

CONSTITUTIONAL POLITICS, CONSTITUTIONAL LAW, AND THE THIRTEENTH AMENDMENT

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In his ticket to the Schmooze, Alex Tthesis addresses “Congressional Authority to Interpret the Thirteenth Amendment,” responding to an article on the same subject by Professor Jennifer Mason McAward.¹ He argues, absolutely correctly, that the Republicans who passed the Civil Rights Act over President Andrew Johnson’s veto in 1866, held that the second section of the Thirteenth Amendment delegated broad power to Congress to secure the rights and privileges associated with freedom in the United States. Both essays are very much constitutional *law* essays, as is Alex’s book, which is indeed subtitled *A Legal History*.² They address the powers of Congress in terms of legal principles and arguments of the sort that ultimately would be presented to courts testing the constitutionality of the sort of broad legislation they envision.

Of course, both arguments are addressed to Congress as well. Professor McAward tells congresspeople that broad legislation to protect rights would be unconstitutional; Alex tells them the opposite. Bound by their oaths to support the Constitution, congresspeople should refrain from passing such legislation if Professor McAward is right; they are free to pass such legislation if Professor Tthesis is right. But the idiom is unmistakably legal and esoteric. One should not be surprised that many congresspeople who favored such legislation might pass it on the understanding that it is

ultimately the Supreme Court's role to decide which legal argument is right, rather than theirs.

CONSTITUTIONAL POLITICS IN THE NINETEENTH CENTURY

I am presently preparing a book on the *constitutional politics* of Reconstruction, as distinguished from the *constitutional law* of Reconstruction. Although constitutional politics remains a very useful concept for understanding present-day American constitutionalism, it is particularly crucial for understanding the constitutionalism of an earlier era. Congress passed the Thirteenth Amendment and the 1866 Civil Rights Act in a different constitutional world than the one Americans know today. It was a world in which politics and political choices were articulated overwhelmingly in constitutional terms, with a powerful conviction that all actions of government must meet constitutional requirements. There was no need for a House rule mandating that every legislative proposal expressly identify a source of constitutional authority. The manager of any bill that might raise constitutional objections began by articulating its constitutional justification. Sometimes the constitutional arguments had been so well and long hashed out that they did not think it necessary to follow this general rule. But as soon as an opponent raised a constitutional objection, proponents had to respond, and they did so at length. It took five volumes for the late Professor David P. Currie to describe the constitutional issues debated in Congress just between the founding and the outbreak of the Civil War. Had he lived and intended to carry the story forward, he would certainly have filled a volume with the constitutional debates in the Civil War Congresses, and another with the constitutional debates of the Reconstruction era. I assure you, he could have done the same with the Congresses of the so-called Gilded Age.³ In scope, length,

and number of subjects, throughout the nineteenth century--and certainly as the Thirteenth Amendment was framed, ratified, and put into effect by the Civil Rights Act of 1866—constitutional debates in Congress dwarfed the attention to issues of constitutional power in the Supreme Court.

As Currie pointed out, the arguments, often made by lawyers in Congress, bore a distinct resemblance to those they might make in court. But they were not aimed at judges. They were not even aimed at fellow congressmen. As congressional correspondent Noah Brooks observed, when a congressman spoke, “only a scattered few” even remained in their seats. The speaker’s argument was “wasted” on the members, he explained, “for the speech is not intended for any special effect in the House or Senate, but upon the country.” Used as campaign documents, or circulated by the speaker to his constituents, “it flies all over the country, and has its small sum of influence upon the masses of the people.”⁴

Constitutional arguments made in Congress were directed to the people of the United States. The decisions—whether laws were defeated, passed, repealed, or allowed to lapse; whether their proponents were elected, re-elected, or defeated—were political decisions strongly, although by no means entirely, affected by constitutional philosophy. Before the Civil War, American politics revolved around issues like the constitutionality of a national bank, a protective tariff, and of federal promotion of transportation, communications, and education. The issue of state versus federal control of policy towards Native Americans roiled American politics as tendentiously as it did the Supreme Court; and so, of course, did the constitutional issues surrounding slavery.

In none of these examples did a court ruling settle the issue. Before the Civil War, the great constitutional issues were decided by the American people, not the Supreme Court. American constitutionalism was characterized by decisions about what is best called constitutional *policy*. The process was essentially political not legal—decision by constitutional politics, not by constitutional law.

