Reconstruction and the Politics of Scholarship


Randall Kennedy†

Eric Foner’s Reconstruction¹ provides the most comprehensive and insightful overview available for a period in American history over which judges and other members of the legal community have wrangled with uncommon ferocity. That much-debated period embraces the years immediately following the Civil War, years that witnessed the enactment of measures aimed at knitting together a polity torn apart by one of the bloodiest armed conflicts to erupt in the Western Hemisphere. The most significant of these measures were the Thirteenth, Fourteenth, and Fifteenth Amendments to the federal Constitution, as well as accompanying legislation designed to insure their ratification or enforce their guarantees.

Histories of Reconstruction provoke unusually strong reactions because the most contentious issues of that era—the status of blacks in American life and the relationship of the states to the federal government—remain flashpoints of controversy today. Nothing more securely links Reconstruction to the present than the constitutional and statutory law enacted then that remains on the books, powerfully affecting the texture of our current political life. One thing that cements this linkage is the popular, albeit contested, belief that “original intent” should play an important, if not decisive, role in determining how statutes and constitutional provisions are applied in resolving contemporary controversies.² Hence, judges’ findings on the history of Reconstruction have affected the resolution of fundamen-

---

* DeWitt Clinton Professor of American History, Columbia University.
† Assistant Professor, Harvard Law School.
tal and highly-charged disputes such as whether state power is limited by the Bill of Rights and whether de jure segregation contravenes federal constitutional protections. In Patterson v. McLean Credit Union, currently the most widely-watched case on the Supreme Court's docket, much of the debate has revolved around the relative persuasiveness of two sharply divergent historical interpretations of the origins and development of the Civil Rights Act of 1866.

This review is guided by two goals. The first is to describe the main features of Reconstruction and encourage members of the legal community to read it. Lawyers and judges (along with the citizenry at large) make important decisions that are informed by their sense of history. That being so, it is imperative to apprise them of new perspectives that illuminate the past. Unfortunately, even relatively sophisticated legal commentators act as if, having once studied American history, they have no need to keep up with current historiographical developments. The second goal of this review is a subset of the first. I hope to help sensitize readers of law reviews to the politics of historical scholarship, to the fact that "historical judgments, while by no means exercises in unconstrained or subjective creativity, necessarily involve elements of creativity and interpretive choice."

3. See, e.g., Adamson v. California, 332 U.S. 46, 51-54 (1947); id. at 61-67 (Frankfurter, J., concurring); id. at 71-75 (Black, J., dissenting); see also M. CURTIS, NO STATE SHALL ABRIDGE (1986); Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 STAN. L. REV. 5 (1949).

4. See Brown v. Board of Education, 347 U.S. 483 (1954). Compare id. at 489 (investigation of circumstances surrounding adoption of Fourteenth Amendment produces "inconclusive" evidence on original intent of framers) with id. at 492 (in determining constitutionality of segregation in public education "we cannot turn the clock back to 1868 when the Amendment was adopted"). See also R. BERGER, GOVERNMENT BY JUDICIARY (1977); Bickel, The Original Understanding and the Segregation Decision, 69 HARV. L. REV. 1 (1955).


6. See infra text accompanying notes 65-68.


Men and women making decisions under conditions of high uncertainty necessarily envision the future partly in terms of what they believe to have happened in the past. Their understanding of the present is shaped by what they think to have gone before. Often, their knowledge of what in fact occurred earlier is shallow or faulty, and deficiencies in information breed greater deficiencies in reasoning. Having learned not to trust inexpert guesswork where numbers, economic models, or scientific formulas are concerned, perhaps they will see that they also need clearer understanding of the history that so often imprisons them.

Id. at 190.

8. For instance, Professor Charles Fairman's voluminous contributions to the legal history of Reconstruction provide information useful to all students of the period. I refer here in particular to his most recent books Reconstruction and Reunion, 1864-88, Part Two (1987) and Five Justices and the Electoral Commission (1988). Remarkably and regretfully, however, his scholarship ignores much of the best work done in Reconstruction studies over the past twenty years. See also Kennedy, Race Relations Law and the Tradition of Celebration, 86 COLUM. L. REV. 1622, 1636 n.58 (1986) (criticizing analysis of Chief Justice Edward Douglass White that relied upon Traditionalist Reconstruction history and ignored more recent and accurate historical studies).

The Politics of Scholarship

Part I of this review analyzes historiographical traditions that have created conflicting images of Reconstruction and the social functions these images have served. Part II describes Foner's work against the backdrop of previous interpretations. Part III explores the relationship between Foner's political commitments and his academic craft and thus touches upon an issue that vexes all intellectual work that implicates important political decisions.

I.

Foner begins his study with an analysis of Reconstruction historiography, a subject once aptly described as a "dark and bloody ground."10 Foner explains that the history of historical writing on Reconstruction has proceeded through at least three distinct phases—Traditionalist, Revisionist, and Post-Revisionist—each of which reflected in part the imperatives of the era in which the writers lived. Throughout the first half of this century, the leading white scholars of Reconstruction portrayed it in an intensely negative fashion.11 According to this pejorative Traditionalist interpretation, the central outrage of the period was the elevation of the Negro to civil and political equality.12 Arming blacks with the ballot was


12. Describing how Reconstruction ruined blacks morally, Claude Bowers maintains the following:

[I]ts crusade of hate and social equality . . . [played] havoc with a race naturally kindly and trustful. Throughout the War, when [white] men were far away on the battle-fields, and the women were alone on far plantations with the slaves, hardly a woman was attacked. Then came the scum of Northern society, emissaries of the politicians, soldiers of fortune, and not a few degenerates, inflaming the negroes’ egotism, and soon the lustful assaults began. Rape is the foul daughter of Reconstruction.

