

## RECONSTRUCTING RECONSTRUCTION: SOME PROBLEMS FOR ORIGINALISTS (AND EVERYONE ELSE, TOO)

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### I. INTRODUCTION

In its 2000 decision in *United States v. Morrison*, the Supreme Court held that the Congress of the United States lacks legislative power to provide a remedy in the federal courts for gender-based violence.<sup>1</sup> The reasoning of the Court was straightforward. Congress could not adopt the bill as an exercise of its enumerated commerce power because “[g]ender-motivated crimes of violence are not . . . economic activity,” and thus do not “substantially affect[] interstate commerce.”<sup>2</sup> This economic-noneconomic line was necessary because “[t]he Constitution requires a distinction between what is truly national and what is truly local.”<sup>3</sup> Nor was the law valid under the Fourteenth Amendment. Assuredly it was the case that “state-sponsored gender discrimination violates equal protection,”<sup>4</sup> and Congress plainly possessed power under Section 5 of the Fourteenth Amendment to “‘enforce,’ by ‘appropriate legislation’ the constitutional guarantee” of equality.<sup>5</sup> Yet, again, there were necessary limitations on such power, most notably the one found in the 1883 *Civil Rights Cases*, which held that Congress lacked power under Section 5 to regulate private rather than state actors.<sup>6</sup> The public-private line was required (this should start to sound familiar) “to prevent the Fourteenth Amendment from obliterating the Framers’ carefully crafted balance of power between the States and the National Government.”<sup>7</sup> Congress’s remedy against gender-motivated violence failed because

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1 529 U.S. 598, 627 (2000).

2 *Id.* at 609, 613.

3 *Id.* at 617–18.

4 *Id.* at 620.

5 *Id.* at 619 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997)).

6 109 U.S. 3 (1883).

7 *Morrison*, 529 U.S. at 620 (citing *Flores*, 521 U.S. at 520–24).

it “visit[ed] no consequence whatever on any [state] . . . official.”<sup>8</sup> The Court conceded that if the allegations of gender-motivated violence in the case were true—and they were hardly atypical ones—“no civilized system of justice could fail to provide . . . a remedy.”<sup>9</sup> “[U]nder our federal system,” however, that “remedy must be provided by [the states], and not by the United States.”<sup>10</sup>

The popular and academic reaction to *Morrison* was all over the map. Conservatives generally were happy—but not all of them, since some had supported the legislation invalidated by the Court.<sup>11</sup> Many liberals were hyperbolic, displaying deep anger with the decision.<sup>12</sup> Still, some liberal voices agreed with the Court, or thought that the decision was not unwarranted.<sup>13</sup> Given subsequent events, notably the trimming of the Rehnquist Court’s federalism initiative, the result in *Morrison* may not seem to matter much. But the bases for the Court’s ruling—its reaffirmation of the *Civil Rights Cases*, and the limited conception of congressional power—have the potential to reverberate.

Rather than entering the already-crowded field on whether the *Morrison* Court decided the case correctly, what I seek to do here instead is highlight the potentially enormous complexity involved in answering the question. Following the Court’s decision, commenta-

<sup>8</sup> *Id.* at 626.

<sup>9</sup> *Id.* at 627.

<sup>10</sup> *Id.*

<sup>11</sup> See Stuart Taylor, Jr., *Why You Can’t Sue Your Rapist in Federal Court*, NAT’L J., May 20, 2000, at 1577 (“The Framers clearly did not intend to let Congress regulate everything. And if rape and domestic violence have a sufficient effect on interstate commerce to justify federal regulation, then so does all violent crime, and so do most other human activities.”). But a few Republican senators expressed frustration with the *Morrison* decision. See, e.g., Linda Greenhouse, *The Court v. Congress*, N.Y. TIMES, Sept. 15, 2005, at A1 (quoting Senator Arlen Specter as declaring that he took “umbrage at what the court has said,” particularly in *Morrison*).

<sup>12</sup> See, e.g., Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 83 (2001) (concluding that the Court, in invalidating federal legislation like the statute at issue in *Morrison*, is “using its authority to diminish the proper role of Congress”); Herman Schwartz, *Assault on Federalism Swipes at Women*, L.A. TIMES, May 21, 2000, at M1 (calling *Morrison* “another salvo” in the Supreme Court’s “jihad against the federal government”); Cass R. Sunstein, *Tilting the Scales Rightward*, N.Y. TIMES, Apr. 26, 2001, at A23 (noting the “remarkable period of right-wing judicial activism”).

<sup>13</sup> See, e.g., Neal Devins, *The Federalism-Rights Nexus: Explaining Why Senate Democrats Can Tolerate Rehnquist Court Decision Making but not the Rehnquist Court*, 73 U. COLO. L. REV. 1307, 1315–16 (2002) (noting that most of the Rehnquist Court federalism decisions “have been narrow in scope”); Editorial, *States’ Business*, WASH. POST, May 16, 2000, at A20 (asserting that “in this one, the court got it right. If Congress could federalize rape and assault, it’s hard to think of anything it couldn’t.”); Anthony Lewis, *Court and Congress*, N.Y. TIMES, May 20, 2000, at A15 (admitting that *Morrison* was a “close case”).

tors questioned whether the Court's conception of American federalism was correct, and whether violence against women was properly characterized as a private act, rather than a failure of state remedial schemes.<sup>14</sup> But there are even more profound and difficult questions that arise if one takes seriously the history of the Fourteenth Amendment, both at its inception and thereafter. Virtually none of this complexity was evident on the face of the Court's opinion, and much of it was missing from the debate that occurred in its aftermath.

What, after all, explains the Court's blithe (and longstanding) assumption that women's equality is protected by the Fourteenth Amendment in the first place? In her days as an activist for women's equality, Ruth Bader Ginsburg conceded that those who adopted the Fourteenth Amendment had intentionally put to one side the issue of gender equality in favor of more pressing concerns over race.<sup>15</sup> Yet, as is familiar to all, in the 1970s the Court—assisted by Ginsburg-as-litigator—extended the heightened protections of the Equal Protection Clause to women.<sup>16</sup> How precisely did the Constitution change in this way?<sup>17</sup> Similarly, although there has been a robust debate both

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14 See Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367, 380–83 (2002) (noting the extent of Congress's findings on state failures to address domestic violence and criticizing the Court's approach as a "radical new understanding of congressional power"); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Law after Morrison and Kimel*, 110 YALE L.J. 441, 445–46 (2000) (arguing that *Morrison*, along with *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), marked a retreat from the antidiscrimination jurisprudence that had developed in the four decades since *Brown v. Board of Education*).

15 Ruth Bader Ginsburg and Jane Picker, *The Equal Rights Amendment: A Discussion at The Ford Foundation* 12 (May 22, 1972) (transcript available in the New York University Law School Library).

16 See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (applying heightened scrutiny to a state beer law that discriminated between young men and young women); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (Brennan, J., plurality opinion) (striking down a discriminatory military benefits regulation on the basis of heightened scrutiny); *Reed v. Reed*, 404 U.S. 71 (1971) (claiming to use rational basis scrutiny, while striking down an estate law that discriminated between male and female heirs).

17 For discussion of rationales for expanding the Equal Protection Clause's scope, see Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 948–49 (2002) (noting that the Supreme Court has incorporated sex discrimination into its Equal Protection jurisprudence by analogizing sex to race, rather than recognizing sex discrimination protections as rooted in the constitutional text). See also Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951 (2002) (arguing that the constitutional text—specifically the Fifteenth and Nineteenth Amendments—should provide guidance in determining the forms of discrimination barred by the Equal Protection Clause); David A. Strauss, *The New Textualism in Constitutional Law*, 66 GEO. WASH. L. REV. 1153, 1154–56 (1998) (asserting that the rise in constitutional sex dis-

on and off the Court regarding the proper application of federalist principles in Section 5 and Commerce Clause cases alike, virtually none of this discussion has acknowledged how understandings of federalism have seesawed throughout American history. Opponents of the *Morrison* majority's view of American federalism typically stress the transformational effect of the Civil War Amendments.<sup>18</sup> Yet, they pay almost no attention to the fact that the nation quickly turned its back on those amendments, motivated in part by a reluctance to substantially abandon antebellum understandings of the American federal structure. Does the swift *de facto* reversal of Reconstruction count for nothing? And if so, why? Is it because those post-Reconstruction understandings themselves were erased by the subsequent events of 1937? Or was the determinative factor the rediscovery of racial equality in the 1950s and 1960s? How, in short, ought a constitutional interpreter deal with these profound swings in constitutional meaning, recorded in constitutional doctrine and history, but not in constitutional text? Should they count for naught?

This Article addresses the difficult task any constitutional interpreter inevitably faces once she determines to take the *entire* document into account, not just a part of it. That problem is exacerbated enormously because the Constitution was enacted *over time* and not all at one time. Both of these problems—holistic interpretation and construction over time—are illuminated by focusing on the meaning of the Constitution in light of the Civil War Amendments.

A central, though hardly exclusive, target of this Article is the possibility and the sincerity of originalist interpretation. The last thirty to forty years have seen a crescendo of support, at least in some quarters, for construing the Constitution in light of its “original understanding.”<sup>19</sup> Obviously, if originalism is the proper methodology for

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crimination protections without a formal amendment reflects the relative unimportance of constitutional text).

18 See, e.g., Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259 (2001) (questioning why the Fourteenth Amendment is seen as modifying the Eleventh Amendment but not Congress's Article I Commerce Clause powers); Siegel, *supra* note 17, at 997–1003, 1039–44 (discussing how discrimination against women has often been justified by federalism concerns, and suggesting that the Fourteenth and Nineteenth Amendments together provide for expanded national authority to combat sex discrimination).

19 See generally, ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990) (providing an overview of the politicization of the Supreme Court and the competing theories and interests that judges take into account when making their decisions, and concluding that a successful theory of interpretation cannot depart from the original meaning of the Constitution); Steven G. Calabresi, *Introduction to ORIGINALISM: A QUARTER-CENTURY OF DEBATE* 1–40 (Steven G. Calabresi ed. 2007) (describing the debate over originalism and concluding

constitutional interpretation, then this methodology must be applied to all parts of the Constitution. In deciding cases like *Morrison*, the Court rightfully looked back to the Founding of the nation in 1787. But it also must take full account of Reconstruction, the nation's Second Founding, and the time when the Fourteenth Amendment itself was adopted. As a nation and a constitutional culture, we wallow deep in the waters of the Founding era. Yet, the rich history of the Civil War Amendments has barely been integrated into our national ethos. This is perfectly understandable. The period is historically rich and deeply complicated; there are no easy stories there. But it also is unfortunate. One cannot talk about interpreting the Constitution without considering what it means to interpret it all together, across text and across time. This sort of interpretation will prove tricky for everyone, but especially for originalists.