Suffused by constitutional issues, nineteenth-century politics had a different character than they had during most of the time we have lived through. For most of the twentieth century, jurists distinguished politics from law. The *judicial* branch of government set the boundaries within which the *political* branches of government could act. Within those legal boundaries, the political branches were free to make unconstrained policy choices. Constitutional scholars were beginning to recognize that the distinction between politics and law was overstated even as the twentieth century ended.⁵ Today, in the ear of the Tea Party, one would have to be blind to adhere to such a simplistic distinction. In the United States, constitutional policy is made through an essentially political process in which the courts and law have played an increasingly important, but not determinative role.⁶ It is affected not only by the esoteric constitutional jurisprudence of lawyers and judges but by popular constitutional convictions that both shape and are shaped by political debate.

The constitutional issues that loomed largest before the Civil War involved federalism—the relative authority of the state and federal governments to make public policy. These issues certainly engaged judges but they were also central to the politics of the new republic, the Jacksonian era, and the Civil War era. The Federalist and Jeffersonian Republican parties were organized around the constitutionality of the

Hamiltonian program to strengthen the federal government and make it an engine of economic development. They utilized conceptions of state rights to combat Federalist efforts to suppress political dissent. The bank issue, federal development of transportation, and the power of states to resist federal diplomatic and war policies characterized the era following the triumph of the Jeffersonians in 1800. Its organizers created the Democratic party to appeal to the American people to preserve a state-rights-oriented federal system against a national constitutionalism that had been endorsed by the Supreme Court. Republicans appealed to the people against constitutional doctrines upholding slavery, again endorsed by the Supreme Court, and limiting federal power to subsidize economic development.

Politicians went to the people on these issues, as representatives of political parties dedicated to great constitutional issues. Every Democratic national platform from 1840 to 1856 began with the party creed, the first principle of which as “[t]hat the Federal Government is one of limited powers, derived solely from the Constitution, and that grants of power therein ought to be strictly construed.”⁷ Similar affirmations appeared in succeeding platforms. As late as 1888 the Democratic platform reaffirmed that “chief among the principles of party faith are . . . devotion to a plan of government regulated by a written Constitution, strictly specifying every granted power and expressly reserving to the States or people the entire ungranted residue of power.”⁸

Whigs, who advocated the use of federal power to promote economic development, endorsed in their 1848 platform a Constitution “cherished in the affections because protective of the interests of the people,” to be construed “by the wise and generous rules which Washington applied to it.”⁹ But Democratic state-rights federalism

proved so attractive to American voters that by 1852 they were compelled to give way.

The first two planks of that year's platform conceded that "all powers not granted or necessarily implied are expressly reserved to the States respectively and to the people" and that the state governments "should be held secure in their reserved rights."¹⁰

Nonetheless, other articles endorsed a protective tariff, deemed unconstitutional by Democrats, and insisted that "[t]he Constitution vests in Congress the power to open and repair harbors, and remove obstructions from navigable rivers, whenever such improvements are necessary for the common defence, and for the protection and facility of commerce with foreign nations, or among the States," as long as they were "national and general in their character."¹¹ In contrast to Democratic concentration on state rights, the Whigs urged, "The Federal and State Governments are parts of one system, alike necessary for the common prosperity, peace and security, and ought to be regarded alike with a cordial, habitual and immovable attachment."¹²

In the first "resolution" of their first national platform, Republicans likewise articulated a constitutional vision—one that linked the Constitution to the egalitarian and, in their view, antislavery principles of the Declaration of Independence: "That the maintenance of the principles promulgated in the Declaration of Independence, and embodied in the Federal Constitution are essential to the preservation of our Republican institutions, and that the Federal Constitution, the rights of the States, and the union of the States, must and shall be preserved."¹³ It stated its key political promise in constitutional terms: "That the Constitution confers upon Congress sovereign powers over the Territories of the United States for their government; and that in the exercise of this power, it is both the right and the imperative duty of Congress to prohibit in the

