charles II in the 1660s. Lacking any explicit provisions for constitutional amendment, the charter failed to channel the passions of later reformers and traditionalists into a constitutional-revision process that both sides could accept. When the issue of constitutional change came

to a boil in the early 1840s, each side sought to exploit procedural ambiguities to its own advantage. A political and military struggle ensued as two rival regimes each claimed to be the lawful government of Rhode Island.

In *Luther*, the Court declined to decide for itself which of the two camps deserved federal recognition as the state's proper republican government. That issue, opined Taney, was a political question that Congress should decide by determining which camp's leaders to seat in the House and Senate.

For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government.³¹

Quoting *Luther* chapter and verse in the 1860s, Sumner and his congressional allies stood on solid ground in insisting that Congress was entitled under Articles I and IV to "judge" congressional elections in a manner that enforced the Constitution's promise of a "Republican Form of Government." Going one step further, many leading congressmen also argued that Congress could properly choose to count only true-blue governments in Article V's numerator and denominator. Representative John Bingham—a highly respected lawyer from Ohio and the main author of the Fourteenth Amendment's opening section—explicitly invoked *Luther* in support of this view.³²

Old Guard critics attacked Sumner and Bingham's sweeping conception of Article IV as a violation of the Founders' vision. But much had happened in the nation's first eighty years to give rise to a more robustly egalitarian and nationalistic conception of republican government than had prevailed in the 1780s. For starters, the intervening decades had witnessed a dramatic expansion of suffrage rights, at least among white men. State-law property qualifications, ubiquitous at the Founding, later sank into oblivion as universal free (white) male suffrage swept the land. By 1865, any state that automatically disenfranchised a quarter or more of its freemen—as did each ex-rebel state—was out of the American mainstream in a way that it would not have been in 1787. The question thus became, was the Article IV guarantee of republican government static or

dynamic? Did the clause promise only that each American state would not retreat from the baseline set by its own 1787 practices, or should the clause also be read as promising that American states would keep pace with post-Founding reforms so as to remain in democracy's vanguard if the nation surged forward? The simple words of Article IV could be read either way, and certain passages from *The Federalist* seemed to lean toward a static test. Yet the fact that elected congressmen would be vital decision makers under this clause injected an inherently dynamic element into the republican-guarantee process.

Long before 1865, Congress had accustomed itself to judging local republicanism by applying dynamic democratic standards in the course of admitting new Western states. In the 1780s, a group of preexisting states had combined to give birth to the federal government. Over the next eighty years, the federal government itself became a prolific parent, siring new states at a rapid rate. By the outset of the Civil War, nearly two-thirds of the states in the Union were there only because Congress had chosen to admit them after assuring itself that these states met contemporary standards of republicanism. The process of admitting states had also sharpened congressional sensibilities concerning local electoral improprieties and had heightened congressional interest in local suffrage rules. These were the pulsating issues at the heart of the Bleeding Kansas controversy in the late 1850s, a controversy in which local electoral misconduct had touched the national conscience and aroused the Republican Party. Thus both Rhode Island's civil war in the 1840s and Kansas's civil war in the 1850s helped frame Congress's understanding of its own broad powers to judge local republicanism in the aftermath of a far wider civil war in the 1860s.

A long history of slavocratic contempt for core republican freedoms formed yet another factor inclining Sumner, Bingham, and company to a strongly nationalistic and democratic understanding of Article IV. In the decades ramping up to the Civil War, the Deep South's paranoid obsession with protecting its peculiar institution—an institution coming under increasingly sharp criticism in the outside world—spurred countless acts of tyranny and intolerance. The result was an arc of Southern unfreedom spiraling outward. At the spiral's center, slaves of course suffered brutal deprivations of life, liberty, and property. Then came serious repression of free blacks (whose very presence was feared to be a potential incitement to those in bondage); and then, increasingly, repression of whites themselves, both in the South and beyond. Several Southern states made it a crime—in some places, a capital offense—for a free white person to advocate abo-

lition or to condemn slavery in strong language. Pulpits were silenced, presses confiscated, pamphlets burned, and abolitionist mail suppressed.

In the grip of a mind-set and political structure known by its critics as the Slave Power, Southern politicians even tried to silence Northerners. In the 1840s, slavocrats succeeded for a while in imposing gag rules that muzzled congressional free speech and debate over slavery. The Slave Power's assault on congressional free speech took more graphic shape in 1856, when a South Carolina representative, Preston Brooks, bludgeoned Charles Sumner into bloody unconsciousness on the floor of the Senate in reprisal for Sumner's fiercely antislavery speech "The Crime Against Kansas." Brooks was hailed in the South for his savage caning of an unarmed man. Though an overwhelming majority of Northern congressmen voted to expel Brooks, every Southerner save one voted to retain him, thereby causing the expulsion motion to fall short of the necessary two-thirds. Brooks received a second Southern vote of confidence when he resigned mid-session and his constituents returned him to Congress by a roaring margin that left no doubt about where they stood. On the eve of the Civil War, North Carolina went so far as to demand that various Northern congressmen and other Northern leaders be extradited to the Tar Heel State to face felony charges for having endorsed Hinton Helper's provocative antislavery tract *The Impending Crisis*.³³

By 1860, the Slave Power exemplified all the evils that the original Article IV guarantee of republican government had aimed to avert. Aggressive slavocrats had flouted basic democratic freedoms within their own states, menaced freedom-lovers in neighboring states, and begun to corrupt the character of federal institutions that rested on state-law foundations. A society that criminalized core political expression and that in effect outlawed the Republican Party—recall that Lincoln got zero popular votes south of Virginia in 1860—was not merely un-Republican in a partisan sense but un-republican in a generic sense.

And then came the most un-republican act of all: secession itself. Howsoever distasteful Lincoln's triumph in 1860 may have been to some, his election was wholly lawful. If the Twelfth Amendment's rules had, just this once, advantaged an antislavery candidate, these rules had usually, and by design, done just the opposite; in a sound republic, turnabout was fair play. As Lincoln himself explained on July 4, 1861, republicanism's foundational premise required the losers of a fair election to abide by its results. The root question was "whether a constitutional republic, or a democracy—a government of the people, by the same people—can, or can-

not, maintain its territorial integrity, . . . whether discontented individuals, too few in numbers to control administration, according to organic law, . . . [can] break up their Government, and thus practically put an end to free government upon the earth. . . . When ballots have fairly, and constitutionally, decided, there can be no successful appeal, back to bullets; . . . there can be no successful appeal, except to ballots themselves, at succeeding elections."³⁴

This, then, was the backdrop against which the 1865 House and Senate declined to readmit Southerners until Congress could confidently assure itself that the new South would abide by the basic ground rules of republican government—as the old South had not. A central plank of Reconstruction policy as it eventually came to be hammered out in the Thirty-ninth Congress was that Southern governments would need to be based on a broad popular foundation that included free black voters alongside free whites. By voting in large numbers, Southern blacks would both embody the republican ideal of broad-based popular government and also prevent the revival of various un-republican practices and tyrannical policies.³⁵

Old Guard Democrats cried foul. The Southern elections in 1865 had generally followed the state election laws on the books in 1860. Since all Southern states in 1860 had been republics in good standing, eligible to be seated in Congress, Democrats argued that the new Southern states likewise deserved seats. Republicans countered that the act of secession itself and the unlawful war that the rebel states had waged against a duly elected Union government justified the Union's demands for new safeguards in rebel regions.³⁶ Also, Republicans argued that excluding *slaves* from the franchise in 1860 was one thing, but disenfranchising *free men* in 1865—many of whom had in fact fought for the Union Army—was something altogether different.³⁷

Ackerman finds it "odd to suggest that the South had rendered itself un-republican by freeing the slaves."³⁸ Contrary to the tilt of this sentence, "the South . . . itself" did not of its own accord "free[] the slaves." Freedom came to the South thanks largely to Northern and national voices, arms, and votes³⁹—Lincoln's Emancipation Proclamation, the Union Army's triumphs, the (Union) elections of 1862 and 1864, black self-help (in both North and South), and the Thirteenth Amendment itself, proposed in a true-blue Congress and ratified by an overwhelming majority of Northern states long before most Southern governments finally agreed to say yes (sometimes under pressure). Given that *the nation* had been instrumental

in freeing the slaves, it was hardly odd to think that the nation also had to follow through by guaranteeing freedmen their proper place in a genuinely republican government.

