

- Speaker 1: Major funding for Backstory is provided by an anonymous donor, the National Endowment for The Humanities and the Joseph and Robert Cornell Memorial foundation.
- Ed Ayers: From Virginia Humanities, this is Backstory. This is Backstory, the show that explains the history behind today's headlines. I'm Ed Ayers. If you're new to the podcast, my colleagues, Joanne Freeman, Brian Balogh, Nathan Connolly, and myself are all historians and each week we explore the history of one topic that's been in the news.
- Speaker 3: Neither slavery nor involuntary servitude except as a punishment for a crime shall exist within the United States or any place subject to [crosstalk 00:00:48]-
- Speaker 4: All persons born or naturalized in the United States are citizens of the United States and of the state wherein [crosstalk 00:00:58]-
- Ed Ayers: What you're hearing are portions of the 13th, 14th, and 15th Amendments to the US constitution.
- Speaker 4: Which shall outweigh the privileges or [crosstalk 00:01:02]-
- Speaker 3: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.
- Speaker 5: The right of citizens of the United States to vote shall not be denied on account of race, color, or previous condition of servitude.
- Ed Ayers: They're known as the Reconstruction Amendments passed in 1865, 1868 and 1870 respectively. And if you ask Pulitzer Prize winning historian Eric Foner, they make up a second founding of the United States of America. The amendments are so important, Eric has made them the subject of his brand new book, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution*. He says they have the power to bring progressive change on deep seated issues from citizenship to voting rights if only we'd give them their due. So today on Backstory, we're bringing you a feature interview I did with Eric about his new book. It joins a host of others he's written including *Reconstruction: America's Unfinished Revolution, 1863-1877*, and *The Fiery Trial: Abraham Lincoln and American Slavery*. We talked about many things from public perceptions of Reconstruction to what Eric and I learned about the period when we were in elementary school. But I started our conversation by asking Eric why he felt we needed a book about the Reconstruction Amendments right now.
- Eric Foner: Two things; one the 13th, 14th and 15th Amendments, I argue and I think many scholars would agree, really transformed the constitution and are essential to understanding the Civil War era and indeed our current situation today, and yet they are not widely known or understood. Even though they really are central documents of American history, they don't occupy the same place in our historical imagination as other key documents such as the Declaration of Independence or the Emancipation Proclamation. Your man or woman in the street has probably never heard of the people who wrote these

amendments, people like John Bingham and James Ashley and Henry Wilson. They're not part of the Pantheon of key figures in American history. I just wanted to draw attention to why they're important, why those people are important, why the amendments are important.

Eric Foner: But secondly, as I said, I lecture a lot, as you do, to all sorts of audiences within the university, outside, or people who are just interested in history and I've found that there's very little understanding of what these amendments were attempting to accomplish. Even in law schools, I hate to say it, I'm not a lawyer or a law scholar, I find that there's a lot of misconception and even, dare I say it, on the halls of the Supreme Court. One of my arguments is that there's a long history of what I can think of as misconceived Supreme Court decisions that are still embedded in our jurisprudence. If my book can help nudge the nine members of the Supreme Court toward a more expansive vision of these amendments, then I think that would be all to the good.

Ed Ayers: Yeah, that would be quite a return on your investment here. So you talk about being out in the world talking about Reconstruction, and I find that people don't even claim to know anything about Reconstruction. My joke is that Reconstruction happens over the winter break and between volume one and volume two, and that it-

Eric Foner: They don't reach it in the first semester if you're teaching the survey of American history or if it's the beginning of the second. They scoot right through it because there's a heck of a lot of history coming along afterwards, but that's a step forward Ed. You and I know that not that long ago when you mentioned Reconstruction, people knew "about it." What they knew was that it was a period of misgovernment, corruption, the lowest point in the saga of American democracy. And that the reason for that was one, vindictive Northern radicals who wanted to fasten their power on the South, but also the former slaves who were just incapable of exercising democratic rights. They were manipulated by whites. They were childlike, and that giving them the right to vote was a disastrous mistake.

Eric Foner: That played an important part in the ideological edifice of the Jim Crow era. The supposed horrors of Reconstruction were part of the justification for taking the right to vote away from black men in the late 19th, early 20th Century. That people no longer generally hold that view and actually know little is better. That at least now if people are interested, they can go at it with a fresh, a clean slate rather than having to disabuse themselves of a lot of mythologies.