Territories those twin relics of barbarism--Polygamy, and Slavery.”¹⁴ Like the Whigs before them, the Republicans declared that congressional appropriations promoting transportation and communications “are authorized by the Constitution, and justified by the obligation of the Government to protect the lives and property of its citizens.”¹⁵ In all, Republicans cited the Constitution in six of the eight resolutions issued by its first national convention. The 1860 platform echoed the constitutional principles of 1856, but conceded “the right of each state to order and control its own domestic institutions according to its own judgment exclusively.”¹⁶ However, it added a new constitutional argument to justify banning slavery in the territories: “That, as our Republican fathers . . . ordained that ‘no persons should be deprived of life, liberty or property without due process of law,’ it becomes our duty, by legislation, whenever such legislation is necessary, to maintain this provision of the Constitution against all attempts to violate it”¹⁷

In an era when people voted for parties rather than candidates,¹⁸ politicians attacked and defended specific policies in terms of constitutional principles. From the era of the American revolution at least through the era of Reconstruction, all politics were constitutional politics.

THE COURTS IN AN ERA OF CONSTITUTIONAL POLITICS

Note that in their 1860 platform, Republicans avowed that it was the responsibility of Congress to pass legislation to assure that no one was deprived of liberty without due process of law in the territories. They did not mention the courts. But in the same plank they denied “the authority of Congress, of a territorial legislature, or of any individuals, to give legal existence to slavery in any territory of the United States.”¹⁹ No

doubt Republicans believed that courts ought to enforce that constitutional limitation on federal power. But there was no prospect that courts would do so as long as Democrats remained in political power. Quite the contrary. In the Dred Scott case the Supreme Court had held that Congress was bound to protect the right of Americans to bring slaves into federal territory. Everyone understood that the plank meant that Republicans intended to carry out their interpretation of the Constitution by continuing to pass legislation to bar slavery in the territories, no matter what the Supreme Court had said, and to place on the Court justices who agreed with their interpretation.

Courts and formal constitutional law play a powerful role in today's constitutional politics, but they played a more ambiguous role in the nineteenth-century constitutional system, and it is a real struggle to understand it.²⁰ The Supreme Court's constitutional adjudication took place in the context of the popular constitutional politics of the time. The constitutional issues that came before it primarily involved challenges to state legislation deemed inconsistent either with the Constitution or with federal laws or treaties. It was in those cases that Americans became accustomed to the Supreme Court's claims of constitutional authority, not in cases directly challenging federal statutes. Before the war, only four cases involved direct challenges to the constitutionality of congressional legislation—*Marbury v. Madison*,²¹ *Stuart v. Laird*,²² *Cohens v. Virginia*,²³ and the Dred Scott case.²⁴ *Marbury* might have laid the groundwork for aggressive constitutional challenges to congressional legislation had the court followed it by holding the law repealing the Judiciary Act of 1801 unconstitutional in *Laird*. It didn't. The Court upheld the constitutionality of Section 25 of the Judiciary Act of 1789 in *Cohens v. Virginia*. Only in the Dred Scott decision did the Court attempt to rule unconstitutional a

law of Congress that embodied a major public policy. And, rightly or wrongly decided, it was decisively repudiated by the people of the United States.

Before the Civil War the issue of the constitutionality of congressional statutes arose primarily in cases where state laws were challenged as inconsistent with federal laws or provisions of the U.S. Constitution. A completely deferential Court might have assumed the constitutionality of federal laws and limited itself to judging whether the challenged state laws were compatible with them. Instead, the Court considered the constitutionality of the federal law as part of its assessment, most famously in *McCulloch v. Maryland*.²⁵ Some justices took the opportunity when considering the constitutionality of state laws to interpret the scope of constitutional provisions, especially the interstate commerce power, in ways that implied limits on federal power.²⁶ But as of the time the American people ratified the Thirteenth Amendment, the Court had never actually ruled a congressional enactment unconstitutional in a case testing the constitutionality of a state statute.

The Supreme Court had been somewhat more active in protecting rights against state infringement. It did so particularly when those rights arose directly from the U.S. Constitution, federal laws, or treaties, and especially when the Constitution explicitly barred a state action, such as the impairment of contracts. The protection of rights growing out of federal laws and treaties really were more about federalism than the protection of individual rights. The protection of individual rights was largely confined to enforcement of the Constitution's ban on state impairments of the obligation of contracts. The Court had carefully eschewed broadening its authority to protect individuals from

state actions by holding in *Barron v. Baltimore*²⁷ that the Bill of Rights applied only to the federal government and not the states.

