

THE ORIGINAL INTENT OF THE FOURTEENTH AMENDMENT: A CONVERSATION WITH ERIC FONER

Eric Foner

David S. Tanenhaus:¹ This afternoon's conversation with Professor Eric Foner on Reconstruction, the Fourteenth Amendment, and Constitutional Interpretation is a significant event in the life of our young and dynamic law school, which has valued the importance of legal history since its inception. Today, we are honored to discuss perhaps the most complicated chapter in American history, the Reconstruction Era, with its preeminent historian.

Professor Foner's monumental *Reconstruction: America's Unfinished Revolution, 1863-1877*,² is required reading for all serious students of American history and law. Professor Foner, an elected fellow of the American Academy of Arts and Sciences and the British Academy, is the DeWitt Clinton Professor of History at Columbia University. He has been a prolific author since the publication in 1970 of his first book, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War*.³ Most recently, he has published a textbook *Give Me Liberty!: An American History*⁴ and the companion two-volume documentary reader, *Voices of Freedom*.⁵ Earlier this week, his *Forever Free: The Story of Emancipation and Reconstruction*, written with Joshua Brown, was published.⁶

Professor Foner has also played a leading role in furthering the historical profession's mission to support the creation and dissemination of knowledge. He is the former president of both the Organization of American Historians and the American Historical Association. He also speaks throughout the United States to high school and middle school teachers as part of the Teaching American History program.

Professor Foner has also made his mark in legal circles. The American Bar Association recently awarded *The Nation* the Silver Gavel Award for an issue featuring Professor Foner's lead article, with Randall Kennedy, "Brown at 50."⁷ This award is given for outstanding efforts to foster public understand-

¹ David S. Tanenhaus, James E. Rogers Professor of History and Law, William S. Boyd School of Law, University of Nevada, Las Vegas.

² ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* (1988).

³ ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (1970).

⁴ ERIC FONER, *1 GIVE ME LIBERTY!: AN AMERICAN HISTORY* (2004).

⁵ ERIC FONER, *2 VOICES OF FREEDOM: A DOCUMENTARY HISTORY* (2004).

⁶ ERIC FONER & JOSHUA BROWN, *FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION* (2005).

⁷ *THE NATION*, May 3, 2004; available at http://www.thenation.com/doc/20040503/foner_kennedy (last visited Jan. 25, 2006).

ing of the law. Professor Foner also served as an expert witness in the affirmative action cases, *Gratz v. Bollinger*⁸ and *Grutter v. Bollinger*.⁹

Before we begin today's conversation, I would like to thank the people who have made this event possible. Professor Michael S. Green of the Community College of Southern Nevada, author of *Freedom, Union and Power: Lincoln and his Party in the Civil War*, deserves special thanks for arranging Professor Foner's visit to Las Vegas, including his talk this afternoon.¹⁰ In addition, Deans Dick Morgan, Joan Howarth, Annette Appell, and Christine Smith have all provided support for the event; and Professors Tom McAfee, Sylvia Lazos, and Lynne Henderson all contributed questions for our distinguished speaker to consider.¹¹ Finally, the advisors¹² and editors of the *Nevada Law Journal* have also worked hard on today's event.

The law faculty has asked Professor Foner to begin this afternoon's conversation by responding to questions about how his historical perspective and sensibility can help us to interpret the Fourteenth Amendment. There is a burgeoning literature in the field of legal history on the differences between historical and legal methods of interpretations¹³, and we believe that today's conversation will contribute to this larger, ongoing conversation between the disciplines.

I am delighted to welcome Professor Foner to begin our conversation about the most misunderstood period in American history, which produced the most significant amendments to the U.S. Constitution.

Eric Foner: Thank you very much. I'm quite happy to be here. This is billed as a conversation, but I do want to begin with a few thoughts that arise out of the questions that were sent to me.¹⁴

The thing to start with is that historians like myself are often very puzzled by what seems to be a focus by many legal historians on the original intent of the Fourteenth Amendment, or the original intent of anything in the Constitution. Now, on the one hand, historians are always trying to figure out original intent. I mean part of our job is to figure out what people were thinking and doing at the time: what their motivations were; what ideas went into the actions they took. But the first point is that the question of original intent is a political question. It is not a historical question.

Whether the Constitution should be interpreted according to original intent is a political issue. Historians don't have an answer to that question, and as citizens we may have thought about it but there's no particular reason historians should know whether the Supreme Court should interpret things on the basis of original intent or not. We do often find that the way that many, not all, legal

⁸ *Gratz v. Bollinger*, 135 F. Supp. 2d 790 (E.D. Mich. 2001).

⁹ *Grutter v. Bollinger*, 137 F. Supp. 2d 874 (E.D. Mich. 2001).

¹⁰ MICHAEL S. GREEN, *FREEDOM, UNION AND POWER: LINCOLN AND HIS PARTY IN THE CIVIL WAR* (2004).

¹¹ See *infra* Appendix I.

¹² Professors Elaine Shoben, Steve Johnson, & Thomas B. McAfee, William S. Boyd School of Law, University of Nevada, Las Vegas.

¹³ See, e.g., LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996); see also JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996).

¹⁴ See *infra* Appendix I.

scholars go about trying to ascertain original intent is sometimes confusing or perhaps limited.

First, legal scholars tend to focus very narrowly, particularly *vis à vis* the Fourteenth Amendment. When I wrote my book on Reconstruction¹⁵ I tried to talk about what they meant and what they were thinking of when they wrote the Fourteenth Amendment and ratified it, but to do that you have to look at the entire society. You've got to look at trends of ideology going back before the Civil War. You've got to look at many historical actors outside of Congress who had no direct role in the drafting and ratification of the Fourteenth Amendment, but nonetheless created the climate of the time.

Professor Tanenhaus mentioned my book on Reconstruction. One of the things that made it different from previous literature was that it made African-Americans central actors in the Reconstruction Era. The former slaves helped to set the agenda for that period and put forward their own vision of what "emancipation" meant, and what kind of society should emerge out of the ashes of slavery.¹⁶ There weren't any black people in Congress when the Fourteenth Amendment was drafted. There were some African-Americans in the state legislatures in the South that eventually ratified the Fourteenth Amendment, but one interesting question might be, "How do you get an African-American voice into discussions of the purpose or the original meaning of the Fourteenth Amendment?" You're not going to get that if you simply look at the members of the Thirty-ninth Congress.¹⁷

So, as I say, historians' visions of this question are usually far broader and far more indeterminate. I don't think any historian would say there was a single meaning that was universally accepted in the Fourteenth Amendment. There was a set of general purposes, but they came out of the greatest crisis in our history. You have to step back and look at the whole battle over Reconstruction that took place in 1865 and the first part of 1866. The Civil War had thrown open to question fundamental issues about the nature of American society. It had ended slavery. It had led to a significant decline in racism in the North, although certainly not the elimination of racism. It had generated new ideas which had very little precedent before the war about the American nation and how to define what nationality is, about American citizenship, about the federal system, about what freedom is in American society, and about the Republican Party and its role in society. And all of those things flow into the

¹⁵ FONER, *supra* note 2.

