

**A NEW BIRTH OF FREEDOM:
THE FORGOTTEN HISTORY
OF THE 13TH, 14TH, AND 15TH AMENDMENTS**

NATHAN NEWMAN & J.J. GASS

**JUDICIAL
INDEPENDENCE
SERIES**

**BRENNAN CENTER
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THE FORGOTTEN HISTORY OF THE 13TH, 14TH, AND 15TH AMENDMENTS

The Supreme Court's recent turn away from civil rights and toward states' rights claims legitimacy from a familiar – but false – history: the Constitution of 1787 carefully preserved the states' sovereignty; Congress operated for 150 years within narrow constraints on its enumerated powers; the courts zealously policed the boundaries of proper federal action; and the half-century starting with the New Deal, when the Supreme Court allowed the federal government to do more or less what it wanted, was an anomaly.

None of this is true. If there is an anomalous period in the relationship between the Court and Congress, it began shortly after the Civil War and ended with the “switch in time” of 1937. The Court commenced its first sustained campaign to cut back on congressional power by striking down civil rights statutes passed during Reconstruction. These decisions betrayed Lincoln, who had promised a “new birth of freedom” at Gettysburg, and the people who enacted the constitutional amendments and legislation to make that promise a reality – not to mention the thousands of blacks slaughtered while defending their rights and the millions condemned to live under Jim Crow in the wake of the Court's rulings.

Whatever else might be said of “originalist” constructions of constitutional provisions adopted in 1787, the Rehnquist Court's decisions on the New Birth Amendments are utterly indefensible as a matter of history. Like the reactionary Court of the 1870s – whose infamous precedents it unabashedly cites – the states'-rights bloc on today's Court has struck down federal civil rights legislation enacted pursuant to the New Birth Amendments without regard for the widely understood meaning and purpose of those amendments at the time they were ratified. This paper aims to revive the memory of the New Birth Framers and their work and to debunk the claim that the Court's anti-equality agenda has any support in the history of the 13th, 14th, and 15th Amendments.

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INTRODUCTION: FROM THE COLFAX MASSACRE IN THE 1870S TO THE RAPE OF CHRISTY BRZONKALA IN THE 1990S

Two Virginia Tech football players raped freshman Christy Brzonkala in 1994. University administrators and other state officials failed to punish the athletes, and Brzonkala dropped out. Despairing of protection from the state, she took charge herself, suing her assailants under the Violence Against Women Act (VAWA). But six years later, when Brzonkala's case reached the Supreme Court, the conservative majority struck down VAWA's civil remedy, holding that Congress had no power to punish private violence motivated by the victim's sex. In spite of Congress's extensive investigation showing that state authorities often failed to protect women from sex-based attacks or to punish their attackers, the Court held by a 5-4 vote that the federal government could do nothing about it.

As with many other anti-civil-rights decisions by the Rehnquist Court, the majority justified its harsh result as mere fidelity to the original understanding of the 14th Amendment. Whatever one thinks of genuine originalism – the theory that the Court should apply each constitutional clause according to how its text was understood when drafted and ratified – recent cases cutting back Congress's power to protect civil rights are false originalism. For what Chief Justice Rehnquist's opinion failed to mention was that the “original” understanding that denied Christy Brzonkala her day in court was not that of the Congressmen who wrote the 14th Amendment, nor of the Radical Republicans who supported it, nor of the public whose representatives ratified it, but of nineteenth-century judges who opposed racial equality.

Whether she knew it or not, Christy Brzonkala's fate was linked to that of more than 100 blacks murdered in Colfax, Louisiana in 1873 for defending their right to vote. The Supreme Court threw out the ringleaders' convictions in 1875, saying Congress could not criminalize private violence, even when the violence was motivated by the victims' race, even when it was designed to prevent them from exercising their constitutional rights, and even when the states did nothing to punish the offenders. According to that Court, the 14th Amendment “adds nothing to the rights of one citizen as against another.” One hundred twenty-five years later, the Rehnquist Court quoted that very sentence in throwing Christy Brzonkala out of court in a case called *United States v. Morrison*.

The sentence came from *United States v. Cruikshank*, a case that should be as infamous as *Dred Scott* and *Plessy v. Ferguson* in the sordid history of nineteenth-century Supreme Court decisions on racial questions. Yet it is not; while no modern Court would ever cite *Dred Scott* or *Plessy* approvingly, hardly anyone noticed when Chief Justice Rehnquist quoted *Cruikshank's* immunization of the

Colfax murderers. That is, at least in part, because we have forgotten the people that the Chief Justice did *not* quote: John Bingham, the principal author of the 14th Amendment; Thaddeus Stevens, the House floor manager; Jacob Howard, who led the amendment's passage in the Senate; or Speaker of the House Schuyler Colfax, later Vice President and, ironically, the man for whom Louisiana's Reconstruction government named the town of Colfax. Compare the obscurity of these constitutional framers with the fame of the framers of the Constitution of 1787 – men like James Madison, Alexander Hamilton, and Benjamin Franklin.

President Lincoln promised at Gettysburg that the Civil War would produce a “new birth of freedom.” The Radical Republicans who passed the post-war amendments to the Constitution – the 13th, 14th, and 15th Amendments – aimed to honor Lincoln's promise. The New Birth Constitution would harness the national legislative power created by the 1787 Constitution. But unlike the original Constitution, which had used federal power to uphold slavery, the New Birth Constitution would turn that power to the protection of individual rights. New Birth Framers like Bingham bitterly remembered how the pre-war Court had upheld the draconian federal Fugitive Slave Acts. They were determined that the same federal authority that had once oppressed blacks would now establish and defend their equality. They were also determined not to leave the protection of individual rights to the courts, which had been so hostile to individual liberty before the war; Congress must have the power to legislate equality and punish those who denied it.

The view that the Constitution of 1787 enshrined states' rights, and that the New Birth Amendments did little more than take away the states' ability to legalize slavery and impose *de jure* discrimination, is a myth. Before the Civil War, the Constitution did not simply preclude the federal government from interfering with the states' decisions regarding slavery; it affirmatively mandated federal support for the institution, to the extent of invalidating civil rights laws in northern states. That, at least, was the Supreme Court's consistent interpretation, driving abolitionists like William Lloyd Garrison to denounce the Constitution as “a covenant with death, an agreement with hell.” And as their label implies, the Radical Republicans did not simply tinker with the Constitution, but fundamentally changed it from a pro-slavery document into a pro-equality document.

The New Birth Framers and their allies not only drafted the New Birth Amendments. They immediately used the powers those amendments gave Congress, passing legislation to root out white supremacy and establish racial equality in the defeated South. Some legislation reinforced political rights like the right to vote and run for office, but Congress also attacked private racism. Most Americans would probably be surprised to learn that Congress banned segregation in private inns, restaurants, and transportation as early as 1875, let alone that a congressional majority supported mandatory desegregation of public schools 80 years before *Brown v. Board of Education*. When Strom Thurmond and his

cohorts filibustered the Civil Rights Act of 1964, they were blocking legislation that Congress had already passed a century earlier – legislation struck down in another precedent the Rehnquist Court relied on in *Morrison*, the misnamed *Civil Rights Cases* of 1883. And when the Court imposed strict constraints on federal affirmative action programs in the 1990s, it rehashed the same arguments made by President Andrew Johnson in his vetoes of race-conscious legislation in the 1860s – vetoes that were overridden by decisive margins by the very Congresses that adopted the New Birth Amendments.

Cruikshank put an end to the federal government’s drive to break white supremacy. Federal troops were withdrawn from the South, civil rights laws that had not been expressly invalidated fell into desuetude, and the pall of Jim Crow fell across the coming century. Lincoln’s vision yielded to justices who left a legacy of lynching, segregation, and white supremacy.

That legacy is the “original understanding” enforced by the five-justice anti-civil-rights bloc on the Rehnquist Court. It is the result not of a disinterested search for an objective original meaning, but rather of a phony history of the New Birth Amendments, and indeed of the 1787 Constitution. The Rehnquist Court’s anti-equality agenda originated not in the New Birth Amendments, but in *Cruikshank* and the *Civil Rights Cases*. Invoking this shameful history, the Court has struck down parts of not only VAWA, but the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Religious Freedom Restoration Act. These are not the actions of true originalists, let alone believers in judicial restraint. Aggressively striking down democratically enacted laws is not restraint, and zealously cutting back Congress’s power to enforce the 14th amendment is not originalism.

Aggressively striking down democratically enacted laws is not restraint, and zealously cutting back Congress’s power to enforce the 14th amendment is not originalism.

STRONG NATIONAL POWER UNDER THE PRE-CIVIL-WAR COURT

THE SLAVE CONSTITUTION OF 1787 AND STATES' RIGHTS

SELECTED PRE-CIVIL-WAR DECISIONS UPHOLDING NATIONAL POWER AT STATES' EXPENSE

Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). Struck down, under the Contract Clause, a Georgia law seeking to recover state property sold after the legislature had been bribed.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Invalidated a state tax on the Bank of the United States and said that the federal government was created by the people, not the states.

Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). Held that a state could not modify a corporate charter granted by the pre-Revolution colonial government.

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). Invalidated a steamboat monopoly granted by New York that conflicted with a federal law regulating coastal trade, emphasizing the broad scope of the federal commerce power.

While it embodied great principles of democratic governance, the Constitution of 1787 was pervasively shaped by slave states' demand that it protect their "peculiar institution." As Georgia recalled in its 1861 Declaration of the Causes of Secession, "the question of slavery was the great difficulty in the way of the formation of the Constitution," and without the Fugitive Slave Clause, "it is historically true that we would have rejected the Constitution." From the Fugitive Slave Clause, to counting slaves as three-fifths of a person in allocating federal representatives and presidential electors, to the "Great Compromise" balancing slave state power against free state power with equal representation in the Senate, to the requirement that direct taxes be apportioned according to population (again with slaves counted as three-fifths of a person), the structure of the original Constitution cannot be isolated from the political necessity of accommodating slavery. It may be tempting to think that in outlawing slavery, the 13th Amendment simply removed an extraneous flaw that was incompatible with the Constitution's essence. But that view ignores the centrality of slavery in shaping numerous compromises in Philadelphia. More important for understanding the New Birth Amendments, that was not the view of the New Birth Framers. They understood what later generations have had the luxury of forgetting: one cannot ignore slavery and still maintain a coherent understanding of the compromises and aims that created the Constitution of 1787.

