

# THE PERSISTENCE OF THE CONFEDERATE NARRATIVE

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INTRODUCTION.....	302
I. RECONSTRUCTION: ANTISLAVERY CONSTITUTIONALISM	
CONCEIVED AND ABORTED.....	309
A. <i>The 1787 Constitutional Order Reconstructed</i> .....	311
B. <i>Early Supreme Court Interpretation: The 1787</i> <i>Constitutional Order Restored</i> .....	313
C. <i>The Competing Interpretation: A New Charter of</i> <i>Freedom</i> .....	322
II. POWER AND THE PEOPLE: CIVIL RIGHTS JURISPRUDENCE	
TESTED BY A PEOPLE’S MOVEMENT.....	325
A. <i>Assigning the “Occasional Unpleasant Task” of Civil</i> <i>Rights Enforcement</i> .....	327
B. <i>Protecting the Enactment of Free Citizenship</i> .....	333
C. <i>Confronting A Sharper Cry for Civil Rights</i> <i>Enforcement</i> .....	340
III. LOST OPPORTUNITIES: THE CONFEDERATE NARRATIVE IN	
MODERN DOCTRINE .....	350
A. <i>The Confederate Narrative Surfaces in a Struggle Over the</i> <i>Separation of Federal Powers</i> .....	351
B. <i>The Confederate Narrative Holds Fast in a Case Involving</i> <i>Gender Subordination</i> .....	353
C. <i>The Confederate Narrative Justifies Voting Rights</i> <i>Retrenchment</i> .....	355
D. <i>Rights of Sexual Minorities Are Affirmed, but the People’s</i> <i>Narrative Goes Unspoken—and the Confederate Narrative</i> <i>Continues to Sound</i> .....	356
CONCLUSION.....	359

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*Ever since the United States was reconstituted after the Civil War, a Confederate narrative of states' rights has undermined the Reconstruction Amendments' design for the protection of civil rights. The Confederate narrative's diminishment of civil rights has been regularly challenged, but it stubbornly persists. Today the narrative survives in imprecise and unquestioning odes to state sovereignty.*

*We analyze the relationship, over time, between assertions of civil rights and calls for the protection of local autonomy and control. This analysis reveals a troubling sequence: the Confederate narrative was shamefully intertwined with the defense of American chattel slavery. It survived profound challenges raised by post-Reconstruction civil rights claimants and by mid-twentieth century civil rights movements. It reemerges regularly to pose questionable but unanswered challenges to calls for national protection of civil rights. Our examination of the Confederate narrative's jurisprudential effects exposes an urgent need to address the consequential but under-recognized tension between human and civil rights in the United States on the one hand and local autonomy on the other.*

#### INTRODUCTION

Two narratives of our country's post-bellum Reconstruction have figured importantly in Supreme Court deliberations about civil rights: a Confederate narrative<sup>1</sup> and a People's narrative. The Confederate narrative is a story in which the states' reunion after the Civil War was a modest reform by which state-sanctioned slavery was ended, but states' rights were virtually unaffected. It is a story grounded in the assumption that People's rights are best

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1. We use the word "Confederate" deliberately though we recognize it may provoke unease. By stating that certain modern Court decisions continue the Confederate narrative, we are not arguing that particular Justices or supporters of particular opinions embrace the racist ideology of the historical Confederacy. We recognize the value of principled defenses of decentralized enforcement power when they are based on careful and context-specific thought about the optimal or just allocation of particular kinds of civil rights decision-making authority. *See, e.g.*, Roderick M. Hills, Jr., *Federalism and Public Choice* 10 (N.Y. Univ. Pub. Law & Legal Theory, Working Paper No. 114, 2009) (arguing that decentralization can improve political "voice"); *see also* Roderick M. Hills, Jr., *Towards a Universal Field Theory of National Private Rights and Federalism*, 76 MONT. L. REV. 41, 52 (2015). We worry, however, about uncritical adherence to the belief that decentralization of government power is, in itself, an enhancement of the people's liberty. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2578 (2012).

protected by limiting federal power and protecting the power and independence of states. The People's narrative is one in which the nation rejected both slavery and its assault on human dignity and altered its slavery-tolerating Constitution to give the federal government power to protect the People's rights. It is a story involving guarantees of national citizenship and national protection of citizens' equal rights.

The states' rights presumption underlying the Confederate narrative has innocent sources: it echoes colonial resistance to British tyranny, and it is bolstered by the psychological residue of times when the perils of distant rule loomed large because interstate communication and travel were so slow and arduous that the nation seemed unworkably large and federal authority could seem unworkably remote. Yet the Confederate narrative is notoriously significant for having protected slave power, undermined the Civil War Amendments, and justified Jim Crow subordination. Indeed, it is now clear that under the banner of state sovereignty state governments were complicit in the surveillance, harassment, and murder of civil rights workers who dared to challenge segregation and white supremacy.<sup>2</sup> Although beaten back for a while during the

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2. The Mississippi State Sovereignty Commission (MSSC) (1954) and the Louisiana State Sovereignty Commission (LSSC) (1960) exemplify states' persecution of civil rights workers under the banner of local sovereignty. Both commissions were reactions to federal mandates to overturn segregation, and particularly to the 1954 and 1955 Supreme Court rulings in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) (holding segregation of public schools unconstitutional) and *Brown v. Board of Education*, 349 U.S. 294, 300 (1955) (calling for desegregation "with all deliberate speed"). Sarah Rowe-Sims, *The Mississippi State Sovereignty Commission: An Agency History*, MISSISSIPPI HISTORY NOW (Sept. 2002), <http://mshistorynow.mdah.state.ms.us/articles/243/mississippi-sovereignty-commission-an-agency-history>. The MSSC and the LSSC espoused states' rights, with a particular focus on maintaining the status quo in race relations. As an LSSC pamphlet proclaimed, Louisiana should "never give up in our fight for the American Way of Life" and "[didn't] have to integrate [its] schools[.]" LOUISIANA STATE SOVEREIGNTY COMMISSION, DON'T BE BRAINWASHED: WE DON'T HAVE TO INTEGRATE OUR SCHOOLS! (1960), available at [http://cds.library.brown.edu/projects/FreedomNow/do\\_search\\_single.php?searchid=10061](http://cds.library.brown.edu/projects/FreedomNow/do_search_single.php?searchid=10061). Sovereignty Commissions and similar bodies invoked the illegitimacy of federal control to downplay the salience of white supremacist ideologies. JENNY IRONS, RECONSTITUTING WHITENESS: THE MISSISSIPPI STATE SOVEREIGNTY COMMISSION 48 (1st ed. 2010). The MSSC characterized the Civil Rights Act as "vicious and tyrannical legislation," *id.* at 139, and Mississippi Governor James P. Coleman argued that the civil rights bills were a violation of "sound governmental principles" that were undermining the division of powers between the federal and state governments. *Id.* at 48. The act creating the MSSC gave the agency broad power to "do and perform any and all acts and things

Civil Rights Movements of the last century, the Confederate narrative and its underlying assumptions about the importance of states' rights persist to this day in discourse hostile to the People's rights.<sup>3</sup>

Although it has had a persistent influence in constitutional discourse, the Confederate narrative rests on a distorted reading of our legal history and encourages a narrow understanding of the rights of constitutional personhood. We therefore advance what we

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deemed necessary and proper to protect the sovereignty of the state of Mississippi, and her sister states" from "encroachment thereon by the Federal Government or any branch, department or agency thereof; to resist the usurpation of the rights and powers reserved to this state and our sister states by the Federal Government or any branch, department or agency thereof." Rowe-Sims, *supra*. Using these broad powers, the MSSC "engaged in wiretapping, bugging, and other acts of espionage against Mississippi citizens[.]" ultimately collecting "dossiers on 'approximately 250 organizations' and . . . 'about 10,000 individual[s].'" JOHN DITTMER, *LOCAL PEOPLE: THE STRUGGLE FOR CIVIL RIGHTS IN MISSISSIPPI* 60 (1994). With that information, the MSSC's agents penetrated the major civil rights organizations, informed police about planned marches or boycotts, encouraged police harassment of African-Americans who cooperated with civil rights groups, obstructed African-American voter registration, and harassed African-Americans seeking to attend white schools. SPIES OF MISSISSIPPI (PBS television broadcast Feb. 10, 2014), <http://proxy.lib.utk.edu:90/login?url=http://fod.infobase.com/PortalPlaylists.aspx?WID=98092&xtid=58663> (access available upon request).

There is evidence that the MSSC was linked to both attempted and executed assassinations. See Kevin Sack, *Mississippi Reveals Dark Secrets of a Racist Time*, N.Y. TIMES, Mar 18, 1998, at A1 (describing an MSSC memorandum indicating MSSC's capacity to arrange the murder of Clyde Kennard, a black man who tried to desegregate Mississippi Southern College.); Phillip Abbott Luce, *The Mississippi White Citizens Council: 1954-1959*, at 90 (1960) (unpublished M.A. thesis, The Ohio State University) (on file at [https://etd.ohiolink.edu/etd.send\\_file?accession=osu1144847499&disposition=inline](https://etd.ohiolink.edu/etd.send_file?accession=osu1144847499&disposition=inline)) (describing MSSC involvement in the shooting of Gus Courts, a black man who refused to withdraw his name from the rolls of registered voters, the assassination of Reverend George Lee, a black voter registration activist, and the lynching of Mack Charles Parker, a black man awaiting trial for the rape of a white woman); *Dr. Horace Germany's Sacrifice—1960-2010*, NEWSWIREHOUSTON (Sept. 1, 2000), <http://newswirehouston.com/dr-horace-germany%E2%80%99s-sacrifice-1960-2010/> (describing an MSSC plan to "kill [a white minister attempting to establish a seminary for black students] and scatter that so-called Bible College to the wind."); see also, Sarah Rowe-Sims & David Pilcher, *Processing the Mississippi State Sovereignty Commission Records*, 21 THE PRIMARY SOURCE 15, 18–23 (1999) (describing the 1977 class action suit that resulted in the opening of the MSSC's files); *Louisiana State Sovereignty Commission*, CIVIL RIGHTS DIGITAL LIBRARY (Dec. 30, 2016), [http://crdl.usg.edu/export/html/mus/sovcomfolders/crdl\\_mus\\_sovcomfolders\\_99-104-0.html?Welcome](http://crdl.usg.edu/export/html/mus/sovcomfolders/crdl_mus_sovcomfolders_99-104-0.html?Welcome) (compiling records collected by the MSSC from correspondence with the LSSC between 1963 and 1967).

3. Contemporary Supreme Court cases that advance the Confederate narrative (wittingly or unwittingly) are examined *infra* in Part IV.

call the People's narrative. This more historically grounded account holds that Reconstruction changed the constitutional balance among federal, state, and people power. Basic civil rights<sup>4</sup>—including the mutually reinforcing rights to be accommodated in public places, to be educated, and to participate in the nation's political life—became privileges of the People, and the federal government became the ultimate judge and protector of those rights.

The Founders' accommodation to human chattel slavery problematized the delineation of human rights. As we will show below, the Confederate insistence on local control has been used to justify slavery, Jim Crow subordination and toleration of the subordination of women and sexual minorities.<sup>5</sup> Union victory in the Civil War and Reconstruction might have established the primacy of human rights over local control. The Thirteenth, Fourteenth, and Fifteenth Amendments and no fewer than five Reconstruction-Era Civil Rights Acts declared the People's rights and gave the federal government power to protect them. Yet as federal authority was asserted, the Confederate narrative was reasserted to valorize local control, and Reconstruction was undone.<sup>6</sup> As historian David Blight has brilliantly shown, the excited post-war celebration of emancipation and of newfound hope for a more egalitarian Union were replaced over time by shock over the war's carnage and persisting belief in white supremacy.<sup>7</sup> As a result, the South was redeemed, and the nation was left with a dominant memory of principled and valiant brothers ending a painful misunderstanding with mutual respect and ponderous questions about the optimal balance of state and federal power.<sup>8</sup> In most of white America, enthusiasm for freedom and equality was lost.<sup>9</sup>

The Confederate narrative's underlying assumptions about history and the proper balance of sovereign power were not

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4. We use the term "civil rights" to include both entitlements specified in the Bill of Rights (like the right of free speech or religious choice) and entitlements (like an individual's right of personal integrity, family autonomy, or public accommodation) that are implicit in our traditions and our commitment to republican democracy.

5. See *infra* Parts II & IV.

6. See *infra* Part II.

7. See *generally* DAVID BLIGHT, *RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY* 1 (2001) (providing a "history of how Americans remembered their most divisive and tragic experience during the fifty-year period after the Civil War").

8. See *id.* at 2.

9. See *id.* at 3.

effectively challenged again until the 1960s. During the 1960s, civil rights protesters renewed the Reconstruction effort to transform popular and official discourse about power and rights.<sup>10</sup> They challenged the dominant dichotomous view that only two powers count when it comes to rights—state versus federal.<sup>11</sup> Civil rights protesters revived a passion about the people’s national citizenship that had been expressed by black Union soldiers when roughly 200,000 members of the United States Colored Troops (USCT) marched “under USCT numerals rather than state designations” as they and their families “established themselves in a new and distinctive relationship with the federal government.”<sup>12</sup> Representing what civil rights activist Robert Moses calls the “Demand Side” of civil rights,<sup>13</sup> civil rights protestors argued that both nation and state exist to protect the People’s rights and interests.<sup>14</sup> The argument for the People’s place in a triangle of power posited the Fourteenth Amendment as a charter of people’s rights.<sup>15</sup> Rejecting Confederate accounts of post-Civil War history that belittled the changes wrought by Reconstruction, civil rights activists called for strong and double-barreled interpretation of the federal and state governments’ simultaneous obligations to the

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10. See Christopher W. Schmidt, *Divided by Law: The Sits-Ins and the Role of the Courts in the Civil Rights Movement*, 33 L. & HIST. L. REV. 93 (2015).

11. *Id.* at 99 (“The student sit-in movement of 1960 was transformative on a number of levels. It reshaped and reinvigorated the struggle for racial equality. The sit-ins marked a new phase of the Civil Rights Movement, one in which mass participatory direct-action protest would become the leading edge of the movement’s demand for social and political change.”)

12. J. Matthew Gallman, *Foreword* to RONALD S. CODDINGTON, *AFRICAN AMERICAN FACES OF THE CIVIL WAR: AN ALBUM*, at ix, xv (2012) (suggesting that as the USCT “marched under the federal flag . . . their ties to the federal government were more explicit than those of their white comrades, who fought almost exclusively in state-numbered regiments.”).

13. *Math as a Civil Rights Issue: Working the Demand Side*, HARV. GAZETTE (May 17, 2001), <http://news.harvard.edu/gazette/story/2001/05/math-as-a-civil-rights-issue/>.

14. Schmidt, *supra* note 10, at 112–13.

15. We borrow the concept of triangulation from Laurence H. Tribe, *Commentary, Triangulating Hearsay*, 87 HARV. L. REV. 957, 957-61 (1973–74). Tribe emphasized the conceptual value of thinking separately but simultaneously about an utterance, the belief of the utterer, and the conclusion the utterance would urge. *Id.* at 958. We emphasize the conceptual value of thinking separately and simultaneously about the possessor of a right and the bodies responsible for defining and enforcing it.

People.<sup>16</sup> Although the Supreme Court often ruled in ways that were favorable to the cause of civil rights, the Court never came to terms with the contradictions between the Confederate narrative and protection of the People's rights.<sup>17</sup>

The Court's failure to confront the Confederate narrative in the manner advocated by 1960s civil rights activists has been consequential. Confederate valorization of local control has quietly reemerged in our modern constitutional discourse. It has surfaced with disturbingly little contestation in cases involving gender-based violence<sup>18</sup> and justifying voting rights retrenchment.<sup>19</sup> The narrative has framed key debates over separation of powers<sup>20</sup> and animated dissent over recognizing the rights of sexual minorities.<sup>21</sup> In each of these contexts, the Court has been encouraged to belittle Reconstruction's significance and utter unquestioning odes to state sovereignty.<sup>22</sup>

The claims set out above rest importantly on our understanding of the concept of narrative. Before elaborating those claims, we pause to explain what we mean by "narrative" and how the concept guides our analysis. We use the term "narrative" in its technical sense. A narrative features "a cast of human-like characters" interacting in a plot.<sup>23</sup> Plots unfold along a timeline where "an initial steady state . . . [is] disrupted by a [t]rouble." The trouble "evok[es] efforts at redress or transformation, which succeed or fail, . . . so that the old steady state is restored or a new . . . steady state is created[.]"<sup>24</sup> Through this simple ordering, narratives construct meaning in a discourse: inexplicable events are reconstructed as straightforward stories; random facts are made coherent; ambiguous statements are reinterpreted as connected propositions.<sup>25</sup> Narrative theory helps explain the discursive meaning of judicial opinions.

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16. Christopher W. Schmidt, *Conceptions of Law in the Civil Rights Movement*, 1 U.C. IRVINE L. REV. 641 (2011).

17. *See infra* Part III.

18. *United States v. Morrison*, 529 U.S. 598, 617 (2000).

19. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2632 (2014).

20. *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997).

21. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2611–26 (2015) (Roberts, C.J., dissenting).

22. *See infra* Part IV.

23. ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 113 (2000) (emphasis omitted).

24. *Id.* at 113–14 (emphasis omitted).

25. *See id.* at 115 (dramatizing a story's ability to be more than "the sheer transfer of information").

Buried within judicial opinions, one can find stories with beginnings (steady states), middles (troubles generating responses), and ends (redress or transformation).<sup>26</sup>

Viewed through a narrative lens, judicial opinions do more than decide concrete disputes between parties and establish abstract principles for deciding future cases. Opinions also rely on and advance narratives that help the author of, and the audience for, the decision to translate abstract ideas into familiar and socially resonant concepts. These narratives are not mere rhetorical flourishes. Long after the holding and precedential rule of the case have evolved, been overturned, or been made irrelevant by the passage of time, the narrative elements of the case will often retain their persuasive power.

We understand the Confederate narrative as an enduring story in which states' sovereignty is the steady state, federal power is the trouble, and squelching federal power is the happy ending. In that telling, states' rights are the doctrinal lodestar or constitutional true north. The People's narrative, on the other hand, is one in which liberty ordered by respect for national human rights norms is the steady state, infringement of that ordered liberty is the trouble, and enforcement of the norms is the happy ending. In that telling, respect for human dignity is the lodestar. In the sections that follow, we trace the alternating power of the Confederate narrative's calls to protect state sovereignty and the People's narrative's calls to protect the people's liberty as a matter of respect for human dignity.<sup>27</sup>

As it happens, the People's narrative has so far found its most fulsome expression in overlooked dissents—especially those of the first Justice Harlan<sup>28</sup> and of Justice Douglas.<sup>29</sup> Justice Douglas once

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26. *See id.* at 113.