I begin by sketching the odd neglect of the Reconstruction Amendments as a matter of constitutional interpretation and interpretive methodology both. Then, in what is the heart of the Article, I detail five specific problems that repairing this neglect pose for any interpretive theory (but particularly originalism). First, there is the problem of interpretation. For a variety of reasons I detail, developing an original understanding of the Constitution of 1787 is a snap compared to making sense of the Second Founding. Second is the problem of integration: how does one render a coherent interpretation of a Constitution that has clauses layered atop others over time, clauses that sometimes trump earlier ones, but more often simply modify them in elusive ways? Third is the problem of rejection. By the early 1880s the country largely had turned its back on the work of the Reconstruction Congress. Chattel slavery had ended, but in many places that was about it. What does one do with constitutional provisions that fall into desuetude? Fourth, there is the problem of revision: as the country turned its back on the original commitments of the Civil War Amendments, the courts found altogether new meanings in the clauses of the Fourteenth Amendment, interpretations largely constructed to protect the interests of property holders and interstate businesses. These interpretations, arguably quite different from the original understanding of the Reconstruction Amendments, were dominant for almost half a century. Can longstanding revision-

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originalist constitutional interpretation is the most effective way to interpret the Constitution); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999) (explaining why originalism is the prevailing form of constitutional interpretation); John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 31 HARV. J.L. & PUB. POL'Y 917 (2008) (arguing that originalism produces desirable results).

ist understandings themselves become embedded in the Constitution? And what happens if then, over time, they too are rejected? Fifth, there is the question of recovery. Beginning in the twentieth century, renewed concern about civil rights led to a rebirth of attention to the original commitments of the Civil War Amendments. Can rejected original understandings be reborn, and if so, how should they then be understood—in the terms of their original naissance, or their renaissance?

As I believe will become apparent, these problems, taken together, are somewhat devastating for a purely originalist methodology. Yet, importantly, they do not make life comfortable for any theory of interpretation. It is commonplace (and perfectly understandable) for constitutional interpreters of all stripes to seek consistency, to try to set a straight course between ratification and the present. As the checkered history of the Reconstruction Amendments demonstrates, however, in reality there has been much tacking to and fro. How does one interpret the Constitution coherently given this varied course?

In closing, I will argue that constitutional interpreters necessarily have to engage in synthesis. Any serious interpreter of the Constitution has to have something sensible to say about the back and forth of constitutional meaning throughout history. One cannot simply ignore tidal changes in the interpretation of the Constitution. I will make the point that as lawyers, when we synthesize, we do so looking backward, not forward. Perhaps it is inevitable that backward synthesis involves the drawing of straight lines, even if they are not true to history. If this is so, then constitutional interpretation is not so much an exercise in reconstructing our past, as in tracing our way back to it as best we can. Still, there are better and less acceptable means of doing so.

History is empiricism of a sort, and a useful analogy might be an empirical one. When assessing claims of cause and effect, empiricists use regression analysis. They take a set of data points and do the best job they can fitting a straight line to it. Some points lie right on the line, some far above or below it, but the best line is one that minimizes the overall deviation from the data that exists. The line, in this sense, is not some fictitious straight line from a foundational moment that determines the present. Rather, it is an understanding of the present that provides the best account of all the points in the past.

## II. THE UNFORTUNATE NEGLECT OF THE RECONSTRUCTION AMENDMENTS

Reconstruction, America's Second Founding, remains curiously neglected as a subject of constitutional exploration. Even assuming any serious theory of constitutional interpretation can pick and choose the clauses it wishes to consider, it is difficult to see how that choice reasonably could fail to include the Civil War Amendments. Yet, for those engaged in the endeavor of original understanding—as well as for most other methods of constitutional interpretation—those amendments remain a bit of a frontier, relatively unexplored and little understood.

Although making this claim involves the always-perilous task of proving a negative, one doubts the point is likely to elicit a serious challenge. This is not an assertion that the Civil War Amendments themselves have not played a sufficient role in American constitutionalism. Obviously the Fourteenth Amendment alone has been deeply significant to constitutional law at least since the 1880s (albeit with its high and low points). Nor is it necessarily that there is a dearth of scholarship regarding Reconstruction. There has been a great deal of good work done on what happened in the late 1860s and what the nation expected out of the Civil War Amendments.<sup>20</sup> Rather, the claim is that Reconstruction has inadequately influenced the direction of constitutional law itself, particularly as compared with the original founding. Constitutional doctrine imperfectly understands Reconstruction.<sup>21</sup>

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<sup>20</sup> See, e.g., WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 42–45 (1988) (detailing the political climate and goals during the proposal and adoption of the Reconstruction Amendments); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 864 (1986) (analyzing “the Republican theory of national civil rights enforcement authority under the thirteenth amendment, which the Civil Rights Act was intended to implement, and the fourteenth amendment. . . [and finding that] the Supreme Court ultimately rejected the interpretation of the Civil Rights Act of 1866 and Reconstruction amendments suggested by the Republican theory of civil rights enforcement”).

<sup>21</sup> Fairness requires conceding that original understandings of the Founding may not really have influenced constitutional law significantly either. Talk of the originalist methodology is abundant. Conferences are held, and articles and books written, imploring courts to be originalist (or exploring the pitfalls of originalism). Sometimes it seems there is far more attention to the question of whether original understandings ought to be pursued, rather than attention to actually pursuing them. As Robert Post and Reva Siegel explain it, originalism is a political movement, an ideology, much more than an attention to interpretive understanding. Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 *FORDHAM L. REV.* 545 (2006). Still, there is no denying some broader attention in Supreme Court decisions to original meanings of the Founding era. See *infra* note 131 and accompanying text.

Although it is difficult to establish conclusively a relative lack of attention to understandings of the Civil War Amendments, there are some significant data points. Take the Supreme Court, where the strategy with regard to interpreting the Fourteenth Amendment at critical moments has been one akin to confession and avoidance. Did those who adopted the Equal Protection Clause intend to prohibit racial discrimination in schools? The Court found no meaningful answer in the history (or perhaps not the one it wanted), so it quickly moved on to other reasons why such discrimination was unlawful.<sup>22</sup> Similarly, did the Privileges or Immunities Clause, or the Due Process Clause, incorporate the provisions of the existing Bill of Rights? The history appeared indeterminate (or problematic), so the Court went its own way and adopted the approach of selective incorporation.<sup>23</sup> As serious works of scholarship have made clear, the history of the Fourteenth Amendment actually had a lot to say about each of these questions, albeit not in the terms the Court was willing to hear.<sup>24</sup> So, that inconvenient history was simply cast to one side.

In the public realm, the relative deficit of attention to Reconstruction is even more telling. A trip to the bookstore reveals a country practically awash in the original founding; biographies and histories for the popular educated reader abound. In comparison, Reconstruction is a diaspora, and the Gilded Age that followed lost almost entirely. In the popular mind, American history seems to run through Lincoln straight to Theodore Roosevelt, if not his cousin Franklin.

Remarkably, the same unfortunate neglect seems pervasive among those who would interpret the Constitution using an originalist methodology. The present obsession in some quarters with originalism can be traced back to the rise of conservatism in the 1970s and

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22 The Court in *Brown v. Board of Education* acknowledged that reargument had focused on the circumstances surrounding the Fourteenth Amendment's adoption, but explicitly refused to "turn the clock back." 347 U.S. 483, 492 (1954). For a historical argument that *Brown* actually was consistent with the original understanding of the Fourteenth Amendment, see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995). For a critique, see Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995).

23 See *Adamson v. California*, 332 U.S. 46, 54 (1947) (holding that the Fourteenth Amendment could not automatically incorporate the original Bill of Rights since "[n]othing has been called to [the Court's] attention that either the framers of the Fourteenth Amendment or the states that adopted intended its due process clause to draw within its scope the earlier amendments to the Constitution").

24 See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 215–18 (1998) (arguing that the issue of incorporation is complicated by basic differences in how the original Bill of Rights and the Fourteenth Amendment are structured).



1980s.<sup>25</sup> Yet, since that time originalists—with a few notable exceptions such as John Harrison, Akhil Amar (really a textualist), Michael McConnell, and Randy Barnett—have devoted little if any attention to the Second Founding.<sup>26</sup>

Though it is easy to see why Reconstruction has been neglected—more on this in a moment—the impact of doing so should be readily apparent. The period after the Civil War involved telling debates about one of America’s deepest commitments: equality. The very conception of citizenship, of political and civil existence in the American polity, was detailed and discussed at great length. There were intricate analyses of what rights state and national citizens possessed. The country watched closely as Congress debated legislative and constitutional measures, voter turnout was high, and elections were fought and won (or lost) on the perceived justice (or injustice) of congressional statutory and constitutional decisions.<sup>27</sup> These issues of equality, citizenship, and foundational rights have been critical to American political development over at least the last half century. The failure to devote the same attention to this founding moment as has been given to 1787 is almost unimaginable.

One perfectly plausible reason for the relative inattention of originalist scholars is that a focus on the Fourteenth Amendment and its cousins would invigorate the constitutional movement of those on

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25 See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* ch.9 (2009) (describing the rise of originalism in the years following the Warren Court); JONATHAN O’NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS* 111–60 (2005) (discussing the revival of originalism led by Raoul Berger in the 1970s and the favored status of originalism in Edward Meese’s Department of Justice during the 1980s); Post & Siegel, *supra* note 21, at 545–46 (2006) (discussing the contributions to originalism of the “pioneer conservative academics”); see also STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 135–80 (2008) (providing an overview of the rise of conservatism in law schools).

26 See generally AMAR, *supra* note 24 (devoting half of his book to a discussion of Reconstruction); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004) (discussing how an originalist understanding of the Fourteenth Amendment requires a dramatically expanded reading of the Privileges and Immunities Clause); John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375 (2001) [hereinafter Harrison, *Lawfulness*] (examining the legality of the Reconstruction Amendments); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1460–61 (1992) [hereinafter Harrison, *Privileges or Immunities*] (analyzing the Privileges or Immunities Clause in reference to the Reconstruction Amendments); McConnell, *supra* note 22 (discussing originalism in the context of desegregation and thus the Reconstruction Amendments).

27 See Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 456–57 (2007) (referring to the vaguely-worded Amendment as “a new addition to the Constitution, a campaign proposal for the 1866 elections and an armistice to be imposed on the defeated South”).

the political left. Though there are originalist stirrings on the ideological left, in the main the enterprise of original understanding has been one for conservatives. Yet, the bold themes of Reconstruction, the equality and rights of American citizens and those within our jurisdictional grasp, certainly resonate most with the left's agenda. But do not be too certain that an originalist examination of Reconstruction necessarily or always favors the left. While Reconstruction bespoke a commitment to equality and foundational rights, those conceptions had their limits, most notably in generally excluding women from the vision, and ultimately in separating civil and political equality from social equality.<sup>28</sup> While the amount of scholarship tying Reconstruction's understanding to specific constitutional claims is not what it should be, some of the extant work is conservative in nature and makes points that if adopted into doctrine might roll back the scope of existing constitutional protections.<sup>29</sup> There is something in the original understanding of the Civil War Amendments for scholars of every ideological stripe.