¹⁶ For example, in the introduction to RECONSTRUCTION, Professor Foner noted the influence of the distinguished African American scholar and activist, W.E.B. DuBois. FONER, *supra* note 2. See W.E.B. DuBois, BLACK RECONSTRUCTION: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880 (1935).

¹⁷ On African-American officeholders during Reconstruction, see ERIC FONER, FREEDOM'S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION (1993). See also THOMAS C. HOLT, BLACK OVER WHITE: NEGRO POLITICAL LEADERSHIP IN SOUTH CAROLINA DURING RECONSTRUCTION (1977).

Fourteenth Amendment. The original intent of the Fourteenth Amendment covers all of these kinds of issues.¹⁸

Now as I said in my Reconstruction book, and this was quoted in the book by [Michael J.] Perry that's mentioned in the questions,¹⁹ the Thirty-ninth Congress was engaged in a bitter battle with Andrew Johnson over the reconstruction of the nation. Without that battle, the Fourteenth Amendment might not have been written. But in the course of that, Congress was forced to articulate its vision of what the reconstructed nation ought to look like. My view is that the Fourteenth Amendment was intentionally written in this broad, ambiguous language that we all know. It's very different from the Civil Rights Law of 1866²⁰, which was passed over Johnson's veto in April 1866, so that's two months before the Fourteenth Amendment is sent by Congress to the states. The Civil Rights Law lists specific rights that you are to enjoy.²¹ The Fourteenth Amendment doesn't list any specific rights. They didn't want to list specific rights. Congressman Bingham, who was the key author, said, in effect, we do not want to list rights because we might leave some out inadvertently. We're not stating what the rights of citizens are. We are giving a principle of how all citizens ought to enjoy equality in this country. They wanted to leave the door open to future congresses, future courts, to deal with circumstances that might not even be anticipated in 1866.

One of the key points about the Fourteenth Amendment which it's easy to lose sight of is that the people who wrote it expected it to be enforced. You don't put something in the Constitution and then expect it to be nullified for a hundred years, which is what actually happened. And if it had been enforced, then we wouldn't even be debating many of the questions today about what is the federal court's power to override state legislation, et cetera. That's why they put the third section in, which we don't even think about today, which disqualifies from office leaders of the Confederacy. They wanted to create a situation in which what they would consider loyal government would come into power in the South. Johnson's governments would be eliminated and you would have local governments which were willing to abide by this principle of equality among citizens. In that case, the federal government wouldn't have to do anything. But it didn't work out that way. They didn't anticipate it wouldn't work out that way. They didn't dismantle the federal system but they assumed, as I said, that local and state governments of the South within the federal system would abide by the Constitution. That didn't happen, and therefore the way the Fourteenth Amendment evolved eventually was based on the fact that local governments were obstructing it and nullifying it, not abiding by it.

¹⁸ FONER, *supra* note 2; see also LA WANDA COX & JOHN H. COX, POLITICS, PRINCIPLE, AND PREJUDICE, 1865-1866: DILEMMA OF RECONSTRUCTION AMERICA (1963); and ERIC L. MCKITTRICK, ANDREW JOHNSON AND RECONSTRUCTION (1960).

¹⁹ MICHAEL J. PERRY, WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT 48 (1999). See also Eric Foner, *My Life as an Historian*, in HISTORIANS AND RACE 91 (Paul A. Cimbala & Robert F. Himmelberg eds., 1996).

²⁰ 1866 Civil Rights Act, 14 Stat.27 (1866).

²¹ *Id.*

Now again, to think about the Fourteenth Amendment, we have to step back and think about the abolition of slavery. I mean that's the fundamental point here, the abolition of slavery. What are the consequences for American society of the abolition of slavery? You can't answer that question without first asking, what is slavery, to begin with? What do you think slavery is? That may seem like a very simple question, but it's not. What was abolished? Was it labor without wages? Is that what was abolished, so now people have to pay wages and that is the meaning of emancipation? Is slavery a broad system of racial inequality? And if that's abolished, other consequences flow out of emancipation. Is it a system of unequal power in which some people exercise power over others in the society? Is that what's abolished? What is necessary to secure the abolition of that? What does it mean to be a free American? Remember, Congress passed the Civil Rights Law of 1866 under the Thirteenth Amendment, not the Fourteenth; there *was* no Fourteenth Amendment. The Civil Rights Law was passed as part of the abolition of slavery. That was the constitutional justification for it. It was part of the implementation of the abolition of slavery to create a situation of legal equality and of black citizenship.

So this question of what is slavery is really at the heart of the Fourteenth Amendment. Another way of putting it is to say, "What further social changes are needed in a society that was resting on slavery to fulfill the promise of the abolition of slavery?" Slavery was absolutely central to American life, politics, constitutionalism, economics before the Civil War. The abolition of that institution, as I said, raised all sorts of questions about what new systems, what new institutions, what new principles had to be implemented. That's the kind of question that the Thirty-ninth Congress was thinking about. There was no one single answer. You will search in vain for a single set of answers to that question that all members of Congress agreed to.

Second of all, the Fourteenth Amendment was a political document. It was written in part to be the platform for the Republican Party in the congressional elections of 1866. It was a compromise between the various factions of the Republican Party. There were Radical Republicans who wanted to give African-American men the right to vote. As you all know, the Fourteenth Amendment does not give anybody the right to vote. It attempts to penalize states which deny certain men the right to vote, but it was denounced by quite a few Radicals for recognizing the right of states to limit the right to vote. On the other hand, there were people like Thaddeus Stevens, a congressman, not a senator. Read Stevens's speech, the last speech before the adoption by the House of the Fourteenth Amendment. It was a wonderful speech where he laid out the Radical vision of a perfect republic with no inequality of race, of caste, et cetera. Then he said, in essence, that dream has vanished. That's not what the Fourteenth Amendment is. It's imperfect. But I am supporting it. Why? Because it's a step in the right direction. We're going to continue to move forward.²² In other words, people like Stevens didn't think the Fourteenth Amendment was the final statement of the victorious Union as to what the status of the former slaves was going to be. This was a resting place. Most

²² CONG. GLOBE, 39th Cong., 1st Sess. 3144, 3148-49, 4103 (discussed in FONER, *supra*, note 2, at 254).

northern Republicans didn't think you could go to the northern public in 1866 with black suffrage as part of your platform, so they put that issue aside until after the election.

And so one of the purposes of the Fourteenth Amendment was to secure the supremacy of the Republican Party in the nation. That's why I think *Bush v. Gore*,²³ which is one of the oddest uses of the Fourteenth Amendment, actually was a good original intent decision, because the purpose of the Fourteenth Amendment was to keep the Republican Party in power and that's how the Supreme Court acted.

Remember also that the shadow of *Dred Scott*²⁴ hovered over all of these deliberations. *Dred Scott* was by far the most important decision of the Supreme Court before the Civil War in the minds of the people who fought the Civil War. It was a warning against the Supreme Court usurping power. The service of black soldiers in the Civil War and the general process of emancipation had repudiated *Dred Scott* and had, as I said, led to a different vision of American life in which African-Americans were citizens of the United States, which *Dred Scott* denied. But there was also a long tradition of what you might call alternative constitutionalism which had no legal standing before the Civil War but had been articulated by abolitionists and some Radical Republicans. This other tradition of a unified nation-state with a single national citizenship with all citizens enjoying the same rights, that vision had been legitimated, so to speak, by the Civil War and emancipation, and that's part of what a lot of members of Congress thought they were doing in drafting the Fourteenth Amendment.

