THE FORGOTTEN CONSTITUTIONAL MOMENT

*Michael W. McConnell**

Theory and history have an uncomfortable relation. Sometimes theory derives from history, as an attempt to explain and reconcile events that have taken place. And sometimes history trips up theory, when events stubbornly refuse to conform to the theory we have laid out.

One currently popular constitutional theory, the theory of "constitutional moments" championed by Yale Professor Bruce Ackerman, purports to be derived from history. The present state of orthodox constitutional theory, Ackerman says, is "peculiarly ahistorical," which has produced "a remarkable breach between constitutional theory and constitutional practice."[1] Our constitutional order, he says, "is best rediscovered by reflecting on the course of its historical development over the past two centuries."[2] Ackerman's history reveals that the real Constitution is not truly, or not solely, the text we call the "Constitution," nor is it whatever five Justices of the Supreme Court think it is. The real Constitution is a set of principles adopted by "We, the People" at extraordinary "moments" of intense constitutional participation and deliberation, with or without changes in the constitutional text. These "moments" result in constitutional transformations that are *and should be* honored by the courts and other political actors no less than amendments adopted pursuant to Article V.

This, according to devotees of the theory, has happened three times in American history: in 1787, when the Federalists

* William B. Graham Professor of Law, University of Chicago. The author wishes to thank the Morton C. Seeley Endowment Fund and the Arnold and Frieda Shure Research Fund for financial support during preparation of this article, and Akhil Amar, Steven Calabresi, David Currie, Christopher Eisgruber, Richard Epstein, Dan Kahan, Elena Kagan, Michael Klarman, Larry Kramer, Lawrence Lessig, Sanford Levinson, Geoffrey Miller, Michael Stokes Paulsen, Richard Ross, Anne-Marie Slaughter-Burley, Geoffrey Stone, and Cass Sunstein for helpful comments on an earlier draft.

1. Bruce Ackerman, *We the People: Foundations* 3, 5 (Belknap Press, 1991) ("*We the People*").

2. Id. at 5.

obtained popular approval of the Constitution in violation of the procedures specified in the Articles of Confederation; during Reconstruction, when the Thirteenth and Fourteenth Amendments were declared to be ratified without the genuine approval of three fourths of the states; and during the New Deal, when President Franklin Roosevelt and a compliant Congress cast aside the shackles of limited government through a combination of popular opinion and the Court packing plan.[3]

The theory can be maintained, however, only by ignoring the fact that for almost eighty years of our history, from 1877 until 1954 (if not longer), the constitutional principles actually put into practice had nothing to do with any of the constitutional moments recognized by the theory, but were in direct repudiation of the principles of the Reconstruction Amendments. This article is about the end of Reconstruction, the forgotten constitutional moment, and its implications for the constitutional moment theory itself. The first section discusses constitutional moment theory in greater detail; the second section shows why the end of Reconstruction must be understood as a constitutional moment under the theory; and the third section discusses the implications of these conclusions.

I. THE THEORY OF CONSTITUTIONAL MOMENTS

Constitutional moments theory presents itself as democratic, positivist, and historical, rather than foundationalist, realist, or critical. It rejects the idea that constitutional law is mere political decisionmaking by the judiciary, for it affirms that judges have an obligation to give legal force to objectively ascertainable constitutional principles that were adopted by the People.[4] It denies that law is predicated on inherent principles of human rights or natural justice rather than on the will of the governed. The job of the judge is to *preserve* principles adopted (by others) in the past, not to nudge the system in a direction that the judge thinks would be desirable for the future. The theory thus bears a strong resemblance to originalism, but with two significant differences.

First, rather than interpreting the constituent parts of the Constitution in accordance with their original purpose and understanding, the constitutional moment theorists understand constitutional interpretation to require "intergenerational synthesis." This means that later amendments (whether textual

3. This is a rough summary of the theory as presented in Ackerman, *We the People* (cited in note 1).

4. Id. at 60-61.

or nontextual) subtly modify earlier provisions even if those earlier provisions were not explicitly amended. This process of synthesis, moreover, is conducted at an extremely high level of generality, allowing judges a large number of legitimate interpretive options. Thus, for example, *Griswold v. Connecticut*[5] is explained as a synthesis of the Founders' concern with individual liberty, as modified by the New Deal's affirmation of activist government in the economic sphere.[6] This requires the interpreter to generalize from the Bill of Rights to a general libertarianism, and then to particularize from New Deal government "activism" to activism in the economic sphere—producing a regime of libertarianism in non-economic matters. But as Ackerman acknowledges, it would be equally possible to particularize the Founding (treating the Bill of Rights as a list of relatively specific protections) and to generalize the New Deal (treating it as an affirmation of the broad powers of democratic government), thus producing the dissenting opinion in *Griswold*. At this level of abstraction, everything depends on which elements in the three constitutional regimes the judge decides to expand or emphasize, and which to contract or subordinate.[7]

Second, the constitutional moment theory disputes what had been the least controversial aspect of originalist (or any other traditional) interpretation: the priority of the text. According to the constitutional moment theory, the Constitution can be amended (and was amended, during the New Deal) without any actual changes to the text. This makes it difficult to know precisely what changes in the constitutional regime have been made. It is a nice intellectual exercise to imagine what constitutional amendment(s) the New Dealers would have made if the New Dealers had made a constitutional amendment (an end to dual federalism? additional federal powers over economic affairs? expanded presidential authority? abolition of substantive due process?). This compounds the problem of abstraction already noted.

None of this matters much for the first two recognized constitutional moments. Whatever their procedural irregularities, both resulted in actual changes to the constitutional text, and the problem of synthesis is minimized by the fact that the original

5. 381 U.S. 479 (1965).

6. Ackerman, *We the People* at 150-58 (cited in note 1).

7. In my view, there is nothing inherently inconsistent between originalism and the idea of intergenerational synthesis, but the high level of generality and the tendency to assume unintended changes in unamended parts of the text are nonoriginalist in their orientation.

Constitution dealt primarily with the subject of the national government while the Fourteenth Amendment is primarily addressed to the states.[8] The practical significance of the theory lies in its treatment of the New Deal as an unwritten amendment to the Constitution. According to the theory, the Old Court was in a sense correct to find the new centralized welfare-regulatory state of the New Deal inconsistent with the principles of the Constitution, but in the ensuing struggle between the Court and the political branches, "We the People" were mobilized, and "amended" the Constitution (though not the constitutional text) to reject laissez-faire and embrace a new, more activist, vision of government. Thus what had been unconstitutional before became part of the constitutional fabric.

This challenges the conventional view of New Deal constitutionalism, which rested not on an asserted amendment of the Constitution, but on a return to what Justice Hugo Black—a quintessential New Dealer—said was "the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."[9] Far from constituting a "revolution"—or even a constitutional "amendment"—Robert Jackson, Roosevelt's Solicitor General from 1933 to 1939, described New Deal constitutionalism as a correction of past mistakes and a return "to the original sweep and vigor of those clauses which confer power on the Federal Government," as well as to "tolerable approximations" of the "original meaning" of the clauses that limit governmental power.[10] It was "a struggle against judicial excess" and for a return to "judicial restraint."[11] No longer would the Supreme Court "deny important powers to both state and nation on principles nowhere found in the Constitution itself."[12]

---

8. Probably the most interesting problems of intergenerational synthesis posed by the Fourteenth Amendment have to do with the incorporation of the Bill of Rights. Do some of the principles of the Bill of Rights attain a different meaning when applied to state and local government? See, e.g., Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 Mich. L. Rev. 477, 491-92 (1991) (arguing that the Supreme Court failed to recognize the difficulties involved in applying the Religion Clauses of the First Amendment to the states).

