Slavery as an Interpretive Issue in the Reconstruction Congresses

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Constitutional scholars have conceptualized Reconstruction debate mainly as a debate over the meaning of the original Constitution. However, Civil War narratives that identified "the problems" with slavery and emplotted the events of slavery politics were a major vehicle by which the Fourteenth Amendment was debated. Dispute over a text (the original Constitution) and dispute over the description of events intertwined. This article elucidates the content of slavery/war narratives and applies them to the domain of constitutional law. Crucial elements of the Northern Democratic war narrative were endorsed by the Supreme Court in the *Slaughter-House Cases* (1873), even though the Democrats were the legislative losers. Democratic history, grounded on a strong strain of white supremacy extending back to Stephen Douglas, played a crucial role in legitimating the Court's narrow doctrinal interpretations of the Fourteenth Amendment.

"All knew," said President Abraham Lincoln in his second inaugural address, that slavery "was somehow the cause of the [civil] war" (Fehrenbacher 1977:686). Indeed, it is easy to find assent on the matter among Republicans and Northern Democrats in the Reconstruction congresses. "Slavery was the cause and the only cause of the rebellion." It was "the parent of secession." But the Civil War did not come to the congressmen "already narrativized, already 'speaking itself'" (White 1987:24). The *way* in which slavery was implicated in the war was disputed. Northern Democrats argued that Southerners' rejection of the popular sovereignty doctrine (i.e., the Southern claim to federal enforcement of slave law in the western territories) was where the slave states fell into error. Republicans identified a broader

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range of problems with slavery, from slavery's effect on white labor to Southerners' denials of white civil liberties. Republicans and Northern Democrats held different views of "the problem" with slavery, and they argued heatedly about the war's issues. Significantly, they gave different answers to the question of whether the slavery problem was fixed by the Thirteenth Amendment.

In this article I elucidate the Civil War narratives of Republican[1] and Northern Democratic[2] congressmen in 1866 and argue that these narratives played a central and as yet unrecognized role in structuring debate over the Fourteenth Amendment. A competition to construct history—to define both "the problem" with slavery and the causes and objectives of the Civil War—gave vital shape and structure to Reconstruction debate. In the *Slaughter-House Cases* (1873), the Supreme Court adopted crucial elements of the Northern Democratic narrative, even though the Democrats were the legislative losers. The Court used this narrative to justify its famously narrow interpretation of the Privileges or Immunities Clause of the Fourteenth Amendment. Scholarly examination of this justificatory role is critical if we are to understand how the Northern Democrats' racial ideology was silently institutionalized in Reconstruction-era Court doctrine.

Historians will not be surprised by the content of these slavery/war narratives. What is new is how I apply them to the domain of constitutional law. I return to two well-worn sources for constitutional scholars, the *Congressional Globe* and the *Slaughter-House Cases*, but with questions in tow that have their origins in sociolegal scholarship. I take up a number of familiar problems in sociolegal studies, among them the organization of legal narrative, the character of legal development, and the dynamics of race, law, and legitimation. My main goal is to show how the con-

[1] Most historians divide Republicans into three groups: Radicals, Moderates, and Conservatives. A substantial group of Republicans defied categorization, and many shifted in their views. (Bogue [1981:88–124] develops statistical measures to chart shifts in position among Senate Republicans.) Historians, too, have differed in their definitions of Radicalism. While historian James G. Randall (1937) labeled the Radicals "vindictives," this label has since been delegitimated. Bogue (1981:103) defines Radicalism as a "complex phenomenon, involving many issues or even perhaps a whole set of closely related attitudes" most evident in matters relating to race, slavery, and the South. Defining characteristics of the Radicals included: a persistent refusal to compromise with the South on any question involving slavery (Foner 1970:104, 144); agitation against the gag rule of 1840 (113); defenses of black rights in courts in the 1850s (263); and initial support for Southern emancipation as a goal. No economic policy was shared among the Radicals. They were not a mouthpiece for business interests (Donald 1956:110). The Radicals, notes David Donald (1956:109), never gave Lincoln their full confidence, though few Republicans did. They did not become a unified group until after Lincoln's death (126). On the distinctions between Radicals and Moderates, see Foner (1970:103–48, 186–225).

[2] There was internal division among Northern Democrats (Silbey 1977:89–114, Benedict 1974a:339–41, 344–45, 391–92). On one side were "moderates," such as Rep. Samuel Cox, who were pro-Union, supportive of the war effort (on the narrow grounds of denying the secession right), and concerned with electoral strategy. On the other were "purists," or "extreme Peace men," such as Clement Vallandigham and Fernando Wood, who argued it was impossible to both support the war and preserve the Constitution.

struction of lived relations, that is, the construction of the "slavery experience," entered into both Reconstruction debate and Supreme Court doctrine on the Fourteenth Amendment.

At issue here, in general, is the relationship between constitutional law and society, a subject examined in a small but significant body of scholarship (on the impact of society on constitutional law, see Cover 1975; Lofgren 1987; and Tushnet 1987; on the impact of constitutional law on society, see Hansen 1980; Rosenberg 1991; and Slotnick 1991). There are, of course, large bodies of scholarship identifying the presence of social belief systems (e.g., about race and gender) in constitutional doctrine, though sociological questions about how such beliefs come to be present usually remain unaddressed in these analyses. In this article I focus on a key event in constitutional history, congressional debate over the Fourteenth Amendment, and hope to apply sociological thought in new and useful ways.

The narrative form of course has drawn wide attention from sociolegal scholars (Cover 1992b[1983]; Levinson & Mailloux 1988; Holstein 1988; White 1990; Williams 1991). Ewick and Silbey (1995) have elaborated a sociology of narrative that conceptualizes narrative analysis and discusses the social organization of legal narrative. They sum up (210) the concerns of narrative analysis as the when, what, how, and why of narrative. Previously in these pages (Brandwein 1996), I began to develop a sociology of constitutional law that explores both narrative competition and the social production of constitutional knowledge. I focused on the famous scholarly dispute between Charles Fairman and William Crosskey, a dispute over whether the Fourteenth Amendment originally applied the Bill of Rights to the states. My objective was to show how their framing assumptions shaped divergent readings of congressional debate over the Fourteenth Amendment, and to offer some institutional reasons for why Fairman's account (which denied application) "won" in the 1950s, despite intrinsic weaknesses in his account.[3] Here, I show that congressional debate over the Fourteenth Amendment was *itself* characterized by a competition to construct history. The institutional "referees" were Supreme Court justices.

Robert Cover (1992b:96 [1983]) has emphasized the location of narrative in a normative universe. "Every narrative is insistent in its demand for its prescriptive point, its moral." Hayden White (1981:20) agrees: "The demand for closure in the historical story

[3] Briefly, Fairman was a member of an institutionally dominant, Harvard-based "interpretive community." Members of this network held high-prestige institutional positions, controlled resources such as law review pages, and shared a set of assumptions about what it meant to produce an "acceptable" historical reading. Beyond this, Crosskey's reputation as a historian had been damaged prior to this dispute. This situation made it easier to reject his account, which suggested that the Supreme Court had been wrong for some 70 years and thus threatened to undermine the institutional doctrine of *stare decisis*.

is a demand . . . for moral meaning, a demand that sequences of real events be assessed as to their significance as elements of a moral drama." This is an apt description of the congressmen's competing historical constructions. In each narrative there were selectively appropriated past characters and events arranged into versions of the "slavery experience." The selected events were temporally ordered, thus providing narrative closure, and events and characters were related in an overarching structure. This "relationality of parts" provided: (1) a definition of the problem with slavery, (2) a version of how and why the war occurred, (3) a particular parsing of the "slavery" and "post-slavery" periods, and (4) a prescription for Reconstruction.