C. Bowers, supra note 11, at 307–08.

Bowers' work was not the most intellectually impressive of the pejorative tradition in Reconstruction historiography; that distinction belongs to the scholarship of William A. Dunning. But what is best from a scholarly point of view often diverges from what is most popular. Bowers' middle-brow rendition of Reconstruction's history may well have had more of an influence on non-academic wielders of power—judges, legislators, executives—than Dunning's more reserved writings. Keeping in mind that Dunning was a professor at Columbia University who served as President of both the American Historical Association and the American Political Science Association, it is well to consider this passage from his classic Reconstruction, Political and Economic:

The negro had no pride of race and no aspiration or ideals save to be like the whites. With
portrayed as a particularly cruel, opportunistic, and stupid provocation. It was cruel because the Radical Republicans, the major political force supporting the civil and political rights of blacks, were motivated—so the argument ran—by a desire to humiliate the defeated white South. It was opportunistic because the Radicals acted out of no authentic solicitude for the former slaves but desired instead simply to control and exploit the black vote for partisan purposes. Finally, it was stupid because the Radicals invested heavily in a futile policy; blacks were unfit to vote and southern whites were determined to prevent them from long exercising that privilege.

In the denigratory version of Reconstruction, black participation in southern politics consisted of “Negro rule,” fiscal laxity, rampant corruption, and the galling tyranny of military occupation. The South’s reconstructed state governments were the first in the nation in which blacks participated to a substantial extent as voters and representatives. But Professor John W. Burgess spoke for many of the country’s leading white academics when he remarked that these governments constituted “the most soul-sickening spectacle that Americans had ever been called upon to behold.”

The only bright side to the story was the “redemption” of the southern states by whites who, determined to install “good government” and “home rule,” were forced to resort to stern measures against the blacks and their white “carpetbagger” and “scalawag” allies.

One reason the pejorative interpretation of Reconstruction held sway for so long was that it fitted well with the racist presuppositions of white scholars and their audiences. It served an important ideological function by helping to rationalize the relegation of blacks to a separate and unequal status in every aspect of social and political life—particularly in the
civil rights and political power, not won, but almost forced upon him, he came gradually to understand and crave those more elusive privileges that constitute social equality. A more intimate association with the other race than that which business and politics involved was the end toward which the ambition of the blacks tended consciously or unconsciously to direct itself. The manifestations of this ambition were infinite in their diversity. It played a part in the demand for mixed schools, in the legislative prohibition of discrimination between the races in hotels and theatres, and even in the hideous crime against white womanhood which now assumed new meaning in the annals of outrage.

W. DUNNING, supra note 11, at 213–14. On Dunning’s views on race and Reconstruction, see Donald, Introduction to W. DUNNING, ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION (1965); Harper, William A. Dunning: The Historian as Nemesis, 10 CIV. WAR HIST. 54 (1964); Muller, Look Back Without Anger: A Reappraisal of William A. Dunning, 61 J. AM. HIST. 325 (1974). A comprehensive analysis of Reconstruction’s images in American culture is a project in need of an author. It would need to examine not only works of history and biography but also fiction such as Thomas Dixon’s The Clansman (1905) and films such as D.W. Griffith’s 1915 sensation Birth of A Nation (Epoch Production Corporation 1915). Cf. Gross, The Negro in the Literature of the Reconstruction, in IMAGES OF THE NEGRO IN AMERICAN LITERATURE (S. Gross & J. Hardy eds. 1966).

13. J. BURGESS, supra note 11, at 263. Burgess was professor of political science and constitutional law at Columbia University and also served as dean of the faculty of political science. His scathing denunciation of the Reconstructed state governments in the South was closely linked to his racial views. “The claim that there is nothing in the color of the skin is a great sophism,” he once declared. Quoted in Simkins, supra note 10, at 58. “A black skin means membership in a race of men which has never succeeded in subjecting passion to reason.” Id.
South, where Jim Crow segregation emerged as a formalized system of racial subordination. The pejorative tradition also rationalized the federal government's laissez-faire attitude towards local racial practices that betrayed the Reconstruction Amendments. After all, the pejorative tradition showed the "wisdom" of keeping blacks "in their place" by painting a lurid picture of what occurred the last time blacks were allowed to participate in Southern politics. As Francis B. Simkins observed, Traditionalist historians "described the follies and rascalities of Negro politicians and their Carpetbagger friends so as to make the [white] reader thankful that such knavery cannot be repeated in his time."14

The second major phase of Reconstruction historiography, Revisionism, culminated in the early 1960's. Revisionists had carefully modified or refuted aspects of the pejorative interpretation throughout the 1940's and 1950's.15 Its status as the reigning paradigm for understanding Reconstruction was not decisively diminished, however, until the Civil Rights Movement overcame the segregation regime.16 At that point, Reconstruction history was itself reconstructed. To some degree, Revisionism stemmed from an accumulation of new knowledge. But what primarily generated this new outlook were the keenly-felt imperatives of new moral and political values, particularly with respect to race relations. The Revisionist attack on traditional portrayals of Reconstruction reflected and reinforced efforts in many areas of intellectual endeavor to rehabilitate what Professor George M. Frederickson calls "the black image in the white mind."17 What Franz Boas and Gunnar Myrdal sought to do for anthropology and sociology,18 Revisionists sought to do for history—liberate it

14. Simkins, supra note 10, at 48. In the 1950's, segregationists were among the first to analogize the Civil Rights Movement to the First Reconstruction. Reciting the pejorative tradition's litany of horrors, they warned against, and then bewailed, the adoption of racial reforms that they feared would bring about a second tragic era. Dissenting bitterly against a judgment invalidating segregation aboard a municipal bus service in Birmingham, Alabama, Judge Ben F. Cameron designated emancipation as the origin of the southern race problem and, citing Claude Bowers' The Tragic Era, urged his colleagues to remember the lessons of Reconstruction, that "period which all Americans recall with sadness and shame..." Boman v. Birmingham Transit Co., 292 F.2d 4, 15 (5th Cir. 1961); see also N. McMillen, The Citizen's Council: Organized Resistance to the Second Reconstruction, 1954-64, at 357-83 (1971); Bloch, A Second Tragic Era—The Role of the Lawyer In It, 24 Ala. Law. 386 (1963).


