

PANEL II: RECONSTRUCTION REVISITED

THE SUPREME COURT AND THE HISTORY OF RECONSTRUCTION—AND VICE-VERSA

*Eric Foner**

Beginning in the 1930s, Reconstruction historiography underwent a dramatic change. Early-twentieth-century historians of Reconstruction viewed aggressive federal intervention to protect the civil rights of freed slaves as a mistake, and they celebrated the Compromise of 1877 and the subsequent retreat from Reconstruction. These historians also praised the decisions of the Supreme Court that offered narrow interpretations of Congressional power under the Thirteenth, Fourteenth, and Fifteenth Amendments.

Modern historians reject the works of early historians of Reconstruction as incomplete, unbalanced, and often racist. Beginning with W.E.B. Du Bois in the 1930s, revisionist historians have reexamined the Reconstruction Era and developed a narrative that praises the Republicans who sought to protect the rights of freed slaves and the freed slaves themselves, who fought for civil and political rights during Reconstruction and its aftermath. Unfortunately, the legal profession and the courts have been slow to embrace the revolution in Reconstruction historiography.

This Essay argues that a historical narrative of Reconstruction repudiated by historians continues to exert an outsized influence on Supreme Court jurisprudence, and that judicial unwillingness to overturn flawed Reconstruction-era precedents hinders the cause of equality before the law even today. It suggests that the overdue judicial repudiation of precedents resting, in part, on a faulty interpretation of Reconstruction's history would have a salutary effect on the Supreme Court's Thirteenth and Fourteenth Amendment jurisprudence.

Reconstruction was a period of profound change in all aspects of American life. The fundamental question that agitated the country in the period after the Civil War was how our society would respond to the destruction of slavery. What system of labor would replace slave labor? What

* Dewitt Clinton Professor of History, Columbia University. The author thanks Professor Randall Kennedy of the Harvard Law School and Linda Tvrdy, a graduate student in the Columbia University Department of History, for many helpful discussions of the issues raised in this Essay. The author would also like to thank the editors and staff of the *Columbia Law Review* for their revisions.

system of race relations would replace the race relations of slavery? What would be the role of former slaves in American civic life? More broadly, who was entitled to American citizenship, and what rights were those citizens to enjoy? Would they be protected by the newly empowered national state? These questions became the focus of a tremendous political struggle in which African Americans themselves played a central role by demanding that the nation give substantive meaning to the freedom they had acquired.

As a result of this crisis, Congress and the states enacted a series of laws and constitutional amendments that for the first time in American history established as a matter of federal law the principle of equal rights for all citizens regardless of race.¹ In addition, black men received the right to vote in the South in 1867² and then throughout the nation via the Fifteenth Amendment in 1870.³ More broadly, Republicans tried to embed the concept of equality among Americans (a principle not mentioned in the original Constitution) into our laws and social reality.⁴

It is important to recognize how revolutionary a departure these measures represented. Slavery had been an intrinsic part of the Constitution and federal law.⁵ Before the Civil War, both northern and southern states practiced widespread discrimination against black Americans, slave and free. The establishment via Reconstruction of civil and political equality represented a radical change in the nature of American public life. Reconstruction represented a remarkable repudiation of the prewar tradition that defined the United States as a “white

1. See U.S. Const. amend. XIII (outlawing slavery and involuntary servitude); U.S. Const. amend. XIV, § 1 (granting citizenship to “[a]ll persons born or naturalized in the United States” regardless of race and prohibiting state infringement of “privileges or immunities,” “equal protection,” and “life, liberty, or property, without due process of law”); U.S. Const. amend. XV (extending right to vote regardless of “race, color, or previous condition of servitude”). See generally Akhil Reed Amar, *America’s Constitution: A Biography* 351–401 (2005) (discussing “trilogy” of Reconstruction Amendments that “made every person born under the flag an equal citizen, guaranteed a host of civil rights to all Americans, and extended equal political rights to black men”).

2. Military Reconstruction Act of Mar. 2, 1867, ch. 153, § 5, 14 Stat. 428, 429.

3. U.S. Const. amend. XV.

4. See generally Harold M. Hyman & William M. Wiecek, *Equal Justice Under Law: Constitutional Development, 1835–1875* (1982) (describing egalitarian origins of Reconstruction Amendments); Robert J. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice, and Civil Rights, 1866–1876* (2005) (describing implementation of Reconstruction Amendments).

5. See, e.g., U.S. Const. art. I, § 2, cl. 3 (apportioning membership in House of Representatives in accordance with population but counting slaves as three-fifths of a person), amended by U.S. Const. amend. XIV, § 2; U.S. Const. art. I, § 9, cl. 1 (preventing Congress from prohibiting importation of slaves before 1808); U.S. Const. art. IV, § 2, cl. 3 (requiring slaves that escaped to another state be returned to owner in state from which they escaped), amended by U.S. Const. amend. XIII; Fugitive Slave Act of 1850, ch. 60, §§ 6–7, 9 Stat. 462, 463–64 (authorizing owners to reclaim fugitive slaves and subjecting persons harboring fugitive slaves to fine and imprisonment) (repealed 1864).

man's Government";⁶ it created for the first time an interracial democracy in which rights attached to persons not in their capacity as members of racially defined groups but as members of the American people.⁷ It represented a triumph for the abolitionist vision of civic equality regardless of race that had spawned an alternative but unimplemented constitutionalism before the Civil War.⁸

This departure was intimately related to a second profound change—the establishment of the federal government as the main protector of citizens' rights. The laws and amendments of Reconstruction gave the national state the authority to intervene in local affairs to protect the basic rights of all American citizens.⁹ This principle also represented a repudiation of the previous traditions of American history. Before the Civil War, most Americans believed that a powerful national government posed a danger to their liberties and that local and state authorities could best protect the rights of citizens. The laws and amendments of Reconstruction opened the door for future Congresses and the federal courts to define and redefine the guarantee of equality, a process that has occupied the courts for the better part of the last half-century.¹⁰

Many of the changes instituted during Reconstruction, of course, proved to be transitory. The nation abandoned Reconstruction in 1877, abdicating the responsibility it had assumed for protecting the basic

6. Cong. Globe, 36th Cong., 1st Sess. 920 (1860) (statement of Sen. Stephen A. Douglas); accord Stephen A. Douglas, Speech at His Public Reception in Chicago (July 9, 1858), in *Political Debates Between Abraham Lincoln and Stephen A. Douglas* 10, 21–22 (1907) (“I am free to say to you that in my opinion this government of ours is founded on the white basis. It was made by the white man, for the benefit of the white man, to be administered by white men, in such manner as they should determine.”).

7. See U.S. Const. amend. XIV, § 1 (defining citizenship and describing rights of citizenship); see also Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 169–86 (1998) (discussing relationship between Citizenship and Privileges or Immunities Clauses in Fourteenth Amendment).

8. See generally Eric Foner, *The Story of American Freedom* 47–68, 84–94 (1998) (chronicling development of abolitionist movement in antebellum America); Paul Goodman, *Of One Blood: Abolitionism and the Origins of Racial Equality* (1998) (same).

9. U.S. Const. amend. XIV; see also, e.g., Enforcement Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (creating cause of action for deprivation of civil rights); Enforcement Act of 1870, ch. 114, § 1, 16 Stat. 140, 140 (granting right to vote to all citizens notwithstanding contrary state law); Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (establishing citizenship by birth and granting civil rights to all citizens notwithstanding contrary state law); Civil Rights Act of 1875, ch. 114, § 1, 18 Stat. 335, 336 (guaranteeing equal treatment in public accommodations), invalidated by *The Civil Rights Cases*, 109 U.S. 3 (1883).

