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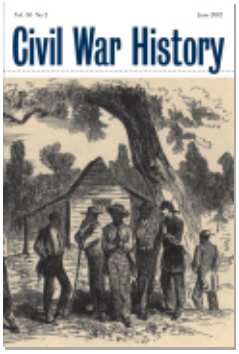

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Imagining a Different Reconstruction Constitution

Michael Vorenberg

When historians give the litany of obstacles that kept Reconstruction from living up to its potential—especially its potential for achieving long-term change in the political and civil rights of African Americans—they usually include the Constitution. By the Constitution, I mean not only the original text of the document and its first twelve amendments but also the three Reconstruction amendments: the Thirteenth, which was ratified in late 1865 and abolished slavery; the Fourteenth, which was ratified in 1868, defined citizenship and prohibited states from denying to people "due process" and "equal protection" of the law; and the Fifteenth, which was ratified in 1870 and prohibited the disqualification of potential voters on the basis of race or previous condition of servitude.

How do historians posit the Constitution as a limit to Reconstruction? Some do so explicitly, as the co-author of a famous textbook did when he entitled a section on Reconstruction "Constitutionalism as a Limit to Change."[1] Others point out that the framers of the original Constitution tended to regard the national government as having limited powers. Thus the framers enumerated specific powers for the new Congress in Article I, Section 8, rather than following the model of the English Constitution and granting to Congress plenary power, much as the English Parliament enjoyed. Such an interpretation assumes that this adherence to limited national power was

1. [David Herbert Donald], *The Great Republic,* 1st ed., 1 vol. (Boston: Little, Brown, 1977), 735–41.

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so anchored in American culture that even the Civil War could not move it from its moorings.

But by far the most common way that historians point to the Constitution as a limit to change is by investigating the origins of the language of the Reconstruction amendments and finding that lawmakers purposefully phrased these measures in a more limiting way than they might have. Such a critique of the amendments carries the implication that, had lawmakers changed a word here and shifted a clause there, they could have made things turn out for the better. Their failure to revise or amend the constitutional text properly kept the Constitution an obstacle to greater social and political change. Thus, in the case of the Thirteenth Amendment, historians make much of the fact that Senator Charles Sumner's proposal for language declaring all persons "equal before the law" failed to take the place of the final language, which seemed more narrow: "Neither slavery nor involuntary servitude, except as a punishment for crime, . . . shall exist within the United States."[2] In the case of the Fourteenth Amendment, lawmakers again rejected broad language—specifically, a proposal that "Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, in every State, the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty and property." The joint congressional committee on Reconstruction ultimately rejected this language, which framed power in terms of what Congress *could* do—Congress had certain powers within the states—to the final language of the amendment, which phrased power in terms of what states *could not* do—"No state shall make or enforce any law."[3] In the case of the Fifteenth Amendment, Congress rejected language declaring all males over the age of twenty-one eligible to vote, choosing instead language that again framed the issue in terms of what could *not* be done—the United States and individual states could not deny the vote on the basis of race or previous condition of servitude.[4] By focusing on these subtle but significant differences in language, historians have suggested implicitly or explicitly that, had more far-reaching language been adopted by Constitution writers—in this case, Reconstruction-era congressmen and various pressure groups—then much less of

2. Michael Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment* (Cambridge: Cambridge Univ. Press, 2001), 53–60, 99–107.

3. William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge, Mass.: Harvard Univ. Press, 1988), 49.

4. Xi Wang, *The Trial of Democracy: Black Suffrage and Northern Republicans* (Athens: Univ. of Georgia Press, 1997), 43–48.

Reconstruction would have been left "unfinished," to use the key adjective from the title of Eric Foner's famous book on Reconstruction.[5]

This premise might be tested by positing a counterfactual scenario. Imagine that the Reconstruction amendments had been phrased using the broadest language proposed, so that the text of the amendments put minimum restrictions on congressional power, on the nature of the rights to be granted, and on the recipients of those rights. Would Reconstruction have turned out any differently?

My answer, quite simply, is no. The constitutional text, either as originally drafted or as revised or amended, could not by itself have made a significant difference in the reach of Reconstruction. Why not? Because developments, some deeply rooted in American legal culture and some the unintended consequences of the Civil War, combined to counteract or undermine the potential for far-reaching change that *any* change of the constitutional text might have made.