Contrary to the modern association of states' rights with an anti-civil-rights agenda, it was federal power that protected slavery, with federal courts often brushing aside abolitionists' states'-rights arguments. The Fugitive Slave Act of 1793, for example, gave slave owners the right to cross into free states and seize alleged fugitive slaves. The breadth of federal power was highlighted by the federal statutory right of slave owners to sue anyone interfering with the capture of alleged fugitives.

Congress's power to create claims against private individuals is especially striking in light of the Rehnquist Court's rejection of a similar power to give women claims against their attackers. Just like the Equal Protection Clause of 1866, whose enforcement underlay VAWA, the Fugitive Slave Clause of 1787 expressly addressed state law rather than private action:

No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.¹

But it was understood – the original understanding, if you will – that Congress could protect the property rights guaranteed by the Fugitive Slave Clause by preventing private individuals from obstructing slaveholders’ enjoyment of those rights. The courts’ obeisance to federal pro-slavery legislation, at the expense of a state’s right to protect the freedom of its own citizens, culminated in the 1842 case of *Prigg v. Pennsylvania*, a decision as infamous to the Civil War generation as *Plessy* is to ours.

For decades, northern states had chafed at the Fugitive Slave Act’s failure to provide any due process for alleged runaways. Slaveholders and traders could enter free states and kidnap black men, women, and children, and the “slaves” never had a chance to prove that they were free. A number of states responded by making it a crime to kidnap a free man or woman. Pennsylvania’s Personal Liberty Law required slave owners to obtain a warrant from a local magistrate or federal judge proving their claims before they could take fugitive slaves back to the South. To the outrage of the North, the Supreme Court declared in *Prigg* that the Pennsylvania law was invalid.

Prigg, which was very much in the minds of the New Birth Framers, sheds light on their intentions in two respects. First, just as the Equal Protection Clause would later invalidate discriminatory legislation without the need of congressional action, the Fugitive Slave Clause had a self-executing aspect in sweeping away state laws that inhibited slaveholders’ property rights. Justice Story explained for the Court: “It is scarcely conceivable, that the slave-holding states would have been satisfied with leaving to the legislation of the non-slave holding states, a power of regulation in the absence of that of Congress.”² In this respect, the Fugitive Slave Clause had an effect that is familiar to modern eyes, empowering courts to strike down improper state action.

The second important aspect of *Prigg* is less familiar today for a number of reasons, but it was crucial to the New Birth Framers: the Court’s deference to federal legislation that Congress found “necessary and proper” in advancing the substantive rights guaranteed by the Fugitive Slave Clause. “If, indeed, the Constitution guaranties the right [to demand the return of escaped slaves] . . . the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it.”³ Before the Civil War, this inference supported Congress’s power to pass the Fugitive Slave Act; after the war, the New Birth Framers recognized that the same reasoning required a broad federal power to enforce the rights guaranteed by the 13th, 14th, and 15th Amendments. Thus the irony of the New Birth Amendments: constitutional clauses dedicated to freedom and equality descended from the Fugitive Slave Clause; civil rights legislation of the 1860s and 1870s was explicitly patterned on the Fugitive Slave Acts of 1793 and 1850; and the pro-slavery decision in *Prigg* provided the legal logic justifying the entire enterprise.⁴

Prigg reflected not only Congress’s power to protect slavery but also the pre-Civil-

Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), overruled by *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Declared that state court decisions did not bind federal courts, allowing federal courts to create their own common law, partly shielding out-of-state businesses from local regulation.

Bronson v. Kinzie, 42 U.S. (1 How.) 311 (1843). Joined a long line of decisions striking down state debt-relief statutes on Contract Clause grounds.

The Genesee Chief, 53 U.S. (12 How.) 443 (1851). Extended federal admiralty power to inland lakes and waterways connecting them.

Piqua Branch of the State Bank of Ohio v. Knoop, 57 U.S. (16 How.) 369 (1854). Prohibited Ohio from taxing a bank that state law had previously exempted from taxation.

War Court's support of expansive federal power in general. Indeed, contrary to the myth that the founding generation construed Congress's powers narrowly, the Court did not strike down a significant piece of federal legislation as exceeding Congress's powers until 1857 – in *Dred Scott*.⁵ On the other hand, the Court routinely invalidated state laws that intruded on federal power. The Marshall Court's landmark cases on the relationship between the states and the federal government almost universally struck down state laws or upheld federal laws (or both), and the Taney Court usually followed the same course. In 1819, Chief Justice Marshall famously encapsulated in *McCulloch v. Maryland* the pre-Civil-War Court's deference to Congress's assessment of what laws were required to carry out its enumerated constitutional powers:

"If, indeed, the Constitution guaranties the right... the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it."

Prigg v. Pennsylvania

Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional.⁶

For most of the succeeding 185 years, the Court has adhered to *McCulloch* and generally deferred to Congress's judgment. The notable exception was the period of aggressive Commerce Clause jurisprudence of the early twentieth century, which culminated in the court-packing crisis of the 1930s.

THE COURT AND THE ROAD TO WAR

In 1850, Congress adopted a complicated set of compromises settling a controversy over whether the territories acquired in the Mexican War should be slave or free. Part of the compromise was a new and even harsher Fugitive Slave Act. The New Birth Framers later used this hated statute as a model for federal protection of individual rights – except that the Reconstruction statutes protected the civil, social, and economic rights of freed slaves, not the property rights of their former masters.

Given the post-war Court's holding that Reconstruction statutes exceeded federal power, it is interesting to consider the breadth of the Fugitive Slave Act of 1850 on which they were modeled – and which the pre-war Court upheld. The Act created a new class of federal commissioners with the power to arrest and imprison private individuals who interfered with the recapture of fugitive slaves. The commissioners could force private citizens to act as a *posse comitatus* and help capture an escaped slave. Private individuals who hindered slaveholders' efforts to catch their "property" now faced federal criminal penalties, in addition to the civil liability established in the 1793 statute. The Act could be enforced not only by the commissioners, but by the military (again acting as *posse comitatus*) on their behalf. Though the commissioners could determine whether an alleged runaway was slave or free, the Act notoriously paid them \$10 per case if they found that the person was a slave and only \$5 if they declared the person free. More allegedly escaped slaves were seized in the first year after passage than during the preceding sixty years.

Abolitionists responded with massive resistance. Mobs stormed jails to free alleged slaves, while state courts declared the law unconstitutional. The Fugitive Slave Act of 1850 radicalized many in the North, not just because it threatened free northern blacks, but because it forced anti-slavery northern whites to “play the role of police for the South in the protection of this particular institution,” as Ulysses S. Grant would later explain. Amos Lawrence, a large funder of free-soil settlers in Kansas, noted that federal raids on Boston abolitionists in 1854 were a key radicalizing event: “We went to bed one night old fashioned, conservative, Compromise Union Whigs & waked up stark mad Abolitionists.” Before the Civil War, “states’ rights” was the rallying cry of abolitionists, not of southerners celebrating the federal power that protected slave property rights.

The Wisconsin Supreme Court held the Act unconstitutional. It ordered the release of an individual – a private individual – who had been imprisoned for interfering with the capture of a fugitive slave. The United States Supreme Court unanimously reversed. The Court could simply have said that a state court had no power to issue a writ of *habeas corpus* to a federal officer, such as the commissioner who ordered the individual to be arrested or the marshal who held him; this would have been a straightforward application of the Supremacy Clause. But Chief Justice Taney’s opinion in *Ableman v. Booth* went further:

But although we think it unnecessary to discuss these questions, yet, as they have been decided by the State court, and are before us on the record, and we are not willing to be misunderstood, it is proper to say that, in the judgment of this court, the act of Congress commonly called the fugitive slave law is, in all of its provisions, fully authorized by the Constitution of the United States; that the commissioner had lawful authority to issue the warrant and commit the party, and that his proceedings were regular and conformable to law.⁷

This decision, issued the year before Lincoln’s election, was recent history when the New Birth Amendments were ratified. If the Fugitive Slave Clause of the Constitution authorized Congress to imprison private individuals who interfered with other private individuals’ property rights, the New Birth Amendments would give Congress similarly broad power to protect the civil, social, and economic rights championed by the Radical Republicans.

Taney’s opinion in *Ableman* upheld broad federal power; his even more inflammatory *Dred Scott* decision had done the opposite. Since at least the Louisiana Purchase in 1803, North and South had quarreled over whether federal territories – and the new states that would be carved from them – would be slave or free. The Compromises of 1820 and 1850 both turned in large part on resolving this question, or at least postponing it. *Dred Scott* held that the Compromise of 1820 was unconstitutional: Congress had no power to deprive a slaveholder of his property when he brought his slave into a free territory. The decision invited slave owners to flood into the territories and vote in pro-slavery constitutions for new states – and propelled the nation into civil war.

DECLARATIONS OF SECESSION

Georgia. For the last ten years we have had numerous and serious causes of complaint against our non-slave-holding confederate States with reference to the subject of African slavery. They have endeavored to weaken our security, to disturb our domestic peace and tranquility, and persistently refused to comply with their express constitutional obligations to us in reference to that property, and by the use of their power in the Federal Government have striven to deprive us of an equal enjoyment of the common Territories of the Republic.

Texas. We hold as undeniable truths that . . . in this free government all white men are and of right ought to be entitled to equal civil and political rights; that the servitude of the African race, as existing in these States, is mutually beneficial to both bond and free, and is abundantly authorized and justified by the experience of mankind, and the revealed will of the Almighty Creator

Mississippi. Our position is thoroughly identified with the institution of slavery – the greatest material interest of the world. . . . There was no choice left us but submission to the mandates of abolition, or a dissolution of the Union.

Dred Scott was the only case in the eighty years of pre-Civil-War constitutional history in which the Supreme Court limited congressional power in any significant way. As long as federal power had supported slave interests, the Court gave it almost unlimited reach. *Dred Scott* proved to many in the North that compromise with slave states was impossible. With the Court upholding the Fugitive Slave Act but striking down the federal government's ability to preserve free territories, abolitionists faced the prospect of continuing kidnappings in the North while the Senate tilted toward the South as slavery was extended to new states. Outrage over this state of affairs elevated Abraham Lincoln to the presidency and led, ultimately, to his Gettysburg promise of a new birth of freedom.