16. The high-point of revisionism in Reconstruction historiography is Kenneth Stampp's The Era of Reconstruction, 1865-1877, which was published in 1965—the same year that Congress passed the Voting Rights Act.


from the dogmatic assumption that blacks are a separate and inferior species of humankind.19

In reconsidering the central figures and deeds of the Reconstruction era, Revisionists emphasized the humanitarian impulse animating reform, the fairness of the federal and reconstructed state governments, the introduction into the South of useful innovations such as public schooling, the fact that white and black reconstructionists were no more corrupt or irresponsible than other politicians, and, most of all, the democratization of politics—never before in southern history had a broader cross-section of the populace been engaged in selecting its political representatives. As one leading Revisionist put it:

\[G\]ranting all their mistakes, the radical governments were by far the most democratic the South had ever known. They were the only governments in southern history to extend to Negroes complete civil and political equality, and to try to protect them in the enjoyment of the rights they were granted. The overthrow of these governments was hardly a victory for political democracy, for the conservatives who ‘redeemed’ the South tried to relegate poor men, Negro and white, once more to political obscurity.20

While the pejorative tradition portrayed Reconstruction as a nightmare from which the nation mercifully awoke, Revisionism portrayed it as a dream superseded by a nightmare.

Despite their differences, Traditionalists and Revisionists largely agree that Reconstruction had truly been radical. However, in the 1970’s and 1980’s a substantial number of historians began to question that assumption. Post-Revisionists emphasize the shared antipathy the white North and the white South felt toward blacks, the way the lives of many blacks were left untouched by formal changes in national policy, and the commitment of even “radical” Republicans to antebellum conceptions of federalism. Post-Revisionists, in short, emphasize the conservative nature of Reconstruction, the extent to which it represented the triumph of continuity over reform.21


21. As is the case with the other categories of historical writing I have labelled for the sake of convenience, Post-Revisionism embraces a wide range of scholarship characterized by significant differences. Raoul Berger is a Post-Revisionist of sorts insofar as he stresses the narrowness of the rights that the framers of the Reconstruction Amendments originally intended to bestow upon the freedpeople. R. Berger, supra note 4. The purpose behind Berger’s scholarship, however, is profoundly conservative, if not reactionary. As a descriptive matter, he argues that the modern Supreme Court has expanded the meaning of the Fourteenth Amendment far beyond the original intent of its Framers. As a normative matter, he argues that judges should not broaden the Amendment’s meaning.

Unlike Berger, the legal historian Michael Les Benedict offers no programmatic proposals on the basis of his historical research. His work may seem politically conservative at first blush insofar as he
Like its predecessors, Post-Revisionism was related to contemporary developments. The accent on beneficent reform that suffused many Revisionist portraits of Reconstruction stemmed from the revolution in race relations thought to be sweeping the United States in the 1950's and 1960's. The stress that some Post-Revisionists placed on continuities of black subordination derived from a new consciousness of the persistence of racism and its intimate association with class oppression. This awareness was honed by disappointment with the failure of the Civil Rights Movement to make a greater impact on blacks' fortunes, particularly the black poor. Criticisms of the economic inadequacies of the Civil Rights Movement were echoed by claims that the First Reconstruction had been doomed from the outset by the Republicans' failure to provide economic support—"forty acres and a mule"—to the newly emancipated slaves.

Images associated with these three historiographical phases have both reflected and conditioned the ways in which members of the legal commu-

---

*defends the Supreme Court from the widely-believed charge that it purposefully sabotaged Reconstruction legislation due to racial indifference or hostility. Benedict, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction*, 61 J. Am. Hist. 65 (1974); Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 Sup. Ct. Rev. 39. But the real thrust of Benedict's message is not apology but a broader indictment of mid-nineteenth-century American politics, in particular a conception of federalism that prevented even well-intentioned Republicans from pursuing policies that may have more effectively protected the newly emancipated slaves. Blame, he contends, should not be placed primarily at the door of the Supreme Court, but rather at the door of those who framed the laws and Amendments the Court was obliged to interpret.*

Although Post-Revisionism emerged as a major tendency in Reconstruction historical studies in the 1970's, several historians had earlier sounded several of its themes. In 1939, for instance, Professor Simkins observed:

A truly radical program would have called for the confiscation of land for the freedman. Land was the principal form of Southern wealth, the only effective weapon with which the ex-slaves could have battled for economic competence and social equality. . . . Conservative constitutional theory opposed any such meaningful enfranchisement. The dominant Radicalism of the day naively assumed that a people's salvation could be obtained through the ballot and the spelling book.

Simkins, *supra* note 10, at 55-56; see also Meier, *Negroes in the First and Second Reconstructions of the South*, 13 Civ. War Hist. 114 (1967) ("[W]hat occurred during reconstruction was really not a genuine revolution, not even an abortive one.").