My general objective, then, is to bring a body of knowledge on slavery criticism to bear on constitutional problems. My approach yields four main benefits. Benefit number one is an expanded conceptualization of the Reconstruction debates. Many scholars taking interpretive approaches to the debates (VanderVelde 1989; Ackerman 1991; Amar 1992; Richards 1993) have sought answers to questions about Republican intent or original understanding by mining the *Congressional Globe* for clues about the constitutional and political theory of the Republicans. The result has been a conceptualization of the debates as a dispute over the meaning of the original Constitution. I show that two major vocabularies, not one, structured the debates. Republicans offered not only categorical principles and constitutional theory to justify their reforms but also an account of the slavery experience and the Civil War. Reconstruction debate was rhetorically structured by disputes over the meaning of a text (the original Constitution) *and* by disputes over the description of events.[4] A slavery discourse was combined with constitutional exegesis to shape and organize Reconstruction debate. (I should emphasize that my use of the term Republican includes Moderates.[5] At times, I draw distinctions between Moderates and Radicals.)

[4] Richards (1993), for example, takes an interpretive stance on the Constitution, but he tends to take an uninterpretive stance on the events (the "bitter experience") of slavery. "[T]he Reconstruction Amendments were as much the result of internal reflections on the revolutionary constitutionalism of 1787–88 as they were external criticisms of that constitutionalism in light of the bitter experience of its antebellum decadence" (114–115). Northern Democrats surely experienced the split of the Democratic Party as "bitter"; in this article I examine the bitter experience of slavery as related by both Republicans and Northern Democrats.

[5] The Moderates, unlike the Radicals, had initially been willing to wait for slavery's demise. It was "the course of events in the 1850s rather than firm ideological commitments that led Moderate Republicans to side more often with radicals than conservatives" (Foner 1970:209). The course of events after 1865 again led Moderates to support Radical initiatives. Moderates controlled the Congressional Joint Committee on Reconstruction (Benedict 1974a:144). The Committee "became radical " Hyman (1967:320). According to Foner (1988:238–39), the Radicals were "vindicated by events." For an argument that Republican policy was dominated by a basic conservatism, see Benedict (1974b). Of course, much hinges on the definition of "conservatism." Moderate policy can be understood as conservative and revolutionary at the same time.

This broadened conceptualization of the debates is itself important but it also bears on investigations of original understanding (benefit number two). Inattention to the construction of Civil War narratives has impeded inquiries into Republican legislative objectives.[6] Once the rhetorical structure of the debates is more fully understood, it becomes possible to loosen the scholarly "impasse" (Nelson 1988:11) in debate over Republican objectives. I elaborate this point further in a section following my examination of Republican Civil War narratives.

The investigation of slavery/war narratives yields benefit number three, and that is a clearer picture of how the organization and structure of the debates set up alternatives for the Supreme Court. This is one way that social factors shape the symbolic content of constitutional law. As Ewick and Silbey point out (1995:211), narratives are not only situated within social contexts and therefore reflective of the cultural and structural features of their production. Narratives are also constitutive of social contexts. Slavery/war narratives played a significant role in *producing* the context for the *Slaughter-House Cases.* In discussing the social factors that shape the law's symbolic content, Alan Hunt (1993:92) identifies the question of "whether the symbolic dimensions of law are direct effects of the legislative process itself or require a more complex analysis." Congressional narratives had an indirect effect on the symbolic dimensions of *Slaughter-House* in the sense that the narratives helped set up alternatives for the Court. The nature of the choices before the Court cannot be fully appreciated when constitutional questions are thought to be the primary language of Reconstruction debate. As I explain, the Republicans' broad and deep conception of the slavery problem made it difficult to contain and manage judicially. I return to this point in the conclusion.

Thus, I examine the character of constitutional development. The relationship between legal development and historical context has been the subject of detailed attention (Thompson 1975; Hay et al. 1975; Horwitz 1977). The scope here is far more modest. While I bring to bear historical sources on antebellum politics and the Republicans and Northern Democrats, I do not use primary source material to fill in the context of 1866 debate. I do not address, for example, how these narratives played in public (e.g., newspaper editorials, political cartoons). Given the constraints of space, I can accomplish only two main objectives: establishing the centrality of Civil War narratives in Reconstruction debate and charting the institutional establishment of a mostly

[6] An old style "sociological jurisprudence" (Stone 1966:4) aims to bring historical knowledge to bear on legal problems, though the legal problems themselves are usually taken as unproblematic givens. The work of Howard Graham (1968) and William Wiecek (1977), which bring the antislavery constitutionalism of Civil War–era Republicans to bear on the problem of original understanding, fit within this tradition.

Democratic narrative. A more complete examination would address issues of context and reception in greater detail.

The final benefit produced by examining Civil War narratives has to do with the ongoing analysis of race and law. Critical race scholars have revealed racial content in purportedly neutral doctrine (Lawrence 1987; Gotanda 1991; Harris 1995), and they have examined the limitations of conceptualizing race discrimination as an intentional, irrational deviation (Freeman 1978; Crenshaw 1988; Williams 1991). My examination of Civil War narratives shows the operation of racial beliefs in Reconstruction debate. I also show how certain racial constructs rather than others came to be institutionalized by the Supreme Court.

In building war narratives in 1866, both Republicans and Northern Democrats selected, sorted, ordered, and reordered the developing events of the years 1865–66 into coherent wholes. Racial beliefs were critically important elements in the frameworks used to accomplish this interpretive work.[7] The Northern Democratic narrative was shaped by a strong strain of white supremacy that denied black membership in "the people." Republican war narratives contained a weaker strain of white supremacy but also a commitment to black membership in the national collective.

In 1866, even the Moderate Republican narrative expressed a reformulated version of the majority rule/minority rights problem[8] in which a black minority was to be protected in its personal rights (Bill of Rights guarantees) and civil rights[9] from white elected majorities and possibly from white mobs. Twenty years ago, Robert Cover (1992a:34[1979]) spoke of majoritarian politics and the special constitutional problems that arise when a minority is subject to a pervasive pattern of oppression. Intermittent judicial intervention, he explained, may be suited to correcting occasional mistreatment, but when the constitutional structure of political activity has been set up to facilitate a pattern of oppression, judicial intervention will necessarily entail either inefficacy or a compromise of the constitutional structure itself. In 1866, a pervasive pattern of oppression against blacks was still a (Radical Republican) prediction. Furthermore, the constitutional structure was legitimately up for revision. The illnesses bred by the

[7] Others (e.g., Therborn 1980 and Hunt 1993) have used the concept of ideology to refer to a set of cognitive elements that structure perception. For a sociological rendering of "frameworks" as a problem in constitutional law, see Brandwein (1996:292–98).

