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2010

## Our Forgotten Founders: Reconstruction, Public Education, and Constitutional Heroism

Tom Donnelly

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### Recommended Citation

Tom Donnelly, *Our Forgotten Founders: Reconstruction, Public Education, and Constitutional Heroism*, 58 Clev. St. L. Rev. 115 (2010)  
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OUR FORGOTTEN FOUNDERS: RECONSTRUCTION, PUBLIC EDUCATION, AND CONSTITUTIONAL HEROISM

TOM DONNELLY\*

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## I. INTRODUCTION

Works on the Founding generation consistently inhabit national bestseller lists. For instance, David McCullough's book *1776*<sup>1</sup> placed fifth on *Publishers Weekly's* 2005 list,<sup>2</sup> beating out pop culture favorites *Blink*<sup>3</sup> and *Freakonomics*.<sup>4</sup> Over the last decade, other similarly successful titles have included *His Excellency*,<sup>5</sup> *Founding Brothers*,<sup>6</sup> and *John Adams*.<sup>7</sup> In fact, McCullough's hagiographic biography of our nation's second President was later transformed into an Emmy Award-winning miniseries on HBO<sup>8</sup>—to say nothing of President Obama's decision to add it to his 2009 summer reading list.<sup>9</sup> In short, Americans revere their eighteenth-century Founders.<sup>10</sup>

At the same time, the American book-consuming public has largely ignored an important generation of leaders—leaders who, “[f]our score years after the Founding . . . transform[ed] what their fathers had brought forth on the continent.”<sup>11</sup> These nineteenth-century Founders<sup>12</sup> include such forgotten men as Thaddeus Stevens, Charles Sumner, and John Bingham. In antebellum America, Stevens defended fugitive slaves for free (and with much success);<sup>13</sup> Sumner fought for school

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<sup>1</sup> DAVID MCCULLOUGH, *1776* (2005).

<sup>2</sup> *Bestselling Books of the Year, 1996-2007*, PUB. WEEKLY, Mar. 24, 2008, available at <http://www.publishersweekly.com/article/CA6540986.html> (last visited Feb. 7, 2010).

<sup>3</sup> STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING* (2004).

<sup>4</sup> MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2005).

<sup>5</sup> JOSEPH J. ELLIS, *HIS EXCELLENCY: GEORGE WASHINGTON* (2004) [hereinafter ELLIS, *EXCELLENCY*].

<sup>6</sup> JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* (2000) [hereinafter ELLIS, *FOUNDING*].

<sup>7</sup> DAVID MCCULLOUGH, *JOHN ADAMS* (2001). For a list of bestsellers since 1996, see *Bestselling Books of the Year*, *supra* note 2.

<sup>8</sup> See Wikipedia, *John Adams (TV miniseries)*, [http://en.wikipedia.org/wiki/John\\_Adams\\_\(miniseries\)](http://en.wikipedia.org/wiki/John_Adams_(miniseries)) (last visited Mar. 27, 2010).

<sup>9</sup> See *Obama's Reading List for Martha's Vineyard*, <http://thepage.time.com/obamas-reading-list-for-marthas-vineyard> (last visited Mar. 27, 2010).

<sup>10</sup> For the remainder of this Article, I will refer to the eighteenth-century Founders as our “Founding Fathers.” Works on Lincoln have been similarly successful, as evidenced by DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* (2005). See *Bestselling Books of the Year*, *supra* note 2.

<sup>11</sup> AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY 351* (2005) [hereinafter AMAR, *CONSTITUTION*].

<sup>12</sup> For the remainder of this Article, I will refer to our nineteenth-century Founders as our “Reconstruction Founders.”

<sup>13</sup> MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 85* (1986) [hereinafter CURTIS, *NO STATE SHALL ABRIDGE*].

desegregation in Boston;<sup>14</sup> and Bingham envisioned federally-protected free speech rights for Southern abolitionists.<sup>15</sup> Under their post-Civil War leadership, “the nation ended slavery, made every person born under the flag an equal citizen, guaranteed a host of civil rights to all Americans, and extended equal political rights to black men.”<sup>16</sup> These are our Forgotten Founders.<sup>17</sup>

While our bookstores are (rightly) filled with works on the Civil War and Abraham Lincoln, they include few works on Reconstruction and even fewer biographies of our Reconstruction Founders. A Library of Congress subject search of books published since 1980 reveals 1,084 works on Abraham Lincoln, 160 on James Madison, and 115 on Alexander Hamilton.<sup>18</sup> The same search yields only eighteen works on Charles Sumner, seven on Thaddeus Stevens, and one on John Bingham.<sup>19</sup> While Madison has emerged in the public consciousness as the “Father of the Constitution,” Hamilton as among our nation’s “Founding Fathers,” and Lincoln as the “Great Emancipator,” Stevens, Sumner, and Bingham have been largely forgotten.

A similar disparity exists in elite legal culture. Larry Kramer describes constitutional theory as “‘Founding obsessed’ in its use of history,”<sup>20</sup> while Barry Friedman chastises his colleagues for an “obsession with original meaning” that “almost entirely ignores the intervening 200 years of constitutional history.”<sup>21</sup> A simple search of recent law journal articles provides some support for these

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<sup>14</sup> Daniel A. Farber & John E. Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMMENT. 235, 251 (1984) (quoting W. PEASE & J. PEASE, THE ANTISLAVERY ARGUMENT 288 (1965)).

<sup>15</sup> See Michael Kent Curtis, *John A. Bingham and the Story of American Liberty: The Lost Cause Meets the “Lost Clause”*, 36 AKRON L. REV. 617, 665 (2003) [hereinafter Curtis, *Bingham*].

<sup>16</sup> AMAR, CONSTITUTION, *supra* note 11, at 351.

<sup>17</sup> Of course, not everyone agrees that Reconstruction should be celebrated as a constitutional success. For a recent account of Reconstruction’s failures, see Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMM. 115 (1994). But see 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 471-74 (1998) [hereinafter 2 ACKERMAN, PEOPLE].

<sup>18</sup> See Library of Congress Online Catalogs, available at <http://catalog.loc.gov/webvoy.htm> (last visited Mar. 27, 2010).

<sup>19</sup> See *id.* Furthermore, in searching *New York Times* articles published since 1998, 1,758 refer to Lincoln, 679 to Hamilton, and 653 to Madison. At the same time, only twenty-four refer to Sumner, six to Stevens, and one to Bingham.

<sup>20</sup> Larry Kramer, *Fidelity to History—And Through It*, 65 FORDHAM L. REV. 1627, 1628 (1997).

<sup>21</sup> Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 5 (1998); see also Keith E. Whittington, “Clothed with the Legitimate Authority of the People”, 91 VA. L. REV. 2023, 2041 (2005) (reviewing AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY (2005)) (warning that “America’s constitutional history is not just the history of the founding.”).

criticisms.<sup>22</sup> This bias among legal elites is reinforced by the appellate briefs and oral arguments of top practitioners, as they similarly privilege the Founding generation over their Reconstruction counterparts.<sup>23</sup> Taken together, these disparities might begin to explain the Supreme Court’s habitual, myopic focus on the Founding.

Between Reconstruction and the 1940s, Sumner and Stevens appeared in only one Supreme Court opinion a piece.<sup>24</sup> At the same time, Bingham was completely ignored by the Court until 1947, when Hugo Black resurrected him as “the Madison of . . . the *Fourteenth Amendment*.”<sup>25</sup> Following Black’s resignation and death in 1971, these Reconstruction leaders disappeared again for two decades.<sup>26</sup> All told, since the outbreak of the Civil War, Sumner has appeared in only nine Court opinions, Stevens in eight, and Bingham in seven. Over that same period, Madison and Hamilton were cited in 191 and 100 Court opinions, respectively.

These data suggest that Justice Scalia’s landmark opinion in *District of Columbia v. Heller*<sup>27</sup> was only the most recent (in a long line of) cases to summarily reject (if

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<sup>22</sup> Over the last decade, 7,630 law journal articles refer to Madison and 4,844 to Hamilton. Although hardly ignored, our Reconstruction Founders lag far behind—with Sumner cited in 312 articles, Bingham in 265, and Stevens in 153.

<sup>23</sup> See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 266 (1998) [hereinafter AMAR, *BILL OF RIGHTS*] (“Today’s NRA pays far too much attention to 1775-91 and far too little to 1830-68.”). Amar notes a similar tendency in the First Amendment context, where “[a]dvocates and scholars focus all their analytic and narrative attention on the Creation, not the Reconstruction.” *Id.* at 242.

<sup>24</sup> See *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896) (citing *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 206 (Mass. 1849)) (“‘The great principle,’ said Chief Justice Shaw, ‘advanced by the learned and eloquent advocate for the plaintiff [Mr. Charles Sumner], is, that by the constitution and laws of Massachusetts, all persons, without distinction of age or sex, birth or color, origin or condition, are equal before the law.’”); *The Legal Tender Cases*, 79 U.S. 457, 517 (1870) (“Those of us who, in the words of the late Thaddeus Stevens, ‘believe, . . . as all should believe, that the judiciary is the most important department of the government, and that great, wise, and pure judges are the chief bulwark of the lives, liberty, and rights of the people,’ will then, indeed, have reason to fear that the court, in reviewing this question, will, so . . . far from having actually and finally settled the principle of constitutional law involved, they rather have unsettled it; and, in so unsettling it, have unsettled also the grounds for the confidence and submission of this people under the determination by this tribunal of constitutional questions.”).

<sup>25</sup> *Adamson v. California*, 332 U.S. 46, 73-74 (1947) (Black, J., dissenting) (“Congressman Bingham may, without extravagance, be called the Madison of the first section of the *Fourteenth Amendment*.”).

<sup>26</sup> The Reconstruction Founders appear in only one case during this period, *Richardson v. Ramirez*, 418 U.S. 24, 45 (1974), which noted that Bingham “was one of the principal architects of the *Fourteenth Amendment* and an influential member of the Committee of Fifteen.”

<sup>27</sup> *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). Referring to *Heller* as one of three “defining opinions” of her tenure at the *New York Times*, Linda Greenhouse described the decision as a “[t]riumph of [o]riginalism.” Linda Greenhouse, *3 Defining Opinions*, N.Y. TIMES, July 13, 2008, at WK4. Lawrence Solum added of *Heller* that “it is hard to imagine finding a clearer example of ‘original public meaning originalism’ in an actual judicial decision.” Lawrence B. Solum, *Semantic Originalism* 26 (Ill. Pub. Law & Legal Theory

not completely ignore) Reconstruction's significance in determining the scope of key Bill of Rights protections.<sup>28</sup> In fact, in the wider context of the Court's history, Scalia's cursory treatment of Reconstruction in *Heller* was almost commendable. At least he paused for a moment on Reconstruction (and even cited Charles Sumner)

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Research Papers Series, Paper No. 07-24, 2008), available at <http://papers.ssrn.com/sol3/>. Even Akhil Amar noted that "Justice Scalia's landmark ruling merits our attention for its method as well as its result. Behold: a constitutional opinion that actually dwells on the Constitution itself!" Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 147 (2008) [hereinafter Amar, *Holistic*]. Even as Scalia allegedly based his decision on the text and history of the Constitution, he devoted less than two pages of his 134-page analysis to the Reconstruction Amendments and related Reconstruction-era civil rights legislation. For Scalia's discussion of "Post-Civil War Legislation" in *Heller*, see 128 S. Ct. at 2809-11.

In earlier works, Scalia acknowledged that originalism's "greatest defect . . . is the difficulty of applying it correctly." Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989). In originalism's defense, Scalia countered that "the originalist at least knows what he is looking for: the original meaning of the text." ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 45 (1997). Although I do not wish to dwell on familiar arguments over originalism, the defense of originalism offered by Scalia in this passage ignores what can often be a more vexing pair of questions: (1) the "original meaning" of which parts of the "text?"; and, (2) whose "meaning" counts as "original?" For an overview of the originalism debate, see Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, 31 HARV. J.L. & PUB. POL'Y 875 (2008); INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 3-10 (Jack N. Rakove ed., 1990); and Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989).

<sup>28</sup> Amar argues that "adding the . . . Fourteenth Amendment[] to the mix would have dramatically strengthened Justice Scalia's opinion from an originalist perspective . . ." Amar, *Holistic*, *supra* note 27, at 177. This is not to suggest that the meaning of Reconstruction (or its relevance to *Heller*) is clear-cut. As evidence, look no further than the longstanding debate over the original meaning of the Fourteenth Amendment, which spans several decades. For early exchanges over the Fourteenth Amendment, see *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Adamson*, 332 U.S. at 46; HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875, at 386-438 (1982); JACOBUS TENBROEK, EQUAL UNDER LAW 201-39 (1951); Michael Kent Curtis, *Further Adventures of the Nine Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 OHIO ST. L.J. 89 (1982) [hereinafter Curtis, *Adventures*]; Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435 (1981); William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); and Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949). For more recent exchanges over the Fourteenth Amendment, see AMAR, BILL OF RIGHTS, *supra* note 23, at 163-283; CURTIS, NO STATE SHALL ABRIDGE, *supra* note 13, at 85; Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment was Ratified in 1868: What Rights are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7 (2008); Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643 (2000); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993) [hereinafter Aynes, *Misreading*].

before dismissing this controversial era's relevance.<sup>29</sup> Although some have rightly focused on the complicity of legal elites in creating our nation's obsession with the Founding,<sup>30</sup> I am interested in analyzing the possible role that wider constitutional culture<sup>31</sup> has played in reinforcing (or, at least, silently accepting) *Heller*-like, "Founding-obsessed" narratives.<sup>32</sup>

In this Article, I move beyond the familiar discussions of Felix Frankfurter,<sup>33</sup> Hugo Black,<sup>34</sup> Charles Fairman,<sup>35</sup> William Crosskey,<sup>36</sup> and Raoul Berger<sup>37</sup>—not to mention Akhil Amar,<sup>38</sup> Michael Kent Curtis,<sup>39</sup> and Richard Aynes.<sup>40</sup> Instead, I

<sup>29</sup> *Heller*, 128 S. Ct. at 2807 (quoting Charles Sumner, *The Crime Against Kansas* (May 19-20, 1856), in *AMERICAN SPEECHES: POLITICAL ORATORY FROM THE REVOLUTION TO THE CIVIL WAR* 553, 606-07 (Ted Widmer ed., 2006)).

<sup>30</sup> Amar, *Holistic*, *supra* note 27, at 177 (flagging the "less [than] admirable role [played by Harvard Law School] in educating its students . . . about the proper meaning of the Fourteenth Amendment"). For Amar's overview of the *Harvard Law Review* influence on Fourteenth Amendment doctrine over the last half-century, see *id.* at 177-90.

<sup>31</sup> Robert Post defines "constitutional culture" as "a specific subset of culture that encompasses extrajudicial beliefs about the substance of the Constitution." Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 *HARV. L. REV.* 4, 8 (2003). Reva Siegel adds that "the term 'constitutional culture' . . . refer[s] to the understandings of role and practices of argument that guide interactions among citizens and officials in matters concerning the Constitution's meaning." Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era*, 94 *CAL. L. REV.* 1323, 1325 (2006). I will draw heavily upon Post's and Siegel's conceptions of "constitutional culture" throughout this Article.

<sup>32</sup> I agree with Barry Friedman, who recently observed, "[a]s a nation and a constitutional culture, we wallow deep in the waters of the Founding era. Yet, the rich history of the Civil War Amendments has barely been integrated into our national ethos." Barry Friedman, *Reconstructing Reconstruction: Some Problems For Originalists (And For Everyone Else, Too)* 1205 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 09-32, 2009), *available at* <http://ssrn.com/abstract=1406713>.

<sup>33</sup> See *Adamson*, 332 U.S. at 59 (Frankfurter, J., concurring).

<sup>34</sup> See *Duncan*, 391 U.S. at 162 (Black, J., concurring); *Adamson*, 332 U.S. at 68 (Black, J., dissenting).

<sup>35</sup> See Fairman, *supra* note 28, at 5-6.

<sup>36</sup> See 2 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 711 (1953); Crosskey, *supra* note 28, at 1-2.

<sup>37</sup> See Berger, *supra* note 28, at 435-39.

<sup>38</sup> See AMAR, *CONSTITUTION*, *supra* note 11, at 349-401; AMAR, *BILL OF RIGHTS*, *supra* note 23, at 137-294.

<sup>39</sup> See CURTIS, *NO STATE SHALL ABRIDGE*, *supra* note 13, at 85-91; Curtis, *Bingham*, *supra* note 15, at 617-26; Curtis, *Adventures*, *supra* note 28, at 89-91.

<sup>40</sup> See Richard L. Aynes, *The Continuing Importance of Congressman John A. Bingham and the Fourteenth Amendment*, 36 *AKRON L. REV.* 589 (2003) [hereinafter Aynes,



consider a factor that has been all-but-ignored in the legal academy—public education—and focus on a question that has not yet been asked by legal scholars: What role has the public school played in constructing (or reinforcing) a constitutional culture that celebrates the Founding generation, but gives short shrift to their Reconstruction counterparts? In this, I build upon the extensive work completed in recent years on the construction of the legal canon,<sup>41</sup> beginning with Bruce Ackerman,<sup>42</sup> and continuing through the work of Jack Balkin,<sup>43</sup> Sanford Levinson,<sup>44</sup> and Richard Primus,<sup>45</sup> among others.<sup>46</sup> These scholars have examined the lessons that our law schools are transmitting to the next generation of lawyers, including extensive analyses of the key issues and cases filling our most widely-used casebooks. At the same time, even as legal scholars are fond of citing “high school civics” notions of our Constitution and its history,<sup>47</sup> few have taken the time to

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*Continuing*]; Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 CHI.-KENT L. REV. 1197 (1995) [hereinafter Aynes, *Amendment*]; Aynes, *Misreading*, *supra* note 28, at 57-62.

<sup>41</sup> See J. M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* 18-19 (1998) (“[T]he key to information is in formation; it lies in the selection and categorization of the flux of experience into comprehensible categories, events, and narratives. In order to understand, we must establish similarities and differences, categories and narratives, canons and heuristics.”).

<sup>42</sup> See 2 ACKERMAN, *PEOPLE*, *supra* note 17; Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007) [hereinafter Ackerman, *Constitution*].

<sup>43</sup> See J. M. Balkin & Sanford Levinson, *Legal Canons: An Introduction*, in *LEGAL CANONS* 6 (J.M. Balkin & Sanford Levinson eds., 2000) (“Just as literature professors decide what poems and novels to teach, editors of casebooks decide what ‘cases and materials’ students ought to be exposed to on their intellectual journey from uninitiated laypersons to well-educated, ‘disciplined’ lawyers.”); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998).

<sup>44</sup> Balkin & Levinson, *supra* note 43.

<sup>45</sup> Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243 (1998).

<sup>46</sup> See also Jerome A. Barron, *Capturing the Canon*, 17 CONST. COMMENT. 349 (2000); Philip Bobbitt, *The Constitutional Canon*, in *LEGAL CANONS*, *supra* note 43, at 331, 364 (“There is a canon in constitutional interpretation. It is captured in the major casebooks, taught in the introductory courses in constitutional law, relied upon explicitly, but more often implicitly, by judges and presidents and members of Congress.”); Suzanna Sherry, *The Canon in Constitutional Law*, in *LEGAL CANONS*, *supra* note 43, at 374; Mark Tushnet, *The Canon(s) of Constitutional Law: An Introduction*, 17 CONST. COMMENT. 187 (2000); William M. Wiecek, *Is There a Canon of Constitutional History?*, 17 CONST. COMMENT. 411 (2000).

<sup>47</sup> A quick Westlaw search yields recent references to “high school civics” instruction in articles by some of our most eminent constitutional scholars. See, e.g., David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 803 (2008) (“Our detailed review is a reminder that the high school civics notion of checks and balances should not be dispensed with so quickly in this context.”); Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 636 n.9 (2000) (“Siegan’s description of the American system . . . is so uncritical that it might embarrass even the author of a high-school civics text.”); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 400 (1995) (“In Ackerman’s view, (a) the New Deal radically changed the Constitution; (b) change

consider what is actually being taught in our high school classrooms. This is a mistake.

In this Article, I consider the constitutional stories we tell our schoolchildren about the Founding and Reconstruction. To that end, I analyze the relevant sections of our leading high school history textbooks, focusing particularly on the consensus narratives and constitutional heroes that emerge in these accounts. This analysis is vital to more fully understanding the background assumptions that elite lawyers, political leaders, and the wider public bring to bear when they consider the meaning of the Constitution.

Part I provides a brief overview of the American history curriculum in our high schools and the political economy of the high school textbook industry. Part II considers how the Founding has been taught in our leading high school textbooks since the early twentieth century, especially in light of related trends among academic historians.<sup>48</sup> Part III turns to a similar analysis of Reconstruction. Part IV

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is justified by constitutional amendment; (c) therefore, an amendment must justify the New Deal; and *high school history to one side*, indeed, (d) there was a constitutional amendment, or the functional equivalent of a constitutional amendment, in the late 1930s sufficient to justify the changes of the New Deal.”) (emphasis added); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 544 (1994) (“It is thus perhaps a bit surprising to arrive at law school and discover that this ‘high school civics’ conception of the separation of powers, particularly presidential control over execution of the laws, has for some time now been out of favor.”); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 495 (1994) (“[W]e have not been taught—in high school civics, in college classrooms, in Supreme Court opinions, or even in law school casebooks and law reviews, just how central James Wilson was to the Founding generation, and to the Founding itself.”); Bruce A. Ackerman, *Foreword: Law in an Activist State*, 92 YALE L.J. 1083, 1112 (1983) (“[W]e continue to tolerate a professional discussion of these matters that rarely moves beyond the banalities of high school civics.”).

<sup>48</sup> It is important to note that it remains difficult to obtain lists of the most widely-used high school United States history textbooks, as education publishers closely guard information about volume and sales as trade secrets. Therefore, I have followed the guidance of noted education scholars in selecting the textbooks to use for this Article. In selecting the textbooks for this Article, I was guided by Professors Diane Ravitch, Meira Levinson, and John J. Patrick, as well as Dr. Frederick Hess of the American Enterprise Institute and staff members at the Center for Civic Education and the National Council for the Social Studies.

The best resource for determining today’s most widely-used high school United States history textbooks is the American Textbook Council’s list of “Widely Adopted History Textbooks.” American Textbook Council, *Widely Adopted History Textbooks*, <http://www.historytextbooks.org/adopted.htm> (last visited Mar. 27, 2010). The Council has been tracking this information since 1986 by surveying “key states and large school districts.” *Id.* They focus on Texas, California, Indiana, North Carolina, Florida, and New York. The American Textbook Council notes that the textbooks I have analyzed comprise an estimated eighty percent of the national market in United States history textbooks. *Id.*

For the most widely-used American history textbooks of the 1940s and 1950s, I relied upon a list compiled by Robert Lerner, Althea Nagai, and Stanley Rothman. For an overview of their methodology, see ROBERT LERNER, ALTHEA K. NAGAI & STANLEY ROTHMAN, *MOLDING THE GOOD CITIZEN: THE POLITICS OF HIGH SCHOOL HISTORY TEXTS* 159-61 (1995). In compiling their list of the most widely-used history textbooks by decade, Lerner, Nagai,

discusses how our textbooks treat key constitutional actors during these periods. Throughout this Article, I consider two sets of American history textbooks: the leading textbooks of the 1940s and 1950s; and their counterparts in today's classrooms. Importantly, the earlier textbooks were dominant when a majority of the current members of the Supreme Court were in high school<sup>49</sup>—not to mention countless judges, professors, and legislators.<sup>50</sup>

With Charles Beard's diminishing influence in the late twentieth century, one would expect a shift in our textbooks' treatment of the Founding—from accounts that emphasize the selfish, antidemocratic motives of our Founding Fathers in the 1940s and 1950s to more celebratory accounts today. Given the collapse of the Dunning School in the second half of the twentieth century,<sup>51</sup> one would expect a similar arc in our textbooks' treatment of Reconstruction. While portrayals of Reconstruction largely track these expectations, the Founding narratives do not. Rather than absorbing the Beardian academic consensus of the 1940s and 1950s, our textbooks' Founding narratives have been consistently hagiographic. This disparate treatment suggests two models for constructing popular constitutional narratives: (1) an "academic integrity" model, which adopts the current consensus among academic historians; and (2) a "civil religion" model, which absorbs the preferred myths of popular constitutional culture. This Article concludes that, over time, the relative influence of these models on textbook content has been largely shaped by the advocacy of broad-based social movements and the political economy of the high school textbook industry itself.

For generations, our leading high school textbooks have praised the Founding generation and canonized certain Founding Fathers, while, at the same time, largely ignoring Reconstruction's key players and underemphasizing the constitutional revolution our Forgotten Founders envisioned (and began to wage). As a result, generations of high school students have been left with a relatively pristine view of

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and Rothman "surveyed all state departments of education" by "requesting information regarding the high school American history textbooks most widely used throughout the state since 1940." *Id.* at 159. They also "decided to survey the 120 largest school districts in the nation, asking them what books their high schools used in the 1940s, 1950s, 1960s, and 1970s." *Id.* at 160. Although this is an imperfect method, I was unable to find a more reliable list.

<sup>49</sup> These were the dominant textbooks in our high schools when Justices Breyer, Ginsburg, Kennedy, Scalia, and Stevens were in high school. For the birthdates of the current Justices, see *The Justices of the Supreme Court*, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Mar. 27, 2010).