9. *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

10. Robert H. Jackson, *The Struggle for Judicial Supremacy* xv (Alfred A. Knopf, 1941).

11. Id. at vii.

12. Id. at viii-ix. See also *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (per Douglas, J.) (summarizing leading New Deal cases as holding that "[w]e do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."); *West Coast Hotel Co. v. Parrish*,

Constitutional moment theorists, by contrast, tell us that the substance of the Constitution was transformed—not just that mistaken interpretations were corrected or that the balance of power between legislative and judicial branches was righted. Indeed, they deny the centrality of judicial restraint to New Deal constitutionalism.[13] This enables them to claim the heritage of the *Lochner* era as precedent to support the judicial activism of the recent past—in service, of course, of a new set of constitutional principles. Professor Ackerman observes that a "dismissive view" of the *Lochner* period is "unfortunate," for it was only during this period that "the Court beg[a]n to review the constitutionality of national legislation on a regular basis" and dramatically increased "the scope and intensity of its scrutiny of state legislation." Let us not "cut ourselves off from such a potentially rewarding source of insight."![14]

This debate over the historical grounding of New Deal constitutionalism is not mere antiquarianism, but bears closely on the debates over constitutional theory today.[15] The "judicial restraint" interpretation of New Deal constitutionalism does nothing to legitimate the recrudescence of judicial activism in the Warren and Burger periods. It emphasizes the essential similarity between *Lochner* and *Griswold*; it suggests that the William Rehnquists and Robert Borks of today are the jurisprudential heirs of Robert Jackson and Hugo Black. Constitutional moment theory, in contrast, by emphasizing political substance rather than institutional competence, traces the lineage from Jackson and Black to William Brennan and Thurgood Marshall.

---

300 U.S. 379, 399 (1937) ("Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment"); *Nebbia v. New York*, 291 U.S. 502, 537 (1934) ("So far as the requirement of due process is concerned . . . a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it.").

13. This view of the New Deal is not peculiar to constitutional moment theorists. See, e.g., Cass R. Sunstein, *The Partial Constitution* 40-67 (Harv. U. Press, 1993). While he does not subscribe to the theory of nontextual constitutional "amendments," Sunstein supports Ackerman's general understanding of New Deal constitutionalism: "[T]he revolution of 1937 should be seen, not principally as an endorsement of 'judicial restraint,' . . . but instead as a dramatic shift in the prevailing notions of neutrality and action." Id. at 42. Significantly, Sunstein recognizes that the "conventional" understanding of the New Deal's repudiation of *Lochner* "lay in the Court's readiness to interfere with democracy." Id. at 66.

14. Ackerman, *We the People* at 63 (cited in note 1).

15. This is best seen not in *We the People*, which is primarily historical in orientation, but in Cass Sunstein's *Partial Constitution* (cited in note 13), which relates the revisionist understanding of New Deal constitutionalism to a wide array of current doctrinal controversies.

It declares the political principles of the New Deal constitutionally entrenched, even though they are nowhere mentioned in the constitutional text, while still proclaiming fidelity to a constitutional order in which the only constitutional principles legitimately enforceable by the courts are those adopted by the People. The theory thus delegitimates those (like Ronald Reagan or Robert Bork) who are unreconciled to the New Deal constitutional moment and propose to depart from it without first obtaining a constitutional moment for their own position.

What is more, constitutional moment theory not only entrenches the political victories of the New Deal but lays the groundwork for extension and elaboration of those political principles in the future. Not limited by any formulation of constitutional principles that was written down at the time of the New Deal constitutional moment, the carriers of the torch in our generation are able to reformulate the constitutional principles of the New Deal in light of the issues of the day, without the constraints that come from constitutional text.

There are many problems with the theory, which other commentators have duly noted.[16] But perhaps the most serious is that there are no generally accepted criteria for describing a constitutional moment. Textualist constitutionalism has no such problem, because we can usually tell when the constitutional text has been amended.[17] "Common law" constitutionalism similarly has no such problem, because no constitutional principle is ever truly entrenched. But if constitutional moments occur without any alteration in the constitutional text, and still must be given the force of law even by judges who disagree with them, we need objective and generally accepted rules of recognition for constitutional moments.

Professor Ackerman is acutely aware of this necessity. He produced his theory in the shadow of a potential claim by Rea-

16. See, e.g., William W. Fisher III, *The Defects of Dualism*, 59 U. Chi. L. Rev. 955 (1992) (Book Review); Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 Stan. L. Rev. 759 (1992); Terrance Sandalow, *Abstract Democracy: A Review of Ackerman's* We The People, 9 Const. Comm. 309 (1992); Frederick Schauer, *Deliberating About Deliberation*, 90 Mich. L. Rev. 1187 (1992) (Book Review); Suzanna Sherry, *The Ghost of Liberalism Past*, 105 Harv. L. Rev. 918 (1992).

17. See Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 Yale L.J. 677 (1993); but see Sanford Levinson, *Accounting for Constitutional Change (Or, How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) >26; (D) All of the Above)*, 8 Const. Comm. 409 (1991).

gan Republicans to constitutional momenthood.[18] Thus, Ackerman propounds four stages that must occur if a political change is to be understood as a constitutional moment. First, proponents of the change must "signal" that they have the broad, deep, and decisive support of the American people for constitutional transformation. Second, the political leaders of the movement must elaborate their transformative agenda into relatively concrete "proposals" that the people can accept or reject. Third, there must be a "substantial period for mobilized deliberation" by the people, typically triggered by conflict between two or more of the branches of government, during which the proponents of change gain the deep and sustained support of the majority of the People. Fourth, after one or another position triumphs in the political arena, the courts must "translate" or "codify" this political success into "cogent doctrinal principles" that will govern constitutional law into the future.[19]

These criteria are said to include the New Deal and to exclude the Reagan era as constitutional moments. Whether they accomplish this purpose is debatable.[20] My intention here, however, is to accept those criteria and to demonstrate that they encompass a constitutional moment that most of us would rather not recognize: the end of Reconstruction. This constitutional moment began with the congressional deliberations over the Civil Rights Act of 1875, took effect with the Compromise of 1877, was codified in a series of decisions culminating in *Plessy v. Ferguson*,[21] and endured until well after the Second World War. If Ackerman is correct about constitutional moments, he is incorrect about something much more important. There have been not three constitutional regimes in American history, but four. Ackerman's "middle republic," defined by allegiance to the Reconstruction Amendments, lasted less than a decade. It was succeeded by the Jim Crow Republic. Those who remain tied to a theory of constitutional law based on the text of the Constitution may have no difficulty in proclaiming Jim Crow illegitimate. But

18. Reagan's "failed constitutional moment" is discussed repeatedly in the book, giving the impression that the specter of Reagan has much to do with the design of the theory. Ackerman, *We the People* at 50-51, 52, 56, 112-13, 162, 268-69, 278 (cited in note 1).

19. Id. at 48-49, 266-68, 272-90. A summary may be found at page 290.

20. William Fisher, for example, contends that under Ackerman's criteria, the constitutional reforms attempted by Presidents Reagan and Bush seem to qualify, while Michael Klarman questions whether the constitutional moments of 1866 and 1936 pass muster. Fisher, 59 U. Chi. L. Rev. at 975-76 (cited in note 16); Klarman, 44 Stan. L. Rev. at 769 n.63, 770-71 (cited in note 16).

21. 163 U.S. 537 (1896).

under the theory of constitutional moments it was no less legitimate—and deserves no less constitutional respect—than the New Deal.

II. THE END OF RECONSTRUCTION AS A CONSTITUTIONAL MOMENT

Professor Ackerman mentions a number of near-miss constitutional moments, from the defeat of William Jennings Bryan's populist crusade to the decline of Reaganism. But he makes only one passing reference to 1877—and even then treats "the constitutional crisis generated by the Hayes-Tilden election of 1876" as significant only for whether the "principal forum for the normal politics of the middle republic would be Congress [or] the Presidency."[22] He does not mention that the events surrounding the Hayes-Tilden election marked the nullification of the Fourteenth and Fifteenth Amendments and the end of the "middle republic." Yet the end of Reconstruction precisely fits Ackerman's model of a constitutional moment, meeting all four of his criteria. It should not be forgotten or overlooked.

