The Riddle of Hiram Revels

Richard A. Primus*

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* Assistant Professor of Law, The University of Michigan. Thanks to…

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

On the 23rd day of February, 1870, having arrived safely in the nation's capital 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 seat, representing not only the interests of Mississippi but the transformation of America.[7]

As it happened, however, Revels did not become a senator that day. As soon as his credentials were read, the Senate's Democrats objected to seating him.[8] They argued that neither Revels nor any other black person could possibly be qualified to hold the office as of 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

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[1] *See* Obituary, *The Passing of an Honored and Useful Man*, SOUTHWESTERN CHRISTIAN ADVOC. (New Orleans), Jan. 31, 1901, at 8 [hereinafter Obituary].
[2] *Id.*
[3] *Id.*
[4] DeCuir v. Benson, 27 La. Ann. 1, 9-10 (1875), *reciting testimony given in* DeCuir v. Benson, (D. La. Mar. 17, 1873) (statement of Thomas P. Leathers, a white Mississippi River steamboat master, representing that he had personally transported Revels in a separate colored cabin).
[5] *See* N.Y. WORLD, Jan. 31, 1870 (describing parties thrown for Revels upon his arrival in Washington).
[6] *See* JEFFERSON DAVIS, THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT 189-91 (1990) (recounting his departure from the Senate).
[7] *See The Colored Gentleman in the Senate*, N.Y. HERALD, Feb. 26, 1860, at 4.
[8] CONG. GLOBE, 41st Cong., 2d Sess. 1503 (1870).
[9] U.S. CONST. art. I, § 3, cl. 3.

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 only been ratified in 1868, two years before Revels arrived in Washington. Prior to 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 had held that blacks could not be citizens of the United States.[14] Whatever the law might be since 1868, the Democrats maintained, the law prior to that date was stated authoritatively by *Dred Scott*. Even if Revels was a citizen in 1870, he had only held that status for 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 on the same terms with whites. 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

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[10] A point that not all of the Democrats conceded. *See infra* Part I.

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

[12] U.S. CONST. amend. XIV.

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

[14] *Id.* at 403.

[15] *Cf.* ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 207-40 (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*, N.Y. WORLD, Feb. 26, 1870, at 1-2; *The Case of the Southern Senator-Elect*, N.Y. TIMES, Feb. 25, 1860, at 5; *Congressional*, DETROIT FREE PRESS, Feb. 24, 1870, at 4 [and also articles on p4 of the Detroit Free Press on both Feb 25 and Feb 26]; *Forty-First Congress*, N.Y. HERALD, Feb. 24, 1860, at 3, 6; *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; [also articles on the front page of the Chicago Tribune on Feb 24 and Feb 25] *The New Senator*, CINCINNATI ENQUIRER, Feb. 26, 1870, at 1.

[17] *See infra*, text accompanying notes 56-58.

[18] There is no mention of the Revels debate in any major constitutional law casebook or in any law review available on Westlaw. Nor is there any mention of the Revels controversy in any judicial opinion available on Westlaw, state or federal, from any time within the last hundred years. I am pleased to report, however, that the editors of

wholly absent from our constitutional discourse. Given the enormous attention the debate commanded in its own day and the prominent forum that it occupied, this absence marks a tremendous act of collective forgetting.[19] This Article redresses that absence, recovering Revels for our collective stock of constitutional knowledge.

Confronting the Revels debate sheds light on at least five key issues in constitutional law. As a conflict about the post-Civil War status of an antebellum constitutional rule, the Revels debate offers fresh data about the Civil War as a historical rupture that displaced the Constitution of 1787.[20] As a legislative debate about a constitutional issue, the Revels affair supplies fodder for thinking about constitutional interpretation by non-judicial actors.[21] As a racially charged context in which the application of a formally non-racial constitutional rule was argued largely in terms of a normative racial question, the Revels debate offers a window onto the tendency of formal and substantive commitments to merge in constitutional argument. As an situation in which an all-white Senate consulted a Constitution written only by whites in order to determine whether to admit a black member, the Revels debate implicates problems of democratic legitimacy and transitional justice.[22] And as a major constitutional event that was later entirely forgotten, the

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one constitutional law casebook—BREST et al., eds., PROCESSES OF CONSTITUTIONAL DECISIONMAKING—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); PAUL CONNERTON, HOW SOCIETIES REMEMBER (1989). On the specific role of collective memory and collective forgetting with respect to issues of the Civil War and Reconstruction, see DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY (2001).

[20] *See, e.g.*, United States v. Morrison, 529 U.S. 598, 620-22 (2000) (reviewing this historical question to reach its view of the limits of Congressional power to enforce the Fourteenth Amendment); City of Boerne v. Flores, 521 U.S. 507, 520-24 (1997) (same); BRUCE A. ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998); Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003).

[21] *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

[22] *See, e.g.*, Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005) (reviewing possible relationships between past decision-making and constitutional legitimacy); Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761 (2004) (reviewing the problems of legal administration that attend transitions from illiberal or undemocratic regimes to liberal, democratic ones).

Revels debate challenges us to think about the process that determines which stories guide our sense of constitutional history.[23]

This Article explores those issues through the Revels debate and then examines the implications of that debate for the Supreme Court's landmark decision in the *Civil Rights Cases* of 1883.[24] Like the Revels debate, the *Civil Rights Cases* engaged all five of the foregoing issues. First, the cases directly addressed the question of how much the Civil War and Reconstruction had reshaped the antebellum constitutional regime. Second, the holding in the *Civil Rights Cases* has become an important source of authority for thinking about the relative roles of court and legislature in constitutional interpretation. Third, the Civil Rights Cases were officially decided on the basis of non-racial considerations of text and federal structure, but normative racial attitudes helped shape the Court's choice among plausible legal outcomes. Fourth, because it adjudicated the validity of a racial antidiscrimination law under a Fourteenth Amendment that African Americans had no part in formulating, the *Civil Rights Cases* raised problems of democratic legitimacy and transitional justice. And fifth, the decision in the *Civil Rights Cases* helped to shape canonical constitutional history. Indeed, the modern Supreme Court overtly uses the *Civil Rights Cases* to structure—and limit—the meaning of the Civil War.

Part I of this Article recovers the Revels debate for constitutional law. Part II then shows how examining our modern intuitions about the Revels debate can stimulate us to endorse certain principles of constitutional theory. Most (or nearly all) twenty-first century Americans will think that Revels should have been seated. The harder question is why, and Part II offers two justifications for reaching that result. Each of those two justifications implies a principle that can be used more broadly in constitutional interpretation. One of those principles rests on the idea that the Civil War revolutionized the Constitution to an extent beyond what was written in the Reconstruction Amendments. The other deals with issues of democratic legitimacy and transitional justice. Reconstruction enfranchised black men, but the regime's democratic legitimacy was still open to question, given that only the old insider group had participated in shaping its groundrules. The authorities that made Revels appear ineligible—Article I, *Dred Scott*, and even the Fourteenth Amendment—were all products of a system in which only whites could make the rules.[25] Governmental

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[23] *See, e.g.*, J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998); Richard A. Primus, *The Canon Has a History*, 14 YALE J.L. & HUMAN. 221 (2002).

[24] 109 U.S. 3 (1883) (striking down section 1 of the Civil Rights Act of 1875, ch. 114, 18 Stat. 335).

[25] *See infra* Part II.C.

action giving serious attention to the interests of African-Americans could accordingly help put the new regime on a more democratically legitimate footing, even if such action pushed the new Constitution a bit farther than it might otherwise seem to go.

Part III then uses the Revels debate and the principles that might emerge from it to critique the *Civil Rights Cases* of 1883. Unlike the 1870 Senate, which depicted the Civil War as a great constitutional revolution, the *Civil Rights Cases* denied that so great a change had occurred. At the beginning of the twenty-first century, the Supreme Court endorsed the *Civil Rights Cases*'s view of this issue: in *United States v. Morrison*,[26] the Court declared that the *Civil Rights Cases* expressed an authoritative view of the constitutional meaning of the Civil War and Reconstruction.[27] To the considerable degree that constitutional lawyers look to history for authority and meaning,[28] and to the concomitant degree to which history as told in Supreme Court opinions has the power to shape future views of constitutional history,[29] the idea of Reconstruction as a limited change is accordingly now positioned to become orthodox. Knowledge of the Revels debate, however, should make that idea harder to maintain. For one thing, reading the *Civil Rights Cases* through the prism of the Revels debate highlights the degree to which the Court's assertion of constitutional continuity across the Civil War was bound up with substantive racial commitments that

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[26] 529 U.S. 598 (2000) (striking down the civil remedy provision of the Violence Against Women Act of 1994, 42 U.S.C. § 13981 (1994) [hereinafter VAWA]).

[27] *Morrison*, 529 U.S. at 622. Some leading constitutional scholars have criticized this view. *See, e.g.*, Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 104-06 (2000) (pointing out that members of Congress who passed the law invalidated in the *Civil Rights Cases* also lived through the passage of the Fourteenth Amendment and were therefore presumably as well-informed as the Court as to its historical meaning); Robert C. Post & Reva B. Siegel, *Equal Protection by Law*, 110 YALE L.J. 441, 481 n.201 (2000). On the Court, however, no Justice dissented from this portion of the *Morrison* opinion. The *Morrison* majority rejected both the argument that the civil remedy provision of VAWA was valid as Commerce Clause legislation, 529 U.S. at 609-614, and the argument that the provision was valid under Section 5 of the Fourteenth Amendment, *id*. at 620-22. Four Justices dissented from the Court's Commerce Clause holding, but not a single Justice maintained that the provision at issue was valid under Section 5. *See id.* at 628 n.1 (Souter, J., dissenting, joined by Stevens, Ginsburg, and Breyer, JJ.) (stating that he dissented only as to the Commerce Clause issue); *id*. at 66 (Breyer, J., dissenting, joined by Stevens, J.) (stating that he dissented from the Commerce Clause holding and reached no conclusion as to the Section 5 issue).