[8] The idea of protecting individual liberty against majority tyranny, of course, was not new. Madison formulated an early and classic version of the problem of majority faction in Federalist #10. He saw economic interest as the primary determinant of faction. See also Wood (1969:471–564) on the process of writing and ratifying the Constitution.

[9] The nineteenth-century definition of civil rights included the right to own property, to sue, to testify in court, and to be subject to the same criminal penalties as others. Political rights were regarded as a separate category of rights and included such things as the right to vote and hold office. Moderates did not regard political rights as among the rights of national citizenship.

antebellum constitutional structure had been implicated in some way in the war, and the nature of these illnesses remained disputed. Thus, while Cover discussed the dilemmas of racial politics when both a pervasive pattern of discrimination and the constitutional structure facilitating it were established, neither of these things were the case in 1866. This makes examination of the racial dimensions of Reconstruction debate all the more crucial.

Northern Democratic racial beliefs were implicitly institutionalized when the Supreme Court endorsed crucial elements of the Democratic narrative, especially the Democrats' definition of the war's issues (Southerners' rejection of popular sovereignty and the South's secession). The strong strain of white supremacy that had given shape to the Northern Democratic war narrative was obscured as the Court reconstituted core elements of the Democratic narrative in *Slaughter-House.* This decision explicitly acknowledged the freedom of the former slaves as the central purpose of the Reconstruction amendments. In an important sense, however, questions of race became a step removed, or latent. This latency—the action of a racial belief system in shaping the Court's war history followed by a covering of these footprints—contributed to the "impactedness," to use Duncan Kennedy's (1986) term, of Court precedent on the Reconstruction amendments. In later decisions relying on the official narrative, questions of race remained latent even while *Strauder v. West Virginia* (1880) struck down a state law that excluded blacks from juries. As Supreme Court decisions that relied on privileges or immunities doctrine accumulated, Democratic racial constructs came to affect an expanding array of political distributions.

I show that the Court *needed* the Democrats' narrative to justify its narrow interpretations of the citizenship and privileges or immunities clauses. The Court denied that Republicans had reformulated the notion of national citizenship, thereby applying the Bill of Rights to the states (among other things). The Democratic narrative played a critical role in legitimating these interpretations. To apply the Bill of Rights to the states, that is, to prohibit state legislatures (and probably state officers) from denying Bill of Rights guarantees and to grant civil rights to blacks was to redraw the boundaries for politics generally and racial politics in particular. The Court, in short, used the Democratic narrative to authorize its rejection of the new constitutional boundaries for politics sought by Republicans.

What follows is a brief section that places the construction of war narratives in the context of antebellum ambiguities in antislavery/free labor doctrine. In Parts II and III, I examine Northern Democratic and Republican Civil War narratives in detail. In Part IV, I develop a new angle of inquiry on the *Slaughter-House Cases.* I examine the war narratives in the majority and dissenting

opinions as well as the roles played by these narratives in legitimating particular interpretations of the Fourteenth Amendment.

This is not the first time that slavery has been treated as an interpretive issue in constitutional law. Sanford Levinson (1993) and Derrick Bell (1993) have argued that it is a mistake to view slavery as a historical artifact with little or no contemporary relevance. An underappreciation among law students and the writers of five major constitutional law casebooks troubles Levinson, for "the basic decision in 1787 to enter a Union with slaveholders had consequences for every aspect of American constitutional doctrine" (1993:1104). Bell argues, too, that the analysis of contemporary legal doctrine is shaped by the possession of information about slavery. Bell (1993:1041) is critical of constitutional scholars who "explain away recognition and protection of slavery in the original Constitution as a historical anomaly." This article adds weight to their view that slavery remains a relevant issue in constitutional law.

I. Period Constructs and the Ambiguity of Antislavery

Historians have recognized that the periodization of history—the segmenting of time into separate and discrete periods—is a constructive (and therefore, of course, political) act, one that takes place with reference to particular concerns and points of view.[10] In their debates on the Fourteenth Amendment, Republicans and Northern Democrats parsed the slavery and post-slavery periods in different ways. Significantly, multiple period constructs were plausible because the antislavery movement of the antebellum period contained crucial ambiguities.

Eric Foner's work on the ambiguity of antislavery (1970:11–72; 1980:57–93; 1988:124–75) has not received much attention from Reconstruction scholars, though VanderVelde (1989) is a notable exception. Briefly, there were different reasons in 1861 for supporting the policy of non-extension, that is, the non-extension of slavery into the western territories.[11] Wil-

[10] Stephen Skowronek (1993:4–8) has called attention to the use of period constructs in shaping scholarly research and knowledge on the American presidency, and I suspect that something similar has occurred regarding legal knowledge about Reconstruction. Constitutional scholars have tended to view the Thirteenth Amendment as an objective wedge, marking the end of the slavery period; and if one assumes that the slavery period ended with formal emancipation, one will be more likely to conceptualize Reconstruction debate mainly as debate over abstract principles (e.g., doctrines of governance, the definition of freedom), which is what has happened. Other factors have likely contributed to this conceptualization of the debates, such as the fact that constitutional language was the main channel through which slavery was debated before the war (Bestor 1964). Relevant too, perhaps, is the greater comfort of thinking in terms of governance and freedom than in terms of slavery.

[11] The war's objectives were initially explicitly limited to the non-extension of slavery in the western territories. It was an axiom of political economy that slavery had to expand in order to survive (Hyman 1967:40–41; Foner 1970:116), so the policy of non-extension implicated a policy of ultimate extinction. After 1863, Southern slavery became

liam Garrison's evangelical abolitionism, which viewed slaveholding as a moral sin, could not generate majority support for nonextension.[12] The free soil platform could. According to Republican free labor precepts, slavery degraded labor. Slavery stunted the South's economic development and sapped the motivation of white Southern laborers (Foner 1970:44–47, 64). It was slavery (not the wage system) "which threatened to destroy the independence of the Northern worker, his opportunity to escape from the wage earning class and own a small farm or shop" (Foner 1980:73).[13] The western territories were a safety valve for Northern workers, keeping open the possibility of social mobility. The territories seemed to be the answer to growing urban poverty.

The free soil platform was purposely vague in order to permit coalition building. "In order for the political antislavery movement to attract a wide following, it would have to adopt a platform so broad that both the prejudiced and the advocates of equal rights could support it" (Foner 1980:78). Crucial ambiguities existed at the heart of the free labor critique. Was it slavery's effect on all labor or slavery's effect on white labor that was of concern? There was a consensus that slavery degraded white labor, but was it the law of slavery, per se, that sapped white labor's motivation or was it the performance of labor by *blacks* that made labor degrading for whites? While Republicans believed deeply in economic opportunity for labor, they also doubted the capabilities of blacks and Irish immigrants.

Some free soilers supported laws that barred black entry to the territories. In the 1850s, four free soil states, Indiana, Illinois, Iowa, and Oregon, passed laws prohibiting the entry of blacks. Thus, many in the labor movement condemned slavery and the Slave Power while hating the abolitionists. Foner (1980:60) notes: "It is important to distinguish the labor movement's response to abolitionism and indeed to black competition from its attitude toward slavery." Non-extension was an "appeal to the lowest common denominator of party ideology, allowing Republicans to sidestep the problem of race and the effects of slavery upon the

implicated in the objectives of the Civil War, though in uncertain fashion. Northerners came to hold the view that victory would be illusory without abolition (Hyman 1967:85). For a brief outline of disagreement among historians as to the causes of the Civil War, see Donald 1956:209–15.