A. SIGNALING

By 1876, opponents of Reconstruction had clearly "signalled" their intent to challenge the previous consensus. The earlier consensus, a national commitment to civil and political rights for all citizens, without regard to race, advanced consistently during the decade of the Civil War. In 1860, there were slaves in the nation's capital and the President-elect offered to support a constitutional amendment to insulate the institution of slavery in the slave states from federal interference. By 1863, that same President abolished slavery by executive order in the states of the rebellion. Slavery was abolished nationwide in 1865 by constitutional amendment. Basic civil rights (to make and enforce contracts, to acquire, hold, and dispose of property, to the equal application of criminal laws, and so forth) were extended to black citizens by statute in 1866. This equality in civil rights, along with equal protection and due process, was constitutionalized in 1868. The right to vote without regard to race, color, or previous condition of servitude was secured by constitutional amendment in 1870. None of this was easy: there was enormous resistance in the South, backed by murderous violence, requiring repeated, expensive, and unpopular interventions by federal

22. Ackerman, *We the People* at 83 (cited in note 1).

troops. In 1870, Senator Charles Sumner of Massachusetts introduced legislation pursuant to Section Five of the Fourteenth Amendment that would have abolished racial discrimination and segregation in public schools, cemeteries, railroads and other common carriers, and inns and other places of public accommodation licensed in the public interest, and the exclusion of citizens from jury service on the basis of their race.[23] This would have been the final triumph of Reconstruction. "I will say," Sumner said, "that when this bill shall become a law, as I hope it will very soon, I know nothing further to be done in the way of legislation for the security of rights in this Republic."[24]

It was not to be. Already, political leaders with a different constitutional vision were signaling their intentions to a public weary of the civil rights crusade. Eli Saulsbury of Delaware questioned on the floor of the Senate whether the Fourteenth Amendment had any "legal or binding force in law," and declared that "I am placed under the most binding obligation to maintain for my race that superiority to which it is entitled by the decrees of God himself, and here in the council of my country I proclaim that no act of mine shall assist to drag it down and place it on an equality with an inferior race."[25] William Robbins of North Carolina stated that it was "time to recur to the doctrine in which is bound up the salvation of this country—the doctrine that this is the white man's land and ought to be a white man's government."[26] If anyone doubted that the controversy over Sumner's Civil Rights bill was a conflict over the constitutional regime, the Democrats' choice of former Confederate Vice President Alexander Stephens as the chief speaker in opposition in the House should have made it plain.

I do not know whether those doing the "signaling" had sufficient support in the populace in 1870 to satisfy Professor Ackerman's numerical criteria—20% deep support plus 31% mild support[27]—but in light of their later electoral success and eighty years of political dominance, it is safe to say they soon got it.[28] The first stage of the constitutional moment had been achieved.

---

23. Cong. Globe, 41st Cong., 2d Sess. 3434 (May 13, 1870).

24. Id.

25. Cong. Globe, 42d Cong., 2d Sess., App. 9 (Jan. 30, 1872).

26. 2 Cong. Rec. 900 (Jan. 24, 1874).

27. Ackerman, *We the People* at 274-75 (cited in note 1). This is one of the odder features of Ackerman's scheme. Surely, in practice, those proposing change—even the New Dealers—must start small and build.

28. In the 1872 elections, a coalition of Democrats and "Liberal Republicans" campaigned on a platform of restoring "local self-government" to the southern states, while the Republicans focused on Ku Klux Klan outrages and the importance of equal rights of

B. Proposal

Next came what Ackerman calls a "proposal"—articulation of the proposed constitutional change in terms sufficiently specific for the People to deliberate about it. The immediate focus of attention was defeat of Sumner's Civil Rights bill, but the anti-civil rights agenda went far beyond the defensive objective of defeating the initiative of the other side. The Democrats' broader objective was to neutralize the Fourteenth Amendment: to restore white Democratic government in the southern states and with it, a legal subordination of the African race. This was to be accomplished without actual repeal of the Amendment, by a combination of an exaggerated fidelity to states' rights and a disingenuous denial of the social realities of discrimination and segregation. These positions were articulated by prominent members of the Democratic Party in the Congress and taken to the People in the elections of 1874 and 1876.

To be sure, the elections of 1874 and 1876 were not just about the Civil Rights bill—any more than the election of 1936 was just about laissez-faire. The nation was in the grips of the deepest depression in its history (until the Great Depression), and the corruption and ineptitude of the Grant administration contributed to a nationwide repudiation of the Republican Party. But Sumner's proposed Civil Rights bill was the single most contentious issue in 1874, especially in the South. The bill had passed the Senate in May but was bottled up in the House. It is not too much to say that the election of 1874 was a referendum on the nation's continued commitment to civil rights, much as the elections of 1934, 1936, and 1938 were referenda on the New Deal.[29]

---

citizenship. The Republicans won 55% of the vote, and swept every state north of the Mason-Dixon line, along with half of the southern states. See Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877* 509-10 (Harper & Row, 1988) ("*Reconstruction: 1863-1877*"). Nonetheless, there was already evidence that the Republicans' commitment to Reconstruction was beginning to be a political liability (id. at 505), and by the next election, in 1874, the tide had dramatically turned.

29. Historians are divided regarding the relative importance of the economic issue and the issue of Reconstruction to the election of 1874. William Gillette describes the election as "a referendum not only on reconstruction but also on civil rights." William Gillette, *Retreat from Reconstruction, 1869-1879* 256 (LSU Press, 1979). Eric Foner, however, maintains that "the depression far outweighed Reconstruction as a cause of Republican defeat." Foner, *Reconstruction: 1863-1877* at 524 (cited in note 28). No one doubts that both were significant issues, and that both contributed to the Democratic victory. See Richard H. Abbott, *The Republican Party and the South, 1855-1877* 230 (U. of N. Carolina Press, 1986) ("The backlash against civil rights, Northern dissatisfaction with the Grant administration's policy in dealing with the Panic of 1873, and a growing disillusionment with Reconstruction and Republican regimes in the South all led Northern voters to repudiate the Republicans.").

C. Mobilized Deliberation

As the people began their "mobilized deliberation" in 1874, one early outcome was plain: the election of 1874 was one of the largest landslides in American political history. The Republicans lost 89 seats in the House of Representatives and were reduced to only 17 of the 54 House seats in the South. Republicans dominated the House in the Forty-third Congress by a two-thirds margin; Democrats outnumbered Republicans by 169-109 in the Forty-fourth. The magnitude of the electoral verdict equalled, if it did not excel, the landslides of the early New Deal.

The first casualty of the electoral shift was the school desegregation provision of Sumner's Civil Rights bill. On May 22, 1874, the bill had passed the Senate by a margin of 29 to 16, and later came within a hair of garnering the two thirds necessary to break the Democrats' filibuster in the House. After the election, a lame duck Congress stripped the bill of its most controversial features (including school desegregation), watered down its penalty provisions, and passed it over the continuing opposition of the Democrats, just one month before the Democratic majority would take over. This was to be the last legislative achievement of Reconstruction. Moreover, the decline in commitment to civil rights was evident in the rhetoric and priorities of the political parties. Republicans were increasingly more concerned with economic issues. Overt racism reappeared in respectable northern political rhetoric, and the call for white supremacy become the major theme of Democratic rhetoric in the South.[30] People came to view the carpetbagger governments of Reconstruction as utterly corrupt and degraded, and linked this corruption to the supposed ignorance and venality of black voters and officeholders.[31] The New England Freedmen's Aid Society disbanded in 1874, and the American Missionary Association, formerly in the forefront of the movement for black civil rights, declared black suffrage a failure.[32]

The Republicans, however, had not given up. To be sure, they soft-pedalled the civil rights agenda (much as Alf Landon backed away from laissez-faire economics in the campaign of 1936) and undertook no new civil rights initiatives in Congress. But they still held power in a handful of southern states, where they continued to enforce the principles of Reconstruction; they

