Two Centuries and Counting: The Study of the United States Constitution

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1. *Introduction*

The historical study of the United States Constitution forms a vast and ever-swelling field of inquiry. Its appeal does not depend on the importance that departments of history have placed on it. Constitutional history is one of those old-fashioned fields that seem less engaging than many of the other "new histories" that have flourished since the 1960s. Yet in institutions where it is taught, it proves a popular subject. Some of that popularity reflects the importance that prospective law students ascribe to it. In the United States, constitutional law marks the *summa theologica* of legal thinking, and any undergraduate contemplating a legal career would find constitutional history naturally attractive. It also matters that constitutional controversies permeate ordinary political disputes. Thinking politically in the United States, often means thinking constitutionally. The active practice of constitutional law is often a continuation of politics by other means.

The framework of this history in turn begins with the two great Founding moments of the 1780s and 1860s. The first of these moments brought the framing, ratification, and amendment of the Federal Constitution; the second produced the three Reconstruction amendments that abolished chattel slavery, established a federal basis for protecting individual rights within the states, and extended the suffrage to African Americans. This was constitutional politics in the highest sense of the term.

But politics and the Constitution have been intertwined at many other moments, from the disputes that led to the formation of the first political parties in the 1790s to the two impeachments of President Donald Trump in 2020 and 2021. Nearly all the great dramas of American political history have profound constitutional origins and implications. Equally important, the origins of most of the leading cases of constitutional law are largely political in nature: they represent strategic choices made by interests or individuals seeking to pursue their

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political objectives by judicial means. The most celebrated examples of this phenomenon would involve the litigation strategy of the National Association for the Advancement of Colored People (NAACP), which ultimately led to the landmark decision in *Brown v. Board of Education* (1954), and the comparable efforts of the pro-life coalition to reverse the Supreme Court's 1973 decision upholding the right to abortion. But countless other cases illustrate the same point. As Alexis de Tocqueville famously observed in *Democracy in America*, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."

Tocqueville's oft-quoted comment implies that constitutional history should be deeply concerned with the reasoning of justices and judges. That is true but – from the perspective of working historians – only up to a point. *Decisions* certainly matter a great deal; the *opinions* ostensibly sustaining them, not so much. Within the ambit of the law schools, these opinions become objects of close study. Collectively they form the interpretive doctrines that shape how the institutions of government operate. Individually they also identify points and arguments that particular interests might wish to challenge and overturn. But from the historians' vantage point, what needs explanation are the origins and consequences of particular decisions.

A different context emerges when one asks how constitutional history relates to the discipline of political science. There the conventional wisdom holds that the United States is still governed under a Madisonian constitution. That proposition rests on the importance that scholars have long ascribed to James Madison's contributions to *The Federalist*, the collection of eighty-five essays that Madison, Alexander Hamilton, and John Jay, under the penname Publius, wrote in support of the ratification of the Constitution in 1787-1788. Hamilton was the originator and main author of *The Federalist*, writing fifty-one essays to Madison's twenty-nine and Jay's five. Yet while Hamilton's essays on the presidency and the judiciary influence modern understanding of the origins of those two institutions, scholars treat Madison's essays on the extended republic and separation of powers – especially *Federalist* 10 and 51 – as the best statement of the underlying theory of the Constitution[1].

The work that constitutional historians do might thus be said to complement the distinct agenda of legal scholars and political scientists. Again, that seems to be true, but only up to a point. Historians are not theorists. They have no interest in fashioning legal doctrines or testing general models of political behavior. More important, the nature of their research, with its emphasis on the granularity of primary sources and the diversity of viewpoints present at any moment, is more likely to produce critical assessments of the findings of scholars in other disciplines. In contemporary scholarship, this is particularly the case when judges and legal scholars advance the *originalist* theory of constitutional interpretation, which holds that the meaning of the text was *fixed* at the moment of its adoption, or when political scientists reduce the meaning of the Constitution to the familiar propositions advanced by Madison, without considering the much broader array of concepts associated with the political arguments of the revolutionary era.

Within the matrix of American constitutional studies, then, historians serve two primary functions. Their first and more important task is to explain the origins and causes of phenomena, from the great formative moments of the Revolution and Civil War, to the movements that led to other constitutional amendments and landmark judicial decisions, and to the ways in which bold individuals, multiple interest groups, and social movements regularly pursued their political ends through constitutional means. Second, in examining these problems, historians can cast a critical and sometimes skeptical light on the theorizing work of other disciplines, whether this takes the form of fashioning judicial doctrines or devising explanatory models of political behavior.

With these preliminary points in mind, then, let us examine in greater detail the questions before us. In pursuing these matters, I will draw upon four decades of teaching constitutional history at Stanford University. That began in the early 1980s, when I taught an introductory seminar on the drafting of the Federal Constitution, while I was also writing *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996). After that book appeared, I began giving a lecture course on The Constitution and Race, which evolved into The Constitution: A Brief History. I also taught a seminar on a variety of Topics in Constitutional History. These were all one-term courses taught on a quarter system, which makes the working historian mindful of the wisdom of the "less is more" principle of modern architecture. But one advantage of teaching a survey of this kind to undergraduates is that it encourages the professor to think about the overall framework of the subject. That is what the rest of this essay will attempt to summarize.

2. *Founding Moments*

The United States has had two founding moments, and how we conceive their origins and consequences, and the relation between them, sets much of the framework for any overarching interpretation of its constitutional history. The first moment covers the rough quarter century of the Revolutionary era, from the initial imperial controversy of 1764-1766, through the crisis of independence and the adoption of the first state constitutions (1774-1777), to the adoption of the Federal Constitution and its first amendments (1787-1791). An underlying continuity of issues gives intellectual coherence to this entire period. Questions about political representation, the sources of sovereignty, restraints on executive power, the identification and protection of fundamental rights, and the very nature of a constitution were raised, disputed, and revised throughout this period. When one studies the climactic debates of the late 1780s, one sees how the questions raised and the solutions reached culminated questions first raised with the Stamp Act crisis of 1765-1766. Equally important, from the complementary vantage points of scholarship and pedagogy, the evidentiary record of these debates and controversies is readily available and widely accessible in a vast array of primary sources, many of which have been scrupulously edited by skilled platoons of documentary editors. Then, too, a scholarly and popular fascination with the Revolution's leaders has led

to whole-life publication of their personal papers, the letters they received as well as sent. No other nation has been more deeply invested in its founding moment than the United States[2].