<sup>50</sup> The early textbooks would have been the most widely-read textbooks for anyone born between the years of 1923 and 1943. This time period includes Vice President Biden, J. COMM. ON PRINTING, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. Doc. No. 108-222, at 653 (2d Sess. 2005); Senate Majority Leader Harry Reid, *id.* at 1796, Senate Minority Leader Mitch McConnell, *id.* at 1531, and Senate Judiciary Committee Chairman Pat Leahy, *id.* at 1430, as well as Senators John Kerry, *id.* at 1378, Joseph Lieberman, *id.* at 1447, and John McCain, *id.* at 1525, among others.

<sup>51</sup> For an example of the Dunning School's scholarship, see WILLIAM ARCHIBALD DUNNING, *ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION AND RELATED TOPICS* (New York, MacMillan 1898).

the Founding, while receiving (at best) a “warts-and-all” account of Reconstruction. These disparate accounts (presented for decades in our high school classrooms) have contributed to constructing our “Founding-obsessed” culture.<sup>52</sup> For our schoolchildren, these high school narratives reinforce the lingering belief that the modern citizen has little role to play in our unfolding constitutional story—that the key moments of American constitutional creativity are in our distant, eighteenth-century past.<sup>53</sup> These effects are reversible, if only we would take the time to understand the key factors shaping our popular constitutional culture “on the ground”—factors like the constitutional stories we tell our schoolchildren.

In the end, Stevens, Sumner, and Bingham struggled to “transform [a] slaveholding republic to one consistent with the Declaration’s promise of liberty and equality.”<sup>54</sup> If today’s schools teach our children to revere the Founding generation by emphasizing their achievements and largely ignoring their shortcomings, our schools should (at the very least) stress the ambition of our Reconstruction Founders—even if they did not fully succeed in their efforts.<sup>55</sup> Our Forgotten Founders, no less than the Reconstruction Amendments they ratified, should take “their proper place: at the center, rather than the periphery, of the unfolding American epic.”<sup>56</sup>

## II. PUBLIC EDUCATION AND POPULAR CONSTITUTIONAL CULTURE

The legal academy has largely ignored public education’s role in shaping popular constitutional culture. In particular, few legal scholars have considered the importance of the constitutional stories that we tell our schoolchildren.<sup>57</sup> These stories are often the product of bureaucratic decisions that are shaped by market

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<sup>52</sup> For an extended account of public education’s influence on popular constitutional culture, see Tom Donnelly, Note, *Popular Constitutionalism, Civic Education, and the Stories We Tell Our Schoolchildren*, 118 YALE L.J. 948, 962-74 (2009) (discussing the relevant social science literature).

<sup>53</sup> See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 58 (1991) (“The professional wisdom arrays these periods in descending order of constitutional creativity: the Founding was creative both in process and substance; Reconstruction was creative only substantively; the New Deal was not creative at all. . . . I shall be proposing a three-solution narrative—in which both Reconstruction Republicans and New Deal Democrats appear as the equals of the Founding Federalists in creating new higher lawmaking processes and substantive solutions in the name of We the People of the United States.”).

<sup>54</sup> MICHAEL LES BENEDICT, *PRESERVING THE CONSTITUTION: ESSAYS ON POLITICS AND THE CONSTITUTION IN THE RECONSTRUCTION ERA* 3 (2006) [hereinafter BENEDICT, *PRESERVING*].

<sup>55</sup> Michael Kent Curtis offers us a way forward, noting that we should “recognize the radical idealism of the American Revolution, the Declaration, and of the later Fourteenth Amendment,” while also “acknowledg[ing] that its authors naturally fell short of fully realizing their ideals.” Curtis, *Bingham*, *supra* note 15, at 663; see also Amar, *Holistic*, *supra* note 27, at 190 (“The Reconstruction Amendments offer Americans a more universally inclusive vision than the Founding-obsessed sagas that still hold sway in so many venues.”).

<sup>56</sup> Amar, *Holistic*, *supra* note 27, at 190.

<sup>57</sup> For a more comprehensive analysis of the role of public education in shaping constitutional culture, see Donnelly, *supra* note 52.

forces and insider arguments made by narrow, highly partisan groups. Although education scholars have considered the portrayal of race and gender in our schools' textbooks,<sup>58</sup> few (if any) legal scholars have considered these stories in any great detail. Furthermore, although many historians—both legal and non-legal—have fought over the proper portrayal of the Founding and Reconstruction, no legal scholar has considered how these debates have shaped the canonical constitutional stories that we have transmitted to our schoolchildren—stories that shape their early conception of their constitutional system and its history—not to mention the role that their generation may play in shaping it.

A. *High School History Courses and American Public Education*

Since its earliest years, American public education has been designed to prepare young Americans for the duties and responsibilities of citizenship.<sup>59</sup> Throughout, American history courses have played an outsized role in achieving this goal. These courses have sought to provide students with both a “sense of perspective” that will allow them to make intelligent political decisions and a “sense of identity with the past” that will “deepen[] [their] national loyalties.”<sup>60</sup> Today, every high school student is required to take at least one course in American history.<sup>61</sup>

Since the early twentieth century, high school history teachers have relied heavily on textbooks for the content of both their classroom lessons and their homework assignments.<sup>62</sup> For years, educators and citizens alike have viewed these texts as important to sustaining the nation’s “collective identity” by transmitting “stories of important past events (e.g., describing the origins of the nation) and stories of important past leaders (e.g., describing the heroic Founding Fathers).”<sup>63</sup> From these

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<sup>58</sup> See, e.g., JAMES ALBERT BANKS, *A CONTENT ANALYSIS OF ELEMENTARY AMERICAN HISTORY TEXTBOOKS: THE TREATMENT OF THE NEGRO AND RACE RELATIONS* (1969); NATHAN GLAZER & REED UEDA, *ETHNIC GROUPS IN HISTORY TEXTBOOKS* (1983).

<sup>59</sup> See DAVID TYACK, *SEEKING COMMON GROUND: PUBLIC SCHOOLS IN A DIVERSE SOCIETY* 41 (2003); William A. Galston, *Political Knowledge, Political Engagement, and Civic Education*, 4 ANN. REV. POL. SCI. 217, 231 (2001).

<sup>60</sup> Ray Allen Billington, *The Case for American History*, in *DEMOCRACY, PLURALISM, AND THE SOCIAL STUDIES* 169, 172 (James P. Shaver & Harold Berlak eds., 1968).

<sup>61</sup> See Carole L. Hahn, *Citizenship Education: An Empirical Study of Policy, Practices and Outcomes*, 25 OXFORD REV. EDUC. 231, 236 (1999); RICHARD G. NIEMI & JANE JUNN, *CIVIC EDUCATION: WHAT MAKES STUDENTS LEARN* 63-67 (1998).

<sup>62</sup> See RONALD W. EVANS, *THE SOCIAL STUDIES WARS: WHAT SHOULD WE TEACH THE CHILDREN?* 5 (2004); see also Robert P. Green, Jr., & Richard L. Watson, Jr., *American History in the Schools*, in *TEACHING SOCIAL STUDIES: HANDBOOK OF TRENDS, ISSUES, AND IMPLICATIONS FOR THE FUTURE* 65, 66 (Virginia S. Wilson et al. eds., 1993) (calling American history textbooks “the single most influential factor in shaping the curriculum”). For a comprehensive account of the changes in American history textbooks through the 1970s, see generally FRANCES FITZGERALD, *AMERICA REVISED: HISTORY SCHOOLBOOKS IN THE TWENTIETH CENTURY* (1979).

<sup>63</sup> Lloyd Kramer & Donald Reid, *Introduction: Historical Knowledge, Education, and Public Culture*, in *LEARNING HISTORY IN AMERICA: SCHOOLS, CULTURES, AND POLITICS* 1, 4-5 (Lloyd Kramer et al. eds., 1994).

shared narratives emerges, what Robert Post has called, our “[d]emocratic public culture[.]”<sup>64</sup>—a “culture” often transmitted to our schoolchildren in the form of canonical constitutional stories that are approved for use in our classrooms. The perceived importance of these stories can be observed in the various textbook adoption battles that have taken place in several states throughout the last century—including battles over the public understanding of the Founding and Reconstruction.<sup>65</sup>

Overall, as David Tyack has concluded, American history textbooks “reveal what adults thought children should learn about the past and are probably the best index of what teachers tried to teach young Americans.”<sup>66</sup> As a result, textbook analysis remains a common research method among education scholars. In this Article, textbook content serves as a proxy for the substance of high school instruction about the Founding and Reconstruction.

### B. *The Political Economy of the High School Textbook Industry*

The institutions that shape textbook content often attempt to “inculcate [important] norms in a manner that spans social divisions.”<sup>67</sup> As a result, when considering controversial periods in American history (such as Reconstruction), we must be particularly sensitive to the compromises that have been made, as key officials attempt to construct narratives that are as acceptable in Charleston, South Carolina as they are in Charlestown, Massachusetts. At the same time, certain cultural forces seek to influence our canonical constitutional stories in such a way that *their* groups’ stories become *our* stories—immortalized in the textbooks that our schoolchildren are forced read.<sup>68</sup> This presents a (potentially) dangerous dynamic where the textbook industry and our school systems seek to construct canonical narratives that are broadly acceptable, while certain interest groups attempt to force their narrow, partisan visions into our broader, canonical stories.

American textbooks are developed through the interplay of market forces, bureaucratic decisions, and interest group pressure. Viewed one way, “Commerce

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<sup>64</sup> Robert Post, *Between Philosophy and Law: Sovereignty and the Design of Democratic Institutions*, in *DESIGNING DEMOCRATIC INSTITUTIONS* 209, 217 (Ian Shapiro & Stephen Macedo eds., 2000).

<sup>65</sup> TYACK, *supra* note 59, at 40 (“Even though history textbooks have been, by most accounts, very dull, they have also been highly controversial. People have wanted history texts to tell the official truth about the past. . . . Textbooks resemble stone monuments. Designed to commemorate and *re-present* emblematic figures, events and ideas—and thus to create common civic bonds—they have also aroused vigorous dissent.”); LERNER, NAGAI & ROTHMAN, *supra* note 48, at 1 (“If American history and civics textbooks have become a battleground, it is because they now serve as the prayer-books of the United States’s civil religion.”).

<sup>66</sup> TYACK, *supra* note 59, at 40.

<sup>67</sup> ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 183 (1995).

<sup>68</sup> As Amy Gutmann notes, “[w]hen citizens rule in a democracy, they determine, among other things, how future citizens will be educated. Democratic education is therefore a political as well as an educational ideal.” AMY GUTMANN, *DEMOCRATIC EDUCATION* 3 (1987).

plays an important part in deciding which historical truths shall be official,” as “private agencies—publishing companies—create and sell textbooks.”<sup>69</sup> At the same time, local and state governments importantly shape textbook content through their varied textbook adoption processes, with roughly half of the states adopting textbooks at the state level and the other half leaving those decisions to local school districts.<sup>70</sup>

Since the costs of researching, drafting, and printing new textbooks are often astronomical, textbook development remains a high-risk enterprise, with California, Florida, New York, North Carolina, and Texas (the largest statewide adoption states) mostly dictating textbook content nationwide.<sup>71</sup> If a publisher does not get their respective textbooks adopted by these large (and influential) states, they are forced to sell their rejected textbooks in a piecemeal fashion to smaller states and school districts.<sup>72</sup> Part III considers how our textbooks’ accounts of Reconstruction have been shaped by the ongoing importance of large Southern states in this process. Furthermore, given the high costs associated with developing new textbook content, our bestselling textbooks often coalesce around a common narrative and style.<sup>73</sup> Over time, these textbooks have privileged the Founding and the Civil War over Reconstruction.<sup>74</sup>

Finally, our textbooks have tended to remain static over time. This is due to the disconnect between academic historians and the key players in secondary education. As a result, new developments in academic history “trickle[] down extremely slowly into the school texts,”<sup>75</sup> with new trends among academic historians often

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<sup>69</sup> TYACK, *supra* note 59, at 59-60.

<sup>70</sup> *Id.* at 60.

<sup>71</sup> See DIANE RAVITCH, *THE LANGUAGE POLICE: HOW PRESSURE GROUPS RESTRICT WHAT STUDENTS LEARN* 98 (2003); see also TYACK, *supra* note 59, at 59 (“Special-interest groups of the right and left pressure publishers to include or drop topics, especially in big states such as California or Texas.”); FRANCIS L. FENNEL, *COLLEGIATE ENGLISH HANDBOOK* 137 (5th ed. 2002) (“[I]n 1961 a right-wing fringe group called Texans for America intimidated the committee, and it pressed several publishers to make substantial changes in their American-history and geography texts. Macmillan, for one, deleted a passage saying that the Second World War might have been averted if the United States had joined the League of Nations.”).

<sup>72</sup> RAVITCH, *supra* note 71.

<sup>73</sup> DAVID JENNESS, *MAKING SENSE OF SOCIAL STUDIES* 275 (1990).

<sup>74</sup> *Id.*

<sup>75</sup> FITZGERALD, *supra* note 62, at 43. As Robert Green, Jr. and Richard Watson, Jr. note, “[o]ne of the most striking academic paradoxes of the last decade has been that, during a period in which American historiography has been ‘undergoing the most creative ferment in its entire lifetime,’ the teaching of American history in the schools has been widely perceived as sterile, moribund, and ineffective.” Green & Watson, *supra* note 62, at 65 (internal citation omitted). Indeed, “[t]he fruits of historical scholarship are [often] neglected, and single-strand interpretations are left unquestioned.” Harold J. Noah et al., *History in High-School Textbooks*, in *DEMOCRACY, PLURALISM, AND THE SOCIAL STUDIES*, *supra* note 60, at 238, 248. This is “strikingly evidenced when . . . textbooks are building wholly improbable stereotypes of, say, patriotic, unselfish Founding Fathers or of a god-like superstatesman, Abraham Lincoln.” *Id.* Lawrence Metcalf further notes that “[t]he conditions surrounding textbook

“proceed[ing] [indirectly] . . . by way of . . . college texts.”<sup>76</sup> Fifteen years (or more) often elapse between a new development in academic history and its transmission to our high school students.<sup>77</sup> Furthermore, other forces (such as broad-based social movements) often intervene to prevent the spread of new developments among historians. Parts II and III consider how certain forces have shaped our textbooks’ treatment of the Founding and Reconstruction.

### III. THE FOUNDING ERA IN OUR HIGH SCHOOL TEXTBOOKS

Bruce Ackerman argues that the American people have “oscillat[ed] between idolizing the Founders and demonizing them.”<sup>78</sup> The textbooks studied in this Article suggest that Ackerman is only partially right—at least as to the last several decades. On the one hand, Ackerman’s statement certainly describes the behavior of academic historians, who shifted from highly critical accounts of the Founding generation in the early twentieth century to increasingly positive accounts from the 1960s onward. On the other hand, Ackerman’s statement does not accurately describe the behavior of average citizens during this same period. Rather than criticizing the Founding generation, the American people unified to defend the popular image of their Founding Fathers against an assault by “subversive” academic historians (such as Charles Beard). In response to this broad-based social movement, our leading high school textbooks rejected Beardian accounts of the Founding—instead, presenting consistent, celebratory accounts of this period from the early twentieth century through today. Interestingly, this is in stark contrast to the narratives in our leading casebooks during this same period.<sup>79</sup>

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manufacturing practically guarantee that the textbook content will be conceptually empty.” Lawrence E. Metcalf, *History Textbooks and Explanation*, in *DEMOCRACY, PLURALISM, AND THE SOCIAL STUDIES*, *supra* note 60, at 235, 235.

<sup>76</sup> FITZGERALD, *supra* note 62, at 43.

<sup>77</sup> *Id.*

<sup>78</sup> 2 ACKERMAN, *PEOPLE*, *supra* note 17, at 32.

<sup>79</sup> Unlike leading casebooks today, some leading constitutional law casebooks of the early twentieth century ignored the Founding moment altogether, focusing instead on “constitutional cases” only. For examples of the centrality of the Founding in today’s casebooks, see DANIEL A. FARBER, WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION’S THIRD CENTURY* 1-12 (4th ed. 2009); GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 8-29 (6th ed. 2009); PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 1-17 (5th ed. 2006); WILLIAM COHEN, JONATHAN D. VARAT & VIKRAM AMAR, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 2-23 (12th ed. 2005). For examples of earlier casebooks, see PAUL A. FREUND ET AL., *CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS* (1954); PAUL G. KAUPER, *CONSTITUTIONAL LAW: CASES AND MATERIALS* (1954); NOEL T. DOWLING, *CASES ON CONSTITUTIONAL LAW* (3d ed. 1946); OLIVER PETER FIELD, *A SELECTION OF CASES AND AUTHORITIES ON CONSTITUTIONAL LAW* (2d ed. 1936).

Furthermore, those early casebooks that did dwell on the Founding were greatly influenced by Charles Beard. For instance, one casebook led with an account by John D. Hick from *A Short History of American Democracy*. RAY FORRESTER, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 1 (1959) (quoting JOHN D. HICKS, *A SHORT HISTORY OF AMERICAN DEMOCRACY* 116-17 (1943)). This excerpt stressed the influence of Shays’ rebellion on the



These findings suggest two different models for transmitting “historical truths” to our high school students—an “academic integrity” model and a “civil religion” model—with the former adopting the current consensus among academic historians and the latter absorbing the preferred myths of popular constitutional culture. Although these models are not mutually exclusive, they sometimes lead to different outcomes in our high school classrooms—as was the case in the early twentieth century with our leading high school textbooks’ treatment of the Founding.

A. *Founding Era Historiography: From Beard to Wood (and Beyond)*

In the late nineteenth century, academics took dead aim at the Founding generation. For instance, Woodrow Wilson attacked James Madison and the *Federalist Papers* in his 1885 doctoral dissertation, contrasting the “Constitution-of-public-memory” with the “Constitution-in-practice.”<sup>80</sup> While most late nineteenth-century Americans were taught to revere their Founders’ Constitution, Wilson argued that the achievements of recent generations owed little to the Founders’ original vision.<sup>81</sup> Other progressive academics quickly followed Wilson’s lead. Douglass Adair surveyed the damage to Madison at the turn of the century: “Madison was still ‘father’ of the Constitution after Appomattox, for such tags once rooted in the textbooks seem impossible to eradicate; but he was a parent treated with increasing disrespect—a parent to be apologized for . . . .”<sup>82</sup> In fact, as Bruce

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Founding, noting that “in practically all the states the conservative property owners were genuinely frightened by the growing power of the agrarian and unpropertied classes.” *Id.* The casebook concluded: “[T]o claim that they were motivated solely by idealistic and theoretical impulses [is untrue]—though it is a chauvinistic idea beloved by Americans and one which has been embraced by many an orator to break the calm of a Fourth of July day.” *Id.* at 6 (emphasis added). Another casebook actually quoted Beard, noting that “[m]ore than half the delegates in attendance were either investors or speculators in the public securities which were to be buoyed up by the new Constitution. All knew the relation of property to government.” JOHN P. FRANK, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 3-4 (1950). This casebook stressed, in particular, the personal economic motivations of the Founders, including George Washington. *Id.* at 3.

Finally, and also contrary to the civil religion in our high school textbooks, our leading casebooks stressed the limited achievements of the Founders, emphasizing later constitutional developments (such as Reconstruction). See FORRESTER, *supra*, at 4-5. For instance, in his leading casebook, Ray Forrester noted the fallacy of the popular narrative: “There are many popular misconceptions of the Constitution of the United States. A prevalent one is the notion that the entire Constitution, as we find it today, is the work of one group of men (frequently referred to as the ‘Founding Fathers’), the result of one set of circumstances, and the embodiment of a consistent and unified theory and purpose.” *Id.* Taken together, these findings suggest the relative autonomy of elite legal education, in stark contrast to the popularly-influenced accounts in our high school narratives.

<sup>80</sup> See WOODROW WILSON, *CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS* 30 (1956) (“The Constitution in operation is manifestly a very different thing from the Constitution of the books.”).

<sup>81</sup> *See id.*

<sup>82</sup> DOUGLASS ADAIR, *The Tenth Federalist Revisited, in FAME AND THE FOUNDING FATHERS* 75, 79-80 (Trevor Colbourn ed., 1974).

Ackerman noted, “Madison’s star had fallen so low that the American Hall of Fame ignored him when it opened in 1900 to honor the great statesmen of the past.”<sup>83</sup>

These late nineteenth-century developments provide an important backdrop for Charles Beard’s 1913 bombshell, *An Economic Interpretation of the Constitution of the United States*.<sup>84</sup> In Beard’s hands, the Founders were no longer outdated and irrelevant—a generation of failed revolutionaries. Instead, Beard’s Founders were effective and quite relevant—a generation of conservatives, who designed a clever constitution that “frustrate[d] the aspirations of a modern democratic society for social justice.”<sup>85</sup> Beard’s account of the Founding emphasized class conflict and clandestine meetings, phony rhetoric and selfish motives, illegal actions and widespread deception.<sup>86</sup> For Beard and his followers, the Constitution was “a counterrevolutionary document, deviously imposed upon the revolutionary masses by a propertied elite.”<sup>87</sup> With Beard’s rallying cry, “[t]he task for clear-thinking lawyers, judges, and Americans was obvious: it was time to move beyond ancestor worship and engage in the hard work of adapting antiquated constitutional arrangements to the felt necessities of the modern age.”<sup>88</sup> Progressive academics during this period largely followed Beard’s lead, with his account becoming the consensus among professional historians shortly thereafter.<sup>89</sup> As Ackerman explains, “[Beard] inspired an entire generation of Progressive historians, who sought to establish that the Framers’ masquerade in the name of the ‘People’ was nothing but a bad joke.”<sup>90</sup>

By the 1950s, many historians, including Robert Brown and Forrest McDonald, began to question Beard’s “simple-minded story.”<sup>91</sup> A new generation of historians would emerge a decade later, led by Gordon Wood.<sup>92</sup> Although Wood’s generation

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<sup>83</sup> Ackerman, *Constitution*, *supra* note 42, at 1795.

<sup>84</sup> See, e.g., CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1918). Beard’s contributions grew out of earlier work by J. Allen Smith. See, e.g., J. ALLEN SMITH, *THE SPIRIT OF AMERICAN GOVERNMENT* (1907).

<sup>85</sup> Ackerman, *Constitution*, *supra* note 42, at 1796.

<sup>86</sup> 1 ACKERMAN, *supra* note 53, at 202 (noting that Beard’s account “strip[ped] away the Founders’ rhetoric to reveal the conflicting class interests that lay beneath.”).

<sup>87</sup> *Id.* at 201-02.

<sup>88</sup> Ackerman, *Constitution*, *supra* note 42, at 1796.

<sup>89</sup> *Id.* at 1797 (noting that the efforts of Wilson and Beard “had grown into a mighty forest of case law and commentary”).

<sup>90</sup> 1 ACKERMAN, *supra* note 53, at 202.

<sup>91</sup> *Id.* at 202, 212.

<sup>92</sup> See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1969); see also 1 ACKERMAN, *supra* note 53, at 349 n.19 (“Just as Beard’s *Economic Interpretation* controlled the historical vision of the first half of the century, Wood’s *Creation* has dominated the last generation.”).

was still greatly influenced by Beard,<sup>93</sup> they challenged certain aspects of the Beardian account. For instance, they turned their attention to “the Founders’ revolutionary commitment to popular sovereignty . . . ,”<sup>94</sup> building on the insights of Bernard Bailyn.<sup>95</sup> This new generation of historians tried to get their readers “to see the Federalists as they saw themselves: as successful revolutionaries, adapting ideas and institutions that had already become a part of their generation’s experience, imagery, self-understanding.”<sup>96</sup> In the process, Wood and his successors “displac[ed] the vigorous muckraking of the Progressive period with a more sympathetic treatment of the Framers’ aims and ideals.”<sup>97</sup> These accounts would provide the intellectual foundation for the new wave of Founding-era hagiographies that have dominated American bookstores for the last decade.<sup>98</sup>

In the end, one would expect our high school narratives to track these developments, with critical accounts of the Founding in our early textbooks and largely celebratory accounts today. Instead, the Founding generation has been widely praised in our high school classrooms from the 1940s onward.

#### B. *The Baseline: Our Founding Fathers—Yesterday and Today*

The textbooks of yesterday and today presented the Founding Fathers as a wise and able lot—both collectively and individually. Early textbooks particularly stressed the “character” of these key figures.<sup>99</sup> In introducing the First Continental Congress, one early textbook described the gathering as “some of the ablest men in America.”<sup>100</sup> In both sets of accounts, the men meeting to write the United States Constitution were collectively referred to as “famous,”<sup>101</sup> “thoughtful,”<sup>102</sup>

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<sup>93</sup> See, e.g., WOOD, *supra* note 92, at 562 (“In effect [the Federalists] appropriated and exploited the language that more rightfully belonged to their opponents. The result was the beginning of a hiatus in American politics between ideology and motives that was never again closed.”).

<sup>94</sup> Ackerman, *Constitution*, *supra* note 42, at 1799.

<sup>95</sup> I ACKERMAN, *supra* note 53, at 219 (noting that Bailyn “brought to life the Radical Whig world inhabited by the early revolutionaries”).

<sup>96</sup> *Id.* at 216.

<sup>97</sup> Ackerman, *Constitution*, *supra* note 42, at 1799.

<sup>98</sup> See, e.g., ELLIS, EXCELLENCY, *supra* note 5; ELLIS, FOUNDING, *supra* note 6; MCCULLOUGH, 1776, *supra* note 1; MCCULLOUGH, JOHN ADAMS, *supra* note 7.

<sup>99</sup> See, e.g., EUGENE C. BARKER & HENRY STEELE COMMAGER, OUR NATION 151-52 (1941).

<sup>100</sup> FREMONT P. WIRTH, THE DEVELOPMENT OF AMERICA 190 (1945).

