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"Nor Long Remember". Book Review Of: Our Secret Constitution: How Lincoln Redefined American Democracy. by George P. Fletcher

Daniel A. Farber

Book Reviews

"NOR LONG REMEMBER"

OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY. By George P. Fletcher.[1] Oxford University Press. 2001. Pp. ix, 292. $25.00

Daniel A. Farber[2]

> *Exactly four years after the surrender . . . Robert Anderson returned to raise his old flag over Fort Sumter. By then, the sounds of battle had given way to the stillness at Appomattox and the issues that inflamed the antebellum years had been settled. Slavery was dead; secession was dead; and six hundred thousand men were dead. That was the basic balance sheet of the sectional conflict.*
>
> David Potter[3]

Walk into any large bookstore, such as your local Borders or Barnes & Noble, and you will find a separate section devoted to the Civil War—not just books covering the entire war or books about Lincoln and other major leaders, but biographies of a dozen generals and chronicles of individual battles, and even entire volumes about portions of battles, such as the second day at Gettysburg.[4] Forty million people tuned in to watch a PBS se-

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1. Cardozo Professor of Jurisprudence, Columbia University School of Law.
2. McKnight Presidential Professor of Public Law, Henry J. Fletcher Professor of Law, and Associate Dean for Faculty and Research, University of Minnesota.
3. David Potter, *The Impending Crisis, 1848-1861* at 583 (Harper & Row, 1976).
4. See James M. McPherson, *Drawn with the Sword: Reflections on the American Civil War* 244 (Oxford U. Press, 1996) ("For Gettsyburg we have an 800-page tome on the first day alone plus two volumes by a single author on the second day totaling 725 pages.")

ries about the War.[5] Clearly, the Civil War still looms large in popular consciousness.

Not so in the law. In the past thirty years, only about twenty Supreme Court opinions have referred to "Abraham Lincoln" or "President Lincoln."[6] Seven times as many opinions referred to "James Madison" and "Alexander Hamilton."[7] Thomas Jefferson received about five times as many mentions as Lincoln.[8] These earlier figures do enjoy perennial public attention, but on nowhere near the scale of Lincoln and the Civil War. Thus, the late Eighteenth Century dominates our view of constitutional history and eclipses the Civil War in our legal culture, in a way that it fails to do in popular culture.

In his latest book, George Fletcher seeks to remedy that imbalance. He offers an important reappraisal of the constitutional significance of Lincoln and the Civil War. The Civil War, he contends, "called forth a new constitutional order." (p. 2) The principles of this new order, embodied in the Reconstruction Amendments, "are so radically different from our original Constitution, drafted in 1787, that they deserve to be recognized as a second American Constitution." (p. 2) According to Professor Fletcher, what he calls the first republic was based on the social compact, individual freedom, and republican elitism. In contrast, the second republic was based on "organic nationhood, equality of all persons, and popular democracy." (p. 2) This second constitution was repressed but never destroyed. "Even after the judges turned their backs on the new order, the second constitution, sanctified by the six hundred thousand who died in its gestation, remained a firm but minimally visible commitment of American political culture." (p. 7) Repressed into the legal subconscious (p. 1), the "Civil War constitution became our alternative charter, our Secret Constitution, waiting in the wings for a more propitious time to step out on the stage of open judicial debate." (p. 7) After the War, "in addition to embedding the states in the rule of law, the new constitutional order embarked on an affirmative program to ensure equality." (p. 25)

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5. Id. at 238.

6. A Westlaw search on July 5, 2001 for "("Abraham Lincoln" "President Lincoln") & date (after 1970)" produced 21 documents.

7. A Westlaw search on July 5, 2001 for "("James Madison" "Alexander Hamilton") & date (after 1970)" produced 146 documents.

8. A Westlaw search on July 5, 2001 for ("Thomas Jefferson" "President Jefferson") & date (after 1970)" produced 102 documents. A post-1970 search for "Jefferson" produced 662 documents, as opposed to 318 for "Lincoln," but both searches retrieved many documents in which these were part of individual or geographic proper names.

The "heart of the new consensus is that the federal government, victorious in warfare, must continue its aggressive intervention in the lives of its citizens." (p. 25)

The Civil War was obviously a critical event in American history, and the Reconstruction Amendments were clearly a major change in the constitutional order. So much is a truism. Where Fletcher departs from the conventional wisdom, however, is in arguing that the critical constitutional moment took place at Gettysburg rather than in Congress and in declaring the upshot to be an entirely new constitutional regime rather than a transformation of the old one. The verdict on this bold recasting of constitutional history is mixed. Fletcher performs an important service by emphasizing the importance of the war in constitutional development.

Part I of this review provides a more detailed account of Fletcher's argument. As shown in Part II, however, the book does not present a solid evidentiary case for the Secret Constitution. This would be a serious flaw if the thesis were offered as a definitive account of our constitutional history. There are a number of indications, however, that Fletcher's purposes are more exploratory. He applauds the existence of multiple, inconsistent readings of the historical record. (p. 109) Some features of the book suggest that Fletcher's own thinking is in the process of evolving. On several occasions, he stakes out a strong position—spending pages, for example, arguing vehemently that a particular Supreme Court opinion is an abomination, (pp. 152-160) only to close with the afterthought that the decision "is hardly as heartless and indifferent to wealth discrimination and social justice as it appears at first blush." (p. 161) Similarly, although much of the book seems to be a lament that the Secret Constitution has failed to triumph over the old one, Fletcher ends with a call for a pragmatic accommodation between the two. (pp. 228-229) Indeed, the notes make it clear that in the course of writing the book, Fletcher has sharply modified some positions previously staked out in his earlier work. (pp. 279 n. 19, 282 n. 7)

