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The Riddle of Hiram Revels

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In 1870, a black man named Hiram Revels was named to represent Mississippi in the Senate. Senate Democrats objected to seating him and pointed out that the Constitution specifies that no person may be a senator who has not been a citizen of the United States for at least nine years. Before the ratification of the Fourteenth Amendment in 1868, the Democrats argued, Revels had not been a citizen on account of the Supreme Court's 1857 decision in Dred Scott v. Sandford. *Thus, even if Revels were a citizen in 1870, he had held that status for only two years. After three days of heated and highly publicized debate, the Senate voted to admit Revels.*

Modern constitutional law has entirely forgotten the Revels debate. In this Article, Professor Richard Primus recovers the episode and analyzes the Senate's proceedings as an instance of nonjudicial constitutional interpretation. He shows how examining our modern intuitions about the Revels debate can prompt us to endorse certain principles of constitutional interpretation, in particular the notion that the Civil War altered the antebellum constitutional regime and the idea that legislatures should be empowered to interpret constitutional provisions flexibly under certain conditions of transitional justice. Professor Primus then uses these principles to criticize the Court's 1883 ruling in the Civil Rights Cases.

INTRODUCTION

In some respects, his journey to Washington followed a familiar pattern. He worked a variety of jobs, found a calling as a preacher and a schoolmaster, and served his country in the Civil War.[1] A few years after leaving the army, he sought and gained public office, first as an alderman and then in the Mississippi state legislature.[2] Soon

* Assistant Professor of Law, The University of Michigan. Earlier versions of this Article were presented at workshops at Columbia Law School, New York University School of Law, the University of Michigan Law School, the University of Southern California Law School, and the Yale Law School. I thank all of the organizers and participants in those workshops for their interest and their suggestions. For especially valuable criticism and conversation I thank Don Herzog, Susan Sturm, and Nelson Tebbe. I also thank Bruce Ackerman, Akhil Amar, Michael Dorf, Ariela Dubler, Noah Feldman, Robert Ferguson, David Franklin, Barry Friedman, Richard Friedman, Ellen Katz, Gerard Magliocca, Deborah Malamud, Anna-Rose Mathieson, Gillian Metzger, Henry Monaghan, Richard Pildes, Robert Post, Rebecca Scott, Jed Rubenfeld, Gil Seinfeld, Reva Siegel, and John Witt. Not least, I thank Margaret Leary and Kent McKeever for invaluable library assistance, Mollie Marr and Karen Rushlow for administrative support, and Jessica Berry, Charlotte Houghteling, Bezalel Stern, and Rebecca Torres not only for their material contributions to this Article but also for being the kind of students who make constitutional law a joy to teach. Research for this Article was funded in part by the Cook Endowment at the University of Michigan Law School.

[1] *See* Obituary, *The Passing of an Honored and Useful Man*, SW. CHRISTIAN ADVOC. (New Orleans), Jan. 31, 1901, at 8.

[2] *Id.*

thereafter, he was chosen to serve as a United States Senator.[3] In a more literal sense, however, Hiram Revels's journey to Washington differed from that of anyone elected to Congress since the beginning of the Republic. As he traveled from Mississippi to the nation's capital, railroad conductors and steamboat captains required him — senator or not — to ride in the separate colored compartments.[4]

On February 23, 1870, having arrived safely in the District of Columbia and enjoyed an enthusiastic reception from the local black community,[5] Hiram Revels entered the Senate chamber. The symbolism of the moment was obvious. Nine years earlier, in the very same room, the last man to serve as a senator from Mississippi — Jefferson Davis — had broken faith with his country and walked off the floor.[6] The chairs belonging to Mississippi's senators had been empty ever since. In what one newspaper called an act of "poetical retribution," a black Republican would now occupy Davis's old office,[7] representing not only the interests of Mississippi but also the transformation of America.

As it happened, however, Revels did not become a senator that day. As soon as his credentials were read, Senate Democrats objected to seating him.[8] They argued that neither Revels nor any other black person could hold the office in 1870. As the Democrats pointed out, the Constitution specifies in Article I, Section 3 that no person may be a senator who has not been a citizen of the United States for at least nine years.[9] Assuming that the Fourteenth Amendment was a valid part of the Constitution,[10] Revels was a citizen of the United States. He had been born — free — in North Carolina,[11] and Section 1 of the Fourteenth Amendment provides that all persons born in the United States and subject to its jurisdiction are American citizens.[12] But the Fourteenth Amendment had been ratified only in 1868, two years before Revels arrived in Washington. Before 1868, the Democrats argued, Revels had not been a citizen. Their proof of that proposition was *Dred Scott v. Sandford*,[13] in which the Supreme Court held that

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3 *Id.*

4 *See* DeCuir v. Benson, 27 La. Ann. 1, 9–10 (1875) (Wyly, J., dissenting).

5 *See Arrival of the Carpet-Bag Negro Senator from Mississippi: A Brief Interview*, WORLD (N.Y.), Jan. 31, 1870, at 1 (describing the warm reception of and party thrown for Revels upon his arrival in Washington).

6 *See* 1 JEFFERSON DAVIS, THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT 220–26 (Thomas Yoseloff 1958) (1881) (recounting his departure from the Senate).

7 *The Colored Gentleman in the Senate*, N.Y. HERALD, Feb. 26, 1870, at 4.

8 CONG. GLOBE, 41st Cong., 2d Sess. 1503 (1870).

9 U.S. CONST. art. I, § 3, cl. 3.

10 Not all Democrats conceded this point. *See infra* pp. 1686–87.

11 Untitled Obituary, COLORED AM. (D.C.), Jan. 19, 1901, at 8.

12 U.S. CONST. amend. XIV, § 1.

13 60 U.S. (19 How.) 393 (1857).

blacks could not be citizens of the United States.[14] Whatever the law might be since 1868, the Democrats maintained, the law before that date was stated authoritatively by *Dred Scott*. Thus, even if Revels were a citizen in 1870, he had held that status for only two years. He could not be a senator.

They had a point.

For the next three days, the Senate debated whether Hiram Revels could take office. In the grand tradition of nineteenth-century senatorial debate on constitutional issues,[15] senators argued at length about the meaning of the Civil War, the respect due to the Supreme Court, and the raw question of whether black men could be high-level participants in American government. Newspapers lavished attention on the event.[16] And at the end of the highly publicized affair, the Senate decided that Revels could sit.[17]

Modern constitutional law has entirely forgotten the Revels debate. It is not covered in textbooks, not written about in law reviews, not discussed by law professors, and not cited by judges.[18] In short, it is wholly absent from our constitutional discourse. Given the enormous attention the debate commanded in its day, the prominent forum where it occurred, and the long-term salience of race in American law, this absence marks a tremendous act of collective forgetting.[19] This Article redresses that absence, recovering Revels for our collective stock of constitutional knowledge.

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[14] *Id.* at 406.

[15] *Cf.* ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 209, 221–40 (1984) (describing senatorial debate as central to American constitutional discourse in the nineteenth century).

[16] *See, e.g.*, *Admission of the Octoroon from Mississippi into the Senate*, WORLD (N.Y.), Feb. 26, 1870, at 1; *Congressional: Credentials of Senator Revels, of Mississippi, Presented*, DETROIT FREE PRESS, Feb. 24, 1870, at 4; *Forty-First Congress*, N.Y. HERALD, Feb. 24, 1870, at 3; *The History of Ten Years*, HARPER'S WKLY., Apr. 2, 1870, at 211; *A Memorable Day in the United States Senate*, NEW ERA (D.C.), Mar. 3, 1870, at 3; *Washington: Admission of Senator Revels, Jeff. Davis' Successor*, CHI. TRIB., Feb. 26, 1870, at 1; *Washington: Further Debate on the Case of the Colored Senator Elect*, N.Y. TIMES, Feb. 25, 1870, at 5; *Washington: The Mississippi Gorilla Admitted to the Senate*, CINCINNATI DAILY ENQUIRER, Feb. 26, 1870, at 1.

[17] *See Congress: The Colored Member Admitted to His Seat in the Senate*, N.Y. TIMES, Feb. 26, 1870, at 1 [hereinafter *Colored Member*].

[18] There is no mention of the Revels debate in any major constitutional law casebook or in any law review available on Westlaw. Neither is there any mention of the Revels controversy in any state or federal judicial opinion available on Westlaw, from any time within the last hundred years. I am pleased to report, however, that the editors of one constitutional law casebook — PROCESSES OF CONSTITUTIONAL DECISIONMAKING (Paul Brest et al. eds.) — have informed me that they now intend to include the Revels debate in their next edition.

[19] On collective memory and collective forgetting, see J.M. BALKIN, CULTURAL SOFTWARE 203–04 (1998), and PAUL CONNERTON, HOW SOCIETIES REMEMBER (1989). On the specific role of collective memory and collective forgetting with respect to Civil War and Reconstruction issues, see DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY (2001).

In Part I of this Article, I recover the Revels debate for constitutional law and analyze the Senate's proceedings as an instance of nonjudicial constitutional interpretation. During the debate, some senators constructed intricate readings of the written Constitution to support their views on the Revels question. A greater number of senators looked past the constitutional text and argued directly about race and the significance of the Civil War. All of these senators, however, were engaged in constitutional argument in the best sense of that term. Constitutional issues, I contend, are those that are basic to the workings of government, whether or not they concern the reading of specific words in the written Constitution. On that understanding, the status of African Americans and the legal significance of the Civil War were central constitutional issues in 1870. Moreover, most of the participating senators seem to have treated the debate as an authentic clash of principles rather than as an occasion for using any available means to achieve a partisan end. The Revels debate is accordingly a leading example of constitutional interpretation — or perhaps constitutional construction — by a legislative body.

In Part II, I show how examining our modern intuitions about the Revels debate can prompt us to endorse particular principles of constitutional interpretation. Nearly all twenty-first-century Americans will think that Revels should have been seated. Indeed, most will think that answer obvious. It is worth thinking carefully, however, about what principle would justify that result as a matter of constitutional interpretation, and I describe two possibilities. Readers who endorse either principle should consider how the relevant rationale would apply in other cases as well.

One justification for seating Revels looks to history as a source of constitutional authority. It holds, with many of the Republican senators of 1870 and in a mode described in various ways by modern theorists,[20] that events of the Civil War era changed the Constitution even more than the text of the Reconstruction Amendments indicates. A second justification is rooted in democratic theory. Part of the reason why constitutional rules can legitimately trump political majorities is that the Constitution embodies past democratic decisions.[21] But the constitutional authorities that would have excluded Revels from the Senate — Article I, *Dred Scott*, and even the Fourteenth Amendment — were all products of decisionmaking processes in which blacks

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[20] *See, e.g.*, 2 BRUCE A. ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 99–254 (1998); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1997).

[21] *See, e.g.*, Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005) (reviewing possible relationships between past decisionmaking and constitutional legitimacy, and also discussing other factors supporting constitutional legitimacy).

could not participate. Nullifying Revels's election because the Fourteenth Amendment had not sufficiently overcome Article I and *Dred Scott* would thus limit black political participation on the say-so of an exclusively white constitutional process, rather than by the authority of a prior decision that blacks should have recognized as legitimately democratic. It cannot be the case, of course, that all constitutional doctrines rooted in pre–Civil War times are per se inapplicable to African Americans. But in complex ways that Part II explores, considerations of democratic legitimacy at a time of transition argued for allowing electoral politics (in which blacks now participated) to revise inherited constitutional rules that would otherwise have perpetuated black exclusion.

In Part III, I use the interpretive principles that emerge from considering the Revels debate to criticize the Supreme Court's landmark ruling in the *Civil Rights Cases*[22] of 1883. In its opinion striking down the Civil Rights Act of 1875,[23] the Court confronted several of the same issues that the Senate engaged in the Revels debate, but it resolved those issues differently. First, the *Civil Rights Cases* denied that events of the Civil War era had worked a great constitutional revolution. Second, the *Civil Rights Cases* rejected the use of national electoral politics as a mechanism for vindicating an important set of rights for African Americans, and it did so in the name of constitutional principles inherited from a time when only whites could participate in making the rules. In so doing, and in marked contrast to the Senate's action in seating Revels, the Court damaged American constitutional law's claim to being a democratically legitimate form of authority in cases adversely affecting African Americans.

I. RECOVERING REVELS

A. The Senate Confronts the Riddle

When Revels arrived in the Senate, the ceremonial honor of presenting his credentials went to Senator Henry Wilson of Massachusetts, a Radical Republican and an outspoken advocate of racial equality.[24] Senator Wilson surely relished the moment. "I present the credentials," he declared, "of Hon[orable] H.R. Revels, Senator-elect from Mississippi."[25] He did not add "and the first person of African descent ever to serve in the Congress of the United States." Everyone

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[22] 109 U.S. 3 (1883).

[23] Ch. 114, 18 Stat. 335.

[24] Three years later, Senator Wilson would become Vice President of the United States under President Grant.

[25] CONG. GLOBE, 41st Cong., 2d Sess. 1503 (1870).

in the chamber — everyone in the country, in fact, or at least everyone who read newspapers — knew that part already.[26]

The Democrats objected immediately.[27] In keeping with the Constitution's provision that each house of Congress is the judge of the qualifications of its own members,[28] their objections were addressed internally rather than referred to a court or some other outside body. During the three days of debate that followed, different Democrats articulated different objections, some more subtle than others.[29] Whatever the credibility of their other arguments, however, the Senate's Democrats had a reasonable point when they argued that Revels was not eligible to sit because he was not yet nine years a citizen. Everyone remembered *Dred Scott*. Everyone knew that the year was 1870, and everyone knew that the Fourteenth Amendment had been ratified only in 1868. Everyone could do the math.

Democrat George Vickers of Maryland conveyed the problem in a measured and lawyerly way. He acknowledged that *Dred Scott* had been widely denounced and was not much respected in the Senate of 1870. Still, he said, the law was the law, and politicians were not free to disregard Supreme Court decisions merely because they disliked them.[30] Senator Vickers then argued that the adoption of the Fourteenth Amendment and the Civil Rights Act of 1866, which also purported to grant citizenship to blacks, showed that the Republicans understood *Dred Scott* to have been the law up until that time, because otherwise the citizenship provisions of those new authorities would have been redundant.[31] Neither the Civil Rights Act nor the Fourteenth Amendment purported to operate retroactively, he noted, and he reminded the Senate that as a general matter laws operate only prospectively unless they expressly state otherwise.[32] As a matter of simple and honest legal interpretation, Senator Vickers concluded, Revels was not yet nine years a citizen.[33]

Other Democrats took less nuanced positions. Senator Garrett Davis of Kentucky invoked the authority of *Dred Scott* to declare that Revels was not a citizen at all, even in 1870.[34] Far from conceding

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[26] *See* sources cited *supra* note 16 and accompanying text.

[27] CONG. GLOBE, 41st Cong., 2d Sess. 1503 (1870).

[28] U.S. CONST. art. I, § 5, cl. 1.

[29] Naturally, some of the objections raised were petty and technical. *See, e.g.*, CONG. GLOBE, 41st Cong., 2d Sess. 1503–04 (1870) (dispute over whether the papers attesting to Revels's selection by the Mississippi legislature were signed by the proper state official). Most of the debate, however, concerned the deeper constitutional question on which this Article focuses.

[30] *Id.* at 1557–58 (statement of Sen. Vickers).

[31] *Id.* at 1560.

[32] *Id.* at 1558.

[33] *See id.* at 1557–60.

[34] *Id.* at 1510 (statement of Sen. Davis).

that *Dred Scott* had been overruled or superseded, Senator Davis deemed that decision a shining tower of constitutional rectitude. "[T]here is no human intellect, there is no legal learning that can overturn or shake the opinion of the Chief Justice in that case," he declared.[35] In his view, the American polity fundamentally excluded people of African descent, and that was that. At the Founding, he reminded his colleagues, various laws held even free blacks far below the status of citizens.[36] Given this history and the uncontestable truth of *Dred Scott*, Senator Davis maintained that Revels could not then or ever be a citizen, much less a senator.[37]

One might wonder where the Fourteenth Amendment fit into Senator Davis's analysis. No matter what the law was before 1868, a constitutional amendment overruling *Dred Scott* and conferring citizenship on all persons born in the United States should have altered the prewar regime, unless the racial basis of American citizenship were somehow so fundamental as to be unchangeable even through constitutional amendment. Senator Davis did not address this matter directly, leaving implicit in his argument that the Fourteenth Amendment had no force to alter the prewar regime.

