

## Dying Constitutionalism and the Fourteenth Amendment

Ernest A. Young\*

My marching orders from Dean Kearney in this year's Boden Lecture are to commemorate the sesquicentennial of the Constitution's Fourteenth Amendment, which was ratified in 1868. This ought to be a much easier task now than it would have been at the *demisesquicentennial*—halfway between 1868 and today—because I think it's fair to say that the Fourteenth Amendment largely *failed* to live up to its promise during the first half of its existence. At that halfway mark in 1943, the African-Americans who were supposed to be the Amendment's primary beneficiaries suffered under a pervasively authoritarian Jim Crow regime in the South and faced rampant discrimination and hostility in the North. The Supreme Court had begun to chip away at Jim Crow in a few isolated decisions, but they hadn't made much practical difference. Fourteenth Amendment demisesqui-centennialists—if there *were* any—would have had very little to cheer about in 1943.

We live in a very different constitutional world today, with a robust and vital Fourteenth Amendment at its center. And so it would be easy to tell you a heartwarming story about the Amendment's second act as one of the great comeback sagas in American history. But failures are often more interesting than successes. I want to focus on the Fourteenth Amendment's bad years, because I think they can tell us something important about constitutional theory.

On the surface, at least, contemporary constitutional theory is dominated by a debate between originalism,<sup>1</sup> which holds that judges should interpret the Constitution in line with the original public meaning of its text at the time that the constitutional provision in question was adopted, and living constitutionalism, which holds that constitutional meaning should evolve over time.<sup>2</sup> The Fourteenth Amendment has been a critical battleground of this debate; in particular, lawyers, scholars, and judges have disagreed about whether the Amendment's Equal Protection Clause should be interpreted to prohibit school segregation in *Brown v. Board of Education*,<sup>3</sup> even though the Amendment's

---

\* Alston & Bird Professor, Duke Law School. This essay is a lightly-edited version of the Robert F. Boden Lecture presented at Marquette Law School on Sept. 20, 2018. I am grateful to Dean Joseph Kearney for his invitation and wonderful hospitality during my visit to Milwaukee, to my friend David Strauss for his commentary, and to Joseph Blocher, Erin Blondel, James Boyle, Guy Charles, Thavolia Glymph, Craig Goldblatt, Sean Griffith, Jed Purdy, and Richard Squire for comments on the manuscript.

<sup>1</sup> See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989).

<sup>2</sup> There is no canonical statement of the living constitutionalist position, and—as will be evident—it comes in a number of quite different flavors. For an influential, albeit very general, articulation of the living constitutionalist view, see William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 S. Tex. L. Rev. 433, 438 (1986) (“[T]he genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.”).

<sup>3</sup> 347 U.S. 483 (1954).

Framers probably did not envision this particular reform,<sup>4</sup> or whether the Amendment's due process clause can be stretched to include rights of privacy and reproductive freedom that would have surprised the generation that ratified the Amendment.<sup>5</sup> In a nutshell, these debates posit that living constitutionalism would allow courts to read the moral progress of the last 50 years or so into the Fourteenth Amendment and use that amendment as a vehicle for further reform.

I believe that the Fourteenth Amendment's bad, early years put a different spin on this debate. Living constitutionalists identify a number of different mechanisms or modalities by which judges should assess the extent to which constitutional meaning has "evolved" over time. These include broad changes in public opinion,<sup>6</sup> electoral or legislative victories by proponents of a new constitutional interpretation,<sup>7</sup> the achievements of social movements,<sup>8</sup> and the common-law-style development of constitutional meaning through decisions of the judges themselves.<sup>9</sup> What I am here to tell you is that in the Fourteenth Amendment's first 75 years, *every one* of these modalities strongly supported the compromise or even abandonment of the amendment's core purpose of freedom and equality for black Americans. Strong social movements supported the end of Reconstruction and the reestablishment of white supremacy in the South, as well as the reunion of North and South predicated on a reinterpretation of the Civil War's meaning. These movements influenced both major political parties, affected electoral outcomes, and legislated their interpretation of constitutional meaning into law. And the courts responded by interpreting the Reconstruction Amendments narrowly and redirecting their concern with racial equality into other channels as a limitation on government regulation of the market.

That is why my title for this lecture is "Dying Constitutionalism." Justice Scalia used to insist that the Constitution was "dead" in a quite different sense: He meant that constitutional meaning was static, and that the whole point of having a constitution was to lock in particular rights and institutional arrangements and make them impossible to change even if we might want to later on.<sup>10</sup> Constitutionalism is about tying yourself to the

---

<sup>4</sup> Compare, e.g., Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995), with Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1 (1955).

<sup>5</sup> Compare, e.g., Thomas C. Grey, *Do We Have An Unwritten Constitution?* 27 Stan. L. Rev. 703 (1975), with Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1 (1971).

<sup>6</sup> See, e.g., Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (2009).

<sup>7</sup> See, e.g., 1 Bruce Ackerman, *We the People: Foundations* (1993).

<sup>8</sup> See, e.g., Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 Suffolk U. L. Rev. 27 (2005); Ilya Somin, *The Tea Party Movement and Popular Constitutionalism*, 105 Nw. U. L. Rev. 300 (2011).

<sup>9</sup> See, e.g., David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877 (1996); Ernest A. Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. Rev. 694 (1994).

<sup>10</sup> See, e.g., Scalia, *supra* note 1, at 862.

mast; you don't want a loosey-goosey constitution that you can slip out of and throw yourself overboard to meet the pretty Sirens.

But this static model may not fit something like the Fourteenth Amendment very well. That amendment was adopted by men who were themselves caught in an unstable tension between their own inevitable racism and the political principles of the Declaration of Independence, which told them that God had created all men equal. It makes sense to view the amendment as aspirational or redemptive, aiming at a state of affairs that had not yet been achieved.<sup>11</sup> And so rather than protecting existing values against future backsliding, the Amendment is importantly a source of forward pressure.

This makes the Fourteenth a favorite amendment for living constitutionalists. But progress isn't inevitable, even when a constitutional marker has been laid down. Living things don't always "grow," "mature," and "flower"—they sometimes "mutate," "wither," and "decay." It's not hard to think of constitutional provisions that have "evolved" right out of the Constitution—the Contracts Clause in most of its applications, for example, or the Fourteenth Amendment's own protection of national "privileges and immunities." These clauses have been victims of "dying constitutionalism."

This potential for constitutional corruption and decay poses a serious problem for any organic model of constitutionalism. But while I certainly don't come to praise living constitutionalism, I'm not here to bury it either. At the end of the day, despite it all, I consider myself a living constitutionalist, not an originalist. And as I will explain, even many originalists agree that some sort of evolutionary approach is inevitable, especially for open-ended and aspirational provisions like the Fourteenth Amendment. It is essential, however, that living constitutionalists understand the downside risks that come with any evolutionary model of constitutionalism. Living constitutionalism needs a cultural shift, based on a sense of tragedy to temper its progressive optimism. Progress can and does happen, but it is by no means inevitable, and sometimes constitutional law goes to hell in a handbasket. That is what happened in the Fourteenth Amendment's first 75 years.

## I. THE FOURTEENTH AMENDMENT'S LOST YEARS

The Fourteenth Amendment's central aim was to confer on black Americans "equality before the law, overseen by the national government."<sup>12</sup> Equality before the law did not exist in 1868, either in the South *or* in the North. The Fourteenth Amendment was a promise to *create* that equality.<sup>13</sup> Its Framers understood that one could not simply write out new rights on paper and expect them to be respected; that is why the Fourteenth Amendment, more than any other Amendment in the Constitution, is centrally concerned

---

<sup>11</sup> See, e.g., Jamal Greene, *Fourteenth Amendment Originalism*, 71 Md. L. Rev. 978, 981 (2012) (observing that "the [Fourteenth] Amendment announces majestic principles that we must constantly strive, prospectively, to realize"). Some constitutionalists believe that *all* constitutional law has this character. See, e.g., Jack M. Balkin, *Constitutional Redemption: Political Faith in an Unjust World* 25 (asserting that "our system of government has a point, a trajectory: It works toward the realization in history of the promises made in the Declaration of Independence and the Constitution").

<sup>12</sup> Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, at 256-57 (1988).

<sup>13</sup> See, e.g., Brennan, *supra* note 2, at 438.

with institutional mechanisms for its own implementation. Section Two created strong electoral incentives to let black people vote, with the hope that the franchise would in turn allow them to protect their own interests politically. Section Three aimed to destroy the existing political class in the South that had held black people down for so long by disqualifying ex-Confederates from office. And—most important—Section Five empowered Congress to implement the Amendment’s provisions by “appropriate legislation.” Congress thus gave itself a primary voice in fleshing out the meaning of Section One’s open-ended phrases.

