Introducing Robert Smalls

Peggy Cooper

Recommended Citation
Available at: https://ir.lawnet.fordham.edu/flr/vol69/iss5/8

Follow this and additional works at: https://ir.lawnet.fordham.edu/flr

Part of the Law Commons

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
INTRODUCING ROBERT SMALLS

Peggy Cooper Davis*

I. THE FIRST INTRODUCTION

The question that occupies me is this: When citizenship is diminished for a class of citizens, should the Fourteenth Amendment be understood to empower the federal government to take affirmative measures, involving the regulation of private as well as official conduct, to assure that class full civic participation?

I respond (as you may have guessed) to United States v. Morrison1 and its conclusion that Congress exceeded its power when, in a section of the Violence Against Women Act (VAWA), it created a Federal right of action against private, gender-motivated violence. My response, like much of my work,2 is grounded in a claim that the Fourteenth Amendment should be understood as having reconstructed the United States constitution to enact a set of democratic principles consistent with the tenets of antislavery.

The circumstances that led to the Morrison litigation are instructive. Antonio Morrison and James Crawford had an encounter with Christy Brzonkala, a fellow student at Virginia Polytechnic Institute. Brzonkala brought a civil action under VAWA, alleging that:

[thirty] minutes after she met Morrison and Crawford in the dormitory where she resided, the two men pinned her down on a bed and took turns forcibly raping her. . . . Subsequently, Morrison allegedly announced publicly in the dormitory’s dining hall that “I like to get girls drunk and f*** the s*** out of them.”3

Brzonkala also alleged that after the rapes she became depressed and ultimately withdrew from school.4 Her action was dismissed in response to Morrison’s and Crawford’s arguments that Congress could not give her a remedy against their “private” acts.5 In an

---

* John S.R. Shad Professor of Law, New York University. I am grateful to Dr. John A. Davis for his insight and guidance, to Z.V.I. Triger for research support, and to Steven Rechner for administrative support.
1. 120 S. Ct. 1740 (2000).
4. Id. at 12.
5. Morrison, 120 S. Ct. at 1746, 1756-57.
ultimate appeal to the Supreme Court, Brzonkala (and the United
States, which supported Congress' decision to give women in her
situation a right to seek redress under federal law) argued that both
the commerce clause and the Fourteenth Amendment are broad
enough to authorize VAWA's response to private violence that
perpetuates the social subordination of women. A majority of the
Supreme Court disagreed. The Court found violence against women
too tangentially related to interstate commerce to justify VAWA as
an exercise of federal power conferred by the Commerce
Clause. Moreover, it held that "private" violence against women, although
found by Congress to impede our functioning in political, social, and
economic spheres, is neither so tolerated by--nor so entwined with--
state governments to justify VAWA as a means of enforcing the
Fourteenth Amendment.

In its Fourteenth Amendment analysis, the Morrison majority
embraced the niggardly interpretation that it had elaborated in the
years following the repudiation of Reconstruction: It gave new life to
United States v. Harris, in which the justices decided, in 1882, that the
Fourteenth Amendment left Congress without power to forbid
violence that restored and perpetuated the ante-bellum subordination
of African-Americans. And it gave new life to the Civil Rights
Cases, in which the Justices decided, in 1883, that the Fourteenth
Amendment left Congress helpless to forbid discrimination against
African-Americans in the management of public accommodations.

I propose (as you perhaps will not have guessed) that when we
attempt to answer questions like the ones posed by Morrison—
questions about the meaning of citizenship in the United States and
the power of the federal government to keep citizenship robust for all
classes—we ask Robert Smalls. Although Smalls may prove a good
source concerning the reach of federal power to regulate commerce,
my ambition here is only to call your attention to the guidance Smalls
can provide with respect to the Fourteenth Amendment. This
limitation of the scope of my efforts is justified (although not
compelled) by the fact that Smalls had a hand in creating the
Fourteenth Amendment and special knowledge of the wrongs it was
designed to prevent.

6. Id. at 1748-54.
7. Id. at 1754-59.
9. Id. at 637-40; see also United States v. Cruikshank, 92 U.S. 542, 554 (1875)
(holding that the Fourteenth Amendment only prohibits state action and "adds
nothing to the rights of one citizen against another").
10. 109 U.S. 3 (1883).
11. Id. at 8-19.
12. The Commerce Clause and Fourteenth Amendment issues in Morrison are, of
course, related. Each forced the Court to consider the extent to which constitutional
and economic change legitimately limit the autonomy of states. As Justice Souter
Smalls is not a familiar name to constitutional lawyers and scholars in the United States, nor is he a traditional source of insight into the meaning of our Constitution. It is appropriate, therefore, that before I introduce Smalls—and before I explain why he is able to shed new light on interpretive questions concerning the Fourteenth Amendment—we consider what can be learned by turning to more obvious sources.

We are accustomed to thinking of sources of legal interpretation in four categories: We look first to the text of a law, then to the intentions of those who made it, and next to the history and traditions—the enduring cultural story—of which it is a part. When those sources fail us, we look to reasoning and policy analysis, asking what function the law should serve and what interpretation will permit it to function properly. Let us see what each of these sources reveals about Morrison’s central issue: the reach of Congressional power to keep citizenship robust for a group specially vulnerable to subordination.

A. Text

Section 1 of the Fourteenth Amendment first provides that “persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”13 It then provides that states shall not “abridge the privileges or immunities” of such citizens, deprive them of “life, liberty, or property, without due process of law,” or deny them “equal protection of the laws.”14 Section 5 provides that “Congress shall have power to enforce” the Amendment “by appropriate legislation.”15

Although the Morrison majority looked only to whether VAWA’s authorization of a civil action to redress gender-motivated violence was justifiable as a means of enforcing the Fourteenth Amendment’s various proscriptions against the states,16 the text lends itself equally

pointed out in his rather dazzling dissent, the Fourteenth Amendment, like the Seventeenth, increased federal power in ways that make natural and constitutionally appropriate political results, like VAWA, that would have been politically and constitutionally precluded before its enactment. This is true whether VAWA is regarded as an exercise of the Commerce Clause made more likely because of factors like economic interdependence and direct election of the Senate, or as an exercise of the power vested in Congress by Section 5 of the Fourteenth Amendment. “Amendments that alter the balance of power between the National and State Governments, like the Fourteenth, or that change the way the States are represented within the Federal Government, like the Seventeenth, are not rips in the fabric of the Framers’ Constitution, inviting judicial repairs.” Morrison, 120 S. Ct. at 1722 (Souter, J., dissenting).

14. Id.
15. Id. § 5.
16. Morrison, 120 S. Ct. at 1755. This limitation of the issue is justified with a quote from Morrison, which frames the question with a careful re-ordering of the text:
to an analysis of whether the legislation was justifiable as a means of guaranteeing full citizenship to women. Indeed, it was clear early on that the Supreme Court’s narrow construction of the powers conferred by Section 5 depended on an unjustified neglect of the broad grant of citizenship contained in the first sentence of Section 1. As Justice Harlan said in the dissent in the Civil Rights Cases, Section 5 conferred “upon Congress power, by appropriate legislation, to enforce not merely the provisions containing prohibitions upon the States, but all of the provisions of the amendment, including the provisions, express and implied, in the first clause of the first section of the article granting citizenship.”

