JURISPRUDENCE OF RETREAT: THE SUPREME COURT'S (CONTINUED) MISREADING OF RECONSTRUCTION

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Since the end of the Civil War, courts consistently misread and under-utilized the historical sources available when interpreting the scope and meaning of the Reconstruction Amendments. Even as historians updated their understandings of Reconstruction history, the courts lagged, shackling themselves to incorrect historical accounts and outdated precedents.

Entering the twenty-first century, the Supreme Court engaged in a more thorough historical review of Reconstruction, prompting historians to question whether the Court was beginning to finally utilize Reconstruction history correctly. Students for Fair Admissions *answers this question: No. This Note describes the history of the Court's limited review of Reconstruction sources, notes the perceived shift to increased historical review in more recent cases, and outlines* Students for Fair Admissions *and its uniquely extensive, yet still underwhelming, review of history. Finally, and most crucially, this Note points to sources that were easily accessible to and missing from the opinions in* Students for Fair Admissions *to argue that the Court continues to misinterpret the meaning of the Fourteenth Amendment through a flawed approach to Reconstruction history.*

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Introduction

American Reconstruction represented an opportunity for immense change.[1] Following the Civil War, questions ranging from the abolition of slavery to expanded citizenship to a reimagining of race relations allowed the chance for a true second founding. In many ways, Congress took this challenge head on. It enacted three constitutional amendments and a host of legislation abolishing slavery, granting birthright citizenship, ensuring equal protection on the basis of race, codifying the right to vote, and more in under a decade.[2] However, while the legislature proved ready to reimagine the nation's racial and social hierarchy, the judiciary resisted.

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[1] Reconstruction typically refers to the period of American history between the issuance of the Emancipation Proclamation on January 1, 1863, and the withdrawal of the final federal troops stationed in the South in early 1877. *See, e.g.*, Eric Foner, Reconstruction: America's Unfinished Revolution, 1863–1877 (1988) [hereinafter Foner, America's Unfinished Revolution].

[2] *See, e.g.*, U.S. Const. amends. XIII, XIV, XV. These amendments are collectively known as the "Reconstruction Amendments." *See also* Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (reenacted by Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144 (codified as amended at 42 U.S.C. §§ 1981–1982 (1987))) (declaring that all persons born in the United States were citizens with full rights under the Constitution); Act of Mar. 3, 1865, ch. 90, 13 Stat. 507 (establishing the Freedmen's Bureau); Act of July 16, 1866, ch. 200, 14 Stat. 173 (extending the Freedmen's Bureau's operations).

Reconstruction's potential diminished substantially and ultimately crumbled as the Supreme Court "systematically undermined Congress's powers to enforce the Reconstruction Amendments."[3] Where there was backlash for efforts to reimagine the country's racial and social hierarchy, there were federal tools to quell and limit that backlash. However, the Court consistently neutered those tools. The reality of this dismantling of Reconstruction, however, would not be noted accurately by commentators for many decades.

Historians and political scientists in the early twentieth century incorrectly described Reconstruction as a failure from the beginning, plagued by misgovernment and corruption. Led primarily by Columbia Professors John W. Burgess, William A. Dunning, and Dunning's graduate students, the Dunning School's unchallenged view of Reconstruction set historians and the public back decades.[4] As one historian summarized, thanks to the white supremacist narrative of Reconstruction evinced by their scholarship, "the telos of history became the Jim Crow world of the present and the future."[5] The Dunning School would not be seriously critiqued until 1935[6] or refuted en masse until the 1950s.[7] By then, however, the damage was done. While historians adapted, the courts failed to keep up.

During Reconstruction, the Supreme Court took an overly narrow interpretation of Reconstruction legislation, often through revising and misreading history, which inhibited reform.[8] As time passed, the Court continued to rely on these early opinions and the Dunning School to misread history.[9] Even after the Warren Court repudiated some of these

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3 Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. Rev. 1801, 1820 (2010).

4 *See generally, e.g.*, John W. Burgess, Reconstruction and the Constitution 1866–1876 (1902) (criticizing Radical Republican approaches to Reconstruction); William Archibald Dunning, Reconstruction, Political and Economic 1865–1877 (1907) (same); *see also infra* note 63.

5 Bruce E. Baker, What Reconstruction Meant: Historical Memory in the American South 46 (2007). Jim Crow represented the violent, post-Reconstruction period of American history marked by explicit, legalized racial segregation and re-entrenchment of pre-Civil War regimes. *See, e.g.*, Leon F. Litwack, Trouble in Mind: Black Southerners in the Age of Jim Crow (1999) (providing an accounting of the routine violence Black Americans faced in the Jim Crow South); Margaret A. Burnham, By Hands Now Known: Jim Crow's Legal Executioners (2022) (same).

6 *See* W.E.B. Du Bois, Black Reconstruction in America: Toward a History of the Part Which Black Folk Played in the Attempt to Reconstruct Democracy in America, 1860–1880 (Routledge Publishers 2012) (1935) (exploring Black contributions to the social order and undermining the foundations of the Dunning School); *see also infra* note 64.

7 *See infra* notes 69–70 and accompanying text.

8 *See infra* Part I.

9 *See infra* Section II.A.

harmful precedents,[10] this outdated interpretation of Reconstruction history prevails among the judiciary.

Professor Eric Foner, one of the foremost scholars on Reconstruction, summarized the root of the problem: "[J]udges and legal scholars . . . focus too narrowly on congressional debates when they explore the context in which legislation was enacted."[11] That is, when the Court engages in historical review of Reconstruction, it overly narrows its sources, leading to a failure to understand the circumstances within which legislation was debated and enacted.[12] In doing so, the Court fails to properly account for the history of Reconstruction and its role in interpreting the period's amendments.[13]

This problem pervaded through the twentieth century, with even major Warren Court decisions failing to cite many works of Reconstruction history, and almost none outside of case law and Congressional statements, despite the richness of sources available.[14] It continued through the early twenty-first century, with the Court invoking outdated and questionable Reconstruction precedents.[15] However, in these later cases, the Court at least began to turn towards modern Reconstruction scholarship.[16] This shift prompted Professor Foner in 2012 to ask an important question: "Does the recent majority's embrace of Reconstruction portend the repudiation of the jurisprudence of retreat?"[17] Over a decade later, we have an answer: No.

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10 *See infra* notes 71–76 and accompanying text.

11 Eric Foner, *The Supreme Court and the History of Reconstruction—And Vice-Versa*, 112 Colum. L. Rev. 1585, 1593 (2012) [hereinafter Foner, *The Supreme Court*]. For a separate account of the Court's use of history in other contexts, see Andrea Scoseria Katz & Noah A. Rosenblum, *Removal Rehashed*, 136 Harv. L. Rev. F. 404, 427 (2023) ("The history the Court relies on does not always meet scholarly standards of rigor. . . . Scholars cannot put their trust in the Court's historical analyses.").

12 *See* Foner, *The Supreme Court*, *supra* note 11, at 1600 ("When the Supreme Court and other courts do make an effort to look at history, they still consult primarily the legislative record, especially debates reported in the *Congressional Globe*.").

13 *Id.* ("Underlying the Court's continuing retreat remains a cramped and ahistorical understanding of the Fourteenth Amendment and the era of Reconstruction.").

14 *See infra* Section II.B; Foner, *The Supreme Court*, *supra* note 11, at 1600 ("[W]hat is striking is how often the[se decisions] ignore the historical context in which Reconstruction legislation was enacted.").

15 *See infra* notes 85–91 and accompanying text.

16 *See infra* notes 90–91 and accompanying text.

17 Foner, *The Supreme Court*, *supra* note 11, at 1604. This "jurisprudence of retreat" describes a judicial retreat from the ideals of Reconstruction and its emphasis on racial equality. It represents, for a simpler characterization, case law which acts against the ideals and goals of the political and social drivers of Reconstruction. While this retreat existed in multiple social spheres, the jurisprudence of retreat specifically examines court opinions (hence the term "jurisprudence"). As such, understanding the goals of Reconstruction-era actors and the legislation they enacted is crucial to determining whether the Court is currently, or has ever, engaged in a jurisprudence of retreat.

The Court has, in recent years, continued to grapple with Reconstruction history more seriously than in the preceding centuries.[18] This came to a head in *Students for Fair Admissions (SFFA) v. Harvard*,[19] in a debate between Justices Thomas and Sotomayor over whether the Fourteenth Amendment's Equal Protection Clause is colorblind.[20] In some ways, the case offers hope that the Court has embraced a "repudiation of the jurisprudence of retreat," as both opinions discuss Reconstruction history more thoroughly than any earlier Supreme Court case.[21] However, the case ultimately fails to meet expectations on this front. Both non-majority opinions remain overly loyal to precedent and Congressional statements, fail to include meaningful sources within that framework, and refuse to account for other, more valuable kinds of sources.[22] In doing so, the opinions continue the judicial trend of under-inclusiveness in Reconstruction history. While the weight of missed sources suggests that the Fourteenth Amendment is not colorblind, each opinion in *SFFA* fails to properly analyze the Amendment's purpose and meaning.[23]

The extent to which the history of Reconstruction should matter in legal interpretations differs among reasonable minds.[24] This Note does not seek to enter those debates. Rather, this piece takes as given that Reconstruction history matters to the Supreme Court in interpreting the period's amendments, and increasingly so. Given this premise, the Court should get that history right.

The stakes of getting that history correct are hard to overstate. The Reconstruction Amendments directly impact our litigation and understandings of Equal Protection,[25] Due Process,[26] and voting

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18 *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2150–53 (2022).

19 600 U.S. 181 (2023).

20 *See infra* Sections III.B–C.

21 *See infra* Sections III.B–C.

22 *See infra* Part IV.

23 *See infra* Part IV.

24 *See, e.g.*, Akhil R. Amar, The Bill of Rights: Creation and Reconstruction 181 (1998) ("The easy case for (nonmechanical) incorporation, then, rests on the plain meaning of the words of section I [of the Fourteenth Amendment] circa 1866."); Jonathan F. Mitchell, *Textualism and the Fourteenth Amendment*, 69 Stan. L. Rev. 1237, 1246 (2017) ("[T]he Court should, at the very least, invoke the text of these congressional enactments as an *additional* reason to support racial-equality rulings that would otherwise rest exclusively on textually dubious constructions of the Equal Protection Clause.").

25 Aside from affirmative action, discussed further below, the Fourteenth Amendment's Equal Protection Clause has formed the basis for major court opinions regarding a national right to same-sex marriage (Obergefell v. Hodges, 576 U.S. 644 (2015)), school desegregation (Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007)), political recounts (Bush v. Gore, 531 U.S. 98 (2000)), and more. *See Equal Protection Supreme Court Cases*, JUSTIA, https://supreme.justia.com/cases-by-topic/equal-protection [https://perma.cc/39B4-UDQD].

26 The Fourteenth Amendment's Due Process Clause has direct implications over abortion rights (Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022)), criminal

rights.[27] Reconstruction history now plays a direct role in evaluating whether firearms restrictions comport with the Second Amendment.[28] Reconstruction history, in part, most recently determined that individual states could not remove Donald Trump from Presidential ballots in 2024.[29] Moreover, getting Reconstruction history right matters beyond the Supreme Court. Getting history wrong, especially in muddy accounts, directly threatens the legitimacy of the judiciary as a whole[30] and creates serious confusion for lower courts (particularly given their relative lack of assistance from historians and other experts[31]).[32] Thus, Reconstruction and the amendments it produced not only greatly shape our laws, but our lives.

As such, this Essay argues that the Court must engage in deeper, more diverse review of Reconstruction history. In doing so, it ought to

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insanity defense pleas (Kahler v. Kansas, 140 S. Ct. 1021 (2020)), whether and when post-deprivation hearings are required (Culley v. Marshall, 601 U.S. 377 (2024)), and more. *See Due Process Supreme Court Cases*, JUSTIA, https://supreme.justia.com/cases-by-topic/due-process [https://perma.cc/RWY3-JHT9].

27 *See, e.g.*, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021) (holding that laws requiring out-of-precinct ballots to be discarded and restricting who may collect early ballots for other voters did not violate the Fifteenth Amendment, weakening section two of the Voting Rights Act); Shelby Cnty. v. Holder, 570 U.S. 529 (2013) (holding that section four of the Voting Rights Act is unconstitutional); Alexander v. S.C. State Conf. of the NAACP, 144 S. Ct. 1221 (2024) (reversing the district court's finding that South Carolina racially gerrymandered its congressional maps).