Thus, the book seems to be part of a work in progress rather than a definitive account. Its real contribution may not lie in the details of the thesis but rather in its central insight. That insight is both valid and important. The constitutional regime did change in some fundamental ways in the course of the Civil War, even before any formal constitutional amendments. What happened at Gettysburg is as important for understanding the mod-

ern constitutional regime as the formal amendment process. As Part III of the review explains, the war experience transformed constitutional practices and understandings. Under the extreme pressure and heat of the Civil War, the old constitutional regime melted and recrystalized into its modern form. Just as limestone is transformed into marble deep inside the earth, so a constitutional metamorphosis took place between Sumter and Appomattox.

I. THE DUALITY THESIS

Before we consider the evidence, a careful explanation of Fletcher's views is in order. Like some other recent writers, such as Bruce Ackerman, Fletcher views constitutional history as divided into distinct regimes. (p. 2) The "first Constitution" was based on individual freedom, republican elitism, and the concept of the social compact. It stood for the "maximum expression of individual freedom, at least against the federal government," carving out "a space for each person to stand alone, free of governmental interference." (p. 2-3) It also focused on rule by the "virtuous few." (p. 3) Under what Fletcher calls a reign of "*ancien* principles," the dominant value was liberty rather than equality. (p. 204) Government was the "interloper, the enemy, the potential violator of our freedom to do as we please." (p. 213)

But the Civil War called forth a new constitutional order—one based on nationhood, equality, and populism. (p. 2) Voluntary consent, the basis of the original Constitution, "marks the people" while "[h]istory breeds the nation." (p. 2) The preamble to the new Constitution is found in the Gettysburg Address, which became a kind of "secular prayer" reminding us of our "collective commitment to nationhood, equality, and democracy." (p. 4) This crystallization of natural law principles began at Gettysburg and was memorialized in the Reconstruction Amendments. (p. 9) Unlike the adoption of the first Constitution in the cool deliberation of a constitutional convention, the second Constitution emerged from "the suffering of a redemptive war,"—"forged not by election but the cleansing action of a war." (p. 10) Unlike the first Constitution's historically unrooted social compact, the new order represented not only the present but the past—not just the legislators who voted for the Reconstruction Amendments but also the dead at Gettysburg and elsewhere, who "if the new order is realized, 'shall not have

died in vain.'" (p. 28) The new constitutional order announced at Gettysburg also stands in "radical contrast" to the old Constitution by defining citizenship, bringing "the principle of equality to the fore," and beginning the move toward universal suffrage. (p.29) In contrast, the original Constitution "slighted the problems of nationality and citizenship, it sidestepped the problem of equality, and it minimized the significance of popular democracy." (p. 29) The Civil War, then, initiated "a second American Republic." (p. 2)

But this new order was suppressed by the courts almost from the moment of its birth. (p. 8) Although new judges replaced those of the *Dred Scot* era, they were still stamped with *ante bellum* values and ideas, rather than the new spirit of nationalism and equality. (p. 114) "It is or [was] almost as though the Civil War had accomplished only one objective, namely settling the issue of secession, while doing nothing to define the nation of the United States or to establish a principle of equality among all its citizens." (p. 128) In the *Slaughterhouse Cases*, for example, the Court missed the opportunity to make the Constitution a charter of economic equality. (p. 129) The Court invoked the concept of reasonableness to uphold the statute, a concept apparently antithetical to the "strict rule suggested by the Maxim 'all men are created equal.'" (p. 174) Similarly, the post-war Court overlooked the application of the equal protection clause to gender discrimination. "Apparently, it lay beyond the imagination of the justices in the 1870s that someday equal protection would be extended to protect all those created in God's image." (p. 130) The Court also continued to give too much credence to the states. After the Civil War, Fletcher says, it would have made sense to view the Tenth Amendment as an anachronism and states merely as convenient administrative units. (p. 118)

By the 1890s, then, "the Secret Constitution had gone into full occlusion." (p. 171) More recently, the Court again betrayed the ideals of the Second American Republic by upholding disparities in state school funding and laws barring convicted felons from voting. (p. 162) Thwarted in the courts, the new principles became "a firm but minimally visible commitment of American political culture," best expressed in repeated constitutional amendments expanding the franchise. (p. 7) Despite its abandonment by the Court, the Secret Constitution "spontaneously percolates through civil society." (p. 189) More recently, however, the Secret Constitution has reasserted itself in judicial

opinions, especially dissents. In particular, Fletcher applauds Justice Stevens for invoking the great maxim that all men are created equal. (pp. 177-187)

What does the Secret Constitution mean? Its first prong is nationhood. The Civil War marked the consolidation of the United States as a nation in the European sense. (p. 12) Rather than being based on the voluntary association of a social compact, nationhood involves a kind of organic solidarity based on the "bonds of memory." (p. 58) Nationalism is not merely a concept but a "romantic surge." (p. 63) "Nationhood rings of romance," appealing "not to the analytic mind but to the sentimental heart." (p. 124)

The second prong of the Secret Constitution is a belief in affirmative government. "The Thirteenth Amendment betokens an entirely new way of thinking about government—not as an ever-threatening enemy, but as a necessary partner in the building of a society free of interpersonal exploitation." (p. 214) The core mandate of the Thirteenth Amendment was for government to "keep a vigilant watch on all labor transactions to insure that there never again would arise relationships bordering on slavery or involuntary servitude." (p. 110) In the new order, then, government "is not the enemy of freedom but rather the mechanism by which freedom is secured in a society that tends toward domination and oppression." (p. 215) Thus, in Fletcher's view, the Secret Constitution embodies the European concept of constitutional freedom rather than the libertarianism of the old Constitution.

