# WE THE PEOPLE

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## TRANSFORMATIONS

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CHAPTER FOUR

# Formalist Dilemmas

## The Unasked Question

Founding and Reconstruction: two shaping events, but what is their legal relationship to one another?

This is the great unasked question of constitutional law. Orthodox opinion posits, but does not analyze, a textualist answer. Modern lawyers assume that each Reconstruction amendment was processed in strict compliance with Article Five—they were proposed by two-thirds of Congress and ratified by three-fourths of the state legislatures.

This pat answer might be satisfactory if the facts were straightforward. But, as I shall show, they raise questions of dizzying difficulty—in which case, modern evasiveness itself requires explanation. Why should America's lawyers—noted worldwide for their contentiousness—suddenly fall silent when confronting the very foundations of the greatest constitutional event since the Founding?

If I am successful, this curious silence will come to seem an act of desperation. Suppose it turns out that the Thirteenth and Fourteenth Amendments were not proposed and ratified consistently with the principles of Article Five. If hypertextualists were obliged to confront this truth, they would be forced to a shattering choice: Are they really prepared to say that the Emancipation and Equality Amendments are NOT part of the Constitution? If this is the result of "good textual analysis," there is little wonder that hypertextualists turn a blind eye. Surely blissful ignorance is better than the proclamation of such an awful truth?

But there is always a price for acts of repression. By consigning crucial events to the collective unconscious, the legal community bars

itself from deeper truths about America's evolving constitutional identity. This might be acceptable if obscurantism were the only way to sustain the validity of the Reconstruction amendments. We are talking, after all, about the greatest statements of moral principle ever pronounced in the name of the American people. But such a bargain between political morality and legal obscurantism is worth paying only as a last resort. Before the next generation builds its constitutional law on a noble lie, it should satisfy itself that the lie is necessary.

This chapter enumerates a series of legal dilemmas that must be resolved if the current orthodoxy is to be vindicated. But the remaining chapters of Part Two do not try to "solve" these dilemmas. Rather, they seek to dissolve them by fashioning a different relationship between Founding and Reconstruction. The dilemmas arise on the assumption that the Republicans could remain faithful to the Founding only by fulfilling Article Five to perfection. Once we free ourselves from this mistake, we can open up a second path linking the 1860's to the 1780's. Though the Republicans played fast and loose with the Federalists' text, perhaps they remained faithful to the precedent established by the Founding practice? During both periods, spokesmen for the People charted a third way between textual regularity and total revolution—unconventionally adapting older institutions to new purposes until the spokesmen for revolutionary reform had earned the constitutional authority to speak for the People. By following the Republicans step by step down this path of democratic adaptation, we will grasp the deeper constitutional dynamics that generate the formalist dilemmas this chapter introduces.

## December 1865

I begin the drama *in medias res.* The month is December 1865. Lee has surrendered the preceding spring. Six days later, Lincoln is shot. Before his death, he had begun to reconstruct civil authority in four states.[1] After the Confederacy collapses, Andrew Johnson orders his victorious generals to summon new "conventions" of the People in each of the other Southern states. These conventions meet in the summer to repudiate their states' secession ordinances and to revise their antebellum constitutions to abolish slavery. They are quickly

succeeded by newly elected state legislatures. Increasingly, the South takes on the appearance of normal government under the Constitution of the United States.

Then comes December 1865, and two fateful events—one involving the Thirteenth Amendment; the other, the Fourteenth.

## *Some Questions about the Thirteenth Amendment*

On December 18, 1865, Secretary of State William Seward proclaims the Thirteenth Amendment ratified by three-fourths of the states. His proclamation includes eight states of the former Confederacy among the twenty-seven signifying assent.[2] As Seward views the situation, all eight are necessary for ratification under Article Five. His proclamation explicitly asserts that thirty-six states are in the Union; hence, twenty-seven is the absolute minimum required by Article Five's three-fourths rule.

At present, I am interested not in Seward's constitutional calculus but in a threshold question: can the hyperformalist avoid elaborate analysis by resting his case on the Secretary's proclamation? After all, I hear him saying, nobody denies that Seward did have twenty-seven ratifications; nor that three-fourths of thirty-six *is* twenty-seven. So where is the problem? Why doesn't the proclamation supply a pat answer to the validity question?