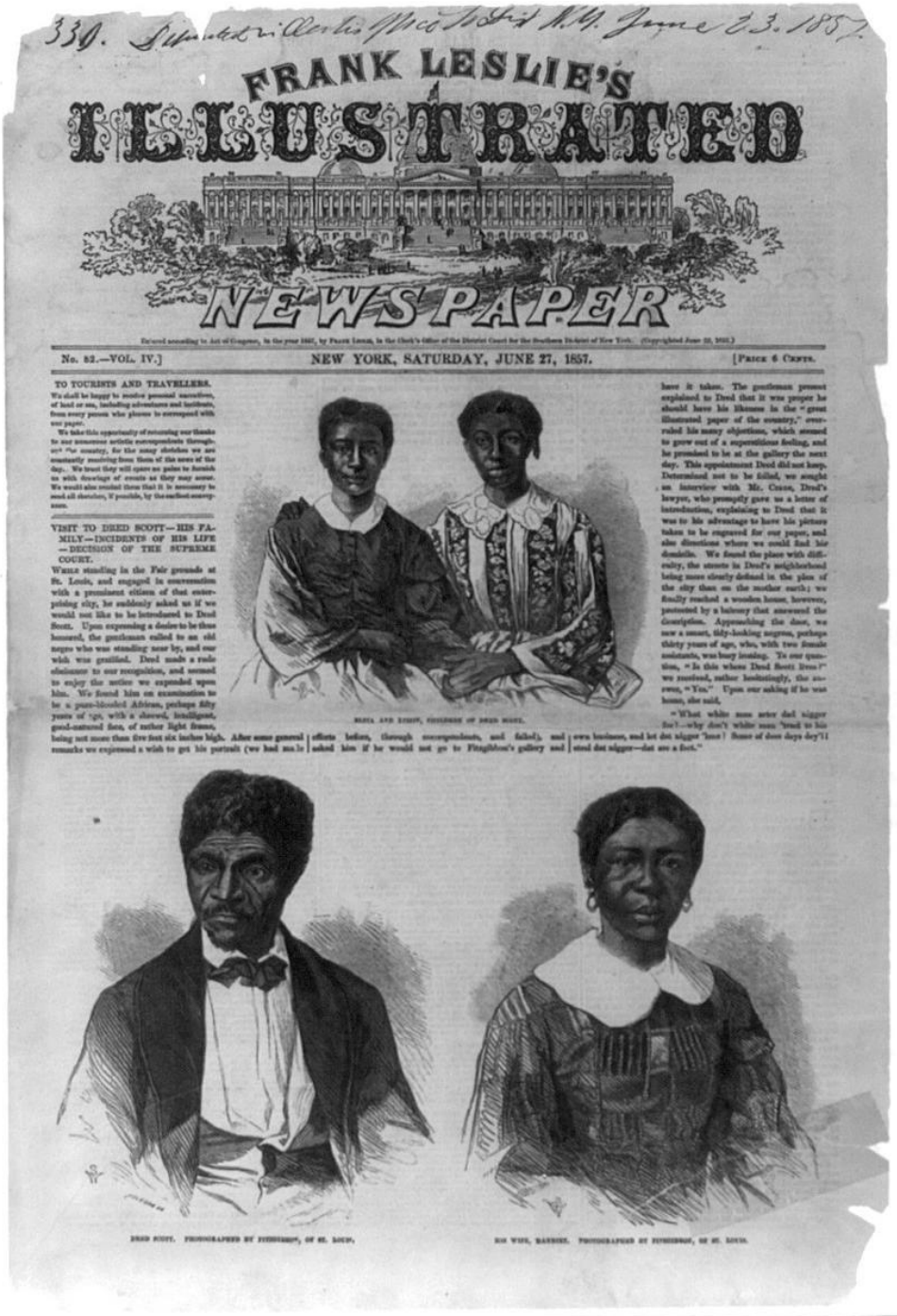
These factors give the study of Revolutionary-era constitutionalism a remarkable depth, focus, and coherence. By contrast, explaining the Second Founding (1865-1870), in either scholarship or pedagogy, poses a more difficult task. Its periodization is no simple matter, nor can one tidily identify a handful of critical moments that capture its dynamics. Where the chronological boundaries of revolutionary constitutionalism can be tightly drawn, the Second Founding requires one to roam more broadly and imaginatively. To think systematically about the origins and consequences of this event, scholars need to go as far back as the Missouri controversy of 1819-1821 and as far forward as the *Plessy v. Ferguson* decision of 1896, which effectively authorized the Jim Crow regime of racial segregation and white supremacy.

To make sense of these four-score years of American constitutional history, then, one needs to incorporate at least these eight categories of analysis.

First, in the realm of high politics, one must begin with the three ante bellum crises that exposed the inherent volatility of sectional politics: the Missouri Crisis of 1819-1821; the Nullification Crisis of the early 1830s; and the Compromise of 1850, the aftermath of the war with Mexico. These episodes illustrate the normative importance of compromise in national politics, a norm that ostensibly originated in the two compromises over representation at the Federal Convention in 1787. The presidential election of 1860 destroyed the efficacy of that norm. The crucial explanatory problem here involves asking why leaders of the Confederate states, driven by the passions of their constituents, treated a single election as a sufficient justification for secession. That perception in turn leads us to view the prior compromises suspiciously, looking for the weak points that portended later and ultimately insuperable difficulties.

Second, this impetus to compromise reflected the stake that political parties had in preserving the Union. Since the 1960s, scholars long emphasized the role of *party systems* in stabilizing American politics. In this view, the structural separation of powers embedded in the Constitution virtually required the invention of political parties for national governance to prove effective. There had been, political scientists held, three party systems in the post-Revolutionary United States: the Federalist and Republican parties during the quarter century after the adoption of the Constitution; the Democratic-Republican and Whig parties that emerged after 1832; and, following the collapse of the Whig party in 1851, the fractious Democratic and newborn Republican parties that contested the election of 1860.

The idea of party systems proved attractive to political scientists and some historians because it provided a framework for analyzing the structure of American politics over different periods and for identifying the functions that organized parties can pursue[3]. One of these functions was to produce coalitions that could govern nationally, and because capturing the presidency was essential to controlling the national government, parties had to strive to form interstate links. Had the framers of the Constitution adopted a parliamentary



FRANK LESLIE'S
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TO TOURISTS AND TRAVELLERS.

We shall be happy to receive personal narratives, of land or sea, including adventures and incidents, from every person who chooses to correspond with our paper.

We take this opportunity of returning our thanks to our numerous artistic correspondents throughout the country, for the many sketches we are constantly receiving from them of the news of the day. We trust they will spare no pains to furnish us with drawings of events as they may occur. We would also remind them that it is necessary to send all sketches, if possible, by the earliest conveyance.

VISIT TO DRED SCOTT—HIS FAMILY—INCIDENTS OF HIS LIFE—DECISION OF THE SUPREME COURT.

WHILE strolling in the Fair grounds at St. Louis, and engaged in conversation with a prominent citizen of that enterprising city, he suddenly asked us if we would not like to be introduced to Dred Scott. Upon expressing a desire to be thus honored, the gentleman called to an old negro who was standing near by, and our wish was gratified. Dred made a rude obeisance to our recognition, and seemed to enjoy the notice we expended upon him. We found him on examination to be a pure-blooded African, perhaps fifty years of age, with a shrewd, intelligent, good-natured face, of rather light frame, being not more than five feet six inches high. After some general remarks we expressed a wish to get his portrait (we had made

efforts before, through correspondents, and failed), and asked him if he would not go to Fitzgibbon's gallery and have it taken. The gentleman present explained to Dred that it was proper he should have his likeness in the "great illustrated paper of the country," overruled his many objections, which seemed to grow out of a superstitious feeling, and he promised to be at the gallery the next day. This appointment Dred did not keep. Determined not to be foiled, we sought an interview with Mr. Cross, Dred's lawyer, who promptly gave us a letter of introduction, explaining to Dred that it was to his advantage to have his picture taken to be engraved for our paper, and also directions where we could find his domicile. We found the place with difficulty, the streets in Dred's neighborhood being more closely defined in the plan of the city than on the mother earth; we finally reached a wooden house, however, protected by a balcony that answered the description. Approaching the door, we saw a smart, tidy-looking negress, perhaps thirty years of age, who, with two female assistants, was busy ironing. To our question, "Is this where Dred Scott lives?" we received, rather hesitatingly, the answer, "Yes." Upon our asking if he was home, she said,

"What white man arter dat nigger for?—why don't white man 'tend to his own business, and let dat nigger 'lone? Some of dese days dey'll steal dat nigger—dat are a fact."