But let's assume that each ex-Confederate all-white state government had freed its slaves by itself and solely out of the goodness of its heart. Once having done so, no state could properly stop there and deny freedmen the franchise. By analogy, consider the issue of immigration. A genuine republic need not allow the entire planet, filled with aliens living oceans away, to vote in its own domestic elections. Nor does a true republic need to allow massive immigration and naturalization. But if a republic does choose to admit and naturalize vast numbers of foreigners, it cannot allow them to remain permanently disenfranchised after they have become equal citizens. Or at least it cannot do so and continue to call itself a republic.

The Old Guard also accused congressional Republicans of hypocrisy. In 1865, only a handful of Northern states allowed blacks to vote. If the South had to enfranchise its blacks, why didn't the North? The most persuasive response from leading Republican congressmen was that in the South, but not the North, blacks amounted to a large slice of the free population. While accounting for 2 percent or less of the total population of most Northern states, free blacks constituted an outright majority in two Southern states (South Carolina and Mississippi), almost half in four others (Louisiana, Alabama, Georgia, and Florida), and more than a quarter in the remaining five ex-Confederate states (Virginia, North Carolina, Texas, Arkansas, and Tennessee). Northern voting restrictions, though illiberal and deeply regrettable to leading Reconstructionists, were not acrimoniously un-republican because the vast majority of Northern free males could in fact vote. Southern whites-only rules, by contrast, offended the basic republican ideal of a government that derived its power from the great mass of its citizens.⁴⁰

As Sumner explained in an elaborate Senate speech in February 1866, the "denial of justice to the colored citizens in Connecticut and New York is wrong and mean; but it is on so small a scale that it is not perilous to the Republic." By contrast, Southern rules disenfranchised a "mighty mass," as Sumner proved by detailed recitation of the black and white population figures in Southern states. "Begin with Tennessee, which disenfranchises 283,079 citizens, being more than a quarter of its whole 'people'—Thus violating a distinctive principle of republican government. . . . But Tennessee is the least offensive on the list." At the other end of the Southern spectrum lay "South Carolina, which disfranchises 412,408 citizens, being

nearly two-thirds of its whole 'people.' A Republic is a pyramid standing on the broad mass of the people as a base; but here is a pyramid balanced on its point. To call such a government 'republican' is a mockery of sense and decency. . . . It is not difficult to classify these States. They are aristocracies or oligarchies." Sumner added that had blacks been able to vote in 1860–61, "the acts of secession must have failed. Treason would have been voted down."⁴¹

Sumner had floated similar ideas on the very first day of the Thirtieth Congress, and analogous views would resound through the Capitol chambers over the ensuing months and years. For instance, Oregon Senator George H. Williams argued that American "history does not produce a case where one half, or a majority, or even one third of the free male citizens of a State have been excluded from all political power under a republican form of government."⁴² In the House debates, Thomas Eliot denied that a republican government could ever disenfranchise "large classes of men" and "large masses of citizens," and Ralph Buckland declared that a state regime propped up by "a mere fraction of the people" was "contrary to the fundamental principles of republican government." Pennsylvania's John Broomall wondered how a government like South Carolina's could "be considered republican in form when four out of every seven adult males are denied the right of suffrage." Noting "with some sense of humiliation" the racial exclusions in his own state's laws, Broomall went on to point out that "but one in sixty is there excluded from participation" and that "easy consciences" might find solace in the "de minimus" nature of this Northern disenfranchisement.⁴³

Though modern critics might be tempted to dismiss this self-serving Republican defense,⁴⁴ it drew strength from both Founding-era definitions of republicanism and contemporary realities. Southern black disenfranchisements in 1865 threatened to skew political power dramatically, both within Congress and within individual state legislatures. Reconstruction Republicans understood that the small numbers of free blacks in the North exerted little effect on either the overall apportionment of most Northern state legislatures or the apportionment of these states' congressional delegations. The situation was vastly different in the South, where several antebellum state constitutions had counted slaves at three-fifths or more for purposes of state legislative apportionment. Once the "mighty mass" of Southern blacks became free, unless they were also enfranchised, the white voters in black plantation belts might have even *more* voting power than before. In some ex-Confederate state legislatures, the old three-fifths bonus for disenfranchised slaves threatened to become a five-fifths

bonus for disenfranchised freemen. In other Southern state legislatures, the system might warp even more dramatically, from zero-fifths to five-fifths. Not only would this massive and unevenly distributed body of non-voting freemen tilt future congressional elections even further toward the South, but *within* each Southern state the uneven distribution might well give revanchist districts far more federal and state seats than ever before, even though the white voters in such districts could hardly be trusted to virtually represent the interests of disenfranchised blacks.⁴⁵

In response to Reconstruction Republicans' quantitative arguments, some Northern Democrats played a quantitative card of their own: If a republic required enfranchisement of the great mass of citizens, what about women?⁴⁶ Most of these critics did not sincerely advocate woman suffrage, but used the issue to prick the pretensions of their adversaries. If the republican-government principle required black suffrage in the South, taunted Pennsylvania Representative Benjamin Boyer, "then women should vote, for the same reason; and the New England States themselves are only *pretended* republics, because their women, who are in a considerable majority, are denied the right of suffrage."⁴⁷

Republicans had an army of counterarguments at their disposal. Women as a rule had not voted at the Founding; nor did they vote in any state, North or South, East or West, in 1865.⁴⁸ Thus under either a static or a dynamic approach to Article IV, the actual practice of American government lent little support to any notion that the clause required woman suffrage. Instead, the basic principles of republican government would be met by broadly enfranchising men, who could in turn be relied on to virtually represent the interests of the women in their lives—their mothers, sisters, wives, and daughters. By contrast, Southern whites could not be trusted to represent the interests of those whom they had so recently and ruthlessly enslaved.⁴⁹ Within each state, the relatively even distribution of women across different districts also meant that male-only suffrage introduced no systemic skew into the process of state apportionment. Here, too, sex differed from race.⁵⁰ Moreover, certain political responsibilities properly accompanied the possession of political rights. Free men, black and white, had in the past been, and could in the future be, obliged to bear arms for the common defense. Women, by contrast, did not bear arms in the military and thus had a lesser claim on the franchise.⁵¹

IT REMAINS TO CONSIDER the Old Guard's objections to congressional demands that Southern states ratify the Fourteenth Amendment as a condi-

tion of reentry, and to examine whether Congress's treatment of the former Confederacy squared with Lincoln's theory of an indivisible union. Had Congress tried to extort Southern ratification of a proposed amendment wholly unrelated to Southern unrepudiation, then we might indeed properly wonder whether Congress had abused its powers. (Imagine, say, a Congress that demanded Southern states agree to a tariff amendment aimed at benefiting Northern mercantile interests.) But in fact, the ratification conditions that Congress imposed were highly germane to the problem at hand—namely, Southern unrepudiation—precisely because the amendment itself revolved in tight orbit around core principles of republican government.

For example, the Fourteenth's opening section served to protect fundamental "privileges" and "immunities"—especially freedom of speech, press, petition, and assembly—against future state abridgement. This section served to codify some of the specifics of republican government, offering a more detailed recipe for future state compliance with American-style republicanism.⁵² State compliance with these safeguards would help prevent future acts of unrepudiation ranging from censorship to armed insurrection. Also, the amendment's section 2 restructured congressional apportionment so as to induce states to practice a maximally inclusive republicanism (at least among men): Each and every state disenfranchising a free male citizen would reduce a state's clout in Congress.⁵³

Finally, the very willingness of a given ex-Confederate state to ratify the amendment would itself credibly signal that the state had rejoined the republican ranks and sincerely renounced its earlier offenses against the republican ideal (including secession itself). Such a credible commitment was necessary to prove Southern good faith to a justifiably skeptical nation.⁵⁴ A mere promise in a state constitution—even a promise that blacks would henceforth be allowed to vote—could be repealed in a subsequent state amendment (whereas no state could unilaterally amend a *federal* constitutional provision).⁵⁵ Suspicion of the South's good faith ran especially high in the mid-1860s because a large percentage of Southern leaders had in fact treasonably betrayed their antebellum Article VI oaths to uphold the federal Constitution. In the first round of postbellum congressional elections, the supposedly "new" South had tried to send to the Capitol many of its old oath-breaking leaders and other prominent (former?) secessionists—four Confederate generals, four colonels, several Confederate congressmen and members of Confederate state legislatures, and even the vice president of the Confederacy, Alexander H. Stephens.⁵⁶ Troubling reports also began to pour into Congress concerning a host of abusive Southern actions all too

reminiscent of prewar Slave Power misconduct: terrorism against blacks, violence targeted at white Unionists, voting fraud, and new laws ("Black Codes") aimed at reducing freedmen to virtual peonage.