[12] The evangelical abolitionism associated with William Garrison had its roots in Christian benevolence and the revivals of the Second Great Awakening, which identified moral progress with each individual's capacity to act as an instrument of God. The "personal sin of the individual master against the individual slave" defined the problem with slavery (Foner 1970:59; 1980:23). Formal emancipation therefore fixed it. Slavery was not viewed as a class relationship. Evangelicals, like almost everyone of that era, viewed blacks as inferior beings.

[13] See also Foner 1970:27, 55. The future shape of western society, i.e., its economic development, was of interest to all Northerners and hence could not be left to local majorities (as the popular sovereignty doctrine would have it).

enslaved" (Foner 1970:59). In 1866, Republicans could no longer sidestep these problems.

The North's military victory forced a shift in the constitutional problematic that defined debate over slavery before the war. The victory settled one constitutional question—that is, whether the federal government had the authority to regulate slavery—while opening up another one: what did it mean to resolve the slavery issue? In 1861, divergent understandings of the threat of slavery could coexist, thanks to ambiguities in free soil doctrine and Southern Democratic rejection of popular sovereignty. (This Southern rejection split the Democratic Party.)[14] The achievement of formal/nominal emancipation splintered the Northern coalition because this achievement fixed the problem with slavery as some of those groups understood it. It makes sense therefore that dispute among Northerners over the nature of the threat of slavery emerged with full force and political consequence only *after* ratification of the Thirteenth Amendment.

Formal emancipation was a minimal definition of slavery's end, but it was not neutral or objective. Every definition of slavery's destruction held a point of view, sprang from a diagnosis of the problem with slavery, and worked to affect political distributions. Every definition worked to construct the boundary between "federal" (Congress and federal courts) and "state" matters and also the boundary between "public" and "private" matters (e.g., labor contracts, innkeepers' exclusion of black travelers).

Period constructs were political in the traditional sense, too. Arguments about the criteria that separated "slavery" from "post-slavery" were the basic stuff of Reconstruction politics. Northern Democrats neatly parsed pre- and post-Thirteenth Amendment events, arguing that formal/nominal emancipation marked the resolution of the slavery problem and the achievement of the war's goals. The Southern demand for federal enforcement of slave law in the territories violated popular sovereignty doctrine and, hence, was "the error."[15] Formal emancipation insured against the recurrence of this threat. For Democrats, the constitutional boundaries of politics were to be redrawn only to the extent that elected majorities were now forbidden from enacting formal slave law. State majorities were to retain the right to pass legislation, such as the Black Codes of the years 1865–66, which enacted harsh vagrancy laws, apprenticeship laws, criminal penalties for breach of contract, and extreme punishments for blacks, all in an effort to control black labor (on the Black Codes, see,

[14] Brandon (1998:132) makes the point that "in crucial respects the most important constitutional opposites of 1858 were not Stephen Douglas and Lincoln but Douglas and the South or at least the Deep South." Southern demands minimized the political consequences of Lincoln-Douglas disagreements. These disagreements (carried on by others) emerged with great political consequence once formal slave law was abolished.

[15] *Congressional Globe*, 38th Cong., 1st Sess. 712 [Cox] (17 Feb. 1864).

e.g. Foner 1988:199–203). To justify their war narrative, Democrats appealed to already institutionalized warrants: a Revolutionary-era conception of liberty,[16] that is, the liberty of popular majorities against the central government, and a theory of race that held blacks as unfit for membership in "the people." Before the war, the Supreme Court had approved both.

The achievement of even the narrowest definition of abolition (the elimination of formal slave law) was, of course, enormously significant. As late as 1861, the absence of federal power to regulate Southern slavery was generally conceded. On the eve of the Civil War, Lincoln was ready to endorse a constitutional amendment, approved by Congress, which explicitly guaranteed Southern slavery against federal interference.[17] Of course, Lincoln's views on this matter, as on matters of emancipation and Reconstruction generally, shifted (see Donald 1956:137–41).

Before the war, Republicans had argued that the threats of slavery included the 1837 murder of antislavery newspaperman Elijah Lovejoy (Curtis 1997), Henry Hammond's congressional gag rule initiatives in 1835 and 1840 (Freehling 1990:308–352), and the 1859 suppression of Hinton Helper's antislavery book, *The Impending Crisis* (Curtis 1993). Foner (1980:40) refers to antebellum Southern repression of abolitionists' civil liberties as "the most thorough-going repression of free thought, free speech and a free press ever witnessed in an American community." Condemnation of the conspiratorial Slave Power was another element of the Republicans' antebellum critique of slavery. They cast slaveholders as a privileged class, an aristocracy, which had illegitimately gained political power.

After the war, Republicans argued that formal emancipation did not fix the problems with slavery. Their narratives organized events from the 1830s to 1866 along a continuum. Harold M. Hyman (1967:lxii–lxiii) has noted that "Lincoln's contemporaries were fond of employing the figure of a falling curtain to symbolize separation between events of wartime and problems of Reconstruction. . . . Lincoln also employed a before-and-after terminology in responding to the happy news of Lee's surrender." I show that Republicans were prompted by events in the wake of the Thirteenth Amendment (e.g., the Black Codes, ex-

[16] Gordon S. Wood (1969:24–25, 60–61) discusses the Revolutionary-era conception of liberty. This was the liberty of popular majorities against a central authority. Of course, traditions of individual liberty existed too. Appleby (1984:78) states, the "intellectual origins of [Jeffersonian Republicanism] were as old as Hobbes's and Locke's social contract theories, but its material base owed much to the recent changes in the Atlantic economy which put a premium on the commodities reaped on American farms."

[17] An amendment to this effect passed both the House and the Senate less than a week before Lincoln's inauguration on March 4, 1861. *Congressional Globe*, 36th Congress, 2d Sess. 1285 (2 Mar., 1861). Northern Democrats supported this amendment because it was consistent with their view that questions of slavery were municipal questions that fell to the states. The rejection of this amendment by the pro-slavery forces, according to Arthur Bestor (1964), is evidence of the fact that slavery was an expanding institution.

Confederate takeovers of political institutions, political violence directed at blacks and white Republicans) to reject before-and-after terminology. They identified events as part of a continuing slavery period.

The racially based nature of Southern slave society[18] was a problem for even Moderate Republicans in the sense that they viewed denials of personal and civil rights for blacks as inconsistent with republican government. In their extension of the slavery period beyond formal emancipation, Republican narratives appealed to two main sources of authority. The first was a "declaratory theory" of rights that expanded the Revolutionary-era conception of liberty and minority rights.[19] The second was a theory of race that held blacks as fit for membership in the national collective, even if they continued to be regarded as unfit for political or social equality. Neither had been approved by the Court in the antebellum period.