*Are we so accustomed to organized violence that we automatically accept without question the conclusion that the Civil War was justified even though it merely loosened the shackles of slavery? Can we be so sure that the privilege of moving from the plantation to the ghetto is worth the death and destruction of a brutal war?*

nity think about Reconstruction. The Traditionalists' negative portrayals
of Reconstruction affected, for instance, a broad spectrum of judicial opin-
ion, including even the most learned and sophisticated of the Justices. In
1945, in a case of racially motivated violence involving a criminal prosecu-
tion pursuant to Reconstruction-era enforcement legislation, Justices
Owen J. Roberts, Felix Frankfurter, and Robert H. Jackson declared
that "[i]t is familiar history that much of this legislation was born of that
vengeful spirit which to no small degree envenomed the Reconstruction
era. Legislative respect for constitutional limitations was not at its height
and Congress passed laws clearly unconstitutional."\textsuperscript{23} In another case in
which Justice Jackson, writing for the Court, broadly derided Reconstruc-
tion legislation, he solemnly cited as authority one of the most extreme of
the Traditionalist historians.\textsuperscript{24} Reconstruction probably continues to evoke
for many a vague sense of distress. When pressed a few years ago at Yale
Law School to justify his decision in a voting rights case\textsuperscript{25} that adversely
affected the interests of black voters, the late Justice Potter Stewart
blurted that, as far as he was concerned, "Reconstruction is over."\textsuperscript{26} This
answer was strange in that the question to which it responded made no
reference to Reconstruction. The answer was instructive, however, in that
it evidenced a perception of Reconstruction that moved the Justice to em-
brace affirmatively the notion that it was about time for the Second Re-
construction to end.

The Revisionist portrayal of Reconstruction is the image that is now
most prevalent and influential. That dominance is best illustrated by the
unqualified praise typically showered upon the Thirteenth, Fourteenth,
and Fifteenth Amendments. The legal literature is full of critiques of judi-
cial decisions or social practices that are said to misinterpret or betray the
enactments of the Reconstruction era. But legal commentators have writ-
ten little that focuses upon flaws in the enactments themselves.

Post-Revisionism is of lesser influence in the legal culture than its his-

\textsuperscript{23.} Screws v. United States, 325 U.S. 91, 140 (1945) (Roberts, Frankfurter, and Jackson, JJ.,
dissenting). In Screws the Court reversed the conviction of white policemen who beat to death a young
black man in "a shocking and revolting episode in law enforcement." Id. at 92. The Court reversed
the conviction because the trial judge did not instruct the jury that, in order to find the defendants
guilty, it had to conclude that the policemen had acted with the specific purpose of depriving their
victim of a federal constitutional right. Justices Roberts, Frankfurter and Jackson argued in favor of
an even more narrow reading of the relevant legislation. The "familiar history" that the Justices
referred to probably stemmed from Claude Bowers' portrayal of Reconstruction. \textit{See infra} text accom-
panying note 11. In the 1960's, new Justices, new priorities, and a new understanding of the Recon-
struction era facilitated rulings that largely nullified Screws. \textit{See United States v. Price, 383 U.S. 787
(1966); United States v. Guest, 383 U.S. 745 (1966).}

\textsuperscript{24.} \textit{See} Collins v. Hardyman, 341 U.S. 651, 656-57, 657 n.8 (1951) (citing C. Bowers, \textit{The
Tragic Era}).


\textsuperscript{26.} I heard Justice Stewart make this remark during the 1980–1981 school year at Yale Law
School. He is quoted by others as having made that same statement during the same year in similar
circumstances in his Chambers. \textit{See Note, Making the Violation Fit the Remedy: The Intent Standard
and Equal Protection Law, 92 YALE L.J. 328, 350 (1982).}
toriographical counterparts. One well-known commentator, however, who does propound Post-Revisionist themes is Professor Derrick Bell. In his text *Race, Racism and American Law*, Bell contends that “[t]he period from the end of the Civil War to 1877 saw the basic rights of blacks to citizenship established in law, but precious little accomplished to ensure their political and economic rights.”

Without the latter,” he writes, “the former proved, then as so often today all but worthless.”

II.

Foner’s *Reconstruction* provides an excellent vantage from which to evaluate critically the imagery of his subject. He synthesizes a vast body of existing scholarship and employs his own extensive examination of primary materials to produce the finest history we have of the period that bequeathed to us the second founding of the nation.

Foner examines the broad array of other issues that faced the Nation in the aftermath of Civil War, including monetary and industrial policy, immigration, agitation for women’s rights, and the wars against Native Americans. But at the center of Foner’s study is the race question, the troubling subject to which all other issues of political importance were inextricably linked: the terms on which blacks were to be made part of the American polity. The “Negro question” assumed primacy on the national political agenda in part because of the insistence of an influential sector of the Republican party passionately committed ideologically to erasing all racial limitations that, as a matter of law, prevented blacks from exercising the same rights available to whites. The race question also assumed primacy because of an intensely practical political problem: the fortunes of the Republican party—its ability to remain in control of the federal government—were intimately tied up with the fate of the Negro. To lend aid to the newly freed slaves risked triggering the resentments of a white Northern electorate that was largely racist. On the other hand, to leave blacks unprotected would not only have meant alienating the humanitarian wing of the party. It would also have meant relinquishing a potential counterforce to the sector of southern society that had led the attempt to establish the Confederacy. Unwilling to subject the South to a colonial status indefinitely, the Republican party was forced to consider ways, compatible with accepted democratic norms, to wrest control of the region from the former secessionists. The strategy ultimately settled upon was

---

28. Id.
arming black men with the ballot. What added special urgency to the Republicans' task was the ironic fact that the South emerged from the Civil War with potentially more congressional power than it had previously enjoyed. The Constitution of 1787 counted each slave as only three-fifths of a person for purposes of determining a state's allotment of congressional representation. The abolition of slavery thus enhanced the congressional representation of the Southern States.

What is most distinctive about Foner's analysis is the way he portrays blacks as active, articulate, and important participants in the making of Reconstruction. Emphasizing the centrality of the Negro is by no means novel; as Foner himself has repeatedly acknowledged, W.E.B. DuBois did precisely that in 1935 in his neglected masterpiece Black Reconstruction. But Foner elaborates upon the theme with unparalleled detail and insight, and ventures beyond existing scholarship by showing the interrelationships that linked racial struggle in the South to the broad national issues that faced the country at large in the aftermath of civil war.

