The Persistence of the Confederate Narrative

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THE PERSISTENCE OF THE CONFEDERATE NARRATIVE
Peggy Cooper Davis*, Aderson Francois** and Colin Starger***

Abstract⊗

Ever since the United States was reconstituted after the Civil War, a Confederate narrative of states’ rights has undermined the Reconstruction Amendments’ design for the protection of civil rights. The Confederate narrative’s diminishment of civil rights has been regularly challenged, but it stubbornly persists. Today the narrative survives in imprecise and unquestioning odes to state sovereignty. That appreciation of the doctrines of federalism and separation of powers should govern adjudication of the Constitution’s meaning is unarguable. That it should preclude national responsibility for the protection of human rights is, however, unacceptable.

We analyze the relationship, over time, between assertions of civil rights and calls for the protection of local autonomy and control. This analysis reveals a troubling sequence: The Confederate narrative was shamefully intertwined with the defense of American chattel slavery. It survived profound challenges raised by post-Reconstruction civil rights claimants, and by mid-Twentieth century civil rights movements, and it reemerges regularly to pose questionable but unanswered challenges to calls for national protection of civil rights. Our close examination of the Confederate narrative’s jurisprudential effects exposes an urgent need to address the consequential but under-recognized tension between human and civil rights in the United States on the one hand and local autonomy on the other.

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THE PERSISTENCE OF THE CONFEDERATE NARRATIVE

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I. INTRODUCTION

Two narratives of our country’s post-bellum Reconstruction have figured importantly in Supreme Court deliberations about civil rights: a Confederate narrative and a People's narrative. The Confederate narrative is a story in which the States' reunion after the Civil War was a modest reform by which state-sanctioned slavery was ended, but States’ rights were virtually unaffected. It is a story grounded in the assumption that People's rights are best protected by limiting Federal power and protecting the power and independence of States. The People's narrative is one in which the nation rejected both slavery and its assault on human dignity and altered its slavery-tolerating Constitution to give the Federal government power to protect the People's rights. It is a story involving guarantees of national citizenship and national protection of citizens' rights.

The States' rights presumption underlying the Confederate narrative has innocent sources: It echoes colonial resistance to British tyranny, and it is bolstered by the psychological residue of times when the threatening potential of distant rule loomed because interstate communication and travel were so slow and arduous that the nation seemed unworkably large. Yet the Confederate narrative is notoriously significant for having protected slave power, undermined the Civil War Amendments, and justified Jim Crow subordination. Although beaten back for a while during the civil rights movements of the last century, the Confederate narrative and its underlying assumptions about the importance of States' rights persist to this day in discourse hostile to the People’s rights.¹

Despite its persistent influence in constitutional discourse, the Confederate narrative rests on a distorted reading of our legal history and encourages a narrow understanding of the rights of constitutional personhood. We therefore advance what we call the People’s narrative. This more historically grounded account holds that Reconstruction changed the constitutional balance among Federal, State, and People power. Basic civil rights² – including the mutually reinforcing rights to be accommodated in public places, to be educated, and to participate in the Nation’s political life – became privileges of the People, and the Federal government became the ultimate judge and protector of those rights.

¹ Contemporary Supreme Court cases that advance the Confederate narrative (wittingly or unwittingly) are examined in Part IV infra.
² We use the term civil rights to include both entitlements specified in the Bill of Rights (like the right of free speech or religious choice) and entitlements (like an individual’s right of personal integrity, family autonomy, or public accommodation) that are implicit in our traditions and our commitment to republican democracy.
The Founders’ accommodation to human chattel slavery problematized the delineation of human rights. Passages in our founding documents that could have been read as statements of human right were qualified time and again to carve out local authority, first to protect rights over human chattel and later to permit local majorities to limit the rights of a “slave” caste, of women, of sexual or racial minorities, or of other politically or socially subordinate people. Union victory in the Civil War and Reconstruction might have established the primacy of human rights over local control. The Thirteenth, Fourteenth and Fifteenth Amendments and no fewer than five Reconstruction-Era Civil Rights Acts declared the People’s rights and gave the Federal government power to protect them. Yet as Federal authority was asserted, the Confederate narrative was reasserted to valorize local control, and Reconstruction was undone. The Confederate narrative’s underlying assumptions about history and the proper balance of sovereign power were not effectively challenged again until the 1960s.

During the 1960’s, civil rights protesters renewed the Reconstruction effort to transform popular and official discourse about power and rights. They challenged the dominant dichotomous view that only two powers count when it comes to rights – State versus Federal. Protesters, representing what civil rights activist Bob Moses calls the “Demand Side” of civil rights, argued that both Nation and State exist to protect the People’s rights and interests. The argument for the People’s place in a triangle of power posited the Fourteenth Amendment as a charter of People’s rights. Rejecting Confederate accounts of post-Civil War history that belittled the changes wrought by Reconstruction, civil rights activists called for strong and double-barreled interpretation of the Federal and State governments’ simultaneous obligations to the People. Although the Supreme Court often ruled in ways that were favorable to the cause of civil rights, the Court never came to terms with the contradictions between the Confederate narrative and protection of the People’s rights.

The Court’s failure to confront the Confederate narrative in the manner advocated by 1960s civil-rights activists has been consequential. Confederate valorization of local control has quietly reemerged in our modern constitutional discourse. It has surfaced with disturbingly little contestation in cases involving gender subordination and justifying voting rights retrenchment. The narrative has framed key debates over separation of

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3 See Part II infra.
5 We borrow the concept of triangulation from Laurence H. Tribe, Triangulating Hearsay, 87 HARV. L. REV. 957, 957-961 (1974). Tribe emphasized the conceptual value of thinking separately but simultaneously about an utterance, the belief of the utterer, and the conclusion the utterance would urge. We emphasize the conceptual value of thinking separately and simultaneously about the possessor of a right and the bodies responsible for defining and enforcing it.
6 See Part III infra.
powers and animated dissent over recognizing the rights of sexual minorities. In each of these contexts, the Court has been encouraged to belittle Reconstruction’s significance and utter unquestioning odes to state sovereignty.

The claims set out above rest importantly on our understanding of the concept of narrative. Before elaborating those claims, we pause to explain what we mean by “narrative” and how the concept guides our analysis.

We use the term “narrative” in its technical sense. A narrative features a cast of humanlike characters interacting in a plot. Plots unfold along a timeline where an initial steady state is disrupted by a trouble; the trouble evokes efforts at redress or transformation, which succeed or fail, so that the old steady state is restored or a new steady state is created. Through this simple ordering, narratives construct meaning in a discourse: inexplicable events are reconstructed as straightforward stories; random facts are made coherent; ambiguous statements are reinterpreted as connected propositions. Narrative theory helps explain the discursive meaning of judicial opinions. At the core of judicial opinions, one usually finds a story with a beginning (steady state), a middle (trouble generating a response), and an end (redress or transformation).

Viewed through a narrative lens, judicial opinions do more than decide concrete disputes between parties and establish abstract principles for deciding future cases. Opinions also rely on and advance narratives that help the author of, and the audience for, the decision to translate the abstract ideas that are the subject of the case into familiar and socially resonant concepts. These narratives are not mere rhetorical flourishes. Long after the holding and precedential rule of the case have evolved, been overturned, or been made irrelevant by the passage of time, the narrative elements of the case will often retain their persuasive power.

We understand the Confederate narrative as an enduring story in which States’ sovereignty is the steady state, federal power is the trouble, and squelching federal power is the happy ending. In that telling, States rights is the doctrinal lodestar or constitutional true north. The People’s narrative, on the other hand, is one in which liberty ordered by respect for national human rights norms is the steady state, infringement of that ordered liberty is the trouble, and enforcement of the norms is the happy ending. In that telling, respect for human dignity is the lodestar.

Our method of analyzing the influence of these two narratives is genealogical. New cases directly descend, of course, from old cases; the Court’s current understanding of the limits of federal power directly descends from earlier cases. We carefully map case genealogies that connect modern opinions voicing the Confederate narrative to Reconstruction-era opinions telling older versions of the same story. We apply this same genealogical method to map the emergence of a competing People’s narrative. In this

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11 See Part IV infra.
way, we are able to trace the alternating power of calls to protect state sovereignty and calls to protect human dignity.13

William O. Douglas once wrote that a “dissent in a court of last resort is an appeal to the brooding spirit of the law.”14 As it happens, the People’s narrative has so far found its most fulsome expression in overlooked dissents – especially those of the first Justice Harlan and of Justice Douglas himself. Our account of the ebbs and flows of the Confederate and People’s narratives is thus an account of judicial brooding over time in majority, concurring and dissenting opinions.

Before we turn to our roadmap, an explanation regarding terminology is in order. We chose the word “Confederate” deliberately though we recognize it may provoke unease. By stating that certain modern Court decisions continue the Confederate narrative, we are not arguing that particular Justices or supporters of particular opinions embrace the racist ideology of the historical Confederacy. We recognize the value of principled defenses of decentralized enforcement power that are based on careful and context-specific thought about the optimal or just allocation of particular kinds of civil rights decision-making authority.15 We worry, however, about uncritical adherence to the Founders belief – belied by the history of slavery and rejected with slavery’s overthrow -- that decentralization of government power is, in itself, an enhancement of the People’s liberty.16

The remainder of the Article proceeds as follows: In Section II, we map the Court’s early resistance to Reconstruction’s enhancement of Federal power and the judicial brooding that resistance generated. In Section III, we trace the renewed brooding over Federal power that was triggered when 1960s civil rights activists revived antislavery ideologies to assert the People’s rights to public accommodation and political participation. Section IV examines more recent opinions and notes the resurgence of the Confederate narrative and the inexplicable silencing of a competing People’s narrative. Section V concludes. Although the Confederate Narrative remains dominant, embers of the People’s narrative of antislavery federalism blow and flicker in the doctrinal broodings we have examined. We call for critical questioning of the assumption that

13 In our quest to uncover the essential lines of the Confederate and People’s narratives, we have benefited from the use of a tool developed by our colleague Colin Starger – the SCOTUS Mapper. This tool helps researchers discover and visually represent the influence of separate opinions in non-unanimous Supreme Court cases. We have mapped the competing lines of cases discussed in this Article using the tool and our are accessible as a separate interactive appendix. Follow links in Appendix B or see http://blogs.ubalt.edu cstarger/beyond-confederate-narrative/


decentralization is by definition liberty-enhancing, and for fanning the flames of the People’s narrative.

II. RECONSTRUCTION: ANTISLAVERY CONSTITUTIONALISM CONCEIVED AND ABORTED

The United States Supreme Court has never answered the central constitutional question posed by the Reconstruction Amendments: Did the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments reconstruct the original constitutional order to establish a national charter of civic freedom? Or did they outlaw slavery and reintegrate the former Confederate states without significant change in the People’s rights or the balance of State and Federal powers?

Between its 1871 decision in *Blyew v. United States*, 17 when the Court considered for the first time the reach of federal power under the Reconstruction Amendments, and its 1906 ruling in *Hodges v. United States*, 18 when it unequivocally declined to read the Reconstruction Amendments as granting a markedly greater role for the federal government in the protection of individual rights, the Court issued no fewer than thirteen decisions in which it grappled with the meaning of the Reconstruction Amendments and Congress’ power to enforce them. 19 In some of these rulings, 20 the Court conceded that the framers of the Reconstruction Amendments intended at least to invalidate state laws or state actions that on their face denied blacks rights and immunities that were guaranteed to others either under the 1787 Constitution or under the constitution of a particular state. 21 Nonetheless, a majority of justices remained steadfastly unwilling to consider the far more significant question whether the Amendments created new federal rights and federal responsibilities to enforce those rights against both state and private action.

The one remarkable exception is a pair of dissents by Justice Harlan in *The Civil Rights Cases* and in *Hodges*, in which he showed that the Reconstruction Amendments, taken together, created a new national charter of civil freedom belonging to American citizenship, and subject to national enforcement. 22

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17 Blyew v. United States, 80 U.S. 581 (1871).
18 Hodges v. United States, 203 U.S. 1 (1906).
19 Blyew, 80 U.S. at 581; Hodges, 203 U.S. at 1; The Slaughterhouse Cases, 83 U.S. 36 (1872); United States v. Cuirkerhank, 92 U.S. 542 (1875); United States v. Reese, 92 U.S. 214 (1875); Strauder v. West Virginia, 100 U.S. 303 (1879); Ex parte Virginia, 100 U.S. 339 (1879); Virginia v. Rives, 100 U.S. 313 (1879); Neal v. Delaware, 103 U.S. 370 (1880); Ex Parte Siebold, 100 U.S. 371 (1879); United States v. Harris, 106 U.S. 629 (1882); Civil Rights Cases, 109 U.S. 3 (1883); Ex Parte Yarbrough (The Ku Klux Cases), 110 U.S. 651 (1884).
20 See e.g., Strauder v. West Virginia, 100 U.S. 303 (1879); Ex parte Virginia, 100 U.S. 339 (1879); Virginia v. Rives, 100 U.S. 313 (1879); Neal v. Delaware, 103 U.S. 370 (1880); Ex Parte Yarbrough (The Ku Klux Cases), 110 U.S. 651 (1884).
21 See Strauder, 100 U.S. at 310; Ex parte Virginia, 100 U.S. at 346; Rives, 100 U.S. at 318; Neal, 103 U.S. at 397.
22 Civil Rights Cases, 109 U.S. at 36.
In the subsections that follow, we trace the Confederate narrative in the majority’s pronouncements between 1871 and 1907 on federal power to delineate and enforce civil rights and then review Justice Harlan’s articulations of the People’s narrative – both in his well-known dissent in *The Civil Rights Cases* and in his oft-neglected *Hodges* dissent.

A. *The 1787 Constitutional Order Reconstructed*

Victory at Appomattox heralded passage and ratification of the Thirteenth, Fourteenth and Fifteenth Amendments and passage of a set of legislative measures to support the Reconstruction project. Freedmen Bureau Bills, passed in 1865 and renewed in 1866, attempted to address the welfare of millions of men, women and children “come into a new birthright, at a time of war and passion, in the midst of the stricken, embittered population of their former masters.”23 More importantly for our purposes, Congress passed four measures to safeguard the rights associated with the citizenship that was now a right of birth in the United States.