10. Of course, a vast literature exists on these topics. For an introduction, see generally Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877*, at xxiv (1988) [hereinafter Foner, *Reconstruction*] (describing emergence of national state committed to “national citizenship whose equal rights belonged to all Americans regardless of race”).

rights of the former slaves.¹¹ There followed a long period in which the laws and constitutional amendments, although remaining on the books, had no bearing on the actual conditions of life for blacks in the South. There were many reasons for this outcome. One, relevant today, is that during the 1870s the efforts of the federal government to uplift and protect former slaves came to be seen by many white Americans as a form of favoritism, which in effect discriminated against the white population. Even during the 1860s, President Andrew Johnson played upon this sentiment in his veto messages. “[T]he distinction of race and color,” Johnson wrote in his veto of the 1866 Civil Rights Bill, “is . . . made to operate in favor of the colored and against the white race.”¹² In the 1866 congressional elections, the northern public overwhelmingly rejected Johnson’s outlook.¹³ But as time went on, the idea of reverse discrimination coalesced with a resurgence of localist and laissez-faire ideology and a sense that the federal government had become too powerful and intrusive. As a result, a growing number of Americans began to believe that power needed to devolve back to the states and that southern Reconstruction governments, in which African Americans played an important role, upended the “natural” order of things in which the “best men” dominated public life. Such ideas helped to legitimize a national retreat from the ideals of Reconstruction.¹⁴

In this retreat, the Supreme Court played a crucial role. Over time, as one scholar has recently written, the Supreme Court “systematically undermined Congress’s powers to enforce the Reconstruction Amendments.”¹⁵ The retreat was gradual and never total.¹⁶ And jurists are not solely to blame. These decisions reflected a resurgence of racism, North and South, and an emerging national, indeed international, con-

11. *Id.* at 582 (“Among other things, 1877 marked a decisive retreat from the idea, born during the Civil War, of a powerful national state protecting the fundamental rights of American citizens.”).

12. Andrew Johnson, Veto Message to the Senate (Mar. 27, 1866), *in* 6 *A Compilation of the Messages and Papers of the Presidents, 1789–1908*, at 405, 413 (James D. Richardson ed., 1909).

13. See Foner, *Reconstruction*, *supra* note 10, at 261–71 (describing Republican victory in 1866 midterm elections).

14. For an introduction to the literature on the abandonment of Reconstruction, see Heather Cox Richardson, *The Death of Reconstruction: Race, Labor, and Politics in the Post-Civil War North, 1865–1901*, at x–xvi (2001) (discussing theories that explain “retreat from Reconstruction”).

15. Jack M. Balkin, *The Reconstruction Power*, 85 *N.Y.U. L. Rev.* 1801, 1820 (2010).

16. See Pamela Brandwein, *Rethinking the Judicial Settlement of Reconstruction 184–205* (2011) [hereinafter Brandwein, *Rethinking*] (emphasizing gradual nature of Court’s retreat and dating “definitive judicial abandonment” later than many other scholars). For early twentieth-century Supreme Court decisions upholding blacks’ rights, see Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 40–42, 61–62 (2004) (describing cases invalidating laws banning blacks from jury service, exempting illiterate whites from literacy tests, and segregating neighborhood blocks by race).

sensus (among whites at any rate) that Reconstruction had been a serious mistake. A recent book by two Australian scholars points out that the late nineteenth and early twentieth centuries were a time of a global sense of fraternity among self-styled “Anglo-Saxon” nations, including Australia, New Zealand, Canada, the United States, and South Africa.¹⁷ Political leaders in these countries studied and copied each other’s racial policies.¹⁸ The “bible” of those who implemented such measures was James Bryce’s *The American Commonwealth*, especially his account of Reconstruction as a time of corruption and misgovernment caused by the enfranchisement of the former slaves.¹⁹ Bryce’s account “proved” the unfitness for citizenship of blacks, “coolies,” aborigines, and other such groups.²⁰ Around the world, the “key history lesson” of Reconstruction was taken to be the impossibility of multiracial democracy.

In this country, the press in all regions applauded successive Supreme Court decisions limiting the scope of the Reconstruction Amendments. Indeed, one might argue that because they were in tune with shifts in public sentiment, these rulings helped to rehabilitate the Court’s public reputation, at low ebb, at least in the North, ever since the *Dred Scott* decision.²¹ Historians and political scientists, especially those at Columbia University, led by John W. Burgess and William A. Dunning, played a powerful and disreputable part in fastening onto the national consciousness an image of Reconstruction as a disastrous error, an era of misgovernment and corruption, the lowest point in the saga of American democracy.²² The era’s laws and amendments, according to this view, arose from the vindictiveness of a small band of Radical Republicans who whipped up hostility to the defeated South, not from any widespread

17. Marilyn Lake & Henry Reynolds, *Drawing the Global Colour Line: White Men’s Countries and the International Challenge of Racial Equality* 315 (2008).

18. *Id.* at 138–40 (describing view that “the experiment in multi-racial democracy ushered in by Radical Reconstruction had been a disastrous mistake.”).

19. See 1 James Bryce, *The American Commonwealth* 462 (London, MacMillan & Co. 1888) (describing enfranchisement of former slaves as one “mischief” resulting from “Federal structure of the government”).

20. See *id.* (describing “the gift of suffrage to a Negro population unfit for such a privilege”).

21. *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393 (1857) (holding individuals of African descent did not possess citizenship rights). For arguments that the Supreme Court generally reflects majoritarian opinion and did so in its retreat from Reconstruction, see Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* 146–166 (2009) (describing political, social, and economic backdrop surrounding retreat from Reconstruction); Klarman, *supra* note 16, at 9–10, 36–39 (describing how upholding “separate but equal” in *Plessy v. Ferguson* was result of “the regressive racial climate of the era” and how *Giles v. Harris* “suggest[s] that even plain constitutional violations during peacetime may go unredressed in the face of hostile public opinion”).

22. See generally John W. Burgess, *Reconstruction and the Constitution 1866–1876* (1902) (criticizing Reconstruction policy of Radical Republicans); William Archibald Dunning, *Reconstruction, Political and Economic 1865–1877* (1907) (same).

commitment to racial equality. This narrative portrayed a Congress running roughshod over constitutional precedent while correctly, although unsuccessfully, opposed by President Johnson. The fundamental reason for Reconstruction's abuses, these scholars argued, was the decision to grant the right to vote to black men, who were congenitally incapable of exercising it intelligently.²³ This outlook shaped the intellectual environment within which the federal courts long operated. The Supreme Court did not invent this account of history. Nonetheless, what the Court says matters. Its decisions may reflect public sentiment, but they also help to shape it.