[28] *See, e.g.*, Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1 (1998) (describing the practice of constitutional interpretation as heavily conditioned by understandings of history).

[29] *See, e.g.*, Balkin & Levinson, *supra* note 23, at 1003-05.

modern constitutional law has rejected.[30] But it can also do more than that. The Revels affair was, among other things, a debate about the nature of constitutional legitimacy. And as Part III shows, approaching the *Civil Rights Cases* through the Revels debate reveals the *Civil Rights Cases* as a lost opportunity to bolster the democratic legitimacy of the post-Reconstruction Constitution.

Adding the Revels debate to the stock of historical materials that constitutional interpreters know is part of an attempt to remake our understandings of constitutional history at a broad level, not to establish legal authority for a specific doctrinal proposition. The fact that the Revels debate occurred in 1870 does not prove how a particular legal issue should be resolved in 2005. The stakes are more diffuse, but they are also much larger. History is a pervasive source of value, authority, and persuasion in constitutional law.[31] Recovering the Revels debate changes the content of available history and provides new material that can inform our views about central constitutional issues, issues like the legal significance of the Civil War and the problem of transitional justice in a polity that has become more inclusive over time. The striking disappearance of the Revels debate from known constitutional history has limited our interpretive tools. This Article recovers that debate, alters the body of known history, and challenges readers to make sense of their views in light of this new information.

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.[32] Wilson surely relished the moment. "I present the credentials," he declared, "of the Honorable H.R. Revels, Senator-Elect from Mississippi."[33] He did not add ". . . and the first person of African

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[30] *Cf., e.g.*, Charles L. Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 97 (1967) (describing the *Civil Rights Cases* as "cut off the same bolt of historical cloth as *Plessy v. Ferguson*.").

[31] *See* Friedman & Smith, *supra* note 28; Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601, 604 & n.17 (1995); PHILIP BOBBIT, CONSTITUTIONAL FATE 9-24 (1982); *cf.* BALKIN, *supra* note 19, at 188-215. Different interpreters value and use history differently, and few decisions are made based on historical understandings alone, but neither is history merely a source of makeweight arguments in constitutional law.

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

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

descent ever to serve in the Congress of the United States." Everyone in the chamber—everyone in the country, in fact, or at least everyone who read newspapers—knew that part already.[34]

The Democrats objected immediately.[35] In keeping with the Constitution's specification that each house of Congress is the judge of the qualifications of its own members,[36] 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.[37] Whatever the credibility of some 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 only been ratified 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 would not be 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.[38] 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, both 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.[39] Neither the Civil Rights Act nor the Fourteenth Amendment purported to operate retroactively, he noted, and as a general matter of legal interpretation, he held that laws operate only prospectively unless they expressly state otherwise.[40] As a matter of

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[34] *See supra* note 16 and accompanying text.
[35] CONG. GLOBE, 41st Cong., 2d Sess. 1503 (1870).
[36] U.S. CONST. art. I, § 5, cl. 1.
[37] One Democratic senator candidly announced his intention to object as often as possible and on any conceivable ground. *See* CONG. GLOBE, 41st Cong., 2d Sess. 1508 (1870) (statement of Sen. Garrett Davis). Naturally, some of the objections raised were petty and technical. *See, e.g.*, CONG. GLOBE, 41st Cong., 2d Sess. 1503 (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. Moreover, even the decision to impose petty objections wherever they could be raised was grounded in the view that something enormous was at stake.
[38] CONG. GLOBE, 41st Cong., 2d Sess. 1557 (1870).
[39] *Id*. at 1560.
[40] *Id.* at 1558.

simple and honest legal interpretation, Vickers concluded, Revels was not yet nine years a citizen.[41]

Other Democrats took less nuanced positions. Garrett Davis of Kentucky invoked the authority of *Dred Scott* to declare that Revels was not a citizen at all, even in 1870.[42] Far from conceding that *Dred Scott* had been overruled or superseded, Davis deemed that decision a shining tower of constitutional rectitude. "There 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.[43] In his view, the American polity fundamentally excluded people of African descent, and that was that. At the glorious Founding, he reminded his colleagues, various laws held even free negroes far below the status of citizens, providing corporal punishment for those who traveled at night or who defamed white persons.[44] Given this history and the uncontestable truth and authority of *Dred Scott*, Davis maintained that Revels could not then or ever be a citizen, much less a senator.[45]

One might wonder where the Fourteenth Amendment fit in Davis's analysis. No matter what the law was prior to 1868, a validly adopted 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 was somehow so fundamental as to be exempt from change even through constitutional amendment. Davis did not address this matter directly, leaving it implicit in his argument that the Fourteenth Amendment had no force to alter the prewar regime.

His colleague Eli Saulsbury of Delaware addressed the Fourteenth Amendment more directly. According to Saulsbury, that amendment was not a valid part of the Constitution at all.[46] 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 not having been validly adopted due to procedural irregularities in the process by which it was ratified.[47] Another, perhaps more in keeping with Davis's impulses,[48] is that no amendment could have the power to alter so fundamental a feature of the American polity as the exclusion of Africans. Whatever Saulsbury's rationale, however, the basic contention was clear. The law of American

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[41] *Id.* at 1557-60.
[42] *Id.* at 1510 .
[43] *Id.* at 1509.
[44] *Id.* at 1511-12.
[45] *Id.* at 1509-12.
[46] *Id.* app. at 127.
[47] *Cf.* ACKERMAN, *supra* note 20, at 99-120.
[48] *See supra* text accompanying notes 42-45.

citizenship was stated, even in 1870, by *Dred Scott*. 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. But beyond that, many of them could not quite believe that anyone would stand up in the 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, the *Dred Scott* decision," said James Nye of Nevada.[49] 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."[50] Not to be outdone, Charles Sumner of Massachusetts declared that *Dred Scott* had been "[b]orn a putrid corpse . . . a stench in the nostrils . . . to be remembered only as a warning and a shame."[51]

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 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 Lincoln, Southern secession, the Civil War, Emancipation, and perhaps the postwar constitutional amendments—constituted 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 prior to 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—were 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 any continuing force to *Dred Scott*.

Though not always clearly distinguishing between those two ways of considering *Dred Scott* void, several Republicans argued that the Civil War itself demonstrated that decision's invalidity. "The comment made upon that great and wrongful judicial decision is to be seen in the

[49] CONG. GLOBE, 41st Cong., 2d Sess. 1513 (1870).
[50] *Id.* at 1543.
[51] *Id.* at 1566-67.

dreadful war through which we have passed," said Howard.[52] Frederick Sawyer, a transplanted Bostonian representing South Carolina, spoke of the war as "a great court of errors" that had reversed the Taney Court's judgment.[53] 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. He described the effort to bar Revels from the Senate as Senator Davis's "last battle-field. 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."[54]

Some of these statements—Howard's, for example—are ambiguous between the view that *Dred Scott* was invalid ab initio and the view that the war, or the war in combination with other events after 1857, rendered the Supreme Court's judgment null retrospectively. 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 fell clearly 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 when the Fourteenth Amendment was ratified in 1868. If Dred Scott had that status, then Revels would have been a citizen for only two years when his qualifications to become a senator were debated, just as Vickers argued for the Democrats. Instead, most of the Republicans who argued that Revels was qualified believed that *Dred Scott* had no force at all.

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, "There 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."[55] On more than one occasion there were outbursts and demonstrations from the spectators and the Vice President had to call for order.[56]

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. Eight senators, all Democrats, voted against. Twelve more, mostly Republicans, were recorded as absent.[57] The Vice President duly called Revels to the front of the chamber to take

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[52] *Id.* at 1543.
[53] *Id.* at 1564.
[54] *Id.* at 1513.
[55] N.Y. TIMES, Feb. 26, 1870, at 1.
[56] CONG. GLOBE, 41st Cong., 2d Sess. 1568 (1870); *see also supra* note 55.
[57] CONG. GLOBE, 41st Cong., 2d Sess. 1568 (1870).

the oath of office.[58] 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[.]"[59]

One wonders who Revels had in mind as the Constitution's enemies as he stood there 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. Race and Revolution

It is easy to characterize the Senate's proceedings in less exalted terms. Given the straight party-line vote, one might hypothesize that the debate was simply a matter of advancing makeweight arguments, with each side really concerned only with partisan advantage. Revels was a Republican. Not surprisingly, the Republicans wanted to seat him, and the Democrats did not. But the Democrats' choice to fight the issue for three days on the Senate floor cannot be explained in this way, because the practical outcome was never in doubt. The Democrats were a tiny minority. They had no hope of preventing the Republicans from seating a senator whom the Republicans wanted to seat, and they knew it.[60] No matter what the Democrats did, Revels was going to become a senator. And yet, the Democrats opposed him vociferously. It follows that something must have been at issue beyond the practical outcome.

For the senators present or constituencies to which they played, and probably for both, matters of principle were at stake. Those principles were worth fighting for, at length and on the record, even if the outcome of this particular round of the struggle were preordained. The precise content of that principle would have been identified

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[58] *Id.*

[59] *See* appendix (containing Revels's oath of office).