Nor were state courts a primary forum for the security of liberty. Although state courts had successfully claimed the power of judicial review by the mid-nineteenth century, the circumstances in which judges had done so involved legislative attempts to interfere in judicial proceedings, to reverse decisions, to deny access to courts, or to shift legal proceedings to other forums—violations of what we would now call procedural due process of law, in which courts have a particular interest.²⁸ From there some courts had gone on to monitor against what became known as “class legislation”—laws that took vested property from individual or class A and transferred it to individual or class B without a justification that could be proven in court. Courts were most aggressive in guarding against class legislation when it could be said to impair the obligation of a contract in violation of the express prohibition in the U.S. Constitution. Other offending statutes were said to deprive victims of property without due process of law. But while pregnant with implications for the future as the first instances of what jurists came to call substantive due process of law, before the Civil War these instances were rare and confined mainly to New York’s singularly aggressive judiciary.²⁹ Courts also energetically protected the rights of criminal defendants in court, but as a matter of adhering to common law rules rather than constitutional law.³⁰

Thus, neither the state nor the federal courts had ever provided protection of constitutional rights generally against infringements by the other branches of government. An independent judiciary was recognized as essential to liberty, but not because it protected individuals or minorities against the tyranny of the majority. An

independent judiciary guaranteed nonpartisan enforcement of the laws. With the exceptions noted above, there was no tradition of going to court to challenge laws or actions impinging civil rights on constitutional grounds. In *Barron*, the Supreme Court had explicitly rejected the idea that state actions could be challenged for violating the U.S. Bill of Rights,³¹ and until the Dred Scott case, when it Justice Taney held that barring slavery in the territories deprived southern slaveholders of property without due process of law, it had never struck down a federal law for violating the Bill of Rights.

Most importantly, Americans did not concede to the judiciary the role of making final decisions on constitutional issues. No one who had lived through the Jacksonian era could have thought that the Supreme Court's constitutional decisions bound either the people or their representatives in the political branches of government. The Supreme Court's decisions had sustained the constitutional nationalism endorsed by the Federalist party, the nationalist wing of the Jeffersonian Republican party, and the Whigs. But Jacksonian Democrats had gained and kept power by advocating state rights and strict construction of federal power under the Constitution. They had destroyed the national bank, ended protective tariffs, and repudiated a national system of internal improvements. Republicans had felt no hesitation about repudiating the Taney Court's proslavery constitutionalism. Citing Supreme Court opinions might strengthen a constitutional argument made in Congress or presented on the stump, but they were hardly determinative. The universal denunciation with which Republicans reacted to the Dred Scott decision reflected their conviction that the authority to interpret the Constitution in the end lay with the people, not the Court.³²

As Larry Kramer has demonstrated for the founding era and early republic, and John J. Dinan for the rest of the nineteenth century, in these circumstances the responsibility for protecting rights lay with the people themselves as expressed through the political system.³³ Antislavery lawyers and politicians like Salmon P. Chase *had* turned to the courts to challenge the grossest federal assault on liberty, the Fugitive Slave Act, and also to argue that setting foot on free territory permanently freed a slave. But it is very unlikely they expected to win. The courts proved a powerful forum for making a constitutional argument to the American people, especially in the days before antislavery advocates secured election to Congress. In the case of Chase, his legal arguments became the foundation for the constitutional argument the Republican party made to the people, and he himself continued to articulate them as a United States senator and then as governor of Ohio.³⁴

Take, for example, one of the better known cases in which antislavery advocates turned to the courts for succor. In *Roberts v. City of Boston* (1850),³⁵ Benjamin Roberts and his lawyers Charles Sumner and Robert Morris challenged Boston's segregated school system, arguing that the local school board's state-sanctioned refusal to admit Roberts's daughter Sarah to an all-white public school violated the provision of the Massachusetts state constitution that declared all persons equal before the law. As happened elsewhere, the Massachusetts supreme court, in an opinion written by its great chief justice Lemuel Shaw, dismissed the suit. It was not up to the courts to overturn state laws based on general declarations of rights. "[A]ll those rights of individuals which can be asserted and maintained by any judicial tribunal . . . depend upon provisions of law," he wrote. "The proper province of a declaration of rights and constitution of government