The Fourteenth Amendment was, in Eric Foner’s words, “an effort by Republicans to constitutionalize the ‘fruits’ of the War.”<sup>14</sup> The War had begun as a war for Union—not emancipation, and certainly not equality. But by 1863, Lincoln’s Emancipation Proclamation made official what was already generally acknowledged—that is, that *freedom* had become a Union war aim. And although there is no “equality proclamation” to go with emancipation, historians argue that equality had become a third Union war aim by Appomattox.<sup>15</sup> Once the guns fell silent, Congress set about following through on that aim through a series of Civil Rights Acts and three constitutional amendments. C. Vann Woodward concludes that “[s]o far as it was humanly possible to do so by statute and constitutional amendment, America would seem to have been firmly committed to the principle of equality.”<sup>16</sup>

“And yet,” Professor Woodward says, “[w]e know that within a very short time after these imposing commitments were made they were broken. America reneged, shrugged off the obligation, and all but forgot about it for nearly a century.”<sup>17</sup> White Southerners fought Reconstruction with fraud, deceit, and terroristic violence. Northern Democrats largely opposed black equality, and Republicans mostly gave up on it after 1876. Woodward was “driven by the evidence to the conclusion that the radicals committed the country to a guarantee of equality that popular convictions were not prepared to sustain, that legal commitments overreached moral persuasion.”<sup>18</sup>

In the beginning, though, there was progress even though “Reconstruction delivered far less to blacks than they hoped.”<sup>19</sup> In particular, the national government disappointed hopes that it would confiscate slaveowners’ property and redistribute it to the Freedmen.<sup>20</sup> Nonetheless, with the Fifteenth Amendment in the books and the Union Army

---

<sup>14</sup> Foner, *supra* note 12, at 251.

<sup>15</sup> See C. Vann Woodward, *Equality: The Deferred Commitment*, in *The Burden of Southern History* 69, 75 (3rd ed. 1993).

<sup>16</sup> Woodward, *Equality*, *supra* note 15, at 78; see also David W. Blight, *Race and Reunion: The Civil War in American Memory* 54 (2001) (“During the two crucial years that the radicals held sway, they did seek to make the nation paramount over the states, and at least to root the idea of racial equality in the American imagination.”).

<sup>17</sup> *Id.* at 78-79.

<sup>18</sup> *Id.* at 83.

<sup>19</sup> Michael J. Klarman, *Unfinished Business: Racial Equality in American History* 59 (2007).

<sup>20</sup> *Id.* at 59-60.

occupying the defeated Southern states, black people exercised real political power in the South.

But enthusiasm for Reconstruction faded quickly, for both good and bad reasons. The good reason was that Americans have always been profoundly uncomfortable with military rule, and even Republicans worried about the incursions on civil liberties that that rule often entailed. The bad reason is that white Northerners were simply never sufficiently committed to equality for black people to stay the course of Reconstruction in the teeth of Southern violence and recalcitrance. And so one by one, southern state governments slipped back into the hands of white supremacist “Redeemers.”

An illustrative battle in this long war occurred over Mississippi’s election in 1875.<sup>21</sup> White Democrats had been forming (and arming) “White Men’s Clubs” as a vehicle for restoring white supremacy. When Democrats swept the 1874 congressional elections nationwide, it was widely interpreted as a repudiation of Reconstruction. Mississippi’s White Men’s Clubs interpreted it as a green light and vowed to “carry the election [of 1875] peaceably if we can, forcibly if we must.”<sup>22</sup> On reflection, they went straight for “forcibly,” producing “dead books” containing the names of black Republicans, disrupting Republican meetings and running off Republican politicians, and assaulting or murdering black leaders and burning black homes.

As the death toll mounted into the dozens, Republican Governor Adelbert Ames asked President Grant for federal troops. Grant responded that the public was “tired out with these annual autumnal outbreaks in the South” and refused to intervene unless Mississippi Republicans first raised their own militia.<sup>23</sup> Well-armed whites were spoiling for exactly that sort of fight and threatened to wipe a black militia “from the face of the earth”; Republicans declined in order to avoid igniting a race war.<sup>24</sup> On election eve armed white riders drove Freedpeople from their homes and threatened to murder them if they voted.<sup>25</sup> It worked. The overwhelmingly black Yazoo County, for example, returned only seven Republican votes against over 4000 Democratic ones. Democrats took control of the legislature, removed the lieutenant governor, and impeached the Republican governor. He fled the state.<sup>26</sup> Mississippi had been redeemed.

A year later, the nation deadlocked over the presidential race between Democrat Samuel Tilden and Republican Rutherford B. Hayes. The election came down to three not-yet-redeemed southern states—Florida, Louisiana, and South Carolina—in which rampant fraud and violence had marred the voting. Republican state election officials decreed Hayes the winner, but Democrats “cried fraud and threatened to march on Washington and

---

<sup>21</sup> See generally Foner, *supra* note 12, at 558-63; Richard White, *The Republic for Which It Stands: The United States During Reconstruction and the Gilded Age, 1865-1896*, at 305-06 (2017); Klarman, *Unfinished Business*, *supra* note 19, at 64.

<sup>22</sup> Quoted in Klarman, *Unfinished Business*, *supra* note 19, at 64.

<sup>23</sup> See Foner, *supra* note 12, at 560-61.

<sup>24</sup> See White, *supra* note 21, at 305-06.

<sup>25</sup> See Foner, *supra* note 12, at 561.

<sup>26</sup> See White, *supra* note 21, at 306; Foner, *supra* note 12, at 561-62.

reignite the Civil War.”<sup>27</sup> A special commission including several Supreme Court justices failed to transcend partisanship and resolve the dispute. But Republicans struck a deal with Southern democrats, who agreed to support Hayes for president in exchange for the withdrawal of troops from the South.<sup>28</sup> The remaining Republican governments in the South fell within weeks of Hayes taking office. One Louisiana freedman remarked that “[t]he whole South—every state in the South—had got into the hands of the very men that held us as slaves.”<sup>29</sup>

In historian Eric Foner’s judgment, the compromise of 1877 “marked a decisive retreat from the idea, born during the Civil War, of a powerful national state protecting the fundamental rights of American citizens.”<sup>30</sup> But blacks’ Reconstruction-era gains did not evaporate overnight. But by 1890 race relations in the South “had begun what was to be a long downward spiral.”<sup>31</sup> Between 1895 and 1900, lynchings of black Americans averaged 101 per year.<sup>32</sup> Although southern states generally avoided formally disenfranchising blacks, they adopted poll taxes and literacy tests which largely prevented them from voting.<sup>33</sup> And when this didn’t do the trick, there was always mayhem.

In the 1890s, for example, a rare alliance of Republicans and Populists managed to take over the state government in North Carolina, but Democrats resolved to take it back in 1898 under the banner of white supremacy. In Wilmington, a Democratic party leader told his followers that if a black man tried to vote, “kill him, shoot him down in his tracks.”<sup>34</sup> The day after the Democrats prevailed in the general election, a large white mob burned down the Wilmington offices of a black newspaper. The mob intimidated white Republican officials into resigning their offices and fleeing the city, then rampaged through black neighborhoods—murdering a dozen black residents and driving nearly 1,400 from the city.<sup>35</sup>

Episodes like “Bloody Wilmington” persuaded many Progressives that legal segregation and disfranchisement were humane alternatives to violence.<sup>36</sup> That—and a fair dose of racism—may explain why Progressives did so little to challenge segregation, and sometimes acted to further it. Restrictions on voting, administered by white officials exercising broad discretion, “virtually eliminated black political participation in the South”

---

<sup>27</sup> Klarman, *Unfinished Business*, *supra* note 19, at 66; *see generally* Foner, *supra* note 12, at ; White, *supra* note 21, at \_\_\_; C. Vann Woodward, *Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction* (1966).

<sup>28</sup> *See* Klarman, *Unfinished Business*, *supra* note 19, at 66. The full story is more complicated, *see* Woodward, *Reunion & Reaction*, *supra* note 27, but this thumbnail sketch will do for present purposes.

<sup>29</sup> Louisianian Henry Adams, quoted in Foner, *supra* note 12, at 582.

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

<sup>31</sup> Klarman, *Jim Crow to Civil Rights*, *supra* note \_\_\_, at 10.

<sup>32</sup> *Id.* at 3.

<sup>33</sup> *See, e.g.*, C. Vann Woodward, *The Strange Career of Jim Crow* 83-86 (3rd rev. ed. 1974).

<sup>34</sup> Quoted in Klarman, *Unfinished Business*, *supra* note \_\_\_, at 75.

