



ARTICLE

The Supreme Court and the Memory of Evil

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Abstract. This Article commemorates the sesquicentennial of the Fourteenth Amendment by exploring the U.S. Supreme Court's engagement with the memory of slavery and segregation. It examines major decisions not merely as jurisprudential landmarks, but as monuments of collective memory. This Article suggests that the Court has invoked the memory of slavery and segregation in two primary ways—through two distinct “modes” of memory. The first of these, which I call the parenthetical mode, responds to the evil past by stressing continuities with an older, nobler tradition. It presents the evil era as exceptional and aberrational, and it depicts the constitutional response to the evil era as a terminal close parenthesis. The second framework, which I call the redemptive mode, highlights repudiation, rather than continuity, and underwrites aggressive judicial action to eradicate any lingering vestiges of past evils. This Article contends that in every period of the Court's history—including the present—the parenthetical mode has predominated over the redemptive. The immediate effect, at times, has been pernicious. The cumulative effect has hindered the Court and the country from coming to terms with the evils of our past.

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Introduction

Modern polities are constituted in two fundamental ways: legally, through the constitution; and culturally, through collective memory.¹ Inevitably, the former invokes the latter. “No set of legal institutions or prescriptions,” wrote Robert Cover, “exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture.”² Constitutions perform a crucial part of their constituent work by harnessing the power of a common past and giving it legal form.³ The appeal to the past is part of the constitution’s bid for legitimacy. Memory supports the constitution’s claim to speak for the people. By invoking memory, the constitution asserts its claims on citizen hearts and hands. The “mystic chords of memory”⁴ intone a canticle of allegiance.

Such mnemonic appeals to allegiance, of course, were common long before the modern constitutional era.⁵ But the constitution provides a particularly powerful pulpit—an unusually resonant site of memory.⁶ It retains that

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1. On the power of memory to underwrite national identity, see generally BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 1-46, 155-62, 187-206 (rev. ed. 1991); *COMMEMORATIONS: THE POLITICS OF NATIONAL IDENTITY* (John R. Gillis ed., 2d prtg. 1996); *MEMORY AND POWER IN POST-WAR EUROPE: STUDIES IN THE PRESENCE OF THE PAST* (Jan-Werner Müller ed., 2002); and Eric Hobsbawm, *Introduction: Inventing Traditions*, in *THE INVENTION OF TRADITION* 1 (Eric Hobsbawm & Terence Ranger eds., 1983).
 2. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983).
 3. For an extended reflection on constitutionalism and national narratives, see generally JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011). On narratives and memory in constitutional adjudication more broadly, see generally Daphne Barak-Erez, *History and Memory in Constitutional Adjudication*, 45 FED. L. REV. 1 (2017) (discussing different ways in which courts in several jurisdictions write about the past); and Andreas von Arnould, *Norms and Narrative*, 18 GER. L.J. 309 (2017) (same). On the broader uses of history in constitutional adjudication, see generally Pierre de Vos, *A Bridge Too Far?: History as Context in the Interpretation of the South African Constitution*, 17 S. AFR. J. ON HUM. RTS. 1 (2001) (criticizing early invocations of history by the Constitutional Court of South Africa); and Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753 (2015) (describing various uses of history by U.S. courts).
 4. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 6 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1917*, at 5, 12 (James D. Richardson ed., 1897).
 5. See Jeffrey K. Olick et al., *Introduction to THE COLLECTIVE MEMORY READER* 3, 3 (Jeffrey K. Olick et al. eds., 2011) (“Priests and politicians before and [after Moses] have intuitively understood the cultic powers of the past to underwrite solidarity and motivate action.”).
 6. The term “sites of memory,” or “*lieux de mémoire*,” is most closely associated with the work of the French historian Pierre Nora. See Pierre Nora, *Between Memory and History: Les Lieux de Mémoire*, *REPRESENTATIONS*, Spring 1989, at 7, 7 (discussing “the problem
footnote continued on next page”).

resonance through constitutional justice. Constitutional courts in many nations have invoked the ethos of a national epic and claimed the mandate of a common past.⁷ Constitutional judges around the world have bolstered their decisions by frequent appeal to constitutional memory.⁸

The U.S. Supreme Court has been a pioneer in this regard. As I shall argue below, constitutional memory runs right through the center of the Court's historical canon—and of its anticanon.⁹ But this Article is about how the Court

of the embodiment of memory in certain sites where a sense of historical continuity persists”).

7. I analyze the jurisprudence of the constitutional courts of Germany and South Africa in this regard in a forthcoming book. See JUSTIN COLLINGS, *SCALES OF MEMORY: CONSTITUTIONAL JUSTICE AND THE BURDENS OF THE PAST* (forthcoming 2019).

The German Federal Constitutional Court, for instance, has argued that foreign jurisprudence on abortion is of limited relevance in Germany, where the right to life has a different valence because of its staggering infringement during the Nazi era. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 25, 1975, 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1, 64-68, 1975 (Ger.); see also Robert E. Jonas & John D. Gorbey, *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 J. MARSHALL J. PRAC. & PROC. 605 (1976) (providing a translation of the Federal Constitutional Court's decision).

The South African Constitutional Court has invoked the memory of apartheid to explain the special strength of various rights under its postapartheid constitutions. For instance, the Constitutional Court wrote in *Shabalala v. Attorney-General*:

What is perfectly clear from these provisions of the Constitution and the tenor and spirit of the Constitution viewed historically and theologically, is that the Constitution is not simply some kind of statutory codification of an acceptable or legitimate past. It retains from the past only what is defensible and represents a radical and decisive break from that part of the past which is unacceptable. It constitutes a decisive break from a culture of apartheid and racism to a constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours. There is a stark and dramatic contrast between the past in which South Africans were trapped and the future on which the Constitution is premised.

1996 (1) SA 725 (CC) at 740 para. 26 (S. Afr.). Another example is *State v. Makwanyane*, in which the Constitutional Court invalidated the death penalty with prominent reference to how the apartheid regime devalued human life and dignity. See 1995 (3) SA 391 (CC) at 453 para. 151 (S. Afr.) (opinion of Chaskalson, President); *id.* at 507 para. 329 (opinion of O'Regan, J.).

8. Constitutional memory is a special form of “ethical” constitutional argumentation, on which see PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 93-119 (1982) (arguing that courts engage in “ethical” argumentation when they condemn a law or practice as inconsistent with the ethos or ethical mores of the polity). Some scholars have classified originalism as a form of ethical argumentation. See, e.g., Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *FORDHAM L. REV.* 641, 652-53 (2013); Jamal Greene, *On the Origins of Originalism*, 88 *TEX. L. REV.* 1, 82-88 (2009); Richard Primus, Response, *The Functions of Ethical Originalism*, 88 *TEX. L. REV.*: SEE ALSO 79 (2010). I regard originalism as one subcategory of constitutional memory.
9. On the “anticanon,” see generally Akhil Reed Amar, *Plessy v. Ferguson and the Anti-Canon*, 39 *PEPP. L. REV.* 75 (2011) (describing how anticanonical cases clash with iconic symbols in American constitutionalism); Jamal Greene, *The Anticanon*, 125 *HARV. L. REV.* 379 (2011) (arguing that cases become anticanonical through historical happen-

footnote continued on next page

has invoked the memory, not of revolutionary triumph, but of appalling evil—the memory of slavery, of segregation, and of their residues.

Many constitutions respond to historic evil, and many constitutional courts invoke the memory of that evil.¹⁰ Unsurprisingly, for instance, the memory of Nazism has loomed large in the jurisprudence of the German Federal Constitutional Court; in the judgments of the Constitutional Court of South Africa, the memory of apartheid has loomed even larger.¹¹ But different courts have adduced the memory of evil in very different ways. Memory’s contours shift with its contexts. In essential respects, however, the U.S. Supreme Court’s mnemonic jurisprudence—its invocation of memory in published opinions—has remained remarkably consistent over time.

This has been especially true of the memory of slavery and segregation. Broadly speaking, the Court has invoked the memory of these evils within two general frameworks, which I shall call the *parenthetical* and the *redemptive* modes of memory.

The parenthetical mode views the evil era as exceptional—a baleful aberration from an otherwise noble tradition. I take the term “parenthesis” from Benedetto Croce, who allegedly dismissed fascism as “*una parentesi*” (a parenthesis) in Italian history.¹² Parenthetical jurisprudence looks beyond the evil era to older and enduring values. It sees constitutional provisions

stance and retain that status through rhetorical deployment by later interpreters); and Richard A. Primus, Essay, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243 (1998) (examining the later canonization of dissenting opinions in anticanonical cases).

10. On the problem of evil and memory more generally, see GARY ALAN FINE, *DIFFICULT REPUTATIONS: COLLECTIVE MEMORIES OF THE EVIL, INEPT, AND CONTROVERSIAL* (2001) (describing how bad reputations forge social solidarity by dramatizing what society rejects).
11. See generally LAW, MEMORY AND THE LEGACY OF APARTHEID: TEN YEARS AFTER *AZAPO v PRESIDENT OF SOUTH AFRICA* (Wessel le Roux & Karin van Marle eds., 2007) (exploring the role of collective memory in the South African Constitutional Court’s evaluation of the Truth and Reconciliation Commission’s power to grant amnesty to perpetrators of human rights abuses); ULRICH LÖFFLER, *INSTRUMENTALISIERTE VERGANGENHEIT?: DIE NATIONALSOZIALISTISCHE VERGANGENHEIT ALS ARGUMENTATIONSFIGUR IN DER RECHTSPRECHUNG DES BUNDESVERFASSUNGSGERICHTS* (2004) (analyzing the German Federal Constitutional Court’s discussions of Nazism); Alexander Blankenagel, *Verfassungsgerichtliche Vergangenheitsbewältigung*, 13 ZEITSCHRIFT FÜR NEUERE RECHTSGESCHICHTE [ZNR] 67 (1991) (same).
12. See BENEDETTO CROCE, *La Libertà Italiana Nella Libertà del Mondo* (1944), in 1 SCRITTI E DISCORSI POLITICI, 1943-1947, at 54, 61 (1993). Croce’s actual views were more complicated. See FABIO FERNANDO RIZI, *BENEDETTO CROCE AND ITALIAN FASCISM* 83-84 (2003) (describing how Croce came to view fascism in historical and comparative perspectives).

adopted after historic evil not as revolutionary, but as restorative. The watchword of the parenthetical mode is continuity.¹³

The animating spirit of the *redemptive* mode is not restoration, but antithesis. It seeks not to resume a noble tradition, but to reverse recent evils. Its basic posture is one of repudiation and redress. Redemptive jurisprudence is “never again” jurisprudence. It is not content merely to proclaim the evil era over, but works to root out any lingering vestige.

Both modes have risks. The parenthetical mode tends to underestimate the scope of past evil, and to do too little to redress it. The redemptive mode, on the other hand, frequently modifies the traditional methods and values of legal liberalism. It does so, to be sure, in the name of overcoming evil, but the effect remains distorting. The parenthetical mode risks fecklessness, the redemptive mode willfulness. The one might do too little to redress the past, the other too much to distort the present.

Different sensibilities will, of course, rate these risks differently. What I hope to demonstrate below is that throughout the history of the U.S. Supreme Court, the parenthetical mode has predominated over the redemptive, and that the consequences, at times, have been pernicious. More controversially, perhaps, I contend that this predominance persists, and with only isolated signs of abatement.

I. After Appomattox: 1865-1896

The parenthetical mode’s dominance began early. From the very beginning, the Supreme Court’s postbellum jurisprudence echoed and advanced the country’s push for sectional reconciliation at the expense of racial equality.¹⁴ In the process, the Court overwhelmingly viewed the historical evil of slavery through a parenthetical lens. The Court treated the Reconstruction Amendments not as a radical response to the centrality of slavery in American history, but as a narrow response to a localized evil. This limiting construction involved two distinct moves. First, the Court conflated slavery and secession, casting the postwar Amendments as a unified answer to a common evil. That evil, in the Court’s narratives, was over. The Amendments ended slavery, just

13. If the parenthetical mode has an intellectual godfather, it is perhaps Edmund Burke, who denounced the French revolutionaries for trying to frame the world anew, rather than building—as had the architects of Britain’s “glorious” revolution of 1688—on the foundation of traditions and precedents older and nobler than the recent, abusive regime. See EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 30-31, 34-37 (L.G. Mitchell ed., Oxford Univ. Press 1999) (1790).

14. On this trend in American life more broadly, see DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY (2001).

as the war ended secession. By treating the cure as definitive, the Court precluded treating the Amendments as a radical re-Founding in response to an evil in ongoing need of redemption.

Second, the Court sought, in effect, to transplant the Amendments retroactively onto “the original Constitution,”¹⁵ rather than read the original document in light of the new Amendments. The effect was to treat the Founders’ Constitution as though it had never enshrined slavery, rather than to reconsider it in light of the radical dislocations that attended slavery’s destruction. The Court did not treat the Amendments as the redemptive core of a *postwar* Constitution, but posited instead a single, unitary tradition—a tradition interrupted, to be sure, by slavery and secession, but resumed after a brief Reconstruction imposed a resounding close parenthesis.

There was, of course, a redemptive counternarrative—most notably in the dissenting opinions of the first Justice Harlan. But the dominant narrative was parenthetical. Indeed, the Court embraced a kind of conciliatory forgetting. In the case of *Plessy v. Ferguson*,¹⁶ such forgetting was worse than amnesia. It was a brazen erasure, an unalloyed resumption of evil. Slavery was the original sin of the American Republic, and segregation marked a second fall. The Court was complicit in both evils. And it compounded that complicity with the cultic power of memory.

A. The Miller’s Tale: The Divided Rhetorics of the *Slaughter-House Cases*

The process began with the *Slaughter-House Cases*,¹⁷ in which a five-Justice majority held that the Thirteenth Amendment banned only slavery itself and close analogs;¹⁸ that the Equal Protection Clause forbade de jure discrimination against blacks, but not much else;¹⁹ and that the Privileges or Immunities Clause guaranteed only the privileges and immunities of *national* citizenship, which, on the Court’s telling, were few and flimsy.²⁰ For all practical purposes, the Privileges or Immunities Clause was pronounced dead on arrival.

15. See, e.g., *The Civil Rights Cases*, 109 U.S. 3, 11-14 (1883), *abrogated in part by* *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *United States v. Harris*, 106 U.S. 629, 636-39 (1883); *Ex parte Virginia*, 100 U.S. 339, 361-62 (1880) (Field, J., dissenting).

16. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

17. 83 U.S. (16 Wall.) 36 (1873).

18. See *id.* at 68-69.

19. See *id.* at 81; see also U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

20. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 73-80; see also U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .”).

What interests us here is the memorial narrative that Justice Miller's opinion for the Court deployed en route to these holdings. Justice Miller began by insisting that the Reconstruction Amendments be read "in connection with the history of the times" that produced them.²¹ "Fortunately," he added, "that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt."²²

Justice Miller's story began with slavery, then passed swiftly to secession and war.²³ Unlike contemporary Southern apologists, Justice Miller insisted that the Civil War was, at bottom, about slavery.²⁴ So were the Amendments adopted thereafter.²⁵

Justice Miller's narrative of the war and its constitutional aftermath was striking for its resolutely redemptive, emancipationist rhetoric—its talk of "armies of freedom" sallying forth "upon the soil of slavery."²⁶ Despite a somewhat patronizing reference to slavery's "poor victims," Justice Miller acknowledged the contribution of black soldiers who "proved themselves men in that terrible crisis."²⁷ Slavery was "the foundation of the quarrel," and its annihilation was the war's "main and most valuable result."²⁸

Justice Miller's account referred to "the Constitution of the restored Union," suggesting not only a new constitutional era but a new Constitution.²⁹ Read aggressively, the phrase suggested that the Thirteenth Amendment marked the founding of a Second American Republic. In any case, Justice Miller's account of the origins of the Thirteenth Amendment was unequivocally redemptive.³⁰ Faced with the historical evil of slavery, the framers of the Thirteenth Amendment crushed that evil. They enacted into constitutional law a "grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government."³¹ Justice Miller's lofty rhetoric paved the way,

21. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 67.

22. *Id.* at 68.

23. *See id.*

24. *See id.* ("[W]hatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery.")

25. *See id.* at 68-72.

26. *Id.* at 68.

27. *Id.*

28. *See id.*

29. *See id.*

30. *See id.* at 68-69.

31. *Id.* at 69.

however, for a narrow reading of the Thirteenth Amendment itself. For Justice Miller and the majority, the Amendment abolished slavery and closely analogous exploitative labor practices.³² But that was all.

When Justice Miller turned to the origins of the Fourteenth Amendment, his narrative became more complicated. On Justice Miller's telling, the moral universe of Reconstruction was murkier than that of the Civil War.

Justice Miller began by describing the notorious Black Codes,³³ though he hinted that accounts of Southern white terrorism might be exaggerated.³⁴ In any case, it had become clear that "the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before."³⁵ Accordingly, Congress adopted the Fourteenth Amendment, and, realizing that the freedmen "could never be fully secured in their person and their property without the right of suffrage," it passed the Fifteenth Amendment as well.³⁶

To Justice Miller, the lessons of this history were clear. "[N]o one can fail to be impressed," he wrote, "with the one pervading purpose . . . lying at the foundation of each [Amendment]."³⁷ That purpose, he said, was "the security and firm establishment of . . . freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."³⁸

Later Justices would invoke Justice Miller's "one pervading purpose" dictum to support robust protection for blacks.³⁹ But the parenthetical holdings in the *Slaughter-House Cases* themselves neutralized such redemptive rhetoric. The majority bolstered those holdings, moreover, with a parenthetical argument about constitutional structure. To hold that the Fourteenth Amendment subjected the states to federal oversight of fundamental rights would, Justice Miller opined, "radically change[] the whole theory of the relations of the State and Federal governments."⁴⁰ Perhaps some readers

32. *See id.* at 69, 71-72.

33. *See id.* at 70.

34. *See id.* (noting that it was "[t]hese circumstances, whatever of falsehood or misconception may have been mingled with their presentation," that led to the Fourteenth Amendment).

35. *Id.*

36. *Id.* at 70-71.

37. *Id.* at 71.

38. *Id.*

39. *See, e.g.,* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 829 (2007) (Breyer, J., dissenting); *Strauder v. West Virginia*, 100 U.S. 303, 307 (1880), *abrogated in other part by Taylor v. Louisiana*, 419 U.S. 522 (1975); *see also infra* Parts I.C, III.D.2.

40. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) at 78.

thought such radical change a natural outcome of the late war. But for the majority, the war was not fought to reshape the Union, but to restore it. The North's victory did not solemnize a fundamental reordering; it marked a close parenthesis. The Fourteenth Amendment furnished a few marginal adjustments to accommodate the fact of emancipation, but it offered nothing radically redemptive.

Four dissenters rejected this reading in favor of a more expansive account. Justice Field, for example, saw in the Fourteenth Amendment a wholesale repudiation of antebellum theories of citizenship and of federal-state relations.⁴¹ Justice Bradley linked the Fourteenth Amendment to the broad sweep of national history even more explicitly than Justice Field did.⁴² "The mischief to be remedied," Justice Bradley wrote, "was not merely slavery and its incidents and consequences," but the South's decades-long "spirit of insubordination and disloyalty to the National government" and its disregard for such basic rights as "free speech and free discussion."⁴³ The Fourteenth Amendment "g[ave] voice," Justice Bradley said, to a "strong National yearning" for equal rights and equal citizenship for all Americans.⁴⁴ It revolutionized how *national* the national Constitution was. It addressed the deeper causes of the late war.⁴⁵

Justice Swayne made this point even more starkly, hailing emancipation as "an act of grace and justice *performed by the Nation*."⁴⁶ The postwar Amendments, he explained, were "all consequences of the late civil war," which had "dispelled" the anticentralizing "prejudices and apprehension" of the Founding generation, and paved the way for constitutional protections "against wrong and oppression by the States."⁴⁷

But these were only dissents—overshadowed, like the majority's sometimes robust redemptive rhetoric, by the cases' parenthetical holdings. The majority's account of constitutional Reconstruction was a compressed one. It began with secession, not with slavery. And the majority's redemptive rhetoric proved, in the end, to be words without deeds. Quite soon the Court would omit the words as well.

41. *See id.* at 94-96 (Field, J., dissenting).

42. *See id.* at 114-16 (Bradley, J., dissenting).

43. *Id.* at 123.

44. *Id.*

45. *See id.*

46. *Id.* at 125 (Swayne, J., dissenting) (emphasis added).

47. *Id.* at 128-29.

B. Memory and Elision in *United States v. Cruikshank*

The elision began two years later in *United States v. Cruikshank*,⁴⁸ which featured a constitutional challenge to the conviction of several white Southerners who had taken part in the Colfax Massacre of April 1873—the bloodiest episode of racial violence in the history of Reconstruction—a bloodbath carried out, ironically, on Easter Sunday, a day before the Supreme Court announced its decision in the *Slaughter-House Cases*.⁴⁹ Only three of the ninety-eight men whom federal prosecutors had indicted in connection with the Colfax killings were ultimately convicted.⁵⁰ Those three persuaded the Supreme Court to unanimously quash their convictions.⁵¹

In an opinion by Chief Justice Waite, the Court ruled that the Fourteenth Amendment did not authorize the federal government to enforce the guarantees of the Bill of Rights (which limited only the federal government) within the states (which bore exclusive responsibility for protecting citizen rights at home).⁵² Along the way, the Court offered a highly traditional account of American federalism, and it erected a monument of parenthetical memory.

Chief Justice Waite began at the Founding, stressing that the federal government “was erected for special purposes” only, and thus “can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction.”⁵³ It was a telling shift in tense—from *was* to *can*. Chief Justice Waite’s implication was obvious: The Civil War and emancipation notwithstanding, little had changed in the nation’s dual system of government. Enforcement of fundamental rights, including those enshrined in the Bill of Rights, remained “subject to State jurisdiction.”⁵⁴ Moreover, the Fourteenth Amendment’s Due Process Clause was largely supplementary—merely “an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society.”⁵⁵

48. 92 U.S. 542 (1876), *abrogated in part by* *De Jonge v. Oregon*, 299 U.S. 353 (1937), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

49. See ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877, at 437 (1988); see also *Cruikshank*, 92 U.S. at 548.

50. See FONER, *supra* note 49, at 530-31; Zanita E. Fenton, *Disarming State Action; Discharging State Responsibility*, 52 HARV. C.R.-C.L. L. REV. 47, 57 (2017).

