

## RACE, ORIGINALISM, AND SKEPTICISM

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The newest Associate Justice of the Supreme Court of the United States, Ketanji Brown Jackson, wasted very little time. The day after she was sworn in as an Associate Justice, she set her sights clearly and directly on the prevailing orthodoxy that reigns over the Court’s race jurisprudence. The case was *Allen v. Milligan*.<sup>1</sup> The plaintiffs, Black voters, sued the state of Alabama alleging that Alabama’s congressional district map diluted their votes in violation of section 2 of the Voting Rights Act of 1965. Alabama responded that Section 2 was unconstitutional because it compelled the state to take race into when apportioning political power. Race conscious decision-making by the government, Alabama argued, was inconsistent with the colorblind command of the 14th Amendment’s Equal Protection Clause.

As the last inquisitor in the last round of questions before Alabama’s solicitor general would leave the rostrum, Justice Brown Jackson flipped the script. She confessed to being “a little confused” as to why Alabama thought the VRA had to be interpreted in a race-neutral way to be consistent with the Constitution. “[G]iven our *normal assessment of the Constitution*,” she asked, “why is it that you think that there’s a Fourteenth Amendment problem?”<sup>2</sup> More specifically, she continued, we should not assume that “just because race is taken into account that that necessarily creates an equal protection problem, because I understood that we looked at the history and traditions of the Constitution at what the framers and the founders thought.”<sup>3</sup>

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<sup>1</sup> 142 S. Ct. 879 (2022).

<sup>2</sup> Transcript of Oral Argument at 57, *Merrill v. Milligan*, No. 21-1086, 2022 WL 3580300 (Aug. 22, 2022) (emphasis added).

<sup>3</sup> *Id.* at 57-58.

Justice Jackson's intervention, coming from the first black woman justice on the Court and from a presumed left-of-center justice, is intriguing in at least two ways. First, her suggestion that "we look[] at the history and tradition of the Constitution at what the framers and founders thought," as the "normal assessment of the Constitution," signals an apparent willingness to identify with and legitimate the project of originalism. This is not what many, particularly race scholars, would have expected from the first black woman justice—that her first major jurisprudential intervention would be to shore up and legitimate originalism, which race scholars generally view as inconsistent with the racial equality project.<sup>4</sup> Maybe originalism is truly "our law"<sup>5</sup> and perhaps we are indeed "all originalists" now.<sup>6</sup>

Second, Justice Jackson suggested that originalism, "our normal assessment of the Constitution,"—that is, as our default method for interpreting the Constitution, in this case the Reconstruction Amendments—necessarily allows race conscious means in the service of racial equality. The framers of the Reconstruction Amendments, she noted, "adopted" these amendments "in a race conscious way. . . . [T]hey were, in fact, trying to ensure that people who had been discriminated against, the freedmen . . . were actually brought equal to everyone else in the society."<sup>7</sup> This is Reconstruction Originalism.

More than a decade ago, Professor Jamal Greene brilliantly gave voice—in a register sympathetic to if not emanating from the perspective of racial

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<sup>4</sup> See Jerome M. Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understanding*, 1990 DUKE L.J. 1163.

<sup>5</sup> William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2352 (2015) (noting that originalism is our law because it is "a convention of *our* interpretation of *our* Constitution") (emphasis in original).

<sup>6</sup> The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States, Hearing before the Committee on the Judiciary, U.S. Senate, 111th Cong, 2d sess., June 29, 2010, at 62 ("And I think that they laid down—sometimes they laid down very specific rules. Sometimes they laid down broad principles. Either way we apply what they say, what they meant to do. So in that sense, we are all originalists.").

<sup>7</sup> Transcript of Oral Argument, *supra* note 2, at 58. Justice Jackson's argument is consistent with, if not reflective of, what William Baude calls "inclusive originalism," see Baude, *supra* note 5, at 2355, what Stephen Sachs terms "the Founders' Law," see Stephen Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. PUB. POL'Y, 817, 821 (2015), and what Lawrence Solum conceptualizes as "semantic originalism." Lawrence B. Solum, *Semantic Originalism* (Apr. 21, 2009) (unpublished manuscript), <https://philpapers.org/archive/SOLSO.pdf/> [<https://perma.cc/J8RW-X89R>]. The shared perspective among them is essentially that as a matter of positive law, originalism is descriptive of our foundational law.

equality scholars—to a central objection to the originalism project. Originalism, he declared, has a “race problem.”<sup>8</sup> Originalism’s race problem was not that few Black people, and few people of color, were interested in originalism, though that is true. As an empirical matter, as Professor Greene noted, there are not many Black people who identify as originalists. Originalism’s race problem was also not about the related point that few Black intellectuals and academics of color were at all compelled by originalism, though that is also true. Indeed, we cannot think of a single Black or Latiné racial justice scholar who identifies as an originalist. In a country in which the population of people of color is growing significantly and consistently, originalism commands very little allegiance among the colored electorate and colored intelligentsia. Disquisitions about originalism are largely taking place among legal academics, almost all of whom are White.<sup>9</sup> This should be, and presumably is, a concern for committed originalists who are certainly interested in the long-term viability of their enterprise.

Greene argues that originalism has a race problem because it uses a backwards-looking approach to derive constitutional meaning and then anchors that meaning within a very specific time and place. Consequently, originalism tends to reject competing and subdominant norms. Unfortunately for both originalists and for people of color, the norms and substantive constitutive meaning that Black and Brown Americans on average prefer are more likely to be competing and subdominant, and thus, always on the other side of the ledger. Greene argues that a “racially-sensitive constitutionalism must always . . . hold out the possibility of legitimate dissent” from the prevailing constitutional orthodoxy. Yet, originalism’s retrospective orientation to collective identity makes it almost impossible for Black and Brown Americans “to experience the Constitution as theirs.”<sup>10</sup> In fact, according to Greene, “[o]riginalism denies that possibility, . . . it speaks in a foreign tongue.”<sup>11</sup>

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<sup>8</sup> Jamal Greene, *Originalism's Race Problem*, 88 DENV. U.L. REV. 517 (2011).

<sup>9</sup> See Christina Mulligan, *Diverse Originalism*, 21 U. PA. J. CONST. L. 379, 380 (2018) (“At the 2017 Originalism Works-in-Progress conference, nonoriginalist scholar Richard Primus tweeted before the first panel, ‘At a conference on originalism. Nice people here. I count 31 around the table. 29 men; 28 white men.’”).

<sup>10</sup> Greene, *supra* note 8, at 522.

<sup>11</sup> *Id.*

Progressive and conservative originalists have attempted to alleviate this problem by relaxing the temporal fixity of originalism and by broadening the epistemic community eligible for epistemic deference on what the Constitution means.<sup>12</sup> Originalism has evolved from privileging the meaning of the text as understood by the framers and drafters to privileging the original public meaning of the text.<sup>13</sup> In the context of race conscious policymaking, originalism now emphasizes the original public meaning of the Fourteenth Amendment with significant vigor, not just the original meaning of the 1789 and 1791 Constitution.<sup>14</sup> For the new originalists, the views of Frederick Douglass on the Constitution and on the Fourteenth Amendment are important. These views may not be as important as Madison's on the Commerce Clause, but Douglass' understanding of the Constitution now commands epistemic deference.

Consequently, Reconstruction Originalism in particular, if not originalism more broadly, ought to be more palatable, if not attractive, to scholars concerned about racial justice and democratic inclusion. That is, racial justice advocates can have their cake—trade in the default currency of constitutional interpretation, originalism—and eat it too—achieve ends consistent with racial liberation. Proponents of racial justice might be able to deploy Reconstruction Originalism, even if strategically, to achieve preferred policy outcomes that they would not be able to achieve were it not for their deployment of Reconstruction Originalism. This should be a bargain that should entice racial justice scholars. We should all be originalists, at least Reconstruction Originalists.

Consistent with that view, Professor Lawrence Solum has recently heralded Justice Jackson “the de facto leader” of the “third wave of

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<sup>12</sup> On the progressive side Jack Balkin's framework originalism rejects the fixity constraint and significantly expands the epistemic community. See e.g., JACK BALKIN *LIVING ORIGINALISM* (2011) and Solum, *supra* note 7. On the conservative side, see e.g., RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT* (2021) and Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 *GEO. L.J.* 1 (2018).

<sup>13</sup> See, e.g., James W. Fox Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 *ALA. L. REV.* 675, 688 (2016) (noting that “originalism as now practiced . . . emphasizes the original public meaning of constitutional language,” which “opens the door to a reconfiguration of originalism that better accounts for the ideas and experiences of women, minorities, and the working class.”).

<sup>14</sup> See BARNETT & BERNICK, *supra* note 12.

progressive originalism” and has encouraged Progressives to support her.<sup>15</sup> Whether Justice Jackson is a progressive originalist is an important, interesting, and we think open, question. Nevertheless, whether she is or not and whether her intimations about Reconstruction Originalism and racial justice are correct or not, she has necessarily put the issue of race and originalism “on the wall”<sup>16</sup> for scholars of race and law. They can no longer ignore the originalism debate.

Justice Jackson’s intervention in *Milligan* implicitly departs from two complementary premises. The first is that originalism, specifically Reconstruction Originalism, is not inimical to racial equality. At the very least, it has the potential of reducing a presumed antipathy between originalism and racial justice. Second, and more broadly, not only is originalism not opposed to racial equality, but it is also in fact concordant with the racial equality project. In sum, Reconstruction Originalism promises to reconcile originalism with the aims of racial justice.

This is an intriguing project. If originalism is “our law” and “not just a method of interpretation, but rather, and most persuasively a normative claim on American identity,”<sup>17</sup> the normative aim of Reconstruction Originalism—defining the American identity—and its valence—to be as inclusive as possible and certainly more inclusive than 1787 or 1791 originalism—commands our fidelity and deserves close attention. This is the tantalizing promise of Reconstruction Originalism.<sup>18</sup>

However, if originalism is not “our” law—more precisely, if it does not describe the “law” that applies in racial justice cases—racial justice scholars are right to be skeptical of its descriptive claims. Moreover, they are justified in rejecting originalism’s project of defining or redefining American identity. That is, there is very little by way of originalism scholarship and doctrine that would allay their fear that the project of defining American identity will

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<sup>15</sup> Lawrence B. Solum, *Progressives Need to Support Justice Ketanji Brown Jackson*, BALKINIZATION (Dec. 9, 2022), <https://balkin.blogspot.com/2020/06/mcclain-symposium-10.html> [https://perma.cc/NH3P-QCQR].