30. See Foner, *Reconstruction: 1863-1877* at 525-26 (cited in note 28).

31. The first major work along these lines was James S. Pike, *The Prostrate State* (D. Appleton, 1874).

32. Foner, *Reconstruction: 1863-1877* at 527 (cited in note 28).

still had nominal control of the Senate; and they still had the Presidency. As late as 1875 (in Louisiana), the Grant administration continued to use federal troops to protect fragile Reconstruction governments from Klan-related violence.[33] It would take more than a single electoral defeat—however much it might be a landslide—to persuade the Republicans to abandon the principles on which their party had been founded. Moreover, the great civil rights and enforcement acts passed in 1866, 1870, 1871, and 1875 were still on the books and could still be enforced in courts largely appointed by Republican Presidents. Reconstruction was not over yet. The Republican Party platform for the presidential election of 1876 affirmed that "the complete protection of all [the] citizens in the free enjoyment of all their rights, are duties to which the Republican party is sacredly pledged," and declared it to be "the solemn obligation of the legislative and executive departments of the government to put into immediate and vigorous exercise all their constitutional powers for . . . securing to every American citizen complete liberty and exact equality in the exercise of all civil, political, and public rights."[34] Although both parties moderated their rhetoric on the civil rights issue, there was little doubt about the historic commitments of the two sides, and the probable effects of the election. African American voters, in particular, are said to have believed that with a Democratic victory, "slavery is to be reestablished."[35]

Thus, the clash of views necessary to a constitutional moment was clearly present. The "reformers" (in this case, the opponents of civil rights) had "gotten together to propose a serious transformative initiative," whereupon the "conservatives" (the defenders of Reconstruction) "pour[ed] lots of energy into a mobilized defense of the status quo."[36] The terminology here is confusing, since those who sought to end Reconstruction claimed both the label "reformer" and the label "conservative"—but the principle is the same. Together, the reformist movement and the "conservative countermobilization" "vastly broaden[ed] and deepen[ed] the political engagement of the People on the funda-

33. See Gillette, *Retreat from Reconstruction* at 122-25 (cited in note 29). Later that year, however, the Attorney General declined to send troops to Mississippi, and the Reconstruction government there was overthrown. Id. at 155-58.

34. *Official Proceedings of the National Republican Conventions of 1868, 1872, 1876, and 1880* 279 (C.W. Johnson, 1903).

35. Foner, *Reconstruction: 1863-1877* at 576 (cited in note 28).

36. Ackerman, *We the People* at 286-87 (cited in note 1).

mental issues at stake," just as constitutional moment theory prescribes.[37]

The election of 1876 may have been the most violent, fraud-ridden, and tumultuous in history; its outcome was surely the most uncertain. The Democratic candidate, Samuel Tilden, won a substantial majority of the popular vote and carried New York, New Jersey, Connecticut, Indiana, and the West Coast states, as well as most of the South. The Republican Hayes, however, claimed victory by a single electoral vote, based on disputed electoral returns in the last remaining carpetbagger-controlled states of South Carolina, Florida, and Louisiana. Rival state governments in these three states sent competing certificates of election to Washington. The prevailing view among modern historians is that Tilden was entitled (at least) to the Florida electors, and thus that he should have prevailed by a vote of 188 to 181.[38] But the Republicans had a potentially decisive institutional advantage. Under the Twelfth Amendment, it is the task of the President of the Senate to open the ballots in the presence of both Houses of Congress and to count the votes. It is unclear whether this duty carries with it the power to determine *which* ballots to count, or whether such a ruling would be subject to an appeal to the floor, and if so, on what basis the votes of the senators and representatives would be counted. But Republicans controlled the electoral commissions of the disputed states, one House of Congress, and the Presidency of the Senate—and they were willing to use them to thwart the apparent Tilden victory. This produced a constitutional crisis.[39]

Constitutional moment theorists insist that the third phase of a constitutional moment must be one of "mobilized deliberation"—not of ordinary politics, where the citizens are content to cast their ballots and to leave the government to their elected representatives. There "will be a great deal of passion and personality, action as well as argument, drama as well as debate."[40] The People will *participate*: they will engage in marches, rallies, and demonstrations, and, although the theorists do not typically mention it, there is a hint of violence, of the ultimate Lockean

37. Id. at 287.

38. C. Vann Woodward, *Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction* 19 (Little, Brown, 1951) ("*Reunion*").

39. For full accounts of these events, see C. Vann Woodward, *Reunion* (cited in note 38); Keith I. Polakoff, *The Politics of Inertia: The Election of 1876 and the End of Reconstruction* (LSU Press, 1973); Charles Fairman, *Five Justices and the Electoral Commission of 1877* (Supp. to Vol VII of the Oliver Wendell Holmes Devise, *History of the Supreme Court of the United States*) (Macmillan, 1988).

40. Ackerman, *We the People* at 287 (cited in note 1).

"appeal to heaven."[41] The first two constitutional moments were washed in the blood of Revolution and Civil War, and an undertone of New Deal politics was the fear that unless dramatic reformist measures were undertaken, America might join Europe in the violent descent to the extremes of Right or Left.

By any of these standards, the events of 1874-77 qualify as a period of mobilized deliberation. No one doubted that these elections were fought over the future character of the constitutional regime in the southern states. There was no dearth of passion or of participation. There was violence aplenty. In the tense months following the election of 1876, Democratic newspapers proclaimed, "Tilden or War" and Democratic governors prepared their militias for armed resistance to a usurpatious Republican administration.[42] According to one participant in the events, "it seemed as if the terrors of civil war were again to be renewed." He observed that more people expected fighting to break out in 1877 than had expected it in 1861.[43] And whatever one may think of the political morality of the participants, there can be no doubt that a substantial portion of the deliberation was at the level of principle: the Democrats' attack on centralized government and defense of states' rights versus the Republicans' waning but still powerful commitment to Reconstruction.

An initial effort to resolve the electoral crisis through mediation failed. Congress established a 15-member Electoral Commission, composed of five congressional Republicans, five congressional Democrats, and five Supreme Court Justices (two Republicans and two Democrats, who would then appoint the fifth, who turned out to be Republican Joseph Bradley). By a series of party line votes, 8-7, the Commission awarded the election to Hayes. Not surprisingly, this exercise in partisanship by the commission failed to assuage the opposition.

Attention turned to Congress, where the Democrats held control of the House of Representatives and had sufficient votes to delay the vote count by filibuster and repeated dilatory motions. If the votes could not be counted by March 4, Hayes could not take office and the country would be thrown into constitutional turmoil. The crisis was averted at the last minute by the so-called Compromise of 1877, under which a sufficient

41. See John Locke, *The Second Treatise of Government*, § 242, in P. Laslett, ed., *Two Treatises on Government* 307, 476-77 (Cambridge U. Press, rev. ed. 1963).

42. For descriptions of the threats of armed resistance, see Foner, *Reconstruction: 1863-1877* at 576 (cited in note 28); Woodward, *Reunion* at 7 (cited in note 38).

43. Allan Nevins, ed., *Selected Writings of Hewitt* 177-78 (Colum. U. Press, 1937), quoted in Woodward, *Reunion* at 7 (cited in note 38).

number of southern Democrats would abandon the filibuster to allow Hayes to be elected President, in return for which Hayes (through intermediaries) made a number of commitments, the most important of which was to remove federal military support for the remaining carpetbagger governments and thus to relinquish responsibility for the civil and political rights of the freedmen to the hands of the southern white majority. The Republicans also agreed to fund major public works projects in the South and to appoint Democrats to federal offices in place of the carpetbaggers and scalawags who had previously been the backbone of the white Republican Party in the South. The Compromise was announced on March 1, 1877, on the floor of the House by Democratic representative William Levy of Louisiana:

> The people of Louisiana have solemn, earnest, and, I believe, truthful assurances from prominent members of the republican party, high in the confidence of Mr. Hayes, that in the event of his elevation to the Presidency he will be guided by a policy of conciliation toward the Southern States, that he will not use the Federal authority or the Army to force upon those States governments not of their choice, but in the case of these States will leave their own people to settle the matter peaceably, of themselves. . . . Under these circumstances, pretermitting, at least at this time, any discussion of the manner and means by which Mr. Hayes may secure the Presidency, . . . I shall throw no obstacle, by any action or vote of mine in the way of the completion of the electoral count.[44]

With the help of southern Democrats, the filibuster was broken (to the extreme annoyance of Tilden's northern Democratic supporters) and on March 2 Hayes was declared the winner. In April, federal troops were removed from active intervention in the governments of Louisiana and South Carolina. The last Reconstruction governments collapsed.