51. See *Cruikshank*, 92 U.S. at 559. While Justice Clifford filed a “dissenting” opinion, he concurred in the result—i.e., quashing the convictions. See *id.* (Clifford, J., dissenting) (“I concur that the judgment in this case should be arrested, but for reasons quite different from those given by the court.”).

52. See *id.* at 550-55 (majority opinion).

53. *Id.* at 550.

54. See *id.* at 551-52.

55. *Id.* at 554.

The Fourteenth Amendment, Chief Justice Waite clearly implied, did not incorporate the guarantees of the Bill of Rights against the states.

The Court proceeded to discuss the Fifteenth Amendment, concluding that although the right to vote was not an attribute of national citizenship, the right to vote without racial discrimination was.⁵⁶ But that was neither here nor there because the indictments failed to allege that the Colfax Massacre was motivated by racial animus.⁵⁷ It was the opinion's only mention of race—a purely negative one. Of slavery, the Civil War, and emancipation, the Court made no mention at all. The judgment not only presumed that the parenthetical was closed; the Court didn't even acknowledge its existence.

C. Memory and Synthesis: *Strauder v. West Virginia*

In the years that followed, the Court occasionally took seriously the redemptive dicta of the *Slaughter-House Cases*, marshaling them in the process of striking down some discriminatory laws, such as the West Virginia law excluding black people from jury service that the Court condemned in *Strauder v. West Virginia*.⁵⁸ Even then, the Court described emancipated slaves in racialized terms that boded ill for the future.⁵⁹ And Justice Field dissented to reiterate his complaint in *Ex parte Virginia* that the Court's reading of the Equal Protection Clause was overly generous.⁶⁰ In *Ex parte Virginia* (decided the same day as *Strauder*), Justice Field insisted that juries were a purely local matter, unaffected by the Reconstruction Amendments.⁶¹ The new Amendments, Justice Field explained, “are additions to the previous amendments, and are to be construed in connection with them and the original Constitution as one instrument.”⁶² The Amendments, in short, must be read by the light of what had gone before—not the other way around.

56. *See id.* at 555-56.

57. *See id.* at 556.

58. *See Strauder v. West Virginia*, 100 U.S. 303, 304, 306-08, 312 (1880), *abrogated in other part by Taylor v. Louisiana*, 419 U.S. 522 (1975); *see also Ex parte Virginia*, 100 U.S. 339, 344-45 (1880) (“One great purpose of the[] [Reconstruction] amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States. . . . They were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress.”).

59. *See Strauder*, 100 U.S. at 306 (“The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence.”).

60. *See id.* at 312 (Field, J., dissenting); *see also Ex parte Virginia*, 100 U.S. at 367-68 (Field, J., dissenting).

61. *See Ex parte Virginia*, 100 U.S. at 353-54, 357 (Field, J., dissenting).

62. *Id.* at 361.

Justice Field's call for the unified construction of old and new constitutional provisions "as one instrument" was one response to the challenge of what Bruce Ackerman has called "intergenerational synthesis"—the challenge of harmonizing the constitutional vision of one era with the expanded, or even opposing, vision of a new era.⁶³ Justice Field made clear, however, that in forging such a synthesis, the overwhelming balance lay with the older epoch and the original Constitution. The new Amendments, he declared,

do not . . . contravene or repeal any thing which previously existed in the Constitution Aside from the extinction of slavery, and the declaration of citizenship, their provisions are merely prohibitory upon the States and there is nothing in their language or purpose which indicates that they are to be construed or enforced in any way different from that adopted with reference to previous restraints upon the States.⁶⁴

This was the very essence of parenthetical memory. When Justice Field spoke of "the Constitution," he meant the "good old Constitution"—the *Founders'* Constitution. The Reconstruction Amendments were an exceptional response to an exceptional era. They placed a close parenthesis on a brief, aberrational period, but otherwise left the original charter unchanged. The American Republic was, for Justice Field, a beacon of continuity and endurance, and the conflagration that torched the Union and claimed nearly a million casualties⁶⁵ was an unfortunate—but providentially terminated—parenthetical.

D. Leaving the Parenthetical Behind: *The Civil Rights Cases*

Justice Field, of course, wrote in dissent in *Strauder*. But within three years a majority of the Court embraced a similar parenthetical vision in the *Civil Rights Cases*, in which the Court struck down the portion of the Civil Rights Act of 1875 that banned racial discrimination in public accommodations.⁶⁶ Justice Bradley began his opinion for an eight-Justice majority by insisting that Congress's enforcement powers under the Reconstruction Amendments were just as limited as its enforcement powers under various provisions "of the original Constitution."⁶⁷ The postwar Amendments, Justice Bradley maintained, addressed only direct state action under the Fourteenth

63. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 86-94 (1991).

64. *Ex parte Virginia*, 100 U.S. at 361 (Field, J., dissenting).

65. See J. David Hacker, *A Census-Based Count of the Civil War Dead*, 57 *CIV. WAR HIST.* 307, 344-48 (2011).

66. See 109 U.S. 3, 9, 25-26 (1883), *abrogated in part by* *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); see also Civil Rights Act of 1875, ch. 114, §§ 1-2, 18 Stat. 335, 335-36.

67. See *Civil Rights Cases*, 109 U.S. at 11-13; see also *id.* at 17 ("The Civil Rights Bill here referred to is analogous in its character to what a law would have been under the original Constitution . . .").

Amendment and slavery's close analogs under the Thirteenth Amendment.⁶⁸ "It would be running the slavery argument into the ground," Justice Bradley wrote, "to make it apply to every act of discrimination" against potential social guests or business patrons.⁶⁹ The Thirteenth Amendment gave Congress no power to remedy "[m]ere discriminations on account of race or color," and the Fourteenth Amendment empowered Congress to remedy discrimination only if it was embodied in "the laws themselves."⁷⁰

At the heart of this holding was the majority's conviction that Reconstruction's redemptive impulse had gone far enough—too far, in fact. The era of slavery was over, and the evil could be safely bracketed and discarded. Justice Bradley reflected,

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.⁷¹

It was time, in other words, to close the parenthetical. The exceptional epoch was over; the wrong had been remedied. It was time for black Americans to take their place as "mere citizen[s]" in the "ordinary" march of American history.

Justice Harlan, the cases' lone dissenter, forcefully rejected this parenthetical posture, accusing his brethren of having a short and myopic memory.⁷² His appeal to memory was quite explicit, and he insisted that memory must precede text, just as spirit must inform letter.⁷³

Justice Harlan's appeal to the past reached beyond the immediate framing history of the Reconstruction Amendments to the larger arc of American history. In doing so Justice Harlan stressed that slavery was a *national* problem. All branches of the federal government, and the Constitution itself, had been complicit in slavery's survival and spread.⁷⁴ This broader mnemonic context was, for Justice Harlan, more than *mise-en-scène*: It held the very "keys with which to open the mind of the people" and understand the constitutional legacy of the Civil War.⁷⁵

68. *See id.* at 22-25.

69. *Id.* at 24-25.

70. *See id.* at 25.

71. *Id.*

72. *See id.* at 26 (Harlan, J., dissenting).

73. *See id.* at 26, 28.

74. *See id.* at 28-32.

75. *Id.* at 28.

The mileposts of Justice Harlan's narrative were clear: the Constitution's Fugitive Slave Clause;⁷⁶ the federal Fugitive Slave Laws of 1793 and 1850;⁷⁷ the Supreme Court's lavish reading, in *Prigg v. Pennsylvania*, of Congress's power to pass such laws;⁷⁸ and *Dred Scott v. Sandford*.⁷⁹ In Justice Harlan's telling, the federal government, including the Supreme Court, had moved heaven and earth to buttress chattel slavery.⁸⁰ For Justice Harlan, the overriding purpose of the Reconstruction Amendments was to reverse that narrative—to redeem the national story from the stain of human slavery. At the very least, the Court should construe Congress's express power to promote equality as generously as it had, in *Prigg*, construed its implied power to assist slave catchers.⁸¹ It ought to be as solicitous of the rights of freedmen as it had been, in *Dred Scott*, of the rights of their former masters.⁸²

The architects of Reconstruction had sought to establish “a state of freedom,” which, in Justice Harlan's view, meant more than the absence of institutionalized slavery sustained by positive law.⁸³ Because slavery “rested wholly upon the inferiority, as a race, of those held in bondage,” destroying slavery entailed protecting former slaves against “all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races.”⁸⁴ Anything less would reduce the Reconstruction Amendments to “splendid baubles, thrown out to delude those who deserved fair and

76. *See id.*; *see also* U.S. CONST. art. IV, § 2, cl. 3 (“No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”).

77. *See Civil Rights Cases*, 103 U.S. at 28-30 (Harlan, J., dissenting); *see also* Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462; Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302.

78. *See Civil Rights Cases*, 103 U.S. at 28-30 (Harlan, J., dissenting); *see also* *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

79. *See Civil Rights Cases*, 103 U.S. at 30-32 (Harlan, J., dissenting); *see also* *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

80. *See Civil Rights Cases*, 109 U.S. at 28-32 (Harlan, J., dissenting).

81. *See id.* at 28-30, 33-34.

82. *See id.* at 30-34.

83. *See id.* at 34.

84. *Id.* at 36.

generous treatment at the hands of the nation.”⁸⁵ Former slaves deserved such fairness and generosity because the nation owed them something. Justice Harlan concluded,

With all respect for the opinion of others, 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.⁸⁶

Rousing words. But Justice Harlan’s redemptive *cri de coeur* was, alas, a lonely dissent. The upshot of the Court’s decisions from the *Slaughter-House Cases* to the *Civil Rights Cases* was that barring formal, *de jure* state discrimination, blacks in the South were on their own.⁸⁷ The Court honored the twentieth anniversary of the Emancipation Proclamation by speaking, almost in unison, for a nation that wished to forget.

Nine months earlier, the Court in *Pace v. Alabama* had unanimously upheld Alabama’s antimiscegenation statute.⁸⁸ In doing so, the Justices had reasoned that the law did not discriminate against blacks, since white people and black people were equally forbidden to marry across racial lines.⁸⁹ Justice Field’s terse opinion for the Court—redolent with lofty abstractions of imperious neutrality—was parenthetical to the core. It seemed to endorse without reservation the basic logic of separate but equal. A dozen years later, the Court would give its unqualified blessing to that logic, and to the foul host of Jim Crow laws underwritten by it.

E. Erasure and Resumption: *Plessy v. Ferguson*

Today, *Plessy v. Ferguson*⁹⁰ assumes an unchallenged position in the “anticanon” of American constitutional law.⁹¹ It forms, with *Dred Scott* and *Korematsu v. United States*,⁹² an unholy trinity, like the trio of traitors whom

85. *Id.* at 48.

86. *Id.* at 53.

87. For contemporaneous reactions to the cases from the black community, see generally Marianne L. Engelman Lado, *A Question of Justice: African-American Legal Perspectives on the 1883 Civil Rights Cases*, 70 CHI.-KENT L. REV. 1123 (1995).

88. See 106 U.S. 583, 585 (1883), *overruled by* *McLaughlin v. Florida*, 379 U.S. 184 (1964).

89. See *id.*

90. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

91. See BALKIN, *supra* note 3, at 14-15, 188-89; Amar, *supra* note 9; Greene, *supra* note 9, at 412-17; Primus, *supra* note 9, at 244-47.

92. 323 U.S. 214 (1944), *abrogated by* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

Dante consigned to the bottom of hell.⁹³ To some, *treachery* seemed just the right word for the majority opinion in *Plessy*: It seemed to betray the nation's noblest ideals and traduce what little remained of the Fourteenth Amendment's promise.⁹⁴ What concerns us here, however, is *Plessy's* status as an artifact of constitutional memory—or, as it happens, a monument of willful forgetting.

For our purposes, the most remarkable feature of Justice Brown's opinion for the Court is its resolute refusal to think historically—to engage in constitutional memory. There was no usable narrative, no effort to grapple with (or even mention) the legacy of slavery and its aftermath. Justice Brown's treatment of the Reconstruction Amendments discussed a handful of earlier cases,⁹⁵ but principally relied on the *Slaughter-House Cases* and the *Civil Rights Cases* as sufficient proof that the Amendments' framers could not have intended what the petitioner requested.⁹⁶ In a conciliatory, anti-sectional gesture, Justice Brown alluded to segregated schools in Massachusetts⁹⁷ and to discriminatory laws in other Northern and Western states.⁹⁸ Clearly, he meant to rescue the Louisiana laws at issue from the taint of sectional stigma. But this part of Justice Brown's opinion also highlighted the continuity of segregation laws across time and space. It was a parenthetical account that didn't put much inside the parenthetical.

Justice Brown argued breezily that the “underlying fallacy of the plaintiff's argument” was its “assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority.”⁹⁹ If that were so, it was “not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”¹⁰⁰ If Justice Brown and his colleagues thought the past held any insights on the matter, they never said so.

Plessy was less an exercise in constitutional memory than an act of willful amnesia. The majority opinion was impressively blind to both past oppressions and present realities. Asserting white supremacy and affirming black inferiority was, of course, the law's *raison d'être*. From a mnemonic

93. The three were Judas Iscariot, Brutus, and Cassius. See DANTE ALIGHIERI, *THE INFERNO*, in *THE DIVINE COMEDY* 3, 264, 266-67 (John Ciardi trans., New Am. Library 2003) (1320).

94. Unlike other repudiated decisions, such as *Lochner v. New York*, 198 U.S. 45 (1905), *overruled by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), *Plessy* is almost never described by modern commentators as “right in its own day,” but rather as “wrong the day it was decided.” See BALKIN, *supra* note 3, at 208-11; see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 863 (1992).

95. See *Plessy*, 163 U.S. at 542-50.

96. See *id.* at 542-43, 546-47.

97. See *id.* at 544-45 (citing *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849)).

98. See *id.* at 545.

99. *Id.* at 551.

100. *Id.*

perspective, *Plessy* marks the final extreme of parenthetical memory—the point at which memory fades to silence, or is actively suppressed. An extraterrestrial visitor could read the opinion carefully without realizing that the country had hosted for centuries a regime of racialized chattel slavery, or that it had fought a bloody civil war to end the practice.

Plessy was not parenthetical in the sense of declaring the evil past over and resuming the noble tradition. It was, instead, an unvarnished resumption of evil. If slavery was the original sin of the American Republic, segregation marked a second fall. Just thirty years after Lee's surrender at Appomattox, the myopic memory of one historical evil had eased the constitutional endorsement of a second.

A dissenting Justice Harlan once more sounded the trumpet of redemptive memory. Once again, he did so alone.

Justice Harlan's dissent was not the blistering denunciation of racism that some of its admirers have made it out to be.¹⁰¹ But Justice Harlan was unwilling to let his colleagues—or the country at large—forget the broad, redemptive purpose of the postwar Amendments. Taken together, he wrote, the Reconstruction Amendments “removed the race line from our governmental systems.”¹⁰²

The laws challenged in *Plessy* flouted that redemptive purpose, and betrayed the sacrifices and bloodshed of the Civil War itself. Jim Crow laws, Justice Harlan observed, were “cunningly devised to defeat legitimate results of the war,”¹⁰³ the foremost of which was the end of a racial hierarchy. “There is no caste here,” Justice Harlan wrote.¹⁰⁴ “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”¹⁰⁵

Eight Justices of the Supreme Court, however, had just held otherwise. The parenthetical mode of memory triumphed decisively over the redemptive mode, as the constitutional memory of evil elided itself—first into silence, and then into support for the unalloyed resumption, in modified guise, of the evil itself.

101. *See id.* at 561 (Harlan, J., dissenting) (“There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. . . . I allude to the Chinese race. But by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States. . . .”); *see also* Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 156–66 (1996) (discussing Justice Harlan's negative comments about persons of Chinese ancestry in his *Plessy* dissent and placing those comments in the context of his Chinese jurisprudence more broadly).

102. *Plessy*, 163 U.S. at 555 (Harlan, J., dissenting).

103. *Id.* at 560–61.

104. *Id.* at 559.

105. *Id.*

II. After *Plessy*: 1896-1954

The parenthetical mode of memory that took hold in the last decades of the nineteenth century went virtually unchallenged during the first half of the twentieth century. Several Justices even embraced a view of Reconstruction popularized by the Dunning School of Reconstruction historiography,¹⁰⁶ which, according to Eric Foner, the leading modern historian of Reconstruction, “played a powerful and disreputable part in fastening onto the national consciousness an image of Reconstruction as a disastrous error, an era of misgovernment and corruption, the lowest point in the saga of American democracy.”¹⁰⁷ The views of the Dunning School found a wide popular resonance,¹⁰⁸ and an imprint—at least once through direct citation—in the pages of the *United States Reports*.¹⁰⁹ In many respects, however, especially after the 1930s, the Court became more liberal and more civil libertarian. But it did so in ways that were largely ahistorical and antimnemonic. The Court reached some results that it could have supported, but emphatically did not, with a redemptive mnemonic vision.

A. The Silent Years: 1896-1911

At the outset of the twentieth century, the Court’s posture toward the past was, for all practical purposes, an inflexibly turned back. Continuing *Plessy*’s pattern of erasure, the Justices had very little to say about the legacy of slavery and the Civil War, even when that history might have seemed most relevant. In 1903, for instance, the Court consummated its complicity in Jim Crow when it refused, on jurisdictional grounds, to strike down Alabama’s voter registration and qualification requirements.¹¹⁰ In doing so, the Court reflected that the laws applied to all citizens; that they stated no intent to disfranchise blacks; and that in any case, even if there were an illicit legislative intent, the Justices were powerless to affect the laws’ impact on the ground.¹¹¹ About the past, the Court preferred to keep mum.

106. See *infra* Parts II.C, III.A.1. On the work of Dunning School historians, see generally THE DUNNING SCHOOL: HISTORIANS, RACE, AND THE MEANING OF RECONSTRUCTION (John David Smith & J. Vincent Lowery eds., 2013).

107. Eric Foner, Essay, *The Supreme Court and the History of Reconstruction—and Vice-Versa*, 112 COLUM. L. REV. 1585, 1589 (2012).

108. See *id.* at 1594-97.

109. A majority of the Court, for instance, cited Claude Bowers’s *The Tragic Era* in *Collins v. Hardyman*. See 341 U.S. 651, 657 n.8 (1951) (citing CLAUDE G. BOWERS, THE TRAGIC ERA: THE REVOLUTION AFTER LINCOLN 340-48 (1929)), *overruled by* *Griffin v. Breckenridge*, 403 U.S. 88 (1971).

110. See *Giles v. Harris*, 189 U.S. 475, 486 (1903).

111. See *id.* at 486-88.

This pattern of silence appeared in other cases as well. The Court continued, for instance, to read the Reconstruction Amendments narrowly and to ignore their historical antecedents.¹¹² This was true both of the Amendments' substantive provisions and of Congress's related enforcement powers.¹¹³ The Court also sustained states' power to *require* racial segregation, even by private corporations. Thus, in 1908, the Court upheld a Kentucky law that made it a crime for private schools to educate black and white students together.¹¹⁴ The majority took it for granted that states could regulate corporations pretty much as they pleased, since the matter was "of a purely local nature."¹¹⁵ To say that race relations were a purely local concern was, of course, to reject the major premise of redemptive memory. The gesture was symptomatic of the times. The Court's opinion never mentioned slavery, the Civil War, Reconstruction, or even the Fourteenth Amendment. It was an ahistorical opinion that shunned textual engagement. It was a monument to an era of outright erasure, a season of startling silence.

The silence was broken only by the persistent dissents of an aging Justice Harlan, which were occasionally joined by junior colleagues. Justice Harlan's dissents kept the redemptive mode of memory alive, however feebly, and asserted a countermemory, however dormant. Justice Harlan continued to insist on a broad reading of the Thirteenth Amendment, which in his view marked a break with the past so sharp as to render tradition and comparison—at least in certain contexts—irrelevant.¹¹⁶

Justice Harlan delivered his mnemonic swan song in a pair of cases decided on the same day in the fall of 1908. In the first of them, Justice Harlan dissented with special fire from the Court's blessing of Kentucky's criminalization of interracial private schooling.¹¹⁷ Justice Harlan maintained that the law was "an arbitrary invasion" of freedom in its most basic sense.¹¹⁸ It was not merely

112. See, e.g., *Robertson v. Baldwin*, 165 U.S. 275, 277-78, 280-82, 287-88 (1897).

113. See *Hodges v. United States*, 203 U.S. 1, 2-4, 17-20 (1906) (ruling that the Thirteenth Amendment did not empower Congress to intervene to combat racially motivated contract interference, and overturning the federal convictions of three white men in Arkansas for conspiring to deprive black sawmill workers of their right to make contracts), *overruled by* *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

114. See *Berea Coll. v. Kentucky*, 211 U.S. 45, 46, 57-58 (1908).

115. See *id.* at 54.

116. See, e.g., *Robertson*, 165 U.S. at 292-93, 303 (Harlan, J., dissenting) (contending that the Thirteenth Amendment applied to protect runaway sailors jailed for breach of contract, and warning that the hunt for runaway seamen might come to resemble earlier hunts for runaway slaves); see also *Hodges*, 203 U.S. at 26-28 (Harlan, J., dissenting) (pushing once more for an expansive reading of the Thirteenth Amendment).

117. See *Berea Coll.*, 211 U.S. at 46, 57-58; *id.* at 65-70 (Harlan, J., dissenting).

118. *Id.* at 67 (Harlan, J., dissenting).

unconstitutional, he argued, it was un-American.¹¹⁹ The postbellum United States, he implied, was simply not the sort of polity where such a statute could exist. But such a law did exist, and the Court sustained it by a vote of 7-2. And even Justice Harlan's opinion never invoked the memory of slavery or of the Civil War explicitly, though the specters of the past surely swirled around his dissent.

In the second case, Justice Harlan made his most extended argument that the Fourteenth Amendment incorporated the Bill of Rights against the states.¹²⁰ A majority of the Court, invoking the *Slaughter-House Cases*, took the opposite stance. The majority conceded that the *Slaughter-House* interpretation "gave much less effect to the Fourteenth Amendment than some of the public men active in framing it intended, and disappointed many others."¹²¹ But that, the Court implied, was all to the good, since incorporation would undermine "the authority and independence of the States."¹²² In any case, the *Slaughter-House* interpretation of the Privileges or Immunities Clause had been "steadily adhered to by this court," and was, by 1908, "firmly established."¹²³

The majority's deference to precedent highlights how constitutional memory is always mediated by earlier exercises in constitutional memory. Constitutional memory is *genre memory*, with each exercise constrained by the conventions of the genre—in this case, by precedent.¹²⁴ In this sense, the *Slaughter-House Cases* were not merely an early exercise in constitutional memory; they helped define the genre. They thus cast a long shadow over the Court's subsequent engagement with the legacy of slavery and the Civil War. The shadow is with us still.