<sup>101</sup> LEON H. CANFIELD & HOWARD B. WILDER, THE MAKING OF MODERN AMERICA 132 (Howard R. Anderson et al. eds., 1952).

<sup>102</sup> WIRTH, DEVELOPMENT, *supra* note 100.

“energetic,”<sup>103</sup> “notable,”<sup>104</sup> “very distinguished,”<sup>105</sup> and “men of good judgment”<sup>106</sup>—“fathers of the Constitution”<sup>107</sup> all. Even more dramatically, this meeting included “the outstanding leaders in America,”<sup>108</sup> “a group of men who have not been surpassed in character and ability by any body of equal size in the world’s history.”<sup>109</sup> One early textbook did not stop there, noting that Thomas Jefferson, a Founding Father himself (though not present at the Convention), called them “an assembly of demigods.”<sup>110</sup> In our canonical stories, even the venue has been sanctified, with one textbook calling Independence Hall “a national shrine of great beauty”<sup>111</sup> and “one of our most important national monuments.”<sup>112</sup> This hagiographic presentation in our early textbooks is in stark contrast to the Beardian vision that dominated academic history during this same period.

Concededly, a few early textbooks presented our Founding Fathers as “conservative” men,<sup>113</sup> especially in connection with the decision to replace the Articles of Confederation with the United States Constitution. In these early textbooks, conservatism was a virtue—particularly the brand of conservatism that incorporated the best ideas of the past. One early textbook noted that “[s]ome of the ideas which went into the Constitution of the United States were evolved by the

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<sup>103</sup> DANIEL J. BOORSTIN & BROOKS MATHER KELLEY, *A HISTORY OF THE UNITED STATES* 117 (2005).

<sup>104</sup> CANFIELD & WILDER, *supra* note 101.

<sup>105</sup> DAVID SAVILLE MUZZEY, *A HISTORY OF OUR COUNTRY* 133 (2d ed. 1950) [hereinafter MUZZEY, *HISTORY* 2d].

<sup>106</sup> FREMONT P. WIRTH, *UNITED STATES HISTORY* 104 (rev. ed. 1955) [hereinafter WIRTH, *HISTORY*].

<sup>107</sup> DAVID SAVILLE MUZZEY, *A HISTORY OF OUR COUNTRY* 180 (1942) [hereinafter MUZZEY, *HISTORY*].

<sup>108</sup> WIRTH, *HISTORY*, *supra* note 106; *see also* PAUL BOYER, *HOLT AMERICAN NATION* 143 (Sue Miller et al. eds., 2003) (calling them “a remarkable collection of politicians”); GERALD A. DANZER ET AL., *THE AMERICANS* (2007) (“[The Constitutional Convention] included some of the most outstanding leaders of the time . . .”).

<sup>109</sup> MUZZEY, *HISTORY*, *supra* note 107, at 174.

<sup>110</sup> *Id.* at 173. Not to be outdone, another textbook quoted George Mason as saying of the framers at the Constitutional Convention that “America has certainly, upon this occasion, drawn forth her first characters.” BARKER & COMMAGER, *supra* note 99, at 151; *see also* CANFIELD & WILDER, *supra* note 101, at 132-33 (quoting the same passage by Mason). The same textbook also quoted James Madison as concluding that the Constitutional Convention “contains in several instances the most respectable characters in the United States, and in general may be said to be the best contribution of talents the States could make for the occasion.” BARKER & COMMAGER, *supra* note 99, at 152.

<sup>111</sup> WIRTH, *HISTORY*, *supra* note 106, at 105.

<sup>112</sup> CANFIELD & WILDER, *supra* note 101, at 133.

<sup>113</sup> *See, e.g.*, WIRTH, *DEVELOPMENT*, *supra* note 100. This is in striking contrast to the “radicalism” of Reconstruction that these early textbooks later denounce.

colonies in their struggle with Great Britain.”<sup>114</sup> Of the break with England, another textbook added that “[t]he colonists regarded themselves not as rebels against the king but as defenders of long-established rights which the British ministers and Parliament were denying them.”<sup>115</sup> In these accounts, our Founders’ ideas and actions were rooted in the Enlightenment and defended by key British leaders and thinkers, such as Edmund Burke.<sup>116</sup> One textbook flatly rejected “the idea that the Constitution was something brand new,” noting that “[t]he delegates to the Constitutional Convention were far too practical to risk mere invention.”<sup>117</sup> Although not viewed through the prism of “conservatism,” today’s textbooks similarly stress the intellectual foundations of the American Revolution and the United States Constitution.<sup>118</sup>

Even so, these scattered discussions of our “conservative” Founders should not be confused with the dark image of this generation presented by Beard. Not surprisingly, a few of our early textbooks contained snippets of the Beardian account. For instance, one early textbook observed, “[m]ost of the delegates . . . believed that it was dangerous to place too much power in the hands of the people and were ready to prevent that possibility by putting certain ‘safeguards’ into the new government.”<sup>119</sup> Another textbook noted in passing that the Framers “feared such disorders as Shays’ Rebellion and the danger to property from the radical democrats.”<sup>120</sup>

Interestingly, one early textbook challenged Beard directly. This textbook began: “Some students of the Constitution are fond of pointing out that the members of the Federal Convention and the advocates of ratification in the states belonged to the educated and the well-to-do classes and were benefited by the government which they created.”<sup>121</sup> The textbook quickly replied:

[The Founders] were, of course, benefited by the government that the Constitution created. There is therefore circumstantial evidence of selfishness, *but one need not accept it as proved*. On the contrary, one

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<sup>114</sup> *Id.* at 194.

<sup>115</sup> MUZZEY, HISTORY, *supra* note 107, at 131-32.

<sup>116</sup> *See id.* at 132.

<sup>117</sup> CANFIELD & WILDER, *supra* note 101, at 138.

<sup>118</sup> For instance, one textbook has an entire section entitled “Ideas Help Start a Revolution.” DANZER, *supra* note 108, at 103. Another has a similar section entitled “Ideas Behind the Revolution.” ANDREW CAYTON ET AL., AMERICA: PATHWAYS TO THE PRESENT 118 (2005). One textbook explains, under a section entitled “Revolutionary Ideology,” “[t]he colonists still thought of themselves as British. Even though they lived an ocean away, they believed they were entitled to all the rights that British citizens had claimed over the years.” EDWARD L. AYERS ET AL., HOLT AMERICAN ANTHEM 117 (2007). Furthermore, “[c]olonial leaders knew the philosophy of Enlightenment thinkers such as John Locke.” Indeed, “[t]he idea of natural rights was part of their revolutionary ideology.” *Id.*

<sup>119</sup> CANFIELD & WILDER, *supra* note 101, at 133.

<sup>120</sup> MUZZEY, HISTORY 2d, *supra* note 105, at 134.

<sup>121</sup> BARKER & COMMAGER, *supra* note 99, at 162.

may well believe that those who made the Constitution endeavored to establish a government which, in the long run, would benefit every citizen of the United States.<sup>122</sup>

In the end, the few Beardian passages in our early textbooks were vastly outnumbered by the pages upon pages of praise heaped upon the Founding generation.

#### 1. In Praise of Compromise; or, Ignoring the Failures of Our Founding Fathers<sup>123</sup>

Each of the Founders' key undertakings—the Declaration of Independence, the American Revolution, and the United States Constitution—were presented in a decidedly positive light by both sets of textbooks.<sup>124</sup> In the remainder of this Part, I focus particularly on the stories told about our Founders' Constitution—including the Constitutional Convention, the ratification debates, and the Bill of Rights.

In our early textbooks, the Constitution was framed as a “[w]onderful [a]chievement.”<sup>125</sup> For instance, one early textbook noted: “By the adoption of the Constitution our country passed, without revolution or military dictatorship, from weakness to strength, from anarchy to order, from death to life.”<sup>126</sup> Similarly

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<sup>122</sup> *Id.* (emphasis added).

<sup>123</sup> This title is adapted from a recent book by Bruce Ackerman. See BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* (2005).

<sup>124</sup> For instance, in our early textbooks, the Declaration of Independence is described as “one of the vital documents of history.” CANFIELD & WILDER, *supra* note 101, at 102. This vitality stems from the fact that “it described a new kind of liberty and applied that liberty to conditions in America.” *Id.* “The adoption of the Declaration of Independence . . . gave the Americans a definiteness of purpose which they previously had lacked,” BARKER & COMMAGER, *supra* note 99, at 120, and “put spirit into the American army by giving it a cause supremely worth fighting for.” MUZZEY, *HISTORY* 2d, *supra* note 105, at 105. Discussions of the Declaration are often accompanied by pictures of the Declaration committee, as well as key venues celebrating the Declaration, including the “marble shrine” in Washington, D.C., BARKER & COMMAGER, *supra* note 99, at 119, and a “beautifully designed niche” in Philadelphia, MUZZEY, *HISTORY* 2d, *supra* note 105, at 104.

Today's textbooks are similarly celebratory. One textbook leads with a section entitled: “The Patriots Declare Independence.” DANZER, *supra* note 108, at 105. Another textbook adds, “[i]t was not the mere announcement, but the ‘declaration’ . . . of independence that Americans would always celebrate. For Americans were proud of the reasons for the birth of their nation. These reasons gave the new nation a purpose that it would not forget.” BOORSTIN & KELLEY, *supra* note 103, at 88. Indeed, the Declaration was “an eloquent birth certificate for the new United States, which would inspire people all over the world.” *Id.* at 89. Furthermore, “like other documents that live and shape history, [the Declaration] has had the magical power to be filled with new ideas.” *Id.* In the end, “Jefferson's document did much more than declare a nation's independence, . . . [i]t also defined the basic principles on which American government and society would rest.” CAYTON, *supra* note 118, at 121.

<sup>125</sup> MUZZEY, *HISTORY*, *supra* note 107, at 178.

<sup>126</sup> *Id.*

celebratory accounts can be found in every textbook analyzed for this Article. Interestingly, both sets of textbooks fixated on praise from abroad, with an early textbook noting that “[w]orld statesmen have been astonished that the men who framed this document could have finished such a tremendous task in only four months.”<sup>127</sup> Other early textbooks added that our Constitution “has been widely admired”<sup>128</sup> and has served as “the model for the organization of republican governments on both sides of the Atlantic.”<sup>129</sup> Today’s textbooks similarly note that the Constitution “continues to inspire people around the world.”<sup>130</sup> In short, this “City-Upon-a-Hill” narrative of the Constitution pervades the textbooks of yesterday and today.

Above all, the Constitutional Convention and the ratification debates were used in both sets of textbooks to teach a simple lesson: Progress requires compromise; or, as one early subject heading noted: “Compromises Strengthen Unification.”<sup>131</sup> This message has remained largely unchanged since the 1940s. Even today, our textbooks celebrate the series of compromises made at the Convention—beginning with the Virginia Plan, New Jersey Plan, and the “Great Compromise,” and including the other deals that helped clear the path for our Founders’ “wonderful achievement.”<sup>132</sup> In these accounts, the Constitution emerges as “a triumph of practical statesmanship . . . .”<sup>133</sup> Not surprisingly, the greatest mistake these textbooks make is ignoring how one key compromise enabled the rise of the slave power in the nineteenth century and culminated in the Civil War.

In our early textbooks, the Three-Fifths Compromise was simply (and matter-of-factly) mentioned among the other deals that helped to bring about the Constitution.<sup>134</sup> As a result, these accounts downplayed the evil at work in the

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<sup>127</sup> CANFIELD & WILDER, *supra* note 101, at 138.

<sup>128</sup> *Id.* Some early textbooks even named names. For instance, one textbook noted the praise of the “great prime minister of England,” William Pitt, who said of the Constitution: “It will be the pattern for all future constitutions and the admiration of all future ages.” MUZZEY, HISTORY, *supra* note 107, at 178-79. This same textbook noted that “the great English statesman Gladstone called the Constitution ‘the most wonderful work ever struck off at a given time by the brain and purpose of man.’” *Id.* at 179; *see also* CANFIELD & WILDER, *supra* note 101, at 138 (quoting the same statement by Gladstone).

<sup>129</sup> MUZZEY, HISTORY, *supra* note 107, at 179.

<sup>130</sup> CAYTON, *supra* note 118, at 154.

<sup>131</sup> MUZZEY, HISTORY 2d, *supra* note 105, at 139.

<sup>132</sup> *See, e.g.*, CANFIELD & WILDER, *supra* note 101, at 136 (“The process was very difficult and often a middle ground had to be found between two extreme points of view.”); MUZZEY, HISTORY, *supra* note 107, at 176 (“[A]ll these disputes were settled by a series of ‘compromises,’ or bargains.”).

<sup>133</sup> CANFIELD & WILDER, *supra* note 101, at 136. Today’s textbooks draw similar conclusions, noting that, “[a]fter nearly four months of debate and compromise, the delegates succeeded in creating a constitution that was flexible enough to last through the centuries to come.” DANZER, *supra* note 108, at 144.

<sup>134</sup> *See, e.g.*, WIRTH, DEVELOPMENT *supra* note 100, at 194 (listing the Three-Fifths Clause among the “Other Compromises” made at the Convention).

compromise itself, simply noting that “the agricultural, slaveholding states of the South were given certain concessions: . . . [including that] three fifths of the slaves were to be counted as ‘population’ in apportioning a state’s representation in the House . . . .”<sup>135</sup>

Even in today’s textbooks, the Three-Fifths Compromise is mostly framed as an unfortunate (if immediately successful) arrangement. As one textbook notes, “[t]he Three-Fifths Compromise settled the political issue[s] [of taxation and representation].”<sup>136</sup> Another adds, “The final agreement . . . established that *only* three fifths of a state’s slave population would count in determining representation.”<sup>137</sup> Although today’s textbooks often explain that “[s]ome delegates spoke eloquently about including a ban on slavery in the Constitution,”<sup>138</sup> even these textbooks ignore the long-term effects of this key structural flaw in our Founders’ original Constitution.<sup>139</sup> Of course, the Three-Fifths Clause would help to undermine the Founders’ entire project, leading to the overrepresentation of the South in the Congress and on the Supreme Court—not to mention within the walls of the White House.<sup>140</sup> In short, this important compromise “tilted the long-run game against the forces of freedom,”<sup>141</sup> even as some scholars have argued that the Three-Fifths Compromise was far from inevitable.<sup>142</sup>

It is astounding that neither set of textbooks even hints at this key structural critique of our Founders’ Constitution. While our early textbooks branded

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<sup>135</sup> MUZZEY, HISTORY, *supra* note 107, at 176.

<sup>136</sup> DANZER, *supra* note 108, at 142.

<sup>137</sup> BOYER, *supra* note 108, at 145 (emphasis added).

<sup>138</sup> AYERS, *supra* note 118, at 154.

<sup>139</sup> Akhil Amar provides a powerful critique of the Founding Fathers on slavery, noting, “Though the Constitution of 1787-88 did not abolish slavery, it would be nice to think that the Founding Fathers designed a document whose arc would inexorably bend toward freedom and equality. Alas, the facts do not bear out this comforting thought.” AMAR, CONSTITUTION, *supra* note 11, at 352.

<sup>140</sup> *Id.* (“For every slave bought or bred (both before and after 1808) the slavocracy’s clout in Congress and the electoral college would increase, thanks to the three-fifths clause. In a process akin to compound interest, the effects of this one little number would grow exponentially as time passed, giving the Slave Power far more than its fair share of federal House seats, state legislative (and therefore federal Senate) seats, and electoral-college seats (and therefore far more chances to dominate the presidency, the cabinet, and the Court).”).

<sup>141</sup> *Id.* Slavery itself “led slave states to violate virtually every right and freedom declared in the Bill—not just the rights and freedoms of slaves, but of free men and women too.” AMAR, BILL OF RIGHTS, *supra* note 23, at 160. For instance, abolitionist speech “was incendiary and had to be suppressed in southern states, lest slaves overhear and get ideas.” *Id.* “[W]riting, printing, publishing, or distributing abolitionist literature was punishable by death” in at least one state. *Id.* at 161. Overturning the original system took “Lincoln, secession, war, black arms-bearing, and victory.” AMAR, CONSTITUTION, *supra* note 11, at 352.

<sup>142</sup> See, e.g., AMAR, CONSTITUTION, *supra* note 11, at 352 (noting the the gradual dissolution of slavery “might have been relatively painless [during the Founding era]—say, by constitutionally excluding slavery from all future Western territories.”).



Reconstruction a failure and today's textbooks provide a mixed (if largely fair) appraisal of this controversial era, the Founders escape both sets of textbooks largely unscathed. There is little doubt that American schoolchildren should be proud of their Constitution and the Founding generation. At the same time, the disparate treatment of our Founding Fathers and their Reconstruction counterparts creates a dynamic where one set of actors emerges as brilliant, ingenious, praiseworthy constitutional heroes, while the other set is cast as either constitutional villains or largely ineffective, wannabe revolutionaries (that is, if they are not ignored entirely).

## 2. The Founding Narrative and the "Myth of Continuity"

By ignoring some of the original Constitution's most glaring defects, our leading textbooks succumb to the "myth of continuity"—namely, the belief that somehow we still live in the world and under the government that the Founders envisioned—rather than one that was transformed by a bloody Civil War and Reconstruction (not to mention later constitutional developments). Kurt Lash refers to this as the "lingering belief in a *constitutional big bang*: the idea that all of our most cherished constitutional values sprang into existence in a single moment at the Founding."<sup>143</sup> Lash adds that "[t]his creation myth is not limited to the legally uninformed: The modern Supreme Court often supports its decisions by relying on the original intent of the Founding generation."<sup>144</sup>

For instance, one of today's textbooks marvels, "[i]n only four months, the Philadelphia Convention produced the document that has governed the United States for more than 200 years."<sup>145</sup> Another notes that "the basic structure of the federal government [today] remains exactly as the Framers envisioned it over 200 years ago."<sup>146</sup>

At the same time, our early textbooks included similar statements. For instance, one early textbook observed that the "Constitution of the United States has stood the

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<sup>143</sup> Kurt T. Lash, *Two Movements of a Constitutional Symphony: Akhil Reed Amar's The Bill of Rights*, 33 U. RICH. L. REV. 485, 487 (1999) (emphasis added).

<sup>144</sup> *Id.*; see also AMAR, CONSTITUTION, *supra* note 11, at 360 ("A casual reader encounters a Thirteenth Amendment whose words seem to follow smoothly after the first seven Articles and the first twelve amendments . . . . What the bare text does not show is the jagged gash between Amendments Twelve and Thirteen—a gash reflecting the fact that the Founders' Constitution *failed* in 1861-65. The system almost died, and more than half a million people did die. Without these deaths, the Thirteenth Amendment's new birth of freedom could never have occurred as it did.").

<sup>145</sup> CAYTON, *supra* note 118, at 150.

<sup>146</sup> AYERS, *supra* note 118, at 156. Another of today's textbooks, under the heading "A Lasting Document," adds, "Remarkably, this written plan of government has remained basically the same for over two hundred years." CAYTON, *supra* note 118, at 154. With this longevity in mind, one of today's textbooks wonders, "[h]ow has a short document written over two centuries ago for thirteen struggling seaboard colonies been able to give strength and liberty to a vast, two-ocean nation of more than 250 million?" BOORSTIN & KELLEY, *supra* note 103, at 124. Still another observes, "The Constitution works as well today for an industrialized nation of 50 states and a population of more than 280 million as it did in 1790 for an agricultural nation of 13 states and fewer than 4 million inhabitants." BOYER, *supra* note 108, at 154.

test,” adding that the “importance of the government set up under the Constitution can be judged from the fact that our government has survived under the Constitution from 1789 to the present day.”<sup>147</sup> Another went even further, noting that the original Constitution “finally solved” the “difficult problem of obtaining the proper balance between the central government and the states.”<sup>148</sup>

This myth of continuity appears to be fed (in part) by the small number of Article V Amendments that have been ratified since the original Founding. For instance, an early textbook noted that the “changes that have been made in the original work of the Constitutional delegates are remarkably few” and the Constitution, “as [the Founders] put it together, has remained the basis of the government of a great people for a longer time than any other single written document.”<sup>149</sup> That same textbook concluded that “[i]t is a very great tribute to the Fathers of the Constitution that the system of government which they worked out . . . has endured through the many startling changes which have taken place in this nation and in the world.”<sup>150</sup>

The myth of continuity is just as striking in our textbooks’ portrayals of the Bill of Rights, which

ignore[] the ways in which the Reconstruction generation—not their Founding fathers and grandfathers—took a crumbling and somewhat obscure edifice [in the Bill of Rights], placed it on new, high ground, and remade it so that it truly would stand as a temple of liberty and justice for all.<sup>151</sup>

Both sets of accounts begin by noting the importance of the Bill of Rights to the anti-Federalists. For instance, as one early textbook noted, “[m]any people had objected to the Constitution because they felt that their rights were not sufficiently guaranteed.”<sup>152</sup> One of today’s textbook adds, “[u]nlike many state constitutions, the

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<sup>147</sup> WIRTH, HISTORY, *supra* note 106, at 107, 110.

<sup>148</sup> *Id.* at 106; *see also* BARKER & COMMAGER, *supra* note 99, at 163 (“The Constitution provided for the establishment of the government that we now have. . . . It was accepted by the states, the new government that it created went into operation, and the danger of disunion was averted.”).

<sup>149</sup> CANFIELD & WILDER, *supra* note 101, at 143; *see also* CAYTON, *supra* note 118, at 154 (“Perhaps the best proof of this flexibility is the fact that the Constitution has been amended just 27 times in this nation’s history.”).

<sup>150</sup> CANFIELD & WILDER, *supra* note 101, at 143.

<sup>151</sup> AMAR, BILL OF RIGHTS, *supra* note 23, at 288 (“The conventional narrative focuses on those present at the Creation—on the hasty oversights and omissions in the last days of a hot summer in Philadelphia; on the centrality of the (absence of a) Bill of Rights in ratification debates; and on the quick repair work by the First Congress, fixing in place the keystone of the arch of liberty. And we all lived happily ever after.”); *see also* Roderick M. Hills, Jr., *Back to the Future? How the Bill of Rights Might Be About Structure After All*, 93 NW. U. L. REV. 977, 993 (1999) (“[W]e under-appreciate the debt we owe to the Reconstruction generation, attributing our modern vision of the Bill of Rights to the Anti-Federalists when it is actually the product of the Republicans who drafted and ratified the Fourteenth Amendment.”).

<sup>152</sup> WIRTH, DEVELOPMENT, *supra* note 100, at 197.

United States Constitution did not contain a bill of rights, or a document describing the civil liberties, or individual rights, that a government promises its citizens.”<sup>153</sup> Another of today’s textbooks concludes that, to correct this oversight, “[the anti-Federalists] wanted written guarantees that the people would have freedom of speech, of the press, and of religion. They demanded assurance of the right to trial by jury and the right to bear arms.”<sup>154</sup>

From there, our textbooks celebrate the Founders’ achievement. As one early textbook explained, “in the . . . the Bill of Rights . . . the citizens of the United States are guaranteed against interference by the government with some very important rights and privileges.”<sup>155</sup> Another early textbook added, “[the] Bill of Rights . . . guarantees some of our fundamental freedoms.”<sup>156</sup> Still another noted, “[t]he Bill of Rights has become one of the foundation stones of our American way of life.”<sup>157</sup> One of today’s textbook goes even further, adding, “[m]ost of the amendments in the Bill of Rights listed things that *no* government, *state* or *federal*, could do.”<sup>158</sup> Finally, another early textbook used the Bill of Rights to contrast American democracy with totalitarianism: “The great importance of the guarantee of these fundamental rights was made apparent to us in the events leading up to the Second World War when, in some of the countries under dictatorial rule, the people lost these rights and privileges.”<sup>159</sup>

Of course, the Founders’ Bill of Rights failed to protect Southern abolitionists and free blacks from similar violations in antebellum America. It would take a new generation of American leaders to transform the Bill of Rights into the sacred text it has become today—our Forgotten Founders.

*C. The Founding: “Academic Integrity,” Social Movements, and High School Narratives*

Academic scholarship had little effect on our early textbooks’ treatment of the Founding. Even as Charles Beard and his disciples provided muckraking accounts of this period, our high school narratives remained consistently hagiographic. These findings introduce the following puzzle: If our early textbooks’ treatment of the Founding cannot be explained by “academic integrity,” what other factors shaped these celebratory accounts? In the end, there is considerable evidence that our early high school narratives were the product of a broad-based movement to defend the public image of the Founding Fathers against the Beardian assault. This evidence

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<sup>153</sup> BOYER, *supra* note 108, at 147.

<sup>154</sup> DANZER, *supra* note 108, at 147. Another textbook explains, “[t]he Constitution as originally framed did not contain a bill of rights, guaranteeing the rights of citizens and pointing out things that the government could not do. The omission was thought to be a serious defect . . . .” BARKER & COMMAGER, *supra* note 99, at 158.

<sup>155</sup> MUZZEY, HISTORY, *supra* note 107, at 179.

<sup>156</sup> WIRTH, HISTORY, *supra* note 106, at 109.

<sup>157</sup> CANFIELD & WILDER, *supra* note 101, at 140.

<sup>158</sup> AYERS, *supra* note 118, at 163 (emphasis added).

<sup>159</sup> WIRTH, HISTORY, *supra* note 106, at 110.

suggests that civil religion trumped academic integrity in our early textbooks' treatment of the Founding.