<sup>16</sup> Jack M. Balkin, *Agreements with Hell and Other Subjects of Our Faith*, 65 FORDHAM L. REV. 1703, 1731, 1735 (1997) (drawing a distinction between interpretations of the Constitution that are “plausible,” “on the wall,” and interpretations that are “off-the-wall”).

<sup>17</sup> Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 980 (2012).

<sup>18</sup> There are many versions of originalism and we do not purport to address all of them here. See Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1247 (2019) (asserting that “the meaning of the word ‘originalism’ is disputed” and that “‘originalism’ is just a name for a theory or a set of theories”).

simply reflect and further entrench the existing structural racial inequality. Additionally, they are also justified in rejecting a necessary normative corollary of originalism, which is that fidelity to the Constitution must mean fidelity to originalism.

This Essay assesses the relationship between Reconstruction Originalism and racial justice. We are pessimistic in our assessment. Given the changing and growing demographic of our polity, to the extent that scholars of originalism are invested in the long-term viability of their enterprise, they must take more seriously and address more explicitly their understanding of the relationship between originalism and racial equality. It is surprising that a deep engagement with racial equality has largely been missing from the originalism literature.<sup>19</sup>

It has been more than a decade since Professor Greene noted that originalism has a race problem. Unfortunately, scholars of originalism have by and large failed to discuss much less resolve originalism's race problem.<sup>20</sup> In our view, if Reconstruction Originalism is to be at all useful to the racial equality project, it must overcome at least three grounds of skepticism. First, originalism is rarely used to further racial justice, as communities of color understand it. Or worse, originalism is often selectively deployed to advance a colorblind ideology that most scholars of race find racially regressive. Second, to the extent that originalism defines original public meaning as the prevailing or dominant public meaning—as opposed to any understanding that anyone alive at the time had—there is no original public meaning of race consistent with our current understanding of racial equality. White Americans in the nineteenth century did not view Black people as humans

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<sup>19</sup> Largely, but not fully. Originalism scholars have begun to engage with questions of racial equality. For example, this is the work of Jack Balkin, Randy Barnett and Evan Bernick. *See* sources cited *supra* note 12. This is also the work of Steve Calabresi. *See* Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 3 MICH. ST. L. REV. 429 (2014). *See generally* Stephen M. Griffin, *Optimistic Originalism and the Reconstruction Amendments*, 95 TUL. L. REV. 281 (2021).

<sup>20</sup> *See, e.g.*, JOHN O. MCGINNIS & MICHAEL RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013). Professor McGinnis and Rappaport concede that the “exclusion of the vast majority of African Americans from substantial participation in the drafting or ratification of the Constitution represents the most serious departure from the conditions conducive to generating a good constitution.” *Id.* at 107. And, the “exclusion of African Americans from the constitutional enactment process was undoubtedly an enormous failure of the supermajoritarian process.” *Id.* at 107. However, they argue, “this failure was corrected through the enactment of the Reconstruction Amendments.” *Id.* Further, “[i]f enforced according to their terms, these amendments would have contributed substantially to a ‘new birth of freedom’ for African Americans that would have provided them with largely the same rights that white males enjoyed in 1789.” *Id.* at 108.

worthy of equal dignity. Reconstruction Originalism needs an account that explains Redemption and Jim Crow and so far, it does not have one. We are skeptical that they can develop a compelling one.

Third, there is a temporal incompatibility between Reconstruction Originalism and racial equality. Scholars of originalism look to the past to find their vision of equality. Scholars of race look to the future. The past is fixed and narrow. The future is fluid and expansive. Originalists would have to make a convincing case to racial equality scholars to persuade them to choose the backward-looking vision of racial equality over the forward-looking vision. We are skeptical that they can do so.

This Essay has four Parts. Part I conjectures what Justices Jackson and Kagan are up to by putting the Reconstruction Originalism issue on the table. Part II reviews key precedents of the Reconstruction era. We review these key precedents for two reasons. First, to remind us that the Court has rarely committed to the racial equality project, tout court. Second, to make clear the monumental task that awaits Reconstruction Originalists. They would have to confront and overrule key doctrinal precedents if Reconstruction Originalism is to be more than simply a quixotic intellectual enterprise.

Part III expands the historical overview beyond the Court and argues that the challenge for Reconstruction Originalism is not just limited to inconvenient judicial precedents of the Reconstruction era. Redemption and Jim Crow followed the brief Reconstruction era because the country as whole could not commit to the racial equality project. Notwithstanding the promises of the Reconstruction Amendments, the reality is that the country could never muster the political and moral will to fully include black and brown people within the governing community.

Part IV sketches the implications of the brief historical overview for the potential payoff of Reconstruction Originalism for racial justice. Building on the work of Professor Jamal Greene, we suggest that Reconstruction Originalism and racial justice are deeply incompatible because the equality project is necessarily future oriented and forward looking, whereas Reconstruction Originalism is necessarily about the past and backward looking. The future vision of racial equality will always be greater and more expansive than the past, especially a past that for the most part regarded Black people and other people of color as barely fit to join the ranks of the governed. Second, building on recent work by Professor Richard Fallon, we

suggest that racial justice scholars will likely always be distrustful of Reconstruction Originalism. The selective deployment of originalism will lead them to believe that Reconstruction Originalism will most often be used when it will hinder the racial equality project and not when it will further it.

## I. THE ORIGINALIST CHALLENGE AND THE COURT

In two cases that considered the constitutionality of race-conscious decision-making, Justices Ketanji Brown Jackson and Elena Kagan intimated that the constitutional questions before the Court could, and perhaps should, be resolved by recourse to Reconstruction Originalism, particularly for those who believe in originalism as our law.

In the first case, *Allen v. Milligan*,<sup>21</sup> the plaintiffs argued that Alabama's restricting plan was not in compliance with the requirements of section 2 of the Voting Rights Act. Alabama responded that section 2 was unconstitutional to the extent that it required the State to prioritize racial representation over the State's redistricting criteria. Alabama also argued, quite forcefully, that section 2 was unconstitutional because Congress required the state to be race conscious in the drawing of its electoral districts.

For Justice Jackson, the conclusion that Congress does not have the power to compel the states to take race conscious action was too facile. "I looked at the report that was submitted by the Joint Committee on Reconstruction, which drafted the Fourteenth Amendment," she said, "and that report says that the entire point of the amendment was to secure rights of the freed former slaves."<sup>22</sup> She continued: "The legislator who introduced that amendment said that 'unless the Constitution should restrain them, those states will all, I fear, keep up this discrimination and crush to death the hated freedmen.'<sup>23</sup> From her perspective, the Fourteenth Amendment had a clear purpose. It was to make sure that black people were equal to white people. "That's not . . . a race-neutral or race-blind idea in terms of the remedy. And . . . even more than that, I don't think that the historical record establishes that the founders believed that race neutrality or race blindness was required, right?"<sup>24</sup>

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<sup>21</sup> 143 S.Ct. 1487 (2023).

<sup>22</sup> Transcript of Oral Argument, *supra* note 2, at 58.

<sup>23</sup> *Id.* at 58-59.

<sup>24</sup> *Id.* at 59.



Four months later, during the oral arguments in *Students for Fair Admissions Inc. v University of North Carolina* (“*SFFA v. UNC*”), about the constitutionality of the University of North Carolina’s affirmative action program, it was Justice Elena Kagan’s turn to ask about the relevance of Reconstruction Originalism.<sup>25</sup> Surprisingly, given the subject matter of the case, given Justice Jackson’s intervention in *Merrill*, and given the promise of Reconstruction Originalism, originalism, our supposed law, did not surface at all during the argument until Justice Kagan forced it up toward the end.

Directing her question ostensibly to the Solicitor General, Elizabeth Prelogar, who was arguing as amicus curiae in support of North Carolina’s affirmative action plan, Justice Kagan observed that “one notable thing about the argument here is that both sides there’s been very little discussion of what originalism suggests about this question.”<sup>26</sup> She then asked the Solicitor General what could be characterized as a softball question: “what would a committed originalist think about this kind of race-consciousness that’s at issue here?”<sup>27</sup> Put differently, if we were really committed to originalism as method and not simply when it dictated a preferred policy outcome, how would we apply it when it dictates a policy result that cuts against our preferred outcomes?<sup>28</sup>

Elizabeth Prelogar did not miss. “[A]n originalist,” she explained, “would think this [North Carolina’s affirmative action program] is clearly consistent with the original understanding of the Fourteenth Amendment.”<sup>29</sup>

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<sup>25</sup> See Transcript of Oral Argument, *Students for Fair Admissions Inc. v Univ. of N.C.*, No. 21-707, 2022 WL 2899390 (Oct. 31, 2022).

<sup>26</sup> *Id.* at 160.

<sup>27</sup> *Id.*

<sup>28</sup> In a forthcoming article, Professor Richard Fallon has very nicely explored what he terms “selective originalism,” which he defines “as the practice of the Justices and others in professing obligations of adherence to the Constitution’s original meaning in some cases but, without close engagement with historical evidence or invocation of *stare decisis* as a ground of obligation, taking no interest in or subordinating arguments based on original meanings in other cases.” Professor Fallon notes that “[i]n large swathes of cases spread across multiple areas of law, the Justices make little or no effort to justify their rulings by reference to original constitutional meanings.” Moreover, “self-avowed originalist Justices often show little or no interest in whether the precedents that they accept as controlling would be justifiable based on originalist premises.” See Richard H. Fallon Jr., *Selective Originalism and Judicial Role Morality* (forthcoming *Texas Law Review*); see also Ronald Turner, *The Problematics of the Brown-Is-Originalist Project*, 23 *J.L. & POL’Y* 591, 596 (2015) (“I argue that originalism does not meaningfully constrain interpreters who are and remain free to fashion and shape the methodology in ways that yield a Brown-is-originalist conclusion.”).