His colleague Senator Eli Saulsbury of Delaware addressed the Fourteenth Amendment more directly. According to Senator Saulsbury, that Amendment was not a valid part of the Constitution at all.[38] He did not explain why the Fourteenth Amendment was invalid, so we can only speculate about the theory behind his claim. One possibility is that he regarded the Amendment as invalid because of procedural irregularities in its ratification.[39] Another, perhaps more in keeping with Senator Davis's impulses, is that no amendment could have the power to alter so fundamental a feature of the American polity as the exclusion of people of African descent. Whatever Senator Saulsbury's rationale, however, the basic contention was clear: Even in 1870, *Dred Scott* stated the law of American citizenship. Hiram Revels was not a citizen, let alone a citizen for nine years.

The Senate Republicans believed in the validity of the Fourteenth Amendment, of course. They had no doubt that Revels was a citizen on the day he arrived in the Senate chamber. More fundamentally, many of them could not believe that anyone would stand up in the

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[35] *Id.* at 1509.

[36] *Id.* at 1511–12.

[37] *See id.* at 1509–12.

[38] *Id.* app. at 127 (statement of Sen. Saulsbury).

[39] *See generally* 2 ACKERMAN, *supra* note 20, at 99–120 (discussing "formalist dilemmas" embedded in the history of the Thirteenth and Fourteenth Amendments, and noting that "the process by which Congress procured ratification of the Fourteenth Amendment simply cannot be squared with the text [of Article V]").

United States Senate in 1870 and argue that *Dred Scott* had ever been authoritative. "I never expected to hear read in the Senate of the United States, or in any court of justice where authority was looked for, the *Dred Scott* decision," said Senator James Nye of Nevada.[40] Senator Jacob Howard of Michigan was less civil. He pronounced himself "nauseated," disdaining entirely the thought of going "into that recondite inquiry as to the political status of a black man under the *Dred Scott* decision."[41] Not to be outdone, Senator Charles Sumner of Massachusetts declared that *Dred Scott* had been "[b]orn a putrid corpse," and described it as "a stench in the nostrils . . . to be remembered only as a warning and a shame."[42]

In a mirror image of the Democratic belief that the Fourteenth Amendment had not validly overruled *Dred Scott*, many Republicans believed that *Dred Scott* had no legal force even without the Fourteenth Amendment. One can distinguish two forms of that belief. The first, which might follow from Senator Sumner's description of *Dred Scott* as "*born* a putrid corpse," is that *Dred Scott* was so wrong as to have been invalid ab initio. The other, which is more complex conceptually but yields the same result, is that events following *Dred Scott* — the election of President Lincoln, Southern secession, the Civil War, emancipation, and perhaps the postwar constitutional amendments — amounted to a radical break with the past, one that made it senseless to treat certain legal authorities from the old regime as if they had continuing meaning. On this view, the Republican position might not be that Revels had been a citizen for nine chronological years before 1870, or at least not in a sense that could be confirmed by asking whether a court in 1861 would have deemed him a citizen. Instead, the position would be that in 1870, it was impermissible to betray fundamental principles of the new order by giving legal effect to the fact that other principles — evil principles — had been applied at an earlier time. Whatever people might have done in 1857 or 1861, this perspective would hold, it would violate the norms of 1870 to give continuing force to *Dred Scott*.

Although not always clearly distinguishing between those two positions, several Republicans argued that the Civil War itself demonstrated *Dred Scott*'s invalidity. "The comment made upon that great wrongful judicial decision is to be seen in the dreadful war through which we have passed," said Senator Howard.[43] Senator Frederick Sawyer, a transplanted Bostonian representing South Carolina, spoke of the war as "the great court of errors" that had reversed the Taney

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[40] CONG. GLOBE, 41st Cong., 2d Sess. 1513 (1870) (statement of Sen. Nye).
[41] *Id.* at 1543 (statement of Sen. Howard).
[42] *Id.* at 1566–67 (statement of Sen. Sumner).
[43] *Id.* at 1543 (statement of Sen. Howard).

Court's judgment.[44] Senator Nye said that *Dred Scott* had been "repealed by the mightiest uprising which the world has ever witnessed" and regarded the Democrats in this debate as attempting — pathetically, perhaps — to stand in the shoes of the defeated Confederate armies.[45] He described the effort to bar Revels from the Senate as Senator Davis's "last battle-field," noting: "It is the last opportunity he will have to make this fight. . . . He has been fighting it boldly, and he feels as Lee felt and as [Jefferson] Davis felt when Grant swung his army around Richmond."[46]

Some of these statements — Senator Howard's, for example — could reflect either the view that *Dred Scott* was invalid ab initio or the view that the war, or the war in combination with other events after 1857, rendered the Supreme Court's judgment null retroactively. Individual senators did not always differentiate between the two theories, and there is no reason to think that each Republican senator's thoughts on the issue fit neatly in one category or the other. What is clear, however, is that these Republican senators did not consider *Dred Scott* a constitutional authority that had been displaced only when the Fourteenth Amendment was ratified in 1868.

For three days, the Senate debated the status of *Dred Scott* and the qualifications of Hiram Revels. The public was riveted. According to a reporter observing the scene, "[t]here was not an inch of standing or sitting room in the galleries . . . and to say that the interest was intense gives but a faint idea of the feeling which prevailed throughout the entire proceeding."[47] On more than one occasion there were outbursts and demonstrations from the spectators and the Vice President had to call for order.[48]

Finally, on Friday, February 25, the Senate called the question. Forty-eight senators, all Republicans, voted in favor of administering the oath of office to Hiram Revels.[49] Eight senators, all Democrats, voted against.[50] The Vice President duly called Revels to the front of the chamber to take the oath of office.[51] Hiram Revels, Republican of Mississippi, then and there became a United States senator by swearing to "support and defend the Constitution of the United States against all enemies, foreign and domestic."[52]

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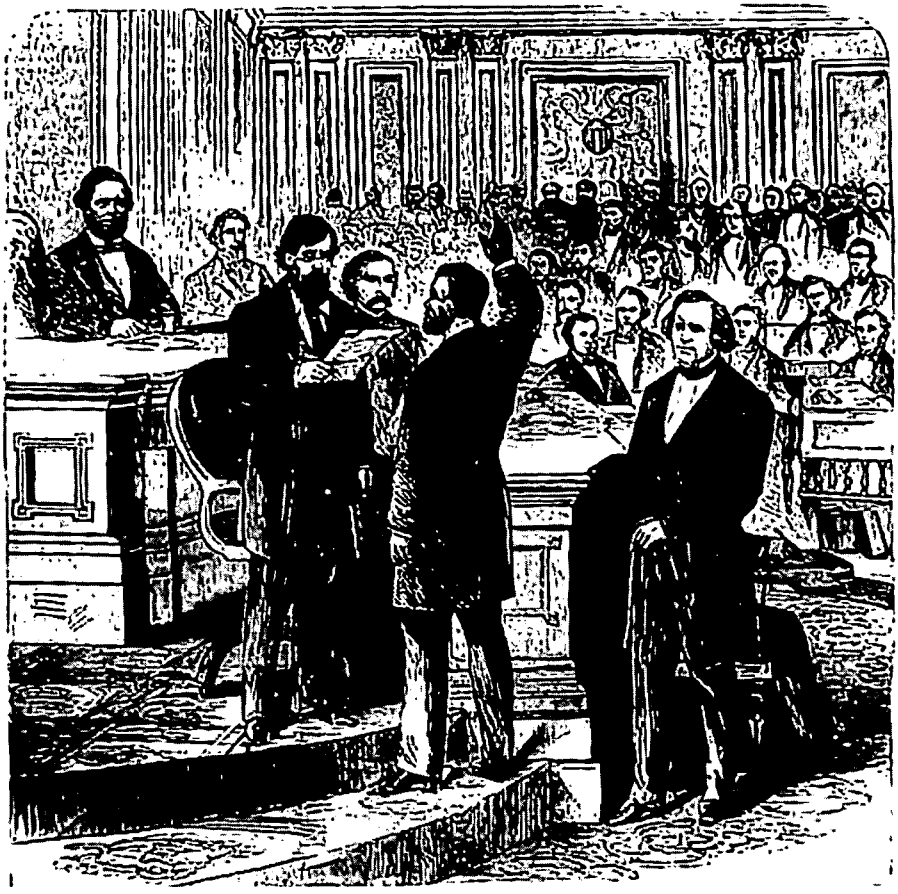
[44] *Id.* at 1564 (statement of Sen. Sawyer).
[45] *Id.* at 1513 (statement of Sen. Nye).
[46] *Id.*
[47] *Colored Member*, *supra* note 17.
[48] CONG. GLOBE, 41st Cong., 2d Sess. 1568 (1870); *see also Colored Member*, *supra* note 17.
[49] CONG. GLOBE, 41st Cong., 2d Sess. 1568 (1870).
[50] *Id.*
[51] *Id.*
[52] *See* Appendix (containing Revels's oath of office).

HIRAM REVELS TAKING THE OATH OF OFFICE IN THE UNITED STATES SENATE, FEBRUARY 25, 1870.



FRANK LESLIE'S ILLUSTRATED NEWSPAPER, Mar. 12, 1870, at 425.

One wonders who Revels had in mind as the Constitution's enemies as he stood in the well of the chamber. More subtly, one wonders how to understand the content of his oath. He swore to support and defend the Constitution, but what was the Constitution at the moment when he swore? The preceding debate reflected radical disagreement within the Senate about even the basic fact of what texts the Constitution contained, let alone what the Constitution meant or to what values or vision of government it was committed. At the very least, the Senate was debating the content and meaning of the Constitution when it debated Revels's qualifications. What was the Constitution's position on racial equality, and what was the constitutional significance of the war? The decision to seat Revels was, among other things, a bid to shape authoritative answers to those questions.

B. The Revels Debate as Constitutional Interpretation

Characterizing the Revels affair as a constitutional debate entails three propositions that are worth developing. The first is that nonjudicial actors engage in constitutional interpretation. The second is that the debating senators articulated an authentic dispute about issues of principle, rather than merely advancing whatever arguments supported their desired outcome in the matter before them. The third proposition is that the issues before the Senate were *constitutional* issues. Together, these three propositions establish that the Revels debate was an exercise in constitutional interpretation — or perhaps in constitutional construction.

1. *Nonjudicial Constitutionalism.* — It is important, although perhaps no longer as necessary as it once was, to be clear that constitutional debate and interpretation occur outside as well as inside of courts.[53] Courts themselves have long recognized that other branches must at least share in the process of constitutional interpretation and, moreover, that the constitutional views of nonjudicial actors are often entitled to judicial deference.[54] To take an easy example, a congressional determination that some federal officer's conduct constitutes impeachable high crimes and misdemeanors under Article II, Section 4 is a constitutional judgment. Many would take the view that a congressional determination that the Family and Medical Leave Act of

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[53] *See, e.g.*, LARRY KRAMER, THE PEOPLE THEMSELVES (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); JOHN YOO, THE POWERS OF WAR AND PEACE (2005) (arguing that the Executive Branch can engage in unfettered interpretation of the Constitution in much of foreign affairs).

[54] *See, e.g.*, City of Boerne v. Flores, 521 U.S 507, 535–36 (1997) (acknowledging that Congress is presumed to consider questions of constitutionality when it acts and that Congress's constitutional judgment is entitled to respect, even when still subject to judicial review).

1993[55] is an appropriate means of enforcing the Fourteenth Amendment is also a constitutional judgment, even if many who took that view would also say that Congress's interpretation was subject to judicial review.[56] Although the proper allocation of interpretive authority among judicial and nonjudicial actors remains a contested question,[57] it is certainly the case that some nonjudicial activities call for constitutional interpretation. Accordingly, the fact that the Revels debate occurred in the Senate rather than in a court does not preclude it from being properly classified as a constitutional debate.

To be sure, readers who acknowledge that the Senate can in principle engage in constitutional interpretation might be skeptical about whether the Revels affair was in practice such an exercise. Two different intuitions might underlie that objection: that the Revels affair was a cynical political exercise rather than an authentic clash of principles, or that it was an authentic debate about nonconstitutional ideas. As the remainder of this section explains, however, neither of these intuitions should withstand scrutiny: the contest over Revels was a constitutional debate in the deepest sense.

2. Politics and Principles. — Revels was a Republican. The Republicans wanted to seat him, and the Democrats did not. The matter was decided on a party-line vote. Observers who approach legislative debate through certain assumptions of twentieth- or twenty-first-century political culture might accordingly suspect that the fight over Revels's qualifications was not a conflict between constitutional visions but merely a matter of partisanship, with each side espousing whatever makeweight arguments supported its preferred result. And to be sure, the debate was not entirely free of either partisanship or disingenuity. Nonetheless, it would be wrong to understand the Revels debate as merely sound and fury signifying normal politics. Indeed, the Revels debate makes little sense if one assumes that at root both sides were trying to achieve a local result rather than to vindicate a larger principle.

As a practical matter, the outcome of the Revels affair was never in doubt. The Republicans held an overwhelming majority in the chamber. The Democrats had no hope of blocking Revels, and they knew it.[58] And yet, the Democrats opposed him vociferously for three days

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[55] 29 U.S.C.A. §§ 2601–2654 (West 1999 & Supp. 2005).

[56] *See* Nevada v. Hibbs, 538 U.S. 721, 728, 740 (2003); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2045–48 (2003).

[57] *See generally* SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988) (describing "Protestant" and "Catholic" approaches to the question of which institutions have the authority to interpret the Constitution).

[58] Senator Davis acknowledged before making his major arguments that anything he said would be "ineffectual." CONG. GLOBE, 41st Cong., 2d Sess. 1509 (1870) (statement of Sen.

on the Senate floor. It follows that for the senators present or for the constituencies they represented — and probably for both — something beyond the practical result must have been at issue. That larger something was worth fighting for, at length and on the record, even though the outcome of this particular round of the struggle was preordained.

This is not to say that partisan considerations played no part in the debate, nor is it to claim that every argument offered was made in good faith.[59] It cannot be the case, however, that a debate must traffic *only* in pure principled argument to qualify as constitutional interpretation, or else the number of instances in which even the Supreme Court has interpreted the Constitution would be vanishingly small. Fifty-six senators, like nine Justices, are likely to decide a contested question for some combination of partisan, personal, and principled reasons rather than with any one kind of reasoning alone. At the extreme, when principled constitutional reasoning accounts for nearly none of the motive force behind a decision, we might say that no authentic constitutional interpretation had occurred, even if the decision purported to concern a constitutional issue. But when decisionmakers acting in good faith argue for their views largely or chiefly on principled grounds, the decisionmaking process can be an authentic act of constitutional interpretation even if other kinds of considerations are also in play. Chief Justice John Marshall may well have wanted to preserve Federalist Party power in the judiciary when he decided *Marbury v. Madison*,[60] but *Marbury* is still an act of constitutional interpretation.[61] Thus, the claim that the Revels affair was sufficiently principled to qualify as an exercise in interpreting the Constitution means that the Senate debate was not *only* or *predominantly* a matter of politicians advancing whatever arguments suited their partisan advantage.

Different participants in the debate would have characterized the content of the larger principle in different ways, but two themes predominated. One was whether and in what respect blacks were the equals of whites. The other was the significance of the war, and in particular whether a new political order had swept away the antebel-

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Davis). Senator Saulsbury described himself as "attempting to prevent that which is already a certainty." *Id.* app. at 125 (statement of Sen. Saulsbury).

59 One Democratic senator candidly announced his intention to object as often as possible and on any conceivable ground. *See id.* at 1508 (statement of Sen. Davis). In light of the practical futility of opposition, however, it seems likely that even a decision to impose petty objections whenever they could be raised stemmed from the view that something enormous was at stake.

60 5 U.S. (1 Cranch) 137 (1803).

61 A purist might retort that *Marbury* is not authentic constitutional interpretation either. But if *Marbury* does not count as constitutional interpretation, then the going criteria for what counts as constitutional interpretation are too demanding for "constitutional interpretation" to be a meaningful category of real-world activity.

lum constitutional regime. The two issues were interrelated. Indeed, it is not clear that they could always be distinguished.

