

Race, Retrenchment, and the Roberts Court

In a speech to the Massachusetts Historical Society in 1965, Mark DeWolfe Howe offered the following “paradoxical thought:” “that the effort to assure Negro citizens what they had been promised by the Thirteenth Amendment and the act of 1866 would really and truly be theirs was ultimately the source of their undoing.”¹ Howe was looking to the post-war period and the role played by the Fourteenth Amendment in framing and ultimately narrowing congressional authority to respond to the discrimination and violence confronting the Black community. The state action doctrine featured prominently in this argument.²

Here is the paradox. The Thirteenth Amendment constitutionalized the freedom of four million formerly enslaved people. But the Amendment did not define the content of that new freedom, and, as the Black Codes soon made clear, the national government must do more to ensure that this freedom would be more than an empty promise.³ Congress responded with the Civil Rights Act of 1866, which supplied a substantive definition of freedom and empowered the national government to protect it.

Aware that their statutory protections would not withstand the inevitable passing of Republican majorities, Congress drafted the Fourteenth Amendment. The Amendment constitutionalized birthright citizenship, imposed substantive limits on the states, and provided Congress with the power to enforce those limits. Reconstruction legislation subsequently made ratification of the Amendment a condition for the readmission of the former Confederate states. Two years later, Congress used this Amendment to re-enact the 1866 Act and place it on firmer constitutional footing.⁴

¹ Mark DeWolfe Howe, *Federalism and Civil Rights*, 77 Proceedings of the Massachusetts Historical Society 15, 24 (1965)

² See *United States v. Cruikshank*, 92 U.S. 542 (1876); *United States v. Harris*, 106 U.S. 629 (1883); *Civil Rights Cases*, 109 U.S. 3 (1883); Pamela Brandwein, *A Judicial Abandonment of Blacks? Rethinking the “State Action” Cases of the Waite Court*, 41 Law & Soc’y Rev. 343 (2007).

³ *The Slaughter-House Cases*, 83 U.S. 36, 70 (1872) (explaining that “the condition of the slave race would, without further protection of the federal government, be almost as bad as it was before”).

⁴ *Cite the Enforcement Act of 1870.*

And herein lies Howe's paradox. The Fourteenth Amendment was adopted to secure the freedom and citizenship of Black Americans and to establish the national government's power to protect them. But the Amendment's language supplied the basis for a doctrine that would restrict the very national power that Reconstruction had sought to secure. This was the state action doctrine. The Supreme Court interpreted the Amendment as directed principally against state action, which meant that Congress' enforcement authority could not reach private actors. The irony is inescapable: as the Fourteenth Amendment sought to constitutionalize Black freedom, its language supplied the doctrinal basis for retrenchment.

The Court's modern equal protection doctrine shares the same logic. To see it plainly, replace "state action" with "equal protection." The paradox is essentially the same.

In this brief essay, we confront this paradox head on. Two cases anchor our discussion: the *Slaughter-House Cases*, decided in 1873, and the *Civil Rights Cases*, decided a decade later. Together, they reveal how quickly the constitutionalization of Black freedom constrained future efforts to secure it. As the Court's first encounter with the Fourteenth Amendment, *Slaughter-House* offers an important window into judicial behavior, constitutional change, and the influence of social and political pressures on judicial review. They show the beginnings of retrenchment. The *Civil Rights Cases*, and specifically Justice Harlan's dissent, reveal its logic.

The *Slaughter-House Cases* were not about racial violence, civil rights, or black citizenship. They arose from a dispute brought by white butchers in New Orleans who challenged a slaughterhouse monopoly created by the state. This was a decidedly awkward test case for the Court to give life to the new constitutional order. And in a most counterintuitive manner, the Court offered a narrow interpretation of the new Amendments.

"The most cursory glance at these articles discloses a unity of purpose," Justice Miller wrote for the Court, "when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true

meaning.”⁵ This purpose was the abolishment of slavery and securing “the personal freedom of all the human race within the jurisdiction” of the federal government. Or as Miller put it elsewhere: “on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, . . . the freedom of the slave race.”⁶ In other words, the black experience, and specifically the country’s subordination of black people, defines the meaning of freedom at the heart of the Reconstruction Amendments.

Paradoxically, this focus on the Black experience led the Court to a narrower reading of the Amendments and ultimately to fewer protections for the Black community. By using the Black experience in the antebellum period and immediately after the Civil War to articulate its conception of freedom, the Court anchored the meaning of freedom to the eradication of only the worst aspects of human deprivation. Freedom is defined against the most extreme of unfreedom. The bar was thus set at the floor. If unfreedom meant slavery, freedom meant liberation from slavery. If the Black Codes indicated inequality and the denial of life, liberty, or property without due process, their elimination restored equality and due process. The Court’s thin conception of freedom was thus related to its use of the Black experience – the quintessential definition of subjugation – to understand what freedom required.