[60] 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. Davis). Saulsbury described himself as "attempting to prevent that which is already a certainty." *Id.* app. at 125.

differently by different people, but two major themes predominate. One was whether and in what respect blacks were the equals of whites. The other was the constitutional meaning of the war, and in particular the question of whether a new political order had swept away the antebellum Constitution. In 1870 as in later years, the two issues were interrelated. Indeed, as an operational matter in the Senate debate, it is not clear that the two 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 orangoutang in Congress" and added that Revels had "hands resembling claws[.]"[61] The discourse inside the chamber was almost equally pointed. 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 alter of Hymen."[62] Saulsbury baited his Republican colleagues, speaking of "the tender sensibilities of a majority of this body" who are "fondly . . . attached to the negro race. I know how dearly you love it." Further denigrating 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[.]"[63] A Republican senator tried to lighten the mood by teasing 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."[64] The Congressional Globe recorded laughter in the chamber,[65] and even Saulsbury—as a good politician with an audience—was willing to indulge the moment as humorous.[66] Nonetheless, he regarded the issue with deadly seriousness. To Saulsbury, the seating of a negro or even an octoroon senator was a "great calamity" that left him with "but little hope for the future of my country."[67]

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,[68] the

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[61] *See From Washington*, N.Y. WORLD, Feb. 24, 1870, at. 1.
[62] CONG. GLOBE, 41st Cong., 2d Sess. 1514 (1870).
[63] *Id.* at app. 126.
[64] *Id.* (statement of Sen. Charles Drake of Missouri).
[65] *Id.*.
[66] *Id.*
[67] *Id.* at app. 130.
[68] *See Hiram R. Revels, Senator Elect from Mississippi*, FRANK LESLIE'S ILLUSTRATED NEWSPAPER, Feb. 26, 1870, p. 401 (describing Revels as "about three-fourths white"); JULIUS E. THOMPSON, HIRAM R. REVELS, 1827-1901 8 (1982). In his autobiography, Revels referred to himself as "Negro" and as "colored." *See* Autobiography of Hiram

multiplicity of designations suggesting the hazards of trying to quantify and categorize precise forms of racial mixing. Wherever his forebears 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 that case were an authoritative construction of the constitution, because *Dred Scott* should be read to apply only to persons of "pure African blood."[69]

This attempt to settle the issue without having to confront the hard constitutional question had a legal pedigree. Williams made no reference to this fact, but no less an authority than the Attorney General of the United States had proffered the same reading of *Dred Scott* eight years before.[70] 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.[71] Free people of mixed racial ancestry, he said, were citizens of the United States if born on American soil.[72] 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 under that standard.

But what was good enough for the Lincoln Administration in 1862 was decidedly not good enough for the Senate in 1870. Williams's tack garnered no support from senators of either party, and indeed it provoked some Republicans to repudiate it directly as an unacceptable and perhaps cowardly dodge. Stewart, for one, immediately intervened to say that the Senate should not distinguish *Dred Scott* but should instead make clear that *Dred Scott* was in no way the law.[73] Simon Cameron of Pennsylvania found the suggested compromise a bit repulsive and took the opportunity to deliver a short sermon on the

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R. Revels (no date) (unpublished handwritten manuscript, on file with the Carter G. Woodson Collection of Negro Papers, the Library of Congress) (hereinafter Revels Autobiography) at 2, 3.

[69] CONG. GLOBE, 41st Cong., 2d Sess. 1543 (1870).

[70] *See* Citizenship to the Secretary of the Treasury, 10 Op. Att'y Gen. 382 (1862).

[71] *Id.* at 409-13.

[72] *Id.* 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 ship master at sea because he was colored (in this case, of mixed African and European ancestry) and therefore perhaps not a citizen. The Treasury Department's inquiry to the Attorney General was made in order to determine whether such a person could be a citizen and therefore a legal ship master in the coasting trade. John Witt has encouraged me to regard this incident as an early example of arrest for driving while black.

[73] CONG. GLOBE, 41st Cong., 2d Sess. 1543 (1870).

subject of trans-racial brotherhood.[74] Cameron had not participated in the debate at all to that point, and he would have continued to keep out of the discussion, he said, had 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 preponderates? He is a man[.]"[75] Perhaps more than that, Cameron continued, "his race, when the country was in peril, came to the rescue."[76] And then, in an admirable concession of his own fallibility, 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."[77]

The racial issues underlying the Revels debate could be, and often were, argued without reference to matters that would be called "Constitutional" in a narrow or technical sense. In setting forth views about whether Revels was or was not the equal of a white man, or whether negroes as a class should be accepted or reviled, or even about whether Revels himself should be classified as black, the senators often proceeded without parsing constitutional language or prior constructions of legal authority. They argued from their substantive convictions about issues of race. But they did not argue only from that set of first-order convictions. Although it was from start to finish a fight about race, the debate over Hiram Revels was also a fight about the constitutional 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.

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, some Republicans addressing the Revels controversy spoke not just of technical points of constitutional law but of grand tectonic shifts, depicting 1870 as a world made wholly new. Nye, for example, acknowledged that the treatment of Africans in America had historically been abysmal but insisted that the past was wiped away: "that reign of wrong is over, and the reign of right and righteousness has

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[74] *Id.* at 1544.
[75] *Id.*
[76] *Id.* It is worth noting an internal tension in Cameron's pronouncements, one that has beset many subsequent liberal arguments about race: Cameron regards Revels as a man, not as a person with a given proportion of white or black blood, but he still recognizes Revels's racial identity so as to be able to speak of Revels's race coming to the rescue in the Civil War.
[77] *Id.* Cameron, who as Lincoln's Secretary of War had been Attorney General Bates's colleague in 1861-62, had initially entered the Senate as a Democrat.

taken its place."[78] Taking stock of the enormity of the constitutional change, 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[.]"[79] 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. Saulsbury insisted that the Constitution was "framed by [the people's] worthy and patriotic sires, and . . . intended to be a rich and noble heritage to them and their posterity forever."[80] He wished to preserve that "proud heritage, bequeathed to us by our noble ancestors as they intended it to be preserved."[81] 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."[82] In doing so, they were betraying the true Constitution of the United States.

Saulsbury and other Democrats were surely sincere in feeling that a great question of constitutional theory was at stake, one 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 Saulsbury was an innovation about race. If a new order would repudiate the old one, the key element of that repudiation would concern the old regime's sanction for slavery, caste distinction, and other official disadvantages visited upon black Americans. His chief concern was to preserve the prewar racial hierarchy to the greatest extent possible, even after the Reconstruction Amendments. 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.

One of the most telling moments in the three days of debate occurred when the Republican Stewart tried to press the Democrat Vickers to expand on his view of Revels's ineligibility. Vickers had

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[78] CONG. GLOBE, 41st Cong., 2d Sess. 1513 (1870).
[79] *Id.* at 1564.
[80] *Id.* at app. 127.
[81] *Id.* at app. 130.
[82] *Id.* at app. 127.

articulated the Democratic position in moderate terms. He called for the question to be decided with judicious deliberation rather than political will;[83] he argued that *Dred Scott*, no matter what one thought of the merits, was the positive law until overturned;[84] and he maintained that as matter of legal craft the Fourteenth Amendment had no retroactive application.[85] Perhaps curious as to how far this Democrat's reasonableness would extend, 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 Vickers vote to admit a colored man to the Senate?[86]

Vickers did not answer. Instead, he said that he had not heard the question and wished for it to be repeated to him.[87] (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.) Stewart obliged, repeating the question: would 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 in point?[88] Once again, Vickers did not answer. Instead, he dodged and parried and perhaps grew indignant, though 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?[89]

We all know exactly what Stewart's question was supposed to illustrate. He wanted to establish whether the Democrats were engaged in a constitutional argument that could be severed from the racism that motivated it. If so, they should be prepared to concede that the racial

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[83] *Id.* at 1560.
[84] *Id.* at 1557.
[85] *Id.* at 1558.
[86] *Id.* at 1561.
[87] *Id.*
[88] *Id.*
[89] *Id.* One other Democrat was willing to meet Stewart's challenge. Perhaps sensing that Vickers's dodge would undermine his party's claim to be making good-faith constitutional arguments, Stockton of New Jersey subsequently addressed himself to Stewart's question and said that if a state "prefers a negro to represent her, I have no right to call it in question," so long as the negro in question "is a citizen, and is eligible[.]" CONG. GLOBE, 41st Cong., 2d Sess. 1561 (1870). Even this position left 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 that point could not be taken for granted among Democrats. Nonetheless, a charitable reading would construe Stockton as having met Stewart's challenge by answering that yes, seven years later a black man could sit in the Senate.

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 the year 1870 must be bound up with the substance of their racial views. That need not mean that they were not in good faith about their constitutional theory—more probably, it would mean that their constitutional theory and their racial theory were in fact the same, or at least substantially interdependent.

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 indicated, however, much larger things were at stake, and in keeping with that deeper reality, the Senate mostly conducted the debate at the level of broad principles. Moreover, the sense that a technical or lawyerly solution to the Revels problem would be unsatisfying or even disingenuous is one that most twenty-first Americans are likely to share with their nineteenth-century predecessors. Almost all modern Americans will take the view, as a bottom-line matter, that Revels should have been seated.[90] And if we are properly self-aware, we will recognize that that view derives from large normative 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

[90] I have posed the question to more than two hundred students and colleagues, and I have yet to encounter an interlocutor who takes this position. Nonetheless, some readers may have the opposite impulse and conclude that Revels should not have been seated. Indeed, reaching that conclusion might show a kind of interpretive integrity. After all, one feature of holding a good-faith theory of constitutional interpretation rather than merely picking and choosing desirable results is the willingness to tolerate unpleasant outcomes. *See* Henry Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981) (arguing that constitutional theories that always produce the interpreters' desired normative results are not really constitutional theories at all, because authentic constitutional interpretation must act as a constraint). Any reader who is tempted to bite this bullet, however, should also be sure to contemplate this variation of the Revels issue: Would W.E.B. Du Bois have been constitutionally barred from running for President in 1932, at the age of 64? He was born five months before the Fourteenth Amendment was ratified. If Revels was not qualified to be a senator in 1870, then perhaps Du Bois was not qualified to be President any point in his entire life, because he was not a citizen at birth.