Much of the opposition to Revels was starkly racist. Outside the chamber, Democratic newspapers set a vicious tone: the New York *World* decried the arrival of a "lineal descendant of an ourang-otang in Congress" and added that Revels had "hands resembling claws."[62] The discourse inside the chamber was almost equally pointed. Senator Davis asked rhetorically whether any of the Republicans present who claimed willingness to accept Revels as a colleague "has made sedulous court to any one fair black swan, and offered to take her singing to the altar of Hymen."[63] Senator Saulsbury baited his Republican colleagues, speaking of "the tender sensibilities of a majority of the members of this body" who were "fondly . . . attached to the negro race," and adding, "I know how dearly you love it."[64] Further assailing the Republicans' motives and indeed their states of mind, he wondered aloud at the great "anxiety which you all display for the . . . admission . . . of this negro or mulatto man."[65] A Republican senator tried to lighten the mood by teasing Senator Saulsbury, interrupting to say that Revels was in fact neither negro nor mulatto but "an octoroon, if that will make any difference in [the Senator's] argument."[66] The *Congressional Globe* recorded laughter in the chamber,[67] and even Senator Saulsbury — as a good politician with an audience — was willing to indulge the moment as humorous.[68] Nonetheless, he regarded the underlying issue with deadly seriousness. To Senator Saulsbury, the seating of a negro or even an octoroon senator was a "great calamity" and a "great and damning outrage" that left him with "but little hope for the future of [the] country."[69]

One Republican senator — George Williams of Oregon — tried to turn the facts underlying this joke into a legal basis for finessing the constitutional issue. At different times in his life, Revels was called a quadroon, an octoroon, and a Croatan Indian as well as a negro,[70] the multiplicity of designations suggesting the hazards of trying to quantify and categorize precise forms of racial mixing. Wherever his fore-

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62 *Sensation in the Senate*, WORLD (N.Y.), Mar. 17, 1870, at 1.

63 CONG. GLOBE, 41st Cong., 2d Sess. 1514 (1870) (statement of Sen. Davis).

64 *Id.* app. at 126 (statement of Sen. Saulsbury).

65 *Id.*

66 *Id.* (statement of Sen. Drake).

67 *Id.*

68 *Id.* (statement of Sen. Saulsbury) (mocking Senator Drake's observation).

69 *Id.* app. at 130.

70 *See* JULIUS ERIC THOMPSON, HIRAM R. REVELS, 1827–1901, at 8 (1982); *Hiram R. Revels, U.S. Senator Elect from Mississippi*, FRANK LESLIE'S ILLUSTRATED NEWSPAPER, Feb. 26, 1870, at 401 (describing Revels as "about three-fourths white"). In his autobiography, Revels referred to himself as "Negro" and as "colored." *See* Hiram R. Revels, Autobiography 2, 3 (n.d.) (unpublished handwritten manuscript, on file with the Harvard Law School Library).

bears had lived, however, and in whatever proportions, Revels was light skinned and generally understood to have had more European ancestors than African ones. Accordingly, Senator Williams argued, the citizenship bar of *Dred Scott* should not apply to Revels even if the case were authoritative when applicable, because *Dred Scott* should be read to apply only to persons of "pure African blood."[71]

This attempt to settle the issue without confronting the hard constitutional question had a legal pedigree, albeit one that Senator Williams did not mention. Eight years earlier, the Attorney General of the United States had proffered the same reading of *Dred Scott*.[72] In a proceeding that turned on whether a colored man was an American citizen, Attorney General Edward Bates admitted arguendo the authority of *Dred Scott* but officially opined that its holding, in light of a strict construction of the pleadings in that case, applied only to people of unmixed African descent.[73] Free people of mixed racial ancestry, he said, were citizens of the United States if born on American soil.[74] This position amounted to a one-drop rule in reverse: any non-African ancestry would remove a person from the bar of *Dred Scott*. Revels surely qualified for citizenship under that standard.

But what was good enough for the Lincoln Administration in 1862 was decidedly not good enough for the Senate in 1870. Senator Williams's tack garnered no support from senators of either party, and indeed some Republicans expressly repudiated it as an unacceptable and perhaps cowardly dodge. Senator William Stewart, for one, immediately intervened to say that the Senate should not distinguish *Dred Scott* but should instead make clear that it was "overruling the *Dred Scott* decision."[75] Senator Simon Cameron of Pennsylvania found the suggested compromise a bit repulsive and took the opportunity to deliver a short sermon on the subject of transracial brotherhood.[76] Senator Cameron had not participated in the debate at all to that point and said he would have continued to keep out of the discussion had Senator Williams not "got up to make an argument that this man has more of white than of black blood in his veins. What do I care which pre-

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[71] CONG. GLOBE, 41st Cong., 2d Sess. 1543 (1870) (statement of Sen. Williams).

[72] *See* 10 Op. Att'y Gen. 382, 412 (1862).

[73] *See id.* at 409–13.

[74] *Id.* at 412–13. The incident prompting Bates to write this letter involved a law requiring the masters of ships plying the coasting trade to be United States citizens. Acting under that law, a revenue cutter detained a merchant shipmaster at sea because he was colored (in this case, of mixed African and European ancestry) and therefore perhaps not a citizen. The Treasury Department asked the Attorney General whether such a person could be a citizen and therefore a legal shipmaster in the coasting trade. John Witt has encouraged me to regard this incident as an early example of arrest for driving while black.

[75] CONG. GLOBE, 41st Cong., 2d Sess. 1543 (1870) (statement of Sen. Stewart).

[76] *Id.* at 1544 (statement of Sen. Cameron).

ponderates? He is a man . . . ."[77] Perhaps more than that, Senator Cameron continued, "his race, when the country was in its peril, came to the rescue."[78] And then, in an admirable concession of his own fallibility, Senator Cameron acknowledged that his own views about race and equality had changed in the course of his lifetime: "I admit that it somewhat shocks my old prejudices, as it probably does the prejudices of many more here, that one of the despised race should come here to be my equal; but I look upon it as the act of God."[79]

In addition to being a fight about race, the debate over Hiram Revels was a fight about the significance of the Civil War. In particular, it was a fight about the extent to which a new regime had superseded the Constitution of 1787. Like the issue of racial equality, this issue of constitutional transition was contested at a high level of principle rather than merely as a means for seating or blocking Hiram Revels.

The Republican position entailed more than the belief that the Fourteenth Amendment — or some other comparable force — had rejected *Dred Scott*. It entailed the belief that *Dred Scott* should be given no recognition at all, not even the recognition that it had been the law nine years earlier. Accordingly, Republicans addressing the Revels controversy spoke not just of technical points of law, but also of grand, tectonic constitutional shifts, depicting 1870 as a world made wholly new. Senator Nye, for example, acknowledged that the treatment of blacks in America had historically been abysmal but insisted that the past had been wiped away: "[T]hat reign of wrong is over, and the reign of right and righteousness has taken its place."[80] Taking stock of the magnitude of the constitutional change, Senator Charles Drake of Missouri prophesied that if people would understand the full importance of the Reconstruction Amendments, "gentlemen on the other side will find that there is a Constitution there such as they never dreamed of."[81] From this perspective, relying on *Dred Scott* was a pathetic attempt to hold on to a bygone past, and an unhappy past at that.

But to the Democrats, standing firm for the old Constitution was a noble act. Senator Saulsbury insisted that the Constitution was "framed by [the people's] worthy and patriotic sires, and . . . intended

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[77] *Id.*

[78] *Id.* It is worth noting an internal tension in Senator Cameron's pronouncements, one that has beset many subsequent liberal arguments about race: Senator Cameron regarded Revels as a man rather than a person with a given proportion of white or black blood, but he still recognized Revels's racial identity in order to speak of Revels's race coming to the rescue in the Civil War.

[79] *Id.* Senator Cameron, who as Lincoln's Secretary of War had been Bates's colleague from 1861 to 1862, had initially entered the Senate as a Democrat.

[80] *Id.* at 513 (statement of Sen. Nye).

[81] *Id.* at 1564 (statement of Sen. Drake).

to be a rich and noble heritage to them and their posterity forever."[82] He wished to preserve that "proud heritage, bequeathed to us by our noble ancestors as they intended it to be preserved."[83] By their "alarming innovations," he charged, the Republicans were turning their backs on the Constitution, seeking to make America "more completely revolutionized than was this country by the separation of the Colonies from Great Britain."[84] In doing so, they were betraying the true Constitution of the United States.

The predominant Republican attitude regarding how to respond to the Democrats demonstrates that most Republican senators also regarded these issues as matters of principle rather than as debates to be won with whatever tools presented themselves. A few times during the debate, individual Republican senators suggested technical solutions to the nine-year problem. Senator Williams's attempt to reclassify Revels as mostly white and therefore not within the ambit of *Dred Scott* was one such attempt.[85] Senator Stewart offered another, arguing that the Citizenship Clause of the Fourteenth Amendment, properly read, was intended to relate back to birth.[86] On this account, language conferring citizenship on "[a]ll persons born . . . in the United States"[87] implicitly conferred that citizenship as of the time of birth, even if that time preceded the date of the Fourteenth Amendment's ratification. Senator John Scott of Pennsylvania tried a third technique, suggesting that the nine-year citizenship requirement should not apply to Revels at all.[88] The point of the nine-year requirement, he said, was to prevent foreign influence, which was of no moment in Revels's case.[89] Even if Revels had not been a citizen for nine years, he had never been loyal to a foreign state, either.[90] These three senators used three conventional modes of legal argument — facts, text,

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82 *Id.* app. at 127 (statement of Sen. Saulsbury).

83 *Id.* app. at 130.

84 *Id.* app. at 127.

85 *See supra* pp. 1694–95.

86 CONG. GLOBE, 41st Cong., 2d Sess. 1566 (1870) (statement of Sen. Stewart).

87 U.S. CONST. amend. XIV, § 1.

88 *Id.* at 1565 (statement of Sen. Scott).

89 *Id.*

90 *Id.* Senator Scott supported this argument by pointing out that the nine-year rule had historically been flexible when there was no worry about foreign influence. When Texas was admitted to the Union, he noted, Texan senators were immediately seated, despite the fact that they had been citizens of the Republic of Texas and not of the United States immediately before admission. *Id.* It would not have been difficult, however, to rebut Scott's point about the Texans by keeping to the same kind of strict reading of the nine-year clause that the Democrats' argument implied throughout. The first Texan senators had uncontroversially been United States citizens for the many years between their births within the United States and their migration to Texas as adults. *See id.* at 1566. Thus, even if they were not citizens for the nine years immediately preceding their election to the Senate, they had still at some point been American citizens for nine years. For the possible application of this wrinkle to Revels, see *infra* note 107.

and policy — in search of a technical solution. There are reasonable arguments, perhaps even strong ones, for the proposition that none of these arguments succeeds as a strict matter of legal craft.[91] Nonetheless, these technical arguments or others that one could invent[92] might support (or at least rationalize) admitting Revels to the Senate, thus allowing the Republicans to reach their desired result without having to invoke more extreme positions about a rupture in constitutional history.

It is noteworthy, therefore, that these attempts at lawyerly solutions attracted almost no support. No Republican senators expressed enthusiasm for the clever readings of the Citizenship Clause or the nine-year rule that would have justified seating Revels, and the idea of winning the argument by playing with the racial categories and declaring him not black earned active opprobrium. Instead, the dominant Republican impulse was to deny any compromise that accommodated the contrary authority of the old regime. In other words, the Republicans did not simply seek a way to justify seating Revels. They wanted the admission of Revels to stand for a set of larger principles.

3. What Makes Principles "Constitutional"? — The real issues in the Revels debate had little to do with textual interpretation. Plainly, what divided the parties so bitterly was not whether relevant canons

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[91] The argument that Revels was not within the bar of *Dred Scott* because he was not of full African blood had some technical plausibility in light of the stipulated facts of that case: Scott was identified as a negro of full African blood, and Chief Justice Taney's opinion could be read to apply only to cases on all fours with the one before the Court. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 400 (1857). Nonetheless, this would be an idiosyncratic reading, especially in light of dominant cultural practices that regarded persons of mixed ancestry as subject to the legal regimes applicable to black people rather than those applicable to white people. *See, e.g.*, Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 177–78 (1998) (stating that before the Civil War most states treated persons with one-fourth to one-eighth black ancestry as black, and after the war many states moved toward "one-drop" rules under which even less black ancestry would classify a person as black). The argument that the language of the Citizenship Clause relates back to birth is essentially an argument for retroactive application, and although the point is contestable, much nineteenth-century authority supported the Democrats' contention that, as a default rule, legal enactments were not read to be retroactive unless they specifically said otherwise. Indeed, shortly after the Revels debate the Supreme Court gave effect to that rule by twice expressly refusing to give retroactive effect to another Reconstruction Amendment: the Thirteenth. *See infra* note 111 and accompanying text. Finally, although it seems reasonable to interpret the nine-year rule as intended to bar foreign influence, the language of Article I, Section 3 — "No Person shall be a Senator who shall not have . . . been nine Years a Citizen of the United States" — does not contemplate exceptions. U.S. CONST. art. I, § 3, cl. 3. Moreover, one could adduce a policy rationale for applying the nine-year rule to all new citizens, whether formerly foreigners or not: perhaps the nine-year rule would have the salutary effect of providing a period of time during which the would-be senator could participate in the polity, learning its norms and values before becoming eligible to hold high office. Such a period of education and experience could be valuable irrespective of the danger of foreign influence.

[92] For suggestions, see *infra* section II.A.

of construction indicated that the Fourteenth Amendment's Citizenship Clause should or should not be read to have retroactive force. Indeed, if the controversy had centered on such technical issues, the strict party-line vote would bespeak a great deal of disingenuousness in the Senate, because there is no reason to think that party affiliations would cleanly map so many people's views about a relatively abstract interpretive issue. The natural inference would be that the senators cared little about that interpretive issue and simply endorsed whatever position conduced to their preferred results. In the main, however, the senators who clashed over Revels did not pretend that they were fighting about canons of interpretation, and they did not focus their arguments on the text of the written Constitution. Nonetheless, their principal contentions were *constitutional* arguments. And indeed, the partisan division of the Senate reflected the constitutional nature of the conflict.

On a properly rich understanding, the subject of American constitutional inquiry is not a written document alone, or that document and its judicial glosses, but the fundamental set of ideas, practices, and values that shape the workings of legitimate American government. Nobody can accurately describe the full content of that set. The boundaries of the constitutional are contestable, both in the sense that there will always be disagreement about what governmental actions are permitted and in the sense that there will always be disagreement about which issues are of sufficient importance to the functioning of government to be classified as "constitutional." Thus, reasonable people can argue both about whether the War Powers Resolution[93] is constitutional in the sense of being a permissible exercise of legislative authority and about whether the War Powers Resolution is constitutional in the sense of having more than merely statutory dimension. (In the first sense, "constitutional" is opposed to *unconstitutional*; in the second sense, "constitutional" is opposed to *nonconstitutional*.) That said, there are also significant areas of consensus. More or less everyone agrees that Congress may constitutionally prescribe wage and hour rules for interstate truckers, and more or less everyone agrees that whether a state may use racial criteria when hiring contractors poses a constitutional question. Because the written Constitution addresses many fundamental aspects of American government and frequently does so in general terms, it is contingently (and not coincidently) true that most constitutional issues bear some relationship to passages in the written Constitution. But such a relationship to the text is not, I contend, the criterion by virtue of which an issue is constitutional.

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[93] 50 U.S.C. §§ 1541–1548 (2000).

What makes an issue constitutional is its substantively important place in American governance.