Even if we accept Justice Harlan’s logic and regard Congress as empowered both to safeguard citizenship and to enforce Section 1’s proscriptions against the states, it is difficult to argue that the meaning of Sections 1 and 5 of the Fourteenth Amendment is “plain.” To say in Section 1 that dual citizenship, federal and state, is the birthright of those born on United States soil and the entitlement of those naturalized by operation of law is not to say what citizenship entails. To say that Congress shall have power to enforce the provisions of the Fourteenth Amendment is not to clarify what the Amendment assures when it assures citizenship. Citizenship necessarily includes the privileges and immunities guaranteed by Article IV, but those guarantees have always been defined in overly broad and incomplete terms. Section 1’s proscriptions against the states make it clear that citizens and non-citizens alike are to be safe from official action of certain kinds. And those proscriptions are suggestive of the status to which all people were thought to be entitled. But they do not purport or serve to exhaust the meaning of the citizenship that the Amendment guarantees.

B. Intent

The meaning of citizenship and the reach of Congressional power conferred by Section 5 are notoriously resistant to clarification by

“The principles governing an analysis of congressional legislation under §5 are well settled. Section 5 states that Congress may “enforce,” by “appropriate legislation” the constitutional guarantee that no State shall deprive any person of “life, liberty [sic] or property, without due process of law,” nor deny any person “equal protection of the laws.” Id. (citing City of Boerne v. Flores, 521 U.S. 507, 517 (1997)).


19. Although it is outside the scope of this article, I would join the large number of scholars considering the question who argue that the Slaughter-House Cases were wrongly decided, and that Section 1’s reference to privileges and immunities of citizens of the United States should be understood, as Representative Bingham, Section 1’s principal drafter insisted, as a reference to “those rights common to all men, and to protect which, not to confer, all good governments are instructed.” Cong. Globe, 35th Cong. 2d Sess., at 985.
reference to the intent of the Amendment's drafters or of the larger bodies that voted to recommend it for ratification. Even if we were able to answer the doubts of those who counsel against seeking the meaning of law in the intentions of lawmakers, we would find ourselves confused by the outward manifestations of the intent of the joint committee or of Congress as a whole.

Of course, these people were not of one mind.

Moreover, and more importantly, Congressional proponents were ambivalent, and in their ambivalence they settled for vague language that would allow them to own their highest moral ambitions while accepting compromise and inconsistency. As intellectual histories of the antebellum and post-war period have repeatedly shown, the drafters of the Fourteenth Amendment drew from a strong national tradition of commitment to principles of liberty and equality for all men, if not for all persons. These principles, however, mixed uneasily with racialist doubts that African-Americans were worthy and capable of citizenship. Even one as noble and beleaguered in the cause of equal rights as Charles Sumner held these doubts. After his first encounter with slaves, he wrote: "My worst preconception of their appearance and ignorance did not fall as low as their actual stupidity. . . . They appear to be nothing more than moving masses of flesh, unendowed with any thing of intelligence above the brutes." Years later, Sumner predicted that emancipated blacks "would remain in the South as 'a dependent and amiable peasantry.'"

Feelings of this kind made it difficult for Radical Republicans to write the Fourteenth Amendment's charter of freedom in clear, universal terms, for it was difficult to enact genuinely equal citizenship so long as a substantial proportion of the new citizenry was thought of in terms that denied the possibility of equal achievement or worth. Although full and equal citizenship was espoused, its implications were often denied in the give and take of Congressional debate. Invalidation of anti-miscegenation laws was said to be unthinkable. The right to vote was described as outside the reach of equal protection or civil rights guarantees. Class-based voting qualifications were defended.

Of course, Republican racialism was not the only impediment to an unambiguous charter of equal citizenship. To the extent that the Reconstruction's Republicans subdued their racialism and

22. Id. at 235 (footnote omitted).
23. See Davis, supra note 2, at 68-74.
25. See 2 Cong. Rec. 409 (1874) (discussing arguments that the Fourteenth Amendment permits literacy requirements for voting).
universalized principles of liberty and equality, they found their principles in tension with the need to find common ground with Northern Democrats and with the former Confederacy. As a result, clarity that survived the Republicans' reluctance to embrace African-Americans as equal citizens was often lost in language designed to appease.

The important work of my colleague, William Nelson, and of other legal historians has broadened the study of the intentions of the Fourteenth Amendment's proponents to include the state legislatures—and, to a lesser extent, the constitutional conventions of the former Confederate states—that voted its ratification. Here, too, scholars have found representatives of the people manifesting, and denying, inconsistencies born of simultaneous commitment to state and federal power and of ambivalent dedication to liberty and equality in a multi-racial polity.

C. History and Tradition

We might ask which interpretation of Sections 1 and 5 is most consistent with the United States' history and its political and legal traditions. This question, widely accepted as an appropriate interpretive guide to charting the contours of rights and liberties guaranteed by the due process clause, should not be foreign to jurisprudence concerning federal power to safeguard civil rights. It disciplines our work by keeping our gaze fixed on the makers of law rather than on our own wishes or hopes for what the law should be. At the same time, it broadens our conception of lawmakers so that we look beyond individual legislators to imagine a people acting in history and a political and legal system evolving in patterned ways. Here, as in the consideration of the intent of Congress and of the ratifying conventions, we find ambivalence and contradiction—traditions of commitment to liberty and equality alongside traditions of racial (and gender and class) hierarchy, traditions of celebrating an egalitarian charter of United States citizenship alongside traditions of state and regional allegiances and commitment to state autonomy.

D. Right Reasoning and Policy Analysis

We might—finally, and perhaps only when all else fails—break loose from the will of lawmakers and ask what interpretation would be right, just, or most likely to enhance collective well-being. But this is the most controversial and the least conclusive of interpretive approaches to deciding the meaning of Fourteenth Amendment citizenship and liberty. Unless we come to the processes of "right

27. Id. at 60-61.
28. Id. at 60-63.
reasoning” and policy analysis with a strong preexisting commitment, we find ourselves pulled by the same competing arguments about liberty, equality, and federalism that were advanced by the Amendments’ creators and drawn from the nation’s history and traditions.

* * *

This inconclusive review of interpretive sources positions me to introduce Robert Smalls. Let me now say who he is and what I argue when I recommend that you seek his counsel. Smalls, born a slave in 1839, was a prominent member of the South Carolina constitutional convention of 1867. Between 1875 and 1887 he served four terms in the United States House of Representatives, and he served as a public official in South Carolina throughout the balance of the Reconstruction period.