<sup>29</sup> Oral Argument, *supra* note 25, at 161.

Moreover, she continued, the defendants “have come forward with powerful evidence that surrounding the time of enactment of the Fourteenth Amendment, there were federal and - - and state laws that took race into account for purposes of trying to achieve the central premises of the Fourteenth Amendment to bring African American citizens to a point of equality.”<sup>30</sup> By contrast, the plaintiffs have “come forward with essentially no history to support this color blind interpretation of the Constitution that would make all racial classifications automatically unconstitutional. There’s nothing in history to support that.”<sup>31</sup>

It is not clear what Justices Jackson and Kagan are up to in forcing Reconstruction Originalism to the surface. We think of four possibilities. First, the Justices might simply be pointing out the cynicism of their colleagues. No one believes in originalism, but for political or legitimacy reasons, the justices pretend that we do. Originalism is but a tool to achieve their preferred interpretive outcomes. Second, they may be highlighting the hypocrisy of their colleagues. The conservative justices may in fact believe in originalism but will depart from it when it suggests outcomes inconsistent with their purposes and preferred policy positions. Third, the justices may be deploying Reconstruction Originalism as a political strategy. They may think that they have a winning argument that will offer the constitutional positions they prefer. Finally, they may be true believers. At least with respect to Justice Kagan, we don’t think this is true.

## II. THE ORIGINALIST CHALLENGE AND THE COURT

“To ask whether the written Constitution and the original interpretive rules are the law today,” according to the one leading positivist account of originalism, “is to ask a question about *modern social facts*.”<sup>32</sup> That is, if we want to know something about our legal system—such as whether we consider originalism to be our law—we examine our practices—what we say and what we do. Specifically, we examine the practices of the Supreme Court. This is our task in this Part. We show that past Court practices pose a difficult challenge for originalists, particularly Reconstruction Originalists, because the Court has rarely been originalist in the context of race. Race

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Baude, *supra* note 5, at 2364 (emphasis in original).

scholars might surmise that originalist methodology is avoided, and will be avoided, if it points toward racial equality—and conversely it will be embraced where it cuts against racial equality. This Part pours old wine into new wineskins. It reminds us of a past we no longer pay much attention to, if we ever did.

There is a strongly held view of Reconstruction as forging a second founding, a restructuring of rights and responsibilities. Reflective of the problems then seen across the country and especially in the former confederate states, this is a view that shifts the protection of rights from the states to the national government. Reconstruction is thus understood as a constitutional revolution, a structural reorientation that flips the federalism structure on its head, away from the states and towards the national government.<sup>33</sup>

Reconstruction is the moment that we can point to and confidently say that African Americans specifically and people of color more generally were made beneficiaries of the blessings of liberty promised by the American republic. They were now part of the “we” and the “our” of the Preamble to the Constitution of the United States — “We the People” who “do ordain and establish this Constitution” to “secure the Blessings of Liberty to ourselves and our Posterity.” Constitutional amendments put an end to legal slavery; established formal racial equality; and enshrined Black male voting. Congress codified the first civil right laws in the history of the United States and established an enforcement apparatus to protect these new rights. The president protected these new rights to the full extent of the law.

But the Supreme Court did not follow the Reconstruction script. The Court made its position clear from the moment it first addressed these questions in the *Slaughterhouse Cases*.<sup>34</sup> These cases, brought by butchers in New Orleans who were upset by a state law creating a slaughterhouse monopoly, were poor test cases for the Court to operationalize the Fourteenth Amendment. To be sure, the justices well understood “the great responsibility” they faced. As Justice Miller explained, writing for a 5-member majority:

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<sup>33</sup> See, e.g., Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986); Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War*, 92 AM. HIST. REV. 45 (1987).

<sup>34</sup> 83 U.S. (16 Wall.) 36 (1873).

No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, of the several States to each other, and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members.<sup>35</sup>

The stakes were immense. Before the war, the national government played a modest role in protecting individual rights. Such protection was the responsibility of the states. By the end of the war, however, it was clear that the former confederate states would not protect Black communities within their jurisdictions. Hence, the question for the Court in the *Slaughterhouse Cases*: had Reconstruction – and specifically the Fourteenth Amendment – turned federalism on its head and placed the national government in charge of protecting individual rights? The wording of the amendment spoke in the language of grand theory and legal principles, which the Court must translate into the language of constitutional law and politics. What were the privileges and immunities of citizenship? What would it mean to deprive a person of due process, or to deny her the equal protection of the laws? The settlement of Reconstruction hung on the Court’s answers to these questions.

The text of the amendment guided the Court’s interpretation. The first sentence was crucial: “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.”<sup>36</sup> This is the “birthright citizenship” clause, which overruled the holding in *Dred Scott* that no African American or their descendants could be citizens of the United States.<sup>37</sup> Crucially, the Court highlighted the fact that the clause referenced both national and state citizenship. Birth on U.S. soil conferred both.

This argument proved crucial once the Court turned to the centerpiece of the Amendment: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” What were these “privileges or immunities” and what role would the federal government play in protecting them? One obvious answer argued that the Bill of Rights would be incorporated through the 14th Amendment and apply to the states. But the Court rejected that answer. Though the citizenship clause referenced two citizenships, the Court highlighted the fact

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<sup>35</sup> *Id.* at 67.

<sup>36</sup> U.S. CONST. amend. XIV.

<sup>37</sup> See KURT LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 171 (2014).

that the Privileges and Immunities Clause only referenced national citizenship. “It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State,” the Court reasoned, “that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States in the very sentence which precedes it.”<sup>38</sup> In fact, the Court continued, “[i]t is too clear for argument that the change in phraseology was adopted understandingly and, with a purpose.”

And what exactly was this purpose? It was to protect the privileges and immunities of *national citizenship*. In turn, the privileges and immunities of state citizenship “must rest for their security and protection” with the states, “where they have heretofore rested.”<sup>39</sup> To conclude otherwise would be unthinkable. The Court first defined the rights of state citizenship as “fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign.” The Court did not enumerate these rights—“it would be more tedious than difficult”<sup>40</sup> to do so but instead offered three general categories. These were the right to protection, the right to property, and the right “to pursue and obtain happiness and safety.” To interpret the 14th Amendment’s Privileges and Immunities Clause to reach these rights, the Court explained, “would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment.”<sup>41</sup> This reading of the 14th Amendment would affect a revolution in federalism and the role of the national government *vis-a-vis* the states; in the Court’s words, “it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people.”<sup>42</sup> Such a conclusion must not be taken lightly. The Court was “convinced”

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<sup>38</sup> 83 U.S. (16 Wall.) at 74.

<sup>39</sup> *See id.* at 77 (“But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government.”).

<sup>40</sup> *Id.* at 97.

<sup>41</sup> *Id.* at 78.

<sup>42</sup> *Id.*

that neither Congress nor the ratifying states intended to “fetter and degrade” the state governments in this way.

Rather than interpret the new Privileges and Immunities Clause broadly and assertively, the Court instead offered a reading that rendered its promise useless. What were these privileges and immunities left to the national government to protect? These were those rights that “owe their existence to the Federal government, its national character, its Constitution, or its laws.”<sup>43</sup> For example: the right to protection by the federal government while on the high seas; all rights secured by treaty; the right to use the navigable waters of the United States, “however they may penetrate the territory of the several States;” and all rights already secured by the US Constitution.<sup>44</sup> We would not go as far as to call these rights insignificant, though it is not clear why Radical Republicans would invest so much effort into an Amendment that would protect such rights. Besides, it was not clear that states could infringe on these rights long before the states ratified the 14th Amendment. Such was the import of *McCulloch v. Maryland*.<sup>45</sup> Instead, the most important lesson of the *Slaughterhouse Cases* is that the Court would not cooperate with Congress and the president to further the promise of Reconstruction. Tragically, when it came to seeking protection from private violence, the Black community must look to state governments. Reconstruction changed nothing.

The Supreme Court made its reticence clear over the course of the next decade. In *Cruikshank v. United States*,<sup>46</sup> the Court considered an indictment for individuals involved in the Colfax Massacre, a moment widely considered “the bloodiest single act of carnage in all of Reconstruction,”<sup>47</sup> involving “a level of violence tantamount to a localized civil war.”<sup>48</sup> According to the

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<sup>43</sup> *Id.* at 79.

<sup>44</sup> *Id.*

<sup>45</sup> 17 US 316 (1819).

<sup>46</sup> 92 U.S. 542 (1876).

<sup>47</sup> ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877, at 530 (Updated ed. 2014); see STEPHEN KANTROWITZ, MORE THAN FREEDOM: FIGHTING FOR BLACK CITIZENSHIP IN A WHITE REPUBLIC, 1829-1889, at 375 (calling “the massacre of black militiamen at Colfax, Louisiana, the worst single episode of white supremacist violence during Reconstruction”).

<sup>48</sup> ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876, at 175 (2005).