If we are to interpret the Constitution in light of how it originally was understood, it seems unavoidable that the devotion to original understanding must extend to all parts of the Constitution. In the aftermath of a chilling war, the American Constitution itself experienced a moment of profound re-evaluation and rebirth. Yet, that moment remains remarkably obscured today.

### III. INTERPRETIVE PROBLEMS

#### A. *The Difficulty of Interpretation*

The first problem with incorporating Reconstruction into the originalist canon is the sheer difficulty of doing so. Critics of originalism

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<sup>28</sup> See PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 242–48 (4th ed. 2000) (citing legislative history supporting the proposition that the Framers generally did not intend to protect social rights through the Fourteenth Amendment); Siegel, *supra* note 17, at 964–65 (noting that “the framers of the Fourteenth Amendment were not terribly interested in enfranchising women”). See generally, Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229 (2000) (discussing how the framers explicitly intended to exclude women's equality issues from the scope of the Reconstruction Amendments).

<sup>29</sup> See, e.g., Harrison, *Lawfulness*, *supra* note 26, at 375–80 (describing defects in how the Reconstruction Amendments were ratified and concluding that, while the Amendments are still legally valid, they did not represent popular national sentiment); John Harrison, *State Sovereign Immunity and Congress's Enforcement Powers*, 2006 SUP. CT. REV. 353, 399–400 [hereinafter Harrison, *Sovereign Immunity*] (suggesting that *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), was wrongly decided and that Section 5 of the Fourteenth Amendment should not limit States' Eleventh Amendment protections).

in the context of the original Founding have gone to great lengths to establish how difficult the task can be. Yet, compared to discerning the proper construction of the Reconstruction Amendments, the similar search regarding the Founding era is a tea party. Materials are unavailable, their meaning is obscure; it is unclear that originalist methodologies developed to deal with the Founding are even coherent when addressed to Reconstruction. None of this excuses the lack of effort to take full account of Reconstruction, but it does help explain the failure.

First, it is worth addressing the possibility that the interpretive hierarchy regarding original intent and understanding may need to be reversed when it comes to Reconstruction. In its initial formulation, the originalist insistence was upon elucidating the “intentions” of those who framed the Constitution.<sup>30</sup> This idea of original intention proved elusive for a variety of reasons, including the professed secrecy of the Constitutional Convention, the incoherence of the idea of collective intent, and the simple impossibility of discovering any germane original intentions as applied to many modern questions.<sup>31</sup> Thus, as is well known, the idea of “original intention” quickly gave ground to the broader notion of “original understanding.”<sup>32</sup> Today,

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<sup>30</sup> See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 363–66 (1977) (analyzing the history and importance of “original intention”); Edwin Meese III, U.S. Att’y Gen., Speech Before the American Bar Association (July 9, 1985), in *ORIGINALISM: A QUARTER-CENTURY OF DEBATE* 47 (Steven G. Calabresi ed. 2007) (advocating that judges adhere to the intentions of the founders); Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL’Y 5 (1988) (discussing the evolution of the “jurisprudence of original intent”). For background of the rise and refinement of originalism, see Balkin, *supra* note 27, at 444–46, and see Thomas B. Colby & Peter J. Smith, *Living Originalism*, (GWU Leg. Stud. Res. Paper No. 393, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1090282](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090282).

<sup>31</sup> See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 214 (1980) (discussing how the founders’ intentions are difficult to ascertain and aggregate); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1087–97 (1989) (summarizing various lines of attack on original intent including the ambiguity of such intent); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 887–88 (1985) (arguing that the Founders themselves did not expect the Constitution to be interpreted through an originalist lens); Mark Tushnet, *The U.S. Constitution and the Intent of the Framers*, 36 BUFF. L. REV. 217, 217–18 (1987) (describing criticisms of the “original intention” method for interpreting the Constitution).

<sup>32</sup> See FRIEDMAN, *supra* note 25, at ch.9 (describing switch to advocacy for jurisprudence of original understandings); Barnett, *supra* note 19, at 621 (defining originalism as seeking to ascertain “the objective original meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment”).

the preference for societal understandings over the intentions of the Framers in Philadelphia is almost universal.<sup>33</sup>

Nonetheless, there is a reasonable argument that the move to original understandings was an error, for the simple reason that original intentions actually are more revealing. The discussions in Philadelphia were a relatively candid affair. By the time the proposed Constitution hit the street, however, posturing often sullied the debates in ways that make reliance on the original understanding troublesome. Those who opposed the Constitution, the anti-Federalists, sought to invoke fears about the “consolidation” of the central government vis-à-vis the states.<sup>34</sup> To this end, they often made claims about the Constitution they happily would abandon once ratification occurred.<sup>35</sup> Similarly, Federalists anxious to quell anti-Federalist worries minimized the import of the Constitution in ways they too would deny in later years.<sup>36</sup> It is unclear that one can set an interpretive compass by what in the main were often fairly disingenuous or overstated explanations of constitutional meaning.

Second, even assuming the proper focus is on the original understanding of those doing the ratifying, when it comes to Reconstruction the tools for constructing this original understanding are extremely difficult to come by, if not nonexistent. As Larry Kramer has pointed out, the shift from a focus on intentions to one of original understandings was not driven entirely by theory.<sup>37</sup> Rather, it was aided by the availability of critical interpretive resources. The *Documentary History of the Ratification of the Constitution* was published in

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33 See Barnett, *supra* note 19, at 620 (declaring that “originalism has itself changed—from original *intention* to original *meaning*. No longer do originalists claim to be seeking the subjective intentions of the framers”); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 554 (2003) (discussing how original understanding is often portrayed as being an “objective” interpretive methodology).

34 See, e.g., EDWARD A. PURCELL JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY 28–29 (2007) (noting that Anti-Federalists repeatedly attacked the Constitution’s terms as ambiguous and likely to lead to overreaching by the federal government); Brutus, Essay No. XII (Feb. 14, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 426–27 (Herbert J. Storing ed., 1981) (claiming that the federal courts would expand Congress’s powers so that “the states [will] lose [their] rights, until they become so trifling and unimportant, as not to be worth having”).

35 See PURCELL, *supra* note 34, at 33 (describing how many Anti-Federalists who had criticized the Constitution for granting the central government “unbounded” powers later insisted that the text “was both precise and sharply restrictive”).

36 For example, Hamilton’s claim that the Necessary and Proper Clause did not provide the federal government with additional substantive authority—expounded during the ratification debates—soon gave way to a more expansive interpretation of the Clause. PURCELL, *supra* note 34, at 32.

37 Larry Kramer, *Two (More) Problems with Originalism*, 31 HARV. J.L. & PUB. POL’Y 907, 909–10 (2008).

1978. “Suddenly,” wrote Kramer, “everybody could be an historian of ratification, because a vast reserve of primary sources were available in neatly bound volumes.”<sup>38</sup> Now, finally, the tools were at hand with which to construct an original understanding.

Yet, even today the tools necessary to construct the original of the Fourteenth Amendment are difficult to obtain if not entirely lacking. There are the congressional debates over Reconstruction, to be sure, those seemingly endless and dense discussions that prove frustratingly difficult to interpret coherently (more on this too in just a moment). But what of ratification, the process that proves so edifying to originalist scholars of the founding? As the historian James Edward Bond noted in his 1997 *No Easy Walk to Freedom*, a discussion of ratification in the southern states, “[t]here are very few studies of the state ratification debates on the Fourteenth Amendment.”<sup>39</sup> This is hardly a surprise, for—as Michael Kent Curtis explains—“[m]ost of the state legislatures that considered the Fourteenth Amendment either kept no record of their debates, or their discussion was so perfunctory that it shed little light on their understanding of its meaning.”<sup>40</sup> Of course, one is not limited to formal debates. There are newspaper chronicles of the views of the people “out-of-doors” as well as political tracts, campaign speeches, and other relevant sources. But it is an enormous effort to piece these together, especially given that one might often need to begin anew as novel interpretive questions presented themselves. It is one thing to be familiar with the entire assembled corpus of legislative debates and apply them to particular issues. It is another to seek out whatever extra-legislative sources happen to bear upon any given interpretive question.

Third, even if the materials were available to discern the original understanding of the Reconstruction Amendments, it is not at all clear they would be enlightening. To describe the congressional debates over the Reconstruction Amendments and accompanying legislation as opaque, intricate, confusing—or tedious for that matter—is hardly to begin to do justice to the topic. The times were chaotic; political strategies were in constant flux. Politics outside the halls of Congress was keeping a watchful eye, but often distorting what hap-

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38 *Id.*

39 JAMES E. BOND, *NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT* 12 n.23 (1997); *see also* CHESTER JAMES ANTIEAU, *THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT* vii (1997) (providing an analysis of the ratification debates in Pennsylvania, while noting that Pennsylvania was the only State which preserved a complete record of the debates).

40 MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 145 (1986).

pened inside. Expecting coherence may be asking far too much. Recall again the examples from the previous Part. Unequivocally one of the most important questions regarding Reconstruction is that of incorporation. Were the Reconstruction Amendments intended to apply the provisions of the Bill of Rights against the states? Portions of them? To what extent? Debate over the intentions of those who adopted the Fourteenth Amendment on this question still is ongoing. There are voluminous studies, two of the most notable by Charles Fairman and Akhil Amar.<sup>41</sup> The two disagree vehemently. Though I have my own view of who gets the better of that debate, the end of controversy on this central question is hardly near.

Fourth, even if we knew the answers, we might be loath to accept them. Two examples come immediately to mind here: the question of segregated public schools and the application of the equality guarantees of the Fourteenth Amendment along lines other than race. Suffice to say that no theory of constitutional interpretation that sanctions school segregation or denies equality to women can be considered remotely viable today.<sup>42</sup> There have been originalist arguments consistent with this *realpolitik*, interesting and valiant ones, but the consensus remains that originalists who seek to make the case for gender equality and school desegregation consistent with the original understanding are swimming upstream.<sup>43</sup>

The difficulty in getting the Fourteenth Amendment to mean what is politically palatable today is apparent in one notable attempt at defending school desegregation that—to the extent it succeeds—

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<sup>41</sup> AMAR, *supra* note 24, at 215–30 (advocating a theory of “refined incorporation”); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 138 (1949) (concluding that the historical records argue against total incorporation).

<sup>42</sup> See Bruce Ackerman, 2006 *Oliver Wendell Holmes Lectures: The Living Constitution*, 120 HARV. L. REV. 1737, 1752 (2007) (noting that *Brown* has been canonized to a greater extent than explicit constitutional guarantees, such as the republican Guarantee Clause: “While no Supreme Court nominee could be confirmed if he refused to embrace *Brown*, he could safely confess great puzzlement about the meaning of ‘republican’ government and gain a seat on the bench”); see also Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323, 1410–11 (2006) (discussing how popular belief in constitutional protections against sex discrimination contributed to the defeat of Professor Bork’s nomination to the Supreme Court).