MARIA AND EMILY, CHILDREN OF DRED SCOTT.

DRED SCOTT. PHOTOGRAPHED BY FITZGIBBON, OF ST. LOUIS.

HIS WIFE, HARRIET. PHOTOGRAPHED BY FITZGIBBON, OF ST. LOUIS.

Visit to Dred Scott - his family - incidents of his life - decision of the Supreme Court, *in Frank Leslie's Illustrated Newspaper (1857 June 27)*

model akin to the British system, a multiple party system could well have evolved. But they had other ideas.

The concept of party systems has recently been attacked, however, for two sets of reasons. First, many historians now believe that parties were far more fluid, unstable, and subject to rapid formation and dissolution, than the party system model suggests. The idea that highly organized national party competition was replicated at the lower levels of governance seems delusional. Second, a framework focusing on electoral competition will necessarily emphasize the importance of mobilizing a white male electorate and make the winning of elections the primary goal of political activity. But such an emphasis will neglect the political activities of the formally disenfranchised, who looked for other mechanisms than elections to influence public debate and raise social issues[4].

That realization leads, *third*, to understanding the importance of social movements to constitutional politics. The reforms antebellum Americans favored pursued diverse objectives. The temperance movement sought to cure the measurable surge in alcohol consumption that emerged after the Revolution. Militant Protestants opposed the decision of the Jeffersonian Republicans to allow postal service on Sundays, a moral evil that threatened the solemn practice of the Christian sabbath. Most important, the antislavery movement generated the most volatile issue in American politics, focusing first on ending the slave trade and then on abolishing slavery itself. This was an issue that political parties desperately wished to repress, but which citizens and voluntary associations insisted on addressing.

The emergence of these social movements transformed American politics in two major ways. Petitioning had long been the device that individuals, communities, and special interests had used to submit their requests and grievances to public authorities. But in post-Revolutionary America, petitioning became a mechanism for collective protest and a vehicle for mobilizing and enlarging the number of supporters attached to particular causes. Second, petitioning was inherently democratic because it was not restricted by the limitations that gender and (to a lesser extent) property imposed on the exercise of the franchise. Women could petition as well as men or join associations that advanced the causes they favored. So could African Americans and members of radical religious groups. Indeed, to a significant extent, women and African Americans formed the voluntary associations that dominated antislavery agitation, offering an alternative to the male world of electoral politics but also an incentive to society more generally to take this great question seriously[5].

This is a form of what scholars call "popular constitutionalism," a term that can mean either that political coalitions openly campaigned on constitutional claims or, alternatively, that the people at large found innovative ways to advance their positions. Yet within the framework of governance, another path lay open: constitutional litigation. This is the *fourth* and most familiar category of analysis, the one that represents the dominant concern of American constitutional scholarship. In the period between 1840 and the close of the nineteenth century, six decisions lay atop the list of legally significant cases. Two preceded the Civil War: *Prigg v. Pennsylvania* (1842), and, more

momentously, *Dred Scott v. Sandford* (1857); and four later decisions, beginning with the *Slaughterhouse* case (1873) and ending with *Plessy v. Ferguson* (1896), which worked out the implications of the three Reconstruction-era amendments. (This second set of cases will be discussed later.)

Prigg dealt with a sensitive issue that had a massive impact in free and slave states alike. Article IV of the Constitution gave owners a legal right to recover slaves who fled to free territory. But how that right would be enforced, and whether northern officials or citizens were obliged to assist the recapture of fugitive slaves, were delicate questions. As antislavery feelings expanded in the North, legitimate questions could be raised about the due process rights of the accused fugitives, reinforced by qualms over seeing individuals they knew being legally kidnapped into slavery. In the South, however, any resistance to enforcing the Fugitive Slave Act of 1793 was perceived as an insult to their owners' property rights. In *Prigg*, the Supreme Court affirmed owners' legal right of recapture, but it imposed no positive obligations on free state governments to support this process. Many northern states enacted Personal Liberty Laws that left the act still difficult to enforce[6].

Dred Scott v. Sandford tested a thornier question. Owners often carried their slaves with them when they visited or resided in free states and territories. At some point, residence in a free jurisdiction would emancipate the slave. But as northern states began holding that *any* residence in their jurisdiction would be emancipatory, southern states moved in the opposite direction. Dred Scott's case arose when his military owner brought him back to Missouri after an extended residence in Illinois and the Minnesota territory, where slavery was invalid under the Missouri Compromise of 1821. It took eleven years for Scott's case to reach the Supreme Court, but in its decision, the Court declared that the territorial restriction on the extension of slavery set by the Missouri Compromise was unconstitutional. Moreover, in the opinion that mattered most, Chief Justice Roger Taney asserted not only that slaves had no right to seek federal legal protection, but that African Americans in general, whether enslaved or free, had none of the rights of citizens or even persons. The entire race was a degraded people, possessing no "rights which the white man was bound to respect"[7].

In *political* terms, the gutting of the territorial aspect of the Missouri Compromise was the most important part of *Dred Scott*; but it was the racist degradation of African Americans that mattered most *constitutionally*. Among the many immediate causes of the Civil War, the most important part of *Dred Scott* certainly was one. But even if many politicians hoped that this one suit would miraculously provide a judicial solution to "the impending crisis" of sectional conflict, the sources of that conflict were too intense to be dissolved so neatly. As Don Fehrenbacher observes in his classic study of *Dred Scott*, there is no simple way to measure its impact. The dominant *casus belli* was the election of a Republican president drawing all of his electors solely from northern states, plus California and Oregon. Explaining why this one election drove the secessionist states to leave the Union still remains a puzzle—until one considers how deeply embedded the South was in the "peculiar institution" of slavery, and how

easily they viewed any threat to its persistence as a mortal peril.

"And the war came," Lincoln recalled in his Second Inaugural Address. The Civil War itself marks the *fifth* category of analysis that merits attention. Its consequences were immense, complex, and often unexpected. Politically, the departure of the southern delegations enabled Republican majorities in Congress to pursue legislative visions that would have been inconceivable before 1861. Legally, the scale of warfare that was unleashed after 1861 led Lincoln to launch a fresh effort to codify and reform the laws of war, with Professor Francis Lieber, a Berlin native, playing the key role in drafting what the legal historian John Fabian Witt has called *Lincoln's Code.* In the South, the constitution drafted for the Confederacy incorporated many of the states'-rights ideas that had dominated southern thinking before 1861, arguably to the detriment of its war effort. Southern writers, engaging in wartime speculation that now seems almost fantastic, imagined the brave new world they would create if they emerged victorious, vindicating the wisdom of chattel slavery while their dominant crop still reigned as King Cotton. In the North, this kind of speculation took a different form, as writers imagined how the Union would be reconstituted after the rebellion was suppressed.