First, of course, there was the matter of winning the Civil War, a war fought principally over slavery. Mississippi's legislature adopted a 21-paragraph declaration of reasons for leaving the Union in 1861; the only two paragraphs that did not mention slavery were the first and the last, which were merely introductory and conclusory, respectively. Mississippi's declaration, like those of other seceding states, listed the free states' alleged refusal to comply with the Fugitive Slave Clause as a principal grievance. The North's opposition to the expansion of slavery into the territories also featured prominently in southern declarations. So did the formation and political ascendancy of a purely northern political party, the Republicans, whose victory in the 1860 election made a clash between abolitionism and slavery inevitable.

The Confederate Constitution made some concessions to state sovereignty in other areas but required states to yield to central authority where slavery was concerned. No Confederate state would have the power to interfere with the central government's protection of slavery. All new territories would become slave states, whatever the will of their populations. Under the Confederate Constitution, central power would always trump state power on the issue of slavery – the most eloquent testament that for the South, the Civil War was first and always about slavery, with states' rights at best a secondary issue.

CREATING THE NEW BIRTH CONSTITUTION

THE THIRTEENTH AMENDMENT

Even before the war ended, both houses of Congress passed the 13th Amendment, which banned slavery, and sent it to the states for ratification. Key to the amendment was its second section, empowering Congress to enforce abolition with “appropriate legislation.” More than merely ending slavery, the amendment was understood to make blacks citizens of the United States (overruling *Dred Scott* on that point), with the federal government there to guarantee the rights of citizenship. In light of *Prigg*, which had held that the Constitution’s guarantee of slaveholders’ rights *implied* a broad federal power to protect those rights, the Radical Republicans naturally believed that the *explicit* enforcement clause of the 13th Amendment gave Congress plenary power to wipe out all vestiges of slavery. “Surely we have the authority to enact a law as efficient in the interest of freedom, now that freedom prevails throughout the country, as we had in the interest of slavery when it prevailed in a portion of the country.”⁸

It did not take long for Congress to demonstrate the breadth of its power to “enforce” abolition. Despite ratification of the 13th Amendment, newly constituted southern governments enacted Black Codes to maintain white supremacy. Responding to these laws and the general harassment of freedmen, Congress passed the Civil Rights Act of 1866, guaranteeing blacks “the same right in every state and territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, sell and convey real and personal property; and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens.”⁹ Congress explicitly modeled the enforcement provisions of the 1866 Civil Rights Act on the 1850 Fugitive Slave Act, criminalizing violations of civil rights by private persons just as the earlier statute had criminalized interference with slaveholders’ rights. In an analog to the fugitive slave commissioners, Congress authorized the appointment of special federal officials to enforce the rights guaranteed by the Act and authorized stiff fines for anyone obstructing those rights. The Act, in short, embodied the plenary power of Congress to enforce civil rights to the same extent as it had enforced slaveholders’ rights in the antebellum era.

The Congressmen who adopted the 13th Amendment and the Civil Rights Act of 1866 understood that the § 2 power to adopt “appropriate legislation” was not limited to preventing the “slavery [or] involuntary servitude” proscribed by § 1. Protecting blacks’ rights to make contracts, purchase property, and testify in court on the same terms as whites could be an “appropriate” way of “enforcing” their right not to be held in bondage. The word “appropriate” did not originate with the 13th Amendment’s drafters. They consciously cribbed it from Marshall’s famous statement in *McCulloch* recognizing Congress’s considerable leeway to

THE 13TH AMENDMENT

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

decide what laws were “necessary and proper”: “Let the end be legitimate . . . and all means which are *appropriate* . . . are Constitutional.” Indeed, the Necessary and Proper Clause by its own terms applied to the 13th Amendment:

The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, *and all other Powers vested by this Constitution in the Government of the United States*, or in any Department or Officer thereof.¹⁰

The congressional debates over § 2 often used the words “necessary,” “proper,” and “appropriate” interchangeably.¹¹ Mindful of this (very recent) history, Supreme Court Justice Noah Swayne upheld the new Civil Rights Act while riding circuit in 1866.

Without any other provision than the first section of the amendment, congress would have had authority to give full effect to the abolition of slavery thereby decreed. It would have been competent to put in requisition the executive and judicial, as well as the legislative power, with all the energy needful for that purpose. The second section of the amendment was added out of abundant caution. It authorizes congress to select, from time to time, the means that might be deemed appropriate to the end. It employs a phrase which had been enlightened by well-considered judicial application [i.e., *McCulloch*]. Any exercise of legislative power within its limits involves a legislative, and not a judicial question. It is only when the authority given has been clearly exceeded, that the judicial power can be invoked.¹²

Swayne was not alone. Chief Justice Salmon P. Chase, in his capacity of circuit justice, also found the Act constitutional, as did other courts.¹³

THE FOURTEENTH AMENDMENT

Still, some Republicans (a minority) felt that a more complete statement of Congress’s power to protect civil rights was necessary to guarantee the constitutionality of the Civil Rights Act of 1866 and any other laws Congress might find necessary and proper to protect civil rights. Others, fearing less equality-friendly Congresses in the future, wanted to inscribe self-executing guarantees into the Constitution. The objective was therefore twofold: a new amendment should set forth rights that courts could enforce against states; and it should also empower Congress to enact legislation to protect civil, social, and economic rights against state or private interference.

The House and Senate adopted the 14th Amendment in May and June of 1866, at the same time as they debated and passed the Civil Rights Act of 1866. Like the Fugitive Slave Clause, the Privileges or Immunities, Due Process, and Equal Protection Clauses in § 1 of the 14th Amendment are phrased as prohibitions on the states. These clauses were designed to be self-executing. The first time the 14th Amendment was introduced, in February 1866, the draft would simply have

given Congress power to protect civil rights. That was not enough, according to Radical Republicans like Giles Hotchkiss of New York, since a future Congress might decline to do so.¹⁴ For this and other reasons, the first proposal was tabled. Whatever future Congresses might do, § 1 would reverse *Barron v. Baltimore*, a pre-war case holding that the Bill of Rights did not apply to the states. Congressman John Bingham, the amendment's main author, said the amendment was designed "to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today."¹⁵ Bingham's emphasis on the power of Congress to enforce the amendment was not accidental in light of the unhappy experience with the pre-war Court's treatment of racial issues. Nonetheless, Bingham and his colleagues also expected the courts to strike down state laws that violated § 1, just as *Prigg* struck down a state law that violated the Fugitive Slave Clause.¹⁶ This was the accepted understanding in the legal community. Constitutional law treatises published after the 14th Amendment was adopted but before it was ratified explained that the amendment would enforce the Bill of Rights against the states. Like the Fugitive Slave Clause, however, the 14th Amendment would give Congress the power to do much more than merely require the states to obey the prohibitions in § 1. To be sure, the federal government could force the states to comply with the Bill of Rights. But that was something the courts could do on their own. Giving Congress the power to enforce the amendment "by appropriate legislation" would mean nothing if Congress could simply pass a statute enabling individuals to take the states to court for conduct that the courts could already invalidate under § 1.

[I]t is clear that had the fifth section of the fourteenth amendment been entirely omitted, the judiciary could have stricken down all state laws and nullified all state proceedings in hostility to rights and privileges secured or recognized by that amendment.¹⁷

Such a narrow reading would also contradict the broad powers that the same terms in § 2 of the 13th Amendment were understood to encompass. Bingham and the others who drafted and passed the 14th Amendment had no doubt that § 5 permitted Congress to prohibit discrimination not only by states, but by individuals as well. After all, the Fugitive Slave Clause, which was also phrased as a prohibition on state law, had given Congress the power to criminalize the conduct of private individuals, and it had not even had an accompanying enforcement clause.

Congress could invoke its § 5 authority whenever individuals were prevented from enjoying – as a practical matter – the rights guaranteed by § 1. Even if states maintained facially nondiscriminatory laws, their failure or inability to prevent private actors from interfering with civil rights would give Congress license to remedy the situation. "If a State fails to secure to a certain class of people the equal protection of the laws, it is exactly equivalent to denying such protection. Whether that failure is willful or the result of inability can make no difference,

THE 14TH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

and is a question into which it is not important that Congress should enter.”¹⁸ The private terror aimed at blacks and Republicans during Reconstruction, if left unchecked, would effectively overturn the New Birth Amendments. As Justice Swayne said in upholding the Civil Rights Act of 1866, “Blot out this act and deny the constitutional power to pass it, and the worst effects of slavery might speedily follow. It would be a virtual abrogation of the [13th] amendment.” Representative David Lowe echoed those sentiments in defending 14th Amendment legislation aimed at private conduct: “Constitutions and laws are made for practical operation and effect What practical security would this provision [§ 5] give if it could do no more than to abrogate and nullify the overt acts and legislations of a State?”¹⁹

THE 15TH AMENDMENT

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

THE FIFTEENTH AMENDMENT

The white electorate of the southern states initially refused to ratify the 14th Amendment, with violence often marring elections and constitutional proceedings. In response, Congress implemented “military Reconstruction” in 1867, deploying federal troops to suppress violence and allowing southern states back into the Union only if their state constitutions permitted blacks to vote and if the readmitted states ratified the 14th Amendment.

With state governments barred from officially disfranchising blacks, private groups did their best to supply the deficiency. The Ku Klux Klan, organized in Tennessee in 1866, became the model for paramilitary units across the South. In the 1868 election, the Klan’s suppression of turnout led to Democratic victories in Georgia and Louisiana. The violence convinced even moderates that explicitly guaranteeing blacks’ right to vote was the only way to ensure that civil rights would be protected. Thus, a new federal amendment to forbid racial discrimination in voting was ratified in 1870. As the drafter of the 15th Amendment, Massachusetts Republican George Boutwell, explained: “With the right of voting, everything a man ought to have or enjoy of civil rights comes to him. Without that right he is nothing.” Former abolitionist leader Wendell Phillips wrote: “A man with a ballot in his hand is the master of the situation. He defines all his other rights. What is not now given him, he takes.”

RECONSTRUCTION LEGISLATION UNDER THE NEW BIRTH AMENDMENTS

THE FREEDMEN'S BUREAU

Starting in the closing days of the war and continuing for the rest of the 1860s, Congress passed a series of bills creating and augmenting the Freedmen's Bureau. The Bureau provided economic assistance to blacks (including those who had never been slaves), helped them enforce their rights in court, educated them, and otherwise sought to improve their economic, political, and social situation. President Andrew Johnson vetoed several of the Freedmen's Bureau bills, as well as the Civil Rights Act of 1866. Congress overrode the vetoes, usually by comfortable margins; these were the first presidential vetoes overridden in United States history. Partly because of them, the House impeached Johnson, and the Senate came within a single vote of removing him from office.