Foner's attentiveness to the ideas and conduct of blacks in Reconstruction—most of whom were illiterate former slaves—will be of particular interest to legal commentators interested in discerning contributions to the meaning of law that have been made by people on the lower rungs of the social order; people without official roles as authors or interpreters of legal texts; the masses that are often rendered invisible by elitist historical studies. He delineates ways in which Negroes defined for themselves what freedom should mean and reveals methods by which they sought to bring into existence their aspirations.

Characteristic of his analytic style is his discussion of the Emancipation Proclamation, the executive order that freed all slaves in jurisdictions in rebellion against the federal government. In addition to focussing on President Abraham Lincoln's conception of the Emancipation Proclamation,

31. Foner is notably punctilious in crediting scholars whose work has nourished his own. Moreover, in Reconstruction and other writings, he has made a point of both (1) calling attention to the disgraceful way in which white historians wrongly ignored the scholarly contribution of their black colleagues and (2) carefully noting the special role that black academics have played in Reconstruction historiography. See Pp. xxi, 610-11; E. Foner, Nothing But Freedom, supra note 29, at 5-6. Throughout the long period when the pejorative tradition constituted the dominant paradigm of sound learning, black historians (and a few whites) writing primarily in the Journal of Negro History propounded, documented, and refined the Revisionist arguments that are now dominant. See A. Meikle & E. Rudwick, Black History and the Historical Profession, 1915-1980 (1986).
33. See, e.g., Forbath, Minow & Hartog, Introduction: Legal Histories From Below, 1985 Wis. L. Rev. 759, 760 (describing genre of legal history that seeks to "highlight the contribution to the meaning of law made by people with no official roles in the hierarchy of legal authority."); Maitzuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 Harv. C.R.-C.L. L. Rev. 323 (1987); see also W. Wiecek, The Sources of Antislavery Constitutionalism in America, 1760-1848 (1977). Arguing that constitutional historians need to be more inclusive in their concerns and sources, Professor Wiecek maintains that "[c]onstitutional development was (and is) not a monopoly of a hieratic caste of judges and lawyers." Id. at 7.
Foner emphasizes the meaning that blacks gave the document. In certain respects, the Proclamation is remarkably narrow. It contained no criticism of slavery and did not even free all slaves; at least 800,000 remained unaffected. Because of the limitations, one historian has suggested that the Emancipation Proclamation displayed all the “moral grandeur of a bill of lading.” Yet blacks read the Proclamation as an inspirational charter. The revolutionary meaning they assigned to it is indicated by the response of a group of slaves living in a union-controlled section of South Carolina. When news of Lincoln’s signing arrived, they recited prayers and speeches, then sang none other than “My Country, ’Tis of Thee.”

Foner’s discussion of blacks’ post-slavery legal consciousness sheds light upon the formative influence of events that have received all too little attention. He emphasizes, for instance, the consequences that stem from the fact that large numbers of blacks fought in the Civil War; by its end, 180,000 had served in the Union Army—a number that represented about one-fifth of the country’s male black population under age forty-five. “Within the army,” Foner writes, “black soldiers were anything but equal to white.” They were isolated in all-black units led almost always by white officers. They were frequently abused by their white superiors and typically relegated to performing the most menial tasks. They were initially paid less than their white counterparts. On the other hand, the Union army provided the forum in which many former slaves “saw the impersonal sovereignty of the law supersede the personal authority of the master.” In the army, thousands of blacks learned to read and received their first lessons in the rudiments of republicanism. Their experience had a profound impact, for, as one white northerner observed, black soldiers had “learnt what it is to be free and . . . will infuse their feelings into others.” Validating this prediction, black soldiers angrily protested racial inequality in compensation, prompting Congress to enact a measure assuring equality in pay. Soldiers, moreover, were typically among the blacks least afraid of returning Confederate veterans. Recognizing his for-

34. The Emancipation Proclamation did not free those held in bondage in the four slave states that remained loyal to the Union—Missouri (the locus, ironically, of Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856)), Delaware, Kentucky and Maryland. Nor did it affect slaves in certain southern territories under Union control. See p. 1; see also J. FRANKLIN, THE EMANCIPATION PROCLAMATION (1962). These rather large exceptions moved the London Spectator to observe that the underlying principle of the Proclamation was “not that a human being cannot justly own another, but that he cannot own him unless he is loyal to the United States.” Quoted in Rosenberg, supra note 22, at 264 n.*.

35. R. HOFSTADTER, THE AMERICAN POLITICAL TRADITION 131 (1948). On the other hand, the Emancipation Proclamation did free over three million slaves, making it in the words of Charles and Mary Beard, “the most stupendous act of sequestration in the history of Anglo Saxon jurisprudence.” Pp. 2-3 (citing C. BEARD & M. BEARD, THE RISE OF AMERICAN CIVILIZATION 100 (1933)).

36. P. 1.
37. P 8.
38. Id.
mer master among a group of military prisoners, one black soldier was heard to exclaim: "Hello massa; bottom rail top dis time."

The Union victory doomed slavery. But what did "freedom" mean to the emancipated slaves and what did they do with this strange new power? In answering these questions, Foner puts to best advantage an impressive feature of his work: a finely-tuned appreciation for the texture of ordinary lives. Living securely on this side of freedom, even a trained observer may overlook the significance that emancipated slaves attached to the exercise of personal liberties that may now seem too banal to merit notice. Foner recognizes, however, that these liberties significantly defined the former slaves' conception of freedom. "Blacks relished," he writes:

opportunities to flaunt their liberation from the innumerable regulations . . . associated with slavery. Freedmen held mass meetings and religious services unrestrained by white surveillance, acquired dogs, guns, and liquor (all barred to them under slavery), and refused to yield the sidewalks to whites. They dressed as they pleased, black women sometimes wearing gaudy finery, carrying parasols, and replacing the slave kerchief with colorful hats and veils.