Popular resistance to the Beardian consensus emerged almost immediately. These efforts were led by patriotic organizations, such as the American Legion and the Veterans of Foreign Wars,<sup>160</sup> however, their coalition quickly widened to include leading "ethnic" organizations, such as the Steuben Society, the Knights of Columbus, and the Jewish Alliance.<sup>161</sup> These disparate organizations were driven by a common fear that progressive historians would "erode faith in the nation's founders," particularly among high school students.<sup>162</sup> As a result, this broad-based coalition "insist[ed] that America's conception and birth remain immaculate,"<sup>163</sup> with movement leaders promoting Founding-era "hero worship" in our leading high school textbooks.<sup>164</sup>

By 1923, twenty-one state legislatures were already pursuing laws to purge "treasonous" textbooks from our high school classrooms.<sup>165</sup> For instance, a 1923 bill in Wisconsin banned any textbook that "falsifie[d] the facts regarding the War of Independence" or "defame[d] our nation's founders."<sup>166</sup> These statewide efforts were quickly joined by local pushes.<sup>167</sup> In 1928, Walter Lipmann concluded that, "It almost seems as if there were hardly an organization in America which has not set up a committee to rewrite the textbooks."<sup>168</sup>

Similar attacks would last into the 1930s and 1940s, with the focus shifting from the Founding generation, in general, to the Constitution, in particular.<sup>169</sup> Although hardly ignored by the first wave of textbook activists, this second wave took dead aim at Beardian interpretations of the Constitution.<sup>170</sup> These attacks rejected Beard's central claims: (1) that "well-to-do Americans devised and supported the Constitution to protect the value of their securities;" and (2) that these Founding-era elitists constructed the Constitution to "check the democratic impulses unleashed by

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<sup>160</sup> JONATHAN ZIMMERMAN, *WHOSE AMERICA?: CULTURE WARS IN THE PUBLIC SCHOOLS* 14 (2002). "[A]ny censure of the Founding Fathers weakened the Revolution; weakening the Revolution elevated England; and elevating the English belittled America's other ethnicities." *Id.* at 20.

<sup>161</sup> *Id.* at 14.

<sup>162</sup> *Id.* at 26.

<sup>163</sup> *Id.* at 15.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 18. Targeted authors included David Muzzey, whose leading textbook is considered in detail in this Article. *Id.* at 13.

<sup>166</sup> *Id.* at 26.

<sup>167</sup> *Id.* at 18.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 66 (noting that, during this period, "the framing of the U.S. Constitution . . . replaced the Revolution as the chief focus of historical controversy in American textbooks.").

<sup>170</sup> *Id.* at 75.

the Revolution.”<sup>171</sup> The findings in Section II.B suggest that these efforts were largely successful.

In the end, civil religion and academic integrity diverged in our early textbooks’ accounts of the Founding, as broad-based social movements organized to overturn the influence of progressive historians. These findings suggest the importance of social movements in shaping popular constitutional narratives, as well as the longstanding affection the American public has had for their Founding Fathers—an affection that the public has not extended to the leaders of Reconstruction.

#### IV. RECONSTRUCTION IN OUR HIGH SCHOOL TEXTBOOKS

Reconstruction was one of the most controversial eras in American history. It should come as little surprise that it has also been a period of great controversy among both academic historians and textbook publishers.<sup>172</sup> Part of the reason for this is obviously “the legacy of bitterness left behind by the internal conflict.”<sup>173</sup> As John Hope Franklin noted in 1980, “If every generation rewrites its history . . . then it may be said that every generation since 1870 has written the history of the Reconstruction era.”<sup>174</sup> Franklin’s statement was, of course, an exaggeration. It underemphasized the lasting influence of one generation of historians—the Dunning School—on both the public and academic accounts of Reconstruction.

##### A. *Reconstruction Historiography: From Dunning to Foner (and Beyond)*

The first wave of Reconstruction scholarship began in the early twentieth century with the work of William Dunning, John Burgess, and their disciples at Columbia University.<sup>175</sup> Their accounts “reach[ed] a mass audience” in Claude Bowers’ *The Tragic Era*.<sup>176</sup> For several decades, the Dunning School “dominate[d] the field.”<sup>177</sup> Their scholarship grew out of the “anti-Reconstruction propaganda of southern Democrats during the 1870s . . . .”<sup>178</sup> The Dunning School offered an account of

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<sup>171</sup> *Id.*

<sup>172</sup> See, e.g., John Hope Franklin, *Mirror for Americans: A Century of Reconstruction History*, 85 AM. HIST. REV. 1, 7 (1980) (“Reconstruction history has been argued over and fought over since the period itself ended. Historians have constantly disagreed not only about what significance to attach to certain events and how to interpret them but also (and almost as much) about the actual events themselves.”); Armstead L. Robinson, *Beyond the Realm of Social Consensus: New Meanings of Reconstruction for American History*, 68 J. AM. HIST. 276, 276 (1981) (“The Civil War and Reconstruction era remains a center of historical controversy.”).

<sup>173</sup> Franklin, *supra* note 172, at 7.

<sup>174</sup> *Id.* at 3.

<sup>175</sup> ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877, at xix (1988) [hereinafter FONER, RECONSTRUCTION].

<sup>176</sup> Eric Foner, *Reconstruction Revisited*, 10 REV. AM. HIST. 82, 82 (1982) [hereinafter Foner, *Revisited*].

<sup>177</sup> Franklin, *supra* note 172, at 3.

<sup>178</sup> Foner, *Revisited*, *supra* note 176, at 82.

Reconstruction that was sympathetic to the white South and hostile to both African-Americans and the Radical Republicans. For the Dunning School, “Reconstruction was the darkest page in the saga of American history,”<sup>179</sup> and the “heroes of the story were President Johnson, whose lenient Reconstruction policies were foiled by the Radicals, and the self-styled ‘Redeemers,’ who restored honest government.”<sup>180</sup> Dunning “was as unequivocal as the most rabid opponent of Reconstruction in placing upon Scalawags, [freedmen], and Northern radicals the responsibility for making the unworthy and unsuccessful attempt to reorder society and politics in the South.”<sup>181</sup> Furthermore, “Dunning’s students were more ardent than he . . . in pressing the case against Radical Republicans and their black and white colleagues.”<sup>182</sup> In the end, “[p]erhaps the most important impact of such writings was the influence they wielded on authors of textbooks, popular histories, and fiction.”<sup>183</sup>

Since the 1960s, the consensus account of Reconstruction has been transformed. As Eric Foner concluded in 1988, “no part of the American experience has, in the last twenty-five years, seen a broadly accepted point of view so completely overturned as Reconstruction—the violent, dramatic, and still controversial era that followed the Civil War.”<sup>184</sup> Even in the early years of the Dunning School assault, criticisms emerged from “a handful of survivors of the Reconstruction era and the small fraternity of black historians,” including A.A. Taylor and W.E.B. DuBois.<sup>185</sup> This was the opening salvo in a long struggle among academic historians over Reconstruction.

By the 1960s, a “revisionist wave broke over the field, destroying, in rapid succession, every assumption of the traditional viewpoint.”<sup>186</sup> New accounts on the national politics of the period “portrayed Andrew Johnson as a stubborn, racist politician” and “acquitted the Radicals—reborn as idealistic reformers genuinely committed to black rights . . . .”<sup>187</sup> New accounts of the Republican governments in the South proved that “‘Negro rule’ was a myth and that Reconstruction represented more than [corruption].”<sup>188</sup> These new accounts focused on the signal achievements of the Republican governments—the “establishment of public school systems, the granting of equal citizenship to blacks, and the effort to revitalize the devastated Southern economy . . . .”<sup>189</sup> Even accounts of Republican misrule were placed in the

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<sup>179</sup> FONER, RECONSTRUCTION, *supra* note 175, at xx.

<sup>180</sup> Foner, *Revisited*, *supra* note 176, at 82.

<sup>181</sup> Franklin, *supra* note 172, at 3-4.

<sup>182</sup> *Id.* at 4.

<sup>183</sup> *Id.*

<sup>184</sup> FONER, RECONSTRUCTION, *supra* note 175, at xix.

<sup>185</sup> *Id.* at xxi.

<sup>186</sup> *Id.* at xxii.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

proper context—noting that “corruption in the Reconstruction South paled before that of the Tweed Ring, Credit Mobilier scandal, and Whiskey Rings in the post-Civil War North.”<sup>190</sup> As Foner notes, “By the end of the 1960s, the old interpretation had been completely reversed[:] Radical Republicans and Southern freedmen were now the heroes, white supremacist Redeemers the villains, and Reconstruction was a time of extraordinary social and political progress for blacks.”<sup>191</sup> Foner adds, “[i]f the era was ‘tragic,’ revisionists insisted, it was because change did not go far enough, especially in the area of Southern land reform.”<sup>192</sup>

By the late 1960s, however, “the more optimistic assumptions of many revisionist writers were challenged by those who took a skeptical view of the entire Reconstruction enterprise.”<sup>193</sup> Scholars like C. Vann Woodward and August Meier “contended that . . . racial prejudice severely compromised northern efforts to assist the freedmen” and that, “in contrast to the Second Reconstruction, the first was fundamentally ‘superficial.’”<sup>194</sup> The 1970s and 1980s featured new criticisms of “the ‘conservatism’ of Republican policymakers, even at the height of Radical influence” and the “continued hold of racism and federalism despite the extension of citizenship rights to blacks and the enhanced scope of national authority.”<sup>195</sup> These post-revisionist historians began to “question[] whether much of importance happened at all” during Reconstruction, noting the great “continuity between the Old and New South.”<sup>196</sup>

Although historians still note that “[t]he traditional narrative of the Reconstruction era tends toward intellectual incoherence,”<sup>197</sup> Foner outlined a promising framework in 1988:

Over a century ago, prodded by the demands of four million men and women just emerging from slavery, Americans made their first attempt to live up to the noble professions of their political creed—something few societies have ever done. The effort produced a sweeping redefinition of the nation’s public life and a violent reaction that ultimately destroyed much, but by no means all, of what had been accomplished. From the enforcement of the rights of citizens to the stubborn problems of economic and racial justice, the issues central to Reconstruction are as old as the American republic, and as contemporary as the inequalities that still afflict our society.<sup>198</sup>

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<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Foner, *Revisited*, *supra* note 176, at 83.

<sup>194</sup> *Id.*

<sup>195</sup> FONER, RECONSTRUCTION, *supra* note 175, at xxiii.

<sup>196</sup> Foner, *Revisited*, *supra* note 176, at 84.

<sup>197</sup> Thomas C. Holt, *Reconstruction in United States Textbooks*, 81 J. AM. HIST. 1641, 1641 (1995).

<sup>198</sup> FONER, RECONSTRUCTION, *supra* note 175, at xxvii.

In spite of its obvious shortcomings, “Reconstruction transformed the lives of southern blacks in ways [im]measurable by statistics and in areas unreachable by law” by “rais[ing] blacks’ expectations and aspirations, redefin[ing] their status in relation to the larger society, and allow[ing] space for the creation of institutions that enabled them to survive the repression that followed.”<sup>199</sup>

In the end, “[Reconstruction’s] legacy deserves to survive as an inspiration to those Americans, black and white alike, who insist that the nation live up to the professed ideals of its political culture.”<sup>200</sup> The question we turn to now is whether today’s textbooks have followed Foner’s lead—or whether remnants of the discredited Dunning School remain. One would expect our high school history textbooks to shift from a hostile account in the 1940s and 1950s to a more balanced account today.

### B. *The Reconstruction Narrative—Yesterday and Today*

The last half-century has witnessed a dramatic retelling of the Reconstruction story in our leading high school history textbooks, as the account has shifted from one of downright hostility in the 1940s and 1950s to a mixed account today. The Dunning School account dominated yesterday’s textbooks—with stories of vindictive Radicals, corrupt carpetbaggers, opportunistic scalawags, ignorant freedmen, and oppressed Southern whites. The key shift in today’s treatment of Reconstruction is that it is much more sensitive to the plight of the freedmen—and, as a result, more sympathetic to the Radical Republicans’ cause. While earlier accounts were laced with racism and focused on the challenges facing the white South, today’s accounts eliminate any hint of racism and are much more critical of white Southerners.<sup>201</sup> Although the Radical Republicans are still portrayed as bitter, angry, and vindictive, today’s textbooks provide a more detailed account of the underlying values that animate those feelings—namely, a genuine belief in civil and political equality for all.

In the end, although the modern account of Reconstruction is more sympathetic than the 1940s-1950s Dunning School narrative, it is also much more critical than modern accounts of the Founding. Today’s textbooks leave our Founding Fathers largely unscathed, while subjecting their Reconstruction counterparts to extensive criticism. Furthermore, none of the accounts sufficiently articulate our Reconstruction Founders’ larger constitutional vision for a rights-enforcing, equality-protecting national government—the vision that provided a constitutional foundation for the expansion of individual rights and equality in the twentieth century (and beyond).<sup>202</sup>

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<sup>199</sup> Foner, *Revisited*, *supra* note 176, at 95.

<sup>200</sup> *Id.*

<sup>201</sup> Although this shift is worthy of examination, I focus my analysis on the treatment of the Radical Republicans and our textbooks’ overall assessment of Reconstruction, limiting my discussion of race to passages particularly relevant to accounts of our Reconstruction Founders.

<sup>202</sup> As Jacobus tenBroek summarized:

[The Reconstruction Amendments’] meaning is to be gathered from the comprehensive goals of the abolitionist crusade; from the abrogation of



### 1. The Enduring Power of the “But-For-Lincoln” Narrative

One of the key Reconstruction themes in both sets of textbooks is what could be described as the “But-For-Lincoln” narrative. One early textbook’s account summarized this view well: “There is a good chance that Lincoln—generous, patient, and with kindly feelings toward the southern states—might have been able to guide the country safely through the difficult task of reconstruction.”<sup>203</sup> Although there is little doubt that the nation would have been better-served by a President Lincoln than a President Johnson during Reconstruction, both sets of textbooks use Lincoln’s “gentleness” as a foil to the Radical Republicans’ “harshness.”<sup>204</sup>

Especially in the early accounts, this contrast was used to criticize the Radical program. For instance, in our early textbooks, Lincoln was clearly distinguished from the Radical Republicans in that he was “[f]ree from a spirit of vindictiveness toward a fallen foe . . . .”<sup>205</sup> In his program, Lincoln would call for “gentleness and compromise,”<sup>206</sup> believing that “the South should not be punished severely.”<sup>207</sup> As such, he wanted “to restore the states to their former position as quickly . . . as possible.”<sup>208</sup> These early textbooks did not consider any of the possible negative effects of a lenient Reconstruction program on the freedmen. Instead, they presented Lincoln’s proposed program as the “logical” path to national reconciliation.

Not a single early textbook cited the Congressional Republicans’ legitimate concern for the freedmen as a source of their opposition to the Lincoln program. Instead, our early textbooks simply noted that the Congressional Republicans “wanted to punish the Southerners.”<sup>209</sup> Divorced from the values animating their “harsher” program, the Congressional Republicans emerged as irrationally angry obstructionists. Furthermore, in this case, they were obstructing the preferred path of America’s martyred President.<sup>210</sup>

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the natural rights of men, bound and free, black and white, which were the active cause of that crusade; from the unmistakable nationalistic implications of the abolitionist movement; and from the constitutional theory which the abolitionists evolved to fit those goals, causes, and implications.

TENBROEK, *supra* note 28, at 234.

<sup>203</sup> CANFIELD & WILDER, *supra* note 101, at 322-23.

<sup>204</sup> BARKER & COMMAGER, *supra* note 99, at 419-20.

<sup>205</sup> WIRTH, DEVELOPMENT, *supra* note 100, at 406.

<sup>206</sup> BARKER & COMMAGER, *supra* note 99, at 419.

<sup>207</sup> WIRTH, HISTORY, *supra* note 106, at 255.

<sup>208</sup> WIRTH, DEVELOPMENT *supra* note 100, at 406.

<sup>209</sup> CANFIELD & WILDER, *supra* note 101, at 322.

<sup>210</sup> Indeed, in these accounts, Lincoln pocket vetoes the Wade-Davis bill “because he thought it imposed terms too hard for the South to meet.” BARKER & COMMAGER, *supra* note 99, at 422.

Our early textbooks framed Lincoln's assassination as "a great loss to the South,"<sup>211</sup> as it left the conquered region "at the mercy of its worst enemies."<sup>212</sup> In short, they concluded that the nation could have been spared the horrors of Reconstruction, but-for John Wilkes Booth's bullet. In a clear statement of the "But-For-Lincoln" narrative, one textbook concluded, "If Lincoln had lived to take charge of reconstruction, the South might have been spared the misgovernment forced upon it by congressional leaders."<sup>213</sup>

Although many of today's textbooks still succumb to a softer version of the "But-For-Lincoln" narrative, they all offer some context for the Radical Republicans' obstructionism. These accounts still begin with a charitable Lincoln. In fact, several textbooks frame the initial discussion of Reconstruction as a question of "forgiveness" or "punishment."<sup>214</sup> In this formulation, Lincoln's plan was the path to "forgiveness," the Radical Republicans' the path to "punishment." In these accounts, Lincoln "made it clear [before his death] that he favored a lenient Reconstruction policy."<sup>215</sup> Unlike the Radical Republicans, he "wished to make the South's return to the Union as quick and easy as possible."<sup>216</sup> By framing the discussion in this manner, these textbooks offer an implicit preference for the conciliatory approach.

Some textbooks still give a nod to the Dunning School, as well, noting that "the South had already been punished" by the war and that "it was important to get the South back into working order."<sup>217</sup> On this account, "Lincoln had shown his greatness—and his forgiving spirit—by his plan for bringing Southerners back to the Union. He was less interested in the past than in the future."<sup>218</sup> Lincoln "had not gone to war to destroy the South, but to preserve the Union."<sup>219</sup> The Radical Republicans, on the other hand, rejected Lincoln's approach and "concoct[ed] a plan of their own" because "[t]hey could not take their eyes off the past."<sup>220</sup> In the end,

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<sup>211</sup> *Id.* at 420.

<sup>212</sup> WIRTH, HISTORY, *supra* note 106, at 257.

<sup>213</sup> CANFIELD & WILDER, *supra* note 101, at 323.

<sup>214</sup> One of today's textbooks begins its Reconstruction unit with a chapter entitled, "To Punish or to Forgive?," and its first section is entitled, "With malice toward none." BOORSTIN & KELLEY, *supra* note 103, at 360-61. Another leads with a section entitled, "Punishment or Pardon?," noting that Lincoln's "plan was forgiving to the South." CAYTON, *supra* note 118, at 425-26.

<sup>215</sup> DANZER, *supra* note 108, at 377.

<sup>216</sup> *Id.*

<sup>217</sup> BOORSTIN & KELLEY, *supra* note 103, at 361.

<sup>218</sup> *Id.* at 362.

<sup>219</sup> BOYER, *supra* note 108, at 403.

<sup>220</sup> BOORSTIN & KELLEY, *supra* note 103, at 362. On this account: Under the Radicals' scheme it would have been years before any Southern state could set up a majority government. It would have had to wait until the whole Civil War generation was dead. . . . The Radical Republicans said that they were in favor of liberty. But they were not willing to give it to hated white Southerners.

some of today's accounts still pit Lincoln's "lenient" vision against that of a group of "Northern avengers,"<sup>221</sup> "bitter against the Southern rebels,"<sup>222</sup> and eager to "destroy the political power of former slaveholders."<sup>223</sup>

In spite of this unfavorable framework, all of today's textbooks (eventually) offer a sound reason for the Radical Republicans' hostility that transcends mere sectionalism. As one textbook notes, "[m]ost of all, [the Radical Republicans] wanted African Americans to be given full citizenship and the right to vote."<sup>224</sup> Needless to say, most white Southerners did not share these goals. Even today's textbooks that contain remnants of the Dunning School account mention the Radical Republicans' commitment to civil and political equality for African-Americans. Although students still must reject the sainted Lincoln and the spirit of forgiveness to overcome the "But-For-Lincoln" narrative, today's accounts are a vast improvement over those of the 1940s and 1950s.

## 2. Andrew Johnson: Principled (if Annoying) Heir to Lincoln; or, Racist Scoundrel?

The accounts of Presidential Reconstruction largely track those of the "But-For-Lincoln" narrative. Although there is a shift in our textbooks' treatment of Andrew Johnson—from sympathetic accounts in the 1940s-1950s to highly critical accounts today—Johnson's Reconstruction policy is still tightly linked to the gentle Lincoln in both sets of textbooks. Our early textbooks conceded many of Johnson's negative (un-Lincoln-like) qualities. "He was untactful and stubborn"<sup>225</sup> and possessed a "violent temper."<sup>226</sup> At the same time, they noted that Johnson was an "honest, sincere, self-reliant, and courageous"<sup>227</sup> man—indeed, "even his severest critics testify to his integrity of purpose in all of his acts as President" and "his great ability, honesty, and sincere devotion to the cause of justice and service to his country."<sup>228</sup> "[L]ike Lincoln," Johnson was "a man of humble origin and scant education,"<sup>229</sup> who "had risen from poverty through sheer force of character."<sup>230</sup> Although a Democrat, "Johnson hated the slave-owners" and "had been the only member of Congress from the seceded states who remained in his seat at Washington in 1861."<sup>231</sup> In the end,

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*Id.* at 363.

<sup>221</sup> *Id.* at 361.

<sup>222</sup> *Id.*

<sup>223</sup> DANZER, *supra* note 108, at 377.

<sup>224</sup> *Id.*

<sup>225</sup> WIRTH, DEVELOPMENT, *supra* note 100, at 407.

<sup>226</sup> BARKER & COMMAGER, *supra* note 99, at 422.

<sup>227</sup> CANFIELD & WILDER, *supra* note 101, at 323.

<sup>228</sup> WIRTH, DEVELOPMENT, *supra* note 100, at 407-08.

<sup>229</sup> MUZZEY, HISTORY, *supra* note 107, at 428.

<sup>230</sup> CANFIELD & WILDER, *supra* note 101, at 323.

<sup>231</sup> MUZZEY, HISTORY, *supra* note 107, at 428.

Johnson emerged from these early accounts as “a man of natural good sense”<sup>232</sup> (with certain flaws) stuck in a tough situation and dealing with an unreasonable foe.

Today’s textbooks are much more critical of Johnson. Although some textbooks still note that “Johnson was the only senator from a Confederate state to remain loyal to the Union” and a “supporter of abolition,”<sup>233</sup> today’s accounts seldom celebrate Johnson’s honesty and integrity. Instead, they stress that Johnson was a vulgar, former slave-owner, opposed to civil and political equality for African-Americans, and committed to white supremacy in the South. Importantly, one textbook does contain traces of the Dunning School narrative—for instance, stressing that “Johnson, like Lincoln, was a man of rock-ribbed honesty”<sup>234</sup>—but this account is the exception. Its existence speaks to the enduring legacy of the Dunning School, but it is notable only because it is so unusual in today’s accounts of Johnson.

In spite of the divergent descriptions of Johnson’s character in our two sets of textbooks, both accounts tie Johnson’s Reconstruction plan to Lincoln’s lenient program.<sup>235</sup> As a result, their narratives largely track those analyzed in Sub-Section III.B.1. In our early textbooks, Johnson faced the same implacable foe as Lincoln. On this view, “[i]t is certain that if Lincoln had lived . . . he would have had on his hands the struggle with Congress which he passed on to his successor.”<sup>236</sup> Whereas Lincoln may have actually succeeded, due to his superior skill and popularity, the flawed (even if well-meaning and honest) Johnson was destined to fail. Although “Johnson tried to carry out Lincoln’s humanitarian plan of reconstruction[,] he [w]as blocked . . . by revengeful politicians.”<sup>237</sup> Tracking the “But-For-Lincoln” narrative above, our early textbooks concluded that, “[i]f Congress had admitted [the Johnson governments], our country would have been spared a disgraceful chapter in its history.”<sup>238</sup> Once again, these early accounts ignored the potential plight of the freedmen under Johnson’s “lenient” program.

In today’s accounts, Johnson’s Reconstruction plan is still closely linked to Lincoln’s program.<sup>239</sup> However, just as in their discussion of Lincoln’s plan, today’s textbooks provide a convincing explanation for the Radical Republicans’ obstructionism—an explanation that transcends mere sectionalism and power politics. In short, “[t]he Radicals were especially upset that Johnson’s plan . . . failed to address the needs of former slaves in three areas: land, voting rights, and protection under the law.”<sup>240</sup> Therefore, the Radical Republicans emerge in today’s

<sup>232</sup> BARKER & COMMAGER, *supra* note 99, at 422.

<sup>233</sup> DANZER, *supra* note 108, at 376.

<sup>234</sup> BOORSTIN & KELLEY, *supra* note 103, at 371.

<sup>235</sup> WIRTH, DEVELOPMENT, *supra* note 100, at 408 (“Johnson made known his determination to continue . . . the policy of Lincoln.”); *see also* DANZER, *supra* note 108, at 378 (including an entire section entitled, “Johnson Continues Lincoln’s Policies”).

<sup>236</sup> MUZZEY, HISTORY, *supra* note 107, at 428.

<sup>237</sup> CANFIELD & WILDER, *supra* note 101, at 323.

<sup>238</sup> MUZZEY, HISTORY, *supra* note 107, at 429.

<sup>239</sup> DANZER, *supra* note 108, at 378 (“Johnson’s plan differed little from Lincoln’s.”).

<sup>240</sup> *Id.*

accounts as the defenders of the vulnerable freedmen—not as irrationally angry sectionalists committed to prolonging the agony of an already-defeated South.

3. The Radical Republicans and Congressional Reconstruction: Bitter Hostility; or, Justified Anger?

Accounts of Congressional Reconstruction have shifted from downright hostility in the 1940s-1950s to a more mixed account in today. I consider each set of textbooks in turn.