27. In our quest to uncover the essential lines of the Confederate and People's narratives, we have benefited from the use of a tool developed by our colleague Colin Starger—the SCOTUS Mapper. *The Supreme Court Mapping Project*, UNIV. OF BALT., (Dec. 13, 2016) <http://law.ubalt.edu/faculty/scotus-mapping/> [hereinafter the SCOTUS Mapper]. This tool helps researchers discover and visually represent the influence of separate opinions in non-unanimous Supreme Court cases. We have mapped the competing lines of cases discussed in this Article using the SCOTUS Mapper. These maps are accessible through the interactive links *infra* in Appendix B or at *The Persistence of the Confederate Narrative*, IN PROGRESS, <http://blogs.ubalt.edu/cstarger/beyond-confederate-narrative/> (last visited Jan. 21, 2017, 9:56 PM).

28. *Hodges v. United States*, 203 U.S. 1, 20–38 (1906) (Harlan, J., dissenting); *The Civil Rights Cases*, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

wrote, quoting Chief Justice Hughes, that “[a] dissent in a court of last resort is an appeal to the brooding spirit of the law[.]”<sup>30</sup> Our account of the ebbs and flows of the Confederate and People’s narratives is thus an account of judicial brooding over time in majority, concurring, and dissenting opinions.

The remainder of the Article proceeds as follows: In Section II, we map the Confederate narrative’s influence on the Court’s early resistance to Reconstruction’s enhancement of federal power, and the emergence of a People’s narrative in the judicial brooding that resistance generated. In Section III, we trace the play of Confederate and People’s narratives in renewed brooding over federal power that was triggered when 1960s civil rights activists revived antislavery ideologies to assert the People’s rights to public accommodation and political participation. Section IV examines more recent opinions and notes the continuing power of the Confederate narrative and the inexplicable silencing of the competing People’s narrative. Section V concludes and offers a resource for readers who wish to continue or critique our inquiry: an interactive “map” of significant cases, statutes, and events discussed in the preceding sections.<sup>31</sup>

#### I. RECONSTRUCTION: ANTISLAVERY CONSTITUTIONALISM CONCEIVED AND ABORTED

The United States Supreme Court has never answered the central constitutional question posed by the Reconstruction Amendments: Did the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments reconstruct the original constitutional order to establish a national charter of civic freedom? Or did they outlaw slavery and reintegrate the former Confederate states without significant change in the People’s rights or the balance of state and federal powers?

Between its 1871 decision in *Blyew v. United States*,<sup>32</sup> when the Court considered for the first time the reach of federal power under

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29. See *United States v. Williams (Williams I)*, 341 U.S. 70, 87 (1951) (Douglas, J., dissenting); *United States v. Williams (Williams II)*, 341 U.S. 70, 92 (1951) (Douglas, J., dissenting).

30. William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. AM. JUDICATURE SOC’Y 104, 106 (1948) (quoting Chief Justice Hughes).

31. See *The Supreme Court Mapping Project*, *supra* note 27. This tool was instrumental in tracing the Confederate and People’s narratives in majority and dissenting opinions across time.

32. *Blyew v. United States*, 80 U.S. 581, 591–95 (1871).

the Reconstruction Amendments, and its 1906 ruling in *Hodges v. United States*,<sup>33</sup> when it unequivocally declined to read the Reconstruction Amendments as granting a markedly greater role for the federal government in the protection of individual rights, the Court issued no fewer than thirteen decisions in which it grappled with the meaning of the Reconstruction Amendments and Congress's power to enforce them.<sup>34</sup> In some of these rulings, the Court conceded that the framers of the Reconstruction Amendments intended at least to invalidate state laws or state actions that explicitly discriminated against African-Americans.<sup>35</sup> Nonetheless, a majority of Justices remained steadfastly unwilling to consider the far more significant question whether the Amendments created new federal rights and federal responsibilities to enforce those rights against both state and private action.

The one remarkable exception is a pair of dissents by Justice Harlan in *The Civil Rights Cases*<sup>36</sup> and in *Hodges*,<sup>37</sup> in which he showed that the Reconstruction Amendments, taken together, created a new national charter of civil freedom belonging to American citizenship, and subject to national enforcement.<sup>38</sup>

In the subsections that follow, we trace the Confederate narrative in the majority's pronouncements between 1871 and 1907 on federal power to delineate and enforce civil rights and then review Justice Harlan's articulations of the People's narrative—both in his well-known dissent in *The Civil Rights Cases*<sup>39</sup> and in his oft-neglected *Hodges*<sup>40</sup> dissent.

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33. *Hodges*, 203 U.S. at 14–15.

34. *Id.* at 1; *Ex parte Yarbrough*, 110 U.S. 651, 664 (1884); *The Civil Rights Cases*, 109 U.S. at 3; *United States v. Harris*, 106 U.S. 629, 636–37 (1882); *Neal v. Delaware*, 103 U.S. 370, 386 (1880); *Ex parte Siebold*, 100 U.S. 371, 373 (1879); *Ex parte Virginia*, 100 U.S. 339, 344 (1879); *Virginia v. Rives*, 100 U.S. 313, 317 (1879); *Strauder v. West Virginia*, 100 U.S. 303, 305 (1879); *United States v. Cruikshank*, 92 U.S. 542, 554 (1875); *United States v. Reese*, 92 U.S. 214, 217 (1875); *The Slaughterhouse Cases*, 83 U.S. 36, 58 (1872); *Blyew*, 80 U.S. at 581.

35. *Ex Parte Yarbrough*, 110 U.S. at 664; *Neal*, 103 U.S. at 397; *Ex Parte Virginia*, 100 U.S. at 345–46; *Rives*, 100 U.S. at 318; *Strauder*, 100 U.S. at 310.

36. *The Civil Rights Cases*, 109 U.S. at 26 (Harlan, J., dissenting).

37. *Hodges*, 203 U.S. at 20 (Harlan, J., dissenting).

38. *Id.*; *The Civil Rights Cases*, 109 U.S. at 36 (Harlan, J., dissenting).

39. *The Civil Rights Cases*, 109 U.S. at 26 (Harlan, J., dissenting).

40. *Hodges*, 203 U.S. at 20 (Harlan, J., dissenting).

*A. The 1787 Constitutional Order Reconstructed*

Victory at Appomattox heralded passage and ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments and passage of a set of legislative measures to support the Reconstruction project. Freedmen Bureau Bills, passed in 1865 and renewed in 1866, attempted to address the welfare of millions of men, women and children “come into a new birthright, at a time of war and passion, in the midst of the stricken, embittered population of their former masters.”<sup>41</sup> More importantly for our purposes, Congress passed four measures to safeguard the rights associated with the citizenship that was now a right of birth in the United States.

First, Congress enacted what we refer to as the Citizenship Act<sup>42</sup> (more commonly known as the Civil Rights Act of 1866) which reiterated the Fourteenth Amendment’s guarantee of birthright citizenship and went on to specify that, regardless of color, citizens had the rights to enter contracts, sue, present evidence in court, buy, hold, and sell property, and enjoy all the benefits of the laws theretofore enjoyed by white persons.<sup>43</sup> Additionally, the Citizenship Act made it a federal crime to deprive any person of the rights it protected and created removal jurisdiction in federal courts when civil rights enforcement was denied or precluded in state courts.<sup>44</sup>

In 1870 Congress passed the Enforcement Act (also known as the Force Act), which reenacted the Citizenship Act,<sup>45</sup> affirmed the Fifteenth Amendment’s right to vote without regard to color, provided for the use of federal troops to protect the right to vote, and added a new catch-all criminal conspiracy provision, making it a felony for two or more persons to conspire with the intent to violate the provisions of the Act or to prevent citizens from exercising or

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41. W. E. Burghardt Du Bois, *The Freedmen’s Bureau*, ATLANTIC MONTHLY, Mar. 1901, at 354, 357, available at <http://www.theatlantic.com/past/docs/issues/01mar/dubois.htm>.

42. Civil Rights Act of 1866, ch. 31, §§ 1–3, 14 Stat. 27 (codified as amended at 18 U.S.C. § 242 (2006)).

43. *Id.* at § 1.

44. *Id.* at §§ 2, 3.

45. Reenactment was thought necessary to claim or clarify the authority of the newly ratified Fourteenth Amendment. See Boyd A. Byers, *Adventures in Topsy-Turvy Land: Are Civil Rights Claims Arising Under 42 U.S.C. § 1891 Governed by the Federal Four-Year “Catch-All” Statute of Limitations, 28 U.S.C. § 1658*, 38 WASHBURN L.J. 509, 513 (1999).

enjoying any right or privilege granted under the Constitution.<sup>46</sup>

By 1871, it was clear that more was needed. Citing “overwhelming evidence that through tacit complicity and deliberate inactivity, state and local officials were fostering vigilante terrorism against politically active blacks and Union sympathizers,” President Grant requested emergency legislation to quell rampant Southern violence that states were unwilling or powerless to control.<sup>47</sup> In response, Congress passed the Ku Klux Klan Act.<sup>48</sup> As compared to the Force Act, the Klan Act extended federal civil rights protection in two significant ways. First, whereas the substantive civil penalties of the Force Act were aimed at violations of the act itself, the Klan Act created civil penalties for the deprivation of any rights, privileges or immunities secured by the Constitution by persons acting under color of state law.<sup>49</sup> Second, the Klan Act used and expanded language from the catchall conspiracy section of the Force Act, to make it a federal crime to conspire to deprive persons or classes or persons of any rights granted by the Constitution or the equal protection of the laws.<sup>50</sup>

Finally, in 1875, Congress responded to Jim Crow segregation by enacting what we will refer to as the Public Accommodations Act, requiring all inns, public conveyances, theaters, and other places of public amusement to open their accommodations without regard to race, color or previous condition of servitude.<sup>51</sup>

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46. Act of May 31, 1870, ch. 114, 16 Stat. 140 (codified as amended at 42 U.S.C. §§ 1971, 1981, 1987–1991 (2012)).

47. *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1153 (1977).

48. *Id.*

49. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (2012)).

50. While the Klan Act’s Section 2 criminal conspiracy provisions were quite similar to the equivalent provision in Section 6 of the Force Act, the language of the Klan Act covered a broader range of conspiratorial acts than the Force Act. For example, the Klan Act made it a criminal offense for two persons to conspire “to overthrow, or to put down, or to destroy by force the government of the United States, or to levy war against the United States, or to oppose by force the authority of the government of the United States, or by force, intimidation, or threat to prevent, hinder, or delay the execution of any law of the United States . . . .” *Id.* at § 2 (codified as amended at 42 U.S.C. § 1985(3) (2012)).

51. Act of March 1, 1875, ch. 114, § 1, 18 Stat. 335, 336. Violations of the Public Accommodations Act were made punishable as misdemeanors, and persons injured by violations of the Act were given the right to recover civil judgments of \$500 for each offense. *Id.* at § 2. A genealogy of the Reconstruction legislation described above, tracing fragments that survive today, appears as Appendix A.

According to the People's narrative, the Thirteenth, Fourteenth, and Fifteen Amendments and the Citizenship, Force, Klan and Public Accommodation Acts were to have been the constitutional and legislative spine of Reconstruction's program to establish a national charter of the People's rights. Taking that view of history, one would have to say that between 1871 and 1907, Supreme Court rulings crippled Reconstruction's multi-racial and egalitarian project. As we demonstrate below, with each crippling blow, the Court sounded the Confederate claim that whatever their language or history, the Reconstruction Amendments did not carve out a strong role for the federal government in defining and protecting civil rights, but worked only a narrow reform of the 1789 constitutional order.

*B. Early Supreme Court Interpretation: The 1787 Constitutional Order Restored*

Although *Slaughterhouse* is properly known as the Supreme Court's first interpretation of the meaning and reach of any of the Reconstruction Amendments, it was not the first case in which the Court took the measure of federal power after secessionist Civil War and reunification. *Blyew v. United States*,<sup>52</sup> decided a year earlier, was the first in a series of challenges to federal prosecutions for acts of supremacist terror. The facts of *Blyew* are representative. The case involved the federal prosecution of two white men for the axe murders of four members of a black family: a ninety-seven-year old grandmother, the mother, the father, and a seventeen-year old boy.<sup>53</sup> The only eyewitness account linking the defendants to the crime was the dying declaration of the seventeen-year old boy.<sup>54</sup> At the time, black people were only competent to testify in Kentucky courts against other blacks, and this preclusion encompassed the dead boy's declaration.<sup>55</sup> The Citizenship Act authorized federal prosecutors to remove cases to federal courts when the "affected persons" whose citizenship rights had been denied could not obtain redress in state or local courts.<sup>56</sup> Relying on that authorization, and citing the

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52. *Blyew v. United States*, 80 U.S. 581 (1872).

53. *Id.*

54. The only survivors of the attack were a thirteen-year old girl who was brutally hacked, and her ten-year old sister who was hiding in the family's one-room cabin. *Id.* at 585.

55. *Id.* at 592.

56. Civil Rights Act of 1866, ch. 31, §§ 2, 3, 14 Stat. 27, 27 (codified as amended at 18 U.S.C. § 242 (2012)).

inadmissibility of the young victim's dying declaration, the United States indicted and convicted the alleged axe murderers in federal court.<sup>57</sup> The defendants appealed, arguing that the federal government had exceeded its enforcement power.<sup>58</sup> Positing the Confederate narrative's link between states' rights and people's freedom, they argued that the Court's decision would be "felt in its influence on the destinies of the country" beyond the Justices' lifetimes, for it would "draw the line of demarcation between the powers of a great central government on the one hand and the local rights of self-government retained to the States and the People on the other."<sup>59</sup>

The Supreme Court overturned the defendants' convictions, but it declined their invitation to treat the case as a clash between federal and state power.<sup>60</sup> Establishing a pattern of avoidance that recurs regularly, both in the early cases addressed in this section and in the mid-twentieth century era of civil rights protest addressed in the next section, the Court avoided reaching constitutional questions of state and federal power by deciding the case on the basis of a technicality.<sup>61</sup> Here, as in subsequent cases we will describe, the avoidance by technicality move seems questionable. Nonetheless, *Blyew* can be said to have "afforded the Supreme Court with its earliest opportunity—an opportunity that it used—to begin the substantial devastation of the federal government's civil rights powers that followed over the next generation."<sup>62</sup>

*Slaughterhouse* was the Court's next—and its first direct—address of the post-Reconstruction balance of state and federal power with respect to civil rights, and in it the Confederate narrative sounds loudly. *Slaughterhouse* is a case full of vexing ironies. It involved a claim brought by opponents of Reconstruction who calculated relying on the Reconstruction Amendments to challenge acts of Louisiana's

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57. *Blyew*, 80 U.S. at 583–84.

58. *Id.* at 584.

59. Jeremiah Black, Argument for Kentucky, *Blyew v. United States*, 80 U.S. 581 (1872), reprinted in CHAUNCEY F. BLACK, ESSAYS AND SPEECHES OF JEREMIAH S. BLACK WITH A BIOGRAPHICAL SKETCH 539 (1885).

60. See *Blyew*, 80 U.S. at 591 (viewing the question before it as one of statutory interpretation instead).

61. Framing the question before it as one of statutory interpretation, the Court reasoned that "affected" persons within the meaning of the Citizenship Act were limited to parties to an action. *Id.* at 594.

62. Robert D. Goldstein, *Blyew: Variations on a Judicial Theme*, 41 STAN. L. REV. 469, 474 (1989).

multi-racial Reconstruction legislature.<sup>63</sup> Moreover, it was decided by a Court packed with Republican supporters of Reconstruction's civil rights agenda.<sup>64</sup> Nonetheless, it resulted in a radical limitation of federal power to enforce that agenda.<sup>65</sup>

The well-known story is that New Orleans butchers sued to invalidate a Louisiana statute regulating the slaughtering of animals within city limits.<sup>66</sup> The butchers argued that the statute, which compelled them to use a state-chartered slaughtering facility, violated nearly every freedom the Reconstruction Amendments were designed to protect: It exacted involuntary servitude; it abridged privileges and immunities of their citizenship, and it denied them equal protection and due process of law.<sup>67</sup> The "black and tan"<sup>68</sup> Louisiana legislature countered that the statute was a legitimate exercise of the state's police power, designed to rid New Orleans of persistent plagues caused by the unregulated dumping of butchering waste.<sup>69</sup>

The Court recognized that it had been called on to gauge the effect of the Reconstruction Amendments on the 1789 Constitution and that nothing so consequential had been brought to them during any of the Justices' tenures.<sup>70</sup> It acknowledged that by enacting and ratifying the three Reconstruction Amendments the nation "recur[red] again to the great source of power in this country, *the people of the States*"<sup>71</sup> in order to secure "additional guarantees of

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63. RONALD M. LABBÉ & JONATHAN LURIE, *THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT* 126 (2005); see MICHAEL A. ROSS, *JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA 198–200* (2003).

64. ROSS, *supra* note 64, at 201.

65. See *id.* at 200 (noting that Judge Miller's narrow interpretation of the Fourteenth Amendment's privileges and immunities clause prevented "the federal government [from having] greater powers to protect the civil and natural rights of African-Americans from discriminatory and violent acts").

66. *The Slaughterhouse Cases*, 83 U.S. 36, 43 (1872).

67. *Id.* at 43–44.

68. "Black and tan" was commonly used to describe racially integrated legislatures during the Reconstruction Era. Richard L. Hume, *Carpetbaggers in the Reconstruction South: A Group Portrait of Outside Whites in the "Black and Tan" Constitutional Conventions*, 64 J. AM. HIST. 313, 313 (1977).

69. *The Slaughterhouse Cases*, 83 U.S. at 62.

70. *Id.* at 67 ("No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, and of the several States to each other and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members.").