U.S. Attorney for Louisiana, J. R. Beckwith, “[t]he details are horrible.”<sup>49</sup> In an urgent message to the Attorney General, he explained:

The Democrats (white) of Grant parish attempted to oust the incumbent parish officers by force and failed, the sheriff protecting the officers with a colored posse. Several days afterwards, recruits from other parishes, to the number of 300 hundred, came to the assistance of the assailants, when they demanded the surrender of the colored posse. This was refused. An attack was then made, and the negroes driven into the court-house. The court-house was fired, and the negroes slaughtered as they left the burning building, after resistance had ceased. Sixty-five negroes, who were terribly mutilated, were found dead near the ruins of the court-house. Thirty were known to have been taken prisoners, and are said to have been shot after the surrender and thrown into the river. Two of the assailants were wounded. The slaughter is greater than in the riot of ‘66 in [New Orleans].<sup>50</sup>

The facts of the moment deeply affected Beckwith. “It has never been my fortune,” he wrote to the Attorney General weeks later, “to be connected with the prosecution of a case so revolting and horrible in the details of its perpetration and so burdened with atrocity and barbarity.”<sup>51</sup>

The Attorney General responded to Beckwith by telegram on April 18 and offered his qualified support. “You are instructed to make a thorough investigation of the affair in Grant parish,” he wrote. Crucially, he added, “if you find that the laws of the United States have been violated, you will spare no pains or expense to cause the guilty parties to be arrested and punished.”<sup>52</sup> The conditional is crucial. The crimes at the heart of the Colfax Massacre were state level crimes, traditionally prosecuted by the states. And yet, as Beckwith told the congressional committee investigating “the Louisiana outrages” in February 1875, “[t]here is no adequate remedy for the killing of negroes in this State.”<sup>53</sup> This meant that the federal government must get involved in the prosecution of these crimes. But this

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49 *The Fighting in Louisiana*, THE BALTIMORE SUN, Apr. 19, 1873, p. 1; see *Grant Parish. The Massacre a Most Terrible One—Escape of the Whites—Difficulty in Sending Off Troops*, N.Y. TIMES, Apr. 18, 1873, at 1 (reporting that “not a single colored man was killed until all of them had surrendered to the whites who were fighting with them, when over 100 of the unfortunate negroes were brutally shot down in cold blood”).

50 *The Fighting in Louisiana*, *supra* note 49, at 1.

51 Letter of J.R. Beckwith to the Attorney General, June 17, 1873, quoted in LEEANNA KEITH, *THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, & THE DEATH OF RECONSTRUCTION* 134 (2008).

52 Telegram from Attorney General Williams to James Beckwith, reprinted in *War of the Races*, CHI. DAILY TRIB., Apr. 16, 1873, at 1.

53 *The Louisiana Outrages*, N.Y. TIMES, Feb. 3, 1875, at 5.

was possible only if federal crimes were committed. Thus the question at the heart of Beckwith's inquiry: had Reconstruction changed the calculus of our federalism? Were local crimes now subject to federal prosecution?

These questions framed Beckwith's challenge. The obvious place to look for statutory support was the Enforcement Act of 1870,<sup>54</sup> the first congressional attempt to give life to the promise of Reconstruction. Enacted three months after ratification of the 15th Amendment, the Act sought to enforce the right to vote. Under section 2, for example, if states or territories imposed voting qualifications as prerequisites to vote, they must "give to all citizens of the United States the same and equal opportunity to perform such prerequisite, and to become qualified to vote without distinction of race, color, or previous condition of servitude."<sup>55</sup> Violation of this section of the Act carried a penalty "of five hundred dollars to the person aggrieved thereby"<sup>56</sup> and criminal penalties. In specific response to the Colfax Massacre, Beckwith looked to section 6 of the Act, which criminalized conspiracies "with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States."<sup>57</sup> In order to bring charges in federal court, Beckwith must connect the murders at Grant Parish to pre-existing national rights, whether under the Constitution or federal law. This was a tall order.

As the U.S. Supreme Court concluded in the infamous *United States v. Cruikshank*,<sup>58</sup> the order proved too tall. Notably, nowhere in the opinion did the Court inform its audience about the facts of the case and the massacre at the courthouse. Instead, the Court began with a recitation of the federal charges, immediately followed by a 6th-grade civics lesson about the levels of government and the duties and allegiances that attach to each. "We have in our political system a government of the United States and a government of each of the several States," the Court wrote. "Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance and whose rights, within its jurisdiction, it must protect."<sup>59</sup> The Court then proceeded to cede little ground to the Reconstruction project.

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<sup>54</sup> Enforcement Act, ch. 114, 16 Stat. 140, (1870).

<sup>55</sup> *Id.* § 2.

<sup>56</sup> *Id.* § 4.

<sup>57</sup> *Id.* § 6.

<sup>58</sup> 92 U.S. 542 (1875).

<sup>59</sup> *Id.* at 549.



For example, the Bill of Rights seemed like a promising source of national rights that the federal government may protect against the states through the Enforcement Act. Not so, said the Court. The Bill of Rights was a safeguard against the national government and not the states. Hence, they were not rights “granted or secured” by the U.S. Constitution. Similarly, though “[t]he Fourteenth Amendment prohibits a State from depriving any person of life, liberty, or property without due process of law,” the Court explained, “this adds nothing to the rights of one citizen as against another.”<sup>60</sup> In other words, the Amendment only protected against state not private action.

More promisingly, the Court conceded that the 15th Amendment created “a new constitutional right.” But the devil was in the formalistic details. This new right was not a positive right to vote that states must provide to all persons and the national government must protect. Rather, this was an “exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude.”<sup>61</sup> The Court did not wish to be misunderstood: the right to vote was “not a necessary attribute of national citizenship” and the 15th Amendment only provided an “exemption from discrimination in the exercise of that right on account of race. . . .”<sup>62</sup> As applied to the Colfax prosecution, Beckwith must plead that the defendants sought to prevent those at the courthouse from voting on account of race. Remarkably, for an event dubbed in the national press as a “race war,”<sup>63</sup> the Court wrote that “[w]e may suspect that race was the cause of the hostility; but it is not so averred.”<sup>64</sup>

The lessons of *Cruikshank* were clear. “Conceived as a lesson to those who advanced the black cause in politics,” Leanna Keith wrote in a recent history of the Colfax Massacre, “the rout of the courthouse defense served notice of white determination.”<sup>65</sup> White supremacists in Louisiana would not give up easily and go to great lengths to “defeat their enemies within, killing and dying for white supremacy and home rule.”<sup>66</sup> The only defense for Blacks in the South was an aggressive national government willing to enforce national norms. But after *Cruikshank*, such enforcement became more difficult.

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<sup>60</sup> *Id.* at 554.

<sup>61</sup> *Id.* at 555.

<sup>62</sup> *Id.* at 555—56.

<sup>63</sup> See e.g., *War of the Races*, CHI. DAILY TRIB., Apr. 16, 1873.

<sup>64</sup> *Cruikshank*, 92 U.S. at 556.

<sup>65</sup> KEITH, *supra* note 51, at 110.

<sup>66</sup> *Id.*

According to Professor Hope Franklin, the decision made “[t]he victory of the counter-reconstructionists . . . complete.”<sup>67</sup> The president no longer had the will to enforce reconstruction, Congress had turned its attention to other matters, and the Court made clear that it would not partner with Congress and the executive to advance the goals of Reconstruction. After the 1876 election and the removal of troops from Louisiana, Florida and South Carolina, the nation explicitly moved on. Reconstruction was over. The era of racial terror awaited.<sup>68</sup>

Six years later, the Supreme Court put any doubts to rest. In the *Civil Rights Cases*,<sup>69</sup> the Court struck down the Civil Rights Act of 1875, which prohibited racial discrimination in places of public accommodations. The argument was almost too simple. The Act reached private action, yet the 14th Amendment only applied to the states. Hence, the Court explained, Section 5 “does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to.”<sup>70</sup> More specifically, the Court continued, Section 5 “does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment.” This was a concededly narrow reading of the new powers of Congress, a reading that, Justice Harlan pointed out in dissent, turned the “recent amendments” into “splendid baubles, thrown out to delude those who deserved fair and generous treatment at the hands of the nation.”<sup>71</sup>

Importantly, this was a new posture towards congressional powers. “It has been the established doctrine of this court during all its history,” Justice Harlan explained, “accepted as essential to the national supremacy, that Congress, in the absence of a positive delegation of power to the State legislatures, may, by its own legislation, enforce and protect any right derived from or created by the national Constitution.” This was *Prigg v. Pennsylvania*,<sup>72</sup>

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<sup>67</sup> JOHN HOPE FRANKLIN, RECONSTRUCTION: AFTER THE CIVIL WAR 208-09 (1961).

<sup>68</sup> See EQUAL JUSTICE INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR 21 (3rd ed. 2017).

<sup>69</sup> See *Civil Rights Cases*, 109 U.S. 3 (1883).

<sup>70</sup> *Id.* at 21.

<sup>71</sup> *Id.* at 48 (Harlan, J., dissenting).

<sup>72</sup> 41 U.S. 539 (1842).

where the Court upheld the Fugitive Slave Law under and expansive if implicit power to enforce Article IV's Fugitive Slave Clause. This was also the canonical *McCulloch v. Maryland*,<sup>73</sup> where the Court explained that so long as the ends of the legislation were legitimate, the means of implementation were up to Congress. But this would not be a public accommodations law enacted in furtherance of the ideals of Reconstruction. The irony did not escape Justice Harlan. To accept the Court's interpretation,

would lead to this anomalous result: that, whereas, prior to the amendments, Congress, with the sanction of this court, passed the most stringent laws -- operating directly and primarily upon States and their officers and agents, as well as upon individuals -- in vindication of slavery and the right of the master, it may not now, by legislation of a like primary and direct character, guard, protect, and secure the freedom established, and the most essential right of the citizenship granted, by the constitutional amendments.<sup>74</sup>

Unquestionably, the Court was changing the way it understood and interpreted the powers of Congress. The one constant was that the Black community found itself on the wrong end of the Court's rulings across time.

The Court had clearly lost patience with the Reconstruction project.<sup>75</sup> "When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state," the Court concluded, "there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected."<sup>76</sup> This is an arresting passage. The Court asks us to believe that a mere 18 years had been enough to "shake off" centuries of bondage. The Court also asks us to believe that a public accommodation law -- and protection from racial discrimination in private life -- places the Black community above others as "special favorite[s] of the law."<sup>77</sup> The Court asks too much.

The *Civil Rights Cases* signaled the end of Reconstruction. The judgment of history has not been kind to the Court. For example, Michael Vorenberg

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<sup>73</sup> 17 U.S. 316 (1819).

<sup>74</sup> *Civil Rights Cases*, 109 U.S. at 51 (Harlan, J., dissenting).

<sup>75</sup> According to Keith Whittington, the Court sided with the conservative wing of the Republican Party, which no longer wished to fight on behalf of the freedmen. KEITH E. WHITTINGTON, *REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT* 144 (2019).