In dissent, Justice Harlan urged his colleagues one last time to emerge from the gloom. For Justice Harlan, "the late Civil War" had raised the question of

119. See *id.* at 69 ("Have we become so inoculated with prejudice of race that *an American government* . . . can make distinctions between such citizens in the matter of their voluntary meeting for innocent purposes simply because of their respective races?" (emphasis added)). This was an *ethical* argument in the sense in which Philip Bobbitt coined that term. See BOBBITT, *supra* note 8, at 93-119 (arguing that courts sometimes reject laws or practices as inconsistent with the ethos or ethical mores of the polity).

120. See *Twining v. New Jersey*, 211 U.S. 78, 121-25 (1908) (Harlan, J., dissenting) (disagreeing with the majority's holding that the Fifth Amendment's Self-Incrimination Clause was not incorporated by the Fourteenth Amendment), *overruled by* *Malloy v. Hogan*, 378 U.S. 1 (1964); see also U.S. CONST. amend. V ("[N]or shall any person . . . be compelled in any criminal case to be a witness against himself . . .").

121. *Twining*, 211 U.S. at 96.

122. See *id.*

123. *Id.*

124. On memory and genre, see JEFFREY K. OLICK, *THE SINS OF THE FATHERS: GERMANY, MEMORY, METHOD* 67-74, 446-53 (2016) (describing how, within a particular genre, each exercise of public memory reacts to prior exercises and influences subsequent ones).

ensuring “against attack by the States” those rights that the original Constitution had shielded from federal encroachment.¹²⁵ For Justice Harlan, the Fourteenth Amendment had settled the matter in the affirmative, making the Privileges or Immunities Clause even more “[m]omentous” than the declaration of birthright citizenship.¹²⁶ The Clause had enshrined “our heritage of liberty” against “assault by any government, Federal or state.”¹²⁷

Justice Harlan’s argument that the Fourteenth Amendment incorporated at least the guarantees of the Bill of Rights against the states represented his final assault on the cramped reading of the Privileges or Immunities Clause inaugurated in the *Slaughter-House Cases*. It was his final extended exercise in redemptive memory, though it said little about the evils that gave rise to the need for redemption. Three years later, Justice Harlan was dead—as, for a time, was the redemptive mnemonic vision he had been articulating for almost thirty-five years.¹²⁸

B. The Progressive Era: 1911-1937

In the years after Justice Harlan’s death, the Court surprised some observers by beginning, however haltingly, to breathe some life into the egalitarian guarantees of the Reconstruction Amendments. The judicial victories for civil rights in this era were modest, to be sure, and in practical terms pyrrhic. As monuments of constitutional memory, they presented some arresting curiosities.

1. Don’t mention it: *Bailey v. Alabama*

The modest wins were curious in part because they professed to be utterly uninfluenced by the past. In *Bailey v. Alabama*, for instance, the Court struck down an Alabama peonage law,¹²⁹ but deemed the past irrelevant to its holding. Justice Hughes’s majority opinion began with a glaring preterition. He vowed, in effect, not even to mention that the case was about the rights of black laborers in the Jim Crow South.¹³⁰ This indirection reflected the Justices’

125. See *Twining*, 211 U.S. at 121 (Harlan, J., dissenting) (emphasis omitted).

126. See *id.* at 122.

127. *Id.*

128. Justice Harlan served on the Supreme Court from 1877 until his death in 1911. See *John Marshall Harlan*, ENCYCLOPÆDIA BRITANNICA, <https://perma.cc/MUK8-DSXH> (last updated Oct. 10, 2018).

129. See 219 U.S. 219, 242-43, 245 (1911).

130. See *id.* at 231 (“We at once dismiss from consideration the fact that the plaintiff in error is a black man. . . . The statute, on its face, makes no racial discrimination, and the record fails to show its existence in fact. No question of a sectional character is
footnote continued on next page”)

eagerness to distance the Court from any trace of sectional hostility and to spare Southern nerves. In a grandly parenthetical gesture, Justice Hughes professed to ignore not only history but also geography and, of course, race.

Later in the opinion, Justice Hughes did make some high-sounding statements about the expansive reach of the Thirteenth Amendment, which he called “a charter of universal civil freedom for all persons, of whatever race, color or estate, under the flag.”¹³¹ The Alabama peonage regime ran afoul of that universal charter, though the majority was quick to acknowledge the State’s good faith and to stress that the case, at bottom, was about free labor, not race.¹³²

This was redemptive memory of a very muted sort. The case’s strongest mnemonic thrust was parenthetical. Justice Hughes, for instance, gave the Thirteenth Amendment a long pedigree, tracing its principles back to the Northwest Ordinance of 1787 and forward through the *Slaughter-House Cases* and the *Civil Rights Cases*, which he selectively cited.¹³³ The effect was to present the American polity as basically pro-freedom and antislavery from the very beginning. The Thirteenth Amendment had come to complete what the Northwest Ordinance began. Reconstruction was not a re-Founding, but a continuation of the work of 1787. It came, not to reframe the Constitution, but to fulfill it.

In its modest way, *Bailey* presaged things to come. Three years later the Court struck down another Alabama labor law on Thirteenth Amendment grounds.¹³⁴ On the same day, the Court also invalidated an Oklahoma law that allowed luxury train accommodations for white people only.¹³⁵ The next year, the Court condemned state efforts to disenfranchise blacks through “grandfather clauses,” which exempted from literacy tests and poll taxes all persons enfranchised before the mid-1860s (that is, before black people in the South received the right to vote) and their descendants.¹³⁶ In none of these cases did the Court engage with the memory of slavery, the Civil War, or

presented, and we may view the legislation in the same manner as if it had been enacted in New York or in Idaho.”).

131. *Id.* at 241.

132. *See id.* at 244-45.

133. *See id.* at 240-41; *see also* Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51 n.a (reprinting the Northwest Ordinance of 1787).

134. *See* *United States v. Reynolds*, 235 U.S. 133, 149-50 (1914) (invalidating a law imposing labor requirements as a sanction for breach of contract).

135. *See* *McCabe v. Atchison, Topeka & Santa Fe Ry. Co.*, 235 U.S. 151, 161-62 (1914). For technical reasons, however, the Court did not grant relief to the plaintiffs in the case at hand. *See id.* at 162-64.

136. *See* *Myers v. Anderson*, 238 U.S. 368, 377, 379-80 (1915); *Guinn v. United States*, 238 U.S. 347, 356-57, 368 (1915).

Reconstruction. These judgments were not exercises in judicial memory, but the standard fare of obvious legal analysis—easy cases in which Jim Crow had simply gone too far.

2. A touch too brazen?: *Buchanan v. Warley*

Buchanan v. Warley, in which the Court struck down a municipal ordinance mandating residential segregation,¹³⁷ was different. While some commentators have viewed the decision as a product of laissez-faire, *Lochner*-era constitutionalism,¹³⁸ the most striking feature of Justice Day's majority opinion, for our purposes, is its comparatively robust invocation of Reconstruction ideology and redemptive memory.

In a pattern that would become familiar, Justice Day invoked the *Slaughter-House Cases*' redemptive dicta while eschewing their parenthetical holding.¹³⁹ He highlighted isolated instances in which the late nineteenth-century Court had condemned racial discrimination, and he ignored everything else.¹⁴⁰ Measured against the general tenor of the Court's earlier mnemonic jurisprudence, Justice Day's narrative was noticeably redemptive. In his selective citation of precedent, he exploited the available redemptive resources to the full.¹⁴¹

It might not have mattered much on the ground. The Court put a formal end to some of the most egregious de jure abuses of the Jim Crow South, but segregation remained the dominant norm, and de facto discrimination went almost unchallenged. Still, the Court had made a modest move toward a more robust reading of the Civil War Amendments' equality provisions, and toward a more redemptive engagement with the past that gave rise to those Amendments. The redemptive vision was brought, however limply, back to life. Decades passed, however, before it once more stood and fought.

3. Memory quiescent, equality (slowly) rising

Meanwhile, there were more small victories. In the 1920s and 1930s, the Court invalidated various aspects of the Texas Democratic Party's all-white

137. See 245 U.S. 60, 81-82 (1917).

138. See, e.g., David E. Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797, 854-55, 858-73 (1998) (describing *Buchanan* as a form of moderate laissez-faire constitutionalism and arguing that laissez-faire jurisprudence had positive effects for blacks during the *Lochner* era).

139. See *Buchanan*, 245 U.S. at 76. For a full discussion of these dicta, see Part I.A above.

140. See *id.* at 76-78 (discussing the *Slaughter-House Cases* and *Strauder*).

141. See *id.* at 79-80.

primary (albeit without any serious engagement with the past).¹⁴² But in 1935, the Justices upheld a reformulated version of the Texas Democrats' all-white primary system,¹⁴³ and the Court did not abolish the all-white primary tout court until 1944.¹⁴⁴ For the most part, the Court continued to read the Reconstruction Amendments narrowly in the context of racial equality,¹⁴⁵ even as it interpreted due process expansively in economic contexts¹⁴⁶ and even as it held, for the first time, that a right protected against the federal government by the Bill of Rights was enshrined by the Fourteenth Amendment against the states.¹⁴⁷

The Taft Court engaged only rarely with the constitutional legacy of Reconstruction, and when it did so, its tone was sometimes disparaging. The most dramatic example was the Chief Justice's majority opinion in *Myers v. United States*, a famous separation of powers case.¹⁴⁸ Chief Justice Taft censured the Reconstruction Congress for passing a law "without discussion of [its] inconsistency" with the views of the First Congress in 1789, and for going out of its way to "prevent[] this Court from passing on the validity of reconstruction legislation."¹⁴⁹ Chief Justice Taft reverently invoked "the decision of 1789," contrasting its wisdom with the "extreme provisions" of Reconstruction legislation, which "exhibited in a clear degree the paralysis to which a partisan Senate and Congress could subject" the executive branch "if the President had

142. See *Nixon v. Condon*, 286 U.S. 73, 81-82, 89 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

143. See *Grovey v. Townsend*, 295 U.S. 45, 46-48, 55 (1935), *overruled by* *Smith v. Allwright*, 321 U.S. 649 (1944).

144. See *Smith*, 321 U.S. at 650-51, 664-66.

145. See, e.g., *Corrigan v. Buckley*, 271 U.S. 323, 327, 330-31 (1926) (deeming a racially restrictive housing covenant legally binding).

146. See, e.g., *Heiner v. Donnan*, 285 U.S. 312, 320-21, 331-32 (1932) (invalidating a federal law that conclusively presumed gifts made within two years of death to have been made in contemplation of death); *Untermeyer v. Anderson*, 276 U.S. 440, 445-46 (1928) (invalidating the application of a federal gift tax to a gift made after Congress had begun considering the tax but before it was enacted); *Nichols v. Coolidge*, 274 U.S. 531, 532-33, 542-43 (1927) (invalidating the application of a federal estate tax to property transferred in trust before the law was passed); *Schlesinger v. Wisconsin*, 270 U.S. 230, 236, 240 (1926) (invalidating a state law that presumptively deemed any gift made within six years of the decedent's death to have been made in contemplation of death).

147. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

148. See 272 U.S. 52, 176 (1926) (asserting the President's exclusive power to remove executive branch officers and his power to do so without congressional approval); see also Jonathan L. Entin, *The Curious Case of the Pompous Postmaster: Myers v. United States*, 65 CASE W. RES. L. REV. 1059, 1059 (2015) ("*Myers v. United States* is perhaps the leading Supreme Court case on the law of presidential power." (footnote omitted)).

149. *Myers*, 272 U.S. at 165-66.

no power of removal save by consent of the Senate.”¹⁵⁰ In the conflict between the men of 1789 and the men of 1867—between the authors of the Bill of Rights and the architects of the Reconstruction Amendments—it wasn’t hard for Chief Justice Taft and the majority to side with the former.¹⁵¹

Chief Justice Taft died in 1930, and Charles Evans Hughes took his place as Chief Justice—a former presidential candidate replacing a former President.¹⁵² During the early years of Chief Justice Hughes’s tenure, the Court continued to expand, slightly and gradually, the egalitarian scope of the Fourteenth Amendment, and to improve modestly the legal standing of blacks. In *Powell v. Alabama*, for example, the Court reversed the convictions of the Scottsboro Nine, a group of young black men accused of raping two white women on a freight train in Alabama, on the ground that the right to counsel was fundamental to a fair trial and, under the circumstances, the trial judge should have informed the defendants of that right.¹⁵³ It was the first time the Court had ever reversed a state criminal conviction for violating a procedural guarantee found in the Bill of Rights¹⁵⁴—an important step toward incorporating Bill of Rights guarantees against the states, though the *Powell* Court had nothing to say about slavery, the Civil War, or Reconstruction. The same was true of *Norris v. Alabama*—in which the Court condemned, as a violation of equal protection, the use of an all-white jury for a black defendant in a jurisdiction in which no black person had served on a jury for more than a generation¹⁵⁵—and of *Brown v. Mississippi*, in which the Justices ruled that states could not admit coerced confessions into evidence.¹⁵⁶

These judgments were overshadowed, of course, by the Court’s greatest clash with the political branches of government since the Civil War. This clash transformed the Court, and in its aftermath President Franklin D. Roosevelt

150. See *id.* at 165-67.

151. See *id.* at 174-76.

152. See *Charles Evans Hughes*, ENCYCLOPÆDIA BRITANNICA, <https://perma.cc/ZL9X-CAN9> (archived Nov. 20, 2018); *William Howard Taft*, ENCYCLOPÆDIA BRITANNICA, <https://perma.cc/8DPD-HDA6> (archived Nov. 20, 2018).

153. See 287 U.S. 45, 49-51, 71-73 (1932).

154. The Court had previously reversed on due process grounds a denial of habeas corpus. See *Moore v. Dempsey*, 261 U.S. 86, 91-92 (1923).

155. See 294 U.S. 587, 588-89, 596-97, 599 (1935).

156. See 297 U.S. 278, 281-83, 286-87 (1936).

made eight appointments to the Court in six years.¹⁵⁷ The new Justices would help to revolutionize the Court's race jurisprudence¹⁵⁸ and transform its engagement with the past.

C. The Roosevelt Court and the Dunning School: 1937-1954

The changes came slowly. During the 1940s, the Court slowly chipped away at laws and practices of official discrimination. The Justices invalidated Texas's all-white Democratic primary,¹⁵⁹ ordered the desegregation of interstate buses,¹⁶⁰ banned exclusion of blacks from juries,¹⁶¹ extended an earlier holding that required states to admit black students to graduate schools when no separate state graduate school was available,¹⁶² and forbade lower courts from enforcing racially discriminatory real estate covenants.¹⁶³ But the Justices remained reluctant to revisit earlier landmarks or to interrogate the historical narratives that informed them. In most major cases, the Justices said little about the past. In *Shelley v. Kraemer*,¹⁶⁴ for instance, the Court went out of its way to avoid reconsidering the *Civil Rights Cases*. Instead, the Justices presented their remarkable holding—that judicial enforcement of racially restrictive covenants constituted state action—as a humdrum extension of precedent.¹⁶⁵ The Court mentioned the history of Reconstruction only in closing, almost as an afterthought.¹⁶⁶

157. Actually, there were nine, but I'm not counting Justice James F. Byrnes, who resigned after a little more than a year on the Court, see BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774-2005, H.R. DOC. NO. 108-222, at 762 (2005), and was replaced by another Roosevelt appointee, Wiley Blount Rutledge. The Roosevelt appointees were Justice Hugo Black (1937), Justice Stanley Forman Reed (1938), Justice Felix Frankfurter (1939), Justice William O. Douglas (1939), Justice Frank Murphy (1940), Chief Justice Harlan Fiske Stone (1941), Justice James F. Byrnes (1941), Justice Robert H. Jackson (1941), and Justice Wiley Blount Rutledge (1943). See *Justices 1789 to Present*, SUP. CT. U.S., <https://perma.cc/XA75-ZEG4> (archived Nov. 17, 2018).

158. See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 193 (2004) ("Justices sitting on the high court during the World War II era proved remarkably supportive of progressive racial change.").

159. See *Smith v. Allwright*, 321 U.S. 649, 656-57, 664-66 (1944); see also *supra* text accompanying notes 142-44.

160. See *Morgan v. Virginia*, 328 U.S. 373, 374, 386 (1946).

161. See *Patton v. Mississippi*, 332 U.S. 463, 468-69 (1947).

162. See *Sipuel v. Bd. of Regents of the Univ. of Okla.*, 332 U.S. 631 (1948) (per curiam).

163. See *Shelley v. Kraemer*, 334 U.S. 1, 4, 23 (1948).

164. 334 U.S. 1.

165. See *id.* at 13-18.

166. See *id.* at 23 (noting, in the opinion's final paragraph, that "[t]he historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten").

1. Reconstruction and its discontents

The cases just described were part of a watershed in race relations after the Second World War.¹⁶⁷ Despite these broader shifts, historians were slow to challenge received wisdom about Reconstruction. The Dunning School remained dominant,¹⁶⁸ which helps explain an irony in the Court's jurisprudence: Even as the postwar Court began, for the first time, to give teeth to the Reconstruction Amendments' promise of racial equality, the Court's explicit engagement with the legacy of the Civil War and Reconstruction remained, on the whole, conciliatory and parenthetical. The postwar Court was more egalitarian than ever before. But its newly egalitarian jurisprudence was not rooted in redemptive memory.

Some Justices viewed Reconstruction, quite in the spirit of the Dunning School, as an age of excess—of vindictive legislative overreach and disregard for constitutional limits. In a startling 1944 dissent, for instance, Justice Douglas invoked an 1894 federal statute designed, as he put it, “to restore control of election frauds to the States” by abolishing “detailed federal controls over elections which were contained in the much despised ‘reconstruction’ legislation.”¹⁶⁹ It was unclear precisely by whom Reconstruction legislation was “much despised,” but the scare quotes around “reconstruction” were telling. A year later, Justice Douglas would write for a plurality of the Court in *Screws v. United States*,¹⁷⁰ another case that sounded squarely in memory of Reconstruction. While Justice Douglas's plurality opinion spoke with parenthetical caution, a dissenting triumvirate of Justices Roberts, Frankfurter, and Jackson fulminated with anti-Reconstruction stridency.

The facts in *Screws* were, as the plurality put it, “shocking and revolting”—a grisly tale of police brutality that killed a young black man in Georgia.¹⁷¹ The local sheriff and two subordinates were convicted under federal law of depriving the deceased, under color of state law, of “rights, privileges, or immunities” guaranteed by the Fourteenth Amendment.¹⁷² A plurality of the Court cautiously upheld the relevant provision, stressing that the statute “should be construed so as to respect the proper balance between the States and

167. For a concise summary of these developments, see KLARMAN, *supra* note 158, at 171-96.

168. See Bernard A. Weisberger, *The Dark and Bloody Ground of Reconstruction Historiography*, 25 J. SOUTHERN HIST. 427, 427-29 (1959) (noting that despite some challenges to the Dunning framework raised in the late 1930s and early 1940s, “twenty years after these premonitory signs, the indicated tide of revision has not fully set in”); see also *supra* notes 106-09 and accompanying text.

169. *United States v. Saylor*, 322 U.S. 385, 391-92 (1944) (Douglas, J., dissenting).

170. 325 U.S. 91 (1945).

171. See *id.* at 92-93 (plurality opinion).

172. *Id.* (quoting Criminal Code, Pub. L. No. 60-350, § 20, 35 Stat. 1088, 1092 (1909) (codified as amended at 18 U.S.C. § 242 (2017))).

the federal government in law enforcement.”¹⁷³ But the plurality was careful also to reaffirm the principle, derived from *Cruikshank* and the *Civil Rights Cases*, that “[t]he Fourteenth Amendment did not alter the basic relations between the States and the national government.”¹⁷⁴

The dissenting trio of Justices Roberts, Frankfurter, and Jackson took a much dimmer view of the Reconstruction legislation. Its historical origins, they suggested, made it suspect. Justice Roberts wrote that the law “was born of that vengeful spirit which to no small degree envenomed the Reconstruction era.”¹⁷⁵ Reconstruction, he continued, was a time when “[l]egislative respect for constitutional limitations was not at its height and Congress passed laws clearly unconstitutional”—in support of which he cited, without comment, the *Civil Rights Cases*.¹⁷⁶ Even so, the dissenters continued, not even Reconstruction’s radicals expected any revolutionary shift in federal-state relations.¹⁷⁷ In their view, there was no sharp rupture with the past—no redemptive reversal. There was only a brief burst of hyperactive response to an exceptional era, bookended by profound continuities.

Two years after *Screws*, in a bankruptcy case raising technical questions of federal jurisdiction,¹⁷⁸ Justices Frankfurter and Jackson joined in dissent and once more voiced their suspicion of Reconstruction laws promulgated “when the influences toward expansion of federal jurisdiction were at flood-tide.”¹⁷⁹ Reconstruction, they said, was marked by an “expansionist trend in federal jurisdiction” that “gave to the federal courts jurisdiction over cases” thitherto “left entirely to State tribunals.”¹⁸⁰ Over time, this federalizing trend brought baleful byproducts. It overburdened the federal docket and disrupted federal-state relations.¹⁸¹ Congress wisely had restored balance, and Justice Frankfurter thought the majority wrong to push in the other direction.¹⁸²

173. *Id.* at 108.

174. *See id.* at 109.

175. *Id.* at 140 (Roberts, J., dissenting).

176. *Id.* (citing *The Civil Rights Cases*, 109 U.S. 3 (1883), *abrogated in part by* *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968)).

177. *See id.* at 144 (“[T]o have provided for the National Government to take over the administration of criminal justice from the States to the extent of making every lawless act of the policeman on the beat or in the station house . . . a federal offense, would have constituted a revolutionary break with the past overnight. The desire for such a dislocation in our federal system plainly was not contemplated . . .”).

178. *See Williams v. Austrian*, 331 U.S. 642, 644-46 (1947).

179. *Id.* at 663 (Frankfurter, J., dissenting).