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 the fact of its past enactment (and amendment) 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 as principles of constitutional interpretation that would enable modern Americans to make sense of Revels, not 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. This is especially so for the race and revolution idea, which relies to a greater extent than the transitional justice idea on the premise that historical events are sources of constitutional authority and then on a certain interpretation of an particular set of events. The transitional justice idea relies more on theoretical considerations of democratic value, but 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 ideas occupy different conceptual spaces. Moreover, 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 or these hypotheses thus endorse principles of constitutional interpretation that should also apply in other cases, as Part III will show. 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

1. Then

Although the roots of the Democrats' objections lay in broad normative visions of race, their invocation of the nine-year rule posed as a technical legal problem and was therefore ostensibly addressable through a technical legal solution, if one could be found. A few Republican senators did suggest such technical solutions. Williams's attempt to reclassify Revels as mostly white and therefore not within the ambit of *Dred Scott* was one such attempt.[91] Stewart offered another, arguing that the citizenship clause of the Fourteenth Amendment, properly read, was intended to relate back to birth.[92] On this account, language conferring citizenship on "All persons born or naturalized in the United States" implicitly conferred that citizenship effective at the time of birth or naturalization, even if that time preceded the date of the amendment's ratification. John Scott of Pennsylvania tried a third technique, suggesting that the nine-year citizenship requirement should not apply to Revels at all.[93] The point of the nine-year requirement, he said, was to prevent foreign influence in the Senate, and foreign influence was of no moment in Revels's case.[94] Even if Revels had not been a citizen for nine years, he had never been loyal to a foreign state, either.[95] These three senators used three conventional modes of legal argument—facts, text, 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.[96] Nonetheless, these technical arguments or others that one

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[91] *See supra* text accompanying notes 68-69.

[92] CONG. GLOBE, 41st Cong., 2d Sess. 1566 (1870).

[93] *Id.* at 1565.

[94] *Id.*

[95] *Id.* 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 the senators in question had been citizens of the Republic of Texas and not of the United States immediately before admission. *Id*. at 1565-66. 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. 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 100.)

[96] 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 Taney's opinion could

might invent[97] 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. On the Republican side, nobody articulated 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 category and declaring him not black earned active opprobrium.[98] Instead, the dominant Republican impulse was to deny any compromise that accommodated the contrary authority of the old regime. And in this insistence on resolving the issue on broad grounds, the Republicans mirrored the essentially uncompromising tenor on the Democratic side. After all, the entire objection based on the nine-year rule posed as a formal legal argument, but Vickers's refusal to concede that the problem would disappear after 1877 suggested the Democrats' unwillingness to live within the framework that their technical argument implied.

Given the larger issues at stake, it makes some sense that neither side could be satisfied through technical legal arguments. When interpreters work within an agreed-upon framework with known basic

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be read to apply only to cases on all fours with the one before him. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (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 Gross, *Litigating Whiteness*, 108 YALE L.J. 109, 177-78 (1998) (stating that most states before the Civil War treated persons with one-fourth to one-eighth black ancestry as black and that in the 1860s most 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 though the point is contestable, much nineteenth-century authority supported the Democrats' contention that as a general default rule legal enactments were not read to be retroactive unless they specifically said otherwise. Indeed, the Supreme Court shortly after the Revels debate gave effect to that rule by twice expressly refusing to give retroactive effect to the Thirteenth Amendment. *See infra* note 106 and accompanying text. Finally, although it seems reasonable to interpret the nine-year rule as intended to bar foreign influence, any textualist would point out that 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 1, § 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 would be a participant 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 even without respect to the danger of foreign influence.

[97] See *infra* Part II.A.2 for suggestions.

[98] *See supra* text accompanying notes 74-77.

authorities, such arguments can often be sufficient. In the debate over Revels, however, the question of what legal materials were authoritative was itself a central issue. Republicans like Howard and Nye were poles apart from Democrats like Saulsbury and Davis on many issues debated that week, but they shared the view that the issue before them was not to be settled within a straightforward scheme of positive law in which *Dred Scott* had been valid in 1857 and the Fourteenth Amendment had validly worked a change in 1868. The real rules and principles governing how the Senate could think and act—in other words, the real constitution of the Senate, and of the Republic—called for something else. For the Democrats, who could not possibly win in 1870, the debate invited the setting forth of a vision that could perhaps be redeemed when the political pendulum swung back. And for most of the Republicans, the need at hand was not just to win the local dispute but to win it on broad grounds. That way, they might better establish that the Civil War and Reconstruction had brought sweeping constitutional change.

2. Now

Like the senators of 1870, most moderns who learn of the Revels controversy will probably form their views about the correctness of seating Revels on some basis other than thinking closely about technical aspects of the legal problem. Instead, twenty-first century Americans are likely to applaud the decision that the 1870 reached and then, if they are of lawyerly casts of mind, they will 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,[99] it should be possible to develop such arguments. And indeed it is. Here are three examples, none of which was articulated by the Republicans of 1870.

i) *Departmentalism*. Consider a approach under which the Supreme Court had the authority to define "citizen" for the purposes of Article III but that Congress had superior authority to define "citizen" for the purposes of Article I. *Dred Scott* concerned Article III citizenship, because the citizenship question in that case arose from the Article III requirement of citizenship for diversity jurisdiction in federal court.[100] This approach could therefore leave *Dred Scott* intact and still enable the Senate to act independently when defining Revels's citizenship with respect to his qualifications to be a senator.[101]

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[99] Pamela Karlan & Daniel Ortiz, *Constitutional Farce*, *in* CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES, 180, 180-88 (William N. Eskridge & Sanford Levinson, eds., 1998).

[100] Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[101] One shortcoming with this approach for the Republicans of 1870 is precisely that it would *not* have impugned the Supreme Court's action in *Dred Scott*. Because

ii) *Institutional substitution*. This is a variant of (i) above, though 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 Revels question could have been settled by a court rather than by the Senate, then perhaps the Supreme Court would have taken the case and overruled *Dred Scott* in a way that permitted Revels to sit but without asserting that the Civil War or the Reconstruction Amendments revolutionized 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 its 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.

iii) *Nine earlier years*. Perhaps Article I's nine-year rule would be satisfied if a prospective senator had been a citizen for *any* nine years prior to assuming office, rather than as a requirement that the senator have been a citizen for the nine years immediately preceding. 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 could have been citizens *before* 1857. In that case, Revels could 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.[102]

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departmentalism asserts that each branch can interpret the Constitution independent 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*. And the Republicans of 1870 did not merely want to seat Revels; they wanted to repudiate *Dred Scott*, root and branch, and indeed they saw their action on Revels 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.

[102] This move could also have solved the problem of the Texas senators, who had been born and raised within the United States before moving to Texas. *See supra* note 95. It would also suggest, however, that Revels or any 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 any senators *be* citizens at the time they serve in the Senate. It only requires that each senator have "*been* nine years a citizen of the United States." U.S. Const., Art. I, § 3 (emphasis added). If the nine-year rule can be satisfied on the basis of nine years of citizenship not immediately preceding one's election to the Senate, then, on the present theory, Revels would 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 the Senate, even if he or

These three possibilities are merely illustrative, not exhaustive, of the possibility 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.[103] 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

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she later renounced her citizenship entirely. Needless to say, the oddity of these conclusions should weigh against endorsing this method of declaring Revels eligible.

[103] I will here mention one more such possibility, not because further demonstration of the basic point is needed but because it concerns a controversy in the constitutional law literature on which the history of the Revels debate supplies strong evidence for one side of the question. The possibility I have in mind is that there is a *Fifteenth* Amendment article 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 258-59, 271-74; Akhil Reed Amar, *The Fifteenth Amendment and "Political Rights"*, 17 CARDOZO L. REV. 2225 (1996). Those "political rights" prominently include officeholding. *See* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1261-62 (1992). 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," because that is the rhetorical name for the category of rights that African-Americans enjoy. *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 earlier in the very same month when Revels arrived in the Senate, that is, February of 1870. (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 in a broader set of "political rights" including officeholding, one would expect the just-ratified Fifteenth Amendment to play a prominent role in the Revels debate. In fact, however, no senator mentioned the Fifteenth Amendment during the three days when Revels's qualifications were discussed. 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.

the result are likely to be much stronger than our confidence in any one of the proposed technical resolutions.

In this respect, our constitutional attitudes share something with those of most of the Senators of 1870, Democratic and Republican alike. Like them, our view of the right result stems from larger convictions. Also like them, we want more than a merely technical resolution. 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 our 1870 predecessors, many twenty-first century lawyers might articulate the larger principle behind seating Revels with arguments about a simple normative commitment to racial equality. In the year 2005, 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 an instance of regime change, a revolution rather than a mere reform.[104] That perspective could support the view that the Civil War and Reconstruction had the capacity to unmake antebellum authority even in ways not expressly specified in the Thirteenth, Fourteenth, or Fifteenth Amendments. Neither of these principles, however, can adequately resolve the Revels case standing alone. Instead, the two work together, and it is the combination of the two 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 Revels issue should have been resolved, consider a hypothetical variant in which the issue arises in 1858, one year after *Dred Scott*, rather than in 1870. Suppose, in other words, that some 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 reactions to their decision would probably differ from our reactions to the Democrats of 1870, even

[104] *See, e.g.*, ACKERMAN, *supra* note 20; AMAR, *supra* note 20.

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 some of us disagreed with it. 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, if also morally disturbing.