In the antebellum South, blacks had been forbidden to travel without passes. But with emancipation, blacks took to the roads with a notable enthusiasm. "Right off colored folks started on the move," a former slave in Texas recalled. "They seemed to want to get closer to freedom, so they'd know what it was—like it was a place or a city."

The conception of freedom held by newly emancipated slaves displayed other features as well, the most pervasive of which was a thirst for autonomy that prompted changes in family life, religious observance, and modes of labor. Blacks persistently sought "to escape from white supervision and establish a modicum of economic independence." Many became transfixed by the dream of becoming an owner of land. "Gib us our own land and we take care ourselves," remarked one black South Carolinian. "[B]ut widout land, de ole masses can hire us or starve us, as dey please."

Participation in politics also became an element in many blacks' conception of freedom. "You never saw a people more excited on the subject of politics than are the negroes of the South," observed a planter in 1867. "They are perfectly wild." Blacks enrolled in organizations like the Union League that facilitated political education through speeches and de-

40. Id.
41. P. 79.
42. P. 80.
43. P. 104.
44. Id. Viewing the situation from a different perspective, a white Georgia planter observed that the blacks "will almost starve and go naked before they will work for a white man if they can get a patch of ground to live on." Id.
45. P. 283.
They drafted petitions to local authorities protesting such things as the exclusion of blacks from juries or failures to arrest white criminals. They attended rallies and Republican party conventions. They voted in defiance of hardship and ran for office even when doing so entailed lethal danger. Between 1870 and 1877, sixteen blacks were elected to Congress; eighteen to positions as state lieutenant governors, treasurers, secretaries of state, or superintendents of education; and at least six hundred to state legislatures. "Rarely," Foner writes, "has a community invested so many hopes in politics as did blacks during Radical Reconstruction."

Those hopes were ruthlessly smashed. Blacks never exercised decisive control of any southern state government, even in states like Mississippi and South Carolina where they held voting majorities. But for a short period, they did wield sufficient power to insist upon policies that provided support for their steep climb from slavery: the provision of public education; laws relatively favorable to workers, debtors, and tenants; and prohibitions against racially discriminatory conduct on the part of the state. By 1877, however, every southern state had fallen under the control of white opponents of Reconstruction who sought openly to reimpose the norms of racial subordination. Within two decades, they had succeeded overwhelmingly, erecting structures of racial oppression so entrenched and complex that they are still being undone.

The demise of Reconstruction is traceable to many sources: Northern white racism and indifference; judicial rulings that invalidated or narrowed important congressional initiatives; administrative weaknesses of the federal government; the dulling influence of Republican party functionaries who were devoid of the humanitarian commitments that had inspired their forbearers; and the debilitating consequences of economic depression. The factor, however, that Foner emphasizes most in explaining the downfall of Reconstruction is political terrorism. According to him, "the wave of counterrevolutionary terror that swept over large parts of the South . . . lacks a counterpart either in the American experience or in that of the other Western Hemisphere societies that abolished slavery in the nineteenth century." Anti-reconstructionists of all social classes resorted to violence of the most brutal sort including rape, mutilation, and murder in order to intimidate blacks and their white allies.

Foner's study indicates ways in which various images of Reconstruction need modifying. He rightly rejects the notion that Reconstruction constituted little more than a reformist gesture condemned to failure by the unwillingness of the Radical Republicans to distribute land to the emancipated slaves. Politically, Foner has much in common with progressive Post-Revisionists. They share a commitment to economic as well as racial
egalitarianism. They also share a critical view of the political-economic vision of the Republican Party. Indeed, one of Foner's important contributions is his discerning, dialectical critique of the Republicans' free labor ideology. On the one hand, the ideology of free labor powerfully indicted slavery and animated insistence that blacks be accorded basic civil rights, particularly the right to hold property and make contracts. On the other hand, the free labor ideology tended to limit the willingness of Republicans to use government power to support economically the new freedom of the blacks.

Foner makes two important points, however, that Post-Revisionists tend to minimize unduly. First, economic status, while important, is not necessarily decisive in political matters. Whites resorted to terror because they were unable to control blacks simply with market pressures. Reconstruction was overcome "not because propertyless blacks succumbed to economic coercion, but because a politically tenacious black community, abandoned by the nation, fell victim to violence and fraud." 48 Second, in evaluating Reconstruction, one should keep in mind not only its unfulfilled goals but also its starting point—slavery—and the record of other societies that previously legalized slavery. When those considerations are brought to bear, we see the problem with declaring that during Reconstruction "little" was accomplished to ensure the political and economic rights of Blacks. "Little" compared to what? Compared to slavery, the life bequeathed to ordinary blacks by Reconstruction was a great improvement. And compared to what occurred in other societies, the treatment accorded America's emancipated slaves was remarkable indeed. "Alone among the nations that abolished slavery in the nineteenth century, the United States, within a few years of emancipation, clothed its former slaves with citizenship rights equal to those of whites." 49 These rights, of course, have frequently faced de facto nullification. Yet it should be appreciated that Reconstruction helped to close off even worse alternatives:

The post-Reconstruction labor system embodied neither a return to the closely supervised gang labor of antebellum days, nor the complete dispossession and immobilization of the black labor force and coercive apprenticeship systems envisioned by white Southerners in 1865 and 1866. Nor were blacks, as in twentieth-century South Africa, barred from citizenship, herded into labor reserves, or prohibited by law from moving from one part of the country to another. As illustrated by the small but growing number of black landowners, businessmen, and professionals, the doors of economic opportunity that had opened could never be completely closed. Without Reconstruction, moreover, it is difficult to imagine the establishment of a framework of legal rights enshrined in the Constitution that . . .