180. *Id.* at 665.

181. *See id.* at 679-80.

182. *See id.* at 662-64.

In time, jaundiced views of Reconstruction made their way into majority opinions. Writing for a plurality of the Court in 1951, Justice Frankfurter again underscored the shortcomings of Reconstruction legislation. The era's "dominant conditions," he explained, "were not conducive to . . . carefully considered and coherent legislation."¹⁸³ As a result of passionate "post-war feeling" and "inadequate deliberation," the era's laws were often "loose and careless."¹⁸⁴ The same year, Justice Jackson, writing for a Court majority, broadly derided Reconstruction legislation and the "conquered province" theory that supposedly underpinned it.¹⁸⁵ As authority, Justice Jackson cited *The Tragic Era* by Claude Bowers, the Dunning School's most passionate and successful popularizer.¹⁸⁶ Bowers's book was a sustained assault on Reconstruction, which he called a "black and bloody drama" in which "the Southern people literally were put to the torture"¹⁸⁷ through the policies of radical Republicans and carpetbaggers, enabled by black suffrage and officeholding.¹⁸⁸ It is unclear to what extent the Justices actually read Bowers, but some of their descriptions of Reconstruction clearly breathed the antagonistic spirit of the Dunning School. Such antipathy toward Reconstruction provided one backdrop to an epic interpretive battle between Justice Frankfurter and Justice Black.

2. Incorporation's battle royal: *Adamson v. California*

The battle broke out in *Adamson v. California*, and the crux of contention, of course, was incorporation.¹⁸⁹ For our purposes, the salient point is that while Justice Frankfurter adduced judicial tradition, Justice Black invoked Reconstruction memory. In his concurring opinion, Justice Frankfurter stressed that the anti-incorporation position had been embraced by a steady

183. *United States v. Williams*, 341 U.S. 70, 74 (1951) (plurality opinion), *abrogated in other part by* *United States v. Price*, 383 U.S. 787 (1966).

184. *Id.*

185. *See Collins v. Hardyman*, 341 U.S. 651, 656-58 (1951), *overruled by* *Griffin v. Breckenridge*, 403 U.S. 88 (1971).

186. *See id.* at 657 n.8 (citing BOWERS, *supra* note 109, at 340-48); *see also supra* notes 106-09 and accompanying text. For more on Bowers and the Dunning School, see FONER, *supra* note 49, at 609-10; and Eric Foner, Opinion, *Why Reconstruction Matters*, N.Y. TIMES (Mar. 28, 2015), <https://perma.cc/92QA-E3BV>.

187. BOWERS, *supra* note 109, at vi.

188. On Bowers's telling, for instance, radical "corruptionists" in South Carolina "found among the negroes men of cunning, cupidity, and some ability, with whom they affiliated for control of the great mass of ignorance, and this mass dominated the State." *Id.* at 358. Bowers argued that because of their "abysmal ignorance and strong passions," black voters were easily manipulated by carpetbaggers and radical Republicans. *See id.* at 358-59.

189. *See* 332 U.S. 46, 49-53 (1947), *overruled by* *Malloy v. Hogan*, 378 U.S. 1 (1964).

stream of judicial Hall of Famers, all of whom were “duly regardful of the scope of authority that was left to the States *even after the Civil War*.”¹⁹⁰ Justice Frankfurter “put to one side the Privileges or Immunities Clause,” noting that the Court had rightfully recoiled from “the mischievous uses to which that clause would lend itself if its scope were not confined” by the *Slaughter-House Cases* and their epigones.¹⁹¹ At bottom, Justice Frankfurter’s view of constitutional development was evolutionary rather than redemptive.¹⁹² The important thing, for Justice Frankfurter, was the steady development of the tradition. The past’s evils were aberrations, and once the parenthetical was closed, judges must resume the tradition, eschewing any misbegotten notion of radical rupture.

By contrast, Justice Black’s dissent honored the Reconstruction Congress as a second set of Founders.¹⁹³ Justice Black’s opinion included a lengthy historical discussion¹⁹⁴ and a beefy appendix.¹⁹⁵ He argued, controversially, that the framers of the Fourteenth Amendment saw their work principally as incorporating the Bill of Rights against the states.¹⁹⁶ For purposes of constitutional memory, Justice Black’s first notable move was to insist that exercises in constitutional memory ought to be independent. He chided the majority for relying on the Court’s own institutional memory (in the form of precedent) rather than engaging directly with the relevant past.¹⁹⁷ Justice Black’s independent historical case for incorporation was, in notable respects, a redemptive gesture. His suggestion that Reconstruction’s architects were a second set of Founders cut sharply against the grain of the parenthetical mode.¹⁹⁸

In that spirit, Justice Black selectively invoked the mnemonic authority of late nineteenth-century precedents to underscore the antidiscriminatory objectives of the Reconstruction Amendments.¹⁹⁹ Elsewhere, Justice Black highlighted the irony that despite those core objectives, the Reconstruction

190. *See id.* at 62 (Frankfurter, J., concurring) (emphasis added).

191. *Id.* at 61-62.

192. *See id.* at 66 (declaring that the Constitution “should not be imprisoned in what are merely legal forms even though they have the sanction of the Eighteenth Century”).

193. *See id.* at 73-74 (Black, J., dissenting).

194. *See id.* at 71-75.

195. *Id.* app. at 92-123.

196. *See id.* at 71-72.

197. *See id.* at 74.

198. Justice Black wrote, for instance, that John Bingham, an important member of the Thirty-Ninth Congress, “may, without extravagance, be called the Madison of the first section of the Fourteenth Amendment.” *Id.* at 73-74.

199. *See id.* at 75-79. Several of these earlier cases are discussed in Part I above.

Amendments had been invoked in support of black equality in only a fraction of cases.²⁰⁰ Instead, the Court had exalted the rights of corporations and neglected those of blacks.²⁰¹ The Fourteenth Amendment had become, as Justice Black quoted in *Adamson*, “the Magna Charta of accumulated and organized capital.”²⁰² The pattern was part of a broader trend by which sectional reconciliation and economic nationalism trumped racial integration and equality before the law.²⁰³

In this respect, Justice Black’s accusation that the majority (and Justice Frankfurter in concurrence) had revived the spirit of *Lochner* was more than a point-scoring conjuration of a constitutional bogeyman. In one sense, *Lochner* marked a judicial celebration of national economic reconciliation—the annulment of a state health measure in the name of a national economic liberty rooted in the core provisions of the Reconstruction Amendments.²⁰⁴ But, for Justice Black, celebrating economic unity and strength while soft-pedaling civil liberties missed the core constitutional legacy of the Civil War. In a dissent that resurrected the voices of the Fourteenth Amendment’s framers, Justice Black in *Adamson* took umbrage at what he saw as a perversion of the Civil War’s constitutional legacy. The centerpiece of that legacy, for Justice Black, was incorporation, which conferred on millions of former slaves all the protections of the Bill of Rights against the states that had authorized their enslavement. “[A]fter the bloody sacrifice of our four years’ war,” Justice Black quoted from a speech by a member of the Thirty-Ninth Congress, “we gave the most grand of all these rights, privileges, and immunities, by one single amendment to the Constitution, to four millions of American citizens who sprang into being, as it were, by the wave of a magic wand.”²⁰⁵

200. See *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 90 (1938) (Black, J., dissenting).

201. See *id.* (“[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 cent[] invoked it in protection of the negro race, and more than fifty per cent[] asked that its benefits be extended to corporations.”).

202. *Adamson*, 332 U.S. at 84 (Black, J., dissenting) (quoting CHARLES WALLACE COLLINS, *THE FOURTEENTH AMENDMENT AND THE STATES: A STUDY OF THE OPERATION OF THE RESTRAINT CLAUSES OF SECTION ONE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES* 138 (1912)).

203. On this broader trend, see generally BLIGHT, *supra* note 14, at 198-208, 300-97.

204. See *Lochner v. New York*, 198 U.S. 45, 52-54 (1905), *overruled by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

205. *Adamson*, 332 U.S. app. at 119 (Black, J., dissenting) (quoting CONG. GLOBE, 42d Cong., 1st Sess. 476 (1871) (statement of Rep. Dawes)); see also BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774-2005, H.R. DOC. NO. 108-222, at 171 (2005) (listing Representative Henry L. Dawes of Massachusetts as a member of the Thirty-Ninth Congress).

If this was redemptive memory, however, it was redemptive in a distinctively parenthetical way. In his *Adamson* dissent, and for twenty years thereafter, Justice Black linked the constitutional response to slavery with the eighteenth-century Founding, suggesting that the means of redemption were not to transform the Founding structure, but to nationalize the Founders' deepest values.²⁰⁶ On this account, the evil of slavery could be (ab)solved by getting the original Founding *right*. The evils of the past could be remedied by expanding the original Constitution's scope. Accordingly, Justice Black would later insist that beyond incorporation, the Reconstruction Amendments had not fundamentally altered the basic structure—particularly the *federalist* structure—of the original Constitution.²⁰⁷

Justice Black's historical case for incorporation marked a departure in the Court's mnemonic jurisprudence. He challenged the dominant parenthetical accounts for the first time in decades. Yet even so, Justice Black's brand of redemptive memory was something of a hybrid: It had a strong parenthetical strand of its own. Only later, after the Court had finally denounced Jim Crow, did the redemptive mode truly begin to take hold. It was clear by then, however, that there was another evil to commemorate—a second guilt to atone. In the second half of the twentieth century and into the twenty-first, the redemptive and parenthetical modes would clash over the meaning and legacy, not only of slavery, but of segregation as well. And, once again, the parenthetical mode would ultimately gain the upper hand.

III. After *Brown*: 1954-Present

*Brown v. Board of Education*²⁰⁸ marked the end of a constitutional era and raised new dilemmas of constitutional memory. *Brown* acknowledged formally, if only implicitly, that slavery had a sequel—that legalized human bondage and de jure racial subordination were part of a single saga. That recognition, though tacit and partial, unsettled the parenthetical accounts that had dominated the Court's jurisprudence since Reconstruction. What's more, *Brown* tacitly acknowledged the Court's complicity in the second towering evil of American constitutional history. After *Brown*, the Court's engagement with

206. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 164-65 (1968) (Black, J., concurring); cf. *infra* Part III.A.1 (noting Justice Black's consistent calls for total incorporation of the Bill of Rights through the Fourteenth Amendment).

207. See, e.g., *Younger v. Harris*, 401 U.S. 37, 44-45 (1971) (extolling the centrality of "Our Federalism," which was a product of "the profound debates that ushered our Federal Constitution into existence" and which "occupies a highly important place in our Nation's history and its future," without mentioning how Reconstruction might have altered the Founding design).

208. 347 U.S. 483 (1954).

the historical evil of slavery was not only mediated by the memory of the Civil War and Reconstruction—and by seven decades of the Court’s own jurisprudence—but by the memory (and sometimes the lingering reality) of Jim Crow.

This created an odd memorial dynamic: With respect to the memory and legacies of Jim Crow, the constitutional provisions invoked to address the evil and its aftermath actually predated the evil. For obvious reasons, this made the parenthetical mode of memory awkward. But it complicated the redemptive mode as well. In the latter half of the twentieth century, the redemptive reading of the Reconstruction Amendments was animated by a felt need to repudiate not only antebellum slavery but also the racial caste system that succeeded it—the caste system, that is, that betrayed those Amendments’ original promise.

This brand of redemptive reading—of repudiation as affirmation of original promise—has an intriguing historical parallel. It mirrors the engagement of moderate Reconstruction Republicans with the American Founding. Such moderates hoped, they said, not to destroy the original Constitution, but to fulfill it—not to tear down the ancient edifice, but to restore it.²⁰⁹ The constitutional architects of the second Reconstruction made similar claims about the first Reconstruction. They were not, they insisted, distorting the Reconstruction Amendments beyond recognition, but fulfilling their original aspirations. The framers of the second Reconstruction understood themselves as redeeming the promise of the first Reconstruction by reversing its earlier betrayal.

In doing so, they ran into two major obstacles. The first was the Court’s own precedent, which enshrined an “institutional account of Reconstruction”²¹⁰ that precluded aggressive, redemptive readings of the Reconstruction Amendments. Measured against this standard account, the Warren Court redemptivists sometimes look unprincipled—vulnerable to the charge of bending the past to

209. John Bingham, for instance, argued that the Fourteenth Amendment changed nothing but Congress’s power to enforce constitutional rights, and that states had always been morally obligated to enforce the Bill of Rights and other national privileges and immunities equally. See GERARD N. MAGLIOCCA, *AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT* 114-15 (2013).

210. See PAMELA BRANDWEIN, *RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH* 16 (1999).

present objectives.²¹¹ The dissenting Justices who made these charges argued in a parenthetical mode, insisting that the majority's holdings swept far beyond the Fourteenth Amendment's more modest objectives.²¹²

That insistence dovetailed with a second great obstacle for redemptive memory in the second half of the twentieth century: a persistent desire to escape the past and declare it done. As the Civil War and emancipation reached and passed their centennial, it seemed to some past time to move on—to view the country and the Constitution from a neutral platform, independent of the anguished saga of racial strife. There emerged two competing camps: those who yearned to view the Constitution—and particularly the Fourteenth Amendment—through the lens of “colorblind,” neutral principles, and those who insisted that the Constitution was unintelligible or misleading unless seen through the prism of the past.

In important respects, the new paladins of colorblind constitutionalism presented their case as a kind of redemptive memory. They saw themselves as engaged in “never again” jurisprudence. For them, however, the evil that must never recur was not racial subordination as such, but official attention to race. That conviction gave rise to a new debate about the past—a debate about the meaning of *Brown*.²¹³

A. From *Brown* to the Civil Rights Act: 1954-1964

As a document of public memory, *Brown* itself was noteworthy primarily for stressing the limits of memory.²¹⁴ It was impossible, Chief Justice Warren

211. *See id.* at 97 (describing how critics of the Warren Court marshalled this institutional account to support “their charge that the Court’s decisions were the product of ‘politics, not law’”).

212. *See, e.g.,* *Reynolds v. Sims*, 377 U.S. 533, 590 (1964) (Harlan, J., dissenting) (“The Court’s constitutional discussion . . . is remarkable . . . for its failure to address itself at all to the Fourteenth Amendment as a whole or to the legislative history of the Amendment pertinent to the matter at hand.”); *Gray v. Sanders*, 372 U.S. 368, 384 (1963) (Harlan, J., dissenting) (“The Court’s holding surely flies in the face of history.”); *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting) (upbraiding the majority for relying on “abstract analogies which ignore the facts of history,” “deal in unrealities,” and “betray reason”).

213. Reva Siegel has written powerfully of the clash between the “anticlassification” and “antisubordination” accounts of *Brown*’s legacy: The former forbids formal classifications on the basis of race; the latter seeks to dismantle any vestige of a racial caste system. The former is outcome neutral; the latter, emphatically, is not. *See* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1470-73 (2004). As will become clear below, this divide tracks closely the parenthetical and redemptive modes of memory.

214. On *Brown* as a rejection of historical approaches, see generally David J. Garrow, *From Brown to Casey: The U.S. Supreme Court and the Burdens of History*, in RACE, LAW, AND CULTURE: REFLECTIONS ON *BROWN V. BOARD OF EDUCATION* 74 (Austin Sarat ed., 1997).

wrote, to turn back the clock.²¹⁵ Instead, the Court could only “consider public education in the light of its full development and its present place in American life throughout the Nation.”²¹⁶ Chief Justice Warren also downplayed the Court’s postbellum precedents, presenting *Plessy* as a belated anomaly—a departure from the antidiscriminatory thrust of earlier decisions, rather than an outgrowth and extension of them.²¹⁷ Thus, although *Brown* itself was not an overt exercise in constitutional memory, it claimed an alternative post-Reconstruction legacy that the Court would invoke in later cases.

1. Justice Frankfurter and the parenthetical tradition

Justice Frankfurter played a notable role in *Brown*, both by urging a second round of oral arguments focused on the Fourteenth Amendment’s origins,²¹⁸ and by pushing for a gradualist remedy, lest local intransigence undermine the Court’s legitimacy.²¹⁹ These instincts—focusing on history and worrying about legitimacy—were evident in various contexts throughout Justice Frankfurter’s career. He was, wrote Alfred Kelly, “a major force in reintroducing the Court to the history-oriented opinion.”²²⁰ But unlike his Warren Court colleagues, who often invoked the memory of the Founding or Reconstruction in order to evade the force of the Court’s own earlier decisions, Justice Frankfurter “used history as an instrument of judicial continuity and restraint rather than as an activist weapon of political interventionism.”²²¹ He was parenthetical memory’s most powerful twentieth-century proponent.

215. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 492 (1954) (“[W]e cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written.”).

216. *Id.* at 492-93.

217. See *id.* at 490-91 (“In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of ‘separate but equal’ did not make its appearance in this Court until 1896 . . .” (footnote omitted)).

218. See KLARMAN, *supra* note 158, at 301. Alexander Bickel, one of Justice Frankfurter’s law clerks, later published the results of this historical inquiry, together with his own additional research into the original understanding of the Fourteenth Amendment. See generally Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

219. See KLARMAN, *supra* note 158, at 311-12; Jack M. Balkin, *The History of the Brown Litigation*, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION 29, 40-41 (Jack M. Balkin ed., 2001).

220. Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 129.

221. *Id.*

This was especially so in the ongoing debate about incorporation. As he had done in his *Adamson* concurrence,²²² Justice Frankfurter loved to marshal citations to cases in which the Court had rejected incorporation, and to chant litanies of earlier anti-incorporation Justices.²²³ For Justice Frankfurter, nonincorporation was as central as it was obvious. Incidentally, his historical case against incorporation relied heavily on the work of Charles Fairman,²²⁴ who for his part was influenced by the Dunning School.²²⁵

Justice Black pressed the case for incorporation as relentlessly as Justice Frankfurter opposed it. Justice Black consistently called for total incorporation for almost twenty years,²²⁶ and Justice Frankfurter could only sigh about colleagues who invoked “abstract analogies which ignore the facts of history,” “deal in unrealities,” and “betray reason.”²²⁷

2. Redemptive rumblings

Justice Frankfurter’s distress at Justice Black’s obstinacy was compounded by other currents of countermemory within the Court. Beginning in the early 1960s—the twilight of Justice Frankfurter’s tenure²²⁸—other Justices began to write in a redemptive key. In a concurring opinion in *School District of Abington Township v. Schempp*, Justice Brennan supported the incorporation of the Establishment Clause by observing that “the Fourteenth Amendment created a

222. See *Adamson v. California*, 332 U.S. 46, 62-66 (1947) (Frankfurter, J., concurring), *overruled by* *Malloy v. Hogan*, 378 U.S. 1 (1964); see also *supra* Part II.C.2.

223. See, e.g., *Bartkus v. Illinois*, 359 U.S. 121, 124 & n.2 (1959); *Knapp v. Schweitzer*, 357 U.S. 371, 378 & n.5 (1958), *abrogated in other part by* *Murphy v. Waterfront Comm’n*, 378 U.S. 52 (1964).

224. See, e.g., *Bartkus*, 359 U.S. at 124 n.3 (citing Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5 (1949)).

225. See BRANDWEIN, *supra* note 210, at 96-154. For a sampling of Fairman’s work on the Fourteenth Amendment, see 6 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1207-388 (1971); Fairman, *supra* note 224; and Charles Fairman, *A Reply to Professor Crosskey*, 22 U. CHI. L. REV. 144, 150-56 (1954).

226. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 164-65 (1968) (Black, J., concurring) (reasserting the view that the Bill of Rights was entirely incorporated against the states and rejecting Fairman’s historical critique of that view); *Adamson*, 332 U.S. at 89 (Black, J., dissenting) (“I would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all the people of the nation the complete protection of the Bill of Rights.”).

227. *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting).

228. Justice Frankfurter retired from the Court in 1962. See *Felix Frankfurter*, ENCYCLOPÆDIA BRITANNICA, <https://perma.cc/HM7Y-W8KD> (archived Nov. 22, 2018).

panoply of new federal rights.”²²⁹ In *Monroe v. Pape*, the majority noted that legislative landmarks of the Reconstruction era were animated less by the fear of oppressive state law than by the fear that neutral state laws would go unenforced.²³⁰ Such nonenforcement would deny the “rights, privileges, and immunities guaranteed by the Fourteenth Amendment.”²³¹ These were modest redemptive rumblings, but harbingers—perhaps—of things to come.

B. From the Civil Rights Act to *Bakke*: 1964-1978

The Civil Rights era was a remarkable period for constitutional memory. It produced some of the most thoroughly redemptive language anywhere in the *United States Reports*. But it also witnessed a countercurrent of parenthetical memory that regained the upper hand over time.

1. The Civil Rights Act and its aftermath

The legislative landmarks of the mid-1960s prompted further changes in the Court’s mnemonic jurisprudence. In *Bell v. Maryland*, for instance, although a majority of the Justices dodged the question whether racial discrimination in public accommodations violated due process and equal protection,²³² Justice Douglas, writing separately, sounded squarely in redemptive memory.

Justice Douglas began by forging a genealogical link between slavery and Jim Crow, which he called “a relic of slavery.”²³³ Segregation, moreover, preceded as well as postdated the Civil War. It was one of the evils the Reconstruction Amendments were designed to destroy. “Prior to those Amendments,” Justice Douglas observed, “Negroes were segregated and disallowed the use of public accommodations except and unless the owners chose to serve them.”²³⁴ Modern segregationists “would remit . . . Negroes to their old status and allow the States to keep them there.”²³⁵ But the Reconstruction Amendments forbade that by banning slavery and its “relics”—successor practices designed to perpetuate subordination and second-class

229. 374 U.S. 203, 255 (1963) (Brennan, J., concurring); see *id.* at 205 (majority opinion); see also U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

230. See 365 U.S. 167, 174-80 (1961), *overruled in part by* *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

231. *Id.* at 180.

232. See 378 U.S. 226, 228, 242 (1964) (vacating, reversing, and remanding to state court in light of a “supervening change in state law”).

233. See *id.* at 246-48 (opinion of Douglas, J.).

234. *Id.* at 247.

235. *Id.*

citizenship.²³⁶ “The Black Codes,” Justice Douglas intoned, “were a substitute for slavery; segregation was a substitute for the Black Codes; the discrimination in these sit-in cases is a relic of slavery.”²³⁷ It was a robustly redemptive opinion.