The third prong is equality. (p. 2, 8) "The commitment, first and foremost, of the new constitutional order was to the equality of all persons affected by the laws of the United States." (p. 110) In this way, the Secret Constitution provides the basis for opposition to "unqualified rights of speech, of religion, and of criminal defense" by targets of racist speech, opponents of religious preferences, and victims of crime "who are forgotten in the rush to protect defendants." (p. 9) This commitment to equality has also required equal participation by all citizens in government (p. 2), and equal treatment for all. The Secret Constitution requires that "all individuals, black and white, men and women, gay and straight, born in wedlock and out of wedlock, should be treated equally under the law." (p. 97) As with nationalism, the power of this idea is as much emotional as intellectual. Fletcher emphasizes that the roots of equality are religious: "The central idea that generates the concept of universal human-

ity or universal brotherhood is that we are made in the image of God." (p. 103)

Fletcher does not attempt a comprehensive analysis of the Secret Constitution's implications for current social or legal issues. He does, however, sketch some of them. He views the disenfranchisement of felons as a brutal violation of the Secret Constitution, having the particularly unfortunate effect of disenfranchising vast numbers of minority voters. (pp. 147-151). Likewise, he sees the Supreme Court's resolution of the 2000 election as an affront to the principle of government "of the people, by the people, and for the people." (p. 258) The Secret Constitution also mandates equal educational opportunity, meaning statewide equality of funding for schools. (pp. 152-161) The current system of higher financing in richer districts, he tartly observes, is merely "a 'head-start' program for the rich." (p. 153) The decision upholding such financing "represents the low point in the historical influence of the values of nationhood, equality, and democracy that inspired the Secret Constitution." (p. 154) A proper understanding of equality "would have led rather rapidly to the conclusion that grossly unequal spending was a violation of the equal dignity and equal merit of all children living in the state." (p. 155) As mentioned earlier, Fletcher views Justice Stevens's equal protection opinions as paradigm applications of the Secret Constitution. (pp. 177-187) He also finds the Secret Constitution at work in more surprising places—in proposed flagburning and victims' rights amendments to the Constitution (pp. 197-204) and in the Prohibition experiment. (p. 197) He views the Eighteenth Amendment as "the most significant of the lot, for once again we witness in action a government solicitous of the welfare of its people." (p. 193)

Fletcher is less clear about the status of the Secret Constitution in modern society. He begins by comparing the Secret Constitution to the deep structure of a language, providing a "bedrock of our legal culture that influences and shapes the decisions of courts and lawyers the way the unconscious influences behavior or the deep grammar shapes our sense of proper syntax." (p. 1) He also speaks of the Civil War as establishing a "new legal regime." (p. 2) The emergence of this new regime was not only a "major disruption in our constitutional history" (p. 10) but also a "historical necessity, and there is no turning back from the course we then adopted." (p. 11) As the values of the Secret Constitution have found their way into proposed and actual constitutional amendments, and into federal legislation (p. 189),

these values provide the basis for a "deeper meaning" ready to come alive if given "faith and personal investment beyond the surface meaning." (p. 92)

Throughout, Fletcher portrays the Secret Constitution as a potent legal force and a fitting object of celebration—a "compelling ideological whole" that would have triumphed except for "reactionary forces that sought to mystify and entrench the values of 1787." (p. 56) Elsewhere, Fletcher speaks of the original Constitution as analogous to the feudal order of France, to which the Secret Constitution compares "as any redeemed legal culture compares to the brutality and chaos that precedes it." (p. 24) Thus, throughout much of the book, Fletcher seems to be advocating that we abandon the first Constitution and acknowledge the Secret Constitution as the true font of wisdom.

But Fletcher's endorsement of the Secret Constitution is, in the end, more guarded. As it turns out, he is willing to countenance alternative readings of the history or at least, certain kinds of alternative readings:

> May all these readings flourish. They testify to the innate multiplicity of meanings inherent in the second founding of the United States in the postbellum legal order. Our only problem, then as now, is that we are not sure which way the revolutionary refounding of the nation should go. (p. 109)

This passage seems clear in its enthusiasm for abandoning the original Constitution in favor of a radical refounding, though it expresses a degree of agnosticism about the precise direction to take. But even this enthusiasm for constitutional reformation becomes ambiguous by the end of the book.

Besides the two constitutional regimes, Fletcher also speaks of the emergence of a third legal regime, "a 'pragmatic' middle road" between the original and the second constitutions. (p. 6) At times, he seems disdainful of pragmatism for replacing moral absolutes with slippery concepts of reasonableness. "Either you are equal or you are not. It is not a matter of degree, not a question of reasonably relating means to ends." (p. 175) Yet, in the end he seems to see no escape from our being "locked in ongoing contradiction between the values of our first and our second constitutions." (p. 222) "The Civil War may have achieved unity of the nation, but it left our minds in ideological tatters." (p. 225)

Thus, Fletcher's final position is deeply pragmatic.