The most consequential development occurred on the battlefield. Whenever Union armies entered Confederate territory, slaves by the thousands fled their plantations. At first the treatment of these "contrabands" puzzled Union commanders. Legally, slaves were property, not persons. Prior to 1861, one general argument against their legal emancipation was that their owners would then deserve compensation under the Fifth Amendment. There was thus a preliminary question whether slaves could be confiscated as enemy property or could simply liberate themselves by escaping their owners. But that question took little time to answer. When Lincoln greeted the new year of 1863 with the Emancipation Proclamation, the abolition of slavery joined the preservation of the Union as the second great war aim. But the Proclamation applied only to slaves living behind Confederate lines. It did not affect the border states of Maryland, Delaware, Kentucky, or Missouri. Nor was the future status or abolition forever ensured. As an executive act promulgated in wartime, it could be overturned legislatively or judicially.

The ultimate solution to this problem was the adoption of the Thirteenth Amendment in 1865. That development, along with the addition of the Fourteenth and Fifteenth Amendments in 1868 and 1870, identified the *sixth* and most important turning point in the nineteenth-century history of the Constitution. This constitutional transformation is what warrants describing the beginning of the Reconstruction of the South as a Second Founding[8].

In retrospect, the use of a constitutional amendment to abolish slavery seems so obvious and compelling a tactic as to barely need a historical explanation. In fact, as Michael Vorenberg argued in a seminal monograph, the resort to the amendment process marked a surprising shift in American constitutional culture. Six decades had passed since the ratification of the Twelfth Amendment, which altered the presidential election system. Although many other amendments were proposed after 1804, none ever came close to adoption. The Con-

stitution bequeathed by the founding generation was becoming almost a sacred text. Using the amendment process to achieve fundamental legal and social change thus opened up a new and expansive path of reform[9].

The importance of this development became evident in the months following the end of the war and Lincoln's assassination. With the newly elected Thirty-Ninth Congress not due to assemble until December 1865, President Andrew Johnson, a Unionist Democrat from Tennessee, had some initiative in determining how Reconstruction would unfold. His willingness to pardon former Confederate officials was one cause of alarm. But more disturbing was the enactment of so-called Black Codes throughout the South that actively restricted the freedom of Black labor. If the old ruling class could not restore slavery per se, it could find other means to keep African American laborers subservient.

Congressional Republicans adopted a two-pronged strategy to remedy this situation. One critical measure was the Civil Rights Act of 1866. The act reversed the effective denial of full citizenship to African Americans that *Dred Scott* had proclaimed. All citizens would enjoy the equal protection of the laws and the full range of civil rights over persons and property vested in every citizen. Section 2 of the Thirteenth Amendment had provided one basis for this statute by empowering Congress to enforce emancipation. Yet the Civil Rights Act had to be enacted over the veto of President Johnson, indicating that its permanence could not be taken for granted. Moreover, because this empowerment of every citizen in the exercise of civil rights implied a massive transformation of state law, it would radically alter the structure of American federalism, Republicans concluded that the Act needed further constitutional authority. That is what the Fourteenth Amendment provided.

The amendment had multiple purposes. Because the interpretation of Section 1 has dominated modern legal scholarship on the Constitution, the historical importance of the remaining sections has been somewhat neglected. Section 1 deserves quotation in full:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The first sentence effectively overturned the racist suppositions that informed Taney's opinion in *Dred Scott*; the second laid a principled basis for enforcing the Civil Rights Act of 1866 (and for "persons" rather than "citizens" alone).

But the Fourteenth Amendment had further purposes. Because the Thirteenth Amendment gutted the Three Fifths Clause of the original Constitution, which had benefitted slave states in the apportionment of representation and presidential electors, Section 2 provided that their membership in the House of Representatives would be reduced should male voters be deprived of their suffrage. Section 3 prohibited any officeholder who had sworn an oath to "support the Constitution" and thereafter "engaged in insurrection or rebellion against the same" from holding office in the future,

unless amnestied by Congress. Section 4 guaranteed the security of the public debt that the Union had contracted to suppress the rebellion, while barring Southern states from assuming or paying their own obligations. Section 5 echoed the Thirteenth Amendment by giving Congress "the power to enforce, by appropriate legislation," the entire amendment.

While the analysis of Section 1 dominates modern legal scholarship, the other provisions of the Fourteenth Amendment are viewed almost as historical curiosities. That is an error, because Sections 2-4 illustrate its deeper political purposes. Collectively they dealt with the pressing political challenges of Reconstruction, not only to address the dire situation that emerged in the defeated Confederate states, but also to help maintain Republican rule[10].

One major element of that effort involved creating a new political landscape in the south. The Thirty-Ninth Congress had stopped short of including the suffrage – a distinct *political* right subject to the jurisdiction of state legislatures – among the *civil* rights needing protection. But as the provisional governments organized under President Johnson retained whites-only electorates and officials, the need to remake the South politically became evident. With Johnson repeatedly vetoing their measures, congressional Republicans, possessing the super-majorities to enact legislation, broadened their agenda. Conventions would be summoned to draft new constitutions; new governments would be elected; male African Americans would receive the right to vote and hold office; and the states would need to ratify the new constitutional amendments before their delegations could return to Congress. The South would remain under military occupation, and martial law and military courts would be available to enforce these obligations.

To guarantee African American suffrage, the Fifteenth Amendment was proposed in 1869 and ratified in 1870. Beyond its obvious importance to the South, the amendment mattered in northern states, too, because the two parties had grown more competitive nationally. Proponents naively hoped that possession of the suffrage would radically alter the character of southern politics. Armed with the vote, supported by northern interests, and capable of forming alliances with other southerners, African Americans would be better able to protect their rights and interests.

The three amendments adopted between 1865 and 1870 were thus truly equivalent to a second founding. Though respect for federalism remained important, the United States became much more of a nation-state and much less of a confederation than it had been in 1861. Yet fundamental constitutional change does not occur in a political and social vacuum. Throughout the South, the white population desperately wanted to preserve its political command, economic dominance, and most important, its racial supremacy. To achieve these ends, it was also willing to employ violence and political terror, a strategy made easier by the brutal experience the Civil War had provided. The appearance of the Ku Klux Klan and other para-military groups imperiled Republican officials and terrorized African Americans, requiring the South to remain under military occupation.