Now I would be happy to discuss, if people want, the whole logic or illogic of originalism, original intent, as a mode of constitutional interpretation. As a historian, I notice that textual originalism is something that all sorts of people appeal to when it's in their self-interest to do so, and when it's not, they forget about it. Today it's mostly appealed to by conservatives. During the Clinton impeachment, it was suddenly liberals who were racing back to discover the original intent of the drafters of the Constitution as to what that provision about impeachment, high crimes, and misdemeanors meant, and they said, no, no, the Founding Fathers would never have meant the kind of things that Clinton was accused of, so they suddenly became originalists. In fact, during the Clinton impeachment, a group of historians circulated a public statement that the impeachment of Clinton was a violation of the original purpose of the impeachment clause in the Constitution. I refused to sign it. I thought the impeachment of Clinton was absurd, but I refused to sign it and people said, what, are you in favor of the impeachment of Clinton? I said no, I am not in favor, but I am against this whole idea that originalism is how you decide whether the guy should be impeached or not, and moreover I notice that most of the people who signed this are not constitutional scholars. To the person who asked me to sign it, I said, "Can you tell me what the original meaning of those words was in the minds of the Philadelphia convention?" And she said, "Well, no." I said, "Well, how can I sign this then? How can you sign it?"

²³ 531 U.S. 98 (2000).

²⁴ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

"Well, because we're against the impeachment of Clinton." [Laughter] The attempt to use history to answer political questions can often lead you to be skating on very thin ice, so to speak.

But I also find it odd that some conservatives have been trying to, for example, square the *Brown*²⁵ decision with original intent, and if there's one thing you can say about the Thirty-ninth Congress, it was not thinking about school segregation when it passed the Fourteenth Amendment. There's no question about that. They set up a segregated school system in Washington, D.C. right at the same time. Most black leaders were not thinking about it. The issue of segregation versus integration was not an issue at that time. It's like saying what were they thinking about gay marriage? It was not an issue, so they weren't. There's nothing about gay marriage in the original intent. The issue at the time was *access* to education, and whether African-Americans should *have* education. Under slavery it was illegal to educate a slave. In presidential reconstruction, some of the southern states began making provision for public education but only for whites. So in a sense, the Thirty-ninth Congress said no, blacks have to get education too. It is illegal to set up a school system just for whites. That was the issue: exclusion from education, not integration or segregation.

The funny thing is *Brown* is now iconic. I mean, even Robert Bork says that *Brown* was rightly decided on an originalist ground, which is ridiculous. The Supreme Court itself, as you know, was quite candid about that in its decision. It said, we really don't know what the original meaning of the Fourteenth Amendment was, and anyway, it doesn't matter. Education means something entirely different in mid-twentieth century America than it did in mid-nineteenth century America. So the deprivation of the right to equal education is a wholly different matter.

By the way, as a student of mine pointed out to me this week when I mentioned I was coming out here to talk about this, "Look, even on the website of the Supreme Court, there is a little history of the Supreme Court and in there it talks about the Supreme Court guaranteeing rights under a living constitution."²⁶ The website of the Supreme Court itself repudiates original intent and talks about a living constitution.

Let me just say one or two more things about this because I think more important to this topic is how the courts do try to *use* history, and often misuse it. When the Supreme Court does refer in footnotes of opinions to Reconstruction, they normally cite literature which is completely out of date. In other words, if you're going to be an originalist, you ought to be up to date in historical interpretation, but they aren't. But the courts have an obligation to know up-to-date history, which they often don't, and particularly when it comes to issues of race. I may be wrong about this but I believe it's true that no Supreme Court decision has ever stated that America is a racist society. In fact, they denigrate what are called by Justice Sandra Day O'Connor arguments based on "societal racism."²⁷ You can have a remedy if there's individual discrimina-

²⁵ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

²⁶ See <http://www.supremecourtus.gov/about/constitutional.pdf> (last visited Feb. 1, 2006).

²⁷ See FONER, WHO OWNS HISTORY?: RETHINKING THE PAST IN A CHANGING WORLD 184-85 (2002).

tion. In fact, in a famous Richmond affirmative action case,²⁸ the Supreme Court overturned a Richmond city plan to give extra benefits to black construction companies. O'Connor's opinion said you know the fact that they didn't give contracts in the past to a lot of black contractors, none of them, doesn't prove discrimination. Maybe blacks just choose different occupations than whites.²⁹ Now, to say that in this country, as if the choice of occupation in American history has been totally free for everybody and equal and the distribution of people along the employment system is just a matter of individual choice, shows a shocking lack of understanding of the history of race in this country. But you find that all the time, and I can well understand why the Supreme Court doesn't want to rule "this is a racist society" because look at all the cases that would open up with people seeking remedies. Still, I found it interesting because on affirmative action, for example, the court rulings are absurd to any person who knows any history. Everybody knows the reason for affirmative action is because some people have had the country standing on their neck for three hundred years, and finally they took their foot off their neck and said, well, maybe we'll give you a little help. To most people that makes sense, but that is not the legal basis for affirmative action. As you all know, the legal basis is the educational value of diversity.

I was the witness in a court in Detroit, a federal court.³⁰ I wrote an expert opinion and I went and testified, which was a very interesting experience which drove home to me the difference between a legal situation and a historical situation. First of all, the judge seemed to think this was an opportunity to get a free education and he kept questioning me over and over about Reconstruction. He said, "Professor, what was Andrew Johnson doing?" And what about this and what about that and the Klan? It didn't have anything to do with the case but he just figured he had a free opportunity to clear up a few things in American history. It was like being back in my orals exams.

Then the cross-examination began and they started asking me questions about my expert opinion. But of course the difference is that to a historian, especially when you're dealing with an issue like race, you're generally looking for nuance and complication. You're always looking to give the full complex picture with all the different variables. That's not what they want in a court of law. They want yes-and-no answers, but these questions are not amenable to yes-and-no answers, so I found it very interesting.

But even more profoundly, to go back to my other point, I wrote this expert opinion, and it was a history of race in America, but it had to support this legal argument. I didn't write anything that I didn't believe was true. I wrote about how the historical experience of African-Americans and whites has been so different in American history that most blacks and most whites have ended up with very different perceptions—which I think is true—about key issues like the police, the legal system, is this a free society, things like that. That fits into the diversity argument. But if I were just sitting down to write a history of race, I wouldn't write about that. That's not how I would start off. I would talk about a lot of other issues which are much more important than

²⁸ *City of Richmond v. J. A. Cronson Co.*, 488 U.S. 469 (1989).

²⁹ *Id.* at 510.

³⁰ *Grutter v. Bollinger*, 137 F. Supp. 2d 874 (E.D. Mich. 2001).

whether psychologically blacks and whites have different perceptions. The Supreme Court's unwillingness to face up to the real history of racism in America skews the whole debate into this strange diversity area which to me is a minor little side note to the actual reasons for affirmative action.