*a. Congressional Reconstruction in Our Early Textbooks*

In our early textbooks, the Radical Republicans were supposedly driven by animosity and power politics,<sup>241</sup> resulting in political corruption, Southern anger, and regional tragedy. These early textbooks described the Radical Republicans as a group of “extrem[ists] . . . urged on by their bitter animosity toward the South . . . .”<sup>242</sup> Their program was portrayed as a “harsh” alternative to Presidential Reconstruction, driven by the Radicals’ “angry mood”<sup>243</sup> and “hat[red of] Johnson for his Southern birth . . . .”<sup>244</sup>

<sup>241</sup> This is not to suggest that “politics” played no role in the Republicans’ Reconstruction program. See, e.g., BENEDICT, PRESERVING, *supra* note 54, at 96 (“[T]hroughout the Reconstruction era, the chief goal of Republicans North and South was to create a competitive Republican Party in the South.”).

<sup>242</sup> WIRTH, DEVELOPMENT, *supra* note 100, at 405.

<sup>243</sup> CANFIELD & WILDER, *supra* note 101, at 324.

<sup>244</sup> MUZZEY, HISTORY, *supra* note 107, at 429. Needless to say, our early textbooks’ accounts of the brutality of Republican rule in the South are largely absurd. As Kenneth Stampf noted,

[R]arely in history have the participants in an unsuccessful rebellion endured penalties as mild as those Congress imposed upon the people of the South, and particularly upon their leaders. After four years of bitter struggle costing hundreds of thousands of lives, the generosity of the federal government’s terms was quite remarkable.

KENNETH M. STAMPP, THE ERA OF RECONSTRUCTION, 1865-1877, at 11 (1965). Stampf added: What, then, constituted the alleged brutality that white Southerners endured? First, the freeing of their slaves; second, the brief incarceration of a few Confederate leaders; third, a political disability imposed for a few years on most Confederate leaders; fourth, a relatively weak military occupation terminated in 1877; and, last, an attempt to extend the rights and privileges of citizenship to southern Negroes. Mistakes there were in the implementation of these measures—some of them serious—but brutality almost none.

*Id.* Furthermore, as Foner noted of the Radical Republican’s main motivations, “Rather than vengeance, the driving force of Radical ideology was the utopian vision of a nation whose citizens enjoyed equality of civil and political rights, secured by a powerful and beneficent national state.” FONER, RECONSTRUCTION, *supra* note 175, at 230. Foner added:

For decades, long before any conceivable political benefit derived from its advocacy, Stevens, Sumner, and other Radicals had defended the unpopular cause of black suffrage and castigated the idea that America was a “white man’s government” (a doctrine, Stevens remarked, “that damned the late Chief Justice [Roger B. Taney] to everlasting fame; and, I fear, to everlasting fire”).

*Id.*

Although Radical leaders like Thaddeus Stevens *were* no doubt angry at the South, our early textbooks provided few explanations for the Radical Republicans' anger—apart from their misdirected (and largely unexplained) animosity for the white South. Rather than stressing the Radicals' commitment to racial equality and a “new birth of freedom”—and connecting their anger at the South to those commitments—our early textbooks described our Reconstruction Founders as “bent upon a policy of revenge and punishment.”<sup>245</sup> These accounts were more likely to stress political concerns, such as “want[ing] a weak South in order to keep the Republican party . . . in power,”<sup>246</sup> than any nobler ambitions. Even black suffrage was given this political gloss.<sup>247</sup> Although political motivations surely played some role in Republican support for black suffrage, our early accounts largely ignored the long-term commitment of many Radicals to this cause. While these early textbooks tended to give our Founding Fathers the benefit of the doubt (and even ignored some of their key failings), they always assumed the worst of our Reconstruction Founders.

In these early accounts, Northern support for Congressional Reconstruction was built upon deception and misunderstanding. Moderate Northerners went along with Congressional Reconstruction because of “[s]everal unfortunate and grossly misinterpreted occurrences . . . .”<sup>248</sup> These “occurrences” included the election of high Confederate officials (said to be “the result of a sincere desire to be represented by their most able men”) and “the passage of the so-called ‘black codes’” (meant to deal with the “[m]any . . . negro freedmen [who] positively refused to work . . .”).<sup>249</sup> In these accounts, the Black Codes were only necessary because “few of the liberated slaves had any sense of responsibility,”<sup>250</sup> and the Northerners simply refused to empathize with the legitimate challenges facing the white South. Instead, most Northerners supported the early measures offered by Congressional Republicans—measures intended to overturn the Black Codes, punish the Southern rebels, and promote black suffrage.

Our early textbooks stressed the harshness and overall ineffectiveness of these measures. In these accounts, Congressional Reconstruction “developed gradually, growing harsher as it unfolded step by step,”<sup>251</sup> with our early textbooks providing pointed criticisms for each component of the congressional program. For instance, they criticized the Freedman’s Bureau for “pursu[ing] a policy so unwise and

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<sup>245</sup> WIRTH, DEVELOPMENT, *supra* note 100, at 408.

<sup>246</sup> WIRTH, HISTORY, *supra* note 106, at 256.

<sup>247</sup> In the early accounts, black suffrage is presented as “[t]he surest plan for the Republicans to keep . . . power [in the South].” WIRTH, DEVELOPMENT, *supra* note 100, at 410. Indeed, these textbooks note that the Radical Republicans especially pushed for black suffrage only after Grant’s narrow victory over Seymour, when these results “[w]arned . . . how necessary it was to retain the colored vote.” MUZZEY, HISTORY, *supra* note 107, at 435.

<sup>248</sup> WIRTH, DEVELOPMENT, *supra* note 100, at 409.

<sup>249</sup> *Id.*

<sup>250</sup> MUZZEY, HISTORY, *supra* note 107, at 430.

<sup>251</sup> BARKER & COMMAGER, *supra* note 99, at 425.

discriminatory that [local officials] won for the bureau the ill will of the white people of the South."<sup>252</sup> In addition, while our early textbooks were not nearly as critical of the Civil Rights Act of 1866, they tended to cheapen its historic significance by stressing its limitations rather than its achievements—for instance, noting that the Act “did not . . . give [blacks] the privilege of voting and holding office.”<sup>253</sup>

Most importantly, in the hands of these early textbook authors, the Fourteenth Amendment became just another harsh measure offered during Congressional Reconstruction, as these accounts emphasized the Amendment’s punitive sections over the “new birth of freedom” offered by Section One. In these accounts, Section One was often dispensed with in a single sentence—usually stressing that it was designed to “remov[e] doubts about the constitutionality of the Civil Rights Act.”<sup>254</sup> Although black citizenship was almost always mentioned, *Dred Scott* was not. Furthermore, both the Due Process and the Privileges or Immunities Clauses were (largely) ignored—and with them John Bingham’s vision of federally-protected fundamental freedoms.<sup>255</sup> At the same time, these accounts dwelled on Sections Two through Four as “harsh,”<sup>256</sup> “obnoxious”<sup>257</sup> measures designed to punish the South. As such, early accounts of the Fourteenth Amendment left students with little sense of the constitutional revolution that our Reconstruction Founders were attempting—as well as how radical a departure this Amendment was from our Founding Fathers’ original vision.

Needless to say, Congressional Reconstruction emerged in this early era as an unprincipled, harsh program, driven largely by sectional anger and power politics. Congressional Reconstruction has been largely rehabilitated in today’s accounts.

*b. Congressional Reconstruction in Today’s Textbooks*

Although the Radical Republicans are still described as “angry” in today’s textbooks, contemporary accounts provide a noble explanation for their anger—the Radicals’ genuine commitment to racial equality. In these accounts, the perceived “harshness” of Congressional Reconstruction is not merely a means of punishing the South for its own sake; rather, some of its harsher elements are required to promote black equality. For instance, unlike earlier accounts, where the Radicals sent troops to the South to avenge the Civil War and punish secession, today’s textbooks note that the Radical Republicans designed their Reconstruction program to promote “sweeping political change in the South . . . .”<sup>258</sup> Union troops were sent into the

<sup>252</sup> WIRTH, DEVELOPMENT, *supra* note 100, at 410.

<sup>253</sup> BARKER & COMMAGER, *supra* note 99, at 426.

<sup>254</sup> WIRTH, DEVELOPMENT, *supra* note 100, at 411.

<sup>255</sup> *Id.*; see also BARKER & COMMAGER, *supra* note 99, at 426. *But see* CANFIELD & WILDER, *supra* note 101, at 325 (“The amendment . . . proceeded to safeguard the civil and political rights of citizens.”); MUZZEY, HISTORY 2d, *supra* note 105, at 326 (noting that the Fourteenth Amendment “forbade any state to deprive them of their privileges as citizens”).

<sup>256</sup> MUZZEY, HISTORY, *supra* note 107, at 432.

<sup>257</sup> WIRTH, DEVELOPMENT, *supra* note 100, at 411.

<sup>258</sup> GARY B. NASH, AMERICAN ODYSSEY: THE 20TH CENTURY AND BEYOND 186 (2004).

South for a good reason—not merely to irrationally punish the South—but also because the Radicals “believed [that sweeping political change] would occur only with the strong presence of Union troops.”<sup>259</sup> In short, Congressional Reconstruction emerges in today’s accounts as a (mostly) reasonable and noble plan.

Even so, many of today’s textbooks couple Congressional Reconstruction’s commitment to racial equality with an equal desire to punish the rebels. In fact, most textbooks lead their description of Congressional Reconstruction with the goal of vengeance. For instance, one of today’s textbooks notes that Congressional Reconstruction was “designed to punish the former Confederate states, to increase Republican power in the South, and to create conditions that would promote economic development and racial equality in the South.”<sup>260</sup> Another adds that, “Congressional Reconstruction would combine revenge, idealism, and political opportunism.”<sup>261</sup> In this sense, Radical Republican anger, which was so prominent in the Dunning School narrative, does not disappear in today’s accounts of Reconstruction—nor, might I add, should it. For instance, Stevens and Sumner were undoubtedly “angry” at the South for slavery, secession, and post-Civil War repression. Even so, it is important for Republican anger not to overshadow the Party’s commitment to nobler goals.

There is also a major shift in how today’s textbooks treat early Northern support for Congressional Reconstruction. While our early textbooks credit Republican deception for early Northern support, today’s textbooks take Northerners’ concerns about Southern white repression seriously. With the racist assumptions of the earlier accounts entirely removed from today’s textbooks, the Black Codes become a canonical act of evil by white Southerners—an attempt to “severely restrict[] the rights of newly freed African Americans”<sup>262</sup> and “establish[] virtual slavery.”<sup>263</sup> For many Northerners, these laws indicated “that the South had not given up the idea of keeping African Americans in bondage.”<sup>264</sup> In addition to the Black Codes, in today’s accounts, the Northerners are rightly disappointed when the Johnson governments “sent to Washington nine Confederate generals, two Confederate cabinet members, and Alexander Stephens, the vice president of the Confederacy.”<sup>265</sup> In these accounts, the election of former Confederate leaders is not an indication of the South’s genuine desire to send their best leaders to Congress—rather it is an act

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<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> BOORSTIN & KELLEY, *supra* note 103, at 369.

<sup>262</sup> NASH, *supra* note 258, at 185.

<sup>263</sup> CAYTON, *supra* note 118, at 430. Another textbook similarly notes that the Black Codes “all aimed to prevent African Americans from achieving social, political, and economic equality with southern whites.” BOYER, *supra* note 108, at 405. Another textbook adds, “Because the Black Codes helped retain a familiar way of life, local sheriffs and Civil War veterans supported and enforced these laws. . . . invad[ing] African Americans’ homes and seiz[ing] guns and other property.” AYERS, *supra* note 118, at 412.

<sup>264</sup> DANZER, *supra* note 108, at 379.

<sup>265</sup> AYERS, *supra* note 118, at 411.



of Southern defiance. In short, Northern support for Congressional Reconstruction emerges in today's accounts as both reasonable and justified.

In addition, today's accounts are more favorable to various features of Congressional Reconstruction, including the Freedman's Bureau, the Civil Rights Act of 1866, and the Fourteenth Amendment. Instead of framing the second Freedman's Bureau Bill and the Civil Rights Act of 1866 as purely "radical" measures, today's textbooks emphasize that these policies received broad support, as "moderate Republicans joined with Radicals to override the president's vetoes."<sup>266</sup> Instead of focusing on Southern resentment for the alleged corruption of the Freedmen's Bureau, today's textbooks call it "the first major federal relief agency in United States history" offering "clothing, medical supplies, and millions of meals to both black and white war refugees."<sup>267</sup> Instead of downplaying the historic importance of the Civil Rights Act of 1866, today's textbooks note that it is was "the first civil rights law in the nation's history . . . designed . . . to overturn discriminatory laws and the Supreme Court's 1857 *Dred Scott* ruling . . ."<sup>268</sup>

Finally, and most importantly, Section One takes center-stage in today's accounts of the Fourteenth Amendment, as the Amendment is described as "a turning point" whose "effects have echoed throughout American history."<sup>269</sup> Today's textbooks note that the Fourteenth Amendment "made 'all persons born or naturalized in the United States' citizens of the country;"<sup>270</sup> declared "[a]ll were entitled to equal protection of the law, and no state could deprive any person of life, liberty, or property without due process of law;"<sup>271</sup> and, "forbade any state from depriving citizens of their rights and privileges."<sup>272</sup> Indeed, in these accounts, we can see the outlines of Bingham's vision (though he is never mentioned by name), as today's textbooks conclude that the Fourteenth Amendment "granted the nation's citizens rights—enjoyed equally by all—that could be enforced by the federal government."<sup>273</sup> As a result, today's textbooks provide a fairly robust account of our Reconstruction Founders' vision of national citizenship.

Furthermore, some of today's textbooks even note the Supreme Court's complicity in undermining our Reconstruction Founders' vision.<sup>274</sup> This is a major shift from our early textbooks, which used the Supreme Court's decisions in

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<sup>266</sup> DANZER, *supra* note 108, at 379.

<sup>267</sup> CAYTON, *supra* note 118, at 429.

<sup>268</sup> BOYER, *supra* note 108, at 410.

<sup>269</sup> CAYTON, *supra* note 118, at 431.

<sup>270</sup> DANZER, *supra* note 108, at 379.

<sup>271</sup> *Id.* at 379-80.

<sup>272</sup> BOORSTIN & KELLEY, *supra* note 103, at 368.

<sup>273</sup> BOYER, *supra* note 108, at 410.

<sup>274</sup> For a concise account of the Court's role in Reconstruction, see Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1 (2002).

*Cruikshank* and *The Slaughterhouse Cases* to “raise[] doubt[s]”<sup>275</sup> about the constitutionality of Reconstruction. Today’s textbooks largely set the record straight, lamenting the Supreme Court’s “role in bringing about the end of Reconstruction.”<sup>276</sup> In these accounts, “[a]lthough Congress . . . passed important laws to protect the political and civil rights of African Americans, the Supreme Court began to take away those same protections” in a series of decisions “that undermined both the Fourteenth and Fifteenth Amendments.”<sup>277</sup> After these rulings, “the Supreme Court[] . . . had narrowed the scope of these amendments so much that the federal government no longer had much power to protect the rights of African Americans.”<sup>278</sup> Although the Court is only mentioned in two-thirds of the modern accounts analyzed for this Article, these accounts further emphasize the external forces working against the noble ambitions of our Reconstruction Founders.<sup>279</sup>

In spite of the positive shift mentioned above, certain textbooks still contain traces of the Dunning School account—particularly in the form of passages stressing the “vindictive”<sup>280</sup> motives of the Radical Republicans.<sup>281</sup> For instance, one textbook notes that Union soldiers were sent to the South so “nobody would be allowed to forget” that they were a “conquered province.”<sup>282</sup> Another textbook questions whether “the presence of federal troops was necessary to bring about political and social changes in the South,” noting the “more astute” (and contrary) view of General Sherman that “[n]o matter what change we may desire in the feelings and thoughts of people South, we cannot accomplish it by force.”<sup>283</sup> In one of the most pro-Southern, backward-looking passages in any of today’s accounts, one textbook adds:

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<sup>275</sup> BARKER & COMMAGER, *supra* note 99, at 429.

<sup>276</sup> CAYTON, *supra* note 118, at 444.

<sup>277</sup> DANZER, *supra* note 108, at 398. These decisions included *The Slaughterhouse Cases* (holding that the Fourteenth Amendment did not protect “most of Americans’ basic civil rights”), *United States v. Cruikshank* (concluding that the “Fourteenth Amendment did not give the federal government the right to punish individual whites who oppressed blacks”), and *United States v. Reese* (proclaiming that the “Fifteenth Amendment did not ‘confer the right of suffrage on anyone’”). *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> See also AYERS, *supra* note 118, at 425; CAYTON, *supra* note 118, at 444; NASH, *supra* note 258, at 191.

<sup>280</sup> BOORSTIN & KELLEY, *supra* note 103, at 369.

<sup>281</sup> Importantly, some textbooks continue to stress the political motivations for black suffrage above all else. For instance, one textbook notes that Grant’s close election in 1868 “made the Republicans more eager than ever to control the Southern governments and hold the black vote. With these political ambitions in mind they proposed the Fifteenth Amendment to the Constitution.” *Id.* at 372.

<sup>282</sup> *Id.* at 369.

<sup>283</sup> NASH, *supra* note 258, at 185.

Worst of all was the Radical refusal to forgive or forget. They denied leading citizens of the Old South the right to vote or to hold any office in state or local government. Hungry for power, the Radicals wanted to rule the South through their own friends. . . . They said that they loved liberty, but really they were afraid of it. They were afraid to give political liberty to their old enemies.<sup>284</sup>

Concededly, this passage is found in the most pro-Southern of today's textbooks, but it suggests the enduring influence of the Dunning School.

In spite of these scattered passages that hearken back to the Dunning School narrative, today's textbooks primarily focus on the key constitutional advancements made during Congressional Reconstruction—achievements that “increased the rights and freedoms of African-Americans.”<sup>285</sup> Although our Reconstruction Founders do not receive treatment that matches the Founding Fathers, their program of Congressional Reconstruction is treated much more favorably today than it was half a century ago.

#### 4. The Johnson Impeachment—No Longer Tragic (But Still a Regrettable Affair)

Both sets of textbooks are critical of the Johnson impeachment. In the early accounts, the impeachment of Johnson was a tragic episode in Reconstruction—the villainous Republicans, led by Thaddeus Stevens, looking for a “pretext”<sup>286</sup> to remove a principled (if annoyingly stubborn) President. In the hands of our early textbook writers, Johnson's impeachment became the pinnacle of Radical Republican overreach and the “climax” of the “feud between President Johnson and the radical Republicans . . . .”<sup>287</sup> In this account, the Republicans' “handling of the case was marked by political hostility rather than open-minded justice,” as they “were determined to get rid of Johnson and make room for one of their own group in the Presidency.”<sup>288</sup> Johnson was ultimately acquitted, as “seven Republican Senators were honorable enough to place justice before partisan hatred,”<sup>289</sup> in spite of “desperate efforts on the part of the President's enemies to secure [a conviction] by bribery and intimidation . . . .”<sup>290</sup> In the end, “the country was saved from the disgrace of using a clause of the Constitution as a weapon of personal and political vengeance against the highest officer of the land.”<sup>291</sup> Regardless, our early textbooks concluded that Johnson's impeachment was “one of the most farcical and deplorable episodes in American history.”<sup>292</sup>

<sup>284</sup> BOORSTIN & KELLEY, *supra* note 103, at 369.

<sup>285</sup> NASH, *supra* note 258, at 186.

<sup>286</sup> WIRTH, DEVELOPMENT, *supra* note 100, at 412.

<sup>287</sup> CANFIELD & WILDER, *supra* note 101, at 326.

<sup>288</sup> *Id.* at 327.

<sup>289</sup> MUZZEY, HISTORY, *supra* note 107, at 434.

<sup>290</sup> WIRTH, DEVELOPMENT, *supra* note 100, at 413.

<sup>291</sup> MUZZEY, HISTORY, *supra* note 107, at 434.

<sup>292</sup> WIRTH, DEVELOPMENT, *supra* note 100, at 412.

Today's textbooks still criticize the Radical Republicans for the Johnson impeachment. Indeed, some of today's accounts are indistinguishable from the milder narratives of the 1940s and 1950s. For instance, one textbook notes that "the Radicals were out to 'get' Johnson," since "[t]hey could not bear the idea of a President who was not in their pocket."<sup>293</sup> Most, however, are critical without becoming hostile. These accounts begin by stressing that "[t]he case against Johnson was weak from the start."<sup>294</sup> At the same time, in today's textbooks, the episode does not serve as the paradigm case of Radical thuggery. This reflects a shift among some academic historians, beginning in the late twentieth century.<sup>295</sup> In fact, one textbook even takes seriously the Radicals' claims, noting that "[r]adical leaders felt President Johnson was not carrying out his constitutional obligation to enforce the Reconstruction Act."<sup>296</sup> In the end, most of today's accounts use the episode as a cautionary tale about Congressional overreaching and a lesson on the proper scope of the impeachment power, noting that "Johnson . . . escaped by the closest of margins" and that "[t]he crisis set the precedent that only the most serious crimes, and not merely a partisan dispute with Congress, could remove a President from office."<sup>297</sup>

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<sup>293</sup> BOORSTIN & KELLEY, *supra* note 103, at 370. One textbook even connected its criticism of the Radicals to its reverence for the Founding Fathers—noting that "[t]he framers showed their special wisdom when for such a drastic act [as impeachment] they required the support of *two-thirds* of the members present." *Id.* at 371. This textbook concluded that Johnson's "only 'crime' had been that he believed it his duty to obey the Constitution as he saw it." *Id.* Furthermore, "[t]he strength of the Constitution and the American system was upheld when even the President's bitter enemies accepted the result." *Id.*

<sup>294</sup> BOYER, *supra* note 108, at 412.

<sup>295</sup> For a "revisionist" view of the Johnson impeachment, which argues that it was a moderate-to-conservative project, see BENEDICT, PRESERVING, *supra* note 54, at 32-43. "[T]he impeachment of Andrew Johnson was no hasty, passionate decision by vindictive radicals. . . . [I]t was the reluctant decision of men who felt that they had been forced to take a stand to defend the constitutional prerogatives of Congress against presidential aggression." *Id.* at 43. Benedict argues that few Republicans "displayed that eagerness for revenge upon the president that subsequent generations of Americans ascribed to them." *Id.* at 36. Instead, it was an overdue reaction to the provocations of a hostile President. Importantly, Benedict defends the merits of the Republican decision, appealing to traditional conceptions of impeachments: "Radicals complained of precisely the type of offenses [traditional] legal authorities believed were impeachable," such as Johnson's use of his "discretionary power in a manner that undermined congressional legislation." *Id.* at 37. To support this conclusion, Benedict cites a number of Johnson's offenses, including his order to return the land of pardoned ex-Confederates, his efforts to undermine the Freedman's Bureau, and his decision to ignore the Test Oath. *Id.* at 37-38. Beyond these concrete actions, Benedict also notes the tone that Johnson set in the South: "By his encouragement of former Confederates, his blatant antipathy toward racial equality before the law, his inflammatory speeches . . . Johnson succeeded in creating a spirit of determined resistance in the South to concessions on great war issues of importance to northerners." *Id.* at 38. As a result, Benedict concludes, "Conservative Republicans, feeling they were left no choice, bitterly joined the radicals in presenting articles of impeachment to the Senate." *Id.* at 43.

<sup>296</sup> DANZER, *supra* note 108, at 381.

<sup>297</sup> CAYTON, *supra* note 118, at 433.

Overall, today's textbooks appear satisfied with the result of this episode—a chastened group of Radicals and a weakened President Johnson.<sup>298</sup>

5. Republican Rule in the South: A Den of Corruption and Incompetence; or, A Mixed Bag?

One of the great transformations in our textbooks occurred in the consensus accounts of the Republican governments in the South. I consider each set of textbooks in turn.

*a. Republican Rule in the South: Yesterday's Textbooks*

Our early textbooks provided highly critical accounts of Republican rule in the South. In particular, they offered stinging critiques of the carpetbaggers, scalawags, and newly-enfranchised freedmen. For instance, each early textbook presented the myth of the carpetbagger as fact, noting that “they were said to have brought all of their possessions with them in carpetbags,” even as “many of them returned a few years later loaded with the wealth they had extorted from their former enemies.”<sup>299</sup> Furthermore, the scalawags were said to have partnered with the carpetbaggers “in the hope of sharing in the booty,” and as such, were “[e]ven more despised by the white people in the South . . . .”<sup>300</sup>

These early textbooks stressed the carpetbaggers' pernicious influence on the newly-empowered freedmen. These “rascally” Northerners “poison[ed] [the freedmen's] minds against the only people who could help them to get a start in their new life of freedom”—Southern whites.<sup>301</sup> From there, the carpetbaggers, scalawags, and freedmen united to form among the most corrupt, extravagant, ineffective governments in Southern history. These Southern governments were “sorry affairs . . . supported by Northern bayonets.”<sup>302</sup> Their “extravagance and corruption . . . stagger[ed] belief,”<sup>303</sup> with key criticisms centering on their rampant spending and high taxes,<sup>304</sup> which were unsurprising, since “the [financial]

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<sup>298</sup> For extensive treatment of how the Johnson impeachment helped “construct” the proper scope of the impeachment power and shape the relationship between Congress and the Presidency, see KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 113-57 (2001).

<sup>299</sup> WIRTH, *DEVELOPMENT*, *supra* note 100, at 413.

<sup>300</sup> *Id.*

<sup>301</sup> MUZZEY, *HISTORY*, *supra* note 107, at 430. One textbook even connected the carpetbaggers to certain “violent methods,” including instances where “Democratic white leaders were robbed and even murdered, or their houses and barns were burned.” WIRTH, *DEVELOPMENT*, *supra* note 100, at 415.