"Fairly construed these amendments may be said to rise to the dignity of a new Magna Charta."

Justice Noah Swayne

Johnson's veto messages objected to Freedmen's Bureau bills because they singled out one race for preferential treatment: "I again urge upon Congress the danger of class legislation, so well calculated to keep the public mind in a state of uncertain expectation, disquiet, and restlessness...."²⁰ Almost all race-conscious legislation passed during Reconstruction applied to blacks who had always been free as well as to former slaves. For example, in 1867 Congress passed a law providing relief for "freedmen or destitute colored people in the District of Columbia," to be distributed under the auspices of the Freedmen's Bureau.²¹ Of particular importance in the late 1860s was the Bureau's operation of schools for blacks, to the point that black children in the South were often better educated than their white counterparts. Opponents, including Johnson, raised the same arguments that would be marshaled against affirmative action programs a century later, but well more than the necessary two-thirds of Congress concluded that the 13th and 14th Amendments authorized race-conscious legislation to ameliorate the social condition of blacks.

THE ENFORCEMENT ACTS

The New Birth Framers' conviction that the 13th, 14th, and 15th Amendments authorized Congress to regulate private conduct as well as governmental acts is evidenced by the legislation they passed after the amendments were ratified. The pace picked up when Ulysses S. Grant became President in March 1869, replacing Johnson. Grant's Attorney General and Solicitor General were ardent defenders of civil rights, and the United States Department of Justice was established in 1870 largely to enforce civil rights statutes. Simultaneously, Klan violence dramatically increased throughout the South, sometimes leading to Democratic victories at the polls. Pleas streamed in from southern Republicans and black voters for Congress to do something to protect freedmen from private terrorism.

Between 1870 and 1872, Congress passed five Enforcement Acts to protect civil rights. Congress created a positive right to vote in state and local elections and prescribed criminal penalties for anyone preventing a person from registering to vote or voting. With an eye squarely on the Klan, Congress made it a crime for “two or more persons [to] band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with the intent to violate any provision of this act” or “to injure, oppress, threaten, or intimidate any citizen with intent to prevent his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States.” It was these provisions that fell in *Cruikshank* following the Colfax Massacre.

“Surely we have the authority to enact a law as efficient in the interest of freedom, now that freedom prevails throughout the country, as we had in the interest of slavery when it prevailed in a portion of the country.”

Senator Lyman Trumbull,
Author of the Civil Rights Act
of 1866

The Enforcement Acts echoed the despised Fugitive Slave Acts. All of the agents of the new Department of Justice could arrest, imprison, set bail for, and prosecute violators – powers enjoyed by federal commissioners under the Fugitive Slave Act of 1850. Congress prohibited individuals from hindering federal officials in enforcing the new laws. The President could use the military to assist in enforcement, recalling the Fugitive Slave Act’s *posse comitatus* provision.

Grant used his new authority to crack down on Klan terrorism in nine South Carolina counties in 1871 and essentially destroyed the Klan there. Similar efforts significantly reduced violence across the South. Federal courts convicted hundreds of Klansmen between 1870 and 1873 for violating freedmen’s rights of property, speech, assembly, and voting, as well as the rights to keep and bear arms and to enjoy equal protection of the laws. Recognizing the need to take on the Klan if blacks’ rights were to mean anything in practice, Grant rejected the argument that the New Birth Amendments allowed Congress to regulate only state action, calling it a “great mistake” that betrayed the intent of their drafters.

Federal prosecutors reported in 1872 – the year before the Colfax Massacre – that the Justice Department was winning its war against the Klan. The Department’s determination to prosecute violations of the Enforcement Acts was “demoralizing and carrying terror to these lawless K.K. Klans,” the United States attorney reported from Alabama. “We have broken up Ku Klux in North Carolina,” federal judge Hugh L. Bond gleefully wrote to his wife. “Everybody now wants to confess & we are picking out the top puppies only for trial.” Bond would eventually sentence more than 100 Klan conspirators to prison. The government’s success created the conditions for the most peaceful election of Reconstruction in 1872 and the reelection of Ulysses S. Grant.

THE CIVIL RIGHTS ACT OF 1875

In his second inaugural address, President Grant declared that racial segregation was unacceptable and called for federal legislation to assure equal rights in access to transportation and public schools. Following Grant’s lead, Congress passed the Civil Rights Act of 1875, banning segregation in public accommodations, transportation, and entertainment facilities. The Act would also have banned

public school segregation, but filibusters blocked passage of those provisions. Still, it is remarkable that in repeated votes in the 1870s, majorities in both the House and the Senate supported a statutory nationwide ban on school segregation.

The debates over the Civil Rights Act of 1875 and its predecessor bills in the prior Congress are remarkable for the modern flavor of their civil rights rhetoric. One House member condemned separate-but-equal segregation, saying its sole purpose was “the subjugation of the weak of every class and race.”²² Another declared that segregation treated blacks like lepers.²³ Opponents argued, as their political descendants would in the 1960s, that the national government had no power to outlaw private discrimination, but those who had drafted the 14th Amendment rejected that contention. State failures to stop private discrimination were “sins of omission” that the federal government could rectify.

Who knew the meaning of the 14th Amendment better than the legislators who enacted it? Almost every legislator who voted for the 14th Amendment also supported passage of anti-segregation bills. Most of their colleagues agreed; to overcome filibusters, these bills had to pass by overwhelming margins. In fact, in the Senate in 1874, a version of the bill banning school segregation passed with a margin of 29-16, with all Senators who had supported the 14th Amendment voting in favor. In the House, an early version of the bill, also including the school provision, passed the House in 1872 by a margin of 114-83, short of the two-thirds vote needed to overcome a filibuster (an opposition tool that then existed in the House as well as the Senate). As Michael McConnell, the conservative legal scholar appointed by George W. Bush to the 10th Circuit, detailed in his research, votes on the 14th Amendment matched votes on the 1872 bill: “All eleven members of the House who had voted in favor of the Fourteenth Amendment voted in favor of the bill; the three who had voted against the amendment opposed it.” When the Civil Rights Act finally passed in 1875, all the House members who had been around to vote for the 14th Amendment supported the new law; only one Senator who had originally voted for the 14th Amendment voted against the 1875 Act.

HOW THE KLAN AND THE COURT KILLED RECONSTRUCTION

The Civil Rights Act of 1875 was the high-water mark of Reconstruction legislation. In less than two years, Reconstruction would be over and white supremacy would be firmly entrenched in the South for almost another century.

The ultimate bulwark of white supremacy was violence. A vigorous federal response had beaten back murder and terrorism before the 1872 election, but by the 1874 and 1876 elections, scores of blacks and allied white Republicans lay dead as anti-civil-rights Democrats returned to power throughout the South. Federal prosecutions dropped off sharply, and the cases that were brought became harder to win because of interference from southern officials and private individuals. State governments systematically harassed and arrested federal witnesses to deter their participation, even convicting them of perjury for testimony given at federal trials. Federal witnesses were murdered quite regularly. The bloodbath climaxed with the disputed presidential election of 1876, with most southern states reporting two sets of results. The dispute was resolved by Republicans' agreement to end Reconstruction.

What had turned federal prosecutors' optimism of 1872 into their surrender of 1876? The severe depression beginning in 1873 bears some blame for shifting federal attention away from racial violence. However, continuing indictments by the Justice Department and passage of the Civil Rights Act of 1875 show that many national Republicans were still committed to civil rights. Their commitment was finally destroyed by the Supreme Court's determined opposition to equality. When the Court overturned Reconstruction statutes and allowed terrorists to go free, it not only hamstrung the federal government but also signaled that anyone fighting for civil rights in the South would die. Denied any realistic hope of contesting elections in the South, the Republican Party gave up on Reconstruction.

THE SUPREME COURT'S CAMPAIGN AGAINST CIVIL RIGHTS

The Supreme Court manifested its opposition to Reconstruction as early as a pair of 1866 decisions removing professional restrictions on ex-Confederates.²⁴ But the lasting damage started in the 1870s and continued through the early 20th century, as the Court eviscerated both aspects of the New Birth Amendments: it refused to enforce the amendments' self-executing aspects to protect civil rights (though it increasingly deployed them to invalidate federal and state regulation of business); and it struck down legislation passed under the amendments' enforcement clauses.

Nothing was more critical to the enforcement of civil rights than the ability of

federal courts to take jurisdiction when racist state courts failed to protect blacks. The Supreme Court struck its first major blow against that principle in 1872. In the *Rhodes* case six years earlier, Justice Swayne had upheld the provision of the Civil Rights Act of 1866 that permitted removal of civil and criminal cases from state courts that did not permit blacks to sue and testify on the same terms as whites. In the new case before the full Court, the same discriminatory Kentucky statute that had been at issue in *Rhodes* was invoked to bar two black witnesses from testifying against two white men charged with killing a blind and elderly black woman. The Court's majority held that the removal provision did not apply: the witnesses had no rights at stake, and the victim's rights were not at issue because she was dead.²⁵ Justice Bradley's dissent (joined, not surprisingly, by Swayne) noted that the Court's construction put "a premium on murder": a minor assault would trigger the statute, but federal jurisdiction would "cease when death is the result."²⁶ While not a constitutional ruling, this macabre statutory interpretation foreshadowed the coming assault on the New Birth Amendments themselves.