Historians debate over the extent to which the Compromise of 1877 was the product of a specific backroom political deal and extent to which it was the culmination of a gradual shift in public opinion and the priorities of the Republican Party. But no one disputes that a vast and dramatic change occurred between 1874 and 1877, or that the effect was to nullify the rights won by black Americans through the Fourteenth and Fifteenth Amendments.

At this point in a constitutional moment, after the mobilized deliberation of the People has reached a conclusion, even the defenders of the old regime capitulate and commit themselves to

44. Cong. Rec., 44th Cong., 2d Sess. 2047 (Mar. 1, 1877).

honoring the new constitutional norms.[45] Indeed, the true hallmark of a constitutional moment is that afterward it becomes unthinkable that any serious political figure would set himself in opposition to the constitutional settlement. Even those not genuinely convinced will be forced to give lip service to it. This was true of the end of Reconstruction.

The Compromise of 1877 was no mere ceasefire in the partisan wars. It was the culmination of a political shift that had already gained steam from the ouster of Republican governments in state after state in the former Confederacy. No longer could the Republican post-War political strategy of achieving national majorities by carpetbag control of southern states be maintained, and political support in the North for civil rights—which was never robust—had run its course. Civil rights became a political liability. Thus, the Compromise of 1877 marked a fundamental reorientation of the Republican Party away from the goals of Reconstruction and toward the goal of economic expansion—a goal more effectively pursued in alliance instead of conflict with business-oriented whites in the South. The Compromise was only the most visible sign of a sea-change in public and professional opinion, as profound as any change in opinion in the New Deal.[46] Thereafter, neither of the great political parties of the Nation retained a commitment to fulfillment of the ideals of the Fourteenth Amendment. Reconciliation between North and South (and with it, more lucrative political activities such as railway construction projects) was achieved at the sacrifice of the rights of black Americans. In the decades after the Compromise, the abandonment of these ideals became ever more extreme. The Compromise of 1877 "wrote an end to Reconstruction and recognized a new regime in the South. More profoundly than Constitutional amendments and wordy statutes it shaped the future of four million freedmen and their progeny for generations to come."[47]

It should be noted that, as part of the Compromise, President-elect Hayes received assurances that the Democratic governments of the southern states would take upon themselves the responsibility to protect the civil rights of their black citizens.[48] These assurances may be dismissed as disingenuous, and proba-

45. Ackerman, *We the People* at 48-49 (cited in note 1).

46. C. Vann Woodward, *The Strange Career of Jim Crow* 77-78 (Oxford U. Press, 3rd rev. ed., 1974) ("*Strange Career*").

47. Woodward, *Reunion* at 4 (cited in note 38).

48. Id. at 227; Woodward, *Strange Career* at 54-56 (cited in note 46); Foner, *Reconstruction: 1863-1877* at 580 (cited in note 28); James M. McPherson, *Coercion or Concilia-*

bly were; but for a brief time it appeared that they might be fulfilled, at least in a few places. Wade Hampton, the "Redeemer" governor of South Carolina, for example, appointed more black officeholders (86) than his carpetbagger predecessors and sought to improve education and the justice system for black South Carolinians.[49] The Compromise can thus be restated in the following terms. The two great constitutional issues of the era were the balance of power between the states and the federal government and the rights of the recently emancipated black citizens. The Compromise of 1877 was a capitulation on the first issue; the independence and autonomy of the southern states was restored. But it was not a total capitulation on the second: the rights of black citizens would continue to receive a promise of protection, albeit from state governments rather than the federal government. This resolution proved to be unstable, however, as the Redeemer governments of aristocratic "Bourbon" Democrats, with whom the Compromise of 1877 was struck, were succeeded by more populist Democratic governments with a more overtly racist political program. A recurring truth of constitutional experience is that institutional structure is a more important determinant of the character of a regime than are theoretical guarantees of rights. Once power shifted back to the southern states and away from Congress, the promises of continued respect for the rights of black Americans quickly proved illusory. This probably came as no surprise to anyone.

The first step was the Democrats' consolidation of power. A major element of this part of the program consisted of the continuation of fraud and political violence against black voters—this time with no federal troops or threats of prosecutions under the Ku Klux Klan Act to restrain them. In the electoral campaigns of 1878, scores of African Americans were killed and Republicans were overwhelmingly defeated throughout the South. Blacks continued to vote and to hold office in significant but ever diminishing numbers for the remainder of the century; but by the first decade of the 1900s black disenfranchisement was complete and the Fifteenth Amendment was a dead letter in the states of the old Confederacy.[50]

---

tion? Abolitionists Debate President Hayes's Southern Policy, 39 New England Q. 474, 484-85 (1966).

49. Woodward, *Strange Career* at 55 (cited in note 46).

50. *Id.* at 53-54; Foner, *Reconstruction: 1863-1877* at 590-92 (cited in note 28); Everette Swinney, *Enforcing the Fifteenth Amendment, 1870-1877*, 28 J. Southern Hist. 202 (1962).

Repressive social legislation followed. As C. Vann Woodward has shown in his classic study, *The Strange Career of Jim Crow*, race relations in the twenty years following 1877 were flexible and uncertain.[51] Although a combination of custom, legal hostility, company regulation, and black poverty led to substantial segregation of common carriers and places of public accommodation in many areas,[52] there was a surprising degree of both *de jure* and actual desegregation in many southern jurisdictions from the early 1870s until 1900.[53] The first major wave of segregation legislation did not occur until the 1880s.[54] The first genuine Jim Crow law requiring segregation of all railroad facilities was passed by Florida in 1887, followed by Mississippi in 1888 and Texas in 1889. The Louisiana statute upheld in *Plessy v. Ferguson* was passed in 1890.[55] By 1900, a rigid system of legally-enforced separation and subordination dominated all aspects of race relations throughout the South.[56]

The Compromise of 1877 marked not just a legal revolution, but a social revolution. It transformed the way the people of the South conducted their government, exercised their legal rights,

---

51. Woodward, *Strange Career* (cited in note 46). In accord, Foner, *Reconstruction: 1863-1877* at 587-93 (cited in note 28).

52. Foner, *Reconstruction: 1863-1877* at 368, 371-72 (cited in note 28); Charles A. Lofgren, *The Plessy Case* 9-17 (Oxford U. Press, 1987).

53. See generally Woodward, *Strange Career* at 31-44 (cited in note 46). See also C. Vann Woodward, *American Counterpoint: Slavery and Racism in the North-South Dialogue* 253 (Little, Brown, 1964) ("*American Counterpoint*") (describing the desegregation of transportation in New Orleans, Charleston, Richmond, Savannah, and Louisville). For a less rosy picture, see Richard C. Wade, *Slavery in the Cities: The South 1820-1860* (Oxford U. Press, 1964) (tracing origins of Jim Crow practices to the cities of the South prior to the War); Joel Williamson, *After Slavery: The Negro in South Carolina During Reconstruction, 1861-1877* (U. of N. Carolina Press, 1965) (discussing southern movement toward segregation in the early years after the War); Lofgren, *The Plessy Case* at 7-27 (cited in note 52) (presenting a balanced account of the evidence). Woodward himself acknowledges the historical dispute in Woodward, *American Counterpoint* at 253 n.53.

54. For detailed accounts of the emergence of Jim Crow laws in four southern jurisdictions, see Stanley J. Folmsbee, *The Origin of the First "Jim Crow" Laws*, 15 J. Southern Hist. 235 (1949) (Tennessee); Linda M. Matthews, *Keeping Down Jim Crow: The Railroads and the Separate Coach Bills in South Carolina*, 73 S. Atl. Q. 117 (1974); Bruce A. Glasrud, *Jim Crow's Emergence in Texas*, 15 Am. Students 47 (1974); August Meier and Elliott Rudwick, *A Strange Chapter in the Career of "Jim Crow,"* in August Meier and Elliott Rudwick, eds., *The Making of Black America: Essays in Negro Life & History, Vol. II, The Black Community in Modern America* 14-19 (Atheneum, 1969).

