The Second Founding:

How the Civil War and Reconstruction Remade the Constitution

By Eric Foner

Reviewed by Marc Alexander

Marc Alexander is a mediator and litigator at AlvaradoSmith APC. He authors California Mediation and Arbitration blog (www.CalMediation.org) and is a co-contributor to California Attorney's Fees blog (www.CalAttorneysFees.com). He is a member of the California Litigation Editorial Board.

When President Lincoln began his Gettysburg Address, "Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal," he was acknowledging the Constitution was a flawed document. For his reference to 87 years, to a new nation, to liberty, and to equality, was not a reference to the Constitution, but rather to the Declaration of Independence. In the original Constitution, there was no reference to equality under the law. Nor did the promise in the Preamble to "secure the Blessings of Liberty to ourselves and our Posterity" include slaves. Referring to "the magnificent words of the Constitution and the Declaration of Independence" 100 years after the Gettysburg Address, Martin Luther King Jr. declaimed: "Instead of honoring this sacred obligation, America has given the Negro people a bad check, a check which has come back marked 'insufficient funds.'"

The 13th, 14th, and 15th Amendments, ending slavery, promising due process and equality under law, and providing that the right to vote was not to be denied "on account of race, color, or previous condition of servitude" addressed slavery and promises the Constitution had not fulfilled. The origins of those Reconstruction Amendments, the legislative battles to enact them, and their subsequent judicial interpretation and evisceration by the post-Reconstruction Supreme Court are the subject of historian Eric Foner's *The Second Founding*.

Foner, the DeWitt Clinton Professor Emeritus of History at Columbia University, has a masterful command of the history of race relations in the United States. He is the preeminent historian of Reconstruction, having authored *Reconstruction: America's Unfinished Revolution, 1863-1877*, winner of numerous awards and prizes. That earlier book's title brings together two themes of *The Second Founding*: the revolutionary nature of the Reconstruction Amendments and the unfinished promise of the revolution.

As Foner points out, the history of Reconstruction and the Amendments is "a prime

example of what we sometimes call the politics of history — the ways historical interpretation both reflects and helps to shape the time in which the historian is writing." In the early 20th century, the history of Reconstruction was written by the so-called Dunning School of scholars trained by William Dunning at Columbia University. This view of Reconstruction will be familiar to anyone who had to watch *The Birth of a Nation*. The intellectual foundation provided by the Dunning School helped to support the "Lost Cause" ideology of a South crushed by the Civil War and victimized by that unholy trinity of scalawags, freedmen, and carpetbaggers.

In an article Professor Dunning wrote in *The Atlantic* in 1901, he argued the Reconstruction Amendments enfranchised Blacks, leading to Republican party control of several Southern states, and that "the negroes exercised an influence in political affairs out of all relation to their intelligence or property, and . . . so many of the whites were disenfranchised, excessive even in proportion to their numbers." Eventually, "there emerged again the idea of Jefferson and Clay and Lincoln . . . that the ultimate root of the trouble in the South had been, not the institution of slavery, but the coexistence in one society of two races so distinct in characteristics as to render coalescence impossible . . . ." And acceptance of this, even in the North, led to the undoing of Reconstruction.

While Dunning's racist assumptions, relegation of slavery to secondary importance, and concern about political domination of the South by Blacks no longer dominates the writing of American history, the Dunning School represented a mindset that helps to explain the judicial evisceration of the Reconstruction Amendments — especially because Supreme Court Justices relied on writings of the Dunning School.

Foner's book includes a chapter on each of the Amendments, explaining how they were products of legislative debate, redrafting, and compromise. The Civil War's decisive Northern victory advanced the idea among northerners of "a powerful national state protecting the rights of citizens." While the Amendments accomplished major changes in the Constitution, abolishing slavery, promising due process and equality under law, and prohibiting denial of suffrage based on race, legislative compromises created weaknesses and ambiguities that could be exploited by those seeking to undermine the scope and impact of the Amendments.

During the legislative process, there were sordid compromises, and recognition of problems on the horizon. For example, 19th century feminists would be disappointed that the 14th Amendment inserted the limiting word "male." Final passage of the Amendment was "a long and torturous path, with numerous wording changes along the way . . .. " As for voting rights, "congress was hardly unaware that the Fifteenth Amendment's purpose might be circumvented," as would happen through poll taxes, literacy requirements, and expansion of criminal law violations that disenfranchised voters — facially nonracial requirements aimed at Blacks.

Most interesting for lawyers will be Foner's chapter explaining how the Supreme Court provided answers "to the question of how far the constitutional system and the rights of citizens had been transformed" by the Amendments. The answer "[w]ould spell disaster for black Americans." In 1890, a newspaper deplored that too many rights had been lost when they reached "that grave of liberty, the Supreme Court of the United States." Foner writes, "in almost every instance, the Court chose to restrict the scope of the second founding."

Once slavery was abolished — a great accomplishment — the 13th Amendment became "a dead letter." If the Court, however, had broadly interpreted the "badges and incidents of slavery" (a phrase that does not actually appear in the 13th Amendment), the reach and effect of that Amendment would have been greater, because that Amendment is not limited to state action. Because of the narrow interpretation of "badges and incidents," the 13th Amendment did not touch segregation in private businesses, in public pools and facilities, in schools, in hotels, and in transportation.