48. P. 279.
49. Id.
created a vehicle for future federal intervention in Southern affairs. As a result of this unprecedented redefinition of the American body politic, the South's racial system remained regional rather than national, an outcome of great importance when economic opportunities at last opened in the North.\footnote{50}

Foner's account also illuminates aspects of Reconstruction that remain shaded or ignored altogether by the overly laudatory image that Revisionists have sometimes created. The Thirteenth, Fourteenth, and Fifteenth Amendments are often praised as if they were the flawless products of undiluted efforts on behalf of the former slaves. But the Reconstruction Amendments were as much the product of morally ambiguous bargaining as the document they altered. The Thirteenth Amendment passed the Congress by an exceedingly narrow margin in 1865;\footnote{51} a year earlier the Amendment had failed to gain the necessary votes. The Fourteenth Amendment was condemned by Wendell Phillips and other strong supporters of the Blacks as "a fatal and total surrender"\footnote{52} because it not only failed to enfranchise blacks, but implicitly recognized the right of states to restrict the ballot to whites. What Phillips was referring to was section two of the Fourteenth Amendment, which provides for a reduction in representation in proportion to the number of male citizens denied the suffrage.\footnote{53} The Fifteenth Amendment finally provided a degree of federal constitutional protection for black voters. But instead of directly enfranchising blacks,\footnote{54} the Amendment merely bars states from excluding persons from the franchise on the basis of race—a provision that invites (and has attracted) all manner of evasion. Noting that the Fifteenth Amendment would not forbid literacy, property, and educational tests that

\footnotesize{\textit{50.} Pp. 602-03; see also G. FREDERICKSON, WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY (1981).}

\footnotesize{\textit{51.} Foner writes surprisingly little about the history of the Thirteenth Amendment or the political struggle that led to its passage and ratification. The "first" Thirteenth Amendment was sent by Congress to the states for ratification in March 1861. It would have provided explicit constitutional protection for slavery. It was killed, ironically, with the coming of the Civil War. The "second" Thirteenth Amendment, the one that abolished slavery, did not obtain Congressional approval when it was first voted upon in 1864. Later, in a second attempt to gain Congressional approval, President Lincoln was forced to the edge of legality, if not beyond, to insure passage of the Amendment. Considerable evidence suggests that Lincoln used secret promises of presidential patronage to obtain the votes of certain key members of the House of Representatives. J. NOONAN, BRIBES 455-59 (1984).}

\footnotesize{\textit{52.} P. 255.}

\footnotesize{\textit{53.} See U.S. CONST. amend. XIV, § 2:
Representatives shall be apportioned among the several States according to their respective numbers. . . . But when the right to vote at any [federal] election . . . is denied to any of the male inhabitants of such State . . . or in any way abridged . . . the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.}

\footnotesize{\textit{54.} Congress rejected a proposal that would have barred states from excluding persons from voting or holding office on the basis of "race, color, nativity, property, education or religious beliefs." P. 446; see also supra note 53.}
could effectively exclude most blacks from the polls, Representative Henry Wilson decried its language as "lame and halting.”55

It should be clear that Foner rejects the pejorative tradition in Reconstruction historiography; no one can sensibly charge that he is soft on the Traditionalist perspective. He has been attacked, however, from a very different direction. Professor David Donald complains that Foner "over idealizes the black community,"56 creating a portrait of blacks that is both artificially homogeneous and spuriously wholesome. "[I]t would be welcome," Donald writes, "to find in [Foner's] pages a freedman who was less than heroic."57 Donald’s charge, however, is woefully inaccurate. It inexplicably slights Foner’s discussion of black women’s actions in Freedmen’s Bureau courts against physically abusive lovers and husbands,58 his analysis of bitter class and color divisions within black communities,59 his exploration of ideological struggles among blacks over contending political strategies,60 and his exposure of corruption within the ranks of black officeholders.61 W.E.B. DuBois once observed with respect to the founders of the pejorative tradition in Reconstruction historiography that “they [could not] conceive of Negroes as men.”62 Taking that complaint to heart, Foner conceives of blacks as men and women63 and accepts all that that implies—disappointing failure as well as surprising triumph.

55. P. 446; cf. Jackson, The United States Constitution: Black Americans Made It What It Is Today, AM. VISIONS, Feb. 1988, at 23 (“The Fifteenth Amendment . . . was a weakling. Instead of affirming black voting rights, it merely denied states the right to deprive any individual of the right to vote on racial grounds. . . . Poll taxes and literacy tests were the baneful fruit of this ineffective amendment.”).

The narrowness of the language of the Fifteenth Amendment stemmed less from specifically anti-black impulses than desires to limit the power of various other groups in American society, particularly the Chinese, the foreign-born, the poor and the illiterate. Pp. 446-47.


57. Id.; cf. D. DONALD, THE POLITICS OF RECONSTRUCTION, 1863-1867, at xii-xiii (1965) (suggesting that historians “have understandably been wary of pursuing researches which might be misused to promote present-day bigotry or racial strife”).

58. P. 88.

59. See pp. 100-01, where Foner describes color prejudice among Negroes and notes that while “free blacks welcomed the end of slavery . . . many resented the elimination of their unique status and feared being submerged in a sea of freedmen.”