The next and more well-known step in the campaign against civil rights was an odd decision known as the *Slaughter-House Cases* – odd because it dealt not with blacks' civil rights but with white butchers' economic rights. New Orleans had granted a monopoly to a privately owned slaughterhouse. The city's butchers claimed that this abridged their privileges and immunities as United States citizens, violating § 1 of the 14th Amendment. The Court held that the government-imposed monopoly did not violate any protected privileges or immunities, and it could have stopped there. However, the majority also declared that the Privileges and Immunities Clause did not require the states to respect the Bill of Rights, disregarding the New Birth Framers' explicit intention to overrule *Barron v. Baltimore*.²⁷

As Judge McConnell argued before ascending to the federal bench, *Slaughter-House* radically repudiated Reconstruction, replacing the New Birth Framers' vision with a "southern, Democratic theory of states' rights." The decision reflected the background of the justices in the majority, who were either pro-slavery Democrats or conservative Republicans from the party's pro-business wing. At one swipe, these justices destroyed much of the 14th Amendment's self-executing force. Members of Congress who had adopted the amendment condemned the Court's interpretation of their work as a rank betrayal. Swayne, again among the dissenters, agreed with them. The decision "defeats . . . the intention of those by whom the instrument was framed and of those by whom it was adopted." Nor should the extent of the damage be underestimated; the Court "turns, as it were, what was meant for bread into a stone."²⁸

Formally, *Slaughter-House* dealt only with whether courts would enforce the Bill of Rights against state governments in the absence of congressional legislation. But the decision clearly hinted that the Court would be hostile to Reconstruction statutes when they came before the justices. If, as the dissenters claimed, § 1

"Reconstruction's enemies relied upon the Court to do what Democratic members of Congress had failed to accomplish – and the Court, through a process of reasoning very similar to that of Democratic legislators, deprived the enforcement legislation of nearly all its strength."

W.E.B. DuBois

required the states to obey the Bill of Rights, then § 5 would “bring within the power of Congress the entire domain of civil rights,” a proposition the majority found absurd.²⁹ Swayne’s closing words are chilling in the light of subsequent history: “I earnestly hope that the consequences to follow may prove less serious and far-reaching than the minority fear they will be.”³⁰

Swayne was tragically prescient. When political violence erupted again in 1873 and the Justice Department began bringing new indictments, federal judges read the *Slaughter-House* tea leaves and ruled that they had no jurisdiction. Several judges held civil rights statutes unconstitutional. In response, the government suspended civil rights enforcement until the Supreme Court could rule on the constitutionality of the Enforcement Acts. The violence of 1873 included the Colfax Massacre, and, as previously noted, the 1874 elections – held during the federal government’s enforcement hiatus – returned racist governments to several southern states. The suspense, such as it was, came to an end with two 1875 decisions that finished off the New Birth Amendments, at least as their framers had envisioned them.

The first case, *United States v. Reese*, stemmed from the 1873 election in Kentucky, when riots and lynchings swept the state to discourage black voting. Using a variety of methods, from residency requirements to literacy tests to poll taxes, whites took two-thirds of black voters off the rolls. A federal grand jury indicted scores of officials for their refusal to accept the poll tax from black voters. The Court declared that the “Fifteenth Amendment does not confer the right of suffrage upon any one.”³¹ The Enforcement Acts had made it a crime for officials to “wrongfully refuse” ballots, a rule which the Court said Congress had no power to enact under the 15th Amendment. Again, the technical holding was less important than the practical effect. *Reese* theoretically left Congress free to fix the defective statutory language, but by leaving black voters without protection in 1876, the Court ensured that no Congress willing to do so would be elected for more than 90 years.

If *Reese* gave public officials the green light to disfranchise blacks, *Cruikshank* gave private individuals a similar *carte blanche* to augment official discrimination with private violence. More than one hundred people were slaughtered in Colfax defending their right to vote, yet the Supreme Court declared in *Cruikshank* that their murderers were beyond the reach of federal law. The Klan and similar groups were now free to overthrow Reconstruction governments with impunity. Since the 14th Amendment “adds nothing to the rights of one citizen as against another,” there could never be a federal civil rights violation when private individuals conspired to deny civil rights.³²

The Supreme Court, which had so assiduously protected the rights of slaveholders before the Civil War, would not allow Congress to protect the lives of former slaves afterwards. Before the war, the Court had upheld federal prosecution of private individuals who interfered with the capture of runaway slaves. Now, it

struck down an analogous remedy against individuals who interfered with former slaves' attempt to cast meaningful votes. Senators who had written the Enforcement Laws denounced the Court's decision, but in vain. Senator Oliver Morton had to concede that the 14th and 15th Amendments had been "almost destroyed by construction." Congress was powerless to combat racist violence.

Years later, W.E.B. DuBois described the Court's decisions in terms that could have come from conservative critics of "liberal judicial activist" decisions of the Warren Court. Reconstruction's enemies "relied upon the court to do what Democratic members of Congress had failed to accomplish – and the Court, through a process of reasoning very similar to that of Democratic legislators, deprived the enforcement legislation of nearly all its strength when it rendered its decisions in the cases of *United States v. Reese* and *United States v. Cruikshank*."

With civil rights enforcement all but shut down from 1873 onwards, Reconstruction governments were driven from office throughout the South. Violence destroyed the Republican Party in Mississippi. Taking advantage of the void, Democrats recaptured the legislature and impeached the Republican governor and lieutenant governor, driving them from office by force of arms. Similar violence would "redeem" every state in the region, to use the term adopted by white supremacists. In 1876, Confederate General Matthew Butler led a white mob to murder an opposing black militia defending the South Carolina government – and was then elected to the United States Senate by the new, "redeemed" legislature. The effects on the federal government were almost as dramatic, as pro-civil-rights Republican representatives and senators were replaced by anti-civil-rights Democrats – sufficient in number, as their successors proved in the mid-twentieth century, to filibuster meaningful civil rights legislation, even when a majority of the country supported it.

The final blow to Reconstruction was the presidential election of 1876. With the black vote suppressed throughout the South, Democrat Samuel Tilden won a majority among those allowed to vote. A commission, including five justices of the Supreme Court, was appointed to resolve the ensuing dispute over the electoral college vote. The political parties cut a deal: Republican Rutherford B. Hayes would become President in exchange for the end of Reconstruction. Hayes ensured that federal troops would not return to the South to enforce civil rights by signing the Posse Comitatus Act, banning the military from "execut[ing] the laws."³³ Barely two decades had passed since the Attorney General had authorized the military to "execute" the Fugitive Slave Act. Recognizing that the Supreme Court had made contesting elections in the South impossible, northern Republicans essentially conceded the end of the New Birth of Freedom. Murder and disfranchisement would be the fate of blacks fighting for civil rights in the South for the next ninety years.

This did not mean that the Republican Party renounced the use of federal power in general, or even of military power for domestic law enforcement. Rather,

On this site occurred the Colfax Riot in which three white men and 150 negroes were slain. This event on April 13, 1873 marked the end of carpetbag misrule in the South.

Historical marker erected by the State of Louisiana in 1950

Erected to the Memory of the Heroes Who Fell in the Colfax Riot Fighting for White Supremacy, April 13, 1873.

Memorial over the three whites' graves

"I venture, with all respect for the opinion of others, to insist that the national legislature may, without transcending the limits of the constitution, do for human liberty and the fundamental rights of American citizenship, what it did, with the sanction of this court, for the protection of slavery."

The First Justice Harlan

control of federal power shifted from pro-civil-rights Radical Republicans to the party's pro-business faction. Within three months of the end of Reconstruction, federal troops were deployed to break the Great Strike of 1877. The federal government built armories in the North to ensure that troops would be available for future labor conflicts. Former President Grant acidly remarked that many Republicans had resisted using federal troops "to protect the lives of negroes. Now, however, there is no hesitation about exhausting the whole power of the government to suppress a strike on the slightest intimation that danger threatens." As for the courts, they did find a use for the self-executing aspect of the New Birth Amendments: during the ensuing "*Lochner* era," federal courts regularly struck down laws regulating subjects like labor relations and food packaging on the grounds that they violated the 14th Amendment's Due Process Clause (*Lochner* itself invalidated a New York statute prohibiting bakery employees from working more than 60 hours per week).³⁴ As historian Eric Foner observed, "The federal courts . . . retained the greatly expanded jurisdiction born of Reconstruction; they increasingly employed it, however, to protect corporations from local regulation." Amendments meant to give birth to freedom brought forth *Lochner* instead.

THE AFTERMATH OF RECONSTRUCTION

Civil rights laws remaining on the books were rarely enforced after Reconstruction, but the Supreme Court continued to deepen its doctrinal subversion of the New Birth Amendments. Year after year, the Court destroyed any remaining hope that the law would protect black Americans. Having declared that Congress could not stop private terrorism, the Court eventually declared in *Plessy v. Ferguson* that even state-sponsored discrimination was acceptable.

Some decisions elaborated on *Slaughter-House's* holding that the Bill of Rights did not apply to the states. State courts could deny defendants jury trials,³⁵ for instance, and state prosecutions did not require indictment by a grand jury.³⁶ Foreshadowing *Plessy*, the Court held that women could be denied the right to practice law; as the three concurring justices explained, a state could maintain separate "spheres and destinies" for the sexes.³⁷ In any case, the Court would not enforce the self-executing aspects of the 14th Amendment in anything like the circumstances envisioned by the New Birth Framers.

Other cases elaborated on *Cruikshank's* evisceration of congressional power. *United States v. Harris* confirmed in 1883 that racist murderers were immune from federal prosecution, making official what had technically been dicta in *Cruikshank*.³⁸ The Court freed leaders of a lynch mob who had broken into a state jail cell and murdered four black prisoners. Any of the Enforcement Acts dealing with the acts of private individuals were declared unconstitutional. When the United States promised in a treaty to prevent private violence against Chinese subjects, the Supreme Court declared that the federal government lacked any power to comply with its legal obligations to China by indicting leaders of a mob who

drove Chinese aliens from their homes and businesses.³⁹

The Supreme Court opened the door to Jim Crow segregation in the *Civil Rights Cases*. This decision relied on *Cruikshank* to strike down the Civil Rights Act of 1875, which had banned discrimination in privately-owned inns, transportation, and places of entertainment. Justice Harlan, the sole dissenter, detailed the history of the New Birth Amendments. He noted the importance of *Prigg* and the Fugitive Slave Act of 1850 in creating famous precedents for far-reaching federal powers. He also reminded his colleagues of the New Birth Framers' well-founded concern that private persons would interfere with civil rights:

It was perfectly well known that the great danger to the equal enjoyment by citizens of their rights, as citizens, was to be apprehended not altogether from unfriendly State legislation, but from the hostile action of corporations and individuals in the States. And it is to be presumed that it was intended, by that section [§ 5], to clothe Congress with power and authority to meet that danger.⁴⁰

"The marvel is that born in a slave State, accustomed to see the colored man degraded, oppressed and enslaved, he should find himself possessed of the courage to resist the temptation to go with the multitude."

Frederick Douglass
on Justice Harlan's
Civil Rights Cases dissent

Indeed, Harlan pointed out, it was particularly inappropriate to interpret Congress's *express* § 5 power narrowly, considering the broad power the Court had found *implied* in the Fugitive Slave Clause – a power broad enough to reach private conduct even though the constitutional text spoke in terms of state action.