This view of Reconstruction, which dominated historical writing into the mid-twentieth century and popular memory even longer, carried clear political lessons. Indeed, its longevity may be explained in large measure not by the superiority of its scholarship, which in fact was often very questionable (a point irrefutably demonstrated as early as 1935 by W.E.B. Du Bois in the devastating final chapter of *Black Reconstruction in America*, "The Propaganda of History"²⁴), but by the fact that it was congruent with the racial system of the United States from the late nineteenth century until the civil rights era. The alleged horrors of Reconstruction "demonstrated" that it had been a mistake to give black people the right to vote; therefore, the white south was justified in implementing black disenfranchisement.²⁵ Any effort to restore African Americans' political rights would inevitably produce another orgy of misgovernment. Reconstruction was imposed upon the South by Northern outsiders (the Dunning School historians by and large ignored the role of blacks in bringing about political change). The outcome demonstrated that even well-intentioned northerners do not understand southern race relations. Therefore, the white south should resist outside calls for change in its racial system. Moreover, celebrating Reconstruction-era terrorists such as members of the Ku Klux Klan as defenders of democratic self-government helped to justify lynching and other forms of racist violence, while serving as a stark reminder of blacks' continuing vulnerability. Overall, as one historian has recently put it, thanks to the white supremacist narrative of Reconstruction, "the telos of history became the Jim Crow world of the present and the future."²⁶

This Essay examines a set of related questions about the courts and the history of Reconstruction—the actual history and the understanding

23. See Foner, *Reconstruction*, supra note 10, at xix–xx (summarizing scholars' arguments).

24. W.E.B. Du Bois, *Black Reconstruction in America, 1860–1880*, at 711–29 (Free Press 1998) (1935).

25. See Burgess, supra note 22, at 133 ("A black skin means membership in a race of men which has never of itself succeeded in subjecting passion to reason, has never, therefore, created any civilization of any kind.")

26. Bruce E. Baker, *What Reconstruction Meant: Historical Memory in the American South* 46 (2007).

of it embedded in scholarship and popular memory. In a juridical system based on respect for precedent except in extraordinary circumstances, how should we view earlier decisions grounded in faulty history and a racist view of black Americans and of American society at large? Do judicial decisionmaking practices allow courts to correct earlier errors of historical fact and interpretation? Can the existing jurisprudence derived from the laws and amendments of Reconstruction be separated from the assumptions and political implications that gave it birth? In seeking the purposes of Reconstruction legislation and amendments, have the courts kept abreast of recent scholarship, which has thoroughly repudiated the traditional interpretation of the era, upon which many earlier decisions rested? If, indeed, established precedents offer a cramped and ahistorical view of Reconstruction civil rights legislation and the Thirteenth, Fourteenth, and Fifteenth Amendments, should these precedents be challenged and overturned?

This Essay does not address the related debate as to whether the Constitution *should* be interpreted according to “original intent.”²⁷ To historians, this seems a pointless argument. Few, if any, historians believe that a single intent characterized the laws and amendments of Reconstruction (or, indeed, any other important historical documents). These measures represented a radical break from prevailing prewar definitions of American citizenship, the rights pertaining to it, and the sources of protection for citizens’ basic rights. Yet all the major accomplishments of the Reconstruction era, from the Civil Rights Act of 1866 to the Fourteenth and Fifteenth Amendments and the Civil Rights Act of 1875, were compromises, the work of numerous individuals and factions within the Republican Party. They reflected ambivalent attitudes, in Congress and society at large, about the scope of racial equality. They attempted a partial, not total, modification of the existing federal system. They failed to spell out with clarity such crucial issues as the boundary between private and state action. They introduced into our constitutional law concepts like equal protection and birthright citizenship²⁸ that cried out for further interpretation and elaboration.

Unfortunately, for most of its history, when faced with the task of in-

27. For works supporting originalism, see generally Edwin Meese III, *The Attorney General’s View of the Supreme Court: Toward a Jurisprudence of Original Intention*, 45 *Pub. Admin. Rev.* 701 (1985); Eric A. Posner, *Why Originalism Is So Popular*, *The New Republic* (Jan. 14, 2011, 12:00 AM), <http://www.tnr.com/article/politics/81480/republicans-constitution-originalism-popular#> (on file with the *Columbia Law Review*). Recent scholarship has shifted away from Meese’s notion of “Original Intention” to the related notion of “original meaning.” See generally Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 *Nw. U. L. Rev.* 703, 703 (2009) (describing goal of originalists “to discover the ‘objective meaning’ of the enacted text—the meaning it would have had for reasonably competent users of the language at the time of adoption”). For a summary of arguments against originalism, see generally Mitchell N. Berman, *Originalism Is Bunk*, 84 *N.Y.U. L. Rev.* 1 (2009).

28. U.S. Const. amend. XIV, § 1.

terpreting Reconstruction measures, the Supreme Court has generally chosen a narrow reading,²⁹ partly because of the enduring power of the Dunning School view of the era. Even today, long after the Warren Court repudiated some (although not all) of the earlier precedents,³⁰ the old interpretation of Reconstruction remains embedded in the law long after the intellectual foundations of that historical outlook have been demolished. The Dunning School, abandoned by historians, lives on in the jurisprudence of the Reconstruction statutes and Amendments. Here is the problem in a nutshell: The task of rewriting Reconstruction's history and dispelling the myths that surrounded it has occupied scholars for the better part of the past half-century. Yet, as Barry Friedman notes in a recent essay, "[c]onstitutional doctrine imperfectly understands Reconstruction."³¹ The dissonance between doctrine and history matters.

There is a related question here. One of the things that make the literature of the past two generations different from that of its predecessors is that it recognizes African Americans as central actors in the saga of Reconstruction. The former slaves put forward their own vision of what emancipation meant and what kind of society should emerge from the ashes of slavery. Yet there were no black people in Congress when the Civil Rights Act of 1866 and the Thirteenth, Fourteenth, and Fifteenth Amendments were drafted and discussed. How does one get an African American voice into discussions of the purposes of Reconstruction legislation?

Reconstruction was also an era when ideas evolved rapidly. People who opposed black suffrage embraced it a few years later. People who rejected federal action against private acts of discrimination changed their minds. How do we avoid freezing history at a single moment, thus failing to take into account the era's dynamic quality? All this cannot be done simply by looking at speeches in Congress, as too much legal scholarship and too many court decisions tend to do. Even dedicated originalists generally do not concern themselves with the broad public debates during Reconstruction over such questions as citizenship, federalism, and the meaning of equality. Moreover, in terms of the "memory" of Reconstruction (the society's evolving understanding of the era's successes, failures, and legacies), the white narrative that invoked the era's alleged horrors as a weapon in the construction of the Jim Crow South, and that found its way into Supreme Court decisions, needs to be bal-

29. See, e.g., *The Civil Rights Cases*, 109 U.S. 3, 24–25 (1883) (adopting restrictive view of congressional power under Fourteenth Amendment); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74 (1873) (adopting restrictive interpretation of Privileges or Immunities Clause).

30. See *Boynton v. Virginia*, 364 U.S. 454, 460 (1960) (banning racial discrimination in public transportation); *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954) (holding *Plessy's* "separate but equal" doctrine inapplicable to public education).

31. Barry Friedman, *Reconstructing Reconstruction: Some Problems for Originalists (and Everyone Else, Too)*, 11 U. Pa. J. Const. L. 1201, 1207 (2009).

anced by a “countermemory,” an alternative historical narrative that survived in black communities and that found in Reconstruction a model for the interracial cooperation they hoped to bring to the twentieth-century south.³²

This Essay argues that judges and legal scholars, with some exceptions, focus too narrowly on congressional debates when they explore the context in which legislation was enacted. Not all jurists are guilty of this practice. Consider a recent dissent by Judge B.D. Parker, Jr., of the U.S. Court of Appeals for the Second Circuit, in a 2006 lawsuit challenging New York’s felon disenfranchisement law: “When attempting historical analysis, judges are prone to oversimplify complex legislative and political problems. Limitations in the adversary process mean sacrificing nuance and detail for brevity I note that I have found the scholarship on the period to be both rich and extensive.”³³ Judge Parker kindly cites my own work, as well as books by David Donald, Alex Keyssar, William Gillette, and John Hope Franklin, among others.³⁴ Unfortunately, his attentiveness to recent scholarship is somewhat atypical.