. . . is to declare great principles and fundamental truths, to influence and direct the judgment and conscience of legislators in making laws, rather than to limit and control them, by directing what precise laws they shall make.”³⁶

What followed illustrated Shaw’s proposition and the role of the people in protecting constitutional rights. Making the same arguments they had directed to the courts, by 1855 opponents of segregation secured a law barring school boards from denying admission to students on racial grounds. Sumner and Morris’s recourse to the courts was part of a long-term, persistent political effort to end school segregation, rather than an alternative to it.³⁷ Nine years later Sumner proposed a substitute for what became the Thirteenth Amendment the declaration: “All persons are equal before the law, so that no person can hold another as a slave,” along with an explicit delegation of power to Congress to enforce the declaration. The utility of that constitutional language in the constitutional politics that overturned Boston’s segregated school system was likely one of the things that influenced him.³⁸

Thus, when Congress proposed and the state legislatures ratified the Thirteenth Amendment, they did not conceive that the courts would be primary agency that would enforce it. They expected it to be enforced through the political process. An application to the courts might be part of that political process, but it would not be an alternative to it.

THE THIRTEENTH AMENDMENT AND CONSTITUTIONAL POLITICS

The great but very law-oriented constitutional jurist Charles Fairman complained that exultant supporters of the Thirteenth Amendment in Congress spoke with “imprecision” about what constituted freedom as they sent it to the states for ratification. Their “heightened language” reflected their exultation but failed to provide

useful legislative history to guide future interpretation. “[I]n construing the amendment, there is need to distinguish between sanguine prophecies and cold propositions about legal consequences,” he wrote.³⁹

Fairman’s criticism would be accurate if Americans had been primarily concerned with the Amendment’s impact on constitutional law. But at war’s end constitutional law still played a relatively small and unimportant role in the making of constitutional policy. Republicans expected the Thirteenth Amendment to affect future constitutional politics. From that standpoint, the “heightened language” that Fairman condescendingly excused in light of the emotions of the hour was more relevant than the “cold propositions” of law that Fairman would have preferred. Republicans did not address the precise meaning of freedom because that was not the constitutional issue before the American people.⁴⁰ With rare exceptions,⁴¹ Democratic opponents did not attack the proposed Amendment for the rights it might promise the freedmen and women. They attacked it as the emblem of a new constitutional order. They charged that the Amendment and the constitutional order it represented would complete the alienation of white southerners, reconfirming their will to fight. They said it marked a revolutionary intrusion into the right of the states to order their domestic relations. Because the change was so profound, they argued that the Amendment exceeded the power of constitutional amendment itself. They addressed those arguments to the people, not to future generations of lawyers and judges, and those were the arguments Republicans had to answer.

In response, Republicans lambasted the proslavery constitutional order and spoke glowingly of the benefits that the new order that the Amendment represented would provide the nation. As Michael Vorenberg has pointed out, the debates took place in the

run-up to the presidential election of 1864. Republicans “saw in the amendment an issue that they could use to define themselves against the Democrats in the upcoming elections.”⁴² And, as had been the case throughout the antebellum years, the partisan distinction was one of constitutional philosophy. Democrats and Republicans presented a direct and clear choice to the American people: preserve a chance for a restoration of the Union by adhering to prewar, proslavery Constitution—“the Union as it was, the Constitution as it is,”⁴³ in the words of the Democratic slogan, or commit to a war to reconstruct the Union on the basis of freedom.

In those terms, it made perfect sense for Massachusetts’ Republican Senator Henry Wilson to “exult” that the Amendment “will obliterate the last lingering vestiges of the slave system; its chattelizing, degrading, and bloody codes; its dark, malignant, barbarizing spirit; all it was and is, everything connected with it or pertaining to it, from the face of the nation,” and to predict that “the nation, ‘regenerated and disenthralled by the genius of universal emancipation,’ will run the career of development, power, and glory, quickened, animated, and guided by the spirit of the Christian democracy that ‘pulls not the highest down, but lifts the lowest up.’”⁴⁴

Wilson and his colleagues did not expect the courts to establish this new order. They would, hopefully, be a part of it. But the Amendment’s proponents and opponents were engaged in constitutional politics not constitutional law. Wilson’s prediction precisely reflected Shaw’s understanding of constitutionalism. The antislavery principle that the Thirteenth Amendment would incorporate into the Constitution would, in Shaw’s words, “influence and direct the judgment and conscience of legislators in making laws, rather than . . . limit and control them, by directing what precise laws they shall make.”