Smalls is but one of a large number of African-American public officials who were active and assertive in the Reconstruction of our nation and of its Constitution. He was not the most distinguished of these public officials; other African-American legislators of his day were better versed in law and political theory and more successful at advancing the tenets of antislavery. Nonetheless, his story is richly instructive. Robert Smalls is a neglected but noble figure in American public life. His story embodies the antislavery vision of democracy in the United States; it reveals a direct connection between antislavery activism and the remaking of the Constitution; and it exposes the rhetorical and physical violence employed to prevent full civic participation on the part of those whom the Reconstruction Amendments were designed to empower as citizens. I introduce Smalls that he might stand as a token of an antislavery conception of citizenship and as evidence that this conception of citizenship is vulnerable to both private and public acts of group-based intimidation.

My broader argument is that the Supreme Court has been ahistorical and unjustifiably narrow in its approach to the close interpretive questions that determine the reach of Congressional power to enforce the Fourteenth Amendment. This is so because the Court has analyzed intent, history and tradition without regard for the intentions of African-American participants in the lobbying and ratification processes that helped to produce the Fourteenth Amendment, the history of African-American involvement in the Civil War and Reconstruction, and the broader egalitarian, federalist, and anti-racist traditions that African-American political figures exemplify. The Court’s neglect of African-American and antislavery history is, I believe, powerfully related to conceptual limitations that are a residue of racialism. I will first describe the pattern of neglect—
II. THE PATTERN OF DERISION AND NEGLECT

One can imagine that for a brief period during and after the Civil War, African-Americans began to be regarded as agents in United States history—subjects rather than objects in the American story. Robert Smalls’ life story suggests as much. When Smalls was twelve or thirteen, his owner (who was also his half-brother) began hiring him out, first as a waiter, then as a lamplighter, then as a laborer on the Charleston harbor, and ultimately as a sailor. At the start of the Civil War, Smalls, then twenty-two, was enlisted by the Confederacy as pilot of the Planter, a 300-ton side-wheel steamship built in 1860 for commercial use and converted in 1861 to serve the Confederate Army as an armed transport and dispatch vessel.\(^\text{29}\) In May of 1862, he gathered a crew of eight African-American sailors, his own family, “several other women and children,” and “several cannon,”\(^\text{30}\) boarded the Planter, and, in the words of a Naval Historical Center description, “boldly steamed her past the Charleston fortifications and turned her over to Federal forces.”\(^\text{31}\) Union naval forces were pleased to acquire “a ship, several cannon, and a man with an intimate knowledge of the Charleston harbor defenses and waters.”\(^\text{32}\) The government awarded Smalls and his crew “half the value of their ship and its cargo”\(^\text{33}\) (approximately fifteen hundred dollars), and Smalls “became a national hero” and a leading spokesperson for the Sea Islands experiment.\(^\text{34}\) Smalls devoted most of the following three years to service in the Union navy, in which he gained a reputation for “courage under fire,” and appears to have earned the rank of captain.\(^\text{35}\) When he was evicted from a Philadelphia streetcar in 1864, protests against Jim Crow treatment of a war hero led to integration of that city’s public transportation system.\(^\text{36}\) When the Planter was decommissioned in 1866, Smalls returned to Beaufort, the South Carolina town in which he was born. He used the money awarded him for the Planter’s capture to open a store and to purchase, at

31. Naval Historical Center, supra note 29.
32. Zuczek, supra note 30, at 201.
33. Naval Historical Center, supra note 29.
34. Zuczek, supra note 30, at 201.
35. Id.
36. Id.
government auction, his birthplace: the house that had been the home of his father and first owner.  

As Smalls was resettling in Beaufort, Congressional Republicans were struggling with a predicament that seemed insoluble. In 1867, every Southern state except Tennessee had refused to ratify the Fourteenth Amendment, and Reconstruction was faltering. So long as the electorate was imagined as consisting only of white males, there seemed no way to win ratification of the Amendment and achieve unification on Republican (and genuinely republican) terms. Charles Sumner was able to imagine—and dared to propose—a different electorate: if African-American men were able to vote, the balance of Southern political power would shift, the Fourteenth Amendment would be ratified, and Reconstruction could proceed. Sumner won Congressional approval of a provision imposing a “requirement of suffrage irrespective of race or color in the election of delegates to the Reconstruction conventions, and as the basis of suffrage for the constitutions of the rebel states.” When this suffrage provision was agreed upon by the Committee, Senator Wilson of Massachusetts remarked: “then and there in that small room, in that caucus, was decided the greatest pending question of the North American continent.” This bitterly resisted provision survived Presidential veto and became law in the last days of the congressional session. As a result, American-born people of African descent constituted twenty-five percent of those electing delegates to the constitutional conventions by which states of the former Confederacy were reconstituted; electoral majorities in the delegate elections of five states, and delegate majorities in one state. Black voter turnout in the late 1860s was overwhelming, approaching ninety percent in many elections. South Carolina, with its population of roughly 300,000 whites (most of whom did not vote in the delegate elections) and 400,000 blacks (most of whom did), elected seventy-one black people to the 1868 constitutional convention. Needless to say, Robert Smalls was one of them. He joined 260 African-American convention delegates who voted to ratify the Fourteenth Amendment.

This assertion of African-American political power—symbolized here by Robert Smalls, but enacted in the lives of thousands of blacks

37. Id. at 202.
39. Id. at 332.
40. Id. (footnote omitted).
42. Id. at 134.
43. Foner, Reconstruction, supra note 24, at 314.
throughout the former Confederacy—evoked a barrage of derisive invective that subsided over the years to quiet disdain before settling as a simple denial of the actions, intentions, and principles of African-American political figures in the Reconstruction era.

Disgruntled racialists described delegates to constitutional conventions in the former Confederacy as "'baboons, monkeys, mules,' or 'ragamuffins and jailbirds.' The South Carolina convention, according to a local newspaper, was the 'maddest, most infamous revolution in history.'"45 A Northern journalist described the South Carolina legislature as a "mass" permeated with unimaginable "ignorance and vice." Immediately after Reconstruction, African-American legislators were omitted from the Georgia legislative manual on the ground that "[i]t would be absurd . . . to record 'the lives of men who were but yesterday our slaves, and whose past careers, probably, embraced such menial occupations as boot-blacking, shaving, table-waiting, and the like."46

For racialist white citizens, the ideal of universal—now more fully comprehended as multiracial—civil freedom paled. Southern resentment deepened, and Northern sentiment for compromise with the former rebels grew. The Democratic Party consistently and vocally resisted Reconstruction, counseling "magnanimity and generosity to a fallen foe."47 In 1872, white Republicans in substantial numbers joined Democrats to support Horace Greeley's campaign for "reconciliation and purification."48 For the next four years, Greeley, a Radical Republican turned Democrat and editor of the New York Sun, made "No Negro domination!" a constant cry of the paper.49

These sentiments were deliberately and effectively advanced well beyond the 1870s. Consider, if you will, Birth of a Nation. This 1915 film is remembered as director D.W. Griffith's masterpiece and as a triumphant advance in cinematic art. But, it is just as much the triumph of Thomas Dixon, Jr., who wrote the screenplay and The Klansman, the book on which Birth of a Nation was based. Dixon's work was a fervent and effective expression of southern whites' opposition to what they perceived as "Negro domination." His story is best told in John Hope Franklin's powerful and carefully researched essay, The Birth of a Nation: Propaganda as History.50

Dixon was born in 1864. At the age of eight, his uncle took him to observe a session of the South Carolina legislature. His impression of

48. Id. at 97.
49. Id. at 101.
“ninety-four Negroes, seven native scalawags and twenty-three white men” deliberating in the state house seems to have had “a profound influence on his future career,” much of which was driven by a desire to “set the record straight” about Reconstruction.