First, Congress enacted what we refer to as the Citizenship Act (more commonly known as the Civil Rights Act of 1866) which reiterated the Fourteenth Amendment’s guarantee of birthright citizenship and went on to specify that, regardless of color, citizens had the rights to enter contracts, sue, present evidence in court, buy, hold and sell property, and enjoy all the benefits of the laws theretofore enjoyed by white persons. Additionally, the Citizenship Act made it a federal crime to deprive any person of the rights it protected and created removal jurisdiction in federal courts when civil rights enforcement was denied or precluded in state courts.24

In 1870 Congress passed the Enforcement Act (also known as the Force Act), which reenacted the Citizenship Act,25 affirmed the Fifteenth Amendment’s right to vote without regard to color, provided for the use of federal troops to protect the right to vote, and added a new catch-all criminal conspiracy provision, making it a felony for two or more persons to conspire with the intent to violate the provisions of the Act or to prevent citizens from exercising or enjoying any right or privilege granted under the Constitution.26

By 1871, it was clear that more was needed. Citing overwhelming evidence that through tacit complicity and deliberate inactivity, state and local officials were fostering vigilante terrorism against politically active blacks and Union sympathizers, President Grant requested emergency legislation to quell rampant Southern violence that States were unwilling or powerless to control. In response, Congress passed the Ku Klux Klan

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25 Reenactment was thought necessary to claim or clarify the authority of the newly ratified 14th Amendment.
Act. As compared to the Force Act, the Klan Act extended federal civil rights protection in two significant ways. First, whereas the substantive civil penalties of the Force Act were aimed at violations of the Act itself, the Klan Act created civil penalties for the deprivation of any rights, privileges or immunities secured by the Constitution by persons acting under color of state law. Second, the Act used and expanded language from the catchall conspiracy section of the Force Act, to make it a federal crime to conspire to deprive persons or class or persons of any rights granted by the Constitution or the equal protection of the laws.

Finally, in 1875, Congress responded to Jim Crow segregation by enacting what we will refer to as the Public Accommodations Act, requiring all inns, public conveyances, theaters, and other places of public amusement to open their accommodations without regard to race, color or previous condition of servitude. Violations of the Public Accommodations Act were made punishable as misdemeanors, and persons injured by violations of the Act were given the right to recover civil judgments of $500 for each offense.

According to the People’s narrative, the Thirteenth, Fourteenth, Fifteen Amendments and the Citizenship, Force, Klan and Public Accommodation Acts were to have been the constitutional and legislative spine of Reconstruction’s program to establish a national charter of the People’s rights. Taking that view of history, one would have to say that between 1871 and 1907, the Supreme Court crippled Reconstruction’s multi-racial and egalitarian project. As we demonstrate below, with each crippling blow, the Court sounded the Confederate claim that whatever their language or history, the Reconstruction Amendments did not carve out a strong role for the federal government in defining and protecting civil rights, but worked only a narrow reform of the 1789 constitutional order.

B. Early Supreme Court Interpretation: The 1787 Constitutional Order Restored

Although Slaughterhouse is properly known as the Supreme Court’s first interpretation of the meaning and reach of any of the Reconstruction Amendments, it was not the first case in which the Court took the measure of federal power after secessionist Civil War and reunification. Blyew v. United States, decided a year earlier, involved the federal prosecution of two white men for the ax murder of four members of a black

28 While the Klan Act’s Section 2 criminal conspiracy provisions were quite similar to the equivalent provision in Section 6 of the Force Act, the language of the Klan Act covered a broader range of conspiratorial acts than the Force Act. For example, the Klan Act made it a criminal offense for two persons to conspire “to overthrow, or to put down, or to destroy by force the government of the United States, or to levy war against the United States, or to oppose by force the authority of the government of the United States, or by force, intimidation, or threat to prevent, hinder, or delay the execution of any law of the United States…”
29 Act of March 1, 1875, ch. 114, 18 Stat. 335., § 2.
family: a 97-year old grandmother, the mother, the father, and a 16-year old boy. The only eyewitness account linking the defendants to the crime was the dying declaration of the 16-year old boy. At the time black people were only competent to testify in Kentucky courts against other blacks. The Citizenship Act authorized Federal prosecutors to remove cases to Federal courts when they “affected persons” whose citizenship rights had been denied and who could not obtain redress in state or local courts. Relying on that authorization, and citing the inability to testify, the United States indicted and convicted the alleged ax murderers in Federal Court. The defendants appealed, arguing that the Federal government had exceeded its enforcement power. Positing the Confederate narrative’s link between States’ rights and People’s freedom they argued that the Court’s decision would be “felt in its influence on the destinies of the country” beyond the Justices’ lifetimes, for it would “draw the line of demarcation between the powers of a great central government on the one hand and the local rights of self-government retained to the States and the people on the other.

The Supreme Court overturned the defendants’ convictions, but it declined their invitation to treat the case as a clash between Federal and State power. Establishing a pattern of avoidance that recurs regularly, both in the early cases addressed in this section and in the mid-Twentieth Century era of civil rights protest, the Court avoided reaching constitutional questions of State and Federal power by deciding the case in terms of a technicality. Framing the question before it as one of statutory interpretation, the Court reasoned that the “affected” persons in the case were limited to parties to an action. Witnesses whose testimony was precluded did not qualify so as to confer federal removal jurisdiction. Here, as in subsequent cases we will describe, the avoidance by technicality move seems questionable. Nonetheless, Blyew can be said to have “afforded the Supreme Court with its earliest opportunity—an opportunity that it used—to begin the substantial devastation of the federal government’s civil rights powers that followed over the next generation.”

Slaughterhouse was the Court’s next – and its first direct – address of the post-Reconstruction balance of state and Federal power with respect to civil rights, and in it, the Confederate narrative sounds loudly. Slaughterhouse is a case full of vexing ironies. It involved a claim brought by opponents of Reconstruction who calculated to rely on the Reconstruction Amendments to challenge acts of Louisiana’s multi-racial Reconstruction

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30 The only survivors of the attack were a 6-year old girl who was brutally hacked, and her 10-year old sister who was hiding in the family’s one-room cabin.
32 Bylew, 80 U.S. at 591.
33 In overturning the defendants’ conviction, the Supreme Court avoided reaching the constitutional question whether Congress properly exercised its enforcement powers under Section 2 of the Thirteenth Amendment when it conferred federal removal jurisdiction under the Citizenship Act. Blyew, 80 U.S. at 594
Moreover, it was decided by a Court packed with Republican supporters of Reconstruction’s civil rights agenda. Nonetheless, it resulted in a radical limitation of Federal power to enforce that agenda.

The well-known story is that New Orleans butchers sued to enjoin a Louisiana statute regulating the slaughtering of animals within city limits. The butchers argued that the statute, which compelled them to use a state-chartered slaughtering facility, violated nearly every freedom the Reconstruction Amendments were designed to protect: It exacted involuntary servitude; it abridged privileges and immunities of their citizenship, and it denied them equal protection and due process of law. The “black and tan” Louisiana legislature countered that the statute was a legitimate exercise of their police power, designed to rid New Orleans of persistent plagues caused by the unregulated dumping of butchering waste.

The Court recognized that it had been called on to gauge the effect of the Reconstruction Amendments on the 1789 Constitution and that nothing so consequential had been brought to the Court during any of the Justices’ tenures. It acknowledged that by enacting and ratifying the three Reconstruction Amendments the nation “recur[red] again to the great source of power in this country, the people of the States” in order to secure “additional guarantees of human rights; additional powers to the Federal government; [and] additional restraints upon those of the States.” But, the Court hastened to add that the Amendments were also part of a “process of restoring to their proper relations with the Federal government and with the other States those which had sided with the rebellion.” The Justices were bound, then, to balance respect for the momentousness of an amendment process that altered the State and Federal balance of power in defense of human rights against the need for “proper” restoration of the powers of states that had been in rebellion. It did so by emphasizing the narrower goal of ending human chattel slavery rather than the larger goal of protecting human rights. Harking back to the 1867 Constitution rather than its post-Civil War reconstruction, the Court

35 See MICHAEL ROSS, JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA 198-200 (2003) (“The lead attorney in most of the hundreds of cases individual butchers brought against the state was John A. Campbell, the former United States Supreme Court justice who had resigned from the Court at the start of the Civil War to join the Confederacy.”); see also RONALD M. LABBÉ & JONATHAN LURIE, THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT (2003).

36 “Black and tan” was commonly used to describe integrated legislatures during the Reconstruction Era, see Richard L. Hume, Carpetbaggers in the Reconstruction South: A Group Portrait of Outside Whites in the "Black and Tan" Constitutional Conventions, 64 J. AM. HIST. 313 (1977).

37 Slaughterhouse Cases, 83 U.S. at 67 (“No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, and of the several States to each other and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members.”).

38 Id. at 67 (emphasis added).

39 Id. at 67-68.

40 Id. at 71.

41 Id.
reasoned that the privileges and immunities guaranteed by the Fourteenth Amendment were limited to those few that flowed uniquely from national citizenship.\textsuperscript{42} The definition and protection of basic civil rights was therefore left to the various States.\textsuperscript{43} Underlying this interpretation was the strong suggestion that the Reconstruction Congress and the ratifying States acted “under the pressure of . . . excited feeling” and therefore neglected, rather than recalibrated, the balance of State and Federal power.\textsuperscript{44}

\textit{Slaughterhouse} is fascinating because it stood civil rights discourse on its head, with customary proponents on the side of State autonomy and customary opponents on the side of Federal intervention. In putting autonomous behavior in marketplaces under an individual rights umbrella, it encouraged commercial actors to take the Reconstruction Amendments as a shield, such that they arguably have come to benefit more from Fourteenth Amendment protections than more traditional targets of discrimination or oppression.\textsuperscript{45} \textit{Blyew} was the more traditional civil rights case, and post-\textit{Slaughterhouse} it was followed by a string of similar cases in which Federal authorities attempted to combat supremacist exclusion and terror, and the Court ruled that they lacked authority to do so. \textit{United States v. Cruikshank} was the next such case, and it brought the Court to take a direct stance on the question of Federal power to prosecute cases of anti-civil rights terrorism.\textsuperscript{46}

After Louisiana’s 1872 gubernatorial election, two candidates declared victory: William Pitt Kellogg, a Republican and supporter of Reconstruction and John McEnery, a Democrat and former Confederate commander. While the disputed election made its way through the federal courts, each camp attempted to appoint local officials. In the Parrish that included Colfax, Louisiana, both sides made judicial appointments, and freedmen gathered in the Parish courthouse to support and protect the Republican appointees. In what came to be known as the Colfax Massacre, three hundred white men, most mounted on horseback and armed with rifles, set fire to the courthouse, and killed more than three hundred freedmen as they tried to surrender.

The State made no effort to sanction the white assailants.\textsuperscript{47} The United States

\begin{itemize}
  \item \textsuperscript{42} \textit{Id.} at 74.
  \item \textsuperscript{43} \textit{Id.} at 77-78 (Concluding that it was not “the purpose of the fourteenth amendment. . .to . . . bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?”).
  \item \textsuperscript{44} \textit{Id.} at 82.
  \item \textsuperscript{45} See Connecticut Gen. Life Ins. Co. v Johnson, 303 U.S. 77, 90 (1938) (Black, J., dissenting) (“[The Fourteenth] amendment sought to prevent discrimination by the states against classes or races. We are aware of this from words spoken in this Court within five years after its adoption, when the people and the courts were personally familiar with the historical background of the amendment. . . .Yet, of the cases in this Court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of 1 per cent invoked it in protection of the negro race, and more than 50 per cent. asked that its benefits be extended to corporations.”).
  \item \textsuperscript{47} Following the massacre white democrats let loose a reign of terror over the county so as to foreclose any possibility of local prosecution. \textit{See} CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION 126 (2008). When United States Attorney
indicted several under the Force Act charging that they had conspired to deprive the murdered freedmen of their civil rights. The Court held that Congress exceeded its powers when it authorized Federal enforcement of what the Court considered to be state-granted rights. It therefore dismissed all of the Federal changes. In doing so, it offered an analysis of the constitutional balance between state and federal power that has been repeated so often by subsequent courts that it has come to sound (and to serve) as a statement of faith about the proper role of the Federal government in defining and protecting the People’s rights – a catechism to be repeated without question or doubt. One might call it the Cruikshank creed. One might also call it the Confederate narrative.

The tenets of the Cruikshank creed are that the People granted power to the various States; in 1787, the States surrendered very limited powers to a federation; powers not surrendered to the federation remain exclusively with the States, and the States serve the People by carefully guarding their reserved power. For its comprehensive theory of state sovereignty, the Creed cites only two authorities: Slaughterhouse and the Preamble to the Constitution.

Dismissals of prosecutions for acts of racial terrorism continued, as the Court narrowed each of the post-War civil rights enforcement statutes to protect States’ sovereignty. In United States v. Harris, the Court unanimously relied on Slaughterhouse as it extended the reasoning of Cruikshank Creed to dismiss indictments under the Klan

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See id. at 549 infra (Cruikshank creed voiced by Chief Justice Roberts in NFIB v. Sebelius).

United States v. Cruikshank, 92 U.S. 542, 549-50 (1875) (“Citizens are the members of the political community to which they belong. ... In the formation of a government, the people may confer upon it such powers as they choose”).

Id. (“Within the scope of its powers, as enumerated and defined, [the national government] is supreme and above the States; but beyond, it has no existence”).

Id. (“The people of the United States resident within any State are subject to two governments: one State, and the other National; but there need be no conflict between the two. The powers which one possesses, the other does not. They are established for different purposes, and have separate jurisdictions. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad”).