Ed Ayers: That's a very optimistic interpretation. I like that. Now it's my sense that a lot of people still take their general idea about Reconstruction from *Gone with the Wind*, in which we have this great saga of that in which the victim is a slave holding white woman from the South. We're sympathetic with her and it creates the impression that Reconstruction began immediately after the end of the war and the devastation there. Is this your experience? Do you think that people are still filtering this through ... What do they think they know about Reconstruction? Where does it come from?

Eric Foner: Yeah. Well certainly *Gone with the Wind* or if you want to push back further *Birth of a Nation*, which of course is even much more pernicious because it's a direct defense and glorification of the Ku Klux Klan, *Gone with the Wind* is probably the most popular American movie ever made and it's constantly being shown on Turner movie channels. Look, people don't watch *Gone with the Wind* for a history lesson on Reconstruction. They watch so they can trace out Scarlet O'Hara's ups and downs. But yes, the Klan is in there, the whole idea that black people were just ignorant and incapable of taking part of democracy is in there. Whether it's that or just what you learned in school.

Eric Foner: I'm old enough to have learned in high school, and this was in Long Island, the suburbs of New York. I learned the old Dunning School view that Reconstruction was the worst period in all of American history. I think today most scholars see Reconstruction, or at least I've tried to argue, as an important moment in the history of democracy, the first effort to really make the United States an interracial democracy, which it had never been before the Civil War and then would not be again that until our own era. The tragedy of Reconstruction is not that it was attempted, but that it failed, and that left to subsequent generations, including our own, this question of racial justice in America.

Ed Ayers: Yeah. I should say in full disclosure, you learned about Reconstruction on Long Island in New York. I learned about it at Andrew Johnson Elementary School in East Tennessee, and I'm not kidding. There's only two in the United States, and I was at one of them, but I had my students and for a class here at the University of Richmond go online and say, "What do we think about Reconstruction? What's the general sense that you get?" And they came back with one word; failure. That's a word that you used, a description right now. And so what's the consequences of thinking of Reconstruction as failure? It's been a great continuity, as you're saying that people who hated Reconstruction defined it as a failure and people who admire it defined it as a failure. Does that have any cost?

Eric Foner: I think that's a great question and I will withdraw my word failure. You're absolutely right. It is so embedded. That idea is so embedded that it's just impossible to avoid. The problem with declaring Reconstruction a failure is that then it makes the question at hand why did it fail, rather than what it seek to accomplish and how much of that was accomplished? If you define Reconstruction as the effort to create a utopian society, it failed. We haven't had one yet, and certainly if you go a little less expansive than that and just say the effort to put into the laws and constitution and to enforce them, the basic rights of citizens for all Americans, including African-Americans, well it's not exactly that it failed, but it didn't become secure enough that later on these rights couldn't be taken away.

Eric Foner: But of course Reconstruction was many, many things and not all of them were a failure. Reconstruction saw the creation of the black church as really a major, major institution throughout the country. That's still here and as you well know, the black church has been the springboard for all sorts of activism among African Americans. Schooling, which was denied to almost all black people before the Civil War, this is when the public school systems of the South were created. This was when the black colleges were created. Those survived and so the black family, which had been it really disrupted in

many ways by slavery now is consolidated and becomes the foundation of black communities. That didn't go away when Reconstruction ended.

Eric Foner: So yeah, we should amend failure at least to say, well, in what realms did it fail and in what realms did it succeed? Because my definition of Reconstruction is not a specific time period, let's say 1865 to 1877 or other people have other dates, but as a historical process. How does the United States deal with the end of slavery?

Ed Ayers: As we're thinking really about the place of Reconstruction in the current American imagination, we have seen signs of awakened acknowledgement and interest in it. You and I both were fortunate to be in the Henry Louis Gates series on the Reconstruction on PBS, and people seem to really engage with that. So where do you think this interest is coming from?