This did not mean that Republicans were unconcerned about how courts might understand the Amendment. Sumner hoped judges would join the effort to dedicate the nation to freedom, but he did not intend to rely on them. “[O]ne of the saddest chapters in our history has been the conduct of judges, who have lent themselves to the support of slavery,” he lamented. “Injunctions of the Constitution, guarantees of personal liberty, and prohibitions against its invasion, have all been forgotten.”⁴⁵ Sumner wanted to include a declaration of equal rights as part of the Amendment in order to establish the same principle that had led the people of Massachusetts to ban school segregation. He did not trust courts, a sentiment understandable in light of his experience as Roberts’s lawyer. Michigan Republican Jacob M. Howard, likewise a lawyer and member of the Senate Judiciary Committee that framed the Amendment’s language, opposed Sumner’s proposal pretty much for the same reason Sumner made it. “[I]n a legal and technical sense that language is utterly insignificant and meaningless as a clause of the Constitution.” “What effect would this have in law in a court of justice,” he asked. “What significance . . . before the law in a common-law court? It is not known at all.” The Judiciary Committee’s language, on the other hand, was drawn from the antislavery provision of the Northwest Ordinance, “an expression which has been adjudicated upon repeatedly, which is perfectly well understood both by the public and by judicial tribunals.”⁴⁶

But Howard was the only Republican in either house of Congress to consider how courts would interpret the Thirteenth Amendment. Exactly what freedom meant was an argument for another day, addressed to the American people in 1866, after southern states legislatures forced the issue by passing the Black Codes. No Republican then suggested

entrusting the courts with the question of whether those enactments were consistent with the Thirteenth Amendment. Instead they passed the Civil Rights Act of 1866, proposed the Fourteenth Amendment, and took the constitutional issue to the people, where it belonged.

CONCLUSION

What does the difference between the constitutional politics of the nineteenth century and the twenty-first century mean for enforcement of the Thirteenth Amendment? The logical outcome of the present system of constitutional politics, which recognizes judicial priority in construing the Constitution, is the central proposition of *City of Boerne v. Flores*⁴⁷ that the Supreme Court alone has the authority to define what constitutional provisions mean and that the political branches must acquiesce in those determinations. Should the Supreme Court treat the Thirteenth Amendment as an exception, somehow outside the present system of constitutional politics, because this is not how its framers understood the Court's role when it was ratified? Would we constitutional scholars, bred in the current system, really favor that? After all, the same observation can be made of all the prior constitutional amendments and possibly of the Fourteenth as well.

What of a more restrained proposition—that the Supreme Court should be more deferential to congressional enforcement of the Thirteenth Amendment than it is to state and federal actions that raise other constitutional questions? But, again, why limit this deference to the Thirteenth Amendment when all the prior amendments were products of the same system of constitutional politics as it was?

So perhaps the benefit of revisiting the constitutional politics of the nineteenth century is only to remind us that our ancestors lived in a significantly different constitutional world, to do what history does best—let us know that there have been alternative ways of solving human problems, in this case how maintain liberty in a democratic republic. Only when we have that kind of knowledge can we consider whether the system of constitutional politics in which we live today does the job better than the one in which our ancestors lived one hundred-and-fifty years ago.

¹ Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power after City of Boerne v. Flores*, 88 Wash. U. L. Rev. 77 (2010).

² Alexander Tsesis, *The Thirteenth Amendment and American Freedom: A Legal History* (N.Y.: New York University Press, 2004).

³ For an overview, see Michael Les Benedict, "Constitutional Politics in the Gilded Age," *Journal of the Gilded Age and Progressive Era* 9 (Jan. 2010): 7-35.

⁴ "Castine" [Noah Brooks], *Sacramento Daily Union*, March 14, 1864, quoted in Michael Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment* (N.Y.: Cambridge University Press, 2001), 89.