<sup>35</sup> *See id.* at 75-76; Milton Ready, *The Tar Heel State: A History of North Carolina* 304-05 (2005).

<sup>36</sup> Ready, *supra* note \_\_\_, at 305.

early in the twentieth century's first decade.<sup>37</sup> Black voter registration in Louisiana fell from 95.6 percent prior to an 1896 registration law to 1.1 percent in 1904; estimated black voter turnout in Mississippi fell from 29 percent in 1888 to 2 percent in 1892 to 0 percent in 1895.<sup>38</sup>

Formal segregation, which had not been the rule in the decades immediately after reconstruction, began to increase about the same time. The first wave of railroad segregation laws, beginning in Florida, passed in the late 1880s and early 1890s; much of the remainder of the South followed beginning in 1898.<sup>39</sup> These laws may have reflected the increased political power of lower class whites, who valued segregation for boosting their own precarious status; it also didn't help that in 1883 the Supreme Court struck down the 1875 Civil Rights Act, which would have preempted state segregation laws.<sup>40</sup>

It's important to understand that the deterioration in conditions for black Americans was not simply a Southern phenomenon. This is true in two senses. First, "[w]ithout northern acquiescence, southern racial practices could not have become so oppressive."<sup>41</sup> Northern concern for southern blacks declined for a variety of reasons. The early stirrings of the Great Migration sent increasing numbers of blacks north around the turn of the century, leading to "discrimination in public accommodations, occasional efforts to segregate public schools, increased lynchings, and deteriorating racial attitudes" there.<sup>42</sup> The influx of millions of southern and eastern Europeans, beginning in the 1880s and accelerating after 1900, made the situation worse by exacerbating concerns about racial purity in the North that naturally led some Northerners, especially in New England, to sympathize with Southern racial attitudes.<sup>43</sup> That sympathy was further compounded by national imperial dilemmas arising from the Spanish-American War in 1898 and consequent acquisition of Puerto Rico and the Philippines—territories inhabited by peoples that both Northerners and Southerners tended to consider inferior.<sup>44</sup> Finally, a strong desire

---

<sup>37</sup> Klarman, *Unfinished Business*, *supra* note \_\_, at 77.

<sup>38</sup> *See id.*

<sup>39</sup> *See* Klarman, *Jim Crow to Civil Rights*, *supra* note \_\_, at 18.

<sup>40</sup> *See id.*

<sup>41</sup> Klarman, *Jim Crow to Civil Rights*, *supra* note \_\_, at 12; *see also* Woodward, *Strange Career of Jim Crow*, *supra* note \_\_, at 69 ("The South's adoption of extreme racism was due not so much to a conversion as it was to a relaxation of the opposition.").

<sup>42</sup> Klarman, *Jim Crow to Civil Rights*, *supra* note \_\_, at 12. The core years of the "Great Migration" would not begin until World War I, *see generally* Isabel Wilkerson, *The Warmth of Other Suns: The Epic Story of America's Great Migration* 8-9 (2010), but movement was already picking up in the 1890s and 1900s. *See* Klarman, *Jim Crow to Civil Rights*, *supra* note \_\_, at 12 (noting that black migrants numbered "only 49,000 in the 1870s and 62,000 in the 1880s, [but] increased to 132,000 and 143,000 in the following two decades"). Eventually, "some six million black southerners" traveled North and West out of the South between 1915 and 1970. Wilkerson, *supra*, at 9.

<sup>43</sup> *See* Klarman, *Jim Crow to Civil Rights*, *supra* note \_\_, at 12.

<sup>44</sup> *See id.* at 12-13; *see also* Woodward, *Strange Career of Jim Crow*, *supra* note \_\_, at 72 ("As American shouldered the White Man's Burden, she took up at the same time many Southern attitudes on the subject of race."); Blight, *supra* note \_\_, at 347 ("Infused with imperial language, nationalism, and racial supremacy, the Spanish-American War provided Americans, North and South, with new ways to cement their reunion.").

in both North and South for national reconciliation encouraged the sections to sweep their differences over race under the rug.<sup>45</sup>

The second point is that life for black people was getting worse in the North as well. As the Great Migration of Southern blacks to the North got underway in earnest at the beginning of the twentieth century, “northern discrimination and segregation proliferated,” and “[m]any northern public schools became segregated for the first time in decades, even in former abolitionist enclaves such as Boston and Ohio’s Western Reserve.”<sup>46</sup> Newly-arrived in the North, blacks found that jobs that traditionally would have been available to them were going to European immigrants instead; worse, they faced hostility from labor unions, which generally excluded them and feared their use by employers as strike-breakers.<sup>47</sup>

And the North had its own anti-black violence. In Chicago in 1919, for example, a swimming altercation resulting in the death of a black teenager touched off a rampage of white gangs through black neighborhoods; 38 people (23 blacks and 15 whites) were killed, and over 500 others were injured before the state militia subdued the combatants.<sup>48</sup> As Isabel Wilkerson put it, “riots would become to the North what lynchings were to the South . . . . Nearly every big northern city experienced one or more during the twentieth century.”<sup>49</sup>

In both North and South, then, social practices became more oppressive after the end of Reconstruction, and those practices were increasingly given legal sanction by state and local officials. This new state of affairs, moreover, was increasingly reflected in federal statutory and constitutional law. As Southern governments moved to disfranchise black voters, Congress failed to invoke Section 2 of the Fourteenth Amendment, which provided for a reduction in the congressional representation of states excluding male voters on the basis of race.<sup>50</sup> Section 2 lay dormant even though proponents of the Amendment such as Thaddeus Stevens insisted that it was “the most important [section] in the article,” because it would “either compel the states to grant universal suffrage or so . . . shear them of their power as to keep them forever in a hopeless minority in the national Government.”<sup>51</sup> Democrats also repealed much of the federal voting rights legislation enacted during the 1870s to enforce the Fifteenth Amendment when they attained control of both Congress

---

<sup>45</sup> See Klarman, *Jim Crow to Civil Rights*, *supra* note \_\_, at 13; see generally Blight, *supra* note \_\_.

<sup>46</sup> See Klarman, *Jim Crow to Civil Rights*, *supra* note \_\_, at 63.

<sup>47</sup> See *id.* at 64.

<sup>48</sup> Wilkerson, *supra* note 42, at 271-73. Over twenty northern cities had race riots in 1919. See Klarman, *Jim Crow to Civil Rights*, *supra* note \_\_, at 64.

<sup>49</sup> Wilkerson, *supra* note 42, at 273.

<sup>50</sup> See Klarman, *Jim Crow to Civil Rights*, *supra* note \_\_, at 38.

<sup>51</sup> Quoted in Garrett Epps, *Democracy Reborn: The Fourteenth Amendment and the Fight for Equal Rights in Post-Civil War America* 226 (2006).



and the Presidency in 1893-1894; Republicans made no effort to reenact these measures when they regained control in 1897.<sup>52</sup>

And of course the Supreme Court significantly affected both the statutory and constitutional landscape by striking down the 1875 Civil Rights Act's prohibition of discrimination in public accommodations in the *Civil Rights Cases*<sup>53</sup> and upholding state segregation laws in *Plessy v. Ferguson*.<sup>54</sup> There were occasional victories: Most prominently, *Strauder v. West Virginia*<sup>55</sup> struck down a state law limiting jury service to whites and offered a ringing affirmation that the Fourteenth Amendment "was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons."<sup>56</sup> "What is this," Justice Strong's majority opinion asked, "but declaring . . . that all persons, whether colored or white, shall stand equal before the laws of the States, and in regard to the colored race . . . that no discrimination shall be made against them by law because of their color?"<sup>57</sup>

*Strauder*'s holding seems obvious today, but there were plausible arguments the other way.<sup>58</sup> The Court's holding is thus all the more impressive as a reaffirmation of the Fourteenth Amendment's commitment to equality. But practically speaking, "*Strauder*'s holding was of limited significance."<sup>59</sup> Few states formally barred blacks from juries, and nothing in *Strauder* foreclosed exclusion based on criteria such as not being on the list of registered voters. Hence, "[a]s whites suppressed black voting, blacks disappeared from juries."<sup>60</sup> Moreover, many states excluded blacks from juries by imposing discretionary criteria administered by white supremacist officials. Although the Supreme Court held that such executive discrimination was actionable, subsequent decisions made such a case

---

<sup>52</sup> See Klarman, *Jim Crow to Civil Rights*, *supra* note \_\_, at 38. Republicans' fading interest in black voting rights may, at least in part, have been because "[t]he electoral realignment of the mid-1890s rendered Republicans less dependent on, and thus less motivated to protect, southern black voters." *Id.*

<sup>53</sup> *United States v. Stanley*, 109 U.S. 3 (1883).

<sup>54</sup> 163 U.S. 537 (1896).