Let me finish by saying that lawyers should do their job and historians should do their job. The questions historians ask are not always the same questions that lawyers or legal professionals ask. It was a British historian, W.R. Brock, who made what may be the most profound point of all here, in a book called *An American Crisis*.³¹ It took a British historian, where they don't have a written constitution, to say, actually the existence of a written Constitution was a big problem during the Reconstruction era, that this notion of constitutionalism actually was an impediment to solving the crisis of a nation in a situation that the Founding Fathers had never anticipated. You can go to the Constitution all you want and you will never find out what the Constitution says about reconstructing the nation after a civil war. There's nothing in there. But the need to do so shows the power of constitutionalism even in the victorious North. You know Stevens said, let's treat them as conquered provinces; forget about the Constitution. That had the virtue of being true. I mean that was the reality. The South was a conquered territory. That's the only reason they were in the Union. But most Northerners were not willing to go to that step. They wanted a set of policies that they could claim were within a constitutional framework, and if they couldn't do that they would amend the Constitution. But they were thinking within this constitutionalism mode of thought, and Brock said that really was a straitjacket on thought. It stifled creativity at the moment of the greatest crisis in American history. So, that's another thing we might want to think about, whether our focus on the Constitution might be a little misguided when so many other issues were up for grabs at that time which were not in their essence constitutional issues.

Let me just stop there and throw the discussion open to any questions or comments or anything anyone may want to put on the table here.

Jean Sternlight:³² I'm Jean Sternlight. I'm a law professor. This is a rather broad question, so feel free to narrow it as you need to. I'm wondering whether as a historian you can give us a sense of why you think the United States has ended up or the United States Supreme Court has ended up with this very cramped version of how race ought to be viewed. Specifically, why does our country or the Supreme Court insist on the colorblind sort of methodology, whereas in quite a few other countries they've been able to deal with their racist history in a more up-front way and take more of the approach that you've suggested when they undertake affirmative action or whatever it might be called in other places to make up for past wrongs.

Eric Foner: I think that's a great question, and I don't actually have any very profound answer to it. I think in some sense it is a reflection of the very strong hold that some idea of meritocracy and individual striving still holds in this country, that people ought to advance on their own merits, and that some-

³¹ W.R. BROCK, *AN AMERICAN CRISIS: CONGRESS AND RECONSTRUCTION, 1865-1867* (1966).

³² Jean Sternlight, Director of the Saltman Center for Conflict Resolution, Saltman Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas.

thing that holds somebody back is illegitimate. Obviously slavery is illegitimate. Discrimination is illegitimate. But this is a society of individuals. The thinking is out there that especially since the civil rights movement and since the writing of civil rights laws, racism is a thing of the past. I'm sure people say, yeah, maybe back in the 1920s and '30s there was widespread racism but we're not in a position to deal with that now. Today we have a society in which people have equal opportunity. If you can find specific examples of people being denied that, then fine, we'll adjudicate it. There's one group on the Court, Antonin Scalia, and Clarence Thomas, who say that the basic problem is classification by race.³³ Even thinking about race is the problem. In a really colorblind society, race would be off limits. Nobody would talk about it and it would be gone. That is not the position of the whole Supreme Court but I think the O'Connor position, which was basically the centrist position on the Supreme Court, was what I said, that basically racism is not a big problem right now, and therefore the Supreme Court cannot deal with it; that societal racism is too abstract an issue to be able to be dealt with through legal means.

Is affirmative action a violation of the principle of equal protection of the laws that is in the Fourteenth Amendment? Again, a historian can't answer that question without asking, "What is the basis on which you want to interpret the Constitution?" Did the people who wrote it envision affirmative action? Well, not in a modern sense, but they had just set up the Freedmen's Bureau as a federal agency to help out the former slaves. Is that affirmative action? Maybe it is, in a modern sense. I don't know. But I think they would've been very surprised at the notion—which is quite popular on the court today—that actions of government that seek to help a previously degraded group are legally equivalent to actions that favor an advantaged group. I think they wouldn't have accepted that logic at all. But it all depends on what you mean by equality.

As you all know, the Fourteenth Amendment introduced the notion of equality into the Constitution. There was nothing about equality in the original Constitution except when it talks about the number of senators that each state has. That's the only use of the word "equal" in the original Constitution. The Fourteenth Amendment introduces the notion of equality. Until you can define for yourself what you mean by equality, you can't answer a lot of these questions about what is the meaning of the Fourteenth Amendment.

Martin Geer:³⁴ This whole notion of original intent, how did that develop in constitutional jurisprudence?

Eric Foner: Well, there are probably a lot of people in this room who are more qualified to answer that question than I am. It's like the weather, right? Everyone talks about it but nobody does anything about it. The Supreme Court generally does not operate on original intent. There are dozens and dozens of Supreme Court rulings which are considered good law today which are completely opposite to any notion of original intent. Do you think the Founding Fathers thought that flag burning was a violation of the freedom of speech? I

³³ See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); see also FONER, *supra* note 27, at 186.

³⁴ Martin Geer, Externship Director and Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas.

don't think they did. But I don't know. Does the Supreme Court operate on the basis of original intent today, a majority of the Supreme Court?

David S. Tanenhaus: In response to Marty Geer's question, do you read the *Dred Scott* decision as the beginning of original intent?

Eric Foner: Well, *Dred Scott* was an original intent decision, although a lot of historians think that Chief Justice Roger Taney overdid it in terms of the most infamous line, that a black person has no rights which a white man is bound to respect.³⁵ That was Taney saying that's what the Founding Fathers believed. In fact, he said we're actually a little more enlightened than the Founding Fathers, but the job of the Supreme Court is to do what the Founding Fathers intended. This was the first original intent decision maybe, if you want to put it that way. But many people would say that's completely wrong. That's *not* what the Founding Fathers or the revolutionary generation thought. Black people voted in some states to elect delegates to the ratifying conventions that ratified the Constitution. How can you say that they had no rights which anyone was bound to respect? In fact, at the time of the ratification of the Constitution, more states allowed African-Americans to vote than didn't, if they met property qualifications. So one thing about original intent, as I said before, is that you have to be up to date with history; and also it's a very strange doctrine if you really take it seriously. Constitutional jurisprudence could be turned around 180 degrees if we happen to find more historical evidence. We find a box of papers, letters by delegates to the Constitutional Convention, talking about, I don't know—well, let's say we find out that James Madison was gay. That might completely upend all of our constitutional theory in some way. So that's a strange basis for deciding what principles are to be implemented in 2005.

What about this question of, "Is the Supreme Court at the moment in its majority operating on the basis of original intent? Yes or no?" This is a court. [Laughter]

David S. Tanenhaus: I think just my own response to that, I think there are certain members of the Court, particularly Justice Thomas, who see case law as something that doesn't have the legitimacy of trying to determine original intent or the Founders—

Eric Foner: Right.

David S. Tanenhaus: And I think there's a sense that we don't think about constitutional law as kind of the development of common law with false digressions—

Eric Foner: Right. Right.

David S. Tanenhaus: We don't appreciate advances in history. So I don't think the majority of the Court is operating on the basis of original intent.