All of these developments resulted in some way from the ascension of the Republicans to national power in 1860 and the ensuing outbreak of the Civil War. These circumstances set the stage for the reconstruction of federal judicial power, a power that had been much weakened by the Supreme Court under Chief Justice Roger B. Taney in the Dred Scott decision of 1857, which many regarded as a disastrous attempt by the federal judiciary to resolve a political problem. More trouble came to the federal courts in the first two years of the Civil War: the United States was forced to abandon the federal courts in the Confederate states (though the Confederacy gladly absorbed them), U.S. courts were ineffective in resolving the internal strife in the border states, and even the U.S. Supreme Court could be ignored, most notably by President Abraham Lincoln, who spurned Chief Justice Taney's 1861 *Merryman* decision decrying Lincoln's suspension of habeas corpus. Things seemed to look better for the federal courts in mid-1862, when the Second Confiscation Act empowered federal courts to oversee certain confiscation proceedings, but the real swing back to an empowered judiciary

5. Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* (New York: Harper and Row, 1988). I am aware that I am including myself when I criticize historians who imply that the different language of the Reconstruction amendments might have led to better conclusions. In my defense, I would argue: (1) that I did point out in my book on the Thirteenth Amendment that the exact language of the measure did not reflect an actual difference in attitudes about the expected status of the freed people or the nature of "equality" (see Vorenberg, *Final Freedom,* 55–56); and (2) that since the publication of that book I have grown even more skeptical about the possibility that more far-reaching language would have led to more far-reaching changes.

began more strikingly with the Habeas Corpus Act of 1863, which made federal instead of state courts the primary sites of habeas disputes. By the end of 1864, Congress had passed a statute increasing the number of federal circuit judges and adding a new justice to the Supreme Court. Meanwhile, Lincoln had appointed five new Supreme Court justices, including Chief Justice Salmon P. Chase, who assumed the office after the death of Taney in late 1864. Even before Chase's appointment, the Court had begun to issue rulings, such as the one in the Prize Cases of 1863, that made a convincing reassertion of the Court's power (convincing, in part, because they received the Lincoln administration's support).

By the end of 1864, the restoration of federal judicial power was on its way to being cemented, but that development had not been anticipated prior to that point. Indeed, before late 1864, the future of federal court power was uncertain. It was for this reason that Senator Lyman Trumbull, the Chair of the Senate Judiciary Committee, was reluctant to specify the federal courts as the arbiters of all confiscation and emancipation proceedings in the Second Confiscation Act of 1862. It was also for this reason that the resolution calling for an antislavery amendment to the Constitution, which passed the Senate in April 1864, declared that Congress would enforce the measure by "appropriate legislation" rather than leaving enforcement explicitly and solely to the federal courts; and, finally, it was for this reason that Congress glaringly left federal courts out of the so-called Wade-Davis bill, which Congress passed in mid-1864, but which Lincoln pocket-vetoed. This was the only congressional plan passed before the end of the war to specify the means by which Southern civilians and states would come back into the Union as well as the means by which emancipation would be secured. Congress seemed to think that these processes would be overseen not by the federal courts but by national statute and congressional review.

The reemergence of federal judicial power beginning at the end of 1864 meant that this vision of congressional supremacy would never be fully realized. With the *Slaughterhouse* case of 1873, it became clear that the Supreme Court was back in power as the primary interpreter and maker of constitutional law; that aspect of the antebellum political system had been restored, even as others, such as the centrality of slavery in the constitutional order, had fallen away. *Slaughterhouse,* which concerned the power of a state (in this case Louisiana) to create a monopoly, was especially important as the first Supreme Court decision to issue an interpretation of the Thirteenth and Fourteenth Amendments. The majority opinion of *Slaughterhouse* may have differed from the minority opinions about such matters as the residual

power of the states, but all the opinions agreed implicitly on the principle that, whatever judicial power had been usurped by Congress and the Executive branch during the previous decade or so, the federal judiciary once again was supreme. The U.S. Supreme Court in particular would be the final arbiter of the meaning of the Reconstruction amendments. Congressional committees and executive agencies such as the newly created Department of Justice would have to yield to the Court.[6]

The resumption of federal judicial authority was the result in large part of contingent circumstances, but it was also a natural consequence of a constitutional system in which American constitutions, unlike the English constitution, were written, and the textual nature of those constitutions was seen as necessarily restraining Congress and state legislatures so that they did not become English-style parliaments with plenary powers. That same system simultaneously empowered the courts as the primary interpreters of the constitutional text. As the legal scholar H. Jefferson Powell has written, "One of the most important institutional consequences of the American decision to commit the state and federal constitutions to paper was the occasion it created for courts to set their own judgments on matters of fundamental law against those of legislatures."[7]