71. *Id.* at 67 (emphasis added).

human rights; additional powers to the Federal government; [and] additional restraints upon those of the States.”<sup>72</sup> But, the Court hastened to add that the amendments were also part of a “process of restoring to their proper relations with the federal government and with the other States those which had sided with the rebellion[.]”<sup>73</sup> The Justices were bound, then, to balance respect for the momentousness of an amendment process that altered the state and federal balance of power in defense of human rights against the need for “proper” restoration of the powers of states that had been in rebellion. The Justices did so by emphasizing the narrower goal of ending human chattel slavery rather than the larger goal of protecting human rights.<sup>74</sup> Harking back to the 1867 Constitution rather than its post-Civil War reconstruction, the Court reasoned that the privileges and immunities guaranteed by the Fourteenth Amendment were limited to those few that flowed uniquely from national citizenship.<sup>75</sup> The definition and protection of basic civil rights were therefore left to the various states.<sup>76</sup> Underlying this interpretation was the strong suggestion that the Reconstruction Congress and the ratifying states acted “[u]nder the pressure of . . . excited feeling” and therefore neglected, rather than recalibrated, the balance of state and federal power.<sup>77</sup>

*Slaughterhouse* is fascinating because it stood civil rights discourse on its head, with customary civil rights proponents on the side of state autonomy and customary opponents on the side of federal intervention. In putting autonomous behavior in marketplaces under an individual rights umbrella, it encouraged commercial actors to take the Reconstruction Amendments as a shield behind which business enterprises arguably have come to benefit more from Fourteenth Amendment protections than more traditional targets of discrimination or oppression.<sup>78</sup> *Blyew* was the

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72. *Id.* at 67–68.

73. *Id.* at 70.

74. *See id.* at 71 (noting that the “pervading purpose” of the Amendments was the “freedom of the slave race”).

75. *Id.* at 74.

76. *Id.* at 77 (concluding that it was not “the purpose of the Fourteenth Amendment . . . to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States”).

77. *See id.* at 82

78. *See Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 89–90 (1938) (Black, J., dissenting) “[O]f the cases in this Court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of one per

more traditional civil rights case, and, as we have indicated, post-*Slaughterhouse* it was followed by a string of similar cases in which federal authorities attempted to combat supremacist exclusion and terror, and the Court ruled that they lacked authority to do so. *United States v. Cruikshank* was the next such case, and it brought the Court to take a direct stance on the question of federal power to prosecute cases of anti-civil rights terrorism.<sup>79</sup>

After Louisiana's 1872 gubernatorial election, two candidates declared victory: William Pitt Kellogg, a Republican and supporter of Reconstruction and John McEnery, a Democrat and former Confederate commander.<sup>80</sup> While the disputed election made its way through the federal courts, each camp attempted to appoint local officials.<sup>81</sup> In the parish that included Colfax, Louisiana, both sides made judicial appointments, and freedmen gathered in the parish courthouse to support and protect the Republican appointees.<sup>82</sup> In what came to be known as the Colfax Massacre, three hundred white men, most mounted on horseback and armed with rifles, set fire to the courthouse, and killed more than three hundred freedmen as they tried to surrender.<sup>83</sup>

The State made no effort to prosecute the white assailants.<sup>84</sup> The United States indicted several assailants under the Force Act charging that they had conspired to deprive the murdered freedmen

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cent. invoked it in protection of the negro race, and more than fifty per cent. asked that its benefits be extended to corporations.”).

79. See CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT AND THE BETRAYAL OF RECONSTRUCTION* 229–49 (2008).

80. *Id.* at 13.

81. *Id.* at 13–14.

82. JAMES K. HOGUE, *UNCIVIL WAR: FIVE NEW ORLEANS STREET BATTLES AND THE RISE AND FALL OF RADICAL RECONSTRUCTION* 107–08 (2006).

83. See *id.* at 109–11 (giving a detailed account of the battle and massacre at Colfax).

84. Following the massacre, white Democrats let loose a reign of terror over the county so as to foreclose any possibility of local prosecution. See LANE, *supra* note 79, at 129 (describing a “new campaign to kill or expel Republicans”). When United States Attorney James Beckwith brought charges against the defendants under the Force Act, jurors and witnesses were physically intimidated and even violently attacked. *Id.* at 151–53 (detailing the murders of several witnesses to the Colfax Massacre); see HOGUE, *supra* note 82, at 115 (2006) (noting that after the Colfax Massacre, black men willing to stand up to white pressure received a “never-to-be-forgotten message to stay away from politics altogether”); LEEANNA KEITH, *THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION* 119 (2008) (noting attempts on the lives of the local district attorney and a local African-American judge in response to the Colfax indictments).

of their civil rights.<sup>85</sup> The Court held that Congress exceeded its powers when it authorized federal enforcement of what the Court regarded as state-granted rights.<sup>86</sup> It therefore dismissed all of the federal changes.<sup>87</sup> In doing so, it offered an analysis of the constitutional balance between state and federal power that has been repeated so often by subsequent courts that it has come to sound (and to serve) as a statement of faith about the proper role of the federal government in defining and protecting the People's rights—a catechism to be repeated without question or doubt.<sup>88</sup> One might call it the *Cruikshank* creed.

The *Cruikshank* creed incorporates the major themes of the Confederate narrative. Its tenets are that before the Union was formed, the People granted power to the various states.<sup>89</sup> In 1787, the States surrendered very limited powers to a federation. Powers not surrendered to the federation remain exclusively with the states,<sup>90</sup> and the states serve the People by carefully guarding their reserved powers.<sup>91</sup> For this comprehensive theory of state sovereignty, *Cruikshank* cited only two authorities: *Slaughterhouse* and the Preamble to the Constitution.<sup>92</sup>

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85. At trial, a mostly white jury convicted three defendants of violating section 6 of the Force Act. For purposes of appeal, Justice Joseph P. Bradley, riding circuit in New Orleans, joined Circuit Judge William B. Woods on the bench during trial. On June 27, 1874, Justice Bradley and Judge Woods split: Justice Bradley announced his opinion to overturn the convictions; Justice Woods disagreed, thereby guaranteeing the appeal to the Supreme Court. ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876*, at 176–81 (1985).

86. *United States v. Cruikshank*, 92 U.S. 542, 556–57 (1875).

87. *Id.* at 559.

88. *See, e.g.*, text accompanying note 296 *infra*.

89. *Cruikshank*, 92 U.S. at 549 (“Citizens are the members of the political community to which they belong . . . . In the formation of a government, the people may confer upon it such powers as they choose.”).

90. *Id.* at 550 (“Within the scope of its powers, as enumerated and defined, [the national government] is supreme and above the States; but beyond, it has no existence.”).

91. *Id.* (“The people of the United States resident within any State are subject to two governments: one State, and the other National; but there need be no conflict between the two. The powers which one possesses, the other does not. They are established for different purposes, and have separate jurisdictions. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad.”).

92. *See id.* at 549 (“The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of those governments will be different from those he has under the other.”) (citing *The Slaughterhouse Cases*, 68 U.S. at 74); *id.* at 549–50 (citing U.S. CONST. pmb.).

Dismissals of prosecutions for acts of racial terrorism continued, as the Court narrowed each of the post-War civil rights enforcement statutes to protect states' sovereignty. In *United States v. Harris*, the Court unanimously relied on *Slaughterhouse* as it applied the tenets of the *Cruikshank* creed to dismiss indictments under the Klan Act against members of a Tennessee lynch mob.<sup>93</sup> *Hodges v. United States* was similar: dismissing a federal indictment brought under the Force Act against members of an Arkansas lynch mob, the Court returned to the theme introduced in *Blyew*, affirmed as law in *Slaughterhouse*, set out as creed in *Cruikshank*, and reaffirmed in *Harris*, to explain once again that the Reconstruction Amendments had not significantly altered the 1787 balance of federal and state power.<sup>94</sup>

In *United States v. Reese*, the Court extended its states' rights analysis to limit the applicability of the voting rights provisions of the Force Act.<sup>95</sup> A state official who refused to permit an African-American man to vote was held to be immune from federal charges because it had not been alleged that the refusal was because of his race.<sup>96</sup> Here, as in *Slaughterhouse*, the Court saw the focus and impact of the Reconstruction Amendments as protecting African-Americans against discrimination in civic affairs rather than establishing a broad charter of civil rights: The Fifteenth Amendment is, the Court concluded, an antidiscrimination measure that "does not confer the right of suffrage upon any one."<sup>97</sup>

Although they were decided favorably for the civil rights plaintiffs and are cited by some scholars as the high-water mark of the Court's Reconstruction jurisprudence *Virginia v. Rives*,<sup>98</sup> *Strauder v. West Virginia*,<sup>99</sup> *Ex parte Virginia*,<sup>100</sup> and *Neal v. Delaware*<sup>101</sup> also yielded narrow readings of the Reconstruction Amendments. In each of these cases, the Court held that the

93. *United States v. Harris*, 106 U.S. 629, 638-39 (1882).

94. *Hodges v. United States*, 203 U.S. 1, 16 (1906) ("Notwithstanding the adoption of these three Amendments, the National Government still remains one of enumerated powers, and the Tenth Amendment, which reads, 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people,' is not shorn of its vitality.").

95. *United States v. Reese*, 92 U.S. 214, 221-22 (1875).

96. *Id.* at 218.

97. *Id.* at 217.

98. *Virginia v. Rives*, 100 U.S. 313 (1879).

99. *Strauder v. West Virginia*, 100 U.S. 303 (1879).

100. *Ex parte Virginia*, 100 U.S. 339 (1879).

101. *Neal v. Delaware*, 103 U.S. 370 (1880).

Fourteenth Amendment prohibited the exclusion of blacks from jury service, not because jury service is an entitlement of national citizenship, but because the exclusions constituted racially discriminatory state action that denied black jurors equal protection of the laws.<sup>102</sup>

In the *Civil Rights Cases*, the Court invalidated in its entirety the last of the post-War civil rights statutes: the Public Accommodations Act.<sup>103</sup> In doing so, the Court rejected the democratic vision that had inspired proponents of the Act and revived its opponents' false dichotomy between political and civil rights on one hand, and "social rights" on the other. In the course of four years of debate over the Public Accommodations Act, opponents had lodged two main arguments against the bill: they argued, consistent with the Confederate narrative, that it represented an unconstitutional encroachment of federal authority upon states' rights,<sup>104</sup> and they argued that the Reconstruction Amendments intended to give newly freed slaves political and civil, but not social, equality.<sup>105</sup> Granting "social rights" to black people, they argued, would be unacceptable to the majority of Southern citizens in that it would enforce the sort of social equality that both races would find repugnant. The next step, they warned their fellow white congressmen, would be that black people would "demand a law allowing them, without restraint, to visit the parlors and drawing-rooms of the whites, and have free and unrestrained social intercourse with your unmarried sons and daughters."<sup>106</sup> These arguments reflected what was then a frequently articulated taxonomy of rights, distinguishing among civil and political rights, e.g., the rights to buy and sell property; to enter into contracts; to serve on juries; to appear as witnesses in court; to vote, and the "social right" to be accommodated in public spaces. This taxonomy was given the Court's imprimatur in *Plessy v. Ferguson* when the

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102. *Id.* at 397; *Rives*, 100 U.S. at 320–21; *Strauder*, 100 U.S. at 312, *Ex parte Virginia*, 100 U.S. at 348.

103. The Civil Rights Cases, 109 U.S. 3, 25–26 (1883).

104. See 2 CONG. REC. 388, 405 (1874) (statement of Rep. Durham) ("[Regulation of schools] are matters purely of local legislation or of private contract."); CONG. GLOBE, 42d Cong., 2d Sess. 3190 (1872) (statement of Sen. Trumbull) ("[Attending school] is not any right at all. It is a matter to be regulated by the localities."); Alfred H. Kelly, *The Congressional Controversy Over School Segregation, 1867-1875*, 64 AM. HIST. REV. 537, 548 (1959).

105. See CONG. GLOBE, 42d Cong., 2d Sess. 3189 (1872) (statement of Sen. Trumbull) ("The right to go to school is not a civil right and never was.").

106. 2 CONG. REC. 341, app., 343 (1874) (statement of Rep. Read).

majority explained, “If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.”<sup>107</sup>

However, as historian Rebecca Scott has established, “[t]o conflate the phrase ‘social equality’ with an imagined taxonomy of civil, political, and social rights is to mistake an insult for an analytic exercise.”<sup>108</sup> The rights that proponents of the Public Accommodations Act meant to secure were not so-called social rights but *public rights*. In the words of Representative John Lynch, “It is not social rights that we desire . . . What we ask is protection in the enjoyment of public rights. Rights which are or should be accorded to every citizen alike.”<sup>109</sup> As Representative Robert Elliot explained, these were “the right to enjoy the common public conveniences of travel on public highways, of rest and refreshment at public inns, of education in public schools, of burial in public cemeteries . . .”<sup>110</sup> In short, the proponents of the Public Accommodation Acts—some of them former slaves—articulated a vision of American democratic citizenship that would take a century for a majority of the Supreme Court to understand: constitutional citizenship “consists in having a responsible share according to the capacity in forming and directing the activities of the groups to which one belongs and in participating according to the need in the values which the group sustains.”<sup>111</sup>

Seeing public accommodation as a “social right,” and seeing no state involvement in the maintenance of Jim Crow segregation, the majority in the *Civil Rights Cases* saw no authority in the federal government to end it.<sup>112</sup> The Fourteenth Amendment only addressed state actions with respect to political and civil rights, and although the Thirteenth Amendment reached both private and public action, the Court held that denials of public accommodation had “nothing to do with slavery or involuntary servitude.”<sup>113</sup> The states’ rights theme of the *Cruikshank* creed was again sounded: if those denials violated

107. *Plessy v. Ferguson*, 153 U.S. 537, 552 (1896).

108. Rebecca J. Scott, *Public Rights, Social Equality and the Conceptual Roots of the Plessy Challenge*, 106 MICH. L. REV. 777, 781 (2007).

109. 3 CONG. REC. 920, 944 (1875) (statement of Rep. Lynch) (emphasis in original).

110. 2 CONG. REC. 388, 409 (1874) (statement of Rep. Elliott).

111. John Dewey, *The Public and Its Problems*, An Essay in Political Inquiry 147 (1927).

112. *The Civil Rights Cases*, 109 U.S. 3, 26. (1883).

113. *Id.* at 24.

any right, “redress [was] to be sought under the laws of the state. . . .”<sup>114</sup>

*C. The Competing Interpretation: A New Charter of Freedom*

There is irony in the legacy of the *Civil Rights Cases*. Although the Court’s decision has not been overruled, scholars have regularly questioned its reasoning.<sup>115</sup> The durability of the majority opinion has much to do with the fact that it followed the *Cruikshank* creed—and hence the Confederate narrative—in positing and focusing on a conflict between state and federal power and fixating on that conflict rather than addressing the more fundamental question whether the civil rights claimants were entitled, *as national citizens*, to public accommodation or to any basic civil right.

By contrast, Justice Harlan’s dissent in the *Civil Rights Cases* squarely faced the fundamental questions concerning the attributes of national citizenship and concluded that the Reconstruction Amendments and accompanying federal legislation were “adopted in the interest of liberty, and for the purpose of securing, through national legislation rights inhering in the state of freedom and belonging to American citizenship.”<sup>116</sup> Justice Harlan’s dissent begins and ends with the observation that national rights require national enforcement.<sup>117</sup>

Harlan observed with bitter irony that the 1787 Constitution, together with the Fugitive Slave Act of 1793,<sup>118</sup> the Fugitive Slave Act of 1850,<sup>119</sup> and the Court’s own decisions in *Prigg v.*

114. *Id.*

115. See Michal R. Belknap, *Federalism and the Protection of Civil Rights*, 86 COLUM. L. REV. 1741, 1744 n. 12 (1986) (reviewing ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, THE DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876* (1985)); Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1353 (1964); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1090 (1995); James M. McGoldrick, *The Civil Rights Cases: The Relevancy of Reversing a Hundred Plus Year Old Error*, 42 ST. LOUIS U. L.J. 451, 451 (1998).

116. *The Civil Rights Cases*, 109 U.S. at 26 (Harlan, J., dissenting).

117. *Id.* at 27, 61–62 (Harlan, J., dissenting).

118. Congress enacted The Fugitive Slave Act of 1793 as a means of implementing the Fugitive Slave Clause of the Constitution. U.S. CONST. art. IV, § 2, cl. 3. The Act established the process for both the extradition of fugitives from justice and the recapture of fugitive slaves. Act of Feb. 12, 1793, ch. 7, 1 Stat. 302.

119. Congress enacted the Fugitive Slave Act of 1850 in order to provide slave owners with a federal mechanism for recapturing fugitive slaves. Act of Sept. 18,

*Commonwealth of Pennsylvania*,<sup>120</sup> *Ableman v. Booth*,<sup>121</sup> and *Dred Scott v. Sandford*,<sup>122</sup> established as much when they gave the federal government authority to enforce slaveholders' rights to human subjugation as a property interest.<sup>123</sup> While no clause of the 1787 Constitution explicitly empowered Congress to enforce the master's right to his slave, *Prigg* established that Congress had implicit authority to do so because "a clause of the Constitution conferring a right should not be so construed as to make it shadowy, or unsubstantial, or leave the citizen without a remedial power adequate for its protection."<sup>124</sup>

Under Justice Harlan's reading, the Reconstruction

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1850, ch. 60, 9 Stat. 462. The Act of 1793 had largely relied upon state authorities to enforce slave owners' rights. The 1850 Act sought to remedy that problem by, among other things, authorizing federal judges to appoint United States commissioners with the power "to exercise and discharge all the powers and duties conferred by this act," including the power to seize and return fugitive slaves to their owners. Act of Sept. 18, 1850, ch. 60, § 1, 9 Stat. 462. Thus, the 1850 Act for the first time empowered federal law enforcement officials to directly engage in the pursuit, capture, and return of slaves to their masters.

120. *Prigg v. Pennsylvania*, 41 U.S. 539, 661 (1842).

121. *Ableman v. Booth*, 62 U.S. 506, 526 (1858). *Booth* grew out of efforts in northern states to openly resist enforcement of the Fugitive Slave Act of 1850 in the name of state sovereignty. Robert J. Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 *FORDHAM L. REV.* 153, 202 (2004). In *Booth*, a number of Wisconsin state officials and private citizens "openly defied federal authorities attempting to recapture a slave by the name of Joshua Glover . . . Abolitionists who assisted Glover to escape were prosecuted in the United States District Court for Wisconsin." Kaczorowski, *The Supreme Court, supra*, at 202. One of the arrested defendants, Sherman M. Booth, was tried and convicted of violating the Fugitive Slave Act of 1850. *In re Booth*, 3 Wis. 1, 4–5 (Wis. 1854). Booth petitioned the Wisconsin Supreme Court for a writ of habeas corpus. *In re Booth*, 3 Wis. at 4. The Wisconsin Supreme Court ordered his release, holding that the Fugitive Slave Act of 1850 was unconstitutional. *In re Booth*, 3 Wis. at 31–32. The federal government appealed to the United States Supreme Court. *Booth*, 62 U.S. at 511–12. The Court, in a decision by Chief Justice Roger B. Taney, reversed the Wisconsin Supreme Court's decision, and upheld the constitutionality of the Act of 1850. *Booth*, 62 U.S. at 526.