The majority opinion in *Slaughter-House*, the legal historian Cynthia Nicoletti has written, “is one of the most disparaged decisions in the constitutional law canon, condemned across the ideological spectrum.”⁷ The opprobrium is nearly universal.⁸ Yet the decision

⁵ *Slaughter-House Cases*, 83 U.S. 36, 67 (1873).

⁶ *Id.* at 71.

⁷ Cynthia Nicoletti, *The Rise and Fall of Transcendent Constitutionalism in the Civil War Era*, 106 Va. L. Rev. 1631, 1692 (2020).

⁸ See Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 213 (1998) (noting “[t]he obvious inadequacy” of Justice Miller’s majority opinion in *Slaughter-House*); Randy E. Barnett & Evan D. Bernick, *The Original Meaning of the Fourteenth Amendment* 41-261 (2021); Ilan Wurman, *The Second Founding: An Introduction to the Fourteenth Amendment* 104-21 (2020); Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 Chi. Kent. L. Rev. 627, 627 (1994) (noting that “‘everyone’ agrees the [Supreme] Court incorrectly interpreted the Privileges or Immunities Clause.”); Michael Les Benedict, *Preserving Federalism, Reconstruction and the Waite Court*, 1978 Sup. Ct. Rev. 39, 60 (chastising the case for “virtually eliminating” the Privileges and Immunities Clause “as a source of national power”); Sanford Levinson, *Some Reflections on the Rehabilitation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 Harv. J.L. & Pub. Pol’y 71, 73 (1989) (writing that *Slaughter-House* “ruthlessly eviscerated the Clause of practically all

also reflected the constitutional politics of its time. By 1873, that majority was already retreating from the more radical possibilities of Reconstruction.⁹ *Slaughter-House* translated that retreat into the language of constitutional law, preserving the traditional understanding of federalism against a reading of the new Reconstruction Amendments that would make the federal government the guardian of black freedom.¹⁰ In that sense, *Slaughter-House* was not an aberration from the constitutional politics of its time. It was an expression of them.

To appreciate what these radical possibilities might look like, let us look ahead a decade, to the Court's decision in the *Civil Rights Cases*. Specifically, we focus on Justice Harlan's powerful dissent. The modern Court and critics of race-conscious state action routinely isolate a famous sentence from Harlan's dissent in *Plessy*: "Our Constitution is color-blind." But Harlan's intervention in the *Civil Rights Cases* offers a view of his understanding of Reconstruction and Black freedom that we seldom see. Harlan does not understand the Reconstruction Amendments as neither colorblind nor abstract. His understanding is rooted in the Black experience and in the social conditions left behind by emancipation.

The very first line of his dissent made his position clear. "The opinion in these cases proceeds, it seems to me, upon grounds entirely too narrow and artificial," Harlan wrote. "I cannot resist the conclusion that the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism." It bears

operative meaning."); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341, 342 (1949) (explaining that the case "officially killed" the Privileges and Immunities Clause); Walter F. Murphy, *Slaughter-House, Civil Rights, and Limits on Constitutional Change*, 32 Am. J. Juris. 1, 2 (1987) (noting that the case "gutted the privileges or immunities clause"). For more sources, see Nicoletti, *supra* note ___, at 1692 nn. 283-88.

For a dissenting view, see Ronald M. Labbé & Jonathan Lurie, *The Slaughterhouse Cases: Regulation, Reconstruction, and the Fourteenth Amendment* 12 (2003) ("The major criticism levied against Miller is that through his opinion, he sought to hinder--if not derail entirely--the course of congressional Reconstruction.... [T]here [is] no evidence for such a claim.... The current view of *Slaughter-House* ignores these facts, somehow assuming that what happened after 1877 was inevitable in 1873--and this is not so.").

⁹ Wiecek writes that the racist attitudes of the time had begun to reassert themselves "over short-lived Republican/abolitionist idealism." William M. Wiecek, *The Emergence of Equality as a Constitutional Value: The First Century*, 82 Chi.-Kent L. Rev. 233, 258 (2007).

¹⁰ See Derrick Bell, *Faces at the Bottom of the Well: The Permanence of Racism* 54 (1992); Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* 93 (2008).

reminding that Harlan was writing a mere fifteen years after ratification of the Fourteenth Amendment, a moment “too recent to be called history.”¹¹ We highlight two points from his dissent.

First, Harlan rejected the suggestion that his position was “materially controlled by considerations of mere expediency or policy.” He insisted that his argument followed familiar rules of constitutional interpretation. The Reconstruction Amendments had been “adopted in the interest of liberty and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom and belonging to American citizenship.” And yet, he continued, the Amendments “have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law.” His argument was clear: the Court had departed from the “familiar rule” of constitutional interpretation that required giving “full effect . . . to the intent with which” the constitutional provision under review was adopted. The Court in the *Civil Rights Cases* was doing something different. Rather than interpreting the new Amendments in light of the problem they were intended to solve and the freedom they were meant to secure, Harlan argued that the Court interpreted them in a manner that defeated the Amendment’s intended purposes.