<sup>302</sup> MUZZEY, *HISTORY*, *supra* note 107, at 433.

<sup>303</sup> BARKER & COMMAGER, *supra* note 99, at 433.

<sup>304</sup> For instance, one early textbook noted, “it was in the management of the financial affairs of the state that they made the most pitiful showing.” WIRTH, *DEVELOPMENT*, *supra* note 100, at 414.

responsibility [did not] rest heavily upon their shoulders . . . .”<sup>305</sup> Rather than focusing on the public investments made by these governments (in infrastructure and public education), these early accounts focused on examples of ridiculous personal expenditures. South Carolina (the state with the highest percentage of African-American representatives) was often presented as the paradigm case of self-centered government spending.<sup>306</sup> One textbook’s account was representative of these early narratives: “Extravagant sums were appropriated from the public funds for fine desks, upon which the negroes put their feet; French mirrors; china spittoons; and the most lavish furnishings for the Capitol and the quarters of some of the members.”<sup>307</sup> Furthermore, “[t]he same story was repeated, with variations, in the other reconstructed states.”<sup>308</sup>

In the early accounts, these governments could force their will upon the Southern whites only because “regiments of Northern military forces [were] on hand to enforce the acts of these governments.”<sup>309</sup> As a result, “the white people of the South were powerless to stop such extravagance and corruption.”<sup>310</sup> These accounts expressed sympathy for the Southern whites, noting that “it is not difficult to understand the resentment of southern people, or their determination to regain control of their states.”<sup>311</sup> The South, “[d]eprived of any legal means of defense against such iniquitous government . . . naturally resorted to intimidation.”<sup>312</sup> It was in this context that the Ku Klux Klan was often introduced.<sup>313</sup> From there, our early

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<sup>305</sup> *Id.*; see also MUZZEY, HISTORY, *supra* note 107, at 433 (“Two thirds of the members paid no taxes at all, and the rest only trifling amounts; yet they spent the people’s money lavishly, voting themselves large salaries, installing expensive furnishing in the capitol, and wasting millions on projects for railroads, canals, and public works, from which they reaped large sums in graft.”).

<sup>306</sup> See, e.g., BARKER & COMMAGER, *supra* note 99, at 433 (“In South Carolina the capitol was refurnished at enormous expense.”).

<sup>307</sup> WIRTH, DEVELOPMENT, *supra* note 100, at 414.

<sup>308</sup> MUZZEY, HISTORY, *supra* note 107, at 433.

<sup>309</sup> WIRTH, DEVELOPMENT, *supra* note 100, at 414.

<sup>310</sup> *Id.*

<sup>311</sup> BARKER & COMMAGER, *supra* note 99, at 433-34.

<sup>312</sup> MUZZEY, HISTORY, *supra* note 107, at 433.

<sup>313</sup> Early accounts of the Klan were fairly sympathetic. In the consensus narrative, the Klan begins as a “social club,” “derived from the Greek word ‘kuklos,’ meaning a band, or circle.” WIRTH, DEVELOPMENT, *supra* note 100, at 415. It was led by “an outstanding military hero,” General Nathan Bedford Forrest. WIRTH, HISTORY, *supra* note 106, at 261. Each textbook noted that the Klan garb was intended to take “advantage of the Negroes’ superstition and fear to force them back into a position of social and political obscurity.” MUZZEY, HISTORY, *supra* note 107, at 433-34. These textbooks added that “the original purpose of the order was merely to discipline the criminally inclined negroes and ‘carpetbaggers,’” though even they conceded that “a baser element had crept into the Klan, and . . . had been guilty of conduct which was a discredit to the organization.” WIRTH, DEVELOPMENT, *supra* note 100, at 415. Because of these developments, Klan leaders ordered it disbanded; however, a few groups “refused to disband and continued their programs of violence.” *Id.* Even then,

textbooks tended to celebrate the collapse of Republican rule in the South by emphasizing economic gains made under the “Redeemer” governments and downplaying acts of violence against African-Americans.<sup>314</sup> In many of our early textbooks, Southern resentment arose, not from racism, but from frustration over corrupt Republican governments and anger at the continuing Union occupation.<sup>315</sup> Finally, “‘alien’ rule [eventually] collapsed” in almost all of the Southern states,<sup>316</sup> as the Southern governments “declared . . . the issues of slavery and secession . . . ‘settled for all time.’”<sup>317</sup> Furthermore, once Rutherford B. Hayes (“a man of unquestioned honesty”)<sup>318</sup> pulled all federal troops from the South, “the remaining ‘carpetbagger’ governments immediately collapsed.”<sup>319</sup> This “marked the end of the reconstruction era,” as “the government came now into the hands of men who saw the necessity of laying aside the old issues of ‘rebellion’ and grappling with the problems of politics and economics raised by the marvelous expansion of our country’s industries since the war.”<sup>320</sup>

In their criticisms of Republican rule in the South, our early accounts entirely ignored the achievements made under these governments and downplayed the challenges these governments faced in the form of Southern violence. Today’s textbooks have largely corrected these distortions.

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“[e]xaggerated reports of these deeds of violence were spread through the North and used by the radical politicians to justify the tightening of military rule in the South.” MUZZEY, HISTORY, *supra* note 107, at 434. One textbook even noted that the Republican Party “made special connections with press correspondents who went South to report race disturbances and race friction, and thus keep the North alive to all the brutalities which they claimed were being practiced against Negroes south of the Potomac River.” BARKER & COMMAGER, *supra* note 99, at 427.

According to these accounts, the truth was that “[t]he great mass of the southern people deplored such violence, but the radicals made the most of it in the North to win support for their policies.” *Id.* This resulted in the Ku Klux Klan Acts, which “were rigidly enforced by the Federal troops,” even as they “were later declared unconstitutional,” WIRTH, DEVELOPMENT, *supra* note 100, at 416, and “encourage[d] further strife and bloodshed in the South.” MUZZEY, HISTORY, *supra* note 107, at 435.

<sup>314</sup> Rather than dwelling on white violence in the South or emphasizing efforts to disenfranchise African-Americans, these accounts frequently noted that “more and more of the negroes absented themselves from the polls,” only mentioning in passing the fact that “in most cases, probably, because of intimidation by the whites.” WIRTH, DEVELOPMENT, *supra* note 100, at 416.

<sup>315</sup> For instance, Republican rule collapsed as voters, “[d]isgusted by the corruption of the Republican administration, . . . came to the support of the Democratic nominees in the Congressional election[s].” *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> MUZZEY, HISTORY, *supra* note 107, at 436.

<sup>318</sup> *Id.* at 447.

<sup>319</sup> WIRTH, DEVELOPMENT, *supra* note 100, at 416.

<sup>320</sup> MUZZEY, HISTORY, *supra* note 107, at 449.

*b. Republican Rule in the South: Today's Textbooks*

Today's textbooks stress many of the achievements of Republican rule in the South, while also lamenting the collapse of the Republican governments. These governments were far from perfect, but they were hardly the dens of corruption that emerged in our early textbooks. Rather, the coalition of carpetbaggers, scalawags, and freedmen was filled with idealists and opportunists, self-promoters and humanitarians, adventurers and egalitarians. In today's accounts, the carpetbaggers and scalawags are no longer villainous opportunists, polluting the minds of the freedmen. Although some carpetbaggers "were the dishonest businesspeople whom the Southerners scorned," many were also "Freedmen's Bureau agents, teachers, and ministers who felt a moral duty to help former slaves."<sup>321</sup> Although some scalawags surely hoped "to enrich themselves," many "honestly thought that a Republican government offered the best chances for the South to rebuild and industrialize."<sup>322</sup> Most "were small farmers who wanted to improve their economic and political position and to prevent the former wealthy planters from regaining power."<sup>323</sup>

Turning to the Southern governments themselves, today's textbooks present a similarly balanced account, stressing that some of the Republican governments were, indeed, corrupt, but correcting many of the distortions offered by our early textbooks. Most importantly, today's textbooks emphasize the political advances made by African-Americans in the South, as many blacks voted and held office for the first time. Indeed, the first wave of Southern elections during Reconstruction, "swept Republicans, including hundreds of freedmen, into public office in the South."<sup>324</sup> Altogether, "[m]ore than 600 African Americans were elected to state legislatures," and some African-Americans were even elected to Congress.<sup>325</sup>

In addition to these political advances, today's textbooks stress the many public investments that the Republican governments made, as they attempted to rebuild the South. The Republican governments "built roads, bridges, and railroads and established orphanages and institutions for the care of the mentally ill and disabled. They also created the first public school systems that most Southern states had ever had."<sup>326</sup> Even one of the more critical textbooks notes that these governments "provided a wide range of social welfare programs new to the Southern states."<sup>327</sup> These accounts concede that the Republican governments' efforts led to higher taxes, but unlike the early accounts, today's textbooks link these higher taxes primarily to worthwhile projects. Furthermore, as was noted above, today's textbooks concede that there was "some truth to the charge" of rampant corruption, but quickly add that

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<sup>321</sup> DANZER, *supra* note 108, at 385.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> CAYTON, *supra* note 118, at 434.

<sup>325</sup> *Id.* at 434-35.

<sup>326</sup> DANZER, *supra* note 108, at 384.

<sup>327</sup> BOORSTIN & KELLEY, *supra* note 103, at 372.



“in those days corruption was not peculiar to the South.”<sup>328</sup> Only one textbook suggests the old Dunning School consensus, noting that “many of the Northerners involved in local Southern administrations were inexperienced and even corrupt.”<sup>329</sup> Even this account is a great distance from the damning passages found in earlier textbooks.

Finally, today’s textbooks focus on the white violence that swept through the South and led to the collapse of Republican rule.<sup>330</sup> For instance, one textbook notes, “[b]etween 1868 and 1871, the Klan and other secret groups killed thousands of men, women, and children, and burned schools, churches, and property.”<sup>331</sup> Another adds, “[i]n 1871 alone, in a single county in Florida, 163 blacks were murdered, and around New Orleans the murders came to over 300.”<sup>332</sup> Each textbook cites similar statistics, stressing the extent of white violence. Unlike earlier accounts, today’s textbooks never offer even a hint of support for these acts of repression.<sup>333</sup>

In addition, while earlier accounts stressed the repressive nature of federal efforts to protect the freedmen (like the Enforcement Acts), today’s accounts note that “President Grant was not aggressive in his use of the power given to him by the Enforcement Acts . . . .”<sup>334</sup> In today’s accounts, the “virtual disappearance” of the Klan in the South was not the result of federal efforts, but of the “Klan’s success,” since “by 1880, terrorist groups had managed to restore white supremacy in the South.”<sup>335</sup> As such, “[t]he Klan no longer needed such organized activity to limit the political and civil rights of most African Americans.”<sup>336</sup> From there, today’s accounts correct the excesses of our early textbooks’ descriptions of the “Redeemer” governments, stressing that the new Southern governments “passed laws that

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<sup>328</sup> *Id.* at 373.

<sup>329</sup> NASH, *supra* note 258, at 190.

<sup>330</sup> For a complicated view of Reconstruction in the South, see C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 33 (2d rev. ed. 1966) (“[During Reconstruction,] a great deal of variety and inconsistency prevailed in race relations from state to state and within a state. It was a time of experiment, testing, and uncertainty—quite different from the time of repression and rigid uniformity that was to come toward the end of the century. Alternatives were still open and real choices had to be made.”); *see also id.* at 31 (“The Redeemers who overthrew Reconstruction and established ‘Home Rule’ in the Southern states conducted their campaign in the name of white supremacy. The new rulers did not, however, inaugurate any revolution in the customs and laws governing race relations.”).

<sup>331</sup> DANZER, *supra* note 108, at 394.

<sup>332</sup> BOORSTIN & KELLEY, *supra* note 103, at 374.

<sup>333</sup> For instance, one textbook notes, “Some Southern governments refused to enforce the Fourteenth and Fifteenth Amendments, and some white Southerners used violence to prevent African Americans from voting.” DANZER, *supra* note 108, at 382. Therefore, “[i]n response, Congress passed the Enforcement Act of 1870, giving the federal government more power to punish those who tried to prevent African Americans from exercising their rights.” *Id.*

<sup>334</sup> *Id.* at 395.

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

restricted the rights of African Americans, wiped out social programs, slashed taxes, and dismantled public schools.”<sup>337</sup> Although these accounts note that the “Redeemers” were driven (at least in part) by “what they viewed as a decade of mismanagement by Northerners, Republicans, and African Americans,”<sup>338</sup> today’s textbooks mostly emphasize the negative aspects of “home rule.”<sup>339</sup>

#### 6. The Legacy of Reconstruction: The “Tragic Era”; or, Unrealized Promise?

In the end, there has been a colossal shift in the overall assessment of Reconstruction’s legacy—from an account largely consistent with the “tragic era”<sup>340</sup> narrative of the Dunning School in our early textbooks to a balanced account today. Our early textbooks viewed Reconstruction as a “distressing drama”<sup>341</sup> (at best) and a “crime”<sup>342</sup> (at worst), with one textbook dramatically concluding that “[t]he ten years of reconstruction were worse for the South in some respects than the war had been.”<sup>343</sup> These early accounts typically framed Reconstruction as a lost opportunity to quickly cast aside the hard feelings that followed the Civil War. As one representative textbook noted, “The South emerged from the war without any special resentment toward its conquerors, and was fully resigned to the resumption of its former place in the Union; but the excesses of reconstruction aroused a sectional bitterness which has not yet entirely disappeared.”<sup>344</sup>

Furthermore, most early accounts stressed the degree to which Reconstruction delayed Southern recovery from the Civil War, holding them back “for at least a generation.”<sup>345</sup> By “Southern recovery,” these accounts meant Southern *white* recovery. One textbook lamented the “[p]light of the South” after Reconstruction, noting that “the time and energy which the Southerners should have had to devote to their economic recovery was absorbed in the struggle to wrest political control from the carpetbaggers and keep the Negroes in their social place.”<sup>346</sup> Another added that

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<sup>337</sup> *Id.* at 399.

<sup>338</sup> *Id.*

<sup>339</sup> There is little discussion of the various factors that led to the collapse of Reconstruction and the restoration of “home rule.” For a helpful discussion of these factors, see WOODWARD, *supra* note 330, at 69 (“The South’s adoption of extreme racism was due not so much to a conversion as it was to a relaxation of the opposition. . . . What happened toward the end of the century was an almost simultaneous—and sometimes not unrelated—decline in the effectiveness of restraint that had been exercised by all three forces: Northern liberalism, Southern conservatism, and Southern radicalism.”).

<sup>340</sup> See, e.g., CANFIELD & WILDER, *supra* note 101, at 321 (calling Reconstruction “a tragic time in American history”).

<sup>341</sup> MUZZEY, HISTORY, *supra* note 107, at 436.

<sup>342</sup> CANFIELD & WILDER, *supra* note 101, at 330.

<sup>343</sup> BARKER & COMMAGER, *supra* note 99, at 449.

<sup>344</sup> WIRTH, DEVELOPMENT, *supra* note 100, at 416.

<sup>345</sup> CANFIELD & WILDER, *supra* note 101, at 330.

<sup>346</sup> MUZZEY, HISTORY, *supra* note 107, at 436-37.

“[a]fter the native whites regained control of their states, the South resumed progress and became again a productive part of the nation.”<sup>347</sup> Furthermore, “[t]he Negroes had begun to learn that emancipation did not free them from the necessity of earning bread by the sweat of the brow.”<sup>348</sup>

Even the Reconstruction Amendments were viewed critically in our early textbooks, with one account explaining that the Amendments “unloosed the fetters from the slaves, but they did not solve the racial problem, which now became more serious.”<sup>349</sup> In fact, Reconstruction was even blamed for lingering hostility between the races in future decades, as the political advances (only made possible by Northern occupation) “delayed settlement of the economic and social problems existing between the two races.”<sup>350</sup> In these early accounts, the lesson of Reconstruction was “that the difficult question of racial adjustments would have to be worked out by the peoples who were most directly concerned,” as they tried to solve “the riddle of racial compatibility.”<sup>351</sup> In short, these early accounts concluded that Reconstruction was a complete failure.

Today’s accounts provide a more balanced assessment of Reconstruction.<sup>352</sup> Even so, every end-of-chapter, “final assessment” section leads with criticisms of the Reconstruction era—with the space devoted to criticism usually outstripping the space devoted to our Reconstruction Founders’ achievements. Most accounts conclude that, in an immediate sense, Reconstruction was a failure. These accounts lament that, “[d]espite the efforts of African Americans and many Radical Republicans, Reconstruction ended without much real progress in the battle against discrimination,”<sup>353</sup> as “the South remained as it had been before the Civil War.”<sup>354</sup> In short, “[i]n many ways, Reconstruction did not accomplish its goals.”<sup>355</sup>

Furthermore, these accounts tend to lead with the specific failures of the Radical Republicans themselves. One textbook provides a particularly sharp critique:

First, [the Radical Republicans] assumed that extending certain civil rights to freed persons would enable them to protect themselves through participation in government, especially lawmaking. However, Congress did not adequately protect those rights, and the Supreme Court undermined them. Second, the Radicals balked at distributing land to

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<sup>347</sup> BARKER & COMMAGER, *supra* note 99, at 437.

<sup>348</sup> *Id.* at 437-38.

<sup>349</sup> WIRTH, DEVELOPMENT, *supra* note 100, at 417.

<sup>350</sup> CANFIELD & WILDER, *supra* note 101, at 330.

<sup>351</sup> WIRTH, DEVELOPMENT, *supra* note 100, at 417.

<sup>352</sup> This tracks with the conclusions of academic historians of the late twentieth century. *See, e.g.*, BENEDICT, PRESERVING, *supra* note 54, at 96 (“The social and economic implications of racial equality in basic rights were so radical and the Republicans’ black constituency so poverty-stricken and inexperienced, that success now seems to have been impossible.”).

<sup>353</sup> DANZER, *supra* note 108, at 400.

<sup>354</sup> AYERS, *supra* note 118, at 427.

<sup>355</sup> BOYER, *supra* note 108, at 419.

former slaves. . . . Finally, the Radicals did not fully realize the extent to which deep-seated racism in society would weaken the changes that Congress had tried to make.<sup>356</sup>

Other textbooks offered similar criticisms.<sup>357</sup> Of course, these same textbooks ignored the failures of our Founding Fathers' Constitution, including the complicity of the Three-Fifths Clause in the rise of the slave power.

Although more space is usually devoted to criticism, today's textbooks usually conclude their accounts by stressing the constitutional, political, and social foundations laid by African-Americans (especially) and our Reconstruction Founders during this controversial era. For instance, the Republican governments made some advances at the state and local level in the form of "free public education for whites as well as blacks."<sup>358</sup> More importantly, today's textbooks stress key constitutional achievements, including the abolition of slavery through the Thirteenth Amendment and the "constitutional foundation"<sup>359</sup> for the twentieth-century civil rights movement provided by the Fourteenth and Fifteenth Amendments, as well as the Civil Rights Act of 1866.<sup>360</sup>

In the end, although our Reconstruction Founders are not as revered as our Founding Fathers in today's textbooks, most contemporary accounts of Reconstruction end with an image of that controversial era's promise. In short, as one of today's textbooks concludes, "Reconstruction was not a complete failure."<sup>361</sup>

*C. Reconstruction: "Academic Integrity," Popular Constitutional Culture, and the Political Economy of the High School Textbook Industry*

The accounts of Reconstruction in our leading high school textbooks track the academic consensus among historians, shifting from hostility in the early twentieth century to greater balance today. This is in stark contrast to the Founding narratives analyzed in Part II. Although the "academic integrity" model appears to explain the shifts in our Reconstruction narratives, additional analysis reveals a more complicated account. From the early twentieth century through today, academic historians and popular constitutional culture have shared a common vision of

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<sup>356</sup> DANZER, *supra* note 108, at 400-01.

<sup>357</sup> For instance, one textbook adds, "The failure of land-reform efforts allowed white planters to maintain control over many southern institutions. Southern African Americans saw little economic improvement . . . . They also achieved few lasting civil and political rights." BOYER, *supra* note 108, at 419. Another simply noted, "If the Civil War was fought to settle the issue of states' rights, the experience of Reconstruction showed that it failed to do so." AYERS, *supra* note 118, at 427.

<sup>358</sup> BOORSTIN & KELLEY, *supra* note 103, at 382.

<sup>359</sup> DANZER, *supra* note 108, at 401.

<sup>360</sup> Indeed, "[a]lthough they were rarely enforced for almost a century, the Civil Rights Act of 1866 and the Fourteenth and Fifteenth Amendments provided an important legal framework that enabled later civil rights leaders to win back voting rights for African Americans and to end legal segregation." BOYER, *supra* note 108, at 419.

<sup>361</sup> DANZER, *supra* note 108, at 401.

Reconstruction. Therefore, in the Reconstruction context, our two models have reinforced one another—with the academic consensus consistently lending intellectual support to the preferred myths of popular constitutional culture. In this Section, I outline various controversies over the portrayal of Reconstruction in our high school classrooms from the late nineteenth century through today. This is intended to demonstrate that the trends in popular constitutional culture have tended to mirror the developments among Reconstruction historians.

Not surprisingly, the issue of race, especially as it pertains to the Civil War and Reconstruction, has served as a recurrent source of disagreement in popular constitutional culture—especially in battles over American public education. In the late nineteenth century, “many states and territories banned ‘sectarian’ and ‘partisan’ textbooks by law,” as “[t]he states did not mean to mandate just any form of history; they wanted correct history.”<sup>362</sup> When it came to the Civil War and Reconstruction, “Northern Republicans, pressured by veterans’ organizations, expected children to learn the Civil War according to the version favored by the Grand Army of the Republic,” while “Confederate veterans and Democratic legislatures [in the South] also banned partisan teaching (the northern version).”<sup>363</sup> As a result, “Confederate educators produced their own compilations of *real* history.”<sup>364</sup> This led David Tyack to observe that, although “[t]he South lost the Civil War . . . it was determined not to lose the textbook war.”<sup>365</sup>

Between 1900 and 1910, the North and South coalesced around a “reconciliation narrative”: “Southerners conceded that secession was unconstitutional and slavery was wrong, although its evils had been widely exaggerated by sly Yankee historians; northerners tempered their criticism of slavery but accelerated their attacks on Reconstruction.”<sup>366</sup> These “consensus” textbooks “did not have the white Southerners’ perspective on the Civil War—only on Reconstruction.”<sup>367</sup> This tracked the academic consensus among early twentieth-century historians, such as William Dunning. As was evident in Section III.B, this “reconciliation narrative” dominated the most widely-used American history textbooks of the 1940s and 1950s. Therefore, rather than a simple vindication of the academic integrity model, our early textbooks’ treatment of Reconstruction represented a convergence of our two models, with both “academic integrity” and “civil religion” promoting similar visions of Reconstruction.

The shifts in the accounts of Reconstruction in today’s textbooks follow a similar pattern, as these balanced accounts are likely a product of both the academic consensus among revisionist historians (such as Eric Foner) and the advocacy of the civil rights movement. Although these shifts have improved the overall standing of our Reconstruction Founders, their main goal has been to eliminate racism (explicit

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<sup>362</sup> TYACK, *supra* note 59, at 52.

<sup>363</sup> *Id.*

<sup>364</sup> *Id.* at 49-50 (emphasis added).

<sup>365</sup> *Id.* at 50.

<sup>366</sup> ZIMMERMAN, *supra* note 160, at 33-34.

<sup>367</sup> FITZGERALD, *supra* note 62, at 87.

and implicit) from our high school textbooks. Even with these improvements, there are still some remnants of the Dunning School in today's accounts—perhaps suggesting that popular constitutional culture (particularly in the South) was only willing to go so far to accommodate the demands of the civil rights movement. Furthermore, these snippets of Dunning School history were likely a product of the incentives within the textbook industry itself, given the outsized influence of large Southern states (such as Texas, Florida, and North Carolina) on the textbook adoption process.

In the early twentieth century, the NAACP began arguing that “blacks were either ignored or stereotyped in textbooks,”<sup>368</sup> with the NAACP’s attacks focusing particularly on “flawed analyses of the Civil War and its aftermath.”<sup>369</sup> Through the 1940s and 1950s, “blacks attacked racist slurs and misrepresentations in high school history texts;” however, these attacks were largely unsuccessful.<sup>370</sup> Progress finally came with the 1960s civil rights revolution, which “would alter American textbooks forever,” as “black activists forced the removal of numerous racial slurs. . . . [a]nd blacks managed to insert a wealth of new—and overwhelmingly positive—information about African-American history and culture.”<sup>371</sup> These textbooks “contain[ed] the most dramatic rewriting of history ever to take place in American schoolbooks.”<sup>372</sup>

Although controversial at first, our schools eventually reached a new consensus on race, with bureaucrats, interest groups, and parents on both sides of the aisle settling on a new compromise. Conservatives would permit the introduction of new races into the nation’s story—so long as their inclusion did not undermine that story’s patriotic arc. In short, “these . . . struggles concerned the roster of eligible patriots, not patriotism itself.”<sup>373</sup> As a result, “[b]lack activists and their white allies successfully ‘integrated’ American textbooks, which continued to portray the nation as a beacon of hope and liberty to the world.”<sup>374</sup> These “integrated” textbooks “inserted colorful new characters into American history,” but “blocked a more critical, sophisticated analysis of the nation’s founding narrative.”<sup>375</sup> Although our textbooks “increasingly revered Frederick Douglass,” for instance, “nowhere did history books suggest that the new set of heroes required readers to reevaluate old ones—for instance, that Douglass’s critique of slavery might tarnish the image of Washington or Jefferson.”<sup>376</sup> As Jonathan Zimmerman concluded, “[t]he price that white America exacted for diversity in the textbooks was triumphalism in their

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<sup>368</sup> TYACK, *supra* note 59, at 40.