122. *Dred Scott v. Sandford*, 60 U.S. 393, 416 (1857).

123. According to the court's own logic, insofar as the master had the right to his slave, insofar as that right was grounded in the Constitution, and insofar as Congress had both the authority and obligation to secure that right, Justice Harlan said, quoting *Prigg*, that "[i]t would be a strange anomaly and forced construction to suppose that the national government meant to rely for the due fulfillment of its own proper duties, and the rights which it intended to secure, upon State legislation, and not upon that of the Union." *The Civil Rights Cases*, 109 U.S. 3, 29 (1883) (Harlan, J., dissenting) (quoting *Prigg v. Pennsylvania*, 41 U.S. 539, 623 (1842) (emphasis added)).

124. *Id.* at 28 (quoting *Prigg v. Pennsylvania*, 41 U.S. 539, 612 (1842)).

Amendments “did something more than to prohibit slavery as an *institution* . . . [they] established and decreed universal *civil freedom* throughout the United States.”<sup>125</sup> In contrast, to the Court’s earlier and shameful rulings that Congress had power to protect the right to hold human beings as chattel, he argued that:

[T]he national government has the power, whether expressly given or not, to secure rights protected by the Constitution. *That doctrine ought not now to be abandoned when the inquiry is not as to an implied power to protect the master’s rights but what may Congress, under powers expressly granted, do for the protection of freedom and the rights necessarily inhering in a state of freedom.*<sup>126</sup>

Justice Harlan drew a crucial link between the Thirteenth Amendment’s prohibition of slavery and the Fourteenth Amendment’s grant of birthright citizenship in Section 1. The Fourteenth Amendment’s citizenship clause was, Harlan argued, a “supreme act of the nation” that instantly brought black people “into the political community known as the ‘People of the United States.’”<sup>127</sup> The civil freedom conferred by the Thirteenth Amendment therefore encompasses the privileges and immunities of citizenship. As Justice Harlan put it, the Fourteenth Amendment granted Congress power “in terms distinct and positive, to enforce ‘the *provisions* of [Section 1],’ of [the] amendment; not simply those of a prohibitive character, but the provisions—*all* of the provisions—affirmative and prohibitive, of the amendment.”<sup>128</sup>

According to Harlan, this interplay between the Thirteenth and Fourteenth Amendments meant that Congress had full power to protect those rights “fundamental in citizenship in a free republican government.”<sup>129</sup> The Reconstruction Amendments and acts designed to enforce them were meant “to compel a recognition of the legal right of the black race to take the rank of citizens, and to secure the enjoyment of privileges belonging, under the law, to them *as a component part of the people for whose welfare and happiness government is ordained.*”<sup>130</sup> He ended as he began, with reference to

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125. *Id.* at 34 (emphasis in original).

126. *Id.* at 34–35 (emphasis added) (internal citations omitted).

127. *Id.* at 47.

128. *Id.* at 46. (emphasis added)

129. *Id.* at 47.

130. *Id.* at 61 (emphasis added).

the Court's earlier support of slave power:

I insist that the national legislature may, without transcending the limits of the Constitution, do for human liberty and the fundamental rights of American citizenship, what it did, with the sanction of this court, for the protection of slavery and the rights of the masters of fugitive slaves.<sup>131</sup>

Nearly twenty years later, having endured the succession of cases holding the federal government impotent to protect against supremacist terrorism, the Justice made clear, dissenting in *Hodges*, the Arkansas lynching case, the full reach of the rights of national citizenship that the Reconstruction Amendments, taken together, should secure to all:

[T]he liberty protected by the 14<sup>th</sup> Amendment against state action inconsistent with due process of law is neither more nor less than the freedom established by the 13<sup>th</sup> Amendment . . . [S]uch liberty “means not only the right of the citizen to be free from the mere physical restraint of his person . . . but the term is deemed to embrace the right of the citizen to be free in the enjoyment of *all his faculties*.”<sup>132</sup>

## II. POWER AND THE PEOPLE: CIVIL RIGHTS JURISPRUDENCE TESTED BY A PEOPLE'S MOVEMENT

Civil rights statutes that Justice Harlan thought legitimate under the post-slavery constitution lay nearly dormant in subsequent years. Their disuse was not entirely attributable to their critical reading by the Supreme Court. As the Court shrank from what seemed to have been clear implications of the Reconstruction Amendments for federal enforcement of civil rights, many white Americans grew weary and wary of Reconstruction's multi-racial vision and increasingly sympathetic to the former Confederacy's complaints of occupation, abuse, and disempowerment. What the Court in *Slaughterhouse* had described as a goal of restoring the seceded states to their 1787 powers became a national priority as compromise was reached with southern Democrats and federal

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131. *Id.* at 51.

132. *Hodges v. United States*, 203 U.S. 1, 36 (1906) (Harlan, J., dissenting) (quoting *Allgeyer v. Louisiana*, 165 U.S. 578, 579 (1897)) (emphasis in original).

intervention in southern affairs came to be seen as untoward.<sup>133</sup>

Notwithstanding the official and popular retreat from Reconstruction's commitment to a fulsome idea of national citizenship, the vision lived among the People—especially among those who had endured the status of constitutional property. In every dimension of personal and public life, African-Americans, women, and other subordinated groups regularly claimed and enacted what they understood to be their rights to full and free citizenship.

The wave of sit-in, freedom ride, and voter registration activity that culminated in the 1960s has been perhaps the most conspicuous and consequential revival of Reconstruction-era claims of national citizenship. As civil rights leader Robert Moses reports, sit-in demonstrators, freedom riders, and voting rights activists enacted a freedom that they understood to be their birthright. Moses explains that “We, as People of the United States” claimed with our bodies the rights to occupy public space as civic equals and to be counted in the political process.<sup>134</sup> Moses also reports that the Reconstruction-era civil rights statutes—broken as they were in the interpretive process described in the preceding section—provided “crawl space” for the Civil Rights Movement that culminated in the 1960s.<sup>135</sup> When 1957 civil rights legislation created a Civil Rights Division within the Justice Department, federal enforcement became more focused, and civil rights workers gained a direct line through which they could call on federal authorities to provide some relief from repeated and lengthy jailings (and, in some cases, from spending time in some of the nation's worst prisons) and to provide protection, albeit tragically limited protection, against supremacist violence.<sup>136</sup> For authority to provide that relief and protection, federal officials relied on the Reconstruction Amendments and on remnants of the post-Civil War legislation that was to have been the spine of Reconstruction. The movement's “crawl space” was created, then, by cobbling together a rather feeble piece of mid-twentieth century civil

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133. See generally HEATHER COX RICHARDSON, *THE DEATH OF RECONSTRUCTION: RACE, LABOR, AND POLITICS IN THE POST-CIVIL WAR NORTH, 1865-1901*, at 122–55 (2001).

134. Robert P Moses, Speech at Colgate College 12–17 (January 20, 2011) (on file with the authors).

135. ROBERT P. MOSES & CHARLES E. COBB, JR., *RADICAL EQUATIONS: CIVIL RIGHTS FROM MISSISSIPPI TO THE ALGEBRA PROJECT*, 92 (2001).

136. See Symposium, *Voices of the Civil Rights Division, Then and Now*, 44 *MCGEORGE L. REV.* 269 (2013).

rights legislation and the residue of congressional Reconstruction: the Justice Department's newly created Civil Rights Division summoned powers created by post-Civil War amendments and statutes in response to the claims and calls of a People's movement.<sup>137</sup>

The 1960s civil rights movement called upon federal power to vindicate two kinds of claims. In what we term civil rights "enforcement" cases, the Civil Rights Division attempted to prosecute opponents of the movement for acts of terrorism against civil rights advocates. These federal prosecutions were challenged on the ground that the national government was usurping the states' police power. In what we term civil rights "enactment" cases, protesters performed what they saw as a national right to inhabit public spaces on an integrated basis and to participate in local and federal political processes. These enactments were the genius of the 1960s Civil Rights Movement; they were "demand side" demonstrations of the free citizenship to which the protesters thought all people were entitled. In response to their enactments of citizenship, protesters were arrested, charged, and convicted of state crimes like trespassing or disturbing the peace. Turning here to the federal courts, rather than to the Justice Department, protesters challenged these prosecutions on the ground that people could not be punished for exercising their national constitutional rights to peacefully inhabit public spaces and to participate in political processes. Both enforcement claims and enactment claims were contests between state and federal power, with states claiming supremacy in the realm of policing human behavior and the national government claiming supremacy as a guardian of human rights.

#### A. *Assigning the "Occasional Unpleasant Task" of Civil Rights Enforcement*

To set the 1960s cases in context, we must look to two sets of cases that predated the Movement's rise to prominence. After the significant post-Reconstruction hiatus in federal civil rights prosecutions,<sup>138</sup> the Court faced, in 1945, yet another federal attempt

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137. See John Doar, *The Work of the Civil Rights Division in Enforcing Voting Rights under the Voting Rights of 1957 and 1960*, 25 FLA. ST. U. L. REV. 1 (1997).

138. See STAFF OF S. SUBCOMM. ON THE CONSTITUTIONAL RIGHTS OF THE S. COMM. ON THE JUDICIARY, 94TH CONG., 2D SESS. REP. ON CIVIL RIGHTS 26 (Comm. Print 1977) ("At first, principal enforcement of the newly created civil rights came—as the Reconstruction Congresses had expected—from the Federal Government,

to punish white supremacist terror. The facts fit a familiar pattern: Claude Screws, the Sheriff of the somewhat notorious Baker County in Georgia, acting with a deputy and a local police officer, arrested Robert Hall, a young black man accused of stealing a tire.<sup>139</sup> They handcuffed Hall, drove him to the local courthouse, beat him nearly to death, dragged him feet-first across the courthouse lawn to a jail, threw him on the floor and summoned an ambulance.<sup>140</sup> Robert Hall died within an hour of being transported to a local hospital.<sup>141</sup> Screws and his collaborators faced no state charges, but were convicted in federal court, under surviving provisions of the Citizenship Act,<sup>142</sup> of conspiring to violate, and violating, Hall's civil rights.<sup>143</sup>

When the Georgia officers appealed, three Justices stood firmly against federal prosecution of what they understood to be state crimes. Justice Frankfurter wrote for them, invoking the Confederate narrative to argue that the officers' federal prosecution unconstitutionally disrupted the steady state of Georgia's sovereignty with respect to the enforcement of criminal laws. Noting that the murder of Robert Hall was a state crime, these justices argued that where "[s]tate law is in conformity with the Constitution and local misconduct is in undisputed violation of that State law" it was preferable to "leave to the States the enforcement of their criminal law," and not "weaken the habits of local law enforcement by tempting reliance on federal authority for an occasional unpleasant task of local enforcement."<sup>144</sup> Justice Douglas, in just the sixth of his thirty-six years on the bench, wrote for the Court and elided the question of federal power by reversing on the ground that the jury had not been instructed to find a willful violation of Hall's

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through criminal prosecutions. Between 1870 and 1894, there were over 7,000 Federal prosecutions for civil rights violations. As the century drew to a close, the massive retreat from the earlier mood, accompanied by extraordinarily restrictive (and often disingenuous) decisions by the Supreme Courts slowed civil rights enforcement to a trickle. It was not until the 1940s and 1950s that real advances in civil rights enforcement began again.").

139. *Screws v. United States*, 325 U.S. 91, 92–93 (1945).

140. *Id.*

141. *Id.*

142. The government charged Screws and his collaborators under Section 20 of the Criminal Code, 18 U.S.C. 52. That section was first enacted as part of the Citizenship Act. *Id.* at 93. The amended, modern equivalent, has substantially the same language, 18 U.S.C. § 242.

143. *Screws*, 325 U.S. at 93.

144. *Screws*, 325 U.S. at 149 (Frankfurter, J., dissenting).

constitutional rights, and remanding for a new trial under more precise jury instruction.<sup>145</sup>

Dissenting Justices Murphy and Rutledge shined a critical light on the Court's failure to directly address the reach of federal power and the value, in this context, of state supremacy. Justice Murphy wrote passionately to argue that Federal constitutional power was sufficient and necessary to protect against "the cruelties of bigoted and ruthless [state and local] authority."<sup>146</sup> Justice Rutledge challenged what he saw underlying both the Douglas opinion's resort to technicalities and the Frankfurter opinion's wishful deference to the State of Georgia: The underlying issue was, he said, the question of "federal power."<sup>147</sup> Echoing the first Justice Harlan, Rutledge then argued that in the world created by the Reconstruction Amendments, "federal power lacks no strength to reach [state officials'] malfeasance in office when it infringes constitutional rights."<sup>148</sup>

The *Screws* prosecutions were not so far in time from Civil War and Reconstruction that they escaped their aftermath. In the 1940s (and long after), it was still regularly taught—and believed—that Reconstruction was at best an idealistic mistake and at worst a fit of vengeful rule by uncomprehending or malicious Carpetbaggers and incompetent blacks.<sup>149</sup> Justice Frankfurter's deliberately narrow reading of the Reconstruction legislation under which *Screws* and his collaborators had been charged alluded uncritically to this view of Reconstruction. "It is familiar history," he said, "that much of this legislation was born of that vengeful spirit which to no small degree envenomed the Reconstruction era. Legislative respect for constitutional limitations was not at its height and Congress passed laws clearly unconstitutional."<sup>150</sup>

As if in answer to this view of Reconstruction, Justice Rutledge wrote that if federal power to protect civil rights is a great power, "it is one generated by the Constitution and the Amendments, to which

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145. *Id.* at 106–07.

146. *Id.* at 138 (Murphy, J., dissenting).

147. *Id.* at 133 (Rutledge, J., concurring).

148. *Id.* (Rutledge, J., concurring) For the sake of avoiding a tie, Justice Rutledge joined the remand judgment. *Id.* at 134.

149. PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION & FAMILY VALUES* 150 (1997); ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877*, at 120 (Henry S. Commager et al. eds., 1988); ERIC FONER, *FREEDOM'S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION* xii (1993).

150. *Screws*, 325 U.S. at 140 (Murphy, J., dissenting).

the states have assented and their officials owe prime allegiance.”<sup>151</sup> At the heart of Justice Rutledge’s *cri de coeur*, was the conundrum this article seeks to confront: How can there be a federal right without a federal remedy? Resolving it will require a deeper understanding than the Court has yet undertaken of the values protected by the separation of state and federal responsibilities.

Sheriff Screws and his codefendants were retried under the Douglas opinion’s recommended instructions. Each was acquitted, and each returned to state law enforcement duties.<sup>152</sup> Moreover, the Douglas opinion’s requirements made prosecution of civil rights violations almost prohibitively difficult.<sup>153</sup> Justices Murphy and Rutledge both died in 1949, but broodings about federal power to enforce civil rights did not die with them. As we will see, Justice Douglas soon abandoned the cautious stance he had announced in *Screws* and took up the Murphy/Rutledge call for national enforcement of civil rights.

Ironically, the Court next confronted the question of the Department’s power to enforce federal constitutional rights in two 1951 cases that made no mention of, and seemingly had nothing to do with, racial justice. Yet, here again, it proved impossible for the Court to issue a majority opinion addressing the reach of Federal civil rights enforcement power. The cases, both captioned *United States v. Williams*, and decided on the same day, arose out of an effort by the Justice Department to prosecute three “deputized” investigators and a police officer who had, at the request of the owners of a hardware store in Miami, Florida, beaten and tortured store employees to get them to confess to stealing lumber.<sup>154</sup>

We have seen that, beginning with the Force Act, Reconstruction legislation criminalized both direct interferences with civil rights and conspiracies to interfere with civil rights. One of the *Williams* cases involved a conviction under surviving remnants of the conspiracy provision (the application of which had been precluded, without government appeal, during an early phase of the attempted prosecution of Sheriff Screws) and another involved a conviction under surviving remnants of the direct or substantive criminal provision (the provision that was at issue when the Court vacated

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151. *Id.* at 133 (Rutledge, J., concurring).

152. Harry H. Shapiro, *Limitations in Prosecuting Civil Rights Violations*, 46 CORNELL L. REV. 532, 535 (1961).

153. See Shapiro, *supra* note 158, at 551. See also BRANCH, *supra* note 149, at 409.

154. *United States v. Williams (Williams D)*, 341 U.S. 70, 71 (1951).

Sheriff Screws' conviction).<sup>155</sup> These two cases were rematches in the battle over federal power that had been fought in *Screws* and here Justices Douglas and Frankfurter squared off in sharp disagreement.

The conviction under the substantive provision had been obtained under a charging script tailored in its description of willfulness to meet the vagueness concerns of which Douglas had written in *Screws*.<sup>156</sup> Douglas wrote for the majority, retreating somewhat from the charging requirements he had set in *Screws*. Noting that the *Screws* charging requirements were necessary in cases in which the intent to deprive someone of constitutional rights was unclear, Douglas hinted at their possible superfluosity in this classic case of coerced confession: the intent to deny the victims' constitutional rights was, he wrote, "plain as a pikestaff."<sup>157</sup> Justice Frankfurter wrote briefly for three other Justices, to say that they dissented for the reasons set forth in Frankfurter's dissenting opinion in *Screws* and to make the (unexplained) comment that they were strengthened in their views by "[e]xperience in the effort to apply the doctrine of *Screws*."<sup>158</sup>

In the conspiracy case, Frankfurter wrote for the same three Justices who had dissented in the substantive case and for Chief Justice Vinson. The opinion's conclusions were consistent with Frankfurter's earlier positions, but difficult to reconcile with the outcome in the substantive case. Despite strong similarities in the wording and professed purposes of the substantive and conspiracy provisions, Justice Frankfurter argued that the conspiracy provision was less broad. It was less broad, he said, not because of its language or purpose, but because of a want of constitutional authority. In words that call to mind the reasoning of *Slaughterhouse*,<sup>159</sup> Frankfurter wrote that the conspiracy provision did not address conspiracies to deny the full panoply of federal civil rights, but only conspiracies to deny rights "arising from the substantive powers of the Federal Government."<sup>160</sup> The gravamen of Frankfurter's critique was that the conspiracy provision only covered conduct that the

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155. *Id.* at 71–72; *Williams v. United States (Williams II)*, 341 U.S. 97, 99 (1951); *see also* Brief for the Petitioners at 2, *Screws v. United States*, 325 U.S. 91 (1945) (No. 42).