<sup>76</sup> *Civil Rights Cases*, 109 U.S. at 25.

<sup>77</sup> *Id.*

writes about “the Court’s assault on Reconstruction,” which he describes as “more disheartening than the story in the Court’s role in the modern civil rights movement.”<sup>78</sup> This is a common account of the Court’s role during this period, which ascribes to the justices deep attitudinal disdain for the Reconstruction project.<sup>79</sup> Few put it best than DuBois in his magisterial history of the period. “Meantime, a new power appeared upon the scene, or rather an old power of government paralyzed by the Civil War began to reassert itself, and effectively stopped Northern Federal dictatorship to enforce democracy in the South.”<sup>80</sup> This power was the Supreme Court, which did for political elites what Democratic members of Congress could not: “deprive[ ] the enforcement legislation of nearly all its strength.” More generally, Dubois concluded, the Reconstruction Amendments were “made innocuous so far as the Negro was concerned.”<sup>81</sup> The Court abandoned African Americans.

### III. THE ORIGINALIST CHALLENGE: RECONSTRUCTION AND NATIONAL ABANDONMENT

But the Court is not the only entity that abandoned the Black community. The rest of the country did as well.<sup>82</sup> It is a familiar and comforting story to

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<sup>78</sup> Michael Vorenberg, *Reconstruction as Constitutional Crisis*, in RECONSTRUCTIONS: NEW PERSPECTIVES ON THE POSTBELLUM UNITED STATES 154 (Thomas J. Brown ed. 2006).

<sup>79</sup> See, e.g., LAWRENCE GOLDSTONE, *INHERENTLY UNEQUAL: THE BETRAYAL OF EQUAL RIGHTS BY THE SUPREME COURT, 1865-1903* 118 (2011); ROBERT J. HARRIS, *THE QUEST FOR EQUALITY: THE CONSTITUTION, CONGRESS, AND THE SUPREME COURT* 149 (1960); KACZOROWSKI, *supra* note 48; RAYFORD W. LOGAN, *THE BETRAYAL OF THE NEGRO: FROM RUTHERFORD B. HAYES TO WOODROW WILSON* 117 (1965) (arguing that the *Civil Rights Cases* “virtually assured the subsequent development of Jim Crow laws”); Frank J. SCATURRO, *THE SUPREME COURT’S RETREAT FROM RECONSTRUCTION: A DISTORTION OF CONSTITUTIONAL JURISPRUDENCE* 19 (2000); John P. Frank & Robert F. Munro, *The Original Understanding of “Equal Protection of the Laws”*, 50 COLUM. L. REV. 131, 167 (1950); Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1336-40 (1952).

<sup>80</sup> W.E.B. DUBOIS, *BLACK RECONSTRUCTION IN AMERICA, 1860-1880*, at 690 (1962 ed.).

<sup>81</sup> *Id.* at 691.

<sup>82</sup> According to C. Vann Woodward, “[t]he abandonment of the Negro by his Northern champions after the Compromise of 1877 was as quixotic as their previous crusade in his behalf had been romantic and unrealistic.” In his view, the *Civil Rights Cases* were “only the juristic fulfillment of the Compromise of 1877.” C. VANN WOODWARD, *ORIGINS OF THE NEW SOUTH 1877-1913*, at 216 (1971); see also C. VANN WOODWARD, *REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* 245 (1951) (describing *Civil Rights Cases* as “a sort of validation of the Compromise of 1877”); C. VANN WOODWARD, *THE BURDEN OF SOUTHERN*

view the Court and its precedents as mere obstacles to the challenge of originalism. This is a view of the Reconstruction as a triumph of racial justice, a forceful and clear resetting of prior constitutional norms. But this is not the only view. A competing account sees the Court as operating within and reflecting a political and constitutional framework that dictated the Court's approach. Most recently defended by Pamela Brandwein<sup>83</sup> and Michael Les Benedict,<sup>84</sup> this is a view of the Reconstruction Court as "motivated by a commitment to the traditional roles of state and nation in the federal system."<sup>85</sup> Rather than effecting a revolution in federalism, this view ascribes to Republicans in Congress a far more conservative goal. Reconstruction on this account is led by the influential centrist wing of the Republican party, which was committed to the protection of rights for the freedmen while also preserving the traditional role of the states in the constitutional structure.

Brandwein makes the point forcefully. In her account, the states had the responsibility to enforce the law equally and to protect the privileges and immunities of state citizens. Only when the states neglected this responsibility – hence the label, "state neglect" – would federal intervention into private action be justified. On this reading, she absolves the state action cases, and the Waite Court more generally, of the historical criticism for abandoning the Black community. The Court was acting consistent with the expectations of the Framers of the Reconstruction Amendments and consistent with the expected political understanding of the Amendments.

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HISTORY 84 (1960). Eric Foner agrees, arguing that "[d]uring the 1870's, responding to the shifting currents of public opinion, [the Court] retreated from an expansive definition of federal power, and moved a long way toward emasculating the postwar amendments." FONER, *supra* note 47, at 529. See also HENRY LOUIS GATES, JR., *STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW* 29-35 (2019); WHITTINGTON, *supra* note 75, at 134-345.

<sup>83</sup> Pamela Brandwein, *A Judicial Abandonment of Blacks? Rethinking the "State Action" Cases of the Waite Court*, 41 LAW & SOC'Y REV. 343 (2007).

<sup>84</sup> Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39 (1978); Michael Les Benedict, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction*, in *PRESERVING THE CONSTITUTION: ESSAYS ON POLITICS AND THE CONSTITUTION IN THE RECONSTRUCTION ERA* 3-22 (2006); see EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869* (1990); ERIC L. MCKITRICK, *ANDREW JOHNSON AND RECONSTRUCTION* (1960).

<sup>85</sup> Michael Les Benedict, *New Perspectives on the Waite Court*, 47 TULSA L. REV. 109, 114-15 (2011); see PAUL KENS, *THE SUPREME COURT UNDER MORRISON R. WAITE, 1874-1888* (2010); XI WANG, *THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE & NORTHERN REPUBLICANS, 1860-1910*, at 119-33, 207-15 (1997).

We do not take sides between these competing understandings of the Reconstruction era. We agree with the traditional account about the significance of the Reconstruction project. Unquestionably, Reconstruction mattered. And it is instructive to think about it as another founding, an era that ushered “a new birth of freedom,”<sup>86</sup> and which offered endless possibilities. But we are also interested in considering the revisionist account and the notion that the Reconstruction Amendments did not fundamentally change the structure of the American political and constitutional system. The Reconstruction Amendments largely reflected a compromise within the Reconstruction Congress and the extent to which the new amendments upended the old order.

Both views in mind, we seek to expand the perspective beyond the Court to the nation. Constitutional lawyers and historians rightly focus on the shortcomings of the Court with respect to Reconstruction. Time and again, our focus is the Court itself, which generally chose the most narrow and cabined views of the legal materials in question. To be sure, this accords with the revisionist account, which views Reconstruction as essentially conservative in nature. All the same, this was a *Republican* Court, led by Lincoln and Grant nominees. How to explain why *this* Court essentially disemboweled the crown achievements of Reconstruction? How to explain the Court’s disingenuousness in *Cruikshank*, where it writes that the Colfax Massacre may have been in fact driven by race but the justices could not be sure unless so pled? How to make sense of the similarly narrow reading in *Blyew*?<sup>87</sup> How to defend the Court’s derision of the Black community’s support for a public accommodations law in the *Civil Rights Cases*?

We could make sense of the Court’s posture towards Reconstruction through legal materials. But we think there is something else at play. In our view, the Court was also reflecting its political environment. That is, Reconstruction was both a radical and conservative project. It was never as radical as its supporters hoped and never as conservative as its critics wished. At bottom, the nation could never totally commit to full racial equality.

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<sup>86</sup> Abraham Lincoln, Gettysburg Address, delivered at Gettysburg Pa. (Nov. 19th, 1863), in LIBR. OF CONG., <https://www.loc.gov/resource/rbpe.24404500/?st=text> [https://perma.cc/N27Y-8DDJ].

<sup>87</sup> 80 U.S. 581 (1872); see Robert D. Goldstein, Blyew: *Variations on A Jurisdictional Theme*, 41 STAN. L. REV. 469 (1989).

Thus, it was not only the Court that could never fully commit to prerequisites of full and complete racial equality; it was the nation.

“The period that we know as Radical Reconstruction,” according to John Hope Franklin, “had no significant or permanent effect of the status of the Negro in American life.” For some time, he explained, “some Negroes enjoyed the privileges of voting” but not much else. For example, “[t]hey gained political ascendancy in a very few communities only temporarily, and they never even began to achieve the status of a ruling class. They made no meaningful steps toward economic independence or even stability.” Worse yet, Franklin concluded, “in no time at all, because of the pressures of the local community and the neglect of the federal government, they were brought under the complete economic subservience of the old ruling class.”<sup>88</sup> The nation could not sustain anything resembling a commitment to full racial equality.

Consider how Black men became voters. The question of Black voting rights was as old as the republic. At the founding, most of the existing states did not include race as part of their voting qualifications. Only after property and religious qualifications declined did states begin to set racial qualifications for voting.<sup>89</sup> Their success in removing Black voters from the voting rolls was unqualified. By 1860 and the advent of the war, most Northern states did not allow Blacks to vote. Five northern states allowed Blacks to vote, and these were states with only 7% Black populations.<sup>90</sup> Advocates of Black suffrage continued to press their cause through the war years. In 1863, for example, in a speech delivered at the American Anti-Slavery Society, Frederick Douglass argued that “our work will not be done until the colored man is admitted a full member in good and regular standing in the American body politic.”<sup>91</sup> Douglass advocated for simple fairness. “All I ask, however, in regards to the Blacks, is that whatever rule you adopt, whether intelligence or wealth, as the condition of voting, you shall apply it equally to the black man.”

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<sup>88</sup> John Hope Franklin, *The Two Worlds of Race: A Historical View*, 94 *DAEDALUS* 899, 906-07 (1965).

<sup>89</sup> See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 11, 21 (2009); KIRK H. PORTER, *A HISTORY OF SUFFRAGE IN THE UNITED STATES* 86-87 (1918).

