

JUDICATURE

Published by the Bolch Judicial Institute of Duke Law. Reprinted with permission. © 2018 Duke University School of Law. All rights reserved. judicialstudies.duke.edu/judicature

Six books *for* understanding *the* Fourteenth Amendment

BY ROBERT N. HUNTER, JR.

During the 150th anniversary of the ratification of the Fourteenth Amendment, the judicial scholar with an inquiring mind will find much to read, and much historical and constitutional wisdom to be gained, in new and not-so-new books about the Civil War and Reconstruction.

The story of the Fourteenth Amendment is inseparable from the times in which it was created. The Civil War Amendments, part of the “Second Constitutional Convention,” occurred when “radical” Republicans controlled Congress between 1865 and 1870.

All the Civil War Amendments were enacted to overturn *Barron v. Baltimore*, 32 U.S. 243 (1833), and the legal results of the worst judicial opinion in Supreme Court history, the *Dred Scott* decision.

There is prologue to examine, including: the passage of the Thirteenth Amendment outlawing slavery; the debate over readmission of the rebelling states back into the federal government;

the military rule of Southern states during Reconstruction; and the continuing struggle of the defeated South to deny newly freed slaves the privileges and immunities of citizenship through the passage of “black codes” and suppression of political freedom for white and black Republicans. Racial and political violence throughout the South and a deadly riot in Memphis sparked the Joint Congressional Committee on Reconstruction into action.

What follows, in no particular order, are books I have read that may pique your curiosity in considering how the founding fathers of the Second Constitutional Convention created and used the Fourteenth Amendment to balance the equities, address the challenges of their times, and create a coherent democracy. They also shed light on issues that remain relevant and volatile today.

Michael Kent Curtis’s excellent *No State Shall Abridge, The Fourteenth Amendment and the Bill of Rights*

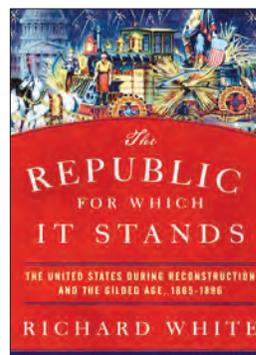
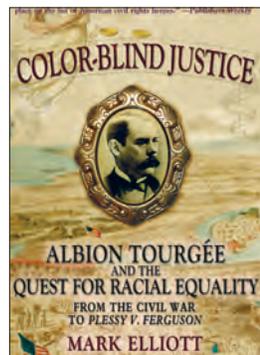
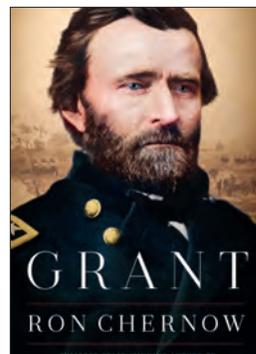
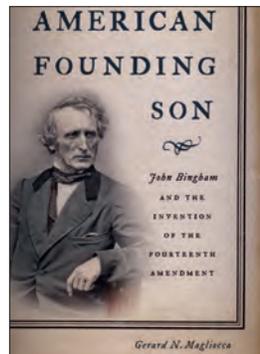
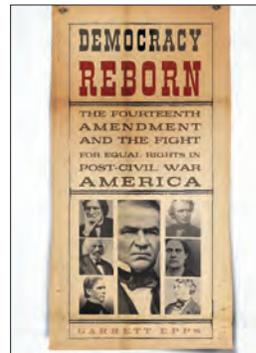
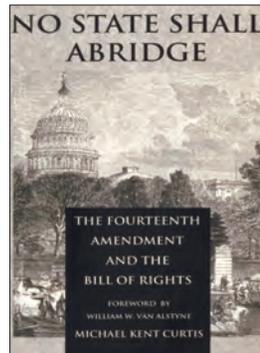
(Duke University Press, 1986) sets the standard. Writing in part to rebut then-Attorney General Edward Meese’s contention that the incorporation doctrine applying the Bill of Rights to criminal defendants was not historically based, Curtis methodically builds his case. Starting with the antebellum state law controversies regarding free speech and slavery, the text describes the legal and political context in which the Fourteenth Amendment was proposed and ratified. Curtis’s thesis focuses on the views of John Bingham, the Ohio congressman who drafted the language of Section 1 of the Amendment. Bingham, a skilled lawyer, sought to overturn any lingering effects of the *Dred Scott* and *Barron* decisions and give constitutional authority to legislative efforts to prevent Southern violence against newly freed blacks and Republicans in the South.

Many Republicans of the 1866 Congress believed the passage of the Thirteenth Amendment granted former slaves citizenship, and, therefore,

the protections of the Due Process Clause of the Fifth Amendment and the Privileges and Immunities Clause of Article IV, which protected all citizens' fundamental liberties against federal or state action, applied equally to freed slaves. But John Bingham saw that more was needed. President Andrew Johnson's veto of the Civil Rights Act of 1866 disabused the Republicans of their belief that statutes alone could protect newly freed slaves and unionists in the post-war South. As chief drafter of the amendment, Bingham's job was to "constitutionalize" the protections of the federal Bill of Rights in order to quell state efforts to abridge those rights.