On this understanding, both of the central issues in the Revels debate were constitutional matters. Whatever the senators may have thought about the proper canons for reading the Citizenship Clause, the question of whether and to what extent a civil war has swept away the authority of the prior regime is as fundamental an issue about government as any decisionmaker is likely to confront. Similarly, whether black persons can be senators goes directly to the way in which American political power can be exercised. Given the importance of officeholding and the salience of race in American life, any answer to that question would have ramifications for the system of governance. Indeed, whether blacks could be senators would have been a constitutional question before as well as after the adoption of the Fourteenth Amendment. At any time in American history, any answer to that question would have relied on a theory about the nature of the Republic and its political processes — that is, a constitutional theory. And given the political culture of 1870, it is entirely natural that a constitutional debate in this deeper sense would have broken down along party lines, even if most senators voted their principles rather than merely their partisanship. At the height of Reconstruction, there was little question that senators' party affiliations mapped a deep difference in views about the values and workings of American government.[94]

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[94] Thinking about this phenomenon may be easier if one recognizes the party dynamics of the Reconstruction Congress as being more like those of antebellum America than those of more modern times. As is well known, leading American politicians in the eighteenth and early nineteenth centuries largely subscribed to a theory on which political parties were undesirable institutions. *See* RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM 40–121 (1969). During the time of what are generally called the First and Second Party Systems (that is, to simplify slightly, the competition between Federalists and Democratic-Republicans from the 1790s to the 1810s and then the competition between Democrats and Whigs from the 1830s to the 1850s), thinkers on each side of the political divide were likely to think of the opposing party less as a legitimate alternative within the constitutional system than as a threat to that system itself. Rather than expecting the two parties to take turns governing throughout the foreseeable future, many early–nineteenth century Americans looked forward to the destruction of all parties but their own (which was not really a party at all, they might say, but an anti-party effort to save the Republic) and the restoration of nonpartisan politics within the proper constitutional framework. *See* GERALD LEONARD, THE INVENTION OF PARTY POLITICS 14–17 (2002) (characterizing the conflict between Democrats and Whigs as less a disagreement over policies than "a battle over the question of party itself and its relationship to the Constitution, neither party ever fully accepting the constitutional legitimacy of the other"). Such an expectation would seem naïve today, but it was surely more plausible during the middle of the nineteenth century; after all, the Democratic-Republicans had only recently ended the First Party System by utterly routing the Federalists. And given the substantial correspondence between party affiliation and geographical section in the 1850s and 1860s, the crisis precipitating the Civil War naturally encouraged many party politicians in the first years of the Third Party System — that is, the system of Republicans and

Finally, it is worth noting that the two constitutional issues at the heart of the Revels debate were largely inextricable from each other. Rather than confronting a question of legal transition that happened to coincide with a question of racial equality, there was an important sense in which the Senate faced a single overriding conflict. The Democrats were surely sincere in feeling that the constitutional issue at stake was rife with tradition and history and other things not collapsible to a simple question about race. It is not clear, however, how much life or content the issue of constitutional revolution had for them independent of their concern with white supremacy. At the very least, the two issues were pervasively intertwined. The substance of the innovation that so exercised senators like Saulsbury and Davis was about race. If a new order would repudiate the old one, the key element of that repudiation would concern the old regime's sanction of slavery, caste distinction, and other official disadvantages visited upon black Americans. Their chief concern was to preserve the prewar racial hierarchy to the greatest extent possible, even after the Reconstruction Amendments.[95]

One of the most telling moments in the three days of debate occurred when the Republican Stewart pressed the Democrat Vickers to expand on his view of Revels's ineligibility. Senator Vickers had articulated the Democratic position in moderate terms. He called on the Senate to decide the question through judicious deliberation rather than political will;[96] he argued that *Dred Scott*, no matter what one thought of its merits, was the positive law until overturned;[97] and he maintained that as a legal matter the Fourteenth Amendment had no retroactive application.[98] Perhaps curious as to how far this Democrat's reasonableness would extend, Senator Stewart asked him an obvious question. Suppose, he inquired, the situation were to arise at a later time, after nine years had passed from ratification of the Fourteenth Amendment. Then would Senator Vickers vote to admit a colored man to the Senate?[99]

Democrats — to continue seeing the other major party less as a legitimate alternative than as a *constitutional* antagonist. *See id.* at 16–17. In 1870, that rift was far from healed.

95 Not coincidentally, no senator of either party articulated conflicting views on the issues of race and revolution. Nobody argued that Africans were tainted lower beings but that as a matter of the proper understanding of the constitutional regime, they were now eligible to sit in the Senate. Conversely, nobody argued that every man was the equal of every other, regardless of race, but that the positive law simply did not permit Revels to be a citizen or a senator.

96 CONG. GLOBE, 41st Cong., 2d. Sess. 1560 (1870) (statement of Sen. Vickers) ("This is not a political but a judicial question, and ought to be decided by us as judges and not as politicians.").

97 *See id.* at 1557.

98 *Id.* at 1558.

99 *Id.* at 1561 (statement of Sen. Stewart).

Senator Vickers did not answer. Instead, he said that he had not heard the question and wished for it to be repeated to him.[100] (As one who asks hypothetical questions for a living, I have some sense of what motivates a questioned party to ask that a question be repeated.) Senator Stewart obliged, repeating the question: would Senator Vickers vote to admit a duly elected colored man to the Senate, supposing that enough time had elapsed that the nine-year issue were no longer germane?[101] Once again, Senator Vickers did not answer. Instead, he dodged and parried and perhaps grew indignant, although we cannot know in what tone of voice he gave this response:

> I shall have to be a little like a Yankee, and answer that question by asking another. Does the Senator consider that question any illustration of a constitutional argument? Is an answer to that question one way or the other to enlighten the judgment of this Senate in determining what is constitutional or not?[102]

We all know exactly what Senator Stewart's question was supposed to illustrate. He wanted to establish whether the Democrats' contention about the legal force of *Dred Scott* could be severed from their view that persons of African descent could not be United States senators. If the two positions were separable, then the Democrats should be prepared to concede that the racial issue would not be relevant nine years after 1868. If the Democrats were unwilling to commit to that resolution, then their legal-constitutional stance regarding the relevance of *Dred Scott* in 1870 must be bound up with the substance of their racial views.

It need not follow that the Democrats were not in good faith about their constitutional theory. More probably, their unwillingness to say that a black man could be a senator if he satisfied the nine-year requirement would mean that the Democrats' constitutional theory and their racial theory were in fact the same, or at least substantially interdependent. In other words, it would mean that the Democrats saw white officeholding as a constitutional principle, a fundamental aspect

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100 *Id.* (statement of Sen. Vickers).

101 *Id.* (statement of Sen. Stewart).

102 *Id.* (statement of Sen. Vickers). One other Democrat was willing to meet Senator Stewart's challenge. Perhaps sensing that Senator Vickers's dodge would undermine his party's claim to be making good-faith constitutional arguments, Senator Stockton of New Jersey subsequently addressed Senator Stewart's query and said that if a state "prefers a negro to represent her, I have no right to call it in question," so long as that negro "is a citizen, and is eligible." *Id.* (statement of Sen. Stockton). Even this position left Senator Stockton some wiggle room: after all, he did not specifically acknowledge that a negro could ever be a citizen, and the debate that week showed that Democrats might not take that point for granted. Nonetheless, a charitable reading would construe Senator Stockton as having met Senator Stewart's challenge by answering that yes, seven years later a black man could sit in the Senate.

of American government. Their vision of *Dred Scott* and Hiram Revels would make perfect sense on that understanding.

Senator Vickers refused to decouple the issues. Every senator in the chamber must have known what that meant.

II. WHAT WE CAN LEARN FROM REVELS

At one level, the Revels debate concerned a discrete legal question about one man's qualifications for a particular office. And as this Part shows, the Senate could have settled the issue either for or against Revels on technical and lawyerly grounds. As both the content of the Senate's conversation and the intense national attention paid to the affair indicate, however, much larger things were at stake. In keeping with that deeper reality, the Senate conducted the debate mostly at the level of broad principles. Moreover, the sense that a technical and lawyerly solution to the Revels problem would be unsatisfying or even disingenuous is one that most twenty-first-century Americans are likely to share with their nineteenth-century predecessors. Almost all modern Americans will take the view that, as a bottom-line matter, Revels should have been seated.[103] And if we are properly self-aware, we will recognize that this view derives from normative constitutional principles rather than from whatever technical legalisms we can develop to "solve" the problem.

This Part analyzes two deeper and potentially more satisfying justifications for seating Revels. The first is that the Civil War and Reconstruction nullified antebellum legal authority limiting the rights of African Americans to a greater extent than was codified in the Thirteenth, Fourteenth, and Fifteenth Amendments. The second is that once black men were recognized as equal participants in the American polity, the legitimacy of the (amended) Constitution rested less on its "democratic" pedigree and more on other considerations, including substantive justice and the subjective identification of citizens with the regime — factors that would be enhanced by seating Revels and vitiated by barring him. I will call the first hypothesis the "race and revolution" idea and the second hypothesis the "transitional justice" idea. If we wish to make sense of why we think Revels should have been seated, I suggest, we must endorse at least one of these two hypotheses.

I offer these ideas primarily as principles of constitutional interpretation that can enable modern Americans to make sense of Revels rather than as a historical account of why the Senate acted as it did in 1870. That said, examining the relevant history yields significant support for both ideas. Historical inquiry is especially valuable for the

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103 I have posed the question to more than three hundred students and colleagues, and not one of them has maintained that Revels should not have been allowed to serve as a senator.

race and revolution idea, which relies heavily on the premise that historical events are sources of constitutional authority, and also depends on a certain interpretation of events. Although the transitional justice idea relies more on theoretical considerations of democratic value, history is still pertinent to evaluating it because historical experience illustrates the practical force of those theoretical considerations. Accordingly, historical analysis is important to the development of each idea, but the two occupy different conceptual spaces. The two ideas are not mutually exclusive: one can accept either, both, or neither. Any of those choices, however, has implications for how the Constitution should be interpreted. Readers who accept either or both of these hypotheses endorse principles of constitutional interpretation that they should also apply in other cases, as Part III shows. And readers who reject both may have a difficult time justifying the decision to seat Revels in the Senate.

Section A of this Part demonstrates the possibility and the poverty of disposing of the Revels question on narrow or technical grounds. Sections B and C then articulate, respectively, the deeper ideas about race and revolution and about transitional justice that would better justify the intuition — surely held by most present readers as well as the 1870 Republicans — that the Senate was right to seat Hiram Revels.

A. Legalisms and Larger Principles

Like the senators of 1870, most modern Americans who learn of the Revels controversy will probably form their views about the correctness of seating Revels on some basis other than a close analysis of the technical legal problem. Instead, present-day Americans are likely first to applaud the decision that the 1870 Senate reached and then, if they are of lawyerly casts of mind, to strive and strain to produce a plausible legal argument justifying that outcome. Because clever constitutional lawyers can find ways of reaching almost any result in cases not wholly disposed of by precedent,[104] it should be possible to develop such arguments. And indeed it is. Here are three examples, none of which was articulated by the Senate Republicans in 1870.

1. *Departmentalism.* — Consider an approach under which the Supreme Court has the authority to define "citizen" for the purposes of Article III, but Congress has independent authority to define "citizen" for the purposes of Article I. This approach could leave *Dred Scott* intact and still enable the Senate to seat Revels. While the *Dred Scott*

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[104] *See* Pamela S. Karlan & Daniel R. Ortiz, *Constitutional Farce*, *in* CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 180, 180–83 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

citizenship issue arose from the Article III requirement of citizenship for diversity jurisdiction in federal court,[105] Revels's citizenship status was an Article I question concerning his qualifications to be a senator.[106]

2. Institutional Substitution. — This argument is related to the above approach, although it is less strictly departmentalist. Perhaps the Senate's constitutional power to determine the qualifications of its own members placed it in a position analogous to that of the Supreme Court when deciding to overrule a prior decision. If, counterfactually, the Supreme Court had settled the Revels question, then perhaps it would have overruled *Dred Scott* in a way that permitted Revels to sit but did not assert that the Civil War or the Reconstruction Amendments transformed the constitutional system. For example, the Court could have ruled that *Dred Scott* was wrong the day it was decided as a matter of "ordinary" constitutional interpretation, perhaps because of errors in the Taney Court's understanding of founding intent or the history of the early Republic. Because there was no possibility of adjudication in the Supreme Court, the Senate had to assume the role of final constitutional adjudicator, and in that role, the Senate was entitled to do what the Court might have done had it had the opportunity.

3. Nine Earlier Years. — Perhaps Article I's nine-year rule could be satisfied if a prospective senator had been a citizen for *any* nine years before assuming office, rather than only if the senator had been a citizen for the immediately preceding nine years. If *Dred Scott* were understood to change the law when it was decided rather than to declare what the law had properly always been, then perhaps persons of African descent were citizens *before* 1857. In that case, Revels would have been a citizen for the first thirty-five years of his life, from 1822 to 1857, as well as the two years from 1868 to 1870.[107]

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105 *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 400–03 (1857).

106 One shortcoming of this approach for the Republicans of 1870 would have been precisely that it would *not* have impugned the Supreme Court's action in *Dred Scott*. Because departmentalism asserts that each branch can interpret the Constitution independently of the others, the license a departmentalist theory would give the Senate to *disregard Dred Scott* would also deprive the Senate of the ability to *repudiate Dred Scott*. The Republicans of 1870 did not want merely to seat Revels; they wanted to repudiate *Dred Scott*, root and branch, and indeed they saw their action as accomplishing that end. *See, e.g.*, CONG. GLOBE, 41st Cong., 2d Sess. 1543 (1870) (statement of Sen. Stewart) (describing the Senate's seating of Revels as "*overruling* the *Dred Scott* decision" (emphasis added)). To seat Revels on a departmentalist theory would therefore have been to win a smaller victory while forgoing a larger one.

107 This move could also have solved the problem of the Texas senators, who had been United States citizens before moving to Texas. *See supra* note 90. It would suggest, however, that Revels and every similarly situated African American would have satisfied the nine-year rule even in 1858, just after *Dred Scott* and before the Civil War. After all, the literalist would say, Article I does not require that senators *be* citizens at the time they serve in the Senate. It requires only that each senator have "*been* nine Years a Citizen of the United States" (emphasis added). If the nine-year rule can be satisfied on the basis of nine years of citizenship not immediately preceding one's

These three examples are illustrative, not exhaustive, of the possible ways of adducing a doctrinal basis for seating Revels that does not require recourse to larger and perhaps more provocative notions. There are others, even many others, of varying plausibility.[108] If we are properly self-critical, however, we should recognize that it is not the persuasive power of such technical arguments that drives our view of the right result. For one thing, each of these technical arguments is contestable on its own terms, and our intuitions about the correctness of the result are likely to be much stronger than our confidence in any one of the proposed technical justifications.

In this respect, our constitutional attitudes share something with those of most of the senators of 1870, Democratic and Republican alike. Like theirs, our view of the right result stems from larger con-

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election to the Senate, and if *Dred Scott* changed rather than declared the law of citizenship, Revels could have been qualified in 1858 on the basis of his citizenship from birth to 1857. Indeed, someone who is uncontroversially an American citizen for more than nine years early in life would then be forever eligible to serve in the Senate, even if she later renounced her citizenship entirely. Needless to say, the oddity of these conclusions should weigh against endorsing this method of declaring Revels eligible.

108 I will here mention one more such possibility, not because further demonstration of the basic point is needed but because it bears on a controversy in the constitutional law literature. The possibility I have in mind is that there is a *Fifteenth* Amendment argument in favor of seating Revels. According to a view of the Reconstruction Amendments advanced most elegantly by Akhil Amar, the correct historical understanding of the Fifteenth Amendment would bar racial discrimination with regard to a whole cluster of "political rights" rather than simply with regard to voting. *See* AMAR, *supra* note 20, at 273–74; Akhil Reed Amar, *The Fifteenth Amendment and "Political Rights"*, 17 CARDOZO L. REV. 2225 (1996). Those "political rights" prominently include officeholding. *See* AMAR, *supra* note 20, at 273–74. On this view, therefore, the adoption of the Fifteenth Amendment should have blocked the Democrats from arguing that Revels's race made him ineligible to hold office.

I have argued elsewhere, however, that the Reconstruction typology of civil, political, and social rights operated as an unstable rhetorical framework rather than a substantive or analytic one. Rights that African Americans were to enjoy were called "civil," and specific rights moved from one category to another depending on whether the speaker wanted to argue that African Americans were entitled to enjoy those rights or not. In the twentieth century, as the idea of limiting rights by race grew less and less tenable, more and more rights (including voting itself, once the core of the "political rights" category) became classified as "civil rights." *See* RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 153–74 (1999). On my view, therefore, the historical record does not support the idea that the Fifteenth Amendment was originally understood to guarantee a stable and identifiable bundle of "political rights."

The history of the Revels debate supports my view. Consider that the Fifteenth Amendment was ratified in February of 1870, in the days just before Revels arrived in the Senate. (The ratification process was complete when Iowa ratified the Amendment on February 3, unless New York's withdrawal of its ratification is considered valid, in which case ratification was complete when Nebraska ratified on February 17.) If senators in 1870 had understood the Fifteenth Amendment to prohibit racial discrimination not just in voting but also in a broader set of "political rights" including officeholding, one would expect the just-ratified Fifteenth Amendment to have played a prominent role in the Revels debate. But in fact, no senator mentioned the Fifteenth Amendment during the three days that the Senate discussed Revels's qualifications. That omission strongly suggests that informed Americans in 1870 did not understand the Fifteenth Amendment to confer a package of "political rights" that included officeholding.

victions. Also like them, we want more than a merely technical justification. Indeed, if we were to accept a technical resolution, it would probably be only as cover for the vindication of a larger principle. Accordingly, this Part now turns to exploring two candidates for a larger principle that would more authentically justify our intuitions about the correct result.