Thus in addition to the constitutional transformation that Reconstruction entailed, its actual implementation became an exercise in *transitional justice* – our sev-

enth category of analysis. Dismantling the old slavocracy and enhancing liberty for the freedmen defined the complementary challenges that Republicans faced after 1865, and even more so after 1869, when Ulysses S. Grant, the Union's former commanding general, replaced Andrew Johnson as president. Thinking of Reconstruction as a case of transitional justice enlarges the framework for both scholarship and teaching, enabling one to make analytical or pedagogical comparisons to the experiences of other modern nations, such as South Africa and Argentina. How far does one go in prosecuting the leaders and abettors of the defeated regime or, on the other hand, attempting to reconcile them to the new government? How deep and costly a commitment does the victorious party want to make to ensure that its original objectives are attained, especially when enthusiasm to sustain the struggle wanes? How does one balance the urgency of maintaining a military occupation against the benefits or restoring normal civil justice? One important outcome of Reconstruction was the creation of the Department of Justice. Before 1861, federal legal activity had been a highly decentralized matter, and the attorney general acted not as the head of an active department but merely as the national government's lead counsel. Now there was an institutional basis for national legal activity, a development which had a lasting impact on the structure of governance.

But litigation can be slow and painstaking, and often requires repetition in multiple locations. The most important task that federal courts faced after 1870 was to convert the broad principles enunciated in Section 1 of the Fourteenth Amendment into coherent legal doctrines. As the legal historian William Nelson argued in his influential book on *The Fourteenth Amendment*, its framers had no need to resolve the divergent emphases and even tensions that their appeals to different principles reflected. But courts would have to make these choices. Beginning with the *Slaughterhouse* decision of 1873 and the *Civil Rights Cases* of 1883, the Supreme Court sharply narrowed the potential impact of Section 1[11].

The focal point of these developments was the interpretation of the second sentence of Section 1, which established three further legal categories of analysis: the privileges and immunities of citizens, and the rights of all persons to due process and equal protection. In *Slaughterhouse* the Court narrowed the Privileges and Immunities Clause to cover only national rights secured under the federal Constitution, not a variety of other claims based on state law. The effective outcome of this ruling, by a narrowly divided Court, was to strip the Clause of any serious use. A decade later, in the *Civil Rights Cases,* the Court overturned the Civil Rights Act of 1875, which barred the owners of private businesses from refusing to serve African American customers. These were merely private acts of discrimination, the Court held, not public acts of state where the claims of equal protection would matter more. In effect, the Court treated racial prejudice as an attitude so deeply embedded in the sentiment of white Americans as to lie beyond the scope of legal reform or regulation. One year later, in *Cruikshank v. United States*, the Court overturned the conviction of a handful of perpetrators who had been charged with abetting the slaughter of roughly a hundred Louisiana freemen who had been holding a political meeting, on the grounds that no

federal right — even under the Petition and Assembly Clause of the First Amendment or the Due Process Clause of the Fourteenth — had been infringed by this private violence.

These decisions set legal doctrines that would have a profound impact for decades to come. But they also reflected other forces that led the great project of Reconstruction to begin collapsing by the late 1870s. The Union army could not occupy the South indefinitely. Nor could northern public opinion remain convinced that the expense and commitment needed to secure equality for the freedmen was fully justified. Even among Republicans, traditional ideas of federalism began to resurge. As competition to control Congress became more intense, both parties refined the practice of partisan gerrymandering for the House of Representatives[12]. A plausible case can also be made that when the mountain and great plains states of North and South Dakota, Wyoming, Montana, Idaho, and Washington were admitted to the Union in 1889-1890, they served as "rotten boroughs" enabling Republicans to retain control of the Senate.

The erosion of the rights and liberties of emancipated African Americans did not occur overnight, but the establishment of this new form of racial subordination was effectively completed by the end of the nineteenth century. Its apotheosis came with *Plessy v. Ferguson* (1896), a ruling that joins *Dred Scott* atop the list of the Supreme Court's most reviled cases. In *Plessy* the Court upheld a Louisiana statute authorizing railroads to provide "equal but separate accommodations" for white and black riders. Homer Plessy, the plaintiff, was a light-skinned African American who could pass as white in ordinary social encounters. His suit was a genuine test case, designed to demonstrate both the arbitrary nature of racial perceptions but, even more important, the extent to which enforcing racial barriers in public transportation would violate the egalitarian implications of the Thirteenth and Fourteenth Amendments.

Plessy lost his suit by a 7-1 vote. The lone dissenter was John Marshall Harlan, who had also been the sole dissenter in the *Civil Rights Cases* a decade earlier. Harlan is one of the few justices who deservedly merits a biography, and as is often the case in writing the history of constitutional law, his dissent makes for far more compelling reading than the majority opinion. (Dissenters are free to express their legal and moral convictions without worrying about doctrinal implications for lower courts.) But where Harlan appealed to a "color-blind" Constitution, the majority held that so long as the railroad carriages were equally comfortable, the segregation of the races was a reasonable exercise of the state's police power, even if African Americans felt demeaned by the process[13].

Plessy and *Dred Scott* are frequently compared, for obvious reasons. Both treated African Americans, whether enslaved or free, as a degraded race. But *Dred Scott* had been innovative in a way that *Plessy* was not. In 1857 many observers hoped that the Supreme Court would somehow find a legal solution to a grave political threat. That hope proved terribly naïve, and while Don Fehrenbacher carefully weighed the case's importance in the many causes of the Civil War, no one would question it was always perceived as being deeply consequential. By contrast, *Plessy* effectively encoded two

decades of the "redemption" of white rule in the South. The exercise in transitional justice that began in 1866 had failed, and by the 1890s, everyone knew it. The decision in *Plessy* deeply disappointed the appellants, but the results were unsurprising. *Plessy* operated as a precedent that controlled judicial and legislative actions for the next six decades, establishing the doctrine that racial segregation was permissible so long as the activities regulated were equally available to whites and blacks alike. That fiction, rarely if ever honored in practice, justified the so-called Jim Crow practices that dominated southern life until *Brown v. Board of Education* (1954-1955) initiated the Second Reconstruction.

And that identifies the final and *eighth* category of analysis that must be addressed. The Second Founding ended in a constitutional *failure* that the United States needed decades to overturn. Given the self-confidence in American exceptionalism that informs so much American writing, the need to reckon with constitutional failure has proved a challenging task. Well into the twentieth century, the failure of Reconstruction was more often attributed to the naïvete of the reformers than to the violent and persistent resistance of a racist South. African American scholars, led by W. E. B. DuBois (1868-1963) and John Hope Franklin (1915-2009), knew better, but it took the work of other white scholars, led by C. Vann Woodward and Kenneth Stampp, to enable the revisionist view to become more successful and pervasive.

3. *The Concerns of Twentieth-Century Constitutionalism*

The turn of the twentieth century opened a new era in the history of the Constitution. Three new amendments made important alterations to the text. The Sixteenth Amendment (proposed in 1909, ratified in 1913) reversed the Supreme Court's controversial decision in *Pollock v. Farmers' Loan and Trust* (1895), which invalidated a congressional tax of two percent on annual incomes over $4,000 on the problematic grounds that this was a "direct tax" that had to be apportioned among the states on the basis of their population. The amendment made the income tax a reliable basis for funding the national government, an important tool that enabled it to use its spending power to shape social policy within the states. Two other amendments marked important steps in the democratization of politics. The Seventeenth Amendment (1913) transferred the power to elect senators from the state legislatures to the voters. The Nineteenth Amendment (1920) declared that the right to vote in national or state elections "shall not be denied or abridged … on account of sex"[14].