55. Lofgren, *The Plessy Case* at 22 (cited in note 52).

56. Constitutional moment theorists might object that it took a quarter of a century for this "moment" to attain its full form. True enough. But it can equally be said that it took 35 years for the welfare-regulatory regime of the New Deal to attain its full form in Lyndon Johnson's Great Society. In both cases, the essential outlines of constitutional change were laid down in a period of two to four years, and the full implications continued to be realized for a generation, at the end of which the principles were firmly entrenched.

and lived their lives. It was accompanied by corroborating ideological shifts in science, literature, journalism, history, and religion.[57] Far more than the Fourteenth Amendment, the Compromise of 1877 created a far-reaching and long-persisting constitutional regime: the regime of Jim Crow.

D. CODIFICATION

According to constitutional moment theorists, the final stage of a constitutional moment consists of "codification" by the courts—when the courts translate the "moment" into formal legal doctrine and uphold statutes that would have been invalidated under the traditional principles of the preceding regime (or strike down statutes that would have been upheld).[58] In the case of the constitutional moment that ended Reconstruction, the "codification" began in 1873 and was complete by 1896.[59]

The first, highly ambiguous step came with the *Slaughterhouse Cases* in 1873. This decision—so difficult to square with the language and theory of the Fourteenth Amendment—can be seen, in retrospect, as an attempt to assuage the conflict over Reconstruction by prudent compromise, and as foreshadowing the Compromise of 1877. Like the Compromise, the *Slaughterhouse* decision attempted to reduce the Amendment's impact on states' rights notwithstanding its effects on race. On the one hand, the Court refused to hold that the Fourteenth Amendment "radically changes the whole theory of the relations of the State and Federal governments to each other."[60] The decision confined the "privileges or immunities of citizens" to rights arising under *federal* law. This meant that the essential civil rights of property, contract, security of the person, equal application of criminal law, and so forth, were left to the vagaries of state law—a great victory for states' rights. The effect of a contrary interpretation, the Court stated, would be to "degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character."[61] On the other hand, the

57. See Woodward, *Strange Career* at 74 (cited in note 46); Herbert Hovenkamp, *Social Science and Segregation Before* Brown, 1985 Duke L.J. 624.

58. Ackerman, *We the People* at 289 (cited in note 1).

59. Indeed, the move may have begun as early as 1872, with *Blyew v. United States*, 80 U.S. (13 Wall.) 581 (1872) (adopting narrow construction of jurisdictional provisions of the Civil Rights Acts of 1866). See Robert D. Goldstein, Blyew*: Variations on a Jurisdictional Theme*, 41 Stan. L. Rev. 469 (1989).

60. 83 U.S. (16 Wall.) 36, 78 (1873).

61. Id.

Court maintained, in dictum, that "the one pervading purpose" of the Reconstruction Amendments is "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."[62] Thus, the Court accepted the southern, Democratic theory of states' rights and the northern, Republican theory of equality of rights.

In a brace of cases in 1876, the Court took major steps toward dismantling the federal power to enforce Reconstruction. As noted above, enforcement of the civil rights laws required massive federal intervention in the form of military occupation and federal prosecution of malefactors. In *United States v. Reese*,[63] the Court struck down a federal statute imposing criminal sanctions on local officials for denial of the right to vote. Although the grounds for the decision were technical—the statute appeared to apply to denials of the right to vote on grounds other than race, and thus exceeded the power of Congress under Section Two of the Fifteenth Amendment—the reasoning was transparently faulty[64] and the practical effect was to undo a major underpinning of Reconstruction. The supposed defect in the statute could be easily remedied, but by 1876 it no longer would be—and indeed, in 1894, the statute would be repealed.[65]

United States v. Cruikshank,[66] while more defensible as a legal matter, was—according to historian Eric Foner—"devastating" to Reconstruction as a practical matter.[67] The case arose out of the outrages of the Colfax massacre, the "bloodiest single instance of racial carnage in the Reconstruction era."[68] After the disputed gubernatorial election of 1872 in Louisiana, blacks in the town of Colfax organized themselves for self-defense against an expected attempt by white Democrats to seize control over the government. On Easter Sunday, 1873, a mob of white citizens armed with rifles and a small cannon overwhelmed the defenders and engaged in a day of indiscriminate killing. Two whites and 280 blacks were killed—including fifty black men who

62. Id. at 71.
63. 92 U.S. 214 (1876).
64. As the dissenting opinion showed, the statute, properly read, applied only to denials based on race. 92 U.S. at 241-45 (Hunt, J., dissenting). Moreover, since the statute was constitutional as applied to the defendant, it was a stretch for the Court to invalidate it *in toto*.
65. 28 Stat. 36, 37 (1894).
66. 92 U.S. 542 (1876).
67. Foner, *Reconstruction: 1863-1877* at 530 (cited in note 28).
68. Id. at 437.

had laid down their arms under a flag of surrender.[69] More than 100 of the alleged perpetrators were indicted in federal court for these offenses, pursuant to the Enforcement Act of May 31, 1870, which prohibited private violence intended to prevent the exercise of rights and privileges protected by the Constitution. Eight of the defendants went to trial and three were convicted. The Supreme Court, however, reversed the convictions and ordered the defendants discharged.

The principal ground of the *Cruikshank* decision is that key counts of the indictment were "too vague and general."[70] This reinforced the sense that the courts would bend over backward to protect the rights of white southerners opposing Reconstruction, but the holding was not unreasonable, nor was it necessarily a serious obstacle to future prosecutions under more precisely drawn indictments. Other sections of the opinion, however, rest on the more far-reaching proposition that private persons are not—and constitutionally cannot be—liable for violating the Fourteenth Amendment rights of other private persons. "The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws," the Court explained, "but this provision does not . . . add any thing to the rights which one citizen has under the Constitution against another." The "only obligation resting upon the United States," it said, "is to see that the States do not deny the right."[71] Thus, the federal government had no power to protect against the private violence that was the principal means by which white Democrats sought to nullify the protections of the law. This is not the occasion for a critique of the legal analysis of *Cruikshank*—suffice it to say that there is a substantial argument that Section Five empowers Congress to supply supplementary protection when a state is unwilling *or unable* to extend the equal protection of the laws to all persons within its jurisdiction—but the effect was to undermine the legitimacy of continued federal intervention to prevent political violence in the southern states, at precisely the time when the Republican Party was finding it politically expedient to withdraw from that thankless task.[72]

---

69. Id.

70. 92 U.S. at 559.

71. Id. at 554-55. This portion of the opinion did not apply to rights under the Fifteenth Amendment.

72. See Swinney, 28 J. Southern Hist. at 207-09 (cited in note 50). The *Cruikshank* holding was later reinforced by *United States v. Harris*, 106 U.S. 629 (1883), which held that Congress could not make lynching a federal crime, at least in the absence of an allegation that the state was derelict in its duty of protection.

The path of judicial codification of a new constitutional order does not necessarily run straight. In 1880, the Supreme Court rendered a series of decisions that kept alive some part of the Reconstruction commitment to an equality of rights. In a trio of decisions written by Justice Strong over strong dissents by Justice Field, the Court held that the equal protection clause protects black defendants against the exclusion of members of their race from the petit jury, whether by statute or by executive or judicial authority.[73] This was hardly adventurous: it simply confirmed the congressional determination, as part of the Civil Rights Act of 1875, that the exclusion of blacks from juries was a denial of equal protection to black litigants. But the Court took the opportunity to reaffirm in powerful language 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, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States."[74]

The private violence cases and the jury cases might be reconciled as an attempted continuation of the *Slaughterhouse* compromise: the heavy hand of federal military and prosecutorial intervention was broken in *Reese* and *Cruikshank*, but the essential protection of trial by impartial jury—a local institution—was retained for black individuals. But just as the political assurances of the Compromise collapsed within a decade, so the Supreme Court's commitment to what it had called "the one pervading purpose" of the Reconstruction Amendments seemed to evaporate after 1880.

The most important step in this development was the *Civil Rights Cases* of 1883.[75] There, the Supreme Court invalidated even the watered-down version of the Civil Rights Act of 1875 that had survived the electoral debacle of 1874. This Act, the last civil rights statute until after World War II,[76] prohibited discrimination by common carriers and licensed establishments of public

---

For an argument that the *Reese* and *Cruikshank* decisions were "based on technicalities" and "still managed to sustain Congress's power to protect directly citizens' fundamental civil and political rights," see Michael Les Benedict, *Reconstruction and the* Waite *Court*, 1978 Sup. Ct. Rev. 39, 79, 77.