Eric Foner: Well, it clearly doesn't. Look at *Lawrence v. Texas*.³⁶ Justice Kennedy's 5-4 opinion said explicitly that freedom is a concept that changes over time.³⁷ He completely repudiated the original intent notion. He said freedom means something different today. Today it is inadmissible to

³⁵ *Scott v. Sandford*, 60 U.S. 393, 407 (1857) (discussed in FONER, *supra* note 27, at 177).

³⁶ 539 U.S. 558 (2003).

³⁷ *Id.* at 564-74 (providing a broad historical summary of changes in jurisprudence regarding sodomy both in the United States and abroad).

penalize people because of private consensual behavior. It may have been permissible in the past, but what does that have to do with today? That's idiotic. If the Founding Fathers thought that gays should be penalized, why should that mean that in 2005 we should do that? So I don't actually think the Supreme Court operates on original intent—maybe in individual cases they do, but not generally speaking.

Sylvia Lazos:³⁸ I wanted to go back to Professor Sternlight's question about why American constitutional law has had such a difficult time with racism. Let me suggest one answer and that is the direction of law in the United States has been dominated by white men. First it took two hundred years to get Thurgood Marshall appointed to the Court, and if you read Thurgood Marshall's opinions, they're very different from those of Justice O'Connor and Justice Scalia.

Eric Foner: Right. Right.

Sylvia Lazos: That's why we have this version of white America's view of history, which is white people are innocent and we're a great country; and if anybody tries hard enough he can make it just like a white person can.

Eric Foner: I think that there's a lot of truth in that, and in fact Justice Ruth Bader Ginsberg is another example one could cite because of her concurring opinion in *Grutter*.³⁹ She didn't base it on diversity. She based it on the history of racism. She said up front, look, there's been a lot of racism in this country and that's why we need some affirmative action, and there's still racism. But that was not the majority opinion of the Court.

The point you're raising is very good and really in a sense goes to the heart of a fundamental problem with original intent, which is how do you get the voices of the excluded into an original intent debate? The fifty-five men who drafted the original Constitution represented a very narrow segment of American society. They were rich, they were white, they were free, and they were male. Not only that, they had their own private self-interests which they wrote into the Constitution. I don't want to go back to Charles Beard but they did have a vested interest in the credit of the country being stable. Why should we privilege the views of a small minority of the population over many others who at the time held different views but weren't represented because of the structure of power in the Constitutional Convention?

So you're right—just the makeup of the Court, the makeup of the legal system, and the makeup of Congress have tended to move the law in a direction which is not all that open to clear judgments about the enduring history. I personally am sympathetic to the idea, although no court in the land has ever adopted this, that the Thirteenth Amendment ought to be used in these cases, not the Fourteenth Amendment. We might be better off without the Fourteenth Amendment at all.

Many of these disputed policies are consequences of the abolition of slavery—are logical consequences—it goes back to my point of what is the abolition of slavery? If it's the destruction of an entire social order based on inequality, then efforts to raise people to equality is a logical consequence of

³⁸ Sylvia Lazos, Justice Myron Leavitt Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas.

³⁹ *Grutter v. Bollinger*, 539 U.S. 306, 345-346 (2003).

the Amendment. Now someone might say, well, look, how are you going to get women into that, though? Affirmative action applies to women. That's a good question. But in terms of African-Americans—I think the only case—I could be wrong about this—that cited the Thirteenth Amendment was, I think it was '68, this open-housing case, *Jones*.⁴⁰ They used the phrase "the badges of servitude" or something⁴¹ to support a federal open-housing law.

David B. Thronson:⁴² In thinking about who the Fourteenth Amendment reaches, I teach immigration law and we see a resurgence of people trying to argue back to an original intent of the Fourteenth Amendment as affecting only African-Americans, so that the rights of citizenship in the Fourteenth Amendment to all persons born in the United States isn't intended in any way to reach anyone other than African-American slaves who were freed.

Eric Foner: I don't think that's true. I mean again they were not debating immigration at that time, but they were well aware that these measures, put in abstract terms, would affect many. In my book, I seem to remember I actually quoted a congressman who said this affects immigrants from abroad, it affects everybody. But we know they were thinking of other groups because when they passed the Fifteenth Amendment, they specifically reworded it, unfortunately, to allow western states, I have to say, to exclude the Chinese from voting. Because you know the original language of the Fifteenth Amendment was a positive grant of the right to vote to males over the age of twenty-one, which would've eliminated a lot of the methods that southern states eventually used to disenfranchise blacks. But California, Nevada, Oregon said, no, no, no, we can't let these Chinese vote, so they turned it around and said you can't deprive a person of the right to vote on the basis of race but you can on other grounds. So they realized that these principles were going to be applying to other people than former slaves.

Willard H. Rollings:⁴³ Native Americans were not citizens until 1924.

Eric Foner: Right . . . it says in the Fourteenth Amendment, of course, except Indians not taxed. You may know better than I—I've often asked this and I've never known. Is that true of Indians not on reservations also?

Willard H. Rollings: Yes, it applies to Indians that—there were Indians who left the reservation and said, OK, I'm living in Omaha, I'm living like a white person . . .

Eric Foner: And they're still not citizens. Oh, that's interesting. OK, I didn't even realize that.

David B. Thronson: They're citizens but by statute, not by Constitution.

Eric Foner: Well, in '24, they did give Indians American citizenship, right?

⁴⁰ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 n.78 (1968) (citing Justice Harlan's dissent in *Civil Rights Cases*, 109 U.S. 3 (1883)).

⁴¹ See *Civil Rights Cases*, 109 U.S. at 43 (Harlan, J., dissenting) ("[S]uch discrimination practiced by corporations and individuals in the exercise of their public or quasi-public functions is a badge of servitude, the imposition of which Congress may prevent under its power. By appropriate legislation, to enforce the Thirteenth Amendment . . .").

⁴² David B. Thronson, Associate Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas.

⁴³ Willard B. Rollings, Associate Professor of History, University of Nevada, Las Vegas.

Willard H. Rollings: In '24 they gave them citizenship. They didn't vote in Arizona until . . .

Eric Foner: Right. Voting. But voting of course is not a right of citizenship in our law, as we all know, and that goes back to this question of what we mean by equality. In the mid-nineteenth century, people who talked about this made distinctions among different kinds of equality which are much less familiar today. There were natural rights which were open to everyone. That's what Abraham Lincoln said, you know. Before the Civil War, he said, essentially, a black person may not be his equal in intelligence, in looks. He didn't favor them voting. He didn't favor them holding office. But he pointed out that in the rights of the Declaration of Independence, the natural rights of man, they are his equal and everyone else's.⁴⁴ So that's one definition of equality. Equality of natural rights. That's why slavery is wrong, says Lincoln, because of life, liberty, and the pursuit of happiness. Liberty is a natural right of all mankind.

Then there's civil rights, you know, the right to go to court, testify, the right to own property, et cetera, et cetera. Well, the Civil Rights Law of 1866 said everyone's got to have that.

Then there's political rights, which obviously states can regulate and nobody thought that it was a violation—well, no *male* thought it was a violation—to deprive women of the right to vote; that didn't take away their equality.