One other amendment deserves notice for a different reason. The Eighteenth Amendment (proposed in 1917, ratified in 1919, repealed in 1933) prohibited "the manufacture, sale, or transportation of intoxicating liquors." Prohibition was the culmination of decades of agitation promoted by the temperance movement. Although passage of the amendment proved remarkably easy, its enforcement was far less popular. The impetus it gave to bootleg liquor dealing gave organized crime a major boost. To avoid the obstructive influence

that the temperance movement exerted over state legislatures, Congress made the Twenty-First Amendment repealing prohibition subject to approval by popularly elected conventions — the only occasion on which that alternative method for ratifying amendments has been used.

Beyond these formal changes in the text, three other developments set the framework for twentieth-century constitutional history. The first of these concerned what scholars call the Lochner era, when the Supreme Court developed a judicial doctrine of substantive due process that sharply constrained legislative actions to regulate the modern economy. The second involved the sustained efforts of the political leaders of the one-party Democratic South to maintain the edifice of white supremacy and racial segregation that the Jim Crow legislation of the late nineteenth and early twentieth centuries had codified. These racial barriers were enforced by the vicious lynching of any African Americans whose behavior seemed to defy or merely insult white supremacy. Third, the organization of the National Association for the Advancement of Colored People (NAACP) in 1909 and the American Civil Liberties Union (ACLU) in 1920 marked an epochal advance in the pursuit of public interest litigation grounded in constitutional claims. The idea of pursuing political interests through constitutional litigation was hardly a novelty to Americans. But the idea of doing this *strategically*, by building one judicial victory atop another over a prolonged period, was innovative. The NAACP and the ACLU became paradigmatic examples of how organizations and the interests they represented could litigate their way to political success.

Lochner v. New York (1905) marked the moment when the Supreme Court gave the Due Process Clause of Section 1 of the Fourteenth Amendment a new importance. In *Slaughterhouse* the Court had limited the scope and impact of the Privileges and Immunities Clause; in *Plessy* it had interpreted the Equal Protection Clause to make it compatible with racial segregation and white supremacy. In ordinary usage, due process of law bears a simple, straightforward meaning: acts of government affecting the fundamental rights of "life, liberty, and property" should conform to some fixed and known set of rules. But with *Lochner* and the line of cases that it symbolized, the Court gave due process a much more expansive meaning.

In *Lochner* a narrowly divided Court overturned a New York statute limiting the working hours of bakers to sixty hours a week or ten hours a day. The law could have been easily justified as a reasonable exercise of the "police power"—that is, of the state's broad authority to act in behalf of public health and safety. Instead, the five-member majority held that the right to bargain for one's labor was so fundamental, so important to individual liberty, that its denial or limitation violated due process of law. In this view, due process could involve something other than making government act in conformity with fixed rules. Some rights were so *substantively* important that their legislative limitation would infringe due process as well[15].

Lochner foretold the restrictive role that the Supreme Court played over the next three decades in checking "progressive" legislation that sought to deal with the social evils of industrial capitalism. By the 1910s the Court had become a major target

of political criticism. But its true crisis came only in the mid-1930s, when it overturned crucial elements of the New Deal program that President Franklin Roosevelt and a solidly Democratic Congress had adopted to deal with the Great Depression. After President Franklin Roosevelt and his party overwhelmingly swept the 1936 elections, some of the Justices began to worry that the Court was losing political legitimacy. The idea that the president and Congress might simply vote to enlarge the Court—its size is *not* determined by the Constitution—may have provided another incentive. The crucial change —"the switch in time that saved nine" – came in *West Coast Hotel Company v. Parrish*, when Justice Owen Roberts joined the four more liberal judges to sustain a Washington State minimum wage law[16].

In the aftermath of this decision, the Court entertained a number of other cases that effectively laid a foundation for the modern regulatory state. This jurisprudential shift is often described, fairly, as a constitutional revolution. Arguably the most important component of this revolution was a profound shift in the interpretation of the Interstate Commerce Clause. In place of the prior view that defined commerce primarily in terms of the physical movement of goods across state lines, the new interpretation involved identifying a "substantial relationship" between the activity being regulated, on the one hand, and manufacturing and trade more generally, on the other. The acceptance of this expansive definition was facilitated by a major change in the composition of the Court. Roosevelt made seven appointments in the years immediately following the switch, dramatically demonstrating how important the appointment power could be in moments of heated contest. The Supreme Court was now politically consistent with national political sentiment, as it was expressed through elections.

In pursuing their agenda, the New Deal Democrats thus transformed the national political landscape. Democrats controlled Congress for decades to come, losing the House of Representatives only in 1946 and 1952, while holding the Senate until 1980. One important element in this success was a shift in political allegiances of African Americans and the Jewish community formed of first- and second-generation immigrants. Both groups had previously favored Republicans, but amid the Depression the New Deal agenda proved highly attractive. Yet to succeed nationally, the Democrats required the continued loyalty of the one-party South, where Republicans remained wholly uncompetitive. Important elements of the New Deal agenda would benefit the South, most notably the creation of the Tennessee Valley Authority, which became the basis for the electrification of much of the rural South, the economic development of the region, and a powerful example of the new role the national government could play in promoting collective social welfare.

Yet in accepting these and other benefits, southern political leaders and their white constituents clung to one tradition: to preserve the segregationist and racial supremacist regime they had created in the late nineteenth century. The maintenance of this regime fulfilled the same function that the treatment of chattel slavery as an institution subject solely to state law had enjoyed before 1861. Southern political leadership became more cohesive and effective with each passing decade. After

1900 – and in defiance of the expectations of the framers of the Constitution – members of Congress began to think of service there in careerist and professional terms. Moreover, the advantages of incumbency were reinforced in both the one-party South and within Congress, where influential committee chairmanships were generally awarded on the basis of seniority. When vital regional interests were at stake, southern senators could use the filibuster — a rule requiring two-thirds of the Senate to agree to terminate a debate and proceed to a vote — as the ultimate check on legislation they opposed. Civil rights legislation equivalent to the measures that Congress had enacted during Reconstruction were a virtual impossibility—unless they were so weak as to be inconsequential[17].

Understanding the force of this commitment is not a hard task for *scholars*, but it does pose a greater challenge to classroom *teachers* precisely because they need to deal directly with the nature of racial and racist attitudes. That much seems obvious. What bears further emphasis, however, is recognizing how much the distinctive and tragic characteristics of the South have *always* mattered in American politics. Counterfactually one can speculate how the free and slave states would have evolved had the Confederacy survived the Civil War intact. In the early 1860s, many southern thinkers remained optimistic that the revival of their "cotton is king" economy would preserve slavery as an institution and the prosperity of their region. But even as a tightly organized minority region, the South acted as an independent variable and often decisive element in American politics.

That is what makes the emergence of sustained public interest litigation, as pioneered by the NAACP, such an important factor in constitutional politics. Without adequate access to any political institution in the segregated South, the NAACP had nowhere else to turn but to the courts. Because most of the laws the NAACP opposed came from state and local governments, its obvious strategy would be to apply Section 1 of the Fourteenth Amendment against these jurisdictions and insist on giving the Equal Protection Clause a robust reading. But mounting a litigation campaign of this kind is hard work. One needs to identify the most vulnerable object of attack; to find the best fact pattern to sustain a case; and to recruit plaintiff-litigants who can bear the vexations, threats, and literal dangers of sustaining their case. In the realm of education, any attempt to desegregate elementary and secondary schools or even undergraduate institutions seemed likely to generate massive protests based on the blatant fear of social intermixing. A more sensible, prudent, and less expensive strategy would focus instead on professional schools, and thereby set precedents that might later be extended to lower levels of education[18].