28 *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022) ("[T]he government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."); *see also* Adam M. Samaha, *Is* Bruen *Constitutional? On the Methodology that Saved Most Gun Licensing*, 98 N.Y.U. L. Rev. 1928, 1930 (2023) (The *Bruen* test is "supposed to make judges less deferential to regulators and less sensitive to policy preferences, by making them concentrate more on eighteenth- and nineteenth-century sources"); United States v. Rahimi, 144 S. Ct. 1889 (June 21, 2024) (affirming *Bruen*'s reliance on history).

29 Trump v. Anderson, 601 U.S. 100, 108–10, 114–15 (2024).

30 *See, e.g.*, Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 Calif. L. Rev. 1473, 1506 (2007) ("Because the Court's legitimacy is an empirically contingent fact, it can not simply be decreed [through] the illocutionary force of the Court's principles; it must be causally produced through the impact of the Court's words.").

31 As a note, this piece does not seek to definitively answer the hard questions of how lower courts should engage in this complex history. The key tool advocated for here are amicus briefs, which are notably lacking in lower courts. Rather, this piece argues that the Supreme Court is the first step in this re-telling of Reconstruction history, thus offering better starting points for lower courts and hopefully incentivizing litigants in lower courts to engage in Reconstruction history more seriously.

32 *See, e.g.*, United States v. Bullock, 679 F. Supp. 3d 501, 521–22 (S.D. Miss. 2023) ("We need the historical community's guidance and expertise. And to accomplish that, we might need to rearrange the incentive scheme [by] . . . ensuring that historical questions are predicated upon a solid foundation of facts, not abstract legal questions reserved only for judges.").

lean on the tools available to it, often presented through amicus briefs,[33] to both engage in more critical review of statutes, jurisprudence, and congressional speeches, while incorporating alternative sources of history that the Court has historically ignored. Put simply, the Court must use more sources, and it must better scrutinize the sources it uses.

Thus, the novelty of this piece is not in its call for better history. Rather, its novelty lies in its status as the first piece to answer Professor Foner's question ("Does the recent majority's embrace of Reconstruction portend the repudiation of the jurisprudence of retreat?"[34]), to explore the Court's uniquely extensive, yet still dissatisfying, use of Reconstruction history in *SFFA*, and to dissect *SFFA* as an example of how the Court should incorporate Reconstruction history into future cases to avoid future problems of constitutional interpretation.

This Note proceeds in four parts. Part I analyzes the Supreme Court during Reconstruction and its narrow interpretations of the Reconstruction Amendments. Part II outlines the twentieth-century change in Reconstruction historiography, noting the shift away from the Dunning School and courts' failure to keep up. Part III details *SFFA*, describing the case's use of Reconstruction history. Part IV points to sources the Court missed in *SFFA*, both in its own framework and beyond, offering a better way of thinking about later cases involving the Reconstruction Amendments.

I
The Reconstruction Court: (Intentionally?) Revising and Misreading History

From the moment Reconstruction began, the Supreme Court played an active role in dismantling its potential. Aside from its early decisions transferring power from the legislature and judiciary to the Presidency, paving the way for a resurgence in Confederate power,[35] the Court consistently took a narrow approach to the Reconstruction

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[33] Nearly 100 amicus briefs were filed in *SFFA*. *See* Ellena Erskine, Angie Gou & Elisabeth Snyder, *A Guide to the Amicus Briefs in the Affirmative-Action Cases*, SCOTUSblog (Oct. 29, 2022), https://www.scotusblog.com/2022/10/a-guide-to-the-amicus-briefs-in-the-affirmative-action-cases [https://perma.cc/3E2L-JUH4]. Moreover, amicus briefs are now filed in almost every Supreme Court case. *See* Anthony J. Franze & R. Reeves Anderson, *Amicus Curiae at the Supreme Court: Last Term and the Decade in Review*, Nat'l L.J., Nov. 18, 2020, at 4 (noting that 96 percent of all Supreme Court cases from 2010–2019 received at least one amicus brief).

[34] Foner, *The Supreme Court*, *supra* note 11, at 1604.

[35] *See, e.g.*, *Ex Parte* Garland, 71 U.S. (4 Wall.) 333, 336 (1866) (finding a loyalty oath bill unconstitutional, allowing former Confederates to return as lawyers without hindrance); Mississippi v. Johnson, 71 U.S. (6 Wall.) 475, 499 (1867) (holding judicial interference with the President in carrying out Reconstruction unconstitutional); Georgia v. Stanton, 73

Amendments. This Part discusses the Reconstruction-era Court's dismantling of the period's Amendments, outlining the litigation it confronted to hinder racial equality.[36] This Part thus offers an overview of the Court's initial treatment of Reconstruction history, plagued by exclusion, revision, and misreading of historical sources.

One example of the Court's dismantling is particularly noteworthy: the *Slaughter-House Cases*.[37] The question presented within *Slaughter-House* appears on the surface to be one of health protections and freedom of labor, as the case arose out of Louisiana's attempt to confine butchering in New Orleans to a single corporation to reduce disease risks.[38] Opposing such legislation, a group of butchers sued, arguing that the creation of a monopoly would force them into involuntary servitude in violation of the Thirteenth Amendment and deprive them of the privileges and immunities, equal protection, liberty, and property protected by the Fourteenth Amendment.[39] However, legal historians have exposed that the attorneys for each side, and the Court's members, were deeply aware of the case's civil rights ramifications.[40]

In ruling for the majority on whether the state-created monopoly violated the Fourteenth Amendment's Privileges or Immunities Clause, Justice Miller held that the "history of the times" was so recent that reference to historical or legislative materials was unnecessary in determining the Amendment's meaning.[41] Instead, the Court could ascertain this meaning for itself, which it did in an overly narrow manner to preclude the legislation's use as a vehicle for applying the Bill of

U.S. (4 Wall.) 50, 74–77 (1867) (finding courts could not order the President to enforce Reconstruction legislation).

36 Even though Reconstruction ended in 1877, *supra* note 1, the Court continued grappling with the period's law beyond that date. Thus, the "Reconstruction-era Court" as defined in this Note represents the Supreme Courts under Chief Justices Salmon P. Chase and Morrison Waite, from December 15, 1864, to March 23, 1888. *See About the Court*, Supreme Court of the United States, https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/F84T-QSJZ].

37 83 U.S. 36 (1873).

38 *Id.* at 36–37.

39 *Id.* at 43.

40 *See* Randy E. Barnett, *The Three Narratives of the* Slaughter-House Cases, 41 J. Sup. Ct. Hist. 295, 301–04 (2016) (exploring how litigators and Court members understood *Slaughter-House*'s relation to race); *see also id.* at 304 ("On one hand, Democrat and former Confederate [and Plaintiffs' attorney] John Campbell attempted to turn the Fourteenth Amendment against a biracial Republican state legislature. On the other, Democrat [and Defendants' attorney] Jeremiah Black attempted to gut the Republicans' amendment itself.").

41 *Slaughter-House Cases*, 83 U.S. at 67.

Rights to the states (a process known as incorporation).[42] This meaning was so assured to the Court that it cited no material to declare that it was "convinced" that incorporation of the Bill of Rights to the states was not "intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them."[43]

This interpretation of the Fourteenth Amendment proves striking, if not deliberately disingenuous. *Slaughter-House* immediately produced protest from legislators intimately involved with the Amendment's drafting and enactment,[44] who collectively viewed incorporation as "a virtually uncontroversial minimum interpretation of the amendment's purposes."[45] The Court specifically departed from the intent of primary drafter John Bingham, who expressed in several public speeches that the Amendment's purpose was to enforce the Bill of Rights against the states.[46] Moreover, Bingham's intent was not lost on the Court, as Justice Miller traveled and communicated with Bingham during the summer of 1871 while the Congressman spoke publicly about the Amendment's meaning.[47] Despite this intimate understanding of the legislative history and drafter's intent, Justice Miller and the Court codified the opposite in their ruling without any citation.[48]

The outcome of *Slaughter-House* was seismic. In the short term, it prohibited the federal government from protecting Black rights in the former Confederacy by constraining that job to state governments. In the long term, it crippled the Privileges or Immunities Clause, which would not invalidate a state law for over one hundred years.[49] Moreover, its restrictive reading of the Clause remains good law.[50] More relevant to our discussion here, however, is that the Court's reasoning plagued later cases and discussions of the Reconstruction

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[42] *See id.* at 74 (interpreting the Privileges or Immunities Clause as placing only the "privileges and immunities of the citizen of the United States" as distinguished from "the privileges and immunities of the citizen of the State . . . under the protection of the Federal Constitution").

[43] *Id.* at 78.

[44] *See* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 99–100 (1993) (collecting statements).

[45] ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 76 (2019) [hereinafter FONER, SECOND FOUNDING].

[46] *See* Aynes, *supra* note 44, at 71–74 (chronicling Bingham's speeches).

[47] Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the* Slaughter-House Cases, 70 CHI.-KENT L. REV. 627, 662 (1994).

[48] *See supra* notes 41–47. For a further account that this opinion purposefully misconstrued history, see Aynes, *supra* note 47, at 662–63 ("While Miller undoubtedly knew the intent of Congress, he had little respect for Congress.").

[49] *See* Saenz v. Roe, 526 U.S. 489 (1999) (striking down a California statute limiting new residents' benefits for the first year they lived in the state).

[50] *See* McDonald v. City of Chicago, 561 U.S. 742, 758 (2010) ("We therefore decline to disturb the *Slaughter-House* holding.").

Amendments. Immediately thereafter, *Slaughter-House* and its understanding of the Amendments was praised by the Court through Jim Crow, with the Court citing the case to prevent the federal government from prosecuting Klan violence,[51] establish the separate-but-equal doctrine,[52] uphold state convictions without a grand jury and with less than twelve jurors,[53] and allow state juries to be instructed to draw negative inferences from a defendant's invocation of the Fifth Amendment.[54]

Slaughter-House represents merely one example of the kind of work the Reconstruction-era Court attempted. The Court consistently limited the scope of the Reconstruction amendments, taking narrow readings of the monumental legislation without substantive historical citation to prohibit women from entering the legal profession;[55] uphold poll taxes, literacy tests, and other anti-Black voting restrictions;[56] restrict Congress from preventing private racial discrimination (now known as the "state action requirement");[57] allow states to outlaw interracial marriage;[58] and more.[59] All of these holdings, contrary to

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51 United States v. Harris, 106 U.S. 629, 643–44 (1883) (invalidating the Ku Klux Klan Act).

52 Plessy v. Ferguson, 163 U.S. 537, 543 (1896) ("The proper construction of [the Fourteenth] Amendment was first called to the attention of this court in the *Slaughter-House Cases* . . . .").

53 Maxwell v. Dow, 176 U.S. 581, 590 (1900) (ruling the Amendment was not intended to "fetter and degrade the state governments by subjecting them to the control of Congress in the exercise of powers heretofore universally conceded to them"); *id.* at 602 (defending this reading based on the "known condition of affairs" leading to the Amendment); *id.* at 587–91 (praising *Slaughter-House* for its "thoroughness" and "the great ability displayed by the author").

54 Twining v. New Jersey, 211 U.S. 78, 96 (1908) ("There can be no doubt, [given] the decision in the *Slaughter-House Cases* . . . that the civil rights sometimes described as fundamental and inalienable, which, before the War Amendments, were enjoyed by state citizenship and protected by state government, were left untouched by this clause of the 14th Amendment.").

55 Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873).

56 United States v. Reese, 92 U.S. 214 (1876).

57 The Civil Rights Cases, 109 U.S. 3 (1883). This interpretation of the Fourteenth Amendment might have been the most impactful decision of the Court. *See* Pamela Brandwein, Rethinking the Judicial Settlement of Reconstruction 4 (2011) ("[The] state action doctrine decisively closed the door on Reconstruction because it answered a critical question about the power of Congress to protect [B]lack rights. Did Congress have the power to punish private individuals, such as Klansmen, whom states failed to punish? The answer has been a firm and decisive no . . . ."); Foner, Second Founding, *supra* note 45, at 128 ("The Court elevated the 'state action' doctrine into a shibboleth and severely restricted federal protection of rights unless states passed overtly discriminatory laws.").