In the *Slaughter-House* decision of 1873, Justice Samuel F. Miller observed that the “history of the times” was so close that everyone understood what the Fourteenth Amendment meant.³⁵ He proceeded, of course, to interpret that Amendment in so narrow a manner that his decision evoked cries of protest from many who had drafted and voted on it.³⁶ Twenty-seven years later, in *Maxwell v. Dow*, a case in which the majority rejected a man’s claim that his conviction for robbery by an eight-member jury violated the Privileges or Immunities Clause of the Fourteenth Amendment, the Supreme Court stated that the Amendment had not been intended to “fetter and degrade the State Governments by subjecting them to the control of Congress in the exercise of power heretofore universally conceded to them.”³⁷ This assessment the Court based on the “known condition of affairs”³⁸ that produced the Fourteenth Amendment. How was it known? Via *Slaughter-House*—a good example of how versions of history become embedded in jurisprudence.³⁹ *Slaughter-*

32. See Baker, *supra* note 26, at 69–88 (comparing white social memory of Reconstruction to countermemory of African Americans).

33. *Hayden v. Pataki*, 449 F.3d 305, 351 n.3 (2d Cir. 2006) (en banc) (Parker, J., dissenting).

34. *Id.*

35. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 67–68 (1873).

36. See Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 *Yale L. J.* 57, 99–101 (1993) (describing opposition to judicial construction of Fourteenth Amendment from members of ratifying Congress).

37. 176 U.S. 581, 590 (1900) (quoting *Slaughter-House*, 83 U.S. (16 Wall.) at 78).

38. *Id.* at 602.

39. See, e.g., *id.* at 587–93 (praising *Slaughter-House* for its “thoroughness” and “the great ability displayed by the author”); Pamela Brandwein, *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth* (1999), 63–64, 94 [hereinaf-

House, which quite controversially rejected the idea that the Fourteenth Amendment had been intended to change significantly the federal system or to elevate national citizenship above that of the states, remains good law even today.⁴⁰

Subsequently, courts began to cite works of history, not simply previous cases. A somewhat unscientific survey of federal courts' references to books on Reconstruction reveals how long the courts continued to cite the Dunning School. It is not surprising that the "traditional" historiography of Reconstruction affected Supreme Court deliberations well into the twentieth century. In a 1945 case arising from the death of a black man at the hands of a Georgia sheriff and two other law enforcement officers, Justices Owen Roberts, Felix Frankfurter and Robert H. Jackson, in dissent, insisted that this "local crime" could not be prosecuted under the Civil Rights Act of 1866.⁴¹ "It is familiar history," they wrote, "that much of this legislation was born of that vengeful spirit which to no small degree envenomed the Reconstruction era," a spirit that led Congress to enact "clearly unconstitutional" laws.⁴² So embedded in the legal consciousness had this "familiar history"—based on the traditional Dunning School version of Reconstruction—become that these Justices felt no need to cite any work of history to justify their statement. Six years later, this time writing for a plurality, Justice Frankfurter observed that conditions during Reconstruction "were not conducive to the enactment of carefully considered and coherent legislation."⁴³ This is not an outlook that encouraged an expansive view of the purposes of the Reconstruction Amendments when it came to protecting the rights of black Americans.

When it did cite works of history, the Court relied on the Dunning School, and especially Claude Bowers's *The Tragic Era*.⁴⁴ Bowers's book offers an example of what the historian Bruce E. Baker calls "the persistent white supremacist narrative of Reconstruction masquerading as proper history."⁴⁵ But the courts long found it persuasive. It took the Supreme Court many years to realize that historians were rethinking the history of Reconstruction.⁴⁶ If W.E.B. Du Bois was too much for the Court to take, the Justices might have noticed Howard K. Beale's seminal arti-

ter Brandwein, *Reconstructing*] (discussing narrow view of *Slaughter-House* interpretation of history).

40. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3031 (2010) ("We therefore decline to disturb the *Slaughter-House* holding.").

41. *Screws v. United States*, 325 U.S. 91, 138, 149 (1945) (Roberts, Frankfurter & Jackson, JJ., dissenting).

42. *Id.* at 140.

43. *United States v. Williams*, 341 U.S. 70, 74 (1951).

44. Claude G. Bowers, *The Tragic Era: The Revolution After Lincoln* (1929); see also *infra* notes 50–60 and accompanying text (gathering judicial citations to Bowers's work).

45. Baker, *supra* note 26, at 148.

46. See *infra* note 61 and accompanying text (discussing change in Court's usage of historical sources).

cle, *On Rewriting Reconstruction History*,⁴⁷ published in 1940, or John Hope Franklin's devastating 1948 critique of E. Merton Coulter's deeply racist *The South During Reconstruction*.⁴⁸ But in 1951, even as the civil rights era was dawning, the Supreme Court, in dismissing a damages suit resulting from a conspiracy by American Legionnaires to break up a left-wing meeting, commented that the Ku Klux Act of 1871, under which the claimants had sued, "was passed by a partisan vote in a highly inflamed atmosphere. It was preceded by spirited debate which pointed out its grave character and susceptibility to abuse, and its defects were soon realized when its execution brought about a severe reaction."⁴⁹ The only historical source cited for this account was *The Tragic Era*.⁵⁰

Seven years later, in a voting rights case, the U.S. Court of Appeals for the Fifth Circuit⁵¹ invoked *The Tragic Era* to demonstrate that "well-intentioned men in too much of a hurry,"⁵² who treated the Constitution "as a doormat,"⁵³ were responsible for the evils of Reconstruction. Although Reconstruction revisionism was already underway among historians, the court added that "the whole world" had "accepted" Bowers's account of "this sad epoch in our history."⁵⁴ It drew from Bowers's account a clear lesson—the states, not the federal government, must retain control over civil rights.⁵⁵ In 1960, a district court judge in Texas, in an opinion upholding a plan for "voluntary" as opposed to mandatory school integration, urged people to "[r]ead 'The Tragic Era' . . . and you will be astonished by what took place" during Reconstruction.⁵⁶ This observation formed part of a long disquisition on southern history, in which the judge ruminated on such subjects as the primitive nature of Africans, how slavery had kindly provided blacks with education and Christianity, the loyalty of slaves to their masters during the Civil War, the depredations of Reconstruction "carpetbagger[s]," and the merits of Booker T. Washington's approach to race relations.⁵⁷ The lesson of all this history, of course, was that "home rule" (the very term the South's

47. Howard K. Beale, *On Rewriting Reconstruction History*, 45 *Am. Hist. Rev.* 807 (1940).

48. John Hope Franklin, *Whither Reconstruction Historiography?*, 17 *J. Negro Educ.* 446 (1948) (discussing E. Merton Coulter, *The South During Reconstruction, 1865–1877* (1947)).

49. *Collins v. Hardyman*, 341 U.S. 651, 657 (1951).

50. *Id.* at 657 n.8 (citing Bowers, *supra* note 44, at 340–48).

51. The Fifth Circuit at the time included much of the Deep South: Florida, Georgia, Alabama, Mississippi, Louisiana, and Texas. See *Judicial Circuits Act of 1866*, ch. 210, § 2, 14 *Stat.* 209, 209 (establishing these five states as Fifth Circuit).