<sup>90</sup> See Charles H. Wesley, *Negro Suffrage in the Period of Constitution-Making, 1787-1865*, 32 *J. NEGRO HIST.* 143, 166-67 (1947).

<sup>91</sup> Frederick Douglass, Speech at the American Anti-Slavery Society at its Third Decade, held in the City of Philadelphia (Dec. 4, 1863).

A year later, at the National Convention of Colored Men, meeting in Syracuse, New York, Black leaders made two requests.<sup>92</sup> First was the abolition of slavery. Until then, “freedom, even to the free, [is] a mockery and a delusion.”<sup>93</sup> Second was political equality. Their arguments were grounded in both principle and expediency. On the first, they argued, “[y]our fathers laid down the principle, long ago, that universal suffrage is the best foundation of government. We believe as your fathers believed, and as they practised.”<sup>94</sup> On the second, they recognized that “[w]e may conquer Southern armies by the sword; but it is another thing to conquer Southern hate.”<sup>95</sup> The answer to this quandary was the ballot: “give the elective franchise to every colored man of the South who is of sane mind, and has arrived at the age of twenty-one years, and you have at once four millions of friends who will guard with their vigilance, and, if need be, defend with their arms, the ark of Federal Liberty from the treason and pollution of her enemies.”<sup>96</sup>

By the end of 1866, the tide turned and Black suffrage came on the congressional agenda. Part of the reason for this remarkable shift—what Eric Foner called “the astonishingly rapid evolution of congressional attitudes”<sup>97</sup>—was the intransigence of President Johnson and the confederate South towards the Reconstruction project. But credit was also due to the resolve of the freedmen, Radical Republicans and “eventually Southern Unionists not to accept a Reconstruction program that stopped short of this demand.”<sup>98</sup> The suffrage project moved in steps. The Washington, DC Suffrage Bill enfranchising African Americans in the District became law over President Johnson’s veto on December 13th, 1866.<sup>99</sup> The following day, debate began in the Senate over the admission of the Nebraska and Colorado territories.

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<sup>92</sup> See Proceedings of the National Convention of Colored Men, held in the city of Syracuse, N.Y., Oct. 4, 5, 6, and 7, 1864; with the Bill of wrongs and rights, and the Address to the American people (stating the location of the National Convention of Colored Men meeting).

<sup>93</sup> *Id.* at 53.

<sup>94</sup> *Id.* at 57.

<sup>95</sup> *Id.* at 61.

<sup>96</sup> *Id.*

<sup>97</sup> FONER, *supra* note 47, at 277.

<sup>98</sup> *Id.*

<sup>99</sup> CONG. GLOBE, 39th Cong., 2nd Sess. 344 (1867) (“[H]aving been certified that the Senate . . . agrees to its passage by a two-third vote, and the House of Representatives . . . having agreed to its passage by a two-third vote, I therefore, according to the Constitution of the United States, do declare that, notwithstanding the objections of the President of the United States, the act to regulate the elective franchise in the District of Columbia has become a law.”).



These various efforts culminated in the Reconstruction Act of 1867. Enacted over President Johnson's veto on March 2, 1867, the Act carved the confederate states into five military districts and set the parameters for their readmission. The reasons for this measure, as James Garfield told his House colleagues on February 8th, were obvious. "I believe, sir, the time has come when we must lay the heavy hand of military authority upon these rebel communities, and hold them in its grasp till their madness is past and until 'clothed and in their right minds' they come bowing to the authority of the Union."<sup>100</sup> Importantly, the goal was for these states to "tak[e] their places loyally in the family circle of the States."<sup>101</sup> The Act was clear on readmission. Each state must amend its state constitution and institute universal suffrage for all male residents over twenty-one years of age.<sup>102</sup> Readmission also required ratification of the 14th Amendment.

This was a crucial step for congressional Republicans. William Stewart, Republican from New Jersey, made this point plain. As he told his colleagues, "we must either give to all men in the South the ballot or we must resort to the military. I have seen that for the last two years; and because we did not give the ballot, because we did not meet the issue last year squarely, we are now called upon to give them military protection."<sup>103</sup> There was no middle ground, either military rule or the right to vote "is inevitable. I am willing to give them military rule until they will take the ballot."<sup>104</sup>

The congressional debate followed a familiar outline. On February 12<sup>th</sup>, Representative William Allison, Republican from Iowa, argued in favor of universal male suffrage. "I believe the hope of restoration of republican governments in those States rests in the masses of the people," he told his colleagues, "the uneducated, the poor, and now powerless masses."<sup>105</sup>

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<sup>100</sup> *Id.* at 1104.

<sup>101</sup> *Id.*

<sup>102</sup> The Reconstruction Act of 1867, § 5, 14 Stat. 428, 429 (1867) ("And be it further enacted, That when the people of any one of said rebel States shall have formed a constitution of government in conformity with the Constitution of the United States in all respects, framed by a convention of delegates elected by the male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident in said State for one year previous to the day of such election, except such as may be disfranchised for participation in the rebellion or for felony at common law, and when such constitution shall provide that the elective franchise shall be enjoyed by all persons as have the qualifications herein stated for electors of delegates.").

<sup>103</sup> CONG. GLOBE, 39th Cong., 2nd Sess. 344, 1361 (1867).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 1181.

Allison drew a clear contrast with “the aristocratic few, who, though vanquished by our arms, are still wedded to the idea that the strong should govern the weak at their own pleasure and will without the consent of the governed.”<sup>106</sup> To fall short of universal suffrage, he continued, “is to trifle with the great subject, and render us ridiculous in the eyes of all those who respect popular government based on the will and judgment of the people.”<sup>107</sup> This was not a controversial principle, he concluded, as leaders of the opposition, both in the House and across the country “recognize the justness of the principle.”<sup>108</sup> Allison yielded a few minutes of his time to Representative James Blaine, Republican from Maine, who proposed an amendment to the Reconstruction bill adding universal suffrage as a condition to readmission.<sup>109</sup>

There was much support for the principle of universal suffrage in the 39<sup>th</sup> Congress. To Burton Cook, Republican of Illinois, “the great principle of universal manhood suffrage [is] the only foundation upon which republican governments can safely and justly rest.”<sup>110</sup> Senator Charles Sumner, Republican from Massachusetts, called the proposal for universal suffrage “a prodigious triumph, . . . a grand and beneficent exercise of existing powers, for a long time invoked, but now at last grasped.”<sup>111</sup> Equating its passage to “the Magna Carta,” he argued that since its signing in 1215 in Runnymede, “there has been nothing of greater value to Human Rights.”<sup>112</sup> James Garfield, Republican from Ohio, called universal suffrage “the *ne plus ultra* of reconstruction, and I hope we shall have the courage to go before our people everywhere with ‘This or nothing’ for our motto.”<sup>113</sup>

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *See id.* at 1182. Senator Williams, Republican from Oregon, proposed his amendment to the bill adding a suffrage condition on February 14th. *See* H.R. Res. 1143, 39th Cong.(2nd Sess. 1867) (“[A]nd when any of the so called confederate states shall have given its assent to the same and conformed its own constitutions and laws . . . and when it shall have provided by its constitution that the elective franchise shall be enjoyed equally and impartially by all male citizens of the United States . . . without regard to race, color, or previous condition of servitude . . . said State . . . be declared entitled to representation in Congress.”).

<sup>110</sup> CONG. GLOBE, 39th Cong., 2nd Sess. 344, 1334 (1867).

<sup>111</sup> *Id.* at 1563.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 1184

Critics of universal manhood suffrage reacted in related ways. Some questioned the impetus for the idea.<sup>114</sup> Others complained that “the right of suffrage is a matter with which the Congress of the United States has no concern.”<sup>115</sup> Many argued that the freedmen were undeserving of the right to vote. Senator James McDougall, Democrat from California, told his colleagues, “Out of the four million negroes I suppose you might possibly get five hundred thousand voters, three or four hundred of whom, in the cotton and sugar-planting States, might have intelligence enough to exercise the elective franchise. The rest of them are but savages; docile savages, because they are held in subjection by the exercise of superior forces.”<sup>116</sup> Days later, he argued that the former confederate states would not “yield the authority of government to negroes, ignorant, altogether uninformed, and who know nothing about what belongs to government.”<sup>117</sup> Rather than continue to “degrad[e] our institutions in making suffrage too popular,” McDougall asked his colleagues to restrict it, “so that there will be some chance of intelligence in those people who have to do with the making of officers in counties, in States, and in the Federal Government.”<sup>118</sup>

As members of Congress debated the suffrage question, they considered a middle position. Senator Thomas Hendricks, Democrat from Indiana, offered an amendment to the bill “to provide for impartial, instead of universal suffrage.”<sup>119</sup> He bluntly told his colleagues that the bill as it then stood “would not allow the States to limit suffrage” and, instead, “requires that by their constitutions the elective franchise shall be enjoyed by all male

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<sup>114</sup> *Id.* at 1183 (“Now, I again ask the gentleman from Maine to point me to a single State that added suffrage distinctly as an additional requirement for the restoration of the southern States.”).

<sup>115</sup> *Id.* at 1381. In his veto message, President Johnson argued: “I would simply ask the attention of Congress to that manifest, well-known, and universally acknowledged rule of constitutional law which declares that the Federal Government has no jurisdiction, authority, or power to regulate such subjects for any State. To force the right of suffrage out of the hands of the white people and into the hands of the negroes is an arbitrary violation of this principle.”

<sup>116</sup> *Id.* at 1377. The Senator continued: “I speak of the great body of this population in the planting States, the field hands. They have no families, they have no education, they have no information. They have not the first idea of liberty except escape from labor, not knowing that labor is one of the first laws. In forcing such a policy on the South we are forcing them again into a local rebellion, for can you suppose that the intelligent population of the South can submit to be ruled and governed by that class of men? It is impossible; it is not in the nature of things.”

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 1569.