58 Pace v. Alabama, 106 U.S. 583 (1883).

59 *See, e.g.*, Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875) (refusing women the right to vote); Hurtado v. California, 110 U.S. 516 (1884) (holding that the Fourteenth Amendment did not extend the Fifth Amendment's Indictment Clause to necessitate an indictment by grand juries in state criminal trials); Soon Hing v. Crowley, 113 U.S. 703, 711 (1885) (upholding a maximum-hours law hindering, in practice, almost exclusively Asian-owned businesses);

the text and purpose of the Reconstruction Amendments, limited Congress's power to protect the rights of Americans without meaningful historical citation.

Moreover, this constriction of Congressional power directly conflicted with the Court's approach to Congressional power in other meaningful spheres. As the Court restricted Congress's authority to defend constitutional rights, it greatly expanded federal authority to regulate the national economy.[60] This line of jurisprudence contrasts with the cases above in two meaningful respects. First, directly contrary to the cases dealing with civil rights protections, the Court substantially bulked up the power of the federal government in relation to the states. Second, it expanded this federal power through reliance on the federal government's ability to handle large issues in direct comparison to the states.[61] Though the Court claimed that this power was necessary to uphold economic order, it did not allow the same to protect Black rights. Coupled with its exclusion of the legislative and historical record, like Representative Bingham's statements about the purpose of the Fourteenth Amendment, the Reconstruction-era Court's jurisprudence suggests that it not only interpreted the Reconstruction Amendments narrowly, but did so through substantial, if not deliberate, exclusions, revisions, and misreadings of history.

As such, the Reconstruction-era Court set the bar for evaluation of Reconstruction history as low as possible. Through its exclusion, revision, and misreading of Reconstruction sources, the Court functionally created its own history to prevent racial equality. Thus, it was left to the next era to pick up the mantle and begin the Court's historical review of Reconstruction.

United States v. Cruikshank, 92 U.S. 542, 553–55 (1876) (striking down legislation allowing the federal government to prosecute conspiracies to deprive citizens of constitutional rights); Elk v. Wilkins, 112 U.S. 94 (1884) (denying application of the Fourteenth Amendment's Citizenship Clause to Native people). The Court soon after similarly embraced constriction of other constitutional amendments. *See, e.g.*, Wilkerson v. Utah, 99 U.S. 130 (1879) (restricting the scope of the Eighth Amendment); Presser v. Illinois, 116 U.S. 252 (1886) (narrowing the First Amendment's right to peaceably assemble).

60 *See, e.g.*, Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868) (emphasizing the congressional monopoly over the Commerce Clause); Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869) (finding no limit on the amount Congress could tax banks); The Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871) (granting Congress the authority to print fiat currency during war); Kohl v. United States, 91 U.S. 367 (1876) (strengthening Congress's eminent domain power); Springer v. United States, 102 U.S. 586 (1881) (upholding personal income taxes); Juilliard v. Greenman, 110 U.S. 421 (1884) (extending Congress's power to print fiat currency to peacetime); Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557 (1886) (constricting state power to influence only "indirect" burdens on the Commerce Clause).

61 *E.g.*, *Wabash*, 118 U.S. at 577 (finding that direct burdens on interstate commerce "cannot be safely and wisely remitted to local rules and local regulations").

II
The Supreme Court's Early, Limited Incorporations of History

Following Reconstruction, the Court's use of history began to shift. This Part outlines that transition, beginning with the early twentieth-century invocation of flawed and outdated historical materials. The Part then overviews the Warren Court's introduction of more accurate, contemporary historical materials, while noting the Court's refusal to properly repudiate the harmful precedents previously established. Finally, the Part details the backsliding of Reconstruction jurisprudence towards the end of the twentieth century, contrasted with the shift towards a deeper use of history in the early twenty-first century, setting the stage for *SFFA*.

A. Taking the First Steps: Initial Reliance on the Outdated Dunning School

Entering the twentieth century, the Court began to cite works of history, rather than the "history of the times" relied on by the Reconstruction-era Court, to interpret Reconstruction legislation.[62] While this transition appears like a move in the right direction, these citations fully embraced the Dunning School, which inaccurately described Reconstruction as riddled with misgovernment and corruption and disregarded the influence of Black Americans.[63] Moreover, the Court's reliance on the Dunning School continued even after W.E.B. Du Bois powerfully repudiated the School's scholarship in 1935.[64]

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[62] Foner, *The Supreme Court*, *supra* note 11, at 1593–94.

[63] *See supra* notes 4–7 and accompanying text; *see also* Foner, *The Supreme Court*, *supra* note 11, at 1590; Harold M. Hyman, The Radical Republicans and Reconstruction, 1861–1870, at xxxii (1967) ("The Dunning warning was that the real danger to democracy was not in the loss of [Black] rights but in the lessening of states' rights and in the sinister secret links of big business to corrupt and demagogic public officials."); John David Smith & J. Vincent Lowery, The Dunning School: Historians, Race, and the Meaning of Reconstruction 4 (2013) ("[M]ost mainstream late twentieth-century scholars relegated the Dunning School to the dustbin of American historiography, dismissing its historians' partisan, reactionary, antiblack, prosouthern condemnation of Reconstruction."); Howard N. Rabinowitz, Southern Black Leaders of the Reconstruction Era xi (1982) ("The negative image of Reconstruction still shared by most Americans today is largely the product of work done by Columbia University professor William Archibald Dunning and his students at the beginning of [the 20th] century.").

[64] Du Bois, *supra* note 6, at 635–51; *see also* Smith & Lowery, *supra* note 63, at 34 ("Whereas the Dunning authors portrayed [Black people] during Reconstruction as dupes of northern Republicans and industrialists, Du Bois emphasized the constructive contributions [Black people] and their white allies made to social legislation in state governments across the South.").

In 1945, the *Screws v. United States* dissent invoked the Dunning School to write that it was "familiar history that" most Reconstruction "legislation was born of that vengeful spirit which to no small degree envenomed the Reconstruction era," leading Congress to enact "clearly unconstitutional" laws.[65] The Dunning School had become so pervasive that, even after its first major challenger in Du Bois, the dissent felt no need to cite any authority for this proposition. Less than a decade later, a plurality of the Court wrote that Reconstruction's "conditions . . . were not conducive to the enactment of carefully considered and coherent legislation."[66] Neither case produced protest on these points from any other Justices. Later that term, the Court cited Claude Bowers's *The Tragic Era*, a popular Dunning School work, to disparage the Ku Klux Klan Act of 1871 (the precursor to "the most significant statutory vehicle used to combat modern law enforcement discrimination"[67]) as particularly susceptible "to abuse, and its defects were soon realized when its execution brought about a severe reaction."[68]

Reliance on the Dunning School at this point was not only unnecessary but directly contrary to evolving historical scholarship. Where the Court might have missed Du Bois, there was ready opportunity to cite contemporary historians who had discredited the School.[69] However, the Dunning School's decades-long monopoly over history had become too developed into the non-academic's conscious. Despite the doctrinal advancements, the judiciary lagged behind academia, dooming itself to flawed interpretations of Reconstruction legislation and plaguing future decisions with misleading precedent.[70]

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65 Screws v. United States, 325 U.S. 91, 140–41 (1945) (Roberts, J., dissenting).

66 United States v. Williams, 341 U.S. 70, 74 (1951).

67 Katherine A. Macfarlane, *Accelerated Civil Rights Settlements in the Shadow of Section 1983*, 2018 Utah L. Rev. 639, 667 (2018). The Act "includes what is now codified as 42 U.S.C. § 1983," which combats civil rights violations by state actors by holding them civilly liable. Tiffany R. Wright, Ciarra N. Carr & Jade W.P. Gasek, *Truth and Reconciliation: The Ku Klux Klan Hearings of 1871 and the Genesis of Section 1983*, 126 Dick. L. Rev. 685, 686 (2022); *see also id.* at 704 ("The Ku Klux Klan Hearings remain the U.S. government's closest attempt to achieve a truth and reconciliation commission following the end of chattel slavery.").

68 Collins v. Hardyman, 341 U.S. 651, 657 (1951).

69 *See generally, e.g.*, Howard K. Beale, *On Rewriting Reconstruction History*, 45 Am. Hist. Rev. 807 (1940); John H. Franklin, *Whither Reconstruction Historiography?*, 17 J. Negro Educ. 446 (1948); Francis B. Simkins, *New Viewpoints of Southern Reconstruction*, 5 J.S. Hist. 49 (1939).

70 *See* Foner, *The Supreme Court*, *supra* note 11, at 1595–96 (describing lower court precedents taking similar inadequate approaches in historical review of Reconstruction).

B. A Rocky Shift to Contemporary Historians: The Warren Court

However, this practice began to shift as "[t]he Warren Court ended the practice of citing Bowers and other Dunning School authors."[71] One of the most revered compositions of the Supreme Court given its unprecedented expansion of personal rights,[72] the Warren Court began to cite contemporary books revising the image of Reconstruction.[73] Still, this shift in sources proved incomplete.

While the Warren Court embraced historical scholarship in new ways, it maintained primary reliance on judicial precedent, particularly in questionable rulings from the Reconstruction era. Though the Warren Court did repudiate some harmful decisions,[74] it kept others alive.[75] Moreover, the Court failed to directly confront the Dunning School framings of Reconstruction that underpinned many of its previous rulings. By instead claiming that rights-constricting Reconstruction-era precedent proved consistent with its rights-expanding rulings, the Warren Court "strained believability" and produced an intellectual incoherence in its jurisprudence.[76] As such, while the Warren Court advanced the law at a particular point in time and more effectively

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[71] *Id.* at 1596.

[72] *See, e.g.*, Geoffrey R. Stone & David A. Strauss, Democracy and Equality: The Enduring Constitutional Vision of the Warren Court 3 (2020) ("The Warren Court's decisions—unlike, it should be said, many decisions of the conservative Courts that followed it—were principled, lawful, and consistent with the spirit and fundamental values of our Constitution."); James B. O'Hara, *Introduction*, *in* The Warren Court: A Retrospective 3 (Bernard Schwartz ed., 1996) (celebrating "the almost revolutionary significance of the Supreme Court's role in extending the jurisprudence of civil rights, equal protection, and freedom of speech during [Chief Justice Earl] Warren's sixteen years of leadership"); David Luban, *The Warren Court and the Concept of a Right*, 34 Harv. C.R.-C.L. L. Rev. 7, 37 (1999) ("[T]he Warren Court gave meaning to the notion of a right as the moral and legal embodiment of a value that stands in need of stringent protection. The Court's activism secured the protection . . . ."); Kermit L. Hall, *The Warren Court: Yesterday, Today, and Tomorrow*, 28 Ind. L. Rev. 309, 327 (1995) ("Since the Warren Court, it has been impossible to separate social domination from political domination in matters of constitutional debate. Warren and his colleagues brought a pragmatic focus to American constitutional law . . . .").

[73] *See, e.g.*, United States v. Price, 383 U.S. 787, 801 n.9 (1966) (citing Kenneth Stampp, The Era of Reconstruction 1865–1877 at 136–37 (1965)); Jones v. Alfred H. Meyer Co., 392 U.S. 409 (1968) (citing Stampp, *supra*; Du Bois, *supra* note 6; W.R. Brock, An American Crisis (1963)); *see also* Foner, *The Supreme Court*, *supra* note 11, at 1596 n.61 (noting these citations).

[74] *E.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (overturning Plessy v. Ferguson, 163 U.S. 537 (1896)); Boynton v. Virginia, 364 U.S. 454, 460–64 (1960) (banning racial discrimination in public transportation).

[75] *E.g.*, The Civil Rights Cases, 109 U.S. 3 (1883) (refusing to extend the Thirteenth and Fourteenth Amendments to private parties).

[76] Pamela Brandwein, Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth 175 (1999); *see also id.* at 174–75 ("[T]he [Warren] majority needed to restate earlier rulings (by distinguishing their fact situations) . . . rather than simply declare (as they did) that those holdings were consistent with the[ir] rulings . . . ."); *id.* at 184

utilized Reconstruction history than preceding decades, it failed to establish convincing precedent for later questions around the Reconstruction Amendments.

