"Amendment"

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

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

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

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

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

2. Congress continued to operate without widespread Southern representation until mid-1868. (Some defeated Southern states did not regain their seats until 1870.) In 1866 a rump Congress proposed the Fourteenth Amendment by a two-thirds vote of each house, but that Article V hurdle would never have been cleared had the eighty excluded Southern members been present. The Senate's exclusions marked a particularly large break with traditional constitutional principles, which had placed each state's right to equal Senate representation in a privileged position, immune even from ordinary Article V amendment.
3. In 1867, the rump Congress enacted legislation purporting to outline the terms under which the defeated states would be readmitted into Congress and allowed to resume internal self-government. In effect, Congress conditioned each state's readmission upon that state's prior ratification of the Fourteenth Amendment. As with the Thirteenth Amendment, this process counted various states for Article V while excluding them from Article I. In fact, the process featured a double standard within Article V itself. If the Southern state assemblies ratifying the Thirteenth and Fourteenth Amendments were valid "legislatures" for Article V purposes, how could the federal assembly excluding these states count as a proper "Congress" for Article V purposes?
4. The combination of congressional carrots and sticks obviously coerced the affected states, tainting the Southern yes votes that emerged from the ratification process. Congress's actions amounted to a "naked violation[] of Article V," which presumed that states would have a truly free choice to say yea or nay to any proposed amendments.
5. The above-noted points are not merely the product of modern constitutional sensibilities. Rather, these and related arguments were voiced loudly by Old Guard critics in the 1860s, especially President Andrew Johnson. Yet the Reconstruction Congress reacted to critics by threatening them with the same aggressive tactics it was using against the defeated states. In particular, the Congress impeached and almost convicted Johnson for his defense of a traditional understanding of the constitutional ground rules, and the legislature took steps to restrict Supreme Court review of Reconstruction laws.[19]

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

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

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

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

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

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

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

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

Thus far, we have been assuming that after Appomattox, all defeated states should be counted in both the (ratifying-states) numerator and the (total-states) denominator of Article V. But the Thirteenth Amendment would also be valid if we instead treated all eleven state governments in the former Confederacy as having lapsed, and thus not properly included in either numerator or denominator. On this view, only twenty-five true-blue state governments were in fact constitutionally operative in 1865, with nineteen needed to ratify under Article V. Long before December 4, nineteen true-blue states had indeed ratified the abolition amendment. So whichever way we count, the Thirteenth Amendment plainly cleared the Article V bar. As for the Fourteenth Amendment, the necessary nineteen true-blue states said yes as of mid-February 1867.[22]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ackerman finds it "odd to suggest that the South had rendered itself un-republican by freeing the slaves."[38] Contrary to the tilt of this sentence, "the South . . . itself" did not of its own accord "free[] the slaves." Freedom came to the South thanks largely to Northern and national voices, arms, and votes[39]—Lincoln's Emancipation Proclamation, the Union Army's triumphs, the (Union) elections of 1862 and 1864, black self-help (in both North and South), and the Thirteenth Amendment itself, proposed in a true-blue Congress and ratified by an overwhelming majority of Northern states long before most Southern governments finally agreed to say yes (sometimes under pressure). Given that *the nation* had been instrumental

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

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

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

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

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

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

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

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

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

Republicans had an army of counterarguments at their disposal. Women as a rule had not voted at the Founding; nor did they vote in any state, North or South, East or West, in 1865.[48] Thus under either a static or a dynamic approach to Article IV, the actual practice of American government lent little support to any notion that the clause required woman suffrage. Instead, the basic principles of republican government would be met by broadly enfranchising men, who could in turn be relied on to virtually represent the interests of the women in their lives—their mothers, sisters, wives, and daughters. By contrast, Southern whites could not be trusted to represent the interests of those whom they had so recently and ruthlessly enslaved.[49] Within each state, the relatively even distribution of women across different districts also meant that male-only suffrage introduced no systemic skew into the process of state apportionment. Here, too, sex differed from race.[50] Moreover, certain political responsibilities properly accompanied the possession of political rights. Free men, black and white, had in the past been, and could in the future be, obliged to bear arms for the common defense. Women, by contrast, did not bear arms in the military and thus had a lesser claim on the franchise.[51]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"born . . . citizens"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"No State shall"

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

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