True, the Fourteenth Amendment contained some provisions that ranged beyond a mere elaboration and implementation of Article IV republicanism. But more than three-quarters of true-blue states—states that had played by republican rules and had not taken up arms against a duly elected Union government—had freely ratified this amendment, which imposed equally stringent limits on all states, whether Northern or Southern. Congress was thus not trying to leverage its control over Southern states to validate an amendment that had failed to win overwhelming support among the states that were in fact republican.⁵⁷

Which brings us at last to the question, why didn't Congress simply adopt a true-blue-only view of Article V? In February 1865, Congress resolved to count electoral votes only from the twenty-five true-blue states, expressly excluding the eleven rebel states from both the numerator (electoral votes cast for each candidate) and denominator (total electors lawfully appointed) of the Twelfth Amendment as applied to the presidential election of November 1864. Several of these eleven states—especially Louisiana, Arkansas, and Tennessee—were already well into the process of Reconstruction, and the new Louisiana and Tennessee governments had in fact purported to appoint presidential electors. Yet Congress refused to count any such returns.⁵⁸ If a true-blue-only approach properly applied in late 1864 and early 1865, why not later in 1865? Why not in 1866 and 1867? Indeed, why not as long as the ex-Confederate states failed to bring themselves into compliance with the standards of republican government, as judged by Congress in its seating decisions? If a true-blue-only approach properly applied to a presidential election—the very election whose ringing endorsement of Lincoln prompted Congress to propose the Thirteenth Amendment—why shouldn't the same approach apply to Article V ratification of that amendment?

Lincoln himself, shortly before his fateful evening at Ford's Theater, cautioned that "such a ratification would be questionable, and sure to be persistently questioned; while a ratification by three fourths of all the States would be unquestioned and unquestionable." Yet Lincoln also said in the same speech—his last public address—that "I do not commit myself against" a true-blue-only view of Article V.⁵⁹

Why not? Ackerman claims that to rely on a true-blue-only tally would be to concede that the South was legally out of the Union—to embrace "secessionist" logic and thus repudiate Lincoln's theory of indivisible

Union.⁶⁰ If Ackerman is right, it would appear that Lincoln, by hedging in his final speech, misunderstood the meaning of his own theory of indivisibility. This seems unlikely. Perhaps there is a better way of understanding Lincoln's vision and that of his fellow Unionists?

Let's recall Lincoln's repeated emphasis on the *geographic* contours of the Union, and on its "territorial integrity."⁶¹ On a geographic view of the matter, neither a state government nor a state electorate could unilaterally remove the state's lands and waters from the Union; but a state government might nevertheless lapse into an unrepublican condition as a result of a coup d'état, an inadequate electoral base, a string of stolen elections, or any number of other problems. In such a case, Article IV would empower—indeed, oblige—the central government to restore republican government to the lapsed state, but until that restoration was complete, the Union might properly opt to administer the state as a de facto federal territory—fully *within* an indivisible Union but *without* a proper republican state government.⁶² In effect, the postwar Congress could treat the South much as the prewar Congress had treated the West.

Ackerman describes the true-blue-only approach as if it proposed to deal with the South by brute force—as a "conquered province."⁶³ But this description blurs critical legal distinctions. In endorsing a true-blue-only approach, men such as Sumner and Bingham never denied the citizenship of all Americans, Southern as well as Northern, whether in operational states, lapsed states, de jure territories, or the national seat. Nor did these men advocate redrawing state boundaries at will or keeping Southern states out of Congress any longer than was necessary to guarantee republicanism. Rather, these true-blue congressmen proposed to nurse the South back into republican health, much as predecessor Congresses had weaned young territories into proper states to be thereafter admitted on equal footing. Such an approach was less a repudiation of Lincoln's vision of Union than an embodiment and sensitive adaptation of that vision—an exemplification of Lincoln's view, doubtless shaped by his own boyhood in the territory-turned-state of Indiana, that the Union had "in fact . . . created" the states.⁶⁴

For all his questionable assertions, Ackerman nevertheless performs a mighty service in drawing our attention to three striking and interrelated aspects of the amendment process in the 1860s. First, the version of Article V on display in the 1860s was dramatically more nationalist than had been foreseen in the 1780s. Second, the ordinary rules of amendment were applied in an extraordinary way as a result of the constitutional crisis brought about by secession and emancipation. Third, Reconstruction

pivoted on a remarkable reinterpretation of the Article IV republican-guarantee clause. The Constitution's sleeping giant had awakened.⁶⁵

ANOTHER SLUMBERING GIANT that arose during the Civil War amendment process was the Union Army itself. For without that army's battlefield victories, Lincoln's Emancipation Proclamation would never have issued, nor would it have had any practical bite. Without the strong electoral support that Lincoln received from the troops, he might never have won reelection in 1864. Without federal soldiers in place to maintain order in the defeated Confederacy and to administer and monitor new Southern elections in compliance with congressional Reconstruction legislation, the Fourteenth Amendment could not have been ratified as it was. And without blacks' massive participation in the Union Army, it is doubtful whether the Fifteenth Amendment—extending the vote to a class of men who had nobly borne arms for their country—would ever have come to pass in this era.

Though nothing in the text of the Reconstruction Amendments explicitly purported to modify the Founders' intricate rules concerning armies and militias—rules that plainly disfavored central armies and glorified local militias—the very process of amendment gave birth to a new constitutional narrative.⁶⁶ If local Minutemen had played starring roles in the Founding story, the national army's boys in blue were the heroes of the new con-Founding story. Liberty would no longer be automatically associated with localism, as it had been for the generation of Americans who lived through the Revolutionary War. The antebellum, Civil War, and early Reconstruction experiences had proved that various states could be just as tyrannical as many Americans at the Founding had feared the federal government might be. These recent events had also shown that the central government—aided by a national army of both volunteers and draftees—could at times be freedom's best friend.

“born . . . citizens”

The Fourteenth Amendment's text began by repudiating the racist vision of American identity that had animated Chief Justice Taney's infamous *Dred Scott* decision. Taney's 1857 opinion had proclaimed that a black man—even if born free in a state that treated him as a full and equal citizen—could never claim rights of citizenship under the *federal* Constitution. In 1862, Lincoln's attorney general opined that free blacks as a rule

were federal citizens, despite Taney's words.⁶⁷ The Civil Rights Act of 1866 took aim at *Dred Scott* even more directly by legislating the principle of birthright citizenship: “All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.”⁶⁸ Two months later, Congress opened its proposed Fourteenth Amendment with similar anti-Taney language: “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”

The amendment aimed to provide an unimpeachable legal foundation for the earlier statute, making clear that everyone born under the American flag—black or white, rich or poor, male or female, Jew or Gentile—was a free and equal citizen. As with the statute, the amendment did not encompass persons born on American soil who owed allegiance to some other jurisdiction—for instance, children of foreign diplomats or of tribal Indians. The amendment also made clear that non-native, naturalized Americans were entitled to claim the privileges of citizenship. This point could be teased out of other federal statutes and had thus been unnecessary to state in the 1866 Act, but it was worth reiterating in the amendment, lest any negative implication arise in this, the first explicit *constitutional* definition of American citizenship. Perhaps most important, the amendment clarified that to be an American citizen meant having rights not just against the federal government but also against one's home state.

These words codified a profound nationalization of American identity. Lacking any explicit definition of American citizenship, the Founders' Constitution was widely read in the antebellum era as making national citizenship derivative of state citizenship, except in cases involving the naturalization of immigrants and the regulation of federal territories. The Fourteenth Amendment made clear that all Americans were in fact citizens of the nation first and foremost, with a status and set of birthrights explicitly affirmed in a national Constitution. Henceforth the nation would not only define national citizenship, but state citizenship as well. Even for persons born on its own soil, a state would no longer enjoy carte blanche to designate some (that is, whites) as “citizens” and to treat others (free blacks) as lesser “inhabitants.” Likewise, no state could henceforth bar any American citizen from choosing to become a state citizen—a point only implicit (at best) in the Founders' text. Article IV had obliged South Carolina to treat a Massachusetts *visitor* with a certain respect but had not stated explicitly that a Massachusetts man had an absolute right to become a South Carolinian, whatever other South Carolinians might think.

Many first-year law students are told, and today's Supreme Court is fond of reiterating, that the Fourteenth Amendment's key words targeted only the actions of state government. Though this claim may be true of the amendment's second sentence ("No State shall . . ."), it is plainly false as an account of the amendment's first sentence, which entitled citizens to rights against both state and federal officials. In tandem with the amendment's final sentence, these opening words also empowered Congress to dismantle various nongovernmental structures of inequality that threatened the amendment's vision of equal citizenship.