Turn to the second critical event of December 1865. This one comes two weeks earlier. On December 4, the Thirty-ninth Congress meets for the first time, and it immediately confronts the constitutional status of the Southern governments, whose Senators and Representatives demand admission. In memorable scenes (to be described later), this demand was rejected by the Republican majority—which seated only a single Southern state, Tennessee, during its two-year term. Indeed, by the end of its deliberations, the Thirty-ninth Congress had publicly declared that "no legal state governments" existed in the other ten states of the South.[3]

All this raises an obvious problem with Secretary Seward's proclamation. If Seward had followed Congress's December 4 decision, he would have struck the eight Southern states from his tally, leaving only nineteen of the requisite twenty-seven state "legislatures" he thought

were required for constitutional validity.[4] What, then, gave him authority to ignore the negative Congressional judgment of December 4? Putting the proclamation to one side, how might a hypertextualist defend the legality of the Thirteenth Amendment?

These questions were of the first importance at the time. Consider, for example, Andrew Johnson's veto of the act of Congress declaring that "no legal state governments" existed in the South:

> The bill also denies the legality of the governments of ten of the states which participated in the ratification of the amendment to the Federal Constitution abolishing slavery forever. . . . If this assumption of the bill be correct, their concurrence cannot be considered as having been legally given, and the important fact is made to appear that the consent of three-fourths of the States—the requisite number—has not been constitutionally obtained to the ratification of that amendment, thus leaving the question of slavery where it stood before the amendment was officially declared to have become a part of the Constitution.[5]

It seems odd to rely on Seward's proclamation when the Secretary's boss is on record as having called it into question.

### *Some Questions about the Fourteenth Amendment*

December 4 also casts a cloud on the Fourteenth Amendment. Textualism's charm lies in its promise of a mechanical solution to the problem of legal validity. By looking up a couple of pages in the *Congressional Globe* of June of 1866, the textualist hopes to establish that the amendment had the support of the requisite two-thirds majorities required by Article Five.

Unfortunately, the purge of December 4 makes this simple solution problematic. Before flipping through the pages of the *Globe,* the textualist must persuade himself that the body of Northerners meeting on Capitol Hill in June of 1866 could properly invoke the Article Five powers of "Congress." Every student of the period recognizes that, were it not for the purge of Southern Senators and Representatives, the "Congress" meeting in June would *never* have mustered the two-thirds majorities required to propose the Fourteenth Amendment.[6] Why, then, does the formalist suppose that the terms of Article Five could be satisfied by taking a head count of those North-

erners who managed to survive the heat of Washington in the summer of 1866?

### *Dilemma Number One*

We can now put both of these questions together to define a dilemma: while the hypertextualist may hope to rationalize *either* the ratification of the Thirteenth *or* the proposal of the Fourteenth, it will be very hard to vindicate both. To see why, consider the two most promising responses to the questions we have raised.

Begin with the "ratification" of the Thirteenth Amendment. Here the textualist will predictably argue that, notwithstanding the Congressional decision of December 4, Seward was right to count the Southern states among the "legislatures" empowered by Article Five to ratify amendments. But if this argument is sound, where does it leave the Fourteenth Amendment? If the *state assemblies* ratifying the Thirteenth Amendment are "legislatures" for purposes of Article Five, how can the *federal assembly* excluding these states count as a "Congress" when it proposed the Fourteenth Amendment? As the *New York World,* a leading Democratic paper, put the point on December 7, 1865: "The ratification of a constitutional amendment being the highest act a State can perform in its federal relations, competency to do this implies competency for every other. There could be no greater absurdity than to hold that a State can give a valid ratification, and at the same time deny to it any of the rights or functions of complete statehood."[7]

The reverse problem arises if our formalist friend focuses first on the Fourteenth Amendment and persuades us that the Republican caucus *did* have the constitutional authority to exclude representatives of the South. How, then, could Southern legislatures validly participate in the ratification of the Thirteenth Amendment?

I do not say these puzzles cannot be solved, only that some fancy footwork will be required. The forensic challenge is to elaborate an Argument X that will justify the Republicans' exclusion of the Southern Senators and Congressmen *without impugning the status of the governments from which they came.* If the hypertextualist can execute this maneuver successfully, he might have his cake and eat it too. Thanks to X, Congress would be within its rights to proceed without

the Southerners and propose the Fourteenth Amendment. But since X does not discredit the Southern governments, the textualist might successfully explain why they remained constitutionally empowered to ratify the Thirteenth Amendment.

Easier said than done: Are there any X's that will serve?

## Paradox Lost?

Perhaps the answer is to be found in Section Five of Article One:

> Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business.

This text explicitly contemplates Congress retaining its legitimacy even though it excludes some members. Moreover, the Republicans *did* constitute a majority in each House. So why can't Section Five justify exclusion without disparaging the Southern governments?