Obviously, the difference between 1858 and 1870 is a matter of the Civil War and Reconstruction. It is less than obvious, however, what if any particular occurrence of that period changed the relevant legal terrain. Part of the reason why the Democrats had a tenable argument against Revels is that no specific action of a legal authority during those years clearly solved the problem of the nine-year rule. Attempts to read the Fourteenth Amendment as retroactive were attempts 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.[105] 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 retrospective application.[106] Absent some reason to differentiate between the

[105] *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 of 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, Chancellor 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. *See infra* note 106 and accompanying text.

[106] Osborn v. Nicholson, 80 U.S. (13 Wall.) 654, 662 (1872); White v. Hart, 80 U.S. (13 Wall.) 646 (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 plaintiffs in both cases, explaining that to regard the Thirteenth Amendment as

Thirteenth and the Fourteenth Amendments, these decisions bolster the Democratic claim that the Fourteenth Amendment lacked retrospective force.

The modern intuition that the Senate acted correctly in seating Revels stems, I suggest, neither from racial egalitarianism of its own force nor from a general view of the legal effect of the Fourteenth Amendment but from a fusion of the two. In other words, the Civil War and Reconstruction can be understood to nullify aspects of the prior legal order that harmed African Americans, even if they are not understood to erase the prewar Constitution across the board. 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 new revolution and what does not requires figuring out what is central to the content of the new constitutional departure.[107] That task requires contestable interpretive choices. One reasonable choice, however, would be to construe Reconstruction's constitutional changes as being above all else about eliminating special burdens on African Americans. The Supreme Court articulated this view in landmark decisions during the 1870s,[108] and the Senate's decision to seat Revels can be understood in the same terms.[109]

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having annulled the contracts at issue would improperly construe that Amendment as having retrospective force, unmaking contracts already executed at the time of the Amendment's adoption.

[107] See BRUCE A. ACKERMAN, WE THE PEOPLE: FOUNDATIONS 86-89, 94-99 (1991) (describing the process by which constitutional interpreters synthesize multiple creative periods in constitutional history).

[108] *See* Strauder v. West Virginia, 100 U.S. 303, 306 (1879) (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"); The Slaughterhouse 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. *See The Slaughterhouse Cases*, 83 U.S. (16 Wall.) at 71-72.

[109] 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 Osborn*, 80 U.S. (13 Wall.) at 663 (noting that no party to the suit was "of the colored race lately in bondage"), a case had arisen 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

Such a reading of the state of constitutional law in 1870 is driven by a large historical interpretation of the meaning of a set of events. It draws on the text of 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 black local 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 would say on their own. On such a reading, it would make sense for the constitutional rupture to be at its greatest when the status of black Americans was at issue. Accordingly, this larger meaning of the Civil War and Reconstruction could justify nullifying the continuing legal consequences of *Dred Scott* in the Hiram 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 its special transformative force even when the African-Americans whose status is at issue were not themselves slaves: 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. 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 retrospective force when the interests of black persons are involved. 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,

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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, which was the strong policy in favor of protecting private rights once vested rather than unraveling transactions on which parties had come to rely. *See, e.g.*, *Osborn*, 80 U.S. (13 Wall.) at 662. The hypothetical manumitter's rights to payment were 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 actual cases and the hypothetical one 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 be understood to annul the manumitted slave's contractual obligation even if it could not annul debts owed on other slave contracts.

conversion, unjust enrichment, and so forth.[110] 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, though, it is also a more radical position, because it promotes the idea of the 1860s as a rupture in constitutional time. That was then; this is now.

C. Transitional Justice and Democratic 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, a basis that deals directly with the democratic legitimacy of the Constitution.[111] Reconstruction posed a problem of transitional justice.[112] A caste society changed its rules to be more inclusive, but as is often the case in such transitions, the terms of the new inclusion were set by the old insider group.[113] The Revels controversy was a microcosm of that larger situation. Hiram Revels did not participate in the senatorial debate in which his qualifications were adjudicated. The debate was conducted entirely by already-sitting 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 responsible to an almost all-white voting public.[114] The principles of racial equality

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[110] *See generally* Hanoch Dagan, *Restitution and Slavery*, 84 B.U. L. REV. 1139 (2002); Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689 (2003).

[111] On the subject of constitutional legitimacy, see generally Fallon, *supra* note 22.

[112] See Posner & Vermeule, *supra* note 22, at 768 (defining successful transitional justice as "a political and economic transition that is consistent with liberal and democratic commitments."); *see also* THE POLITICS OF MEMORY: TRANSITIONAL JUSTICE IN DEMOCRATIZING SOCIETIES (Alexandra Barahona de Brito et al., eds., 2001).

[113] 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)

[114] In 1866, when the Thirty-Ninth Congress established the Joint Committee of Fifteen that drafted the text of the Amendment, African-Americans stood outside of both the Congress and the voting publics to which the 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, by adult black men who met applicable property qualifications). *See* MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 78-79 (1974); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 223 (1988). Thus, the Congress that drafted the Fourteenth Amendment was composed overwhelmingly of

that we now locate in the Fourteenth Amendment are thus unavoidably in tension with the enactment history 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 a whites-only amendment 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 be considered democratically illegitimate at later times.[115] 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 (or of the constitutional regime generally) rests on several factors acting in combination.[116] In addition to methods of enactment, these factors include the subjective identification of citizens with the regime[117] and the

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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. In the framing of the Fourteenth Amendment, as in the debate over admitting Revels to the Senate, an in-group deliberated internally to decide the question of whether, and on what terms, to open the door to outsiders.

There was more meaningful black participation at the ratification stage, though only in states whose ratification processes were not particularly able to influence the textual content 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* STEVEN HAHN, A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION 190-207 (2003); FONER, *supra*, at 186-90, 270-80. The participation of African-Americans 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. It should be remembered, however, that the ratifying conventions did not have the opportunity to shape the text of the amendment. Moreover, it is hard to argue that the ratifying conventions in which more African-Americans participated at least had the power to withhold ratification and thus force a new drafting process at a time when African-Americans had representation in Congress. 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 bring continued nonrepresentation rather than a second chance to draft the text.

[115] 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).

[116] *See* Fallon, *supra* note 22, at 1793.

[117] *See, e.g.*, David A. Strauss, *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).

substantive justice that the law delivers.[118] 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 new Constitution were sufficiently just in its treatment of African Americans, or if it afforded African Americans realistic possibilities of acting through the political system to address unfair disadvantages they faced as holdovers from the old regime, then the new order could achieve legitimacy in spite of its racially exclusive pedigree.[119] Conversely, the legitimacy problem would be aggravated if the law were substantively unfair to blacks or, perhaps worse still, if continuing black disadvantage were built into the constitutional framework itself and therefore extremely difficult to overcome, even once blacks were admitted to the normal political process.[120]

Acceding to the Democratic senators' argument about the nine-year citizenship rule would have entailed reading the Constitution to require continuing black disadvantage. Moreover, given the highly publicized context, it would have done so in full view of the country's black population.[121] A senatorial decision not to seat Revels would have

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[118] *See, e.g.*, Frank I. Michelman, *Is the Constitution a Contract for Legitimacy?*, 8 REV. CONST. STUD. 101, 128 (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* Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 537 (1999).

[119] There is an instructive though imperfect parallel here between a newly included group at a moment of transition and the situation in which every non-Founding 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 more heavily 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).

[120] *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 Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 335, 362 (1994) (arguing empirically that the United States Constitution is among the most difficult constitutions in the world to change).

[121] Unsurprisingly, black newspapers focused a great deal of attention on Revels in February 1870, just as newspapers read predominantly by white audiences did. See, e.g., The New Era (Washington, D.C.), Feb. 24, 1870, p. 1 (column by George B. Vashon, the first African-American admitted to the bar in New York and the first African-American professor at Howard University, arguing that on the correct interpretation of constitutional law black Americans had been citizens since the

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' objection had a certain rule-of-law appeal, and the rule of law is also one of the components of legitimate government.[122] Given the problem of transitional justice that the country faced in 1870, however, the Senate's choice to seat Revels probably brought much more help than harm to the cause of fostering democratic legitimacy.

One implication of this approach goes to the controversy over the scope of congressional power to interpret the Reconstruction Amendments. Each of those Amendments contains a final section empowering Congress to "enforce" its provisions through "appropriate legislation."[123] One of the central debates in modern constitutional law and theory concerns whether Congress's enforcement power includes the authority to define (or participate in the definition of) the substantive content of the Reconstruction Amendments rather than merely the power to implement the substance of those Amendments as construed by the courts, or, failing that, the power to "overenforce" the Amendments with laws that go a bit beyond what prevailing judicial interpretations of the Amendments require.[124] If one sees Reconstruction as raising problems of transitional justice that required affirmative efforts to be made for the sake of the Constitution's democratic legitimacy, one might understand Congressional power to interpret the Reconstruction Amendments expansively as justified by the need to let "normal" political processes adjust the constitutional groundrules after the moment of transition.

To review, the idea that considerations of democratic legitimacy might argue for otherwise extraordinary actions like seating Hiram

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Founding); id. at 2 (describing Revels as a symbolic embodiment of black political potential who would furnish proof of "negro capacity in statesmanship"); *Hiram R. Revels, U.S. Senator Elect from Mississippi*, FRANK LESLIE'S ILLUSTRATED NEWSPAPER, Feb. 26, 1870, p. 401; see also *id*. for March 12, 1870, p. 405 (full-page drawing of Revels taking the oath of office in the Senate).

[122] *See* Fallon, *supra* note 118, at 539.

[123] See U.S. CONST. amend XIII, §2; amend. XIV, § 5; amend XV, §2.

[124] See, e.g., 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. 1493 (2003); Larry D. Kramer, *Foreword: We The Court*, 115 Harv. L. Rev. 5 (2001); 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 (1966) (holding that Section 5 of the Fourteenth Amendment empowers Congress to legislate beyond the boundaries of judicial enforcement of the Fourteenth Amendment); City of Boerne v. Flores, 521 U.S 507 (1997) (sharply limiting *Katzenbach*).