In concurrence, Justice Goldberg fused the parenthetical and redemptive modes, casting the Reconstruction Amendments as a vindication of Founding-era ideals against later departures from those ideals. It was a parenthetical-redemptive hybrid not unlike that of Justice Black in the context of incorporation.²³⁸

Justice Goldberg began with the Declaration of Independence, calling slavery “a fundamental departure from the American creed.”²³⁹ He cast slavery as apostasy from that creed, the Civil War as penance, and Reconstruction as redemption.²⁴⁰ The Reconstruction Amendments, he declared, affirmed an “American commitment to equality” and “must be read . . . ‘as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government.’”²⁴¹ Although *Plessy* and its progeny “too often tended to negate this great purpose,” *Brown* had emphatically restored it.²⁴² In Justice Goldberg’s account, the Court apostatized from the Reconstruction Amendments in *Plessy* and returned to the ways of righteousness in *Brown*. *Plessy* and *Brown* thus stood as bookends around an evil era—an open and close parenthesis.

2. The Warren Court and the redemptive mode

The redemptive note struck by Justice Douglas and Justice Goldberg in *Bell* would be echoed by other Justices throughout the 1960s. These echoes attended expansive readings of Reconstruction legislation—readings that relied on a new, revisionist historiography of Reconstruction.²⁴³ The neo-redemptivist Justices hoped to eradicate all remaining “badges of slavery,” a category they

236. *See id.* at 246-50, 248 n.4.

237. *Id.* at 247-48.

238. *See supra* Part II.C.2.

239. *Bell*, 378 U.S. at 286 (Goldberg, J., concurring).

240. *See id.*

241. *Id.* at 287 (quoting *United States v. Classic*, 313 U.S. 299, 316 (1941)).

242. *Id.*

243. *See, e.g., Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413, 422-37 (1968) (reading Reconstruction civil rights legislation broadly to ban all racial discrimination in housing); *United States v. Price*, 383 U.S. 787, 790, 801-06 (1966) (reading Reconstruction civil rights legislation broadly to reverse a lower court’s dismissal of indictments in a case involving a conspiracy to murder civil rights workers). For more on the murder at issue in *Price*, see Douglas O. Linder, *Bending Toward Justice: John Doar and the “Mississippi Burning” Trial*, 72 MISS. L.J. 731 (2002).

construed capaciously.²⁴⁴ Colleagues and commentators complained that these Justices were playing fast and loose with the historical record,²⁴⁵ but the redemptivists countered that they were being faithful to the “spirit” and “principles” of Reconstruction landmarks.²⁴⁶

Justice Douglas was the most aggressive in this regard. He led the way in casting the Civil War as a revolutionary event, one that shifted radically the tectonic plates of American federalism. “Whatever the balance of the pressures of localism and nationalism prior to the Civil War,” he wrote in a typical passage, “they were fundamentally altered by the war.”²⁴⁷ In Justice Douglas’s telling, *the war itself* overhauled the Constitution’s federalist structure. The postwar Amendments ratified that alteration, but were also revolutionary in their own right.²⁴⁸ Such views informed Justice Douglas’s expansive reading of Reconstruction statutes.²⁴⁹ Other Justices would take a similar approach in the early 1970s.²⁵⁰

3. Justice Black, incorporation, and memory

Such redemptive gestures encountered increasing resistance from an aging Justice Black, whose views, as noted earlier, were redemptive vis-à-vis incorporation but quite parenthetical when it came to constitutional structure.²⁵¹ Justice Black was particularly appalled by the preclearance provision of section 5 of the Voting Rights Act of 1965 (VRA), which required certain (Southern) jurisdictions to secure federal approval before altering electoral districts or any voting procedures.²⁵² Justice Black thought the

244. *See, e.g., Jones*, 392 U.S. at 444-49 (Douglas, J., concurring).

245. *See Kelly*, *supra* note 220, at 120-21 (summarizing contemporary criticism of the Court’s historical method).

246. *See, e.g., Zwickler v. Koota*, 389 U.S. 241, 251-52 (1967) (Brennan, J.) (discussing the “principles” of the Fourteenth Amendment and Reconstruction civil rights legislation); *City of Greenwood v. Peacock*, 384 U.S. 808, 844, 850 (1966) (Douglas, J., dissenting) (referencing the “spirit of 1866” in interpreting Reconstruction civil rights legislation).

247. *Younger v. Harris*, 401 U.S. 37, 61 (1971) (Douglas, J., dissenting).

248. *See id.* at 62-63 (speaking approvingly of the view that the Reconstruction Amendments represented “a constitutional revolution in the nature of American federalism” (quoting *Landry v. Daley*, 288 F. Supp. 200, 223 (N.D. Ill. 1968))).

249. *See id.* at 61.

250. *See, e.g., District of Columbia v. Carter*, 409 U.S. 418, 425-29 (1973) (Brennan, J.), *superseded in other part by statute*, Act of Dec. 29, 1979, Pub. L. No. 96-170, § 1, 93 Stat. 1284, 1284 (codified as amended at 42 U.S.C. § 1983 (2017)); *Mitchum v. Foster*, 407 U.S. 225, 238-43 (1972) (Stewart, J.).

251. *See supra* Part II.C.2.

252. *See South Carolina v. Katzenbach*, 383 U.S. 301, 358-62 (1966) (Black, J., concurring and dissenting), *abrogated in part by Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *see also footnote continued on next page*

provision an affront to federalism.²⁵³ In making this case, Justice Black invoked Reconstruction as a negative precedent. The covered jurisdictions, he wrote, were being treated as “little more than conquered provinces.”²⁵⁴ Section 5 was “reminiscent of old Reconstruction days when soldiers controlled the South and when those States were compelled to make reports to military commanders of what they did.”²⁵⁵ It was the product of “a renewed spirit of Reconstruction,” without which “the people of this country would never stand for such a perversion of the separation of authority between state and federal governments.”²⁵⁶ Section 5 was viable, Justice Black maintained, only because it was sectional.²⁵⁷

4. Justice Frankfurter’s heirs

Justices Black and Harlan both left the Court in 1971,²⁵⁸ contributing to a larger transformation in the Court’s membership.²⁵⁹ The newly constituted Court took a different approach to questions of constitutional memory. For much of the 1970s, the parenthetical mode regained the upper hand in the Court’s jurisprudence. Conservative Justices stressed a mnemonic vision that purported to honor the federalist structure of the eighteenth century and that read narrowly the provisions of Reconstruction’s constitutional and legislative landmarks. The parenthetical tradition was revived, for instance, in frequent arguments that practices prevalent during Reconstruction could not have been banned by the Reconstruction Amendments.²⁶⁰ Redemptivist Justices

Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 52 U.S.C. § 10304 (2016)).

253. See *Katzenbach*, 383 U.S. at 358 (“Section 5, by providing that some of the States cannot pass laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless.”).

254. *Id.* at 359-60.

255. *Allen v. State Bd. of Elections*, 393 U.S. 544, 595 (1969) (Black, J., dissenting).

256. *Perkins v. Matthews*, 400 U.S. 379, 406 (1971) (Black, J., dissenting).

257. See *id.* at 406-07. On the subsequent fate of the VRA, see Part III.D.3 below.

258. See *Justices 1789 to Present*, *supra* note 157.

259. See generally LAURA KALMAN, *THE LONG REACH OF THE SIXTIES: LBJ, NIXON, AND THE MAKING OF THE CONTEMPORARY SUPREME COURT* 252-306 (2017) (analyzing and tracing the long-term impact of changes in the Court’s membership during the late 1960s and early 1970s).

260. See, e.g., *Richardson v. Ramirez*, 418 U.S. 24, 48-52 (1974) (arguing that the Fourteenth Amendment must not forbid felon disenfranchisement because twenty-nine states allowed for it at the time of the Amendment’s ratification and because it was expressly authorized by the conditions imposed upon Southern states for readmission into

footnote continued on next page

countered that interpretation of Reconstruction's constitutional and legislative landmarks must transcend that era's political realities.²⁶¹ But in their broad view of federal power, they sometimes found themselves in the minority.²⁶²

The parenthetical mode also resurfaced in the explosive context of race. In major race-related decisions, several Justices treated *Brown* itself as a close parenthesis. The most striking example was *Washington v. Davis*, in which the majority ruled that although the "central purpose of the Equal Protection Clause . . . is the prevention of official conduct discriminating on the basis of race," the forbidden discrimination must be overt and official, not coincident and de facto.²⁶³

The parenthetical ascendancy, however, was incomplete. Some of the Warren Court's most expansive readings of Reconstruction legislation survived—if only for the sake of stare decisis.²⁶⁴ And on some occasions, a majority of Justices departed from precedent in order to *expand* the scope of Reconstruction legislation.²⁶⁵

5. *Bakke*

These lesser skirmishes prepared the way for the decade's greatest mnemonic clash in *Regents of the University of California v. Bakke*.²⁶⁶ Most of the six opinions in *Bakke* had a unique story to tell about race in the United States. Each story was at least partly about slavery, secession, the Civil War, and segregation.²⁶⁷

Congress). The majority opinion in *Richardson* was authored by then-Justice Rehnquist, who joined the Court in 1972. See *Justices 1789 to Present*, *supra* note 157.

261. See, e.g., *Richardson*, 418 U.S. at 74-76 (Marshall, J., dissenting).

262. See, e.g., *Nat'l League of Cities v. Usery*, 426 U.S. 833, 867 n.8 (1976) (Brennan, J., dissenting) (criticizing the majority's reliance on two 1869 cases, noting that the 1860s were a time of vast expansion in federal power), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

263. See 426 U.S. 229, 238-39 (1976).

264. See, e.g., *Runyon v. McCrary*, 427 U.S. 160, 189-90 (1976) (Stevens, J., concurring) (reluctantly complying with sweeping Warren Court readings of the Civil Rights Act of 1866, although "firmly believ[ing]" them "to have been incorrectly decided").

265. See, e.g., *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 664, 690 (1978) (expanding the reach of 42 U.S.C. § 1983, originally enacted as part of the Reconstruction-era Ku Klux Klan Act, to apply to "municipalities and other local government units"), *overruling in part Monroe v. Pape*, 365 U.S. 167 (1961); see also *Ku Klux Klan Act*, ch. 22, 17 Stat. 13 (1871) (codified as amended in scattered sections of 10 and 42 U.S.C.).

266. 438 U.S. 265 (1978).

267. See *id.* at 291-93 (opinion of Powell, J.); *id.* at 326-36 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part); *id.* at 387-94 (opinion of Marshall, J.); *id.* at 403 (opinion of Blackmun, J.); *id.* at 413-14 (Stevens, J., concurring in the judgment in part and dissenting in part).

The mnemonic portion of Justice Powell's opinion was essentially jurisprudential. Justice Powell began by noting that the Equal Protection Clause was "[v]irtually strangled in infancy by post-civil-war judicial reactionism,"²⁶⁸ and then "relegated to decades of relative desuetude while the Due Process Clause . . . flourished as a cornerstone in the Court's defense of property and liberty of contract."²⁶⁹

In time, Justice Powell continued, "it was no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority."²⁷⁰ While the Equal Protection Clause lay dormant, "the United States had become a Nation of minorities," each struggling to find its place.²⁷¹ The Supreme Court had honored that struggle by extending equal protection "to all ethnic groups seeking protection from official discrimination."²⁷² This was good and proper, Justice Powell suggested, because the Fourteenth Amendment "was framed in universal terms."²⁷³ The Fourteenth Amendment, on Justice Powell's telling, protected whites as well as blacks—racial majorities as well as minorities (terms Justice Powell placed in scare quotes)—against race-based treatment.²⁷⁴

Accordingly, even ostensibly benign racial classifications were subject to strict scrutiny.²⁷⁵ And although Justice Powell deemed diversity in the classroom a compelling state interest,²⁷⁶ the University of California at Davis Medical School admissions program, which reserved a specific number of seats for minority applicants,²⁷⁷ went too far.²⁷⁸ It could not be justified as a remedy for "societal discrimination," which Justice Powell dismissed as "an amorphous concept of injury that may be ageless in its reach into the past."²⁷⁹

The Justices who disagreed with Justice Powell did, in fact, reach quite far into the past. For instance, Justices Brennan, White, Marshall, and Blackmun, writing together, began with the Declaration of Independence, lamenting the

268. *Id.* at 291 (opinion of Powell, J.) (alteration in original) (quoting Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 381 (1949)).

269. *Id.*

270. *Id.* at 292.

271. *Id.*

272. *Id.*

273. *Id.* at 293.

274. *See id.* at 294-97.

275. *See id.* at 287-91.

276. *See id.* at 307, 312-14.

277. *See id.* at 272-76 (describing the admissions process).

278. *See id.* at 315 (concluding that the admissions process "would hinder rather than further attainment of genuine diversity").

279. *Id.* at 307.

original Constitution's compromise between the Declaration's lodestar—equality—and “its antithesis: slavery.”²⁸⁰ The foursome further lamented that the Fourteenth Amendment's equality lay “largely moribund” for nearly a century.²⁸¹ Actually, it faced a fate “[w]orse than desuetude”: The Equal Protection Clause “was early turned against those whom it was intended to set free, condemning them to a ‘separate but equal’ status before the law, a status always separate but seldom equal.”²⁸² Only in a footnote did Justice Brennan acknowledge that it was the Supreme Court that had done the turning.²⁸³

The four Justices then turned to a heroic account of the modern Court. *Brown*, they said, “interred” *Plessy*'s “odious doctrine,” and in later cases the Justices reminded recalcitrant school boards “of their obligation to eliminate racial discrimination root and branch.”²⁸⁴ But the work of redemption remained unfinished. The Court's docket exposed the persistence of “officially sanctioned discrimination,” in light of which the Court must not “let color blindness become myopia.”²⁸⁵ Slavery and segregation continued to cast a long, malevolent shadow.²⁸⁶ And although the foursome agreed that even benign uses of race were subject to strict scrutiny, they thought the challenged program more than met that test.²⁸⁷

In a separate opinion, Justice Marshall invoked a grand narrative that reached even further back. His account was unusual in its unsparing focus on slavery itself. “Three hundred and fifty years ago,” Justice Marshall began, “the Negro was dragged to this country in chains to be sold into slavery.”²⁸⁸ That was the beginning, he said, of a system that “brutalized and dehumanized both master and slave.”²⁸⁹ It was a remarkable exordium, unprecedented in the history of a Court that had typically invoked the memory of slavery only indirectly as an antecedent to the Civil War and Reconstruction.

Justice Marshall's mnemonic recital continued in a minor key. He highlighted the compromises on slavery implicit in the Declaration of Independ-

280. See *id.* at 326 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

281. See *id.*

282. *Id.* at 326-27 (footnote omitted).

283. See *id.* at 326 n.2 (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

284. *Id.* at 327.

285. See *id.*

286. See *id.* at 369-72.

287. See *id.* at 361-62; see also *id.* at 362-79.

288. *Id.* at 387 (opinion of Marshall, J.).

289. *Id.* at 388.

ence and explicit in the original Constitution.²⁹⁰ He underscored the Slave Codes and *Dred Scott*.²⁹¹ Then the War came, “officially eras[ing]” the “status of the Negro as property.”²⁹² But emancipation, alas, proved illusory. Though it “free[d] the Negro from slavery, [it] did not bring him citizenship or equality in any meaningful way.”²⁹³ Slave Codes yielded to Black Codes.²⁹⁴ Constitutional amendments hardly helped: “[T]he Negro was systematically denied the rights those Amendments were supposed to secure.”²⁹⁵ Blacks remained “in a position of legal inferiority for another century after the Civil War.”²⁹⁶

Justice Marshall described that century of subordination in some detail. Reconstruction civil rights legislation and the Freedmen’s Bureau had offered a brief moment of hope,²⁹⁷ but that moment was “short-lived,” and the Supreme Court hastened its demise.²⁹⁸ Worst of all were “the notorious *Civil Rights Cases*,” in which “the Court strangled Congress’ efforts to use its power to protect racial equality,”²⁹⁹ and *Plessy*, the “Court’s ultimate blow to the Civil War Amendments and to the equality of Negroes.”³⁰⁰

The Court’s jurisprudence, Justice Marshall summarized, had made the world safe for Jim Crow. Even after *Brown* and the legislative landmarks of the civil rights movement, the bitter fact was that black Americans were still not equal, and their unequal position was “the tragic but inevitable consequence of centuries of unequal treatment.”³⁰¹ Justice Marshall cited various figures to prove his point,³⁰² then underscored the indissoluble link between past and present inequality: “At every point from birth to death,” he wrote, “the impact of the past is reflected in the still disfavored position of the Negro.”³⁰³

290. *See id.* at 389.

291. *See id.* at 389-90.

292. *Id.* at 390.

293. *Id.*

294. *See id.*

295. *Id.*

296. *Id.*

297. *See id.* at 390-91.

298. *See id.* at 391-94.

299. *Id.* at 391.

300. *Id.* at 392.

301. *See id.* at 395.

302. *See id.* at 395-96 (citing statistics showing that blacks had shorter life expectancies; higher rates of childbirth complications and infant mortality; lower incomes; higher unemployment; and disproportionately low numbers of lawyers, judges, doctors, engineers, and professors).

303. *Id.* at 396.

For Justice Marshall, the lesson of this melancholy tale was clear: “[B]ringing the Negro into the mainstream of American life should be a state interest of the highest order.”³⁰⁴ Failure to do so would be “to ensure that America will forever remain a divided society.”³⁰⁵ On this view, the compelling state interest that justified affirmative action was not diversity in the classroom; it was national expiation and remorse, atonement and reconciliation. It was the imperative to heal the wounded present by redeeming the wounding past. For Justice Marshall, the Court’s judgment in *Bakke* was myopic in the present because it was blind to the past. “While I applaud the judgment of the Court that a university may consider race in its admissions process,” he concluded, “it is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible.”³⁰⁶ How could it be, Justice Marshall wondered, that a Constitution deployed to inflict an evil could not be used to correct it? How was it that the Constitution that for decades permitted or promoted sin could now impede repentance? Justice Marshall feared, he said, “that we have come full circle”:

After the Civil War our Government started several “affirmative action” programs. This Court in the *Civil Rights Cases* and *Plessy v. Ferguson* destroyed the movement toward complete equality. For almost a century no action was taken, and this nonaction was with the tacit approval of the courts. Then we had *Brown v. Board of Education* and the Civil Rights Acts of Congress, followed by numerous affirmative-action programs. Now, we have this Court again stepping in, this time to stop affirmative-action programs of the type used by the University of California.³⁰⁷

It was, for Justice Marshall, the same sad story of the Court clipping the wings of hope—a Court complicit in thwarting redemption.

Justice Marshall objected sharply to Justice Powell’s focus on diversity.³⁰⁸ That focus—which remains the controlling framework of the Court’s affirmative action jurisprudence³⁰⁹—was, at bottom, a parenthetical gesture. It made affirmative action part of the grand old tale of the United States’s

304. *Id.*

305. *Id.*

306. *Id.* at 400.

307. *Id.* at 402.

308. *See id.* at 400-02 (“The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot.”).

309. *See, e.g.,* *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2210 (2016) (reaffirming that “obtaining ‘the educational benefits that flow from student body diversity’” is a compelling government interest that justifies race-conscious university admissions programs (quoting *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013))).

pluralistic melting pot, rather than a redemptive response to a concrete historical evil. It was this parenthetical, amnesiac quality that Justice Marshall found so devastating.

Justice Marshall's dissenting opinion in *Bakke* was surely the most dramatic statement of redemptive memory in the history of the Supreme Court. But it came 113 years after the end of the Civil War, and in an opinion joined by no other Justices. The upshot of the Court's decision in *Bakke* was a limited approval of redemptive measures, but an approval that treated such measures as inherently suspect and that effectively divorced them from the legacies of the past. The Court's imprimatur on race-conscious decisionmaking breathed—and still breathes—an essentially parenthetical spirit.

C. From *Bakke* to *Grutter*: 1978-2003

After *Bakke*, Justice Marshall continued to employ the redemptive mode, though never again with quite such pathos or at quite such length. In his redemptive writing, Justice Marshall was often joined by Justice Brennan and, in later years, by Justice Blackmun as well. The trio anchored the Court's redemptive wing for fifteen years after the retirement of Justice Douglas in 1975.³¹⁰ In their view, the core constitutional legacy of slavery, the Civil War, and Reconstruction was a robust *national* commitment to *substantive* equality. The threesome were untroubled by arguments that their interpretations of Reconstruction-era landmarks went far beyond the anticipations of their framers. They responded to such objections by maintaining that the architects of Reconstruction had charged posterity to pursue equality, and that it was the Court's commission to construe that charge broadly.

By construing Reconstruction landmarks expansively and at a high level of generality, Justices Brennan, Marshall, and Blackmun invited charges of willfulness or carelessness from their conservative colleagues, led most often by Justice Powell and then-Justice Rehnquist, who became the leading exponents of parenthetical memory during the 1970s and 1980s.

As in earlier years, the Court's two wings clashed most frequently in two related settings: construing Reconstruction-era statutes and defining the contours of American federalism.

1. "Our" federalism

In the redemptive view, the Civil War fundamentally altered American federalism by creating robust federal power to secure equality within the

310. See *William O. Douglas*, ENCYCLOPÆDIA BRITANNICA, <https://perma.cc/AMQ5-9ZH2> (last updated Oct. 12, 2018).

states.³¹¹ In the parenthetical view, Reconstruction’s architects limited state sovereignty only narrowly, targeting intentional discrimination and transferring sovereign powers from the states to the federal government only within that narrow realm.³¹²

In the federalism context, as in others since the late nineteenth century, parenthetical Justices read the Reconstruction Amendments by the light of the original Constitution, and redemptivist Justices did the opposite. In a 1989 case, for instance, Justice Brennan wrote for a plurality of the Court that “the ‘shift in the federal-state balance’ occasioned by the Civil War Amendments” was “as applicable to the Commerce Clause as it [was] to the Fourteenth Amendment,” and that “[l]ike the Fourteenth Amendment, the Commerce Clause with one hand gives power to Congress while, with the other, it takes power away from the States.”³¹³ In a dissenting opinion published the same year, Justice Brennan reiterated that the Reconstruction Congress had “transformed our federal system.”³¹⁴

By contrast, when the parenthetical Justices commanded a majority, they insisted that Reconstruction legislation was limited by earlier constitutional provisions and by judicial glosses on those earlier provisions.³¹⁵ The parenthetical Justices maintained, in a variety of contexts, that although the war and its aftermath had unquestionably *changed* federalism, it hadn’t

311. *See, e.g., Quern v. Jordan*, 440 U.S. 332, 354 (1979) (Brennan, J., concurring in the judgment) (maintaining that the Fourteenth Amendment “exemplifies the ‘vast transformation’ worked on the structure of federalism in this Nation by the Civil War” (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972))).

