

# Unalienable Rights, Reconstruction, and Constitutional Continuity

COMMENTARY

By [Peter Berkowitz](#) - RCP Contributor  
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Perhaps at no time since the decade or so preceding the Civil War have debates about America's commitment to fundamental rights been as rancorous as today. Yet at no time have fundamental rights in the United States been enjoyed by so wide and diverse a population as they are now. The contrast in contemporary America between the public rancor and the political reality reflects an estrangement from history and an accompanying loss of perspective.

From the beginning, the gap between the nation's promise of freedom and the shortcomings of American society fueled controversy, and in no matter so much as slavery. Those who declared independence in 1776 and those who drafted, debated, and ratified the Constitution in 1787 and 1788 tended to gloss over the vital question. As disagreement between the North and South intensified during the middle third of the 19<sup>th</sup> century about the extension of slavery into new territories, the controversy over the repugnant institution — to which the Constitution provided circumspect and indirect legal protection — moved to the front and center of national affairs.

Within the ranks of Americans who recognized slavery as a noxious evil, two major arguments emerged about the nation's founding principles. On one side stood those who regarded America's founding as fatally flawed. Prominent abolitionist William Lloyd Garrison thundered that because of its compromise with slavery, the Constitution was “a covenant with death and an agreement with Hell.” The American charter of government, he proclaimed, should be considered “null and void before God.” For Garrison, slavery was inseparable from, and irredeemably tainted, the nation's founding.

On the other side stood Abraham Lincoln. In 1857 -- the year before his famous debates with Stephen Douglas, a part of the soon-to-be president's unsuccessful bid to win election to the United States Senate -- Lincoln delivered a luminous [speech](#) condemning the Dred Scott decision, in which the United States Supreme Court held that blacks could be private property and could not be U.S. citizens. Lincoln focused on the Declaration of Independence and its affirmation of rights shared equally by all. The signers of the document “did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them,” stated Lincoln. “In fact they had no power to confer such a boon. They meant simply to declare the right, so that the enforcement of it might follow as fast as circumstances should permit.”

Moreover, he maintained, by grounding the nation in rights that no government -- including that of the United States -- could justly infringe, the founders also profoundly shaped the conduct and course of American politics. By declaring "certain unalienable rights," they created circumstances that favored protection of individual freedom and equality under law.

According to Lincoln, the founders "meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere."

In "The Second Founding: How the Civil War and Reconstruction Remade the Constitution," Eric Foner explores a crucial chapter in the nation's long and continuing struggle to realize the Declaration of Independence's golden promise. An emeritus professor of history at Columbia, an author or editor of some 25 books, and a Pulitzer Prize-winning scholar of the Civil War era, Foner delves into the debates over freedom in pre-Civil War America. He describes the fights surrounding drafting and ratification of the 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> Amendments in the five years following the Union's 1865 victory over the Confederacy. He also recounts the scaling back by courts and by Southern whites, in the final third of the 19<sup>th</sup> century, of the Reconstruction amendments' promise of equal treatment under the law. Writing with an authority and lucidity that befits a preeminent professional historian addressing a general audience, Foner occasionally punctuates his measured analysis with expressions of indignation at slavery's grotesque affront to freedom and equality and of urgency concerning the work still to be done to ensure that the rights of all persons in the United States are respected equally.

Foner's book raises the question whether the Reconstruction amendments -- as well as the work, 150 years later, that remains -- represent a continuation of, or departure from, the nation's founding principles. He does not provide a definitive answer. But his historical narrative bolsters Lincoln's view that, rather than the radically new beginning that Garrison demanded, the nation's second founding was a crucial step in the refinement and fulfillment of the Declaration's original promise of unalienable rights.

The Reconstruction amendments gave constitutional expression to this promise. The 13<sup>th</sup> Amendment (1865) abolished slavery. The 14<sup>th</sup> Amendment (1868) established birthright citizenship and provided due process and equal protection of the laws for all persons. The 15<sup>th</sup> Amendment (1870) guaranteed that the right to vote could not be denied on the basis of race. All three Reconstruction amendments assigned the federal government responsibility to secure the rights they announced.

Foner's discussion of the four types of rights recognized in antebellum America sheds light on how, in amending the Constitution, the United States could remain true to its deepest political commitments.

The most fundamental rights in the American political tradition, Foner explains, were understood to be the natural or unalienable rights proclaimed by Jefferson: "Every person, by virtue of his or her human status, was entitled to life, liberty (even though this principle was flagrantly violated

by the existence of slavery), and the pursuit of happiness (often understood as the right to enjoy the fruits of one's own labor and rise in the social scale)."

The second type was civil rights. This kind "included legal entitlements essential to pursuing a livelihood and protecting one's personal security — the right to own property, go to court, sue and be sued, sign contracts, and move about freely." Civil rights belonged not to all persons but to all free persons and "could be regulated by the state."

Third came political rights, which involved participation in the political process. These did not inhere in persons by virtue of their humanity, nor in free persons by virtue of their freedom. Rather, they were granted to citizens by express legislation. Before the Civil War, for example, casting a vote was deemed a privilege and not a right of citizenship.

The fourth type was social rights. This was "an amorphous category that included personal and business relationships of many kinds." In the 19<sup>th</sup> century and into the 20<sup>th</sup> those who sought to circumscribe the rights of blacks frequently opposed equal treatment in business dealings and the use of public accommodations — hotels, restaurants, transportation — on the grounds that it would compel "social equality" with whites in personal relations. American constitutional law came to recognize in the second half of the 20<sup>th</sup> century that equal access to public accommodations is rightly guaranteed by the federal government.

These analytical distinctions remain valuable not least because they remind us that the United States was founded on unalienable rights, but left to the democratic political process — limited and directed by the Constitution — to translate those human rights into institutions, laws, and, other types of rights that honor individual freedom and human equality.

Foner highlights an important difference between Reconstruction's second founding and the civil rights era approximately 100 years later: "[N]o significant change in the Constitution took place during the civil rights movement," he writes. "The movement did not need a new Constitution; it needed the existing one enforced." It is equally worth noting that the Reconstruction era also did not need a new Constitution; it needed the existing one amended — in light of the existing constitution's provisions for changing "the supreme law of the land" and in the spirit of the Declaration of Independence's soaring affirmation of the rights shared equally by all.

More attention to America's founding principles and the history of their influence on the nation's constitutional politics might reduce the rancor of contemporary debates about America's dedication to fundamental rights.

*Peter Berkowitz is director of the State Department's Policy Planning Staff. He also serves on the department's Commission on Unalienable Rights.*