And then there was this very amorphous area called social rights or social equality. Nobody who was talking about the Fourteenth Amendment except Charles Sumner believed in social equality. Social equality tended to mean intermarriage between black and white. I mean that's another good original question: Was *Loving*⁴⁵ decided on original intent grounds? The people who were writing the Fourteenth Amendment weren't thinking about interracial marriage. Social equality was for individuals; the state could not mandate. And that got to things like access to public accommodations. But then only nine years after this, they passed the Civil Rights Act of 1875, which did legislate social equality in many areas. Then the Supreme Court declared that unconstitutional.⁴⁶ But this was a period when ideas were changing very dynamically, when concepts of equality were growing. What someone thought in 1865 was different than they thought in 1869, in 1871. So to freeze us at the Fourteenth Amendment, just taking that language, doesn't give a picture of an era of very rapid change. So should we take their views of equality, that there

⁴⁴ First Debate with Stephen A. Douglas at Ottawa, Illinois, August 21, 1858. Mr. Lincoln said, specifically:

[T]here is no reason in the world why the negro is not entitled to all the natural rights enumerated in the Declaration of Independence—the right of life, liberty, and the pursuit of happiness. I hold that he is as much entitled to these as the white man. I agree with Judge Douglas he is not my equal in many respects—certainly not in color, perhaps not in moral or intellectual endowment. But in the right to eat the bread, without the leave of anybody else, which his own hand earns, he is my equal and the equal of Judge Douglas, and the equal of every living man.

Available at <http://www.bartleby.com/268/9/23.html>.

⁴⁵ *Loving v. Virginia*, 388 U.S. 1 (1967).

⁴⁶ *Civil Rights Cases*, 109 U.S. 3 (1883).

are these sharp distinctions between these various areas? In our modern uses, they all get jumbled up together all the time.

Joseph A. Fry:⁴⁷ Do you think that these amendments could have been passed at any other moment in American history?

Eric Foner: No, they couldn't. And there are those who claim that the Fourteenth Amendment was not actually legally adopted because it was required—this is Brock's point.⁴⁸ The constitutional system led to some very strange things. The South was unrepresented in Congress and yet it was counted among the states of which three-quarters had to ratify an amendment. The North didn't just say, "three-fourths of the North's going to ratify this amendment because the South's out of the Union." They didn't say that. At first, the southern states rejected the Fourteenth Amendment in 1866. That's one of the reasons they moved to Radical Reconstruction. The Reconstruction Acts required new legislatures in the South to be convened which would ratify the Fourteenth Amendment. And if they didn't, they couldn't get their representation in Congress back. So some people say, well, this was never really legally ratified because what gives Congress the right to require a state to ratify it? Good question. I guess Bruce Ackerman says that in his book, *We the People*.⁴⁹ He says it was a kind of revolutionary moment. But if you're going to go on that route, what gave the fifty-five men the right to rewrite the Constitution at all in the first place? They were supposed to be meeting about amending the Articles of Confederation. Nobody gave them the right to write a new Constitution, but they did it.

Thomas B. McAfee:⁵⁰ I always thought the answer was the North won the Civil War.

Eric Foner: And that's a critical point. But also remember, Andrew Johnson required the southern states to ratify the Thirteenth Amendment to get recognized governments, so there is this precedent. But as I say, the need to follow constitutional forms created a very odd set of circumstances.

Joseph A. Fry: If this were not to have happened, you have a far more pessimistic sort of possible era of American history subsequent to—

Eric Foner: No, not necessarily. This goes back to when I went to the University of Virginia Law School. My book, *The Story of American Freedom*, had just come out, and Michael Klarman, who has his own particular view about the role of the Supreme Court, said that very lawyer and law professor should read Professor Foner's book because there aren't any Supreme Court decisions in it. In other words, the history of the United States is not just a series of Supreme Court decisions. So we would've still had the civil rights movement if there wasn't a Fourteenth Amendment, you know what I mean? And some other grounds would've been found for eliminating segregation. I think it is a melancholy reflection that probably that is the only moment, maybe even up to the present day, when the Fourteenth Amendment could have been ratified. It was a very unusual moment in American history.

⁴⁷ Joseph A. Fry, Distinguished Professor of History, University of Nevada, Las Vegas.

⁴⁸ See Brock, *supra* note 31.

⁴⁹ Bruce A. Ackerman, *WE THE PEOPLE* (1991).

⁵⁰ Thomas McAfee, Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas.

I don't really believe in counterfactual history. What would the history of the United States look like without the Fourteenth Amendment? You still would've had social movements of people claiming their rights. People would've still demanded equality. They would've done it in different ways, different forums, different legal language. I'm not a total Klarmanite but I do think he's right, that a lot of what we think of as constitutional change comes out of other realms of the society and then is recognized by the courts. You can see how that has happened in other areas which really aren't that relevant to the Fourteenth Amendment, like privacy rights. The Court has still found a way to accommodate to social change even when it's not explicitly mentioned in the Constitution.

Annette Appell:⁵¹ I'm Annette Appell. I teach at the law school. I appreciate your comments very much about original intent, but I did want to go back in history, not to original intent, but to what you refer to as the "climate of the times." I'm particularly interested in my research about children and families, and parental and children's rights. What can you say about what the "climate of the times" was regarding the effect of the Thirteenth and Fourteenth Amendments on the formation of families and the privacy of families at that time in American history?

Eric Foner: Well, that's a great question. You know there is a little literature on this by Lea VanderVelde.⁵² That's a very interesting question because one of the key critiques of slavery by the abolitionist movement was that it destroyed family life.

Annette Appell: Peggy Cooper Davis has written about the importance of family rights using abolitionist narratives.⁵³

Eric Foner: Right. I mean this was one of the main arguments. It destroyed family life, it subjected black women to sexual exploitation, it displaced the man from his natural role as the head of the family, and it was widely believed that one of the consequences of emancipation was that now African-Americans would have the right to form families just like everyone else's families, but those were families which would be male-headed. And in fact the law at that time, even though there were some changes going on, the common law of coverture was still around, and legally-speaking the man was the head of the family and property rights were vested in the man. The Freedmen's Bureau made men sign contracts for their families. I don't know why this is, but I think the Southern Homestead Act actually said "any person." I think it opened even to women to getting public land in the South.

But the basic point is one of the consequences of the end of slavery was widely believed to be that African-American families would now enjoy the same inviolability as white families had. I don't know if you want to call that

⁵¹ Annette Appell, Associate Dean for Clinical Studies, William S. Boyd Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas.

⁵² Lea VanderVelde is the Josephine R. Witte Professor of Law at the University of Iowa. She has written, for example, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437 (1989).

⁵³ PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* (1997).

privacy. The notion of privacy in any modern sense didn't really exist at that time, I don't think.

This was a problem for the women's rights movement at the time because there were people like Elizabeth Cady Stanton and Susan B. Anthony and others who said the liberation of women ought to come out of this. For example, does the Thirteenth Amendment apply to labor within the household? Should not women receive wages for work done in the home now that the Thirteenth Amendment has abolished involuntary servitude? But congressmen explicitly said no, this does not apply within the household, that women's work within the household is not included in the kind of work that the Thirteenth Amendment had in mind.