312. *See, e.g., Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 266-68, 281-82 (1993) (reaffirming that 42 U.S.C. § 1985(3), originally enacted as part of the Reconstruction-era Ku Klux Klan Act, applies only to cases of race- or class-based animus), *superseded in other part by statute*, Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, 108 Stat. 694 (codified as amended at 18 U.S.C. § 248 (2017)); *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 790-92, 795-99 (1986) (holding that unreviewed factfinding in state administrative proceedings does not have preclusive effect with respect to an employee’s Title VII claims, but does have such effect with respect to claims under Reconstruction-era civil rights legislation); *United Bhd. of Carpenters & Joiners of Am., Local 610 v. Scott*, 463 U.S. 825, 836 (1983) (“[I]t is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause”); *Gen. Bldg. Contractors Ass’n v. Pennsylvania*, 458 U.S. 375, 387-88 (1982) (maintaining that “the fact that the prohibitions of [42 U.S.C.] § 1981,” originally enacted as part of the Civil Rights Act of 1866, “encompass private as well as governmental action does not suggest that the statute reaches more than purposeful discrimination”); *see also Ku Klux Klan Act*, ch. 22, 17 Stat. 13 (1871) (codified as amended in scattered sections of 10 and 42 U.S.C.).

313. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 16 (1989) (plurality opinion) (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)), *overruled in other part by Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

314. *See Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 85 (1989) (Brennan, J., dissenting).

315. *See, e.g., id.* at 66-67 (majority opinion).

annihilated it.³¹⁶ Sometimes, moreover, they ignored the Civil War entirely. In one of the modern Court's most extended discussions of federalism,³¹⁷ Justice O'Connor's opinion for the Court in *New York v. United States* reprised at length Founding-era debates about federalism,³¹⁸ but it never mentioned the Civil War.

The divide between parenthetical and redemptive readings of the Civil War also played out in the surprising resurgence of Eleventh Amendment jurisprudence.³¹⁹ Once again, parenthetical Justices seemed sometimes to suggest that apart from selective incorporation, the Civil War and Reconstruction hardly altered federalism at all,³²⁰ and at other times acknowledged the impact only in a qualified dependent clause.³²¹ With respect to the Civil War's impact on federalism, the difference between the redemptive and parenthetical modes was the difference between *because* and *although*.

The most dramatic cases in the so-called "federalism revolution"³²² were surely *United States v. Lopez* and *United States v. Morrison*, which struck down on Commerce Clause grounds the federal Gun-Free School Zones Act and the federal Violence Against Women Act (VAWA), respectively.³²³ In *Lopez*, Chief Justice Rehnquist began his majority opinion "with first principles," including a summary of the Court's Commerce Clause jurisprudence from the Founding to the present.³²⁴ He never mentioned the Civil War era, nor suggested that the

316. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 112-13 (1995) (O'Connor, J., concurring).

317. See *New York v. United States*, 505 U.S. 144, 150-69, 186-88 (1992) (invalidating a federal requirement that states either accept ownership of low-level radioactive waste or regulate the management of the waste according to congressional instructions).

318. See *id.* at 163-66.

319. See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 47, 65-66 (1996) (holding that Congress lacks authority under the Indian Commerce Clause to abrogate states' Eleventh Amendment immunity, and denying that the Reconstruction Amendments "alter[ed] the pre-existing balance between state and federal power" embodied in the Eleventh Amendment); see also U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power "[t]o regulate commerce . . . with the Indian Tribes").

320. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 883 (1995) (Thomas, J., dissenting) (describing continuity in some federalism principles "[f]rom the time of the framing until after the Civil War").

321. See, e.g., *Jenkins*, 515 U.S. at 112-13 (O'Connor, J., concurring) ("[E]ven though the Civil War Amendments altered the balance of authority between federal and state legislatures, . . . 'what the federal courts cannot do at the federal level they cannot do against the States . . .'" (emphasis omitted) (quoting *id.* at 132 (Thomas, J., concurring))).

322. See, e.g., Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7 (2001).

323. See *United States v. Morrison*, 529 U.S. 598, 605-06, 627 (2000); *United States v. Lopez*, 514 U.S. 549, 551, 561-62 (1995); see also Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1796, 1902-55 (codified as amended in scattered sections of the U.S. Code); Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844-45 (codified as amended at 18 U.S.C. §§ 921-922, 924 (2017)).

324. See *Lopez*, 514 U.S. at 552-59.

federal-state balance changed meaningfully at any point between the Founding and the New Deal. Five years later, in *Morrison*, the same five-Justice majority conducted a similar analysis.³²⁵

In *Morrison*, however, the Court ruled that VAWA exceeded Congress's powers, not only under the Commerce Clause, but under the Fourteenth Amendment's enforcement provision as well.³²⁶ Three years earlier, the Court had stressed the Section 5 enforcement power's limits in *City of Boerne v. Flores*, ruling that the Fourteenth Amendment allowed Congress to enforce rights, but not to define their scope.³²⁷ The majority in *City of Boerne* had rested its holding, at least in part, on a string of nineteenth-century precedents, especially the *Civil Rights Cases* of 1883.³²⁸

The *Morrison* majority vindicated these Gilded Age precedents more dramatically in a case that struck closer to their core. Chief Justice Rehnquist argued that cases such as *Cruikshank* and the *Civil Rights Cases* were not only binding precedents, but hallowed pillars of the constitutional canon:

The force of the doctrine of *stare decisis* behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time. Every Member had been appointed by President Lincoln, Grant, Hayes, Garfield, or Arthur—and each of their judicial appointees obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment.³²⁹

Like Justice Miller in the *Slaughter-House Cases*,³³⁰ Chief Justice Rehnquist claimed for the late nineteenth-century Court a privileged memorial position. In light of that privileged position, the modern Court should defer to the mnemonic vision, as well as to the holdings, of those earlier cases. Latter-day Justices need not engage independently with the past. In any case, Chief Justice Rehnquist and his fellow Justices “believe[d] that the description of the § 5 power contained in the *Civil Rights Cases* [was] correct.”³³¹

325. See 529 U.S. at 607-13. Chief Justice Rehnquist authored the majority opinion in both *Lopez* and *Morrison*, and in each case he was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. See *id.* at 600; *Lopez*, 514 U.S. at 550.

326. See 529 U.S. at 627; see also U.S. CONST. amend. XIV, § 5 (“The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”). On the Rehnquist Court's enforcement powers jurisprudence, see generally Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2360-83 (2003).

327. See 521 U.S. 507, 519 (1997).

328. See *id.* at 524-25.

329. *Morrison*, 529 U.S. at 622; see *id.* at 620-22.

330. See *supra* Part I.A.

331. *Morrison*, 529 U.S. at 624. On *Morrison*'s treatment of the *Civil Rights Cases*, see generally Francisco M. Ugarte, *Reconstruction Redux: Rehnquist, Morrison, and the Civil Rights Cases*, 41 HARV. C.R.-C.L.L. REV. 481 (2006).

In dissent, Justice Breyer challenged neither the ongoing validity of the *Civil Rights Cases* and other Fourteenth Amendment precedents cited by the majority, nor the historical memory that those decisions invoked. He merely questioned their applicability to the case at hand.³³² Justice Breyer put forth no counternarrative of his own, framing the entire issue as “how the judiciary can best implement th[e] original federalist understanding.”³³³ By acknowledging the centrality of the Founders’ federalist vision, Justice Breyer effectively conceded the majority’s parenthetical premise.

Justice Breyer took a stronger stand a year later, when the same five-Justice majority ruled that Congress had exceeded its Section 5 enforcement powers in parts of the Americans with Disabilities Act (ADA).³³⁴ The majority held that Congress had inadequate reason to apply the ADA’s employment provisions against the states because the incidents of state employment discrimination against disabled persons on which Congress relied “[e]ll far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based.”³³⁵ In dissent, Justice Breyer (joined by Justices Stevens, Souter, and Ginsburg) maintained that the Reconstruction Amendments “were specifically designed as an expansion of federal power and an intrusion on state sovereignty.”³³⁶ Justice Breyer accused his colleagues in the majority of ignoring the lessons both of Section 5’s origins and of the Court’s own earlier and “(now-discredited) limitation . . . upon Congress’ Commerce Clause power.”³³⁷

But Justice Breyer wrote in dissent. To a striking extent, the memory of the Civil War was absent from late twentieth- and early twenty-first-century discussions of federalism. This was true of opinions by liberal as well as by conservative Justices. In one crucial dissent about federalism and state sovereign immunity, Justice Souter devoted over thirty pages to historical analysis but never mentioned the Civil War.³³⁸ It was a testament, perhaps, to the success of conservative originalists in centering the Court’s memorial

332. See *Morrison*, 529 U.S. at 664-65 (Breyer, J., dissenting).

333. *Id.* at 655-56.

334. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 360, 374 (2001) (holding that Congress does not have the power under Section 5 to authorize money damages in ADA suits against states); see also *Americans with Disabilities Act of 1990*, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (2017)).

335. *Garrett*, 531 U.S. at 370.

336. *Id.* at 388 (Breyer, J., dissenting) (quoting *City of Rome v. United States*, 446 U.S. 156, 179 (1980)).

337. See *id.* at 387-89.

338. See *Seminole Tribe v. Florida*, 517 U.S. 44, 132-68 (1996) (Souter, J., dissenting).

attention on the origins, rather than the axis, of American history.³³⁹ That success was evident even when the Court's liberals (with occasional help from a conservative colleague or two) have rolled back parts of the federalism revival. None of the Court's major twenty-first-century decisions about the scope of federal power has contained any extended discussion, or even a clear acknowledgment, of the impact of the Civil War.³⁴⁰

2. Colorblind?

Conflicting views of the legacy of slavery and segregation—of the Civil War and of *Brown*—also continued to undergird constitutional disputes about affirmative action. The strong parenthetical view was that emancipation closed the slavery parenthetical and that *Brown* closed the Jim Crow parenthetical. On this view, the first Justice Harlan was the true spokesman for the constitutional legacy of the Civil War, and *Plessy*'s great sin was its rejection of colorblind constitutionalism. In *Fullilove v. Klutznick*, in which the Court upheld a law requiring that a certain percentage of federal funds granted for local public works projects be spent on supplies or services from minority-owned businesses,³⁴¹ Justice Stewart (joined by then-Justice Rehnquist) began his dissenting opinion by quoting Justice Harlan's "color-blind" dictum.³⁴² For Justice Stewart, the holding in *Fullilove* was "wrong for the same reason that *Plessy* . . . was wrong"—because it allowed the law to "accord[] a preference" to certain citizens because of their race.³⁴³ On this view, the overarching constitutional legacy of slavery and the Civil War was the command of colorblindness. *Plessy* betrayed that legacy; *Brown* restored it. *Plessy* had opened

339. Richard Fallon has highlighted Justice Souter's *Seminole Tribe* dissent as a core example of the centrality of originalist argument even to avowedly nonoriginalist judges. See Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1824 (2015).

340. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 547-58 (2012) (opinion of Roberts, C.J.) (ruling that the Commerce Clause does not empower Congress to require individuals to purchase health insurance); *id.* at 649-60 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting); *United States v. Comstock*, 560 U.S. 126, 129-31, 133-37, 149 (2010) (upholding, under the Necessary and Proper Clause, a federal statute allowing district courts to order the ongoing civil commitment of sexually dangerous federal prisoners); *Gonzales v. Raich*, 545 U.S. 1, 5, 12-22 (2005) (upholding, under the Commerce Clause, a federal ban on intrastate manufacture, distribution, and possession of marijuana).

341. See 448 U.S. 448, 453-54, 478, 486, 492 (1980) (plurality opinion), *abrogated in part by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

342. See *id.* at 522-23 (Stewart, J., dissenting) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954))).

343. *Id.* at 523.

a new parenthetical, which *Brown* closed. Accordingly, race-conscious legislation, and Supreme Court decisions approving it, revived *Plessy's* spirit and traduced *Brown's*.

Chief Justice Burger, by contrast, wrote for the plurality in *Fullilove* that Congress need not “act in a wholly ‘color-blind’ fashion” when legislating “in the remedial context.”³⁴⁴ The Chief Justice noted that Congress’s remedial powers were “broad,”³⁴⁵ and Justice Powell, in concurrence, added that they had been “‘enlarged’ by the enforcement provisions of the post-Civil War Amendments.”³⁴⁶

Justice Marshall (joined by Justices Brennan and Blackmun) went further, reciting Justice Blackmun’s observation in *Bakke* that “[i]n order to get beyond racism, we must first take account of race.”³⁴⁷ Fair enough, retorted a dissenting Justice Stevens. But that couldn’t justify the challenged legislation’s application to “Spanish-speak[ers], Orientals, Indians, Eskimos, and Aleuts” as well as blacks.³⁴⁸ Justice Stevens conceded that the history recounted by Justice Marshall in *Bakke* was an ignominious and ineradicable part of the American saga.³⁴⁹ “But if,” he warned, “that history can justify such a random distribution of benefits on racial lines as that embodied in this statutory scheme, it will serve not merely as a basis for remedial legislation, but rather as a permanent source of justification for grants of special privileges.”³⁵⁰ By implication, if affirmative action was to be justified by reference to redemptive memory, its programs had to be more particularized and its links to the past more concrete. But that, of course, is a path that the Court has never taken.³⁵¹

The Court’s 1989 decision in *City of Richmond v. J.A. Croson Co.*³⁵² struck many observers as a dramatic reversal in the Court’s posture toward affirmative action programs, and, for champions of such programs, an ominous portent of things to come.³⁵³ In a 6-3 judgment, the Court struck down the City

344. *Id.* at 482 (plurality opinion).

345. *Id.* at 483.

346. *Id.* at 500 (Powell, J., concurring) (quoting *Ex parte Virginia*, 100 U.S. 339, 345 (1880)).

347. *Id.* at 522 (Marshall, J., concurring in the judgment) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (opinion of Blackmun, J.)).

348. *Id.* at 535 (Stevens, J., dissenting) (quoting Public Works Employment Act of 1977, Pub. L. No. 95-28, tit. I, § 103, 91 Stat. 116, 117 (codified as amended at 42 U.S.C. § 6705 (2017)); see also *id.* at 537-38).

349. See *id.* at 537.

350. *Id.* at 539.

351. As noted earlier, the Court’s affirmative action jurisprudence continues to be dominated by the diversity framework. See *supra* text accompanying note 309.

352. 488 U.S. 469 (1989).

353. See, e.g., Joint Statement, *Constitutional Scholars’ Statement on Affirmative Action After City of Richmond v. J.A. Croson Co.*, 98 YALE L.J. 1711 (1989); Dianne E. Dixon, *footnote continued on next page*

of Richmond's minority set-aside program, by which the City required its general contractors to subcontract at least thirty percent of the dollar amount of each contract to "Minority Business Enterprises."³⁵⁴ In her opinion for the majority, Justice O'Connor drew a sharp distinction between the power of Congress to enact such a program, and the corresponding power—or lack thereof—of state and local governments. "The Civil War Amendments," she wrote, "worked a dramatic change in the balance between congressional and state power over matters of race."³⁵⁵ But while those Amendments "granted 'additional powers to the Federal government,'" they "laid 'additional restraints upon . . . the States."³⁵⁶ The federal government possessed broad powers to enact remedial legislation; states and localities much less.³⁵⁷ Local measures must survive strict scrutiny, and the City of Richmond's did not.³⁵⁸ Admittedly, "the sorry history of both private and public discrimination in this country ha[d] contributed to a lack of opportunities for black entrepreneurs."³⁵⁹ But that alone could not "justify a rigid racial quota."³⁶⁰ Justice O'Connor added that states and localities could take measures to correct identified discrimination within their borders.³⁶¹ But the strong implication was that such discrimination must be recent and overt.³⁶² The deep (or not so deep) past did not suffice.

Justice Stevens wrote a concurring opinion that also limited the import of the past. To further the Fourteenth Amendment's goal of equal opportunity for all citizens, he observed, "we must learn from our past mistakes."³⁶³ Yet he "believe[d] the Constitution requires us to evaluate our policy decisions . . . primarily by studying their probable impact on the future."³⁶⁴ Justice Stevens worried that legislation like that enacted in Richmond would smear those

The Dismantling of Affirmative Action Programs: Evaluating City of Richmond v. J.A. Croson Co., N.Y. L. SCH. J. HUM. RTS., no. 3, 1990, at 35; Carol D. Rasnic, *City of Richmond v. J.A. Croson Co.: What Does It Portend for Affirmative Action?*, 23 CREIGHTON L. REV. 19 (1989).

354. See *J.A. Croson*, 488 U.S. at 477-78; *id.* at 511 (plurality opinion).

355. *Id.* at 490 (plurality opinion).

356. *Id.* at 491 (quoting *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 68 (1873)).

357. See *id.* at 490-91.

358. See *id.* at 507-08 (majority opinion).

359. *Id.* at 499.

360. *Id.*

361. See *id.* at 491-92 (plurality opinion).

362. See *id.* ("[I]f the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system.").

363. *Id.* at 511 (Stevens, J., concurring in part and concurring in the judgment).

364. *Id.*

disadvantaged by it “with the unproven charge of past racial discrimination,” and, even worse, stigmatize and stereotype its beneficiaries.³⁶⁵ Better to leave the past unhealed, he implied, than to inflict such a wound on the future.

In a separate concurrence, Justice Scalia expressed enormous hostility to affirmative action programs. He began by highlighting Justice O’Connor’s concession that despite whatever remedial powers the Reconstruction Amendments gave to the federal government, such powers were not granted to the states.³⁶⁶ Invoking *Ex parte Virginia*, Justice Scalia stressed that “the Civil War Amendments were designed to ‘take away all possibility of oppression by law because of race or color’ and ‘to be . . . limitations on the power of the States and enlargements of the power of Congress.’”³⁶⁷ On this point Justice Scalia was quite emphatic. “The struggle for racial justice” in the United States, he wrote, “has historically been a struggle by the national society against oppression in the individual States.”³⁶⁸ That struggle, he added, was limited neither to discrimination against blacks nor to “the Old South.”³⁶⁹ Instead, the course of national history showed “that racial discrimination against any group finds a more ready expression at the state and local than at the federal level”—a reality that “should come as no surprise” to “the children of the Founding Fathers.”³⁷⁰ The Founders, Justice Scalia explained, were acutely aware “of the heightened danger of oppression from political factions in small, rather than large, political units.”³⁷¹ Justice Scalia thus interpreted racial issues by the light of the Founders’ wisdom—a classically parenthetical gesture from the Justice who was to become the modern Court’s most powerful parenthetical voice.

Justice Scalia went on to quote a “prophe[c]y” from James Madison in support of this proposition—a prophecy, he said, that “came to fruition in Richmond in the enactment of a set-aside clearly and directly beneficial to the dominant political group, which happens also to be the dominant racial

365. *See id.* at 516-17.

366. *See id.* at 521-22 (Scalia, J., concurring in the judgment).

367. *Id.* at 522 (alteration in original) (quoting *Ex parte Virginia*, 100 U.S. 339, 345 (1880)); *see also supra* notes 60-62 and accompanying text.

368. *J.A. Croson*, 488 U.S. at 522 (Scalia, J., concurring in the judgment).

369. *Id.* at 523.

370. *Id.*

371. *Id.*

group.”³⁷² That blacks “ha[d] often been on the receiving end of the injustice” in other, parallel contexts was irrelevant.³⁷³ “Where injustice is the game,” he intoned, “turnabout is not fair play.”³⁷⁴

For Justice Scalia, turnabout was permissible in just one context: “[T]he States may act by race to ‘undo the effects of past discrimination’ [only] where that is necessary to eliminate their own maintenance of a system of unlawful racial classification.”³⁷⁵ But this exception, Justice Scalia continued, was exquisitely narrow. States could classify their citizens only to *declassify* them.³⁷⁶ States could formally end their own formal abuses, but that was all. They could enact remedial programs “aimed at the disadvantaged *as such*,” but not programs at those disadvantaged *by race*.³⁷⁷ For our purposes, the striking feature of Justice Scalia’s opinion is its elevation of the parenthetical posture into a positive rule. To Justice Scalia, a race-conscious remedial measure was legitimate only if it paralleled, and served as a close parenthesis to, a specific historical evil. To repent, on this account, is to stop sinning—nothing less, but emphatically nothing more. More, in fact, would be additional sin.

Here and elsewhere, Justice Scalia insisted (as would Justice Thomas later) that the lesson of history was that discrimination is always wrong, whatever its motive, and the proper response to that history was simply to end official recognition of race, not to seek redemption through the very wrong that made redemption necessary. As Justice Scalia wrote in a 1995 concurrence, “[t]o pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred.”³⁷⁸ He concluded, “In the eyes of government, we are just one race here. It is American.”³⁷⁹ The way to realize that ideal was, for Justice Scalia, merely to

372. *Id.* at 523-24; *see id.* at 523 (“[T]he fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plan[] of oppression.” (quoting THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961))).

373. *Id.* at 524.

374. *Id.*

375. *Id.* (emphasis omitted).

376. *See id.* at 525.

377. *See id.* at 528.

378. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment); *see also id.* at 241 (Thomas, J., concurring in part and concurring in the judgment) (“In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice.”).

379. *Id.* at 239 (Scalia, J., concurring in part and concurring in the judgment).

assert it. The alternative to such an unequivocal close parenthesis was to perpetuate the evil that opened the parenthetical in the first place.³⁸⁰

The dissenters in *J.A. Croson*—Justices Brennan, Marshall, and Blackmun—stressed that the locality involved was “the former capital”³⁸¹ and “cradle of the Old Confederacy.”³⁸² Justice Marshall accused the majority of inverting the impulses behind the Fourteenth Amendment. The Reconstruction Amendments, he maintained, were animated by a fear that states would do *too little* to combat violence and discrimination against former slaves.³⁸³ To read those Amendments as barring states and localities from taking remedial measures was to “turn[] the Amendments on their heads.”³⁸⁴ For Justice Marshall, constitutional Reconstruction was about redeeming the country from “the tragic and indelible fact that discrimination against blacks and other racial minorities . . . has pervaded our Nation’s history and continues to scar our society.”³⁸⁵ In light of this overarching purpose, the proposition that the Constitution forbade local remedial efforts to heal that history and reduce those scars was nonsense.