Second, Harlan underscored the “anomalous result” produced by the Court’s holding. Before passage of the Reconstruction Amendments, Congress had ample power to vindicate slavery and “the right of the master.” According to the *Civil Rights Cases*, however, Congress could not “guard, protect, and secure the freedom established, and the most essential right of the citizenship granted, by the constitutional amendments.” Harlan had in mind the Court’s decision in *Prigg v. Pennsylvania*, which upheld congressional power to enact the Fugitive Slave Act of 1793 even though that power was nowhere expressly granted by the Constitution. He continued: “I insist that the national legislature may, without transcending the limits of the Constitution, do for human liberty

¹¹ *Slaughter-House Cases*, 83 U.S. at 71.

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 masters of fugitive slaves.”

The comparison exposed the perversity, in Harlan’s view, of the majority’s interpretation. If Congress possessed implied powers to protect and enforce a right recognized by the Constitution, Harlan asked, “why shall the hands of Congress be tied so that—under an express power, by appropriate legislation, to enforce a constitutional provision granting citizenship—it may not, by means of direct legislation, bring the whole power of this nation to bear upon States and their officers and upon such individuals and corporations exercising public functions as assume to abridge, impair, or deny rights confessedly secured by the supreme law of the land?” Why would constitutional amendments designed to expand the rights of the former slaves, and which expressly constitutionalized congressional power to protect those rights, instead leave Congress with less power to secure freedom than it had once possessed to protect slavery?

The connection between Harlan’s critique and the Roberts Court’s retrenchment from the Second Reconstruction, particularly its treatment of the Voting Rights Act, is unmistakable. Consider *Shelby County*¹² and *Brnovich v. Democratic National Committee*,¹³ and most recently, *Louisiana v. Callais*.¹⁴ Though outside the voting rights domain, *SFFA v. Harvard*¹⁵ is also part of this story as the case when the conservative justices, for the first time, embraced both a unitary and colorblind approach to racial equality, which we labeled “the superordinate conception of equality.”¹⁶ Harlan’s critique resonates in each of these cases. The Court narrowed the promise of the Reconstruction Amendments through “subtle and ingenious verbal criticism,” in ways that sacrifice their “substance and spirit.”

Though far from “subtle and ingenious,” the Court’s decision in *Northwest Austin v. Holder*,¹⁷ decided four years before *Shelby County*, offers a clear illustration of Harlan’s

¹² *Shelby County v. Holder*, 570 U.S. 529 (2013).

¹³ 594 U.S. 647 (2021).

¹⁴ *Louisiana v. Callais*, No. 24-109, slip op. (U.S. Apr. 29, 2026).

¹⁵ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*,

¹⁶ See Guy-Uriel E. Charles and Luis E. Fuentes-Rohwer, *The Constitution of Difference*, 137 Harv. L. Rev. F. 133 (2024).

¹⁷ *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193 (2009).

critique. In *Northwest Austin*, the conservative justices faced a doctrinal problem. They wished to put an end to the Voting Rights Act's coverage formula, but they had no doctrinal means to do so. The most promising path was the notion that Congress must treat states equally but the Warren Court had foreclosed it long ago.¹⁸ "The doctrine of the equality of States," wrote Chief Justice Warren in 1966, "does not bar this approach, for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared."¹⁹ This sentence could not be clearer. In the hands of Chief Justice Roberts, however, this was not an argument that a few strategically placed ellipses could not overcome.

"The Act also differentiates between the States," Roberts wrote in *Northwest Austin*, "despite our historic tradition that all the States enjoy 'equal sovereignty.'" This is not to say that states may not sometimes be treated unequally. For support, Roberts offered the following: "The doctrine of the equality of States ... does not bar ... remedies for local evils which have subsequently appeared." Compare this language with the original text, quoted above. The sleight of hand is obvious. Warren said that the equality-of-states doctrine "applies only" to the terms upon which states are admitted to the Union. Roberts simply removed those words, and then announced the proposition that Warren's actual sentence foreclosed: "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." This is a dishonest distortion of Warren's words,²⁰ neither "subtle nor ingenious." This is ideology and policy making masquerading as constitutional law.

There is great irony in all of this. The modern Court and conservative critics repeatedly invoke Justice Harlan's dissent in *Plessy*, and his blithe and undertheorized ode to colorblind constitutionalism. "Our Constitution is color-blind," Harlan wrote, but this is a statement devoid of the context and history that gave rise to the Reconstruction Amendments. These same advocates have much less use for the richer account penned

¹⁸ See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

¹⁹ *Id.* at 329.

²⁰ See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *State's Rights, Last Rites, and Voting Rights*, 47 Conn. L. Rev. 481 (2014).

by Harlan in the *Civil Rights Cases*, an account that offers a theory for interpreting these Amendments. His theory begins with the freedom the Amendments sought to secure; understands the new powers the Amendments constitutionalized in light of that purpose; and questions interpretations that defeat the purposes these Amendments were intended to accomplish.

The Harlan of *Plessy* offers the modern Court a slogan. The Harlan of the *Civil Rights Cases* provides a constitutional theory of freedom under the Reconstruction Amendments.