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Foreword: History, Fable and Constitutional Interpretation

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SYMPOSIUM:
ONE HUNDRED TWENTY-FIVE YEARS OF
THE RECONSTRUCTION AMENDMENTS

RECOGNIZING THE TWENTY-FIFTH
ANNIVERSARY OF THE
LOYOLA OF LOS ANGELES LAW REVIEW

FOREWORD: HISTORY, FABLE AND
CONSTITUTIONAL INTERPRETATION

*Lawrence B. Solum**

I. THE RECONSTRUCTION AMENDMENTS

One hundred twenty-five years ago, the Reconstruction Amendments to the United States Constitution were beginning to take their final shape. In his inaugural address delivered on March 4, 1861, President Lincoln stated that he would not oppose an amendment to the Constitution, "to the effect that the federal government, shall never interfere with the domestic institutions of the States, including that of persons held to service."¹ The compromise that Lincoln discussed did not become the Thirteenth Amendment. The Civil War began only a few weeks later, forever ending Northern attempts to accommodate the South in a way that would preserve the institution of slavery and the Union. The President issued his final Emancipation Proclamation on January 1, 1863.² Congress debated the Thirteenth Amendment to the Constitution in the spring of 1864 and the winter of the following year.³ Ratified in 1865, the amendment provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been

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1. Abraham Lincoln, Inaugural Address (Mar. 4, 1861), in ABRAHAM LINCOLN, SPEECHES AND WRITINGS: 1859-1865, at 222 (Don E. Fehrenbacher ed., 1989).

2. Abraham Lincoln, Final Emancipation Proclamation (Jan. 1, 1863), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS: 1859-1865, *supra* note 1, at 424.

3. The history of the three Reconstruction Amendments is recounted in DANIEL A. FARBEN & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 247-345 (1990).

duly convicted, shall exist within the United States or any place subject to their jurisdiction."⁴

The Fourteenth Amendment to the Constitution grew out of the conflict between the Reconstruction Congress and President Andrew Johnson. On March 27, 1866, President Johnson vetoed the Civil Rights bill, which prohibited discrimination on the basis of race. Congress overrode his veto on April 9, and twelve days later an amendment to the Constitution was placed before the Joint Committee on Reconstruction. The Fourteenth Amendment was ratified in 1868; Section 1 provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.⁵

Both the House and the Senate debated resolutions prohibiting denial of the right to vote on the basis of race in January 1869. The Fifteenth Amendment was ratified in 1870. It provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude."⁶ After the ratification of the Fifteenth Amendment, the Constitution was not amended again until 1913.

II. HISTORY AND THE SYMPOSIUM

Together, the three Reconstruction Amendments represent a crucial episode in our constitutional history. The five essays in this Symposium relate the history of the Reconstruction Amendments to contemporary constitutional practice. Erwin Chemerinsky's essay, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*,⁷ recounts the wrong turns and missed opportunities that mark the history of judicial interpretation of the Fourteenth Amendment. Professor Chemerinsky argues that cramped judicial construction has left the promise of the Fourteenth Amendment unfulfilled. From the burial of the Privileges or Immunities Clause in the *Slaughter-House Cases*⁸ to the use of rational basis scrutiny to uphold discrimination on the basis of age and wealth, Professor Chemerinsky contends that the Supreme Court has drastically

4. U.S. CONST. amend. XIII.

5. U.S. CONST. amend. XIV.

6. U.S. CONST. amend. XV.

7. Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 LOY. L.A. L. REV. 1143 (1992).

8. 83 U.S. (16 Wall.) 36 (1873).

and erroneously limited the meaning of the Fourteenth Amendment's majestic provisions.

Michael McConnell's essay, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition*,⁹ explores the relationship between the Constitution of the founding period and the Reconstruction Amendments. Professor McConnell argues that the Reconstruction Amendments did not represent a sharp break from the principles eminent in the original Constitution. Rather, the amendments should be viewed as a reaffirmation and restoration of old constitutional values.

In his essay, *The Role of History in Interpreting the Fourteenth Amendment*,¹⁰ William Nelson explicitly addresses the question of whether recourse to history should guide the courts when they interpret the Fourteenth Amendment. Professor Nelson argues that the framers of the Fourteenth Amendment sought both to protect fundamental human rights and to preserve local self-rule. The tension between these two goals became apparent when the Supreme Court attempted to apply the Fourteenth's sweeping provisions to actual cases. As a consequence, neither the text of the amendment nor the original intentions of its framers provide a reliable guide for interpretation. Instead, the courts must look to contemporary values for application of the amendment to today's conflicts.

David Richards's essay, *Abolitionist Political and Constitutional Theory and the Reconstruction Amendments*,¹¹ investigates the role of abolitionist political theory in the framing of the Reconstruction Amendments. The radical antislavery view, that slavery was antithetical to the underlying principles of the original Constitution, moved from the margins of constitutional interpretation to the center of the political stage. Professor Richards urges contemporary constitutional theorists to pay heed to the radical antislavery thesis that the robust protection of human rights is a prerequisite to acceptance of the Constitution as the supreme law of the land.