52. *Sharp v. Lucky*, 252 F.2d 910, 924 (5th Cir. 1958) (quoting Bowers, *supra* note 44, at v).

53. *Id.* (quoting Bowers, *supra* note 44, at v).

54. *Id.* at 924 & n.32.

55. *Id.* at 924.

56. *Borders v. Rippey*, 184 F. Supp. 402, 409 (N.D. Tex. 1960).

57. *Id.* at 405–07.

Redeemers had used to describe the restoration of white supremacy after Reconstruction) was far preferable to outside interference.⁵⁸ The judge added the seemingly irrelevant observation that the Haitian revolution had destroyed “[a] magnificent white civilization in the West Indies.”⁵⁹ As late as 1965, in *Negrich v. Hohn*, a federal district court in Pennsylvania cited *The Tragic Era* as an authority on the purposes of the Ku Klux Klan Act of 1871.⁶⁰

The Warren Court ended the practice of citing Bowers and other Dunning School authors. Decisions of the 1960s referred to a few key revisionist books—notably Kenneth Stampp’s *The Era of Reconstruction*, W.R. Brock’s *An American Crisis*, Eric McKittrick’s *Andrew Johnson and Reconstruction*, and C. Vann Woodward’s *The Strange Career of Jim Crow*.⁶¹ With them came a revised view of Reconstruction. For example, in *United States v. Price*, the case arising from the murder of three civil rights workers in Mississippi in 1964, the Supreme Court cited Stampp to demonstrate the point, long ignored by the Court, that the main purpose of the Fourteenth Amendment had been to protect the rights of the freedmen.⁶² Perhaps the most extensive invocation of historical scholarship in the 1960s came in *Jones v. Alfred H. Meyer Co.*, in which a 7-2 majority allowed suits for damages under the Civil Rights Act of 1866 for racial discrimination in the sale of homes.⁶³ Members of the Court cited an array of revisionist works including Stampp, Brock, and others—even, in an extremely unusual move, Du Bois’s *Black Reconstruction*—to offer an expansive reinterpretation of the purposes of Reconstruction legislation.⁶⁴ Like John Marshall Harlan decades earlier,⁶⁵ the majority in *Jones* de-

58. *Id.* at 410–11.

59. *Id.* at 410.

60. *Negrich v. Hohn*, 246 F. Supp. 173, 180 (W.D. Pa. 1965) (citing Supreme Court’s discussion of *The Tragic Era* in *Collins v. Hardyman*, 341 U.S. 651, 657 (1951)).

61. W.R. Brock, *An American Crisis: Congress and Reconstruction 1865–1867* (1963); Eric L. McKittrick, *Andrew Johnson and Reconstruction* (1960); Kenneth M. Stampp, *The Era of Reconstruction 1865–1877* (1965); C. Vann Woodward, *The Strange Career of Jim Crow* (1957). These books are cited in a number of Supreme Court cases. See, e.g., *Oregon v. Mitchell*, 400 U.S. 112, 255 (1970) (Brennan, J., dissenting) (citing McKittrick, *supra*, at 93–119); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 427 n.36 (1968) (citing Brock, *supra*, at 124; Stampp, *supra*, at 79–81); *Bell v. Maryland*, 378 U.S. 226, 292 n.7, 308 n.26 (1964) (Goldberg, J., concurring) (citing McKittrick, *supra*, at 326–63; Woodward, *supra*, at 15–26).

62. *United States v. Price*, 383 U.S. 787, 801 & n.9 (1966) (citing Stampp, *supra* note 61, at 136–37).

63. 392 U.S. at 413.

64. E.g., *id.* at 426 n.34 (citing, e.g., Stampp, *supra* note 61); *id.* at 427 n.36 (citing, e.g., Brock, *supra* note 61; Stampp, *supra* note 61); *id.* at 444 (Douglas, J., concurring) (citing Du Bois, *supra* note 24).

65. See generally *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting) (reading Reconstruction Amendments to exclude Louisiana’s “separate but equal” policy); *The Civil Rights Cases*, 109 U.S. 3, 33 (1883) (Harlan, J., dissenting) (criticizing majority’s

scribed the Civil Rights Act and Thirteenth Amendment as efforts to give “real content to the freedom” brought about by the Civil War.⁶⁶ The dissenters were similarly familiar with new scholarship; they drew upon Leon Litwack’s *North of Slavery*, an account of the deep racism in the pre-Civil War north, in an attempt to demonstrate that Congress could never have intended to promote racial equality in the sweeping manner claimed by the majority.⁶⁷

Generally speaking, however, the Warren Court cited past Supreme Court decisions, not historians, to establish the parameters for interpretation of the Reconstruction Amendments. And regarding these earlier decisions, it proved remarkably accommodating. A few rulings from the era of retreat, such as *Plessy v. Ferguson*, were explicitly overturned (or, at least, in *Brown v. Board of Education*, held not to be applicable to education);⁶⁸ others, like *Bradwell v. Illinois*,⁶⁹ were superseded more quietly.⁷⁰ Yet many others continued to enjoy respect, notably the ruling in the *Civil Rights Cases*, which established a sharp distinction between state action and private discrimination.⁷¹

As Pamela Brandwein points out, while the Warren Court repudiated or simply moved beyond much previous jurisprudence, it did not directly confront the vision of Reconstruction that underpinned earlier decisions, thus producing a certain intellectual incoherence.⁷² Rather than pointing out that for decades the Justices had been wrong about history, the Court, as well as Congress, worked around earlier rulings—basing the constitutionality of the Civil Rights Act of 1964, for example, on the Commerce Clause rather than the Thirteenth or Fourteenth Amendments.⁷³ In upholding that law, the Supreme Court majority explicitly declined to consider the question of whether it was authorized

reading of Reconstruction Amendments as proceeding “upon grounds too narrow and artificial”).

66. 392 U.S. at 433.

67. *Id.* at 474 & n.56 (Harlan, J., dissenting). Justice Harlan’s *Jones* dissent, which was joined by Justice White, cites Litwack several times to demonstrate the pervasiveness of racism in the Civil War-era North and to argue that the Reconstruction Congress did not intend to interfere with property rights or acts of private discrimination. *Id.* at 474 nn.56 & 58–61 (citing Leon Litwack, *North of Slavery: The Negro in the Free States, 1790–1860* (1961)).

68. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954) (holding *Plessy*’s “separate but equal” doctrine inapplicable to public education).

69. 83 U.S. (16 Wall.) 130 (1873).

70. See, e.g., *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 729 (1971) (describing transition away from *Bradwell*’s limits on employment for women).

71. 109 U.S. 3, 11, 25 (1883) (striking down Civil Rights Act of 1875 as beyond scope of Congress’s enforcement power under Fourteenth Amendment).