The 14th Amendment was weakened by the judicial interpretation of its state action requirement, so that criminal acts directed at Blacks by private citizens did not fall within the ambit of enforcement. And the *Slaughter-House Cases* (1873) "eviscerated the Privileges or Immunities Clause so effectively that it 'ceased to have constitutional meaning,'" by limiting protections to federal privileges or immunities, of which there were few. Over the 20th century, the Bill of Rights has been selectively and incrementally incorporated by the 14th Amendment — long after its framer, Representative John Bingham, argued for incorporation of the first eight amendments. The *Civil Rights Cases* (1883) would make "most of Sumner's Civil Rights Act unconstitutional on the grounds that it sought to punish discrimination by private businesses, not the states."

The 15th Amendment, prohibiting the federal and state government from denying a citizen's right to vote based on "race, color, or previous condition of servitude" was narrowly interpreted so that state restrictions that were racially neutral on their face, such as poll taxes, literacy tests, and felony disenfranchisement, passed muster. "The amendment's fate," concludes Foner, "was an extraordinary example of constitutional nullification and an unusual event in the history of democracy." Millions "who enjoyed the right to vote suddenly had it taken away."

In *Yick Wo v. Hopkins* (1886), the Supreme Court ruled that a law racially neutral on its face could be administered prejudicially, and violate the equal protection clause of the 14th Amendment law "if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances . . . ." Yet the Voting Rights Act of 1965 was necessary to protect the voting rights of Blacks from facially neutral burdens targeting their ability to vote.

Also falling by the wayside were the enforcement powers found in section 2 of the 13th Amendment, section 5 of the 14th Amendment, and section 2 of the 15th Amendment. With the resurgence of the Democratic Party, states' rights, and racism, the departure of Radical Republicans from the political scene, and a seeming national exhaustion and attention deficit, vigorous judicial enforcement failed to coalesce.

The framing of issues surrounding discussion of the Amendments and race relations in the 19th century can seem very familiar. For example, Justice Joseph Bradley "wrote that blacks needed to stop seeking 'to be the special favorite of the laws.'" This sentiment survives in the arguments of those who advocate Whites and "successful minorities" are the real victims of "reverse discrimination," an argument that has been used to undo affirmative action programs.

Also resonant in our time is Justice Harlan's correct prediction that the majority opinion in *Plessy v. Ferguson* (1896), the notorious case involving a Black man's eviction from a segregated railroad car and the "separate but equal

doctrine," would lead to a wave of segregation statutes in the South. Like the majority opinion in *Plessy*, the majority opinion in *Shelby County, Alabama v. Holder* (2013), gutting the preclearance requirement for federal approval in certain jurisdictions before changing voting rules, did not realistically address real-life consequences. Chief Justice Roberts wrote in *Shelby*: "The Fifteenth Amendment is not designed to punish for the past; its purpose is to ensure a better future." Foner acidly comments, "As anyone with a deeper understanding of American history would have predicted, Alabama immediately took the decision as a green light to enact laws meant to restrict the voting population."

Despite the promise of the second founding, some of the wounds addressed by the Amendments continue to suppurate. Presumably the 13th Amendment settled the issue of birthright citizenship; and yet now, it has been reintroduced into our polarized politics. The promise of equality under the law has not been fully tapped, as various groups seek to be fully embraced by the promise of the 14th Amendment. Where poll taxes, property qualifications, and felony disqualification once acted as facially colorblind means to suppress the votes of Blacks, today, "facially colorblind" means such as political gerrymandering, ID requirements, purging voter lists, shortening polling hours, eliminating polling booths, and felony disqualification, can disproportionately burden minorities.

As Foner explains, "the creation of meaning is an ongoing process" and "ambiguity creates possibilities." The 13th Amendment did not clearly define "involuntary servitude," and the 15th Amendment did not explain how to determine that voting restrictions were enacted "on account of race." As for the 14th Amendment, it speaks of general principles: due process, equal protection, and privileges or immunities. As to the "original intent" behind the 14th Amendment, inquiry is problematic, particularly so since women and Blacks did not sit in the Congress that drafted the 14th Amendment.

"[I]n almost every instance," writes Foner, "the Court chose to restrict the scope of the second founding." Foner argues the Supreme Court's narrow interpretation of the Amendments was not the only possible interpretation. Thus, the Amendments contain latent possibilities, just as did Justice John Marshall Harlan's dissent in *Plessy*. And it was not until 1954 that the "separate but equal" doctrine adopted by *Plessy* majority was rejected by the Warren Court in *Brown v. Board of Education*, marking a "Second Reconstruction."

Many of the issues presented by the Amendments are very much alive. How far does the promise of "equality under the law" extend? Who shall be counted as a citizen? What does "We the People" mean today, and what would it have meant if the People "had been more fully represented at Philadelphia"? When does a voter restriction become voter suppression?

Foner argues for a capacious interpretation of the Amendments — one centered not on the exquisite balance of state and federal government, but on civil rights: "viable alternatives exist to actual Supreme Court jurisprudence, alternatives rooted in the historical record, which would infuse the amendments with greater power." However, as a historian, Foner recognizes ground-shifting changes in constitutional interpretation do not occur in a vacuum. And so, while Foner views the second founding as an inspiration, he acknowledges the "counterinterpretation developed in Reconstruction and its aftermath . . . remains available, if the political environment changes."