73. *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Virginia v. Rives*, 100 U.S. 313 (1880) (dictum); *Ex parte Virginia*, 100 U.S. 339 (1880). See also *Neal v. Delaware*, 103 U.S. 370 (1881).

74. *Strauder*, 100 U.S. at 306.

75. 109 U.S. 3 (1883).

76. This characterization puts aside a minor voting rights statute passed in 1890, which quickly became a dead letter.

accommodation. The constitutional theory of the Act's proponents was that the common law of common carriers gave all patrons willing to pay the fare an enforceable legal right to be served, without preference or discrimination; and that the failure or refusal of a state to recognize racial discrimination as a violation of this common law right constituted either a denial of the privileges and immunities of citizens or (after *Slaughterhouse*) of equal protection of the laws.

Within eighteen months of passage of the Act, a challenge to its constitutionality had reached the Supreme Court, in a case involving a Kansas innkeeper who refused to serve a black woman supper at the table of the inn.[77] But mysteriously, the Court dithered for six years before hearing argument and rendering a decision. Historians have suggested no legitimate reason for the delay; it might be surmised that the Court was awaiting a sense of the mood of the nation, which was obviously undergoing a complete transformation. Whatever the reason for delay, the Court held in 1883 that the Civil Rights Act of 1875 was unconstitutional because it constituted "direct and primary" legislation of private conduct, without reference to whether the state provides equal protection of the law.[78] The Act "applie[d] equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment," and thus extended beyond the power of Congress under Section Five.[79] While this statement of controlling principle is sound, the decision to invalidate the entire Act is subject to three quite serious objections. First, why does a defendant in a state that *has* failed to provide equal protection of the common law of common carriers have standing to object to the potential application of the Act to persons in other states? Second, why does Congress lack the power to determine on a nationwide basis that federal law is needed to protect constitutional rights that are frequently (even if not universally) denied? And third, why did the Court not interpret the Act narrowly so as to avoid the constitutional difficulty, or reform it through the doctrine of severability?

---

77. *United States v. Murray Stanley*, File No. 7914 (filed Oct. 3, 1876).

78. *Civil Rights Cases*, 109 U.S. at 20.

79. Id. at 14. The Court did not hold, as is commonly thought, that Congress lacks the power to regulate private action under Section 5. It held only that Congress's power to enforce the Amendment takes effect only when the state government fails to extend equal protection.

Legal propriety aside, the practical effect of the *Civil Rights Cases*, like that of *Reese* and *Cruikshank*, was to erase one of the principal legislative achievements of the Reconstruction period. To be sure, the technical flaws in the Enforcement Act and the Civil Rights Act could be remedied easily as a matter of legislative draftsmanship, but by the time the Court had acted the political balance of power had shifted and Congress no longer had an interest in protecting civil rights. Moreover, the language of the opinion reflected the Justices' "switch in time." Whereas in *Slaughterhouse* the Court had said that the "one pervading purpose" of the Reconstruction Amendments was "the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him,"[80] ten years later Justice Bradley (who had dissented in *Slaughterhouse* and cast the decisive vote for Hayes in the disputed Electoral Commission) would write for the Court: "When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws."[81] That passage can serve as the "codification" of the new constitutional order, the equivalent of *West Coast Hotel* or *Jones & Laughlin*.

But this was not all; things would get worse. The capstone of Jim Crow constitutionalism was the infamous decision in *Plessy v. Ferguson*, upholding the constitutionality of a Louisiana law requiring private railroads to segregate black and white passengers.[82] The decision is so familiar to students of constitutional law that little description is needed. In textbook constitutional moment fashion, the decision upheld a statute that plainly would have been "invalidated under the traditional principles of the preceding regime."[83] The principles of the preceding regime had been clearly enunciated in the Civil Rights Act of 1875, in which

80. 83 U.S. (16 Wall.) at 71.

81. *Civil Rights Cases*, 109 U.S. at 25.

82. This passes by several less important decisions in which the Court further confirmed the growing racism of Jim Crow constitutionalism. Particularly striking is the pair of cases, *Hall v. DeCuir*, 95 U.S. 485 (1878), and *Louisville, N.O. & T. Ry. Co. v. Mississippi*, 133 U.S. 587 (1890), in which the Court held that a state could not prohibit segregation on the intrastate operations of a steamboat engaged in interstate commerce, but that a state could require segregation on the intrastate operations of a railroad engaged in interstate commerce. See also *Pace v. Alabama*, 106 U.S. 583 (1883) (upholding state statute imposing more severe penalties on interracial than intraracial adultery and fornication).

83. Ackerman, *We the People* at 289 (cited in note 1).

Congress employed its Section Five powers to prohibit segregation in common carriers. An amendment that would allow separate-but-equal facilities was voted down after full and vigorous debate.[84] Even most *opponents* of the 1875 Act had conceded that a state law *compelling* racial segregation would be unconstitutional, and vociferously (and accurately) denied that any southern state had enacted such iniquitous legislation.[85] It was not until fifteen years later that Louisiana passed a statute meeting this description. By that time, the constitutional moment had occurred and the statute—which went beyond what even die-hard southern Democrats had been able to defend in 1875—was upheld.

It is curious, therefore, that constitutional moment theorists tend to defend *Plessy* (on legal, not normative grounds): Ackerman treats *Plessy* as a legitimate decision under the constitutional regime of the "middle republic" and claims that *Brown v. Board of Education* is legitimate only (or at least principally) on account of the New Deal's transformation of the nation from one of limited government into one of activist government.[86] This is one of the more bizarre twists in modern constitutional scholarship. According to this theory, a close reading of the opinion reveals that Plessy was based on a "rejection of government activism." *Plessy* thus becomes like *Lochner*, and both can be seen as a product of a laissez-faire constitutionalism that did not recognize the legitimacy of government action to promote social justice.[87] There is a serious weakness in this reading: at issue in *Plessy* was a statute *interfering* in the marketplace by forbidding a private railroad from seating a private passenger in a railroad car acceptable to both. The *Civil Rights Cases* can be seen as resembling *Lochner*, since the effect of invalidating the Civil Rights Act of 1875 was to leave privately owned common carriers free to determine whether or not to engage in racial discrimination. *Plessy* cannot. State laws requiring segregation, no less

84. 3 Cong. Rec. 1010 (Feb. 3, 1875).

85. See, e.g., Cong. Globe, 42d Cong., 2d Sess. 496 (Jan. 22, 1872) (argument of Sen. Thurman); 2 Cong. Rec. 454 (Jan. 7, 1874) (argument of Rep. Atkins); 3 Cong. Rec. 980 (Feb. 4, 1875) (argument of Rep. Lamar); 3 Cong. Rec. 1864 (Feb. 27, 1875) (argument of Sen. Gordon).

86. See Ackerman, *We the People* at 142-50 (cited in note 1).

87. Id. at 147. Ackerman is not alone in this analysis of *Plessy*. See also Louis Michael Seidman, Brown *and* Miranda, 80 Cal. L. Rev. 673, 694-95 (1992); Sunstein, *The Partial Constitution* at 42-45 (cited in note 13).

than state laws imposing maximum hours for workers, contradicted free market principles.[88]

It is true that the *Plessy* Court attempted to cloak its decision in the language of laissez-faire, but the disingenuity of the opinion is transparent. The Court framed the issue in *Plessy* as whether the Fourteenth Amendment would "enforce social equality"[89]—though the actual question was whether the Amendment would tolerate state legislation to enforce social inequality. The Court maintained that "[i]f the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals."[90] This diverted attention from the fact that Jim Crow laws *required* segregation and imposed criminal penalties upon those who sought to meet together in covered institutions by voluntary consent. "Legislation is powerless," said the Court, "to eradicate racial instincts or to abolish distinctions based upon physical differences."[91] That is a debatable proposition,[92] but it turned the issue on its head. No one in *Plessy* was seeking legislation to "abolish" distinctions; *Plessy* was challenging legislation *enforcing* racial distinctions imposed upon the private market by the state. If we look beyond its rhetoric, *Plessy* was an affirmation of the activist state, no less than the New Deal cases—in service of different ends, of course. *Plessy* was neither libertarian nor egalitarian. It marked the effective repeal of the Fourteenth Amendment.