<sup>43</sup> See, e.g., Post & Siegel, *supra* note 21, at 559–60 (noting that most originalists do not publically challenge equal protection doctrine’s adoption of sex discrimination). The accepted wisdom has been that *Brown* cannot be reconciled with an originalist approach, although this has been challenged by Michael W. McConnell in *Originalism and the Desegregation Decisions*, *supra* note 22; regarding McConnell’s success, see Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, *supra* note 22.

undermines the argument for gender equality. Taking the position that *Brown v. Board of Education* was decided correctly as an originalist matter, Robert Bork explained that the case involved a collision between two of the framers' conceptions: racial equality and school segregation. When, in our time, it became apparent the two could not co-exist, one had to give way. The more general concept of "equality" trumped the more specific interest in segregation, Bork explained.<sup>44</sup> Paul Brest offered the following riposte: if the general principle of equality prevailed, why not equality for, say, gays?<sup>45</sup> Bork's comeback: because it was *race* the framers cared about.<sup>46</sup> Even assuming Bork was right (and one hardly would score him the winner of their debate), where precisely does that leave women's equality?

No theory of constitutional interpretation can reach results plainly unacceptable to the polity and remain tenable. The late lay originalist Raoul Berger relied on an (often contested) originalist methodology to skewer popular understandings of the Fourteenth Amendment.<sup>47</sup> But unlike many of today's originalists, Berger was not selling his methodology for widespread adoption and did not have to win adherents. He was free to let his inquiries take him where they led.<sup>48</sup> Yet, originalist interpretations of the Fourteenth Amendment are likely to yield troubling resolutions of some of the most trenchant social issues of our time, issues on which a consensus has been hard-fought. As we will see, there are some possible answers to the dilemma posed by the disparity between original understandings and modern interpretations, but they are unlikely to be acceptable to originalists.

### B. Integrating the Constitution

Like a contract, or a statute, the Constitution is a document that can be added to over time in ways that change the original meaning

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<sup>44</sup> BORK, *supra* note 19, at 82.

<sup>45</sup> Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1091 (1981).

<sup>46</sup> Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 828 (1986) ("The intentionalist may conclude that he must enforce black and racial equality but that he has no guidance at all about any higher level of generality.").

<sup>47</sup> See BERGER, *supra* note 30, at 364 (noting the importance of "original intention" in constitutional interpretation); see also O' NEILL, *supra* note 25, at 111-32 (discussing the influence of Berger's originalist constitutional interpretation in changing the terms of the constitutional debate).

<sup>48</sup> For example, Berger concluded that historical records "all but incontrovertibly establish that the framers of the Fourteenth Amendment excluded both suffrage and segregation from its reach." BERGER, *supra* note 30, at 407.

of the text.<sup>49</sup> The text of our Constitution has twenty-seven amendments adopted since the Founding. Although several of those were technical amendments—for example to fix things plainly wrong with the presidential selection process—others were of far broader import. Interpreting the Constitution requires developing an understanding not only of the original meanings, but how those meanings are pieced together into one coherent whole, what Reva Siegel has called “synthetic interpretation.”<sup>50</sup> Yet, interpretive theory—including originalism—largely is lacking in an approach to the problem of constitutional integration.

Sometimes integrating text can be a simple matter. For example, Section 2 of the Fourteenth Amendment clearly overrides the “three fifths” clause of Article I, Section 2. Before adoption of the Fourteenth Amendment, those in slavery counted for three-fifths of other persons for purposes of congressional apportionment; after ratification of the Thirteenth Amendment there was no more chattel slavery, and those formerly in slavery counted as whole persons. (Section 2 goes on to say, however, that if the vote was denied under certain conditions to adult males in the state, then the apportionment was reduced accordingly.)

But piecing together amendments with prior aspects of the Constitution’s text is not always such a mechanical endeavor. Consider, for example, the relationship of the Eleventh Amendment to the Fourteenth. Adopted in response to the Supreme Court’s decision in *Chisholm v. Georgia*,<sup>51</sup> the Eleventh Amendment essentially says States cannot be sued in federal courts for money damages.<sup>52</sup> Although this

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49 See Balkin, *supra* note 27, at 490 (arguing that constitutional interpretation must take into account how the Constitution’s structural principles changed as it was amended over time).

50 See Siegel, *supra* note 17, at 966–68 (2002) (applying the idea of synthetic interpretation to the Court’s decision in *Bolling v. Sharpe*, 347 U.S. 497 (1954), in which Fourteenth Amendment principles were infused into the Fifth Amendment, and arguing that the Nineteenth Amendment should similarly inform modern interpretations of the Equal Protection Clause).

51 2 U.S. (2 Dall.) 419 (1793) (holding that federal courts had the authority to hear cases against States by private citizens).

52 *Chisholm* was met with considerable surprise, and a constitutional amendment to overrule *Chisholm* was introduced in Congress only two days after the Court issued its decision. RICHARD H. FALLON, JR., ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 978–79 (5th ed. 2003). Or at least this is the common story. *But see id.* at 979 n.2 (summarizing diverse interpretations of the public reaction to *Chisholm*, including scholarship which suggests that the reaction was fairly muted). In its final form, the Eleventh Amendment states: “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the



statement does not begin to capture the nuance of the Court's Eleventh Amendment doctrine, it is a fair enough summary of how the Court came to interpret the Amendment over time.<sup>53</sup> The problem is that the Fourteenth Amendment by its terms is a direct command to the States, and Section 5 of that Amendment allows for congressional enforcement. What then to do if Congress, pursuant to its Section 5 power, opens States up to claims for money damages in the federal courts? Is such legislation valid under the Fourteenth Amendment, or invalid under the Eleventh Amendment?

When confronted with the question in *Fitzpatrick v. Bitzer*, the Court adopted a sort of last-in-time rule for constitutional interpretation, at least as it applied to this particular issue. As the Court explained:

But we think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.<sup>54</sup>

This interpretation might seem entirely sensible. Not only did the Fourteenth Amendment follow the Eleventh, but—as the Court indicates—the Fourteenth Amendment was adopted in a nationalistic environment quite different from the states' rights feelings that motivated the Eleventh Amendment.<sup>55</sup> Radical Republicans frequently pointed to the war as changing the basic assumptions underlying the federal system. "I had in the simplicity of my heart, supposed that 'State rights' being the issue of the war, had been decided," declared

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United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

<sup>53</sup> See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 205–06 (3d ed. 2006) (discussing how Eleventh Amendment jurisprudence has been guided, in part, by the Supreme Court's concern about federal courts forcing state governments to pay money damages).

<sup>54</sup> 427 U.S. 445, 456 (1976) (citation omitted).

<sup>55</sup> *Id.* at 454–56 (drawing on a line of cases in which the Court viewed the Civil War Amendments as intended to limit the power of the States and enlarge the power of Congress).

the Radical Republican Richard Yates of Illinois in Congress in 1866.<sup>56</sup> Another Radical colleague agreed: “[h]itherto we have taken the Constitution in a solution of the spirit of State rights. Let us now take it as it is sublimed and crystallized in the flames of the most gigantic war in history.”<sup>57</sup>

And, indeed, this notion that national rights trumped state powers played a powerful role in resolving interpretive tensions between the Eleventh and Fourteenth Amendments that were regularly presenting themselves during the Gilded Age and the *Lochner* era that followed. For example, at the turn of the nineteenth century States adopted regulatory measures—such as ceilings on railroad rates—that many private interests believed contravened Fourteenth Amendment guarantees. Those interested sued in federal court to restrain state legislation, naming state officials as defendants.<sup>58</sup> Once again, these state officials demurred, arguing they were immune from suit under the Eleventh. *Ex parte Young*, for example, involved a titan clash between railroad interests that sought access to the federal courts to challenge rate regulation, and the State of Minnesota, which preferred to litigate in its own courts.<sup>59</sup> *Young*, the Attorney General of the state, said he could not be sued as a proxy for the state, offering up the text of the Eleventh Amendment, prior precedents, and the general logic of federalism.<sup>60</sup> But the district judge in the case, ruling *Young* indeed could be sued, said that logic compelled understanding the Fourteenth Amendment as trumping the Eleventh in this situation. “There must be some way to enforce that provision of the Constitution,” he said, referring of course to the Fourteenth Amendment.<sup>61</sup> The decision was affirmed by the Supreme Court, in an opinion that simply rested on the now-famous fiction that “the sovereignty of the State” was not really involved “where the state official . . . is about to

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<sup>56</sup> CURTIS, *supra* note 40, at 55 (quoting CONG. GLOBE, 39th Cong., 1st Sess. app. 99 (1866)).

<sup>57</sup> CURTIS, *supra* note 40, at 48 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 163 (1866)).

<sup>58</sup> *See, e.g.*, *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362 (1894) (upholding an injunctive suit against the state attorney general and the railroad commission regarding rates); *Pennoyer v. McConnaughy*, 140 U.S. 1 (1891) (allowing a suit against a state official regarding the constitutionality of a land use regulation).

<sup>59</sup> 209 U.S. 123 (1908). *See generally*, Barry Friedman, *The Story of Ex parte Young*, in *FEDERAL COURTS STORIES* (Vicki Jackson & Judith Resnik eds., forthcoming 2009) (giving a historical background to the case and noting that its “implicit message” is that “when a state law is challenged as unconstitutional, adjudication of the constitutionality of that law ought not to be left to the state courts”).

<sup>60</sup> *Ex Parte Young*, 209 U.S. at 132.

<sup>61</sup> *Perkins v. N. Pac. Ry. Co.*, 155 F. 445, 447 (C.C.D. Minn. 1907).

commence suits, which have for their object the enforcement of an act which violates the Federal Constitution.”<sup>62</sup>

In truth, though, the Court hardly hewed closely to its last-in-time view of constitutional interpretation, even with regard to the Eleventh and Fourteenth Amendments. Rather, throughout the Gilded Age, reconciling the two provisions gave the Court fits in ways that still make coherent interpretation of the case law difficult today. In one sense the problem the Court faced was posed by the Eleventh Amendment’s relationship to the body of the Constitution that preceded it. Article I, Section 10 of the original Constitution contains the Contracts Clause, which prohibits States from impairing the obligations of contracts. When, in the years after Reconstruction, many states and municipalities were sued for refusing to pay their own debts, they frequently raised Eleventh Amendment defenses to those actions.<sup>63</sup> But critics argued that that the Eleventh Amendment itself was an invalid change to the Constitution precisely because it could not be squared with the Contract Clause of Article I.<sup>64</sup> How could one enforce contracts, critics asked, if there was allowed no suit in (federal) court to do so? The Eleventh Amendment, the editors of the *Nation* suggested in 1879, “has been a standing reproach to the nation ever since, inasmuch as it has been a continuous cover for flagrant injustice.”<sup>65</sup> Although the Supreme Court never explicitly accepted the argument that the Eleventh Amendment altered the Contracts Clause in some unacceptable way,<sup>66</sup> anyone familiar with the odd course of Eleventh Amendment jurisdiction knows well that implicitly the thrust of the argument proved somewhat persuasive. Accordingly, the Court rendered interpretations of the Eleventh

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<sup>62</sup> *Ex Parte Young*, 209 U.S. at 167.