One way to think about the Court's mostly Democratic history is in terms of content rules. "Content rules, as they operate within different cultural and institutional settings, define what constitutes an appropriate or successful narrative. They define intelligibility, relevance and believability while specifying what serves as validating responses or critical rejection" (Ewick & Silbey 1995:207). Different content rules held sway in the 39th Congress and in the 1870s Court. The construction of "winning" narratives in the Congress did not depend on appealing to sources of authority that had been accorded past institutional/Court recognition. In contrast, in the changed political context of the 1870s, "winning" narratives for the Court did seem to depend on such sources.

II. The Northern Democratic Narrative

William Nelson (1988:91–109) has summarized Northern Democratic objections to the Fourteenth Amendment, which are no doubt familiar to Reconstruction scholars. The Northern

[18] M. I. Finley (1980:9) notes that while slavery existed all over the world, the U.S. South was one of only five places in the world that had not merely slavery but a slave society. Finkelman (1993:1010) observes that "by 1861 the racially based slavery of the American South was different—peculiar—both when compared to human bondage in other times and places, and as it fit into the political structure of the United States." For Americans, notes David Brion Davis (1976:59), "race has always been the central reality of slavery." See, generally, Patterson (1982). For a discussion of racial views in the North, see Litwack (1961).

[19] Akhil Reed Amar (1992:1203–17) discusses the declaratory theory of rights. The "declaratory theory" of constitutional construction was steeped in common law methods and used by those who viewed the Bill of Rights as applicable to the states in the antebellum period. In the fifteen years before *Barron*, "a considerable number of weighty lawyers implied in passing or stated explicitly that various provisions in the Bill did limit states" (Amar 1992:1203). In the 1840s, high profile "*Barron* Contrarians" included New Hampshire Governor C. P. Van Ness and Chief Justice Henry Lumpkin (Supreme Court of Georgia, a pro-slavery court). See also Graham (1968).

Democrats argued that the amendment would centralize power and destroy an established federalism. They argued that the ex-Confederate states were constitutionally entitled to readmission to the Congress, and that legislation passed in the absence of the ex-Confederate states was illegitimate. Similar to the Antifederalist's critique of the original Constitution,[20] Northern Democrats argued that the Fourteenth Amendment was illegitimate, without precedent, and destructive of state sovereignty. All these objections are present in the speeches quoted below. My point is to show that these objections were entwined with a particular Civil War narrative, and that we learn much from this slavery/war discourse that we cannot learn from the political/constitutional discourse alone.

Joel Silbey (1977:72–75) has identified the Democrats' narrow constitutionalism as one of two related and traditional themes in the years 1861–62. The other theme was a "bitter fear of a puritan-inspired social revolution" that imposed rigid standards of personal behavior. According to Democrats, moral criticism of slavery, along with temperance and prayer laws, were part of the "illiberal" cultural legislation aimed by Republicans at Southern slaveholders, Irish Catholics, and non-evangelicals. Democrats cast this legislation as a threat to individual liberty (Silbey 1977:76, 86, 103, 111, 130). They cast themselves as the defenders of pluralism.[21] In Reconstruction debate, Democrats pressed the issue of "illiberal" race legislation, combining this issue with a related constitutionalism.

The Northern Democrats, a minority in Congress, did not enter the post-war period in a weak or crippled state. According to August Belmont, then chair of the Democratic National Committee, the 1860s were "the most disastrous epoch in the annals of the party" (Silbey 1977:176). But the Democrats remained a strong, functioning, and united party that had to be taken seriously in the calculus of national politics.[22] Democrats were constrained, for they could only run candidates who were active and

[20] The Antifederalists were majoritarians with respect to state legislatures but not with respect to the national legislature (Wood 1969:516). Some were opposed to changes in the Articles of Confederation that might limit the scope of local government. Others were certain that states were the largest political unit at which popular sovereignty and republican government could be maintained; they wanted nothing more than a loose confederation of states. Still others thought a confederation government might be given more power, but not so much as to threaten state sovereignty. See Kenyon (1966).

[21] Rep. Samuel Cox, in an 1863 speech titled "Puritanism in Politics," stated: "Puritanism is the reptile which has been boring into the mound which is the Constitution, and this Civil War comes in like the devouring sea." To Democrats, the Republicans were zealots incapable of restraint, flexibility, or compromise, and in a pluralist society they were destroyers (Silbey 1977:76).

[22] See Silbey's (1977:151, 220) indices of competition for elections between 1861 and 1868, which support his conclusions about the electoral strength of the Democrats. Though they lost most of these races, they "remained very close and always posed a threat" (Silbey 1977:149). Party members believed that the force of public events would ultimately work in their favor.

unqualified supporters of the war (Silbey 1977:201). However, Horace Greeley's identification of the Democratic Party as on the edge of final oblivion, as nothing more than "a myth, a reminiscence, a voice from the tomb, an ancient and fishlike smell" (quoted in Silbey 1977:x) was premature.

"The Problem" with Slavery

Andrew Jackson Rogers, a member of the Joint Committee on Reconstruction and leading House Democrat, identified slavery as "the main principle" upon which the Civil War was waged. He articulated a narrow slavery critique. Southern claims to federal enforcement of slave law in the territories, along with the claimed right to secession, defined and exhausted the problems with slavery. Formal emancipation and Southern renunciation of the right of secession marked the return of "republican government" to the South.

Northern Democrats frequently distinguished themselves from the "Southern Democracy."[23] During the congressional debates, Representative George S. Shanklin of Kentucky stated, "I admit and assert that they erred. . . . They claimed rights which did not belong to them. But, sir, they have now surrendered all those claims."[24] Referring to secession, Rogers identified the "illegality of the action of the Southern people."[25] Speaking in 1864, Representative Samuel S. Cox of Ohio had stated:

> We have, in times apast, affiliated with the Democracy South, but I do not understand that the Democratic party North is responsible for what the Democratic party South did when they separated from us, or since, and when they divided our party and helped you to divide the Union. The Democratic party of the North never was a pro-slavery party, as has been libelously charged. . . . A grosser falsehood was never uttered. Even Horace Greeley is ashamed any more to repeat it. He stated the other day our position correctly, when he said that "northern Democracy is not really pro-slavery, but anti-intervention; maintaining, not that slavery is right, but that we of the free States should mind our own business and let alone other people's." Our platforms are but the repetition of this idea of non-interference. The Democracy ever favored local sovereignty as to slavery and every other domestic matter. They would have extended that sovereignty, and not slavery, from the States to the Territories. On that question of extension, of non-intervention,

[23] Hyman (1967:248, 299, 366) remarks several times on the need felt by Northern Democrats to distance themselves from Southern Democrats, referring to the "burdens of associate guilt that secession and copperheads had fastened upon them."

[24] *Cong. Globe*, 39th Cong., 1st Sess. 2501 (9 May 1866).

[25] *Cong. Globe*, 39th Cong., 1st Sess. 2411–13 (5 May 1866). See also p. 1171 [Kuykendall] (3 March 1866).