<sup>55</sup> 100 U.S. 303 (1880).

<sup>56</sup> *Id.* at 306.

<sup>57</sup> *Id.* at 307.

<sup>58</sup> See David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888*, at 384-85 (1985). In particular, considerable evidence suggested that the Fourteenth Amendment protected "civil" but not "political" rights, and jury service fell in the latter basket. *See id.* The Court avoided this problem by focusing on the rights of the defendant, not the juror, but all defendants were arguably treated in the same way by the law. *See id.* These counter-arguments may not strike contemporary observers as compelling, but they are similar to arguments that the Court found persuasive in other cases. *See, e.g.,* *Pace v. Alabama*, 106 U.S. 583 (1883) (upholding a statute imposing more severe penalties for adultery or fornication if the participants were of different races, on the ground that it treated black and white defendants alike).

<sup>59</sup> Klarman, *Jim Crow to Civil Rights*, *supra* note \_\_, at 41.

<sup>60</sup> *Id.* at 39.

nearly impossible to prove.<sup>61</sup> Even civil rights victories like *Strauder* thus failed to impede the retrenchment of racial oppression in the Fourteenth Amendment's early decades.<sup>62</sup>

Let's be clear: The failure of the Fourteenth Amendment was not simply a failure to progress far enough or fast enough. That sort of failure would still be consistent with a Whig history of ineluctable progress: even if we are frustrated at the slow pace of change, it's still always onward and upward. But the arc of the moral universe does not always bend toward justice—sometimes things get a little better, then take a turn for the worse.<sup>63</sup> Hence Professor Woodward concluded that “racial segregation in the South in the rigid and universal form it had taken by 1954 did not appear with the end of slavery, but toward the end of the century and later.”<sup>64</sup> Lynchings and other forms of violence against blacks plainly got worse toward the end of the nineteenth century, and they extended into the North as blacks migrated there after 1900. And national authorities' willingness to intervene on blacks' behalf peaked during Reconstruction and dwindled to little or nothing after 1876. W.E.B. DuBois summed it all up in what has to be one of the most heartbreaking lines in American history: “[T]he slave went free; stood a brief moment in the sun; then moved back again toward slavery.”<sup>65</sup>

---

<sup>61</sup> See *Ex parte Virginia*, 100 U.S. 339 (1880) (holding that the Equal Protection Clause forbade judicial and executive officers from excluding black jurors); *Neal v. Delaware*, 103 U.S. 370, 397 (1881) (holding that proof of a pattern of all-white juries “presented a *prima facie* case” of unconstitutional discrimination); but see Klarman, *Jim Crow to Civil Rights*, *supra* note \_\_, at 42 (noting that subsequent cases watered down *Neal* and deferred to state court findings on discrimination, and that in any event the absence of blacks from voter rolls “largely nullified *Strauder*”).

<sup>62</sup> See *id.* at 40 (“For the first three decades of the twentieth century, essentially no blacks sat on southern juries.”).

<sup>63</sup> President Barack Obama re-popularized Martin Luther King, Jr.'s assertion that “the arc of the moral universe is long, but it bends toward justice,” which was in turn a quotation from an 1853 sermon by Unitarian minister Theodore Parker. In context, neither Obama, King, nor Parker seem to have intended the phrase to mean that history is predetermined or that progress is inevitable. See, e.g., Mychal Denzel Smith, *The Truth About ‘The Arc of the Moral Universe,’* HuffPost, Jan. 18, 2018, at [https://www.huffpost.com/entry/opinion-smith-obama-king\\_us\\_5a5903e0e4b04f3c55a252a4](https://www.huffpost.com/entry/opinion-smith-obama-king_us_5a5903e0e4b04f3c55a252a4); Matt Lewis, *Obama Loves Martin Luther King’s Great Quote—But He Uses It Incorrectly*, Daily Beast, Jan. 16, 2017, at <https://www.thedailybeast.com/obama-loves-martin-luther-kings-great-quote-but-he-uses-it-incorrectly>; Barack Obama, *A New Era of Service Across America*, Time, Mar. 19, 2009, at <http://content.time.com/time/magazine/article/0,9171,1886571,00.html>.

<sup>64</sup> C. Vann Woodward, *The Strange Career of a Historical Controversy*, in *Thinking Back: The Perils of Writing History* 82-83 (1986); see also Jackson Lears, *Rebirth of a Nation: The Making of Modern America, 1877-1920*, at 93 (“[E]ven after Reconstruction, as white Democrats returned to power, race relations remained fluid among the folk. By the 1890s, the fluidity was gone. Lynching was only the most brutal and sensational example of a concerted white effort to reassert absolute dominance by drawing the sharpest possible boundaries between the races.”).

<sup>65</sup> Quoted in Foner, *supra* note 12, at 602. There is an historical debate about Professor Woodward's claim that segregation did not characterize the immediate postwar South. See generally Howard N. Rabinowitz, *More than the Woodward Thesis: Assessing The Strange Career of Jim Crow*, 75 J. Am. Hist. 842 (1988). The answer seems to be that things were hardly great for black people prior to Jim Crow, but that there was nonetheless a significant hardening of *segregation* around the turn of the twentieth century. But in two respects that are more relevant for my thesis than for Woodward's—violence in the South, and Northern willingness to intervene—the evidence is less equivocal. Woodward's is an argument about changes in policies adopted by Southern governments over time; my concern is with the understanding and efficacy of

All this went on for some time. Others have charted the Fourteenth Amendment's comeback in the second half of the twentieth century, and while it would be interesting to pin down the key turning points and their causes, that is not my subject. My question is what we can learn from the Fourteenth Amendment's initial and lasting failure. The first step, I submit, is to realize that the Amendment's lost years can be understood not simply as a *failure* of constitutionalism, but also as a *form* of constitutionalism. The southern Redeemers who recaptured state governments and implemented Jim Crow; the northern Democrats who sought to minimize the results of the War and repealed Reconstruction measures when they had the chance; the liberal and moderate Republicans who withdrew federal troops from the South and redirected their agenda away from civil rights; and the judges who narrowly construed the Reconstruction Amendments' terms—all these groups had their own constitutional visions, and their words and actions all contributed to the shaping of the Fourteenth Amendment's meaning over time.

This is living constitutionalism in action. Different theorists of living constitutionalism stress different mechanisms by which changes over time get translated into constitutional meaning. But as I hope to demonstrate in the next section, the same mechanisms that living constitutionalists rely on to make constitutional meaning better and better over time—social movements, movements of public opinion, electoral and legislative politics, common law development—all took the Fourteenth Amendment further and further from its noble aspirations during the first 75 years of its life.

## II. THE LIVING CONSTITUTIONALIST CASE FOR RETRENCHED RACIAL OPPRESSION

The resurgence of white supremacy after Reconstruction took place across a wide range of social and political contexts—for example, segregation of public accommodations, schools, transport, and residential neighborhoods; voting and jury service; peonage and other forms of labor relations; and the operation of the criminal justice system. Each of these contexts raised different legal issues, implicated the three Reconstruction amendments to varying degrees, and was resolved by courts and government officials with varying degrees of plausibility. To oversimplify greatly, courts tended to strike down formal or particularly blatant violations of the amendments,<sup>66</sup> and they sometimes went further when racial equality intersected with key elements of the Court's agenda in other areas, such as the protection of property rights.<sup>67</sup> But courts narrowly construed certain

---

the Fourteenth Amendment as a guarantee of black equality before the law. The declining ability of federal officials to protect black rights and lives, and those officials' increasing disinclination to try, is surely central to the latter issue.

<sup>66</sup> See, e.g., *Strauder v. West Virginia*, 100 U.S. 303 (1880) (striking down formal ban on black jury service); *Guinn v. Oklahoma*, 238 U.S. 347 (1915) (striking down grandfather clause exempting whites from literacy test for voting).

<sup>67</sup> See *Buchanan v. Warley*, 245 U.S. 60 (1917) (striking down a residential segregation ordinance on due process grounds).

provisions,<sup>68</sup> often ignored discriminatory motives for facially neutral laws,<sup>69</sup> and tended to permit discriminatory administration of the law to do what formal discrimination could not.<sup>70</sup> Other government actors—such as Congress and the President—likewise largely failed to read the Fourteenth Amendment as obliging them to intervene on behalf of black Americans.

The evolving social and political context in which the Court and other officials construed the Reconstruction Amendments could have affected the Court’s interpretation whether or not Justices of the day considered themselves to *be* living constitutionalists.