> The rule of law dictates an ongoing quest for reconciliation. The Secret Constitution will ever challenge us to find the right way of reconciling the commitments of our historical nation with the choices of a freely associating people, the requirements of equality with the opportunities of freedom, the will of the many with the wisdom of the few. We sought a Constitution and we found that we had two. And with two constitutions in constant tension, we are redeemed from the dogmatism of those who believe they have the last word. (p. 229)

II. THE MISSING EVIDENCE

Professor Fletcher's project is based on an arresting insight about the transformative effect of the Civil War. Yet, his efforts to describe that transformative effect are marred by a failure to provide a solid evidentiary grounding.

Rather than a careful marshaling of historical evidence, the book too often presents casual assertions unbacked by attention to the historical record, including some that could have been cured by a careful inspection of the Constitution itself. One example is the assertion that "the charter of 1787 said nothing about how one becomes a citizen either of a state or of the national polity"—the "matter was left entirely to state law." (p. 124) But Article I § 8, clause 4 empowers Congress "to establish an uniform Rule of Naturalization."[9] Similarly, the dating of the Emancipation Proclamation is said to be highly significant because it refers to "the year . . . of the Independence of the United States of America the eighty-seventh." (p. 37) This "unusual mode of dating" (p. 36) reflected "some dissonance between [Lincoln's] relying on 1776 as the beginning of the American nation and his acting in an office constituted by a documented drafted in 1787." (p. 37) But the Constitution itself is dated "in the Year of Our Lord [1787] and of the Independence of the United States of America the Twelfth." There was nothing innovative about Lincoln's dating, or about his view that the nation predated the Constitution.

The book also features a few offhand assertions of unclear logic. Here are some examples:

- "As time passes and our ranks are continually nourished by immigrants, the descendants of slaves constitute an increasing percentage of the 'original Ameri-

9. U.S. Const., Art. I, § 8, cl. 4.

> cans'—those whose forebears were here at the signing of the Declaration of Independence or at least to witness the surrender at Appomattox." (p. 63) But this makes no sense. The number of immigrants is irrelevant to the composition of the pool of "original Americans.' If the descendants of slaves are an increased percentage of that pool, this can only be because they have a higher birth rate than other original Americans or a greater tendency to marry immigrants.
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> • "The great evil of Germany's sending its own people to Auschwitz constituted a breach of faith with the German Jews who placed their trust in the nation of their birth." (p. 79) But this sentence cannot be meant seriously—it would imply that killing Polish and Russian Jews was relatively less serious than killing German Jews.

One striking example of inattention in handling the historical record involves a statement about Holmes, whom Fletcher describes elsewhere in the book as the main apostle of pragmatism. In the course of a discussion of how criminal law has been used to keep blacks subservient, Fletcher says: "In 1881, the great scholar Oliver Wendell Holmes, Jr. wrote approvingly of an antebellum case in which a young male slave was convicted of attempted rape for walking too closely to a white woman on the street."[10] (p. 142).

This is inaccurate. First, Holmes did not speak particularly approvingly about the case. In the course of a discussion of uncompleted criminal attempts, Holmes made the following statement: "On the other hand, a slave who ran after a white woman, but desisted before he caught her, has been convicted of an attempt to commit rape."[11] A page later he added: "No doubt the fears peculiar to a slave-owning community had their share in the conviction which has just been mentioned." This is not much of an endorsement. Second, the case did not involve "walking too closely to a white woman on the street." The defendant was running, not walking. Indeed, Holmes seems to have tilted the

10. The assertion is not utterly implausible, since Holmes was not known for his sensitivity on racial issues. While it is not central to Fletcher's argument, this assertion does have some relevance since Holmes's 1881 assertion is offered as documentation of the betrayal of the Secret Constitution when local police became "in effect, the heirs to the unrestrained power of the slave owners." (p. 142) Moreover, Fletcher is a renowned expert on criminal law and presumably more careful in this area than elsewhere.

11. Oliver Wendell Holmes, Jr., *The Common Law* 68 (Little, Brown, 1881).

facts to make the conviction appear less justifiable. According to the Alabama Supreme Court—which, incidentally, reversed the conviction and ordered a new trial—the incident took place in the country, the victim began to run and was pursued by the defendant, who "had on no clothing except a shirt" and who repeatedly demanded that she stop.[12] This is a far cry from Fletcher's description of the case.

Like the reference to Justice McLean as "Justice McClean" (p.167), these are relatively peripheral slips. But the book's historical foundation is shaky on other, more central questions.[13] Given the subtitle of the book ("How Lincoln Redefined American Democracy"), close attention to Lincoln's views might seem appropriate. Fletcher, however, limits himself to a few passages in Lincoln's major public addresses. The result is an incomplete portrait in three important respects.

First, Fletcher attributes to Lincoln a "casual attitude toward formal constitutional institutions, such as the writ of habeas corpus." (p. 5) During the war, "[t]he Constitution of 1787 lay suspended in the fires of battle" (p. 38), and Lincoln did not take his obligations under the old Constitution "particularly seriously." (p. 80) In general, Fletcher says, "Lincoln's posture toward the 1787 Constitution was less than reverent." (p. 37) This is an oversimplification. In his first inaugural, for instance—consistent with earlier statements on the subject[14]—Lincoln called for enforcement of the Fugitive Slave Clause and said that legislation on the subject was required by the oaths of all members of Congress to support "the whole Constitution – to this provision as much as to any other."[15] Similarly, the Emancipation Proclamation was shaped in part by Lincoln's view that the war power allowed him to free slaves only in Confederate territory.[16] Rather than viewing the Constitution as "suspended"

12. *Lewis v. State*, 35 Ala. 380 (1860).