156. *See Screws*, 325 U.S. at 106–107.

157. *Williams II*, 341 U.S. at 101.

158. *Williams II*, 341 U.S. at 104 (Frankfurter, J., dissenting).

159. *The Slaughterhouse Cases*, 83 U.S. 36 (1873).

160. *Williams I*, 341 U.S. at 73.

Federal government had power, independently of the Fourteenth Amendment, to enforce against *individuals*,<sup>161</sup> and the federal government had no power to forbid individuals to violate other individuals' civil rights.<sup>162</sup> *Conspiring to commit the act* was safe against Federal sanction, they argued, even though the Court had held that *the action itself* was subject to Federal sanction.<sup>163</sup>

In defense of his narrow and contradictory reading of the conspiracy provision, Frankfurter relied pivotally on *Cruikshank*.<sup>164</sup> He also revived his critique of Reconstruction legislation, asserting that “[t]he dominant conditions of the Reconstruction Period were not conducive to the enactment of carefully considered and coherent legislation” and that “[s]trong post-war feeling caused inadequate deliberation and led to loose and careless phrasing of laws relating to the new political issues.”<sup>165</sup> The count was dead even, with the reach and effectiveness of the Reconstruction conspiracy provision—and the fates of the defendants' conspiracy convictions—undetermined. Justice Black broke the tie—and saved the defendants from their conspiracy convictions—by ruling that the convictions were invalid on more technical grounds.<sup>166</sup>

The constitutional reach of both the conspiracy provision and the substantive provision remained uncertain: Four justices would apparently limit the conspiracy provision to cover interferences with what the Court in *Slaughterhouse* had carved out as uniquely federal rights; four would apply it to protect against interference with *any* rights guaranteed by the federal constitution. Before the Court faced this nest of issues again it had been sobered, but perhaps even more confounded, by cases that presented a flip side of federal prosecutions for Jim Crow violence: state prosecutions for civil rights demonstrations in which protesters “enacted” rights that they believed were federally protected, and their enactments were punished as state crimes.

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161. *Id.* at 77 (“[T]he rights which [the conspiracy statute] protects are those which Congress can beyond doubt constitutionally secure against interference by private individuals.”).

162. *Id.* at 81–82.

163. *See id.* at 82.

164. *Id.* at 79.

165. *Id.* at 74–75.

166. *Id.* at 85–86 (Black, J., concurring).

*B. Protecting the Enactment of Free Citizenship*

As we saw in our consideration of federal prosecutions against supremacist violence, there has been intense disagreement about whether and how federal civil rights enforcement power is limited by the fact that Fourteenth Amendment proscriptions are in the form “no State shall” (just as Bill of Rights proscriptions are in the form “Congress shall make no law”). Some take this language to mean that the federal government is helpless to punish denials of civil rights unless those denials represent or are “colored” by “state action.” Others, noting that the Fourteenth Amendment’s language also confers citizenship, argue that Congress has power to do all that is necessary and proper to secure the privileges of citizenship. The question whether a private establishment that is in other respects open to the public may exclude people on the basis of race elicits an analogous pair of responses—some arguing that anti-discrimination is an obligation that only governments owe to the People, and others arguing that every citizen has a right to be accommodated in public spaces. Using their passively resistant bodies to integrate establishments that were open to the public but marked “For Whites Only,” civil rights demonstrators in the 1960s placed their black and white bodies in spaces designated “for colored only,” to present an enforcement conundrum: *Could they be ejected by state police and prosecuted for trespass or ejected by private force? Were they entitled to federal protection, or were they in a state of nature?*

When Movement demonstrators provoked local hostility by defying and speaking against Jim Crow laws, they were arrested and prosecuted for trespassing, disturbing the peace, unlawful assembly and the like. They sought relief in Federal courts, claiming that the State prosecutions violated their federal right to public accommodation. In *Screws* and in the *Williams* cases, federal civil rights laws enforcing the Fourteenth Amendment were to have been a sword against local, anti-civil rights harassment and intimidation. In these cases, the Amendment itself was used as a shield against local prosecution of civil rights activists. Fortright determination of the activists’ claims would have forced the Court to confront, in another guise, the question of federal power that it had dodged in *Screws* and *Williams*. Although civil rights lawyers raised the power issue, most of the justices chose to skirt it. Justice Douglas was the consistent exception.

During the 1960s, the Supreme Court considered 31 cases

involving sit-ins and other kinds of civil rights protest.<sup>167</sup> In the first of them, a 1960 case involving black demonstrators who had been convicted in 1951<sup>168</sup> of trespassing on a segregated public golf course, there was agreement that access to the course could not constitutionally be denied on account of race, but a bare majority, over strong objection, deemed itself unable on technical grounds to vacate the convictions or remand the case for further consideration in the state courts.<sup>169</sup> This was, however, the last time the Supreme Court would affirm a criminal conviction for a civil rights protest in the mid-twentieth century.

Seasoned criminal appellate lawyers will tell you that there is no such thing as a perfect criminal trial record. As demonstration cases flooded the Court, this axiom was repeatedly demonstrated as Justices searched for ways to exonerate members of an increasingly popular, nonviolent human rights movement without reaching the fundamental questions of constitutional authority that civil rights lawyers—and Justice Douglas—repeatedly pressed.

The second case involved a Trailways bus passenger convicted of trespass for seeking service in a part of the bus terminal designated

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167. *Adderley v. Florida*, 385 U.S. 39 (1966); *NAACP v. Overstreet*, 384 U.S. 118 (1966); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Cameron v. Johnson*, 381 U.S. 741 (1965); *Walker v. Georgia*, 381 U.S. 355 (1965); *Parrot v. City of Tallahassee*, 381 U.S. 129 (1965); *McKinnie v. Tennessee*, 380 U.S. 449 (1965); *Blow v. North Carolina*, 379 U.S. 684 (1965); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964); *Drews v. Maryland*, 378 U.S. 547 (1964); *Dresner v. City of Tallahassee*, 378 U.S. 539 (1964); *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Bell v. Maryland*, 378 U.S. 226 (1964); *Robinson v. Florida*, 378 U.S. 153 (1964); *Henry v. City of Rock Hill*, 376 U.S. 776 (1964); *Diamond v. Louisiana*, 376 U.S. 201 (1964); *Fields v. South Carolina*, 375 U.S. 44 (1963); *Randolph v. Virginia*, 374 U.S. 97 (1963); *Avent v. North Carolina*, 373 U.S. 375 (1963); *Gober v. City of Birmingham*, 373 U.S. 374 (1963); *Wright v. Georgia*, 373 U.S. 284 (1963); *Lombard v. Louisiana*, 373 U.S. 267 (1963); *Shuttlesworth v. City of Birmingham*, 373 U.S. 262 (1963); *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Johnson v. Virginia*, 373 U.S. 61 (1963); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Taylor v. Louisiana*, 370 U.S. 154 (1962); *Garner v. Louisiana*, 368 U.S. 157 (1961); *Wolfe v. North Carolina*, 364 U.S. 177 (1960).

168. Notice that the “crime” occurred before, but the ultimate appeal was decided after, *Brown v. Board of Education* and cases decided in its wake, which outlawed race segregation of public facilities.

169. *Wolfe*, 364 U.S. at 180, 194–96 (1960). A federal court had held that the course unlawfully discriminated against black people, but a jury had found that the protesters were not excluded because of their race. *Wolfe*, 364 U.S. at 180–81. There was a dispute as to whether the record of the federal case was offered in evidence in the state criminal proceedings. *Wolfe*, 364 U.S. at 183. The majority found no constitutional error in the state supreme court’s affirmance of the conviction. *Wolfe*, 364 U.S. at 194–96.

for whites only.<sup>170</sup> Thurgood Marshall argued for the demonstrators as director of the premier civil rights litigation unit that was to become the NAACP Legal Defense and Educational Fund.<sup>171</sup> This is especially significant, for Marshall would later rejoin the Court's discourse on federal power as Solicitor General arguing similar issues for the United States (and still later, of course, as a Justice).<sup>172</sup> Marshall and his colleagues sought a constitutional ruling that the denial of service violated the Fourteenth Amendment.<sup>173</sup> A comfortable majority of the Court chose not to reach the constitutional question, but took the unusual step of reversing the conviction on a ground not raised by the protesters.<sup>174</sup> Pioneering a practice of resorting to Federal Commerce Clause powers rather than grappling with the meaning of constitutional personhood, seven Justices held the conviction invalid because the denial of service was in the course of interstate travel and therefore violated anti-discrimination provisions of the Federal Interstate Commerce Act.<sup>175</sup>

*Garner v. Louisiana*, a sit-in case involving a sit-in demonstration that resulted in convictions for disturbing the peace, was the first of the 1960s protest cases in which the justices disagreed publically about core civil rights and federalism principles.<sup>176</sup> The demonstrators, once again represented by Thurgood Marshall's civil rights litigation unit,<sup>177</sup> had sought to enact, to call attention to, and to establish as a matter of constitutional law, their right to be accommodated in public

170. *Boynton v. Virginia*, 364 U.S. 454, 455 (1960).

171. *Id.* at 454; see Julius L. Chambers, *Thurgood Marshall's Legacy*, 44 STAN. L. REV. 1249, 1252 (1992) ("The NAACP Legal Defense and Educational Fund was created in 1939 and incorporated in 1940, largely by Thurgood, as a separate organization from the NAACP. . . . As head of LDF, Thurgood was responsible for coordinating the entire legal program and the specific litigation strategies of LDF and the NAACP.").

172. For an overview of Marshall's civil rights advocacy before the court as solicitor general see Russell Moss, *Marshall's Battles Before the Bench*, 1 HOW. SCROLL SOC. JUST. REV. 148, 158-61 (1993).

173. *Boynton*, 364 U.S. at 457.

174. *Id.*

175. *Id.* at 463-64.

176. *Garner v. Louisiana*, 368 U.S. 157 (1961).

177. The case was argued by Jack Greenberg, with William Coleman, James Nabritt, III, and Louis Pollak on the brief. All were counsel at and for the Legal Defense Fund. See Brief for Petitioners at 38, *Garner v. Louisiana*, 368 U.S. 157 (1961) (No. 26).

spaces.<sup>178</sup> This time, every justice voted in favor of the protesters. A majority (including Justice Frankfurter<sup>179</sup>) avoided the constitutional issues by voting to vacate the demonstrators' convictions on the ground that there was no evidence that the peace of the Louisiana community in which the sit-in occurred was disturbed or was likely to be disturbed.<sup>180</sup>

Justices Douglas thought any fool could see, and any judge might rightfully take judicial notice, that public, integrated dining would disturb the peace of downtown Baton Rouge, Louisiana in the 1960s, and he squarely confronted the question the demonstrators had wanted to pose. In bold and controversial<sup>181</sup> terms, Douglas laid out an inclusive definition of the public sphere. He relied on language from the *Civil Rights Cases*<sup>182</sup> to argue that State action included not only the enforcement of State laws but also the enforcement of local customs. Pointing to a long and wide-ranging<sup>183</sup> list of Louisiana laws requiring race segregation, he concluded that segregation was so much a part of the policies and customs of the State of Louisiana that the state was complicit even when it enforced a policy of segregation that happened not to be officially mandated.<sup>184</sup> Looking to tort and administrative law precedents, Douglas found ample

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178. *See Garner*, 368 U.S. at 160–63.

179. *Id.* at 174. Justice Frankfurter concurred separately to emphasize that “the whole question on the answer to which the validity of these convictions turns” was whether “the ‘public’ tended to be alarmed by the conduct of the petitioners” and that no attempt had been made to prove it. *Garner*, 368 U.S. at 175.

180. *Id.* at 163–64.

181. *See* Kenneth L. Karst & William W. Van Alstyne, Comment, *Sit-Ins and State Action—Mr. Justice Douglas, Concurring*, 14 STAN. L. REV. 762, 765–68 (1962) (explaining that Justice Douglas believed “custom, observed by parallel private decisions and uncoerced by state police or state laws,” was sufficient to qualify as State action).

182. *Garner*, 368 U.S. at 178 (Douglas, J., concurring) (“[C]ivil rights, such as are guaranteed by the constitution against state aggression, cannot be impaired by the wrongful acts of individual, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings.” (quoting *The Civil Rights Cases*, 109 U.S. 3, 17 (1883))) (emphasis in original).

183. Common carriers of passengers had to provide separate waiting rooms and reception room facilities for the two races. LA. REV. STAT. §45:1303 (West 1960) (repealed 1972); Louisiana required that all circuses or tent exhibitions to which the public was invited must have separate entrances for separate races. LA. REV. STAT. § 4:5 (West 1950) (repealed 1975); No dancing, social functions, entertainment, athletic training, games, sports, contests “and other such activities involving personal and social contacts” were open to both races. LA. REV. STAT. § 4:451 (West 1960) (repealed 1972).

184. *Garner v. Louisiana*, 368 U.S. 157, 181 (1961).

authority for inhibiting a proprietor's choices about how to run a business. Drawing a connection to New Deal legislation that permissibly regulated "private" businesses in order to promote social welfare, he argued that a state's regulation of establishments serving the public made the state complicit when it permitted and enforced a regulated business establishment's voluntary segregation policies.<sup>185</sup>

In language that seemed responsive to the Movement's claim to be the voice of the People, Douglas sounded a People's narrative. After pointing out that "[t]he authority to license a business for public use is derived from the public" he reminded his readers that "Negroes are as much a part of that public as are whites."<sup>186</sup> Having oriented his account to protection of people's rights as a steady state, Douglas renewed Harlan challenge that the Court take on the work of understanding what a post-slavery, classless society would look like and debating whether—or to what extent—the United States was constitutionally committed to being such a society.<sup>187</sup> And with this, he opened a Pandora's Box of new questions about federal power: This time the question was not whether the federal government could prosecute individuals, rather than states, for civil rights violations, but whether private persons could discriminate on racial grounds in their privately owned businesses and count on the state to enforce their exclusionary commands.

As protesters were repeatedly arrested and convicted, demonstration cases proliferated in the Supreme Court. On a single day in 1963, the Court decided six of them.<sup>188</sup> Justice Frankfurter had resigned and been replaced by Arthur Goldberg, who promptly joined Justice Douglas's broodings about state action and people's rights.<sup>189</sup> The six civil rights cases decided on May 20, 1963 were all decided in favor of the demonstrators; all convictions were vacated.

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185. *Id.* at 184–85.

186. *Id.* at 184.

187. *Id.* at 185 ("As the first Mr. Justice Harlan stated in dissent in *Plessy v. Ferguson*, . . . in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind.")

188. See generally *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Shuttlesworth v. City of Birmingham*, 373 U.S. 262 (1963); *Lombard v. Louisiana*, 373 U.S. 267 (1963); *Wright v. Georgia*, 373 U.S. 284 (1963); *Gober v. City of Birmingham*, 373 U.S. 374 (1963); *Avent v. North Carolina*, 373 U.S. 375 (1963).

189. David M. Levitan, *The Effect of the Appointment of a Supreme Court Justice*, 28 U. TOL. L. REV. 37, 60–63 (1996) (discussing the impact of Justice Frankfurter's resignation on civil rights cases).

Eight justices voted in every one either to vacate or to remand for further proceedings.<sup>190</sup> *Peterson*, chosen as the lead case, was briefed and argued for the demonstrators by NAACP Legal Defense Fund attorneys<sup>191</sup> who led with a claim that public accommodation is a federally protected right, even when the decision to segregate is made by the accommodation's private proprietors.<sup>192</sup> Once again, the Court ruled in favor of the individual defendants, but failed to address the People's claim of right.<sup>193</sup> No defense of the People's narrative was voiced. To the contrary, Justice Harlan II, took up Justice Frankfurter's baton, not to the full symphony of restricting the reach of the Fourteenth Amendment to what *Slaughterhouse* set off as uniquely federal rights, but to the tune of insisting that federal enforcement of civil rights had to be limited to proceedings against the states.<sup>194</sup> In doing so, he sounded the Confederate narrative: "[I]nherent in the concept of state action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority."<sup>195</sup>

Five months after the Court announced its decisions in *Peterson*,

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190. *Peterson*, 373 U.S. 244 (unanimous decision) (Warren, C.J., opinion) *rev'g* 122 S.E.2d 826 (S.C. 1961); *Shuttlesworth*, 373 U.S. 262 (7-1 decision) (Warren, C.J., majority opinion), *rev'g* 134 So. 2d 215 (Ala. Ct. App. 1961), *and* 134 So. 2d 213 (Ala. Ct. App. 1961); *Lombard*, 373 U.S. 267 (7-1 decision) (Warren, C.J., majority opinion), *rev'g* 132 So. 2d 860 (La. 1961); *Wright*, 373 U.S. 284 (unanimous decision) (Warren, C.J., opinion), *rev'g* 122 S.E.2d 737 (Ga. 1961); *Gober*, 373 U.S. 374 (per curiam), *vac'g* 133 So. 2d 697 (Ala. Ct. App. 1961); *Avent*, 373 U.S. 375 (per curiam), *vac'g* 118 S.E.2d 47 (N.C. 1961).

191. Matthew J. Perry, then Chief Counsel for the South Carolina Conference of the NAACP, served as counsel for the demonstrators in *Peterson*. See <http://www.columbiabusinessmonthly.com/View-Article/ArticleID/1224/Remembering-Judge-Matthew-J-Perry.aspx>

192. See *Peterson*, 373 U.S. at 247 (noting that the petitioners' argument was based on the Equal Protection clause of the Fourteenth Amendment).

193. See, e.g., *Lombard*, 373 U.S. at 271-74 (reversing based on the presence of State action, not an individual right to public accommodation).

194. Justice John Marshal Harlan II would have remanded all but one of the cases for closer inquiry into the role played by local authority and whether the various proprietors acted under official compulsion. *Peterson*, 373 U.S. at 250-61 (Harlan II, J., concurring in part and dissenting in part).