See id. at 549 (“The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of those governments will be different from those he has under the other. Slaughterhouse Cases, 16. Wall. 74.”); id. at 549-50 (citing Const. Preamble).
Act against members of a Tennessee lynch mob.\footnote{United States v. Harris, 106 U.S. 629, 638-39 (1882).} \textit{Hodges v. United States} was similar: dismissing a Federal indictment brought under the Force Act against members of a lynch mob, the Court returned to the theme introduced in \textit{Blyew}, affirmed as law in \textit{Slaughterhouse}, set out as creed in \textit{Cruikshank}, and reaffirmed in \textit{Harris}, to explain once again that the Reconstruction Amendments had not significantly altered the 1787 balance of federal and state power.\footnote{Id. at 24.}

In \textit{United States v. Reese}, the Court extended its states’ rights analysis to limit the applicability of the voting rights provisions of the Force Act. A State official who refused to permit an African-American man to vote was held to be immune from Federal charges because it had not been alleged that the refusal was because of his race. Here, as in \textit{Slaughterhouse}, the Court saw the focus and impact of the Reconstruction Amendments as protection of African-American emancipation rather than establishing a broad charter of civil rights: The Fifteenth Amendment is, the Court concluded, an antidiscrimination measure that “does not confer the right of suffrage upon any one.”\footnote{Hodges v. United States, 203 U.S. 1, 8 (“Notwithstanding the adoption of these three amendments, the national government still remains one of enumerated powers, and the 10th Amendment, which reads, ‘the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.’ is not shorn of its vitality.”).}

Although they were decided favorably for the civil rights plaintiffs and are cited by some scholars as the high water mark of the Court’s Reconstruction jurisprudence \textit{Virginia v. Rives},\footnote{Virginia v. Rives, 100 U.S. 313 (1879).} \textit{Strauder v. West Virginia},\footnote{Strauder v. West Virginia, 100 U.S. 303 (1879).} \textit{Ex parte Virginia},\footnote{Ex parte Virginia, 100 U.S. 43 (1884).} and \textit{Neal v. Delaware}\footnote{Neal v. Delaware, 103 U.S. 370 (1880).} also yielded narrow readings of the Reconstruction Amendments. In each of these cases, the Court held that the Fourteenth Amendment prohibited the exclusion of blacks from jury service, not because jury service is an entitlement of citizenship, but because the exclusions constituted state action that denied black jurors equal protection of the laws.

In \textit{The Civil Rights Cases}, the Court invalidated in its entirety the last of the post-War civil rights statutes: the Public Accommodations Act.\footnote{Civil Rights Cases, 109 U.S. 3 (1883).} Seeing no State involvement in the maintenance of Jim Crow segregation, the Court saw no authority in the Federal government to end it.\footnote{Id. at 24.} The Fourteenth Amendment only addressed state actions, and although the Thirteenth Amendment reached both private and public action, the Court held that denials of public accommodation had “nothing to do with slavery or involuntary servitude.” The States’ rights theme of the \textit{Cruikshank} creed was again sounded: If those denials violated any right, “redress [was] to be sought under the laws of the
C. The Competing Interpretation: A New Charter of Freedom

There is irony in the legacy of *Civil Rights Cases*. Although it has not been overruled, scholars have regularly questioned its reasoning. The durability of the majority opinion has much to do with the fact that it followed the *Cruikshank* Creed — and hence the Confederate narrative — in positing and focusing on a conflict between State and Federal power and fixing on that conflict rather than addressing the more fundamental question whether the civil rights claimants were entitled, *as national citizens*, to public accommodation or to any basic civil right.

By contrast, Justice Harlan’s dissent in the *Civil Rights Cases* squarely faced the more fundamental question and concluded that the Reconstruction Amendments and accompanying Federal legislation were “adopted in the interest of liberty, and for the purpose of securing, through national legislation rights inhering in the state of freedom and belonging to American citizenship.” Justice Harlan’s dissent begins and ends with the observation that national rights require national enforcement.

According to Harlan, the 1787 Constitution, together with the Fugitive Slave Act of 1793, the Fugitive Slave Act of 1850, and the Court’s own decisions in *Prigg v. Commonwealth of Pennsylvania*, *Ableman v. Booth*, and *Dred Scott v. Sandford*,

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63 Id.
66 Congress enacted The Fugitive Slave Act of 1793 as a means of implementing the Fugitive Slave Clause of the Constitution. U.S. Const. Art. IV, Section 2, Cl. 3. The Act established the process for both the extradition of fugitives from justice and the recapture of fugitive slaves. Act of Feb. 12, 1793, ch. 7, 1 Stat. 302.
67 Congress enacted the Fugitive Slave Act of 1850 in order to provide slave owners with a federal mechanism for recapturing fugitive slaves. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462. The Act of 1793 had largely relied upon state authorities to enforce slave owners’ rights. The 1850 Act sought to remedy that problem by, among other things, authorizing federal judges to appoint United States commissioners with the power “to exercise and discharge all the powers and duties conferred by this act,” including the power to seize and return fugitive slaves to their owners. Act of Sept. 18, 1850, § 1. Thus, the 1850 Act for the first time empowered federal law enforcement officials to directly engage in the pursuit, capture and return of slaves to their masters.
68 41 U.S. (16 Pet.) 539 (1842).
69 62 U.S. (21 How.) 506 (1858). *Booth* grew out of efforts in northern states to openly resist enforcement of the Fugitive Slave Act of 1850 in the name of state sovereignty. In *Booth*, a number of Wisconsin state officials and private citizens openly defied federal authorities’ attempts to recapture a slave by the name of Joshua Glover. Abolitionists who assisted Glover to escape were prosecuted in the United States District Court for Wisconsin. See Robert J. Kaczorowski, *The Supreme Court and Congress’s Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 Fordham L. Rev. 153 (2004). One of the
established as much when they gave the Federal government authority to enforce human subjugation. While no clause of the 1787 Constitution explicitly empowered Congress to enforce the master’s right to his slave, Prigg established that Congress had implicit authority to do so because “a clause of the Constitution conferring a right should not be so construed as to make it shadowy, or unsubstantial, or leave the citizen without a remedial power adequate for its protection.”

Under Justice Harlan’s reading, the Reconstruction Amendments “did something more than to prohibit slavery as an institution… [they] established and decreed universal civil freedom throughout the United States.” (emphasis in original). Referencing in shameful contrast the Court’s prior ruling that Congress had power to protect the right to hold human beings as chattel, he argued that:

The national government has the power, whether expressly given or not, to secure rights protected by the Constitution. That doctrine ought not now be abandoned, when the inquiry is not as to an implied power to protect the master’s rights, but what Congress may do, under powers expressly granted, for the protection of freedom, and the rights necessarily inhering in a state of freedom. (emphasis added)

Justice Harlan’s interpretation of the Reconstruction Amendments drew a crucial link between the Thirteenth Amendment’s prohibition of slavery and the Fourteenth Amendment’s grant, in Section 1, of birthright citizenship. The Fourteenth Amendment’s citizenship clause was, Harlan argued, “a supreme act of the nation” that instantly brought black people “into the political community known as the people of the United States.” The civil freedom conferred by the Thirteenth Amendment therefore encompasses the privileges and immunities of citizenship. As Justice Harlan put it, the Fourteenth Amendment granted congress power “in terms distinct and positive to enforce ‘the provisions of [Article 1], of the amendment; not simply those of a prohibitive

arrested defendants, Sherman M. Booth, was tried and convicted of violating the Fugitive Slave Act of 1850. United States v. Rycraft, 27 F. Cas. 918 (D. Wis.). Booth petitioned the Wisconsin Supreme Court for a writ of habeas corpus. The Wisconsin high court ordered his release, holding that the Fugitive Slave Act of 1850 was unconstitutional. In re Booth and Rycraft, 3 Wis. 179 (1854). The federal government appealed to the United States Supreme Court. The Court, in a decision by Chief Justice Roger B. Taney, reversed the Wisconsin Supreme Court’s decision, and upheld the constitutionality of the Act of 1850.

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

According to the court’s own logic, insofar as the master had the right to his slave, insofar as that right was grounded in the Constitution, and insofar as Congress had both the authority and obligation to secure that right, Justice Harlan said, quoting Prigg, that “it would be a strange anomaly to suppose that the national government meant to rely for the due fulfillment of its own proper duties, and the rights which it intended to secure upon state legislation, and not upon that of the Union.” (emphasis added). Civil Rights Cases, 109 U.S. at 29.

Id. at 28.

Id. at 34.

Civil Rights Cases, 109 U.S. at 34-35.

Id. at 47.
character, but the provisions -- all of the provisions -- affirmative and prohibitive of the amendment.”

According to Harlan, this interplay between the Thirteenth and Fourteenth Amendments meant that Congress had full power to protect those rights “fundamental to citizenship in a free government.” The Reconstruction Amendments and acts designed to enforce them were meant “to compel a recognition of the legal right of the black race to take that rank of citizens, and to secure the enjoyment of privileges belonging, under the law, to them as a component of the people for whose welfare and happiness government is ordained.” He ended, as he began, with the Court’s earlier support of slave power:

I insist that the national legislature may, without transcending the limits of the Constitution, do for human liberty and the fundamental rights of American citizenship, what it did, with the sanction of this court, for the protection of slavery and the rights of the master.

Nearly twenty years later, the Justice made clear, in his Hodges dissent, the full reach of the rights that the Reconstruction Amendments, taken together, should secure to all:

[T]he liberty protected by the 14th Amendment against state action inconsistent with the due process of law is neither more nor less than the freedom established by the 13th Amendment. …Such liberty ‘means not only the right of the citizen to be free from physical restraint of his person. . . but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties…’ (emphasis in original).

III. POWER AND THE PEOPLE: CIVIL RIGHTS JURISPRUDENCE TESTED BY A PEOPLE’S MOVEMENT

Civil rights statutes that Justice Harlan thought fitting under the post-slavery constitution lay nearly dormant in subsequent years. Their disuse was not entirely attributable to their critical reading by the Supreme Court. As the Court shrank from what seemed to have been clear implications of the Reconstruction Amendments for Federal enforcement of civil rights, many white Americans grew weary and wary of Reconstruction’s multi-racial vision and increasingly sympathetic to the former Confederacy’s complaints of occupation, abuse and disempowerment. What the Slaughterhouse Court had described as a goal of restoring the seceded states to their 1787

76 Id. at 46.
77 Civil Rights Cases, 109 U.S. at 47.
78 Id.
79 Id. at 51.
80 Hodges, 203 U.S. at 35-37.
81 See authorities cited in infra note 84.
powers became a national priority as compromise was reached with southern Democrats and federal intervention in southern affairs came to be seen as untoward.  

Notwithstanding the official and popular retreat from Reconstruction’s commitment to a fulsome idea of national citizenship, the vision lived among the People – especially among those who had endured the status of constitutional property. In every dimension of personal and public life, African-Americans, women and other subordinated groups regularly claimed and enacted what they understood to be their rights to full and free citizenship.

The wave of sit-in, freedom ride and voter registration activity that culminated in the 1960s has been perhaps the most conspicuous and consequential revival of Reconstruction-era claims of national citizenship. As civil rights leader Bob Moses reports, sit-in demonstrators, freedom riders and voting rights activists enacted a freedom that they understood to be their birthright. Moses explains that “We, as People of the United States” claimed with our bodies the rights to occupy public space as civic equals and to be counted in the political process. Moses also reports that the Reconstruction-era civil rights statutes – broken as they were in the interpretive process described in the preceding section – provided “crawl space” for the Civil Rights Movement that culminated in the 1960s. When 1957 civil rights legislation created a Civil Rights Division within the Justice Department, Federal enforcement became more focused, and civil rights workers gained a direct line through which they could call on Federal authorities to provide some relief from repeated and lengthy jailings (and, in some cases, from spending time in some of the nation’s worst prisons) and to provide protection, albeit tragically limited protection, against supremacist violence. For authority to provide that relief and protection, Federal officials relied on the Reconstruction Amendments and on remnants of the post-Civil War legislation that was to have been the spine of Reconstruction.

What we speak of as the “1960s civil rights movement” called upon the Supreme Court to adjudicate two kinds of claims. In what we term civil rights “enforcement” cases, the Federal government attempted to prosecute Movement opponents for acts of terrorism against civil rights advocates. These federal prosecutions were challenged on the ground that the national government was usurping the States’ police power. In what we term civil rights “enactment” cases, protesters performed what they saw as a national right to inhabit public spaces on an integrated basis, or who attempted to diversify local

political processes. These enactments were the genius of the 1960’s civil rights movement; they were “demand side” demonstrations of the free citizenship to which the protesters thought all of the People were entitled. In response to their enactments of citizenship, protesters were arrested, charged and convicted of state crimes like trespassing or disturbing the peace. The protesters challenged these prosecutions on the ground that they could not be punished for exercising their national constitutional rights to peacefully inhabit public spaces and to participate in political processes. Both enforcement claims and enactment claims were contests between state and federal power, with states claiming supremacy in the realm of policing human behavior and the national government claiming supremacy as a guardian of human rights.

A. Assigning the “Occasional Unpleasant Task” of Civil Rights Enforcement

To set the 1960s cases in context, we must look to two sets of cases that predated the Movement’s rise to prominence. After the significant post-Reconstruction hiatus in federal civil rights prosecutions, the Court faced, in 1945, yet another federal attempt to punish white supremacist terror. The facts fit a familiar pattern: Claude Screws, the Sheriff of the somewhat notorious Baker County in Georgia, acting with a deputy and a local police officer, arrested Robert Hall, a young black man accused of stealing a tire. They handcuffed Hall, drove him to the local courthouse, beat him nearly to death, dragged him feet-first across the courthouse lawn to a jail, threw him on the floor and summoned an ambulance. Robert Hall died within an hour of being transported to a local hospital. Screws and his collaborators faced no state charges, but were convicted in Federal Court, under surviving provisions of the Citizenship Act, of conspiring to violate, and violating, Hall’s civil rights.