While Bingham's language seems clear now, in a series of cases beginning with the *Slaughter-House Cases*, 83 U.S. 36 (1873), the Supreme Court interpreted the amendment as applying to a small set of rights of citizenship (e.g., the right to use navigable rivers). Bingham's broader view would not become law until the Warren Court of the 1960s. Curtis's book gives an interpretative history of the Fourteenth Amendment in court from its inception, to its demise, and finally to its resurrection in the Warren Court.

Another entertaining volume of history of the Fourteenth Amendment is *Democracy Reborn, The Fourteenth Amendment and the Fight for Equal Rights in Post-Civil War America* by Garrett Epps (Henry Holt & Company, 2006). This volume contains a digestible chronology of events and their significance in the passage of the Civil War Amendments. Epps examines in detail the politics of Reconstruction from Abraham Lincoln's death in 1865 to Republican Senator Charles Sumner's death in 1874, particularly with regard



to the partisan battles between Congress and President Johnson. This is less a book about legal theory than an Allen Drury thriller concerning the ability of Congress to pass legislation over the objections of a recalcitrant president and minority Democratic Party. Epps offers a thorough overview of the period's historical context leading up to the passage of the Fourteenth Amendment and until its ratification.

Epps's volume sets the historical stage for three biographies of recent vintage, which provide in-depth examinations of the

effect of the Fourteenth Amendment through the lives of three key figures in American history. The first is *American Founding Son, John Bingham and the Invention of the Fourteenth Amendment*, by Gerard N. Magliocca (New York University Press, 2013). John Bingham, an Ohio lawyer, served in the House of Representatives from 1855 until 1873, with the exception of two years from 1864 until 1865. He was an abolitionist who fought against admitting Kansas and Oregon to the Union unless they assured the equal rights of all citizens, regardless of race. During the Civil War, Lincoln appointed Bingham to serve as Judge Advocate with the rank of Major in the Union Army. Following Lincoln's death, Bingham served as a military prosecutor in the trials of Dr. Samuel Mudd and John and Mary Sarratt, who were accused of conspiring with John Wilkes Booth to assassinate President Lincoln. Bingham also later served as one of the House prosecutors in the impeachment trial of President Johnson. Bingham's final service to the United States was as Ambassador to Japan under four presidents.

The book examines in depth Bingham's efforts to secure explicit Constitutional authorization for federally protected privileges and immunities, and equal protection for all U.S. citizens. As battles with President Johnson over Reconstruction made clear, any Congressional legislation extending federal rights to the states would be left to the impermanence of future Congressional action or judicial interpretation. Knowing the Southern states would eventually be reconstructed and readmitted to the Union, Bingham and other anti-slavery Republicans seized the opportunity to enact additional amendments. Bingham's pivotal role in ▶

these efforts, particularly in the creation of the Fourteenth Amendment, is worth this deeper look.

The second biography is *Grant* by Ron Chernow (Penguin Press, 2017). In his latest best-seller, the Pulitzer Prize-winning author of *Hamilton* and *Washington* seeks to rehabilitate the reputation of the eighteenth president of the United States. Thanks to his wartime experience and his close confidential relationship with President Lincoln, Grant well understood the racial problems that arose after emancipation.

Beginning with the amnesty proclaimed in Lee's surrender at Appomattox and during his post-war service as Commander of the Armies of Occupation under President Johnson, Grant sought to assure that newly freed slaves were treated as citizens. He was the first president to employ the Fourteenth Amendment and its enforcement legislation to protect black people from the white supremacists in the South following the War. At best, the results were mixed. Still, his biography offers a fascinating study of the life and times of the United States from the Mexican War through the end of Reconstruction. Grant, a West Point graduate, served as a young officer in the Mexican War. From a blue-collar family of hide tanners in the Midwest to marriage into a slave-owning plantation family in Missouri, Grant's personal history illustrates the Civil War's dramatic impact on American families. The book also chronicles the development of Grant's friendship with Lincoln, ratified by a string of battle successes in the War along the Mississippi and culminating in Vicksburg, and his final victory at Petersburg and Appomattox. Following surrender, Grant's generous terms to Southern veterans sought to prevent recriminations that could have

turned a victory into a long-simmering guerilla war.

Grant's efforts to use military troops to enforce the federal Civil War amendments were problematic. As victors have learned in occupying defeated countries, it is difficult to militarily occupy rebel territory and attempt reconciliation at the same time. Republican governors in the South pled with Grant to support their battles against the Klan and other Southern resistance. For a time he did just that. Grant was also the first president to confront a Congress with Southern delegates at full strength. Although Grant's presidency was troubled by corruption and graft, his efforts to secure equality for all citizens remained constant. This biography is a fascinating narrative of an imperfect man who served honorably as president.