The problem comes only when we consider how "Congress" exercised its exclusionary powers. At no point did it inquire into the qualifications of particular Southern Senators or Representatives, excluding those, for example, who were disloyal to the Union during the recent war. Rather than rejecting particular men, Congress excluded *all* representatives, however qualified they may have been, from the Southern states.[8]

At this point, the Qualifications Clause must be limited by other textual considerations. Article One asserts that "each State shall have at least one Representative," and Article Five provides that "no State, without its consent, shall be deprived of its equal suffrage in the Senate." Surely Congress cannot use its power to disqualify particular representatives to defeat a state's claim to all representation. If there is a textual warrant for the proscription of the South, it is not the Qualifications Clause.

## Paradox Regained

The Republicans' justification, if there is one, is in Article Four:

> Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government.

Suppose that after seizing power in the state, the King of New York dispatches two Dukes to serve in the United States Senate. Surely Congress would be empowered by the Guaranty Clause to reject the King's delegates to the Senate. While the Constitution does guarantee each *state* representation, it does not allow any and all state *governments,* however un-republican they may be, to intrude their representatives into the halls of Congress.

So much is unarguable. But it is trickier to apply this line of thought to the present problem. Unsurprisingly, both sides vigorously brought the Guaranty Clause into play. Beyond assessing the contending arguments, we should consider whether any of them take the special X-form required to resolve the dilemma.

### *Saving the Thirteenth?*

The Southern constitutions of 1865 looked very similar to the antebellum documents, except for the new provisions outlawing slavery. Under the traditional reading of the Guaranty Clause, this was more than enough to satisfy constitutional requirements. As Madison explained in the *Federalist:*

> the authority extends no further than to a *guaranty* of a republican form of government, which supposes a preexisting government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the federal Constitution. Whenever the states may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for anti-republican Constitutions.[9]

Madison's view was repeated in many leading commentaries,[10] and Congress had consistently rejected abolitionist efforts to invoke the Guaranty Clause as a bar to the admission of new slave states.[11] Given these facts, wasn't it odd to suggest that the South had rendered itself un-republican by freeing the slaves? If the old constitutions qualified as republican, surely the new ones did?

This is a very powerful argument, so long as one accepts its traditional premise. Unfortunately, it does not have the X-form: while it supports Seward's proclamation on the Thirteenth Amendment, it

denies the authority of Congress to go forward with the Fourteenth. This so-called Congress was instead a Republican Rump that had no business making higher law for the nation. Throughout the period, traditionalists—led by President Johnson—repeatedly and forcefully raised this objection.

### *Saving the Fourteenth?*

But, of course, there was nothing to stop the Republicans from attempting a revolutionary reinterpretation of the Guaranty Clause—one that went beyond antebellum abolitionism in insisting that "republican" government required not merely that blacks be free but that they be enfranchised.[12] Led by Charles Sumner,[13] some Congressional radicals took this step. While Sumner's great speeches served as a rallying point for radical opinion in the country, most Republicans were troubled by the implication that the federal government would have a permanent role in structuring state governments.[14]

Even Sumner found it imprudent to insist upon one of the most obvious implications of his position—if Republican government required black suffrage, why didn't it require women's suffrage?[15] Throughout the debates, conservatives repeatedly used the women's issue to discredit the radical construction of the Guaranty Clause—reducing the formidable Thaddeus Stevens to evasions as he struggled with the implication.[16]

But women's suffrage was hardly the only obstacle on the path toward a principled construction of the Guaranty Clause. Congressional Republicans even found it hard to elaborate a coherent approach to black suffrage. They were painfully aware that only six Northern states had granted blacks the vote by 1865.[17] During the Exclusion Crisis, seven out of nine Northern states defeated proposals for black suffrage in popular referenda.[18] Against this background, it was hard for most Republicans to agree with Sumner that black suffrage was unconditionally required by the Clause. The best they could do was to distinguish their racist Northern constitutions on quantitative grounds: By depriving a third or a half of their male population of the vote, the Southern governments were transforming themselves from republics into oligarchies; in contrast, the Northern exclusions,

while regrettable, eliminated such a small percentage from the suffrage that they could not plausibly be considered oligarchic.[19]

Even this convoluted position could not make sense of Congress's treatment of the suffrage question in the Fourteenth Amendment. Section Two of the amendment did not ban the wholesale exclusion of blacks from the polls—this step was taken only in 1869, with the ratification of the Fifteenth Amendment. Instead, it imposed a special sanction upon the exclusion of large proportions of "male citizens twenty-one years of age" from the ballot box. Any state continuing this practice would suffer a proportionate reduction in its representation in the House of Representatives. While this was a serious penalty, it transparently presupposed the continued constitutional legitimacy of such exclusionary practices. How, then, could Congress justify its refusal to seat the returning Southern governments under the Guaranty Clause when it was not even prepared to ban exclusionary practices in the future?