The appeal to federal courts to adjudicate in support of fundamental individual rights had another source: the American Civil Liberties Union. The main original mission of the ACLU was to protect free speech claims against the repressive persecution that followed the nation's entrance into the First World War and the postwar Red Scare against pro-communist agitators. Although issues of free speech and the free exercise of religion were its core commitments, its concerns grew substantially over time, to the point that protecting the first eight amendments to the Constitution defined the ACLU's greater agenda. When

the sesquicentennial of the Bill of Rights was celebrated in 1941, Americans generally and lawyers more particularly gave new importance to the additional articles that James Madison, almost singlehandedly, had convinced his colleagues in the First Congress of 1789 to consider.

By the 1930s, then, the nation had entered a new epoch, when "rights talk" — rather than discussions of the powers and structure of governance — would dominate its constitutional concerns. The portent of this new era appeared in the most famous footnote in American jurisprudence. *U.S. v. Carolene Products Company* was just one more case in which the Supreme Court developed its new Commerce Clause doctrine. But in footnote 4, Justice Harlan Stone introduced a new set of criteria by which the Court might henceforth consider overturning duly enacted statutes. In the realm of economic legislation, the Court should now show greater deference to the political branches. But there were three other conditions under which the Court could subject legislation to closer scrutiny:

> first, when it involved specific guarantees of rights, including those stated in the first eight amendments to the Constitution, which could be applied against the states under the Fourteenth Amendment;
> second, when ordinary political processes did not offer litigants adequate recourse to redress their grievances;
> and third, when the parties seeking relief belonged to "discrete and insular minorities," whether religious, ethnic, or racial in nature[19].

The first category anticipated the development of the "incorporation doctrine", which explicitly extended nearly all of the rights enumerated in the first eight amendments against the states. The second clearly applied to the disfranchised African American population in the South. The third category fit the situation of religious sects like the Jehovah's Witnesses, whose often obnoxious behavior played a catalytic role in the evolution of doctrines relating to the free exercise of religion[20]. It would also cover the harsh treatment imposed on Japanese Americans during World War Two, when, in defiance of their status as American citizens, the government arbitrarily interned them in isolated camps[21].

This subordination of Japanese Americans marks one of the bleakest chapters in American law. Though far different in duration and severity from the centuries-long oppression of African Americans, it fostered a significant shift in public sentiment that made overt issues of racial discrimination and oppression an open subject of public controversy. The mass murder of millions of European Jews during the Holocaust only deepened this sentiment. It was against this background that the NAACP finally concluded that it could attack segregated schools. Building on the precedents it had gained in its suits pursuing desegregation in graduate education, the NAACP believed the Supreme Court would be willing to reconsider the entire edifice of racial segregation it had legitimated in *Plessy v. Ferguson*.

The outcome of this strategic choice was the Court's unanimous holding in *Brown v. Board of Education*, the most celebrated judicial decision in American (and perhaps even global) constitutional history. The details of this famous decision need not concern us here. But two points deserve major emphasis. First, rather than engage in the kind of nuanced reasoning and extensive citations to legal precedent that commentators might have expected, Chief Justice

Earl Warren wrote an elegant opinion that was, at heart, simply an appeal to egalitarian principles. That opinion, though not its results, therefore disappointed many commentators for its very brevity. Second and more important, the appeal left open difficult questions about how to enforce the decision. For many southern whites, the Court seemed to be attacking an entire way of life that they desperately wished to control. "Massive resistance" was the name given to the southern response to *Brown*[22].

For historians, then, the real problem involves explaining how the United States moved from the initial judgment in *Brown* to the enactment of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. These were the true milestones of the Second Reconstruction. Although the initial role that the Supreme Court played was an important catalyst, it was only secondary in a larger story. The massive opposition that the *Brown* decision aroused through much of the South led the Court to reiterate a famous statement from *Marbury v.* Madison, the famous judicial review decision of 1803, affirming that it was "emphatically" the duty of the judiciary to "say what the law is." But that statement could not overcome the multifold efforts of countless southern jurisdictions, from school boards to state governors and legislatures, to preserve a segregated society[23].

The story of this decade of political change after 1954 has multiple dimensions. One notable aspect of this story involves the role of African American college students sitting in at segregated lunch counters and refusing to leave unless they were served. Protest marches that drew violent responses from local police were widely covered on television news — then a novelty — eliciting popular sympathy from millions of viewers. The refusal of southern officials to conform to judicial orders desegregating schools led the administration of President John Kennedy, initially somewhat hesitatingly, to pursue additional legal remedies. It was the southern "backlash" against *Brown* that helped to persuade other Americans that a mere judicial decision would not complete the greater work. The tragic assassination of President John F. Kennedy in November 1963 also advanced the case. His successor, Lyndon Baines Johnson, treated enactment of the Civil Rights Act and Voting Rights Act as a tribute to Kennedy's legacy and an opportunity to demonstrate his own impressive legislative skills[24].

Those two acts number among the most important pieces of legislation Congress ever passed. Drawing upon the broad reading of the Interstate Commerce Clause fashioned during the New Deal, the Civil Rights Act gave African Americans equal access to every form of business: restaurants, hotel, theaters, stores, and everything else. Equally important, the Voting Rights Act and its later revisions empowered African Americans to exercise their Fifteenth Amendment right to vote throughout the South, while imposing other restrictions on electoral laws that could be manipulated to minimize their political influence. These acts drove the Second Reconstruction that attained many of the goals its predecessor had failed to secure a century earlier. The repercussions of these acts still dominate American politics six decades later.

Yet while the hard work of the civil rights movement in the 1960s became primarily a political struggle, the Supreme Court was reshaping American constitutionalism in other ways. Under the leadership of Chief

Justice Earl Warren and his successor, Warren Burger, the Supreme Court pursued a "rights revolution" of another kind. Following the path marked by Footnote 4 of *Carolene Products*, the Court developed the "incorporation doctrine," which held that nearly all the rights identified in the first eight amendments to the Constitution could be applied and amplified against the states. Nor did this approach always depend on the literal text of the Constitution. In two epochal cases, *Griswold v. Connecticut* (1965) and *Roe v. Wade* (1973), the Court inferred that "penumbras, formed from emanations" from the Bill of Rights established a general right of privacy that protected the right of married couples to practice conception and of pregnant women to decide whether to obtain abortions.

Over time, *Roe v. Wade* arguably became the most controversial decision in American judicial history. When we consider the ongoing repercussions of that case, and those relating to the civil rights laws of the mid-1960s, one can argue that 1973 marked a turning point when we move from the realm of *constitutional history*, properly defined, to the rush of *current events* whose consequences are not yet known, which as yet makes their true historical analysis quite difficult.