So it's a very complex question. There were women at the time who tried to seize on the language of the Fourteenth Amendment to make what at the time were very radical claims for the right of divorce, for the right of women to control their wages. By this time most states had married women's property acts, but very few states allowed a married woman to control her own wages if she worked. They still legally belonged to the husband. These claims didn't get very far, but that doesn't mean they didn't have legitimacy if one takes a broad view of what equality might mean.

Annette Appell: The thing that I'm particularly interested in is the parent-child dyad and triad not the husband-wife dyad.

Eric Foner: Well, again, you see, the shadow of slavery hangs over this whole debate, and under slavery parents did not control their children. For example, whether a child went to work or not was controlled by the owner, not the parents. And one of the main demands of African-Americans was exactly the right to control over their own children. You see this in those states in which the Black Codes that were passed in 1865, '66. North Carolina was the most notorious, including apprenticeship provisions allowing courts to basically take any black child and apprentice him out or her out to a white employer. And these were not apprenticeships like in Benjamin Franklin's time where you learned a craft. The owner had no responsibility whatsoever; it was just another form of slavery. And there are bitter, bitter court battles in North Carolina until eventually the Freedmen's Bureau just abrogates that law about control of children. Courts are taking children away from black families and giving them over to white families as under slavery. So the family unit, the inviolability of the family unit was a critical thing in the minds of people thinking about the consequences of the abolition of slavery. But I don't know. You know more than I. I don't think the notion of the rights of children had any real legal standing in 1866. Maybe I'm wrong.

Annette Appell: Oh, no, you're right; they didn't, not at that time. Notions of children's rights are more recent.

Eric Foner: So again it's hard to think how that would apply 140 years later.

Gregory Borchard:⁵⁴ Greg Borchard. I'm in the School of Journalism. I appreciate your reluctance to overemphasize the role of the Supreme Court in

⁵⁴ Gregory Borchard, Assistant Professor, Hank Greenspun School of Journalism and Media Studies, University of Nevada, Las Vegas.

history. I can't help wondering how *Plessy v. Ferguson*⁵⁵ fits in to all of this, especially given the idea of original intent. Was this an attempt to do the opposite of that if it was a direct reflection on the Fourteenth Amendment?

Eric Foner: Well, no. *Plessy*, of course, is a great case in this regard. The Supreme Court began interpreting the Fourteenth Amendment very quickly in ways that a lot of members of Congress saw as a big mistake. In *Slaughter House*⁵⁶ which is 1873, it was just a few years later, many people who had helped to draft the Fourteenth Amendment thought the Supreme Court was completely wrong in limiting the scope of the rights granted in the Fourteenth Amendment very dramatically. And again, *Plessy* is a great case because it all depends on what you think the Civil War was all about. I mean that's what Justice John Marshall Harlan said. We remember Harlan's dissent, where he says the Constitution is colorblind,⁵⁷ but that's not the important part of his dissent. He says in that dissent, this is a case about freedom. It's not a case about equal protection.⁵⁸ It's a case about freedom. These people were slaves. Part of the abolition of slavery is that they must be treated in the public sphere as equal to everybody else, and singling them out for special treatment is a violation of emancipation, he said, not the Fourteenth Amendment. This is an attempt to continue the legacy of slavery in this country. So Harlan put it right out there. He said forget about this question of whites can't go in the black car and blacks can't go in the white car, so they're being treated equally. That's ridiculous. Everyone knows that's not the purpose of this law, to treat everyone equally. It's to degrade a group of people, and that is a consequence of slavery. So if we're serious about the emancipation of the slaves, we can't have laws like this. Is that an original intent decision? No. That's a decision about what the nature of American society is. I mean that's not a decision; that was one vote.

Thomas B. McAfee: That's one thing that's tricky, I think, about the whole problem of originalism and original intent. For example, I recently read a book by somebody who was very, very critical of originalists who try to claim that *Brown* was a correct originalist decision on the one hand. On the other hand he said that a decision clearly based on a doctrine of white supremacy would be inconsistent with the Fourteenth Amendment. But *Plessy* seems to be exactly that.

Eric Foner: Well, yes, that's what it was. Of course *Brown* obviously repudiated that. If you think the Fourteenth Amendment was meant to abolish white supremacy and that's the original intent, then that is fine, but that certainly opens the door to a lot of other things that have not yet been adjudicated. By the way, just to throw another monkey wrench into the whole thing, no one has mentioned what to my mind is one of the odder Supreme Court traditions if one believes in original intent, and that is the use of the Fourteenth Amendment to define a corporation as entitled to the protection of persons. There is not a scintilla of evidence that anybody in 1866 intended the Fourteenth Amendment to go in that direction, but nonetheless that's, as you all know—well, that's still

⁵⁵ 163 U.S. 537 (1896).

⁵⁶ 83 U.S. (16 Wall) 36 (1873).

⁵⁷ *Plessy*, 163 U.S. at 559.

⁵⁸ *Id.*

the law, isn't it? So surely we should expect Scalia and Thomas to declare that corporations are not persons and do not have the right to due process and can be regulated by the state any way we feel, right? Isn't that likely to happen?

Sylvia Lazos: Well, let me try to sum up what I understand you to be saying, Professor Foner. It seems to me that you are probably a living constitutionalist, and it seems to me that you arrive at that conclusion because you see history as dynamic, moving, that the political process is one in which we form ideas, the basic principles of democratic society. In your more recent book, you talk about liberty as being kind of the key idea around which American society, be that courts, the people, Congress, interest groups, whatever have been debating and that that idea has been kind of the key idea that has shaped our democracy and should be shaping our constitutional precedents.

Eric Foner: I will accept all of that but I will add as well that a lot of people got into the habit during the heyday of the Warren Court of thinking the courts are going to solve all our problems, and I think we need to get out of that habit of thinking. One of the basic premises of my book on freedom is that the idea of freedom has changed many, many times in American history; it's been the subject of contestation many times, but that the dynamic force in these changes is social movements of people demanding greater rights or new definitions of rights. It used to be that when people had grievances, they took to the streets. Now if they have a grievance, they hire a lawyer, and I think that's not necessarily a healthy development in any democracy.

David S. Tanenhaus: I want to thank Professor Foner and also let you know that he'll be delivering a University Forum lecture this evening, *The Meaning of Freedom in American History*, where he'll talk about some of the themes that came up today, as well as thinking a little bit also about how 9/11 has shaped the national conversation we've been having. I want to thank all of you for participating in this conversation. I hope it's just one of many we'll have over the coming years. Thank you very much.

APPENDIX I
QUESTIONS FOR PROFESSOR ERIC FONER

1. You have written, "Reconstruction is the most controversial and misunderstood period in all of American history."⁵⁹ In the context of constitutional interpretation, what are the implications of your observation?

2. In Michael J. Perry's 1999 book on the Fourteenth Amendment, he quotes Raoul Berger that "[b]ecause the [Fourteenth] Amendment . . . furnishes the chief fulcrum for [the Supreme Court's] control of controversial policies, the question whether such control is authorized by the Constitution is of great practical importance."⁶⁰ Does the Fourteenth Amendment, in your view, authorize federal courts' control of controversial policies; for example, expanding defendants' criminal procedure rights, ordering desegregation, ruling on the constitutionality of affirmative action, mandating the balance between religious public observance in state public forums, and declaring that there is a woman's right to privacy that encompasses the right to choose to terminate a pregnancy?