13. If the notes are any indication, Fletcher does not seem to have delved deeply into the historical literature. For instance, he repeatedly relies on a PBS documentary and the accompanying book as historical authority. See 262 n.2, 263 n.10. 264 n.20, 266 n.35

14. See Allen C. Guelzo, *Abraham Lincoln: Redeemer President* 129 (William B. Eerdmans Publishing Company, 1999).

15. First Inaugural Address, reprinted in Abraham Lincoln, *Selected Speeches and Writings* 285 (Vintage Books, 1992) ("*Selected Writings*").

16. Lincoln's view was that "as a matter of civil administration, the general government had no lawful power to effect emancipation in any State," so that emancipation was justified only under the President's war power. Annual Address to Congress (Dec. 8, 1863), in *Selected Writings* at 406 (cited in note 15). In response to the suggestion that the Emancipation Proclamation should apply to occupied portions of Virginia and Lou-

during the war, he argued that the Constitution itself distinguishes between peacetime and "cases of rebellion or invasion involving the public safety"—"I can no more be persuaded that the Government can constitutionally take no strong measures in time of rebellion, because it can be shown that the same could not be lawfully taken in time of peace, than I can be persuaded that a particular drug is not good medicine for a sick man, because it can be shown not to be good food for a well one."[17]

Fletcher's strongest evidence of Lincoln's attitude toward the Constitution relates to the suspension of habeas. Fletcher quotes a famous passage in which Lincoln says that even if habeas suspension violated the Constitution, it was better to violate one provision of the Constitution than to let the whole thing "go to pieces." (p. 38) True, Fletcher says, most of us would agree with Lincoln if the "stark option" of national survival were in question, but "there is no evidence that the country's circumstances were anywhere near this flashpoint of imminent destruction." (p. 38)

This description of the habeas issue, however, fails to provide a complete account of Lincoln's views or of the circumstances. After the passage which Fletcher quotes, Lincoln continues: "But it was not believed that this question was presented. It was not believed that any law was violated."[18] Lincoln then points out that the Constitution does allow suspension during rebellion or invasion, where required by the public safety, and does not explicitly say whether the power to suspend is vested in the President or in Congress. "[T]he Constitution itself, is silent as to which, or who, is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be

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isiana, Lincoln pointed to constitutional concerns:

> The original proclamation has no constitutional or legal justification, except as a military measure. The exemptions were made because the military necessity did not apply to the exempted localities. Nor does that necessity apply to them now any more than it did then. If I take the step must I not do so, without the argument of military necessity, and so, without any argument, except the one that I think the measure politically expedient, and morally right? Would I not thus give up all footing upon constitution or law? Would I not thus be in the boundless field of absolutism?

Letter to Salmon P. Chase (Sept. 2, 1863), in *Selected Writings* at 394 (cited in note 15).

17. Letter to Erasmus Corning and Others (July 12, 1863), in *Selected Writings* 379-80 (cited in note 15).

18. Message to Congress in Special Session, in *Selected Writings* at 307 (cited in note 15).

called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion."[19] Whether or not Lincoln was right, this is a serious constitutional argument, not just a casual disregard of constitutional limits. And when the writ was first suspended, the nation was indeed in great peril. Lincoln did not have enough troops to defend Washington. Access to the city was possible only through Maryland, where it was threatened by mobs and by the possibility of secession by the state legislature.[20] Admittedly, Lincoln was not always overly scrupulous in his attention to legal forms, and he did appeal to the overriding requirements of necessity, but it is misleading to say that he simply set the Constitution aside during the war.

The book also oversimplifies the role of religion in Lincoln's thought. Fletcher speaks of Lincoln as "the president whose thinking and rhetoric were probably more influenced by the biblical idiom than the writings of any other president." (p. 39) "Lincoln," he says, "saw the entire Civil War as a righteous judgment of the Divine." (p. 39, see also p. 48) In the Gettysburg address, "[i]n style as well as substance, Lincoln returns to the religiosity of the 1776 Declaration." (p. 40) In Fletcher's view, the Civil War was "a war understood by many, Lincoln included, to have theological significance," drawing its "power from religious claims about the humanity of all human beings, and its leaders found their solace in psalms and prayers." (p. 51) In short, as demonstrated by the use of the phrase "under God" in the Gettysburg Address, Lincoln viewed the American people as having a "divine mission in history." (p. 4)

Again, the reality was more complex. Early in his political career, because he was not a member of any church and had expressed deistic views, Lincoln was forced to make a public denial of charges that he was overtly hostile to religion.[21] As explained by the author of a recent full-scale study of Lincoln's relationship with religion, "[e]specially for those who had not known Lincoln before the war, Lincoln's comfortable resort to biblical language made it easy to impute some form of piety to him."[22] But Lincoln was not a conventional Christian, and "his repertoire of biblical citations was more a cultural habit rather than a

19. Id.
20. See David Herbert Donald, *Lincoln* 298-99 (Simon & Schuster, 1995).
21. See id. at 114.
22. Guelzo, *Abraham Lincoln: Redeemer President* at 313 (cited in note 14).

religious one."[23] He read the Bible, it was said, in the relaxed manner of a man enjoying a good book.[24] His personal religious views seemed closer to deism (which was of course also the view of Jefferson, drafter of the Declaration that Lincoln loved to quote.)[25] Although on a few occasions he used more conventional religious language,[26] he seems not to have viewed himself as having any personal relationship with a God he generally seemed to regard as remote and unfathomable.[27] In some sense, Lincoln's sensibility may have been profoundly religious and probably deepened in the course of the war. But he was not devout in the conventional sense evoked by Fletcher's description.