A provision like the Fourteenth Amendment, which purports not to entrench an existing set of rights or institutional arrangements but rather to force reform to achieve some desired future state, is particularly prone to indeterminacy.<sup>71</sup> Different proponents and supporters, after all, may have quite different visions of that future state, and they may or may not express those visions with any degree of precision in the text. To the extent that a provision’s original meaning is uncertain, the evolving social and political context is likely to press courts and other interpreters—consciously or unconsciously—in the direction of one resolution or another.<sup>72</sup> The influence of context can be conscious or unconscious, and when it is conscious judges may be candid or not. In any event, my question is whether standard living constitutionalist arguments could have provided plausible reasons to interpret the Fourteenth Amendment the way that courts interpreted it in this period. If they could have, then we have to grapple with the risk that living constitutionalism can be a recipe for constitutional failure.

To be clear, my argument is not that this problem of “dying constitutionalism” proves we should reject evolutionary or organic theories of constitutional meaning in favor of some other methodology. I doubt that a better methodology is out there. My point is simply that there is no necessary connection between living constitutionalism and moral progress. Nor do I think we are likely to find a way to build in such a guarantee. But I do suggest that we will get better results out of living constitutionalism if we spend more time worrying about the downside risks.

To illustrate those risks, it will help to be more specific about the mechanisms of living constitutionalism. Like constitutional interpretation generally, living constitutionalism has its modalities—that is, its methods of justifying particular propositions of constitutional meaning.<sup>73</sup> From this perspective, constitutional meaning is

---

<sup>68</sup> See, e.g., *Pace v. Alabama*, 106 U.S. 583 (1883) (construing statute imposing heavier penalties for adultery and fornication on interracial couples not to deny equal protection).

<sup>69</sup> See, e.g., *Williams v. Mississippi*, 170 U.S. 213 (1898) (rejecting claim that legislature had racial motive for imposing voter registration requirements).

<sup>70</sup> See, e.g., *Gibson v. Mississippi*, 162 U.S. 565 (1896) (rejecting claim of unfair administration of facially neutral juror qualification rule).

<sup>71</sup> See Greene, *supra* note \_\_\_, at 981.

<sup>72</sup> See Klarman, *Jim Crow to Civil Rights*, *supra* note \_\_\_, at 5.

<sup>73</sup> See Philip Bobbitt, *Constitutional Interpretation* 12 (1991) (defining “constitutional modalities” as “the way in which legal propositions are characterized as true from a constitutional point of view”). The modalities of living constitutionalism I describe here could probably be grouped under Bobbitt’s headings of “historical,”

at least partially a function of evolving public opinion or consensus,<sup>74</sup> the more specific activities of social movements,<sup>75</sup> political events and actions such as elections,<sup>76</sup> landmark legislation,<sup>77</sup> or established official practices,<sup>78</sup> and the evolution of doctrine through common-law processes of judicial reasoning.<sup>79</sup> Different scholars emphasize different modalities, but I want to cast my net broadly. The modalities I have just listed are generally the ones identified as means by which constitutional meaning grows, evolves, and generally becomes more just. My point is that they can also be means by which it decays, mutates, and dies.

Start with public opinion. We lack polling data for the nineteenth and early twentieth century, but there is little question that the proponents of the Reconstruction Amendments and of the civil rights laws passed pursuant to them walked a tightrope between their commitment to some measure of black equality and the residual racism and resistance to change of even the northern electorate.<sup>80</sup> That electorate had a far more limited conception of equality than would be acceptable today; perhaps more important, it was weary of conflict after four years of war in which 360,000 Union soldiers died. To the extent that the general views of the American public exercise a gravitational pull on constitutional interpretation by the Court,<sup>81</sup> Northern weariness and reluctance, as well as the South's violent recalcitrance, were bound to impede realization of the Amendments' redemptive ideals.<sup>82</sup>

The Reconstruction Amendments were especially dependent on the acts of the political branches. The open-ended text of the Fourteenth Amendment's first section

---

“doctrinal,” “ethical,” and “prudential” argument. *See id.* at 12-13. But it helps to be more specific about the spin that living constitutionalism puts on these categories.

<sup>74</sup> *See, e.g.,* Richard A. Primus, *Public Consensus as Constitutional Authority*, 78 *Geo. Wash. L. Rev.* 1207 (2010).

<sup>75</sup> *See, e.g.,* Balkin, *supra* note \_\_; Reva B. Siegel, *Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the de facto ERA*, 94 *Cal. L. Rev.* 1323 (2006).

<sup>76</sup> *See* Ackerman, *Foundations*, *supra* note 7.

<sup>77</sup> *See* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 *Duke L. J.* 1215 (2001).

<sup>78</sup> *See, e.g.,* Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 *Sup. Ct. Rev.* 1 (2015).

<sup>79</sup> *See, e.g.,* Strauss, *Living Constitution*, *supra* note \_\_, at \_\_.

<sup>80</sup> *See, e.g.,* David Donald, *The Politics of Reconstruction, 1863-1867* (1984); Balkin, *Constitutional Redemption*, *supra* note \_\_, at 144-47.

<sup>81</sup> *See, e.g.,* Friedman, *supra* note \_\_.

<sup>82</sup> Moreover, the circumstances of the Reconstruction Amendments were unique, as each had been ratified without the conventional consent of the states upon which their provisions would operate most directly. *See, e.g.,* 2 Bruce Ackerman, *We the People: Transformations* \_\_ (2000). Whatever that means for the legitimacy of the Amendments themselves—and I take that to be a basically moot point—it poses a problem in terms of living constitutionalism. Because of the supermajority requirements for ratification, a constitutional amendment typically represents a broad consensus at least at the moment it is adopted. But the circumstances of Reconstruction, under which much of the country ratified the Reconstruction Amendments under duress, made ratification possible without that kind of broad support.

needed more detailed legislation to specify and flesh out its meaning. Consequently, the three Reconstruction Amendments were the first to include their own enumerated powers provisions conferring on Congress the authority to implement their provisions by appropriate legislation. The Civil Rights Act of 1866, for example, has always played a prominent role in construing the Fourteenth Amendment's meaning. Statutes like that are important to living constitutionalists who stress the role of political institutions in shaping evolving constitutional meaning.

But constitutional theories according a prominent role to political branch "constructions" of constitutional meaning<sup>83</sup> or the operation of "constitutional politics" in times of foundational political ferment<sup>84</sup> must take account of what happened in the 1870s, 1880s, and 1890s—not just the 1860s. The election of 1876, for example, bears many indicia of Bruce Ackerman's "constitutional moments"; it had the highest participation rate in American history (at least among white voters) and fundamental issues about Reconstruction and the propriety of military intervention in the South were on the table.<sup>85</sup> And although the electoral deadlock that resulted hardly demonstrated any kind of national consensus,<sup>86</sup> the machinations that resolved that deadlock did effectively shape the implementation and interpretation of the Reconstruction Amendments for generations. Likewise, congressional decisions not to invoke Section 2 of the Fourteenth Amendment to reduce southern representation as a result of black disfranchisement and to repeal much of the Reconstruction-era voting rights legislation reflected a changed sense of Congress's constitutional responsibilities with profound consequences for the nation. The rules of recognition for constitutional change arising from elections or political branch actions have never been clear. But if such things are to count toward constitutional meaning, then the actions of the late nineteenth century have a plausible claim on our attention.

What about social movements? The retrenchment of racial oppression in the late nineteenth and early twentieth century featured contributions from a variety of mobilized social groups, including white supremacist Redeemers who retook control of southern state governments; anti-immigrant populists and progressives who came to sympathize with southern racialism; labor unions who feared competition from black workers; and significant components of the women's movement, who had opposed the Fourteenth and Fifteenth Amendments on the ground that they failed to extend their gains to women.<sup>87</sup> I want to focus, however, on a more seemingly benign social movement, which was the broad effort to achieve national reunion and heal the wounds left by the Civil War.

A favorite Republican electioneering tactic in the postwar nineteenth century was to "wave the bloody shirt"—that is, to tie Democrats to the late Rebellion and campaign

---

<sup>83</sup> See, e.g., Keith Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (2001).

<sup>84</sup> See Ackerman, *Foundations*, *supra* note \_\_, at \_\_.

<sup>85</sup> See White, *supra* note \_\_, at 326-30; Michael F. Holt, *By One Vote: The Disputed Presidential Election of 1876* (2008).

<sup>86</sup> See Ackerman, *Foundations*, *supra* note \_\_, at \_\_.