<sup>119</sup> *Id.* at 1374.

citizens.”<sup>120</sup> He offered that “[h]ardly anybody, I think, is desirous of voting for that.”<sup>121</sup> Senator James Doolittle, Republican from Wisconsin, warned the Senators, “if it be insisted as a condition-precedent that they shall adopt universal suffrage, I believe the people of the South will refuse to do anything under the provision, and would prefer to live under a military government.”<sup>122</sup> However, he argued previously,

if the reconstruction of the States of the South could take place upon the basis of what is called impartial suffrage, that is to say, upon such qualifications as should apply alike to all classes and colors, the people of the South would in good faith undertake the work with a view to change their constitutions and laws in such a way as to produce that result.<sup>123</sup>

This was an argument for voting as a negative rather than a positive right.

But supporters of universal manhood suffrage could immediately see the problems. The turn to impartial suffrage, argued Senator Henderson, Republican from Oregon, “if it be adopted, the State Legislatures may declare that no person unless he can read or write, or unless he has a higher degree of education than that, shall be entitled to vote.”<sup>124</sup> James Wilson, Republican from Iowa, explained that “[i]mpartial suffrage means nothing more nor less than the exclusion of nearly all the colored persons from the polls. That is plain and palpable. The only opportunity of these men is to establish universal suffrage on the basis of manhood.”<sup>125</sup> Senator Benjamin Brown, Republican from Missouri, suggested “another illustration of what may be done under impartial suffrage: they might declare that nobody except those who had served in the rebel army should vote, and that would be impartial suffrage.”<sup>126</sup> Senator Henry Lane, Republican from Indiana, opposed the change from universal to impartial suffrage, “and for this reason: the term ‘impartial suffrage’ is calculated to mislead and to deceive.”<sup>127</sup> He continued:

Real impartial suffrage would be that no test or no condition should be applied to the exercise of suffrage by the colored man that was not applied to its exercise by the white man. Although the word ‘impartial’ is used, it will

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 1375.

<sup>123</sup> *Id.* at 1375.

<sup>124</sup> *Id.* at 1391.

<sup>125</sup> *Id.* at 1375.

<sup>126</sup> *Id.* at 1378.

<sup>127</sup> *Id.*

be exceedingly oppressive and unjust in its operation practically. Take the test of education; the negro has not been permitted to be educated; you will not permit him to vote, because he cannot read, and you have made it a felony to teach him to read; therefore impartial suffrage would operate in favor of the rebel citizen and against the negro. Take a property qualification and the result would be the same.<sup>128</sup>

A promise of impartial suffrage would prove a mirage, they knew. Congress must impose stronger protections. This was the Reconstruction Act of 1867 and its promise of universal suffrage, enacted over President Johnson's veto on March 2nd.

This is one of the most overlooked moments in US political history. Passage of the Reconstruction Act elevated black suffrage as “the indispensable constitutional requirement for Reconstruction.”<sup>129</sup> In fact, the Act had a much more direct effect on Black suffrage in the South than the 14th and 15th Amendments.<sup>130</sup> This is the precise moment, not 1870, when Black political participation rose in record numbers and Black elected officials began to join legislative bodies. US politics would not match these numbers until passage of the Voting Rights Act of 1965. Importantly, the ballot allowed the Black community to protect its own interests.<sup>131</sup> But we must not forget that this was only possible, Michael Klarman reminds us, “so long as federal military might was deployed on its behalf.”<sup>132</sup>

Five days after passage of the Act, Senator Henderson introduced Joint Resolution 8, which referred the 15th Amendment to the Committee on the Judiciary. The proposed amendment read as follows: “[n]o State shall deny

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<sup>128</sup> *Id.*

<sup>129</sup> WANG, *supra* note 85, at 37.

<sup>130</sup> See Gabriel J. Chin, *The “Voting Rights Act of 1867”: The Constitutionality of Federal Regulation of Suffrage During Reconstruction*, 82 N.C. L. REV. 1581, 1582 (2004) (stating how the Reconstruction Acts large impact on Black suffrage was seen until the Second Reconstruction); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 789 (1991) (“Blacks were first enfranchised in meaningful numbers by the Reconstruction Act of 1867, and then by the fifteenth amendment.”).

<sup>131</sup> *C.f.* Klarman, *supra* note 130, at 790 (explaining how Blacks, during Reconstruction, were able to participate in civic life and therefore protect their interests). Klarman writes:

Blacks in significant numbers occupied important positions at all levels of government during Reconstruction, and continued to do so (though in reduced force) until the disfranchisement movement of the 1880s and 1890s. In terms of concrete legislative benefits, it is worth noting, for starters, that the three states with black voting majorities during Reconstruction—Mississippi, Louisiana, and South Carolina—all enacted either statutory or constitutional bans on racial segregation in public schools and places of public accommodation.

<sup>132</sup> *Id.*

or abridge the right of its citizens to vote and hold office, on account of race, color, or previous condition.”<sup>133</sup> This is essentially the same language that Congress sent to the states for ratification two years later. This meant that as applied to the Southern states, Congress codified universal manhood suffrage. The rest of the country, however, would only be subject to impartial suffrage. To the South, a positive right to vote. To the rest of the country, a negative one.

It is easy to make sense of the choice made in 1870. A leading reason was constitutional principle: the states were constitutionally authorized to set voting qualifications and some members of Congress did not wish to disturb that original understanding.<sup>134</sup> Racism also played a part, as did the knowledge that impartial suffrage would be easily circumvented. All three reasons converged within a generation and annulled the settlement of Reconstruction.<sup>135</sup> In retrospect, it is easy to see why Black suffrage was doomed to fail.

This brief history of suffrage offers two important lessons. One lesson is about the transformative possibilities of the Reconstruction Amendments. With Foner, we agree that this moment in history, these Amendments, might alter our constitutional structure away from a primary concern “with federal-state relations and the rights of property into a vehicle through which members of vulnerable minorities could stake a claim to substantive freedom and seek protection against misconduct by all levels of government.”<sup>136</sup> The Amendments spoke the language of equal protection, of due process, or privileges and immunities of national citizenship. More importantly, they spoke the language of freedom. The possibilities were endless.

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<sup>133</sup> S.J.R. Res. 8, 40th Cong. (1867) (enacted).

<sup>134</sup> See CONG. GLOBE, 40th Cong., 3d Sess. 705 (“But, sir, we are not now dealing merely with the qualification of voters. The question is not what shall be the qualifications of the voter, but who shall create, establish, and prescribe those qualifications; not who shall be the voter, but who shall make the voter. In considering that question we ought to remember that it is utterly impossible that any State should be an independent republic which does not entirely control its own laws with regard to the right of suffrage.”).

<sup>135</sup> See Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 YALE L.J. 2003, 2007 (1999) (“For if Reconstruction was, constitutionally speaking, a revolution, it was in many ways an abortive one.”); *id.* at 2008 (“The effective nullification of the Fourteenth and Fifteenth Amendments occurred with the full acquiescence of the North, as evidenced in electoral campaigns, political treatises, and innumerable court decisions.”) (citing RAYFORD W. LOGAN, *THE BETRAYAL OF THE NEGRO FROM RUTHERFORD B. HAYES TO WOODROW WILSON* 18-22, 105 (1965)).

<sup>136</sup> *Id.* at 2006.

But the issue, to turn to the second lesson, is that the new constitutional Amendments, even as fundamental alterations to the constitutional structure, could only do so much. A constitution is more than words on paper; it is a state of mind,<sup>137</sup> a set of normative commitments that the country must be willing to enforce and citizens must be willing to accept.

One could argue about what the words of the Reconstruction Amendments mean. But whatever their intended meaning, the country was not yet willing to give effect to that meaning. It is easy to see why these Amendments soon “became dead letters in much of the country.”<sup>138</sup> This is the reason why the 14th Amendment and Black suffrage were doomed to fail. Both were imposed on a country unwilling to receive them. More specifically, our constitutional norms did not shift as necessary for constitutional change to take hold. Words on a piece of paper would not be enough. In this vein, we read *Slaughterhouse*, *Cruikshank* and the *Civil Rights Cases* as moments when the Court refused to enforce new norms and extend new commitments into spaces not yet prepared for them. Importantly, this is a modest view of the Supreme Court, not as a supreme institution keeping all others in check, but of an institution that must act in concert with others. The Constitution establishes a *cooperative* project. The Court cannot act alone.

Reconstruction is a reminder of possibility but also of failure. It is not surprising that racial justice scholars would not look to that era for constitute meaning. Reconstruction reminds us that the country never fully embraced the freedom project and the protection of rights for the Black community. By 1874, once Northern public opinion had shifted and Democrats regained

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<sup>137</sup> See 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 5, 7, 9 (1991) (explaining that a dualist democracy “express[es] our Constitution’s efforts to require politicians to operate within a two-track system. If politicians hope to win normal democratic legitimacy for an initiative, they are directed down the normal lawmaking path and told to gain the assent of the House, Senate, and President in the usual ways. If they hop for higher lawmaking authority, they are directed down a specially onerous lawmaking path . . . .”); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 5 (1998) (describing the dualist democracy approach to the Constitution); Foner, *supra* note 135, at 2004 (“If the Constitution is not a text but a state of mind . . . constitutional change is taking place constantly.”).

<sup>138</sup> Foner, *supra* note 135, at 2007.

a majority in the House of Representatives, the fate of Reconstruction was sealed.<sup>139</sup> Redemption, Jim Crow and the Era of Racial Terror awaited.

#### IV. THE LOGIC OF ORIGINALISM AND THE PROBLEM OF RACE

It is eminently reasonable, as a matter of first principles, to argue that the intentions of those who commit to constitutional principles should control future adjudications. One could soften the point and argue that the public meaning of these principles should be controlling until the moment when they are amended. A harder question is temporal: how far into the future do these original intentions control? How are future generations bound to agreements they neither made nor understand? Much harder still is the question of representation. As a pure question of democratic theory, how is the Constitution binding on groups who were expressly excluded from its drafting and ratification? The logic of originalism raises a fundamental and perhaps irresolvable problem for racial equality scholars.