Though the word "equal" did not explicitly appear in the Fourteenth Amendment's first sentence, the concept was strongly implicit. All persons born under the flag were citizens, and thus *equal* citizens. The companion Civil Rights Act had spoken of the right of all citizens to enjoy "full and equal" civil rights, and a later Supreme Court case glossed the citizenship clause as follows: "All citizens are equal before the law."⁶⁹ Read alongside Article I's prohibitions on both state and federal titles of nobility, the citizenship clause thus proclaimed an ideal of republican equality binding on state and federal governments alike. Congress, if it chose, could go even further by enforcing the vision of equal citizenship against a host of unequal social structures and institutions. Taney's backdrop *Dred Scott* opinion had located citizenship in a broad context of social meaning and practice above and beyond state action. Blacks, said Taney in notorious language, could not be citizens because they were regarded by the white race—and not merely by white governments—as "beings of an inferior order, and altogether unfit to associate with the white race," with "no rights which the white man is bound to respect."⁷⁰

Thus, when the Fourteenth Amendment overturned Taney, it did so with words suggesting that Congress could use its sweeping *McCulloch*-like enforcement power to enact statutes affirming that blacks were in fact and in law equal citizens worthy of respect and dignity. Such statutes could not compel whites to invite blacks to their dinner parties; such truly private consensual relations lay outside the ambit of equal citizenship. Suffrage rights also lay outside the domain of mere citizenship. For example, white women and children had long been viewed as equal citizens, but this fact did not thereby entitle them to vote. Black citizenship, as conceptualized by the Civil Rights Act and the Civil Rights Amendment, meant full and equal "civil" rights as distinct from "political" rights. But in enforcing the letter and spirit of the citizenship clause, Congress could indeed properly end widespread nongovernmental systems of exclusion in places such as hotels, theaters, trains, and steamships. Congress could also

seek to protect blacks from racially motivated violence and thereby make plain that blacks did have rights that white men were bound to respect.

During the Reconstruction era, Congress enacted several statutes to this effect, some of which were struck down by a Supreme Court ill disposed to construe expansively the constitutional sentence that had been introduced to chastise the Court itself. The first Justice John Marshall Harlan (not to be confused with his Eisenhower-era grandson) dissented in the most important set of these stingy Reconstruction decisions, the 1883 *Civil Rights Cases*, as he would later dissent in *Plessy v. Ferguson*. In 1883, Harlan stressed the "distinctly affirmative character" of the citizenship clause and argued that postwar Congresses should have at least as much authority to protect blacks as prewar Congresses had enjoyed to harm them.⁷¹

Thirteen years later, Harlan explained in *Plessy* that the Constitution forbade government from creating a pervasive racial caste system. As Harlan saw it, any law whose preamble explicitly proclaimed blacks to be second-class citizens would plainly violate the Fourteenth Amendment, and the emerging system of racial apartheid known as Jim Crow broadcast precisely this unconstitutional message by its very operation. In purpose, in effect, and in social meaning, Jim Crow stretched its tentacles out to keep blacks down. Its whole point was to privilege whites and degrade blacks, in direct defiance of the Fourteenth Amendment's promise of equal citizenship. Though Jim Crow slyly claimed to provide formal, symmetric equality ("separate but equal"), in reality it delivered substantive inequality that made its regime practically indistinguishable from the postwar Southern Black Codes—the very set of laws that the amendment had undeniably aimed to abolish. Though Justice Harlan saw all this in 1896, his brethren did not. Not until the middle of the twentieth century would Court majorities embrace Harlan's vision, quietly at first and then with increasing confidence and emphasis.

EVEN AS THE CITIZENSHIP CLAUSE and the rest of the Fourteenth Amendment plainly took aim at the Black Codes, these words also targeted other—nonracial—forms of discrimination. Whereas the Fifteenth Amendment would later use the language "race, color, or previous condition of servitude" to extend suffrage to black men, the Fourteenth spoke more abstractly of all "citizens" entitled to various "privileges [and] immunities" and of all "persons" with a right to "due process" and "equal protection." At this level of abstraction, the amendment seemed to repudiate a multitude of inequalities beyond Black Codes and race laws.

But how to define this range? From one perspective it might be said that virtually all laws discriminate, treating some persons differently from others. Thus, most criminal codes treat arsonists differently from burglars and both differently from non-felons; tax codes often draw lines between homeowners and renters, between wage earners and dividend recipients, and so on. What makes ordinary tax codes qualitatively different from the Black Codes? Conversely, what sorts of nonracial laws might be more like the Black Codes than the tax codes?

Modern judges have wrestled with these issues by fixing their gaze on the phrase "equal protection" in the Fourteenth Amendment's overworked second sentence. Yet perhaps additional guidance may be found in the overlooked first sentence, and in particular in its key word: "born." The amendment's text summoned up a provocative vision of birthright citizenship: Government could properly regulate its citizens' behavior—their conduct and choices—but should never degrade or penalize a citizen or treat that citizen as globally inferior to others simply because of his or her low birth status. The Black Codes, which subordinated certain people simply because they were born with dark skin, defined the paradigm case of impermissible legislation, but the grand idea that humans were born free and equal opened itself to broader interpretations—some plainly invited by Reconstruction Republicans, others less clearly foreseen yet nonetheless textually permissible. Laws that stigmatized those born out of wedlock, or that discriminated against American-born children of immigrants, or that doled out extra inheritance rights to firstborn children, or that heaped disabilities on anyone born a Jew or born female, or that gave special privileges to scions of the wealthy—all such legislation could plausibly be seen as violative of the equal-birth principle.⁷²

The notion that all persons are born/created equal was hardly a new idea in 1866. Lincoln had insisted that this was *the* core idea of the Declaration of Independence, whose main draftsman himself had worked to overturn Virginia's primogeniture laws during the Revolution. In a farewell message penned fifty years after the Declaration, Jefferson had also famously reminded his countrymen that "the mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately, by the grace of God."⁷³ Though the slaveholding Jefferson had not in life practiced what he preached on his deathbed, other Founding-era texts offered sturdier, less ironic foundations upon which Reconstruction Republicans could build. As of 1792, six states had outlawed or moved toward outlawing slavery, and in turn four of these six had enacted a Revolutionary-era state constitution. Every

one of these four—and interestingly enough, only these four—featured a clause affirming that "all men" were "born" "equal."⁷⁴

Whereas the Founding text used the word "men" in describing the principle of birthright equality, its Reconstruction descendant did not—and for good reason. Far more than is generally recognized today, the framers of the Reconstruction Amendments focused not merely on the race issue but also on intersecting issues of gender. Urgent questions of status and inequality topped the political agenda in the 1860s in a way that they had not in the 1780s. Once these issues had risen to the surface, conversations about race and sex intertwined in complex and fascinating ways. The justices debating the question of black citizenship in *Dred Scott* had found themselves obliged to ponder female citizenship; the framers of the Thirteenth Amendment had plainly understood that females were half the population seeking emancipation; and, as we have already begun to glimpse and shall soon see in more detail, women were central political actors in, and subjects of, the great drama surrounding the enactment of the Fourteenth and Fifteenth Amendments.

"No State shall"

Nowadays, the Fourteenth Amendment's second sentence ("No State shall . . .") is the handiest constitutional tool in the judicial kit bag, a constitutional provision deployed in court more often than any other—more often, perhaps, than all others combined. As a formal matter, this single sentence has come into play in most of the major constitutional cases decided by the modern Supreme Court. In its entirety, the sentence reads as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Today's Court construes these words to safeguard a vast array of rights against states—both substantive rights (like freedom of religion and expression) and procedural rights (such as a criminal defendant's entitlements to appointed counsel and trial by jury); both rights enumerated elsewhere in the Constitution (especially in the Bill of Rights) and unenumerated rights (most important, rights of privacy and sexual freedom); both political rights (paradigmatically the rights to vote, hold office, and serve on juries) and nonpolitical civil rights (including rights of minors, aliens, and other nonvoters). All of which should lead us to ask whether

this sentence's text and enactment history in fact support this extraordinary judicial outpouring.*

Let's begin with what lawyers call the "incorporation" doctrine: the firmly settled judicial principle that the Fourteenth Amendment should be construed to "incorporate"—to apply—almost all of the provisions of the Bill of Rights against states. As we have seen, the First Congress designed the Bill of Rights in 1789 to rein in the *federal* government. This Bill safeguarded freedom of religion and expression, the right to keep and bear arms, entitlements to grand and petit juries, and so on, against violation by federal officials, but did not expressly guarantee any of these rights and freedoms against state officials. The First Amendment explicitly spoke of limiting "Congress," while the rest of the Bill was understood in the 1790s as a constraint on federal officials. For instance, when the Fifth Amendment said that "no person shall be . . . deprived of life, liberty, or property, without due process of law," the clear meaning to contemporaries was that no person could be so deprived *by the federal government*.