It is not known whether Dixon encountered Robert Smalls on that day, but it is possible: Smalls served in the South Carolina General Assembly between 1868 and 1875.

Dixon went on to be a “superior student and leading debater” at Wake Forest College. He also briefly attended Johns Hopkins, and while he was there he met and befriended Woodrow Wilson. Dixon tested his talents as an actor, lawyer, clergymen, essayist, and lecturer before turning to the work for which he was to become famous: a three volume series, *The Leopard's Spots: A Romance of the White Man's Burden, The Clansman: An Historical Romance of the Ku Klux Klan*, and *The Traitor: A Story of the Rise and Fall of the Invisible Empire*. The *Clansman* was enormously successful in the South, both as a novel and as a play, and Dixon was moved to expand his audience by use of the cinema.

Griffith thought *The Clansman* an insufficiently grandiose title for the film that resulted, and gave it the title *The Birth of a Nation*. This engrossing depiction of black lechery, ignorance, and vindictiveness overcome by a Klan sworn to end the humiliation and vice of Reconstruction met with substantial protests, but Dixon had a plan.

He first turned to his friend, now President, Woodrow Wilson. Wilson, who is remembered for having destroyed much of the black middle class in Washington, D.C. by firing every non-menial African-American civil servant, was happy to return a favor to an old friend by screening *Birth of a Nation* at the White House. Wilson’s response to the film: “It’s like writing history with lightning. And my only regret is that it is all so terribly true.”

Dixon then arranged a meeting with Chief Justice Edward White to arrange for the film to be shown to members of the United States Supreme Court. The Chief Justice was resistant until he learned that the film was about the Klan. At hearing this news, he “leaned forward in his chair and said, ‘I was a member of the Klan, sir.’” The screening was held at the ballroom in Washington’s Raleigh Hotel with an audience that included not only members of the Supreme

51. Id. at 11 (alterations omitted).
52. See id.
53. Zuczek, supra note 30, at 203.
54. Franklin, supra note 50, at 11.
55. Id.
56. Id. at 11-14.
57. Id. at 12-14.
58. Id. at 14.
59. Id. at 16.
60. Id. at 17.
Court, but also members of Congress. Persisting opposition to the film was met with the report that the President, members of the Supreme Court, and members of Congress "had seen the film and liked it. When this was confirmed by a call to the White House, the censors in New York withdrew their objection and the film opened" for a forty-seven week run at the Liberty Theatre.\(^1\)

One critic described an "element of excitement that swept a sophisticated audience like a prairie fire in a high wind."\(^2\) Dixon was gratified. As he wrote to Wilson's secretary during the film's New York run, "[t]he real purpose back of my film was to revolutionize Northern sentiments by a presentation of history that would transform every man in my audience into a good Democrat! ... Every man who comes out of one of our theatres is a Southern partisan for life."\(^3\)

Later, he wrote to Wilson, "[t]his play is transforming the entire population of the North and West into sympathetic Southern voters. There will never be an issue of your segregation policy."\(^4\)

*Birth of a Nation* helped to set a tone that permeated the culture. Franklin concludes his account of *Birth of a Nation* as propaganda by observing its uncanny similarity to *The Tragic Era*, a 1929 book by journalist-historian Claude Bowers that stood for more than a generation as the most widely read account of Reconstruction.\(^5\)

A 1924 elementary school text commissioned by the American Legion taught that during Reconstruction "nobody knew what to do with the 4 million 'ignorant human beings' who had been suddenly emancipated."\(^6\)

As late as the 1960s,

Alabama fourth-graders, whether white or black, learned that under "terrible carpetbag rule" during Reconstruction, freed slaves were so ignorant that they bought colored sticks from mercenary Northern carpetbaggers in the belief that "they could own the land where they put those sticks." They also learned that "loyal white men," trying "to protect their families," formed the Ku Klux Klan "to bring back law and order." Never violent, the Klansmen protected Alabamans from "bad lawless things," persuaded the "lawless men who had taken control of the state" to go back North, and persuaded "the Negroes who had been fooled by the... carpetbaggers to get themselves jobs and settle down to make an honest living."\(^7\)

Disdain for the political leaders of Reconstruction was equally apparent in scholarly literature. There is now a consensus among

---

61. *Id.*
62. *Id.*
63. *Id.* at 20.
64. *Id.* at 20-21.
65. *Id.* at 22-23.
67. *Id.* at 61-62.
INTRODUCING ROBERT SMALLS

historians that interpretations of the work and thought of the Reconstruction's political figures were tainted for several decades by the attitudes that are reflected, and so brilliantly advanced, in *Birth of a Nation.* As DuBois argued in 1934, and Foner reaffirmed in 1988, United States historians first told the story of Reconstruction with "prevailing disdain," grounded in a judgment that Radical Reconstruction was a product of Republican opportunism and vindictiveness and that its implementation of multiracial democracy was folly in the face of "incompetence by black office holders." As DuBois established in detail, generations of students and scholars were taught to view Reconstruction as a frenzy of misrule and corruption. A college history text used in the 1930s reported, "[I]n the exhausted [Southern] states already amply 'punished' by the desolation of war, the rule of the Negro and his unscrupulous carpetbagger and scalawag patrons, was an orgy of extravagance, fraud and disgusting incompetency." Reviewing the legacy of the historians James Ford Rhodes, John W. Burgess, William A. Dunning, and their students, DuBois confirmed the conclusion of Will Herberg, a young labor leader in the 1920s and 1930s:

The great traditions of... Reconstruction are shamelessly repudiated by the official heirs of Stevens and Sumner.... [H]ardly a single book has appeared consistently championing or sympathetically interpreting the great ideals of the crusade against slavery, whereas scores and hundreds have dropped from the presses in... measureless abuse of the Radical figures of Reconstruction. The Reconstruction period as... the logical culmination of decades of previous development, has borne the brunt of the reaction.