<sup>63</sup> See JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* 58 (1987) (noting that Louisiana and North Carolina together repudiated debts of twenty-seven million dollars).

<sup>64</sup> *Id.* at 66–67 (noting that maligned bondholders who brought suit under this theory were unable to overcome the Eleventh Amendment bar); see *Cunningham v. Macon & Brunswick R.R. Co.*, 109 U.S. 446 (1883); *Louisiana v. Jumel*, 107 U.S. 711 (1883).

<sup>65</sup> *The Federal Judiciary and the Repudiators*, 705 *NATION* 5 (1879) (asserting that “[n]othing could be more unfair in practice or reprehensible in principle. . . . [The Eleventh] amendment impaired the symmetry of the Constitutional plan as first adopted. . . . At this day, by reason of it, there are obligations of States, issued under their broad seals, outstanding to the amount of one hundred and eighty millions of dollars that are dishonored, and no legal remedy exists to their injured holders.”).

<sup>66</sup> In fact, the idea that the Constitution simply cannot be amended in particular ways never has gained as much attention in the United States as it has abroad. For example, the German Constitution makes certain provisions unamendable. Vicki C. Jackson, *Constitutions as “Living Trees”? Comparative Constitutional Law and Interpretive Metaphors*, 75 *FORDHAM L. REV.* 921, 933 n.47 (2006).

Amendment that permitted suits in federal court over government debts, for example by holding that the Amendment applied to States but not state officials, or by concluding that States could not be sued, but municipalities could.<sup>67</sup> Thus, later-in-time amendments apparently can be ignored when inconvenient or difficult to reconcile with pre-existing constitutional ideals.

Conversely, the Court has been willing to find the original text altered even when no later text clearly did so, an issue brought to the fore by the Court's gender equality decisions. As we have seen, women's equality was hardly the goal of the framers of the Fourteenth Amendment.<sup>68</sup> Yet, the Court in *United States v. Morrison* relied on cases like *Reed v. Reed* and *Craig v. Boren* for its now apparently unchallengeable position that the Fourteenth Amendment does cover discrimination against women.<sup>69</sup> However, just as the Court was rendering decisions like *Reed v. Reed*, *Frontiero v. Richardson*, and *Craig v. Boren*, drawing women into the equal protection fold, the country was outright rejecting the Equal Rights Amendment, which would have done so explicitly. The Court's decisions are remarkably silent as to how this transformation in the constitutional meaning of the Fourteenth Amendment came to pass. *Reed* plausibly applies the general mandate of equal protection to a case of gender discrimination, and says little else.<sup>70</sup> By *Craig*, though, the Court was plainly applying heightened scrutiny to such claims of gender equality—a scrutiny that after decisions like *VMI*<sup>71</sup> and *Mississippi School for Women*<sup>72</sup> may indeed be strict—with no explanation of what changed the Constitu-

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67 See *Lincoln County v. Luning*, 133 U.S. 529 (1890) (holding that the Eleventh Amendment does not prohibit a suit against a county); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 857–58 (1824) (holding that the Eleventh Amendment does not bar suit against state officers).

68 See *supra* notes 13–16, 24 and accompanying text.

69 529 U.S. 598, 620 (2000) (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996) [hereinafter *VMI*] and *Craig v. Boren*, 429 U.S. 190, 198–99 (1976), as part of case law establishing that gender discrimination violates the Equal Protection Clause unless it “serves ‘important governmental objectives and . . . the discriminatory means employed’ are ‘substantially related to the achievement of those objectives’”).

70 *Reed v. Reed*, 404 U.S. 71, 76 (1971) (stating that “[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment”).

71 518 U.S. 515 (holding that the Virginia Military Institute's male-only admissions policy violated the Equal Protection Clause).

72 *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (holding that it was violative of the Equal Protection Clause to deny men admission to an all-female nursing school).

tion since the adoption of the Fourteenth and the failure of the Equal Rights Amendment.<sup>73</sup>

Reva Siegel has provided an explanation for the gender equality decisions, which is rooted at least in part in clause integration.<sup>74</sup> Siegel's primary argument rests in the success of social movements' claims for women's equality, an interpretive technique with which I have considerable sympathy. Still, she recognizes the benefits if not the necessity of having an available constitutional text, and she has one to which she can point: ratification of the Nineteenth Amendment, extending the franchise to women.<sup>75</sup>

Not everyone will buy the argument that the Nineteenth Amendment amended the Fourteenth, thereby expanding the mandate of the latter into the area of women's equality. But some explanation is needed for the well-accepted conclusion of the *Morrison* Court. Originalists in particular need an argument on this point, but they are largely at sea in explaining the equality decisions.<sup>76</sup> Indeed, there is not really an originalist theory of constitutional integration of any sort.

### C. *Rejecting Constitutional Amendments*

For the most part, constitutional interpreters seem to favor a methodology that constructs a straight story from the adoption of constitutional text to the present, with few deviations in meaning. All recognize, of course, that there have been detours from the one true path—no matter how that path is defined. Liberals tend to believe the *Lochner* era was one such, with the correct course re-established

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<sup>73</sup> In *Craig*, the Court relied primarily on *Reed v. Reed* and subsequent cases to justify heightened scrutiny; although the Court condemned “archaic and overbroad” generalizations about the sexes, it did not root this objection in either constitutional text or original understanding. 429 U.S. at 198.

<sup>74</sup> Siegel, *supra* note 17, at 966 (defining the method of synthetic interpretation as “interpret[ing] one clause or provision in light of another—attending especially to relations among different parts of the Constitution as they are interpreted or amended over time”).

<sup>75</sup> *Id.* at 949–51.

<sup>76</sup> Originalist scholars often fall back on the argument that sex discrimination is *similar* to race discrimination. For example, Steven Calabresi argues that sex can be viewed as a “caste” for discrimination purposes in his article *The Fourteenth Amendment and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097, 1120–21 (2004). Taking a different approach, John Harrison hints that the Privileges and Immunities Clause could be used to protect against sex discrimination in *Reconstructing the Privileges or Immunities Clause*, *supra* note 26, at 1460–61.

after the New Deal fight.<sup>77</sup> Some conservatives, on the other hand, see the New Deal settlement itself as a departure from the original constitutional meaning.<sup>78</sup> The general point, though, is that in interpreting the Constitution, deviation is to be minimized; a coherent story should be told from start to finish, and over-rulings of Supreme Court decisions should be relatively few.

Unfortunately, that's not how it is with actual American constitutional history, which often has charted a more winding course in which even foundational moments can be rejected at a later time. Reconstruction stands as paradigmatic here. Not long after the adoption of the Civil War Amendments, and much embellishment of them in statutory text, the country lost its patience with the entire endeavor. It turned its back on the freedmen, and on most of the commitments to them that had been extended during the tumultuous years following the Civil War.<sup>79</sup>

Commonly employed interpretive methodologies find it difficult to grapple with such sharp turns in the constitutional path. There is one sentence in *United States v. Morrison* that is remarkable in this regard. Justifying the state action requirement that spells the death to the private right of action under the Violence Against Women Act, the Court states that “[s]hortly after the Fourteenth Amendment was adopted, we decided two cases interpreting the Amendment’s provisions,” one of which was *The Civil Rights Cases*, 109 U.S. 3 (1883).<sup>80</sup> And that case, explained the Court, barred legislation under the Fourteenth Amendment aimed at private conduct.<sup>81</sup>

The Court’s “shortly after” claim is breathtaking in its disregard of actual historical events. The *Civil Rights Cases* came the better part of a generation after ratification of the Fourteenth Amendment.<sup>82</sup> During that fifteen-year period, it is fair to say that political ideals in the United States were turned on their head as much as virtually any other period in history.

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77 See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 259 (1998) (exploring the idea that “the New Deal Court was simply reestablishing itself in the main stream of American constitutional law”).

78 See, e.g., Richard A. Epstein, *The Mistakes of 1937*, 11 *GEO. MASON U. L. REV.* 5, 7–12 (1988) (critiquing post-1937 Commerce Clause jurisprudence as “tragic”).

79 For an account of this, claiming that the rejection of Reconstruction could be considered its own constitutional “moment,” see Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 *CONST. COMMENT.* 115 (1994). For Bruce Ackerman’s response, see ACKERMAN, *supra* note 77, at 471 n.126.

80 *United States v. Morrison*, 529 U.S. 598, 621 (2000).

81 *Id.*

82 The Fourteenth Amendment was ratified in 1868, while the *Civil Rights Cases* were decided in 1883. 109 U.S. 3 (1883).

Between the onset of Reconstruction and the Gilded Age that followed, rapid social change caused the country to turn its back on the original commitments of the Civil War Amendments with startling speed. The Civil War jump-started America's industrial revolution, altering forever the nature of economic life in the United States. In the middle of all this economic transition, the Crash of 1873—occasioned by a severe tightening of credit when the banking house of Jay Cooke failed—left the country in dire economic straits.<sup>83</sup> By the time of the disputed Hayes-Tilden election of 1876, the country had altogether tired of the expense and effort required to protect the freedman, and was ready for an entirely new course. "We have tried . . . constant partisan intermeddling from Washington and bayonets *ad lib*. The malady," explained the Springfield *Republican*, "does not yield to the treatment. Let us now try . . . a little vigorous letting alone."<sup>84</sup> Hayes's victory was a negotiated deal that allowed the Republicans to hold the White House so long as military control of the South came to an end. Reconstruction was not only over by 1877, but the state of affairs on the ground was moving quickly to reverse its course. Redeemer governments in the South harshly oppressed blacks, driving them from office, depriving them of the franchise, and snuffing out the promise of Reconstruction.<sup>85</sup> By the 1890s the job was done. The 1896 decision in *Plessy v. Ferguson*,<sup>86</sup> in which the Supreme Court gave its imprimatur to State-enforced racial apartheid, ran comfortably in the current of a sharply-altered understanding of what Reconstruction was supposed to accomplish.

This sharp change of sentiments was echoed time and again in popular "huzzahs" as the Court dismantled Reconstruction. Even as the Congress was debating the Civil Rights Act of 1875, the *Chicago Tribune*, which had supported abolition during the war, was asking "Is it not time for the colored race to stop playing baby?"<sup>87</sup> In 1875, the Court decided *United States v. Cruikshank*, involving criminal prosecutions by the federal government of those responsible for the slaughter of several hundred blacks in the fight for political control of Louisiana.<sup>88</sup> The Court overturned the convictions, adopting a very

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83 See generally ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 512–63 (1988) (describing the economic depression that began in 1873).

84 REPUBLICAN, Jan. 11, 1875, quoted in WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION, 1869–1879, at 280 (1979).

85 See FONER, *supra* note 83, at 588–98 (detailing the various methods used to dismantle the Reconstruction state and subordinate blacks).

86 163 U.S. 537 (1896).

87 *The Nigger School*, CHI. TRIB., June 8, 1874, at 4.