We make two points here. First, building on Professor Jamal Greene's prior work, we suggest a fundamental incompatibility between Reconstruction Originalism and racial equality. Second, building on recent work by Professor Richard Fallon on the selective application of originalism, we suggest selective application will make it hard for race scholars to take Reconstruction Originalism seriously. As students of history, they will suspect that Reconstruction Originalism will be applied when inconsistent with the aims of racial justice and not applied when it would further the aims of racial justice.

Recall Justice Thurgood Marshall's reflections on fixity, constitutional interpretation, and inclusion on the occasion of the bicentennial of the Constitution. "I do not believe that the meaning of the Constitution was forever 'fixed' at the Philadelphia Convention," he wrote. The Constitution is an evolving document, he continued:

For a sense of the evolving nature of the Constitution we need look no further than the first three words of the document's preamble: 'We the People.' When the Founding Fathers used this phrase in 1787, they did not have in

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<sup>139</sup> FONER, *supra* note 47, at 529 ("But during the 1870s, responding to the shifting currents of Northern public opinion, it retreated from an expansive definition of federal power, and moved a long way toward emasculating the postwar amendments – a crucial development in view of the fact that Congress had placed so much of the burden for enforcing black's civil and political rights on the federal judiciary.").



mind the majority of America's citizens. 'We the People' included, in the words of the framers, 'the whole Number of free Persons.' On a matter so basic as the right to vote, for example, Negro slaves were excluded, although they were counted for representational purposes—at three-fifths each. Women did not gain the right to vote for over a hundred and thirty years.<sup>140</sup>

This is standard fare in constitutional history. For support that the phrase "We the People" did not include African Americans, Justice Marshall quoted from the anticonstitutional *Dred Scott* decision.

Justice Marshall's reflection is memorable and oft-quoted because it captures the precise tension between originalism and racial equality. The problem that racial equality poses for originalism — public meaning, Progressive, Reconstruction Originalism — is that originalism, methodologically, finds constitutive and collective meaning and identity in the past, as Professor Jamal Greene has noted. It is anchored in an actuality. Originalism looks backwards, to what has happened before, to project forward a collective identity. It seeks to project a past reality onto the present.

By contrast, racial justice looks forwards. Racial justice finds its collective identity in a vision of the future. It aims for a reality that has not yet been realized. It seeks to project on the present the possibility of a better future. It sees the past as an anti-identity, as exclusionary. It is the future that is liberatory. For racial justice advocates, finding collective meaning in the past is tantamount to being complicit in their own subjugation. Given America's racial history, our narrowest understanding of racial equality will always be in the past and the greatest liberatory possibility will always be in the future.

Reconstruction and Progressive Originalism seek to counter that impulse by pointing backwards to an era of inclusion and racial liberation. However, Reconstruction Originalism is sensible as an enterprise only if it focuses selectively on the aspects of Reconstruction history that are most conducive to the racial equality project. If the whole of Reconstruction history is placed in the balance, Reconstruction Originalism becomes incompatible with the racial equality project. Put differently, why should we not understand the meaning of the Reconstruction Amendments through the refracted prism of Redemption and Jim Crow? What is the justification for this selectivity?

The question becomes even more complicated when dealing with diverse communities with different and arguably incompatible nomic preferences, as

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<sup>140</sup> Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987).

in the United States. Put differently and sharply, why should citizens of color privilege the views and intentions of past political elites, the vast majority of whom were either indifferent or hostile to the inclusion claims of citizens of color and only a small number of whom were willing to concede the pleas for inclusion by citizens of color, but only on the narrowest of terms? It is one thing for a relatively homogenous polity, with undifferentiated and relatively uncontested set of nomic practices and commitments, to look back at “our” traditions, “our” commitments, and “our” past practices, to understand “our” law. It is altogether a different enterprise for a polity with the depth and history of caste subjugation that gave the United States its constitutive identity to look backwards to determine “our” traditions, “our” commitments, and “our” past practices, to understand “our” law. There is no meaningful “our”; there is no meaningful collective identity. There are hegemonic understandings and counter-hegemonic understandings. To the extent that the enterprise produces outcomes that are consistent with racial equality, it will have to rely on counter-hegemonic understandings. But a counter-hegemonic approach would be, to put it charitably, in deep tension with the original public meaning approach. Originalism stacks the deck against marginalized groups.

To add an additional complication, what are we to do about claims for inclusion by groups who were not the objects of Reconstruction? Justice Marshall found himself and found his inclusion as an African American into the American project via the Reconstruction Amendments. But what if Justice Marshall were Native American and not African American? Would the Reconstruction Amendments have served the same purpose? Reconstruction was exclusively a Black-White project. It did not include Asians, some of whom were soon subject to exclusion laws. It did not include Native Americans or Latinés. It did not include the US territories. Recall Justice Miller’s oft-quoted statement in the *Slaughterhouse Cases* on the purpose of the Reconstruction Amendments. “In the light of the history of these amendments, and the pervading purpose of them,” wrote Justice Miller, “it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.”<sup>141</sup>

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<sup>141</sup> 83 U.S. 36, 81 (1872).

Originalism, even Reconstruction Originalism, narrows even as it purports to expand the pool of people with legitimate claims to membership. The backward-looking exercise inevitably excludes. These exclusions raise what we take to be the most important yet often ignored question in the originalism debate: how to make sense of the originalism project for groups of people for whom the past did not grant them an active voice in the constitutional project? Are the Reconstruction Amendments a blank slate upon which we write all our normative commitments? If so, are the equality claims of Native Americans, Asian-Americans, or Latinés, to name some categories, grafted in? And if that is the case, what is the purpose of original public meaning originalism?

Professor Fallon's instruction that originalism can only be deployed selectively adds another obstacle for Reconstruction Originalism. Reconstruction Originalism cannot be applied uniformly. Uniform application is not consistent with our jurisprudential system. Selective application is the only way that originalism is practiced in our constitutional system. Scholars of racial justice will rightly wonder why they should swear fealty to an interpretive method that will be abandoned precisely when it would lead to an outcome that would be more consistent with racial justice and followed when it would lead to an outcome that is inconsistent with the policy preferences of people of color. It is hard for race scholars to take Reconstruction Originalism seriously when it is not taken seriously by those who purport to practice it.

Alternatively, we could try to be faithful adherents of our religion. But the costs of faithful application are too high. Consider in this context once more *SFFA v. UNC*<sup>142</sup> and its companion *SFFA v. Harvard*,<sup>143</sup> the affirmative action cases currently before the Court. If we all believed in our religion, if originalism was really "our" law, we would first repudiate the last forty years of Supreme Court precedent—say goodbye to *Bakke*,<sup>144</sup> *City of Richmond*,<sup>145</sup> or *Northwest Austin*.<sup>146</sup> Next, we would embrace race consciousness, as it is the

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<sup>142</sup> *Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 1:14-cv-00954 (M.D.N.C. Oct. 18, 2021), *cert. granted sub nom. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 142 S. Ct. 895 (2022).

<sup>143</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 397 F. Supp. 3d 126 (D. Mass. 2019), *aff'd*, 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022).

<sup>144</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

<sup>145</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>146</sup> *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

approach that is consistent with the original public meaning of the Reconstruction Amendments. Finally, we would tell our Asian American sisters and brothers who believe that they were discriminated against by both private and public educational institutions that the original public meaning of the Fourteenth Amendment was to first assure the equality preferences of African Americans and, to the extent that private and public entities are doing so, the Equal Protection Clause is not violated and Congress has the power to authorize preferences in favor of African Americans.

Instead, the conservative justices hardly bothered with an answer. In a concurring opinion, Justice Thomas took it upon himself to make the case for Reconstruction Originalism. His opinion tracked closely a supplemental brief by the US government on reargument in *Brown v. Board of Education*,<sup>147</sup> as suggested by the plaintiffs' attorney during oral arguments.<sup>148</sup> Importantly, professional historians filed a brief in the case that argued the opposing view. They argued, for example, that "[t]he text and history of the Fourteenth Amendment focus on ensuring equality, not mandating race neutrality."<sup>149</sup> Specifically, they argued that the Reconstruction Congress implemented various race conscious means to further their goals of equality of opportunity. This brief, and the vast consensus among historians of the Reconstruction Era about the constitutionality of race conscious measures, did not persuade the conservative originalists on the Court. Reconstruction Originalism fell short.

This case leaves us with a question: Who among us is willing to be an original public meaning fundamentalist?

#### CONCLUSION

The truth about the Reconstruction era is that Reconstruction never achieved its promise. The story of Reconstruction is one of failure. And

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<sup>147</sup> 347 US 483 (1954).

<sup>148</sup> Transcript of Oral Argument, *Students for Fair Admissions Inc. v Presidents and Fellows of Harvard College*, 143 S. Ct. 2141 (2023) (No. 20-1199), at 5 (Oct. 31, 2022).

<sup>149</sup> Brief of Law Professors of History and Law as Amici Curiae in Support of Respondents, *Student for fair Admissions v. President and Fellows of Harvard College*, 143 S. Ct. 2141 (2023) (Nos. 20-1199 & 21-707), at 4.

Reconstruction failed precisely for the same reasons that we invoke it as a redemptive story. The nation, not just the Court but the whole country, was not willing to pay the cost necessary to attain Black equality. The Reconstruction era is defined not by Reconstruction but by Redemption and Jim Crow. The country did not believe in black equality enough to fight for it. Black equality was easily sacrificed for expedient political ends. This is an odd place to look for a redemptive, constitutive, and national identity.

As it was with the history of Reconstruction, so it is with Reconstruction Originalism. Reconstruction Originalism presents originalists with a similar challenge. This is the choice between a race-conscious originalism, which is more faithful to the idea that originalism is our law and more consonant with racial justice, or a colorblind understanding, which sacrifices the professed adherence to originalism but achieves the political project of colorblind constitutionalism. The lesson from history is that the political project is always more compelling than racial equality. Originalists jurists have not yet sacrificed the political project in favor of racial equality. We are skeptical that they would begin now. Moreover, race scholars are rarely interested in replicating the past. To the extent that Reconstruction Originalism derives constitutive meaning from the past, it will always be in tension with the racial equality project, which is invested in correcting the past and creating a better future.