When the Georgia officers appealed, three Justices stood firmly against Federal prosecution of what they understood to be state crimes. Justice Frankfurter, wrote for

84 See STAFF OF S. SUBCOMM. ON THE CONSTITUTIONAL RIGHTS OF THE S. COMM. ON THE JUDICIARY, REP. ON CIVIL RIGHTS, 94th Cong., 2d Sess. (Comm. Print 1977) (“At first, principal enforcement of the newly created civil rights came - as the Reconstruction Congresses had expected - from the Federal Government, through criminal prosecutions. Between 1870 and 1894, there were over 7,000 Federal prosecutions for civil rights violations. As the century drew to a close, the massive retreat from the earlier mood, accompanied by extraordinarily restrictive (and often disingenuous) decisions by the Supreme Courts slowed civil rights enforcement to a trickle. It was not until the 1940's and 1950's that real advances in civil rights enforcement began again.”). See generally, Anthony G. Amsterdam, Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial, 113 U. PA. L. REV. 793 (1965); Louis Lusky, Racial Discrimination and the Federal Law: a Problem in Nullification, 63 COLUM. L. REV. 1163 (1963); William L. Taylor, Federal Civil Rights Laws: Can They Be Made to Work?, 39 GEO. WASH. L. REV. 971 (1971).
85 [Cite the best source of case facts.]
86 The government charged Screws and his collaborators under Section 20 of the Criminal Code, 18 U.S.C. s 52. That section was first enacted as part of the Citizenship Act.
them, invoking the Confederate narrative to argue that the officers’ federal prosecution unconstitutionally disrupted the steady state of Georgia’s sovereignty with respect to the enforcement of criminal laws. Noting that the murder of Robert Hall was a state crime, these justices argued that where “[s]tate law is in conformity with the Constitution and local misconduct is in undisputed violation of that State law” it was preferable to “leave to the States the enforcement of their criminal law,” and not “weaken the habits of local law enforcement by tempting reliance on federal authority for an occasional unpleasant task.”

Justice Douglas, in just the sixth of his thirty-six years on the bench, wrote for the Court and elided the question of Federal power by reversing on the ground that the jury had not been instructed to find a willful violation of Hall’s constitutional rights, and remanding for a new trial under more precise jury instruction.

Justices Murphy and Rutledge shined a critical light on the Court’s failure to address directly the reach of Federal power and the value, in this context, of State supremacy. Justice Murphy wrote a passionate dissent to argue that Federal constitutional power was sufficient and necessary to protect against “the cruelties of bigoted and ruthless [state and local] authority.” Justice Rutledge challenged what he saw underlying both the Douglas opinion’s resort to technicalities and the Frankfurter opinion’s wishful deference to the State of Georgia: The underlying issue was, he said, the question of “federal power.”

Echoing the first Justice Harlan, Rutledge then argued that in the world created by the Reconstruction Amendments, “federal power lacks no strength to reach [state officials’] malfeasance in office when it infringes constitutional rights.”

The Screws prosecutions were not so far in time from Civil War and Reconstruction that they escaped their aftermath. In the 1940s (and long after), it was still regularly taught – and believed – that Reconstruction was at best an idealistic mistake and at worst a fit of vengeful rule by uncomprehending or malicious Carpetbaggers and incompetent blacks. Justice Frankfurter’s deliberately narrow reading of the Reconstruction legislation under which Screws and his collaborators had been charged alluded uncritically to this view of Reconstruction. “It is familiar history,” he said, “that much of this legislation was born of that vengeful spirit which to no small

88 Screws, 325 U.S. 149 (Frankfurter, J., dissenting).
89 Screws, 325 U.S. 138 (Murphy, J., dissenting)
90 Screws, 325 U.S. 133 (Rutledge, J., concurring) (describing the claim “that Congress could not . . . denounce as a federal crime the intentional and wrongful taking of an individual’s life or liberty by a state official acting in abuse of his official function and applying to the deed all the power of his office.”)
91 Screws, 325 U.S. at 132 (Rutledge, J., concurring) For the sake of avoiding a tie, Justice Rutledge joined the remand judgment. Id. at 134.
degree envenomed the Reconstruction era. Legislative respect for constitutional limitations was not at its height and Congress passed laws clearly unconstitutional.\footnote{Screws, 325 U.S. at 140 (Murphy, J., dissenting).}

As if in answer to this view of Reconstruction, Rutledge wrote that if Federal power to protect civil rights is a great power, “it is one generated by the Constitution and the Amendments, to which the states have assented and their officials owe prime allegiance.”\footnote{Screws, 325 U.S. at 133 (Rutledge, J., concurring).} At the heart of Justice Rutledge’s 	extit{cri de coeur}, was the conundrum this article seeks to confront: How can there be a Federal right without a Federal remedy? Resolving it will require a deeper understanding than the Court has yet undertaken of the values protected by the separation of State and Federal responsibilities.

Sheriff Screws and his codefendants were retried under the Douglas opinion’s recommended instructions. Each was acquitted, and each returned to state law enforcement duties.\footnote{Harry H. Shapiro, Limitations in Prosecuting Civil Rights Violations, 46 CORNELL L. REV. 532 (1961).} Moreover, the Douglas opinion’s requirements made prosecution of civil rights violations almost prohibitively difficult.\footnote{See Shapiro, supra at 551. See also Branch, supra; BURKE MARSHALL, FEDERALISM AND CIVIL RIGHTS (1964).} Justices Murphy and Rutledge both died in 1949. We will see, however, that in the post Screws years Justice Douglas abandoned the cautious stance he had announced in Screws and took up the Murphy/Rutledge call for national enforcement of civil rights.

Ironically, the Court next confronted the question of the Department’s power to enforce federal constitutional rights in two 1951 cases that made no mention of, and seemingly had nothing to do with, racial justice. Yet, here again, it proved impossible for the Court to issue a majority opinion addressing the reach of Federal civil rights enforcement power. The cases, both captioned 	extit{United States v. Williams}, and decided on the same day, arose out of an effort by the Justice Department to prosecute three “deputized” investigators and a police officer who had, at the request of the owners of a hardware store in Miami, Florida, beaten and tortured store employees to get them to confess to stealing lumber.\footnote{United States v. Williams, 341 U.S. 58 (1951).}

We have seen that, beginning with the Force Act, Reconstruction legislation criminalized both direct interferences with civil rights and conspiracies to interfere with civil rights. One of the Williams cases involved a conviction under surviving remnants of the conspiracy provision (the application of which had been precluded, without government appeal, during an early phase of the attempted prosecution of Sheriff Screws) and another involved a conviction under surviving remnants of the direct or substantive criminal provision (the provision that was at issue when the Court vacated Sheriff Screws’ conviction).\footnote{See Williams v. United States, 341 U.S. 97 (1951) [Williams II herein]; see also Brief for Petitioner, M. Claude Screws, Frank Edward Jones, Jim Bob Kelley at 2, Screws v. United States, 325 U.S. 91 (1945) (No. 42), 1944 WL 42513.} These two cases were rematches in the battle over federal power
that had been fought in Screws and here Justices Douglas and Frankfurter squared off in sharp disagreement.

The conviction under the substantive provision had been obtained under a charging script tailored in its description of willfulness to meet the vagueness concerns of which Douglas had written in Screws.\(^99\) Douglas wrote for the majority, retreating somewhat from the charging requirements he had set in Screws. Noting that the Screws charging requirements were necessary in cases in which the intent to deprive someone of constitutional rights was unclear, Douglas hinted at their possible superfluousness in this classic case of coerced confession: the intent to deny the victims’ constitutional rights was, he wrote, “plain as a pikestaff.”\(^100\) Justice Frankfurter wrote briefly for four, to say that they dissented for the reasons set forth in Frankfurter’s dissenting opinion in Screws and to make the (unexplained) comment that they were strengthened in their views by “[e]xperience in the effort to apply the doctrine of Screws.”\(^101\)

In the conspiracy case, Frankfurter wrote for the same four who had dissented in the substantive case. The opinion’s conclusions were consistent with Frankfurter’s earlier positions, but difficult to reconcile with the outcome in the substantive case. Despite strong similarities in the wording\(^102\) and professed purposes\(^103\) of the substantive and conspiracy provisions, these four justices argued that the conspiracy provision was less broad. It was less broad, they said, not because of its language or purpose, but because of a want of constitutional authority. In words that call to mind the reasoning of The Slaughterhouse Cases, Frankfurter wrote that the conspiracy provision did not address conspiracies to deny the full panoply of federal civil rights, but only conspiracies to deny rights "arising from substantive powers of the federal government."\(^104\) It was not intended, the Frankfurter opinion asserted, to protect rights that states were forbidden by the federal government to deny. The gravamen of Frankfurter’s critique was that the conspiracy provision only covered conduct that the Federal government had power, independently of the Fourteenth Amendment, to enforce against individuals,\(^105\) and the Federal government had no power to forbid individuals to violate other individuals’ civil rights. Conspiring to commit the act was safe against Federal sanction, they argued, even though the Court had held that the action itself was subject to Federal sanction.\(^106\)

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\(^99\) Screws, 325 U.S. at 84.
\(^100\) Williams II, 341 U.S. at 101.
\(^102\) Justice Douglas artfully described the differences in his dissent. See Williams, 341 U.S. at 87 (Douglas, J., dissenting).
\(^103\) Williams I, 341 U.S. at 89.
\(^104\) Williams I, 341 U.S. at 73.
\(^105\) See Williams I, 341 U.S. at 77 (“the rights which [the conspiracy statute] protects are those which Congress can beyond doubt constitutionally secure against interference by private individuals.”).
\(^106\) Id. at 82 (“[I]ncluding an allegation that the defendants acted under color of State law in an indictment under [the conspiracy statute] does not extend the protection of the section to rights which the Federal Constitution merely guarantees against abridgment by the States.”)
In defense of his narrow and contradictory reading of the conspiracy provision, Frankfurter relied pivotally on *Cruikshank.* He also revived his critique of Reconstruction legislation:

The dominant conditions of the Reconstruction Period were not conducive to the enactment of carefully considered and coherent legislation. Strong post-war feeling caused inadequate deliberation and led to loose and careless phrasing of laws relating to the new political issues. The sections before us are no exception. Although enacted together, they were proposed by different sponsors and hastily adopted. They received little attention in debate. While the discussion of the bill as a whole fills about 100 pages of the Congressional Globe, only two or three related to § 6, and these are in good part a record of complaint that the section was inadequately considered or understood.

The count was dead even, with the reach and effectiveness of the Reconstruction conspiracy provision – and the fates of the defendants’ conspiracy convictions – undetermined. Justice Black broke the tie – and saved the defendants from their conspiracy convictions – by ruling that the convictions were invalid on more technical grounds.

The constitutional reach of both the conspiracy provision and the substantive provision remained uncertain: Four justices would apparently limit the conspiracy provision to cover interferences with what the *Slaughterhouse* Court had carved out as uniquely federal rights; four would apply it to protect against interference with *any* rights guaranteed by the federal constitution. Before the Court faced this nest of issues again it had been sobered, but perhaps even more confounded, by cases that presented a flip side of federal prosecutions for Jim Crow violence: state prosecutions for civil rights demonstrations in which protesters “enacted” rights they believed were federally protected and their enactments were punished as state crimes.

**B. Protecting the Performance of Free Citizenship**

As we saw in our consideration of federal prosecutions against supremacist violence, there has been intense disagreement about whether and how federal civil rights enforcement power is limited by the fact that Fourteenth Amendment proscriptions are in the form “no State shall…” (just as Bill of Rights proscriptions are in the form “Congress shall make no law…”). Some take this language to mean that the federal government is helpless to punish denials of civil rights unless those denials represent or are “colored” by “state action.” Others, noting that the Fourteenth Amendment’s language also confers

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107 *Id.* at 79.
108 *Id.* at 74-75.
109 See, e.g., *Virginia v. Rives,* 100 U.S. 313, 318, (1879); *Civil Rights Cases,* 109 U.S. 3 (1883); *United States v. Harris,* 106 U.S. 629 (1883); *Shelley v. Kraemer,* 334 U.S. 1, 13, and n. 12 (1948); *Romer v.*
citizenship, argue that Congress has power to do all that is necessary and proper to secure citizenship's privileges. The question whether a private establishment that is in other respects open to the public may exclude people on the basis of race elicits an analogous pair of responses – some arguing that anti-discrimination is an obligation that only governments owe to the People, and others arguing that every citizen has a right to be accommodated in public spaces. Using their passively resistant bodies to integrate establishments that were open to the public but marked “For Whites Only,” civil rights demonstrators in the 1960’s presented an enforcement conundrum: Could they be ejected by state police and prosecuted for trespass? Could they be ejected by private force? Were they entitled to federal protection? Or were they in a state of nature?

The 1960s civil rights movement proceeded in part on the theory that African-Americans were “constitutional people,” having won in Civil War and Reconstruction freedom from the status of “constitutional property.” As citizens of the United States, people in the Movement claimed the right of public accommodation by placing their black and white bodies in spaces designated “for colored only.” When Movement demonstrators provoked local hostility by defying and speaking against Jim Crow laws, they were arrested and prosecuted for trespassing, disturbing the peace, unlawful assembly and the like. Demonstrators sought relief in Federal courts, claiming that the State prosecutions violated the protesters’ Federal civil rights. In Screws and in the Williams cases, federal civil rights laws enforcing the Fourteenth Amendment were to have been a sword against local, anti-civil rights harassment and intimidation. In these cases, the Amendment itself was used as a shield against local prosecution of civil rights activists. Forthright determination of the activists’ claims would have forced the Court to confront, in another guise, the question of federal power that it had dodged in Screws and Williams. Although civil rights lawyers raised the power issue, most of the justices chose to skirt it. Justice Douglas was the consistent exception.

In the 1960s, the Supreme Court considered 31 cases involving sit-in’s and other kinds of civil rights protest. In the first of them, a 1960 case involving black
demonstrators who had been convicted in 1951\(^{112}\) of trespassing on a segregated public golf course, there was agreement that access to the course could not constitutionally be denied on account of race, but a bare majority, over strong objection, deemed itself unable on technical grounds to vacate the convictions or remand the case for further consideration in the state courts.\(^{113}\) This was, however, the last time that the Supreme Court would affirm a criminal conviction for mid-Twentieth century civil rights protest. Seasoned criminal appellate lawyers will tell you that there is no such thing as a perfect criminal trial record. As demonstration cases flooded the Court, this axiom was repeatedly demonstrated as Justices searched for ways to exonerate members of an increasingly popular, nonviolent human rights movement without reaching the fundamental questions of constitutional authority that civil rights lawyers – and Justice Douglas – repeatedly pressed.