<sup>87</sup> See Epps, *supra* note \_\_, at 214-21 (discussing the women's movement).

on Republican loyalty to the Union cause.<sup>88</sup> So the strength of the movement for reunion and reconciliation during the same period may be somewhat surprising. And yet a prominent movement soon developed around decoration days to remember the war dead, a burgeoning and generally nostalgic popular literature telling soldiers' stories, and veterans' organizations and reunions that eventually reached across sectional lines.<sup>89</sup> This movement tended to emphasize the valor and honor of the combatants and to soft-pedal the divisive issues, especially slavery and race, that underlay the War. Historian David Blight writes that because "race was so deeply at the root of the war's causes and consequences, and so powerful a source of division in American social psychology," it was "the antithesis of a culture of reconciliation."<sup>90</sup> For that reason, "[t]he memory of slavery, emancipation, and the Fourteenth and Fifteenth Amendments never fit well into a developing narrative in which the Old and New South were romanticized and welcomed back to a new nationalism, and in which devotion alone made everyone right, and no one truly wrong, in the remembered Civil War."<sup>91</sup> Hence, in 1913, President Woodrow Wilson gave a commemorative address at Gettysburg on the fiftieth anniversary of the great battle. He said,

How wholesome and healing the peace has been! We have found one another again as brothers and comrades in arms, enemies no longer, generous friends rather, our battles long past, the quarrel forgotten—except that we shall not forget the splendid valor, the manly devotion of the men then arrayed against one another, now grasping hands and smiling into each other's eyes. How complete the union has become . . . .<sup>92</sup>

On the one hand, the reunion *was* marvelous. No one wants to be Yugoslavia, where people still kill each other over grievances from centuries ago. Reunion not only brought real healing to many, but it permitted the nation to become the preeminent defender of democracy and human rights on the world stage not long after Wilson spoke.

But Wilson also symbolized the cost of the forgetting that made reunion possible. The first Southern president since the Civil War, he presided over segregation of much of the federal government. And so, Blight says, "[i]n the half century after the war, as the sections reconciled, by and large, the races divided."<sup>93</sup>

The Reunion movement had another consequence that mattered for constitutional interpretation. Anyone who thinks history is always written by the winners hasn't studied the historiography of the Civil War and Reconstruction. For much of the twentieth century, that historiography was dominated by the "Lost Cause" myth of the War, which held that

---

<sup>88</sup> See Blight, *supra* note \_\_, at 51-52

<sup>89</sup> See generally Blight, *supra* note \_\_.

<sup>90</sup> *Id.* at 4.

<sup>91</sup> *Id.*

<sup>92</sup> Quoted in Blight, *supra* note \_\_, at 11.

<sup>93</sup> Blight, *supra* note \_\_, at 4.

the South had fought for its freedom, not for slavery,<sup>94</sup> and the Dunning school of Reconstruction history, which insisted that Reconstruction was a malicious attempt by vindictive radicals to punish the South and foist freedom on a black race that was fundamentally unready for it.<sup>95</sup> “The demeaning of black people as helpless, sentimental children and the crushing of their adult rights to political and civil liberty under the Fourteenth and Fifteenth Amendments” were integral parts of this ideology.<sup>96</sup> These interpretations would hold sway until the late twentieth century and inform the Supreme Court whenever it turned to history in its deliberations.

One could, of course, focus on other social movements—the Redeemers, for instance—that challenged the legitimacy of the Reconstruction Amendments, pushed for as narrow an interpretation as possible, and tried to block their enforcement (often with considerable success). The central point, however, should already be obvious. Living constitutionalists like Jack Balkin extol social movements as motors of moral progress. “[W]e understand many important social movements in American history,” Professor Balkin writes, “as working out the meaning of the Declaration and the Constitution, engaging in popular uprisings that help to redeem their promises.”<sup>97</sup> But as Scot Powe points out, “mass movements . . . that have set themselves out to overturn an existing legal order have sometimes been wonderful—the Civil Rights Movement jumps first to mind—but equally as often they have been horrible.”<sup>98</sup>

Many living constitutionalists—like Professor Strauss—have turned to courts as more institutionally regular exponents of evolving constitutional meaning. The extent to which the Republican architects of Reconstruction eschewed reliance on the courts has sometimes been exaggerated. Despite the debacle of *Dred Scott* and continuing concerns that the Court would undermine military Reconstruction, Congress made Section 1 of the Fourteenth Amendment self-executing—that is, directly enforceable by courts. Congress also expanded federal court jurisdiction and created federal civil rights causes of action and federal prosecutorial authority to enforce it.<sup>99</sup> The federal court system as we know it dates from Reconstruction.

But the courts’ record in the Amendment’s early decades would likely have disappointed many of its framers. In key decisions, the federal courts read aspects of the

---

<sup>94</sup> Blight, *supra* note \_\_, at 255-58.

<sup>95</sup> See William A. Dunning, *Reconstruction, Political and Economic 1865-1877* (1907); Foner, *supra* note \_\_, at xxix-xx (describing the Dunning School and the reaction against it).

<sup>96</sup> Blight, *supra* note \_\_, at 272.

<sup>97</sup> Balkin, *Constitutional Redemption*, *supra* note 11, at 26.

<sup>98</sup> Powe, *supra* note 115, at 893.

<sup>99</sup> See generally Harold M. Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* (1973).



Amendment narrowly,<sup>100</sup> accorded significant discretion to biased state and local administrators,<sup>101</sup> or refused to provide effective remedies for potential violations.<sup>102</sup>

Some have accused the Supreme Court of strangling the Fourteenth Amendment in its crib,<sup>103</sup> but that charge is overstated. In the *Slaughter-House Cases*,<sup>104</sup> to be sure, the Court did interpret the Amendment more narrowly than it might have done. The New Orleans ordinance challenged in *Slaughter-House* conferred a local monopoly on the owners of a particular abattoir. Some butchers left out by this law challenged it under Section One of the Fourteenth Amendment. But the Court insisted that “the one pervading purpose” of the Reconstruction Amendments was “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.”<sup>105</sup> The majority found little connection between that purpose and the plaintiffs’ legal claim. Notwithstanding the broader scope of Republicans’ free labor ideology, it is hard to argue with the Court’s conclusion that the Civil War was not fought to uphold the rights of white butchers to defy local sanitation laws.

Critics complain that *Slaughter-House* wrongly construed the Fourteenth Amendment’s Privileges and Immunities Clause not to apply the Bill of Rights to the States, but it’s hard to see how that would have helped the butchers. And in any event, that dictum has been readily circumvented since by incorporating the Bill of Rights into the Due Process Clause. What the butchers needed was for the Court to adopt into the Fourteenth Amendment Justice Bushrod Washington’s open-ended formulation of “privileges and immunities” under the similar language of Article IV from an 1823 case called *Corfield v. Coryell*.<sup>106</sup> Justice Washington’s capacious formulation—which included “the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety”<sup>107</sup>—may be broad enough to include the right to dismember animals wherever you want, but it could also include just about any other right one might dream up. That’s mostly alright under Article IV, because that provision allows *states* to define which privileges and immunities they actually wish to protect and then simply restricts them from discriminating with respect to those rights between in-staters and out-of-staters. But what the butchers wanted in *Slaughter-House* was for the *Court* to define these broad privileges and immunities and protect them against *any* encroachment, whether discriminatory or not.

---

<sup>100</sup> See, e.g., *Slaughter-House Cases*, 83 U.S. 36 (1872) (defining narrowly the privileges and immunities of U.S. citizenship).

<sup>101</sup> [cites]

<sup>102</sup> See, e.g., *Giles v. Harris*, 189 U.S. 475 (1903).

<sup>103</sup> See, e.g., Epps, *supra* note \_\_, at 263-64.

<sup>104</sup> *Butcher’s Benevolent Ass’n of New Orleans v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 83 U.S. 36 (1872).

<sup>105</sup> *Id.* at 71.

<sup>106</sup> 6 Fed. Cas. 546 (C.C.E.D.P.A. 1823).

<sup>107</sup> *Id.* at 551-52.

That was tantamount to an invitation to write a new constitution, and it is not hard to see why the Court declined.

It's more plausible to point the finger at the *Civil Rights Cases*.<sup>108</sup> Those cases were federal prosecutions under the 1875 Civil Rights Act of various operators of public accommodations—including Maguire's Theatre in San Francisco and the Grand Opera House in New York City—for refusing to serve black patrons. The Court struck down the Act on the ground that it exceeded Congress's power under Section Five of the Fourteenth Amendment, which confers legislative authority to prohibit and punish actions that would be unconstitutional under Section One. The trouble, the Court said, was that *private* discrimination is not unconstitutional under Section One, which imposes obligations on *states*, and thus Congress had no authority under Section Five to legislate against such discrimination.