72. Brandwein, *Reconstructing*, *supra* note 39, at 1–6, 174–76.

73. See Balkin, *supra* note 15, at 1803–05 (noting general consensus that upholding Act under equal protection would require overturning past precedents).

under the Fourteenth Amendment.⁷⁴ And other than in *Jones v. Alfred H. Mayer Co.*, the Court did nothing to reinvigorate the Thirteenth Amendment as a weapon against racial inequality.⁷⁵

Jurisprudence since the Warren Court, of course, has moved in a more conservative direction, at least at the highest judicial echelons. While one will no longer find references to Bowers's work, a narrow "color-blind" interpretation of the purposes of the Reconstruction Congress, one rooted more in modern-day politics than the actual history of the era, has generally prevailed, fueling a long retreat from race-conscious efforts to promote equality. A little over twenty years ago, I wrote an essay that criticized the reading of history in decisions of the 1980s.⁷⁶ The Court's majority had consistently voted to interpret civil rights laws in the narrowest possible manner, without actually overturning them. The Court's emasculation of the Civil Rights Act of 1866 in *Patterson v. McLean Credit Union*⁷⁷ exemplified this pattern of interpreting the aims of Reconstruction in a constricted manner, even though the Thirty-Ninth Congress clearly had sought to secure for the former slaves the essential rights of free labor and equality in competition for advancement in the economic marketplace.⁷⁸ In a Richmond case, the fact that less than one percent of city contracts had gone to black-owned companies in the five years before the adoption of a race-conscious set-aside program did not demonstrate past discrimination to the Court.⁷⁹ Justice Sandra Day O'Connor, who wrote the majority opinion, suggested that lack of access to credit and professional training, as well as unfamiliarity with bidding procedures, might have limited the number of black construction contractors.⁸⁰ She refused to consider that these so-called "nonracial factors"

74. See *Katzenbach v. McClung*, 379 U.S. 294, 297, 304 (1964) (upholding statute as permissible exercise of commerce power).

75. See *infra* notes 96–97 and accompanying text (discussing Court's approach to Thirteenth Amendment in *Jones*).

76. Eric Foner, *Blacks and the US Constitution 1789–1989*, *New Left Rev.*, Sept.–Oct. 1990, at 63, 72–74 (1990) [hereinafter Foner, *Blacks and the US Constitution*] (“[T]he history of slavery and racism, embedded in the U.S. Constitution by the founding fathers and sanctioned by the law for most of our history, cannot be erased by the sophistries of five Supreme Court Justices.”).

77. See 491 U.S. 164, 171 (1989) (“[R]acial harassment relating to the conditions of employment is not actionable under § 1981 because that provision does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations.”), superseded by Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981a), as recognized in *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008).

78. Foner, *Blacks and the US Constitution*, *supra* note 76, at 72.

79. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 479–80, 511 (1989) (holding city failed to identify need for remedial action in award of public construction contracts); see also Foner, *Blacks and the US Constitution*, *supra* note 76, at 72 (“The Court also overturned a Richmond law reserving thirty percent of city construction contracts for minority businesses . . .”).

80. *Croson*, 488 U.S. at 498–99, 509–10.

themselves stemmed from past racism.⁸¹

Lower courts have sometimes adopted an approach more in line with contemporary historical scholarship. A year after *Patterson*, the Court of Appeals for the Eighth Circuit upheld the use of the Civil Rights Act of 1866 to impose punitive damages for racial discrimination in a case involving an employee's dismissal from his job.⁸² The judges chided the Supreme Court for relying too narrowly on "isolated quotations from Reconstruction Era congressional debates" to determine the purposes of legislation while slighting "the ideological beliefs" of the Republican Party.⁸³ To supplement legislative history, the decision offered a modern account of Reconstruction history, recounting the transformation of the Civil War from a war for the Union into a struggle for emancipation, the actions of former slaves in demanding protection of their rights, and the growing conviction in the North that national action was needed to protect the freed people and ensure that a genuine free labor system replaced slavery.⁸⁴ The decision cited many recent works of Reconstruction history⁸⁵ to bolster its broad view of congressional purposes and its vigorous interpretation of Reconstruction legislation.⁸⁶

Unfortunately, over the past two decades, despite changes in the Supreme Court's membership, its basic approach to civil rights issues has not changed. The Justices have continued to employ the Fourteenth Amendment's Equal Protection Clause primarily to support white plaintiffs who claim to be suffering "reverse discrimination" from affirmative action programs.⁸⁷ The Court still appears to view what it calls "racial classifications," not inequality, as the root of the country's race problems.⁸⁸ Based on these assumptions, it has in the past two decades invalidated affirmative action programs, made it easier for school districts to free themselves from judicial desegregation orders, and allowed local authorities to draw local districts in a way that diluted the growing black

81. See *id.* at 498–99 ("While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota . . .").

82. *Hicks v. Brown Grp., Inc.* 902 F.2d 630, 652–54 (8th Cir. 1990), vacated, 499 U.S. 914 (1991).

83. *Id.* at 643 & n.33.

84. *Id.* at 642–46.

85. *Id.* at 644 (citing, e.g., Foner, *Reconstruction*, *supra* note 10, at 132).

86. *Id.* at 643 & n.33.

87. See Kenneth M. Casebeer, *Memory Lost: Brown v. Board and the Constitutional Economy of Liberty and Race*, 63 U. Miami L. Rev. 537, 544–46 (2009) (disagreeing with outcome of *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), which involved white plaintiffs claiming discrimination on basis of race).

88. See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 Stan. L. Rev. 1111, 1142 (1997) (describing Court's tendency to aggregate racial classifications intended to promote integration with those intended to maintain segregation).

vote.⁸⁹ Underlying the Court's continuing retreat remains a cramped and ahistorical understanding of the Fourteenth Amendment and the era of Reconstruction.

Most of these decisions do not cite many works of history; indeed, what is striking is how often they ignore the historical context in which Reconstruction legislation was enacted. When the Supreme Court and other courts do make an effort to look at history, they still consult primarily the legislative record, especially debates reported in the *Congressional Globe*.⁹⁰ Some works of history are cited, but they are generally those of law professors—most frequently, of late, Akhil Amar, an excellent scholar but not someone who offers (or claims to offer) a full historical account of the era. In fact, given the voluminous literature, it is remarkable how few works on Reconstruction appear in decision footnotes nowadays.

Today, despite the revolution in historiography, the jurisprudence from the retreat from Reconstruction survives, especially in the vitality of the state action requirement, which Michael Klarman has called one of the “most formidable barriers to securing racial justice.”⁹¹ Over the years, thanks to Supreme Court rulings, this requirement has become far more important than it actually was during Reconstruction. The Civil Rights Act of 1866 outlawed both governmental actions and any “custom” that produced inequality in the enjoyment of the basic rights of freedom.⁹² Yet the courts have interpreted “custom” very narrowly, generally requiring that state agents join in the wrongdoing before an injury arising from private actions can be prosecuted under the 1866 Act.⁹³ In 1948, in its landmark ruling that discriminatory covenants in housing contracts were unenforceable in court, the Supreme Court explicitly stated that since the *Civil Rights Cases*, “the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the

89. See *Gratz v. Bollinger*, 539 U.S. 244, 250–51 (2003) (striking down University of Michigan's undergraduate affirmative action program); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 340–41 (2000) (permitting Voting Rights Act preclearance of redistricting plan “enacted with a discriminatory but nonretrogressive purpose”); *Bd. of Educ. of Oklahoma City Pub. Sch. v. Dowell*, 498 U.S. 237, 249 (1991) (lifting desegregation order based in part on finding of previous compliance). See generally Casebeer, *supra* note 87, at 543 (discussing Supreme Court's education jurisprudence); Lucas A. Powe, Jr., *The Supreme Court and the American Elite, 1789–2008*, at 324–26 (2009) (summarizing modern Court's stance on race-based classification cases).

90. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 520–24 (1997) (citing congressional debates over Fourteenth Amendment); *Adamson v. California*, 332 U.S. 46, 92–121 (1947) (Black, J., dissenting) (gathering citations from *Globe*), overruled in part by *Malloy v. Hogan*, 378 U.S. 1 (1964).