Eric Foner: Well, I, like your students, I look around and say, "Well, how is ..." I look particularly at how Reconstruction is referred to in the press by journalists almost offhandedly. It's not that long ago. I remember in the 1990s, a distinguished, I'm not going to name any names, but a pretty distinguished journalist for the New York Times wrote a little article about the Bosnian Civil War. And he said, "Well, I hope that after the Bosnian Civil War is over that the victorious side just doesn't wreak vengeance on the losers as happened in the United States in Reconstruction." And I, as a complainer, I send him a note. And I said, "You're not writing about Reconstruction really, but I think it's important to know that that's not how historians view it anymore. You're reinforcing the idea that giving rights to black people is an act of vengeance against white people, which is a really dangerous idea."

Eric Foner: He wrote back and said, "You're absolutely right. I shouldn't have said that, but my wife is from South Carolina," and I've heard this all the time. And I said to myself, "That's a funny way of running journalism." You put in your article what your wife told you over breakfast. But be that as it may, you don't see that anymore. I think what now, if Reconstruction pops up is Tim Scott is the first black Senator from South Carolina and the first ones were in Reconstruction. I think Reconstruction is being seen as a time when positive things happened even though negative things happened as well. So I think it's good. And of course the Gates series was very important as you well know, that there's now a national park site being developed in Beaufort, South Carolina to highlight the history of Reconstruction. So I think Reconstruction is, people are encountering it in all sorts of venues and I think in a more modern form than the old what we call Dunning School approach.

Ed Ayers: Well you were modest before in walking away from the word failure, but in many ways you came up with the right word back in 1988 with your great book on Reconstruction; unfinished revolution. Are you willing to stand by that phrase still?

Eric Foner: Yeah, I am. That was the very last words of the Gates series, if you may remember. Professor Kimberlé Crenshaw got the very last word in Reconstruction was an Unfinished Revolution. So I said, "Oh, look at that. That's nice. My phrase still reverberating out there." The funny thing is that that wasn't the title of the book. The

title of book was just Reconstruction, and the day before it finally went to the printer, my editor called me and said, "People here don't think anyone's going to buy that book. It needs a good subtitle. By tomorrow morning, give us a subtitle." And I thought, "Gee whiz." And I thought and thought and thought and suddenly this popped into my head, The Unfinished Revolution and I told it to him. So it wasn't something that had shaped the way I wrote the book or anything like that.

Eric Foner: But anyway, yeah, it's unfinished, and particularly, when you talk about the legal and constitutional aspects, yes. The Reconstruction put forward a whole set of ideals, a whole set of principles for our society and they weren't fully accomplished, certainly. I want to give the impression of something that's still ongoing, that Reconstruction is not just the dead past. It's still happening in the sense that the issues of Reconstruction; who should be a citizen? Who should have the right to vote? How do we deal with terrorism and others? These are on our agenda today. So that debate is still unfinished.

Ed Ayers: Your new book, let's talk about the title of it. The Second Founding. So why did United States need a second founding? What was it about the first founding that was inadequate?

Eric Foner: Well, as you well know, there's a lot of debate among historians about exactly what the relationship between the constitution and slavery was. I don't want to get into that right here. The abolitionist movement debated that forever, but I think we would all have to say that slavery in some form was embedded in the original constitution. We had the Fugitive Slave Clause, which required the return of those who managed to escape to freedom. We had the Three-Fifths Clause, which gave the slave South added representation in the House of Representatives by counting part of their slave population. So we needed a second founding to cleanse the constitution of slavery and to clarify issues which the constitution had left undecided.

Eric Foner: Number one, who is a citizen of the United States? One of the funny things is the constitution refers to citizens all over the place, but it never defines who is a citizen. What do you need to be to be a citizen? My view of Reconstruction, I use this phrase, a modern phrase, I didn't use it back then, is this is regime change that's going on. A pro-slavery regime is being replaced with what? With some kind of antislavery regime and you've got to rewrite the constitution in order to cleanse it of the remnants of the pro-slavery regime.

Ed Ayers: And that regime wasn't just in the South. The whole nation was a regime based on slavery.

Eric Foner: Absolutely. That's why Lincoln in his second inaugural address referred to it as American slavery, not Southern slavery. Lincoln always said that, that we are complicitous in the North. We don't own slaves right now, but we are complicitous. We profit from slavery.