Of course, James Madison had sought to add to this catalogue a list of rights that "no state shall" abridge, but his pet amendment to this effect, which passed the House as its proposed "Art. XIV," did not clear the Senate. The incorporation doctrine reads Congressman Bingham's Fourteenth Amendment to do almost precisely what Congressman Madison tried and failed to do with his proto-Fourteenth Amendment. Indeed, Bingham went beyond Madison in a way that Madison himself would have envied. Madison's unsuccessful plan had said only that "no state shall infringe the right of trial by jury in criminal cases, nor the rights of conscience, nor the freedom of speech, or of the press." Bingham's successful plan said that "no State shall . . . abridge" a wide range of "privileges" and "immunities"—encompassing not merely the privileges mentioned by Madison's prototype but all fundamental civil rights and freedoms declared in the Bill of Rights and in other canonical legal sources.⁷⁵

In ordinary nineteenth-century language, the various civil rights and freedoms mentioned in the Bill of Rights were indeed quintessential "privileges" and "immunities" of Americans. In fact, Bingham borrowed directly from the Bill itself with his language "No . . . shall . . . make . . . law . . . bridg[ing]"—all words lifted directly from the First Amendment.

*For much more discussion and documentation of the ideas summarized over the next several pages, the interested reader may wish to consult my earlier book *The Bill of Rights: Creation and Reconstruction*, especially Chapters 7–12.

Here the very text of the Fourteenth Amendment pointed the careful reader to its tight interlinkage with the Bill of Rights. Bingham's specific phraseology made special sense to his 1860s audience, because the most widely read (if also reviled) judicial opinion of the era was Taney's *Dred Scott*, which had explicitly described the Bill of Rights as "rights and privileges of the citizen." Elsewhere in the opinion, Taney referred to "liberty of speech," the right "to hold public meetings upon political affairs," and the freedom to "keep and carry arms" as core "privileges and immunities of citizens."⁷⁶ Though Bingham and his fellow Republicans emphatically rejected Taney's definition of *who* was a citizen, they largely agreed with Taney about *what* citizenship meant: American citizenship entitled a person to a broad set of "privileges and immunities" exemplified by the Bill of Rights. Henceforth, Bingham and others explained, no state would be allowed to abridge these fundamental freedoms.

Antebellum judicial case law had (properly) held that the Founders' Bill did not apply against states. Bingham was thus proposing an important change, as he explained in a series of prominent speeches in the House. Bingham repeatedly pointed his audience to the leading Supreme Court opinion, *Barron v. Baltimore*, authored by Chief Justice Marshall in 1833.⁷⁷ *Barron* said that if the First Congress had meant to apply the Bill of Rights to states, Congress would have used explicit words to that effect, just as the Philadelphia framers had used explicit words in Article I, section 10 when they imposed various limits on state governments. Taking his cue from *Barron*, Bingham decided to use the very Simon-Says language the *Barron* Court had called for; thus, his proposal borrowed the words "No State shall" verbatim from Article I, section 10.

Bingham's public explanations of his proposed amendment repeatedly linked the phrase "privileges or immunities of citizens" to "the bill of rights." The latter phrase appeared more than a dozen times in one key 1866 speech and six times in a later speech.⁷⁸ *The New York Times* summarized Bingham's amendment as "a proposition to arm the Congress . . . with the power to enforce the Bill of Rights," and Bingham himself published his key speech in a popular pamphlet whose title said it all: "One Country, One Constitution, and One People: Speech of the Hon. John A. Bingham of Ohio, in the House of Representatives, February 28, 1866, *In support of the proposed amendment to enforce the Bill of Rights*."⁷⁹

Other Reconstruction leaders echoed Bingham. For example, Senator Jacob Howard, speaking on behalf of the amendment's sponsors in a speech delivered before a packed gallery, reported that "privileges or immunities of citizens" encompassed "the personal rights guaranteed and secured by

the first eight amendments of the Constitution." Howard then listed these rights one by one—"freedom of speech and of the press," "the right to keep and to bear arms," "the right to be tried by an impartial jury," and so on—and explained that "the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights . . . do not operate in the slightest degree as a restraint or prohibition upon State legislation. . . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."⁸⁰ Both *The New York Times* and the *New York Herald* (the nation's bestselling newspaper in 1866) gave Howard's explanation front-page coverage and reprinted in full his Bill of Rights discussion.

Other leading Reconstruction Republicans sang from the same hymn, and several elaborated the particular need to hold states to the specific guarantees in the federal Bill. The Slave Power had been able to prevail in antebellum America precisely because it had been allowed to trample basic rights such as free expression, freedom of worship, and due process. In their first national campaign, in 1856, Republicans had highlighted these outrages in a memorable slogan that told voters just what Republicans stood for: "Free Speech, Free Press, Free Men, Free Labor, Free Territory, and Fremont."

But why, we might wonder, did the Fourteenth Amendment's second sentence append a due-process clause to its earlier language requiring states to honor "the privileges or immunities of citizens"? If the privileges-or-immunities clause encompassed the various rights enumerated in the first eight amendments, those rights surely included the right to due process, which appeared explicitly in the Fifth Amendment. Wasn't the Fourteenth Amendment's inclusion of its own due-process clause weirdly redundant? In a word, no. As Bingham and Howard both explained,⁸¹ the privileges-or-immunities clause would protect only *citizens* from oppressive state action. A separate due-process clause was thus needed to make clear that all "persons"—even aliens—were entitled to basic rights of procedural fairness. The citizen/person distinction took on particular significance because Taney's *Dred Scott* opinion had insisted that the federal Bill of Rights protected only "citizens" and that free blacks, as noncitizens, had no rights under the Bill. (This insistence explained why Taney could so quickly brush aside the due-process claims of free blacks threatened by the rigged procedures of the Fugitive Slave Act of 1850.) In making clear that even noncitizens had certain procedural rights that states (and by implication, the federal government) had to respect, the Fourteenth Amendment's

second sentence continued the anti-Taney theme that plainly animated its first sentence.

Despite the wealth of textual, structural, and historical evidence supporting the incorporation doctrine, skeptics have raised important questions about the peculiar manner in which the Court eventually came to apply the Bill of Rights to the states—a judicial process that did not begin in earnest until the mid-twentieth century. What took the justices so long to see the light? And instead of emphasizing the clean textual argument that "privileges or immunities of citizens" encompassed the federal Bill in both ordinary language and case law circa 1866, the modern Court has used the Fourteenth Amendment's due-process clause as the vehicle for incorporation. Where various procedural rights are at issue—confrontation, compulsory process, counsel, and so on—the "due process" language is surely spacious enough to do the work. But how does a clause about *procedural* rights incorporate *substantive* freedoms such as freedom of expression and religion? The Court's odd answer—its doctrine of "substantive due process"—not only verges on oxymoron, but also perversely builds on *Dred Scott* itself, the Court's first effort to inject strong substantive content (there, the right to hold slaves) into the words "due process." To make matters worse, the Court has never satisfactorily explained why it has (thus far) declined to incorporate three provisions of the federal Bill—the right to keep arms, the right to be indicted by a grand jury, and the right to demand a civil jury in common-law cases.

But none of the skeptics' objections is a good argument against incorporation per se, as distinct from the particular manner in which the Court has effected and explained its doctrine. The best objection to the very idea of incorporation is thus this: If the Fourteenth Amendment meant to incorporate the first eight (or ten) amendments against the states, surely it could have expressed this purpose in more direct language.⁸²

What this objection misses is that the Fourteenth Amendment aimed to incorporate various rights and freedoms in the Bill of Rights in a subtle way that meant both *more* and *less* than the first set of amendments as originally understood. Although "privileges or immunities" of citizens paradigmatically included the rights and freedoms in the federal Bill, these were not the *only* fundamental rights that henceforth no state could abridge. Other rights declared elsewhere in the Constitution—for example the "privilege" of habeas corpus protected against the federal government in Article I, section 9—defined additional core privileges that should be applied against states. Still other eligible candidates for inclusion in the civil-rights pantheon included fundamental freedoms affirmed by canon-

cal legal texts, such as the American Declaration of Independence or the English Bill of Rights, or declared in various state constitutions, or promulgated by Congress in landmark civil-rights legislation (like the Civil Rights Act of 1866).