195. *Id.* at 250. The majority assumed a State action requirement and found that it was, or could have been, met by local segregation ordinances or, in one case, by a sheriff's announcement. See *Peterson*, 373 U.S. at 246-48 (relying on an ordinance to satisfy the State action requirement); *Shuttlesworth*, 373 U.S. at 264-65 (relying on a trespass ordinance to satisfy State action requirement); *Lombard*, 373 U.S. at 273-74 (equating a sheriff and other city official's pro-segregation statements to State action).

*et al.*, it heard arguments in two other sit-in cases. Eight months later, it brought these two cases to a conclusion, ducking once again the question whether there is a constitutional right of public accommodation and remanding each case to state courts for reconsideration in light of anti-discrimination laws passed after the sit-ins had occurred.<sup>196</sup> Justice Douglas seemed infuriated by the Court's failure to reach the constitutional question presented by the cases, and he had gained allies: Chief Justice Earl Warren (who, like Douglas, had voted in the past to duck the constitutional question) and Justice Goldberg (who had replaced Justice Frankfurter) adopted Douglas's view on the right to public accommodation.<sup>197</sup> In words that gave a sense of the tenor of the time, Douglas asserted that "[t]he whole nation has to face the issue" of public accommodation:

Congress is conscientiously considering it [in deliberations over what was to be enacted, eleven days later, as the Civil Rights Act of 1964]; some municipalities have had to make it their first order of concern; law enforcement officials are deeply implicated, North as well as South; the question is at the root of demonstrations, unrest, riots, and violence in various areas. The issue in other words consumes the public attention. Yet we stand mute. . . .<sup>198</sup>

Douglas then made his position on the core constitutional question crystal clear, and in doing so made the strongest assertion he had made yet with respect to federal power to protect civil rights. Once again echoing the People's claim of national right, he grounded his position by saying: "We deal here with incidents of national citizenship."<sup>199</sup> Reviewing the arguments he had made in *Garner*, he concluded that whether the American version of apartheid was mandated, enforced, or simply tolerated by the state, it violated the People's rights that were solidified by the Reconstruction Amendments.

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196. *Bell v. Maryland*, 378 U.S. 226, 239–42 (1964).

197. *See id.* at 286 (Goldberg, J., concurring with Warren, C.J., joining) ("I am impelled to state the reasons for my conviction that the Constitution guarantees to all Americans the right to be treated as equal members of the community with respect to public accommodations.").

198. *Id.* at 243 (Douglas, J., concurring).

199. *Id.* at 249.

C. *Confronting A Sharper Cry for Civil Rights Enforcement*

Months after the decision in *Bell*, Robert Moses and his colleagues were struggling to discover ways to call the nation's attention to Southern terrorism. When asked about Freedom Summer 1964, Robert Moses often says that three supremacist murders and the failures of Mississippi and Federal officials to bring the murderers to justice persuaded young people in the Movement that it was necessary and right to call a group of college students to Mississippi and force the country to "look at itself." Violence against black civil rights workers in Mississippi was routine and officially tolerated.<sup>200</sup> Drastic measures were needed if the Movement was not to be snuffed out by terror.

The drastic measure chosen was Freedom Summer 1964. Hundreds of young people from across the country joined a demonstration of multi-racial citizenship to claim, as People of the United States, the rights of public accommodation and political participation. They trained in the Spring of 1964 to become non-violent protesters, voter registration coaches and teachers in "Freedom Schools" and then traveled to Mississippi to live and work during the summer in sharecropper communities in enactments of multi-racial democracy.

As Moses had predicted, Freedom Summer became a public spectacle, and what the country saw when it "looked at itself" were the terrorist murders of yet another young black civil rights worker

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200. Moses knew this from personal experience. After he was beaten by a sheriff's nephew, a local jury acquitted the sheriff's nephew. Steven F. Lawson, *Prelude to the Voting Rights Act: The Suffrage Crusade, 1962-1965*, 57 S. C. L. REV. 889, 894 (2006). Things got worse. Voter registration activist Herbert Lee was shot dead by Eugene Hurst, a member of the Mississippi legislature. W. William Hodes, *Lord Brougham, the Dream Team, and Jury Nullification of the Third Kind*, 67 U. COLO. L. REV. 1075, 1097 n.57 (1996). Hurst said that Lee had a tire iron. Local officials pressured Lewis Allen, a black man who had witnessed the killing, to testify before a local grand jury that Lee did have a tire iron. John Doar, Essay, *The Work of the Civil Rights Division in Enforcing Voting Rights Under the Civil Rights Acts of 1957 and 1960*, 25 FLA. ST. U. L. REV. 1, 6 (1997). Federal Justice Department officials said they could do nothing. Two years later, on New Year's Eve, 1964, Louis Allen, who had admitted to federal officials that he saw no tire iron, was also murdered. Hodes, *supra*, at 1097 n. 57. There was no state or federal prosecution. There followed the assassination of Medgar Evers, one of Mississippi's most prominent civil rights leaders, by a member of the White Citizens' Council. There was no state or federal prosecution. *The Civil Rights Legacy of Medgar Evers*, NPR: NEWS & NOTES (June 13, 2015), <http://www.npr.org/templates/story/story.php?storyId=4700724>.

and—alas, more compellingly to the nation as a whole—two white college students who were volunteers in the Freedom Summer project. The terrorist murders of James Cheney, Robert Goodman, and Michael Schwerner were barely addressed at the time in the Mississippi Court system.<sup>201</sup> Justice Department attempts to prosecute fifteen alleged lynch mob members, three of them law enforcement officers, came to the Supreme Court on interim appeal in 1966 in *United States v. Price*.<sup>202</sup> The murders of Goodman, Cheney and Schwerner were still matters of public consciousness; indeed, the Government's oral argument, made by Thurgood Marshall, then serving as Solicitor General, began by pointing out that the case was known throughout the world.<sup>203</sup>

As it had in the *Williams* cases and in the cases that clustered around *Garner* and *Peterson*, the Court debated a burning constitutional question in more than one instantiation. *United States v. Price* was argued and decided with *United States v. Guest*. As it had done with respect to the issue of public accommodation in *Garner* and *Peterson*, the Court found ways to duck the crucial question that the cases raised.

While *Price* dealt with Mississippi supremacist terrorism, *Guest* dealt with supremacist terrorism in Georgia. Three African-

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201. The political and law enforcement climate in Neshoba County, the county in which the civil rights workers were murdered, is suggested by this account of a 1966 demonstration that Martin Luther King, Jr. led at the county courthouse on the second anniversary of the murders:

A large man dressed in a cowboy hat, sunglasses and a short-sleeved uniform met King at the two-story red-brick courthouse. It was Deputy Cecil Price. Price said, "You can't come up these steps." "Oh, yes," King replied. "You're the one who had Schwerner and the other fellows in jail." "Yes, sir," Price answered. King tried to address the crowd above the loud jeers of white onlookers. "In this county, Andrew Goodman, James Chaney, and Michael Schwerner were brutally murdered. I believe the murderers are somewhere around me at this moment." "You're damn right—they're right behind you," muttered the Deputy.

Douglas O. Linder, *Bending Toward Justice: John Doar and the "Mississippi Burning" Trial*, 72 MISS. L.J. 731, 754–55 (2002). One of the killers was convicted of murder in a Mississippi court, but not until 2005. *Former Klansman Found Guilty of Manslaughter*, CNN (Jun. 22, 2005), <http://www.cnn.com/2005/LAW/06/21/mississippi.killings/>. The remaining suspects in the murders have never been charged.

202. *United States v. Price*, 383 U.S. 787, 789 (1966).

203. Transcript of Oral Argument at 2, *United States v. Price*, 383 U.S. 787 (1966), (Nos. 59 & 60).

American army reserve officers were fired on by Klansmen in 1964 as they were driving on a Georgia highway from a summer assignment at Fort Benning.<sup>204</sup> One of the officers, Lemuel Penn, a 48-year-old decorated World War II veteran and assistant school superintendent in the District of Columbia, was shot dead.<sup>205</sup> Predictably, no state conviction ensued; two of the assailants were charged but acquitted. Although no officer or employee of the State was involved in the shooting, the Justice Department charged the Klansmen under reenacted portions of the Force Act.<sup>206</sup> All of the indictments were dismissed in their entirety by a District Court judge who relied in part on *Williams II* to hold that the conspiracy provision did not reach private actions to deny Fourteenth Amendment rights.<sup>207</sup>

Thurgood Marshall had chosen these Georgia and Mississippi terrorism cases to be his first arguments as Solicitor General. They were heard on the same day. Having urged, without success, as a civil rights lawyer that access to privately owned public accommodations is an entitlement of United States citizenship, Marshall argued in *Guest* that private conspiracies to keep people from enjoying access to public accommodations are prosecutable by the United States, *at least insofar as the facilities are provided by a state*. This strategic concession was possible because the Government had charged the *Guest* defendants with conspiring and acting for the purpose of denying people of African descent equal use of roads, highways and other public facilities. The Court did not take the bait; Marshall's attempt to extend the government's authority at least to private action that interfered with the enjoyment of public benefits or facilities failed.<sup>208</sup> As in the enactment cases, the Court found itself in these enforcement cases unable to make a majority statement that significantly broadened the scope of federal power to protect civil rights.<sup>209</sup>

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204. See *United States v. Guest*, 383 U.S. 745, 747 n.1 (1966) (listing the criminal charges against the defendants).

205. See *United States v. Guest*, 246 F. Supp. 475, 487 (M.D. Ga. 1964), *rev'd* 383 U.S. 745 (1965) (“[T]wo of the defendants, Sims and Myers, have already been prosecuted . . . for the murder of Lemuel A. Penn and by a jury found not guilty.”).

206. *Guest*, 383 U.S. at 746–47.

207. *Guest*, 246 F. Supp. at 478–86. The District Court also held that, if the Klan Act remnant did reach private action, it was unconstitutionally vague. *Id.* at 486–87.

208. See *United States v. Price*, 383 U.S. 787, 806 (1966) (noting that the Court's decision was based on the traditional state action requirement and did not raise “fundamental questions of federal-state relationships”).

209. *Id.*

Since our method is to focus on competing strands of judicial brooding rather than on case outcome alone, we need not end the story of the 1960s cases with a report of failure to put a significant dent in the state action doctrine. Thurgood Marshall planted, and Justice Fortas hid away in the *Price* majority opinion, a time bomb of historical material that squarely challenges the Confederate narrative and its underlying premises. This material may one day permit a more people-focused approach to the question of federal civil rights enforcement power.

But for the very public drama of the Mississippi murders, the Court's opinion in *Price* might be regarded as unremarkable. Eighteen people, three of them law enforcement officers, had been charged with violating and conspiring to violate the provisions of Sections 241 and 242 of Title 18 of the United States Code.<sup>210</sup> The district court had sustained all of the indictments under the general conspiracy statute, but it had relied on *Williams I* to dismiss the indictments under the substantive provisions as to the fifteen defendants who were not State officials.<sup>211</sup> The allegations were that the abductions and murders of the civil rights workers were coordinated from start to finish in collaboration with the law enforcement officers and with their active participation and that the officers had acted in their official capacities.<sup>212</sup> Indeed, the extent of official participation was at least as great, if not greater, than it had been in the *Williams* cases. But the private defendants relied on Justice Frankfurter's four-person concurrence in *Williams I*, and on Justice Harlan's echo of that concurrence in *Peterson*, to argue that the conspiracy statute could not reach them. They argued, that is, that Section 241, the conspiracy statute, had limitations analogous to those that the Court in *Slaughterhouse* held the Fourteenth Amendment itself to have: It applied to private individuals' conspiracies only when the conspirators' intent was to deprive someone of a *uniquely* federal right. Speaking in the terms of the Confederate narrative, with steady state control at risk of disruption by federal meddling, they argued that the statute did not apply in ways that would usurp or discourage state civil rights and criminal justice enforcement.

The *Price* Court seemed reasonably unified on the surface. Justice Fortas wrote for the Court, and there was only one brief

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210. *Id.* at 790.

211. *Id.* at 791–93.

212. *Id.* at 790.

concurrence (by Justice Black to distance himself from the Court's reliance on *Williams II*).<sup>213</sup> In its second paragraph, the Court denied that it was making constitutional law. The issue, it said, was simply one of statutory construction.<sup>214</sup> Still, in its next sentence it declared (ambiguously, we think) that it had no doubt of Congressional power to enforce by criminal sanction "every right guaranteed by the Due Process clause."<sup>215</sup> Reasoning that private persons who engage with state officials in prohibited conduct are acting "under color" of law for purposes of the conspiracy statute, the opinion easily concluded that the indictments should not have failed as against the fifteen private citizens by virtue of their status.<sup>216</sup> In addressing the *Williams I* "uniquely federal right" limitation of the conspiracy statute, the Court relied on legislative history to hold—as a matter of statutory interpretation rather than as a matter of federal power—that Congress had intended to reach exactly the kind of private, Klan terrorism in which the defendants allegedly engaged.<sup>217</sup> Frankfurter's *Slaughterhouse* strategy of draining the federal government of power to address basic civil rights was put to sleep, if not to final rest.

The Court's reluctance to face questions of federal power is equally clear in the arguments and opinions in *United States v. Guest*. *Guest*, like, other anti-terrorism cases we have reviewed, was resolved on the basis of technicalities. The *Guest* and *Price* cases differed in that none of the *Guest* respondents was a public official. Marshall attempted to finesse this difficulty by creating a passive link to the state: he argued that the defendants were interfering with the victims' access to roads, highways, and other public facilities that the state was required under the Fourteenth Amendment to make available regardless of race. Their actions therefore interfered with the state's Fourteenth Amendment obligation of equal protection even though the state was, as Marshall put it in oral argument, doing its constitutional duty.<sup>218</sup> The Court

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213. *Id.* at 807 (Black, J., concurring).

214. *Id.* at 789 (majority opinion) ("It is an issue of construction, not of constitutional power.")

215. *Id.*

216. *Id.* at 799–800.

217. *Id.* at 801–806.

218. Transcript of Oral Argument at 8, *United States v. Guest*, 383 U.S. 745 (1966) ("Here we have the state opening up and the state has certain responsibilities, but once the state owns it up nobody should be allowed to prevent the Negro from getting his right. . . . If the state says 'Well, we'll go ahead and do what we're

declined to expand state action doctrine in this way; it instead found a claim of state action in the allegation of a plot to have African-Americans falsely charged with crimes and suggested that proof at trial might establish that law enforcement officials were knowingly involved in the false arrest scheme.<sup>219</sup> The law regarding the necessity of state action was left untouched.<sup>220</sup>

Taken as a whole, the three opinions filed in *Guest* are a tangle of disagreement. Only Justice Clark joined Justice Stewart's opinion in full, and the Justices were unable to agree as to what the opinion actually held. Justice Harlan joined the Stewart opinion, but dissented "to the extent that" the conspiracy statute was being held to cover "conspiracies embracing only the actions of private persons."<sup>221</sup> Justice Clark wrote separately to deny that the statute was being held to cover conspiracies embracing only the actions of private persons, a question he said the opinion "clearly" avoided.<sup>222</sup> In this, he was joined by Justices Black and Fortas. Justice Brennan interpreted the Stewart opinion to *rule against* Marshall's passive link argument and wrote emphatically to say that he could "find no principle of federalism nor word of the Constitution" that denies Congress power to guarantee civil rights.<sup>223</sup> Justice Harlan (II) wrote at length to disassociate himself from any part of the Court's opinion that relied on the existence of a federal right against private interference with interstate travel.<sup>224</sup>

Careful vote-counting and opinion-comparisons tell us, then, that the scope of federal power to define and enforce a federal body of civil rights remained unclear after the sit-in and anti-terrorism cases of the 1960s. The state action doctrine continued—and continues today—to haunt us; the *Price* opinion repeated, and the Court has often repeated, Justice Douglas's concession in *Williams II* that

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supposed to do and break it down,' and hoodlums do the things charged in this indictment then what happens, the rights are [a] nullity.").

219. *Guest*, 383 U.S. at 756–57.

220. Presumably the Justices were not persuaded that state action could be found in the attempt to use state officials unwittingly in the scheme, and a distinction was made between arrest at the behest of a segregationist shop-owner and arrest at the behest of a Klan member bent on harassing blacks to deter their exercise of more clearly established federal rights. See *id.* at 756 (noting that Klan harassment "may go considerably further" than arrest at the request of a segregationist shop-owner).

221. *Id.* at 762–63 (Harlan, J. dissenting).

222. *Id.* at 762 (Clark, J. dissenting).

223. *Id.* at 784 (Brennan, J., concurring).

224. *Id.* at 762–74 (Harlan, J., dissenting).

“[t]he Fourteenth Amendment protects the individual against *state action*, not against wrongs done by *individuals*,”<sup>225</sup> and the Justices in *Price* were unable to make a unified statement about the reach of federal civil rights enforcement power. We remain in doubt about Congressional authority to contain separatist insult or supremacist terror. But, as we have suggested, the *Price* opinion contains material that should feed further judicial brooding about civil rights and federal power.

Between the lines of Justice Fortas’s rather inconclusive *Price* opinion lie historical insights and doctrinal themes that problematize the Confederate narrative of states’ rights. The Justice orients his readers to Reconstruction rather than to 1787, framing the conspiracy and substantive civil rights statutes as having “come to us from Reconstruction days, the period in our history which also produced the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution.”<sup>226</sup> Citing Justice Holmes in a voting rights case for the proposition that the section applies to “*all* Federal rights,” Fortas calls to mind the context of Southern terrorism:

The source of this section in the doings of the Ku Klux and the like is obvious and acts of violence obviously were in the mind of Congress. Naturally Congress put forth all its powers. . . . [T]his section dealt with Federal rights and with all Federal rights, and protected them in the lump . . . . [It should not be construed so] as to deprive citizens of the United States of the general protection which on its face § 19 [now § 241] most reasonably affords.<sup>227</sup>

Having turned readers’ attention in this case of Klan violence to the Klan terrorism of the Reconstruction era, Fortas offered a brief history of southern violence in the years before the conspiracy statute was passed. This history frames presentation of “the only statement explanatory of § 241 in the recorded congressional proceedings relative to its enactment.”<sup>228</sup>

The statement, which had, ironically, been relied on by Justice

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225. *United States v. Williams (Williams II)*, 341 U.S. 70, 92 (1951) (Douglas, J., dissenting) (emphasis in original).

226. *United States v. Price*, 383 U.S. 787, 789 (1966).

227. *Id.* at 800–01 (citing *United States v. Mosley*, 238 U.S. 383, 387–88 (1915)).

228. *Id.* at 805.