A year later in *Metro Broadcasting, Inc. v. FCC*, Justice Marshall was back in the majority as the Court upheld a federal program under which certain radio and television stations could be transferred only to firms controlled by minorities.³⁸⁶ The vote was 5-4, and there were two dissenting opinions: one by Justice O’Connor, another by Justice Kennedy. Both dissents expressed strong skepticism about the existence of “benign” racial classifications, which Justice O’Connor called “a contradiction in terms.”³⁸⁷ Both dissents also invoked the lessons of “history,” though neither mentioned the Civil War era.³⁸⁸ For Justice Kennedy, the lesson of history was that government, including courts, should stay out of the business of racial classification, regardless of its purpose. “I regret,” he concluded, “that after a century of judicial opinions we interpret the Constitution to do no more than move us

380. For a sharp critique of Justice Scalia’s memorial posture, see Chris Edelson, *Judging in a Vacuum, or, Once More, Without Feeling: How Justice Scalia’s Jurisprudential Approach Repeats Errors Made in Plessy v. Ferguson*, 45 AKRON L. REV. 513 (2012).

381. See 488 U.S. at 528 (Marshall, J., dissenting).

382. See *id.* at 561 (Blackmun, J., dissenting).

383. *Id.* at 559 (Marshall, J., dissenting).

384. *Id.*

385. See *id.* at 551-52.

386. See 497 U.S. 547, 552, 557-58, 566 (1990), *overruled in part by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

387. *Id.* at 609 (O’Connor, J., dissenting) (quoting *id.* at 564 (majority opinion)); see also *id.* at 634-35 (Kennedy, J., dissenting) (“A fundamental error of the *Plessy* Court was its similar confidence in its ability to identify ‘benign’ discrimination . . .”).

388. See *id.* at 609-11 (O’Connor, J., dissenting); *id.* at 635-38 (Kennedy, J., dissenting).

from ‘separate but equal’ to ‘unequal but benign.’³⁸⁹ Justice Kennedy’s was a thoroughly parenthetical opinion. For Justice Kennedy, *Brown* closed the *Plessy* parenthetical by enshrining the principle of colorblindness. To depart from that principle was to repeat *Plessy*’s errors and revive its spirit.

By the time the Court decided its next major affirmative action case in 1995, Justices Brennan, Marshall, and Blackmun had all retired, and the conservative Justices commanded a majority.³⁹⁰ In *Adarand Constructors, Inc. v. Peña*, the Court ruled that *federal* remedial schemes that relied on racial classifications were subject to strict scrutiny under the Due Process Clause of the *Fifth* Amendment.³⁹¹ Justice O’Connor’s opinion for the Court stressed that this was not a complete bar to the federal government taking account of race to counter the dark legacies of the past.³⁹² But there were limits to what the government could do. In a pair of concurrences, Justices Scalia and Thomas reiterated their view that any official attention to race repeated the sins of the *Plessy* parenthetical.³⁹³

In dissent, Justice Stevens pointed to a very different lesson from history, highlighting the nation’s conviction, enshrined in the Fourteenth Amendment, “that the Federal Government must be the primary defender of racial minorities against the States, some of which may be inclined to oppress such minorities.”³⁹⁴ Justice Stevens denied vehemently that there was any “moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination.”³⁹⁵ Justice Stevens was thus asserting the “antidiscrimination” view of equal protection against the “anticlassification” view.³⁹⁶ At the same time, he was invoking the redemptive mode of memory against the parenthetical.

389. *Id.* at 637–38 (Kennedy, J., dissenting).

390. *See Justices 1789 to Present*, *supra* note 157.

391. *See* 515 U.S. at 204–05, 227; *see also* U.S. CONST. amend. V (“[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . .”).

392. *See Adarand Constructors*, 515 U.S. at 237.

393. *See id.* at 239 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 241 (Thomas, J., concurring in part and concurring in the judgment); *supra* text accompanying notes 378–80.

394. *Adarand Constructors*, 515 U.S. at 255 (Stevens, J., dissenting).

395. *Id.* at 243.

396. *See generally* Siegel, *supra* note 213.

3. Diversity or redemption?: *Grutter* and *Gratz*

Surprisingly, invocations of historical memory were all but absent from the omnium-gatherum of opinions in the Court's epic 2003 decisions on affirmative action in higher education.³⁹⁷ The past haunted both cases, but the Justices assiduously avoided mentioning it.

Grutter v. Bollinger and *Gratz v. Bollinger* collectively featured no fewer than thirteen opinions analyzing the issues from as many different perspectives.³⁹⁸ Of the three Justices who voted to invalidate *both* admissions programs, only Justice Thomas spoke of the past, beginning his concurring opinion in *Grutter* by invoking a plea from Frederick Douglass. "What I ask for the negro," Douglass had said, "is not benevolence, not pity, not sympathy, but simply justice."³⁹⁹ Douglass's plea to white Americans was "[d]o nothing with us!"⁴⁰⁰ For Justice Thomas, Douglass was a culture hero⁴⁰¹ who gave voice to the anticlassification principle "embodied in [both] the Declaration of Independence and the Equal Protection Clause."⁴⁰² Justice Thomas's vision of equal protection was one of historical continuity. "The Constitution abhors classifications based on race," he wrote.⁴⁰³ "Purchased at the price of immeasurable human suffering," he continued—an allusion to the Civil War,

397. See *Grutter v. Bollinger*, 539 U.S. 306, 315-16, 343 (2003) (upholding a law school admissions program that considered an applicant's contribution to the racial diversity of the student body as one positive factor in a holistic assessment); *Gratz v. Bollinger*, 539 U.S. 244, 253-57, 275-76 (2003) (condemning an undergraduate admissions program that awarded a specified number of objective "points" to applicants who belonged to certain racial minorities).

398. There were six opinions filed in *Grutter*, authored respectively by Justice O'Connor (majority opinion), Justice Ginsburg (concurring), Justice Scalia (concurring in part and dissenting in part), Justice Thomas (concurring in part and dissenting in part), Chief Justice Rehnquist (dissenting), and Justice Kennedy (dissenting). See 539 U.S. at 310 (enumerating the opinions).

Gratz featured seven opinions, authored respectively by Chief Justice Rehnquist (majority opinion), Justice O'Connor (concurring), Justice Thomas (concurring), Justice Breyer (concurring in the judgment), Justice Stevens (dissenting), Justice Souter (dissenting), and Justice Ginsburg (dissenting). See 539 U.S. at 247 (enumerating the opinions).

399. *Grutter*, 539 U.S. at 349 (Thomas, J., concurring in part and dissenting in part) (quoting Frederick Douglass, *What the Black Man Wants: An Address Delivered in Boston, Massachusetts* (Jan. 26, 1865), in 4 THE FREDERICK DOUGLASS PAPERS: SERIES ONE; SPEECHES, DEBATES, AND INTERVIEWS 59, 68 (John W. Blassingame & John R. McKivigan eds., 1991)).

400. *Id.* (quoting Douglass, *supra* note 399, at 68).

401. On the appeal to "culture heroes" in constitutional adjudication, see generally Balkin, *supra* note 8, at 681-82.

402. See *Grutter*, 539 U.S. at 378 (Thomas, J., concurring in part and dissenting in part).

403. *Id.* at 353.

among other things—“the equal protection principle reflects our Nation’s understanding that such classifications ultimately have a destructive impact on the individual and our society.”⁴⁰⁴

This was the true principle proclaimed in Jefferson’s Declaration, Douglass’s speeches, and Justice Harlan’s *Plessy* dissent—all of which were central to Justice Thomas’s constitutional canon.⁴⁰⁵ This was the true faith from which the country had apostatized by accommodating slavery, by countenancing Jim Crow, and, most recently, by indulging affirmative action. Each of these heresies, in Justice Thomas’s view, was a parenthetical aberration from the noble tradition. It was the Court’s job to end them, to impose a close parenthesis. Unfortunately, the Court had abdicated yet again. After entrenching slavery and blessing Jim Crow, it was now approving affirmative action as well.

Justice O’Connor’s opinions were parenthetical in a different way. Unlike Justice Thomas, she was willing to concede that historical exceptions must be counteracted by exceptional means.⁴⁰⁶ A close parenthesis, in other words, sometimes requires a new kind of parenthesis. But in history, as in prose, a parenthetical mustn’t last forever. One must sometimes fight fire with fire, but conflagration mustn’t become the norm.

Justice O’Connor assigned concrete chronological terms to these abstractions. “We expect that 25 years from now,” she wrote for *Grutter*’s majority, “the use of racial preferences will no longer be necessary to further the interest approved today.”⁴⁰⁷ There remained redemptive work to be done, but it must proceed under parenthetical premises, and with the express goal of closing the parenthetical by and by.

404. *Id.* (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment)).

405. *See id.* at 378; *see also* *Evenwel v. Abbott*, 136 S. Ct. 1120, 1137-38 (2016) (Thomas, J., concurring in the judgment); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2429 (2013) (Thomas, J., concurring); *McDonald v. City of Chicago*, 561 U.S. 742, 807, 849-50 (2010) (Thomas, J., concurring in part and concurring in the judgment); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 772-73 (2007) (Thomas, J., concurring); *Zelman v. Simmons-Harris*, 536 U.S. 639, 676, 678, 683-84 (2002) (Thomas, J., concurring); *Adarand Constructors*, 515 U.S. at 240 (Thomas, J., concurring in part and concurring in the judgment).

406. *See Grutter*, 539 U.S. at 341-42 (permitting “race-conscious admissions policies” but requiring that they be limited in time to “assure[] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself” (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989) (plurality opinion))); *see also* *Gratz v. Bollinger*, 539 U.S. 244, 276-80 (2003) (O’Connor, J., concurring).

407. *Grutter*, 539 U.S. at 343.

Justice Ginsburg agreed with this notion in principle, but was less optimistic and less exacting.⁴⁰⁸ The past, in her view, remained present, and it was illogical to equate “[a]ctions designed to burden groups long denied full citizenship . . . with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated.”⁴⁰⁹ For Justice Ginsburg, the parenthetical elision of the difference between race-conscious remedies and the evils that they seek to cure was not an alternative mode of memory; it was a pernicious form of forgetting. Constitutional offenses, like moral crimes, were of two kinds. There were sins of omission and sins of commission. To avoid both, the Constitution must be “both color blind and color conscious”: “color blind” to avoid the latter but “color conscious” to avoid the former.⁴¹⁰ To redeem the evils of the past, it was not enough to avoid repeating them. One must cure them and redress their lingering effects.⁴¹¹ Indeed, by failing to cure them, one repeated them by default.

In that respect, Justice O’Connor’s gesture toward 2028 must be viewed as aspirational, not constraining. Her “25 years” were the biblical forty.⁴¹² “From today’s vantage point,” Justice Ginsburg concluded, “one may hope, but not firmly forecast, that over the next generation’s span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.”⁴¹³ A close parenthetical was Justice Ginsburg’s goal as well. But to close it prematurely was to delay redemption and prolong the evil.

D. Constitutional Memory on the Roberts Court

The *Grutter-Gratz* cacophony reflected broader divisions in the Court’s mnemonic jurisprudence—divisions that stretched back to the 1870s and that persist today. Over the last fourteen years, contrasting memorial visions have divided the Roberts Court, as they did all of its predecessors.

1. Arms and memory

Some of the Roberts Court’s earliest discussions of the Civil War era came in an unlikely context: cases about guns. In *District of Columbia v. Heller*, Justice Scalia’s opinion for the majority invoked Reconstruction history to buttress its

408. *See id.* at 346 (Ginsburg, J., concurring); *see also Gratz*, 539 U.S. at 298-302, 304-05 (Ginsburg, J., dissenting).

409. *Gratz*, 539 U.S. at 301 (Ginsburg, J., dissenting).

410. *See id.* at 302 (quoting *United States v. Jefferson Cty. Bd. of Educ.*, 372 F.2d 836, 876 (5th Cir. 1966), *modified in other part per curiam*, 380 F.2d 385 (5th Cir. 1967) (en banc)).

411. *See id.* at 304.

412. I first heard this locution in a conversation with Judge Guido Calabresi.

413. *Grutter*, 539 U.S. at 346 (Ginsburg, J., concurring).

core conclusion about the original public meaning of the right to bear arms.⁴¹⁴ Although the “outpouring of discussion of the Second Amendment in Congress and in public discourse” during the Reconstruction era was less valuable than Founding-era evidence, Justice Scalia thought it “instructive” to note that leading abolitionists championed an expansive right to bear arms; that one of the many iniquities of the postbellum South was its disarming of former slaves; and that the Reconstruction Congress believed “that the Second Amendment protected an individual right to use arms for self-defense.”⁴¹⁵ All of this, of course, played a secondary role in the majority’s analysis.⁴¹⁶ Justice Scalia’s rhetorical point was that an individual right to bear arms was deeply embedded in American history, and that the right had been championed by history’s heroes and subverted by its villains.

In dissent, Justice Stevens dismissed the majority’s invocation of Reconstruction as irrelevant. “All of the statements the Court cites,” he objected, “were made long after the framing of the Amendment and cannot possibly supply any insight into the intent of the Framers.”⁴¹⁷ The statements were made, moreover, “during pitched political debates, so that they are better characterized as advocacy than good-faith attempts at constitutional interpretation.”⁴¹⁸ It was an unusual split. The conservatives highlighted, and the liberals downplayed, the relevance of Reconstruction. But both camps gave pride of place to the Founding.

They replayed the battle two years later under altered premises. In *McDonald v. City of Chicago*, a conservative majority ruled that the Second Amendment right to private gun ownership, which *Heller* had applied against the federal government, was binding on the states by virtue of incorporation through the Fourteenth Amendment.⁴¹⁹ Justice Alito’s opinion achieved this result through the first extension in decades of “selective incorporation” under the Due Process Clause.⁴²⁰ Justice Alito noted that the Civil War Amendments

414. See 554 U.S. 570, 614-19 (2008).

415. See *id.* at 614-16.

416. See *id.* at 614 (“Since [Reconstruction-era] discussions took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources.”). Indeed, in a heavily historical opinion spanning more than sixty pages, Justice Scalia devoted only three pages to the Reconstruction era. See *id.* at 614-16.

417. *Id.* at 670 (Stevens, J., dissenting).

418. *Id.*

419. See *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (plurality opinion); *id.* at 805 (Thomas, J., concurring in part and concurring in the judgment); see also *Heller*, 554 U.S. at 574-75, 629, 635.

420. See *McDonald*, 561 U.S. at 784-88 (plurality opinion); see also U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

“fundamentally altered our country’s federal system.”⁴²¹ He acknowledged the many scholars who thought this fact was inadequately recognized in the Court’s Reconstruction-era jurisprudence—who thought the interpretation of the Privileges or Immunities Clause in the *Slaughter-House Cases* was unduly narrow and “egregiously wrong.”⁴²² But for many decades the Due Process Clause had done what the Privileges or Immunities Clause originally promised. By now, the Fourteenth Amendment afforded robust protection against state infringement of citizens’ rights, and it hardly mattered, at this late date, under which clause’s banner that protection marched.⁴²³ “We therefore decline,” Justice Alito wrote, “to disturb the *Slaughter-House* holding.”⁴²⁴ Justice Thomas *was* willing to disturb it, but he was alone in his views.⁴²⁵ Both Justice Alito and Justice Thomas emphasized, as had the majority in *Heller*, Reconstruction Republicans’ disapproval of Southern efforts to disarm former slaves.⁴²⁶

In dissent, Justice Stevens and Justice Breyer denounced the opinions of the Justices in the majority as specious and solipsistic. For Justice Breyer, the conservatives’ fixation on what the architects of Reconstruction thought about the substantive right to bear arms missed the central and historically relevant point. “[T]he *fundamental* concern of the Reconstruction Congress,” he wrote, “was the eradication of discrimination, not the provision of a new substantive right to bear arms free from reasonable state police power regulation.”⁴²⁷

Justice Stevens’s denunciation was more sweeping. For him, the originalist-historicist methodology embraced by his conservative colleagues was fundamentally flawed.⁴²⁸ Limiting due process protection to rights rooted in history and tradition thwarted progress. If the provision guarded only those rights that had been generally guarded already, it served little purpose.⁴²⁹ “That approach,” Justice Stevens continued, “is unfaithful to the expansive principle Americans laid down when they ratified the Fourteenth Amendment and to

421. *McDonald*, 561 U.S. at 754.

422. *See id.* at 756-57 (quoting Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners at 33, *McDonald*, 561 U.S. 742 (No. 08-1521), 2009 WL 4099504); *see also* U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .”).

423. *See McDonald*, 561 U.S. at 758 (plurality opinion).

424. *Id.*

425. *See id.* at 806, 813-55 (Thomas, J., concurring in part and concurring in the judgment).

426. *See id.* at 770-78 (majority opinion); *id.* at 847-49 (Thomas, J., concurring in part and concurring in the judgment); *see also* *District of Columbia v. Heller*, 554 U.S. 570, 614-16 (2008).

427. *McDonald*, 561 U.S. at 935 (Breyer, J., dissenting).

428. *See id.* at 875-76 (Stevens, J., dissenting).

429. *See id.*

the level of generality they chose when they crafted its language.”⁴³⁰ Worse still, such an approach would “countenance[] the most revolting injustices in the name of continuity, for we must never forget that not only slavery but also the subjugation of women and other rank forms of discrimination are part of our history.”⁴³¹ Finally, the approach “effaces this Court’s distinctive role in saying what the law is, leaving the development and safekeeping of liberty to majoritarian political processes.”⁴³² It was, he concluded, “judicial abdication in the guise of judicial modesty.”⁴³³

This was Justice Stevens hurling down the redemptive gauntlet—contending that the Frankfurterian model of construing the Fourteenth Amendment by the light of deep history and embedded tradition (a classically parenthetical model)⁴³⁴ perversely shackled the Civil War’s central constitutional achievement to the very historical eras whose evils it was designed to cure. And, not least, it surrendered the stewardship of the Supreme Court as guardian of the Civil War revolution.

The irony in the gun cases was that the Court’s two camps had so manifestly swapped their usual roles on the underlying interpretive posture. It was the parenthetical Justices who were arguing for robust and expansive protection of the relevant right, whereas the redemptivist Justices urged a limited construction. For many observers, this reversal aligned only too neatly with the Justices’ political views about guns,⁴³⁵ confirming suspicions that the Justices, left and right, were practicing *Sound of Music* constitutionalism—showing special solicitude for each Justice’s “favorite things.”⁴³⁶

But the deeper methodological and mnemonic dispute remained unchanged. Justice Thomas took the dramatic step of urging that *Cruikshank* and the *Slaughter-House Cases* be overruled,⁴³⁷ but his vision of a restored Privileges or Immunities Clause was closed and retrospective rather than forward-looking and open-ended. What, Justice Thomas asked, counted as a privilege or immunity of citizenship prior to 1868? The universe of rights that did so count

430. *Id.* at 876.

431. *Id.* (footnote omitted).

432. *Id.*

433. *Id.*

434. *See supra* Part III.A.1.

435. *See, e.g.*, J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254 (2009) (“*Heller* encourages Americans to do what conservative jurists warned for years they should not do: bypass the ballot and seek to press their political agenda in the courts.”).

436. *See* THE SOUND OF MUSIC (Argyle Enterprises, Inc. 1965).

437. *See McDonald*, 561 U.S. at 850-58 (Thomas, J., concurring in part and concurring in the judgment).

was incorporated in its totality through the Fourteenth Amendment.⁴³⁸ Anything else was beyond the scope of constitutional protection.⁴³⁹ Justice Alito's opinion asked instead what rights were "deeply rooted in [American] history and tradition,"⁴⁴⁰ but its frame of historical reference was similar.⁴⁴¹ The conservatives shared a view that the Fourteenth Amendment protected a certain set of rights that could be identified from the vantage of its framing moment. The Fourteenth Amendment, in short, imposed a great close parenthesis, and what came after the parenthetical was defined by the tradition that preceded it.

2. *Brown's* contested memory: *Parents Involved*

The Court's intramural mnemonic debates continued along more familiar paths in the perennially fraught context of race. The debate was at its sharpest in *Parents Involved in Community Schools v. Seattle School District No. 1*, in which the Court invalidated race-conscious public school transfer policies in Louisville and Seattle.⁴⁴² Every opinion in *Parents Involved* cast itself as the guardian—and its detractors as the marauders—of *Brown's* legacy.⁴⁴³

For Chief Justice Roberts and a plurality of the Court, *Brown's* legacy was simple: Classifying citizens on the basis of race was always wrong—wrong in 1868, wrong in 1954, and wrong in 2007. "[T]he position of the plaintiffs in *Brown*," Chief Justice Roberts wrote, "could not have been clearer: '[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race.'"⁴⁴⁴ The evil to be rooted out was "differential treatment," regardless of aim. School districts that had committed that evil in the past were permitted to undo it only so long as the remedy mirrored the offense.⁴⁴⁵ Otherwise, taking account of race repeated rather than redeemed the evil.⁴⁴⁶ The real remedy was to embrace Justice

438. *See id.* at 835-50.

439. *See id.* at 852-55.

440. *Id.* at 768 (majority opinion) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

441. *See id.* at 768-78.

442. *See* 551 U.S. 701, 711-18 (2007); *id.* at 747-48 (plurality opinion).

443. For a discussion of *Parents Involved* as a debate about the meaning of *Brown*, see Mark Tushnet, Jerome Hall Lecture, *Parents Involved and the Struggle for Historical Memory*, 91 IND. L.J. 493 (2016).

444. *Parents Involved*, 551 U.S. at 747 (plurality opinion) (second alteration in original) (quoting Brief for Appellants in Nos. 1, 2 & 4 & for Respondents in No. 10 on Reargument at 15, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (Nos. 1 et al.), 1953 WL 48699).

445. *See id.* at 720-21 (majority opinion).

446. *See id.* at 742-48 (plurality opinion).

Harlan's dictum and close one's eyes to color. "The way to stop discrimination on the basis of race," Chief Justice Roberts proclaimed, "is to stop discriminating on the basis of race."⁴⁴⁷

A concurring opinion by Justice Thomas similarly argued that the dissenting Justices, who would have approved the Seattle and Louisville plans, were on the wrong side of *Brown* and (therefore) the wrong side of history. Justice Thomas cast himself as an heir of the first Justice Harlan and "the lawyers who litigated *Brown*,"⁴⁴⁸ while condemning the dissenters' embrace of "an approach reminiscent of that advocated by the segregationists in *Brown*."⁴⁴⁹ This was at once the standard fare and a terse synthesis of parenthetical memory.