> the Democracy North and South unhappily divided. The consequences are upon us.[26]

Thus, renunciation of the doctrine of popular sovereignty was the problem with slavery. Rogers, like other Northern Democrats, initially opposed the Thirteenth Amendment on popular sovereignty grounds, but he came to accept it as an "event of the war."[27] "I never was in favor of slavery. No man, sir, ever heard me advocate slavery in the abstract, but I was in favor of standing by the elementary principles embodied in the Constitution. . . . I did not then approve of it [Thirteenth Amendment], but I believe now it was for the best interests of the country; that as an issue of war it should be given up in the reconstruction, after the war had wiped out slavery, to prevent future agitation upon it."[28]

The Northern Democrats' definition of the problem with slavery is also visible in their protests against the exclusion of ex-Confederate states from the 39th Congress. (Southern states withdrew from Congress when they seceded in 1861.) In an exchange with Republican Representative James F. Wilson of Iowa, who had argued that the exclusion of the ex-Confederate states was legitimate, Rogers argued in the congressional debates that Southern states had "republican forms of government" just before the onset of the war in 1861. Rogers asserted that the surrender of Lee's armies signaled a return to republican government. Hence, readmission should follow this surrender. Rogers asserted that it was only with secession that republican government was suspended; republican government had been revived "upon the surrender of the rebel armies."[29]

Northern Democrats' assertions that slavery could be removed while leaving local sovereignty intact (minus the local right to enact slave law) reveal their view of the problem with slavery. Cox argued that Republicans were "striking at constitutional liberty in striking at domestic slavery." Clearly, Northern Democrats did not view Southern repression of white men's civil liberties as among the problems of slavery.

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[26] *Cong. Globe*, 38th Cong., 1st Sess. 712 [Cox] (17 Feb. 1864).

[27] *Cong. Globe*, 38th Cong., 1st Sess. 2412 (5 May 1866). A number of Democratic congressmen voted for the Thirteenth Amendment despite bitter opposition of most of the party. Rep. Cox argued that acceptance of the Thirteenth Amendment would permit the Democrats to "strengthen [them]selves . . . by throwing off the proslavery odium" (Grossman 1976:27).

[28] *Cong. Globe*, 39th Cong., 1st Sess. 2412 (5 May 1866).

[29] *Cong. Globe*, 39th Cong., 1st Sess. 2412, 2413 (5 May 1866).

Slavery's "Resolution"

The Democrats repeatedly asserted that formal emancipation marked the "entire subversion of that institution." The rebellion was now "over" and "crushed."[30] Representative Phelps quoted President Johnson in asserting that slavery was "dead and buried."[31] The comment of Burwell C. Ritter of Kentucky is representative of the Democrats' view on the criteria that marked the resolution of the slavery problem: "Sir, why have the people in the lately rebellious States abolished slavery, pronounced their secession ordinances void, repudiated their war debts, unless it has been to conform to the requirement of the conquerors, and thereby give assurances, or guarantees if you please, that they will obey the laws of the United States."[32] According to Phelps, only "purblind patriots" still "predict the revival or even affirm the actual present existence of slavery."[33]

Northern Democrats' definitions of slavery's resolution also can be found in their assertions and definitions of "peace," which came in several varieties of speeches. In all of them, they neatly parsed the "slavery" and "post-slavery" periods with formal emancipation marking the divide. Some speakers emphasized that the ex-Confederate region was loyal and harmonious. Representative William E. Finck of Ohio, for example, remarked on the "profound peace" in the region; Southerners accepted the fact that slavery was a thing of the past.[34] Others, like Shanklin of Kentucky, emphasized the "persecutions and relentless oppression" Republicans were enforcing on the South.[35] This policy would lead to a renewal of war, Shanklin argued. Senator Edgar Cowan of Pennsylvania, a conservative Republican who voted with the Northern Democrats on Reconstruction legislation, painted a sympathetic portrait of Southerners appealing to the

[30] *Cong. Globe*, 39th Cong., 1st Sess. 1107 (1 Mar. 1866); 1112 (1 Mar. 1866); 2096 (21 Apr. 1866).

[31] In his annual message to Congress, 4 December 1865, President Johnson stated: "[T]he evidence of sincerity in the future maintenance of the Union shall be put beyond any doubt by the ratification of the proposed amendment to the Constitution [the Thirteenth] which provides for the abolition of slavery forever within the limits of our country. The adoption of the amendment reunites us beyond all power of disruption. It heals the wound that is still imperfectly closed." Johnson's speech is quoted by Phelps, *Cong. Globe*, 39th Cong., 1st Sess. 2395 (5 May 1866).

[32] *Cong. Globe*, 39th Cong., 1st Sess. 2098 [Ritter] (21 Apr. 1866).

[33] *Cong. Globe*, 39th Cong., 1st Sess. 2394 (5 May 1866).

[34] *Cong. Globe*, 39th Cong., 1st Sess. 2460 (8 May 1866).

[35] My findings are similar to that of Grossman (1976:27), who states that Democrats had two kinds of responses to Southern political violence. The first was outright denial. The second was to blame the Republicans. A few, like former Sen. Eugene Casserly, warned Southerners not to hand Republicans a campaign weapon (Grossman 1976:49). "So long as war passions survive or can be lashed into animation" so long did Republicans have the advantage (quoted in Silbey 1977:237).

"aristocracy" critique of the Slave Power.[36] The Southern people were "abused by their leaders" and perfectly ready for re-admission.[37]

Representative Phelps perceived (correctly) that the former Confederate states would resist the legislation proposed by the Joint Committee on Reconstruction.

> The congressional treatment of the eleven States lately in insurrection, according to the plan of the gentleman from Pennsylvania [Thaddeus Stevens], is so well adapted to provoke continued hostility to the Government and goad a maddened population into desperate resistance . . . [I] believe that all further guarantees, by way of constitutional amendment or otherwise, as conditions precedent to a cautious and discriminating admission of loyal Representatives from States and districts whose inhabitants have been in insurrection, but who now present themselves in an attitude of loyalty and harmony are unnecessary, impolitic, unstatesman-like and prejudicial to the peace and welfare of the country . . . The question is simply one of union or disunion. . . . For myself I wish no new war-cry.[38]

Shanklin insisted that all could be made well in the nation only by discharging the Joint Committee, by abolishing the Freedmens Bureau, by repealing the civil rights bill [of 1866], and by admitting all the delegates from the seceded states to their seats in Congress.[39] When Northern Democrats portrayed Southerners as reformed and secession as the act of a now displaced aristocracy, they presented the slavery problem as fixed. In this way, they could lay the blame for post-war conflict at the feet of the Republicans, who now were sowing the seeds of disunion.[40] The Republicans were no better than the antebellum Southern Democrats because both parties renounced popular sovereignty doctrine and "divided the Union."[41]

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[36] Cowan and Orville Browning ranked farthest from the Radicals on Bogue's (1981:94) statistical measure of the tendency of Republicans to take polar positions.

[37] *Cong. Globe*, 39th Cong., 1st Sess. 1134 (2 March 1866).

[38] *Cong. Globe*, 39th Cong., 1st Sess. 2395, 2398 (5 May 1866).

[39] *Cong. Globe*, 39th Cong., 1st Sess. 1286 (9 March 1866). See also Shanklin's portrait of the South, p. 2510 (9 May 1866).

[40] See, e.g, *Cong. Globe*, 39th Cong., 1st Sess., 2093 [Smith] (21 Apr. 1866); 2096, 2097 [Ross] (21 Apr. 1866); 2253–55[Harding] (28 Apr. 1866); 2394, 2397 [Phelps] (5 May 1866); 2505, 2506 [Eldridge] (9 May 1866); 2465 [Boyer] (8 May 1866); 2501 [Shanklin] (9 May 1866); 2530–32 [Strouse] (10 May 1866); 2530 [Randle] (10 May 1866).