The second case involved a Trailways bus passenger convicted of trespass for seeking service in a part of the bus terminal designated for whites only.\(^{114}\) Thurgood Marshall argued for the demonstrators as director of the premier civil rights litigation unit that was to become the NAACP Legal Defense and Educational Fund.\(^{115}\) This is especially significant, for Marshall would later rejoin the Court’s discourse on federal power as Solicitor General arguing similar issues for the United States (and still later, of course, as a Justice). Marshall and his colleagues sought a constitutional ruling that the denial of service violated the Fourteenth Amendment. A comfortable majority of the Court chose not to reach the constitutional question, but took the unusual step of

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\(^{112}\) Notice that the “crime” occurred before, but the ultimate appeal was decided after *Brown v. Board of Education* and cases decided in its wake outlawed race segregation of public facilities. See *Brown v. Board of Education*, 347 U.S. 483 (1954).

\(^{113}\) Wolfe *v.* North Carolina, 364 U.S. 177 (1960). A federal court had held that the course unlawfully discriminated against black people, but a jury had found that the protesters were not excluded because of their race. There was a dispute as to whether the record of the federal case was offered in evidence in the state criminal proceedings. The majority found no constitutional error in the state Supreme Court’s affirmation of the conviction.

\(^{114}\) Boynton *v.* Virginia, 364 U.S. 454 (1960).

\(^{115}\) See Julius Chambers, *Thurgood Marshall’s Legacy*, 44 STAN. L. REV. 1249, 1252 (1992) (“The NAACP Legal Defense and Educational Fund was created in 1939 and incorporated in 1940, largely by Thurgood, as a separate organization from the NAACP…. As head of LDF, Thurgood was responsible for coordinating the entire legal program and the specific litigation strategies of LDF and the NAACP.”).
reversing the conviction on a ground not raised by the protesters.\textsuperscript{116} Pioneering a practice of resorting to Federal Commerce Clause powers rather than grappling with the meaning of constitutional personhood, seven justices held the conviction invalid because the denial of service was in the course of interstate travel and therefore violated anti-discrimination provisions of the Federal Interstate Commerce Act.\textsuperscript{117}

\textit{Garner v. Louisiana} was the first of the 1960s protest cases in which the justices disagreed publically about core civil rights and federalism questions.\textsuperscript{118} \textit{Garner} involved sit-in demonstrators’ disturbing the peace convictions. This time, every justice voted in favor of the protesters. A majority (including Justice Frankfurter\textsuperscript{119}) avoided the constitutional issues by voting to vacate the demonstrators’ convictions on the ground that there was no evidence that the peace of the Louisiana community in which the sit-in occurred was disturbed or was likely to be disturbed. The demonstrators, once again represented by Thurgood Marshall’s civil rights litigation unit,\textsuperscript{120} had sought to enact, to call attention to, and to establish as a matter of constitutional law, their right to be accommodated in public spaces. The reach of Federal power against arguably private class-based insult – \textit{i.e.}, the State action question – was squarely presented. The majority punt, granting the demonstrators relief, but granting it on the basis of an irrelevant technicality.\textsuperscript{121}

Justices Douglas and Harlan (II) both disagreed with the majority opinion. They thought any fool could see, and any judge might rightfully take judicial notice, that public, integrated dining would disturb the peace of downtown Baton Rouge, Louisiana in the 1960’s. This insight led them, however, to entirely different conclusions. Justice Harlan (II) wrote that the statute, as applied to the demonstrators, was unconstitutionally vague, but he declined to consider whether the demonstrators’ conduct could have been punished under a narrower statute. Justice Douglas, on the other hand, confronted the question the demonstrators had wanted to pose.

In bold and controversial\textsuperscript{122} terms, Douglas set out to address the State action problem with an inclusive definition of the public sphere. He relied on language from the Reconstruction civil rights statutes\textsuperscript{123} to argue that State action included not only the enforcement of State laws but also the enforcement of local customs. After reviewing a

\begin{itemize}
  \item \textsuperscript{116} Boynton, 364 U.S. at 457.
  \item \textsuperscript{117} Id. at 463–64..
  \item \textsuperscript{118} Garner v. Louisiana, 368 U.S. 157 (1961).
  \item \textsuperscript{119} Id. at 174. Justice Frankfurter concurred separately to emphasize that “the whole question on the answer to which the validity of these convictions turns” was whether “the public” tended to be alarmed by the conduct of the petitioners” and that no attempt had been made to prove it.
  \item \textsuperscript{120} The case was argued by Jack Greenberg, with William Coleman, James Nabritt, III and Louis Pollak on the brief. All were counsel at and for the Legal Defense Fund.
  \item \textsuperscript{121} Garner, 368 U.S. at 163–64.
  \item \textsuperscript{122} See e.g., Kenneth L. Karst & William W. Van Alstyne, Comment, \textit{Sit-Ins and State Action- Mr. Justice Douglas, Concurring}, 14 STAN. L. REV. 762-76 (1962).
  \item \textsuperscript{123} [Please check. I the language is both in the statutes and in the \textit{Civil Rights Cases} opinion. If so, let’s cite both].
\end{itemize}
long and wide-ranging list of Louisiana laws requiring race segregation, he concluded that segregation was so much a part of the policies and customs of the State of Louisiana that the State was complicit even when it enforced a policy of segregation that happened not to be officially mandated. Looking to tort and administrative law precedents, Douglas found ample authority for inhibiting a proprietor’s choices about how to run a business. Drawing a connection to New Deal legislation that permissibly regulated “private” businesses in order to promote social welfare, he argued that a state’s regulation of establishments serving the public made the state complicit when it permitted and enforced a regulated business establishment’s voluntary segregation policies.

In language that seemed responsive to the Movement’s claim to represent the voice of the People, Douglas went on to observe that “[t]he authority to license a business for public use is derived from the public” and then reminded his readers that “Negroes are as much a part of that public as are whites.” Having oriented his account to protection of People’s rights as a steady state, Douglas renewed Harlan I’s challenge that the Court take on the work of understanding what a post-slavery, classless society would look like and debating whether – or to what extent – the United States was constitutionally committed to being such a society. And with this, he opened a Pandora’s Box of new questions about federal power: This time the question was not whether the federal government could prosecute individuals, rather than states, for civil rights violations, but whether private persons could discriminate on racial grounds in their privately owned businesses and count on the state to enforce their exclusionary commands.

As protesters were repeatedly arrested and convicted, demonstration cases proliferated in the Supreme Court. On a single day in 1963, the Court decided six of them. Justice Frankfurter had resigned and been replaced by Arthur Goldberg, who promptly joined Justice Douglas’s broodings about State action. The six civil rights cases decided on May 20, 1963 were all decided in favor of the demonstrators; all convictions were vacated. Eight justices voted in every one of the cases either to vacate or to remand

124 Employers must provide separate places to eat in separate rooms with separate eating and drinking utensils for members of the two races. L.A. REV. STAT. § 23:972 (1960); Common carriers of passengers must provide separate waiting rooms and reception room facilities for the two races. L.A. REV. STAT. §45:1303 (1960); Louisiana requires that all circuses or tent exhibitions to which the public is invited must have separate entrances for separate races. L.A. REV. STAT. § 4:5 (1950); No dancing, social functions, entertainment, athletic training, games, sports, contests "and other such activities involving personal and social contacts" may be open to both races. L.A. REV. STAT. § 4:451 (1960).

125 Garner, 368 U.S. at 184.

126 Garner, 368 U.S. at 185 (“As the first Mr. Justice Harlan stated in dissent in Plessy v. Ferguson, . . . in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind.”).

for further proceedings.\textsuperscript{128} Peterson, chosen as the lead case, was briefed and argued for the demonstrators by LDF attorneys who led with a claim that the right of public accommodation is guaranteed by the Fourteenth Amendment and enforceable by the federal government, even when the decision to segregate is made by the accommodation’s private proprietors. Once again, the Court failed to address that possibility.

The Peterson opinion assumed a State action requirement and found that it was, or could have been, met by local segregation ordinances or, in one case, by a sheriff’s announcement.\textsuperscript{129} The Court voted to vacate each conviction, but the second Justice Harlan wrote separately, taking up Justice Frankfurter’s baton, not to the full symphony of restricting the reach of the Fourteenth Amendment to what Slaughterhouse set off as uniquely Federal rights, but to the tune of insisting that Federal enforcement of civil rights had to be limited to proceedings against the States.\textsuperscript{130} Harlan II framed the state action requirement as a call to balance the proprietors’ liberty to use their property and to discriminate as they saw fit, and the protestors right to demand equal treatment. He also sounded the Confederate narrative:

\begin{quote}
[i]nherent in the concept of state action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority.\textsuperscript{131}
\end{quote}

Five months after the Court announced its decisions in Peterson, et al., it heard argument in two other sit-in cases. Eight months later, it brought these two cases to a conclusion, ducking once again the question whether there is a constitutional right of public accommodation and remanding each case to state courts for reconsideration in light of anti-discrimination laws passed after the sit-ins had occurred.\textsuperscript{132} Justice Douglas seemed infuriated by the Court’s failure to reach the constitutional question presented by the cases, but he had gained allies: Chief Justice Earl Warren (who, like Douglas, had voted in the past to duck the constitutional question\textsuperscript{133}) and Justice Goldberg (who had replaced Justice Frankfurter) joined Douglas’s impassioned dissent. In words that gave a

\begin{footnotes}
\item[128] Peterson, 373 U.S. 244 (reversing in Chief Justice Warren’s unanimous opinion); Shuttlesworth, 373 U.S. 262 (reversing in Chief Justice Warren’s majority opinion with 7 other justices); Lombard, 373 U.S. 267 (reversing in Chief Justice Warren’s majority opinion with 7 other justices); Wright, 373 U.S. 284 (reversing in Chief Justice Warren’s unanimous opinion); Gober, 373 U.S. 374 (reversing in a per curiam opinion); Avent, 373 U.S. 375 (reversing in a per curiam opinion).
\item[129] See Lombard, 373 U.S. at 271-74.
\item[130] Harlan II would have remanded all but one of the cases for closer inquiry into the role played by local authority and whether the various proprietors acted under official compulsion.[cite]
\item[131] Peterson, 373 U.S. at 327-28.
\item[133] See Bell, 378 U.S. at 286 (Goldberg, J., dissenting with the Chief Justice joining).
\end{footnotes}
sense of the tenor of the time, Douglas asserted that “[t]he whole nation has to face the issue” of public accommodation:

Congress is conscientiously considering it [in deliberations over what was to be enacted, eleven days later, as the Civil Rights Act of 1964]; some municipalities have had to make it their first order of concern; law enforcement officials are deeply implicated, North as well as South; the question is at the root of demonstrations, unrest, riots, and violence in various areas. The issue in other words consumes the public attention. Yet we stand mute.

Douglas then made his position on the core constitutional question crystal clear, and in doing so made the strongest assertion he had yet made with respect to federal power to protect civil rights. Once again echoing the “demand side’s” claim of national right, he grounded his position by saying: “We deal here with incidents of national citizenship.”

Reviewing the arguments he had made in Garner, he concluded that whether the American version of apartheid was mandated, enforced, or simply tolerated by the State, it violated the People’s rights that were solidified by the Reconstruction Amendments.

C. Confronting A Sharper Cry for Civil Rights Enforcement

Months after the decision in Bell, Bob Moses and his colleagues were struggling to discover ways to call the nation’s attention to Southern terrorism. When asked about Freedom Summer 1964, Bob Moses often says that three supremacist murders and the failures of Mississippi and Federal officials to bring the murderers to justice persuaded young people in the Movement that it was necessary and right to call a group of college students to Mississippi and force the country to “look at itself.” Violence against black civil rights workers in Mississippi was routine and officially tolerated. Drastic measures were needed if the Movement was not to be snuffed out by terror.

The drastic measure chosen was Freedom Summer 1964. Hundreds of young people from across the country joined a demonstration of multi-racial citizenship to claim, as People of the United States, the rights of public accommodation and political participation. They trained in the Spring of 1964 to become non-violent protesters, voter

\[134\] Id. at 249.

\[135\] Moses knew this from personal experience. After he was beaten by of a sheriff’s nephew, a local jury acquitted the sheriff’s nephew. Things got worse. Voter registration activist Herbert Lee was shot dead by Eugene Hurst, a member of the Mississippi legislature. Hurst said that Lee had a tire iron. Local officials pressured Lewis Allen, a black man who had witnessed the killing, to testify before a local grand jury that Lee did have a tire iron. Federal Justice Department officials said they could do nothing. Two years later, on New Years Eve, 1964, Lewis Allen, who had admitted to federal officials that he saw no tire iron, was also murdered. There was no state or federal prosecution. There followed the assassination of Medgar Evers, one of Mississippi’s most prominent civil rights leaders, by a member of the White Citizens’ Council. There was no state or federal prosecution. Herbert Lee, Lewis Allen, Medgar Evers. No official sanction.
registration coaches and teachers in “Freedom Schools” and then traveled to Mississippi to live and work during the summer in sharecropper communities in enactments of multiracial democracy.

As Moses had predicted, Freedom Summer became a public spectacle, and what the country saw when it “looked at itself” were the terrorist murders of yet another young black civil rights worker and – alas, more compellingly to the nation as a whole – two white college students who were volunteers in the Freedom Summer project. The terrorist murders of James Cheney, Robert Goodman and Michael Schwerner were barely addressed at the time in the Mississippi Court system.\textsuperscript{136} Justice Department attempts to prosecute fifteen alleged lynch mob members, three of them law enforcement officers, came to the Supreme Court on interim appeal in 1966 in \textit{United State v. Price}.\textsuperscript{137} The murders of Goodman, Cheney and Schwerner were still matters of public consciousness; indeed, the Government’s oral argument began by pointing out that the case was known throughout the world.\textsuperscript{138}

As it had in the \textit{Williams} cases and in the cases that clustered around \textit{Garner} and \textit{Peterson}, the Court debated a burning constitutional question in more than one instantiation. \textit{United States v. Price} was argued and decided with \textit{United States v. Guest}. As it had done with respect to the issue of public accommodation in \textit{Garner} and \textit{Peterson}, the Court found ways to duck the crucial question that the cases raised.