Fletcher also goes astray in his discussion of the Thirteenth Amendment, which he regards as central to the Secret Constitution. He paraphrases the amendment to say: "Securing and protecting the autonomy of labor would become the duty of all state power. Government would have to keep a vigilant watch on all labor transactions to insure that there never again would arise relationships bordering on slavery or involuntary servitude." (p. 110) More generally, "[i]f servitude should be understood as relationships of domination, then an open-ended approach to the concept would have generated a watchdog role for the federal government in inspecting and supervising private relationships of potential exploitation and domination." (p. 140). Thus, the amendment "betokens an entirely new way of thinking about government—not as an ever-threatening enemy, but as a necessary partner in the building of a society free of interpersonal exploitation." (p. 214)

Fletcher's expansive reading of the Thirteenth Amendment, however appealing it might be in other respects, is weakly grounded in history. Rather than being a revolutionary breakthrough in ideas about government, the language of the Thirteenth Amendment was lifted directly from the Northwest Ordinance, which predated the Constitution. The sponsors of the Amendment refused to modify this familiar language, and rebuffed an effort by Senator Sumner to add a declaration that "all persons are equal before the law."[28] Supporters of the amend-

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23. Id. at 313.
24. Id. at 314.
25. Id. at 319-25.
26. See id. at 342.
27. Id. at 418-19.
28. See Daniel Farber and Suzanna Sherry, *A History of the American Constitution* 277 (West Publishing, 1990).

ment generally did not view it as giving Congress legislative authority over civil rights in general.[29] Rather than the expansive charter for social reform envisioned by Fletcher, most Republicans took a narrow view of slavery.[30] The Amendment's supporters believed only that "it would give emancipated slaves at least a right not to be chattelized and perhaps additional basic rights of locomotion, labor, and security to person and property."[31]

Moreover, contrary to Fletcher's efforts to cast the Thirteenth Amendment as an effort to reform oppressive relationships in the labor market, Republicans like Lincoln indignantly rejected any analogy between the slavery and the status of workers in the North, an analogy that Southerners were prone to make.[32] "Your whole hireling class of manual laborers . . . are essentially slaves," as one Southerner famously put it, the only difference being that "our slaves are hired for life and well compensated. Yours are hired by the day, not cared for, and scantily compensated."[33] Lincoln was confident that anyone who worked hard could move up in American society, and he was untroubled by the distribution of wealth—not surprising in someone who had gone from being an impoverished farmhand to an affluent railroad lawyer.[34] Lincoln made his views on the subject perfectly clear. Attacking Southern efforts to analogize Northern workers to Southern slaves, he said:

> The prudent, penniless beginner in the world, labors for wages awhile, saves a surplus with which to buy tools or land, for himself; then labors on his own account another while, and at length hires another new beginner to help him. This, say its advocates, is *free* labor—the just and generous, and prosperous system, which opens the way for all . . . . If any continue through life in the condition of the hired laborer, it is not the fault of the system, but because of either a dependent nature which prefers it, or improvidence, folly, or singular misfortune.[35]

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29. See Herman Belz, *A New Birth of Freedom: The Republican Party and Freedmen's Rights, 1861-1866* at 117 (Fordham U. Press, 2000 ed.)

30. Id.

31. Id. at 120.

32. See Donald, *Lincoln* at 233-35 (cited in note 20).

33. McPherson, *Drawn with the Sword* at 49 (cited in note 4) (quoting Senator Hammond).

34. Donald, *Lincoln* at 234 (cited in note 19).

35. Address to the Wisconsin State Agricultural Society, Milwaukee, Wisconsin (Sept. 30, 1859), in *Selected Writings* at 234 (cited in note 15).

In this respect, Lincoln was no precursor of FDR; he believed mightily in the free enterprise system.

Fletcher's response to all of this would probably be that it is irrelevant. What matters, he might say, is not the original understanding of the Thirteenth Amendment or Lincoln's own religious or social perspective, but rather the way in which the amendment and Lincoln's speeches have become embedded in our culture. In a section rejecting originalism as a constitutional philosophy, Fletcher says that "the relevant perspective is not that of those who first engage in the practice but rather of those who witness the pattern of the past and adopt it as binding on themselves." (p. 33) "So," he says, "it is with the Gettysburg Address. The right question is not what Lincoln intended, but rather what the words meant to those who looked to them as the explanation of the war and as a charter for freedom and equality for all Americans." (p. 33) This position has some merit—for example, the historical significance of the Magna Carta in English law has little to do with the specific understanding of the Barons gathered at Runnymede. But taking this approach seriously would require mustering substantial historical evidence about how American culture actually responded to the Civil War's legacy.

Unfortunately, however, the book does not provide substantial evidence that Lincoln, the Gettysburg Address, the Civil War, or the Thirteenth Amendment actually retained the cultural meaning embodied in the Secret Constitution. The evidence suggests the contrary. While Fletcher suggests that it was only the reactionary Justices of the Supreme Court who buried the egalitarian implications of the Civil War, recent historical research shows that the Court was reflecting the popular mood. In the interests of national reconciliation, whites North and South united in their desire to expunge the racial aspects of the conflict—"the white supremacist vision . . . locked arms with reconciliationists of many kinds, and by the turn of the century delivered the country a segregated memory of its Civil War on Southern terms."[36] What Fletcher calls the Secret Constitution did survive, particularly among blacks, but it was not the dominant view in American culture.[37] Instead, the reconciliationist vision celebrated the courage of soldiers on both sides and held

36. David W. Blight, *Race and Reunion: The Civil War in American Memory* 2 (Belknap Press of Harvard U. Press, 2001).

37. See id. at 2-3, 357-58, 383.

that Reconstruction was a tragic mistake.[38] *Birth of a Nation*, not the Gettysburg Address, shaped the national memory of the war a half century later.[39] This vision, shameful though it may have been, was ascendant, and if the Secret Constitution still held sway, it was very secret indeed.