The final biography essential to understanding the story of the Fourteenth Amendment is *Color Blind Justice, Albion Tourgee and the Fight for Racial Equality from the Civil War to Plessy v. Ferguson*, by Mark Elliot (Oxford University Press, 2006). Albion Tourgee, a native of the Western Reserve of Ohio, was a Union officer who settled in North Carolina following the Civil War. Active in local politics, he was elected as a circuit court judge and served from 1869 to 1873, was a leading delegate to the 1868 Constitutional Convention, and served as a Code Commissioner in the writing of North Carolina's civil code. Following the end of his elected career, he became a best-selling author of fiction, recounting stories gleaned from his years on the bench in Reconstruction-era North Carolina.

Two of Tourgee's books, *A Fool's Errand* and *The Invisible Empire*, describe the challenges trial court judges faced as they enforced the newly won rights of African Americans to serve as jurors,

give testimony, and bring civil actions against their former masters. Imagine serving as a trial judge, riding your circuit with a horse and buggy, carrying a sidearm to prevent your own assassination, and having to dismiss cases because all witnesses had been killed or were too frightened to testify. Tourgee's fiction is a thinly disguised *roman à clef* for his life.

Tourgee went on to be a newspaper writer who never lost the radical Republican views he held in his youth. His penultimate act was to plot with citizens in New Orleans to bring a challenge to railroad segregation in the South in *Plessy vs. Ferguson*. 163 U.S. 537 (1896). His arguments were grounded in the Fourteenth Amendment, and in his brief to the Supreme Court he coined the phrase "color-blind justice." His story further emphasizes the difficulties faced by the victors in trying to "reconstruct" a hostile, defeated people to accept new ideas. Cases like *Plessy* and *United States v. Cruikshank*, 92 U.S. 542 (1876), largely ended practical enforcement of the Fourteenth and Fifteenth Amendments for six decades thereafter.

The final volume I recommend is *The Republic for which it Stands: The United States During Reconstruction and the Gilded Age, 1865-1896*, by Richard White (Oxford University Press, 2018), the latest volume in the multi-volume set, *The Oxford History of the United States*. For those who have read the other Pulitzer Prize-winning volumes in this series, its tradition of excellence in historical storytelling continues here. While *The Republic for which it Stands* adequately recounts the events of the time, the author does more than simply tell the story of the United States during this time period. He gives fresh meaning to these events through the broad lens of

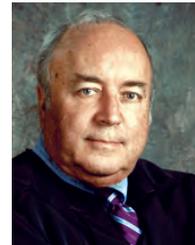
the governing philosophy of the time. For example, he points out that at the end of the Civil War, the United States was three different countries: the victorious and controlling North, the stillborn South, and the Wild West. He points out that during this period the North's dominating ethic permeated public policy. Its tenets favored a free-labor and contract-rights economy tempered by the growth of private organizations, such as fraternal orders and protestant Christianity. This dominating ethic dictated the philosophy that not only formed the Southern Reconstruction but also the development of the West, which, he contends, was the subject of a Greater Reconstruction. A useful insight.

The shifting political coalitions that helped achieve victory in the Civil War had very different ideas about reconciliation with the South and settlement of the West. For example, "liberal republicans" who believed in laissez-faire economics and a weak central government formed

a coalition with the Democrats to support Horace Greely for president against Grant in the election of 1872, presaging the abandonment of the blacks in the South in the compromise of 1877. Despite their best efforts, Radical Republicans, ascendant until 1872, failed to effectuate the legal revolution their efforts envisioned. Nevertheless, the ideals that dominated this period helped shape the American dream of home, public concepts of morality, and the role of government in homogenizing the country. This is a good read, as are the other books in this series, and a must-read for students of American history.

History and law are studies of energy. At various times in the history of our country, concern for the poor is paramount, then populism is ascendant, and, at other times, business oligarchies rule. Nevertheless, the energies that take political hold and become law remain with us for generations, only to reappear as new

legal arguments. The energy that underpinned the Fourteenth Amendment may have failed to hold in its time, but after lying dormant for years it was resurrected by the Warren Court in the 1950s and 1960s. And it still occupies our attention today, in new form. The past is prologue; study the past.



ROBERT N. "BOB" HUNTER, JR., is a judge on the North Carolina Court of Appeals. He previously practiced law for 35 years with the firm of Hunter, Higgins, Miles, Elam and Benjamin, PLLC, as managing partner. He is past president of BarCares, Inc., which delivers programs and counseling services to meet the psychological health needs of the bench and bar, and he is a 2014 graduate of the Duke Law Master of Judicial Studies program.

A PROUD SPONSOR OF JUDICATURE



CLASS ACTION + COMMERCIAL LITIGATION

2 ALHAMBRA PLAZA, STE 601, CORAL GABLES, FL 33134

P: 305-740-1423 | F: 786-298-5737 | E: INFO@MOSKOWITZ-LAW.COM | W: MOSKOWITZ-LAW.COM