[41] A. J Rogers, for example, made multiple references to the "disunionists of either the South or the North." See, e.g. *Cong. Globe,* 39th Cong., 1st Sess. 2413 (5 May 1866). Rogers refers to Wendell Phillips ["he had been a disunionist for thirty years" and Horace Greeley; "he held out an invitation to the Southern people to secede"], 2411 (5 May 1866). See also p. 2464 [Finck] (8 May 1866).

Representing Political History

Northern Democrats, as is well known, consistently charged Republicans with centralizing the government and overthrowing a well-established federalism. The Fourteenth Amendment overturned the "chief excellence"[42] of the Republic and the "chief cause of its wonderful success," namely, the balance set up between the states and the federal government. Representative Cox called local self-government "the very genius of our civil polity."[43]

Less well known is that Northern Democrats' assertions of an established federalism rested on a representation of slavery history. This version of history leapfrogged many events of slavery politics involving issues of speech and the press. To acknowledge these disputes was to recognize the Republicans' political critique of slavery, that is, the view that slavery required the repression of white civil liberties. To acknowledge these disputes was to recognize that certain features of the antebellum notion of state sovereignty were under attack before the war, even if that attack went against Court doctrine (*Barron v. Baltimore* [1833] held the Bill of Rights inapplicable to the states) and even if Southern slave law was conceded as constitutional.

In their many comments attributing the progress of the United States to Democratic doctrine, the Democrats *reduced the dimensions of slavery politics,* as the Supreme Court would do in the *Slaughter-House Cases* (and as Charles Fairman would do in the 1950s). Representative Myer Strouse of Pennsylvania stated: "History should be our guide and counsel. . . . *What necessity is there now,* Mr. Speaker, that demands the change which this bill calls for? The history of the United States is the history of the Democratic Party; its creed is the Constitution, and its principles have been for seventy-five years the operative cause of our country's rise, progress, strength and greatness."[44] (As we will see, Republicans included Southern repression of whites' civil liberties in their slavery critiques, therefore there was ample necessity for changes beyond formal emancipation.) Using language that will be familiar to Reconstruction scholars, Rogers appealed to the original Constitution in defining slavery's resolution:

> I mean to have peace by restoring and referring to the instrumentalities by which the Constitution and the Union were first established by our fathers; and I believe, if these instrumentalities, which were founded in a spirit of compromise, charity, friendship, love and affection, were employed in this House, the bonds which have been torn assunder by four years of bloody conflict will be again cemented together. . . . I desire to see the Union restored, the Union of our fathers. I want peace,

[42] *Cong. Globe,* 39th Cong., 1st Sess. 2465 [Boyer] (8 May 1866).

[43] *Cong. Globe,* 38th Cong., 1st Sess. 712 (17 Feb. 1864).

[44] *Cong. Globe,* 39th Cong., 1st Sess. 2531 [Strouse, emphasis added] (10 May 1866).

> prosperity, happiness, greatness, grandeur and glory such as characterized this nation when the Democratic party had control.[45]

Rogers repeatedly claimed that the "doctrine of state sovereignty . . . led [the United States] in peace and prosperity for seventy-five years."[46] This claim looks outlandish given the recent war. Of course, Rogers could claim that it was the Southerners' rejection of popular sovereignty that caused the war, and this he did. Rogers' leapfrog over the civil liberties disputes that marked slavery politics is consistent with his understanding of slavery's transgressions. It is also consistent with his claim that the Southern states had republican forms of government until the moment of secession.

Racial Belief System

The North's military victory marked a change in antebellum parameters of race struggle. The competition was on to authorize new constitutional boundaries for racial politics. Northern Democrats conceded that this struggle would now take place within the boundary of formal self-ownership, but that was it. The Democratic doctrine of popular sovereignty was married to a strong belief in white supremacy and "white man's government." It was a doctrine of white popular sovereignty. Northern Democrats reserved to local majorities the right to pass the Black Codes. Majority rights would be infringed, they asserted, if elected majorities lost the prerogative to pass the Black Codes. Senator Thomas A. Hendricks of Indiana stated: "I say we are not of the same race; we are so different that we ought not to compose one political community."[47] Rogers, too, asserted that blacks were not part of the "people."[48] Representative Nicholson stated:

> Now, the Negro race in this country constitutes such a class which is easily and well defined; and the peace and welfare of a State, especially where they are found in great numbers, demand that the radical difference between them and the white race should be recognized by legislation; and every State should be allowed to remain free and independent in providing punishments for crime and otherwise regulating their internal affairs, so that they might properly discriminate between them, as their peace and safety might require. For the Negro is not actuated by the same motives as the white man, nor is he deterred from crime except by punishments adapted to the brutal, sensual nature which characterizes him.[49]

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[45] *Cong. Globe*, 39th Cong., 1st Sess. 2538 (10 May 1866).

[46] *Cong. Globe*, 39th Cong., 1st Sess. 1121, 1123 (1 Mar. 1866).

[47] Quoted in Foner 1988:279.

[48] *Cong. Globe*, 39th Cong., 1st Sess. 1121 (1 March 1866).

[49] *Cong. Globe*, 39th Cong., 1st Sess. 2081 [Nicholson] (21 Apr. 1866). See also p. 1312 [Goodyear] (10 March 1866), "[T]he negro, as a race, has no aspirations for free-

Nicholson continued, "The object of government is not to benefit the individual. . . . The individual must yield to those restraints which a community for its own good sees fit to impose." In criticizing the Freedmen's Bureau, Representative George Shanklin stated, "Crowds of these negroes have hung over us like a black and threatening cloud, while we were crucifying the Constitution of our fathers and trampling under our feet the rights and liberties of the people in passing the Freedmen's Bureau bill.[50] When Shanklin referred to "the people," he clearly meant white people.

Rogers stated explicitly on many occasions that the government was "made for white men and white women."[51] The war was fought, he said, "because we desired to perpetuate the Union which our forefathers established and handed down to us for the protection and defense of the white men and white women of this land."[52] In the above comments, the Democrats' understanding of the problem with slavery is clearly linked to their racial beliefs. Indeed, they are inseparable. David M. Potter's (1976:173, 340–42) comments on Stephen Douglas seem applicable to the Congressional Northern Democrats in general. According to Potter (1976:342), "[A] readiness to subordinate blacks made [Douglas] responsive to the local majoritarianism of whites." Rogers' and the Northern Democrats' defense of local majoritarian rule were always implicitly, and often explicitly, a defense of white local rule.[53]

My argument that racial beliefs were inextricably tied to the Democrats' popular sovereignty doctrine is consistent with that of Hyman (1975:77) and Silbey (1977:189). If scholars conceptualize Northern Democrats' opposition to the amendments mainly in terms of their constitutional theory, and if scholars do not treat popular sovereignty doctrine as having racial content, the use and impact of racial belief systems in the Reconstruction debates will remain implicit and unrecognized.

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dom . . . "; "by nature far inferior to the white race, never accustomed to think or provide for themselves"; and p. 2100 [Smith] (21 Apr. 1866), regarding blacks' unwillingness to work without being forced.