The story may have been different a century after Gettysburg—the era of Martin Luther King and the Warren Court. But the case remains to be made that the First Reconstruction provided the deep structure for the Second, rather than merely serving as one source of inspiration.[40] The book's thesis is that the cultural memory of the post-war Secret Constitution has made a real difference in our later history, and this is a claim that requires empirical support.

Thus, taken as a structural description of American popular or legal culture over the past century and a half, the Secret Constitution is badly in need of empirical evidence which the book does not attempt to provide. Taken as a description of the Civil War era, the Secret Constitution does not seem to be supported in some important respects by the historical record.

III. CONSTITUTIONAL METAMORPHOSIS

In contrast to Bruce Ackerman's focus on the post-War adoption of the Reconstruction Amendments as the crucial constitutional change,[41] Fletcher draws our attention to the war itself as a period of constitutional tranformation. This is an important insight. Indeed, the war transformed the role of the federal government and its relationship with its citizens. The war had a critical impact on federalism, but apart from ending slavery, the war and Reconstruction failed to produce lasting racial equality.

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38. Id. at 96, 358.

39. Id. at 395.

40. Similarly for the Gettysburg Address. True, the Gettsyburg Address has been memorized by millions of school children, but it remains "more often iterated than understood." McPherson, *Drawn with the Sword* at 185 (cited in note 4). Scholars have identified five strands of the Lincoln image in American culture: Savior of the Union, Great Emancipator, Man of the People, the First American, and the Self-Made Man. Id. at 180. While these themes are "blended in the grand theme of democratic nationalism," id., they fall short of the "Founder of a New American Republic" image that Fletcher's thesis would suggest.

41. Bruce Ackerman, 2 *We the People: Transformations* 99-252 (Belknap Press of Harvard U. Press, 1998). Ackerman does briefly discuss the elections of 1860 and 1862, but only as background for his discussion of the formal amendments. Id. at 126-36.

A brief reprise of the history may be helpful. [42] Lincoln took the position that the Union was perpetual and that secession was unconstitutional. Consequently, he pledged to hold those Southern forts still in Union possession, the most important of which were Fort Pickens in Florida and Fort Sumter in Charleston. On April 12, the Confederates opened fire on Sumter, and the war came.

The North could hardly have been less prepared for war. It had virtually no army. Because of the Jacksonian attack on the Bank of the United States, it lacked a modern fiscal system with which to finance the war. It had no bureaucracy with which to organize the war effort. Worse, the president had no clear legal authority to oppose secession, let alone to take the drastic steps needed to bring the South back under federal authority. Nevertheless, Lincoln did take decisive action. He proclaimed a blockade of Southern ports, disbursed funds to anti-secessionists without legal authorization, suspended the writ of habeas corpus, and hastily mustered an army consisting of volunteers and state militias. Slowly and clumsily, the North mobilized for war.

Although the original aim of the war was simply reunification, inevitably Republicans like Lincoln came to believe that emancipation was necessary to achieve the avowed goal of preserving the Union. In 1862, Congress provided for the seizure of rebel property, including slaves, and prohibited slavery in the Territories and the District of Columbia. In the fall of that year, Lincoln issued a preliminary Emancipation Proclamation, which became final at the beginning of 1863.

All of this took place in the face of great constitutional uncertainty. The Constitution, after all, said nothing explicitly about secession. It also said nothing about waging civil war, nor did it speak to the question of reconstructing a defeated South. Strict constructionists like President Buchanan believed that the North was powerless to oppose secession, to wage civil war, or to conclude the war by Reconstruction. During the war, however, Republicans came to believe that the national government's powers were adequate to resolve whatever problems were facing the nation.[43]

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42. This and the following two paragraphs are drawn from Farber and Sherry, *History of the American Constitution* at 276-77 (cited in note 28), which provides appropriate citations.

43. Id. at 300.

Prior to the war, the state governments were primarily responsible for meeting the basic needs of American citizens. Apart from mail delivery, the national government had little impact on the daily lives of most Americans. Consequently, before the war, state citizenship was paramount. From this premise, it was a small step to the conclusion that allegiance to the state came before allegiance to the federal government. But such concepts obviously could not survive the Civil War, a war for the primary allegiance of the citizen.[44] In the *Prize Cases,*[45] the Supreme Court made it clear that citizens owe "supreme allegiance" to the federal government and only "qualified allegiance" to their home states.[46]

By the end of the war, even cautious constitutional analysts like Senator Reverdy Johnson argued that the federal government could protect black civil rights "because it is a necessary, incidental function of a Government that it should have authority to provide that the rights of everybody within its limits shall be protected, and protected alike."[47] Similarly, Senator Trumbull emphasized that to "be a citizen of the United States carries with it some rights . . . They are those inherent, fundamental rights which belong to free citizens or free men in all countries . . . The right of American citizenship means something."[48]

The Civil War also marked an unprecedented wave of federal legislation. After decades of wrangling about the propriety of federal funding for "internal improvements," Congress funded the Pacific railroad with hundreds of millions of dollars in cash and land grants.[49] During wartime, the government encouraged the adoption of uniform track gauges and other steps toward unifying the rail system.[50] The protective tariff, another subject of constitutional dispute dating back to the South Carolina Nullification Crisis, was adopted and remained unchallenged for half a century.[51] The Homestead Act gave three million acres of land to over twenty-five thousand migrants before the

44. Id. at 300-01.

45. 67 U.S. (2 Black) 635 (1862).