The restoration of judicial over congressional power made almost irrelevant the precise phrasing of the Reconstruction amendments or of the other clauses of the Constitution relevant to Reconstruction. Had the federal court system during Reconstruction remained as discredited as it had become by 1861, then the main judicial body of the period would not have been the federal courts but congressional committees and the executive branch's Department of Justice. Historians already have given much attention to the

6. See Patricia Allan Lucie, *Freedom and Federalism: Congress and Courts, 1861–1866* (New York: Garland, 1986); Robert J. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice, and Civil Rights, 1866–1876* (Dobbs Ferry, N.Y.: Oceana, 1985); Stanley I. Kutler, *Judicial Power and Reconstruction Politics* (Chicago: Univ. of Chicago Press, 1968). The federal judiciary's reassertion of power came only partly in their role in outlining civil rights. The main way the federal judiciary flexed its muscle was on issues of finance, as in the 1863 case of *Gelpke v. Dubuque* (Iowa), 1 Wall. 175; see William M. Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886–1937* (New York: Oxford Univ. Press, 1998), 79–80, and Harold M. Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* (New York: Alfred A. Knopf, 1973), 229–33. For factual information relating to the transformation of the Supreme Court during the Chase years, this essay relies most heavily on Charles Fairman, *Reconstruction and Reunion, 1864–88,* part 1 (New York: Macmillan, 1971).

7. H. Jefferson Powell, *A Community Built on Words: The Constitution in History and Politics* (Chicago: Univ. of Chicago Press, 2002), 10.

Department of Justice. They have given less to congressional committees, which played a greater role than before the war, despite the threat that such bodies represented to the principle of separation of powers.[8]

It is possible to imagine a Reconstruction in which the proceedings of congressional committee hearings, not the rulings of federal courts, became the means by which constitutional law was made and publicized. As opposed to court proceedings, in which judges carefully regulated testimony and followed procedure, congressional hearings allowed witnesses to air their grievances freely. The opportunity of witnesses to testify without restraint was only one part of a retributive, constitutive form of justice that the hearings offered. The most famous of these proceedings was the set of Ku Klux Klan hearings of 1871, in which victims were encouraged to speak openly in order to help influence the way that Congress shaped policy in the occupied South. The purpose of the hearings was to interrogate the law—in the case of the Ku Klux Klan hearings, the Fourteenth and Fifteenth Amendments and their enforcement acts—so that Congress could ensure that the intended consequences of measures that it had passed were being realized. In contrast, federal courts did not interrogate the law but rather *interpreted* it. That is, the courts took inherently political measures and treated them as purely judicial abstractions. Whereas the Ku Klux Klan hearings gave emotional life and a visceral sense of justice to constitutional provisions, Supreme Court decisions such as *Slaughterhouse* abstracted the constitutional text, imagining it as a neutral set of rules.[9]

This tendency of the courts toward abstraction was the essence of what Morton J. Horwitz, William M. Wiecek, and other legal historians have called "Classical Legal Thought," which had its heyday in the last half of the nineteenth century.[10] Federal courts imagined law as a science: they reduced immediate circumstances to data points to be mapped according to rules set by the written record of common-law decisions and state and federal constitutions and statutes. In contrast, congressional hearings acted more as courts of equity: they behaved and ruled on the basis of lawmakers' sense of justice, not on the basis of imagined objective, universal, scientific

8. Allan G. Bogue, *The Congressman's Civil War* (Cambridge: Cambridge Univ. Press, 1989), 60–109.

9. On the Ku Klux Klan hearings' role in shaping the memory of the Civil War and Reconstruction, see David W. Blight, *Race and Reunion: The Civil War in American Memory* (Cambridge, Mass.: Harvard Univ. Press, 2001), 116–22.

10. Wiecek, *The Lost World of Classical Legal Thought,* chaps. 1–2; and Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (New York: Oxford Univ. Press, 1992), 9–31.

principles. Equity courts were more likely than common-law courts to act on conscience. If conscience was the ultimate arbiter of equity decisions, procedure was the lodestar of common-law decisions.[11]

Assume for the moment that, as I have suggested, Congress in the Reconstruction era had the interpretive mode of equity courts and the federal courts had the interpretive mode of common-law courts. What does that have to do with whether the text of the federal constitution was an obstacle to Reconstruction? The answer is that whereas Congress during Reconstruction was likely to examine closely the text of constitutional provisions—not only the wording but the origins of that wording (including the original congressional debates over the wording)—federal courts were not. The idea that courts did not interrogate the political origins of constitutional text may seem surprising to us today, for courts today often use this method, and they are encouraged to do so not only by right-leaning legal thinkers, especially "originalists" such as Edwin Meese and "textualists" such as Justice Antonin Scalia, but even by left-leaning neo-originalists such as Akhil Amar.[12] But in the mid-nineteenth century, American jurisprudence followed the practice of treating judicial doctrine as distinct from politics. As a result, judges cared less about the precise wording or original legislative meaning of constitutional provisions than they did about how the constitutional provision fit into traditions of law. Tradition, and its handmaiden, precedent, was everything to common-law jurisprudence.