Ed Ayers: So as you know from our giving talks, people think that the Civil War itself ended slavery and that the 13th Amendment was just a codification of something that had already happened with the Emancipation Proclamation and so forth. So I thought that was one

thing that was interesting about the Lincoln movie focusing on the 13th Amendment. So why did we need the 13th Amendment if the Civil War ended slavery?

Eric Foner: Well there were still slaves on the ground when the Civil War ended, quite a few of them. People who had gotten to Union lines or where the Union Army had come and established control, yeah. Part of their job, part of the Union Army's job once the Emancipation Proclamation was issued, was to protect the freedom that Lincoln had announced. But legally speaking, emancipation and abolition are not quite the same thing. Slavery is created by state law, not federal law, state law. States can abolish slavery as the Northern states did soon after the American Revolution, but freeing individuals does not abrogate the state laws that create slavery. That's why Lincoln's, even though you wouldn't quite see this in the movie. That's fine. It's not a historical treatise. Lincoln's preferred route to the end of slavery during the war was state by state abolition.

Eric Foner: Even after he issued the Emancipation Proclamation, he was pressing Southern states. If any of them wanted to come back in the union, they would have to abolish slavery. That's how you get rid of slavery on the ground, by having the state laws abrogated. But that couldn't really happen in the Civil War very much, and so by 1864, many people particularly abolitionists are saying the simpler way is just to have this constitutional amendment. That will completely abrogate slavery everywhere in the country. We won't have to go state by state and let's do it that way. Lincoln got onboard of course, and as the movie shows, twisted a lot of arms in January, 1865 to get some people in the House of Representatives to vote for the 13th Amendment, so to completely get rid of slavery. It's certainly true. The war disrupted slavery. Many people fled. Some states like Maryland, a border state and Louisiana where Lincoln was trying to push a Reconstruction plan, they abolished slavery on the state level, but there were plenty of places slavery was still existing when the Civil War ended.

Ed Ayers: Well, why would Lincoln have to twist so many arms if the United States awakened to the great injustice of slavery during the war and mobilized 200000 African American men to be soldiers and sailors? Why was there still resistance to it as late as 1864 and early 1865?

Eric Foner: Yeah, well, of course the first time they tried, the 13th Amendment failed in the House of Representatives. Remember, it needs two-thirds vote in the Congress, which is often not that easy to get. The Democratic Party was still there. It was still, if not pro-slavery, it was still resistant to abolition. The border slave states, the people there were quite adamant that they didn't, Kentucky, Maryland said they didn't want this constitutional amendment. They were still in the union, but it took arm twisting because the 13th Amendment gets lost in the shuffle in a way. We talk about the 14th and 15th much more for complicated reasons, but the 13th Amendment was really a constitutional revolution in and of itself.

Eric Foner: Never before had the constitution been written or amended to just abrogate a whole type of property. Some of the people in Congress said, "Wait a minute. If we're going to say this kind of property is gone, next year there'll be demanding that we confiscate the

factories of New England." It also completely reversed the position and that was traditional, but from the constitution arm, with the ratification of the constitution arm, that this was a state matter. Now it's a, "Forget it. I don't care what the states want. No slavery anymore in this country, do supersede." That is a fundamental shift of power from the states to the federal government. And then the second clause. The first clause, abolition of slavery. The second clause, Congress shall have the power to enforce this amendment. A lot of southerners, once the war is over and Andrew Johnson's Reconstruction plan is moving along, a lot of white Southerners say, "Wait a minute, wait a minute. Yeah, slavery is dead. We understand that. We're not going to have slavery back, but this second clause seems to give Congress the right to legislate about anything they want."

Eric Foner: How do you enforce the abolition of slavery? Do you give black people the right to vote? Yeah. People said that's what they need if they're going to be free. Do you give them land? That's what African Americans wanted. In other words, it's very open-ended. Enforcing the abolition of slavery is a very complicated idea. Unfortunately, for very complex legal reasons, it has never really been implemented. The Supreme court has barely ever used the 13th Amendment as a weapon against the racial inequality that is, of course, tied up in slavery.

Ed Ayers: Yeah, so the 13th Amendment, it's a breakthrough in thinking about what the nation is as well as ending slavery right?

Eric Foner: Right.

Ed Ayers: Does that help explain why the 14th Amendment comes so quickly after the 13th after there have been decades, really, without constitutional change?