B. Race and Revolution

Like some of the senators in 1870, many twenty-first-century lawyers might articulate the larger principle behind seating Revels as a simple normative commitment to racial equality. In the year 2006, almost all Americans believe that it is wrong to disqualify someone from an elective office on the grounds that he or she is of African (or any other) descent. Other modern lawyers, following other 1870 senators, might concentrate on historical arguments about the legally transformative nature of Reconstruction. In the last generation, several works of constitutional theory have promoted the idea of Reconstruction as a period of regime change, a revolution rather than a mere reform.[109] That perspective could support the view that the Civil War and Reconstruction had a greater capacity to unmake antebellum authority than the Thirteenth, Fourteenth, and Fifteenth Amendments expressly specify. Neither of these principles standing alone, however, can adequately resolve the Revels case. Instead, the two work together, and it is their joint operation that drives our sense of the right result. As was true for the senators of 1870, our views about constitutional history are bound up with our views about normative issues like racial equality, and what we think along one dimension is likely to affect what we think along the other.

To see how the normative commitment to racial equality is not sufficient to explain a modern intuition about how the Senate should have resolved the Revels issue, consider a hypothetical variant in which the issue arose in 1858, one year after *Dred Scott*, rather than in 1870. Suppose that a state in 1858 had — quite improbably — named a black person to represent it in the Senate. If senators in 1858 had concluded that under *Dred Scott* the black would-be senator could not sit — as I suspect most of the Senate would have concluded in 1858 — our modern reaction to their decision would probably differ from our reaction to the Democrats of 1870, even though the raw racial equality question is the same. Most modern observers are likely to regard the Democratic attempt to bar Revels in 1870 as not just wrong but as outrageously so. In contrast, we might take a more temperate view of a decision to follow or defer to *Dred Scott* in 1858, even if many of us

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[109] *See* sources cited *supra* note 20.

disagreed with the Supreme Court's judgment. Whatever outrage we might muster at such a senatorial decision in 1858 would be largely derivative of outrage at *Dred Scott* itself. And many people today, I suspect, would take the view that a decision to bar a proto-Revels in 1858 would have been legally reasonable, or even legally correct, albeit morally disturbing.

Obviously, the difference between 1858 and 1870 is a matter of the Civil War and Reconstruction. Less than obvious, however, is what if any particular occurrence of the intervening period changed the relevant legal terrain. Part of the reason why the Democrats had a tenable argument against Revels was that no specific action of a legal authority during those years clearly solved the problem of the nine-year rule. Reading the Fourteenth Amendment as retroactive was an attempt to identify the adoption of that Amendment as such an action, but the arguments for retroactivity were vulnerable at best. The text of the Amendment says nothing about retroactive effect, and as the Democrats insisted, prevailing canons of interpretation at the time suggested that legal enactments should not be presumed to operate retroactively.[110] Indeed, shortly after Revels was seated, the Supreme Court twice refused to give retroactive force to the Thirteenth Amendment, noting that "the language of the amendment . . . [was] wholly silent upon the subject" of retroactive application.[111] Absent some reason to differentiate between the Thirteenth and the Fourteenth Amendments, these decisions bolster the Democratic claim that the Fourteenth Amendment lacked retroactive force.

The modern intuition that the Senate acted correctly in seating Revels stems, I suggest, neither from racial egalitarianism of its own

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[110] *See, e.g.*, Murray v. Gibson, 56 U.S. (15 How.) 421, 423 (1854) ("As a general rule for the interpretation of statutes, it may be laid down, that they never should be allowed a retroactive operation where this is not required by express command or by necessary and unavoidable implication."); Dash v. Van Kleeck, 7 Johns. 477, 503 (N.Y. Sup. Ct. 1811) (Kent, C.J.) ("It is a principle in the *English* common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect."). Both of the preceding authorities address the rules of statutory rather than constitutional construction, but there are good reasons to think that the principle they describe would apply in constitutional cases as well. For one thing, then–Chief Justice Kent's emphasis that the presumption applies to laws passed by an "omnipotent parliament" suggests that even an unconstrained lawmaker — analogous in the American system not to a legislature passing a statute but to the People enacting a constitutional amendment — is subject to the presumption. The Supreme Court so understood the principle as applied to the Thirteenth Amendment.

[111] Osborn v. Nicholson, 80 U.S. (13 Wall.) 654, 662 (1872); *see also* White v. Hart, 80 U.S. (13 Wall.) 646, 652–54 (1872). In each of these cases, the plaintiff had sold a slave in the prewar South, and the money due under the contract remained unpaid at the time of emancipation. When the plaintiffs sued to collect their debts at the end of the 1860s, the defendants argued that the contracts were legally void. The Supreme Court ruled for the plaintiff in both cases, explaining that to regard the Thirteenth Amendment as having annulled the contracts at issue would improperly construe that Amendment as having retroactive force.

force nor from a general view of the legal effect of the Fourteenth Amendment, but from a fusion of the two. In other words, we can understand the Civil War and Reconstruction as having nullified aspects of the prior legal order that harmed African Americans. It would be extravagant to claim that events of the 1860s erased *all* of that previous system. Nobody thinks that the Civil War and Reconstruction cast doubt on whether Presidents should serve four-year terms. Instead, determining what survives a revolution and what does not requires figuring out what is central to the content of the new constitutional departure.[112] That task entails contestable interpretive choices. And one reasonable choice would be to construe Reconstruction's constitutional changes as focused on eliminating special burdens on African Americans. The Supreme Court articulated this view in landmark decisions during the 1870s,[113] and the Senate's decision to seat Revels can be understood in the same terms.[114]

Such a reading of constitutional law in 1870 is driven by an interpretation of the meaning of historical events. It draws on the text of

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[112] *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 86–90, 94–99 (1991) (describing the process by which constitutional interpreters synthesize multiple creative periods in constitutional history).

[113] *See* Strauder v. West Virginia, 100 U.S. 303, 306 (1880) (stating that the Reconstruction Amendments had the "common purpose [of] securing to a race recently emancipated . . . all the civil rights that the superior race enjoy[s]"); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1873) (stating that "the one pervading purpose" of all three Reconstruction Amendments was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him"). The Court acknowledged that only the Fifteenth Amendment spoke expressly of race or color, and it conceded that nonblacks could claim the protection of, say, the Thirteenth Amendment if they were actually held in a state of slavery. Nonetheless, the core of Reconstruction's legal reformation focused on blacks and was to be understood in that light. *Slaughter-House Cases*, 83 U.S. at 71–72.

[114] Consider, then, a hypothetical variant on the slave contract cases. Suppose that instead of having to pass on the continuing validity of a contract whereby a white seller sold a black slave to a white buyer — as happened in the cases that actually reached the Court, *see, e.g.*, *Osborn*, 80 U.S. (13 Wall.) at 663 (noting that no party to the suit was "of the colored race lately in bondage") — the Court had considered a case in which a white master had manumitted a black slave in 1860 in exchange for a promised share of the former slave's future earnings, payable in 1870. The Court might well have looked more favorably on such a former slave's contention that the Thirteenth Amendment annulled his contractual obligation than it did on the parallel contention of white litigants in *Osborn* and *White*, even though the cases would not differ in terms of the principal rationale that nineteenth-century authorities (including *Osborn* and *White*) gave for the presumption against retroactivity: the policy in favor of protecting private rights once vested rather than unraveling transactions on which parties had come to rely. *See, e.g.*, *id.* at 662. The hypothetical manumitter's right to payment would have been legal when contracted for and fully vested before slavery became illegal, just like the rights of the actual plaintiffs in *Osborn* and *White*. Instead, the difference between the hypothetical case and the actual ones is a matter of Reconstruction's special relationship to the freedom, rights, and status of black Americans, especially those formerly held as slaves. On that principle, the Thirteenth Amendment might have been understood to annul the manumitted slave's contractual obligation even if it could not annul debts owed on other slave contracts.

the Reconstruction Amendments, but it is not limited by them: on this model, the Amendments are partial indicators of the scope of the new constitutional departure rather than the exhaustive source of authority for that departure. Other events, including secession, the war itself, the transformation of the war into a crusade against slavery, the emergence of black soldiers and local black officeholders, and the early course of Radical Reconstruction, all combine with the passage of the Amendments to form a narrative, or a set of images, with a social meaning that speaks to the changed status of black Americans and says more than the Amendments say on their own. On such a reading, the constitutional rupture is most pronounced when the status of black Americans is at issue. Accordingly, this larger meaning of the Civil War and Reconstruction could justify nullifying the continuing legal consequences of *Dred Scott* in the Revels affair.

Two further notes are in order about this line of thought. First, any version of this idea that would justify seating Revels in the Senate requires interpreting Reconstruction to have had its special transformative force even when the African Americans whose status was at issue were not themselves slaves. After all, Revels was born free. This is a reasonable way to read Reconstruction, given that two of the three Reconstruction Amendments eliminated racial disabilities beyond the mere point of slavery and that various other governmental actions in the 1860s advanced the status of free blacks as well as former slaves.[115]

Second, the principle that the Reconstruction Amendments should be interpreted to eliminate continuing legal disabilities on black Americans is not the same as a principle stating that those Amendments should be interpreted as having retroactive force in *all* cases involving the interests of black persons. The latter principle might lead to results that no court in the nineteenth century or since would have countenanced, such as permitting freedmen to sue their former masters for battery, false imprisonment, conversion, unjust enrichment, and so forth.[116] The idea of interpreting the Amendments to block the antebellum order from visiting continuing disadvantages on African Americans is a more moderate proposition in that it does not invoke state power to remake existing arrangements of property and power. On another level, however, it is also a more radical position, because it

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[115] For example, the First Reconstruction Act of 1867, ch. 153, 14 Stat. 428 (1867), granted Southern black men the right of suffrage. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 272–80 (1988).

[116] *See generally* Hanoch Dagan, *Restitution and Slavery: On Incomplete Commodification, Intergenerational Justice, and Legal Transitions*, 84 B.U. L. REV. 1139 (2004); Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689 (2003).

depicts the 1860s as a rupture in constitutional time. That was then; this is now.

C. *Transitional Justice*

1. A Problem of Legitimacy. — The idea of the 1860s as a rupture in constitutional time suggests another possible basis for the modern intuition that Revels should have been seated, one that deals directly with the democratic legitimacy of the Constitution.[117] Reconstruction posed a problem of transitional justice.[118] A caste society changed its rules to become more inclusive, but as is often the case in such transitions, the old insider group sets the terms of the new inclusion.[119] The Revels controversy was a microcosm of that larger situation. Hiram Revels was physically present when the Senate debated his qualifications,[120] but he did not participate in the proceedings. The debate was conducted entirely by existing senators, all of them necessarily white. Those discussants decided whether, why, and on what terms a colored senator could be admitted. In this respect, Revels stood to the Senate in 1870 as African Americans in general stood to the national polity during the framing of the Fourteenth Amendment. That Amendment was, after all, written by an all-white Congress accountable to an almost all-white voting public.[121] The principles of racial equality that

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117 On the general subject of constitutional legitimacy, see Fallon, *supra* note 21.

118 *See generally* THE POLITICS OF MEMORY: TRANSITIONAL JUSTICE IN DEMOCRATIZING SOCIETIES (Alexandra Barahona de Brito et al. eds., 2001); Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 768 (2004) (defining successful transitional justice as "a political and economic transition that is consistent with liberal and democratic commitments").

119 There are exceptions to this pattern, as the modern South African example illustrates. *See* Aeyal M. Gross, *The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel*, 40 STAN. J. INT'L L. 47, 58–63 (2004).

120 Associated Press Dispatches, ATLANTA CONST., Feb. 24, 1870, at 3.

121 In 1866, when the Thirty-Ninth Congress established the Joint Committee on Reconstruction that drafted the text of the Fourteenth Amendment, African Americans were excluded from both Congress and the voting publics to which Congress answered. There were, of course, no blacks in Congress. Moreover, only five New England states with minuscule black populations — Maine, New Hampshire, Vermont, Massachusetts, and Rhode Island — permitted voting by blacks (meaning, of course, adult black men who met applicable property qualifications). Thus, the Congress that drafted the Fourteenth Amendment was composed overwhelmingly of representatives from white-only polities, with the remainder being representatives from polities that were not formally white-only but in which black participation was entirely inconsequential. Black America was not part of the political community that formulated the constitutional text.

There was more meaningful black participation at the ratification stage, although only in states whose ratification processes could not influence the text of the Amendment. Black men became eligible to vote in the South under the First Reconstruction Act in 1867 and played significant roles as both voters and officeholders in several state conventions and governments by the time of final ratification in 1868. *See* FONER, *supra* note 115, at 281–91; STEVEN HAHN, A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION 197–213 (2003). The participation of African Americans

we now locate in the Fourteenth Amendment are thus unavoidably in tension with the enactment process from which the Amendment's authority might be thought to derive. Once racial equality is a core constitutional value, it is hard to make sense of an amendment adopted only by whites as having been adopted in a democratically legitimate way.

It does not follow, of course, that the Fourteenth Amendment is illegitimate. Constitutional theory could not bear that conclusion, because *all* elements of the Constitution adopted before the Fourteenth, Fifteenth, and Nineteenth Amendments were approved by limited polities that would now be considered democratically illegitimate.[122] It does follow, however, that the legitimacy of the Fourteenth Amendment cannot rest only on the claim that it was democratically enacted. Instead, the legitimacy of the Fourteenth Amendment (and of the constitutional regime generally) rests on several factors acting in combination.[123] In addition to methods of enactment, these factors include the subjective identification of citizens with the regime[124] and the substantive justice that the law delivers.[125]

Factors like these, rather than the process by which the Amendment was adopted, would have to do most of the work if a Fourteenth Amendment (and indeed a whole Constitution) written exclusively by whites were to be legitimate authority for African Americans. If the

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could therefore be part of a sophisticated originalist inquiry into the ratifiers' understanding of the Fourteenth Amendment, as opposed to an inquiry into the intent of its drafters. Any such inquiry, however, should keep in mind that the ratifying conventions did not have the opportunity to shape the text of the Amendment. The only ratifying conventions with significant African American participation were those of Southern states, and the readmission of those states to representation in Congress depended on their ratifying the Amendment that Congress had written. Accordingly, nonratification would have brought continued non-representation rather than a second chance to draft the text.

122 On this problem as applied to both the original Constitution and the Civil War Amendments, see Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 230 (1980).

123 *See* Fallon, *supra* note 21, at 1793 (arguing that constitutional legitimacy does not rest on "a single rock of legitimacy," but rather on "shifting sands").

124 *See, e.g.*, David A. Strauss, Reply, *Legitimacy and Obedience*, 118 HARV. L. REV. 1854, 1861–62 (2005); *see also* Grutter v. Bollinger, 539 U.S. 306, 332 (2003) (stating that citizens' views of legitimacy will depend on whether they believe that the path to leadership within the system is open to all, including people like themselves).

125 *See, e.g.*, Frank I. Michelman, *Is the Constitution a Contract for Legitimacy?*, 8 REV. CONST. STUD. 101, 107–09 (2003) (discussing the importance of substantive justice in creating constitutional legitimacy). Other relevant factors include the possibility of changing the constitutional system through democratic politics, *see, e.g.*, United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting), and the benefits of the rule of law, *see, e.g.*, Richard H. Fallon, Jr., *How To Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 549–50 (1999) (arguing that constitutional theories should be judged on their ability to maintain the rule of law, preserve political democracy, and protect substantive rights, as well as on the extent to which they "fit" the Constitution).

Constitution as amended were sufficiently just in its treatment of African Americans, or if it afforded African Americans realistic possibilities of using the political system to address inequities held over from the old regime, then the new order could achieve legitimacy in spite of its racially exclusive pedigree.[126] Conversely, the legitimacy problem would be aggravated if postwar law were substantively unfair to blacks. The problem would be even worse if continuing black disadvantage were built into the constitutional framework itself and therefore extremely difficult to overcome,[127] even once blacks were admitted to the normal political process.

Reading continuing black disadvantage into the Constitution would have been exactly the result of acceding to the Democratic senators' argument about the nine-year citizenship rule. Moreover, given the attention that the country's black population paid to the affair,[128] a senatorial decision not to seat Revels would have sent a powerful signal that the official rules of American politics still excluded African Americans from equal participation. By seating Revels, the Senate instead increased the substantive justice afforded to African Americans, fostered visible black participation in the political process, and perhaps, as a result, gave blacks more reason to identify themselves with the constitutional regime. To be sure, the Democrats' argument had a certain rule-of-law appeal, and the rule of law is also one of the components of legitimate government.[129] Given the problem of transi-

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126 There is an instructive although imperfect parallel here between a newly included group at a moment of transition and the situation in which every nonfounding generation of Americans finds itself by virtue of not having written the Constitution. This is the familiar dead-hand or intertemporal problem of constitutional law. Some theorists believe this problem to be soluble, and others do not; among those who do not, a standard and reasonable move is to say that constitutional law and theory should focus on issues of substantive justice rather than on anything about the history or origins of the Constitution. *See, e.g.*, PAUL W. KAHN, LEGITIMACY AND HISTORY 8 (1992).