Even under Republican rule, the federal courts followed this trend: they treated law as an ever-developing set of rules and assumed continuity over the whole course of Anglo-American legal history rather than a discontinuity created by the Civil War. That tendency was not universal, however. In 1866, for example, Justice Noah Swayne issued a decision on circuit, in *U.S. v. Rhodes,* that described the rights revolution launched by the Civil War as "an act of national grace," a break from the past signaling a future in which the Constitution would give "protection over everyone."[13] But by

11. See Peter Karsten, *Heart versus Head: Judge-Made Law in Nineteenth-Century America* (Chapel Hill: Univ. of North Carolina Press, 1997), and especially Peter Charles Hoffer, *The Law's Conscience: Equitable Constitutionalism in America* (Chapel Hill: Univ. of North Carolina Press, 1990).

12. Edwin Meese III, "Interpreting the Constitution," in Jack N. Rakove, ed., *Interpreting the Constitution: The Debate over Original Intent* (Boston: Northeastern Univ. Press, 1990), 13–21; Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton Univ. Press, 1997), and Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale Univ. Press, 1998).

13. 27 *Federal Cases* 785 (C.C.D. Ky. 1866).

the early 1870s, if not earlier, federal judges more frequently embraced the common-law style, looking to legal precedent, rather than the contingent political circumstances of the Civil War, as the basis of their rulings. Chief Justice Chase revealed this retreat to the common-law mode of reasoning in his 1871 decisions invalidating pre-emancipation contracts for the sale and warranty of slaves. In *White v. Hart* and *Osborn v. Nicholson,* Chase did not mention the Civil War and relied not at all on the Reconstruction amendments or any other constitutional provisions. Rather, he argued that such slave contracts, regardless of when they had been enacted, had always been against the "original principles of liberty, justice, and right" enshrined in English common law. It was precedent, argued Chase, not circumstance or new constitutional text, that made vestiges of slave law run afoul of what he called "sound morals and natural justice."[14] We might applaud the result of Chase's decision, but the *mode* of his reasoning was a problem, for it denied the Civil War a place in judicial memory. While Congress during Reconstruction returned again and again to the Civil War and the Reconstruction amendments as a punctuating episode in American history, especially as it framed new legislation on behalf of African Americans, the Supreme Court and lower federal courts tended instead to regard these events as but one of many ripples in the unbroken flow of the distant past to the present.

Only by understanding the return of the supremacy of the federal courts as the primary architects of constitutional law, and the accompanying, related return of the primacy of the common-law mode over the equity mode of judicial reasoning, can we appreciate fully the inevitability of the *Slaughterhouse* decision, which did more than any Reconstruction act or decision up to that time to turn back the constitutional clock. The majority opinion in that case, written by Justice Samuel F. Miller, acknowledged the Reconstruction amendments but interpreted them in light of legal traditions that predated the Civil War. By far the most important of these traditions (though it was not made explicit in *Slaughterhouse*) was the notion that "equality before the law" did not mean the same thing as equitable justice. Equity courts, and, by extension, congressional hearings (if one accepts my premise about such hearings acting as equity courts more than as common-law courts), sought to achieve equitable justice, meaning that they took stock of the peculiar circumstances involved and looked to political realities as well as to the letter of the law to resolve conflicts. Common-law courts, and, by extension, the Supreme Court and federal courts under Reconstruction, sought "equality

14. *Osborn v. Nicholson,* 80 U.S. (13 Wall.), 663–64. See *White v. Hart,* 80 U.S. (13 Wall.), 646.

before the law," meaning not the positive creation of justice but simply the elimination of explicit measures and procedures that were clearly unjust. The judiciary's reduction of the moral notion of equality to the legal principle of "equality of law" predated the Civil War. It was a principle that led to the conclusion that laws that explicitly treated blacks and whites differently, or any other laws that smacked of so-called class legislation, were inherently unconstitutional.[15]

The Supreme Court in *Slaughterhouse* took this principle and began to reshape it into what would become known as the "state action doctrine," the rule that courts delivered on the "due process" and "equal protection" promised by the Fourteenth Amendment by doing no more than outlawing explicitly discriminatory statutes and actions by state and federal governments. Embryonic in the *Slaughterhouse* decision of 1873, the state action doctrine found its clearest explication ten years later in the Civil Rights Cases, which declared unconstitutional the Civil Rights Act of 1875, the most far-reaching federal antidiscrimination law of the Reconstruction era.[16]