<sup>369</sup> ZIMMERMAN, *supra* note 160, at 32.

<sup>370</sup> *Id.* at 111.

<sup>371</sup> *Id.*

<sup>372</sup> FITZGERALD, *supra* note 62, at 58.

<sup>373</sup> ZIMMERMAN, *supra* note 160, at 7.

<sup>374</sup> *Id.* at 10.

<sup>375</sup> *Id.* at 31.

<sup>376</sup> *Id.* at 110.

tone<sup>377</sup>—at least in the context of the Founding narrative. At the same time, our textbooks settled on a more sympathetic account of Reconstruction (at least on issues of race), without similarly deifying our Reconstruction Founders.

#### V. CONSTITUTIONAL HEROISM IN OUR HIGH SCHOOL TEXTBOOKS

Our Founding Fathers emerge from both sets of textbooks as constitutional heroes—both collectively and individually. In contrast, individual Reconstruction Founders are either ignored in our textbook accounts (e.g., John Bingham) or emerge as conflicted personalities (at best) or as irrationally angry and vindictive characters (at worst). In today’s textbooks, Thaddeus Stevens takes on added prominence, as our textbooks provide a greater explanation for his motives, but Bingham is still entirely ignored and Sumner is still remembered most for being caned by Preston Brooks. Even Stevens emerges as a more complicated (and less sympathetic) hero than any of our Founding Fathers—including more controversial figures like Hamilton.

##### A. “Portraits” and “Boxes” in Our Textbooks—Yesterday and Today

Many individual Founding Fathers are celebrated in both sets of textbooks.<sup>378</sup> For instance, one early textbook provided a portrait of the Constitutional Convention and instructed the students to “[i]dentify as many of the people shown here as you can.”<sup>379</sup> This textbook followed with individual portraits of “[s]ome of the great men who founded our nation,”<sup>380</sup> including Benjamin Franklin, George Washington, William Paterson, Edmund Randolph, James Wilson, Robert Morris, John Dickinson, James Madison, John Adams, and Alexander Hamilton.<sup>381</sup> The same textbook offered similar portraits of Reconstruction leaders Charles Sumner, Thaddeus Stevens, and Edwin Stanton. In the caption below their portraits, it noted that these men “favored harsh treatment for the South after the war.”<sup>382</sup> It then asked students how “their views differ[ed] radically from those of President Lincoln” and “[f]or what ill-feeling between the two sections of our country were the radicals largely responsible[.]”<sup>383</sup> Although today’s textbooks are more subtle, there is still a disparity in the treatment of these two generations of leaders.

In Sections IV.B and IV.C, I focus on our textbooks’ portrayals of key Founding Fathers (Madison and Hamilton) and Reconstruction Founders (Stevens, Sumner, and Bingham). Before turning to these individual analyses, I first consider which figures our textbooks chose to honor with portraits and “Biography Boxes.” This is

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<sup>377</sup> *Id.* at 118.

<sup>378</sup> Metcalf, *supra* note 75, at 241 (“The legend of the Founding Fathers, who could do no wrong, coming to the rescue of a sick and dying country, still pervades the high-school history textbooks.”).

<sup>379</sup> WIRTH, HISTORY, *supra* note 106, at 107.

<sup>380</sup> *Id.* at 108-09.

<sup>381</sup> Indeed, Adams was included even though he did not sign the Constitution.

<sup>382</sup> WIRTH, HISTORY, *supra* note 106, at 257

<sup>383</sup> *Id.*

intended as a rough way of examining which key historical figures our textbooks have chosen to canonize as genuine constitutional heroes.

Turning first to yesterday's textbooks, our Founding Fathers fared much better than their Reconstruction counterparts in receiving the "portrait treatment." Importantly, our early textbooks were less likely than today's to feature key figures in separate "Biography Boxes." In fact, only one textbook featured such boxes, and only our Founding Fathers merited such an honor—three of them, to be precise (Washington, Hamilton, and Jefferson). Even so, our early textbooks featured separate portraits for key figures. Again, generally, our Founding Fathers outstripped our Reconstruction Founders. George Washington and Thomas Jefferson merited portraits in all six of the early textbooks analyzed for this Article. Alexander Hamilton received a portrait in four of the six textbooks, John Jay in three, and John Adams and James Madison in two. Patrick Henry, Benjamin Franklin, William Paterson, Edmund Randolph, James Wilson, Gouverneur Morris, John Dickinson, and Charles Cotesworth Pinckney each merited one portrait a piece. Key Reconstruction Founders were much less likely to be featured in separate portraits. Thaddeus Stevens led the way, with two portraits, followed by Charles Sumner and Edwin Stanton, each with one.<sup>384</sup> John Bingham was not included in any of our early textbooks.

Generally speaking, today's textbooks include a greater number of individual portraits and are also much more likely to feature "Biography Boxes." Even so, the Founding Fathers still greatly outstrip our Reconstruction Founders. Again, all six textbooks include portraits of George Washington and Thomas Jefferson. Today, every textbook also includes a portrait of James Madison, and five out of six include a portrait of Alexander Hamilton. Interestingly, four textbooks include portraits of Roger Sherman, followed by three with portraits of Patrick Henry and John Jay, two with portraits of John Adams and Benjamin Franklin, and one each of Richard Henry Lee, James Wilson, John Hancock, John Dickinson, Benjamin Rush, and Samuel Adams. Turning to the "Biography Boxes," Washington and Madison are featured in five of the six textbooks, with Jefferson in four, and one each for Roger Sherman and Alexander Hamilton.

Again, the Reconstruction Founders are largely slighted, with only Thaddeus Stevens receiving multiple portraits, with four—the same number as Roger Sherman.<sup>385</sup> Several Reconstruction figures receive one portrait a piece, including Charles Sumner, Hiram Revels, Ulysses S. Grant, Frederick Douglass, and Blanche Bruce. No Reconstruction figure receives multiple "Biography Boxes," with Stevens, Revels, Douglass, Grant, and Bruce each receiving one.<sup>386</sup> Charles Sumner is snubbed. Furthermore, even as James Madison takes on greater prominence in today's accounts, John Bingham is still completely ignored.

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<sup>384</sup> Though he was not considered a "Reconstruction Founder" for the purposes of this Article, Andrew Johnson was also featured in two portraits.

<sup>385</sup> Andrew Johnson received three.

<sup>386</sup> Andrew Johnson received one.



*B. Our Founding Fathers—Madison and Hamilton in Our Textbooks*

Turning first to our textbooks' portrayals of key Founding Fathers, Madison and Hamilton emerge in both sets of textbooks as genuine constitutional heroes. Since the 1940s, these accounts focus on the key achievements and praiseworthy characteristics of each Founder, while largely overlooking possible negative characteristics. Hamilton is remembered as Washington's deputy and one of the key authors of *The Federalist*—not as a controversial crypto-monarchist. Madison is simply presented as the erudite “Father of the Constitution.” Importantly, there are no traces of the Beardian account in our early textbooks' treatment of these figures.

Turning first to Madison, both sets of textbooks present the Virginian as one of the most learned men in our Founding generation. In addition to his important work at the Constitutional Convention, our textbooks explain that “Madison . . . helped draft Virginia's state constitution and served as a member of the Continental Congress.”<sup>387</sup> He is variously referred to as “a profound student of government and history”<sup>388</sup> and the “best-informed Man of any point in debate . . .”<sup>389</sup> Throughout the Constitutional Convention, he “impressed his colleagues with his exact knowledge upon every important subject of debate.”<sup>390</sup> In addition to his intellect, Madison had a “quiet, modest demeanor,” which “disarmed antagonism, even when a member disagreed with him.”<sup>391</sup> These praiseworthy qualities made him “one of the most influential members”<sup>392</sup> of the Constitutional Convention and the early republic.

At the Convention, Madison is credited with crafting the “highly influential”<sup>393</sup> Virginia Plan,<sup>394</sup> which “resulted from extensive research on political systems that he had done before the convention.”<sup>395</sup> Furthermore, his “brilliant political leadership”<sup>396</sup> and “eloquent support of the Constitution in *The Federalist* helped bring ratification.”<sup>397</sup> Finally, Madison would also draft the Bill of Rights, which was “designed to protect citizens' rights.”<sup>398</sup> Because of these contributions, most

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<sup>387</sup> BOYER, *supra* note 108, at 143.

<sup>388</sup> WIRTH, HISTORY, *supra* note 106, at 104.

<sup>389</sup> CAYTON, *supra* note 118, at 151.

<sup>390</sup> BARKER & COMMAGER, *supra* note 99, at 152.

<sup>391</sup> *Id.*

<sup>392</sup> WIRTH, DEVELOPMENT, *supra* note 100, at 192; *see also* BARKER & COMMAGER, *supra* note 99, at 152 (“Madison was probably the most influential member of the Convention.”).

<sup>393</sup> AYERS, *supra* note 118, at 151.

<sup>394</sup> *See, e.g.*, BARKER & COMMAGER, *supra* note 99, at 153 (“It was chiefly the work of Madison.”).

<sup>395</sup> DANZER, *supra* note 108, at 141.

<sup>396</sup> *Id.*

<sup>397</sup> AYERS, *supra* note 118, at 151.

<sup>398</sup> CAYTON, *supra* note 118, at 162.

early textbooks referred to him as “one of the most important framers”<sup>399</sup> and the “Father of the Constitution.”<sup>400</sup> Today’s textbooks are similarly celebratory.<sup>401</sup>

Alexander Hamilton also emerges in both sets of textbooks as a key figure in the development and ratification of our Constitution. For instance, one early textbook noted, “During the Revolutionary War and the critical years that followed, America profited greatly from the talented services and patriotism of Alexander Hamilton.”<sup>402</sup> Early in his life, “Hamilton’s brilliance and his ability to learn attracted attention.”<sup>403</sup> It was for this reason that he became “President Washington’s most trusted advisor.”<sup>404</sup> Today’s textbooks are similarly reverential, noting that, “During the war General George Washington, recognizing Hamilton’s brilliance, made him his close adviser and gave him the job of organizing military headquarters.”<sup>405</sup> Discussing the Annapolis Convention, one of today’s textbooks notes, “when Hamilton was only 29 years of age, he saw that the thirteen states would never prosper until they formed a strong union. He demanded that the states send delegates at once to a larger meeting to see what could be done.”<sup>406</sup> This textbook concludes: “If Hamilton had never lived another day, his courage and vision at the Annapolis convention would entitle him to a place in American history.”<sup>407</sup>

In the context of the Constitutional Convention and the ratification debates, Hamilton is described as “bold”<sup>408</sup> and “brilliant.”<sup>409</sup> Furthermore, Hamilton is widely praised for his work on *The Federalist*—variously described as a “remarkable set of essays,”<sup>410</sup> “the greatest book ever written about the Constitution,”<sup>411</sup> and “the classic statement of why freedom-loving people need a strong central government.”<sup>412</sup> These accounts also stress that Hamilton’s “tireless work”<sup>413</sup> and

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<sup>399</sup> MUZZEY, HISTORY 2d, *supra* note 105, at 192.

<sup>400</sup> WIRTH, DEVELOPMENT, *supra* note 100, at 192.

<sup>401</sup> AYERS, *supra* note 118, at 151 (“History remembers James Madison as the Father of the Constitution because of his central role at the Constitutional Convention.”); CAYTON, *supra* note 118, at 151 (creating a special section for Madison, entitled “The Father of the Constitution”).

<sup>402</sup> CANFIELD & WILDER, *supra* note 101, at 149.

<sup>403</sup> *Id.*

<sup>404</sup> BOYER, *supra* note 108, at 192.

<sup>405</sup> BOORSTIN & KELLEY, *supra* note 103, at 116.

<sup>406</sup> *Id.*

<sup>407</sup> *Id.*

<sup>408</sup> *Id.*

<sup>409</sup> CANFIELD & WILDER, *supra* note 101.

<sup>410</sup> MUZZEY, HISTORY, *supra* note 107, at 178.

<sup>411</sup> BARKER & COMMAGER, *supra* note 99, at 160.

<sup>412</sup> BOORSTIN & KELLEY, *supra* note 103, at 122-23.

<sup>413</sup> MUZZEY, HISTORY, *supra* note 107, at 177.

“driving leadership”<sup>414</sup> were the key to the Constitution’s “narrow victory” in New York. Although one of today’s textbooks notes that Hamilton was controversial, even that account was almost entirely positive: “Hamilton was one of the most brilliant—and often controversial—of the nation’s founders,” further noting that “[t]hrough his writings and political involvements, he exerted almost as great an influence on the young republic as the early presidents did.”<sup>415</sup>

In short, the Founding Fathers emerge from these accounts as praiseworthy heroes, with few (if any) flaws. The Reconstruction Founders are accorded much less respect.

### C. *Our Reconstruction Founders—Stevens, Sumner, and Bingham in Our Textbooks*

While accounts of our key Founding Fathers tend to be extensive and almost entirely celebratory, our Reconstruction Founders are either ignored or criticized. Although today’s textbooks provide more extensive and balanced accounts of Reconstruction than those in the 1940s and 1950s, it is striking how much more favorably today’s textbooks treat the Founding generation than our Reconstruction Founders. The only Reconstruction Founder receiving extensive treatment in our early textbooks (Thaddeus Stevens) was portrayed as one of American history’s villains. Today’s textbooks provide a more balanced account of Stevens, although they still completely ignore John Bingham and focus more on the caning of Charles Sumner than his lifelong commitment to racial equality. In the end, even today’s (improved) textbooks are much more critical of our Reconstruction Founders than the Founding generation.

#### 1. Thaddeus Stevens

Thaddeus Stevens emerges in both sets of textbooks as the paradigmatic Reconstruction Founder. In early accounts, he was portrayed as an angry, vindictive villain. In today’s accounts, he is presented as a more complicated figure, with most textbooks explaining the sources of his anger—sources that transcend the pure sectionalism that animated the Dunning School caricature.

In our early textbooks, Stevens was simply driven by his “bitter hatred toward the Southern secessionists . . . .”<sup>416</sup> He was viewed as a “grim,”<sup>417</sup> “vindictive man of seventy-three, who believed that the South should be severely punished for its ‘rebellion . . . .’”<sup>418</sup> Several early textbooks noted his “harsh” theory that the Southern states had become “‘conquered provinces,’ subject to the laws of war.”<sup>419</sup> Under this theory, Stevens “would not even grant the former southern states the

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<sup>414</sup> BARKER & COMMAGER, *supra* note 99, at 161.

<sup>415</sup> BOYER, *supra* note 108, at 192.

<sup>416</sup> WIRTH, HISTORY, *supra* note 106, at 258.

<sup>417</sup> CANFIELD & WILDER, *supra* note 101, at 324.

<sup>418</sup> MUZZEY, HISTORY, *supra* note 107, at 429.

<sup>419</sup> CANFIELD & WILDER, *supra* note 101, at 324. For a defense of this theory, see AMAR, CONSTITUTION, *supra* note 11, at 349-403.

standing of territories.”<sup>420</sup> Furthermore, Stevens was described as having “ruled the House of Representatives with a rod of iron”<sup>421</sup> and was presented as the architect of Johnson’s “farcical and deplorable”<sup>422</sup> impeachment. One early textbook did note Stevens’s commitment to “social and political equality of the two races,”<sup>423</sup> but nowhere in these early accounts was Stevens’s anger sufficiently balanced by his idealism.

These early accounts largely ignored praiseworthy aspects of Stevens’s background. Prior to his tenure in Congress, Stevens was a successful lawyer, who “defended fugitive slaves without fee and with considerable success.”<sup>424</sup> As a Pennsylvania politician, Stevens fought for prophetic goals, including a system of free public education for all children and the enfranchisement of African-Americans.<sup>425</sup> In fact, as a participant in the Pennsylvania constitutional convention, Stevens refused to sign the finished document because it disenfranchised free blacks.<sup>426</sup> Because of his commitment to racial equality, Stevens was an early leader of the Republican Party, speaking “with eloquence and simplicity on behalf of blacks,” including his failed (but “farsighted”) project “to provide freed slaves with forty acres and a mule.”<sup>427</sup> During the Civil War, Stevens argued for immediate emancipation.<sup>428</sup> During Reconstruction, Stevens was the undisputed leader of the Radical wing of the Republican Party in the House.<sup>429</sup> As a Chairman of the Ways and Means Committee and member of the Joint Committee on Reconstruction, Stevens was committed to a Reconstruction program that would “give [African-Americans] perfect equality before the law and ‘. . . overcome the prejudice and ignorance and wickedness which resisted such reform.’”<sup>430</sup> In the end, these early accounts ignored the man who “[b]y his own wish . . . was buried in a black cemetery,”<sup>431</sup> and proclaimed during Reconstruction that “Our Fathers had been compelled to postpone the principles of their great Declaration and wait for their full establishment until a more propitious time. That time ought to be present now.”<sup>432</sup>

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<sup>420</sup> CANFIELD & WILDER, *supra* note 101, at 324.

<sup>421</sup> MUZZEY, HISTORY, *supra* note 107, at 429.

<sup>422</sup> WIRTH, DEVELOPMENT, *supra* note 100, at 412.

<sup>423</sup> WIRTH, HISTORY, *supra* note 106, at 258.

<sup>424</sup> CURTIS, NO STATE SHALL ABRIDGE, *supra* note 13, at 85.

<sup>425</sup> STAMPP, *supra* note 244, at 103.

<sup>426</sup> JULIAN E. ZELIZER, THE AMERICAN CONGRESS: THE BUILDING OF DEMOCRACY 237 (2004).

<sup>427</sup> CURTIS, NO STATE SHALL ABRIDGE, *supra* note 13, at 85.

<sup>428</sup> ZELIZER, *supra* note 426.

<sup>429</sup> CURTIS, NO STATE SHALL ABRIDGE, *supra* note 13, at 85.

<sup>430</sup> STAMPP, *supra* note 244, at 88.

<sup>431</sup> CURTIS, NO STATE SHALL ABRIDGE, *supra* note 13, at 85.

<sup>432</sup> W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 1860-1880, at 304 (1992).

Of course, Stevens was far from perfect. As Eric Foner explains, “Stevens was a master of Congressional infighting, parliamentary tactics, and blunt speaking.”<sup>433</sup> Indeed, Stevens’s “quick tongue and sarcastic wit were legendary.”<sup>434</sup> Even today, historians often remember Stevens most “as [the] ideologue and powermonger who spearheaded the impeachment of President Andrew Johnson.”<sup>435</sup> In addition, many continue to blame Stevens for Reconstruction’s failures.<sup>436</sup> At the same time, as Eric Foner counters, “Even those who disagreed with [Stevens’s] policies could not avoid a grudging admiration for the man and his honesty, idealism, and indifference to praise and criticism—qualities not altogether common among politicians.”<sup>437</sup> Even this complicated portrait escapes our early textbooks—replaced by a one-dimensional, bitter, irrational ideologue.

Today’s textbooks are more evenly balanced—although they are still disproportionately critical when viewed against the pristine portraits of the Founding generation that comprise these same textbooks. Today’s accounts still note Stevens’s bitterness towards the South, calling him a “Radical avenger”<sup>438</sup> and noting that he “viewed white southerners as ‘conquered rebels.’”<sup>439</sup> One textbook leads with a section heading, “*Why was Thaddeus Stevens so angry?*,” noting that “Stevens’s strong, controversial opinions made him deeply hated—and deeply admired.”<sup>440</sup> One textbook even begins its account of Stevens by noting that he is “one of the strangest men in American history.”<sup>441</sup> As a result, Stevens’s anger (not his idealism) is still the primary focus of our Reconstruction narrative. At the same time, today’s textbooks provide a fairer, more balanced portrait of this complicated man.

The key shift is that today’s textbooks actually mention the sources of Stevens’s anger, as most connect his bitterness towards the South to his commitment to racial equality. For instance, one textbook notes, “Very early in life Stevens took up the great cause of abolishing slavery. He never abandoned that cause. Nor did he ever forgive men who had held slaves or who had been entangled in the web of slavery.”<sup>442</sup> Another textbook adds, “Stevens hated slavery and in time came to hate white Southerners as well. He declared, ‘I look upon every man who would permit slavery . . . as a traitor to liberty and disloyal to God.’”<sup>443</sup> This textbook adds that

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<sup>433</sup> FONER, RECONSTRUCTION, *supra* note 175, at 229.

<sup>434</sup> *Id.*

<sup>435</sup> ZELIZER, *supra* note 426, at 236.

<sup>436</sup> *Id.*

<sup>437</sup> FONER, RECONSTRUCTION, *supra* note 175, at 229.

<sup>438</sup> BOORSTIN & KELLEY, *supra* note 103, at 367.

<sup>439</sup> AYERS, *supra* note 118, at 410.

<sup>440</sup> *Id.*

<sup>441</sup> BOORSTIN & KELLEY, *supra* note 103, at 362.

<sup>442</sup> *Id.*

<sup>443</sup> DANZER, *supra* note 108, at 377.

Stevens “defended runaway slaves” early in his life and, “[a]fter Stevens died, at his own request he was buried in an integrated cemetery, because he wanted to show in death ‘the principles which I advocated throughout a long life: Equality of Man before his Creator.’”<sup>444</sup>

Even largely positive portraits, however, are quickly clouded by some of Stevens’s negative qualities. For instance, one textbook notes that “[h]e was sometimes called ‘a humanitarian without humanity’” and “seemed to use up all his good feelings on large and noble causes, so that he had very little left for individuals.”<sup>445</sup> Furthermore, Stevens’s bitterness was often portrayed as personal and deep:

When the Confederate army invaded southern Pennsylvania in 1863, they destroyed Stevens’s ironworks . . . . After Appomattox, Stevens made it his purpose in life to punish all “traitors.” . . . At the age of 75 he boasted that he would spend his remaining years inventing new ways to make the hated Southern rebels suffer.<sup>446</sup>

On this account, “Just as Lincoln inspired love and respect, Stevens inspired fear.”<sup>447</sup> In the end, Stevens still emerges from today’s textbooks as a bitter, angry man—but, a bitter, angry man with a (largely) noble purpose.

## 2. Charles Sumner

Over time, Charles Sumner has been treated less extensively, but somewhat more favorably, than Stevens. In both sets of textbooks, accounts of Sumner tend to stress both his idealism and his inflexibility—although these accounts rarely include more than a sentence or two. For instance, one early textbook noted that Sumner “fought constantly and uncompromisingly for the extension of suffrage to the freedmen . . . .”<sup>448</sup> Another added that he was “an ardent believer in Negro equality . . . .”<sup>449</sup> From there, both accounts usually tag Sumner as a “leader” of the Radical Republicans and, therefore, tie him to their overall evaluations of Congressional Reconstruction. In our early textbooks, Sumner was connected to the perceived failures of the Radical Republicans; in today’s textbooks, he is tied to Reconstruction’s mixed legacy.

One of today’s textbooks does provide a full paragraph on Sumner’s background, noting,

As early as 1862 [Sumner] had begun to fight for equal rights for blacks. He was a proud, vain man, bitter against white Southerners and intolerant of all opposition. But in the Senate he was the conscience of the North.

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<sup>444</sup> *Id.*

<sup>445</sup> BOORSTIN & KELLEY, *supra* note 103, at 362.

<sup>446</sup> *Id.*

<sup>447</sup> *Id.*

<sup>448</sup> WIRTH, DEVELOPMENT, *supra* note 100, at 408.

<sup>449</sup> MUZZEY, HISTORY, *supra* note 107, at 429.

And he was just as bitter against the white South and just as concerned about black Southerners as Thaddeus Stevens.<sup>450</sup>

This account provides a balanced portrait of a complicated man—a portrait that is more positive than the consensus image of Stevens, but hardly as pristine as those of the Founders.<sup>451</sup>

Since Sumner was rarely treated extensively in either set of textbooks, students are robbed of his prescience on issues of equality. Early in his career, Sumner supported numerous reform movements, including “world peace, temperance, women’s rights, prison reform, and, of course, abolitionism.”<sup>452</sup> Sumner’s early and deep belief in legal equality led him to oppose school segregation over a century before *Brown v. Board of Education*.<sup>453</sup> Sumner argued that “school segregation violated ‘that fundamental right of all citizens, Equality before the Law,’ because it branded ‘a whole race with the stigma of inferiority.’”<sup>454</sup> During the Civil War, Sumner was one of the earliest congressional leaders to fight for immediate abolition, and he persistently lobbied President Lincoln to issue the Emancipation Proclamation.<sup>455</sup> During Reconstruction, Sumner was a consistent “Radical,” “demand[ing] civil and political rights for [African-Americans].”<sup>456</sup> Sumner believed that “[t]he South . . . must be reconstructed in accordance with the principles of the Declaration of Independence, with government founded upon the consent of the governed.”<sup>457</sup>

Julian Zelizer describes Sumner as “a man of burning intellect.”<sup>458</sup> Sumner’s specialty was “lengthy, erudite speeches in which he expounded the recurrent theme of his political career: the principle of equality before the law.”<sup>459</sup> In these speeches, “he hammered at the same theme, winning a firm hold on the intellectual and moral opinion-makers of the North . . .”<sup>460</sup> Over time, “Sumner’s uncompromising stance on black rights . . . caused many Republicans to reassess their own opinions . . .”<sup>461</sup>

<sup>450</sup> BOORSTIN & KELLEY, *supra* note 103, at 362.

<sup>451</sup> For a physical description of Sumner, see MICHAEL LES BENEDICT, *A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863-1869*, at 37 (1st ed. 1974) [hereinafter BENEDICT, *COMPROMISE*] (“With a noble visage, dignified demeanor, and deep, rich voice, Sumner looked every inch a classical Roman senator.”).