These doubts and hesitations account for the cautious treatment of the Guaranty Clause by the Republican majority when it sought to justify its behavior in a great state paper issued by the Joint Committee on Reconstruction in June 1866. The document, prepared at a moment of grave crisis (to be described later), sought both to justify Congress's power to exclude Southerners and to propose the Fourteenth Amendment. Although the Republicans were determined to use the Clause as their principal legal basis, they could not accept a purely traditionalist account. At the same time, they crafted an interpretation far removed from the Sumnerian claim that the guarantee of republican government required the South to extend suffrage to blacks. Instead of challenging the substance of the new Southern constitutions, the Committee focused upon the process through which they were brought into force:

> [I]t would seem that, before being admitted to the participation in the direction of public affairs, such governments should be regularly organized. Long usage has established, and numerous statutes have pointed out, the mode in which this should be done. A convention to frame a form of government should be assembled under competent authority. Ordinarily, this authority emanates from Congress; but, under the peculiar circumstances, your committee is not disposed to criticize the President's action in assuming the power exercised by him in this regard. The convention,

> when assembled, should frame a constitution of government, which should be submitted to the people for adoption. If adopted, a legislature should be convened to pass the laws necessary to carry it into effect. When a state thus organized claims representation in Congress, the election of representatives should be provided for by law, in accordance with the laws of Congress regulating representation, and the proof that the action taken has been in conformity to law should be submitted to Congress.
>
> In no case have these essential preliminary steps been taken.[20]

When the Committee speaks of "long usage," it is referring to the process by which Congress regulated the admission of territories into statehood. Once a state had entered the Union, however, Congress had strictly followed Madisonian principles.[21] It did not scrutinize the process by which states undertook further constitutional change—which, in fact, was sometimes quite irregular.[22] The only question was whether the end result remained "republican." Since there had never been a case of a state "exchang[ing] republican for anti-republican Constitutions," Congress had never questioned the validity of a government under the Guaranty Clause.[23]

Nevertheless, as the Committee emphasized, Congress had never encountered a total collapse of governmental order like the one experienced in the South after the Civil War. Under the circumstances, its extension of the Guaranty Clause seems plausible, if not compelling.[24] Those textualists who agree have overcome one large hurdle on the path to the formal validity of the Fourteenth Amendment.

But many more hurdles remain. It is one thing to say that Congress could legitimately exclude the South and still pass ordinary legislation; quite another, that it could legitimately propose a constitutional amendment under Article Five.

After all, whatever the merits of the Congressional exclusion of December, one should pause long and think hard before saying that it had deprived the Northern representatives of the authority to call themselves a "Congress" for the purpose of enacting ordinary statutes under the powers vested in them by Article One of the Constitution.[25] Such a conclusion would mean that *no* federal body existed during the critical Reconstruction years that had *any* legitimate lawmaking authority. And the Constitution is not a suicide pact.

But it is a very big leap to a similar grant of power under Article

Five. So long as "Congress" is conceded the power to pass ordinary legislation, anarchy has been avoided. When it comes to Article Five, the textualist is no longer obliged to play fast and loose with basic principles on plea of necessity. Indeed, the text of Article Five imposes a special caution. It contains a final clause that carves out a permanent exception to the general amendment procedures: "no State, without its consent, shall be deprived of its equal suffrage in the Senate." This clause exists on a conceptually more fundamental level than *any* other part of the Constitution. While every other element—including the Guaranty Clause—may be transformed under Article Five, it is only the Senatorial equality of each state that is a permanent part of our Constitution.

Or is it? Given the foundational character of this text, wasn't it especially wrong for the Republicans to proceed with their proposed amendments until Senators from *all* the States could deliberate together on their constitutional destiny?

As we shall see, President Johnson raised these concerns throughout the debate, and they certainly should be taken seriously in a thoughtful reading of the text. Many will conclude that, although both Article One and Article Five speak in terms of "Congress," the text granted the Republican Rump powers of ordinary legislation only under One, without granting them higher lawmaking powers under Five. Others, of course, might disagree and think it more plausible to read the word "Congress" to mean the same thing in both contexts.

Suppose you find yourself in the second group. Not only have you persuaded yourself that Congress acted appropriately in excluding the South on December 4 for purposes of normal legislation; you have also decided that the Southern governments were *so* un-republican that they could be deprived of their rights to participate in the Congressional process of higher lawmaking. With this conclusion, you have successfully vindicated the authority of the Thirty-ninth Congress to propose the Fourteenth Amendment.

But not in a way that saves the Thirteenth Amendment. If, as you have just insisted, the Southern governments were un-republican, what justified Secretary Seward's decision to count these very same governments in proclaiming the ratification of the Thirteenth Amendment?