C. Setting up the Twenty-First Century: Backsliding in the Court's Use of History

Following the Warren Court, Supreme Court rulings on Reconstruction trended back to a more conservative direction, particularly through the rise of a "color-blind" interpretation of the Fourteenth Amendment.[77] This theory of colorblindness posits that the Constitution, particularly the Fourteenth Amendment's Equal Protection Clause, prohibits virtually all differential treatment in legislation on the basis of race. This narrow reading of the Equal Protection Clause, highly disavowed by most historians and legal scholars,[78] allowed courts in the late twentieth century to consistently strike down applications of civil rights laws without overturning the legislation itself.[79]

Entering the turn of the century, this trend prevailed as the Court "continued to employ the Fourteenth Amendment's Equal Protection Clause primarily to support white plaintiffs" claiming "reverse discrimination" from affirmative action programs.[80] In doing so, the Court freed school districts from desegregation orders,[81] paved the way for local districts to dilute Black voting power,[82] and invalidated affirmative action programs designed to increase Black attendance in higher education.[83] As such, the Court continued to retreat from progressive acts through a "cramped and ahistorical understanding of the Fourteenth Amendment and the era of Reconstruction."[84]

Moreover, the Court's approach to Reconstruction-era jurisprudence evinced a similar ignorance of historical review. For

("The majority needed to take on all of it—authorized history and conventions together—in order to build a fully coherent and historically grounded (from 1866–1960) opinion.").

77 *See* Eric Foner, *Blacks and the US Constitution, 1789–1989*, New Left Rev., Sept.–Oct. 1990, at 63, 72–74 (describing the Court's new approach).

78 *See infra* note 131.

79 *See, e.g.*, Foner, *The Supreme Court*, *supra* note 11, at 1598–99 (describing cases).

80 *Id.* at 1599.

81 *See* Bd. of Educ. of Oklahoma City Pub. Sch. v. Dowell, 498 U.S. 237, 249 (1991) (lowering the burden for school districts to be freed from judicial desegregation orders).

82 *See* Reno v. Bossier Par. Sch. Bd., 528 U.S. 320, 340–41 (2000) (holding that the Voting Rights Act "does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose").

83 *See* Gratz v. Bollinger, 539 U.S. 244, 250–51 (2003) (striking down university affirmative action plan).

84 Foner, *The Supreme Court*, *supra* note 11, at 1600.

example, in striking down a provision in the Violence Against Women Act that gave victims of gender-motivated violence the right to sue their attackers, the Court relied largely on Reconstruction-era case law to re-affirm that the Fourteenth Amendment contained a requirement of state, rather than private, action.[85] As particularly notable, the Court treated these Reconstruction-era precedents as binding not only for their age, but because of the supposed insider knowledge of the Justices at the time, which the Court refused to question:

> The force of the doctrine of stare decisis behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time. Every Member had been appointed by President Lincoln, Grant, Hayes, Garfield, or Arthur—and each of their judicial appointees obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment.[86]

This reliance on questionable jurisprudence, marked by a lack of historical analysis,[87] overshadowed meaningful review of even the most basic of sources, where the Congressional record evinced an obvious alternative. "Much of the congressional discussion in 1866 . . . dealt with intimidation of the free people and white Unionists *by private parties*. [Future President] Garfield spoke of the need to ensure that the rights of citizens were 'no longer left to the caprice of mobs.'"[88] Similarly, reliance on these Justices as political insiders proves questionable, as none of them "served in Congress when it debated and approved the constitutional amendments, and few had significant contact with [B]lack Americans."[89] As such, by the end of the twentieth century, the Court's engagement with Reconstruction history had noticeably declined.

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[85] United States v. Morrison, 529 U.S. 598, 621–22 (2000) (first citing United States v. Harris, 106 U.S. 629 (1883); then citing The Civil Rights Cases, 109 U.S. 3 (1883); and then citing United States v. Cruikshank, 92 U.S. 542 (1876)). The impact of the state action requirement has, moreover, had a massive impact in preventing civil rights advancements. *See* Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 152 (2004) (describing the state action requirement as one of "the most formidable barriers to securing racial justice"); *see also supra* note 57.

[86] *Morrison*, 529 U.S. at 622.

[87] *See* Part I.

[88] Foner, Second Founding, *supra* note 45, at 79 (emphasis added) (quoting Cong. Globe, 39th Cong., 1st Sess. App., 67 (1866)) (quote cite corrected from original); *see also* Brandwein, *supra* note 57, at 5 ("In addition, then, to imposing a reading that is not demanded by the text [of the Fourteenth Amendment], the Court appeared to be betraying the original understanding.").

[89] Foner, Second Founding, *supra* note 45, at 129; *see also id.* ("After the death of [former Chief Justice Salmon P.] Chase in 1873, moreover, very few had an organic connection to the prewar antislavery movement and the rights-based constitutionalism it had developed.").

However, within the last two decades, the Court shifted to a deeper exploration of Reconstruction history. Beginning in 2010, the Court started to more thoroughly rely on historical sources to argue that the right to bear arms was considered a fundamental right during Reconstruction in *McDonald v. City of Chicago*.[90] Though the Court maintained that *Slaughter-House* remains good law,[91] leading one to question the quality of the Court's historical analysis, the shift in judicial writing proved stark enough for Professor Foner to ask: "Does the recent majority's embrace of Reconstruction portend the repudiation of the jurisprudence of retreat?"[92]

This shift continued with the Court again engaging with Reconstruction history in *New York State Rifle & Pistol Association v. Bruen* to determine whether a firearm restriction was part of the nation's history and tradition.[93] Although confined to the Second Amendment, these cases represented a serious shift in the use of Reconstruction sources. As such, questions about whether the Court would finally grapple with Reconstruction history head on and paint a more accurate interpretation of the country's second founding continued to grow. Building on these opinions with a unique opportunity to answer such questions, the Court came to its most expansive consideration of Reconstruction history just one year later in *SFFA*.

III
Students for Fair Admissions: The Most Extensive Judicial Review of Reconstruction History to Date

SFFA represented a challenge to the admissions processes of Harvard College and the University of North Carolina as violating the Fourteenth Amendment's Equal Protection Clause by unconstitutionally considering an applicant's race in the selection process.[94] In determining whether the systems violate the clause, a crucial question revolves around the Amendment's meaning and what kinds of treatment prove permissible. Thus, history regarding the Civil War, Reconstruction,

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90 561 U.S. 742, 770–80 (2010); *see also id.* at 826–38 (Thomas, J., concurring).

91 *Id.* at 758.

92 Foner, *The Supreme Court*, *supra* note 11, at 1604.

93 597 U.S. 1, 60–66 (2022) (citing Reconstruction-era case law and legislative history to explore "how postbellum courts viewed the right to carry protected arms in public").

94 *SFFA v. Harvard*, 600 U.S. 181, at 190 (2023). As a private institution, Harvard University is directly governed by Title VI of the Civil Rights Act of 1964, though that provision is viewed as equal to the Fourteenth Amendment's Equal Protection Clause. *Id.* at 198; Gratz v. Bollinger, 539 U.S. 244, 276 n.23 (2003) ("We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI.").

and the Amendment's enactment are crucial to determining the Amendment's relationship to those admissions policies.

Recognizing the centrality of this history, two opinions in *SFFA* collectively present the most in-depth account of Reconstruction history in any Supreme Court case. Moreover, *SFFA* represents the first time the Court engaged in a centralized, large-scale debate about that history, where prior cases kept such debates small or to the periphery, if they existed at all. Building on the Court's recent Second Amendment jurisprudence,[95] Justice Thomas's concurrence and Justice Sotomayor's dissent support the view that Reconstruction history plays an important role in how the twenty-first century Court will continue to interpret and interact with various rights and amendments. As such, exploring whether the Court is adequately engaging with that history is crucial to evaluating whether it needs to change its approach and, if so, how.

This Part provides a brief overview of the majority opinion's limited engagement with Reconstruction history, critiquing that use in both scale and substance. The Part then outlines Justice Thomas's concurrence and Justice Sotomayor's dissent in-depth, re-hashing their debate over Reconstruction history and whether the Fourteenth Amendment should be read as colorblind. In doing so, this Part appreciates the scale of the debate involved and its unprecedented Reconstruction analysis for the Supreme Court, though notes each Justice's continued, ultimately underwhelming, reliance on precedent, statutes, and Congressional speeches. In doing so, it tees up the next Part's critique of *SFFA* and the Court's missed opportunity to fill in the gaps it left in the case's historical review.

A. The Majority Opinion: Ignoring Reconstruction History

Though our focus on *SFFA* lies primarily in the debate between Justice Thomas's concurrence and Justice Sotomayor's dissent, the majority opinion deserves mention. Continuing the Court's trend of shunning an extensive review of Reconstruction history, the majority opinion focused nearly entirely on prior Supreme Court decisions and Congressional statements.[96] Beginning with the Fourteenth Amendment, the majority relied almost solely on Congressional records

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[95] *See supra* notes 90–93 and accompanying text.

[96] The majority's discounting proves particularly notable considering the author's deep-seated interest in history. *See* Adam M. Guren, *Alum Tapped for High Court*, Harv. Crimson (July 15, 2005), https://www.thecrimson.com/article/2005/7/15/alum-tapped-for-high-court-john [https://perma.cc/3S6C-64XL] (quoting the Chief Justice's former roommate as noting that "John loved history, and said he'd be a history professor").

to explore the Amendment's purpose.[97] Recounting statements from Representatives John Bingham, Thaddeus Stevens, Jacob Howard, and "soon-to-be" President James Garfield, the majority declared the Equal Protection Clause as creating simply "equal justice."[98] Then, as quickly as it entered its account of the Fourteenth Amendment, the majority transitioned to the Court's first applications and interpretations of the transformative legislation.

According to the majority, "[a]t first, this Court embraced the transcendent aims of the Equal Protection Clause."[99] Relying on *Strauder v. West Virginia*,[100] *Yick Wo v. Hopkins*,[101] and *Truax v. Raich*,[102] the majority lauded Reconstruction-era Court rulings as those of racial egalitarianism.[103] As previously noted, citations to this judicial history alone prove dangerous. For one, it leans into Professor Foner's fears that court decisions are an inadequate substitute for history.[104] Second, it fails to include precedent, such as *Slaughter-House*, whose existence causes us to question whether the Reconstruction-era Court truly "embraced the transcendent aims"[105] of the Amendment, regardless of how one defines those aims.[106] Finally, and perhaps most importantly, it misses the Reconstruction-era Court's manipulation of history, again furthering an incorrect reading.[107] Nevertheless, the majority charged on, suddenly turning to the Jim Crow Supreme Court,[108] most notably demonstrated through *Plessy v. Ferguson*.[109] Having done so, the majority left Reconstruction in the dust.

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97 *SFFA*, 600 U.S. at 201–02 (collecting representative statements).

98 *Id.* (quoting CONG. GLOBE, 39th Cong., 1st Sess., 2766 (1866) (statement of Sen. Jacob Howard)).

99 *Id.* at 202.

100 100 U.S. 303, 307–09 (1879) (describing the Equal Protection Clause as "declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States").

101 118 U.S. 356, 368–69 (1886).

102 239 U.S. 33, 36 (1915) (applying the Equal Protection Clause to Australian immigrants). Citation to *Truax* proves particularly strange given that the case was decided nearly two decades after *Plessy v. Ferguson*, 163 U.S. 537 (1896), which the majority accurately notes is part of the Jim Crow era. As such, *Truax* will not prove relevant for this Note's purposes, as it is not a Reconstruction-era case.

103 *SFFA*, 600 U.S. at 202.

104 *See supra* notes 11–13 and accompanying text.

105 *SFFA*, 600 U.S. at 202.

106 *See supra* notes 37–60 and accompanying text.

107 *See supra* notes 41–47 and accompanying text.

108 *SFFA*, 600 U.S. at 202–03 ("Despite our early recognition of the broad sweep of the Equal Protection Clause, this Court—alongside the country—quickly failed to live up to the Clause's core commitments.").

109 163 U.S. 537 (1896).

Despite the richness of Reconstruction-era history,[110] the majority devoted no more than two paragraphs to its legacy.[111] Those paragraphs include citations to the Fourteenth Amendment, statements of four Congressional representatives, and three Court cases.[112] As such, the majority continued the Court's tradition of sparsely reviewing Reconstruction history. Despite the extensive debate between Justices Thomas and Sotomayor,[113] the majority avoided these waters. In doing so, much like the Court of the late twentieth century, it encourages continued citation to misleading or incomplete accounts of Reconstruction history in later cases grappling with the period's Amendments.