Negative interpretations of Reconstruction had, as Foner puts it, "remarkable longevity and [a] powerful hold on the popular imagination." A well-received book of the late 1950s that served as a text in college history courses throughout the country reinforced the understanding of Reconstruction as a process by which narrow political motivation led the Republican Party, acting with "hatred of the white South," "to give the Negro more rights than he possibly could exercise with profit to his advancement," and establish "carpetbag governments built upon Negro suffrage." This influential work concludes that abandonment of the tenets of Radical

70. Foner, Freedom's Lawmakers, *supra* note 46, at xii.
72. *Id.* at 717.
73. Foner, Reconstruction, *supra* note 24, at xxi.
75. *Id.* at 91.
76. *Id.*
Reconstruction facilitated a healing process that was necessary and noble, albeit grounded in acceptance of a "credo" of white superiority which the author justified, saying, in the final paragraph of a chapter titled "The Negro Problem Always Ye Have with You,"[77] "[o]nce a people admits... that a major problem is basically insoluble they have taken the first step in learning how to live with it."[78]

Despite the deep appeal of the interpretative work begun by Rhodes, Burgess, and Dunning, in the years following publication of Black Reconstruction historians began a process of research and rethinking by which the derisive view of Reconstruction was "completely rewritten."[79] As Foner reports:

Today, not only has the history of the era been completely rewritten, but most scholars view Reconstruction as a laudable, though flawed, effort to create a functioning interracial democracy for the first time in American history, and view Reconstruction's overthrow as a tragedy that powerfully affected the subsequent course of American development.[80]

But Reconstruction's political figures have not been made a positive part of popular political consciousness; they are far less often derided; rather they are neglected or denied. White Radical Republicans are regarded, if at all, as misguided utopians; black political figures of the Reconstruction era are forgotten. Supreme Court jurisprudence tracks the popular trend. There is nothing of antislavery ideology or Reconstruction history even in judicial opinions suggesting that the Civil Rights Cases should be overruled. The briefs and opinions in Morrison were written as though Reconstruction had not happened.

Let us consider a sample of what might be gained if we were to overcome our amnesia about the history and traditions of antislavery and Reconstruction and the intentions of those who supported, drafted, referred, and ratified the Reconstruction Amendments.

III. THE SECOND INTRODUCTION

In 1864—long before Sumner's enfranchisement proposal made the idea of black citizenship concrete—Robert Smalls was part of an interracial delegation that surprised the Republican National Convention by appearing under the flag of South Carolina.[81] The delegation was not seated, but it made its presence felt, presaging the short-lived era of full African-American participation in Southern politics that began in 1867.

77. Id. at 294.
78. Id. at 308.
79. Foner, Freedom's Lawmakers, supra note 46, at xii.
80. Id.
INTRODUCING ROBERT SMALLS

When, after the de-commissioning of the Planter, Smalls settled in the house that had been the domain of his master and father, he did so with a sense of ownership and belonging. As he once said, "I was born and raised in South Carolina, and to-day I live on the very spot on which I was born, and I expect to remain here as long as the great God allows me to live, and I will ask no one else to let me remain." For Smalls, making a home again in South Carolina also entailed a deep sense of citizenship and public responsibility. He immediately became central to the political life of his community. As a public servant, "Smalls so dominated local politics that one newspaper called him 'the King of Beaufort County.'" A champion of education, economic redevelopment, the building of railroads, public works, and strong protection of civil rights, Smalls stood apart from corruption, pledging in an 1871 speech to "guide the ship of state... past the rocks, torpedoes and hostile guns of ignorance, immorality and dishonesty" as he had guided the Planter out of the Confederacy.

In 1874, Smalls was elected to the United States House of Representatives. He was therefore able to cast a vote for the Civil Rights Act of 1875, the Act invalidated by the Civil Rights Cases. The logic and constitutional theory that underlay his vote are revealed by the words of African-American Senators and Congressmen who preceded him in the House and by other African-American colleagues with whom he voted in 1875. I quote their words extensively below to demonstrate their relevance to contemporary debates about the scope of federal power conferred by the Fourteenth Amendment.

Some of the black legislators who preceded Smalls in Congress participated in the debates concerning the Act of 1871—popularly known as the Klan Act—which was invalidated in United States v. Harris. This legislation was, of course, designed to address the reign of terror by which former Confederates sought to "discipline" black labor and force African-American voters and office holders out of political life in the South. As one observer reported:

When Congress intervened by its reconstruction measures to defeat the reactionary program of the South, there swept over that section a crime-storm of devastating fury. Lawlessness and violence filled the land, and terror stalked abroad by day, and it burned and

83. Zuczek, supra note 30, at 203.
84. Id. at 204.
85. Foner, Freedom's Lawmakers, supra note 46, at 198.
86. 106 U.S. 629 (1882). Of the sixteen black men who sat in the House or Senate during Reconstruction, four (Benjamin S. Turner of Alabama, Josiah T. Walls of Florida, and Robert B. Elliott and Joseph H. Rainey of South Carolina) were sitting during the debates of the Klan Act. See Foner, Freedom's Lawmakers, supra note 46, at xv, 70, 175, 215, 223.
murdered by night. The Southern states had actually relapsed into barbarism.87

Black congressmen addressed the Klan Act with a special sense of urgency, for they and other African-American office-holders were common targets of reactionary violence in the South. Richard Cain, who, like Smalls, was elected to the House of Representatives from South Carolina, was of African-American and Cherokee descent. Educated at Wilberforce University in Ohio, he served as a minister in Brooklyn, New York before moving to South Carolina in 1865. In South Carolina, he led a large African Methodist Episcopal congregation and was regularly elected to state and local office.88 From the time he stood for election to the South Carolina Constitutional Convention, he and his family “lived in constant fear at all times,” their home guarded day and night by armed men.89 Among the 267 black delegates to the Constitutional Conventions of 1867-69, “at least one tenth . . . became victims of violence during Reconstruction, including seven [who were] murdered.”90

Robert B. Elliott, a black Representative from South Carolina and one of the five lawyers among Reconstruction’s black Congressmen,91 argued that the Klan Act was justified both by the Federal government’s duty to guarantee a republican form of government and its obligation to enforce the provisions of the first Article of the Fourteenth Amendment.92 To demonstrate that the Act was not disproportionate to the threat to liberty and citizenship in the former Confederacy, Elliot documented both “the declared purpose [of Southern Democrats] to defeat the ballot with the bullet and other coercive means, and . . . acts of organized lawlessness perpetrated pursuant to that purpose.”93 Summarizing the Klan’s reign of terror, he minced no words: “Every southern gentleman should blush with shame at this pitiless and cowardly persecution of the negro. . . . It is the custom . . . of Democratic journals to stigmatize the negroes of the South as being in a semi-barbarous condition; but pray tell me, who is the barbarian here?”94

Joseph H. Rainey was a colleague of Elliott in the South Carolina delegation to the Forty-Second Congress, and, like both Elliott and Cain, a veteran of South Carolina’s post-Civil War Constitutional Convention.95 When Rainey spoke to Congressional power to