<sup>452</sup> STAMPP, *supra* note 244, at 103.

<sup>453</sup> Farber & Muench, *supra* note 14, at 251.

<sup>454</sup> *Id.* (quoting *THE ANTISLAVERY ARGUMENT* 288 (William H. Pease & Jane H. Pease eds., 1965)).

<sup>455</sup> ZELIZER, *supra* note 426, at 222.

<sup>456</sup> STAMPP, *supra* note 244, at 103.

<sup>457</sup> *Id.* at 88.

<sup>458</sup> ZELIZER, *supra* note 426, at 221.

<sup>459</sup> FONER, *RECONSTRUCTION*, *supra* note 175, at 230.

<sup>460</sup> BENEDICT, *COMPROMISE*, *supra* note 451, at 38.

<sup>461</sup> FONER, *RECONSTRUCTION*, *supra* note 175, at 230.

As a result, Eric Foner explains, “abolitionists . . . considered [Sumner] *their* politician . . . [as] did ordinary blacks, North and South, who deluged him with requests for advice and accounts of their grievances.”<sup>462</sup> Not surprisingly, “[a]t the time of his death, [Sumner] was trying to secure the passage of a far-reaching civil rights bill, which would have prohibited discrimination in schools, transportation, and public accommodations.”<sup>463</sup>

If the cursory treatment of Sumner deprives students of many of the Senator’s noble qualities, it also underplays his smugness. As Foner noted, Sumner was “[d]isliked by Senate colleagues for egotism, self-righteousness, and stubborn refusal to compromise . . . .”<sup>464</sup> Many criticized Sumner for “act[ing] as though he were the voice, the embodiment, of the New England conscience.”<sup>465</sup> Michael Les Benedict provided a similar account, noting that Sumner “[l]ack[ed] wit” and was “unable to find the humor in others’ jokes.”<sup>466</sup> In the end, students are left with little sense of this key historical figure.

Instead, students are likely to remember Sumner as the victim of an assault on the Senate floor.<sup>467</sup> The caning of Sumner—or, as one of today’s textbooks cleverly describes the episode, “Bleeding Sumner”<sup>468</sup>—has been one of the key narratives in our textbooks for many generations. In fact, it was mentioned in every textbook analyzed for this Article, and has long been used as a symbol for growing sectionalism leading up to the Civil War. The typical account of this episode has comprised roughly a page, with most including an accompanying picture.

Early accounts tended to emphasize the harshness of Sumner’s speech that provoked the attack. These accounts described the speech as “abounding in personal abuse”<sup>469</sup> and “scathing in [its] denunciation of proslavery men.”<sup>470</sup> Furthermore, “Sumner went out of his way to slander Senator Butler of South Carolina,”<sup>471</sup> “singl[ing] [Butler] out for his venomous onslaught.”<sup>472</sup> Senator Butler was portrayed sympathetically, as “ill at the time and absent from his seat.”<sup>473</sup> In these

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<sup>462</sup> *Id.*

<sup>463</sup> ZELIZER, *supra* note 426, at 222.

<sup>464</sup> FONER, RECONSTRUCTION, *supra* note 175, at 230.

<sup>465</sup> *Id.*

<sup>466</sup> BENEDICT, COMPROMISE, *supra* note 451, at 37.

<sup>467</sup> For a retelling of the brutality of this caning, see Curtis, *Bingham*, *supra* note 15, at 627 (“Brooks beat Sumner (his legs trapped under his bolted down Senate desk) over the head thirty times with a gold topped cane. Finally, Sumner wrenched the desk free from the floor and then collapsed, his head covered with blood.”).

<sup>468</sup> CAYTON, *supra* note 118, at 364.

<sup>469</sup> MUZZEY, HISTORY 2d, *supra* note 105, at 280.

<sup>470</sup> WIRTH, DEVELOPMENT, *supra* note 100, at 208.

<sup>471</sup> CANFIELD & WILDER, *supra* note 101, at 289.

<sup>472</sup> MUZZEY, HISTORY 2d, *supra* note 105, at 280.

<sup>473</sup> *Id.*



accounts, Sumner was beaten by Butler's first cousin, Preston Brooks, who was outraged by the speech. Brooks did not quite emerge as a hero in these accounts, but the caning was portrayed as (at least) somewhat justified, with Sumner cast as an angry blowhard, attacking an absent, ill old man.

Modern accounts still frame Sumner's speech as "angry,"<sup>474</sup> directing "bold insults"<sup>475</sup> and "his most vicious remarks at South Carolina's Andrew Butler, who was absent from the Senate at the time."<sup>476</sup> Sumner "ridiculed"<sup>477</sup> and "verbally attacked his colleagues" for two days, "sneering at [Senator Butler] for his proslavery beliefs and making fun of his impaired speech."<sup>478</sup> At the same time, some of the modern accounts provide additional context for why Sumner was as angry as he was—including more critical accounts of Southern racism and the proslavery push in the territories.<sup>479</sup> Today's accounts also stress the brutality of the caning itself, noting that "Congressman Preston Brooks of South Carolina entered the nearly empty Senate chamber"<sup>480</sup> and brutally beat Sumner, leaving him incapacitated for several months. In the end, the vivid image of a "bleeding Sumner" is likely to outweigh the limited information on Sumner's nobler commitments that are sprinkled throughout our leading high school textbooks.

### 3. A Truly Forgotten Founder: John Bingham

Rather than being tarred or misunderstood, John Bingham is simply ignored in our leading high school textbooks.<sup>481</sup> Jack Rakove was stating the obvious when he noted that "Bingham is something less than a household name."<sup>482</sup> Unlike the Declaration of Independence (which canonized Jefferson) and the U.S. Constitution (which canonized Madison), Section One of the Fourteenth Amendment has failed to canonize its primary architect.<sup>483</sup> Even as Madison has taken on added prominence

<sup>474</sup> AYERS, *supra* note 118, at 332.

<sup>475</sup> CAYTON, *supra* note 118, at 364.

<sup>476</sup> AYERS, *supra* note 118, at 332.

<sup>477</sup> BOYER, *supra* note 108, at 356.

<sup>478</sup> DANZER, *supra* note 108, at 316.

<sup>479</sup> *Id.*

<sup>480</sup> NASH, *supra* note 258, at 171.

<sup>481</sup> Of course, John Bingham was not perfect. At the same time, he was quite influential. See Curtis, *Bingham*, *supra* note 15, at 625 ("Bingham was not perfect. But, of course, neither were other founders who have been enshrined in the pantheon of constitutional heroes. Far more than most, Bingham made substantial and enduring contributions to constitutional liberty. Bingham has important things to teach us.").

<sup>482</sup> Jack N. Rakove, *Two Foxes in the Forest of History*, 11 YALE J.L. & HUMAN. 191, 191 (1999) (book review).

<sup>483</sup> See Aynes, *Continuing*, *supra* note 40, at 590 ("[O]ne cannot read the journal of the Joint Committee on Reconstruction without seeing conclusive evidence that Bingham was not only the drafter of this language, but also the relentless champion of engrafting these concepts into the Constitution. Without his advocacy within the Joint Committee, Section one probably would not exist today.").

in today's textbooks as the "Father of the Constitution" and primary author of the Bill of Rights, these same textbooks continue to ignore the Reconstruction Founder who most attempted to realize the promise of Madison's Bill.<sup>484</sup> Furthermore, even as lesser eighteenth-century Founders have become consistent characters in our national story (e.g., William Paterson)—and even received extensive treatment in our leading textbooks (e.g., Roger Sherman)—Bingham has failed to play even a minor role in our textbooks' portrayal of Reconstruction.

At first glance, Bingham's omission is puzzling. During Reconstruction, the Ohio Congressman was one of the House's most important leaders, serving as the second-ranking Republican on the Joint Committee on Reconstruction and a key leader of the moderate-to-conservative wing of the Republican Party.<sup>485</sup> In fact, many historians have concluded that Bingham's influence during Reconstruction was even greater than many of his better-known, radical counterparts, such as Charles Sumner.<sup>486</sup> Furthermore, from the perspective of constitutional law, the battle over Bingham's Fourteenth Amendment has often become a battle over the (elite) public memory of Bingham himself.

This battle over Bingham began in 1947, with Hugo Black's memorable dissent in *Adamson*. While discussing the Fourteenth Amendment's ratification history, Justice Black famously labeled Bingham "the Madison of the first section of the *Fourteenth Amendment*."<sup>487</sup> Interestingly, this was Bingham's first appearance in a Supreme Court opinion—coming almost fifty years after his death.

In the 1940s and 1950s, Black was strongly opposed on the Court by Felix Frankfurter and within legal academia by Charles Fairman, both of whom were greatly influenced by the Dunning School account of Reconstruction.<sup>488</sup> Frankfurter's Fourteenth Amendment jurisprudence was driven by "contempt for the framers of the amendment, a belief that the amendment was not necessary, and a hope that it could be judicially construed so as to have no enforceable effect."<sup>489</sup> At Frankfurter's urging, Fairman (a Stanford Law Professor and Frankfurter disciple) began a parallel attack on Black's account within academia, beginning with a 1949

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<sup>484</sup> See Curtis, *Bingham*, *supra* note 15, at 651 (arguing that Section One of the Fourteenth Amendment "embodie[s] [Bingham's] passionate concern for liberty and equality").

<sup>485</sup> BENEDICT, *COMPROMISE*, *supra* note 451, at 36.

<sup>486</sup> See, e.g., *id.* ("Inflexible, as quick to anger as Stevens, [Bingham] braved Stevens's and Butler's wrath, ultimately having a greater influence on the course of Reconstruction than the radical leaders themselves."); see also Aynes, *Continuing*, *supra* note 40, at 591 (cataloguing praise that Bingham received from his contemporaries, including being ranked third in "relative importance" during Reconstruction behind Thaddeus Stevens and William P. Fessenden). Cf. Berger, *supra* note 28, at 446 (endorsing Benedict's general conclusion that Reconstruction was a moderate-to-conservative Republican).

<sup>487</sup> *Adamson v. California*, 332 U.S. 46, 74 (1947) (Black, J., dissenting).

<sup>488</sup> See Aynes, *Amendment*, *supra* note 40, at 1204 ("Fairman and Frankfurter were both educated while the 'Dunning' school of history was predominant. They both had a jaundiced view of Reconstruction and of the framers of the Fourteenth Amendment.").

<sup>489</sup> *Id.* at 1218.

piece in the recently-established *Stanford Law Review*.<sup>490</sup> In this landmark Article, Fairman took dead aim at Bingham's constitutional vision, providing an extensive analysis of the Fourteenth Amendment's ratification history and criticizing Bingham's thinking as "confused" and his "construction of the Constitution" as "befuddled."<sup>491</sup>

Although Fairman's account was decisive for many within the legal academy,<sup>492</sup> it hardly settled the debate over the meaning of the Fourteenth Amendment (or Bingham's role in shaping it). For instance, William Winslow Crosskey countered Fairman just five years later in a lengthy Article in the *University of Chicago Law Review*, noting that Fairman's characterizations of Bingham<sup>493</sup> were "almost totally false."<sup>494</sup> Crosskey defended Bingham as a "very good draftsman," with "an intimate knowledge of [the Constitution and] the Supreme Court's [relevant] decisions."<sup>495</sup> Although most within the legal academy sided with Fairman in the ensuing decades, his account failed to silence all dissenters. For instance, in the early 1980s, a heated exchange occurred between Raoul Berger and Michael Kent Curtis, with Berger criticizing Bingham for his "confused misstatements"<sup>496</sup> and Curtis attacking Berger for treating Bingham and his supporters "as first year law students who . . . failed to master constitutional law."<sup>497</sup> In recent years, the number of legal scholars defending Bingham has grown exponentially, spanning the ideological spectrum.<sup>498</sup>

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<sup>490</sup> Fairman, *supra* note 28. Fairman was joined by other critics. See, e.g., Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 25 (1955) (noting that Bingham was "not normally distinguished for precision of thought and statement"); Wallace Mendelson, *Mr. Justice Black's Fourteenth Amendment*, 53 MINN. L. REV. 711, 716 (1969) (arguing that Bingham "used ringing rhetoric as a substitute for rational analysis"); Stanley Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Judicial Interpretation*, 2 STAN. L. REV. 140, 161 (1949) (concluding that Bingham's "many statements . . . are so confused and so conflicting as to be of little weight").

<sup>491</sup> Fairman, *supra* note 28, at 26, 31.

<sup>492</sup> By the mid-1980s, Fairman's piece was the nineteenth most cited article of the past forty years. See Aynes, *Amendment*, *supra* note 40, at 1229.

<sup>493</sup> For Crosskey's criticism of Fairman's attacks, see Crosskey, *supra* note 28, at 11 ("Mr. Fairman's method was to let drop, here and there, throughout his discussion, derogatory hints and comments which gave the impression that the framers of the [Fourteenth Amendment], and Bingham in particular, were not very bright; that they held the strangest ideas about the Constitution; knew little about it, or about the decisions of the Supreme Court under it; that they were poor draftsmen; and that it was not to be expected anything intelligible could come from their hands.").

<sup>494</sup> *Id.*

<sup>495</sup> *Id.*

<sup>496</sup> Berger, *supra* note 28, at 449, 450.

<sup>497</sup> Curtis, *Adventures*, *supra* note 28, at 89.

<sup>498</sup> See DAVID H. GANS & DOUGLAS T. KENDALL, *THE GEM OF THE CONSTITUTION: THE TEXT AND HISTORY OF THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT* (2008); AMAR, *BILL OF RIGHTS*, *supra* note 23; Aynes, *Continuing*, *supra* note

In spite of his importance during Reconstruction and his centrality to key debates within legal academia over the Fourteenth Amendment, Bingham's exclusion from our public memory is understandable.<sup>499</sup> From the Dunning School's perspective, Bingham does not easily fit into its conception of the prototypical "Radical Republican." Indeed, Michael Les Benedict's extensive analysis of the politics of Reconstruction categorized Bingham as a "conservative."<sup>500</sup> Bingham doubted the "wisdom and practicality of rebel disenfranchisement,"<sup>501</sup> opposed "incendiary language in radical bills,"<sup>502</sup> impeded some efforts to "limit state prerogatives,"<sup>503</sup> rejected the "conquered province" theory of Reconstruction,<sup>504</sup> battled against a bill to readmit Louisiana that "virtually guaranteed universal suffrage for blacks,"<sup>505</sup> and led the initial opposition to the impeachment of President Johnson.<sup>506</sup> Given this background context, better for the Dunning School to emphasize the most radical of the Republicans (such as Stevens and Sumner) and underemphasize pivotal conservatives (such as Bingham).

At the same time, Bingham's reputation was harmed among academic elites by the efforts of Frankfurter, Fairman, and Berger—for quite different reasons.<sup>507</sup> In the context of these debates over the meaning of the Fourteenth Amendment, Bingham was attacked for his expansive vision of federal power. Although Bingham was a conservative Republican during the Reconstruction era, his Fourteenth Amendment

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40; Steven G. Calabresi, *We Are All Federalists, We Are All Republicans: Holism, Synthesis, and the Fourteenth Amendment*, 87 GEO. L.J. 2273 (1999) [hereinafter Calabresi, *Federalists*].

<sup>499</sup> For an alternative explanation for the public's indifference to Bingham, see Curtis, *Bingham*, *supra* note 15, at 666 ("Bingham's story intersects with what had been omitted parts of our national narrative and illuminates the dark recesses of the national shadow—suppressions of free speech and civil liberty in the interests of slavery; rejection of the ideals of the Declaration by the people who became leaders of the Confederacy and the new South; denials of basic rights to African Americans by the Southern state governments Andrew Johnson installed right after the Civil War; use of political terrorism against blacks and Republicans during Reconstruction; the Supreme Court's rejection of the Fourteenth Amendment's basic protection of constitutional rights of all Americans in every state; the destruction of Reconstruction statutes, and denials of the right to vote for blacks; and the perversions of the Fourteenth Amendment's guarantees to protect corporate empires from democratic regulation.").

<sup>500</sup> BENEDICT, *COMPROMISE*, *supra* note 451, at 36 (noting that Bingham "led the Republican nonradicals in the House."); *see also* Curtis, *Adventures*, *supra* note 28, at 107 (noting that Bingham "was not a radical"); ERIC L. MCKITRICK, *ANDREW JOHNSON AND RECONSTRUCTION* 257 (1960) (describing Bingham as one of the most conservative Republicans in the House).

<sup>501</sup> BENEDICT, *COMPROMISE*, *supra* note 451, at 216.

<sup>502</sup> *Id.* at 225.

<sup>503</sup> *Id.* at 319.

<sup>504</sup> *Id.* at 225.

<sup>505</sup> *Id.* at 230.

<sup>506</sup> *Id.* at 244.

<sup>507</sup> For a comprehensive overview of this history, see Aynes, *Continuing*, *supra* note 40.

was responsible for the expansion of federal judicial power decades later, especially during two of the most controversial periods in Supreme Court history. While Frankfurter and Fairman were concerned with the *Lochner*-era implications of Bingham's handiwork,<sup>508</sup> Berger criticized Bingham for his Amendment's importance to the Warren Court revolution.<sup>509</sup> Taken together, these attacks harmed Bingham's standing among legal elites.

From the perspective of constitutional storytelling, Bingham's consistent exclusion from our high school Reconstruction narrative has been unfortunate. Bingham could serve as the perfect foil to Stevens and Sumner—a Republican leader who could demonstrate to our students the complicated structure of the Republican Party during Reconstruction.<sup>510</sup> Furthermore, with Bingham's omission from our textbooks, generations of high school students have been left with an incomplete understanding of our Reconstruction Founders' vision for Section One of the Fourteenth Amendment, a provision of “enormous importance today.”<sup>511</sup>

In 1951, Jacobus tenBroek noted that Bingham's constitutional vision served as “the meeting ground, in a sense that the work of no other individual was, of the three concepts and clauses that came to constitute the first section of the [Fourteenth] amendment,” an “amalgamation of natural rights, due process, and equal protection . . .”<sup>512</sup> In recent years, several notable scholars have followed tenBroek's lead. For instance, Akhil Amar has argued that Bingham's vision for the Bill of Rights “helped change the vocabulary of legal discourse—and ultimately changed its substance and structure.”<sup>513</sup> Steven Calabresi has similarly added that “our modern understanding of the Bill of Rights developed [more] out of the thinking of John Bingham . . . than of James Madison.”<sup>514</sup> Leaving aside concerns about the “original public meaning” of the Fourteenth Amendment,<sup>515</sup> recent accounts leave little doubt that Bingham had

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<sup>508</sup> See *id.* at 1217-29.

<sup>509</sup> See Berger, *supra* note 28, at 449-50.

<sup>510</sup> See, e.g., BENEDICT, COMPROMISE, *supra* note 451, at 36 (“Slender and blond, with vapid blue eyes, [Bingham] diverged as much from Stevens in appearance as he did in his views.”); *id.* at 183 (noting that Bingham and Stevens were “the two great House leaders of the Reconstruction committee”).

<sup>511</sup> Farber & Muench, *supra* note 14.

<sup>512</sup> TENBROEK, *supra* note 28, at 145.

<sup>513</sup> AMAR, BILL OF RIGHTS, *supra* note 23, at 284 (“[B]efore the adoption of the Fourteenth Amendment, the Supreme Court never—not once—referred to the 1791 decalogue as ‘the’ or ‘a’ ‘bill of rights.’ Yet within a few years of John Bingham's odes to the Bill, the Court began to adopt Bingham's terminology.”).

<sup>514</sup> Calabresi, *Federalists*, *supra* note 498, at 2281.

<sup>515</sup> See Friedman, *supra* note 32; Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, J. CONTEMP. LEGAL ISSUES (forthcoming), available at <http://ssrn.com/abstract=1358473>; and George C. Thomas III, *Newspapers and the Fourteenth Amendment: What Did the American Public Know About Section 1?*, J. CONTEMP. LEGAL ISSUES (forthcoming), available at <http://ssrn.com/abstract=1392961>.

a “deep and emotional respect for the Bill of Rights”<sup>516</sup> and “intended to use the Privileges or Immunities Clause of the Fourteenth Amendment to enforce [at least some of] the Bill of Rights against the states.”<sup>517</sup>

In the end, perhaps Bingham does not deserve the reverential treatment that Madison has received. Even so, this (completely) Forgotten Founder deserves to be (at least) a minor character in our nation’s story.<sup>518</sup> His omission is one of the most glaring defects in our leading textbooks’ portrayal of Reconstruction.

## VI. CONCLUSION

In the early twentieth century, academic historians provided highly critical accounts of the Founding and Reconstruction, with the Founding narrative under the thumb of Charles Beard and Reconstruction dominated by William Dunning. By the late twentieth century, both accounts became decidedly more positive, with the Founding narrative reversed by the work of Gordon Wood (and his disciples) and portrayals of Reconstruction reshaped by revisionist historians (such as Eric Foner). Even with these parallel developments among academic historians, our leading high school textbooks treated these two eras differently. While our textbooks’ treatment of Reconstruction tracked the trends among academic historians, our textbooks offered consistently hagiographic accounts of the Founding from the early twentieth century onward.

This Article offers an explanation for these diverging accounts—relying on both the political economy of the high school textbook industry and the influence of broad-based social movements. In the case of the Founding, a broad coalition of disparate interest groups defended our high school classrooms from the attacks of Charles Beard and his fellow progressive historians. This finding suggests that when civil religion and academic integrity collide, civil religion prevails. This should come as little surprise. Above all, our high school textbooks are called upon to reinforce the preferred myths of popular constitutional culture.

In the case of Reconstruction, the political economy of the textbook industry and popular constitutional culture reinforced the views of Reconstruction historians in the early twentieth century—with all three factors supporting a critical account of this controversial period. Since then, trends among Reconstruction historians have largely tracked popular constitutional culture, as the revisionist accounts of Foner

<sup>516</sup> CURTIS, NO STATE SHALL ABRIDGE, *supra* note 13, at 59.

<sup>517</sup> Aynes, *Misreading*, *supra* note 28, at 74. As Bingham himself noted: “The proposition pending before the House is simply a proposition to arm the Congress . . . with power to enforce the bill of rights as it stands in the Constitution today.” CONG. GLOBE, 39th Cong., 1st sess. 1088 (1866). Bingham added elsewhere: “Hereafter the American people cannot have peace, if, as in the past, States are permitted to take away freedom of speech, and to condemn men, as felons, to the penitentiary for teaching their fellow men that there is a hereafter, and a reward for those who learn to do well.” CURTIS, NO STATE SHALL ABRIDGE, *supra* note 13, at 145. Bingham concluded: “The great want of the citizen and stranger, protection by national law from unconstitutional state enactments, is supplied by the first section of this amendment.” CONG. GLOBE, 39th Cong., 1st Sess. 2542-43 (1866).

<sup>518</sup> See Curtis, *Bingham*, *supra* note 15, at 667 (“Bingham’s story is a central part of the story of American liberty: the struggle against slavery and its legacy; the struggle for equality; and for free speech and press and other basic constitutional rights.”).

(and his successors) have mirrored the preferences of the civil rights movement (and the constitutional culture it left behind). As a result, our high school accounts of Reconstruction have become more positive in recent years—yet have still remained more critical (and less complete) than those of the Founding era.

In the end, our leading high school history textbooks celebrate our Founding Fathers, but give short shrift to their Reconstruction counterparts. Although American schoolchildren should be proud of Thomas Jefferson, James Madison, and Alexander Hamilton, they should also be aware of the key contributions of their Forgotten Founders—Thaddeus Stevens, Charles Sumner, and John Bingham, among others. Near the end his *Bill of Rights: Creation and Reconstruction*, Akhil Amar raises a question that helped prompt this Article:

What, in the end, are we to make of the pervasive ways in which our stock stories have exaggerated the Creation and diminished the Reconstruction? . . . [M]any of us are guilty of a kind of curiously selective ancestor worship—one that gives too much credit to James Madison and not enough to John Bingham . . . . Great as men like Madison and Jefferson were, they lived and died as slaveholders, and their Bill of Rights was tainted by its quiet complicity with the original sin of slavery.<sup>519</sup>

Reconstruction was a controversial period in American history—an era filled with great promise and great peril. Not surprisingly, historians have struggled for generations to make sense of its various features. Our Reconstruction Founders were hardly perfect (far from it), and their mistakes should not be ignored by our high school textbooks. At the same time, if our textbooks dwell on the mistakes made by our Reconstruction Founders, they should similarly stress the flaws in our Founding Fathers' original Constitution—eighteenth-century flaws that contributed to many of the nineteenth-century challenges that our Reconstruction Founders struggled (and, at times, failed) to overcome. Our textbooks should also note the great debt we owe to our Reconstruction Founders for the freer and more equal America we live in today. Although our Reconstruction Founders' vision was largely rejected by the next generation, it held out the promise of a more perfect union—a nineteenth-century promise more fully realized a century later.<sup>520</sup>

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<sup>519</sup> AMAR, *BILL OF RIGHTS*, *supra* note 23, at 293.

<sup>520</sup> See STAMPP, *supra* note 244, at 215 (“[African-Americans] were no longer denied equality by the plain language of the law, as they had been before radical reconstruction, but only by coercion, by subterfuge, by deceit, and by spurious legalisms.”); *see also id.* (“The Fourteenth and Fifteenth Amendments, which could have been adopted only under the conditions of radical reconstruction, make the blunders of that era, tragic though they were, dwindle into insignificance. For . . . it was worth a few years of radical reconstruction to give [African-Americans] the ultimate promise of equal civil and political rights.”).