Though the modern Court has failed to appreciate Congress's general authority to enact "appropriate" enforcement laws defining new substantive "privileges or immunities of citizens," the Reconstruction Congress chose these broad words at the beginning and end of the amendment precisely to give itself and its successors a sweeping mandate to invalidate future state misconduct. In effect, the Fourteenth Amendment was designed to revive an idea that Madison had repeatedly put forth, unsuccessfully, at 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 understanding of the individual right in question.

Even as the precise language of the Fourteenth Amendment thus meant more than the first eight (or ten) amendments, it also meant less. Not every facet of the early amendments was truly a "privilege" of individual "citizens" as distinct from a right of states. For instance, part of the First Amendment had protected a state's authority to define its own policies regarding church establishments, yet this states'-rights aspect of the First Amendment made little sense if applied *against* states.

The Second Amendment gave rise to a particularly nice illustration of how the precise language of "privileges or immunities" incorporated core elements of the Bill of Rights while at the same time refining and redefining the Founders' text. At the Founding, the Second Amendment's affirmation of the people's right to bear arms intertwined with a strong commitment to local militias, a pronounced uneasiness about a federal army, and a tight focus on the political rights and responsibilities of voters/jurors/militiamen. Four score years later, this original vision had dissolved, thanks largely to the Civil War and to the very process by which the Fourteenth Amendment was to be ratified with the aid of the Union Army. Yet when filtered through the well-chosen language of "privileges or immunities of citizens," the Founders' Second Amendment could be refined into a rather different kind of right: a right/privilege to keep a gun at home for self-protection—a right of all citizens, female as well as male, acting individually rather than in a collective militia, wielding weapons in a private space rather than mustering on the public square.

In 1866, the prevalence in the South of marauding bands of white thugs, terrorizing black families whom state governments were failing to

safeguard via genuinely "equal protection" of criminal laws, made an individual right to keep a gun in his—or her—home a core civil right deserving federal affirmation. This transformation of a Founding-era political right into a Reconstruction-era civil right was exemplified by a key congressional enactment in 1866, which declared that "laws . . . concerning *personal* liberty [and] *personal* security, . . . including the *constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens."⁸³

The words "privileges or immunities of citizens" not only enabled Reconstructionists to refine the Bill of Rights while generally applying these rights against states, but also made clear to the American public that the opening section of the Fourteenth Amendment applied only to civil rights and not to political rights such as voting, jury service, militia service, and officeholding. By conferring birthright citizenship on females as well as males—"all persons born" under the flag—the amendment's first sentence had strongly implied a focus only on civil rights. Citizenship itself did not imply voting or other political rights—a point that Justice Benjamin R. Curtis had famously stressed in his emphatic dissent in *Dred Scott*. Two years before that case, Congress itself had made clear in a naturalization statute that a foreign-born white woman who married an American husband would herself become a (nonvoting) "citizen" of the United States.⁸⁴

The amendment's civil-rights focus sharpened in its second sentence, whose language borrowed from Article IV, which had likewise spoken of "Privileges" and "Immunities" of "Citizens." Article IV, it will be recalled, had affirmed an idea of *interstate equality of citizenship*: A Massachusetts citizen traveling in South Carolina would as a rule be entitled to be treated as a South Carolinian. The Fourteenth Amendment promised much more, namely, *full and equal in-state citizenship*: 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. But under both Article IV and the Fourteenth Amendment, the basic "privileges" and "immunities" of "citizens" would extend only to civil rights, not political rights. Under Article IV, a Massachusetts visitor would have no right to vote in a South Carolina election, serve on a South Carolina jury, et cetera. So, too, the Fourteenth Amendment guaranteed civil rights but not political rights against each citizen's home state.⁸⁵ In explaining the amendment's first two sentences to the American public and state legislatures being asked to support and ratify the amendment, Republican leaders repeatedly stressed these sentences' utter inapplicability

to suffrage issues.⁸⁶ Northerners were not yet ready for a federal amendment mandating black (or woman) suffrage in every state.*

"Representatives shall be apportioned"

Yet the suffrage question demanded urgent attention in 1866. The Founders' Constitution had allowed the South to count nonvoting slaves at three-fifths, but after emancipation ex-slave states would be entitled to count all inhabitants at five-fifths, whether or not freedmen could vote. Emancipation thus ironically threatened to increase the South's clout in future Congresses (and electoral colleges).⁸⁷ Congress's 1867 resolve that ex-rebel states must extend the franchise to black men as a condition of reentry promised to solve part of the problem: If blacks could vote in the new South, then this Reconstructed region would *deserve* more seats. But what if a readmitted state later backslid by amending its state constitution to disenfranchise blacks? Suppose several states did this en masse and had enough pull in a future Congress to prevent exclusion or expulsion on republican-government grounds? And what about loyal states such as Kentucky, Maryland, and Delaware, where blacks made up a double-digit percentage of the population yet were not allowed to vote? Why should such states be allowed to count these nonvoters at a full five-fifths when white representatives could hardly be trusted to represent black interests?

Republicans grappling with these questions in 1866 faced several alternatives. First, Congress could propose a Fourteenth Amendment that would directly regulate state suffrage. Such an amendment could either constitutionalize universal adult male suffrage or, more modestly, forbid all race-based suffrage rules while allowing states to impose other sorts of voting restrictions (involving age, sex, residence, literacy, nativity, payment of poll taxes, absence of criminality, and so on). In 1869, Congress would ultimately propose the more modest version in its Fifteenth Amendment, but in 1866 even this was thought to go too far. Moderate Republicans

*The modern Supreme Court has read the language of the equal-protection clause to apply to voting rights; see, e.g., *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964). But the Thirty-ninth Congress designed this clause with nonvoting aliens—"persons" as distinct from "citizens"—quintessentially in mind and sold this clause to the American public as a guarantee of civil rights, as opposed to political rights. From the perspective of constitutional text, history, and structure, the voting-rights issues in cases such as *Baker* and *Reynolds* are better seen through the lens of the Article IV clause guaranteeing republican government. For a discussion of why courts may properly enforce this Article IV clause, notwithstanding certain overbroad readings of *Luther v. Borden*, see my essay "The Central Meaning of Republican Government," *Colorado LR* 65 (1994): 749, 753–54, 776–77, 780.

feared they could not sell the equal-suffrage idea in the North, where white bigotry remained a stubborn fact of life. Only five Northern states in 1864 let blacks vote on equal terms, while a sixth (New York) allowed blacks to vote if they met special property qualifications. Everywhere else, blacks were barred from the ballot. In 1865–67, equal-suffrage proposals went down to defeat in all six of the states that put the issue to a popular vote (twice in the case of Minnesota). While the vast majority of Republican voters supported these proposals, this sizable vanguard had yet to win control of the political center.⁸⁸

A second possible approach would have linked House apportionment directly to each state's voting base rather than its overall population: The more persons a state let vote, the more seats it would get. Disenfranchising blacks would not be prohibited but rather penalized, via a loss of seats. Conversely, each state would have a strong republican incentive to expand its suffrage. But perhaps too strong? For example, a given state might double its federal clout by enfranchising women; other states might thereafter feel pressure to follow suit.⁸⁹ The question of woman suffrage—which had been a nonissue in the late 1780s—was far from hypothetical in the mid-1860s: Less than two years after the Fourteenth Amendment's ratification, the Wyoming Territory would embrace complete political equality for women (in voting, jury service, and officeholding). In 1865, a couple of states already allowed some women to vote in local school elections, and beginning in the mid-1870s, many more states would follow suit. A proposal for general woman suffrage appeared alongside a separate proposal for black suffrage on the Kansas ballot in 1867, though both measures were ultimately voted down by (white male) voters.⁹⁰

Indeed, it was in no small measure the woman issue that ultimately dictated the precise shape of the Fourteenth Amendment's eventual solution to the urgent question of black suffrage. Had Congress opted to peg apportionment to each state's voting base, this would have solved the North-South imbalance only by creating a perceived East-West imbalance—an imbalance that itself reflected the uneven gender distribution among true-blue states. According to the 1860 census, females accounted for over 51 percent of the white population in Massachusetts but less than 30 percent in California. To switch from a population base to a voting base would (in the absence of woman suffrage) give the Massachusetts delegation roughly the same number of seats as she currently enjoyed but would dramatically increase California's share, since the Golden State boasted a much higher ratio of voters (or, put differently, had a much lower ratio of nonvoting women and children).⁹¹ In debating the apportionment

question, congressional Republicans openly discussed the gender issue⁹² and in the end found themselves obliged to insert the word "male" into the Constitution—a word that the Founders had managed to omit.