III. IMPLICATIONS FOR THE CONSTITUTIONAL MOMENT THEORY

Constitutional moment theorists conveniently chop American constitutional history into three periods, each inaugurated by a "constitutional moment" defined *not* by significant revisions in constitutional text but by a major clash of constitutional ideals, followed by mobilized popular deliberation leading to a clear conclusion, capitulation of the losers, and judicial codification of the result. Thus, the "first republic" is the product of the framing

88. It is often forgotten that railroads and street car companies opposed the enactment of Jim Crow laws—and were frequently successful in their opposition until the last decade of the Nineteenth Century. See Matthews, 73 S. Atl. Q. at 121-27 (cited in note 54) (describing opposition of railroad and streetcar interests to segregation legislation in South Carolina).

89. 163 U.S. at 544.

90. Id. at 551.

91. Id.

92. See Woodward, *Strange Career* at 102-09 (cited in note 46).

and ratification of the Constitution; the "middle republic" of the Reconstruction Amendments and the Civil War; and the "third republic" of the New Deal.

If the theory is taken seriously, however, this neat scheme falls apart. By the criteria of the theory there have been at least four constitutional moments. The so-called "middle republic" inaugurated by the Reconstruction Amendments was short-lived. It was challenged by the Democratic Party, especially its southern wing, contested in key elections in 1874 and 1876 characterized by massive popular participation, and brought to an end by the Compromise of 1877, which ushered in a constitutional era wholly unlike that envisioned by the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments: Jim Crow.

Faced with this history, constitutional moment theorists have two options. First, they can accept the consequences of the theory: they can recognize the end of Reconstruction as a constitutional moment and agree that judges were obligated to respect it. This means, among other things, that *Plessy* was right and *Brown* was wrong. That may not be a happy result, but any theory of constitutional legitimacy based on the will of the People is subject to the risk that the People may go grievously awry.

Second, they can counter the claim that 1877 marked a constitutional moment by assimilating the constitutional principles of the Jim Crow Republic to the preceding period. Under this view, the interpretation of the Fourteenth Amendment that prevailed after 1877 did not require a constitutional moment because it was within the range of legitimate interpretations of the Amendment (albeit at the conservative, formalistic end of the range). *Cruikshank* and *Reese* can be seen as technical and probably correct, *Slaughterhouse* as an attempt to maintain traditional understandings of federalism, the *Civil Rights Cases* the same for the state action doctrine, and *Plessy* as based on a formalistic view of racial nondiscrimination. Proponents of this view can remind us that the architects of Reconstruction were committed to states' rights and that the white people of that day were infected with racism, thus making radical interpretations of the Amendment (such as Sumner's) implausible.

The problem is that this tames Jim Crow at the expense of taming Reconstruction as well. If the end of Reconstruction was no big deal, this must have been because Reconstruction itself was no big deal. This line of reasoning implies that the Fourteenth Amendment was not intended to wreak any radical transformation of the regime but only to institute certain rather

specific changes in legal practices in the South.[93] It was a superstatute, not a transformative amendment. Alternatively, one could argue that the constitutional moment begun in 1866 continued through 1877, resulting in a set of constitutional amendments that, when the smoke had cleared, meant relatively little. This means that there were not four constitutional moments, but only two: neither Reconstruction nor the end of Reconstruction is entitled to the status of a constitutional moment.

Either way—accept the end of Reconstruction as a constitutional moment or deny Reconstruction as a constitutional moment—the effect is the same. *Plessy* was right and *Brown* was wrong.

One could cure this problem by declaring that the Civil Rights Movement of the 1960s was a constitutional moment, as well. That is not implausible (it featured relatively concrete "proposals," popular mobilization, interbranch conflict (at least as long as southerners controlled the House Rules Committee), a decisive decision by the People in the landslide of 1964, and judicial codification in such cases as *Heart of Atlanta*, *Katzenbach v. Morgan*, *Jones v. Alfred E. Mayer*, *Griggs*, and *Swann*), but it leaves us with the uncomfortable conclusion that *Brown* was wrongly decided in 1954, and that the authors of the Southern Manifesto were right. Under the constitutional moments theory the courts have no authority to transform the regime in advance of the constitutional moment. One could say that the constitutional moment came in 1947-48, when President Truman made the first courageous steps toward desegregating the military, Hubert Humphrey proposed a civil rights plank, the Dixiecrats bolted the Party, and Truman was reelected anyway.[94] But I fear that the criteria for constitutional moments become so malleable that almost any significant popular movement addressed to a constitutional issue will suffice. Once we recognize five moments, why not six (adding the so-called "Revolution" of 1800 precipitated by Jefferson's defeat of Adams), or seven (the rise of Jacksonian democracy), or eight (the Progressive era, which produced two of the most transformative of all amendments, the

93. This is the view of some constitutional scholars even apart from the post-Reconstruction history. See, e.g., Raoul Berger, *Government By Judiciary* (Harv. U. Press, 1977). My own view is that the political principles of the Reconstruction Amendments were simply an extension of the fundamental principles of the Founding, which, because of slavery, had never been fully achieved. This means that the Amendments were transformative in practice but restorative in principle. See Michael W. McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?*, 25 Loy. L.A. L. Rev. 1159 (1992).

94. I am grateful to Sanford Levinson for this suggestion.

Sixteenth (income tax) and Seventeenth (direct election of Senators)), or nine (the discovery of substantive due process in the 1890s), or ten (the replacement of New Deal judicial restraint by Warren Court activism), or eleven (its replacement by the Rehnquist Court)? This means that constitutional moments are not very effective in entrenching their principles. All that is required for repeal is another popular movement the other way, just as the Civil Rights Movement repealed the Compromise of 1877 and the Compromise of 1877 nullified the Fourteenth and Fifteenth Amendments. The theory becomes little more than Mr. Dooley's pronouncement on the correlation between constitutional judgments and the "iliction returns."[95]

A final option is to abandon the theory—at least as a theory of interpretation. The problem is that the courts cannot know whether a constitutional moment has taken place until after they have acquiesced in it. If they do not acquiesce, it is not a constitutional moment. If the Court had decided *Slaughterhouse*, *Cruikshank*, and *Plessy* the other way, and stuck to its guns, it would not have been wrong; its very actions would have been proof that the attempted constitutional moment had failed. So, too, with the New Deal. If the Old Court had adhered to its principles, and if new appointees to the Court had adopted the jurisprudential coloration of the old (as Jefferson's appointees adopted Marshallian jurisprudence to Jefferson's extreme annoyance), Roosevelt's attempted constitutional moment would have failed. And—most importantly—we would have no basis under the constitutional moment theory to say that the Court had erred. If the function of a theory of interpretation is to enable us to evaluate whether decisions, when made, are "right" or "wrong," then the theory of constitutional moments is of no use.

The history recounted here cannot, of course, "disprove" the theory of constitutional moments, any more than the histories of the Constitution of 1787, Reconstruction, and the New Deal can "prove" it—though an understanding of the ramifications of the theory may cause some to question its utility. Abandonment of the theory would have the very considerable advantage of restoring the principle of a written constitution, on which the institution of judicial review is said to rest,[96] to the center of constitutional jurisprudence, and of restoring to constitutional lawyers and judges a single text on which to base their interpreta-

95. Finley Peter Dunne, *The Supreme Court's Decisions, Mr. Dooley's Opinions* 26 (R.H. Russell, 1901).

96. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

tions. But it also would reduce the New Deal to the status of a mere phase of our political history, to be imitated or rejected as future generations see fit. The same would not be true of Reconstruction. If we are not compelled to respect the outcomes of nontextual constitutional moments, the principles embodied in the Fourteenth and Fifteenth Amendments can be said to survive even the popular counterrevolution that ushered in Jim Crow.