127 *See* Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 877 (2003) (deeming the basics of American constitutional law "virtually unamendable" as a practical matter); Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 362 (1994) (arguing empirically that the United States Constitution is among the most difficult constitutions in the world to change).

128 Unsurprisingly, black newspapers focused a great deal of attention on Revels in February of 1870, just as newspapers read predominantly by white audiences did. *See, e.g.*, *Hiram R. Revels, U.S. Senator-Elect from Mississippi*, FRANK LESLIE'S ILLUSTRATED NEWSPAPER (N.Y.), Feb. 26, 1870, at 401; Geo. B. Vashon, *The Citizenship of Colored Men*, THE NEW ERA (D.C.), Feb. 24, 1870, at 1 (advancing the view that, under a correct interpretation of constitutional law, black Americans had been citizens since the Founding, and describing Revels as a symbolic embodiment of black political potential who would furnish proof of "negro capacity in statesmanship"); *see also* Illustration, *Administering the Oath to Hiram Revels, Colored Senator from the State of Mississippi, in the Senate Chamber of the United States on Friday, February 25, 1870*, FRANK LESLIE'S ILLUSTRATED NEWSPAPER (N.Y.), Mar. 12, 1870, at 425 (full-page drawing of Revels taking the oath of office).

129 *See, e.g.*, Fallon, *supra* note 125, at 539.

tional justice that the country faced in 1870, however, the Senate's choice to seat Revels was probably a significant net improvement for the cause of democratic legitimacy.

2. A Solution from Legislative Constitutionalism (and a Reading of Section 5). — Understanding the Senate's action as necessary for fostering the legitimacy of the postwar constitutional order points to an underappreciated feature of a legislature's role in constitutional interpretation. During a political transition like Reconstruction, an elected body like Congress may be more likely than the courts to redress problems of legitimacy if given the power to do so.

If the Fourteenth Amendment's meaning were fixed at the moment of ratification, no mechanism (short of further constitutional amendments) could authorize a greater constitutional change than the white-only polity had approved. The very terms of the equality offered to African Americans would be limited to whatever white Americans had chosen to give. Those terms could not be altered even if the overall calculus of democratic legitimacy argued strongly for doing so — and even if a majority of all voters, including black voters, favored further reform. On the other hand, if some branch of government likely to respond to the needs of the newly enfranchised population had the power to interpret the Reconstruction Amendments expansively, there would be a straightforward means of adjusting the terms of the new constitutional order in ways that would bolster the regime's legitimacy. Such expansive interpretations could render the law more substantively fair to African Americans. To be sure, any such adjustments would need the approval of a majority of the representatives of the polity overall, rather than reflecting exactly the preferences of the newly enfranchised black population. But some such limits would surely be appropriate — legitimacy cannot require that a newly enfranchised minority group be permitted to rule unopposed — and the possibility of some adjustment would be an improvement over the static and insufficiently democratic set of constitutional rules otherwise on offer. Partly as a result of such increased justice and partly for symbolic reasons, expansive interpretations of the Reconstruction Amendments could also encourage African Americans to identify subjectively with the government. And improvements in the substantive justice of the law and the subjective identification of African Americans with American government could mitigate or even overcome the democratic legitimacy problems inherent in the Constitution's formation.

It is not impossible for a court to be the institution that interprets a constitutional provision expansively. As a matter of institutional design and the realities of Reconstruction history, however, Congress would have been a better candidate to fulfill that function in the years after the Civil War. Unlike the Supreme Court, the postwar Congress was a frequently elected body whose constituents quickly came to in-

clude large numbers of African American voters. Many members of Congress accordingly had clear reasons to respond to the needs and interests of African Americans. To be sure, courts as well as legislatures generally accommodate changes in public opinion over the long run,[130] but addressing the problem of legitimacy during Reconstruction called for a certain timeliness of response. Given the institutional differences between the two branches, one should expect the postwar Congress to have been at least as friendly to black interests as the postwar Court. And indeed, as a historical matter, it was.[131]

The advisability of letting Congress adjust the constitutional balance after black men became voting citizens suggests a new way to understand Section 5 of the Fourteenth Amendment. Like the other Reconstruction Amendments, but unlike any antebellum amendment, the Fourteenth Amendment contains a final section empowering Congress to "enforce" its provisions through "appropriate legislation."[132] One of the central debates in modern constitutional law concerns whether Congress's enforcement power includes the authority to define (or participate in the definition of) the substantive content of the Reconstruction Amendments or merely the power to implement judicial constructions of those amendments (or, on an intermediate view, the power to "overenforce" the Amendments with prophylactic laws that go a bit beyond what judicial rulings require).[133] Given the need for affirmative efforts bolstering the Constitution's democratic legitimacy once black men were recognized as full members of the polity, congressional power to legislate expansively under the Reconstruction Amendments would enable "normal" political processes to adjust the ground rules handed down from a time of racially exclusive government.

The preceding argument for legislative power to construe the Reconstruction Amendments is not offered as an account of anyone's original understanding of Section 5. It is, like the ideas in this Part generally, a suggestion that might make sense for modern interpreters. More specifically, it is a suggestion that might (or should) appeal to

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130 *See, e.g.*, Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957) (stating that the Supreme Court's views "are never for long out of line with the policy views dominant among the lawmaking majorities of the United States").

131 *See infra* Part III, pp. 1716–30.

132 *See* U.S. CONST. amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2.

133 *See generally* Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4 (2001); Post & Siegel, *supra* note 56; Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978). *Compare* Katzenbach v. Morgan, 384 U.S. 641, 648–49 (1966) (holding that Section 5 of the Fourteenth Amendment empowers Congress to legislate beyond the boundaries of judicial enforcement of the Fourteenth Amendment), *with* City of Boerne v. Flores, 521 U.S. 507, 527–29 (1997) (sharply limiting *Morgan*).

readers who credit the idea that considerations of democratic legitimacy can justify our intuition that Revels should have been seated. It may or may not make sense to apply this suggestion to modern cases implicating the scope of Congress's power under Section 5 of the Fourteenth Amendment: after enough time has passed, the force of transitional justice arguments becomes subsumed within the general intertemporal problem of constitutional law. (Because no one alive today participated in shaping the Fourteenth Amendment, perhaps no subpopulation can demand adjustments based on the exclusion of their nineteenth-century forerunners. Perhaps we are now all in the same democratically deficient boat.) But irrespective of its applicability in the twenty-first century, the idea that democratic legitimacy called for giving the nineteenth-century Congress a broad warrant to construe the Reconstruction Amendments has implications for our evaluation of nineteenth-century constitutional decisions.

D. Conclusion

The riddle of Revels's eligibility can be solved by understanding the Civil War and Reconstruction either as a revolution authorizing the revision of the prior constitutional regime to a greater degree than expressly stated in the Reconstruction Amendments, or as an incompletely democratic expansion of the polity that required further extension as a matter of transitional justice. The two theories are not mutually exclusive, and they occupy somewhat different conceptual spaces. The former is grounded in the authority of historical events, and the latter relies on more abstract considerations of democratic value. One can endorse both, neither, or one but not the other. Accepting either or both of these principles, however, has implications in other cases calling for decisionmakers to interpret the constitutional significance of the Civil War transformation, to address the problem of transitional justice, or both. The next Part accordingly examines a prominent Supreme Court decision — the *Civil Rights Cases* of 1883 — that raised both of those issues, and it asks what implications our intuitions about Revels should have for our assessment of that decision.

III. APPLICATION: THE *CIVIL RIGHTS CASES*

The *Civil Rights Cases* of 1883 are as familiar to constitutional lawyers as the Revels debate is unknown. In those cases, the Supreme Court invalidated section 1 of the Civil Rights Act of 1875,[134] which had prohibited racial discrimination in "inns, public conveyances on

[134] The Civil Rights Cases, 109 U.S. 3, 27, 32 (1883).

land or water, theaters, and other places of public amusement."[135] According to the Court, Congress lacked the power to make such a law, even under its authority to enforce the Reconstruction Amendments.[136] In the 1960s, Congress's expanded power to pass antidiscrimination laws under its Commerce Clause authority limited the practical import of the *Civil Rights Cases*,[137] but the decision remains good law. Indeed, the Supreme Court now presents the *Civil Rights Cases* as articulating an especially authoritative interpretation of Reconstruction: in *United States v. Morrison*,[138] the Court not only followed the holding of the *Civil Rights Cases*, but also declared that the 1883 Court had privileged insight into the meaning of the Reconstruction Amendments.[139]

This Part contrasts the Revels debate with the *Civil Rights Cases*. Seeing the *Civil Rights Cases* through the prism of the Revels debate helps reveal the degree to which the Court's decision reflected racial values that modern constitutional law rejects. In contrast to the Senate in the Revels debate, the Supreme Court in the *Civil Rights Cases* aggravated the democratic legitimacy problems inherent in the transition to a more inclusive polity. Moreover, those legitimacy problems mattered to a broad audience, not merely to a few constitutional theoreticians. Many African Americans interpreted the *Civil Rights Cases* as reason to question whether the Constitution could be their Constitution at all, or the United States government their legitimate government. Less than twenty years after the adoption of the Fourteenth Amendment, many black leaders and laypeople came to see the Constitution as "a white people's affair."[140] Approaching the *Civil Rights Cases* with the tools developed in thinking about Hiram Revels can help explain why.

A. The Climate and the Court

Between the Revels debate in 1870 and the *Civil Rights Cases* in 1883, the country's political center moved significantly. As several historians have chronicled, moderate Northerners began to lose enthusiasm for the burdensome federal apparatus needed to police the Southern states and to protect the rights of free blacks.[141] A severe

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135 Civil Rights Act of 1875, ch. 114, § 1, 18 Stat. 335.

136 *Civil Rights Cases*, 109 U.S. at 15, 25.

137 *See* Katzenbach v. McClung, 379 U.S. 294, 305 (1964) (upholding Title II of the Civil Rights Act of 1964 as commerce legislation); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964) (same).

138 529 U.S. 598 (2000).

139 *See id.* at 622.

140 Leon F. Litwack, *Trouble in Mind: The Bicentennial and the Afro-American Experience*, 74 J. AM. HIST. 315, 315 (1987).

141 *See* FONER, *supra* note 115, at 524–28.

economic downturn in 1873 further alienated many voters from the ruling Republican Party, and the Democrats won a crushing victory in the 1874 midterm elections, taking control of the House of Representatives for the first time since the 1850s.[142] The Civil Rights Act of 1875 was a last-gasp action of the lame-duck Republican majority: recognizing that the bill would never pass if it were held over until the next Congress, the Republicans rammed the Act through the House of Representatives just ahead of the transition.[143] The 1876 presidential election was famously close, and the Hayes-Tilden compromise that kept the White House in Republican hands also marked, in the traditional telling, the end of Reconstruction. And although the Party of Lincoln eked out one more presidential victory in 1880, the Congress that convened at the beginning of Garfield's Administration in 1881 was once again an all-white institution.[144]

To be sure, there remained a strong minority constituency — white and black — in favor of radical reform. When the Supreme Court decided the *Civil Rights Cases* in 1883, that constituency responded with an outpouring of protest the likes of which have been seen only in response to decisions like *Roe v. Wade*,[145] *Brown v. Board of Education*,[146] and *Dred Scott*.[147] Moreover, Southern blacks continued to vote in significant numbers; full disfranchisement still lay ten to twenty years in the future.[148] Nonetheless, the political majority of 1883 was ready to let Reconstruction recede further and further into the past. The Supreme Court was still composed entirely of Republican appointees. But most of the Justices in 1883, like most other white Americans at that time, had less of an appetite than they might once have had for strong racial egalitarianism. Eight of the nine — including two of the Court's three Union Army veterans[149] — were willing to let the Civil Rights Act go.

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[142] *See id.* at 512–24.

[143] *See* Irving J. Sloan, *The Civil Rights Act of 1875: Introduction*, *in* 1 AMERICAN LANDMARK LEGISLATION 227, 227–32 (Irving J. Sloan ed., 1976) (describing congressional politicking on the Civil Rights Act from its introduction through its eventual adoption).

[144] *See* Brief for the Congressional Black Caucus as Amicus Curiae in Support of Appellants at app. A, United States v. Hays, 515 U.S. 737 (1995) (Nos. 94-558, 94-627), *reprinted in* 38 HOW. L.J. 665, 690–92 (1995) (listing the names and years of service of all African Americans who served in Congress between 1870 and 1995).

[145] 410 U.S. 113 (1973).

[146] 347 U.S. 483 (1954).

[147] *See infra* pp. 1722–23.

[148] *See* Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 308–16 (2000).

[149] In addition to Justice Harlan, the sole dissenter in the *Civil Rights Cases*, Justices Woods and Matthews had served in the Union Army. The other six had not.

B. The Decision

The Court described the issue in the *Civil Rights Cases* as whether Reconstruction had sufficiently altered the Constitution so as to authorize Congress to make a law that it would not have had the power to make before the Civil War.[150] Its answer was no. Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth Amendment gave Congress the power to enforce the substantive provisions of those Amendments.[151] Writing for the Court, however, Justice Joseph Bradley held that the Thirteenth Amendment concerned only slavery as such, rather than racial discrimination more broadly. Accordingly, Congress could not pass the Civil Rights Act under its power to enforce the Thirteenth Amendment.[152] Neither could Congress pass the Act as a matter of enforcing the Equal Protection Clause of the Fourteenth Amendment, because that clause addressed only states rather than private actors such as innkeepers and railroad companies.[153]

This interpretation of the Fourteenth Amendment is now considered compelling as a matter of plain reading, as indeed it seemed to some contemporary observers in 1883.[154] After all, the sentence forbidding the denial of equal protection does begin with the words "[n]o *State* shall."[155] Both then and now, however, others have contested the strength of this textual argument. According to the common law background against which the Fourteenth Amendment was adopted, innkeepers and common carriers were public servants with a legal duty to serve all customers impartially.[156] Therefore, the counterargument runs, those actors are agents of the state as a matter of law and accordingly are within the reach of the Fourteenth Amendment.[157]

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150 The Civil Rights Cases, 109 U.S. 3, 10 (1883) (stating that Congress clearly would not have had the power to pass the 1875 Act before adoption of the Reconstruction Amendments).

151 *See* U.S. CONST. amend. XIII, § 2; *id.* amend. XIV, § 5.

152 *Civil Rights Cases*, 109 U.S. at 20–22, 24; *id.* at 31–32 (Harlan, J., dissenting).

153 *Id.* at 10–11 (majority opinion).

154 *See, e.g.*, *Civil Rights Cases Decided*, N.Y. TIMES, Oct. 16, 1883, at 4 (writing that to many Americans it would appear that "nothing was necessary but a careful reading of the [Fourteenth Amendment] to show that it did not authorize such legislation"); *A New Civil Rights Agitation*, WKLY. TIMES (Phila.), Oct. 27, 1883 ("[M]any thousands of the best and most intelligent American citizens . . . would have been glad to see the law sustained if there was any real warrant for it in the Federal Constitution or its amendments. They are compelled to admit, however, that there was none . . . .").

155 U.S. CONST. amend. XIV, § 1 (emphasis added).

156 *See, e.g.*, THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 282 (1880); JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS § 508, at 328 (1832); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 489–90 & nn.233–34 (2000).

157 *Civil Rights Cases*, 109 U.S. at 58–59 (Harlan, J., dissenting); *see also* Joseph William Singer, *No Right To Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996) (elucidating this argument). This reading of the Fourteenth Amendment is expansive, but it is less adventurous than several other well-accepted readings of constitutional text. Indeed,

Unsurprisingly, these textual arguments were not the last word in the *Civil Rights Cases* any more than textual arguments were the last word in the Revels debate. Instead, larger issues shaped how different interpreters read and applied the text.[158]

One of those issues was how much the Civil War and Reconstruction had remade the antebellum constitutional system. The Court decided that there had been little structural change, and Justice Bradley made the point in several ways. He presented a view of federalism on which the Tenth Amendment barred federal power from intruding into traditional state spheres,[159] and he denied that the Fourteenth Amendment had overcome or constricted that Founding limit on congressional power.[160] Similarly, he reasoned that the limits of congressional power under the Fourteenth Amendment were analogous to the limits of congressional power under the Contracts Clause of Article I.[161] That clause, he noted, did not authorize Congress to create a federal cause of action in contract cases.[162] But the Contracts Clause contains no text empowering Congress to enforce its provisions,[163] and the Fourteenth Amendment does expressly give Congress the power of enforcement.[164] It would therefore be exceedingly odd to assume that Congress's power under the Fourteenth Amendment could be limited by analogy to Congress's lack of power under the Contracts Clause — except on a general interpretive assumption that the Constitution's original provisions create a template of governance to which later amendments should be substantially assimilated, even if their text seems to contemplate a different set of arrangements. This sense that the Fourteenth Amendment effected little change in the Founders' system of federalism was central to the outcome of the *Civil Rights Cases*.