B. Justice Thomas's Concurrence: Continuing the Justice's Trend of Reviewing Reconstruction

Though his writing does not include a holistic account of Reconstruction, nor do I argue it should,[114] Justice Thomas's concurrence represented a significant shift in the use of history in Reconstruction Amendment cases. Given this, exploration of the concurrence in full is required to understand its depth of review. While the opinion did not entirely depart from the Court's proclivity for case law and Congressional statements, it outlined Reconstruction in a far more detailed and defensible means than perhaps ever before.[115] As such, coupled with Justice Sotomayor's similarly detailed dissent, it raises important questions about the extent to which the Court is shifting its analysis of Reconstruction and the ramifications of such a shift.

Concurrences and dissents, while not the immediate rule of law, play invaluable roles in the evolution of jurisprudence.[116] This is especially true

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110 *See generally* FONER, SECOND FOUNDING, *supra* note 45; IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 235–60; DU BOIS, *supra* note 6; FONER, AMERICA'S UNFINISHED REVOLUTION, *supra* note 1; LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY (1979).

111 By way of comparison, Justice Thomas devoted over twenty pages to Reconstruction history, and Justice Sotomayor added another seven. *SFFA*, 600 U.S. at 232–52, 319–26.

112 *Id.* at 201–02.

113 *See infra* Sections III.B–C.

114 Such an extensive enterprise would prove too burdensome for an individual case and is better left for books written by historians over years of research.

115 This fascination with Reconstruction history is not a first for Justice Thomas, though is still new practice for the Court. *See* United States v. Vaello Madero, 596 U.S. 159, 166–80 (2022) (Thomas, J., concurring).

116 *See* Thomas B. Bennett, Barry Friedman, Andrew D. Martin & Susan N. Smelcer, *Divide & Concur: Separate Opinions & Legal Change*, 103 CORNELL L. REV. 817, 868–69 (2018) ("Dissents speak to the people, and the future, but often at quite a distance. . . . Concurrences, on the other hand, can do their work more quickly. Concurrences point out possible directions for immediate legal movement, encouraging lawyers and litigants to focus their efforts in those directions.").

when, as here, the underlying rationale of the concurrence and dissent match. Though Justice Thomas disagrees with Justices Sotomayor, Kagan, and Jackson about how to read Reconstruction history, all four agree that looking to its history in depth is key to understanding the Equal Protection Clause. As such, these opinions support the notion that thorough review of Reconstruction history matters to understanding the scope of the period's amendments, emphasizing a particular evaluative framework for future cases.

Justice Thomas began his concurrence at the "second founding," marked with the Thirteenth and Fourteenth Amendments.[117] However, this recollection started with a conclusion: that the Constitution is "color-blind."[118] Starting in earnest with the leadup to the 1864 election, Justice Thomas recounted the Republican Party's platform pledge to "amend the Constitution to accomplish the 'utter and complete extirpation' of slavery from 'the soil of the Republic.'"[119] In working to do so, the Republican Congress soon thereafter enacted its first historic piece of legislation: the Thirteenth Amendment.[120]

After describing the Amendment, Justice Thomas moved to more specialized legislation. First, he recalled the Black Codes, a series of laws passed in former Confederate states "impos[ing] all sorts of disabilities" on Black people, such as "limiting their freedom of movement and barring them from following certain occupations, owning firearms, serving on juries, testifying in cases involving whites, or voting."[121] Given the impact of these laws, Congress needed more firepower to defend the goals of the Thirteenth Amendment.

Responding, in part, with the Civil Rights Act of 1866,[122] Justice Thomas quoted its text, then boldly proclaimed the Act's "aim": "All persons born in the United States were equal citizens entitled to the

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117 *SFFA*, 600 U.S. at 231 (Thomas, J., concurring).

118 *Id.* at 231 (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

119 *Id.* at 233–34 (quoting ARTHUR M. SCHLESINGER, JR., HISTORY OF U.S. POLITICAL PARTIES 1860–1910, at 1303 (1973)).

120 *Id.* at 234.

121 *Id.* (quoting FONER, SECOND FOUNDING, *supra* note 45, at 48) (internal quotations omitted). For further exploration of the Black Codes and their history, see FONER, AMERICA'S UNFINISHED REVOLUTION, *supra* note 1, at 198–209.

122 For a related discussion of whether the Fourteenth Amendment was enacted to respond to the Black Codes, compare JED RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW 41 (2005) (arguing that the primary purpose was to outlaw the Black Codes) with Balkin, *supra* note 3, at 1847 (arguing that the "protection" of Black people and "their white allies from private violence [w]as a central and immediate purpose . . . in addition to abolishing the Black Codes") and Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 785 (1985) ("There is, moreover, substantial evidence that Congress adopted the [F]ourteenth [A]mendment in part to provide a constitutional basis for the Freedmen's Bureau Act.").

same rights and subject to the same penalties as white citizens in the categories enumerated."[123] In support of such a characterization, Justice Thomas recounted the law to be overruled, that Black people were not citizens per *Dred Scott v. Sandford*,[124] then outlined Senator Lyman Trumbull's revised proposal, removing language of "African descent" in the Citizenship Clause to reach a broader "all persons" conception.[125] Justice Thomas here relied primarily on case law and Congressional records, pointing to legislative statements to discern the Civil Rights Act's authority[126] and later Congressional sentiment that the Act alone was insufficient to accomplish Reconstruction's goals.[127] Through this, Justice Thomas made clear that this Congress was not finished enacting legislation.

Shifting to the Fourteenth Amendment, Justice Thomas relied heavily on Congressional statements to review revised versions of the proposed Amendment.[128] Concluding this review, Justice Thomas proclaimed, partially relying on his previous concurrences,[129] that the "Amendment was designed to remove any doubts regarding Congress's authority to enact the Civil Rights Act of 1866 and to establish a nondiscrimination rule that could not be repealed by future Congresses."[130] In codifying that purpose through "wholly race-neutral text," according to Justice Thomas, the Amendment kept the Constitution "color-blind."[131] To bolster this framing, Justice

123 *SFFA*, 600 U.S. at 235 (Thomas, J., concurring).

124 60 U.S. 393 (1857).

125 *SFFA*, 600 U.S. at 236 (Thomas, J., concurring).

126 *Id.* at 236–37.

127 *Id.* at 237 ("As debates continued, it became increasingly apparent that safeguarding the 1866 Act" would require a constitutional amendment.).

128 *Id.* at 237–41 (noting, for example, that "Representative John Bingham . . . believed the 'very letter of the Constitution' already required equality," but that a constitutional amendment was needed to secure the enforcement of civil rights (quoting CONG. GLOBE, 39th Cong., 1st Sess., 1034, 1291 (statement of Rep. John Bingham))).

129 *Id.* at 241 (citing United States v. Vaello Madero, 596 U.S. 159, 171 (2022) (Thomas, J., concurring) and Missouri v. Jenkins, 515 U.S. 70, 120–21 (1995) (Thomas, J., concurring)).

130 *Id.*

131 *Id.* at 242 (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). In theme with the limitations of history in Supreme Court decisions, this conclusion proves particularly controversial among historians engaging in substantially more thorough reviews of Reconstruction, most of whom reject the colorblindness theory. *Compare, e.g.*, Foner, *The Supreme Court*, *supra* note 11, at 1605 ("In th[e] paradigm [of the Fourteenth Amendment as colorblind], the idea of 'equal protection' is wrenched out of historical context."), Schnapper, *supra* note 122, at 788 ("Because Congress could not have intended the Civil Rights Act to prohibit the [Freedmen] Bureau's activities, the amendment that constitutionalized the Act should not be construed to invalidate other race conscious programs."), Christopher W. Schmidt, Brown *and the Colorblind Constitution*, 94 CORNELL L. REV. 203, 206 (2008) ("Colorblind principles have little basis in the original meaning of the Fourteenth Amendment."), Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L.

Thomas relied primarily on the Civil Rights Act of 1875[132] and Reconstruction-era Court decisions[133] as supporting this colorblind interpretation.[134]

Seeing his review of history as adequately supporting the colorblind Constitution, Justice Thomas shifted to defense. In contestation of Justice Sotomayor's arguments that the Fourteenth Amendment was meant to be race-conscious, Justice Thomas utilized some broader historical citations, though remained primarily loyal to legislation and Congressional statements.

First, Justice Thomas grappled with the Freedmen's Bureau Act.[135] Establishing the Freedmen's Bureau to issue provisions, clothing, shelter, land, and other benefits to "loyal refugees and freedmen,"[136] the Act has been oft-cited as evidence of Congress's focus on race-consciousness given its overwhelming assistance to Black people, rather than a form

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Rev. 1, 2–3 (1991) (finding the color-blind interpretation as developing after the passage of the Reconstruction amendments and "legitimat[izing], and thereby maintain[ing], the social, economic, and political advantages that whites hold over other Americans"), Cass Sunstein, Radicals in Robes: Why Extreme Right-Wing Courts are Wrong for America 141 (2005) ("[B]y invoking an ideal of color-blindness, fundamentalists are making up a principle, not following the original understanding."), Jack M. Balkin, Living Originalism 223 (2014) ("Although the most radical Republicans in Congress may have favored a general guarantee of racial equality, moderates in the party did not wish to go this far . . . ."), Jed Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427, 462 (1997) ("[A]n anticaste principle captures the Equal Protection Clause's paradigm cases better than does a principle of colorblindness."), Laurence H. Tribe, American Constitutional Law § 16–22, at 1524–26 (2d ed. 1988) ("Viewing the [F]ourteenth [A]mendment as requiring *all* race distinctions to be condemned as instances of inequality derives less from any genuine analysis of what the [F]ourteenth [A]mendment has ever meant than from the most sweeping and activist reading of . . . *Brown v. Board of Education*.") (emphasis in original) (footnotes omitted), *and* HLS News Staff, *Professor Michael Klarman Delivers Address on the Supreme Court and Race at the American Academy of Arts and Sciences*, Harvard Law Today (Mar. 18, 2010), https://hls.harvard.edu/today/professor-michael-klarman-delivers-address-on-the-supreme-court-and-race-at-the-american-academy-of-arts-sciences [https://perma.cc/3G9W-UH96] ("The text of the Fourteenth Amendment doesn't say anything about government color blindness and the original understanding of the Fourteenth Amendment, which these justices ordinarily profess a commitment to abiding by, does not mandate color blindness."), *with* Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 Notre Dame L. Rev. 71, 72–73 (2013) ("[T]he original meaning [of the Fourteenth Amendment] can reasonably be interpreted as prohibiting affirmative action and . . . the originalist Justices are therefore not being inconsistent or hypocritical by supporting a colorblind Constitution.").

132 *SFFA*, 600 U.S. at 243–44 (Thomas, J., concurring).

133 *Id.* at 244–46.

134 Justice Thomas cites to the *Slaughter-House Cases*, 83 U.S. 36 (1873), *Strauder v. West Virginia*, 100 U.S. 303 (1880), *Virginia v. Rives*, 100 U.S. 313 (1880), and *Ex Parte Virginia*, 100 U.S. 339 (1880). While this represents a partial examination of the Reconstruction-era Supreme Court, it misses a number of cases from that era with more problematic outcomes. *See supra* notes Part I.