87. See Du Bois, supra note 38, at 674 (quoting, Milner, Ku Klux Klan 6).
88. Foner, Freedom’s Lawmakers, supra note 46, at 36.
89. Id.
90. Foner, Reconstruction, supra note 24, at 426.
91. In addition to Elliott, John R. Lynch, James T. Rapier, James Milton Turner, and Josiah T. Walls were lawyers. Foner, supra note 46, at 257.
93. Id. at 390.
94. Foner, Freedom’s Lawmakers, supra note 46, at 70.
95. Id. at 265.
prosecute Klan violence, he confessed that he did not view the matter exclusively in terms of competing "interpretation[s] put upon the provisions of the Constitution." As Rainey urged passage of the Klan Act, he reflected a progressive stance typical of African-American political figures of his day—a stance grounded in the assumption that his country was progressing from a time during which racial supremacists compromised democratic values to a time of genuinely egalitarian democracy. As he once said to his colleagues in the House, segregation was "the remnant of the old proslavery spirit, which must eventually give place to more humane and elevating ideas." In this progressive vision, the Amendment Rainey had voted to ratify had to be sufficiently potent to end racial caste subordination:

I stand upon the broad plane of right; I look to the urgent, the importunate demands of the present emergency; and while I am far from advocating any step not in harmony with that sacred law of our land, while I would not violate the lightest word of that chart which has so well guided us in the past, yet I desire that so broad and liberal a construction be placed upon its provisions as will insure protection to the humblest citizen, without regard to rank, creed, or color. Tell me nothing of a constitution which fails to shelter beneath its rightful power the people of a country!

After documenting Klan violence against black and white Republicans of South Carolina, Rainey concluded his speech with a vivid reminder of the dangers he and his colleagues faced as they took their places in the political sphere:

When myself and colleagues shall leave these Halls and turn our footsteps toward our southern homes we know not but that the assassin may await our coming, as marked for his vengeance. Should this befall, we would bid Congress and our country to remember that 'twas—

"Bloody treason flourish'd over us."

Be it as it may, we have resolved to be loyal and firm, "and if we perish, we perish!" I earnestly hope the bill will pass.

The Civil Rights Bill of 1875, like the Klan Act, was designed to address injustices that African-American legislators felt keenly and

---

For other expressions of progressive African-American ideology during the post-war period, see, e.g., 2 Cong. Rec. 416 (1874) (arguing against "obsolete ideas of the past from which progressive men desire to be emancipated"); Id. (describing a need "to remove from the path of [the nation's] upward progress every obstacle which may impede its advance in the future"); Id. at 410 (describing "the great steps of human progress which have marked our national history since slavery tore down the stars and stripes on Fort Sumter").
99. Id.
Drafted to end discrimination in public accommodations, transportation, and schools, the Bill was ultimately limited, after five years of debate, to a guarantee of equal access to inns, public transportation, theaters, and other places of amusement. Regarding the need for the legislation, Richard Cain stated: "[I]nasmuch as we have been raised to the dignity, to the honor, to the position of our manhood, we ask that the laws of this country should guarantee all the rights and immunities belonging to that proud position, to be enforced all over this broad land." James T. Rapier of Alabama made even more vivid black Congressmen's felt need of public accommodations legislation:

Just think that the law recognizes my right upon this floor as a lawmaker, but that there is no law to secure to me any accommodations whatever while traveling here to discharge my duties as a Representative of a large and wealthy constituency. Here I am the peer of the proudest, but on a steamboat or car I am not equal to the most degraded.

In subsequent debates on the subject, he said:

After all, this question resolves itself into this: either I am a man or I am not a man. If I am a man, I am entitled to all the right and privileges and immunities that any other American citizen is entitled to. If I am not a man, then I have no right to vote, I have no right to be here upon this floor . . . .

The time-worn argument that the bill was an improper and futile effort to legislate social equality was met by several black Congressmen, but by none so effectively as John R. Lynch of Mississippi. He first demonstrated the logical flaw of the argument, pointing out that no one would concede that all whites, each of whom enjoyed equal access to public schools and accommodations, were thereby rendered social equals. He reinforced his point in these rather caustic words:

I can . . . assure that portion of my democratic friends on the other side of the House whom I regard as my social inferiors that if at any time I should meet any one of you at a hotel and occupy a seat at the same table with you, or the same seat in a car with you, do not think that I have thereby accepted you as my social equal. Not at all. But if any one should attempt to discriminate against you for no other reason than because you are identified with a particular race or religious sect, I would regard it as an outrage; as a violation of the

100. For descriptions of discrimination experienced or witnessed by Congressmen and reported during the Civil Rights Act debates, see 2 Cong. Rec. 344 (1873).
102. 2 Cong. Rec. 565 (1874).
103. Id. at 4782.
104. 3 Cong. Rec. 1001 (1875).
principles of republicanism; and I would be in favor of protecting you in the exercise and enjoyment of your rights by suitable and appropriate legislation.  

Black Congressmen did not stop at describing the need for equal access to public accommodations and the degradation of its denial; they also spoke directly to the questions of federalism and constitutional power that the 1875 legislation raised. When Rainey addressed the constitutionality of the Bill of 1875, he sounded the same progressive theme that he had sounded in speaking to the constitutionality of the Klan Act. He noted that he viewed the constitutional question not in narrow legalistic terms, but in terms that captured the spirit and goals of the Reconstruction Amendments. "I view it in the light of the Constitution," he said, "in the light of the amendments that have been made to that Constitution; I view it in the light of humanity; I view it in the light of the progress and civilization which are now rapidly marching over this country."  

Alonzo J. Ransier, a free-born clerk and editor of the South Carolina Leader, was elected to the House of Representatives in 1872. He too was a veteran of the South Carolina Constitutional Convention. Speaking to the constitutionality of the 1875 Civil Rights Bill, he described the central goal of the Fourteenth Amendment as guaranteeing practical freedom regardless of race or caste. With no hint of Representative Rainey's reluctance to engage "legalisms," Ransier spoke clearly to Constitutional purpose and Congressional power. He reminded his colleagues that Senator Trumbull, an author of the Fourteenth Amendment, viewed it as an instrument "to secure all persons in the United States practical freedom." He then made clear, quoting Blackstone, what practical freedom was: "[T]hat state in which each individual has the power to pursue his own happiness according to his own views of his interest and the dictates of his conscience, unrestrained, except by equal, just, and impartial laws." After making the incontrovertible observation that black people in the United States did not enjoy practical freedom in 1871, he made his case for Congressional power:  

The fourteenth amendment expressly provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside;" that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," &c.; and each of these amendments concludes with a  

105. Id. at 944.  
106. 2 Cong. Rec. 343-44 (1873).  
108. 2 Cong. Rec. 383 (1874) (emphasis added).  
109. Id.
proviso, that "Congress shall have power to enforce this article by appropriate legislation."