⁵ Bruce Ackerman played a crucial role by proposing instances in which politics switched to a "higher track," leading to what he called constitutional "transformations." **Error! Main Document Only.** Ackerman, *We the People, 2: Transformations* (Cambridge, Mass.: Harvard University Press, 1998). Steven Griffin proposed abandoning the distinction between constitutional law and politics in *American Constitutionalism: From Theory to Politics* (Princeton, N.J.: Princeton University Press, 1996). For other examples, see Cass R. Sunstein, *The Partial Constitution* (Cambridge, Mass.: Harvard University Press, 1993); Wayne D. Moore, *Constitutional Rights and Powers of the People* (Princeton, N.J.: Princeton University Press, 1996); Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton, N.J.: Princeton University Press, 1999); Keith Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge, Mass.: Harvard University Press, 1999); William E. Forbath, "Why is this Rights Talk Different from All Other Rights Talk: Demoting the Court and Reimagining the Constitution," *Stanford Law Review* 46 (July 1994): 1770-1805; Larry D. Kramer, "The Supreme Court 2000 Term: Foreword: We the Court," *Harvard Law Review* 115 (November 2001): 4- 168.

⁶ John J. Dinan has distinguished among three eras, or "regimes," that provided differing means for the protection of rights—a "republican" regime that relied on the structure of government and the political process, a "populist" regime that introduced the initiative and the referendum as innovative procedures to protect popular rights, and finally a "judicialist" regime, emerging in the mid-twentieth century, which relied upon judicial review. Dinan, *Keeping the People's Liberties: Legislators, Citizens, and Judges as Guardians of Rights* (Lawrence: University Press of Kansas, 1998). Dinan's conclusions are uncongenial to present-day law-faculty dominated constitutional jurisprudence, and have gained little traction. I fear my observations will prove similarly irrelevant to present-day jurisprudential concerns.

⁷ *National Party Platforms, 1840-1972*, comp. Donald Bruce Johnson and Kirk H. Porter, 5th ed. (Urbana: University of Illinois Press, 1973), 2, 3, 10, 16, 24.

⁸ *Ibid.*, 77.

⁹ *Ibid.*, 15.

¹⁰ *Ibid.*, 20.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*, 27.