Mark Tushnet's essay, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*,¹² challenges us to question our assump-

9. Michael W. McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?*, 25 LOY. L.A. L. REV. 1159 (1992).

10. William E. Nelson, *The Role of History in Interpreting the Fourteenth Amendment*, 25 LOY. L.A. L. REV. 1177 (1992).

11. David A.J. Richards, *Abolitionist Political and Constitutional Theory and the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1187 (1992).

12. Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1207 (1992).

tions about the future of the Fourteenth Amendment by reminding ourselves about its past. Professor Tushnet contends that Reconstruction era legal thinkers drew sharp distinctions between three categories of rights—civil, political and social. The framers of the Fourteenth Amendment believed that it would protect civil rights, such as the right to contract, but would not interfere with state regulation of political rights, such as the right to serve on a jury. In the modern era, the line between civil and political rights has eroded, but the line between civil and social rights, such as the right to adequate housing, remains bright. Professor Tushnet argues that the dramatic difference between the line-drawing practices of Reconstruction era thinkers and contemporary categorizations may well prefigure further conceptual change. In the future, judicial enforcement of social rights may seem as natural as does judicial enforcement of political rights today.

III. HISTORY AND CONSTITUTIONAL INTERPRETATION

The essays that comprise this Symposium display a wide range of attitudes toward the role of history in constitutional interpretation. Michael McConnell and David Richards believe that important lessons can be learned from the political theory that shaped the framing of the Reconstruction Amendments. William Nelson cautions against reliance on the original intentions of the framers. Erwin Chemerinsky sees the history of the judicial interpretation of the Fourteenth Amendment as a betrayal of the original aspirations it embodies. For Mark Tushnet, the gap between our views and those of Reconstruction era thinkers serves to remind us of the contingency of our own constitutional concepts.

The different stances toward history by the Symposium authors reflect a debate over the relationship between history and constitutional interpretation.¹³ Participants in the debate have included judges, consti-

13. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990); RONALD DWORKIN, *A MATTER OF PRINCIPLE* 33-57 (1985); William Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989); Richard Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988); Earl M. Maltz, *The Failure of Attacks on Constitutional Originalism*, 4 CONST. COMMENTARY 43 (1987); Stephen R. Munzer & James W. Nickel, *Does Our Constitution Mean What it Always Meant?*, 77 COLUM. L. REV. 1029 (1977); Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669 (1991); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Larry Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CAL. L.

tutional scholars and legal philosophers. The focus of the debate has been on a theory of constitutional interpretation that is usually labeled "originalism." There are several strands of originalism, but they share a core belief that the meaning of a constitutional provision for its framers and ratifiers should have great weight in judicial interpretation. For most originalists, the "original intentions of the framers" are the guide to original meaning. Some originalists believe that the intentions that count are the general principles affirmed by the framers. Others believe that intentions about particular policies or practices are binding. Many proponents of originalism contend that deference to the intentions of the framers is required by democratic theory.

Originalism has been criticized in a number of ways. One line of criticism has focused on the coherence of the idea that there is anything that should be called the "original meaning" of the Constitution. A second line of criticism attacks the notion that contemporary judges should defer to the opinions or intentions of framers who lived long ago, under conditions that are very different from the contemporary situation.

It is difficult to say whether the debate over originalism has resulted in any convergence of views about the proper relevance of history to constitutional interpretation. On the one hand, the recent appointments of conservatives to the Supreme Court could lead to the increasing use of originalist premises in the opinions of the Justices. On the other hand, the academic debate is thought by many constitutional scholars to have resulted in a thorough trouncing of originalism as a constitutional theory.

One reaction to the originalism debate has been to deny the independent normative force of history for current constitutional practice. For example, Samuel Freeman has written:

Appeals to original meanings serve as an adjudicative device—one among many employed by the Court—used in this case to provide confirming evidence for decisions reached on the basis of independent principles, and show the continuity of the constitution over time. Framers' intent is then standardly invoked as the result of a *conclusion* of analysis; it is not a principle providing independent and sufficient reasons of its own.¹⁴

REV. 1482 (1985); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

14. Samuel Freeman, *Original Meaning, Democratic Interpretation, and the Constitution*, 21 PHIL. & PUB. AFF. 3, 19 (1992). Freeman's article provides an important and original analysis of the implications of the originalism debate for democratic theory.

Even if one rejects originalism as a theory of constitutional interpretation, Freeman's point does not seem quite right. Framers' intentions may not settle constitutional questions, but this does not imply that they lack normative force. Courts take history seriously. The fact that the framers, advocates or ratifiers of a constitutional provision believed in a principle is not mere window dressing, to be added to an opinion after the work of decision is done. For example, the voices of Hamilton, Jay and Madison, as the authors of the *Federalist Papers*, speak to us with authority when we inquire into the meaning of the original Constitution. Abolitionist theories of human rights have moral force that cannot be disregarded when we interpret the Reconstruction Amendments.