I have never heard a serious argument that the Constitution should not *have* a state action requirement, and that requirement is absolutely basic to modern constitutional law. Without it, a private citizen like yours truly would have to give my son Michael notice and a hearing under the Due Process Clause before grounding him for staying out too late on Saturday night. The better criticism is that the failure of states like California and New York—and, obviously, the recalcitrant states of the Old Confederacy—to prohibit race discrimination by places of public accommodation *was* state action. After all, “public accommodations” in the law are largely defined by their legal obligation to serve all comers, and the refusal to enforce this preexisting and general requirement on behalf of black people surely denied them the “equal protection of the laws.” Public accommodations requirements, however, were subject to an exception for “reasonable” requirements. And in the railroad context, common law decisions since the 1850s had upheld segregation on the ground that “‘repugnancies’ between the races arising from natural differences created friction that segregation could minimize.”<sup>109</sup> From this perspective, the *Civil Rights Cases* prefigure the Court's later holding in *Plessy v. Ferguson*<sup>110</sup> that separate but equal public accommodations satisfy the reasonableness requirement for valid police power legislation.

It is fair to say that, in the Fourteenth Amendment's early decades, the common law development of the Amendment's meaning pushed in the same direction as the other modalities of living constitutionalism—that is, to undermine and narrow the Amendment's commitment to black equality. It is not clear how much practical impact the courts' decisions had. Michael Klarman writes that “[t]he 1875 [Civil Rights] Act was essentially a dead letter before the Court invalidated it in 1883 . . . . Blacks seeking to enforce their statutory rights of access to public accommodations frequently encountered hostility and violence.”<sup>111</sup> It is thus no coincidence that none of the consolidated *Civil Rights Cases* came from the Deep South. But “[e]ven public accommodations laws in northern states

---

<sup>108</sup> *United States v. Stanley*, 109 U.S. 3 (1883).

<sup>109</sup> Klarman, *Jim Crow to Civil Rights*, *supra* note \_\_\_, at 20.

<sup>110</sup> 163 U.S. 537, 549-51 (1896).

<sup>111</sup> Klarman, *Jim Crow to Civil Rights*, *supra* note \_\_\_, at 49.

had proved inconsequential in practice.”<sup>112</sup> More broadly, the Court’s decisions in this era likely “reflected, far more than they created, the regressive racial climate of the era.”<sup>113</sup>

There is one last modality to consider: violence. Echoing Clausewitz, historian George Rable wrote of Reconstruction that “for the South, peace became war carried on by other means.”<sup>114</sup> The Fourteenth Amendment’s first decades offer a history of violence and death—lynchings, murderous race riots, and other forms of terrorism and intimidation. No one thinks violence is a legitimate modality of living constitutionalism.<sup>115</sup> But it is equally obvious that violence powerfully affected aspects of history that *are* the raw material of evolving constitutional meaning. Any method of living constitutionalism that takes into account changes in the political and social world offers a route by which the violence that is part of that world can creep into constitutional meaning. Just as the violence of the Civil War settled a longstanding debate about whether the Constitution permitted secession, the violence and terror of whites’ rejection of black equality powerfully shaped the political, social, and even legal meaning of the Fourteenth Amendment. James McPherson has concluded, “[t]he road to redemption was paved with force. Power did flow from the barrel of a gun.”<sup>116</sup> I would add that *law* flowed from that barrel, too.

Violence determined, for example, whether there would *be* litigation invoking the Fourteenth Amendment. Mounting a legal challenge to segregation was frightfully dangerous for African-Americans, and they tended to do so only under very special circumstances until well into the twentieth century. Violence also framed the possible judicial resolutions of the cases that were brought. In *Giles v. Harris*,<sup>117</sup> for example, a black plaintiff alleged that an Alabama requirement that registered voters be of “good character and understanding” effectively discriminated on the basis of race and demanded an injunction compelling registration of black voters. Writing for the Court in 1903, Justice Holmes said that even if the administration of such a requirement could be challenged as discriminatory, the plaintiff would have to seek relief from the national political branches. He explained:

[T]he great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff’s

---

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

<sup>113</sup> *Id.* at 9.

<sup>114</sup> George C. Rable, *But There Was No Peace: The Role of Violence in the Politics of Reconstruction* 15 (1984).

<sup>115</sup> The closest thing to such an argument is Larry Kramer’s peculiarly extra-institutional argument for popular constitutionalism, see Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004), which lauds large (and often unruly) public gatherings meant to pressure public institutions. I share Scot Powe’s worry that “mass meetings with an agenda of complaint can—and have—lead to violence.” L.A. Powe, Jr., *Are “the People” Missing in Action (And Should Anyone Care)?* 83 *Tex. L. Rev.* 855, 893 (2005) (reviewing Kramer). The basic ambiguity of calls for popular constitutionalism unmediated by institutions, see *id.* at 882-83, leaves the door wide open to a variety of dangers.

<sup>116</sup> James M. McPherson, *Redemption or Counterrevolution? The South in the 1870s*, 13 *Rev. in Am. Hist.* 545, 549 (1985) (review essay).

<sup>117</sup> 189 U.S. 475 (1903).

name to be inscribed upon the [voting] lists of 1902 will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that state by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form.<sup>118</sup>

It is instructive to compare *Giles* with the 1958 decision in *Cooper v. Aaron*.<sup>119</sup> *Cooper* held emphatically that Arkansas Governor Orval Faubus's effort to mobilize "the great mass of the white population"—not to mention the National Guard—to prevent blacks from attending white schools could *not* be permitted to interfere with a federal injunction under the Fourteenth Amendment. President Eisenhower's deployment of federal troops to Little Rock was a statement that the federal government would no longer tolerate the "autumnal uprisings in the South" that President Grant had been unwilling or unable to suppress. The irony of *Cooper v. Aaron*, then, is that the most categorical statement of judicial supremacy in the U.S. Reports depended for much of its power on the Executive's demonstrated willingness to enforce the Court's decree through violent means if necessary. There was no such willingness during the Fourteenth Amendment's lost decades.

Finally, a word about originalism is in order. As I stated earlier, my critique of living constitutionalism is not an argument for originalism as an alternative mode of constitutional interpretation. I don't really think originalism can help. The first reason is that many originalists have concluded that the original understanding of the Fourteenth Amendment entails a general and fairly open-ended commitment to equality. Robert Bork, for example, said that the Fourteenth Amendment's framers "intended that the Supreme Court should secure against government action some large measure of racial equality," but that "those same men were not agreed about what the concept of racial equality requires. Many or most of them had not even thought the matter through."<sup>120</sup> Hence a court applying the Equal Protection Clause must fall back on "core idea of black equality against governmental discrimination," defined at a relatively high level of generality.<sup>121</sup> Bork was comfortable with courts working out this principle in specific cases and untroubled by the prospect that this might entail consequences that the framers themselves did not foresee.<sup>122</sup>

Critics of originalism decry this account as giving away a chief advantage claimed by originalism—constraining unelected judges—by leaving contemporary judges unconstrained as they fill in the meaning of the Equal Protection Clause's open-ended language.<sup>123</sup> That is fair enough, but it hardly means that Judge Bork's reading of the Fourteenth Amendment's original understanding is wrongheaded. That reading strikes me

---

<sup>118</sup> *Id.* at 488. See also Klarman, *Jim Crow to Civil Rights*, *supra* note \_\_, at 36 ("The extraordinary *Giles* opinions are among the Court's most candid confessions of limited power. The only analogous statements appear in cases where the justices confessed their inability to protect civil liberties during wartime.").

<sup>119</sup> 358 U.S. 1 (1958).

<sup>120</sup> Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L. J.* 1, 14 (1971).

<sup>121</sup> *Id.* at 14-15.

<sup>122</sup> See *id.*

<sup>123</sup> Gene R. Nichol, *Bork's Dilemma*, 76 *Va. L. Rev.* 337, 343-44 (1990) (book review).

as almost certainly correct. It does mean, however, that originalism cannot rescue us from the perils of living constitutionalism when it comes to the Fourteenth Amendment. If originalism respects the original understanding of constitutional text when that understanding is open-ended then its prospects will basically dovetail with those of living constitutionalism.

Originalism is unlikely to bail us out for a second reason. The Supreme Court's decisions interpreting the Fourteenth Amendment narrowly rest on plausible—if not indubitably correct—interpretations of the historical evidence of original meaning.<sup>124</sup> Where the legal arguments are close on the merits, the social and cultural forces expressed in the modalities of living constitutionalism tend to play a decisive role. In other words, even if a good originalist case could have been made against the result in *Plessy* or the *Civil Rights Cases*,<sup>125</sup> it would be a lot to expect for a court to buck the forces of contemporary politics if the matter is admittedly close. Living constitutionalism is not just an alternative methodology to originalism; it also sums up a variety of forces operating on courts regardless of the method that they set out to employ.

Neither of these points means that originalism will never have comparative advantages over living constitutionalism in preventing the deterioration of constitutional norms over time. Where the original understanding is clear and specific, originalism will generally do a better job at preserving a constitutional principle intact. But the Fourteenth Amendment's text and history and sufficiently open-ended and uncertain to leave originalists and living constitutionalists in essentially the same leaky boat.