91. Klarman, *supra* note 16, at 152.

92. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981).

93. Brandwein, *Rethinking*, *supra* note 16, at 162–70, 229–37 (discussing *Screws v. United States*, 325 U.S. 91 (1945)).

Fourteenth Amendment is only such action as may fairly be said to be that of the States,” not “merely private conduct, however discriminatory or wrongful.”⁹⁴ As noted above, judicial rulings upholding civil rights legislation in the 1960s that did in fact outlaw many private manifestations of racism sidestepped such precedents rather than confronting them.⁹⁵ The alternative approach suggested in 1968 in *Jones v. Alfred H. Mayer Co.*, in which the Supreme Court invoked the Thirteenth Amendment (which, of course, lacks state action language) against discrimination in the sale of private property,⁹⁶ remains, thus far, stillborn. Even in this ruling, the Court recoiled from overturning the decision in the *Civil Rights Cases*, declaring instead that it had been rendered “largely academic” by the Civil Rights Act of 1964.⁹⁷

In his great dissent in the *Civil Rights Cases*, Justice John Marshall Harlan correctly pointed out that the majority had “sacrificed” the “substance and spirit of the recent amendments.”⁹⁸ Harlan offered his own reading of Reconstruction’s history: The men who wrote the Fourteenth Amendment intended to empower Congress to “do for human liberty and the fundamental rights of American citizenship, what it did, with the sanction of this court, for the protection of slavery.”⁹⁹ Unfortunately, while many forms of private discrimination are now outlawed, the state action/private action dichotomy (sometimes called the difference between de facto and de jure discrimination) so anxiously embedded in past Supreme Court jurisprudence survives and indeed has become more and more powerful in recent years.¹⁰⁰ This is true despite the fact that few historians take this distinction seriously. Numerous works have demonstrated the symbiotic connections between these two forms of racism.¹⁰¹ Housing patterns, for example, viewed by the Supreme Court as the outcome of “private choices”¹⁰² and market forces, have always been powerfully shaped by the actions of local, state, and federal governments.¹⁰³

94. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

95. See supra text accompanying notes 68–71 (describing Warren Court’s approach to Reconstruction history).

96. 392 U.S. 409, 413 (1968).

97. *Id.* at 441 & n.78.

98. 109 U.S. 3, 33 (1883) (Harlan, J., dissenting).

99. *Id.* at 51.

100. See Mark A. Graber, Foreword: Plus or Minus One: The Thirteenth and Fourteenth Amendments, 71 Md. L. Rev. 12, 13 (2011) (noting “how powerful the state action requirement of the Fourteenth Amendment has become in recent years” and summarizing relevant scholarship).

101. See generally *id.* at 13–20 (summarizing debate on modern relevance of state action/private action dichotomy).

102. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 736 (2007) (quoting *Freeman v. Pitts*, 503 U.S. 467, 495 (1992)).

103. See *id.* at 736 (“The distinction between segregation by state action and racial imbalance caused by other factors has been central to our jurisprudence in this area for generations.”).

Federal tax, transportation, and mortgage policies frankly encouraged and strongly reinforced the racial and spatial divide between cities and suburbs.¹⁰⁴ A recent Columbia doctoral dissertation, to take but one example of current scholarship, studied the history of schooling in post-World War II Nashville.¹⁰⁵ Racial inequality in education, it showed, stemmed from a wide array of interlocking and reinforcing causes—school location decisions by public officials, highway construction patterns, the policies of real estate companies, private employment practices, urban renewal projects, disciplinary decisions by individual teachers, and on and on. Some were primarily public, some private—but to disentangle them is virtually impossible.¹⁰⁶ Judicial precedents and current decisions that take as a given a hard and fast distinction between private and state discrimination reinforce an understanding of the history of race and racism in the United States that is fundamentally misleading but deeply embedded in current jurisprudence.¹⁰⁷

Today, too many rulings from the retreat from Reconstruction remain undisturbed. In 2000, in *United States v. Morrison*, the Supreme Court invoked the *Civil Rights Cases* to conclude that Congress lacks power to provide a remedy in federal courts for gender-based violence that is not state-sponsored, adding, in words that echoed the *Slaughter-House* majority, that the Fourteenth Amendment was not intended to “obliterat[e]” federalism.¹⁰⁸ *Morrison* also cited *United States v. Harris*, from 1883, in which convictions for lynching under the Ku Klux Klan Act were overturned because Congress lacked the power to punish individual criminal acts.¹⁰⁹ The Court defended its reliance on these cases not simply because of the “length of time they have been on the books” (the principle of *stare decisis*), but because the Justices who decided those Reconstruction cases “had intimate knowledge and familiarity with the events surrounding the [Fourteenth] Amendment’s adoption”—as if the judges gutting Reconstruction had more insight into the purposes of the laws and Amendments of Reconstruction than those who actually en-

104. See Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States* 235–38, 241 (1987) (discussing federal government programs that encouraged racial homogeneity in communities); see also Thomas J. Sugrue, *The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit* 33–56 (1998) (arguing differing availability of jobs to black and white applicants led to housing segregation in Detroit).

105. Ansley T. Erickson, *Schooling the Metropolis: Educational Inequality Made and Remade Nashville, Tennessee, 1945–1985* (2010) (unpublished Ph.D. dissertation, Columbia University) (on file with the *Columbia Law Review*).

106. *Id.*

107. See Brandwein, *Rethinking*, *supra* note 16, at 22–24, 221 (arguing “[t]he state/private distinction has been and will always remain a judicial artifice” and “[a] more historically attuned reading of the state action cases would provide resources for . . . [analyzing] how distorted knowledge about the state action cases came to win institutionally”).

108. *United States v. Morrison*, 529 U.S. 598, 620 (2000).

109. *Id.* at 621 (citing *United States v. Harris*, 106 U.S. 629, 642–44 (1883)).

acted them.¹¹⁰

Ironically, while the Court majority has systematically whittled away at the meaning of Reconstruction legislation when it comes to race, it has recently adopted an expansive interpretation regarding the right of gun ownership.¹¹¹ Traditionally, Court “liberals” pressed for the incorporation of the Bill of Rights to the states via the Fourteenth Amendment, while “conservatives” opposed the idea. Today, conservatives have embraced this idea while liberal Justices argue for a more constrained view. To this end, conservatives have turned to modern Reconstruction scholarship.

McDonald v. City of Chicago, decided in 2010, offers a striking example.¹¹² *McDonald* began as a challenge to Chicago’s restrictive gun ordinance by a black man who wanted to protect himself against criminals in Chicago.¹¹³ In its 5-4 decision, the Court, building on its previous decision in *District of Columbia v. Heller* relating to gun control laws in Washington, D.C., incorporated the Second Amendment to invalidate a Chicago law banning possession of handguns.¹¹⁴ Both Justice Samuel Alito, in the majority opinion,¹¹⁵ and Justice Clarence Thomas, in his concurrence,¹¹⁶ offered detailed discussions of Reconstruction history, mainly to make the argument that at the time the right to bear arms was considered a fundamental right. These opinions contain citations to many works of history,¹¹⁷ one of which is a volume of documents co-edited by Philip S. Foner that contains the proceedings of Reconstruction-era black conventions protesting, among many other things, laws that barred blacks from owning guns.¹¹⁸

110. *Id.* at 622.

111. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821–22 (2008) (holding Second Amendment protects individual handgun ownership in Washington, D.C.); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010) (extending *Heller* holding to states).

112. 130 S. Ct. 3020.