Revels begins with the fact that nonwhites were excluded from the process by which the text of the Reconstruction Amendments was written. That exclusion threatens to diminish the democratic legitimacy of the constitutional regime, because a significant part of the population over which the Constitution claims authority was not permitted to help shape its content. Because legitimacy is a product of several factors, however, it might be possible to compensate for this defect in the democratic pedigree of the Constitution by enhancing other factors fostering legitimacy, such as substantive justice and citizen's subjective identification with the regime.

Consider now that if the substance of the Reconstruction Amendments was fixed when they were adopted, there would be no political mechanism (short of further constitutional amendments) for going beyond what the white-only polity had approved. The very terms of the equality offered to African Americans would thus be limited to whatever content white Americans had chosen to give it, and those terms could not be altered even if the overall calculus of democratic legitimacy argued strongly for doing so. On the other hand, if a branch of government likely to be quickly responsive to a newly enfranchised population were empowered to interpret the Reconstruction Amendments expansively, there would be a straightforward mechanism for adjusting the terms of the new constitutional order in ways that might increase the regime's democratic legitimacy. That is, a Congress partly responsible to African American voters could increase the substantive justice that the law provided to African Americans and by that means as well as others increase the degree to which African Americans identified with their government and considered it legitimate. To be sure, any such adjustments would be limited to what a majority of the representatives of the polity overall could be persuaded to endorse, rather than extending to whatever the newly enfranchised black population might want. 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.

The preceding argument in favor of legislative power to construe the Reconstruction Amendments expansively is not offered as an account of anyone's understanding of those amendments in the 1860s or 1870s. 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 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 contemporary cases implicating the scope of

Congress's power under Section Five of the Fourteenth Amendment: after enough time has passed, the force of transitional justice arguments might become subsumed within the general intertemporal problem of constitutional law. (If none of us alive today participated in shaping the Fourteenth Amendment, then perhaps no subpopulation can assert special claims to adjustment arising from a subset of the nineteenth-century's population having been excluded at the time. Perhaps we are now all in the same democratically deficient boat.) It bears noting, however, that there is today a judicial constituency for the idea that Congress has special power to interpret the Reconstruction Amendments expansively when acting to protect the interests of racial minority groups though not at other times, and that the most prominent adherent to this view has no theory in support of it other than a game attempt to map certain precedents.[125] And 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. The next Part examines those implications as applied to one such extremely important decision: the *Civil Rights Cases* of 1883.

D. Conclusion

The problem of Revels's eligibility can be solved if the Civil War and Reconstruction are understood either as a revolution with the authority to revise 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 principles 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. If we accept either or both of these principles, however, that choice will have 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—raising both of those issues, and it asks what implications our intuitions about Revels should have for our assessment of that decision.

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[125] See Tennessee v. Lane, 541 U.S. 409, 561-64 (2004) (Scalia, J., dissenting) (arguing that Congress should be permitted to legislate beyond the boundaries of the judicially enforced Fourteenth Amendment in matters involving racial discrimination but not in other matters).

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, which had prohibited racial discrimination in "inns, public conveyances on land or water, theaters, and other places of public amusement[.]"[126] According to the Court, Congress lacked the power to make such a law, even under its authority to enforce the Reconstruction Amendments.[127] In the 1960s, Congress's expanded power to pass antidiscrimination laws under its Commerce Clause authority would limit the practical import of the *Civil Rights Cases*,[128] 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*, 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.[129]

This Part contrasts the Revels debate with the *Civil Rights Cases* and develops two reasons why the *Civil Rights Cases* should not be afforded the interpretive authority that the modern Court awards it. First, seeing the *Civil Rights Cases* through the prism of the Revels debate helps reveal the degree to which the Court's decision was bound up with racial values that modern constitutional law rejects. Second, and in contrast to 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 were not merely of interest 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.[130] Less than twenty years after the adoption of the Fourteenth Amendment itself, leaders and laypeople among black Americans came to see the Constitution as "a white people's affair."[131] Approaching the *Civil Rights Cases* with the tools developed in thinking about Hiram Revels can help explain why.

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[126] Civil Rights Act of 1875, § 1, Ch. 114, 18 Stat. 335.
[127] 109 U.S. 3, 15, 21 (1883).
[128] *See* Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding Title II of the Civil Rights Act of 1964 as commerce legislation); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (same).
[129] See United States v. Morrison, 529 U.S. 598, 622 (2000).
[130] See infra text accompanying notes 181-193.
[131] Leon F. Litwack, *Trouble in Mind: The Bicentennial and the Afro-American Experience*, 74 J. AM. HIST. 315, 315 (1987).

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 to the right. As several historians have chronicled, moderate Northerners began to lose enthusiasm for the burdensome federal apparatus needed to police the southern states and protect the rights of black freedpeople. A severe economic downtown in 1873 further alienated many voters from the ruling Republican Party, and in the 1874 midterm elections the Democrats won a crushing victory, taking control of the House of Representatives for the first time after the war.[132] 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 held over until the next Congress, the Republicans altered the rules of procedure and rammed the Act through the House of Representatives just ahead of the transition.[133] The 1876 Presidential election was famously close, and the Hayes-Tilden compromise that kept the White House Republican also traditionally marks 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.[134]

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 otherwise only been seen in response to decisions like *Roe v. Wade*, *Brown v. Board of Education*, and *Dred Scott* itself.[135] Moreover, southern blacks continued to vote in significant numbers, and full disfranchisement still lay ten to twenty years in the future.[136] 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, of course: Grover Cleveland, elected the next year, would be the first Democrat with the opportunity to name judges since 1861. But most of the Justices in 1883, like most other white Americans at that time, had less appetite than they might once have had for strong racial

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[132] See FONER, RECONSTRUCTION 512-24.

[133] See 1 Irving J. Sloan, ed., AMERICAN LANDMARK LEGISLATION 227-32 (1976) (describing Congressional politicking on the Civil Rights Bill from its introduction through its eventual adoption).

[134] See 38 Howard L. Rev. 665 (1995) (listing, in appendix, all African-Americans to have served in Congress as of 1995).

[135] See infra, Part III.D.

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

egalitarianism. Eight of the nine—including two of the Court's three Union Army veterans—were willing to let the Civil Rights Act go.[137]

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.[138] Its answer was no. Under Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth, Congress had the power to enforce the substantive provisions of those Amendments.[139] 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.[140] Nor could Congress pass the Act as a matter of enforcing the Equal Protection Clause of the Fourteenth Amendment, because that clause was addressed only to states rather than to private actors such as innkeepers and railroad companies.[141]

This interpretation of the Fourteenth Amendment has come to seem strong as a matter of plain reading, as indeed it did to some contemporary observers in 1883.[142] After all, the sentence forbidding the denial of equal protection does begin with the words "No *state* shall . . . ."[143] 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.[144] Therefore, the counterargument ran, those

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[137] 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.

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

[139] See U.S. CONST. amend. XIII, § 2; U.S. CONST. amend. XIV, § 5.

[140] *Civil Rights Cases*, 109 U.S. at 20-22, 24, 31-32.

[141] *Civil Rights Cases*, 109 U.S. at 11.

[142] *See, e.g.*, N.Y. TIMES, Oct. 16, 1883 (writing that to many Americans it would appear that "nothing were necessary but a careful reading of the [Fourteenth] amendment to show that it did not authorize such legislation"); WKLY. TIMES (Philadelphia), Oct. 27, 1883 (writing that "many 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[.]").

[143] U.S. CONST. amend. XIV, § 1 (emphasis added).

[144] *See, e.g.*, THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 282 (1880); JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS § 508 (1832); *see also*

actors were "agents of the state" as a matter of law and accordingly within reach of the Fourteenth Amendment.[145] Not surprisingly, 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 helped shape how different interpreters would read and apply the text.[146]

One of the larger issues encouraging Justices to read the Reconstruction Amendments one way or another in the *Civil Rights Cases* was the question of how much the Civil War and Reconstruction should be understood to remake the antebellum constitutional system. The Court's answer to that question was that there was little structural change, and Justice Bradley made the point in several ways. For example, he rehearsed a view of federalism on which the Tenth Amendment barred federal power from intruding into traditional state spheres, and he denied that the Fourteenth Amendment had overcome or constricted that Founding limit on Congressional power.[147] 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,[148] under which, he noted, Congress had no power to create a federal cause of action in contract cases.[149] Given

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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).

[145] *Civil Rights Cases*, 109 U.S. at 58-59 (Harlan, J., dissenting); *see also* Joseph Singer, *No Right to Exclude*, 90 NW. U. L. REV. 1283 (1996) (elucidating this argument). This reading of the Fourteenth Amendment is more expansive than the Court's, but it is less adventurous than several other readings of constitutional text that have become well accepted. Indeed, it would not have been beyond the bounds of judicial practice to apply the Fourteenth Amendment against parties admitted *not* to be state actors, in spite of the apparently limiting "No state shall…" language in Section 1, inasmuch as the Court in other doctrinal contexts has applied the substance of constitutional amendments to parties other than those specified in the texts of the relevant amendments. As an example from the era of the *Civil Rights Cases*, consider *Hans v. Louisiana*, 134 U.S. 1 (1890), in which the Court held that the Eleventh Amendment's prohibition on the federal courts' exercising jurisdiction over a suit against a state by a citizen of "another state," *see* U.S. CONST. amend. XI, applies equally to bar federal jurisdiction over a suit against a state brought by a citizen of the *same* state. *See Hans*, 134 U.S. at 10. As a more modern example, consider that courts routinely apply the strictures of the First Amendment against the Executive, *see, e.g.*, Baumgartner v. United States, 322 U.S. 665 (1944) (reversing an executive proceeding to annul the citizenship of a naturalized alien charged with making disloyal statements), despite the fact that the text of the First Amendment is addressed only to "Congress," *see* U.S. CONST. amend. I ("*Congress* shall make no law . . . .") (emphasis added).