This court has uniformly held that the national government has the power, whether expressly given or not, to secure and protect rights conferred or guaranteed by the constitution. That doctrine ought not now to be abandoned, when the inquiry is not as to an implied power to protect the master's rights, but what may congress do, under powers expressly granted, for the protection of freedom, and the rights necessarily inhering in a state of freedom.⁴¹

Even those who approved of the decision in the name of conciliation with the South agreed, as the anti-civil-rights *New York Times* did, that the original understanding of the 14th Amendment "was towards the construction he [Harlan] favors."

With private segregation given Court sanction, states in the 1890s increasingly mandated segregation by statute. In 1878, the Court had struck down a surviving Reconstruction-era Louisiana law that banned segregation on trains passing through the state, saying it improperly interfered with interstate commerce.⁴² In a breathtaking about-face, the Court upheld a Mississippi law *requiring* segregation on trains passing through the state, the only consistency (as Justice Harlan pointed out in dissent) being that civil rights lost in each case.⁴³ The Mississippi case dealt only with the states' interference with interstate commerce and thus did not decide whether state-mandated segregation violated the Equal Protection Clause. *Plessy* answered that question in 1896, yet again over Harlan's dissent. The Court soon made clear that the "equal" aspect of "separate but equal" need not be taken too seriously: three years after *Plessy*, it upheld the decision of a Georgia

county to shut down the only black high school while continuing to fund a high school for white children.⁴⁴

As early as 1877, the “redeemed” Georgia government had adopted a new state constitution “whose purpose, according to the convention’s leader, was to ‘fix it so that the people shall rule and the Negro shall never be heard from.’”⁴⁵ Still, diminished as they were, not only by racist laws but by harassment, threats, and violence, pockets of black voting still survived in the South into the 1890s. The so-called “Mississippi Plan,” embodied in the newly revised Mississippi Constitution, aimed to disfranchise black voters completely through a combination of literacy tests, poll taxes, and other methods. The Supreme Court upheld the plan in 1898, whereupon other states copied it.⁴⁶ Since serving on juries was linked to voting registration, southern juries also became completely white.

The complete abandonment of black voting rights was announced in a 1903 decision, *Giles v. Harris*.⁴⁷ Thousands of blacks in Alabama jumped over all of the formal hurdles and met every requirement of state law to register to vote, yet were denied the vote solely because they were black. Effectively, Alabama disfranchised them for life. The plan embodied in the state’s new white supremacist constitution had three steps: first, keep blacks off the rolls for the 1902 election while allowing whites to register under lax eligibility standards; next, make the eligibility standards much more onerous from 1903 on; finally, permit anyone who had been registered in 1902 to continue to vote in perpetuity. A representative black plaintiff sued, invoking federal jurisdiction under the Enforcement Act that has since been codified at 42 U.S.C. § 1983.

Justice Oliver Wendell Holmes, writing for the Court, did not deny that Alabama’s scheme was a “wholesale fraud” against black citizens. He declared, however, that federal courts could provide no relief: the Court had recently held in *Hans v. Louisiana* that states could not be sued by their own citizens in federal court. (Not coincidentally, the Rehnquist Court has revived and extended *Hans*, creating a new jurisprudence of state sovereign immunity that cuts off relief for violations of federal law.) The disfranchised blacks were wrong to seek a judicial remedy:

Relief from a great political wrong, if done, as alleged, by the people of a state and the state itself, must be given by them or by the legislative and political department of the government of the United States.⁴⁸

Of course, Congress *had* given relief from this great political wrong in the Enforcement Act that the Court had struck down in *Reese*. Harlan, who presumably recalled the Court’s decimation of Congress’s power to protect civil rights, dissented again.

Giles v. Harris put the final touch on the Supreme Court’s betrayal of the New Birth of Freedom – a betrayal of fundamental democratic rights for which Union

soldiers gave their lives and for which Radical Republicans fought alongside blacks throughout Reconstruction. Barely a generation after Lee's surrender at Appomattox Courthouse, this was the constitutional landscape wrought by the Court in the name of states' rights: Congress could not protect black citizens from private violence; courts would not protect them from state-mandated segregation; a novel sovereign immunity doctrine excluded them from court even on the rare occasion when the Court might be prepared to find that a state had violated the 14th and 15th Amendments; and private segregation was legal in spite of a federal statute to the contrary. This was not the New Birth of Freedom that Lincoln had promised.

THE SECOND RECONSTRUCTION

The Court postponed Lincoln's vision, but it could not kill it. A century after the Civil War, Congress passed a second set of momentous civil rights statutes. This time, however, the Court deferred to Congress's judgment and upheld "Second Reconstruction" laws like the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

But did the Court actually overrule nineteenth-century precedents like the *Civil Rights Cases*, or did it merely seem that way? Observers as acute as Archibald Cox and Louis Henkin were under the impression that the old cases were dead and that Congress now enjoyed broad power under § 5 of the 14th Amendment to remedy private civil rights violations.⁴⁹ Various justices opined that the cases striking down New Birth Amendment legislation were no longer good law; on one occasion, six justices so stated, though the opinion for the Court avoided the question.⁵⁰ The unanimous Court later stated in dicta that while the self-executing aspect of the 14th Amendment reached only state action, Congress could "proscribe purely private conduct" under § 5.⁵¹ As early as 1951, every justice agreed that Congress could punish private conspiracies to interfere with federal constitutional rights. The majority went so far as to note, even as it cited *Harris* as good law, that "the post-Civil-War Ku Klux Klan, against whom this Act was fashioned," may well have been just such a conspiracy – a particularly pointed observation, considering that "this Act" was the one *Harris* had struck down.⁵²

The Court's deference to congressional power was not confined to implication and dicta. It expressly held that the permissive *McCulloch* standard applied to the enforcement clauses of each of the New Birth Amendments.⁵³ This liberal standard of judicial review, said the Court, was intended by the New Birth Framers: "By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause."⁵⁴ The Court noted "historical evidence suggesting that the sponsors and supporters of the Amendment were primarily interested in augmenting the power of Congress, rather than the judiciary."⁵⁵ In another case, the Court held that Congress "plainly" had the power under § 2 of the 13th Amendment to prohibit racial discrimination in private housing: "[T]he fact that [the statute] operates upon the unofficial acts of private individuals, whether or not sanctioned by state law, presents no constitutional problem."⁵⁶

The mid-century Court went out of its way, however, to avoid saying explicitly that *Cruikshank*, the *Civil Rights Cases*, and *Harris* had been overruled. Even *Brown* declined to overrule *Plessy*, saying the question was whether *Plessy* should be "held inapplicable to public education."⁵⁷ The Court relied on Congress's Commerce Clause authority to uphold the public accommodation provisions of the Civil Rights Act of 1964, avoiding a confrontation with the *Civil Rights Cases'* evisceration of Congress's § 5 power.⁵⁸ On other occasions, the Court found

creative ways to detect state action in cases that appeared to be about private discrimination, as when it struck down racially restrictive covenants in private contracts on the theory that only state courts' enforcement gave the covenants practical effect.⁵⁹ But whatever the technical status of the nineteenth-century Court's anti-equality decisions, it was virtually impossible to reconcile them with well-established constitutional doctrine by the end of the 1960s.

THE REHNQUIST COURT REVIVES REVILED PRECEDENTS

By the end of the 1990s, however, a bare majority of the Court had embraced the precedents that destroyed Reconstruction. Throwing out Christy Brzonkala's suit against her attackers, the states'-rights bloc cited three cases supporting its narrow construction of § 5: *Cruikshank*, the *Civil Rights Cases*, and *Harris*.⁶⁰ In fact, Chief Justice Rehnquist had planted the seed for those cases' rehabilitation during the lonely years before he became Chief and the four other "new federalists" joined the Court. He argued in 1980 that the *Civil Rights Cases* had rightly taken an aggressive approach in enforcing states' prerogatives against Congress, and his dissent in *City of Rome v. United States* condemned the Court for abandoning that construction of the New Birth Amendments.⁶¹

Twenty years later, he wrote for the majority. His *Morrison* opinion not only revived racist decisions as valid authority but declared that they deserved more respect than other precedents:

The force of the doctrine of *stare decisis* behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time [who] obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment.⁶²

The New Birth Framers, who wrote the 14th Amendment and passed the civil rights laws that the Court struck down, surely had "intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment," but the *Morrison* opinion did not mention them. Henceforth, the authoritative interpreters of the New Birth Amendments would be men who favored "separate but equal" segregation: two justices from the *Civil Rights Cases* majority were still around for *Plessy*, and both again voted with the majority. As for Justice Harlan, the dissenter in both cases, the Court's "originalists" have some use for him; though they ignored him in *Morrison*, they have cited him in other opinions urging the Court to strike down affirmative action laws.⁶³

Cruikshank and its progeny were wrong the day they were decided, and age has not improved them. Justice Harlan was right not only in *Plessy* but in the long series of cases in which he dissented from anti-equality judgments. The Court belatedly recognized that fact in the middle of the twentieth century, but a narrow and technical reading of Second Reconstruction opinions allowed the *Morrison* majority to assert that the older cases were still good law. Six justices' express statement in *Guest* that the *Civil Rights Cases* had been overruled was dismissed on the grounds that three of them expressed themselves only "cursorily," and *Carter*'s unanimous statement to the same effect was ignored as mere dicta.⁶⁴ The same claims could be made by a Court wishing to revive *Plessy*: the only majority references to its "overruling" came decades after *Brown* and were both "cursorily" and dicta.⁶⁵

Morrison is hardly the only instance of retrenchment on the scope of the New Birth Amendments. In other cases, the Court has combined an expansion of state sovereign immunity with a narrowing of § 5 to eliminate victims' right to sue states that violate federal statutes – even statutes that Congress concededly has the power to apply to the states.⁶⁶ Shades of *Giles v. Harris*, which used similar jurisdictional sleight-of-hand to deny relief from a “fraudulent” electoral process. All of these modern states'-rights cases, starting with the decision striking down the Religious Freedom Restoration Act, stem from nineteenth-century decisions condemned by the framers of the amendments those decisions purported to construe.⁶⁷

While a few anti-discrimination laws have survived challenges,⁶⁸ a familiar bloc of five justices has unmistakably embarked on a program of restricting federal civil rights legislation. The renewed attack on Congress is the work of supposed “originalists” lauded for their “judicial restraint” (or, as President Bush puts it in citing Justices Scalia and Thomas as models for his own judicial appointments, not “legislating from the bench”). But the Court's states'-rights bloc rarely attempts to defend its interpretation by analyzing historical sources, such as the congressional debates, the statements of New Birth Framers, or the legislation they passed. This neglect contrasts sharply with the almost biblical reverence given to the records of the Philadelphia convention, the *Federalist*, and founding-generation statutes like the Judiciary Act of 1789 in construing provisions of the 1787 Constitution. When it comes to the New Birth Amendments, the Court cites long-discredited decisions of its anti-equality predecessors rather than seeking anything approximating the “original understanding.” As for “judicial restraint” and declining to “legislate from the bench,” the Rehnquist Court has struck down federal statutes at a pace unprecedented in the Court's 200-year history.