60. See, e.g., p. 65.

61. See pp. 384-91.

62. Quoted at p. xxi.

63. Although the gender question plays a subordinate role in Foner’s history to issues involving race and class relations, he does attend carefully to ways in which Reconstruction affected the public status of women differently than that of men, see pp. 255-56, and the status of black women differently than that of both black men and white women, see pp. 86-88. He explores the background to and ramifications of the bitterly ironic fact that while feminists played an important role in the abolitionist movement, the women’s movement actually lost ground during Reconstruction. With the Fourteenth Amendment, the gender line that had implicitly sanctioned discrimination against women was, for the first time, explicitly inscribed upon the face of the federal Constitution. See U.S. CONST. amend. XIV, § 2 ("[W]hen the right to vote at any election . . . is denied to any of the male inhabitants of such State . . . the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens . . . in such State.") (emphasis added).
Looming behind Professor Donald's specific complaint is the broad issue that has served as a theme throughout this Book Review: the ways in which politics inescapably affects scholarship. I have already suggested that Reconstruction historiography is particularly interesting in this regard because of its immediate and practical links to divisive contemporary issues. Another reason why the relationship of politics to scholarship may be of special interest here has to do with the biography of Professor Foner himself. He came of age intellectually and politically during the late 1960's and has always been a scholar of the Left. Then, as now, a major issue for self-conscious progressives concerned whether, or the way in which, one should express one's politics in scholarly work. Some have opted to fashion their scholarship into ideological weaponry serving immediate political ends. Others have decided to engage in the difficult, but far more fruitful, task of expressing their politics without forsaking the independent claims of their intellectual craft. Reconstruction is an exemplary accomplishment of an intellectual who has chosen this latter course.

Foner's own moral and political perspectives are readily apparent in Reconstruction. He clearly champions racial, sexual, and economic egalitarianism. Yet, throughout his study he displays a disciplined respect for the pastness of the past. This sometimes leads to conclusions that are politically awkward. A striking example of this relates to Patterson v. McLean Credit Union, an employment discrimination case pending before the Supreme Court. Patterson involves, among other things, the scope of the Civil Rights Act of 1866. The plaintiff and her allies contend that the Act was clearly intended by Congress to apply against private persons who refuse to enter into contracts with blacks on the basis of race, as well as against states that restrict the contractual powers of blacks. The opposing view is that originally the Act was clearly intended to address only the discriminatory acts of states. Foner does not attempt to settle the

64. Many "sound," conventional scholars do this all the time but without self-consciousness! Much legal history, for instance, constitutes a "scholarly form of lawyer's patriotism." See Kennedy, supra note 8; see also Horwitz, The Conservative Tradition in the Writing of American Legal History, 17 AM. J. LEG. HIST. 275 (1973).
67. Brief for Petitioner on Reargument at 14-54, Patterson v. McLean Credit Union (U.S.) (No. 87-107).
legal-political issue of how far the Civil Rights Act should now be deemed to reach. What he does indicate, however, is that, as an historical matter, the issue is muddled and provides no clear answer in favor of either side. Writing in a studiously ambiguous fashion that itself replicates the intrinsically complicated reality he seeks to portray, Foner observes that the Act of 1866 “honored the traditional presumption that the primary responsibility of law enforcement lay with the states, while creating a latent federal presence, to be triggered by discriminatory state laws. . . . [D]espite its intriguing reference to ‘customs’ that deprived blacks of legal equality, the Civil Rights Bill was primarily directed against public, not private, acts of injustice.”

He considers it a weakness that the Republicans failed to perceive adequately the danger that private power posed to the fragile freedom of the emancipated slaves. He no doubt wishes that they had displayed more insight. Yet he steadfastly refuses to confuse what actually occurred with wishful thinking about what should have occurred.

Foner’s stance is complicated by the pressures that our legal apparatus exerts upon historical investigations. The courts are often historians’ closest link to practical political power. That link is a source of both temptation and vulnerability: it tempts historians to exercise influence and renders them vulnerable to lawyers and judges who merely deploy historical scholarship as a weapon of persuasion. Foner addresses these pressures explicitly in discussing the Fourteenth Amendment. In that discussion, he takes the unusual step of disclaiming both the ability and the authority to settle the questions that purportedly prompt lawyers and judges to turn to historians. First, confessing an inability to establish what lawyers refer to as “the original intent” of the Fourteenth Amendment, Foner maintains that all he is able to supply is a complicated understanding of a wide variety of shifting aims within the political and ideological context of 1866. Second, he contends that history cannot unilaterally determine its

69. P. 245.

70. Professor Foner has joined a distinguished array of historians in submitting an amicus curiae brief to the Supreme Court in Patterson. See Brief Amicus Curiae of Eric Foner, John H. Franklin, Louis R. Harlan, Stanley N. Katz, Leon Litwack, C. Vann Woodward and Mary Frances Berry, Patterson. Although the brief bears these historians’ names and, more relevant for purposes of litigation, their reputations, it is clearly a lawyer’s document rather than a scholarly venture. Foner’s amivalent, nuanced, and tentative treatment of the issue in his scholarly work stands in sharp contrast to the unambiguous assertions advanced in the amicus curiae brief that he signed; a brief that maintains, among other things, that “[i]t will conclusively demonstrate that the Act was intended by its framers. . . . to protect the civil rights of both blacks and whites, notwithstanding [the identity of the source of the violation].” Id. at 3 (emphasis added).


72. R. HOSTADTER, THE PROGRESSIVE HISTORIAN 465 (1968) (“[A]t their best, the interpretive historians have gone to the past with some passionate concern for the future; and somehow. . . . they have produced from the inner tensions of their minds an equipoise that enable them to superimpose upon their commitment a measure of detachment about the past, even to reconcile themselves to having knowledge without power.”).
own proper role in the process of adjudication since "[w]hether the courts should be bound by the ‘original intent’ of a constitutional amendment is a political, not historical question." Freed of burdens he has the good sense to disown, Professor Foner has produced an admirable study that will now itself become part of the ongoing struggle over Reconstruction.

73. P. 256.