While \textit{Price} dealt with Mississippi supremacist terrorism, \textit{Guest} dealt with supremacist terrorism in Georgia. Three African-American army reserve officers were fired on by Klansmen in 1964 as they were driving on a Georgia highway from a summer assignment at Fort Benning. One of the officers, Lemuel Penn, a 48-year-old decorated World War II veteran and assistant school superintendent in the District of Columbia, was shot dead. Predictably, no state conviction ensued; two of the assailants were charged but acquitted. Although no officer or employee of the State was involved in the shooting, the Justice Department charged the Klansmen under reenacted portions of the

\begin{quote}
\textsuperscript{136} The political and law enforcement climate in Neshoba County, the county in which the civil rights workers were murdered, is suggested by this account of a 1966 demonstration that Martin Luther King led the county courthouse on the second anniversary of the murders:

A large man dressed in a cowboy hat, sunglasses and a short-sleeved uniform met King at the two-story red-brick courthouse. It was Deputy Cecil Price. Price said, "You can't come up these steps." "Oh, yes," King replied. "You're the one who had Schwerner and the other fellows in jail." "Yes, sir," Price answered. King tried to address the crowd above the loud jeers of white onlookers. "In this county, Andrew Goodman, James Chaney, and Michael Schwerner were brutally murdered. I believe the murderers are somewhere around me at this moment." "You're damn right-they're right behind you," muttered the Deputy.

\end{quote}

\begin{quote}
\textsuperscript{137} 383 U.S. 787 (1966).
\end{quote}

\begin{quote}
\end{quote}
Force Act. All of the indictments were dismissed in their entirety by a District Court judge who relied in part on Williams II to hold that the conspiracy provision did not reach private actions to deny Fourteenth Amendment rights. 139

Thurgood Marshall chose these Georgia and Mississippi terrorism cases to be his first arguments as Solicitor General. They were heard on the same day. Having urged, without success, as a civil rights lawyer that access to privately owned public accommodations is an entitlement of United States citizenship, Marshall argued in Guest that private conspiracies to keep people from enjoying access to public accommodations are prosecutable by the United States, at least insofar as the facilities are provided by a state. This strategic concession was possible because the Government had charged the Guest defendants with conspiring and acting for the purpose of denying people of African descent equal use of roads, highways and other public facilities. The Court did not take the bait; Marshall’s attempt to extend the Government’s authority at least to private action that interfered with the enjoyment of public benefits or facilities failed. 140 As in the enactment cases, the Court found itself in these enforcement cases unable to make a majority statement that significantly broadened the scope of Federal power to protect civil rights. 141

Since our method is to focus on competing strands of judicial brooding rather than on case outcome alone, we need not end the story of the 1960s cases with a report of failure to put a significant dent in the state action doctrine. Thurgood Marshall planted, and Justice Fortas hid away in the Price majority opinion, a time bomb of historical material that squarely challenges the Confederate narrative and its underlying premises. This material may one day permit a more People-focused approach to the question of Federal civil rights enforcement power.

But for the very public drama of the Mississippi murders, the Court’s opinion in Price might be regarded as unremarkable. Eighteen people, three of them law enforcement officers, had been indicted under both the conspiracy and substantive provisions of the statutes. The trial court had sustained all of the indictments under the Citizenship Act, but it had relied on Williams II to dismiss the conspiracy indictments as to the fifteen defendants who were not State officials. The allegations were that the abductions and murders of the civil rights workers were coordinated from start to finish in collaboration with the law enforcement officers and with their active participation and that the officers had acted in their official capacities. 142 Indeed, the extent of official participation was at least as great, if not greater, than it had been in the Williams cases.

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139 The District Court also held that, if the Klan Act remnant did reach private action, it was unconstitutionally vague.
140 Price, 383 U.S. at 806.
141 Id.
142 See Price, 383 U.S. at 791. The latter section, the general conspiracy provision, makes it a crime to conspire to commit any offense against the United States. The penalty for violation is the same as for direct violation of § 242 -- that is, it is a misdemeanor."
But the private defendants relied on Justice Frankfurter’s four-person concurrence in *Williams II* to argue that the conspiracy statute could not reach them. They argued, that is, that the conspiracy statute had limitations analogous to those that the *Slaughterhouse* Court held the Fourteenth Amendment itself to have: It applied to private individuals’ conspiracies only when the conspirators’ intent was to deprive someone of a *uniquely* federal right. It did not apply in ways that would usurp or discourage State civil rights and criminal justice enforcement.

The *Price* Court seemed reasonably unified on the surface. Justice Fortas wrote for the Court, and there was only one brief concurrence (by Justice Black to distance himself from the Court’s reliance on *Williams II*). In its second paragraph, the Court denies that it is making constitutional law. The issue, it says, is simply one of statutory construction.\(^\text{143}\) Still, in its next sentence it declares, ambiguously, we think, that it has no doubt of Congressional power to enforce by criminal sanction “every right guaranteed by the Due Process clause.”\(^\text{144}\) Reasoning that private persons who engage with state officials in prohibited conduct are acting "under color" of law for purposes of the conspiracy statute, the opinion easily concludes that the indictments should not have failed as against the fifteen private citizens by virtue of their status. In addressing the *Williams II* “uniquely federal right” limitation of the conspiracy statute, the Court relied on legislative history to hold -- as a matter of statutory interpretation rather than as a matter of Federal power -- that Congress had intended to reach exactly the kind of private, Klan terrorism in which the defendants allegedly engaged. Frankfurter’s *Slaughterhouse* strategy of draining the Federal government of power to address basic civil rights was put to sleep, if not to final rest.

The Court’s reluctance to face questions of Federal power is equally clear in the arguments and opinions in *United States v. Guest*. *Guest*, like, other anti-terrorism cases we have reviewed, was resolved on the basis of technicalities. The *Guest* and *Price* cases differed in that none of the *Guest* respondents was a public official. Marshall attempted to finesse this difficulty by creating a passive link to the state: He argued that the defendants were interfering with the victims’ access to roads, highways and other public facilities that the state was required under the Fourteenth Amendment to make available regardless of race. Their actions therefore interfered with the state’s 14th Amendment obligation of Equal Protection even though the state was, as Marshall put it in oral argument, doing its constitutional duty.\(^\text{145}\) The Court declined to expand state action doctrine in this way; it instead found a claim of state action in the allegation of a plot to have African-Americans falsely charged with crimes and a suggestion that proof at trial might establish that law

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143 Price, 383 U.S. at 789 (“It is an issue of construction, not of constitutional power.”).
144 Id.
145 Transcript of Oral Argument at 8, United States v. Guest, 383 U.S. 745 (1966) (“Here we have the state opening up and the state has certain responsibilities, but once the state owns it up nobody should be allowed to prevent the Negro from getting his right. . . . If the state says ‘Well, we’ll go ahead and do what we’re supposed to do and break it down,’” and hoodlums do the things charged in this indictment then what happens, the rights are [a] nullity.”)
enforcement officials were knowingly involved in the false arrest scheme. The law regarding the necessity of state action was left untouched.\textsuperscript{146}

Taken as a whole, the three opinions filed in \textit{Guest} are a tangle of disagreement. Only Justice Clark joined Stewart’s opinion in full, and the Justices were unable to agree as to what the opinion actually held: Justice Harlan joined the Stewart opinion, but dissented “to the extent that” the conspiracy statute was being held to cover “only the actions of private persons.”\textsuperscript{147} Justice Clark wrote separately to deny that the statute was being held to cover only the actions of private persons, a question he said the opinion “clearly” avoided.\textsuperscript{148} In this, he was joined by Justices Black and Fortas. Justice Brennan interpreted the Stewart opinion to \textit{rule against} Marshall’s passive link argument and wrote emphatically to say that he could “find no principle of federalism nor word of the Constitution” that denies Congress power to guarantee\textsuperscript{149} Justice Harlan (II) wrote at length to disassociate himself from any part of the Court’s opinion that relied on the existence of a Federal right against private interference with interstate travel.

Careful vote-counting and opinion-comparisons tell us, then, that he scope of Federal power to define and enforce a Federal body of civil rights remained unclear after the sit-in and anti-terrorism cases of the Sixties. The state action doctrine continued – and continues today -- to haunt us; the \textit{Price} opinion repeated, and the Court has often repeated, Justice Douglas’s concession in \textit{Williams I} that “The Fourteenth Amendment protects the individual against state action, not against wrongs done by \textit{individuals},”\textsuperscript{150} and the Justices in \textit{Price} were unable to make a unified statement about the reach of Federal civil rights enforcement power. We remain in doubt about Congressional authority to contain separatist insult or supremacist terror. But, as we have suggested, the \textit{Price} opinion contains material that should feed further judicial brooding about civil rights and Federal power.

Between the lines of Justice Fortas’s rather inconclusive \textit{Price} opinion lie historical insights and doctrinal themes that problematize the Confederate narrative of states’ rights. The Justice orients his readers to Reconstruction rather than to 1787, framing the conspiracy and substantive civil rights statutes as having “come to us from Reconstruction days, the period in our history which also produced the Thirteenth, Fourteenth, and Fifteenth

\textsuperscript{146} Presumably the Justices were not persuaded that state action could be found in the attempt to use state officials unwittingly in the scheme, and a distinction was made between arrest at the behest of a segregationist shop-owner and arrest at the behest of a Klan member bent on harassing blacks to deter their exercise of more clearly established federal rights.

\textsuperscript{147} Guest, 383 U.S. at 763 (Harlan, J. dissenting) (“To the extent that it is there held that 18 U. S. C. § 241 (1964 ed.) reaches conspiracies, embracing only the action of \textit{private persons}, to obstruct or otherwise interfere with the right of citizens freely to engage in interstate travel, I am constrained to dissent.”).

\textsuperscript{148} \textit{Id.} at 761 (Clark, J. dissenting) (“The Court's interpretation of the indictment clearly avoids the question whether Congress, by appropriate legislation, has the power to punish private conspiracies that interfere with Fourteenth Amendment rights, such as the right to utilize public facilities.”).

\textsuperscript{149} \textit{Id.}, at 784 (Brennan, J. concurring).

\textsuperscript{150} \textit{Williams I}, 341 U.S., at 92 (Douglas, J. dissenting).
Amendments to the Constitution.”[151] Citing Justice Holmes [in a voting rights case] for the proposition that the section applies to “all Federal rights,” Fortas calls to mind the context of Southern terrorism:

The source of this section in the doings of the Ku Klux and the like is obvious and acts of violence obviously were in the mind of Congress. Naturally Congress put forth all its powers. . . . This section dealt with Federal rights and with all Federal rights, and protected them in the lump . . . [It should not be construed so] as to deprive citizens of the United States of the general protection which on its face [the statute] most reasonably affords.[152]

Having turned readers’ attention in this case of Klan violence to the Klan terrorism of the Reconstruction era, Fortas offers a brief history of southern violence in the years before the conspiracy statute was passed. This history frames presentation of “the only statement explanatory of § 241 (or Force Act) in the recorded congressional proceedings relative to its enactment.”

The statement, which had, ironically, been relied on by Justice Frankfurter to very different ends in Williams II,[153] was cited in the Government’s brief, appended in full to the brief and addressed repeatedly in Marshall’s oral argument. It made clear that Senator Pool of North Carolina, sponsor of the conspiracy statute, intended that it extend beyond protection of uniquely Federal rights. But it did much more: It repeatedly made clear Pool’s intention that the statute would protect against the private violence of Klansmen and their ilk, and Justice Brennan, writing in Guest, relied upon it to establish just that point.[154]

Senator Pool and his speech merit more attention than they have received. The lack of attention is interesting in itself. Although the meaning and reach of the conspiracy statute have been actively litigated,[155] and although a majority of the Court accepted Marshall’s description of the speech as the “only” thing in the Congressional Record that spoke directly to the conspiracy provision’s meaning, and despite Justice Fortas’s decision to append the entire speech to the Price opinion, the speech has been referenced in only 11 subsequent Federal cases, only 4 of them opinions at the Supreme Court level.[156] This lack

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151 Price, 383 U.S. at 789.
153 See e.g., Guest, 383 U.S. at 782 (Brennan, J., concurring in part and dissenting in part); see also Cong. Globe, 41st Cong., 2d Sess. 3564, 3611 (statement of Sen. Pool), reprinted in appendix to United States v. Price, 383 U.S. at 807-820.
154 See e.g., Guest, 383 U.S. at 745; In re Quarles, 158 U.S. 532 (1895); Logan v. United States, 144 U.S. 263 (1892); United States v. Waddell, 112 U.S. 76 (1884); Ex parte Yarbrough, 110 U.S. 651 (1884); United States v. Cruikshank, 92 U.S. 542 (1875); Pettibone v. United States, 148 U.S. 197 (1893); Motes v. United States, 178 U.S. 458 (1900); Hodges v. United States, 203 U.S. 1 (1906); United States v. Comstock, 560 U.S. 126 (2010).
155 See Griffin v. Breckenridge, 403 U.S. 88, 101 (1971) (using Senator Pool’s speech to support the argument that a federal statute covered private conspiracies because “Congress must deal with
of attention might signal that *Price* settled so decisively the statute’s meaning that further reference to the speech would be superfluous. But what did *Price* really settle?

As we have said, it decided that the indictment charging a Federally proscribed conspiracy on the part of Goodwin, Chaney and Schwerner’s killers alleged sufficient state action. But neither *Price* nor *Price* and *Guest* taken together settled the question whether state action was required to give the Federal government authority to prosecute conspiracies or actions to inhibit the exercise of civil rights. Nor did they lay to rest decisively the question whether Congress intended to exercise – or whether Congress has – the power to protect People’s rights that are not “uniquely federal.”