First, sir, there can be no doubt, as we have seen, that these people are citizens of the United States; secondly, that they labor under civil disabilities; thirdly, that they do not enjoy practical freedom, not having "the power to pursue their own happiness," because of these disabilities; and fourthly, that not only has Congress the power, but it is made its solemn duty, in the exercise of its constitutional control over the entire subject, to provide, by "appropriate legislation," such a full and complete remedy as is demanded by the situation.\textsuperscript{1}

Robert Elliott, an eloquent historian of African-American contributions during the American Revolution and the Civil War,\textsuperscript{111} turned his legal training to the task of meeting arguments that the Supreme Court's decision in the \textit{Slaughter-House Cases}\textsuperscript{112} established the unconstitutionality of the proposed legislation. The \textit{Slaughter-House} holding was that the State of Louisiana did not violate the Fourteenth Amendment when it provided for the regulation of butchers in the area of New Orleans. In so holding, the Court precluded the claim of local butchers who argued that a corrupt Reconstruction legislature had ceded a monopoly when it centralized butcheries in the vicinity of New Orleans. The Court's rhetoric indicated that it upheld the state's action because the Fourteenth Amendment did not protect the butchers' right freely to pursue their trade. Elliott took pains to parse the opinions carefully and read them narrowly. He first argued that a simple statement of the question presented established that the court had not denied federal power to prevent race discrimination in access to public accommodations:

the question which was before the court was not whether a State law which denied to a particular portion of her citizens the rights conferred on her citizens generally, on account of race, color, or previous condition of servitude, was unconstitutional because in conflict with the recent amendments, but whether an act which conferred on certain citizens exclusive privileges for police purposes was in conflict therewith, because imposing an involuntary servitude forbidden by the thirteenth amendment, or abridging the rights and immunities of citizens of the United States, or denying the equal protection of the laws, prohibited by the fourteenth amendment.\textsuperscript{113}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{110} \textit{Id.}
\item \textsuperscript{111} See \textit{id.} at 407 (describing African-American participation in the Revolutionary and Civil Wars and arguing that "[t]he negro, true to that patriotism and love of country that have ever characterized and marked his history on this continent, came to the aid of the Government in its efforts to maintain the Constitution. . . . now invokes [the Government] for protection against outrage and unjust prejudices founded upon caste").
\item \textsuperscript{112} 83 U.S. 36 (1872).
\item \textsuperscript{113} 2 Cong. Rec. 408 (1874).
\end{itemize}
\end{footnotesize}
But Elliott’s analysis of *Slaughter-House* went deeper. As a former member of South Carolina’s Reconstruction legislature, he was not in the sway of assumptions that the actions of Reconstruction legislatures were corrupt. Rather, he understood well what legal scholars ignored for one hundred years: The Louisiana slaughterhouse legislation was not an act of favoritism and corruption, but a brilliant intervention that ended the yellow fever epidemics that had plagued more than 1,000 people each year from 1812 to 1861.\footnote{114. Herbert Hovenkamp, *Enterprise and American Law: 1836-1937*, at 119 (1991).} Having established a definition of civil freedom that followed Francis Lieber, Alexander Hamilton, and the French Constitution in admitting the need for individual restraints necessary to the public good,\footnote{115. 2 Cong. Rec. 407 (1874).} he deftly argued that the *Slaughter-House* precedent stood for no more than the uncontroversial proposition that the citizen’s right to work was not absolute, but subject to reasonable regulation in the public interest. Combining his argument that equal access to public accommodations was a federally protected right of citizenship and his limited reading of the Court’s holding, he said:

\[\text{T}he \text{S}upreme \text{C}ourt \text{h}ave… \text{n}owhere \text{w}ritten a \text{w}ord or \text{l}ine \text{w}hich \text{d}enies \text{t}o \text{C}ongress the \text{p}ower to \text{p}revent a \text{d}\text{enial of equality of \text{r}ights, whether those \text{r}ights exist by \text{v}irtue of \text{c}itizenship of the \text{U}nited \text{S}tates or of a \text{S}tate}…. \text{I}f a \text{S}tate \text{d}enies \text{t}o \text{m}e \text{r}ights \text{w}hich are \text{c}ommon to \text{a}ll \text{h}er \text{o}ther \text{c}itizens, \text{s}he \text{v}iolates \text{[the} \text{f}ourteenth] \text{a}mendment, unless \text{she} \text{c}an show, as \text{w}as \text{shown \text{in the} Slaughter-house \text{cases}, \text{t}hat \text{s}he \text{d}oes \text{it \text{in the legitimate exercise of her police power}.}^{116}
\]

John Lynch, also a lawyer, joined in the *Slaughter-House* analysis to point out that the Court had declined to define the privileges and immunities of *federal* citizenship and to reiterate that equality in the enjoyment of civil rights was a federal right protected by the Fourteenth Amendment.\footnote{116. Id. at 409.}

Josiah T. Walls, a lawyer and Representative from Florida, took the task of explicating why the Fourteenth Amendment’s guarantees of citizenship and equal protection properly encompassed safeguards against private discrimination. As Walls put it, even in a world in which States did not abridge the privileges or immunities of citizens, equal protection and full citizenship could be denied as a result of private conduct in the provision of a public accommodation:

\[\text{I}t \text{m}ay \text{b}e \text{s}aid \text{t}hat \text{t}here \text{a}re \text{n}o \text{p}ositive \text{statutes \text{p}rohibiting the \text{e}njoyment of all \text{p}ublic \text{r}ights by all \text{c}itizens whose \text{c}omfort and \text{c}onvenience \text{m}ay \text{b}e \text{lessened \text{by \text{s}uch \text{p}rohibition, and who tender the \text{e}quivalent \text{f}ixed by law or custom for public facilities.}\]

\footnote{117. 3 Cong. Rec. 943-44 (1875).}
But if it is found that this denial is made—and I apprehend it is easy of demonstration—by corporations or individuals who exist at the will of the State, then there is need of additional legislation to enforce the spirit of the provisions of the Federal Constitution as amended.

Men may concede that public sentiment, and not law, is the cause of the discrimination of which we justly complain and the resultant disabilities under which we labor.

If this be so, then such public sentiment needs penal correction, and should be regulated by law. Let it be decidedly understood, by appropriate enactment, that the individual rights, privileges, and immunities of the citizens, irrespective of color, to all facilities afforded by corporations, licensed establishments, common carriers, and institutions supported by the public, are sacred, under the law, and that violations of the same will entail punishment safe and certain.118

Echoing the progressivism he shared with other African-American Congressmen, he added: “We will then hear no more of a public sentiment that feeds upon the remnants of the rotten dogmas of the past, and seeks a vitality in the exercise of a tyranny both cheap and unmanly.”119

These black legislators are not quoted when the meaning of the Fourteenth Amendment is debated. They should be. I do not say this because the vision of African-American lawmakers should unseat more traditional analyses of the meaning of the Fourteenth Amendment. I argue instead that most traditional analyses are, on their own terms, incomplete without consideration of the intent, history, traditions, and sense of right that African-Americans expressed when the Amendment was formed.

This critique would not apply, of course, to the analysis of a strict textualist. If text is all that is considered in Constitutional interpretation, one cannot fault a failure to consider other interpretive sources. Thus, consistency gives the textualist no mandate to consider the words or circumstances of African-American officials involved in the ratification and early interpretation of the Fourteenth Amendment.