### III. THE LESSONS OF CONSTITUTIONAL FAILURE

I promised at the outset that if you'd walk with me through the dark valley of the Fourteenth Amendment's early decades that we'd come out the other side with some insights about constitutional theory. I did not promise, however, that they would be cheery or uplifting. For me, the lessons of the Amendment's years of failure are as follows:

---

<sup>124</sup> Klarman, *Jim Crow to Civil Rights*, *supra* note \_\_, at 9.

<sup>125</sup> The Supreme Court has insisted—rightly, to my mind—that *Plessy* was “wrong the day it was decided,” *Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. 833, 863 (1992) (plurality opinion). But I am persuaded that the case was not a slam dunk from an originalist perspective, and that strong living constitution-style arguments can be made for it. On the originalist side, scholars as diverse as Robert Bork, Jack Balkin, and Michael Klarman have pointed out that the framers of the Fourteenth Amendment tended to view it as protecting *civil* rights (such as freedom of contract and access to courts) that the Amendment protected, but not *political* rights (such as voting) or *social* rights (such as interracial marriage or integration). See Bork, *supra* note 120, at 14; Balkin, *Constitutional Redemption*, *supra* note \_\_, at 144-48; Klarman, *Jim Crow to Civil Rights*, *supra* note \_\_, at 19. That distinction creates a strong originalist argument *for* the result in *Plessy*. The originalist argument *against* would point out that the text does not include this distinction and emphasize that subsequent experience demonstrated that exclusion of social rights undermines both civil rights and the Amendment's general commitment to equality. See Balkin, *Constitutional Redemption*, *supra* note \_\_, at 149-51. As Judge Bork pointed out, an originalist forced to choose might choose the general commitment either on textual grounds (it is what the amendment actually says) or because the equality of separate facilities is not susceptible to principled judicial policing. See Bork, *supra* note 120. But we are kidding ourselves if we say this is an easy question either way.

First, this is at least in part a story about the limits of constitutionalism itself. Importantly, I do not simply mean the limits of *judicial review*. Judicial review doesn't come off that well in my story, but neither do political branch actions or popular constitutionalism. After what is still the most devastating war in American history, Americans tried to resolve the central issue of that war—the oppression of black Americans—through a flurry of constitutional creativity that had not been seen since the Founding and has not been equaled since. The resulting amendments, in and of themselves, failed to do what their framers set out to do. They could not prevent the condition of the Freedpeople from deteriorating radically after the withdrawal of Union troops from the South. And they did not achieve real progress until the country itself had changed, nearly a century later. You cannot change basic social conditions simply by changing the Constitution.

One might think that this is simply a problem with the subset of constitutional principles that purport to be “redemptive” or “aspirational” in nature. And surely it *is* easier to constitutionally entrench a state of affairs that has already been achieved than it is to move the social mountain by ratifying words on paper. But the story of the Civil War, Reconstruction, and reassertion of racial oppression after Reconstruction involves not just a failure of the aspirational Amendments, but of any number of other constitutional principles. For example, the original constitutional structures of federalism and separation of powers, designed to mediate conflict and preserve liberty, failed of that mission both before and after the war. Conflict over race is the central drama of our national story, and when push came to shove, constitutionalism was unequal to it.

To that cheery observation let me add another, which is that this is also a story about the limits of constitutional methodology. Much debate in constitutional law proceeds as if by getting the methodology right, we can perfect American constitutionalism and guarantee good results. But it's hard to see how *any* methodology would have helped all that much in confronting the hostile environment into which the Fourteenth Amendment was born. As I've suggested, originalism offers no solace here. The basic point is that *any* methodology can be conducted well or poorly, and as far as I can tell, interpretive methodologies generally do not themselves do much to ensure excellent rather than miserable application. My aim here is to say something about how the history I've canvassed might encourage living constitutionalists to do their job well rather than poorly.

The first thing that living constitutionalists need to get straight is that there is nothing inevitable about moral progress. The use of organic metaphors like “evolving meaning” can cause us to confuse constitutional development with natural processes that may have some sort of direction hard-wired into them. Sometimes living constitutionalists seem to acknowledge that progress is not inevitable. Jack Balkin, for instance, states that “[a] story of constitutional redemption is . . . a story of contingency” that “does not claim that the eventual redemption is assured. It claims only that we should strive to achieve it.”<sup>126</sup> Yet most living constitutionalist accounts of our history have an optimistic, onward-and-upward feel to them. Professor Balkin does not seem to recognize that the very title of his book—“Constitutional Redemption”—dovetails precisely with the name that the

---

<sup>126</sup> Balkin, *Constitutional Redemption*, *supra* note 11, at 29.

nineteenth century “Redeemers” who reestablished white supremacy had for *their* constitutional project.

To overcome this myth of inevitability, living constitutionalism needs a sense of tragedy. This may be the great contribution that the Fourteenth Amendment’s lost years can offer to constitutional law. The Southern historian C. Vann Woodward made a similar point about what the South had to offer America more generally. Writing prior to Vietnam, Professor Woodward proposed Southern history as an antidote to the “American . . . legend of success and invincibility.”<sup>127</sup> He noted that “Southern history, unlike American, includes large components of frustration, failure, and defeat”:

An age-long experience with human bondage and its evils and later with emancipation and its shortcomings did not dispose the South very favorably toward such popular American ideas as the doctrine of human perfectibility . . . For these reasons the utopian schemes and the gospel of progress that flourished above the Mason and Dixon Line never found very wide acceptance below the Potomac during the nineteenth century.<sup>128</sup>

In this sense, ironically, the Fourteenth Amendment is the Constitution’s South. It’s the part of the Constitution that failed (and then rose again to something better). It brings to constitutional law “[t]he experience of evil and the experience of tragedy”<sup>129</sup> needed to remind us that moral progress is not inevitable, that social forces can push constitutional meaning in bad as well as good directions, that living can turn into dying constitutionalism if we are not very, very careful.

I don’t have much to offer beyond this. I doubt that there is some identifiable methodological tweak that can guard constitutional interpretation effectively against the possibility that history may move in the wrong direction. If we let the *movement* of history into interpretation—as opposed to history’s state at an originalist snapshot in time—then we let in the contingency that comes with it. What I am suggesting is that constitutional *culture* may be more important than constitutional *method* when it comes to hanging on to constitutional values. I think we need to change the culture of living constitutionalism if we are going to prevent future tragedies, like the *dying* constitutionalism of the Fourteenth Amendment’s lost years.

To be more specific, we need to not only keep the downside risks of evolving constitutional meaning firmly in mind, but also to make living constitutionalism a little less lively. There needs to be a bit more locking-in and a little less pushing forward, because forward motion can end up not being forward at all. This is harder when a provision is, like the Fourteenth Amendment, profoundly aspirational. But even there, we might have done better had the Amendment’s subsequent interpreters held a little more fast to the Amendment’s central, basic commitment to equality and been a little less willing to modify that commitment in light of more contemporary imperatives. We need to remember that the Fourteenth Amendment’s retrogressive earlier interpreters thought that they, too, *were*

---

<sup>127</sup> C. Vann Woodward, *The Search for Southern Identity*, in Woodward, *supra* note 15, at 3, 18.

<sup>128</sup> *Id.* at 19, 21.

<sup>129</sup> *Id.* at 21.

shaping constitutional meaning to conform to current notions of justice. If we remember that, we'll subordinate our impulse to keep the Constitution "in tune with the times" to a principle of "first do no harm."

There is a cost to this, of course. A less frisky version of living constitutionalism—we could call it "stiff-necked" constitutionalism—would give up the exciting potential for surprising and inspiring moral growth. The Constitution would still evolve, but more slowly and only in response to very sustained trends over time. It might be harder, for example, to go from *Bowers v. Hardwick*'s<sup>130</sup> categorical rejection of gay rights to *Lawrence v. Texas*'s<sup>131</sup> embrace of that principle in just 17 years. That would be a loss. As my friend Marin Levy has observed, "the trouble with tying yourself to the mast is that, sooner or later, you're on the mast."<sup>132</sup> But a stiffer, creakier, even *grumpier* constitutionalism might also make it harder to go from ratification of a Fourteenth Amendment committed to black equality to the *Civil Rights Cases* in 15 years, or from a Fifteenth Amendment committed to black suffrage to the abandonment of black voters to murderous white supremacist mobs in just five.

---

<sup>130</sup> 478 U.S. 176 (1986).

<sup>131</sup> 539 U.S. 558 (2003).

<sup>132</sup> Marin K. Levy, Fall Faculty Reception, Aug. 19, 2018.