## Dilemma Number Two: The Ratification of the Fourteenth Amendment

Hypertextualists have not yet reached the end of the maze they have created for themselves. As they move from the proposal of the Fourteenth Amendment to its ratification, a second dilemma awaits—one more perplexing than the last. The facts are these: once the Thirty-ninth "Congress" made its proposal, the Fourteenth Amendment was sent to all existing governments of the South as well as the North. When one Southern government, Tennessee, ratified the amendment, the Republicans immediately admitted its representatives to Congress.[26] But the other ten Southern states rapidly rejected the Congressional initiative—often justifying their decision by asserting that they had been unconstitutionally excluded from deliberating and voting on its proposal.[27] Since there were never more than thirty-seven states in the Union during this period, a blocking veto of ten had been assembled. Worse yet, there were important pockets of opposition in the North as well. The Fourteenth Amendment seemed doomed.

Until Congress intervened with a series of Reconstruction Acts in the spring and summer of 1867. These revolutionary statutes divided the ten Southern states into five military districts and placed the Union Army in control of any further transition to statehood. Commanding generals were authorized to call new constitutional "conventions," but only after they had compiled new voting registers that empowered previously voteless blacks while disenfranchising many disloyal whites. After revolutionizing the South's political class, the acts instructed the Army to supervise the election of delegates to constitutional conventions who would then offer their proposals for approval by the (redefined) People of each state before they were finally submitted to Congress.[28] All this required an enthusiastic embrace of Sumnerian understandings of the Guaranty Clause that has not been seen before or since in the history of the Republic.[29]

As I have noted, Sumner himself blanched at the logical implications of his position. Yet the constitutional problems pale by comparison with those encountered at the next statutory stage. Congress was not content to determine whether the new constitutions were truly "republican" before allowing Southern representatives to take their seats on Capitol Hill. Instead, it left them out in the cold until "said

State, by a vote of its legislature elected under said constitution, shall have adopted the amendment to the Constitution of the United States, proposed by the thirty-ninth Congress, and known as article fourteen." Indeed, even ratification would not suffice. The state would remain unrepresented until "said article shall have become a part of the Constitution of the United States."[30] Only then would the bar be raised and military rule be lifted.

These last two Congressional provisions—enacted over presidential veto[31]—are qualitatively different from all that came before. Up to now, it was possible to drape a legal fig leaf over each Congressional action. But at this point, we are in the presence of naked violations of Article Five. These last two Congressional conditions cannot conceivably be justified by the Guaranty Clause, however expansively interpreted—for the simple reason that Congress had, by this point, already approved the states' constitutions as republican. Nevertheless it was still asserting its power to keep the states out in the cold until they went along with its demand to ratify the Fourteenth Amendment.

This demand made hash of Article Five. While the text gives Congress the right to *propose* amendments, it only allows it to determine whether ratification will proceed through state legislatures or state conventions. There is nothing in the text that contemplates Congress overriding a veto by the states of a proposed amendment.

Yet this is what Congress was doing in its Reconstruction Acts. Rather than allowing the republican governments of the South to accept *or* reject the Fourteenth Amendment, it was telling them, loud and clear, that their decision to reject deprived them of all political power in the councils of the nation. This is flat-out inconsistent with the limited Congressional role described by Article Five. It follows that the process by which Congress procured ratification of the Fourteenth Amendment simply cannot be squared with the text.

Not, mind you, that such a breach is unprecedented. As Part One showed, the Federalist Convention stood in precisely the same relationship to the thirteenth Article of Confederation. But this chapter is trying to analyze the Republican initiative in textual terms without investigating the unconventional alternative. Given this limitation, the "ratification" of the Fourteenth Amendment can be nothing less than a revolutionary act—one that is best dealt with by changing the subject.

And yet it is hard to ignore the tell-tale signs of irregularity that peer out from the fifteenth volume of the *Statutes at Large.* The volume displays a proclamation from Secretary Seward dated July 20, 1868. Congressional Reconstruction had been proceeding apace. Thanks to the Union Army, the black-and-white electorates of six Southern states now possessed Congressionally approved constitutions and were now prepared to reverse their predecessors' rejection of the Fourteenth Amendment. As the Secretary explained, he had received ratifications from "newly constituted and newly established bodies *avowing themselves to be and acting as the legislatures,* respectively, of the states of Arkansas, Florida, North Carolina, Louisiana, South Carolina and Alabama" (emphasis supplied).

As Seward read the relevant statutes, they did not authorize him "to determine and decide doubtful questions as to the authenticity of the organization of State legislatures, or as to the power of any State legislature to recall a previous act or resolution of ratification of any amendment proposed to the Constitution."[32] Worse yet, Seward had another problem. Though he was in possession of twenty-three Northern ratifications, two of these were from Ohio and New Jersey, which had formally retracted their prior assents. What was he to do?