But if intent is to be considered, then the intent of ratifying delegates should matter.120 And if intent is to matter, it should matter

118. 2 Cong. Rec. 416 (1874).
119. Id.
120. See generally Chester James Antieau, The Original Understanding of the Fourteenth Amendment (1981) (analyzing evidence concerning the intent of ratifying delegates and legislators). Antieau quotes James Madison for the proposition that the meaning of the Constitution is to be found “in the sense attached to it by the people in their respective State Conventions where it received all the authority it possessed.” Id. at v. He then makes the broader—perhaps excessively broad—claim
not only to those who regard text and intent as all, but also to those who look as well to history and tradition or to right reasoning and policy analysis. This is so because complex questions of constitutional interpretation are rarely answered by resort to a single source; they are resolved by consideration of the combined evidence from textual, contextual, and historical sources. Those who rely on history, tradition or right reasoning have no justification in logic or theory for disregarding what can be reasonably surmised about the intent with which a constitutional provision was composed or approved.

Resort to history and tradition to discover the reach of the Fourteenth Amendment is, as its critics often argue, an uncertain interpretive process that can be deeply affected by the interpreter’s perspectives or biases. It is tremendously important whether Reconstruction is regarded as an unfortunate lapse in an American tradition of local hegemony or a dramatic advance in American progress toward a national vision of egalitarian, multi-cultural democracy. As I have argued above, the former view is inconsistent with a great deal of historical evidence. But even if we concede some merit to the negative view of Reconstruction, it is safe to say that a fair reading of the history and traditions upon which the Fourteenth Amendment was predicated is impossible so long as we ignore the voices of Smalls, Cain, Elliott, Rainey, Rapier, Lynch, Ransier, and Walls.

Should we consider what interpretation of the Fourteenth Amendment yields a “right” result, moral philosophy and political theory suggest that our work must entail analysis of the problems of caste subordination and states rights from as many relevant perspectives as we can imagine. Surely, then, interpretation of the Fourteenth Amendment is unlikely to yield “right” results if it neglects the perspective of the caste whose subordination the Amendment was designed to undo in favor of the perspectives of those who had been superordinate and sought, despite military defeat, to regain a position of dominance.

* * *

As we think of the link between Morrison and the Civil Rights Cases, we should heed Alonzo Ransier’s definition of practical freedom. We should think hard about the similarity between the

---

that “[c]ourts and scholars have overwhelmingly accepted the orthodox rule that it is the intent of those who ratified that controls, not the views of those who proposed.”

Id.

121. See, e.g., John Rawls, A Theory of Justice 11-13 (Rev. ed., 1999) (arguing that what fairness requires can be determined by hypothesizing ignorance as to which of all relevant situations and social positions one might hold and considering what social arrangement one might accept from this position of ignorance).
pervasive effects of anti-black violence on the exercise of African-American citizenship and the pervasive effects of gender-based violence on the exercise of women's citizenship. If we do so, it will come as no surprise that after declaring in debate on the 1875 Civil Rights Act that his race would be satisfied with nothing short of "equal civil rights, such as are enjoyed by other citizens," Ransier added:

And may the day be not far distant when American citizenship in civil and political rights and public privileges shall cover not only those of our sex, but those of the opposite one also; until which time the Government of the United States cannot be said to rest upon the "consent of the governed," or to adequately protect them in "life, liberty, and the pursuit of happiness."\(^{122}\)

To make the words of African-American Congressmen (which I have been unable to find collected in electronic format or in print) more accessible to legal and other scholars, I have published the full text of their often eloquent and sometimes brilliant speeches on the subjects of the Ku Klux Klan Act and the Civil Rights Act of 1875.\(^{123}\) To ask that we remember Robert Smalls is to ask that we remember all of them, as well as the more than 1,400 additional African-American office holders, and the millions of African-American voters, who acted on Reconstruction's promise of a multi-racial republic.

IV. THE THIRD INTRODUCTION

The words of Robert Smalls and his colleagues convey an understanding of the Fourteenth Amendment as more than a narrow protection against particularized forms of state action. Like the first Justice Harlan, these men understood the Amendment as a direct, congressionally enforceable guarantee of full citizenship and civil freedom. And like the Federal legislators who enacted VAWA, they understood that systemic, private violence can diminish citizenship in ways that warrant redress by the national government as its guarantor.

The lives of Robert Smalls and his colleagues illustrate the dangers of reading the Fourteenth Amendment not as a guarantee of full citizenship but as a simple prohibition of explicitly described forms of state action. They show how private, group-based discrimination threatens the freedom and citizenship of members of the targeted group and why it requires a national remedy. For Smalls, as for his colleagues, the citizenship claimed after the Civil War was diminished as a result of often "private" violence and intimidation.

During five terms in Congress, Robert Smalls fought for the interests of his constituents, white and black—he sponsored relief for

\(^{122}\) 2 Cong. Rec. 382 (1874).
\(^{123}\) These speeches can be found at http://www.law.nyu.edu/davisp/neglectedvoices.
his former master’s family, and it is rumored that he and his wife took
the widow of one of Smalls’ former masters into their home. He
spoke passionately and consistently against the dismantlement of
Reconstruction and in favor of the use of Federal troops to put down
Klan violence. Calling attention to the murder of black militiamen
in Hamburg, South Carolina, “Smalls made an impassioned plea in
Congress for the retention of Federal troops in his state. Samuel Cox,
a Democrat from New York, challenged the reliability of Smalls’
account of Klan violence and asked who vouched for Smalls. ‘A
majority of 13,000, [Smalls] replied, to the cheers of fellow
Republicans.’” He observed that South Carolina Democrats were
“securing by fraud and murder what could not be obtained by
honorable means” and predicted that “the blood of innocent
freedmen, shed by Southern Democrats would in the future prove one
of the dark spots upon the fair name of the American Republic.”

Even after Democrats regained political control in most of South
Carolina, Smalls “continued to dominate coastal politics,” and he
continued to be elected to Congress. Democrats therefore began a
campaign to oust him from political life. Faced with violence and
criminal indictment, he was offered $10,000 to vacate his office. His
response: “[G]et the people who elected me to pass resolutions
requiring me to resign, then you can have the office without a penny.
[Otherwise,] I would suffer myself to go to the Penitentiary and rot
before I would resign an office I was elected to.” Although he was
shot at, harassed, convicted of fraud on flimsy evidence, and defeated
at the polls in 1878, Smalls was reelected in 1880 and 1884. He
remained a political figure into the Twentieth Century, serving as
collector of customs at Beaufort until 1913 when he, like so many
other African-Americans, was removed from Federal public service
by Woodrow Wilson.

Reviewing the careers of black officeholders during Reconstruction
and assessing the effects of the Klan’s reign of terror and the North’s
reconciliation with a Jim Crow South, Eric Foner observed more than
100 years after Reconstruction’s demise that African-Americans have
yet to regain the political power we enjoyed in the brief period after

124. Zuczek, supra note 30, at 205.
125. Uya, supra note 81, at 63-65.
126. Zuczek, supra note 30, at 205.
127. Id. at 206.
128. Id.
129. Id.
130. Id.
131. Id.
132. Id. at 207-08.
133. Id. at 209.
the Civil War, when abolition could be imagined as the foundation of a multi-racial democracy.\textsuperscript{134}