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- ¹⁴ Ibid.
- ¹⁵ Ibid., 28.
- ¹⁶ Ibid., 32.
- ¹⁷ Ibid.
- ¹⁸ See Michael Les Benedict, "The Party Going Strong: Congressional Elections in the Mid-Nineteenth Century," *Congress and the Presidency* 9 (Winter 1981-82): 37-60.
- ¹⁹ Ibid.
- ²⁰ I have tried to describe the nature of constitutional politics in the Civil War era in "Lincoln and Constitutional Politics," *Marquette Law Review* 93 (Summer 2010): 1333-66.
- ²¹ 5 U.S. (1 Cranch.) 37 (1803).
- ²² 5 U.S. (1 Cranch) 299 (1803).
- ²³ 19 U.S. 264 (6 Wheat.) 264 (1821). Virginia argued that Section 25 of the Judiciary Act of 1789 must be construed in light of what it claimed was the state's general immunity from federal court jurisdiction in all but a few situations. But the argument clearly implies that construing Section 25 to authorize the Supreme Court to direct writs of error to state courts would render it unconstitutional.
- ²⁴ *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).
- ²⁵ 17 U.S. (4 Wheat.) 316 (1819).
- ²⁶ For example, *N.Y. v. Miln*, 36 U.S. (11 Peters) 102 (1837); *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449, 460 (Taney dissenting).
- ²⁷ 32 U.S. (7 Pet.) 243 (1833).
- ²⁸ See Donald F. Melhorne, "Jupiter's Sons: Greene County's Citizen Judges and the Sweeping Resolution, 1810-1814," in *The History of Ohio Law*, ed. Michael Les Benedict and John F. Winkler, 2 vols. (Athens: Ohio University Press, 2004), 1: 238-66; Melhorne, *Lest We Be Marshall'd: Judicial Powers and Politics in Ohio, 1806-1812* (Akron, Ohio: University of Akron Press, 2003); John Phillip Reid, *Legislating the Courts: Judicial Dependence in Early National New Hampshire* (Dekalb: Northern Illinois University Press, 2009). See generally Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (N.Y.: Oxford University Press, 1971). For the close link between procedural due process and early instances of judicial review, see Edward S. Corwin's classic "The Doctrine of Due Process of Law before the Civil War," *Harvard Law Review* 24 (Mar. 1911): 366-85.
- ²⁹ Edward S. Corwin identified the legal principle involved as the doctrine of "vested rights." I have argued that it is better understood as an injunction against "class legislation." See Edward S. Corwin, "The Doctrine of Due Process of Law before the Civil War," *Harvard Law Review* 24 (Mar. 1911): 366-85; Michael Les Benedict, "Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism," *Law and History Review* 3 (Fall 1985): 293-331.
- ³⁰ See Michael Les Benedict, "Civil Liberty in Ohio," in *The History of Ohio Law*, 2: 695-700 for the rubrics under which courts protected defendants' rights in Ohio.
- ³¹ *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).
- ³² Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (N.Y.: Oxford University Press, 1978), 417-18.
- ³³ Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (N.Y.: Oxford University Press, 2004); John J. Dinan, *Keeping the People's Liberties*. I think Dinan underestimates the degree to which a "judicialist" regime was developing at the turn of the twentieth century, the period identifies as the "populist" regime. I also want to distinguish between Kramer and Dinan's factual observations about popular constitutionalism and the role of politics and their normative proposition, explicit or implicit, that popular constitutionalism should constrain and limit judicial review. As a historian, I am concerned only with the former and take no position on the latter.
- ³⁴ See chapter 3 ("A Tradition of Resistance: Antislavery Litigators and the Fight for Freedom") of Jules Lobel, *Success without Victory: Lost Legal Battles and the Long Road to Justice in America* (N.Y.: New York University Press, 2003): 46-73.
- ³⁵ 59 Mass. (5 Cush.) 198 (1850).
- ³⁶ Ibid., 206-207. To improve clarity, I have reversed the order of the clauses in the first sentence of the quoted material. For further adumbration of this point, see Drinan, *Keeping the People's Liberties*, 14-22.
- ³⁷ J. Morgan Kousser, "'The Supremacy of Equal Rights': The Struggle Against Racial Discrimination in Antebellum Massachusetts and the Foundations of the Fourteenth Amendment," *Northwestern University Law Review* 82 (Summer 1988): 941-1010; James B. Stewart and George R. Price, "The Roberts Case, the

Easton Family, and the dynamics of the Abolitionist Movement in Massachusetts, 1776-1870,” in Stewart, *Abolitionist Politics and the Coming of the Civil War* (Amherst: University of Massachusetts Press, 2008), 61-88.

³⁸ *Congressional Globe* (hereafter C.G.), 38 Cong., 1 Sess., 1482-83 (April 8, 1864).

³⁹ Charles Fairman, *Reconstruction and Reunion, 1864-88—Part One*, vol 6 of *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States* (N.Y.: Macmillan, 1971), 1134-35. For a summary of the debates, see Vorenberg, *Final Freedom*, 94-112.

⁴⁰ For a summary of the debates, see Vorenberg, *Final Freedom*, 94-112. The following overview is based on the *Congressional Globe*, 38 Cong., 1 Sess., passim.

⁴¹ For one exception, see the warning of Indiana Democratic Representative William S. Holman that freedom implied participation in government and thus African-American suffrage, without charging Republicans with the intent to enfranchise freedmen. *Ibid.*, 2962 (June 14, 1864). Indiana Democrat Joseph K. Edgerton was not so charitable. *Ibid.*, 2987 (June 15, 1864).

⁴² Vorenberg, *Final Freedom*, 90.

⁴³ “Look at the front of Tammany Hall, or at almost any of the Copperhead banners swung over the street, and you see beneath the Janus-faced portraits of MCCLELLAN and PENDLETON, the inscription – ‘The Union as it was, and the Constitution as it is.’” *N.Y. Times*, Oct. 18, 1864, p. .

⁴⁴ *Ibid.*, 1324 (March 28, 1864).

⁴⁵ *Ibid.*, 1481 (April 8, 1864).

⁴⁶ *Ibid.*, 1488-89.

⁴⁷ 521 U.S. 507 (1997).