The proclamation concludes conditionally, saying that "if the resolutions of the legislatures of Ohio and New Jersey ratifying the aforesaid Amendment are to be deemed as remaining in full force and effect[33] . . ., then the aforesaid Amendment has been ratified."

Congressional reaction was swift and unequivocal. On July 21, both Houses passed a concurrent resolution listing all twenty-nine states as ratifiers of the amendment, declaring it "to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State." This resolution marks the first time Congress asserted the power to pass judgment on the question of ratification.[34]

However unprecedented, it was also entirely successful. On July 28, the Secretary issued a second proclamation "in conformance"[35] with the Congressional resolution of July 21, certifying the amendment's validity. The ratification story ends as it began: with emphatic markers of its legally anomalous character.

As if the problem of ratification were not enough, it is not our only

constitutional dilemma. Our previous paradox was also provoked by a Seward proclamation, this one involving the Thirteenth Amendment. A satisfying solution to the problem raised by Seward's twin proclamations of 1868 should also be consistent with the rationale vindicating his earlier proclamation of 1865. But in this proclamation, Seward validated the Thirteenth Amendment on the basis of the eight assents tendered to him by the *white* governments of the South. As a consequence, the hypertextualist must somehow explain why Seward was right to count these white governments when they said Yes on the Thirteenth Amendment but why Congress could destroy these governments in 1867 when they said No, and keep new governments in the cold until they said Yes.

*Is* there any way out of the textualist wilderness?

## Cutting the Gordian Knot?

I have been assuming that the states of the South did not commit constitutional suicide by rebelling against the Union: While the Southern *governments* had forfeited their claim to legitimacy by rebelling, the *people* of the Southern *states* had not forfeited their right to be counted as constituent parts of the Union—provided, of course, that they reestablished republican governments that *were* loyal to the Union.

But this assumption is open to challenge. Most famously, Charles Sumner argued that Alabama et al. had committed suicide and so should not count as "states" in calculating the three-fourths majority required by Article Five. Thaddeus Stevens and others went even further, arguing that the South was a conquered province at the mercy of the United States.[36] While Stevens's theory differed from Sumner's, they had the same implications so far as Article Five was concerned.[37] If only Northern states in the Union should be counted in applying the three-fourths rule, it is easy to establish formal validity for both the Thirteenth and Fourteenth Amendments.[38] With a single conceptual stroke, the textualist may cut his way free of legal perplexity.

Unfortunately, an embrace of Sumner-Stevens mathematics generates even deeper paradoxes of its own. As President Johnson never tired of pointing out, Congress had explicitly assured the nation that the war's object was "to preserve the Union with all the dignity, equal-

ity, and rights of the several states unimpaired. . . . As soon as these objects are accomplished the war ought to cease."[39] This was also the official position of the Lincoln Administration throughout the war.[40] Now, after hundreds of thousands had died for the Union, Sumner and Stevens seemed to be saying the rebels were right: the Constitution had not created an indissoluble Union, and the Southern states could be transformed into conquered provinces or mere territories. For this reason Johnson constantly likened them to Southern secessionists, portraying himself as the spokesman for moderates who hoped to steer clear from dis-Unionists of both the South *and* the North.

To parry this thrust, the Republican majority in Congress never formally endorsed Stevens-Sumner radicalism and its embrace of Northern diktat.[41] While Congress used the Union Army to create new voting rolls and supervise reconstruction, success still depended upon the decisions made by the new black-and-white electorate. No less than the President, Congress sought to create a process in which Southern states *consented* to the constitutional solutions emerging from the Civil War. Although the means of obtaining this consent made a hash of the Article Five framework, Congress refused to attempt an even deeper break with constitutional values by publicly proclaiming this consent to be unnecessary. Its response of July 1868 to Secretary Seward proudly listed the assents from the South as well the North, and on *that* basis it declared the Fourteenth Amendment valid. The Supreme Court took the same approach in its 1870 decision of *Texas v. White*.[42] Chief Justice Salmon P. Chase prudently avoided any clear-cut decision on the constitutional status of the white governments established by President Johnson. But he made it very clear that Southern secession had *not* reduced the region to a conquered province: "the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."[43]

It follows, then, that before he follows Stevens and Sumner, the hypertextualist must repudiate a considered Supreme Court holding[44] that crystallized the constitutional consensus emerging from Reconstruction. In taking this step, he would be asserting a position yet more paradoxical than any we have encountered thus far: Repudiating the considered judgments of Presidents Lincoln and Johnson, Congress and the Court, he triumphantly informs us that we may save the

validity of the Reconstruction amendments by accepting secessionist opinions of Southern rebels and Northern radicals that never gained the considered endorsement of the American people.