135 Freedmen's Bureau Act of 1865, ch. 90, 13 Stat. 507, 508 (1865).

136 *SFFA*, 600 U.S. at 247 (Thomas, J., concurring).

of colorblindness.[137] Justice Thomas, however, diverged, arguing that the Act bolsters the colorblind Constitution through race-neutral language and the Bureau's assistance of white refugees alongside newly freed enslaved persons.[138] In doing so, Justice Thomas claimed, the Act maintained an entirely race-neutral application, justifying the theory that Congress intended a colorblind Fourteenth Amendment.[139]

Justice Thomas then moved to deal with facially race-conscious legislation more swiftly. First, he downplayed an 1866 law adopting special rules and procedures regarding payment by Black "servicemen in the Union Army" as targeting a problem requiring a race-conscious solution—Black servicemen's overpayment of agent services due to ignorance about the payment system—that could have survived strict scrutiny.[140] According to Justice Thomas, the legislation thus represented an exception to the rule of colorblindness rather than an example of a rule of race-consciousness. Next, the Justice dismissed an 1867 law providing "funds for 'freedmen or destitute [Black] people' in the District of Columbia" as addressing the "special problem" of "shantytowns" overrepresented by formerly enslaved persons.[141] As such, despite facially targeting race, these two laws represented constitutional examples of "undoing the effects of past discrimination."[142] As these "race-based government measures" sought merely to remedy slavery, therefore, they were "not inconsistent with the colorblind Constitution."[143]

Having dealt with this legislation, Justice Thomas grappled with Justice Sotomayor directly. Responding to her invocation of the Freedmen's Bureau Act quickly with the analysis above, Justice Thomas moved to the Civil Rights Act of 1866. Though the Act required equal rights to all citizens as those "enjoyed by white citizens," Justice Thomas argued that instead of singling out a group for "special treatment," the

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137 *See, e.g.*, *id.* at 324 (Sotomayor, J., dissenting); Sunstein, *supra* note 131, at 139; Schnapper, *supra* note 122, at 754; Louis H. Pollak, *"Mr. Chief Justice, May It Please the Court*," 9 Sw. U. L. Rev. 571, 578 (1977).

138 *SFFA*, 600 U.S. at 247–48 (Thomas, J., concurring) (first citing Rappaport, *supra* note 131, at 98; then citing Paul Moreno, *Racial Classifications and Reconstruction Legislation*, 61 J. So. Hist. 271, 276–77 (1995); and then citing Randy E. Barnett & Evan D. Bernick, The Original Meaning of the Fourteenth Amendment 119 (2021)). This conclusion proves particularly notable as a departure from the Court's prior interpretation of the role of white refugee assistance given through the Freedmen's Bureau. *See infra* note 179 and accompanying text.

139 *SFFA*, 600 U.S. at 247–48 (Thomas, J., concurring).

140 *Id.* at 248 (citing Rappaport, *supra* note 131, at 110).

141 *Id.* (quoting Rappaport, *supra* note 131, at 111–12).

142 *Id.* at 248–49 (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 526 (1989) (Scalia, J., concurring) (quotations and alterations omitted)).

143 *Id.* at 249 (quoting Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 772 n.19 (Thomas, J., concurring) (quotations and alterations omitted)).

Act required states to "level up" in a colorblind manner and grant all citizens the same treatment as those who already possessed "the full rights of citizenship."[144] Next, Justice Thomas refuted the invocation of two state laws: a South Carolina statute placing the burden of proof on the defendant when a Black plaintiff claimed a violation and a Kentucky statute authorizing a county superintendent "to aid '[Black] paupers.'"[145] Rather than proving that the Fourteenth Amendment sought to invoke "differential treatment based on race," Justice Thomas also narrowed these statutes to mere "discrete remedial measures," thus fitting within his theory of colorblindness.[146] Just as early Jim Crow legislation did not embody the meaning of the Fourteenth Amendment, according to Justice Thomas, neither did the small number of laws that "appear to target [Black people] for preferred treatment."[147] As such, the Fourteenth Amendment could only have meant to embody one lens: colorblindness.

All told, therefore, Justice Thomas engages in a kind of substantive historical review long missing from the Court, absent some of his previous opinions. By directly confronting Reconstruction jurisprudence, statutes, and legislative history, Justice Thomas's concurrence sets a solid foundation for historical review. Despite the controversial embrace of constitutional colorblindness[148] and important shortcomings about the limited scope of this historical analysis,[149] Justice Thomas's concurrence deserves some commendation. When coupled with Justice Sotomayor's dissent, the two Justices create the most substantial historical review of Reconstruction within a Supreme Court opinion.

C. Justice Sotomayor's Dissent: The First Serious Counter to Justice Thomas's Review of Reconstruction

In direct contrast to Justice Thomas, Justice Sotomayor[150] declared that the Fourteenth Amendment's guarantee of "racial equality" "can be enforced through race-conscious means in a society that is not, and has never been, colorblind."[151] Beginning her recount of history prior to the Civil War, Justice Sotomayor noted that "'[l]ike all great historical transformations,' emancipation was a movement, 'not a single event'

144 *Id.* at 250.
145 *Id.*
146 *Id.* at 250–51.
147 *Id.* at 251.
148 *See supra* note 131.
149 *See infra* Part IV.
150 Joined by Justices Kagan and Jackson, though only with respect to the UNC case for Justice Jackson, who recused herself from the Harvard decision.
151 *SFFA*, 600 U.S. at 318 (Sotomayor, J., dissenting).

owed to any single individual, institution, or political party."[152] However, and particularly important for this case, "[t]he fight for equal educational opportunity . . . was a key driver."[153] In emphasizing the importance of redefining access to education in the post-Civil War states, Justice Sotomayor quoted extensively from Du Bois and Reconstruction historians, summarizing that "Black people's yearning for freedom of thought, and for a more perfect Union with educational opportunity for all, played a crucial role during the Reconstruction era."[154]

After outlining this background, Justice Sotomayor turned to the need for special legislation, particularly to curb the Black Codes. With Congress responding in part with the Fourteenth Amendment, Justice Sotomayor relied on Congressional statements to find race consciousness at the heart of the legislation.[155] Though Justice Sotomayor followed Justice Thomas's path here, discussing the Amendment's text and rejected alternative drafts, she reached a markedly different conclusion: that "Congress chose its words carefully . . . rejecting 'proposals that would have made the Constitution explicitly color-blind.'"[156]

This disagreement between Justices Thomas and Sotomayor highlights one of the flaws of reliance on mere congressional activity in determining the meaning of legislation as impactful and multi-faceted as the Fourteenth Amendment. Both Justices reviewed the Amendment's text, rejected language, and Congressional statements, yet came to opposite conclusions. One might read this cynically: that the Justices are selectively choosing and reading sources, disingenuously engaging in Reconstruction history only to support their personal views.[157] However, the fairer and more accurate reading is that this particular disagreement among Justices highlights what Professor Foner made

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152 *Id.* at 319–20 (quoting FONER, SECOND FOUNDING, *supra* note 45, at 51–54).

153 *Id.* at 320.

154 *Id.*

155 *Id.* at 322 ("Proponents of the Amendment declared that one of its key goals was to 'protec[t] the [B]lack man in his fundamental rights as a citizen with the same shield which it throws over the white man.'" (quoting CONG. GLOBE, 39th Cong., 1st Sess., 2766 (1866) (statement of Sen. Jacob Howard))). It should be noted that these statements were made by the same Senator cited in the majority opinion in defense of a more race-neutral view of the Amendment, further highlighting the difficulty of merely citing legislators' remarks during a time of such diverse history. *See supra* note 98 and accompanying text.

156 *SFFA*, 600 U.S. at 322 (quoting ANDREW KULL, THE COLOR-BLIND CONSTITUTION 69 (1992)).

157 For this kind of pessimistic account of the Court broadly, see Regina L. Ramsey, *A Country in Crisis: A Review of How the Illegitimate Supreme Court Is Rendering Illegitimate Decisions and Doing Damage That Will Not Soon Be Undone*, 12 J. OF RACE, GENDER, AND ETHNICITY 64, 74 (2023) ("The Supreme Court is illegitimate in its decision-making because the current [conservative] majority does not respect the doctrine of stare decisis and seems more concerned with advancing a political party agenda instead of upholding well-established precedents.").

clear over a decade ago: Courts' readings of Reconstruction history focus too narrowly in their use of sources, particularly given the extensive amount of scholarship available and complexity of issues involved.[158]

Moving beyond the Amendment, Justice Sotomayor defended the race-conscious laws below, rejected by Justice Thomas, as indicative of "fulfill[ing] the Amendment's promise of equality, leaving no doubt that the Equal Protection Clause permits consideration of race."[159] Considering the Freedmen's Bureau Act, Justice Sotomayor emphasized the Bureau's unique focus on Black education.[160] From taking over 100,000 students, "nearly all of them [B]lack," to providing land and funding to several HBCUs (spending over $400,000 on Black colleges and only $3,000 on white colleges), "contemporaries understood that the Freedmen's Bureau Act benefited Black people."[161] Though they assisted non-Black groups, no one would have seen that as anything other than incidental to the Bureau's purpose, according to the dissent. Citing several Congressional statements about its founding Act, both for and against enactment, and President Johnson's veto, Justice Sotomayor argued that the legislation "eschewed the concept of colorblindness."[162] Again, this marks a stark disagreement compared to Justice Thomas. While both justices pointed to the Act's text, Congressional statements, and the practical effects of the Bureau, they came to inverse positions as to whether its founding Act supports or rejects the theory of a colorblind Fourteenth Amendment.

Moving to the Civil Rights Act of 1866, Justice Sotomayor argued that the text of the Act subverts colorblindness. Noting that Section One provided citizens "of every race and color" the same rights as those "enjoyed by white citizens" and that Section Two prohibited "different punishment . . . by reason of . . . color or race, than is prescribed for

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158 Foner, *The Supreme Court*, *supra* note 11, at 1593.

159 *SFFA*, 600 U.S. at 322 (Sotomayor, J., dissenting).

160 *Id.* at 322–23 (citing Foner, Second Founding, *supra* note 45, at 97, 144).

161 *Id.* at 323–24.

162 *Id.* at 324 (citing Cong. Globe, 39th Cong., 1st Sess., 632 (1866) (statement of Rep. Samuel W. Moulton) ("[T]he true object of this bill is the amelioration of the condition of the colored people."); Joint Comm. on Reconstruction, S. Rep. No. 39-112, at 11 (1st Sess. 1866) (reporting that "the Union men of the south" declared "with one voice" that the Bureau's efforts "protect[ed] the colored people"); Cong. Globe, 39th Cong., 1st Sess., 397 (statement of Sen. Waitman T. Willey) (the Act makes "a distinction on account of color between the two races"); Cong. Globe, 39th Cong., 1st Sess., 544 (statement of Rep. Nelson Taylor) (the Act is "legislation for a particular class of the blacks to the exclusion of all whites"); App. to Cong. Globe, 39th Cong., 1st Sess., 69–70 (statement of Rep. Lovell H. Rousseau) ("You raise a spirit of antagonism between the black race and the white race in our country, and the law-abiding will be powerless to control it"); 6 Messages and Papers of the Presidents 1789–1897, at 425 (J. Richardson ed. 1897) (noting how President Johnson vetoed the bill on the basis that it provided benefits "to a particular class of citizens")).

the punishment of white persons," the dissent claimed the text reveals the Act was not colorblind in nature.[163] In utilizing white citizens as a benchmark and overriding President Johnson's veto, which complained that the Act "provid[ed] Black citizens with special treatment," Congress further demonstrated this race-conscious belief.[164]

Concluding with the Civil Rights Act of 1870 and similar legislation, also containing race-conscious language and separate appropriation of federal funds "explicitly and solely for the benefit of racial minorities," Justice Sotomayor argued this Act made clear that race-conscious policies proved legitimate.[165] Given the collective legislation, Congress could not have intended the Fourteenth Amendment to operate under colorblindness.

When read alongside Justice Thomas's concurrence, Justice Sotomayor's dissent and *SFFA* include the most in-depth review of Reconstruction in Supreme Court history. However, this review left significant gaps, as outlined in the next Part.

IV
Misplaced History: Forgotten Sources in *SFFA*

The debate between Justices Thomas and Sotomayor embodies an exploration of Reconstruction history never before seen by the Court. Still, they paint an incomplete picture of Reconstruction.[166] The debate fails to live up to a proper account of history, even in the limited sense that ought to exist in court opinions, in two respects. First, it misses several statutes and Congressional speeches that further illustrate Reconstruction's history. Second, it ignores several different kinds of sources, the inclusion of which substantially alters how history is told. Perhaps most importantly, it ignores sources produced and directly influenced by Black Americans, largely excluded from the federal legislature and judiciary. As such, the discussion embedded within *SFFA*, like its predecessors, refuses to give proper accord to Reconstruction history.

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163 *Id.* at 324–25 (citing Act of Apr. 9, 1866, 14 Stat. 27).

164 *Id.* at 325.

165 *Id.*

166 This mirrors the flaws in modern teachings of Reconstruction history in other contexts. *See generally* Ana Rosado, Gideon Cohn-Postar & Mimi Eisen, *Erasing the Black Freedom Struggle*, Teach Reconstruction Report, https://www.teachreconstructionreport.org/#findings [https://perma.cc/GGH4-DUKD] ("Most Reconstruction state standards emphasize congressional and presidential debates, politics, and policies. Although this is an important part of the history of Reconstruction, the political narrative all too often leads to emphasizing the actions of white people and normalizing a theory of change that moves inexorably from the top down.").