The full text of the Pool speech goes directly to both of these still unanswered questions. Why did Marshall append the full text of the speech to the Government’s brief?157 And why did Fortas append the full brief to the Court’s opinion, adding a puzzling footnote saying that it was appended “only to show that the Senator clearly intended § 241 to cover Fourteenth Amendment rights.”158 Senator Pool sounds the People’s narrative of full Federal protection of civil rights and insists on the Federal government’s power to proceed in doing so against individuals as well as against States:

That the United States Government has the right to go into the States and enforce the fourteenth and the fifteenth amendments is, in my judgment, perfectly clear, by appropriate legislation that shall bear upon individuals.

***

I believe that the United States has the right, and that it is an incumbent duty upon it, to go into the States to enforce the rights of the citizens against all who attempt to infringe upon those rights when they are recognized and secured by the Constitution of the country. If we do not possess that right

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158 Price, 383 U.S. at 805 n. 19 (“We include these remarks only to show that the Senator clearly intended § 241 to cover Fourteenth Amendment rights.”).
the danger to the liberty of the citizen is great indeed in many parts of this Union.\textsuperscript{159}

Here we have a post-Civil War vision, not of reform, but of hugely consequential reconstruction of the federation that was conceived under the proposition that all people are created equal, but designed to preserve the freedom of private persons to enslave other human beings. Here we have a vision of national protection of human rights:

I believe that we have a perfect right under the Constitution of the United States, not only under these three amendments, but under the general scope and features and spirit of the Constitution itself, to go into any of these States for the purpose of protecting and securing liberty. I admit that when you go there for the purpose of restraining liberty, you can go only under delegated powers in express terms; but to go into the States for the purpose of securing and protecting the liberty of the citizen and the rights and immunities of American citizenship is in accordance with the spirit and whole object of the formation of the Union and the national Government.\textsuperscript{160}

Granted, we are talking about the opinion of one Congressman, albeit the sponsor and drafter of important Federal antiterrorism legislation. But we are not talking about the opinion of a Radical Republican. John Pool grew up and resided throughout his life on a North Carolina plantation. He was opposed to secession, but not an antislavery advocate. He was persistently active in fighting the Klan, both with federal force and with state forces. In his heart of hearts, Senator Pool may well have preferred that States have full and exclusive power to define and protect civil rights. He understood, however, the need for change and joined the Republican Party in part out of “fear that estates would be confiscated. . .and divided among the blacks unless conservative Unionists like himself accepted the political changes demanded by Congress and controlled the course of reconstruction in the state.”\textsuperscript{161}

The possibility of Pool’s ambivalence is no justification for watering down the meaning of the statutes he sponsored, or of the Amendments pursuant to which they were passed. As we have shown, there has been a persistent tendency to interpret the Reconstruction statutes and Amendments narrowly owing to the fact that they were approved in a time of upheaval. But, as Pool’s words reveal, a substantial post-bellum reorganization of Federal, State and People power was deliberately undertaken and fully comprehended. This reorganization meant that where the liberty of the People was threatened, the national government had independent authority and responsibility to respond. As Pool put it, for the Federal government “to go into the States for the purpose of securing and protecting the liberty of the citizen and the rights and immunities of American citizenship is in accordance

\textsuperscript{159} Price, 383 U.S. 810-19.
\textsuperscript{160} Id. at 812.
\textsuperscript{161} WILLIAM S. POWELL, DICTIONARY OF NORTH CAROLINA BIOGRAPHY, VOL. 5 (2000).
with the spirit and whole object of the formation of the Union and the national Government.”

IV. LOST OPPORTUNITIES: THE CONFEDERATE NARRATIVE IN MODERN DOCTRINE

When we look to cases after Price and Guest, we find an interesting pattern: We see revivals of the Confederate reform narrative both within and outside the field of civil rights, and we see mantras to the liberty-enhancing function of states’ rights protections prominently repeated. On the other hand, we see no direct critique of the Confederate premise that the People’s liberty depends primarily on States’ autonomy and little trace of the People’s Reconstruction narrative exemplified by Senator Pool’s defense of the Enforcement Act. We do see signs of brooding within the Court about the reach of Federal power to protect civil rights, but that brooding no longer references the People’s story of a genuine reconstruction to address the contradictions that were inherent in the Founders’ compromise with slavery.

It is beyond the scope of this article to analyze the nearly fifty years of Supreme Court federalism jurisprudence since the 1960s. It will suffice here to identify significant moments of lost opportunity – moments when defense of the Federal government as a guardian of civil rights lacked the persuasive weight of a People’s account of Reconstruction. To that end, we discuss four cases: City of Boerne, Brzonkala, Shelby County, and Obergfell,162 to trace the influence of the Confederate narrative and the opportunities lost by silencing of the People’s post-bellum story of reconstruction.

A. The Confederate Narrative Surfaces in a Struggle Over the Separation of Federal Powers

City of Boerne must be addressed in any discussion of more recent civil rights federalism doctrine. It established the principle that Congressional measures authorized by the Fourteenth Amendment’s Enforcement Clause must be “congruent and proportional” to the injury Congress seeks to prevent or remedy.163 We do not address here the fit between notions of congruence and proportionality and the analysis of Federal anti-terrorism or anti-discrimination measures. For present purposes, we regard Boerne as an atypical civil rights case that improbably, and unfortunately, evoked a revival of the Confederate narrative.

Boerne involved much Congressional and judicial sword-rattling and is best understood as a case about the separation of Supreme Court and Congressional powers. The Court had ruled, in Employment Division v. Smith,164 that a State could deny an

163 City of Boerne, 521 U.S. at 520.
employee unemployment benefits where the employee had been discharged as a result of having used peyote, not on the job or recreationally, but in a religious ceremony. In response, Congress had passed a law for the explicit purpose of altering the doctrine the Court had announced in reaching its result. The Court had said that because the State’s prohibition of peyote use was broad and neutral, rather than directed specifically at a religious practice, the State had not impermissibly thwarted free exercise of the dismissed employees’ religion. Believing that the Court had erected an impossibly high barrier to vindication of Free Exercise claims, Congress attempted to legislate a standard of review that the Smith Court had expressly rejected: It decreed in a Religious Freedom Restoration Act (RFRA) that governments’ facially neutral laws must not substantially burden the free exercise of religion except in furtherance of a compelling interest and through the use of minimally drastic means.

RFRA faced Supreme Court scrutiny in City of Boerne. The city had denied the application of a church situated in an historic district to expand its premises, and the church had offered RFRA in defense of its right to expand. The city understandably responded that RFRA was too sweeping and disproportionate a response to the Congressional mission of securing religious freedom. The Court’s response was more elaborate than it might have been. Not only did the Court devise a proportionality and congruence test for determining whether Congress had acted more broadly than the risk of constitutional injury warranted, but it also went on to make the broader, inessential argument that the Fourteenth Amendment’s drafters had considered and rejected a proposal to give Congress broad civil rights enforcement powers. Cases decided after Price and Guest had made clear that Congress is authorized by the Fourteenth Amendment’s Enforcement Clause to employ both remedial and prophylactic measures to protect civil rights. The Boerne Court might have used the concept of congruence and proportionality to distinguish remedial and prophylactic measures that are appropriately related to civil rights enforcement and those that are not. This would have allowed it to address the church’s claim while staying squarely within the bounds of precedent. However, for reasons that remain unclear, the Court went on to revive the Confederate narrative, not to elaborate a line-drawing process with respect to the admittedly fuzzy distinction between defining a right and enforcing it, but to ”confirm[] the remedial, rather than substantive, nature of the Enforcement Clause.”

165 The legislation announced Congressional findings that “(4) in Employment Division v. Smith, . . . the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.” 42 U.S.C. § 2000bb(a). The Act’s stated purposes were: ”(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398, (1963) and Wisconsin v. Yoder, 406 U.S. 205, (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened.”

166 City of Boerne, 521 U.S. at 519-20 (“While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed.”).
In what has become a sharply controverted account of Reconstruction politics, the opinion describes debate – both on the floor of Congress and in the press – concerning the first proposed version of the Enforcement Clause. In the course of that debate, opponents of the proposed clause complained that it disturbed too much the balance of Federal and State power. The initially proposed clause gave Congress power “to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.” The version ultimately adopted provided the "the Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Discerning differences between the reach of the first proposal and the reach of the adopted Enforcement Clause is a complex and indeterminate interpretive task. The Court’s conclusion that the adopted clause gave Congress significantly less -- or any less -- authority than did the first proposal is at best controversial. Moreover, it is not clear whether the 1866 debate was about who had the authority to define or who had the authority to enforce rights guaranteed by the Fourteenth Amendment’s first section: At least some who spoke against the first version of the Enforcement Clause spoke or voted against the notion that the Federal government should have any civil rights enforcement power at all. As we will see, the Court’s unnecessary and questionable rehashing of Reconstruction history foretold a retreat from the vision Marshall and Fortas had offered of the power shifts and new constitutional understandings that followed on Union victory in the Civil War.

B. The Confederate Narrative Holds Fast in a Case Involving Gender Subordination

The People’s narrative is a large story of human rights, whereas the Confederate narrative is a minimalist story of freeing slaves. In light of this distinction, we would expect the People’s narrative to be prominent when groups other than slaves and their descendants

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168 City of Boerne, 521 U.S. at 520.

169 U.S. CONST. amend. XIV, § 5.

170 Colker, supra at 817; Colker & Brudney, supra at 85-86; see also Ronald D. Rotunda, The Powers of Congress Under Section 5 of the Fourteenth Amendment After City of Boerne v. Flores, 32 IND. L. REV. 163 (1998) (arguing for limitations on Congress's legislative authority under Section 5); Steven A. Engel, Note, The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5, 109 YALE L.J. 115 (1999) (arguing for more deference to congressional legislation passed pursuant to the Fourteenth Amendment).

171 See CONG. GLOBE 39th Cong., 1st Sess. 1087 (1866) (including remarks of opposition by Representative Davis); CONG. GLOBE, 39th Cong., 1st Sess. 2545 (1866); ROBERT J. HARRIS, THE QUEST FOR EQUALITY: THE CONSTITUTION, CONGRESS, AND THE SUPREME COURT 40 (1960) (describing Representative Rogers as an "extreme opponent" of the Fourteenth Amendment).
claimed rights under the Reconstruction Amendments. We therefore turn, in this subsection to a case involving women’s rights and in the next to a case involving sexual minorities.

_Bronkala_, a case involving the civil rights of women, was decided in the year 2000, but changes in federalism doctrine had been signaled earlier when, in _United States v. Lopez_, the Court decided that Congress lacked the power to prohibit the carrying of guns in the neighborhood of a school. _Lopez_ was decided under the Commerce Clause, and was arguably of little relevance to questions of Federal authority pursuant to the Reconstruction Amendments, but both the Commerce Clause and the Enforcement Clause were relied upon when Congress enacted the Violence Against Women Act (VAWA), the statute at issue in _Bronkala_. Deciding that VAWA exceed Congressional authority when it created a civil action for gender-motivated acts of violence, the Court looked to both clauses, and, to the detriment of doctrinal precision, Commerce Clause jurisprudence influenced the Court’s thinking in both Constitutional contexts.

In _Bronkala_ Justice Rehnquist, writing for the Court, relied principally on _Lopez_ for his Commerce Clause analysis. In deciding that creation of the civil cause of action on which Christy Bronkala relied to seek relief on a claim of rape exceeded Congressional authority, he intoned the mantra that decentralization of power is the People’s best protection against tyranny, saying, “the Framers crafted the federal system of government so that the people’s rights would be secured by the division of powers,” and repeated a caution from the _Boerne_ against blurring “the boundaries between the spheres of federal and state authority.”

For his analysis of the reach of Federal power under the Reconstruction Amendments, Rehnquist, speaking for five, announced the Court bound by two of its most crippling late Nineteenth Century assaults on Federal power to protect civil rights: _United States v. Harris_ and _The Civil Rights Cases_. The Rehnquist opinion went on to repeat a version of the Confederate narrative: It spoke of limitations placed upon Congressional power to enforce civil rights that were necessary, not because they were explicitly set out in the Amendments, and not because of a context-specific assessment that decentralization was preferable, but “to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government.” The challenged VAWA provision consequently fell, but not without hearty disagreement. Direct exchanges between the majority and dissenting opinions put on public display disagreements that would otherwise have remained in the privacy of the Justices’ chambers.

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172 The case is usually cited, as it was captioned in the Supreme Court, as _United States v. Morrison_. We follow the feminist convention of referencing the case by the name of its original plaintiff.

173 _Morrison_, 529 U.S. at 616 n. 7

174 _Id_. at 611.

175 _Id_. at 620.
and conference room. Most of that disagreement concerned the reach of the Commerce Clause, but exchanges regarding the Enforcement Clause were telling.

Four Justices joined a section of a dissent by which Justice Breyer questioned the majority’s Enforcement Clause reasoning, but stopped short of deciding the Enforcement Clause question. These Justices did not make a full assault on the state action requirement. They distinguished *Harris* and *The Civil Rights Cases* on the ground that neither involved a Federal statute that was explicitly remedial of unconstitutional State actions or failures. Rather than repeat Confederate mantras about state sovereignty, these Justices expressed comfort with a model in which State and Federal powers might be used in pursuit of a common goal of protecting the People’s liberty. They questioned the Confederate view that the exercise of police powers is the exclusive province of States and appeared to find no threat to our system of government in parallel State and Federal efforts to protect the People’s interests. In this, the Justices echoed Judge Diana Gribbon Motz’s dissent from the decision the majority had chosen to affirm. Imagining both complementary and remedial Federal efforts in the service of the People’s interests and noting the representative character of Congress, Judge Motz had pointed out that

Congress is composed entirely of members elected from each state to represent the interests of the people of that state, and is specifically designed to preserve state authority and protect state interests. Congressional legislation accordingly is not, as the majority suggests, a command from an autonomous central power to totally subjugated states. Congressional legislation is instead the product of the constitutionally coordinated authorities of the states, the localities, and the people.