Eric Foner: Yeah. The 14th Amendment, I would say, is working out the consequences of the 13th Amendment as well as the consequences of the Civil War. I see the 14th Amendment as putting the Northern Republicans understanding of what they had achieved in the Civil War into the constitution. Some of it has something to do with race or slavery, for example, that Confederate bonds are never going to be repaid. If you patriotically loaned money to the Confederacy, forget it. You're never getting that back. It has to do with various other things related to the war. But the first section, which is the key one, is really henceforth because of the abolition of slavery, everybody born in the United States is a citizen of the United States.

Eric Foner: You needed that because the status of citizenship was still very uncertain and then more important, all those citizens are going to enjoy the equal protection of the law. The original constitution said nothing about equality among Americans, nothing. It's the 14th Amendment that makes the constitution as it has been in our own time, a vehicle through which all sorts of people can claim greater equality. The gay marriage decision a few years ago was a 14th Amendment decision. They weren't thinking of gay marriage when they were writing the 14th Amendment, but they were thinking of how do you make people equal before the law?

Ed Ayers: The last amendment you talk about of course, is the 15th, which I think often tends to be seen as a footnote to the 14th but was that also a hard fought battle to create that?

Eric Foner: That was very hard fought because the principle that the states controlled the right to vote was deeply embedded North and South. There were plenty of Northern states that were nervous. In Congress, they were those who said, "We want an amendment that just says every male citizen age 21 has the right to vote." If they had gotten that through, just think of all the trouble that would have been avoided. Even today when we're debating voter IDs and all that, a positive statement. Now they weren't willing to give women the right to vote and the women's movement was very outraged by that. But Northern states, the Chinese couldn't vote in California. Immigrants couldn't vote on the same basis as a native born in Rhode Island. Massachusetts had a literacy test for voting. They didn't want to give up their control of the rights. So instead of a positive amendment, it's what you might call a negative amendment; that no state can deny anyone the right to vote because of race.

Ed Ayers: Well, it's a work-around in a way, right? It's-

Eric Foner: It's a work-around and it has a serious flaw, which is any other limit on the right to vote is not prohibited right? You can have a literacy test. You can have a poll tax. When the Southern states, as you well know, took away the right to vote, they didn't do it by saying, "Hey, black people can't vote anymore," because that would've violated the 15th Amendment. What they did was put all these other qualifications and then understanding clauses. You've got to prove to the registrar that you understand the state constitution, but the Supreme Court allowed this to happen. They said, "Well, look, they're not talking about race actually. This law says nothing about race so it doesn't violate the 15th Amendment."

Ed Ayers: Well and there's other parts of these amendments that have come back to haunt us in some ways. Perhaps you could talk a little bit about the clause about involuntary servitude and the 13th Amendment?

Eric Foner: That's been highlighted a few years ago by the documentary of, the Hollywood documentary, 13th. 13th Amendment, the language is taken just about directly from the Northwest Ordinance of Thomas Jefferson, and it says, "Neither slavery nor involuntary servitude except as a punishment for crime, can exist in the United States." That criminal exemption. Now this is not a conspiracy as some people think, "Oh look. They were looking ahead to mass incarceration, to convict labor, to the exploitation of the labor." They were hardly any prisons in 1865. There was a little bit of a history of convict labor to help pay the cost of prisons, but it wasn't a mass system. But this little, this exemption, which was not even debated in Congress, nobody even mentioned it except Charles Sumner, the abolitionist Senator from Massachusetts. It wasn't debated in the press. I looked through the newspapers. Nobody mentions it.

Eric Foner: It's just boilerplate language really. But nonetheless, inadvertently, it created this loophole through which the Southern states particularly drove this Mack truck in the late 19th century of massive convict labor, either within prisons or leasing out of

convicts to work in mines and plantations and on roadwork and stuff like this, under terribly oppressive conditions. The courts have persistently ruled that the 13th Amendment allows the requirement, the involuntary labor of people convicted of a crime. And then after Reconstruction, Southern states began making almost anything a felony. You steal a chicken, it's a felony, and you're eight years in jail and you are sent out pretty soon to labor on some guy's plantation who has rented the labor of the prisoners from the federal government. So it's disastrous really in Southern history later on, but it was inadvertent almost. What it shows you is people talk a lot about the original intention. Sometimes unintended consequences can be just as important as the intended consequences of an amendment.