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

[147] *Civil Rights Cases*, 109 U.S. at 11, 15.

[148] U.S. CONST. art. I, § 10.

[149] *Civil Rights Cases*, 109 U.S. at 12-17.

that the Contracts Clause contains no text empowering Congress to enforce its provisions[150] but the Fourteenth Amendment does expressly give Congress the power of enforcement,[151] it would be exceedingly odd to assume that Congress's power under the Fourteenth Amendment could be limited by analogy with Congress's lack of power under the Contracts Clause—unless one indulged a general interpretive assumption that the Constitution's original provisions created a template of governance to which later amendments should be substantially assimilated, even if their text seemed 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 *Civil Rights Cases*.

To be sure, there are plausible arguments for the proposition that the Court acted properly in declining to read the Fourteenth Amendment to sweep away antebellum visions of limited federal government. In the spirit of what Ackerman has called the "synthesis" of two prior moments of constitutional lawmaking,[152] one can understand the *Civil Rights Cases* as an instance in which the judiciary asked how Reconstruction and the Founding could both be preserved together, 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 impulse toward radical change that lasted through the 1860s petered out in the 1870s as the country's political center declined to continue supporting Radical Republicanism.[153] 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, settling into a regime that was different from the antebellum order but less so than the Senate that seated Revels would have expected.[154] Within this framework, the *Civil Rights Cases* can be seen as implementing the public's desired balance between continuity and change.[155] Historians have accordingly described the decision as ratifying the political settlement that ended Reconstruction.[156]

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[150] *See* U.S. CONST. art. I, § 10.
[151] *See* U.S. CONST. amend. XIV, § 5.
[152] ACKERMAN, *supra* note 107.
[153] *See generally, e.g.*, FONER, *supra* note 114.
[154] *Id*.
[155] *See* NELSON, *supra* note 196, at 197.
[156] *See, e.g.*, C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH, 1877-1913, at 216 (1967) (describing the *Civil Rights Cases* as "the juristic fulfillment of the Compromise of 1877[,]" under which Reconstruction came to an end).

The settlement so ratified, however, was a settlement 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 Northern Democrats, because it was they who held the political center in the late 1870s and early 1880s.[157] Though 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.[158] 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 might make moderns uneasy to realize that the set of judicial interpretations so adopted reflected the views of people *opposed* to the Reconstruction Amendments—that is, Northern Democrats. And realizing that "Northern Democrats" at this time meant people like Vickers, Saulsbury, and the others who had opposed seating Revels should make that sense of unease a bit more concrete.[159]

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 that the cases actually relied on such views of race to reach their conclusions.[160] This Section accordingly shows 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 betrayed a substantive distaste for

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[157] *See* BRANDWEIN, *supra* note 196, at 2, 82-94; Balkin & Levinson, *supra* note 197, at 1097.

[158] *Id*.

[159] 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 had already resumed sending representatives to Congress had mostly elected Republican senators, much as Mississippi 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, meaning former slave states that had declined to join the Confederacy, rather than the more anti-slavery states of the Upper North. Nonetheless, the category of "Northern Democrats" includes those Democrats who sought to bar Revels.

[160] For earlier versions of the claim that the *Civil Rights Cases* are tainted with racism, *see, e.g.*, OWEN M. FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910, at 362 (1993) (saying that the *Civil Rights Cases* rendered *Plessy v. Ferguson* "a forgone conclusion"); Black, *supra* note 30.

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 "has nothing to do with slavery or involuntary servitude."[161] Justice Bradley wrote as follows:

> 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 their personal status as freemen because they were not admitted to all the privileges enjoyed by white citizens, or because they were subjected to discriminations in the enjoyment of accommodations in inns, public conveyances, and places of amusement. Mere discriminations on account of race and color were not regarded as badges of slavery.[162]

The argument here is straightforward. Race and slavery were legally independent. Historical 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, the Court's argument here 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.[163]

Before the war, the regime of *Dred Scott* limited the rights not just of slaves but of free blacks as well.[164] 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.[165] The legal validity of antebellum discrimination against free blacks, the Court's critics reasoned, was surely connected to that

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[161] The Civil Rights Cases, 109 U.S. 3, 24 (1883).
[162] *Civil Rights Cases*, 109 U.S. at 31-32.
[163] *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) [hereinafter BROTHERHOOD]; NAT'L REPUBLICAN, Oct. 23, 1883 (quoting Robert Ingersoll).
[164] *See* MARK TUSHNET, THE AMERICAN LAW OF SLAVERY, 1810-1860 (1981).
[165] Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857)

proposition.[166] In the critics' view, therefore, the *Civil Rights Cases*'s affirmative endorsement of the continuing relevance of antebellum legal arrangements prejudicial to free blacks demonstrated the Court's willingness to give continuing force to legal arrangements rooted in the world of *Dred Scott*.[167] Indeed, for the Court to justify the continuing legal disadvantage of blacks based on the legal treatment of blacks before the war 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 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* itself retained some continuing force even 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 Act was invalid because it was beyond Congress's enumerated powers, the logic of 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*[168] 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 to promote the interest of society as a whole.[169] In modern constitutional law, such legislation is usually considered the valid product of legislative 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

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[166] *See* Civil Rights Cases Scrapbook, Series 1, Box 20, Reel 7, Frame 441, in Papers of Justice John Marshall Harlan (microfilm, on file with the University of Louisville Law Library) (report of 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.'"); OMAHA REPUBLICAN, Oct. 30, 1883, (quoting former Nebraska Senator John Thayer as saying that "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.").

[167] *See supra* note 163.

[168] Lochner v. New York, 198 U.S. 45 (1905).

[169] *See generally* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1995).

deny due process of law.[170] Justice Bradley saw just such an infirmity in the Civil Rights Act of 1875. That Act, he wrote, made blacks "the special favorite of the laws."[171] 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 subject to strict scrutiny and struck down if it used express racial classifications in its text.[172] 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.[173] Instead, 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 protect would obviously be black. To Bradley, such a law was an unwarranted show of governmental favoritism.[174]

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. Simply put, the reason why an antidiscrimination law was vulnerable to the objection of legal favoritism 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 Bradley's objection. Under existing social realities, the power to discriminate in the provision of hotel, railroad, or theater accommodations lay in the hands of white people, and the victims of any discrimination would be 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

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[170] *See generally* GILLMAN, *supra* note 169.

[171] The Civil Rights Cases, 109 U.S. 3, 31 (1883).

[172] *See* 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).

[173] Civil Rights Act of 1875, § 1, Ch. 114, 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.")

[174] *Civil Rights Cases*, 109 U.S at 31. 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*, 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 largely conceived as a protection for black persons and that in operation it would always or nearly always be invoked by blacks.

statutes as a substantive matter, that attitude could help push the Court toward resolving a constitutional issue in a way that would invalidate an antidiscrimination law.

This relationship between race and ostensibly non-racial constitutional issues in the *Civil Rights Cases* was not exactly the same as the parallel relationship in the Revels debate. When the Democrats invoked the nine-year rule against Revels, their behavior was opportunistic: they wanted to bar Revels from sitting in the Senate, and they used whatever tools came to hand in pursuit of that end. 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 to say 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 were no longer in point, 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.[175] But when faced with contestable questions, decisionmakers are routinely influenced by their background preferences on related issues, whether consciously or not. In the *Civil Rights Cases*, where 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* Court's comfort with black subordination could help it believe in good faith that a segregated-car law did not deny legal equality, 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.

C. Transitional Justice and Democratic Legitimacy

The same set of social realities ensuring that a facially neutral antidiscrimination law would in practice be a law providing for black persons in particular was also at the heart of a problem of democratic legitimacy that the *Civil Rights Cases* faced and ultimately aggravated rather than redressed. Like the Revels debate, the *Civil Rights Cases* required a government decisionmaker to deal with a problem of

[175] In the wake of the *Civil Rights Cases*, several northern states passed antidiscrimination laws of their own, and those laws went largely unchallenged. *See* Donald G. Nieman, *The Language of Liberation: African Americans and Equalitarian Constitutionalism, 1830-1950, in* BLACK SOUTHERNERS AND THE LAW, 1865-1900, at 262 (Donald G. Nieman ed., 1994).

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 (*i.e.*, 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 lasting effects of *Dred Scott*. In the *Civil Rights Cases*, the question was whether the "No state shall . . ." language should be read narrowly in a way that would perpetuate black disadvantage whose origins lay in the law of slavery itself.[176] This time, however, the federal decisionmaker did not act to mitigate the shortcomings in democratic legitimacy that inhered in the method of adoption of the Reconstruction Amendments. Instead, its 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 decision in the *Civil Rights Cases* prompted many African-Americans to question whether the constitutional regime was, as to them, a legitimate form of government.[177]

Prior to the war, American blacks lived either in conditions of legalized slavery or, even if free, under conditions in which the law impeded their economic advancement.[178] 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 those white owners were inclined to discriminate on the basis of race, blacks would have substantially less ability than whites to travel or 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.

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.[179] 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

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[176] As noted earlier, 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 despite the "No state shall" language, had it wanted to do so. *See supra* note 145 and accompanying text.

[177] *See infra* text accompanying notes 181-193.

[178] *See* TUSHNET, *supra* note 164.