## Grasp of War?

Thoughtful hypertextualists often give up the ghost at this point. If we cannot continue to suppress the problematic origins of the Reconstruction amendments, I hear them say, why don't we just make a virtue out of necessity: Granted that the South had not successfully seceded from the Union; nonetheless, the North was within its rights in holding the South within "the grasp of war"[45] until the South accepted its demands. On this view, the Thirteenth and Fourteenth Amendments are part of our Constitution not by virtue of Article Five, but by virtue of Antietam and Gettysburg and the war power.[46]

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Without wishing to appear ungracious, I cannot accept this concession without emphasizing its importance. This book's central target is hypertextualism—the naive, but orthodox, view that Article Five provides a framework within which modern lawyers can explain *all* valid amendments since the Founding. Any constitutionalist who accepts the "grasp of war" argument has broken decisively with this orthodoxy. He agrees with me that Reconstruction did not proceed by the old formula, but that the Republicans put together their new regime in a new way. The question is no longer whether hypertextualism is adequate, but what theory of constitutional change should replace it?

"Grasp of war" strikes me as a bad candidate. Most importantly, it would place the Reconstruction amendments on a radically different, and much less attractive, constitutional foundation than all other parts of our Constitution. The Founding, and other amendments, gain their authority from the constitutional will of the American people; but if we accept "grasp of war," the Civil War amendments emerge from the guns of the Union Army.

Maybe we would have to grit our teeth and accept this harsh truth—if it were the truth. But as I hope to show, "grasp of war" is bad history. When the cannons went silent, the constitutional meaning of the war was unresolved. Many answers were possible, none were

inevitable. "Grasp of war" does not emerge from a careful study of the facts, but from a misguided jurisprudence which restricts our choices to a sharp dichotomy—*either* the framework of Article Five governed in all its legalistic splendor *or* the legal framework was destroyed and only force reigned.

But the entire point of this book is to reject this dichotomy between legalistic perfection and lawless force. If I am successful, the Civil War's relationship to the Reconstruction amendments will seem similar to the American Revolution's relationship to the Constitution of 1787. After all, the Revolution was itself a civil war, pitting loyalists against patriots in bloody struggle. And yet we do not suppose that the shape of the Constitution of 1787 was determined by the Battle of Yorktown. We believe—and rightly so—that it was the political struggle provoked by the Philadelphia Convention that determined America's constitutional destiny.

So too with the Civil War and Reconstruction. Only after the killing stopped did Americans begin to struggle in earnest over the meaning of the Union victory: Was it simply a vindication of the old Constitution? Did it authorize the construction of a radically new republic? Or something in between? Despite its pseudo-realistic ring, "grasp of war" goes wrong in ignoring the unconventional but profoundly democratic ways in which the American people—in the South as well as the North—exercised a *genuine choice* amongst the constitutional solutions opening up before them.

There is only one way to recover these unconventional structures of popular sovereignty. As with the Federalists, we must follow the Republicans as they moved, step by step, to gain a mandate from the People for their revolutionary reforms of the old regime.

## The Sounds of Silence

Since a long and arduous journey lies ahead, I should respond to a common effort to cut it short: *If* you were right, Bruce, and there is a serious problem about the Reconstruction amendments, why haven't lawyers been talking about it? Lord knows, they manage to talk plenty about less important matters! Silence *must* mean that these legal dilemmas have been decisively resolved so long ago that the answers have been lost in the mists of time.

To the contrary, the legal blockage has more proximate sources. In 1939, the Supreme Court announced that it was going out of the Article Five business. Breaking with a long line of precedents, *Coleman v. Miller*[47] declared that Article Five was off limits, raising "political questions" rather than legal ones. Since then, the Court has been true to its word: it has not decided a single case under Article Five. Within a different scholarly culture, this sudden retreat from legalism might have been the source of great curiosity: Why did the Court decide that Article Five was too hot to handle? If Article Five is the hard law that the hypertextualist supposes, why don't courts enforce it? But the fact is that American legal scholars tend to be court-watchers, and when the Court stops talking about an issue, scholars also put it on the back burner.

Indeed, the only time the problem has surfaced was in the 1950's, when Southern law reviews contained a number of articles that revived the Fourteenth Amendment's problematic pedigree as part of the campaign against *Brown v. Board of Education.*[48] Apart from a weak and belated response in a Northern review,[49] mainstream legal opinion generally ignored this Southern challenge.