Frankfurter to very different ends in *Williams I*,<sup>229</sup> was cited in the government's brief, appended in full to the brief and addressed repeatedly in Marshall's oral argument. It made clear that Senator Pool of North Carolina, sponsor of the conspiracy statute, intended that it extend beyond protection of uniquely Federal rights. But it did much more: It repeatedly made clear Pool's intention that the statute would protect against the *private* violence of Klansmen and their ilk, and Justice Brennan, writing separately in *Guest*, relied upon it to establish just that point.<sup>230</sup>

Senator Pool and his speech merit more attention than they have received. The lack of attention is interesting in itself. Although the meaning and reach of the conspiracy statute have been actively litigated,<sup>231</sup> and although a majority of the Court accepted Marshall's description of the speech as the "only" thing in the Congressional Record that spoke directly to the conspiracy provision's meaning, and despite Justice Fortas's decision to append the entire speech to the *Price* opinion, the speech has been referenced in only seven subsequent federal cases, only four of them opinions at the Supreme Court level.<sup>232</sup> This lack of attention might signal that *Price* settled so

229. See *United States v. Williams (Williams I)*, 341 U.S. 70, 74 (1951)(relying on statements of Senator Poole to establish that debate was hasty)...

230. See *United States v. Guest*, 383 U.S. 745, 782 (1966) (Brennan, J., concurring in part and dissenting in part).

231. See generally *United States v. Comstock*, 560 U.S. 126 (2010); *United States v. Guest*, 383 U.S. 745 (1966); *Hodges v. United States*, 203 U.S. 1 (1906); *Motes v. United States*, 178 U.S. 458 (1900); *In re Quarles*, 158 U.S. 532 (1895); *Pettibone v. United States*, 148 U.S. 197 (1893); *Logan v. United States*, 144 U.S. 263 (1892); *United States v. Waddell*, 112 U.S. 76 (1884); *Ex parte Yarbrough*, 110 U.S. 651 (1884); *United States v. Cruikshank*, 92 U.S. 542 (1875).

232. See *United Bhd. of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 838 (1983) (using Senator Pool's speech to ultimately find that 42 U.S.C.S. § 1985(3) does not reach conspiracies "motivated by economic or commercial animus"); *Griffin v. Breckenridge*, 403 U.S. 88, 101 (1971) (using Senator Pool's speech to support the argument that a federal statute covered private conspiracies because "Congress must deal with individuals[,] not States. It must punish the offender against the rights of the citizen."); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968) (using Senator Pool's speech to rebut the argument that the Fourteenth Amendment was meant somehow to limit the Civil Rights Act to state action); *United States v. Johnson*, 390 U.S. 563, 566–67 (1968) (using cases that relied on Senator Pool's speech to say that § 241 is a statute that encompasses "all of the rights and privileges secured to citizens by all of the Constitution and all of the laws of the United States.") (emphasis in original); *Duane v. Geico*, 37 F.3d 1036, 1042 (4th Cir. 1994) (using Pool's speech to support the argument that "section 16 of the 1870 Act prohibited private discrimination against aliens"); *United States v. Gaggi*, 811 F.2d 47, 56 (2d Cir. 1987) (using Pool's speech to show that Congress's original intent in enacting § 241 was to "secur[e] and protec[t] the liberty of the citizen"); *Bauers v. Heisel*, 361

decisively the statute's meaning that further reference to the speech would be superfluous. But what did *Price* really settle?

As we have said, it decided that the indictment charging a federally proscribed conspiracy on the part of Goodwin, Chaney, and Schwerner's killers alleged sufficient state action. But neither *Price* nor *Price* and *Guest* taken together settled the question whether state action was required to give the federal government authority to prosecute conspiracies or actions to inhibit the exercise of civil rights. Nor did they lay to rest decisively the question whether Congress intended to exercise—and whether Congress has—the power to protect people's rights that are not “uniquely federal.”

The full text of Senator Pool's speech goes directly to both of these still unanswered questions. Why did Marshall append the full text of the speech to the government's brief?<sup>233</sup> And why did Fortas append the full brief to the Court's opinion, adding a puzzling footnote saying that it was appended “only to show that the Senator clearly intended § 241 to cover Fourteenth Amendment rights.”<sup>234</sup> Senator Pool sounds the People's narrative of full federal protection of civil rights and insists on the federal government's power to proceed in doing so against individuals as well as against States:

That the United States Government has the right to go into the States and enforce the fourteenth and the fifteenth amendments is, in my judgment, perfectly clear, by appropriate legislation that shall bear upon individuals. . . . I believe that the United States has the right, and that it is an incumbent duty upon it, to go into the States to enforce the rights of the citizens against all who attempt to infringe upon those rights when they are recognized and secured by the Constitution of the country. *If we do not possess that right the danger to the liberty of the citizen is great indeed in many parts of this Union.*<sup>235</sup>

Here we have a post-Civil War vision, not of reform, but of hugely consequential reconstruction of the federation that was conceived under

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F.2d 581, 593 (3d Cir. 1966) (using Pool's speech to show that “Congress intended the Civil Rights Acts to be applicable to every person as citizen and not as state officer”).

233. See CONG. GLOBE, 41st Cong., 2d Sess. 3611–3613 (1870) (remarks of Sen. Pool of North Carolina on sponsoring Section 6 of the Enforcement Act of 1870), reprinted in Appendix to United States v. Price, 383 U.S. 787, 807–20 (1966).

234. *Price*, 383 U.S. at 805 n.19.

235. Appendix to *Price*, 383 U.S. at 819 (emphasis added).

the proposition that all people are created equal, but designed to preserve the freedom of private persons to enslave other human beings. Here we have a People's narrative of national protection of human rights:

I believe that we have a perfect right under the Constitution of the United States, not only under these three amendments, but under the general scope and features and spirit of the Constitution itself, to go into any of these States for the purpose of protecting and securing liberty. I admit that when you go there for the purpose of restraining liberty, you can go only under delegated powers in express terms; but to go into the States for the purpose of securing and protecting the liberty of the citizen and the rights and immunities of American citizenship is in accordance with the spirit and whole object of the formation of the Union and the national Government.<sup>236</sup>

Granted, we are talking about the opinion of one Congressman, albeit the sponsor and drafter of important federal antiterrorism legislation. But we are not talking about the opinion of a Radical Republican. John Pool grew up and resided throughout his life on a North Carolina plantation. He was opposed to secession, but not an antislavery advocate. He was persistently active in fighting the Klan, both with federal force and with state forces. In his heart of hearts, Senator Pool may well have preferred that States have full and exclusive power to define and protect civil rights. He understood, however, the need for change and joined the Republican Party in part out of "fear that estates would be confiscated . . . and divided among the blacks unless conservative Unionists like himself accepted the political changes demanded by Congress and controlled the course of reconstruction in the state."<sup>237</sup>

The possibility of Senator Pool's ambivalence is no justification for watering down the meaning of the statutes he sponsored, or of the Amendments pursuant to which they were passed. As we have shown, there has been a persistent tendency to interpret the Reconstruction statutes and Amendments narrowly owing to the fact that they were approved in a time of upheaval. But, as Pool's words reveal, a

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236. *Id.* at 812.

237. DICTIONARY OF NORTH CAROLINA BIOGRAPHY, VOL. 5 119 (William S. Powell ed., 1994).

substantial post-bellum reorganization of federal, state and people power was deliberately undertaken and fully comprehended. This reorganization meant that where the liberty of the People was threatened, the national government had independent authority and responsibility to respond. As Pool put it, for the federal government “to go into the States for the purpose of securing and protecting the liberty of the citizen and the rights and immunities of American citizenship is in accordance with the spirit and whole object of the formation of the Union and the national Government.”<sup>238</sup>

### III. LOST OPPORTUNITIES: THE CONFEDERATE NARRATIVE IN MODERN DOCTRINE

When we look to cases after *Price* and *Guest*, we find a significant pattern: we see revivals of the Confederate narrative both within and outside the field of civil rights, with mantras to the liberty-enhancing function of states’ rights protections prominently repeated. On the other hand, we see no direct critique of the Confederate premise that the People’s liberty depends primarily on states’ autonomy and little trace of the People’s Reconstruction narrative that found voice with the revival of Senator Pool’s defense of the Enforcement Act. We do see signs of brooding within the Court about the reach of federal power to protect civil rights, but that brooding no longer references the People’s story of a genuine reconstruction to address the contradictions that were inherent in the Founders’ compromise with slavery.

It is beyond the scope of this article to analyze the nearly fifty years of Supreme Court federalism jurisprudence since the 1960s. It must suffice here to identify significant re-emergences of the Confederate narrative and moments of lost opportunity—moments when defense of the federal government as a guardian of civil rights lacked the persuasive weight of a People’s account of Reconstruction. To that end, we discuss four cases: *City of Boerne v. Flores*, *Morrison v. Brzonkala*, *Shelby County v. Holder*, and *Obergefell v. Hodges*.<sup>239</sup>

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238. Appendix to *Price*, 383 U.S. at 812.

239. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013); *United States v. Morrison*, 529 U.S. 598 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

*A. The Confederate Narrative Surfaces in a Struggle Over the  
Separation of Federal Powers*

*City of Boerne* must be addressed in any discussion of more recent civil rights doctrine. It established the principle that congressional measures authorized by the Fourteenth Amendment's Enforcement Clause must be "congruent and proportional" to the injury Congress seeks to prevent or remedy.<sup>240</sup> We do not address here the fit between notions of congruence and proportionality and the analysis of federal anti-discrimination measures. For present purposes, we regard *Boerne* as an atypical civil rights case that improbably, but consequentially, evoked a revival of the Confederate narrative.

*Boerne* involved much congressional and judicial sword-rattling and is best understood as a case about the separation of judicial and legislative powers. The Court had ruled, in *Employment Division v. Smith*,<sup>241</sup> that a State could deny unemployment benefits to an employee who had been discharged as a result of having used peyote in a religious ceremony. Breaking precedent, the Court found the State's action permissible because its sanction against peyote use was broad and neutral, rather than directed specifically at a religious practice.<sup>242</sup> In response, Congress took the combative step of passing a law for the explicit purpose of altering the doctrine the Court had announced in reaching its result.<sup>243</sup> Acting under its Fourteenth Amendment enforcement powers, Congress legislated a standard of review that the *Smith* Court had expressly rejected. In what it called the Religious Freedom Restoration Act (RFRA), Congress decreed that

240. *City of Boerne*, 521 U.S. at 520.

241. *Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 876–90 (1990).

242. *Id.*

243. The legislation announced congressional findings that

(4) in *Employment Division v. Smith*, . . . the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

42 U.S.C. § 2000bb(a)(4)–(5) (2000). The Religious Freedom Restoration Act's stated purposes were: "(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1) (2000).

governments' facially neutral laws could not substantially burden the free exercise of religion *except in furtherance of a compelling interest and through the use of minimally drastic means*.<sup>244</sup>

RFRA was challenged in *City of Boerne*<sup>245</sup> as too sweeping and disproportionate a response to the Congressional mission of securing religious freedom. The Court's response was more elaborate than it might have been. The Court devised a facially reasonable proportionality and congruence test for determining whether Congress had acted more broadly than the risk of constitutional injury warranted and applied that test to hold RFRA unconstitutional as applied to the states. But it went further. It offered the inessential assertion that the Fourteenth Amendment's drafters had considered and rejected a proposal to give Congress broad civil rights enforcement powers, thereby reviving the Confederate narrative's call for restraint of federal power.<sup>246</sup>

In what has become a sharply controverted account of Reconstruction politics,<sup>247</sup> the opinion describes debate—both on the floor of Congress and in the press—concerning the first proposed version of the Enforcement Clause. In the course of that debate, opponents of the proposed clause complained that it disturbed too much the balance of federal and state power. The initially proposed clause gave Congress power “to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.”<sup>248</sup> The version ultimately adopted provided that “Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”<sup>249</sup> Discerning differences between the reach of the first proposal and the reach of the adopted Enforcement Clause is a complex and indeterminate interpretive task. The Court's

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244. 42 U.S.C. § 2000bb-1(a)–(b) (2000).

245. The city had denied the application of a church situated in an historic district to expand its premises, and the church had offered RFRA in defense of its right to expand. *City of Boerne*, 521 U.S. at 512.

246. *Id.* at 520 - 23.

247. See generally Ruth Colker, *The Supreme Court's Historical Errors in City of Boerne v. Flores*, 43 B.C. L. REV. 783 (2002) (arguing that the Court in *City of Boerne's* narrow construction of Congress's authority under § 5 of the Fourteenth Amendment is not supported by the history of that constitutional amendment); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 85–86 (2001).

248. *City of Boerne*, 521 U.S. at 520 (quoting CONG. GLOBE, 39th Cong., 1st Sess., 1034 (1866)).

249. U.S. CONST. amend. XIV, § 5.

conclusion that the adopted clause gave Congress significantly less—or any less—authority than did the first proposal is at best controversial.<sup>250</sup> Moreover, it is not clear whether the 1866 debate was about who had the authority to *define* or who had the authority to *enforce* rights guaranteed by the Fourteenth Amendment's first section: At least some who spoke against the first version of the Enforcement Clause spoke or voted against the notion that the Federal government should have *any civil rights enforcement power at all*.<sup>251</sup> As we will see, the Court's unnecessary and questionable rehashing of Reconstruction history foretold a retreat from the vision Marshall and Fortas had offered of the power shifts and new constitutional understandings that followed on Union victory in the Civil War.

*B. The Confederate Narrative Holds Fast in a Case Involving Gender Subordination*

The People's narrative incorporates a large Fourteenth Amendment story of human rights, whereas the Confederate narrative incorporates a minimalist Fourteenth Amendment story of freeing slaves. In light of this distinction, we would expect the People's narrative to be prominent when groups other than slaves and their descendants claimed rights under the Reconstruction Amendments. We therefore turn, in this subsection to a case involving women's rights and, in the next, to a case involving sexual minorities.

*Brzonkala*,<sup>252</sup> a case involving the civil rights of women, was decided in the year 2000, but judicial narrowing of federal power had been signaled earlier when, in *United States v. Lopez*, the Court

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250. Colker, *supra* note 258 at 817; Colker & Brudney, *supra* note 258 at 85–86; see also Ronald D. Rotunda, *The Powers of Congress Under Section 5 of the Fourteenth Amendment After City of Boerne v. Flores*, 32 IND. L. REV. 163, 169–80 (1998); Steven A. Engel, Note, *The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5*, 109 YALE L.J. 115, 118 (1999).

251. See CONG. GLOBE, 39th Cong., 1st Sess. 1087 (1866) (including remarks of opposition by Rep. Davis); CONG. GLOBE, 39th Cong., 1st Sess. 2545 (1866) (including the “nay” votes to the Amendment); ROBERT J. HARRIS, *THE QUEST FOR EQUALITY: THE CONSTITUTION, CONGRESS AND THE SUPREME COURT* 40 (1960) (describing Rep. Andrew Rogers as an “extreme opponent” of the Fourteenth Amendment).

252. The case is usually cited, as it was captioned in the Supreme Court, as *United States v. Morrison*. We follow the feminist convention of referencing the case in the text by the name of its original plaintiff. See *United States v. Morrison*, 529 U.S. 598, 601 (2000).

decided that Congress lacked the power to prohibit the carrying of guns in school zones.<sup>253</sup> *Lopez* was decided under the Commerce Clause, and was arguably of little relevance to questions of Federal authority pursuant to the Reconstruction Amendments, but both the Commerce Clause and the Enforcement Clause were relied upon when Congress enacted the Violence Against Women Act (VAWA),<sup>254</sup> the statute at issue in *Brzonkala*.<sup>255</sup> Deciding that VAWA exceeded congressional authority when it created a civil action for gender-motivated acts of violence, the Court looked to both clauses, and, to the detriment of doctrinal precision, Commerce Clause jurisprudence influenced the Court's thinking in both Constitutional contexts.

Justice Rehnquist, writing for the Court to invalidate the provision of VAWA under which Christy Brzonkala had sought judgment and damages for rape, relied principally on *Lopez* for his Commerce Clause analysis.<sup>256</sup> In deciding that creation of the civil cause of action on a claim of rape exceeded congressional authority, he intoned the Confederate narrative's theme that decentralization of power is the People's best protection against tyranny saying, "the Framers crafted the federal system of Government so that the people's rights would be secured by the division of power[.]"<sup>257</sup> and repeated a caution from Justice Kennedy's concurrence in the *Lopez* case against blurring "the boundaries between the spheres of federal and state authority."<sup>258</sup>

For his analysis of the reach of federal power under the Reconstruction Amendments, Rehnquist, speaking for five, announced the Court bound by two of its most crippling late nineteenth century assaults on federal power to protect civil rights: *United States v. Harris* and the *Civil Rights Cases*.<sup>259</sup> The Rehnquist opinion went on to repeat a version of the Confederate narrative: it spoke of limitations placed upon congressional power to enforce civil rights that were necessary, not because they were explicitly set out in the Amendments, and not because of a context-specific assessment that decentralization was preferable, but "to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of

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253. *United States v. Lopez*, 514 U.S. 549, 551 (1995).

254. 42 U.S.C. § 13981(a) (2012).

255. *Morrison*, 529 U.S. at 601.

256. *Id.* at 615–19.

257. *Id.* at 616 n.7.

258. *Id.* at 611 (citing *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring)).

259. *Id.* at 621–22.

power between the States and the National Government.”<sup>260</sup> The challenged VAWA provision consequently fell.<sup>261</sup>

Four dissenting Justices questioned the majority’s Enforcement Clause reasoning, but stopped short of resolving the Enforcement Clause question.<sup>262</sup> They distinguished *Harris* and the *Civil Rights Cases* on the ground that neither involved a federal statute that was explicitly remedial of unconstitutional State actions or failures.<sup>263</sup> They expressed some comfort with a model in which state and federal powers might be used in pursuit of a common goal of protecting the People’s liberty,<sup>264</sup> but they failed to address the People’s decision in the 1860s to alter the Founders’ design and enhance federal power with respect to peoples’ rights. The Confederate narrative commanded a majority, and the Peoples’ narrative was truncated and muted.