3. Professor Perry also contends that the wave of "Klan lynchings and private violence undeterred and unpunished by the state that characterized the post-Civil War era is the paradigmatic Equal Protection violation, not Jim Crow laws and segregated schools."⁶¹

a. Is Professor Perry right that states' failure to provide "equal protection" as to already existing legal prohibitions on private wrongs was the paradigmatic wrong the Fourteenth Amendment sought to address?

b. Did the Supreme Court basically ignore that paradigmatic state wrong, in *United States v. Morrison*⁶² by **not** sufficiently giving the protection implicitly promised by the law when it held that Congress could not "make a federal case" out of gender-motivated violence (Cheryl Brzonkala's gang rape) under Section 5 of the Fourteenth Amendment?

4. Senator Thaddeus Stevens, a key framer of the Fourteenth Amendment, observes Professor Perry, stated "that the amendment required that whatever law protected the white should protect the black equally"⁶³ Senator Stevens's statement is sometimes linked to Justice Harlan's assertion that "[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens."⁶⁴

a. Some modern conservatives hook these statements together and contend that this is evidence that the intent of the Fourteenth Amendment is contrary to modern affirmative action programs in that they assess the qualifications of an individual through race-conscious methods. What is a Reconstruction historian's response?

⁵⁹ Foner, *supra* note 19.

⁶⁰ PERRY, *supra* note 19, at 48 (quoting GOVERNMENT BY JUDICIARY at 1).

⁶¹ *Id.* at 54 (citing Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 139 (1991)).

⁶² 529 U.S. 598 (2000).

⁶³ PERRY, *supra* note 19, at 55.

⁶⁴ *Plessy v. Ferguson*, 163 U.S. 537 (1896) (Harlan, J., dissenting).

b. What is a Reconstruction historian's response to the "color blind" interpretation of Equal Protection clause under Rehnquist Court case law?⁶⁵ To illustrate, in *Shaw v. Reno*,⁶⁶ the Supreme Court held that race consciousness in drawing district lines was unconstitutional because if race were to be a "predominant factor," race-neutral districting principles (like geographic boundaries of communities or just plain politics) would become subordinated to racial considerations.⁶⁷ The Court held that race-conscious line drawing requires heightened scrutiny because it is a constitutional wrong for state actors to project onto racial minorities political predisposition merely because of the color of their skin.⁶⁸ Is the Rehnquist Court's "colorblindness" interpretation of the Equal Protection clause consistent with how the framers viewed the purposes of the Fourteenth Amendment?

5. William Nelson, a Fourteenth Amendment historian, wrote:

In their efforts to elaborate a theory of equality, statesmen of the generation which framed and ratified the Fourteenth Amendment faced [a difficult issue] that continue[s] to plague Fourteenth Amendment analysis today. [The issue], once they moved beyond obviously defective racial criteria, was to distinguish classifications that would be reasonable under the amendment from those that would be arbitrary.

...
In dealing with the ... issue, the congressional proponents of the Fourteenth Amendment were always able to specify whether a particular classification was reasonable or arbitrary. But they were persistently unable to elaborate how their conclusions were derived from or compelled by their more general theory; they simply knew an arbitrary exercise of power when they saw one.⁶⁹

a. Was the Fourteenth Amendment deliberately drafted to be so vague?

b. Does Professor Nelson's analysis reflect that equal status under law—not necessarily "rights" or "liberty" as such—was the central value of the Fourteenth Amendment?⁷⁰

6. Race theorists emphasize that the central purpose of the Fourteenth Amendment was to eliminate caste. Justice Harlan provides the most famous statement of this principle, "in the view of the constitution, in the eye of the law, there is in this country no superior, dominant ruling class of citizens. There is no caste here."⁷¹

A key concern of the Reconstruction Congress was to do away with the Black Codes enacted in Southern states. The *Slaughter House Cases* make reference to this enactment history in stating that "the [Fourteenth Amendment's] lone pervading purpose" was the "freedom of the slave race, the security and firm establishment of the freedom, and the protection of the newly made freedman, and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."

⁶⁵ See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 US 469, 493 (1988) (To whatever racial group these citizens belong, their "personal rights" to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decision-making.).

⁶⁶ 509 U.S. 630 (1993).

⁶⁷ *Id.* at 646-51.

⁶⁸ *Id.* at 649.

⁶⁹ WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 138-39 (1988).

⁷⁰ FONER, *supra* note 2, at 257-58 (1988).

⁷¹ 163 U.S. 537 (1896) (Harlan, J., dissenting).

However, might the enactment history also be consistent with reading the anti-caste principle more broadly? For example in *Romer v. Evans*,⁷² Justice Anthony Kennedy begins the opinion quoting Justice Harlan's anti-caste principle. Justice Kennedy argues that the heterosexual majority had used its political power and majority numbers to enact a law that would have permanently placed gay men and lesbians in a subordinate the civic status by preventing them from petitioning local government for laws that would protect them from discrimination. Such actions legitimized the majority group's animosity and also stigmatized gay men and lesbians.⁷³

- a. Is such a broad reading of the purposes of the Fourteenth Amendment consistent with its history of enactment?
- b. Did the framers of the Fourteenth Amendment intend that any identifiable group, who had been historically and socially discriminated, would come under the protection of the Fourteenth Amendment?
- c. Under such a view not only would gay men and lesbians come under the protection of the Fourteenth Amendment but also conceivably aliens/noncitizens. Is such an extension of the Fourteenth Amendment to a group, which courts view as standing outside of the political community constituted by "We the People," consistent with the Framers' intent or the broad purposes of the Fourteenth Amendment?

7. Professor Michael Perry asserts:

If Curtis and Amar (and others) are right, then, insofar as the original understanding of the privileges or immunities provision is concerned, the answer to the question [of what rights should be "incorporated"] is this: No state law regulates "for the public good in a reasonable fashion"—no state law is "reasonably" designed to accomplish a legitimate governmental purpose—if the law, were it a national law, would violate a right of citizens protected by the Bill of Rights.⁷⁴

- a. Do Law Professors Michael Kent Curtis and Ahkil Amar have the "incorporation controversy" right?
- b. Or does incorporation come about, as suggested by Professor Michael Perry, logically because state laws that would violate the federal Bill of Rights are, virtually by definition, denials of equal status under law?

8. In the *Slaughter House* Cases, Justice Field in dissent emphasized Justice Washington's opinion in *Corfield v. Coryell*, and asserted that "[t]hat only is a free government, in the American sense of the term, under which the inalienable right of every citizen to pursue his happiness is unrestrained, except by just, equal, and impartial laws."⁷⁵ Was Section One of the Fourteenth Amendment intended to secure to "We the people" all their natural and inalienable rights—whether or not any one of them was specified in the text of the Constitution?

9. As a historian what is your reaction to originalist theories of constitutional interpretation?

10. Do courts ever do a good job of elucidating the "Framers' intent," or applying competently historical context? Please provide examples of your "best hits" or "worst hits."

⁷² 517 U.S. 620 (1996).

⁷³ *Id.* at 627.

⁷⁴ PERRY, *supra* note 19, at 78.

⁷⁵ 83 U.S. (16 Wall) 36 (1873).