The solution that ultimately became section 2 of the Fourteenth Amendment pegged apportionment to each state's overall population—including women, children, aliens, and other nonvoters—but with a twist. Whenever a state disenfranchised any part of its presumptive voting base, its federal apportionment would correspondingly drop. Thus if, say, Missouri disenfranchised the 7 percent of its population that was black, then it would receive 7 percent fewer seats. The penalty would bite regardless of whether the state formally used race as the basis for disenfranchisement or instead crafted some sly proxy (such as literacy) or indeed did anything that in fact disenfranchised any part of its presumptive voting base, black or white. The key to this strategy was to define a state's presumptive voting base in a manner that avoided penalizing the state for disenfranchising women or aliens. Hence section 2's gendered focus on each state's "male inhabitants" who were "twenty one years of age, and citizens of the United States."⁹³

Women's-rights advocates, led by prominent women themselves, voiced their strong disapproval of section 2. Some of these early feminists, such as Lucy Stone, nevertheless eventually came to support the Fourteenth Amendment. For these crusaders, section 1's strong affirmation of basic civil rights for all citizens—black and white, male and female—outweighed section 2's implicit affirmation of political-rights inequality between black males and white females. For other champions of women's rights, including Susan B. Anthony and Elizabeth Cady Stanton, the insertion of the word "male" sent an unacceptably retrograde message, namely, that the federal Constitution cared not a whit whether women voted: presumptively, only men were voters. On New Year's Day, 1866, Stanton wrote to a (male) colleague that "if that word 'male' be inserted [into the Constitution], it will take us a century at least to get it out."⁹⁴

The divisions within the women's-rights movement—divisions that would soon widen with the proposal and enactment of the Fifteenth Amendment—were particularly poignant because women reformers had

⁹²One final wrinkle in this gendered formula allowed a state to disenfranchise without penalty all Confederate rebels and other criminals, lest the new South be deterred from meeting out justice to those whose gross misconduct had unfit them for the ballot. In a similar spirit, section 3 of the Fourteenth Amendment rendered certain Confederate officials who had betrayed antebellum loyalty oaths ineligible to serve in Congress, federal office, or state government unless two-thirds of each congressional house voted to lift the ineligibility.

played leading roles in abolitionism and the crusade for racial justice. Sisters Sarah and Angelina Grimké had won acclaim for their antislavery lectures, while novelist Harriet Beecher Stowe was, in Lincoln's words, "the little woman who wrote the book that made this great war." In early 1864, the Women's National Loyal League presented Congress with an emancipation petition bearing one hundred thousand signatures, most of them women's; eventually the League gathered some four hundred thousand names. At the Eleventh National Woman's Rights Convention, held only a month before the Fourteenth Amendment cleared Congress, delegates unanimously applauded "Emancipation and the Civil Rights bill" by which "the negro and woman now hold the same civil and political status, alike needing only the ballot; and . . . the same arguments apply equally to both classes, proving all partial legislation fatal to republican institutions."⁹⁴ In a related campaign, thousands of women flooded Congress with petitions for woman suffrage.⁹⁵ Section 2 spurned these petitions even as it embraced the presumptive political rights of black men.

In later decades, this section's rules were never enforced as intended to penalize any actual disenfranchisement. Part of the problem arose during the 1870 census, when Congress began to confront some of the difficulties involved in determining the exact proportions of each state's actual disenfranchisements.⁹⁶ Thanks to Reconstruction legislation and the newly ratified Fifteenth Amendment, widespread black suffrage circa 1870 was a genuine reality in both the former Confederacy and the middle states, leaving section 2 with rather less work to do than had been feared in 1866. In later decades, when massive Southern disenfranchisement began to take root, the lapses in 1870 meant that there was no early institutional practice on which to build a sturdy section 2 enforcement apparatus. Ironically enough, perhaps section 2's largest legacy was its splintering effect upon the woman-suffrage movement. A clause aimed at including black men had its largest impact by dividing white women.

But all this is hindsight. Republicans in 1866 could hardly know that the very goal that they thought was politically unreachable—a national ban on race discrimination in suffrage—would soon become the law of the land and thereby shift future federal policy away from a regime of indirect apportionment incentives and toward a direct mandate on states.

"The right . . . to vote"

In the congressional election of 1860, race-blind suffrage rules prevailed in only five states, comprising less than one-half of 1 percent of the nation's

blacks. In the congressional election of 1870, thanks to the newly ratified Fifteenth Amendment, equal suffrage was the supreme law of the land, binding in every state and in all elections, local, state, and federal. How could such a sea change occur? How could a rule that Republican leaders themselves saw as politically suicidal in mid-1866 win the assent of three-quarters of the states in early 1870?

The story of black ballots begins with black bullets. At war's end, it started to sink in that blacks in blue had helped save the Union. In March 1864, Lincoln was confidentially moving toward the notion that reconstructed Southern governments should enfranchise some blacks—in particular, “the very intelligent, and especially those who have fought gallantly in our ranks.” In another private letter, Lincoln declared himself “clear and decided” that blacks, “who have so heroically vindicated their manhood on the battle-field, . . . have demonstrated in blood their right to the ballot, which is but the humane protection of the flag they have so fearlessly defended.” In a speech delivered four days before his death—formal remarks that grieving Americans soon came to realize were his last words to them—Lincoln went public with his new vision: “It is . . . unsatisfactory to some that the elective franchise is not given to the colored man. I would myself prefer that it were now conferred on the very intelligent, and on those who serve our cause as soldiers.”⁹⁷

On the first day of the Thirty-ninth Congress, Sumner took the position that no ex-Confederate state “can be accepted as republican, where large masses of citizens who have been always loyal to the United States are excluded from the elective franchise, and especially where the wounded soldier of the Union, with all his kindred and race, and also the kindred of others whose bones whiten the battle-fields where they died for their country, are thrust away from the polls.”⁹⁸ Sumner here both played the soldier card and upped the ante, openly urging not just ballot access for the black soldier himself, but for all black men.* While focusing particular attention on

*Sumner also played a property card, stressing the need to keep “faith with national soldiers and national creditors.” *CG*, 39:1-4 (Dec. 4, 1865) (emphasis added). Section 4 of the Fourteenth Amendment ultimately constitutionalized this theme. Just as the Founders in Article VI had pledged faith to creditors who had backed the United States in the Revolutionary War, so section 4 provided that “the validity of the public debt of the United States, authorized by law, including debts incurred for payments of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned.” Section 4 went on to prohibit any governmental payment of Confederate debt and also any compensation for slave masters, even loyal ones—a dramatic reversal of the compensation plan at the heart of Lincoln’s proposed Fourteenth Amendment in late 1862.

Southern disenfranchisements, he also let it be known that he favored black suffrage in the North as well.⁹⁹

Sumner’s colleagues, however, were not yet prepared to follow his lead. The path from Sumner’s fall to Sumner’s rise was rather roundabout. In the end, black bullets won black ballots only indirectly, via a political ricochet. First, in 1866–68, Northern white Republicans imposed black suffrage on the former Confederacy while exempting their own states. Then, in 1869–70, Northern white Republicans eventually linked arms with new Southern black voters and black lawmakers to reform the North and also cement voting rights in the South.

DECEMBER 7, 1868, is a date that should live in glory. For the first time ever, a session of Congress (in this case, the third session of the Fortieth Congress) began with a membership that had been obliged to come before various electorates and state legislatures encompassing large numbers of blacks alongside whites. Although many Northern states continued to exclude black voters, the great majority of ex-Confederate states had finally rejoined Congress, thanks to their enactments of new state constitutions based on equal suffrage and their ratifications of the Fourteenth Amendment (which was proclaimed valid in late July). These readmissions left only three unreconstructed holdouts—Virginia, Texas, and Mississippi—outside the congressional fold.¹⁰⁰

Much as they had cause to celebrate in December 1868, Republicans also had grounds for concern. True, the party had just won substantial victories in the November congressional races and could also look forward to the departure of Andrew Johnson in favor of General Ulysses Grant. Yet the general had won only 300,000 more popular votes than his Democratic rival, Horatio Seymour. Since roughly half a million blacks had voted, it appeared that most whites had actually backed the Democratic presidential ticket. If, however, another constitutional amendment could require Northern and middle states to extend the franchise to blacks, this infusion of new voters might give Republicans extra electoral security in the coming years. Also, by federalizing an equal-suffrage right that was then only a feature of state constitutions arguably subject to unilateral repeal, a new amendment could guarantee against the risk of future Southern backsliding.¹⁰¹

But why, we might ask, was the political climate in 1868–69 any more conducive to an equal-suffrage amendment than in 1866, when Republi-

cans had carefully considered and rejected this option? For starters, Northern Republican crusaders in Congress could now join forces with new Southern Republicans who themselves had to answer to multiracial constituencies. Also, the Fifteenth Amendment would be conceived at a different stage of the electoral cycle than had the Fourteenth. In the spring of 1866, Republicans in the *first* session of the Thirty-ninth Congress knew that they had to come before the voters very soon and thus crafted their Fourteenth Amendment as the party's unofficial campaign platform. Since Northern (white) voters were not ready for a national mandate of political rights for blacks, Republicans promised only civil rights. But in the winter of 1869, members of the *third* (lame-duck) session of the Fortieth Congress had less to fear from potentially hostile voters, whom they would not need to face immediately. With any luck, by the time new elections rolled around, the Fifteenth Amendment itself would be the law of the land. If so, any lost white votes might be offset by grateful black votes; Republican congressmen in 1869 were thus freer than they had been in 1866 to vote their conscience with impunity.