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it would not be beyond the bounds of judicial practice to apply the Fourteenth Amendment against parties admittedly *not* state actors, in spite of the apparently limiting "[n]o State shall" language in Section 1. In other doctrinal contexts, the Court has applied the substance of constitutional amendments to parties other than those specified in the text of the relevant amendments. An example from the era of the *Civil Rights Cases* is *Hans v. Louisiana*, 134 U.S. 1 (1890), in which the Court held that the Eleventh Amendment's prohibition on the federal courts' exercise of jurisdiction over a suit against a state by a citizen of "another State" also applies to bar a suit against a state brought by a citizen of the *same* state. *See id.* at 10–20. A modern example is the routine application of the First Amendment against the Executive, despite the fact that the text of the Amendment is addressed only to "Congress."

158 *Cf.* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1209–17 (1987) (arguing that constitutional decisions are rarely made on the basis of text alone).

159 *Civil Rights Cases*, 109 U.S. at 15.

160 *Id.* at 11.

161 *See id.* at 11–14.

162 *See id.* at 12.

163 *See* U.S. CONST. art. I, § 10.

164 *See id.* amend. XIV, § 5.

To be sure, there are plausible arguments for the proposition that the Court acted properly by declining to read the Fourteenth Amendment as sweeping away antebellum visions of limited federal government. In the spirit of what Bruce Ackerman has called the "synthesis" of two prior moments of constitutional lawmaking,[165] one can understand the *Civil Rights Cases* as an instance in which the judiciary asked how the Founding and Reconstruction could both be preserved, rather than interpreting the later transformative period to obliterate the earlier one. The idea that such a synthesis properly expresses the will of the people draws support, as applied to the 1870s and 1880s, from the arc of Reconstruction politics over time. As several leading historians have written, the post–Civil War impulse toward radical change petered out in the 1870s as the country's political center stopped supporting Radical Republicanism.[166] Democratic electoral victories in 1874 and the Hayes-Tilden compromise of 1876 marked the limits of Reconstruction and the polity's choice to step back from certain egalitarian and federalizing reforms. The country then settled into a regime that was different from the antebellum order but less so than the Senate that seated Revels would have expected.[167] Within this framework, one can see the *Civil Rights Cases* as implementing the public's desired balance between continuity and change.[168] Historians accordingly have described the decision as ratifying the political settlement that ended Reconstruction.[169]

The settlement so ratified, however, was on terms favorable to a white constituency that had been hostile to the Reconstruction Amendments and whose elected representatives had opposed the seating of Hiram Revels. To be specific, it was largely a settlement on the terms of the Northern Democrats, who held the political center in the late 1870s and early 1880s.[170] Although loyal to the Union in the Civil War, this slice of the population had never been enthusiastic about Reconstruction. They had largely voted against adopting the Reconstruction Amendments at all.[171] Even if the *Civil Rights Cases* represented an accurate reflection of dominant political opinion in 1883 or an appropriate theoretical synthesis of Reconstruction and the Founding, it

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165 ACKERMAN, *supra* note 112, at 86–99.

166 *See, e.g.*, FONER, *supra* note 115, at 512–601.

167 *See id.*

168 *See* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT 197 (1988).

169 *See, e.g.*, C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH, 1877–1913, at 216 (1971) (describing the *Civil Rights Cases* as "the juristic fulfillment of the Compromise of 1877," under which Reconstruction came to an end).

170 *See* PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION 2, 81–95 (1999); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1097 (2001).

171 *See* BRANDWEIN, *supra* note 170, at 2.

might make modern Americans uneasy to realize that this interpretation reflected the views of people *opposed* to the Reconstruction Amendments — that is, Northern Democrats. Realizing that Northern Democrats at this time prominently included people like Senators Vickers, Saulsbury, and the others who had opposed seating Revels should make that sense of unease a bit more concrete.[172]

C. *Race and Continuity*

For this association to have real sting, however, it must be shown that the Court's decision was not merely congenial to people who had troubling views about race but actually relied on such views to reach their conclusions.[173] This section analyzes two ways in which the Court's race-related assumptions shaped its reasoning. First, the premises of the Court's Thirteenth Amendment argument show the relationship between race and the Court's view of regime change. Second, the Court exhibited a substantive distaste for antidiscrimination laws, irrespective of concerns about federalism. As in the Revels debate, an apparently nonracial constitutional argument (there the nine-year rule, here the principles of federalism) was bound up with a substantive view about how the law should deal with issues of race.

1. Regime Change and Dred Scott. — According to the *Civil Rights Cases*, Congress could not pass the 1875 Civil Rights Act under its power to enforce the Thirteenth Amendment because the lack of equal access to public accommodations "ha[d] nothing to do with slavery or involuntary servitude."[174] Justice Bradley wrote:

> There were thousands of free colored people in this country before the abolition of slavery . . . [and] no one, at that time, thought that it was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public

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[172] The principal Democrats who argued against Revels were Northerners, in the sense that none of them represented states that had joined the Confederacy. When Revels arrived in Washington, those Southern states that already had resumed sending representatives to Congress had elected mostly Republican senators, much as Mississippi had sent Revels himself. The opposition to Revels was thus articulated almost entirely by officeholders whose states had been loyal to the Union. One should not push this point too far: the Democrats in the Senate at the time disproportionately represented border states — former slave states that had declined to join the Confederacy — rather than the more antislavery states of the Upper North. Nonetheless, the category of "Northern Democrats" includes those Democrats who sought to bar Revels.

[173] Several scholars have claimed that the *Civil Rights Cases* are tainted with racism. *See, e.g.*, OWEN M. FISS, 8 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910, at 362 (Stanley N. Katz ed., 1993) (asserting that the *Civil Rights Cases* rendered *Plessy v. Ferguson*, 163 U.S. 537 (1896), "a foregone conclusion"); Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 97 (1967).

[174] The Civil Rights Cases, 109 U.S. 3, 24 (1883).

> conveyances and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery.[175]

The argument here was straightforward. Race and slavery were legally independent. Past discrimination against free blacks showed that racial discrimination could be and had been practiced against people who were not slaves. It followed that forbidding slavery did not entail forbidding racial discrimination.

As an analytic matter, this argument is internally coherent. What it ignores, however, is that it might be problematic to use the prewar legal status of blacks — even free blacks — as the premise for an argument about the acceptability of discriminating against blacks in 1883. To many contemporary critics of the *Civil Rights Cases*, black and otherwise, the Court's presumption that it could reason from the antebellum status of free blacks to the state of the law after Reconstruction was one of the most disturbing aspects of its decision.[176]

Before the war, the regime of *Dred Scott* limited the rights not just of slaves but of free blacks as well.[177] In addition to denying that blacks could be American citizens, *Dred Scott* had famously announced that, under the Constitution, blacks had no rights that whites needed to respect.[178] The legal validity of antebellum discrimination against free blacks, the Court's critics reasoned, was surely connected to that proposition.[179] In their view, when the Court treated antebellum restrictions on free blacks as a valid basis for ongoing discrimination, it gave continuing force to legal arrangements rooted in the world of *Dred Scott*.[180] Indeed, the Court's reasoning was parallel to invoking *Dred Scott* to show that Hiram Revels — a free man since birth — was still constitutionally ineligible to sit in the Senate in 1870. Neither

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175 *Id.* at 25.

176 *See, e.g.*, THE BROTHERHOOD OF LIBERTY, JUSTICE AND JURISPRUDENCE: AN INQUIRY CONCERNING THE CONSTITUTIONAL LIMITATIONS OF THE THIRTEENTH, FOURTEENTH, AND FIFTEENTH AMENDMENTS 142–43, 428–30 (1889); *The Color Controversy*, NAT'L REPUBLICAN, Oct. 23, 1883, at 1 (quoting Col. Robert Ingersoll as saying that the Thirteenth Amendment had effected a profound change).

177 *See generally* MARK TUSHNET, THE AMERICAN LAW OF SLAVERY, 1810–1860 (1981).

178 Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857).

179 *See* Family Scrapbook: Civil Rights Cases, 1883, *microformed on* Papers of Justice John Marshall Harlan, Series 1, Box 20, Reel 7, Frame 441 (on file with the Harvard Law School Library) (reporting a meeting at the City Hall of New Bedford, Massachusetts, approving a resolution denouncing the Supreme Court for having "by eight-ninths of its influence declared in substance the legality of the Chief Justice Taney decision, that 'black men have no rights which white men are bound to respect'"); *Civil Rights: The Supreme Court Decision Discussed at a Meeting of Colored Citizens*, OMAHA DAILY REPUBLICAN, Oct. 30, 1883, at 4 (quoting former Nebraska Senator John Thayer) ("Twenty five or thirty years ago a decision came from out the dark recesses of the supreme court declaring that colored men had no rights which white men were bound to respect. . . . That decision planted seed from which germinated this last decision. To-day . . . we are told that the colored race has no rights . . . which the white man is bound to respect.").

180 *See* sources cited *supra* note 176.

the (more moderate) Democrats in 1870 nor the Court in 1883 maintained that *Dred Scott* was the law in the present, of course. But in stark contrast to the Senate of 1870, the Court of 1883 had a vision of regime change narrow enough that even the principles of *Dred Scott* retained some force after the revolution.

2. Federalism and Special Favorites. — The *Civil Rights Cases* discussed the relationship between the pre- and postwar Constitution mostly in terms of federalism. As in the Revels debate, however, this ostensibly nonracial constitutional issue was tied to a substantive racial one. For although the Court held that the 1875 Civil Rights Act was invalid because it was beyond Congress's enumerated powers, its discussion suggested that such a law would be constitutionally problematic even if it had been passed by a state legislature.

Through the nineteenth century and into the *Lochner* era, a prominent strand of constitutional jurisprudence prohibited laws that were deemed "class legislation," meaning laws passed for the benefit of a subset of society rather than that of society as a whole.[181] In modern constitutional law, such legislation is usually considered the valid product of bargaining among interest groups. At the time of the *Civil Rights Cases*, however, such laws were often taken to evince unfair governmental favoritism and therefore to deny due process of law.[182] Justice Bradley saw this infirmity in the Civil Rights Act of 1875. That Act, he wrote, made blacks "the special favorite of the laws."[183] Justice Bradley did not mean, of course, that the Act was invalid because its language protected blacks but not whites against discrimination, as a modern statute might be invalid if it used express racial classifications.[184] Section 1 of the 1875 Act was written in a race-neutral manner, prohibiting racial discrimination against persons of any race rather than against blacks in particular.[185] Instead, Justice Bradley meant that as a substantive matter the Act had been written for the protection of black persons and that in operation the people it would

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[181] *See generally* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993) (developing a thesis that *Lochner*-era jurisprudence conceived of a relationship between state and society that did not allow class legislation).

[182] *See id.* at 61–99.

[183] The Civil Rights Cases, 109 U.S. 3, 25 (1883).

[184] *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (announcing that all governmental actions using express racial classifications are subject to strict scrutiny).

[185] Civil Rights Act of 1875, ch. 114, § 1, 18 Stat. 335 ("[A]ll persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.").

protect obviously would be black. To Justice Bradley, such a law was an unwarranted show of governmental favoritism.[186]

The substance of this objection, however, takes the Court's constitutional criticism of the 1875 Act beyond the federalist framework in which the *Civil Rights Cases* might be justified because the objection had nothing to do with the fact that the law in question had been passed by Congress rather than by a state legislature. Even today, and certainly in the 1870s and 1880s, *any* racial antidiscrimination law would be vulnerable to Justice Bradley's objection. Given nineteenth-century social realities, the power to discriminate in hotel, railroad, or theater accommodations lay in the hands of white people, and the victims of any discrimination would overwhelmingly be black. Whatever disdain the Court had for laws with special favorites must therefore have been applicable to all antidiscrimination statutes, federal and state alike. And if the Court was unfavorably disposed toward antidiscrimination statutes as a substantive matter, that attitude could help push the Court to resolve a constitutional issue in a way that would invalidate an antidiscrimination law.

This relationship between race and ostensibly nonracial constitutional issues in the *Civil Rights Cases* was not identical to the parallel relationship in the Revels debate. For the Democrats who invoked the nine-year rule against Revels, white officeholding was a matter of fundamental principle. The Justices of 1883 had a more complex orientation. They were skeptical of affirmative federal efforts to secure black equality, but they were also not actively bent on enforced white supremacy in the manner of the 1870 Democrats. It would be more accurate to say that they were unbothered by racial hierarchy than that they consciously sought to subordinate blacks and used federalism arguments as subterfuge. Thus, unlike Senator Vickers, who signaled that he would reach for some other argument against seating Revels once the nine-year rule was no longer applicable, the post-Reconstruction Court may or may not have looked for reasons to invalidate state antidiscrimination laws when the federalism issue was not in play.[187]

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[186] *Civil Rights Cases*, 109 U.S. at 25. Today, a facially neutral antidiscrimination law would not be understood as special favoritism for blacks but rather as guaranteeing equality for all persons, even though in operation such a law would still benefit members of some racial groups more than others, and predictably so. *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 526 (2003). It would be unfair to Justice Bradley, however, to fault him for failing to conform to a later generation's intuitions. As a matter of substance, he was correct to think that the law was conceived largely as a protection for black persons and that in operation it would always or nearly always be invoked by blacks.

[187] In the wake of the *Civil Rights Cases*, several Northern states passed antidiscrimination laws, and those laws went largely unchallenged. *See* Donald G. Nieman, *The Language of Libera-*

When faced with contestable questions, however, decisionmakers are routinely influenced by their background preferences on related issues, whether consciously or not. In the *Civil Rights Cases*, in which a plausible argument about federalism and the Court's substantive distaste for antidiscrimination laws both tended toward the same result, the substantive racial view could shape the Court's attitude about how to resolve the federalism issue. Just as the *Plessy v. Ferguson*[188] Court's comfort with black subordination could bolster its good faith belief that a segregated-car law did not deny legal equality,[189] the *Civil Rights Cases* Court's unconcern with continuing racial hierarchy could help it decide among contestable views about the reach of the Fourteenth Amendment.

D. Transitional Justice and Democratic Legitimacy

The same set of social realities ensuring that a facially neutral antidiscrimination law would be in practice a law providing for black persons was also at the heart of a problem of democratic legitimacy that the *Civil Rights Cases* ultimately aggravated rather than redressed. Like the Revels debate, the *Civil Rights Cases* required a governmental decisionmaker to deal with a problem of transitional justice. Once again, a decision affecting the status of African Americans was to be made by applying a Reconstruction text written by an all-white polity (that is, the Fourteenth Amendment) to a situation shaped by an antebellum legal background that discriminated explicitly against blacks. In the Revels debate, the question was whether a Fourteenth Amendment lacking language of retrospective effect could eliminate the lasting effects of *Dred Scott*. In the *Civil Rights Cases*, the question was whether the "[n]o State shall" language of the Fourteenth Amendment should be read narrowly so as to perpetuate black disadvantage, the origins of which lay in the law of slavery itself.[190] This time, however, the federal decisionmaker did not act to mitigate the shortcomings in democratic legitimacy that inhered in the process by which the Reconstruction Amendments were adopted. Instead, the Court's ruling largely deprived African Americans of the use of the national political process as a means of improving their position in the polity. And indeed, the *Civil Rights Cases* prompted many African Americans to

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tion: African Americans and Equalitarian Constitutionalism, 1830–1950, *in* BLACK SOUTHERNERS AND THE LAW, 1865–1900, at 247, 262 (Donald G. Nieman ed., 1994).

188 163 U.S. 537 (1896).

189 *Id.* at 550–51.

190 As noted in section III.B, alternative readings of the Fourteenth Amendment were sufficiently plausible under the conventions of the time that the Court could have upheld the Civil Rights Act, had it wanted to do so. *See supra* p. 1719.

question whether the constitutional regime was, as to them, a legitimate form of government.

Before the war, black Americans lived either under conditions of legalized slavery or, if free, under conditions in which the law impeded their economic advancement.[191] As a result, private property was overwhelmingly in the hands of white people at the time of emancipation. Railroads, hotels, and similar businesses were owned almost exclusively by whites. Given that many of these white owners were inclined to discriminate on the basis of race, blacks would be substantially less able than whites to travel and otherwise conduct their lives in the postwar world. When the Civil Rights Act of 1875 forbade private owners of public accommodations to discriminate on the basis of race, it mitigated the disadvantages that African Americans after 1865 would face as continuing consequences of antebellum law and racial prejudice.