46. Id. at 673. For the classic study of the pre-war confusion over citizenship and its resolution, see James H. Kettner, *The Development of American Citizenship, 1608-1870* (U. North Carolina Press, 1978).

47. Cong. Globe, 39th Cong., 1st Sess. 530 (1866).

48. Id. at 1757. For further discussion of evolving concepts of national citizenship in the Civil War era, see Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. Rev. 863 (1986).

49. Guelzo, *Abraham Lincoln: Redeemer President* at 375 (cited in note 14).

50. Id.

51. Id. at 376-77.

war was even over.[52] In the meantime, the Morrill Act funded agricultural colleges in twenty-two states, the foundation of today's major state universities.[53] The national bank system was created, as well as paper money and an income tax.[54] This expansion of the role of the federal government turned out to be permanent, and in the end, all of these wartime innovations have become permanent fixtures in American life.

Thus, the way that Americans related to the federal government had irrevocably changed by the time of Lee's surrender. How did this change in our vision of federalism take place? Fletcher is right, once again, to point out the importance of public sentiment in this transformation, a sentiment that Lincoln articulated with astounding clarity in a few brief words at Gettysburg.[55] The end of Reconstruction and the triumph of reconciliationism submerged racial equality as a theme, but left unchallenged (and even in some ways reinforced) the sense of national unity. But two other factors were also important, one political, the other intellectual.

First, Lincoln's election in 1860 marked a transformation in American politics. Until 1860, the South had dominated the political system far out of proportion to its population. Two-thirds of the presidents had been Southern slaveholders, along with an equal proportion of the Congressional leadership and nearly as many Supreme Court Justices.[56] Southern influence on federal policy was augmented by frequent threats of secession—threats successfully deployed on all manner of subjects, from diplomatic recognition to Haiti (taboo because the ambassador would have been black), to the Compromise of 1850 and the executive's support for a pro-slavery state Constitution in Kansas.[57] As Lincoln pointed out, secession threats were in effect an effort to trump the democratic process.[58] By the end of the Civil War,

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52. Id. at 378.

53. Id. at 379.

54. Id. at 380-81.

55. Fletcher is not the first, of course, to highlight the importance of Gettysburg. See Garry Wills, *Lincoln at Gettysburg: The Words That Remade America* (Simon & Schuster, 1992).

56. See McPherson, *Drawn with the Sword* at 64 (cited in note 4).

57. Id. at 41-42.

58. Now we are told in advance, the government shall be broken up, unless we surrender to those we have beaten [in the 1860 election], before we take the offices. In this they are either attempting to play upon us, or they are in dead earnest. Either way, if we surrender, it is the end of us, and of the government. They will repeat the experiment upon us *ad libitum*. A year will not pass, till we shall have to take Cuba as a condition upon which they will stay in the Union.

Letter to James T. Hale (Jan. 11, 1861), in *Selected Writings* at 276 (cited in note 15).

this Southern dominance was broken forever. Even after Southern whites resumed their control of congressional seats, they were a minority, and their party of choice was to elect only two presidents before World War I. Thus, the actors responsible for constitutional interpretation, from 1860 onwards, no longer based their readings on the South's distinctive brand of constitutionalism. They rapidly accumulated a body of precedents from all three branches of government that supported a much fuller role for the national government.

Second, the war discredited the strongest version of states' rights ideology, under which the states were considered to be the sole locus of sovereignty to the exclusion of the federal government.[59] The range of respectable views was truncated at one end, shifting the balance toward more nationalist conceptions of the Constitution. What had previously been a somewhat moderate states' rights position now became the extreme end of the spectrum. The result was to transform the nature of constitutional debate. Rather than being forced to focus on the highly contested supremacy of national law, the task was merely to mark out the outer boundries of national sovereignty. While disputes would rage for another seventy years about the range of federal power,[60] many previously contested powers such as the protective tariff and internal improvements were settled. After many years in the wilderness, the Supremacy Clause had finally come into its own.

Thus, Fletcher is right to see the Civil War as a critical turning point in constitutional history. But he overestimates the breadth of the transformation, which was actually more profound regarding federalism than racial equality. The Civil War only imperfectly accomplished the vision that Lincoln expressed at Gettysburg. The "cash value" of the Gettysburg address was the end of slavery and the creation of the modern American na-

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59. See Forrest McDonald, *States' Rights and the Union: Imperium in Imperio, 1776-1876* at 194 (U. Press of Kansas, 2000)

60. As Lincoln put it:

> This relative matter of National power, and State rights, as a principle, is no other than the principle of *generality*, and *locality*. Whatever concerns the whole, should be confided to the whole—to the general government; while, whatever concerns *only* the State, should be left exclusively, to the State. This is all there is of original principle about it. Whether the National Constitution, in defining boundaries between the two, has applied the principle with exact accuracy, is not to be questioned. We are all bound by that defining, without question.

Message to Congress in Special Session (July 4, 1861), in *Selected Writings* at 311 (cited in note 15).

tion. The other part of Lincoln's message—a "new birth of freedom"—was only a promissory note, one that was dishonored with the end of Reconstruction and then lay forgotten for nearly a century.