[179] *See supra* notes 116-118 and accompanying text.

might deliver substantively just results under the new system.[180] As such, it 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 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 discriminations reasonably perceived as substantively unjust. Third, and as a consequence of the forgoing 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 purely conceptual. It accords in practice with the actual reactions of many American blacks to the Supreme Court's decision. After the *Civil Rights Cases*, many African-Americans concluded that the Constitution was not in fact their Constitution after all and instead questioned the legitimacy, as to them, of the existing government. Addressing what some contemporary observers described as the largest political meeting ever yet held in Washington, D.C., Frederick Douglass declared that the *Civil Rights Cases* had nullified the Fourteenth Amendment,[181] and others echoed the claim elsewhere.[182] 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, "We are now aliens in our native land," and the

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[180] Indeed, the Act had this symbolic value in spite of its having been notoriously underenforced in practice. Frederick Douglass, who acknowledged that the Act was not regularly enforced, maintain that it still had great 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., 1976).

[181] 4 FREDERICK DOUGLASS, THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 424, 398 (Philip S. Foner ed., 1976) ("By this decision of the Supreme Court, the Fourteenth Amendment has been slain in the house of its friends.").

[182] *See* ENQUIRER, Oct. 20, 1883 (describing "the decision of the Supreme Court negativing the Fourteenth Amendment" and "The reversal of the Fourteenth Amendment by the Court"); NAT'L REPUBLICAN, Nov. 19, 1883 (saying that the Court had pronounced the Reconstruction Amendments "meaningless").

government could not be "worthy of the respect and loyalty of honest men."[183] Another counseled "defiance," writing that black readers must now realize that they could depend only on themselves and not on the government.[184]

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] the allegiance of the Negro to the United States."[185] Many people took this proposition quite seriously. Turner himself ended his days in Canada,[186] and others contemplated yet more radical steps. Douglass had warned that the *Civil Rights Cases* risked "forcing [blacks] outside the law,"[187] and indeed some African-Americans despairingly concluded that "the only thing left to us is to take the law into our own hands."[188] White officials did not dismiss these statements as mere talk: in Texas, reports that several hundred blacks had actually taken up arms against the government in the wake of the *Civil Rights Cases* prompted the Governor to mobilize the state militia to put down a potential insurrection.[189]

As always, black responses were diverse. Not everyone took so strong a stance.[190] But four years after the *Civil Rights Cases*, when the centennial of the Constitution was celebrated in Philadelphia, the 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.[191] So few blacks wanted to participate in the event that the planned parade floats simply could not be populated with actual colored people.[192] 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."[193]

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[183] GLOBE (New York), Oct. 20, 1883.
[184] CHRISTIAN RECORDER (Philadelphia), Oct. 25, 1883, quoted in Blight, *supra* note 19, at 309-10.
[185] *See* CHRISTIAN RECORDER, Dec. 13, 1883; ERIC FONER, FREEDOM'S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION 216 (1996) (describing Turner's background).
[186] *See* FONER, *supra* note 185, at 216.
[187] DOUGLASS, *supra* note 181, at 398.
[188] THE STATE JOURNAL (Harrisburg, Penn.), Mar. 1, 1884.
[189] *From Austin*, GALVESTON DAILY NEWS, Oct. 30 1883, at 4; *The Trouble at Gause*, GALVESTON DAILY NEWS, Oct. 31 1883, at 1.
[190] *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 wrong).
[191] See Litwack, supra note 131.
[192] *Id.*
[193] *Id.*

In the way it dealt with the transition away from white-only citizenship, the Supreme Court's decision in the *Civil Rights Cases* stands 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. Where the earlier Senate had stressed radical change, the Court now 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 result; 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. Whether (and to what degree) to see the Civil War as ushering in a new regime requires an interpretive choice about constitutional history, because the historical record contains themes of rupture and also themes of continuity. Similarly, just because a newly enfranchised group was unable to participate in the framing of the laws that define the terms of their inclusion does not mean that every subsequent decision must be made to favor that group's interests.[194] 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 had yielded 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 inherited from before the war. 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.[195]

CONCLUSION

On both sides of the Revels debate, senators understood that they were adjudicating more than a concrete dispute. Their arguments about

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[194] *See* JEREMY WALDRON, LAW AND DISAGREEMENT 13-14 (1999).

[195] *See* BRANDWEIN, *supra* note 196, at 2-3, 63-68, 94-132 (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 196, at 197.

the merged issues of race, history, and legal interpretation were less significant as a means of deciding whether Revels could sit than as a bid to shape the future meaning of the constitutional past. 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, they insisted on framing their victory as a matter of broad principles about a transition in constitutional history.

The Republicans did not succeed in establishing that broader point, or at least not in a way that prevailed for very long. Reconstruction ended, and both the Supreme Court and the other federal branches came to articulate views downplaying the degree to which the 1860s had seen a rupture in constitutional history.[196] But although the Republicans of 1870 failed to write a lasting chapter of constitutional history, they were not wrong to believe that making a major constitutional decision part of American historical consciousness could help establish their constitutional vision more generally. On that point, they shared common ground with the Democrats: both sides in the Revels debate understood that history lay ahead of them as well as behind. Their views of the past partly shaped their views of how to settle the Revels issue, but they also knew that future decisionmakers would be influenced by the history they would confront. The disappearance of the Revels debate from the shared memory of American constitutional interpreters was thus an important victory for the Democrats, easing 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 they tracked the views of the Republicans who wrote and ratified them.[197]

Recovering the Revels debate for constitutional discourse changes the raw materials of known 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 the *Civil Rights Cases* were wrongly decided in 1883 or that Congress should today be able to reach private action through its Section Five enforcement powers. Knowledge of the Revels debate does, however, challenge the present

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[196] *See* The Civil Rights Cases, 109 U.S. 3 (1883); The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873); PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION 2, 82-94 (1999); WILLIAM NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 193-97 (1988); *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).

[197] *See* BRANDWEIN, *supra* note 196; J.M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1097-98 (2001).

Court's conception of the *Civil Rights Cases* as an authoritative interpreter of constitutional history.[198] As some constitutional lawyers are aware, many post-Civil War Americans—including many in political office—had more expansive views about constitutional revolution or about the Fourteenth Amendment than did the late-nineteenth-century Court.[199] Adding the Revels debate to the stock of images through which constitutional interpreters see their past should throw a particularly incendiary log on that fire. Moreover, 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 a new and 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. Like the *Civil Rights Cases*, the Revels debate is only part of our history. Moreover, the raw materials of the past do not determine the meaning of history for 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 in constitutional history, 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 the political pendulum swung back. After Reconstruction ended, the Democrats' views of more limited change came to dominate constitutional interpretation. And indeed, eighteen years after the *Civil Rights Cases*, even the career of Hiram Revels himself would be made into a symbol of normalization and continuity rather than one of revolutionary change.

Revels did not serve long in the Senate. He returned to Mississippi in 1871, served briefly as Secretary of State,[200] was widely accused of (but heatedly denied) having supported the Democratic Party in the 1875 elections that ended Republican control of Mississippi

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[198] See United States v. Morrison, 529 U.S. 598, 622 (2000) (following the *Civil Rights Cases* and stating that the 1883 Court had special insight into the nature and constitutional meaning of Reconstruction).

[199] *See, e.g.*, Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 105-06 (2000); Michael W. McConnell, *Originalism and the Segregation Decisions*, 81 VA. L. REV. 947 (1995) (arguing that the majority of Congress in the 1870s believed the Fourteenth Amendment to prohibit racial segregation). *But see* Michael J. Klarman, Brown, *Originalism, and Constitutional Theory*, 81 VA. L. REV. 1881 (1995) (criticizing McConnell's view).

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

politics,[201] and spent many of his remaining years as president of Alcorn University, the country's first black land-grant college.[202] Having lived to see both the *Civil Rights Cases* and *Plessy v. Ferguson*,[203] Hiram Revels died in 1901 and was buried in Holly Springs.[204]

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 more stable 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 for 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.[205] This decision was a new departure. Many years earlier, the Senate had explicitly 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 prior to their states' readmission.[206]

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 African-American like Hiram Revels. Indeed, the Senate might have shown continuing concern with transitional justice had it refused to

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[201] *See* REPORT OF THE SELECT COMMITTEE TO INQUIRE INTO THE MISSISSIPPI ELECTION OF 1875, at 1016 (1876); CHRISTIAN RECORDER, Jan. 6, 1876; CHRISTIAN RECORDER, Feb. 24, 1876.

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

[203] 163 U.S. 537 (1896).

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

[205] *See* 47 CONG. REC. 2,948 (1901) (statement of Sen. Chandler, Comm. on Elections and Privileges).

[206] *See* REPORT OF THE COMMITTEE ON THE JUDICIARY, S. REP. NO. 36 (1870), adopted by full Senate as reflected in CONG. GLOBE, 41st Cong., 2d Sess. 1250 (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); REPORT OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS, S. REP. NO.,1820, at 2 (1890) (reaffirming the Reconstruction practice of paying senators only from the date of the readmission of their states, and applying the principle to determine that senators from newly admitted western states should be paid only from the date of the admission of their states).

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's recommended appropriation was reported to the full Senate, the proposal was re-reported in an altered form.[207] Under the amended proposal, Revels would be merely one of many people to receive a retrospective salary adjustment. In addition, the Committee proposed back payments to fifteen white Reconstruction-era senators from southern states who, like Revels, had served partial terms after Congress reauthorized their states to resume sending representatives to the national legislature.[208] Upon Revels's death, all of these former lawmakers were to be paid as if they had served full congressional terms.

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 the southern states senators 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.[209] 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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[207] *See* 47 CONG. REC. 3189 (1901) (statement of Sen. Chandler).

[208] *See* 47 CONG. REC. 3189 (1901) (statement of Sen. Chandler); Proposed Amendment by Sen. Chandler to H.R. Res.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.

[209] *See* BLIGHT, *supra* note 19, at 351-53.

APPENDIX

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