This Part explores that inadequacy in depth, pointing to sources both within the court's own framework (statutes, jurisprudence, and congressional speeches) and those outside of that framework (newspaper articles, actions by politicians in their political role, and actions by non-governmental actors). Moreover, it does so by referencing only sources easily accessible to the Court in *SFFA*: those found in amicus briefs and Professor Foner's *The Second Founding*, already cited by Justices Thomas and Sotomayor.[167]

A. Missing History in the Court's Own Framework: Statutes and Speeches

First, each opinion fails to recognize many valuable sources within its own framework. Several undiscussed race-conscious statutes passed during Reconstruction shed light on whether the Fourteenth Amendment intended to be colorblind. In 1865, Congress "created a bank, the Freedman's Saving and Trust Company, for 'persons heretofore held in slavery in the United States, or their descendants.'"[168] The following year, it "appropriated money for 'the relief of destitute [Black] women and children'"[169] and separately "provided educational opportunities for [B]lack, but not white, soldiers when it provided that the duties of chaplains assigned to [B]lack regiments 'shall include the instruction of the enlisted men in the common English branches of education.'"[170] In 1873, it revised its antebellum prohibition on participation in the international slave trade with specifically "racially exclusive language."[171] During an era where the Reconstruction Congress "repealed almost all laws granting preference to 'whites,'" it revised and affirmed a law granting protection specifically to Black people.[172] Moreover, these programs were not random. As Eric Schnapper has outlined, particularly by comparison to two statutes enacted within two weeks of each other, one authorizing relief specifically for Black people

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167 This Note does not argue that amicus briefs or individual historical materials are infallible. Our understanding of history, as demonstrated by the rise and fall of the Dunning School, is constantly shifting. Rather, this Note argues that the requisite contemporary tools are available for the Court to put forth an adequate account of history, even if it confines itself solely to amicus briefs and books by Pulitzer-Prize winning historians.

168 Balkin, *supra* note 131, at 417 n.20 (quoting Act of Mar. 3, 1865, ch. 92, § 12 Stat. 510, 511).

169 Rubenfeld, *supra* note 131, at 430 (quoting Act of July 28, 1866, ch. 296, 14 Stat. 317).

170 Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 Nw. U. L. Rev. 477, 560 (1998) (quoting An Act to increase and fix the Military Peace Establishment of the United States, ch. 299, § 30, 14 Stat. 332, 337 (1866)).

171 *Id.* at 557 (citing R.S. §§ 5375–76, 5551, 5554 (1873)). I have avoided quoting from this statute directly as it contains racial slurs.

172 *Id.* at 558.

and another giving relief to Black and white people, "Congress was not indiscriminate in the creation of race-conscious programs."[173]

These statutes may not end the debate. Each may represent a remedial measure that fits into the colorblind Constitution, as Justice Thomas argued for previously noted race-conscious legislation.[174] If so, the legislation does not help Justice Sotomayor's claim that Congress meant for the Fourteenth Amendment to eschew colorblindness. Meanwhile, if these statutes do not represent remedial measures, they support Justice Sotomayor's claim while undermining Justice Thomas's framework. However, the Court neglected to cite or discuss any of them, failing to utilize the historical tools at its disposal. Moreover, these acts were not hidden from the Court. Each of the above statutes were cited, either directly or through the authors cited above, in multiple amicus briefs submitted in *SFFA*.[175] As such, there exists little excuse for the Court to avoid discussing these sources, as race-conscious statutes proved crucial for the concurrence and dissent in determining whether the Fourteenth Amendment is colorblind.

Regarding Congressional speeches, many meaningful statements in the Congressional record remain uncited. The number of Congressional speeches during Reconstruction is astounding, and understanding the entirety of the record would prove impossible, even for full-time historians.[176] However, some Congressional statements regarding the Freedmen's Bureau Act are worth mention, particularly given their citation in *Regents of University of California v. Bakke*,[177] the first major affirmative action case in front of the Supreme Court:

> *Although the Freedmen's Bureau legislation provided aid for refugees*, thereby including white persons within some of the relief measures, 14 Stat. 174; see also Act of Mar. 3, 1865, ch. 90, 13 Stat. 507, *the bill was regarded, to the dismay of many Congressmen, as "solely and entirely for the freedmen, and to the exclusion of all other persons* . . . ." Cong. Globe, 39th Cong., 1st Sess., 544 (1866) (remarks of Rep. Taylor). See also *id.*, at 634–35 (remarks of Rep. Ritter); *id.*, at App. 78, 80–81 (remarks of Rep. Chanler). Indeed, the bill was bitterly opposed

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173 Schnapper, *supra* note 122, at 777.

174 *See supra* notes 140–46 and accompanying text.

175 Brief of Constitutional Accountability Center as Amicus Curiae in Support of Respondents at 8, Students for Fair Admissions v. President and Fellows of Harvard Coll., 600 U.S. 181 (2023) (No. 20-1199); Brief of Professors of History and Law as Amici Curiae in Support of Respondents at 18–21, Students for Fair Admissions v. President and Fellows of Harvard Coll., 600 U.S. 181 (2023) (No. 20-1199).

176 *See generally Congressional Globe Debates and Proceedings, 1837–1873*, Libr. of Cong., https://memory.loc.gov/ammem/amlaw/lwcglink.html [https://perma.cc/VG97-TN4S].

177 438 U.S. 265 (1978).

> on the ground that it "undertakes to make [Black people] in some respects . . . superior . . . and gives them favors that the poor white boy in the North cannot get." *Id.*, at 401 (remarks of Sen. McDougall). See also *id.*, at 319 (remarks of Sen. Hendricks); *id.*, at 362 (remarks of Sen. Saulsbury); *id.*, at 397 (remarks of Sen. Willey); *id.*, at 544 (remarks of Rep. Taylor).
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> . . .
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> "The very discrimination it makes between 'destitute and suffering' [Black people], and destitute and suffering white paupers, proceeds upon the distinction that, in the omitted case, civil rights and immunities are already sufficiently protected by the possession of political power, the absence of which in the case provided for necessitates governmental protection." *Id.*, at App. 75 (remarks of Rep. Phelps).[178]

These statements prove notable for two reasons. First, they add substantial context to the views of various legislators regarding the Freedmen's Bureau Act. Nonetheless, only two of the nine statements referenced in *Bakke* were noted in *SFFA*, despite directly supporting Justice Sotomayor's position about the intent of the Fourteenth Amendment's framers.[179] Second, they invoke potential precedent for how the Court has understood this statute, a precedent directly contrary to Justice Thomas's view. Though this discussion in *Bakke* was dicta, it is notable that no justice in *SFFA* discussed whether that dicta should be controlling, persuasive, or inapposite.[180] Thus, though *SFFA* engages in a historical review of Reconstruction on a scale never seen before, it fails to live up to its own goal of telling history through statutes and Congressional records.

B. History Outside the Court's Framework: Social History Sources

Aside from the problems in the Court's citations to statutes and Congressional statements, a more severe deficiency remains: a lack of citation to other kinds of history. Though statutes, Court cases, and Congressional statements are noteworthy aspects of the historical record,

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178 *Id.* at 397 (emphasis added).

179 *SFFA v. Harvard*, 600 U.S. 181, 322 (2023) (Sotomayor, J., dissenting).

180 *See* Marc McAllister, *Dicta Redefined*, 47 WILLAMETTE L. REV. 161, 162 (2011) ("[D]icta can, in practice, range from binding to wholly unpersuasive . . . ."); Pierre N. Leval, *Judging Under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. REV. 1249, 1253 (2006) ("[D]icta often serve extremely valuable purposes. They can help clarify a complicated subject. They can assist future courts to reach sensible, well-reasoned results. They can help lawyers and society to predict the future course of the court's rulings. They can guide future courts to adopt fair and efficient procedures.").

they are only one part. As historians have shifted their understanding of telling history over time, the importance of diversifying sources and focusing on previously underutilized evidence has gained significant headway.[181]

This proves particularly important for Reconstruction, as Black voices were excluded from the former category of sources. Formerly enslaved persons put forward an important vision of how society should change after emancipation. While no Black people were in Congress or on the Supreme Court when the Reconstruction Amendments were enacted or interpreted, their advocacy still meaningfully contributed to the development of the nation during the Civil War and Reconstruction.[182] As such, finding alternative sources to elevate Black voices proves crucial to understanding the purposes of Reconstruction legislation.

The sources available to those studying Reconstruction feel unlimited. From private journals to correspondence to quantitative data, there is too much to recount by any author.[183] Rather, I highlight examples of three kinds of sources included in amicus briefs or Professor Foner's *The Second Founding* that shed light on the meaning of the Fourteenth Amendment: newspaper articles, politicians' communications with constituents, and actions of non-governmental figures.

Moreover, limiting sources included in amicus briefs and well-known materials counters another fear: that introducing social history

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[181] *See* Michael Seidman, *Social History and Antisocial History*, 13 COMMON KNOWLEDGE 40, 40–41 (2007) (Social history's "emphasis on groups and on experience defined as ordinary came as a reaction against prior forms of historiography. The bulk of history writing before the second half of the twentieth century dealt with 'great men' whose greatness was connected primarily to the nation or to public life."); E. J. Hobsbawm, *From Social History to the History of Society*, 100 HIST. STUD. TODAY 20, 24 (1971) ("Social history can never be another specialization like economic or other hyphenated histories because its subject matter cannot be isolated."); Mary Lindemann, *The Sources of Social History*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/international/encyclopedias-almanacs-transcripts-and-maps/sources-social-history [https://perma.cc/9FAF-DWYB] ("[A]lmost no document is without its use for social history.").

[182] *See, e.g.*, Eric Foner, *Black Reconstruction: An Introduction*, 112 S. ATL. Q. 409, 411 (2013) (summarizing how DU BOIS, *supra* note 6, proved that "[r]ather than being 'freed' by Abraham Lincoln or by the Union Army, [Black people] emancipated themselves"); Eric Foner, *Rights and the Constitution in Black Life During the Civil War and Reconstruction*, 74 J. AM. HIST. 863, 872 (1987) (describing "statewide conventions held throughout the South during 1865 and early 1866" largely attended by Black Americans with the "major preoccupations" of "suffrage and equality before the law"); *id.* at 880 ("The political crisis of 1866—which [B]lack complaints against the injustices of Presidential Reconstruction had helped create—had produced the Fourteenth Amendment . . . .").

[183] The scale of the Congressional record, just one kind of Reconstruction source, is already too great to understand in full. *See Congressional Globe Debates and Proceedings*, *supra* note 176.

makes the jobs too unwieldy for courts. While the entire Reconstruction historical record is enormous, courts only need look to the materials litigants are providing to get an adequate picture, particularly as already written about by historians. Moreover, by relying on social history, courts will encourage litigants to bring that history to them more clearly in the future, improving the quality and amount of Reconstruction sources utilized over time. As such, courts need not do history themselves to get history right; experts and litigants are already ready to point it out.

1. Newspaper Articles

Newspaper articles can detail what happened at a particular time, how a specific population responded to events in question, give insight into individual preferences through opinion pieces, and more.[184] Their value to us in understanding Reconstruction proves no different. As Professor Foner has demonstrated, even a few newspaper sources can elucidate our understanding of the motivations behind Reconstruction-era legislation.

"In 1863, when the *National Anti-Slavery Standard* published an article entitled 'Equal Protection Under the Law,' it had to do with the failure of police to protect [Black people] from mob assault during the New York City Draft Riots."[185] Later, during enactment of the Fourteenth Amendment, newspaper articles help discern the views of political antagonists. "Opponents charged that Congress might well feel authorized to use the [Fourteenth] [A]mendment to give '[Black people] political and social equality with the whites.' To accept such a fate by agreeing to ratify, a southern newspaper wrote, would be a form of 'self-degradation.'"[186]

One might express hesitancy at the partisan nature of these examples, a common feature of newspapers during Reconstruction.[187] However, it is this partisanship that makes newspapers particularly

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184 *See generally Why Use Newspapers?*, Ohio State Univ. Libs., https://guides.osu.edu/newspapers/why_use [https://perma.cc/3BPX-B3P7].