But lawyers are merely partners in the preservation of the nation's constitutional memory. And if historians had sustained an interest, the problem would not have dropped so completely from view. Consider James Randall's *The Civil War and Reconstruction,* which served from the 1930's through the 1960's as "as the best one-volume history of the Civil War for general readers, and as a textbook for college classes."[50] Here are some highlights from the chapter dealing with "Postwar Politics and Constitutional Change":

> A notable characteristic of this period of Radical rule was its disregard for the Constitution. Nowhere was this attitude more clearly exhibited than in their disregard for form and procedure in the adoption of the fourteenth amendment. . . .
>
> In reality Congress in 1867–68 was not merely submitting an amendment to the states. It was creating fabricated governments in the South, to which there was given not an untrammeled opportunity of voting *Yes* or *No* on the proposed constitutional article, but only the alternative of voting *Yes* or being denied recognition as states in the Union. As a matter of constitutional law the method of amending the Constitution does not lie within the legislative power of Congress. It is prescribed in Article V of the

> Constitution . . . It is for Congress to choose between the convention and legislative ratification, but not to create new factors or conditions as part of the amending process. In this case Congress submitted an amendment which was rejected by more than a fourth of the states; then in effect Congress changed the process, providing that ratification must be effected by a specified type of legislature, elected in a manner provided by Congress, a legislature chosen on the basis of Negro suffrage (though this was prior to the adoption of the fifteenth amendment, designed to force such suffrage) . . .
>
> Maintaining that the Southern states were not in the Union until redeemed by Congress, the Radicals were driven to the absurd conclusion that the states could not qualify as members of the Union until after they had performed a function which only members can perform, i.e. ratify a Federal constitutional amendment. . . .[51]

If constitutional lawyers were regularly exposed to such acerbic commentaries from historians, they would find it difficult to maintain their blithe indifference to the paradoxes we have exposed to view.

But the last generation of historians has also turned a blind eye to these puzzles. Eric Foner's outstanding work of 1988, *Reconstruction: America's Unfinished Revolution,* is symptomatic.[52] It aims for a comprehensive synthesis of contemporary scholarship, but this 600-page book omits a sustained treatment of Randall's sharp doctrinal complaints. What happened?

An intellectual revolution. A vast outpouring of scholarship has rewritten the social and political history of Reconstruction. Working from an expanded set of sources, the last generation has managed a mighty demolition job on the pro-Southern biases that had informed historical scholarship since the late nineteenth century. But in one key respect, this revisionist wave has only reinforced an already existing tendency. Over the course of the twentieth century, professional historians have steadily lost interest in matters of technical constitutional doctrine. While early academics like John Burgess and William Dunning treated constitutional questions with high interest, most historians of the 1920's and 1930's were already dismissing constitutional doctrine as a manipulative smoke screen used to cover up more basic social and economic interests. Despite Randall's stature, his concern with legal doctrine was already quite exceptional at midcentury.[53] This dismissive tendency has, if anything,[54] been reinforced by the last generation's fascination with social history. Rather than focusing on

the rarefied heights of Capitol Hill, recent historians have preferred to explore the meaning of Reconstruction history for the ordinary men and women of the South.

No less important has been a subtle change in attitude amongst the small but outstanding band of scholars who have sustained a serious legal interest. Speaking broadly, they have sought to avoid the caustic judgmentalism expressed in Randall's commentary. Rather than responding on the merits to Randall's complaints, the best books and articles have proceeded from a more detached interpretivist stance—seeking to understand, rather than judge, the ways law and politics interacted during the period. Much has been gained by this change, but something has been lost—a sense of the anxiety with which Americans saw the higher lawmaking system unraveling before their eyes, and their grim determination to fill the legitimacy gap that had been revealed.

The sense of crisis came on early. By 1862, Sidney George Fisher's great *Trial of the Constitution* was already explaining to his countrymen that they could not rely on the mechanisms for constitutional change provided by Article Five: "We must understand the Fifth Article, as providing one mode by which amendments may be made, not as excluding others."[55] Buttressing this claim with an extraordinary range of arguments that included—but went far beyond—many developed here, Fisher recalled his countrymen to their ultimate responsibility:

> The Constitution belongs to the people,—to the people of 1862, not to those of 1787. It must and will be modified to suit the wishes of the former, by their representatives in Congress, just as the English Constitution has been modified by Parliament, or it will be destroyed. . . . It may be thought, by some, that it would run greater risks if committed to the caprice of the multitude, or to such a Legislature as the multitude elects. But these perils must be encountered in a republic. If the people cannot preserve the Constitution, it must perish, for it cannot be preserved by the Judiciary.[56]

I cannot do justice to Fisher's brilliant speculations.[57] My concern is with the remarkable way Americans rose to his challenge and managed to reaffirm the possibility of popular sovereignty through unconventional adaptations that even Fisher had not foreseen during the darkest days of the war.