### C. *The Confederate Narrative Justifies Voting Rights Retrenchment*

Our account of 1960s civil rights activism and the judicial brooding it immediately spawned neglects an important dimension of the protesters’ work and their impact on federalism jurisprudence. Protecting the franchise was a central goal of Southern civil rights activism of the time; voter registration was a central function of the young people from across the country who joined Freedom Summer; and black political participation was a key target of Southern supremacist terror. This activism inspired passage of the 1964 Voting Rights Act, prohibiting specified voting practices traditionally used to exclude black voters and authorizing the federal government to “pre-clear” changes in state voting laws or practices to assure that the changes were not an impediment to minority voting.<sup>265</sup> The law was repeatedly challenged and repeatedly upheld in decisions approving remedial and prophylactic legislation under Congress’s Reconstruction Amendment enforcement authority.<sup>266</sup>

That pattern changed in 2012 with *Shelby County v. Holder*.

260. *Id.* at 620.

261. *Id.* at 627.

262. *Id.* at 666 (Breyer, J., dissenting) (“Despite my doubts about the majority’s § 5 reasoning, I need not, and do not, answer the § 5 question, which I would leave for more thorough analysis if necessary on another occasion.”).

263. *Id.* at 664–65.

264. *Id.* at 665.

265. 52 U.S.C. §§ 10301, 10304 (Supp. II 2014).

266. *Lopez v. Monterey Cty.*, 525 U.S. 266, 269 (1999); *City of Rome v. United States*, 446 U.S. 156, 187 (1980); *Georgia v. United States*, 411 U.S. 526, 541 (1973).

Here Justice Roberts, speaking for the Court, embellished the Confederate narrative, elevating the status of States to both horizontal and vertical sovereignty,<sup>267</sup> and invalidated the Voting Rights Act's preclearance measures as extraordinary interferences with States' rights of equal sovereign power.<sup>268</sup> Four Justices dissented in *Shelby County*. The dissent comprehensively reviewed the Congressional record supporting extension of the preclearance formula, prior rulings regarding the standard by which Congressional enforcement choices should be made, and the questionable path to a doctrine of equal sovereignty.<sup>269</sup> The dissent did not offer, however, the historical narrative that supports giving Congress the broad authority it exercised when it passed and repeatedly reauthorized the Voting Rights Act. In other words, the dissent failed to evoke the cruel lesson of slavery: that majoritarian political processes can yield results that violate the human rights principles that bind us as a nation.

*D. Rights of Sexual Minorities Are Affirmed, but the People's Narrative Goes Unspoken—and the Confederate Narrative Continues to Sound*

In a movement reminiscent of extralegal slave marriages<sup>270</sup> and of civil rights sit-ins of the 1960s, lesbian, gay, bisexual, and transsexual (LGBT) people formed families, while simultaneously enacting and claiming a constitutional right of family union. When the right of their families to legal recognition came to the Court in *Obergefell v. Hodges*, the Court did not equivocate as it has done in so many African-American civil rights cases. It did not resort to technicalities. It relied squarely on the People's right to reasonable autonomy in the formation of families to hold that every state must recognize same-sex marriages.<sup>271</sup>

*Obergefell's* vindication of nationally conferred and nationally enforced civil rights was a significant doctrinal move, but the Court's exercise of federal power was not defended, as it might have been, in

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267. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2622–25 (2013).

268. *Id.* at 2631. Justice Roberts had introduced the concept of “equal sovereignty” in an earlier voting rights case. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009).

269. *Shelby Cty.*, 133 U.S. at 2635–38 (Ginsburg, J., dissenting).

270. COOPER DAVIS, *supra* note 155, at 30–40, 42–49.

271. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (“the right to marry is a fundamental right inherent in the liberty of the person”).

terms of a People's Reconstruction narrative. Vindication built on a People's Reconstruction narrative was, however, readily available to the Court, for the constitutionalization of family rights was an explicit objective of the Reconstruction Congress.<sup>272</sup> It was well understood that the end of slavery would mean the end of deprivations of family integrity and autonomy;<sup>273</sup> scholars had firmly established that slavery's denial of family recognition conferred a civic and social death that was antithetical to free citizenship; and even former Confederate states had recognized post-Emancipation that the right of marriage recognition was an attribute of free citizenship.<sup>274</sup>

Although the majority shied away from the People's Reconstruction narrative, dissenters from the Court's result each relied on the Confederate story that the People's rights are best protected by protection of States' rights. Justice Roberts decried "stealing" decisionmaking about same-sex marriage rights from "the People" and

272. See Brief for Experiential Learning Lab at New York University School of Law as Amicus Curiae Supporting Petitioners at 15–18, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571 & 14-574)..(Obergefell Amicus). For a comprehensive account of congressional acknowledgement during Reconstruction Amendment debates that freedom required restoration of family rights, including marriage rights, see Peggy Cooper Davis, *Neglected Stories and the Lawfulness of Roe v. Wade*, 28 Harv. C.R.-C.L. L. Rev. 299 (1993).

273. See, e.g., S.J. Res. 82, 38th Cong. (1864) ("Joint Resolution to encourage enlistments and to promote the efficiency of the military forces of the United States."); CONG. GLOBE, 38th Cong., 1st Sess. 1180 (1864); CONG. GLOBE, 38th Cong., 2d Sess. 64 (1864); CHARLES K. WHIPPLE, THE FAMILY RELATION, AS AFFECTED BY SLAVERY 3, 9, 11–13 (1858); HENRY WILSON, HISTORY OF THE ANTISLAVERY MEASURES OF THE THIRTY-SEVENTH AND THIRTY-EIGHTH UNITED STATES CONGRESSES, 1861–64, at 313–27 (1864); Amy Dru Stanley, *Instead of Waiting for the Thirteenth Amendment: The War Power, Slave Marriage, and Inviolable Human Rights*, 115 AM. HIST. REV. 732, 732–33 (2010).

274. Upon emancipation, the former Confederate states recognized that "domestic relations of that class of persons who have been recently released from the condition of slaves and given the rights and privileges of free persons" was "of great importance." *McReynolds v. State*, 45 Tenn. 18, 20 (1867). In response, they found that, "justice and humanity, as well as sound public policy, demanded legislation giving legal sanction, as far as possible, to the moral obligations of [former slave marriages], and rendering legitimate the offspring thereof." *Jennings v. Webb*, 8 App. D.C. 43, 54 (1896). Thus, between 1865 and 1870, all eleven states of the former confederacy revised their laws to recognize marriage between former slaves. See Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. MARSHALL L. REV. 299, 316 n. 87, 316 n.100, 324 n.123, 325 n.127, 326 n.131, 331 n.167, 332, 334 n.185, 335 n.193 & 336 n.196 (2006) (compiling Tennessee (1866), Louisiana (1868) Virginia (1866), South Carolina (1865, modified in 1872), North Carolina (1866), Florida (1866), Arkansas (1866), Mississippi (1865), and Georgia (1866) statutes respectively); Washington, *supra* note 3 (describing Alabama (1865) and Texas (1870) statutes),.

“from the hands of state voters” and accused the majority of accumulating power at “the expense of the people.”<sup>275</sup> Justice Scalia accused the majority of robbing the People of the liberty to govern themselves.<sup>276</sup> Justice Thomas charged the majority with “wiping out with a stroke of the keyboard the results of the political process in over 30 States,”<sup>277</sup> and Justice Alito accused it of usurping “the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage.”<sup>278</sup>

The dissenters were correct, of course, in saying that the majority had overridden a number of state political processes. This was inevitable and right, for the People may legitimately seek to trump both state and federal legislative processes. This does not mean that their claim of civil and human rights violation disregards political process: their claim summons *the people’s decision, at moments of constitutional enactment or amendment*, that majoritarian politics can not be permitted to function without limitations based on respect for human rights. Justice Kennedy made this point by summoning oft quoted tenets of constitutional democracy:

An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution “was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”<sup>279</sup> This is why “fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.”<sup>280</sup>

Justice Kennedy’s argument might have been strengthened by explicit recognition that the 1787 constitutional order was reconstructed for the precise purpose of assuring that fundamental rights be understood as supervening principles to be applied by courts.

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275. *Obergefell*, 135 S. Ct. at 2612, 2615, 2624–25 (Roberts, C.J., dissenting).

276. *Id.* at 2627 (Scalia, J., dissenting).

277. *Id.* at 2632 (Thomas, J., dissenting).

278. *Id.* at 2642 (Alito, J., dissenting).

279. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943).

280. *Id.* at 2605–06 (Kennedy, J., majority opinion) (citing *Barnette*, 319 U.S. at 638).

## CONCLUSION

It is a consequential and insufficiently acknowledged part of our intellectual history that anti-Federalist ideas about the liberty-enhancing effects of local control have been used repeatedly to paper over the contradiction between slaveholding and other forms of subordination on the one hand and equal respect for all people on the other. Chief Justice Roberts, author of the *Shelby County* majority opinion and author of the opinion that constitutes one of two precedential links to the opinion's idea of equal sovereignty, has played a significant role in the retelling of the Confederate anti-Federalist narrative and its rationale.

In the majority opinion upholding a provision of the Affordable Care Act in *NFIB v. Sebelius*, Chief Justice Roberts included a wholly unnecessary preamble.<sup>281</sup> This preamble, not joined by any other member of the Court, was ostensibly offered as a statement of principles governing congressional power to enact a national medical care system that sustains itself by making demands on States and on the People. The Roberts preamble is an ode to the importance of limiting Federal power. It essentially recites what we have called the *Cruikshank* creed: the preamble refers at length to the history of the nation's Founding, but never to its post-bellum Reconstruction; it reiterates the Confederate rationale without explanation or qualification;<sup>282</sup> and it makes no mention of the impressive body of scholarly work in the fields of law, decision theory, philosophy and political science addressing the circumstances under which decentralization of government power is and is not in the interests of a principled People.<sup>283</sup>

As we have shown, the Confederate Reconstruction narrative of modest reform and preservation of States' rights can easily go unchallenged. A highly distinguished historian of Reconstruction addressed the legal community in 2012 to point out that the

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281. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577–80 (2012).

282. *See id.* at 2578 (“The independent power of the States also serves as a check on the power of the Federal Government: ‘By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.’” (quoting *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011))).

283. Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201, 1230–52 (1999); Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL'Y 181, 181–93 (1998) (discussing state and local governments as administrative arms of the federal government).

narrative of modest reform “remains embedded in the law long after the intellectual foundations of that historical outlook have been demolished.”<sup>284</sup> He argued, and we agree, that a critical reassessment of the Supreme Court’s interpretations of the tensions between the People’s freedom and States’ autonomy is long overdue.<sup>285</sup>

The Court’s willingness to defer to States on fundamental questions of dignity sets the United States apart from the growing international consensus that the protection of human rights is the obligation of every national sovereign, whether composed of federated states or not.<sup>286</sup> A reassessment of Federal authority to

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284. Eric Foner, *Reconstruction Revisited: The Supreme Court and the History of Reconstruction—and Vice-Versa*, 112 COLUM. L. REV. 1585, 1592 (2012).

285. *Id.* at 1585.

286. The United States is a signatory to a number of the core international human rights instruments, including The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 195; International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 213 (binding as of Mar. 23, 1976); and The International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195, 303. These instruments have been ratified by no fewer than one hundred and sixty nine nation states in “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family.” *E.g.*, International Covenant on Civil and Political Rights, 999 U.N.T.S. at 172. However, in ratifying each of these international treaties, the U.S. raised two broad objections that together minimize the role of the federal government in protecting human rights. First, in the name of state sovereignty the U.S. maintains that it does not necessarily recognize the federal government as the primary and final defender on human rights. Thus, the ratification statement for each of these conventions states:

[T]he United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.

140 Cong. Rec. S7634-02 (daily ed. June 24, 1994); 138 Cong. Rec. S4784-01 (daily ed. April 2, 1992); *see also* 136 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990) (similar, but not identical, language). Second, the U.S. argues that the substantive provisions of international human right norms to which it is a signatory are non-self-executing. 140 Cong. Rec. S7364-02 (daily ed. June 24, 1994); 138 Cong. Rec. S4782-01 (daily ed. April 2, 1992); 136 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990). As a practical matter, this means that, unless and until Congress enacts specific legislation, the conventions themselves do not provide independent grounds for

protect the people's rights seemed possible amidst the turmoil of the 1960s when the people spoke in the streets to enact freedoms that should have been guaranteed in the 1860s. The flicker of the People's narrative that remains from that era should not die. To the end of reviving robust argument about the effects of the Reconstruction Amendments on the people's freedom, we offer this beginning analysis and an internet site at which one can access relevant cases and other authorities and exchange views about the shape of our reconstructed republic.

#### APPENDIX A: GENEALOGY OF RECONSTRUCTION CIVIL RIGHTS ACTS

Although the Supreme Court did strike down many portions of the Civil Rights Acts passed during Reconstruction, other portions of those Acts remain in effect today. However, those portions have been subsequently renamed and renumbered in the United States Code. This Appendix traces the path from the original legislation to its modern codification.

**Section 1 of the Citizenship Act,**<sup>287</sup> which was reenacted verbatim in Section 16 of the 1870 Act,<sup>288</sup> remains in effect and **has been codified as 42 U.S.C. §1981**. Today §1981 is understood to ban both government and private discrimination in the makings of contracts, and reads in its entirety:

All persons within the jurisdiction of the United States shall

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litigants to bring claims in federal courts for violations of the terms of the treaties. See Gay J. McDougall, *Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination*, 40 HOW. L.J. 571, 588 (1997); see also Tara J. Melish, *From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies*, 34 YALE J. INT'L L. 389, 391 (2009) (arguing that, while the U.S. typically encourages governments to fully incorporate human rights treaties into domestic political and judicial processes, at home we have tended, in the name of state sovereignty and other doctrines, to shield ourselves from similarly committing to fully accepting international human rights norms as federal obligations).

287. Civil Rights Act of 1866, Ch. 31, 14 Stat. 27, 27 (1866).

288. Enforcement Act of 1870, Ch. 114, 16 Stat. 140, 144 (1870).

have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by [W]hite citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.<sup>289</sup>

**Section 1 of the Citizenship Act** and the **identical Section 16 of the Enforcement Act** also produced the modern civil rights provision codified as **42 U.S.C. §1982**. Section 1982 is fairly self-explanatory and reads in its entirety:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by [W]hite citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.<sup>290</sup>

**Portions of the Klan Act**<sup>291</sup> survived as **42 U.S.C. §1983** and now reads in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .<sup>292</sup>

In modern times, §1983 has become the primary vehicle used by private parties to vindicate their constitutional rights against state and local government officials. In and of itself, §1983 did not then (and does not now) create any new substantive right. Rather, it establishes a cause of action in federal court for damages and injunctive relief against state and local officials who violate any constitutional or statutory federal right.

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289. 42 U.S.C. § 1981 (2012).

290. 42 U.S.C. § 1982 (2012).

291. Klu Klux Klan Act of 1871, Ch. 22, 17 Stat. 13 (1871).

292. 42 U.S.C. § 1983 (2012).

**Sections of the Klan Act** also survived as **42 U.S. §1985(3)** and today read in relevant part:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.<sup>293</sup>

At the time of its original passage in 1871, §1985(3) was specifically aimed at providing a federal remedy against the Klan and other groups who used violence and intimidation to prevent Blacks in the South from fully enjoying their freedom. The original provisions of what is now referred to as §1985(3) contained both criminal penalties and civil sanctions for violation of the Act. Shortly after it was enacted, the Supreme Court struck down the criminal sanction provisions of the statute without addressing the constitutionality of its civil penalties. The statute remained dormant until 1940s when it was occasionally used to bring civil suits to quell mob violence directed toward unpopular political groups. Today §1985(3) remains in effect but, as compared to §§ 1981, 1982 and 1983, is rarely the determinative in civil rights litigation.

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293. 42 U.S.C. § 1985(3) (2012).

## APPENDIX B: ONLINE DOCTRINAL MAPS

To see visual representations of this Article's doctrinal argument, please go to our online appendix or follow the individual links below. The online appendix includes six interactive maps that chart the genealogies of key Supreme Court opinions described in the Article. These genealogies link Supreme Court opinions to Reconstruction legislation, Constitutional Amendments and historical events. Click on any of the depicted opinions, laws, amendments, or events to open a new window containing open-source information about the link.

**Sources:** Supreme Court opinions are provided by CourtListener (a free site that provides verbatim opinion text) and by the Court itself. Reconstruction legislation is represented by documents gathered through original research. Information about historical events and constitutional amendments comes from the open-source repository Wikipedia.

<b>Map Description</b>	<b>Direct Link</b>
<i>Map 1</i> depicts Part II.A above – <i>The 1787 Order Reconstructed.</i>	<a href="http://home.ubalt.edu/id86mp66/Confederate%20Narrative/Map1_Congressional_Reconstruction.html">http://home.ubalt.edu/id86mp66/Confederate%20Narrative/Map1_Congressional_Reconstruction.html</a>
<i>Map 2</i> visualizes Part II.B above – <i>Early Supreme Court Interpretation: the 1787 Constitutional Order Restored.</i>	<a href="http://home.ubalt.edu/id86mp66/Confederate%20Narrative/Map2_Early_SCOTUS.html">http://home.ubalt.edu/id86mp66/Confederate%20Narrative/Map2_Early_SCOTUS.html</a>
<i>Map 3</i> illustrates Part II.C above – <i>The Competing Interpretation: A New Charter of Freedom.</i>	<a href="http://home.ubalt.edu/id86mp66/Confederate%20Narrative/Map3_Harlan.html">http://home.ubalt.edu/id86mp66/Confederate%20Narrative/Map3_Harlan.html</a>
<i>Map 4</i> charts Parts III.A-B above – <i>Assigning the “Occasional Unpleasant Task” of Civil Rights Enforcement + Protecting the Performance of Free Citizenship.</i>	<a href="http://home.ubalt.edu/id86mp66/Confederate%20Narrative/Map4_EnforcingRights.html">http://home.ubalt.edu/id86mp66/Confederate%20Narrative/Map4_EnforcingRights.html</a>
<i>Map 5</i> renders Part III.C above – <i>Confronting a Sharper Cry for Civil Rights Enforcement.</i>	<a href="http://home.ubalt.edu/id86mp66/Confederate%20Narrative/Map5_SharperCry.html">http://home.ubalt.edu/id86mp66/Confederate%20Narrative/Map5_SharperCry.html</a>
<i>Map 6</i> summarizes Parts IV.A-D above – <i>Lost Opportunities: The Confederate Narrative in Modern Doctrine.</i>	<a href="http://home.ubalt.edu/id86mp66/Confederate%20Narrative/Map6_LostOpp.html">http://home.ubalt.edu/id86mp66/Confederate%20Narrative/Map6_LostOpp.html</a>