A separate dissent (penned by Justice Souter and joined by all of the other dissenters) addressed only the Commerce Clause issue, but it argued similarly that the Founders’ design of our federal system is too complex to be reduced to a categorical rule of separate spheres, but depends for the representation of state interests on both the idea of enumerated powers and on a political process in which the States have carefully allocated representation at the

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176 Chief Justice Rehnquist only references Justice Souter’s dissent one time in the majority opinion, though Souter references the Chief Justice’s majority opinion twenty-nine (29) times in his dissent. Chief Justice Rehnquist mention of Souter’s dissent relates only to the Commerce Clause while five of Justice Souter’s criticisms of the majority addressed the Fourteenth Amendment rather than the Commerce Clause.

177 *Morrison*, 529 U.S. at 666 (“Despite my doubts about the majority's § 5 reasoning, I need not, and do not, answer the § 5 question, which I would leave for more thorough analysis if necessary on another occasion.”).

178 *Id.* at 621.

179 *Id.* at 665. (“[VAWA] intrudes little upon either States or private parties. It may lead state actors to improve their own remedial systems, primarily through example. It restricts private actors only by imposing liability for private conduct that is, in the main, already forbidden by state law. Why is the remedy ‘disproportionate’? And given the relation between remedy and violation -- the creation of a federal remedy to substitute for constitutionally inadequate state remedies -- where is the lack of ‘congruence’?”).

federal level. The dissenters thus challenged the Confederate story of the Founders’ commitment to rigidly separated spheres of government control, but none of the dissenters addressed the People’s decision in the 1860s to alter the Founders’ design and enhance Federal power with respect to Peoples’ rights. The Confederate narrative commanded a majority, and the Peoples’ narrative remained silenced.

C. The Confederate Narrative Justifies Voting Rights Retrenchment

Our account of 1960s civil rights activism and the judicial brooding it immediately spawned neglects an important dimension of the protesters’ work and their impact on federalism jurisprudence. Protecting the franchise was a central goal of Southern civil rights activism of the time; voter registration was a central function of the young people from across the country who joined Freedom Summer; and black political participation was a key target of Southern supremacist terror. This activism led, not to judicial brooding over the activism, per se, but to, among other things, passage of the 1964 Voting Rights Act. This Act prohibited specified voting practices traditionally used to exclude black voters, and it enabled the Federal government to “pre-clear” changes in state voting laws or practices to assure that the changes were not an impediment to black voting. The law was repeatedly challenged and repeatedly upheld in decisions approving remedial and prophylactic legislation under Congress’s Reconstruction Amendment enforcement authority.

That pattern changed in 2012 with Shelby County v. Holder. Here Justice Roberts, speaking for the Court, embellished the Confederate narrative, elevating the status of States to both horizontal and vertical sovereignty, and invalidated the Voting Rights Act’s preclearance measures as extraordinary interferences with States’ rights of equal sovereign power. Four Justices dissented in Shelby County. The dissent comprehensively reviewed the Congressional record supporting extension of the preclearance formula, prior rulings regarding the standard by which Congressional enforcement choices should be made, and the questionable path to a doctrine of equal sovereignty. The dissent did not offer, however, the historical narrative that supports giving Congress the broad authority it exercised when it passed and repeatedly reauthorized the Voting Rights Act. In other words, the dissent failed evoke the cruel lesson of slavery: that majoritarian political processes can yield results that violate the human rights principles that bind us as a nation.

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181 Morrison, 529 U.S. at 639.
183 Shelby County, 133 S.Ct. at 2616.
184 Id. at 2629. The concept of “equal sovereignty” had been introduced by Justice Roberts in an earlier voting rights case. [Northwest Austin]
185 Shelby County, 133 U.S. at 2647.
D. Rights of Sexual Minorities are Affirmed, but the People’s Narrative Goes Unspoken -- and the Confederate Narrative Continues to Sound

In a movement reminiscent of extralegal slave marriages\(^{186}\) and of civil rights sit-ins of the 1960s, lesbian, gay, bisexual and transsexual (LGBT) people formed families, simultaneously enacting and claiming a constitutional right of family union. When the right of their families to legal recognition came to the Court in \textit{Obergefell v. Hodges}\(^{187}\) the Court did equivocate as it has done in so many African-American civil rights cases. It did not resort to technicalities. It relied squarely on the People’s right to reasonable autonomy in the formation of families to hold that every state must recognize same-sex marriages.\(^{188}\)

\textit{Obergefell}’s vindication of nationally conferred and nationally enforced civil rights was a significant doctrinal move, but the Court’s exercise of Federal power was not defended, as it might have been, in terms of a People’s Reconstruction narrative. Vindication built on a People’s Reconstruction narrative was, however, readily available to the Court, for the constitutionalization of family rights was an explicit objective of the Reconstruction Congress.\(^{189}\) It was well understood that the end of slavery would mean the end of deprivations of family integrity and autonomy;\(^{190}\) scholars had firmly established that slavery’s denial of family recognition conferred a civic and social death that was antithetical to free citizenship; and even former Confederate states had recognized post-Emancipation that the right of marriage recognition was an attribute of free citizenship.\(^{191}\)

Although the majority shied away from the People’s Reconstruction narrative, Dissenters from the Court’s result each relied on the Confederate story that the People’s rights are best protected by protection of States’ rights. Justice Roberts decried “stealing”

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\(^{186}\) Peggy Cooper Davis, Neglected Stories, 30-40, 42-49.
\(^{188}\) Id. at 2607-08 (“[I]f States are required by the Constitution to issue marriage licenses to same-sex couples, the Justifications for refusing to recognize those marriages performed elsewhere are undermined... The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.”).
\(^{189}\) See generally Brief of Amicus Curiae Experiential Learning Lab at New York University School of Law in Support of Petitioners, Nos. 14-1556, 14-562, 14-571 & 14-574 available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV5/14-556_amicus_pet_lab.authcheckdam.pdf
decisionmaking about same-sex marriage rights from “the people” and “from the hands of state voters” and accused the majority of accumulating power at the expense of the people.” Justice Scalia accused the majority of robbing the People of the liberty to govern themselves. Justice Thomas charged the majority with “wiping out with a stroke of the key board the results of the political process in over 30 States,” and Justice Alito accused it of usurping the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage.

The dissenters were correct, of course, in saying that the majority had overridden a number of state political processes. This was inevitable and right, for the People may legitimately seek to trump both state and federal legislative processes. This does not mean that their claim of civil and human rights violation disregards political process: Their claim summons the People’s decision, at moments of constitutional enactment or amendment, that majoritarian politics can not be permitted to function without limitations based on respect for human rights. Justice Kennedy made this point by summoning oft quoted tenets of constitutional democracy:

An individual can invoke a right to constitutional protection when he or she is harmed even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution “was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the read of majorities and officials and to establish them as legal principles to by applied by the courts.” West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 638 (1943). This is why “fundamental rights may not be submitted to a vote: they depend on the outcome of no elections.”

Justice Kennedy’s argument is strengthened by the realization that the 1787 constitutional order was reconstructed for the precise purpose of assuring that fundamental rights be understood as supervening principles to be applied by courts.

V. CONCLUSION

It is a consequential and insufficiently acknowledged part of our intellectual history that anti-Federalist ideas about the liberty-enhancing effects of local control have been used repeatedly to paper over the contradiction between slaveholding and other forms of subordination on the one hand and equal respect for all people on the other. Our Chief Justice, author of the Shelby County majority opinion and author of the opinion that

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192 Obergefell, 135 S.Ct. at 2615, 2625 (Roberts, C.J., dissenting).
193 Id. at 2627. (Scalia, J., dissenting).
194 Id. at 2632 (Thomas, J., dissenting).
195 Id. at 2642 (Alito, J., dissenting).
196 Windsor, 135 S.Ct. at 2605-06.
constitutes one of two precedential links to the opinion’s idea of equal sovereignty, has played a significant role in the seemingly unending retelling of the Confederate anti-Federalist narrative and its rationale.

In majority opinion upholding a provision of the Affordable Care Act in *NFIB v. Sebelius*, Chief Justice Roberts included a wholly unnecessary preamble. This preamble, not joined by any other member of the Court, was ostensibly offered as a statement of principles governing Congressional power to enact a national medical care system that sustains itself by making demands on States and on the People. The Roberts preamble is an ode to the importance of limiting Federal power and essentially recites what we have called the *Cruikshank* creed: the preamble refers at length to the history of the nation’s Founding, but never to its post-bellum Reconstruction; it reiterates the Confederate rationale without explanation or qualification; and it makes no mention of the impressive body of scholarly work in the fields of law, decision theory, philosophy and political science addressing the circumstances under which decentralization of government power is and is not in the interests of a principled People.

As we have shown, the Confederate Reconstruction narrative of modest reform and preservation of States’ rights can easily go unchallenged. A highly distinguished historian of Reconstruction addressed the legal community in 2012 to point out that the narrative of modest reform “remains embedded in the law long after the intellectual foundations of that historical outlook have been demolished.” He argued, and we agree, that a critical reassessment of the Supreme Court’s interpretations of the tensions between the People’s freedom and States’ autonomy is long overdue.

The Court’s willingness to defer to States on fundamental questions of dignity sets the United States apart from the growing international consensus that the protection of human rights is the obligation of every national sovereign, whether composed of federated states or not. A reassessment of Federal authority to protect the People’s

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198 The Framers thus ensured that powers which “in the ordinary course of affairs, concern the lives, liberties, and properties of the people” were held by governments more local and more accountable than a distant federal bureaucracy. The Federalist No. 45, at 293 (J. Madison). The independent power of the States also serves as a check on the power of the Federal Government: “By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.” Bond v. United States, 131 S. Ct. 2355 (2011).


200 The United States is a signatory to a number of the core international human rights instruments, including The International Covenant on Civil and Political Rights, The International Convention on the Elimination of All Forms of Racial Discrimination, and The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. These instruments have been ratified by no fewer than one hundred and sixty nine nation states in “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family.” However, in ratifying each of these international treaties, the U.S. raised two broad objections that together minimize the role of the federal government in...
rights seemed possible amidst the turmoil of the 1960s when the People spoke in the streets to enact freedoms that should have been guaranteed in the 1860s. The flicker of the People’s narrative that remains from that era should not die. To the end of reviving robust argument about the effects of the Reconstruction Amendments on the People’s freedom, we offer this beginning analysis and an internet site at which one can access relevant cases and other authorities and exchange views about the shape of our reconstructed republic.

protecting human rights. First, in the name of state sovereignty the U.S. maintains that it does not necessarily recognize the federal government as the primary and final defender on human rights. Thus, the ratification statement for each of these conventions states:

[T]he United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.

See http://www1.umn.edu/humanrts/usdocs/racialres.html; http://www1.umn.edu/humanrts/usdocs/civilres.html http://www1.umn.edu/humanrts/usdocs/tortres.html. Second, the U.S. argues that the substantive provisions of international human right norms to which it is a signatory are non-self-executing. As a practical matter, this means that, unless and until Congress enacts specific legislation, the conventions themselves do not provide independent grounds for litigants to bring claims in federal courts for violations of the terms of the treaties. See Gay McDougall, Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All; Forms of Racial Discrimination, 40 How. L. J. 571, 588 (1997); see also Tara Melish, From Paradox to Subsidiary: The United States and Human Rights Treaty Bodies, 34 Yale J. Int’l L. 389 (2009) (arguing that, while the U.S. typically encourages governments to fully incorporate human rights treaties into domestic political and judicial processes, at home we have tended, in the name of state sovereignty and other doctrines, to shield ourselves from similarly committing to fully accepting international human rights norms as federal obligations).
APPENDIX A:  
GENEALOGY OF RECONSTRUCTION CIVIL RIGHTS ACTS

Although the Supreme Court did strike down many portions of the Civil Rights Acts passed during Reconstruction, other portions of those Acts remain in effect today. However, those portions have been subsequently renamed and renumbered in the United States Code. This Appendix traces the path from the original legislation to its modern codification.

**Section 1 of the 1866 Act**, which was reenacted verbatim in Section 16 of the 1870 Act, remains in effect and has been codified as 42 U.S.C. §1981. Today §1981 is understood to ban both government and private discrimination in the makings of contracts, and reads in its entirety:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by [W]hite citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

**Section 1 of the Civil Rights Act of 1866** and the identical Section 16 of the 1870 Act also produced the modern civil rights provision codified as 42 U.S.C. §1982. Section 1982 is fairly self-explanatory and reads in its entirety:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by [W]hite persons to inherit, purchase, lease, sell, hold, and convey real and personal property.

**Portions of the 1871 Civil Rights or Ku Klux Klan Act** survived as 42 U.S.C. §1983 and now reads in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

In modern times, §1983 has become the primary vehicle used by private parties to vindicate their constitutional rights against state and local government officials. In and of itself, §1983 did not then (and does not now) create any new substantive right. Rather, it establishes a cause of action in federal court for damages and injunctive relief against state and local officials who violate any constitutional or statutory federal right.
Sections of the Ku Klux Klan Act also survived as 42 U.S. §1985(3) and today read in relevant part:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws ... in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

At the time of its original passage in 1871, §1985(3) was specifically aimed at providing a federal remedy against the Klan and other groups who used violence and intimidation to prevent Blacks in the South from fully enjoying their freedom. The original provisions of what is now referred as §1985(3) contained both criminal penalties and civil sanctions for violation of the Act. Shortly after it was enacted, the Supreme Court struck down the criminal sanction provisions of the statute without addressing the constitutionality of its civil penalties. The statute remained dormant until 1940’s when it was occasionally used to bring civil suits to quell mob violence directed toward unpopular political groups. Today §1985(3) remains in effect but, as compared to §§1981, 1982 and 1983, is rarely the determinative in civil rights litigation.
APPENDIX B: ONLINE INTERACTIVE DOCTRINAL MAPS

To see visual representations of this Article’s doctrinal argument, please go to our online appendix or follow the individual links below. The online appendix includes seven interactive maps that chart genealogies connecting the key Supreme Court opinions described in each section above. All maps include direct links to underlying opinion text in Casetext (a free site that provides verbatim opinion text and permits open annotation and commentary in a wiki-like fashion).

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