88 *United States v. Cruikshank*, 92 U.S. 542 (1875).

limited view of Congress's powers under the Fourteenth and Fifteenth Amendments.<sup>89</sup> Another journal with abolitionist roots, New York's *Independent*, responded to the Court's decision in *Cruikshank* saying "[t]o assume State powers as the method of punishing and preventing wrong in the States would be an experiment with our political system that had better be omitted. . . . Southern questions . . . must be left to the States themselves . . . ."<sup>90</sup> When, in the 1883 *Civil Rights Cases*, the Court invalidated the Civil Rights Act of 1875, the *New York Times* joined most of the popular press in commending the Justices: "The judgment of the court is but a final chapter in a history full of wretched blunders, made possible by the sincerest and noblest sentiment of humanity . . . ."<sup>91</sup>

The practical undoing of Reconstruction poses a further challenge today because with it came a swift return to antebellum federalist principles. Decisions limiting the impact of the Civil War Amendments and accompanying legislation were necessary, the Court explained, because the framers of the Reconstruction Amendments simply had not intended to alter the settled understandings of national-state relations. The *Slaughterhouse* Court rejected the butcher's claims, saying to do otherwise "radically changes the whole theory of the relations of the State and Federal governments to each other and of both those governments to the people."<sup>92</sup> In the *Civil Rights Cases*, the Court announced that the Fourteenth Amendment did "not invest Congress with power to legislate upon subjects which are within the domain of State legislation."<sup>93</sup>

To present the *Civil Rights Cases* as a contemporary interpretation of the Fourteenth Amendment, therefore, as the Court did in *Morrison*, is simply little disingenuous. It is difficult to understand it as anything other than a reflection of the impulse to tell constitutional history in a straight path. Rather than persuading knowing readers on this count, however, the decision in *Morrison* starkly demonstrates the difficulty posed in interpreting the Fourteenth Amendment today.

The question is what one does with constitutional principles—let alone constitutional text—that the country subsequently rejects. Re-

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89 *Id.* at 555–56 (stating that the Fifteenth Amendment was not implicated and declaring that the Fourteenth Amendment duty to protect equal rights "was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right").

90 *INDEPENDENT*, Apr. 6, 1876, *quoted in* 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY 1836–1918*, at 605 (rev. ed. 1926).

91 *The Rights of Negroes*, *N.Y. TIMES*, Oct. 18, 1883, at 4.

92 83 U.S. (16 Wall.) 36, 78 (1872).

93 *Civil Rights Cases*, 109 U.S. 3, 11 (1883).



construction is hardly the only example of the phenomenon, but it is a telling one.<sup>94</sup> Originalists might argue, consistently with their general methodology, that undoing constitutional text requires more constitutional text.<sup>95</sup> Thus, the era of Prohibition ushered in with the Eighteenth Amendment properly was toppled by the Twenty-first. But Reconstruction, having not ever been formally undone, remains as it was.

#### D. *Constitutional Revisionism*

It is not quite that simple, though. Originalists no doubt would deny that their methodology was intended to lead to any specific outcomes, and would insist that they interpret according to their canons and the chips fall where they may. Underscoring the point, there certainly are originalists—Randy Barnett comes to mind—who have read original moments in ways that are not entirely congruent with the generally conservative philosophy of originalism.<sup>96</sup> Nonetheless, it is a fact that originalism and conservatism often are fellow travelers, and no doubt originalism is attractive to many conservatives precisely because it seems to render results consistent with ideological commitments. There is nothing illegitimate about this; cognitive coherence typically implies adopting theoretical understandings that comport with one's priors as to appropriate results. As will be apparent, however, if the historical aftermath of Reconstruction is taken seriously, originalist interpretations are likely to diverge from certain conservative ideological commitments. In short, one cannot necessarily have one's methodological cake and eat it too.

For many originalists, the “switch in time” that followed Roosevelt's threat to pack the Supreme Court in 1937, and much of what happened thereafter to grant Congress virtually unlimited control over the economy, was a betrayal of originalist constitutional under-

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<sup>94</sup> Another significant example occurred in the years leading up to 1937, when the country forced the Supreme Court to abandon long-standing notions of limited congressional powers in the economic realm, yet another signal that prevalent understandings of American federalism had undergone a sea change. See FRIEDMAN, *supra* note 25, at ch.7.

<sup>95</sup> See, e.g., Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 686–87 (2006) (arguing that the text is far more relevant than precedent); McConnell, *supra* note 79, at 143 (arguing that without a textual amendment, “the courts cannot know whether a constitutional moment has taken place until after they have acquiesced in it”).

<sup>96</sup> For example, Barnett's understanding of the Fourteenth Amendment as providing stronger and more expansive liberty protections has been dismissed by another originalist as “faulty.” Calabresi, *supra* note 19, at 3.

standings about congressional power and federalism.<sup>97</sup> To be sure, most originalists are not kamikazes. Robert Bork, for example, has conceded that as much as he may disapprove of the post New Deal expansion of regulatory authority, we just are not going to turn the clock all the way back.<sup>98</sup> But not all originalists are so sanguine. The Constitution in Exile movement in fact seeks a return to much of the New Deal doctrine.<sup>99</sup> And those originalists who are willing to concede some expansion in federal authority nonetheless disagree with the Court's abandonment of property rights at the same time.<sup>100</sup> In short, most originalists are fans of federalist principles that would limit national authority and empower the States. And they believe in the protection of property rights.

The difficulty is that the "original understanding" to which these originalists would return is itself highly dubious at best if not wholly fictive. It is far more a product of post-Reconstruction revisionism than of any original Founding moment. And that revisionism is Janus-faced: while it might support certain property-rights claims of conservatives, it does so at the expense of their more general reliance on principles of federalism in limiting national power.

The cases decided by the Supreme Court in the immediate aftermath of the adoption of the Reconstruction Amendments granted little protection for property rights. In 1873, in the *Slaughterhouse Cases*, the Court made a point of saying the Fourteenth Amendment was about protecting the rights of the freedmen, and it strongly rejected a claim by New Orleans butchers that a Louisiana law creating a butchering monopoly violated their Fourteenth Amendment rights.<sup>101</sup> Evoking the words of Justice White in *Bowers v. Hardwick*, one might say that the *Slaughterhouse* Court found claims of this sort of protection of property rights under the Fourteenth Amendment altogether

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97 See e.g., Epstein, *supra* note 78 (criticizing the change in constitutional interpretation that began in 1937); Bernard H. Siegan, *Rehabilitating Lochner*, 22 SAN DIEGO L. REV. 453 (1985) (examining the legislative history of the Fourteenth Amendment and concluding that *Lochner* was consistent with the framers' intent).

98 See BORK, *supra* note 19, at 216 ("[T]he consolidation of all power at the federal level is too firmly entrenched and woven into our governmental practices and private lives to be undone.").

99 See Douglas H. Ginsburg, *On Constitutionalism*, 2002-2003 CATO SUP. CT. REV. 7 (criticizing the Court's expansive reading of the Commerce Clause and urging the revival of the nondelegation doctrine); Jeffrey Rosen, *Justice Thomas's Other Controversy*, N.Y. TIMES, Apr. 17, 2005, at E44 (quoting Constitution in Exile defender Michael Greve: "I think what is really needed here is a fundamental intellectual assault on the entire New Deal edifice.")

100 BARNETT, *supra* note 26, at 222-23.

101 83 U.S. (16 Wall.) 36, 72-73 (1872) (stating that the main purpose of the Reconstruction Amendments was to protect people of African descent).

“facetious.”<sup>102</sup> In *Munn v. Illinois*, in 1877, the Court gave way a little bit: it suggested that state regulation of property might be subject to some challenge under the Fourteenth Amendment, but not so if the property was devoted to the “public interest.”<sup>103</sup> The Court endowed the term “public interest” with such a capacious meaning, however, including within it railroads and grain elevators, that the majority opinion elicited a strong dissent from that longtime advocate for property rights Stephen Field.<sup>104</sup> But the *Munn* majority was non-plussed: “For protection against abuses by legislatures the people must resort to the polls, not to the courts.”<sup>105</sup>

Over the next fifty years or so, though, the Fourteenth Amendment experienced a remarkable revival, not to help the freedmen, but as a vehicle for the protection of property interests. One can explore this expansion of the Fourteenth Amendment’s jurisdiction with an internal (doctrinal) story or an external (political) one, but the upshot was the same either way.<sup>106</sup> By the turn of the twentieth century the clauses of the Fourteenth Amendment that initially had been closed off to property rights and corporate interests by the *Slaughterhouse* and *Munn* Courts were wide open for business, which was bustling. During the Gilded Age and Progressive Era, the Supreme Court went on a binge of striking down state laws to further the interests of property and capital.<sup>107</sup> Their weapons were varied, among them the Dormant Commerce Clause, substantive due process under the Fourteenth Amendment, and a sort of common law constitutionalism that was applied in diversity cases and cases on direct review. The lower federal courts became a congenial home for

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102 See *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986).

103 *Munn v. Illinois*, 94 U.S. 113, 125–26 (1877).

104 *Id.* at 140 (Field, J., dissenting) (“If this be sound law . . . all property and all business in the State are held at the mercy of a majority of its legislature.”)

105 *Id.* at 134 (majority opinion).

106 For an exploration of both types of stories, see generally SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Cornell W. Clayton & Howard Gillman, eds., 1999).

107 See FRIEDMAN, *supra* note 25, at chs. 5–6 (describing how the Court struck down many state laws during this period); Michael G. Collins, *Before Lochner—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1272–79 (2000) (discussing how the Court’s invalidation of state business regulations through general constitutional law in diversity suits, *see, e.g.*, *Gelpcke v. City of Dubuque*, 68 U.S. 175 (1863), paved the way for *Lochner*-era invalidation of economic regulations on Fourteenth Amendment grounds, *see, e.g.*, *Lochner v. New York*, 198 U.S. 45 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897)).

corporations seeking protection from state regulation and private suitors.<sup>108</sup>

The difficulty, of course, lies in justifying this activism by the federal courts in the name of property rights. There is a body of historical scholarship that ties these decisions—at least the substantive due process ones—to the Constitution, largely by arguing that the Fourteenth Amendment itself incorporated the “free labor” ideology of the antebellum era.<sup>109</sup> These “*Lochner* revisionists” thus seek to explain how the now-reviled decisions of the *Lochner* era actually had a firm basis in pre-existing jurisprudence. Although the *Lochner* revisionists are surely correct that the *Lochner* era decisions had jurisprudential roots in the Gilded Age, there still is room to question whether they necessarily can be tied to the original understanding of the Fourteenth Amendment.