Reformers had also won back the presidency between 1866 and 1869. Though Article V gave no formal role to the president, Andrew Johnson had wielded all his powers of patronage and persuasion to assail the reformist platform in 1866. Even after congressional reformers won a resounding vote of confidence from their Northern constituents in the midterm election of that year, Johnson himself (who was of course not on the 1866 ballot) remained in office as a stubborn reality to be reckoned with. In 1869, however, Republicans were united under Grant, and reformers could make their case with no fear that the president would use his pulpit to foment white bigotry against them. In fact, the new president used his Inaugural Address to "entertain the hope and express the desire" that the Fifteenth Amendment would be promptly ratified. Meanwhile, some white voters seemed to be warming to the idea of black suffrage. Though this idea had lost in all six states that put the issue to a vote between 1865 and 1867, it won in two states in 1868, one of which (Minnesota) had twice rejected the reform in prior votes. In any event, the Fifteenth Amendment would not come directly before the voters, but rather before Republican-dominated state legislatures whose members were more apt to toe the party line and who were themselves likely to benefit from the grateful votes of newly enfranchised blacks in future elections.¹⁰²

Horizontal and vertical federalism issues also interacted in different ways in the mid- and late 1860s. Early on, the issue was whether a given

Northern state should *unilaterally* enfranchise its blacks. Some who believed in the abstract idea of equality might nevertheless have voted no, lest the new rule induce a massive influx of new blacks into the state.¹⁰³ But in 1869–70, the issue was whether *all* states should collectively enfranchise blacks. In this context, no state had reason to fear becoming a magnet. A state that ratified the Fifteenth Amendment did not thereby commit itself to equal suffrage unless and until all its neighbors would likewise be bound. In the end, every Northern state that said no to equal suffrage in 1865–67 said yes to the Fifteenth Amendment in 1869–70.

By its terms, the amendment did not mandate universal manhood suffrage. It merely prohibited race-based disenfranchisements. In later decades, this narrow draftsmanship would prompt countless shams and subterfuges whereby various states—especially ex-Confederate states—would use formally neutral voting rules, such as literacy tests and poll taxes, to exclude blacks from the ballot. In theory, such disenfranchisements should have triggered apportionment penalties under section 2 of the Fourteenth Amendment, but as already noted, this section was never enforced. Robust and sustained enforcement of black voting rights came only in the Second Reconstruction of the 1960s, when Congress used its sweeping enforcement powers under the Fifteenth Amendment's second section to enact "appropriate" legislation targeting state abuses. Here was yet another ricolchet: An amendment that had been propelled forward by black votes in the South ultimately succeeded in revolutionizing black voting in the North, which in turn eventually brought the South back into line. (Much of the congressional support for 1960s enforcement laws occurred thanks to Northern black voters.)

America's Second Reconstruction also witnessed the end of American apartheid, the gross sham of "separate but equal" that the Court had blessed in the 1896 case of *Plessy v. Ferguson*, over the dissent of Justice Harlan. Harlan's dissent has come to be seen as based on the Fourteenth Amendment's guarantees of equal citizenship and equal protection, but Harlan himself took pains to stress the Fifteenth Amendment as well, which he read to guarantee that "no citizen should be denied, on account of his race, the privilege of participating in the political control of his country."¹⁰⁴ Of course, the amendment's text spoke only of "the right to vote," but Harlan evidently understood that this right in both letter and spirit encompassed not merely the equal right to *vote for legislators* and other elected officials, but also the equal right to *vote in legislatures*, the equal right to be *voted for* and *serve in* any elective post, and the equal right to vote in *juries* of all sorts.

Harlan further understood that the Fifteenth Amendment, so read, was by its very nature inherently integrationist. Standing alone, the Fourteenth promised equality, but as a conceptual matter, perhaps some forms of physical separation might well be equal. (Today, for example, physical separation of the sexes in public bathrooms and gym classes is thought to be equal and has met with the general approval of both sexes.) Though Jim Crow was in fact never equal—and thus violated the core idea of the Fourteenth—that amendment did not go so far as did the Fifteenth, which *necessarily* envisioned blacks and whites working side by side in jury rooms, legislative halls, and voting precincts.¹⁰⁵ As Harlan's dissent put the point in language interweaving the classic political rights, blacks had "risked their lives for the preservation of the Union" and were "entitled, by law, to participate in the political control of the State and nation" in "public stations of any kind." Whites and blacks needed to work alongside one another "in the jury box," "in a political assembly," and "when they approach the ballot-box."¹⁰⁶

With this integrationist vision, the nation thus committed itself—at least on paper—to a role for blacks strikingly different than the one that had held sway in the minds of many antebellum antislavery reformers. Whereas Lincoln's proposed Fifteenth Amendment in late 1862 had envisioned blacks being invited to emigrate to Africa or Latin America, America's eventual Fifteenth Amendment in 1870 envisioned black men being invited to work alongside white men in governing the American Republic as full political equals.*

*True, the amendment did not in so many words affirm a right of blacks to be voted for or to serve on juries. But legislators and jurors surely *vote*, and thus the amendment's text was easily read to apply to these domains. As a matter of near-universal antebellum custom and state law, "all the citizens who exercise the elective franchise have the right of serving on a jury." Alexis de Tocqueville, *Democracy in America* (Phillips Bradley, ed., 1945), 2:378 (Appendix I-R to chap. 16, vol. 1). In *Neal v. Delaware*, 103 U.S. 370, 389 (1881), the Supreme Court, in an opinion by Justice Harlan, held that the Fifteenth Amendment automatically made blacks eligible jurors wherever preexisting state law had tied jury service to suffrage rules.

The Reconstruction Congress's views are also instructive. In the late 1860s, Georgia, after promising to respect the right of blacks to vote, expelled all duly elected blacks from the state legislature. Congress responded in 1869–70 first by refusing to seat Georgia's senators and then by reimposing military reconstruction on the state. Thus, at the very moment when the nation was pondering whether to adopt the Fifteenth Amendment, Congress was dramatizing that the right of blacks to vote might indeed entail their rights to vote for fellow blacks and to serve in government. Meanwhile, in Georgia itself, the lead opinion in the state Supreme Court declared that "the right of the people, if they please to choose a colored man for an office, is a necessary incident to the right to vote. The right to vote is worth but little to the colored man if he is restricted in the exercise of that right, so that he can only vote for men of a white color." *White v. Clements*, 39 Ga. 232, 268 (1869). In 1875, Congress evidently relied on the letter and spirit of the

LEFT OUT OF THIS masculine picture, of course, were women, many of whom objected to the enfranchisement of black men while they themselves remained disenfranchised. But their very votelessness in 1869–70 made it that much easier for congressmen and state legislators to disregard their voices. Which raises the obvious question: How did America's women *ever* manage to lever their way out of votelessness and into suffrage? The answer lies in the next chapter of America's constitutional saga.

Black Suffrage Amendment to support enforcement legislation affirming the right of blacks to serve equally on juries. Compare U.S. Const. amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude") (emphasis added) with the Act of March 1, 1875, ch. 114, sec. 4, 18 Stat. 335, 336 ("No citizen . . . shall be disqualified for service as grand or petit juror in any court of the United States or of any State, on account of race, color, or previous condition of servitude") (emphasis added). In three earlier Reconstruction statutes, Congress had likewise linked the language of the Fifteenth Amendment to the right to hold office. See Virginia Readmission Act of Jan. 26, 1870, 16 Stat. 62, 63 ("It shall never be lawful for the said State to deprive any citizen of the United States, on account of race, color, or previous condition of servitude, of the right to hold office") (emphasis added); Mississippi Readmission Act of Feb. 23, 1870, 16 Stat. 67, 68 (same); Texas Readmission Act of March 30, 1870, 16 Stat. 80, 81 (same). For more on the interlinkages among voting, officeholding, and jury service, see note 106 to this chapter, and see also Chapter 11, pages 426–28.