The Civil Rights Act can accordingly be seen as a use of the political process to help bolster the legitimacy of the postwar government. Again, legitimacy is complex, resting partly on the method by which laws are made, partly on the opportunity for reforming the laws, partly on substantive justice, and partly on citizen self-identification with the regime.[192] The 1875 Act could not cure the democratic defect in the all-white enactment of the Fourteenth Amendment, but it symbolized the possibility that the political process might deliver substantively just results under the new system.[193] As such, the Act could help compensate for legitimacy problems inhering in Reconstruction's status as a period of transition from a more exclusive polity to a more inclusive one.

The ruling in the *Civil Rights Cases* worked against that possibility. It narrowed the parameters of potential legislative change, building into the constitutional framework a limit on the democratic majority's

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191 *See* Charles Snydor, *The Free Negro in Mississippi Before the Civil War*, *in* FREE BLACKS IN AMERICA, 1800–1860, at 6, 7 (John H. Bracey, Jr., August Meier & Elliot Rudwick eds., 1971) (footnotes omitted) ("Limitations were also placed on [free blacks] in vocational and other directions. It was illegal for a free person of color to sell any goods . . . in any place other than the incorporated towns of the state. Even in towns there were some goods that a free negro could not sell, such as groceries and spirituous liquors. The business of keeping a house of entertainment was also closed to this class."). *See generally* IRA BERLIN, SLAVES WITHOUT MASTERS 217–49 (1974) (discussing the range of economic obstacles imposed on free blacks, including harsh penalties for failure to pay fines, restrictive apprenticeship laws, disqualification from jobs, and exclusion from certain trades).

192 *See supra* pp. 1711–13.

193 Indeed, the Act had this symbolic value in spite of its notorious underenforcement. Frederick Douglass, who acknowledged that the Act was not regularly enforced, maintained that it still had expressive significance: "It told the American people that they were all equal before the law; that they belonged to a common country and were equal citizens." 4 FREDERICK DOUGLASS, THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 401 (Philip S. Foner ed., 1975).

ability to terminate — or at least temper — the continuing force of racial hierarchies that were in the past expressly supported by law. In so doing, the Court's decision aggravated the legitimacy problem in three ways. First, it reduced the significance of African American political participation. Yes, blacks could now be voters and officeholders, but Congress was stripped of much of its power to improve the conditions of black Americans, thus substantially reducing the benefits of admission to the political process. Second, the Court's decision exposed African Americans to legal discrimination reasonably perceived as substantively unjust. Third, and as a consequence of the foregoing two factors, the *Civil Rights Cases* made it more difficult for many African Americans to think of themselves as coauthors of the legal regime.

The claim that the *Civil Rights Cases* aggravated a problem of legitimacy is not merely speculative. It accords with the actual reactions of many black Americans to the Court's decision. After the *Civil Rights Cases*, many African Americans concluded that the Constitution was not in fact their Constitution and instead questioned the legitimacy, as to them, of the existing government. Addressing what some contemporary observers described as the largest political meeting ever held in Washington, D.C., Frederick Douglass declared that the *Civil Rights Cases* had nullified the Fourteenth Amendment,[194] and others echoed the claim elsewhere.[195] Because it was the Fourteenth Amendment that made blacks American citizens, the idea that the Amendment had been nullified was tantamount to a declaration that blacks were once again legal outsiders. As one leading black newspaper put it, "[w]e are aliens in our native land," and the government could not be "worthy [of] the respect and loyalty of honest men."[196] Another counseled black readers to be "defiant," writing that they needed to realize they could depend only on themselves and not on the government.[197]

Henry Turner of Georgia, at one time the pastor of the largest black church in Washington and later a member of Georgia's Reconstruction legislature, declared that the *Civil Rights Cases* "absolve[d]

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[194] *Id.* at 424 ("[B]y this decision of the Supreme Court the fourteenth amendment has been slain in the house of its friends.").

[195] *See Colonel Ingersoll's Bugle Call*, DAILY INTER OCEAN (Chi.), Nov. 21, 1883, at 4 (saying that the Court had pronounced the Reconstruction Amendments "meaningless"); *The Rights and Wrongs of the Colored People*, CINCINNATI ENQUIRER, Oct. 21, 1883, at 1 (describing the "decision of the Supreme Court negativing the Fourteenth Amendment" and the "reversal of the Fourteenth Amendment by the Court").

[196] *The Civil Rights Decision*, GLOBE (N.Y.), Oct. 20, 1883, at 2.

[197] *The Recent Decision*, CHRISTIAN RECORDER (Phila.), Oct. 25, 1883, at 2, *quoted in* BLIGHT, *supra* note 19, at 309.

the allegiance of the negro to the United States."[198] Many people took this proposition quite seriously. Turner himself ended his days in Canada,[199] and others contemplated yet more radical steps. Douglass had warned that the *Civil Rights Cases* risked "forcing [blacks] outside of law,"[200] and indeed some African Americans despairingly concluded that "the only thing left us is to take the law in our own hands."[201] White officials did not dismiss these statements as mere talk: in Texas, reports that several hundred blacks had taken up arms against the government in the wake of the *Civil Rights Cases* prompted the governor to mobilize the state militia.[202]

As always, black responses were diverse. Not everyone took so strong a stance.[203] But four years after the *Civil Rights Cases*, when the Constitution's centennial was celebrated in Philadelphia, the event's organizers had to significantly reduce their planned "Colored People's Display," which was to have recounted the part that black Americans had played in constitutional history.[204] So few blacks wanted to participate in the event that the planned parade floats could not be populated with actual colored people.[205] Less than twenty years after ratification of the Fourteenth Amendment, most of the black community saw the celebration of the Constitution as "a white people's affair."[206]

In the way the Court dealt with the transition away from white-only citizenship, the *Civil Rights Cases* stand in marked contrast with the Senate's decision to seat Revels. Rather than allowing the Thirteenth and Fourteenth Amendments to be instruments of pragmatic evolution toward a more democratically legitimate system, the *Civil Rights Cases* retarded that process by insulating inherited hierarchies against political reform. The earlier Senate had stressed radical change, but now the Court emphasized continuity. The Republicans of the Revels debate construed the Civil War to annul express positive law from the antebellum period even though it was hard to argue that any specific text in the Reconstruction Amendments required that re-

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198 Letter, CHRISTIAN RECORDER (Phila.), Dec. 13, 1883, at 1; *see also* ERIC FONER, FREEDOM'S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION 215 (1996) (describing Turner's background).

199 *See* FONER, *supra* note 198, at 216.

200 DOUGLASS, *supra* note 193, at 398.

201 *A Plea for Self Defense*, STATE JOURNAL (Harrisburg, Pa.), Mar. 1, 1884, at 2.

202 *See From Austin*, GALVESTON DAILY NEWS, Oct. 30, 1883, at 4; *The Trouble at Gause*, GALVESTON DAILY NEWS, Oct. 31, 1883, at 1.

203 *See* BLIGHT, *supra* note 19, at 310 (describing, inter alia, the reaction of Benjamin Tanner, editor of the *Christian Recorder*, who argued that blacks should trust the constitutional system itself to right the judicial wrong).

204 *See* Litwack, *supra* note 140, at 315.

205 *Id.*

206 *Id.*

sult; the *Civil Rights Cases* gave force to unwritten antebellum principles even in the face of Amendments that could reasonably be read to alter them.

It does not follow that the Court was wrong in 1883, nor does it follow that the Senate was wrong in 1870. Deciding whether (and to what degree) the Civil War ushered in a new regime requires an interpretive choice about constitutional history because the historical record contains themes of rupture as well as continuity. Similarly, just because a newly enfranchised group was unable to participate in framing the laws that defined the terms of their inclusion does not mean that every subsequent decision must be made to favor that group's interests.[207] What is clear, however, is that the 1870 Senate and the 1883 Court had different views about which problems the Constitution should be interpreted to solve: those arising from the old system that led to the Civil War, or those arising from the possibility of too much change. In striking down the Civil Rights Act of 1875, the *Civil Rights Cases* both limited congressional power, thus reinforcing antebellum ideas of federalism, and weakened the legal protections of African Americans, thus reinforcing racial status hierarchies of prewar America. In these respects, the 1883 Court's approach was less in keeping with the Republican Senate of 1870 than with the ideas of moderate 1870 Democrats — people like Senator Vickers — who acknowledged some constitutional change but wished to limit its scope.[208]

CONCLUSION

On both sides of the Revels debate, senators understood that they were adjudicating more than a concrete dispute. Their arguments about the merged issues of race, history, and legal interpretation were less significant as a means of deciding whether Revels could sit than as a showcase for conflicting views of the post–Civil War Constitution. Thus, not only did the Democrats refuse to accept their inevitable defeat without a protracted fight, but most of the Republicans refused to settle the issue on narrow grounds. Instead, the Republicans insisted on framing their victory as a matter of broad principles about a transition in constitutional history. In succeeding years, the disappearance of the Revels debate from the shared memory of American constitutional interpreters was an important victory for the Democrats, easing

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207 *See* JEREMY WALDRON, LAW AND DISAGREEMENT 13–14 (1999).

208 *See* BRANDWEIN, *supra* note 170, at 2–3, 63–68, 94–131 (arguing that between 1873 and the 1940s, the dominant judicial and legal-historical understandings of the Civil War and Reconstruction largely tracked the positions of Northern Democrats during Reconstruction); NELSON, *supra* note 168.

the process by which dominant twentieth-century views of Reconstruction came to track the views of nineteenth-century Democrats who opposed adoption of the Reconstruction Amendments more closely than the views of the Republicans who wrote and ratified them.[209]

Recovering the Revels debate for constitutional discourse changes the raw materials of history, altering the tools available to modern interpreters. Bringing Revels to light is thus part of reshaping constitutional discourse at a broad level rather than an attempt to adduce authority for a specific doctrinal proposition. The fact that the Senate admitted Revels in 1870 does not demonstrate that Congress should today be able to reach private action through its Section 5 enforcement powers or that the *Civil Rights Cases* were wrongly decided in 1883. Interpretive tools that can be developed by thinking about the Revels problem, however, do supply new arguments against the Supreme Court's ruling in that case. By highlighting the post–Civil War government's need to address problems of constitutional legitimacy at a time of transition to a more inclusive polity, the Revels debate adds an important dimension to the literature on the *Civil Rights Cases* and to the study of the legislative role in legitimate transition more generally.

It does not follow that the Revels debate establishes the historical interpretations favored by the 1870 Senate as authoritative for constitutional law today. The Revels debate is only part of Reconstruction history, and, more importantly, the raw materials of the past do not determine normative meaning in constitutional law. Instead, those who interpret constitutional history in the present must make choices, whether consciously or not. The Republicans of 1870 may have hoped that their words and actions in the Revels debate would promote a particular set of meanings, and so indeed they can, especially if they are well known to modern interpreters. But as their Democratic counterparts may have hoped, a different vision of history set out in 1870 could later be redeemed if politics changed course. After Reconstruction ended, the Democrats' views of more limited change came to dominate constitutional interpretation. Indeed, eighteen years after the *Civil Rights Cases*, even the career of Hiram Revels himself would be transformed into a symbol of normalization and continuity rather than one of revolutionary change.

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209 *See* The Civil Rights Cases, 109 U.S. 3 (1883); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); BRANDWEIN, *supra* note 170 at 2, 81–93, 94–131; NELSON, *supra* note 168, at 193–96; Balkin & Levinson, *supra* note 170, at 1097–98; *see also* BLIGHT, *supra* note 19, at 8, 11, 384–91 (describing President Woodrow Wilson speaking at the fiftieth anniversary of the battle of Gettysburg of the Civil War as "the 'quarrel forgotten'" and making no mention whatsoever of emancipation or related matters).

Revels did not serve long in the Senate. He returned to Mississippi in 1871, served briefly as Secretary of State,[210] was widely accused of (but heatedly denied) having supported the Democratic Party in the 1875 elections that ended Republican control of Mississippi politics,[211] and spent many of his remaining years as president of Alcorn University, the country's first black land grant college.[212] Having lived to see both the *Civil Rights Cases* and *Plessy*, Hiram Revels died in 1901 and was buried in Holly Springs.[213]

Back in Washington, members of Congress took the occasion of Revels's passing to propose a revision of the history of his career in the United States Senate — a revision that would obscure the radical change of the 1860s and promote a vision of continuity in its place. Revels had assumed office on February 23, 1870. As of that day, Mississippi was readmitted to the Union. But also as of that day, the Forty-First Congress had already been sitting for nearly a year. The timing of Mississippi's readmission thus meant that Revels served only a portion of a congressional term. Upon his death, however, the Senate Committee on Privileges and Elections voted to pay his estate a senator's salary for the time that Revels had missed, back to the beginning of the term.[214] This decision was a new departure. Many years earlier, the Senate had decided that senators from readmitted Southern states who filled vacant seats and began their actual service in the middle of a term were not to be paid for any time before their states' readmissions.[215]

If the Senate Committee had broken the rules as a unique memorial for Revels, one might see its action as a renewed endorsement of the spirit of the Republicans who seated Revels in 1870. Whatever the formal legal regime governing membership in the Senate, this account would say, it would be perverse to let the misdeeds of white Mississippi secessionists stand in the way of conferring a benefit on an Afri-

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[210] *See* Obituary, *supra* note 1.

[211] *See* S. REP. NO. 527, at 1016 (1876); *Letter from Dr. Revels*, CHRISTIAN RECORDER (Phila.), Feb. 24, 1876, at 1; *Letter of Ex-Senator Revels*, CHRISTIAN RECORDER (Phila.), Jan. 6, 1876, at 4.

[212] *See* Obituary, *supra* note 1.

[213] *See Ex-Senator Revels Dead*, SW. CHRISTIAN ADVOC. (New Orleans), Jan. 24, 1901, at 8; *see also* Untitled Obituary, *supra* note 11.

[214] *See* 34 CONG. REC. 2948 (1901) (statement of Sen. Chandler, Comm. on Privileges and Elections).

[215] *See* S. REP. NO. 36 (1870). This report was adopted by a full Senate. *See* CONG. GLOBE, 41st Cong., 2d Sess. 69–71 (1870) (approving payment of Virginia's newly seated senators only from the date of Virginia's readmission to the Union, which occurred in the middle of a congressional term). *See also* S. REP. NO. 1820, at 2 (1890) (reaffirming the Reconstruction practice of paying senators only from the dates of the readmission of their states and applying that same principle to determine that senators from newly admitted Western states should be paid only from the dates of the admission of their states).

can American like Hiram Revels. Indeed, the Senate might have shown continuing concern with transitional justice had it refused to burden Revels on the basis of legal arrangements in which blacks could have had no voice. Quickly, however, the proposed payment came to have a different significance. Three days after the Senate Committee recommended its appropriation to the full Senate, the Committee re-reported the proposal in an altered form.[216] Under the amended proposal, Revels would be merely one of many people to receive a retrospective salary adjustment. The Committee also proposed back payments to fifteen white Reconstruction-era senators from Southern states who, like Revels, had served partial terms after Congress authorized their states to resume sending representatives to the national legislature.[217]

By this action, the senators of 1901 symbolically promoted a view of history different from the one that most of their predecessors had endorsed in the debate over Revels's qualifications. Retrospectively awarding senators to the Southern states for times during which those states had actually been excluded from Congress would help normalize the history of the 1860s, obscuring a narrative of constitutional failure, chaos, and revolutionary transformation. To be sure, different members of the Senate may or may not have consciously intended that implication. A nice gesture is sometimes just a nice gesture. Nonetheless, the normalizing aspect of their collective action was consistent with the predominant and growing impulse among officeholders of the period to minimize the Civil War conflict.[218] According to their preferred narrative, there had been no thoroughgoing rupture in the system of government. Once the war ended, the Constitution picked up more or less where it left off. Yes, black men were now citizens, and Hiram Revels could even sit in the Senate — if he could get elected. But when he journeyed to Washington to take his seat, he would have to travel in separate colored compartments.

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216 *See* 34 CONG. REC. 3189–90 (1901) (statement of Sen. Chandler).

217 *See id.*; Proposed Amendment by Sen. Chandler to H.R. 14236, 56th Cong. (2d Sess. 1901) (listing former senators to be paid); *see also Salaries for Former Senators*, WASH. POST, Mar. 1, 1901, at 4.

218 *See* BLIGHT, *supra* note 19, at 351–53.

Senate Chamber,

Feb 25, 1870.

I, H. R. Revels, do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement, to persons engaged in armed hostility thereto; that I have neither sought nor accepted, nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution, within the United States, hostile or inimical thereto. And I do further swear (or affirm) that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter: So help me God.

H. R. Revels