185 Foner, Second Founding, *supra* note 45, at 79 (citing *Equal Protection Under the Law*, Nat'l Anti-Slavery Standard, Aug. 29, 1863).

186 *Id.* at 89 (quoting Reconstruction: Voices from America's First Great Struggle for Racial Equality 314 (Brooks D. Simpson ed., 2018)).

187 The names themselves tend to reflect their partisanship, with titles such as "National Anti-Slavery Standard" and "The North Star." *See supra* note 185 and accompanying text; *African American Studies: Newspapers*, Princeton Univ. Libr., https://libguides.princeton.edu/c.php?g=84280&p=544320 [https://perma.cc/3JC2-JYBA]. For broader accounts developing their partisanship, see generally Richard H. Abbott, For Free Press and Equal Rights: Republican Newspapers in the Reconstruction South (John W. Quist ed., 2004); Lorman A. Ratner & Dwight L. Teeter, Jr., Fanatics and Fire-eaters: Newspapers and the Coming of the Civil War (2003).

valuable for determining how everyday Americans perceived the Reconstruction Amendments. Looking to appeal to partisan voter bases and demonize political opponents, newspapers during Reconstruction made their political points upfront and obvious. When a Republican newspaper wrote about equal protection in the context of protecting Black people from mobs and when Democratic newspapers denounced the Fourteenth Amendment as elevating specifically Black rights, they reflected the views of their readerships. Though neither source independently answers whether the Equal Protection Clause is meant to be colorblind,[188] they cast doubt on the proposition that it is by shedding light on significant groups and their views of equal protection as targeted to benefit specifically Black Americans.

While one might be nervous about social history like newspapers overtaking statutes and the Congressional record, this piece does not argue that sources like newspapers should replace traditional markers of history. Rather, social history colors existing materials, providing additional context for history that might otherwise appear ambiguous given reference to traditional sources alone.[189] Moreover, the Court has already set forth potential boundaries for where 19th-century newspapers might be valuable. In *Bruen*, the Court noted that these sources "routinely reported on local judicial matters," giving credence to social history sources as tools of exploration for how lower courts during Reconstruction interpreted Constitutional Amendments and the public's reactions to those interpretations.[190] The Eleventh Circuit also used Reconstruction-era newspapers to their advantage, more than any Supreme Court opinion. In *National Rifle Association v. Bondi*, as one example, the circuit court relied heavily on Reconstruction newspapers, as reported and discussed by several historians, to discuss the broader public's understanding of firearm restrictions for 18-to-20-year-olds.[191] Thus, historians have already demonstrated how social history sources, such as newspapers, can be effectively utilized to interpret Reconstruction history. Whether national or local, partisan or nonpartisan, newspapers can effectively reveal how specific segments of the nation's population viewed constitutional rights and courts' interactions with those rights. To effectively utilize them, courts need only listen to the historians pointing in the right direction.

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188 The debate up to this point, and disagreement between Justices Thomas and Sotomayor, should indicate that no one source can answer this question.

189 *See, e.g.*, *supra* note 158 and accompanying text.

190 N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 58 (2022).

191 Nat'l Rifle Ass'n v. Bondi, 61 F.4th 1317, 1329–30 (11th Cir. 2023), *vacated on grant of reh'g en banc*, 72 F.4th 1346 (11th Cir. 2023).

2. *Politicans' Communications with Constituents*

Actions of politicians in their role as politicians, as opposed to their role as legislators, reveal further information about how leaders communicated with their constituents. Though such actions do not independently reveal statutory meaning, they can reveal beliefs that might be unfit for the Congressional record but represent the electorate's views. Moreover, such actions allow us to explore the viewpoints of politicians who were not involved in the drafting of legislation, yet still hold and express views representative of their voter base.

The Court itself has previously highlighted the value of these kinds of communications. In *Oregon v. Mitchell*, a case challenging the constitutionality of portions of the Voting Rights Act of 1970, Justice Harlan noted that "[f]rom the campaign speeches and from newspaper reactions, we can get some further idea of the understanding of the States" regarding the meaning of the Fourteenth Amendment and its relation to modern voter protections.[192] These kinds of campaign speeches are particularly useful for the same reasons that partisan newspapers are valuable: They reveal some understanding of the most engaged voters on either side of the political aisle. Even where those views might not prove fit for the Congressional record, they directly connect legislators to their electorate, unveiling what kind of scope a politician's voter base expects legislation to hold. As such, politicians' communications to their constituents, particularly where highly publicized, are invaluable to the public's understanding of the meaning and scope of legal rights.

President Johnson's response to the Civil Rights Act of 1866 proves meaningful as a lost example in *SFFA*, as he vetoed the Act because it "was designed 'to afford discriminating protection to colored persons,' . . . and its 'distinction of race and color . . . operate[s] in favor of the colored and against the white race.'"[193] Though President Johnson was not involved in the enactment of the legislation, such information reveals something important: that some Democrats (those the President cared about most) during Reconstruction believed the Act was explicitly race-conscious and should thus be rejected. Moreover, even if this deviated from President Johnson's personal views on the Act, and merely represented political action for constituents, this demonstrates the power of those constituents to sway the Presidency. As such, it

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192 Oregon v. Mitchell, 400 U.S. 112, 197 (1970) (Harlan, J., concurring).

193 Brief of Professors of History and Law, *supra* note 175, at 13 (alteration in original) (quoting 6 A Compilation of the Messages and Papers of the Presidents, 1789–1902, at 408, 413 (James Richardson ed., 1907)).

gives greater credence to historians who argue that the Fourteenth Amendment, created in part to provide Congress the power to enact and enforce the Act, meant to protect legislation widely understood as race conscious.

As Professor Foner makes clear, political rhetoric about the Amendment broadly demonstrated similar sentiments. "Although unable to prevent the amendment's passage, Democrats railed against it as a violation of . . . white supremacy," a "norm[] of American political life . . . ."[194] Radical Republicans communicated the opposite, with Representative Bingham arguing even before the Civil War that free Black people were American citizens and that the Constitution demanded specifically their equal protection.[195] Meanwhile, moderate Republicans, who claimed a plurality of Congress,[196] were explicitly focused on "secur[ing] equal rights for the former slaves."[197] As such, the political actions of legislators reveal further support for the notion that the Fourteenth Amendment intended to be racially focused, combatting white supremacy by elevating specifically Black rights.

3. Actions of Non-Governmental Figures

As Professor Foner has noted, "[a]bolitionists, [B]lack and white, had long [before the Civil War] demanded that African-Americans be accorded the equal protection of the laws," illustrating that many viewed legal change as centered around Blackness.[198] A few examples, explored here, prove illustrative.

Prior to enactment of the Fourteenth Amendment, Virginia's Black Convention claimed "as citizens" that "the laws of the Commonwealth shall give to all men equal protection," which could only be accomplished "by extending to [Black men] the elective franchise."[199] Immediately following establishment of the Freedmen's Bureau, "[a]mong Black Americans, the conviction that 'knowledge is power' drew 'hundreds of thousands, adult and children alike to the freedmen's schools, from the moment they opened.'"[200] In the following decades, Baltimore's

194 Foner, Second Founding, *supra* note 45, at 86.

195 *Id.* at 77.

196 *Id.* at 57 ("The Radical[] [Republicans] enjoyed a considerable presence in Congress but they did not constitute a majority. More numerous were moderates . . . .").

197 *Id.* at 89.

198 *Id.* at 77.

199 *Id.* at 77–78 (citing 2 The Proceedings of the Black State Conventions, 1840–1865, at 263 (Philip S. Foner & George Walker eds., 1979)).

200 Brief of Constitutional Accountability Center, *supra* note 175, at 12 (internal quotations omitted) (quoting Litwack, *supra* note 110, at 473–74).

Brotherhood of Liberty[201] wrote and published the book "Justice and Jurisprudence," a 600-page treatise critiquing the Supreme Court and finding its colorblind interpretation of the Reconstruction Amendments "entirely erroneous."[202]

Moreover, these sorts of contemporary legal writings have already been relied on effectively by courts. As one example, the Seventh Circuit relied on another Reconstruction-era treatise to explore the public's understanding of how the Fourteenth Amendment interacted with the First Amendment's rights to free speech and press.[203] The court even went so far as to find that the treatise indicated that the articulated "understanding prevailed" among the general population, as opposed to representing one of multiple schools of thought.[204] In doing so, the court understood that legal scholars and the public can reveal important information about the scope of legal rights at the time of their creation, even when not directly involved in the drafting or enactment of legislation. Courts should be especially willing to incorporate materials from organizations representing large segments of the population, communal leaders, and organized local societies, as they can reveal a common understanding amongst the community. When Baltimore's Brotherhood of Liberty denounces colorblindness, it reveals something important: that most Black people in Baltimore (at least) did not conceive of the Fourteenth Amendment as colorblind.

These collective actions elucidate our understanding of the Fourteenth Amendment in two ways. First, as active members of the political arena, Black action like that described above shaped and was shaped by popular views of the scope and limits of the law.[205] Second, they reveal that Black non-politicians spoke about and acted in accordance with the idea that equal protection was specifically focused on developing Black rights, rather than implementation of a colorblind scheme of justice. While they do not evince a national understanding, they do give light to the understandings of a specific and important segment of the nation's population. As such, this limited account of non-governmental action continues to give support to the idea that the citizenry viewed equal protection as race conscious.

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201 The Brotherhood was a group of "African-Americans in Baltimore" who "hoped to secure all of 'rights as citizens.'" FONER, SECOND FOUNDING, *supra* note 45, at 125 (citing WILLIAM M. ALEXANDER, THE BROTHERHOOD OF LIBERTY, OR OUR DAY IN COURT 6–12 (1891)).

202 *Id.* at 156–57.

203 ACLU v. Alvarez, 679 F.3d 583, 600 (7th Cir. 2012).

204 *Id.*

205 *See supra* note 182 and accompanying text.

None of the above examples, inside or outside the Court's framework, proves individually dispositive. However, their collective weight continues to give credence to the notion that the Fourteenth Amendment specifically focused on elevating Black rights rather than creating a colorblind approach to equal protection. As such, meaningful historical review of Reconstruction unveils two critiques, one backward- and one forward-looking. First, the entire Court appears to have gotten it wrong in *SFFA*. While Justice Sotomayor's dissent tends closer to the outcome urged by the sources above, each Justice fails to give proper accord to Reconstruction history, and in doing so fails to offer a definition of equal protection obviously supported by the Reconstruction Congress and the historical record. Second, the Court will need to do better historical review in the future, both in scale and substance, if it wishes to give a proper account of the Reconstruction amendments.

Conclusion

Despite consistent opportunities to do so, the Court has failed to engage in convincing Reconstruction review. Though evolving from reliance on the uncited "history of the times" to greater acceptance of historical analysis, the Court has yet to fully utilize the sources available, particularly in recognizing Black voices during Reconstruction. Despite the abundance of material placed in front of the Court in *SFFA*, it primarily relied on a limited amount of legislation, Congressional statements, and judicial precedent. In doing so, it not only gave an unpersuasive answer to the meaning of the Fourteenth Amendment but refused to repudiate its flawed jurisprudence on Reconstruction history.

The stakes on getting this history right are massive. Reconstruction history now plays a direct and ongoing role in defining the Second Amendment, participation in politics, affirmative action, and more.[206] Moreover, the Court's growing interest in this history suggests that its role in jurisprudence will only continue to grow. As such, developing accurate accounts of Reconstruction history are not important merely for the sake of getting history right, but are necessary for adequately interpreting law that has profound impacts on Americans in the twenty-first century and beyond.

To fix its jurisprudence, the Court must conduct a more searching review of history in cases involving the Reconstruction Amendments. Though the Court is not a body of historians, nor should it be, the ease of access to historical sources today makes the demand for robust

206 *See supra* notes 25–32 and accompanying text.

historical review reasonable. To put it bluntly: the tools are now available, and experts are here to guide the Court in how to hold and use them. From books to amicus briefs to articles and beyond, Reconstruction sources have been sufficiently organized such that the Court has no excuse not to at least discuss them in earnest. Though not every source will be applicable in every case, and some will be more confusing or abstract than they are worth, to ignore them nearly entirely would be indefensible. To solve its confused doctrine regarding Reconstruction's history, the Court must completely disavow its "jurisprudence of retreat."