Moreover, the normative force of history is not limited to "the reasons the founders had for their intentions."¹⁵ Consider the following thought experiment. Suppose the *Federalist Papers* had been written for another nation with a similar constitution, say Barbados. In this alternate past, the arguments made in the *Barbados Federalist Papers* are essentially the same, although the historical details are different. The *Barbados Federalist Papers* would speak to us with the force of the reasons provided, but *only* with that force. They would not speak with the authority that Hamilton, Jay and Madison have because of their special role in our constitutional tradition. It is unlikely that the *Barbados Federalist Papers* would be cited with frequency in the judicial opinions of the courts of the United States. Our judges would feel no special obligation to provide compelling reasons when their interpretation of our Constitution ran counter to arguments found in the foreign *Federalist*. The point of the thought experiment is this: the normative force of our history for our current practice, including the writings of the framers, cannot be reduced to the normative force of the arguments found in that history.¹⁶

Finally, the normative force of our history is not based on mere prejudice or superstition or ancestor worship. We pay special attention to the opinions of the framers because those opinions have had a crucial formative influence on who we are, on what we believe and on how we think. History is important because it enables us to understand our-

15. *Id.* at 19 n.29. Freeman's conclusion that the reasons behind the framers' intentions provide the "ultimate justification," *id.*, in judicial decisions that rely upon them is correct in the sense that we must be persuaded by the framers before we agree with them. My point is that the framers' special role in our history gives their opinions independent persuasive force.

16. There is an important question as to what the normative force of original meanings is and should be. At the very least, original meanings and principles endorsed by the framers and ratifiers are entitled to some presumptive weight. Accordingly, we do not interpret the Constitution in a way that departs from ascertainable original meaning without good reason.

selves. As an illustration of this final point, I offer the following constitutional fable—an allegorical meditation on the meaning of the Reconstruction Amendments.

IV. A CONSTITUTIONAL FABLE

Once upon a time, an airplane flew over the land of the Nonos, a people who kept to themselves and did not permit outsiders to interfere with their ancient traditions.¹⁷ From the belly of the plane, a paper fell and fluttered until it landed in the lap of the Chief Woman of the Nonos. The paper had writing in English on it. Long ago, the Nonos had learned the writing of a strange people who called themselves the English. The Nonos had not heard anything of the English for a very long time, but educated Nonos still knew how to read their writing. A Nono elder read the paper to the people, translating as she went along. It began, “We the People of the United States, in Order to form a more perfect Union, . . . do hereby ordain and establish this Constitution.”

“This is a sign from the Heavens,” the Chief Woman exclaimed. “This constitution is a plan for us from the Goddesses.” The wise persons of the Nonos agreed, and so the Nonos began to follow their new plan. The assembly of the representatives of the Nono clans became a Congress, and the Council of the Wise became the Supreme Court. The Chief Woman became the President. “You see,” she explained to a group of Nono youngsters, “the Goddesses approve of our rule that only an older and wiser woman can become the President. They tell us that she must be at least 35 years of age.” The Constitution included some provisions that made a lot of sense to the Nonos, such as age limits for important positions. Other provisions were so mysterious to the Nonos that they were entirely ignored. For example, the various literal translations for “State” made no sense at all, so the assumption was made that the “States” were family clans.

The Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution were quite curious to the Nonos. Most of the provisions seemed so obvious. Who needs to be reminded that slavery is a bad idea? Nonetheless, parts of the Fourteenth Amendment were of profound importance. Some clans were shocked by the provision reading, “But when the right to vote . . . is denied to any of the male inhabitants . . . the basis of representation therein shall be reduced in proportion.” One respected elder asked, “How can the Goddesses think that all men should be al-

17. Another fable about the Nonos is found in Lawrence B. Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599, 1604-05 (1989).

lowed to vote at age 21? Men aren't mature until they are much older." Other members of the tribe pointed out the cleverness of the Goddesses in providing clans an incentive to change their attitudes toward men. A wise woman observed, "The Fourteenth Amendment allows a clan to deny young men the vote if they wish, but the clan must pay the price of reduced representation in the tribal Congress."

The Nonos were also profoundly impressed by Section 4 of the Fourteenth Amendment. They had recently been experiencing some difficulties with the tribal budget. Deficit spending had been going on for quite some time, and many Nonos were loudly complaining about fiscal mismanagement. "The Fourteenth Amendment is a sign from the Goddesses that this criticism must stop," the Chief Woman announced, "It says right here in black and white, 'The validity of the public debt of the United States . . . shall not be questioned.' The First Amendment guarantees the freedom of speech, but the Fourteenth makes it clear that pointless bickering about the tribe's debts is outside of that freedom."

The Nonos, you see, were *nonoriginalists*. They did not have the option of interpreting the Constitution in light of the intentions of its framers. Although they knew English, they knew nothing of American history, nothing of the Revolutionary War, nothing of the Civil War and Reconstruction, and nothing of the Great Depression. But we cannot choose to be like the Nonos. Our assumptions, our prejudices, the questions we think are relevant, the questions we do not bother to ask—all are the product of our history. The Reconstruction Amendments cannot mean for us what they would mean for true nonoriginalists. As the essays that follow show, we cannot escape the history that shapes our understanding of the Constitution.