For present purposes, though, the important point is that no matter where one comes down on the question of the legitimacy of substantive due process in service of property rights, it is extremely difficult to bless the property rights doctrine as an originalist matter and still hold firm to antebellum understandings of federalism. The Gilded Age Court was wildly admired by business and property interests for what it was doing to preserve the sanctity of property under the Constitution. The Court plainly did so, however, at the expense of state autonomy and constitutional federalism. The opponents of the Gilded Age Court were themselves the ones interested in protecting states’ rights. They frequently denounced the Court for trampling on state sovereignty.<sup>110</sup>

By the time of the Supreme Court’s fight against the New Deal, though, the Supreme Court was adopting both a pro-property rights

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108 See FRIEDMAN, *supra* note 25, at ch.5 (discussing the federal judiciary’s relative friendliness to corporations, as compared to state judiciaries); Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 519 (2002) (describing how business interests flocked to the federal courts).

109 For an overview of *Lochner* revisionism, see Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1397–1402 (2001); see also William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 783 (“[T]he abolitionist talked about the freedom of the Northern worker in terms of self-ownership, that is, simply not being a slave, being free to sell his own labor.”).

110 See *Current Topics*, 18 CENT. L.J. 281, 282 (1884) (declaring that no one but those representing corporate interests “can look upon this invasion of the domain of the State judiciary with any thing but regret”); *Notes*, 27 AM. L. REV. 382, 396 (1893) (charging the judges who decided *Gelpcke* with “plain usurpation”); William M. Meigs, *Decisions of the Federal Courts on Questions of State Law*, 8 S. L. REV. 452, 478 (1882) (calling *Gelpcke* “a most radical departure from precedent and principle”).

interpretation of the Fourteenth Amendment, and a vision of federalism as a limit on congressional power. As my colleague William Nelson once put it to me, the New Deal was the first time in history that the Court was forced to choose between business and the federal government. It chose the former and the rest is history. (As the Court ultimately learned, it is not wise to bite the hand that sustains you.) This period, prior to the Court's "switch" in 1937 and thereafter, is precisely the time to which originalists would like to return.

Bruce Ackerman provides an argument that grounds both property rights and limited state power decisions in the Constitution. He synthesizes the original Founding and Reconstruction to arrive at the conclusion that *Lochner* era protection of property rights was appropriate, because those rights are found in the original Constitution and Reconstruction properly is interpreted to require a nationalist protection for all such rights.<sup>111</sup> On the other hand, he says, Reconstruction did not alter the scope of national power generally when constitutionally-protected rights were not at issue, so that next shift had to wait until the New Deal.<sup>112</sup>

Originalists undoubtedly will cotton to Ackerman's thesis—but only the first two-thirds of it! Ackerman famously goes on to argue that when it comes to the question of national power, the New Deal—and particularly the Court fight—signaled a national referendum in favor of what was effectively an amendment to the Constitution to give Congress much broader sway in the economic realm.<sup>113</sup> Originalists are hardly excited to sign on to this aspect of Ackerman's theory, which recognizes a momentous constitutional change occurring without textual amendment. As noted above, most originalists seem willing to concede the impossibility of returning to a pre-New Deal understanding of national power, even though on methodological grounds they cannot agree that a non-textual amendment actually altered the Constitution.

Ackerman's "one-two synthesis" is provocative and has a lot to it, but it is a little bit too tidy to really unite originalist methodology and conservative views of constitutional meaning. Even if one acknowledges that the Constitution was changed during Reconstruction in just the way he says, i.e., to nationalize certain rights, Ackerman also recognizes that the country turned its back on those commitments

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111 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 100–01 (1991).

112 *Id.* at 102–03.

113 ACKERMAN, *supra* note 77, at 279–311.

shortly thereafter.<sup>114</sup> How can we be so certain that the country rejected only part of the original meaning of the Reconstruction Amendments and not all of it? As we already have seen, in 1873 the *Slaughterhouse* Court narrowly interpreted the Fourteenth Amendment to exclude from its ambit precisely those sorts of property claims that would become dominant in the later years.<sup>115</sup> Yet, *Slaughterhouse* was met with plaudits from the country at large.<sup>116</sup> So why did the entire notion of nationalized rights not crumble as Reconstruction did? Further, when the Court did begin to recognize Fourteenth Amendment property rights claims in the coming decades, there was a hue and cry about it precisely because those decisions held insufficient regard for state autonomy.<sup>117</sup>

As a matter of fact, originalists seem split on whether Ackerman's account of the Gilded Age even is correct. Some, those who put large stock in property rights, appear to agree.<sup>118</sup> But many others, perfectly cognizant of the fact that those decisions were grounded in substantive due process—the same vehicle that protects abortion rights and the rights of homosexuals—demur. Robert Bork, for example, attacks *Lochnerizing* relentlessly, though Ackerman would defend it on originalist grounds.<sup>119</sup>

My own view is that the story is more textured, and—accordingly—difficult to interpret as justifying either Ackerman's or the originalists' "one-two" synthesis. Following the collapse of Recon-

114 *Id.* at 471–74 n.126 (recognizing that American institutions increasingly failed to protect black Americans after Reconstruction but rejecting McConnell's claim that this back-turning constituted a constitutional moment of its own).

115 *See supra* note 101 and accompanying text.

116 *See* WARREN, *supra* note 90, at 543–46 (documenting broad support among the major newspapers for the Court's decision).

117 *See* Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 966 (1927) ("The Court has acknowledged great regard for the legislatures' conclusions of fact and opinion, but its action often belies its words, and even its own members accuse it of abuse of authority."); *The New York Labour Law and the Fourteenth Amendment*, 21 L.Q. REV. 211, 212 (1905) (criticizing the Court for treating the state legislature as if it were "an inferior court which has to give affirmative proof of its competence").

118 *See, e.g.*, BARNETT, *supra* note 26, at 253–54 (advocating equal protection of enumerated and unenumerated rights); David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469 (2005) (placing *Lochner* in historical context); Epstein, *supra* note 78, at 13–18 (pointing out the significance that *Lochner* concerned freedom of contract); Siegan, *supra* note 97 (explaining the historical background to *Lochner* and stating that the case was consistent with an original interpretation of the Constitution).

119 BORK, *supra* note 19, at 46–49 (1990) (describing *Allgeyer* and *Lochner* as "unjustifiable assumptions of power"); *see also* Calabresi, *supra* note 19, at 13 ("We must never forget that *Dred Scott v. Sandford*, *Lochner v. New York*, and *Korematsu v. United States* were all substantive due process decisions where the Court was guided by its own twisted ideas about what 'human dignity' required.").

struction, the country's commitment to nationalized rights was not strongly apparent again until the defeat of FDR's Court-packing plan in 1937. One of the chief arguments against Roosevelt's plan was that there were constitutional rights that would be in jeopardy but for the existence of a Supreme Court independent enough to protect them.<sup>120</sup> By then, however, people were thinking primarily of what we today call "civil rights," not property rights.<sup>121</sup> Even that commitment did not really flower until the 1960s. (By the same token, property rights died a sharp death after the New Deal, something Ackerman explains as part of the New Deal non-textual amendment).<sup>122</sup>

The picture is just as confused (or nuanced, depending on how you want to see it) on the federalism side of the equation. The same Gilded Age Court that protected property rights under the Fourteenth Amendment also based many of its pro-business decisions on the Dormant Commerce Clause. This surely was a question of national powers, not rights, of the sort that Ackerman generally would bracket, leaving for resolution in the New Deal years. To be sure, there is a story one can tell of the Gilded Age Justices struggling to find the right balance between state and national authority in a rapidly changing economy. The Court's "original package" cases regarding state authority to limit the importation of alcohol is a good example of this.<sup>123</sup> It also shows the Court trying to navigate its way on a difficult issue of heightened public attention.

The problem for originalists is that these sorts of nuanced stories are grounded as much in doctrinal development—what David Strauss calls common law constitutionalism—and subsequent history as they are in foundational moments.<sup>124</sup> The winding case law departs quite a

<sup>120</sup> See Editorial, *Not Safe for Democracy*, DES MOINES REG., in *Opinions of the Nation's Press on Court Plan*, N.Y. TIMES, Feb. 6, 1937, at 10 (declaring that "executive aggrandizement is not safe for democracy"). See generally FRIEDMAN, *supra* note 25, at ch.7 (describing public concerns about civil liberties in the face of the court packing plan).

<sup>121</sup> See FRIEDMAN, *supra* note 25, at ch.7 (discussing popular concern over civil liberties during the New Deal court fight).

<sup>122</sup> ACKERMAN, *supra* note 77, at 280 (arguing that "*Lochner* is no longer good law because the American people repudiated Republican constitutional values in the 1930's, not because the Republican Court was wildly out of line").

<sup>123</sup> See *Leisy v. Hardin*, 135 U.S. 100, 124–25 (1890) (holding that the Commerce Clause bars Iowa from restricting the sale of imported alcohol that remains in its original package without Congressional authorization). Shortly thereafter, the Court upheld the Wilson Act of 1890, which authorized states to regulate the import of liquor across their borders, *In re Rahrer*, 140 U.S. 545, 562 (1891); the Court later carved out an exception for out-of-state mail-order liquor sales. *Vance v. W.A. Vandercook Co.*, 170 U.S. 438, 452–53 (1898).

<sup>124</sup> See generally David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) (describing the "common law approach to constitutional interpretation"); David Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001)

bit from the original meaning. (Alternatively, sometimes the original meaning is initially obscure, and gets worked out in the intervening years.) The reality is that history does not move in the comfortable forward path that most constitutional interpretation asks of it. There are fits and starts, wrong moves, sharp turns, and serious departures. Legal doctrines and philosophical commitments deemed to go hand-in-hand at the present did not in the past. And still, some sense must be made of it all. The strategy adopted most frequently by constitutional interpreters of all methodological stripes and ideological commitments—including originalism—is of ignoring inconvenient portions of the story, of telling a tale that follows a straight line from what one imagined happened to how one wants things to be. This sort of approach is difficult to square with the messy facts on the ground.

#### *E. The Question of Rebirth*

In 1954, in *Brown v. Board of Education*, the Supreme Court held that segregated public schools violated the Constitution. In resolving the question of segregated schools, the Court said “we cannot turn the clock back to 1868 when the Amendment was adopted.”<sup>125</sup> Yet, in a sense it did. The long chill begun in 1873 with *Slaughterhouse*, confirmed in 1883 with the *Civil Rights Cases*, and ratified in *Plessy* in 1896, had ended. The thaw had been gradual, perhaps, but by the end of the 1950s, and certainly by the 1960s, the “original” Reconstruction commitment to racial equality had experienced a new birth.

In witnessing this rebirth of the country’s commitment to racial equality, one can once again see the apparent impetus of constitutional interpreters to tell a progressive story of constitutional fidelity. As the plurality in *Planned Parenthood of Southeastern Pennsylvania v. Casey* explained, “*Plessy* was wrong the day it was decided.”<sup>126</sup> For what it is worth, this seems to be an impulse shared by the left and right alike. In part because any theory of constitutional interpretation that denies basic equality on the basis of race or gender is untenable, virtually all constitutional interpreters today sanctify the Court’s seminal race and gender decisions, which obviously find some textual support in the Reconstruction Amendments. But though this impetus is understandable, it is not accurate to history to claim any clear continuity

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(arguing that amendments to the Constitution do not largely alter the meaning of the Constitution).