Ed Ayers: You talked before, Eric, about the way that even though women played such a crucial role in bringing about these amendments; petitioning Congress during the war and afterwards, that they were excluded from this. How about the place of American Indians in all this? Who's been born in this country more than American Indians? So why is that a blind spot in these laws of the post Civil War era?

Eric Foner: The legal status of Native Americans was murky, to say the least. You still had the remnants of the idea that they were not Americans. They were members of their own tribal sovereignties. People talked about the Cherokee Nation, the Choctaw Nation. You are not a citizen of the United States. You were a citizen of the Cherokee Nation. Now, of course, by this time, the power of the Indian nations in most places had been broken, and it wasn't as if you had the United States government dealing with equal nations on the other side. But the people who wrote the [inaudible 00:29:15] did not, their aim was not to make Native Americans citizens. The exemption in the 14th Amendment says, "Anybody born in the United States or naturalized coming from abroad except and subject to the jurisdiction of the United States." And the idea, well Native Americans are not subject to the jurisdiction of the United States. They're subject to the laws of their own national sovereignties.

Eric Foner: So Indians were not citizens and it's not until 1924 that Congress enacts a law making all Native Americans, regardless of where they are living, regardless of what tribe they in, citizens of the United States. So yeah. These amendments had exemptions, they had loopholes, they had serious flaws. Women, as you said, certainly objected to the 15th Amendment, which didn't give them the right to vote, and the second clause of the 14th Amendment, which introduces the word male for the first time into the constitution. These measures were compromises. They were worked out after long debate and amendments and ups and downs in Congress. There's no single mind behind the 13th, 14th or 15th Amendments. They were the result of all sorts of negotiation and controversy. Nonetheless, the basic principles are pretty clear. The abolition of slavery, the establishment of a universal notion of citizenship, despite without the native Americans and of equality among those citizens and the vast expansion of the right to vote.

Ed Ayers: And they are alive in today's political and legal culture. What do you see as the issues that are most salient right now on either being contested or helping drive forward some kind of change?

Eric Foner: Well, sadly, yeah. Many of these issues are still unresolved and I'd have to say sadly, our Supreme Court has adopted an increasingly narrow definition of the implications of these amendments. The most notable was a few years ago in the Shelby County decision, which overturned a very important part of the Voting Rights Act of 1965. That's a law passed under the 15th Amendment. It was passed with virtual unanimity in Congress, forcing jurisdictions in the South that had a long history of discrimination and voting to get prior approval from the federal government before they changed the voting rules. Supreme Court a few years ago said, "Well that's a violation of federalism. It treats some states more harshly than other states." Well, these are states that had slavery and not every state did. And also these are states that had consciously removed the right to vote over many years.

Eric Foner: But anyway, so their narrowing the 15th Amendment. Who should have the right to vote is a hot issue in our politics as you well know, with gerrymandering, with various ID and other voter suppression laws. Citizenship, how relevant can you be on our border today? This is being debated all the time. Who has the right to be an American citizen? For example, does the child born in the United States of a undocumented immigrant, is that child automatically an American citizen? Well, language of the 14th Amendment is pretty clear. Yes. Any person born in the United States. Your parents can be bank robbers. That doesn't mean that you can't be a citizen of the United States. But President Trump, among other things, has said that he feels he has the right as president to abrogate the first sentence of the 14th Amendment, the birthright citizenship sentence for the children of undocumented immigrants.

Eric Foner: I don't personally think the president can all by himself eradicate part of the constitution, but some people have tried to do that. So these issues are certainly on our political agenda today and I think an understanding of how the 13th, 14th and 15th Amendments were enacted, what they were intended to accomplish, can help us think through the implications of that today.

Ed Ayers: Eric Foner is professor emeritus of history at Columbia University. His latest book is *The Second Founding: How the Civil War and Reconstruction Remade the Constitution*. That's going to do it for us today, but you can keep the conversation going online. Let us know what you thought of the episode or ask us your questions about history. You'll find this at backstoryradio.org or send an email to backstory@Virginia.edu. We're also on Facebook and Twitter at Backstory Radio. Special thanks this week to Jerry [inaudible 00:34:10] and Katie Gary.

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