The dissenters responded by claiming *Brown's* mantle for themselves. Justice Stevens found "a cruel irony" in the plurality's invocation of *Brown*.⁴⁵⁰ For Justice Breyer, the promise of *Brown* was not a promise of colorblind neutrality. It was the "promise of integrated primary and secondary education," which Louisville and Seattle "sought to make a reality."⁴⁵¹ On Justice Breyer's telling, the Fourteenth Amendment "sought to bring into American society as full members those whom the Nation had previously held in slavery."⁴⁵² In support of this proposition, Justice Breyer cited the "one pervading purpose" dictum of the *Slaughter-House Cases* and the "common purpose" dictum of *Strauder*.⁴⁵³ But Justice Breyer transformed those cases' conceptions of "freedom" and equal "civil rights" into a thicker notion of integration and full membership.⁴⁵⁴ The Amendment's purpose was not to ban racial classifications, but to make full citizens out of members of a previously subordinated group.⁴⁵⁵

447. *Id.* at 748.

448. *See id.* at 772 (Thomas, J., concurring).

449. *Id.* at 748.

450. *Id.* at 798 (Stevens, J., dissenting).

451. *Id.* at 803-04 (Breyer, J., dissenting).

452. *Id.* at 829.

453. *Id.* (first quoting *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1873); and then quoting *Strauder v. West Virginia*, 100 U.S. 303, 306 (1880)).

454. *See id.* at 829-30; *see also Strauder*, 100 U.S. at 306 (declaring that the "common purpose" of the Reconstruction Amendments was "securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy"); *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 71 (proclaiming that "the one pervading purpose" of the Reconstruction Amendments is "the freedom of the slave race").

455. *Parents Involved*, 551 U.S. at 829 (Breyer, J., dissenting).

In closing, Justice Breyer rejected emphatically the conservative Justices' "lesson[s] of history."⁴⁵⁶ It was, he said, "a cruel distortion of history to compare" the plight of the plaintiffs in *Brown* to that of the petitioners in *Parents Involved*.⁴⁵⁷ Such comparisons mocked *Brown's* legacy, and that of the Reconstruction Amendments. Much of American history, Justice Breyer continued, was a history of slavery and segregation.⁴⁵⁸ "In this Court's finest hour," he added,

Brown v. Board of Education challenged this history and helped to change it. For *Brown* held out a promise. It was a promise embodied in three Amendments designed to make citizens of slaves. It was the promise of true racial equality—not as a matter of fine words on paper, but as a matter of everyday life in the Nation's cities and schools. It was about the nature of a democracy that must work for all Americans.⁴⁵⁹

It was impassioned peroration. Justice Breyer was objecting not merely to what he saw as a bad substantive outcome and a bogus application of precedent, but also to a decision that, in his view, threatened to drain the Court's greatest reservoir of legitimacy. For a century and more, the Court had been complicit in the darkest chapters of the national narrative. Then, in its "finest hour," *Brown* brought the promise of renewal—for the Court as well as the country.⁴⁶⁰ This was more than a Churchillian flourish.⁴⁶¹ *Brown* was an axis of constitutional memory that showcased the Court's power to transform a dark past into a bright future, to challenge and change history itself. *Brown* embodied the promise of constitutional redemption, and it cast the Court in the role of redeemer. *Brown* came as a special dispensation of grace. It covered a multitude of sins. It justified a mountain of judicial power. Never mind that the Court in *Brown* was merely erasing the indignities imposed in *Plessy*. Almost everything the modern Court did could be forgiven for the sake of *Brown*. But the plurality had taken the name of *Brown* in vain, and had endangered, for Court and country, the promise of redemption. "This is a decision," Justice Breyer grimly predicted, "that the Court and the Nation will come to regret."⁴⁶²

456. *See id.* at 866-67.

457. *Id.* at 867.

458. *See id.* at 867-68.

459. *Id.* at 867.

460. *See id.* at 867-68.

461. *See* Winston Churchill, Address to the United States (June 16, 1941), in CHURCHILL: THE POWER OF WORDS; HIS REMARKABLE LIFE RECOUNTED THROUGH HIS WRITINGS AND SPEECHES 281, 282 (Martin Gilbert ed., 2012).

462. *Id.* at 868. For contemporary reactions echoing Justice Breyer's mnemonic anguish, see D. Marvin Jones, *Plessy's Ghost: Grutter, Seattle and the Quiet Reversal of Brown*, 35 PEPP. L. REV. 583, 583 (2008) (asserting, in the aftermath of *Parents Involved*, that "[a]ffirmative action is dead"); John A. Powell & Stephen Menendian, *Parents Involved: The Mantle of*
footnote continued on next page

Rarely have the parenthetical and the redemptive modes of memory appeared together in such stark contrast. Rarely had the link between constitutional memory and judicial legitimacy been placed in such bold relief. It was the summary of a dispute as old as the *Slaughter-House Cases*. And, as so often since the *Slaughter-House Cases*, the parenthetical mode of memory had gained the upper hand.

3. Twilight of the Voting Rights Act

The parenthetical mode tightened its grip in subsequent years as the Court first threatened, then toppled, one of the towering achievements of the Civil Rights era. The preclearance provision of the VRA, originally set to expire after five years,⁴⁶³ was renewed in 1970⁴⁶⁴ and periodically thereafter⁴⁶⁵ until, in 2006, Congress extended it, with thumping bipartisan majorities, for twenty-five years.⁴⁶⁶ Congress did not, however, update the provision's coverage formula. The covered states remained those based on data from 1972.⁴⁶⁷ This failure to update furnished one basis for renewed challenges to the provision's constitutionality.

When faced with the first challenge in 2009, the Court ducked the issue, or at least purported to duck the issue, raising constitutional doubts about the statute but ultimately deciding the case on (dubious) statutory grounds.⁴⁶⁸ Four

Brown, *the Shadow of Plessy*, 46 U. LOUISVILLE L. REV. 631 (2008) (discussing *Parents Involved* as a battle over *Brown's* legacy and a triumph of the anticlassification principle).

463. See Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 437, 438 (codified as amended at 52 U.S.C. § 10303 (2016)).

464. See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 3, 84 Stat. 314, 315 (codified as amended at 52 U.S.C. § 10303).

465. See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(a), 96 Stat. 131, 131 (codified as amended at 52 U.S.C. § 10303); Act of Aug. 6, 1975, Pub. L. No. 94-73, § 101, 89 Stat. 400, 400 (codified as amended at 52 U.S.C. § 10303).

466. See Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 4, 120 Stat. 577, 580 (codified as amended at 52 U.S.C. § 10303(a)(8)), *invalidated in part by* *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). The vote was 390-33 in the House, 98-0 in the Senate. See *H.R.9—Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006*, CONGRESS.GOV <https://perma.cc/V9SZ-9WVA> (archived Nov. 28, 2018).

467. See Act of Aug. 6, 1975, § 202, 89 Stat. at 401 (setting November 1, 1972, as the relevant date for measurement of voter participation). Congress did not update the coverage formula in the 1982 renewal or in the 2006 renewal. See *Shelby County*, 133 S. Ct. at 2620.

468. See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 196-97, 205, 209-11 (2009). For critical assessments of the Court's use of the avoidance canon and of its statutory interpretation in *Northwest Austin*, see Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 195-206; and

footnote continued on next page

years later, however, in *Shelby County v. Holder*, a five-Justice majority quashed the preclearance provision and lamed the historic law.⁴⁶⁹

For our purposes, the most striking feature of both VRA cases was the historical narrative that buttressed them. In both cases, Chief Justice Roberts began by chronicling the century-long “failure” of the Fifteenth Amendment to secure meaningful voting rights for black Americans.⁴⁷⁰ That failure justified Congress in employing “extraordinary measures to address an extraordinary problem.”⁴⁷¹ One such extraordinary measure was to treat different states differently—a practice, in the Chief Justice’s view, at odds with “our historic tradition that all the States enjoy ‘equal sovereignty.’”⁴⁷²

But times, Chief Justice Roberts continued, had changed. “There is no denying,” he wrote, “that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.”⁴⁷³ “[H]istory,” he intoned, “did not end in 1965.”⁴⁷⁴ “Things ha[d] changed in the South,” and changed for the better.⁴⁷⁵ Blacks in the South were voting and winning office in record numbers.⁴⁷⁶ The new South was neither pariah nor outlier. History had moved forward, leaving past evils behind. It was time, the Chief Justice suggested, for the landmark legislation of the 1960s to catch up with the times and recognize that redemption, more or less, had already been wrought. In the mid-1960s, the VRA was justified as an exceptional response to an exceptional era. Its purpose was to close a historical parenthesis. It had done its work well, and could now be turned to pasture, while history returned to the sunlit uplands of normalcy.

For Justice Ginsburg, by contrast, historical redemption was never so easy. She insisted that the Civil War Amendments were not modest and momentary modifications of the original constitutional structure, but fundamental revisions.⁴⁷⁷ They did not merely justify temporary departures from original principles—they transformed those original principles. Justice Ginsburg objected that the majority was reading the Constitution backwards. “It cannot tenably be maintained,” she wrote, “that the VRA, an Act of Congress adopted

Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2129-37 (2015).

469. See 133 S. Ct. at 2618-20, 2631.

470. See *id.* at 2619 (quoting *Nw. Austin*, 557 U.S. at 197); *Nw. Austin*, 557 U.S. at 197-98.

471. *Shelby County*, 133 S. Ct. at 2618.

472. *Nw. Austin*, 557 U.S. at 203 (quoting *United States v. Louisiana*, 363 U.S. 1, 16 (1960)).

473. *Shelby County*, 133 S. Ct. at 2618.

474. *Id.* at 2628.

475. See *Nw. Austin*, 557 U.S. at 202.

476. *Id.*

477. See *Shelby County*, 133 S. Ct. at 2637 (Ginsburg, J., dissenting).

to shield the right to vote from racial discrimination, is inconsistent with the letter or spirit of the Fifteenth Amendment, or any provision of the Constitution read in light of the Civil War Amendments.”⁴⁷⁸

Implicitly, Justice Ginsburg was arguing that all constitutional provisions *should* be read by the light of the Civil War Amendments. Those Amendments, she observed, changed everything. “Nowhere in today’s opinion,” she complained, “is there clear recognition of the transformative effect the Fifteenth Amendment aimed to achieve.”⁴⁷⁹ There was a world of difference between the Bill of Rights provisions telling Congress to “make no law” in a given realm⁴⁸⁰ and the Civil War Amendments, which “used ‘language [that] authorized transformative new federal statutes to uproot all vestiges of unfreedom and inequality’ and provided ‘sweeping enforcement powers . . . to enact “appropriate” legislation targeting state abuses.’”⁴⁸¹ Congress’s discretion in wielding those powers was enormous. Beyond the most deferential rationality review, the Court, like Lear’s daughters, should reason not the need.⁴⁸² In any case, the majority’s tale of uninterrupted racial progress since 1965 was altogether too Whiggish. It was the breezy gloss of Dr. Pangloss.⁴⁸³ History might not have ended in 1965, Justice Ginsburg wrote, but what happened before and after the VRA counseled caution.⁴⁸⁴ The dark chapters were not all ended. Without constant vigilance and continuing oversight, some might reopen.⁴⁸⁵

In some ways, Justice Ginsburg’s fears of backsliding were the mirror image of the fears expressed six years earlier by Chief Justice Roberts and Justice Thomas. In *Shelby County*, Justice Ginsburg warned that the bad old

478. *Id.*

479. *Id.*

480. See U.S. CONST. amend. I.

481. *Shelby County*, 133 S. Ct. at 2637 (Ginsburg, J., dissenting) (alterations in original) (quoting AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 363, 399 (2005)).

482. See *id.* (citing *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966)); cf. WILLIAM SHAKESPEARE, *KING LEAR* act 2, sc. 4, ll. 257-58 (Jay L. Halio ed., Cambridge Univ. Press updated ed. 2005) (“O reason not the need! Our basest beggars [a]re in the poorest thing superfluous.”).

483. See generally VOLTAIRE, *CANDIDE, OU L’OPTIMISME* (1759).

484. See *Shelby County*, 133 S. Ct. at 2642 (Ginsburg, J., dissenting) (“There is no question . . . that the covered jurisdictions have a unique history of problems with racial discrimination in voting. Consideration of this long history, still in living memory, was altogether appropriate.” (citation omitted)).

485. See *id.* (“[T]hose who cannot remember the past are condemned to repeat it.” (quoting 1 GEORGE SANTAYANA, *THE LIFE OF REASON, OR, THE PHASES OF HUMAN PROGRESS* 284 (1905))).

times might return if the nation prematurely got its hopes up or let its guard down. In *Parents Involved*, Chief Justice Roberts and Justice Thomas had both warned that the bad times would recommence if the nation, even with the best of motives, continued to classify citizens by race.⁴⁸⁶

In these differing postures toward an evil past lies the core difference between the parenthetical and the redemptive modes of memory on the twenty-first-century Court. For parenthetical Justices, the great desideratum of constitutional memory is to move beyond the evil age. The remedy for historical evil is, on this view, cessation: to stop doing the very thing—racial classification—that made the evil past evil. For redemptivist Justices, the remedy is more radical: to uproot every vestige and lingering consequence of the old order. This requires constant vigilance and aggressive—or, if you will, affirmative—corrective action. The parenthetical judge wishes to restore the pristine order of the Founders, purged of the stain of slavery and the blot of Jim Crow. The redemptivist judge wishes to uphold a new order—a new nation, as Lincoln put it, conceived in liberty and dedicated to meaningful universal equality.⁴⁸⁷ The one would preserve the tradition by purging it, the other would redeem the tradition by transforming it. The contest is unlikely to end in our lifetime. It will last, one suspects, as long as Americans dispute the meaning of the Constitution and the legacy of the Civil War. It will last, that is, as long as the republic endures.

Conclusion

The U.S. Supreme Court's engagement with questions of constitutional memory continues. In March 2017, when the Court overturned a jury verdict because one juror had explicitly relied on racial stereotypes,⁴⁸⁸ Justice Kennedy linked the Court's holding to a broader effort to overcome the past. "The Nation," he wrote, "must continue to make strides to overcome race-based discrimination."⁴⁸⁹ It was, he said, "the mark of a maturing legal system that it seeks to understand and to implement the lessons of history."⁴⁹⁰

The Roberts Court also features powerful new voices on questions of memory. Justice Sotomayor, in particular, has been a forceful champion of

486. See *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747-48 (2007) (plurality opinion); *id.* at 748 (Thomas, J., concurring).

487. See Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863), in *ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS* 734, 734 (Roy P. Basler ed., 3d prtg. 1946).

488. See *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 861-62, 869, 871 (2017).

489. *Id.* at 871.

490. *Id.*

redemptive memory. “The way to stop discrimination on the basis of race,” she wrote in response to the Chief Justice’s 2007 epigram, “is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.”⁴⁹¹ Justice Sotomayor has been remarkably candid, even personal, in her descriptions of the lived experience of racial minorities. “For generations,” she wrote in a 2016 dissent, “black and brown parents have given their children ‘the talk’—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.”⁴⁹² The citation following this sentence united W.E.B. Du Bois, James Baldwin, and Ta-Nehisi Coates⁴⁹³—three authors who surely until then had never appeared together in the *United States Reports*. Justice Sotomayor’s words reflected a great deal of pathos. Her citation embodied more than a century of anger and pain.

This Article, by contrast, is written more in sorrow than in anger. Though I’ve tried to chronicle the Court’s mnemonic jurisprudence *sine ira et studio*, few readers will have failed to sense that I regard the enduring predominance of the parenthetical mode of memory as a disappointment. Repeatedly, the premature assertion of parenthetical memory has prevented full reckoning with the past. And the more often such reckoning is delayed, the more difficult it becomes. Many (white) Americans find the logic of redemption unpersuasive now that the Fourteenth Amendment is 150 years old and *Brown* nearly 65. And the conviction that the parenthetical has long since closed has made residual and resurgent evils all too easy to ignore. In all of this, the Court’s mnemonic jurisprudence has tracked and nurtured national trends, the lingering effects of which have been evident in the memory politics of the Age of Trump.

My approach in this Article has been largely descriptive and definitional. My aim has been to define the major frameworks of constitutional memory on the Supreme Court and to trace their elaboration and deployment across time. I have thus given short shrift to questions of context and to the political nature of nearly all mnemonic gestures, judicial and otherwise. I have left several big questions—such as whether memory drives judicial outcomes or merely justifies them *ex post* or some of both—deliberately open. I have also focused

491. *Schuetz v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting); cf. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

492. *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting).

493. See *id.* (citing JAMES BALDWIN, *THE FIRE NEXT TIME* (1963); TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* (2015); and W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* (1903)).

exclusively on two historical evils, slavery and segregation, to the exclusion of others. I have done so both because these strike me as the evils of greatest magnitude and centrality in the American constitutional experience, and because virtually all Americans do in fact regard them as evil. To the extent that readers have reason to doubt this last assertion, there remains redemptive work to be done. In any case, I hope to have established with sufficient clarity the central fact of the triumph across a century and a half of the parenthetical over the redemptive mode of memory. I close with three normative implications, one about affirmative action, one about originalism, and one about parenthetical memory more broadly.

As seen above, even when the Court's affirmative action jurisprudence has reached modestly redemptive outcomes, it has done so on the basis of stoutly parenthetical considerations. By making diversity, rather than history, the watchword of its affirmative action jurisprudence, the Court has neglected the one factor that might give conceptual coherence and moral persuasion to this explosive field. Unwittingly, perhaps, it might also have fostered some bizarre and unpalatable outcomes—such as the deployment of diversity criteria to the detriment of Asian Americans.⁴⁹⁴ I hope that by highlighting the predominance of parenthetical memory generally, this Article will accentuate the irony—and inappropriateness—of its prevalence in the context of affirmative action.

It will surely be lost on no one that some of the most influential modern paladins of parenthetical memory have been card-carrying originalists. This Article is not intended as a critique of originalism as such, but I do mean to suggest that originalism has, in practice, been insufficiently attuned to questions of memory. This is so in two respects. First, originalists on the Court have tended to look resolutely to the eighteenth-century Founding without sufficiently acknowledging the transformative impact of the Civil War and Reconstruction. To my mind, for instance, it is inconceivable that the Court could decide major federalism cases without mentioning the Civil War era.⁴⁹⁵ But as we have seen, the modern Court has done so many times. Second, originalist engagement with the Civil War era itself has been too focused on the provisions of the Reconstruction Amendments at the expense of their redemptive spirit. What

494. See generally Note, *The Harvard Plan That Failed Asian Americans*, 131 HARV. L. REV. 604 (2017) (exploring how diversity-based admissions plans, such as those at Harvard, work to the disadvantage of Asian American applicants).

495. For a critique of this tendency to ignore the Civil War and Reconstruction in federalism cases, see Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992, 2005-24 (2003).

was done or said or anticipated in the 1860s strikes me, at this late date, as less important than the expression of a general constitutional will to redeem the land from the towering evil of American history.

Parenthetical memory, of course, is congenial to originalists for obvious reasons. Most adherents of originalism find the original Constitution normatively attractive. So, with caveats, do I. Viewing the past's evils as parenthetical aberrations from an otherwise noble tradition allows originalists to preserve that view. But the parenthetical perspective, in an American context, poses problems. Many constitutions have arisen in the aftermath of historical evils, and many constitutional courts invoke the memory of those evils to underwrite their decisions. But in nearly every case, the evil in question antedates the constitution. In such settings, the constitution itself can be read as a global response to the repudiated evil—to fascism or colonialism, communism or apartheid.⁴⁹⁶ But the U.S. Constitution postdates neither slavery nor segregation. These evils grew while the Court was in session and the Constitution in force. Our constitutional tradition developed alongside these evils. In some respects, the tradition nurtured the malignant growth. On the other hand, the redemptive mode, in the American context, could be profoundly destabilizing. What are the implications—for instance, for the Court's or the Constitution's legitimacy—of viewing either or both as objects, rather than agents, of redemption? When dealing with a Constitution whose structural features bear the mark of slavery on almost every hand, where should the redemptive impulse end? The destabilizing risks are real, and even Justices whose opinions I have described as redemptive make parenthetical gestures—describing slavery, for instance, as an apostasy from the American creed, or *Plessy* as a heretical betrayal of Reconstruction's promise.

I don't mean to dismiss any of these accounts. I feel the parenthetical lure myself. Anyone who wishes to retain faith in, or practice fidelity to, the American constitutional project must believe that the evils of our history were departures from our nobler ideals and aberrations from a better tradition—even if the evils were embraced or abetted by some of the very people who first articulated those ideals and who helped launch that tradition. It is psychologically and societally desirable, moreover, to return to normalcy, to heal, and to move forward. Nietzsche spoke a partial truth when he pointed to the “boundary at which the past has to be forgotten if it is not to become the

496. See generally Kim Lane Scheppele, *Constitutional Interpretation After Regimes of Horror*, in LEGAL INSTITUTIONS AND COLLECTIVE MEMORIES 233 (Susanne Karstedt ed., 2009) (exploring how constitutions encode collective memories of oppressive regimes and how constitutional courts harness those memories to expand their powers).

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gravedigger of the present.”⁴⁹⁷ Redemptive jurisprudence, moreover, is exceptional jurisprudence, and it rests uneasily with the ordinary canons of the rule of law. It grants judges discretion that might creep dangerously into other contexts. One longs, with Justice O’Connor in *Grutter*, for the day when it won’t be necessary.

The trouble arises when that day’s arrival is declared prematurely; when the close parenthesis is announced before redemption has taken place; when complete healing is declared by those who inflicted wounds rather than by those who incurred them; when one blithely proclaims that evil is ended and paradise restored, though legions of serpents still slither through the grass. Parenthetical memory has an important place in constitutional jurisprudence, but it must always come *after* redemptive memory. In the United States, alas, it has usually come first, and always predominated in the end. And each premature proclamation of a close parenthesis has postponed the promise of redemption.

497. FRIEDRICH NIETZSCHE, ON THE USES AND DISADVANTAGES OF HISTORY FOR LIFE (1874), in *UNTIMELY MEDITATIONS* 57, 62 (Daniel Breazeale ed., R.J. Hollingdale trans., Cambridge Univ. Press 1997).