The state action doctrine did more than any other judicial principle to eviscerate the potential power of the Fourteenth Amendment, which, if not the most important constitutional provision in American history, is certainly the most invoked one. Supreme Court justices as well as other supporters of the state action doctrine did buttress their position by invoking the wording of the Fourteenth Amendment—specifically, the phrasing that put restrictions on the states rather than granting positive power to the national government. But even if the wording of that amendment *had* granted positive power to Congress, for example, by adopting the original proposal's declaration that "Congress shall have power to make all laws necessary and proper to secure . . . to all persons in every State equal protection in the enjoyment of life, liberty and property," the Supreme Court would have ruled the same way. For the Court ruled not on the basis of the amendment's wording (though the wording helped its case) but rather on the basis of judicially constructed notions of equality that predated the amendment and the Civil War. To put it bluntly, had the text of the Fourteenth Amendment not contained the seeds of the state action doctrine, the Supreme Court would have invented the doctrine anyway.

Despite mentioning the wording of the Reconstruction amendments, the majority rulings in *Slaughterhouse* and the other major Fourteenth Amend-

15. Nelson, *The Fourteenth Amendment,* 91–93.

16. Frank J. Scaturro, *The Supreme Court's Retreat from Reconstruction: A Distortion of Constitutional Jurisprudence* (Westport, Conn.: Greenwood Press, 2000).

ment decisions of the Supreme Court during Reconstruction chose to opt for the common-law mode of interpretation. They did not interrogate the intentions of the authors of the amendments and only rarely acknowledged the transformative quality of the era in which those authors worked. In contrast, Justice Noah Swayne, whose dissent in the 1866 circuit case *U.S. v. Rhodes* had pointed to the novel nature of the Civil War and the Reconstruction amendments, made a similar emphasis in his dissent in *Slaughterhouse,* proclaiming that "fairly construed these amendments may be said to rise to the dignity of a new Magna Charta."[17]

In sum, if law helped apply the brakes to Reconstruction, it did so not by the text of the Constitution but rather by judicial interpretation of that text—specifically, a judicial interpretation based on the dominant, common-law mode of reasoning and contingent on the rapid reemergence of the federal judiciary as the accepted, ultimate arbiter of the meaning of the law.

What are the implications of this conclusion? There are probably many, but three are particularly noteworthy. First, and most obviously, if we are to lay some of the blame for the shortcomings of Reconstruction at the feet of the law, we should be careful to lay it at the feet of judges, not at the feet of the people and their elected officials who created the text of the law.

Second, judges then, and perhaps now, could better interpret the law by adopting equity modes of interpretation at least as frequently as they adopt common-law modes. This is a point made not only by scholars like Peter Hoffer, who approach law from the angle of history and legal theory, but also by those like James Boyd White, who approach law from the angle of literary criticism. White wants lawyers and judges to read the law as an "ideal" reader of literary texts would, by "understanding . . . the text in its cultural and political context, in light of the accepted meanings of words and with an understanding of the major purposes of the text, of its types and examples."[18]

A third implication raised by this counterfactual exercise, and perhaps the most confounding one, is that judges, regardless of how "ideal" they are as readers, are not necessarily the best interpreters of law, especially when they adopt the common-law mode. If this is indeed one of the lessons of Reconstruction, then perhaps we should look favorably on current proposals to shift some judicial power away from courts and to legislatures. Such

17. 83 U.S. (16 Wall.), 129. See Powell, *A Community Built on Words,* 180–83.

18. Hoffer, *Acts of Conscience;* James Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (Chicago: Univ. of Chicago Press, 1984), 272–73.

proposals are not new, of course. Nor have they always come from political conservatives. In the New Deal era, President Franklin Delano Roosevelt suggested such a shift in judicial authority. More recently, in the last years of the twentieth century, similar arguments were made by some left-leaning scholars such as Bruce Ackerman and Sanford Levinson, whose critique of the power of the judicial branch was based as much on historical evidence as on legal theory.[19] We may not like the policies that are likely to result in the short term if judicial authority today shifts from the courts to other branches of government, but at least we should acknowledge that such a shift would mimic what happened during the Civil War era before the Supreme Court reversed the course of Reconstruction.

19. Bruce Ackerman, *We the People:* vol. 2, *Transformations* (Cambridge, Mass.: Harvard Univ. Press, 1998), and Sanford Levinson, *Constitutional Faith* (Princeton: Princeton Univ. Press, 1988).