4. *The Uncertain Path Ahead: A Few Final Thoughts*

Of course, the constitutional history of particular events and decisions occurring over the past half century can already be written. The best examples here cover momentous judicial decisions: *Roe v. Wade* and its aftermath, including the movement that culminated in the Supreme Court's recent decision to repudiate the constitutional right to abortion; the Court's acceptance of same-sex relations as a legitimate expression of a personal right to privacy; and its endorsement, now increasingly problematic, of a neutral standard for judging claims of religious exemptions to particular laws and regulations[25]. Such studies often illustrate how so many legal challenges arise from contrived cases selected and shaped by public interest litigators. Another involves recognizing how the justices often invite challenges to judicial doctrines they want to modify or overturn — including gutting the Voting Rights Act.

There are, however, two broader topics that identify matters of immediate concern. One involves the role of historians in evaluating the so-called originalist arguments that dominate modern constitutional interpretation. The other concerns how historians, today and in the future, will deal with the degradation of constitutional norms embedded in the behavior of Donald Trump and the deterioration of the Republican party into an authoritarian cult.

Historians naturally assume that any inquiry into the original intended or understood meaning of a constitutional text must be inherently historical in nature. That was the inspiration, formed in the early 1970s — before the word *originalism* was coined — that led me to write *Original Meanings*, which explain how a historical approach to this problem could work. But avowed originalists, both on the bench and in the law schools, have turned away from relying on historical sources. They describe their own approach as being inherently linguistic in nature: a search for the public or

semantic meaning of contested terms. In this view, historical analysis appears too indeterminate to satisfy the jurists' desire for certainty. Historical evidence can still illustrate linguistic usage; but the specific political purposes that explained the adoption of these terms seems largely irrelevant to this quest. The obvious rejoinder that historians need to make is to insist that the original meaning of a constitutional clause can never be understood or explained if one does not examine the purposes and debates surrounding its adoption. And their duty as teachers is to explain why a historical approach makes much better sense than the linguistic turn[26].

Dealing with the Trump problem and the degeneration of the Republican party poses far graver difficulties. Historians have always assumed that, once past the Civil War, the nation would always enjoy constitutional stability. They were equally confident that the peaceful transfer of power through democratic elections has been the dominant norm of political behavior since 1801 – again except in 1861. To have a sitting president abandon those norms, foment an insurrection to annul an election, survive two impeachments on the basis of partisan fealty, and remain the dominant figure in his party: these are conditions that stagger any historian's imagination, not merely because they are so anomalous, but because they reveal that the entire constitutional system is in danger[27]. Such a perception will force historians to search for causal explanations they have rarely considered previously. It will be a great source of intellectual stimulation – and perhaps political despair.

[1] See generally, J. Rakove, C. Sheehan (eds.), *The Cambridge Companion to The Federalist*, New York, Cambridge U.P., 2020.

[2] B. Bailyn, *The Ideological Origins of the American Revolution*, 50th anniversary edition, Cambridge, Harvard U.P., 2017; G. Wood, *The Creation of the American Republic, 1776-1787*, Chapel Hill, University of North Carolina, 1969; J. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution*, New York, Knopf, 1996; P. Maier, *Ratification: The People Debate the Constitution, 1787-1788*, New York, Simon Schuster, 2010.

[3] W. Chambers, W. Burnham (eds.), *The American Party Systems: Stages of Political Development*, 2d ed., New York, Oxford U.P., 1975.

[4] R. Shelden, E. Alexander, *Dismantling the Party System: Party Fluidity and the Mechanisms of Nineteenth-Century U.S. Politics*, in «Journal of American History», 3/110, 2023, pp. 419-448.

[5] D. Carpenter, *Democracy by Petition: Popular Politics in Transformation, 1790-1870*, Cambridge, Harvard U.P., 2021.

[6] P. Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity*, Chapel Hill, University of North Carolina, 1981.

[7] The classic study is D. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics*, New York, Oxford U. P., 1978; and see M. Graber, *Dred Scott and the Problem of Constitutional Evil*, New York, Cambridge U.P., 2006.

[8] E. Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution*, New York, Norton, 2019.

[9] M. Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment*, New York, Cambridge U.P., 2001.

[10] M. Graber, *Punish Treason, Reward Loyalty: The Forgotten Goals of Constitutional Reform after the Civil War*, Lawrence KS, Univ. Press of Kansas, 2023.

[11] W. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine*, Cambridge, Harvard U. P., 1988.

[12] P. Argersinger, *Representation and Inequality in Late Nineteenth-Century America*, New York, Cambridge U.P., 2012; H. Richardson, *The Death of Reconstruction: Race, Labor, and Politics in the Post-Civil War North, 1865-1901*, Cambridge, Harvard U.P., 2001; P. Herron, *Framing the Solid South: The State Constitutional Conventions of Secession, Reconstruction, and Redemption*, 1860-1902, Lawrence KS, University Press of Kansas, 2017.

[13] C. Lofgren, *The Plessy Case: A Legal-Historical Interpretation*, New York, Oxford U.P., 1987.

[14] The best study of the amendment process is D. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995*, Lawrence KS, University Press of Kansas, 1996.

[15] P. Kens, *Lochner v. New York: Economic Regulation on Trial*, Lawrence KS, University Press of Kansas, 1998; and see H. Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence*, Durham NC, Duke U.P., 1993.

[16] W. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt*, New York, Oxford U.P., 1995.

[17] On this immensely important development, see D. Bateman, I. Katznelson, J. Lapinski, *Southern Nation: Congress and White Supremacy after Reconstruction*, Princeton, Princeton U.P., 2018; and I. Katznelson, *Fear Itself: The New Deal and the Origins of Our Time*, New York, Liveright, 2013.

[18] M. Tushnet, *The NAACP'S Legal Strategy Against Segregated Education, 1925-1950*, Chapel Hill, University of North Carolina Press, 1987, 2004.

[19] *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152n.4 (1938).

[20] S. Peters, *Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution*, Lawrence KS, University press of Kansas, 2000.

[21] P. Irons, *Justice at War: The Story of the Japanese American Internment Cases*, New York, Oxford U.P., 1983.

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[23] In this and the following paragraphs I rely on M. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*, New York, Oxford U.P., 2004.

[24] J. Zelizer, *The Fierce Urgency of Now: Lyndon Johnson, Congress, and the Battle for the Great Society*, New York, Penguin, 2015, pp. 85-130.

[25] M. Ziegler, *Dollars for Life: The Anti-Abortion Movement and the Fall of the Republican Establishment*, New Haven, Yale, 2022; D. Carpenter, *Flagrant Conduct: How a Bedroom Arrest Decriminalized Gay Americans*, New York, Norton, 2012; C. Long, *Religious Freedom and Indian Rights: The Case of Oregon v. Smith*, Lawrence KS, University Press of Kansas, 2000.

[26] For my preliminary thoughts on this subject, see J. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, in «San Diego Law Review», 48/2, 2011, pp. 575-600.

[27] Similarly, see J. Rakove, *Impeachment, Responsibility, and Constitutional Failure: From Watergate to January 6*, in M. Flinders, Ch. Monaghan (eds.), *British Origins and American Practice of Impeachment*, London, New York, Routledge, 2024, pp. 206-237.