125 347 U.S. 483, 492 (1954).

126 505 U.S. 833, 863 (1992).



from Reconstruction to the present structure of constitutional equality.

The difficulty is that nothing ever is reborn just as it was. It is possible, and at times admirable, to seek a grounding for the present in the past. But to pretend that we simply can return or are returning there is to engage in the most blatant of fictions, one that does a real disservice to who we are as a constitutional polity.

On the one hand, candor requires acknowledging that the country's long deviation from the original understanding of the Fourteenth Amendment imposed enormous disabilities on African-Americans, burdens that themselves influenced the very direction of subsequent American history—political and constitutional. The freedmen were disenfranchised and disempowered through blatant chicanery and bouts of nauseating violence.<sup>127</sup> The Republican Party retained its political hegemony in the aftermath of Reconstruction only at the expense of its breach of faith to the freedmen. To say that the Constitution simply “returned” to its original rails is to deny the path dependence of these intervening events, to say that somehow the constitutional history of the nation runs entirely independently of its political and social history.<sup>128</sup>

By the same token, it would be gross oversimplification to claim that the Court and country are now acting true to the original Fourteenth Amendment. For the very reasons discussed above, at present we are lacking of a clear understanding of what that original understanding even was. We cannot know if such foundational cases such as the *Civil Rights Cases* would have been decided the way they were had not the country turned its back on Reconstruction. All we can do

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127 See generally MICHAEL J. KLARMAN, UNFINISHED BUSINESS: RACIAL EQUALITY IN AMERICAN HISTORY 61–93 (2007) (describing racial discrimination and violence in the South at the end of the nineteenth century and the Supreme Court decisions that followed).

128 Who can say with any certainty what would have been the impact on the country or the Constitution if such disenfranchisement had not occurred? To pick but one example, there is at least some tentative evidence that states that adopted more of the progressives' agenda during the *Lochner* era were those states in a greater portion of the population was enfranchised: not just African Americans, but the poor, and women as well. In turn, in some of the states in which judges struck down these laws on the basis of the Constitution, retribution was taken against the judges. States adopted recalls of judges, of decisions, and supermajority voting requirements. See FRIEDMAN, *supra* note 25, at ch. 6. Conservatives and liberals tell contending stories about what judges were doing during the *Lochner* era, but all agree it was an important time in political and constitutional history alike, with the two interlocking. Yet, had the path of Reconstruction operated uninterrupted, this period may have looked very different.

is make our best effort to reconstruct the original understanding and transpose it to fit an entirely different world.<sup>129</sup>

#### IV. CONSTRUCTING RECONSTRUCTION

Where does this leave us? In closing I'd like to make three points. First, that Reconstruction and its aftermath highlight the difficulty with originalism as an interpretive methodology. Second, that rather than originalism, some synthetic understanding of constitutional history is both necessary and inevitable. Third, that although synthesis is required, the nature of constitutional law, as opposed to constitutional history, requires a backward-looking synthesis, one that accommodates as many of the relevant events and precedents as possible, but nonetheless discards those that simply do not fit. This third point is an ironic one, in that it presents some justification for approaches to constitutional interpretation that insist on seeing constitutional history in a linear way. Yet, as I explain, there is a better way to do this "backward" fitting to a constitutional line.

The first point, regarding the difficulties of originalism, ought to be well-established by this point. Originalism, at least as commonly practiced, tends to be atomistic: what is the original meaning of the Constitution that answers X or Y question we grapple with today? Originalist methodology tends to be bounded in time, as though there was one understanding at time T1, that answers X or Y. But our Constitution has inescapably changed over time. Even if one looks only to alterations in the Constitution's actual text, and seeks the original understanding of those, still there must be a way of integrating those understandings, something originalists have by-and-large failed to do. The real problem is that, even if it could be and were done properly, originalism is unlikely to yield a set of results that is tenable politically and palatable to the conservative impulses of originalists. Generalizing, one ought properly to be skeptical of any interpretive methodology that so consistently seems to yield results favored by any particular political ideology.

The failings of originalism are so vast that it is the staying power of the methodology that begs explanation. But the reasons for this are

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<sup>129</sup> And of course changes in constitutional interpretation over time need not reflect infidelity to the Constitution's original meaning. See generally Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1 (1998) (arguing that the Constitution is best understood as being layered with different interpretations over time); Lawrence Lesig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) (suggesting that interpretation of constitutional text in different historical contexts is similar to an act of translation).

not so very complicated. As Reva Siegel and Robert Post have made clear, originalism is not an interpretive methodology so much as it is an ideology.<sup>130</sup> So long as originalism proves useful to that ideology its appeal will remain. For what it is worth, the movement for original understanding, while fervent, remains small. The American public has surely not bought into the doctrine, and on the Court it resolves few cases. Nonetheless, originalist language gnaws insidiously around the edges, distorting doctrine in troubling ways.<sup>131</sup> One of the real values of focusing on Reconstruction is that given its largely progressive tendencies, the results compelled by an originalist perspective on the Civil War Amendments may serve to undermine the methodology itself. It might collapse under its own weight.

None of this is to say *history* is unimportant. To the contrary, it is difficult to fathom how we could understand either ourselves or our Constitution without recourse to history. And, assuredly, that history essentially includes the foundational moments. But there is a lot of ground between obsessive focus on the foundational moment to the exclusion of all that follows, and an approach that takes all of history into account.

As the history of the Reconstruction Amendments demonstrates, the only real alternative is to adopt a synthetic understanding of the Constitution. One must holistically take account of the entire Constitution. And one must labor to read that document as it has changed over time. Reading in this way requires taking account of both those principles adopted, and those rejected, in the words of Justice Harlan, “what history teaches are the traditions from which it developed as well as the traditions from which it broke.”<sup>132</sup> To take one vivid example, the present commitment to racial equality was not born out of the events of Reconstruction. To the contrary, it had its roots in revulsion to what the rejection of Reconstruction meant, particularly in the Jim Crow South. It is impossible, therefore, to interpret the commitment to equality by looking primarily to 1868, when the rele-

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<sup>130</sup> See generally Post & Siegel, *supra* note 21.

<sup>131</sup> For example, the “reasonable expectation of privacy” test used to review whether police conduct constitutes a search, articulated in *Katz v. United States*, 389 U.S. 347 (1967), has been undercut by originalist decisions, with Justice Scalia leading the way. See, e.g., *Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999) (stating that courts should look first to the common law at the time of the Founding to determine whether a certain type of police search is valid, and then examine modern societal norms only if the originalist inquiry leaves the question unresolved); *California v. Acevedo*, 500 U.S. 565, 581–85 (1991) (Scalia, J., concurring) (arguing against the general warrant rule for searches and in favor of a reasonableness inquiry based on “the protection that the common law afforded”).

<sup>132</sup> *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

vant events are far closer at hand. To take another example, the gradual incorporation of the Bill of Rights against the States was—again—not really a response to the original understanding of the Reconstruction Amendments. Rather, it built upon them but responded to the felt necessities of the post-World War II era, the time in which incorporation primarily occurred.

This sort of synthetic interpretation assuredly presents a wide variety of difficulties. It is not easy to piece together all of American history, which hardly has followed one straightforward path. It is often difficult to distinguish those aspects of history that represent the American people speaking to constitutional norms. Bruce Ackerman addresses this problem with a schematized structure for identifying constitutional moments. The impulse is correct, but constitutional change occurs upon a number of paths, not all of them as dramatic as those “moments” Ackerman pursues. Although the New Deal period certainly represented a time in which Americans came to favor national control over the economy, then and in the coming years the commitment to nationalized rights also grew. A decision like *Gideon v. Wainwright*,<sup>133</sup> guaranteeing counsel to felony defendants, might have been unthinkable prior to the 1960s, but it was met by near-universal acclaim when the Court decided the case in 1963.<sup>134</sup> No constitutional “moment” sanctified *Gideon*; rather, it was the gradual process of constitutional change that any theory of constitutional interpretation must recognize.

Ultimately, though, the most intriguing lesson one can draw from an attempt to make sense of the Reconstruction Amendments is one that, ironically, runs somewhat contrary to the entire thrust of the argument to this point. It rests in the important distinction between understanding constitutional history and fashioning constitutional law. Synthetic though it may be, the enterprise of forging constitutional law necessarily is backward-looking. Constitutional lawyers, as opposed to constitutional historians, do not so much weave our history into a coherent whole as they work in reverse to reconstruct it

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<sup>133</sup> 372 U.S. 335, 344 (1963).

<sup>134</sup> See ANTHONY LEWIS, *GIDEON'S TRUMPET* 147–48 (1964) (discussing how twenty-three States submitted an *amicus* brief on Gideon's side); Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1392 (2004) (noting that all but five States were already providing counsel to indigent defendants when *Gideon* was handed down); Anthony Lewis, *Supreme Court Ruling Steps Up Legal Aid for Poor Defendants: Legislatures, Tribunals and Bar Groups of Many States Are Meeting or Going Beyond Decision to Provide Lawyers*, N.Y. TIMES, June 30, 1963, at 39 (“Reaction to the Supreme Court decision has been almost entirely favorable, even in states that have long resisted a counsel guarantee . . .”).

into a “usable” past. Ackerman captures this in a vivid metaphor in which the constitutional judges sit in the middle of a train, looking backward over the passing terrain, making sense of it as it recedes in the distance, while they decide cases.

In deciding constitutional cases—in making constitutional law—the judges do not have the luxury of fitting every piece of the puzzle, for the very reason that some pieces simply will not fit. They must decide what can be coherently integrated, and what must be rejected or explained away. In a sense they are like empiricists fitting a regression line to a series of data points. The demands of precedent require that the line be fit, even though some of the data points will fall far off it.

There is a difference, however, between this sort of line-fitting, and a methodology that relentlessly seeks to draw a straight line between a foundational moment and the present. For all the reasons set out here, the latter necessarily is artifice: it is impossible to move directly from foundational moments to the present, or in reverse, ignoring all the inconvenient moments that have intervened. The judge or scholar who seeks to synthetically develop constitutional history must take account of as many relevant points as possible. The best understanding of the Constitution is one that integrates most of what of constitutional significance has happened throughout American history. Assuredly there will be moments of sharp deviation that cannot be accounted for fully. But because history is path dependent, even those moments that seem most off the center line will have influenced other data points that do fit the story.

The Constitution we live daily is forged of experience. “[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States,” Justice Holmes explained in *Missouri v. Holland*, “we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.”<sup>135</sup> Referring no doubt to the events that gave rise to the Reconstruction Amendments, which Holmes had witnessed first hand in the line of battle, he continued, “It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation.”<sup>136</sup> Thus, he concluded, with far more wisdom than many interpreters today, “The case before us must be considered in the light of our whole ex-

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135 252 U.S. 416, 433 (1920).

136 *Id.*

perience and not merely in that of what was said a hundred years ago."<sup>137</sup>

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137 *Id.*