113. *Id.* at 3026–27.

114. *Id.* at 3050 (citing *Heller*, 128 S. Ct. 2783).

115. *Id.* at 3038–44.

116. *Id.* at 3071–77 (Thomas, J., concurring).

117. See, e.g., *id.* at 3038, 3041 (majority opinion) (citing Foner, *Reconstruction*, *supra* note 10).

118. E.g., *id.* at 3038 n.18 (citing 2 *Proceedings of the Black State Conventions 1840–1865*, at 302 (Philip S. Foner & George E. Walker eds., 1980)). Philip S. Foner is the author’s late uncle, and there is an irony here. In 1953, the Department of State removed books by “subversives” from its various overseas libraries, including seventy-one copies of another book by Phillip Foner: Philip S. Foner, *The Jews in American History 1654–1865* (1946). See Int’l Info. Admin., Dep’t of State, Report on the Operations of the Overseas Book and Library Program 44 (1953) (on file with the *Columbia Law Review*). No doubt, Americans slept much more soundly knowing that readers abroad no longer had access to Philip S. Foner’s history of the Jews. Fast-forward half a century and another of his works is cited as an authority by a conservative Supreme Court majority. Talk about historical disappearance and rehabilitation, as used to happen in the old Soviet Union.

Does the recent majority's embrace of Reconstruction portend the repudiation of the jurisprudence of retreat? In his opinion in *McDonald*, Justice Alito mentioned *Slaughter-House* and offered no defense of that decision, noting that many legal scholars consider the case to have been wrongly decided. But rather than call for the decision to be overruled, he continued, "[w]e see no need to reconsider that interpretation here. . . . We therefore decline to disturb the *Slaughter-House* ruling."¹¹⁹ Thus, the cramped reading of the Fourteenth Amendment survives. In a further irony, Justice Thomas stated that *United States v. Cruikshank*,¹²⁰ another notorious decision that emasculated Reconstruction efforts to protect blacks against racially motivated violence, "is not a precedent entitled to any respect,"¹²¹ while Justice John Paul Stevens, in his dissent, cited *Cruikshank* as good law.¹²²

Where all this leaves the jurisprudence of Reconstruction and the judicial view of the era's history remains unclear. I am not so unrealistic about the intellectual impact of historical scholarship as to assume that Supreme Court Justices generally base their decisions on a reading of history. More likely, they approach history instrumentally, reaching decisions on other grounds and then turning to history for justification. Even the most celebrated instance of the Court explicitly seeking guidance from history—its request in 1953 for arguments about the original meaning of the Fourteenth Amendment regarding school segregation—seems to have been made less because of interest in the past than because a deeply divided court needed additional time to resolve its disagreements.¹²³ Of course, compared to the writings of historians, the musings on history by nine men and women generally untrained as scholars of the past should not carry any particular weight. Yet the Supreme Court's pronouncements on history matter. They help to legitimate some interpretations and to marginalize others.

Over the years, a misunderstanding of Reconstruction has helped to produce decisions that have made it more and more difficult to use the legislation and amendments of that era to promote the cause of racial equality. The state action doctrine has been a major barrier.¹²⁴ So too has the idea of color blindness, elevated recently into a shibboleth, so that the Fourteenth Amendment is interpreted to prohibit measures aimed

119. *McDonald*, 130 S. Ct. at 3030–31.

120. 92 U.S. 542, 553 (1876) (holding, in case arising from massacre of blacks, that Second Amendment did not apply to states).

121. *McDonald*, 130 S. Ct. at 3086 (Thomas, J., concurring).

122. *Id.* at 3088 & n.1 (Stevens, J., dissenting).

123. See Klarman, *supra* note 16, at 301 (describing Justices' true motives for requesting briefing on Fourteenth Amendment).

124. See generally Charles L. Black, Jr., Foreword: "State Action," Equal Protection, and California's Proposition 14, 81 Harv. L. Rev. 69, 95 (1967) (describing state action doctrine as "conceptual disaster area").

directly at uplifting blacks.¹²⁵ In this paradigm, the idea of “equal protection” is wrenched out of historical context. Indeed, in the influential *Bakke* decision of 1978, Justice Lewis F. Powell, writing for the Court majority, employed (perhaps inadvertently) language reminiscent of Andrew Johnson, insisting that the Equal Protection Clause of the Fourteenth Amendment was not intended to establish blacks as “special wards entitled to a degree of protection greater than that accorded others”—as if African Americans are simply one group among many who have suffered discrimination rather than victims of a very particular history of systemic inequality.¹²⁶ Interestingly, even ardent originalists go back to Harlan’s dissent in *Plessy* for the origins of color-blindness as a constitutional principle, rather than to the era of Reconstruction itself.

These rulings have real consequences for how we think about race in today’s society. For example, since the *Bakke* decision, the only ground for defending affirmative action in education is to promote “diversity”—essentially, the idea that the presence of nonwhites in a classroom benefits whites by expanding their horizons. The real purpose of affirmative action—some sort of recognition of the long history of racial inequality in American society—no longer enjoys traction in court.¹²⁷ Since *Bakke*, legal arguments about affirmative action must be tailored to the Court’s strange logic rather than to actual history. Like grounding the Civil Rights Act of 1964 on the Commerce Clause, this leads to a warping of both argument and reasoning.¹²⁸

My own experience as the author of a brief and as an expert witness in one of the University of Michigan affirmative action cases drove this point home. My writing and testimony about the history of race in this country did not misrepresent the past, but they were designed, in part, to highlight this “diversity” issue, which in historical discussion outside the courtroom would merit little attention. But in the writing of a brief, unlike the writing of history, one must fit one’s claims into legal forms cognizable by a court.¹²⁹ Perhaps recourse to the Thirteenth Amendment, of

125. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747–48 (2007) (holding unconstitutional school district assignment plan utilizing student race as factor to promote integration).

126. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 295 (1978) (rejecting two-class theory under which Fourteenth Amendment protects only against discrimination against nonwhites).

127. In *Bakke*, Justice Lewis Powell, writing for the majority, rejected the idea that some groups in society are more stigmatized than others (a bizarre misunderstanding of the history of racism in the United States) and thus deserve “a degree of protection greater than that accorded others,” but concluded that achieving “a diverse student body” was “a constitutionally permissible goal for an institution of higher education.” *Id.* at 295–96, 311–12.

128. See *supra* text accompanying notes 73–74 (discussing Civil Rights Act of 1964).

129. See Expert Report of Eric Foner at 48, *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000) (No. 97-75321) (describing impact of affirmative action on racial diversity).

which this conference is one example, arises from the Amendment's very lack of jurisprudence. To paraphrase Karl Marx, in the case of the Thirteenth Amendment, unlike the Fourteenth, the dead weight of misconceived past decisions and misunderstandings of history do not weigh like a nightmare on the brain of the living.¹³⁰

Back in 1871, Samuel Shellabarger, a Republican Congressman from Ohio, declared that he did not want "the full idea of the Fourteenth Amendment . . . interpreted by the old rules of construction."¹³¹ In a sense the largest question this Essay attempts to raise is whether a judicial system wedded to old rules of construction can come to terms with unprecedented changes in the purposes of national law and policy. A more accurate understanding of the history of Reconstruction may not enable the courts to do so, but without it what Shellabarger called "the full idea"¹³² of Reconstruction will never be implemented.

130. Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte* 15 (Int'l Publishers Co. 1963) (1852).

131. Hyman & Wiecek, *supra* note 4, at 471.

132. *Id.*