The same bloc has been similarly aggressive in striking down federal and state affirmative action legislation, and it has been similarly oblivious to the New Birth Amendments' history in doing so. In overruling prior case law to hold that federal affirmative action programs were subject to strict scrutiny, none of the five justices in the majority saw fit to discuss the 14th Amendment's history or its framers' contemporaneous passage of race-conscious legislation. The Court's two arch-originalists, Justices Scalia and Thomas, each wrote separate opinions, but neither they nor Justice O'Connor (writing the lead opinion) found space in their nearly 40 pages of text to mention any historical support for their interpretation.⁶⁹ The same is true of the *Shaw v. Reno*⁷⁰ line of “racial gerrymandering” cases, in none of which does any of the five – whether writing a majority, a concurrence, or a dissent – discuss the history of the 14th and 15th Amendments. In their contentious and lengthy opinions in the recent University of Michigan affirmative action cases, none of the anti-affirmative-action justices addressed the relevant constitutional history, although the NAACP Legal Defense and Education Fund and the ACLU had filed a brief laying it out for them.⁷¹

Unlike their complete silence with respect to affirmative action, at least some of

RECENT DECISIONS ON THE POWER OF CONGRESS UNDER THE NEW BIRTH AMENDMENTS

City of Boerne v. Flores, 521 U.S. 507 (1997). Held that Congress had no power under section 5 of the 14th Amendment to require that state laws burdening the exercise of religion be the least restrictive means of furthering a compelling governmental interest.

Lopez v. Monterey County, 525 U.S. 266 (1999). Upheld as a valid exercise of Congress's 15th Amendment enforcement power the "preclearance" requirement of section 5 of the Voting Rights Act of 1965, as applied to a county that was a "covered jurisdiction" under the Act and that was located in a state that was not itself a "covered jurisdiction."

Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999). Held that states are immune from patent infringement suits and that Congress has no power under the 14th Amendment to abrogate that immunity.

the anti-civil-rights justices, in one case, cited historical evidence in support of narrowing Congress's § 5 power. In *City of Boerne v. Flores*, the majority argued that the tabling of Bingham's original draft proved that the 14th Amendment was understood to give Congress only a narrow remedial power against unlawful state action.⁷² It is doubtless true that even some Republicans were concerned about whether the original draft would give Congress overly broad powers. But it is equally true that the version that eventually passed was just as broad. For example, the *City of Boerne* Court quoted Republican Robert Hale of New York, who opposed the original version because its grant of federal power was so broad.⁷³ The Court neglected to quote Representative Hale's characterization of the version that was adopted and ratified; Hale said it gave Congress an "absolute" and "broad" power to "legislat[e] in the first instance" and to "select in [its] own discretion all measures appropriate to the end in view."⁷⁴ Nor did the Court mention its earlier decision in *Morgan*: "The substitution of the 'appropriate legislation' formula [in the second draft] was never thought to have the effect of diminishing the scope of this congressional power."⁷⁵ It did not come to grips with the most compelling evidence of all: the legislation enacted by the same Congresses that adopted the New Birth Amendments.

Even regarding the sole historical event it relied on – the tabling of the first version of the 14th Amendment – the *City of Boerne* opinion was overly simplistic. After all, Rep. Bingham himself voted to table the amendment, as did several other supporters; it can hardly be said that fear of excessive federal power was the sole motivation for the House's taking that action. Some representatives, like Hotchkiss, objected to Bingham's failure to include self-executing text that would guarantee some minimum protection of civil rights even if a future Congress failed to act. Others thought the amendment was unnecessary, the 13th Amendment having already given Congress all the power it needed to enforce civil rights. Most telling, however, is the fact that the very same states'-rights objection raised against Bingham's first draft was also raised against the version of the amendment that did pass.⁷⁶ The adopted version of the 14th Amendment, no less than the first draft, gave Congress "power so dangerous, so likely to degrade the white men and women of this country" that anti-equality politicians could never support it. They did not believe in a Constitution under which "a negro might be allowed to marry a white woman" or have "the right of suffrage and hold[ing] office."⁷⁷ But their vision lost, and Bingham's won. As Hale recognized, his objection to giving Congress broad power to protect civil rights had only delayed matters; in the end, Congress and the country rejected his argument. Accepting the losers' view of federal power is like giving the Anti-federalists the last word on the 1787 Constitution – and an originalist would surely never do that.

The crowning moment in this march from history is Justice Scalia's recent dissent in *Tennessee v. Lane*. The Court's most famous originalist announced that he would henceforth apply a new and uniquely stringent test to New Birth Amendment legislation, a test that Congress would not have to pass when exercising any of its

other constitutional powers. From now on, Justice Scalia will restrict Congress to three almost entirely pointless activities: outlawing government action that the Court would already strike down; giving the courts jurisdiction (which they already have) to strike down such conduct; and adopting “measures that do not restrict the States’ substantive scope of action but impose requirements directly related to the *facilitation* of ‘enforcement’ – for example, reporting requirements that would enable violations of the Fourteenth Amendment to be identified.”⁷⁸

Is the new test based on precedent? No; notwithstanding three cases holding explicitly to the contrary, Justice Scalia will no longer “apply the permissive *McCulloch* standard” to New Birth Amendment legislation (except, grudgingly, on the subject of race).⁷⁹ Is it based on historical sources? No; Justice Scalia cited none, apart from old dictionaries. Indeed, he added ahistorical provisos of his own invention, such as allowing Congress to apply even permissible legislation “only upon those particular States in which there has been an identified history of relevant constitutional violations.”⁸⁰

What, then, is behind this uniquely aggressive standard of review? Justice Scalia initially accepted *City of Boerne*’s “congruence and proportionality” standard for judging § 5 legislation, though he feared that “such malleable standards . . . have a way of turning into vehicles for the implementation of individual judges’ policy preferences.”⁸¹ All was well for the first few years, when the Court invariably struck down § 5 legislation under the *City of Boerne* standard.⁸² But then the Court upheld some parts of the Americans with Disabilities Act and the Family and Medical Leave Act. Justice Scalia’s fears were realized: his colleagues’ policy preferences were getting out of control. Considering that he was satisfied so long as the Court overruled Congress, becoming unhappy only when it upheld federal legislation, one can only stand in awe of the justice’s delicate sense of irony:

I yield to the lessons of experience. The ‘congruence and proportionality’ standard . . . casts this Court in the role of Congress’s taskmaster. Under it, the courts (and ultimately this Court) must regularly check Congress’s homework to make sure that it has identified sufficient constitutional violations to make its remedy congruent and proportional. As a general matter, we are ill advised to adopt or adhere to constitutional rules that bring us into constant conflict with a coequal branch of Government.⁸³

Thus the acme of contemporary states’-rights constitutionalism: original, if not originalist.

Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000). Struck down Congress’s abrogation of states’ immunity from suits under the Age Discrimination in Employment Act.

United States v. Morrison, 529 U.S. 598 (2000). Invalidated a civil remedy provision of the Violence Against Women Act.

Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001). Struck down Congress’s abrogation of states’ immunity from suits under Title I of the Americans with Disabilities Act (“ADA”).

Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721 (2003). Upheld Congress’s abrogation of states’ immunity from suits under the Family and Medical Leave Act.

Tennessee v. Lane, 124 S. Ct. 1978 (2004). Upheld Congress’s abrogation of states’ immunity from suits under Title II of the ADA, as applied to a wheelchair-bound individual’s claim that he was denied access to a courthouse.

CONCLUSION: RESTORING THE CIVIC MEMORY OF THE NEW BIRTH CONSTITUTION

LINCOLN'S VISION AT GETTYSBURG

It is for us the living rather
to be dedicated here
to the unfinished work
which they who fought here
have thus far so nobly advanced.
It is rather for us to be here
dedicated to the great task
remaining before us – that from
these honored dead we take
increased devotion to that cause
for which they gave the last full
measure of devotion –
that we here highly resolve
that these dead shall not have died
in vain, that this nation under God
shall have a new birth of freedom,
and that government of the people,
by the people, for the people
shall not perish from the earth.

The claim of states'-rights jurisprudence to an originalist legitimacy can hope to succeed only through public ignorance: only those who have forgotten the Klan's court-abetted assault on Reconstruction can accept the Rehnquist Court's superficial version of history. The anti-discrimination movement must help restore the public's memory of Reconstruction and the New Birth Framers. Only education can challenge the historical basis for the judicial counter-revolution against the civil rights advances of the past 50 years. Distorting the history of Reconstruction and the New Birth Amendments was a deliberate and sustained project of racist historians and legal scholars in the late 19th and early 20th centuries; it will take a deliberate and sustained effort to return accurate history to our schools and our public debate.

On the eve of the Second Reconstruction, the scholar C. Vann Woodward observed that the history of Jim Crow was shrouded in false memories and beliefs based "on shaky foundations or downright misinformation." Two decades earlier, when historians were still peddling that "downright misinformation," W.E.B. DuBois noted that "[n]ot a single great leader of the nation during the Civil War and Reconstruction has escaped attack and libel."

That is no longer the problem. Great leaders like Bingham and Sumner are not attacked any more; they are ignored.

Reconstruction's political figures have not been made a positive part of popular political consciousness; they are far less often derided; rather they are neglected or denied. White Radical Republicans are regarded, if at all, as misguided utopians; black political figures of the Reconstruction era are forgotten. . . . The briefs and opinions in *Morrison* were written as though Reconstruction had not happened.⁸⁴

While the worst revisionist history has been removed from textbooks, it has been replaced mostly by silence. Teachers mention Reconstruction in passing, if at all. In most American schools, it is as if history stopped at the end of the Civil War and did not resume until the Gilded Age and the emergence of populism near the end of the nineteenth century.

Popular culture has a similar hole. There have been many movies about the Civil War, but few of note about its aftermath, apart from the anti-Reconstruction epics *Gone with the Wind* and *Birth of a Nation*. If we remember whites who fought for civil rights in the South at all, it is as the rapacious "carpetbaggers" at the gates of Tara. Ken Burns's acclaimed documentary series *The Civil War* never uttered the word "Reconstruction." Burns mentioned President Grant's

administration once – concerning the Credit Mobilier scandal, not Grant’s fight against Klan violence.

Even the Civil War battlefields maintained by the National Park Service mentioned nothing about slavery until very recently. Of hundreds of Civil War monuments, only two or three include any representation of black soldiers. Americans can visit historical sites like Gettysburg without learning much about why people went to war and what became of Lincoln’s speech there calling for a new birth of freedom. Americans fought on those battlefields to eradicate slavery. The New Birth Amendments continued that fight by other means, giving the federal government broad power to establish civil and social equality. That seemed to be not only justice, but poetic justice, considering the federal government’s regular antebellum exercise of its broad powers to shore up slavery. Though it had deferred to those earlier pro-slavery statutes, the Supreme Court suddenly embarked upon an aggressive review of congressional action, setting back for nearly a century the cause for which Union soldiers had given their lives – and for which blacks and their white supporters continued to die even as the Court ruled.

We need to recover the accurate history of Reconstruction, to honor those who fought in the Civil War and sacrificed their lives afterwards in the struggle for civil rights. And we need to debunk the idea that contemporary “federalist” jurisprudence has a claim, or even a monopoly, on historical accuracy. One need not believe in a living constitution to oppose the Rehnquist Court’s assault on federal civil rights legislation; the 14th Amendment as it was passed in 1866 and ratified in 1868 will do just fine.

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ENDNOTES

- 1 U.S. CONST. art. IV, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIII.
- 2 *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 624 (1842).
- 3 *Id.* at 615.
- 4 *See Civil Rights Cases*, 109 U.S. 3, 28-33 (1883) (Harlan, J., dissenting) (discussing role of Fugitive Slave Clause, Fugitive Slave Acts, and *Prigg* as historical antecedents to New Birth Amendments and civil rights legislation).
- 5 There were two exceptions in cases better known for reasons other than the minimal or non-existent limits they placed on federal power. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (holding statute improperly gave Supreme Court original jurisdiction over case where Article III permitted only appellate jurisdiction); *Prigg*, 41 U.S. (16 Pet.) at 671 (restricting use of state magistrates in implementing Fugitive Slave Act).
- 6 17 U.S. (4 Wheat.) 316, 421 (1819).
- 7 62 U.S. (21 How.) 506, 526 (1859).
- 8 CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866) (Sen. Trumbull).
- 9 Ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981-82).
- 10 U.S. CONST. art. I, § 8, cl. 18 (emphasis added).
- 11 *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866) (Sen. Trumbull); *id.* at 1124 (Rep. Cook).
- 12 *United States v. Rhodes*, 27 F. Cas. 785, 793 (C.C.D. Ky. 1866).
- 13 *See, e.g.*, *In re Turner*, 24 F. Cas. 337 (C.C.D. Md. 1867) (Chase, C.J.); *Smith v. Moody*, 26 Ind. 299 (1866).
- 14 *See* CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866) (Rep. Hotchkiss).
- 15 *Id.* at 1088 (Rep. Bingham).
- 16 *Id.* at 2459 (Rep. Stevens).
- 17 *Civil Rights Cases*, 109 U.S. at 45-46 (Harlan, J., dissenting). *But see Tennessee v. Lane*, 124 S. Ct. 1977, 2007 (2004) (Scalia, J., dissenting) (claiming federal courts in 1866 had no jurisdiction over cases alleging deprivation of constitutional rights).
- 18 CONG. GLOBE, 42d Cong., 1st Sess. App. 251 (1871) (Sen. Morton); *accord id.* at 321 (Rep. Stoughton).
- 19 *Id.* at 375 (Rep. Lowe).
- 20 5 Messages and Papers of the Presidents 3620, 3623 (1914).
- 21 Resolution of March 16, 1867, No. 4, 15 Stat. 20.
- 22 3 CONG. REC. 999 (1875).
- 23 CONG. GLOBE, 42d Cong., 2d Sess. App. 16 (1872) (Rep. Rainey).
- 24 *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1866); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866).
- 25 *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 592-94 (1871)
- 26 *Id.* at 599 (Bradley, J., dissenting).
- 27 *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77-78 (1872).

- 28 *Id.* at 129 (Swayne, J., dissenting).
- 29 *Id.* at 77.
- 30 *Id.* at 130 (Swayne, J., dissenting).
- 31 *United States v. Reese*, 92 U.S. 214, 217 (1875).
- 32 *United States v. Cruikshank*, 92 U.S. 542, 554 (1875).
- 33 Posse Comitatus Act, ch. 263, 20 Stat. 152 (1878) (codified as amended at 18 U.S.C. § 1385).
- 34 *Lochner v. New York*, 198 U.S. 45 (1905).
- 35 *Walker v. Sauvinet*, 92 U.S. 90 (1876).
- 36 *Hurtado v. California*, 110 U.S. 516 (1884).
- 37 *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring). *But cf. Garland*, 71 U.S. 333 (holding that Congress could not prohibit ex-Confederates from practicing law in federal courts).
- 38 *United States v. Harris*, 106 U.S. 629 (1883).
- 39 *Baldwin v. Franks*, 120 U.S. 678 (1886).
- 40 *Civil Rights Cases*, 109 U.S. at 54 (Harlan, J., dissenting).
- 41 *Id.* at 34 (Harlan, J., dissenting) (citations omitted).
- 42 *Hall v. DeCuir*, 95 U.S. 485 (1878).
- 43 *Louisville v. Mississippi*, 133 U.S. 587 (1890).
- 44 *Cumming v. Richmond County Bd. of Educ.*, 175 U.S. 528 (1899).
- 45 *Miller v. Johnson*, 515 U.S. 900, 936 (1995) (Ginsburg, J., dissenting) (internal quotation marks omitted).
- 46 *Williams v. Mississippi*, 170 U.S. 213 (1898).
- 47 *Giles v. Harris*, 189 U.S. 475 (1903).
- 48 *Id.* at 488.
- 49 Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 118 (1966); Louis Henkin, Book Review, *On Law & Justice*, 82 HARV. L. REV. 1193, 1199 (1969).
- 50 *United States v. Guest*, 383 U.S. 745, 761-62 (1966) (Clark, J., concurring); *id.* at 783-84 (Brennan, J., concurring in part and dissenting in part).
- 51 *Dist. of Columbia v. Carter*, 409 U.S. 418, 423 n.8 (1973).
- 52 *Collins v. Hardyman*, 341 U.S. 651, 662 (1951); *id.* at 664 (Burton, J., dissenting).
- 53 *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443-44 (1968) (§ 2 of 13th Amendment); *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (§ 5 of 14th Amendment); *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (§ 2 of 15th Amendment).
- 54 *Morgan*, 384 U.S. at 650.
- 55 *Id.* at 648 n.7.
- 56 *Jones*, 392 U.S. at 438-39.
- 57 *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 492 (1954).
- 58 *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 251-52 (1964).

- 59 *Shelley v. Kraemer*, 334 U.S. 1 (1948).
- 60 *United States v. Morrison*, 529 U.S. 598, 621 (2000).
- 61 *City of Rome v. United States*, 446 U.S. 156, 219-21 (1980) (Rehnquist, J., dissenting).
- 62 *Morrison*, 529 U.S. at 622.
- 63 See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 378 (2003) (Thomas, J., concurring in part and dissenting in part); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring in the judgment).
- 64 *Morrison*, 529 U.S. at 622-24.
- 65 *Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833, 864 (1992); *Oregon v. Mitchell*, 400 U.S. 112, 133 (1970); see also *Bryson v. United States*, 396 U.S. 64, 76 (1969) (Douglas, J., dissenting) (noting *Plessy* “has never been officially overruled”).
- 66 See *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).
- 67 *City of Boerne v. Flores*, 521 U.S. 507, 524-25 (1997) (citing *Reese*, the *Civil Rights Cases*, and *Harris*).
- 68 See *Lane*, 124 S. Ct. 1978; *Nev. Dep’t of Human Resources v. Hibbs*, 538 U.S. 721 (2003).
- 69 *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).
- 70 *Shaw v. Reno*, 509 U.S. 630 (1993).
- 71 See Brief for the NAACP Legal Defense and Educational Fund, Inc. and the American Civil Liberties Union as Amici Curiae at 29 & App. A in *Grutter*.
- 72 *City of Boerne*, 521 U.S. at 520-23. This was not an opinion of the usual five-justice bloc: Justices Stevens and Ginsburg joined the majority, and Justice O’Connor dissented. The Court’s opinion, authored by Justice Kennedy, is, however, the only opinion written by any of the five “new federalists” that uses historical evidence to justify the Court’s recent path.
- 73 *Id.* at 521 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1063-65 (1866)).
- 74 CONG. GLOBE, 43d Cong., 2d Sess. 979 (1875).
- 75 *Morgan*, 384 U.S. at 650 n.9.
- 76 See CONG. GLOBE, 39th Cong., 1st Sess. 2080-81, 2538, App. 134-35 (1866).
- 77 *Id.* at App. 134 (Rep. Rogers).
- 78 *Lane*, 124 S. Ct. at 2009-10 (Scalia, J., dissenting).
- 79 *Id.* at 2012 (Scalia, J., dissenting).
- 80 *Id.*
- 81 *Id.* at 2007-08 (Scalia, J., dissenting); see also *City of Boerne*, 521 U.S. at 520 (“There must be a congruence and proportionality between the [constitutional] injury to be prevented or remedied and the means adopted to that end.”).
- 82 *Lane*, 124 S. Ct. at 2008 (Scalia, J., dissenting) (citing *Garrett*, *Morrison*, *Kimel*, and *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999)).
- 83 *Id.* at 2008-09 (Scalia, J., dissenting).
- 84 Peggy Cooper Davis, *Introducing Robert Smalls*, 69 FORDHAM L. REV. 1695, 1708 (2001).

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