[50] *Cong. Globe*, 39th Cong., 1st Sess. 2501 (9 May 1866).

[51] *Cong. Globe*, 39th Cong., 1st Sess. 2538 (10 May 1866).

[52] *Cong. Globe*, 39th Cong., 1st Sess. 2411 [Rogers] (5 May 1866).

[53] The crucial point for Democrats, Silbey (1977:191) states, was that this was "the country of the white race, given by the Almighty on which to build a great white nation." The Democrats spent more energy on condemning in the fiercest terms the "effort to place the African on a level with the Caucasian" than on anything else (Silbey 1977:190). See also Silbey 1977:27, 51, 81–83, 241. In 1868, the Democrats chose General Frank Blair of Missouri to run for vice president. Grossman (1976:9) calls Blair a "crude racist" and his selection a confirmation of the party's "negrophobia."

III. Republican Slavery Criticism

Like Northern Democrats, Republicans identified slavery as the "cause of our National troubles." Republicans, too, stated that "the doctrine of secession should be repudiated and branded with everlasting infamy."[54] But with this the similarities end. Historian Lea VanderVelde (1989:495) remarks on the contest to define what it meant to abolish slavery: "In the minds of the radicals, abolishing slavery and involuntary servitude was more than merely abolishing the formal legal status of human beings held as property." But Moderates, too, defined slavery's destruction as something more than formal emancipation.

Republicans often began their speeches in the wake of the Thirteenth Amendment by "elucidat[ing] the causes and objects of the war," assessing the "causes of rebellion," and "survey[ing] the present situation."[55] What followed were Republican versions of past experiences and present events, frequently accompanied by appeals to the soldiers' sufferings.[56] Outside the halls of Congress, Carl Schurz observed that the "embers of slavery" were still alive (Hyman 1967:304). Inside Congress, Republicans dismissed, usually with great derision, the Northern Democrats' portraits of formal emancipation as a clean break with the slavery past.

As Republicans gained experience with the depth and extent of the Southerners' recalcitrance, the contexts changed in which Republicans articulated their objectives and applied their constitutional theory. Expressions of legislative intent were a moving target of sorts. Republicans invented language to deal with this situation. Representative William Windom of Maine referred to the "body" and "spirit" of slavery.[57] Some referred simultaneously to the end of slavery and the continuation of it, despite its formal prohibition. Alluding generally to the Black Codes, Senator Henry Wilson of Massachusetts stated, "In several of these States new laws are being framed containing provisions wholly inconsistent with the freedom of the freedmen."[58] Prominent Radicals, such as Senator Charles Sumner of Massachusetts, constructed and mobilized a distinction between abolishing slavery "in form" and "in substance."

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54 *Cong. Globe*, 39th Cong., 1st Sess. 2085 [Perham] (21 Apr. 1866).

55 *Cong. Globe*, 39th Cong., 1st Sess. 1011 (24 Feb. 1866); 1015 (24 Feb. 1866); 1072 (28 Feb. 1866).

56 Appeals to "the brave soldiers of the North" and to "land made sacred by their noble deaths" appeared in almost every Republican speech on Reconstruction legislation. See, e.g. *Cong. Globe*, 39th Cong., 1st Sess. 2464 [Thayer], 2410 [Lawrence] (5 May 1866); 2509 [Spalding] (9 May 1866); 2511 [Eliot] (9 May 1866); 2534 [Eckley] (10 May 1866); 2691 [Morris] (19 May 1866); 2695 [Patterson] (19 May 1866).

57 *Cong. Globe*, 39th Cong., 1st Sess. 1159 (18 Mar. 1866).

58 *Cong. Globe*, 39th Cong., 1st Sess. 39 (1865), quoted in VanderVelde 1989:487.

A View of the South

Journalists' reports from the South, especially by those who proclaimed that they were initially "Douglas men," were influential in the North (Hyman 1967:349). "The war did not squelch out rebellion," declared Moderate Republican Senator William Pitt Fessenden of Maine, "it simply disarmed it. . . . Treason is as rampant in that region as it was in 1861."[59] Fessenden's statements are particularly noteworthy since he was one of only seven Senate Republicans (among them Lyman Trumbull) who voted against the impeachment of President Andrew Johnson. "When Fessenden moved," noted the *Chicago Tribune,* "it signifies that the whole glacier has started" (quoted in Bogue 1981:162).

Republicans, including Fessenden, offered nothing but scorn for Northern Democratic descriptions of the Southern states.[60] Representative Ephraim R. Eckley of Ohio commented: "Peace we are told, reigns throughout our borders. I wish I could believe that." He continued:

> That the rebels are conquered, is an admitted fact. That they have any loyalty, any love, for the peace of the country and permanency of the Government, is not manifested by anything they have done. It is true they say they accepted the situation, so does the culprit. They say they laid down their arms. But their arms were forced from them. They say they disbanded their armies, but their armies were captured or scattered by the Union forces. Then what have they done to prove their submission to the law? They have neglected to pay their portion of taxes; they have expelled loyal citizens from the South; they have treated with brutality the freedmen, and enacted laws disgraceful to a Christian age or a Christian people. Those who engaged in the rebellion are as disloyal today as they were at any time during the war. Will anyone pretend they have changed?[61]

According to both Moderate and Radical Republicans, the rebellion was not dead.[62] Representative William Higby of Penn-

[59] *Cong. Globe*, 39th Cong., 1st Sess. 1008, 1017 [Fessenden] (24 Feb. 1866); 2534 [Eckley] (10 May 1866).

[60] Republicans frequently expressed disdain for Northern Democrats because "every traitor of the South and every sympathizer with treason in the North sustains the policy of the Democratic Party and the President" *Cong. Globe*, 39th Cong., 1st Sess. 2508 [Boutwell] (9 May 1866). See also p. 2401–2 [Ingersoll] (5 May 1966); and 2409 [Lawrence] (5 May 1866). Eckley mocks Finck and the Northern Democrats, noting that they voted against "every measure necessary to sustain the Govt. and resist the rebellion. . . . To my colleague and the copperhead party," Eckley stated, "no credit [for the victory over slavery] is due," p. 2534 (10 May 1866).

[61] *Cong. Globe*, 39th Cong., 1st Sess. 2534–35 [Eckley] (10 May 1866).

[62] *Cong. Globe*, 39th Cong., 1st Sess. 1016 (1 Mar. 1866), no evidence for Southerners' change of heart; 1307 [Orth] (10 Mar. 1866); war was like an "earthquake"; "reverberations" still remain; 1471–72 [Hill] (17 March 1866); "old times seem to be coming back upon us . . . "; "crack of the slave drivers whip is distinctly perceptible"; "each days history [is] but developing some new phase of those problems [of restoration] and adding to them more complications and embarrassment"; 1619 [Myers] (24 Mar. 1866);

sylvania stated that a "virulent and deep-seated disease still lingers in a latent form to break forth soon again." Senator Benjamin Wade of Ohio declared that the Northern military victory was not enough. Principles had not yet triumphed.[63]

In short, Republicans argued that the war had not ended but had *transmuted.* "The old battles for liberty and justice on the one side and for slavery and tyranny on the other are upon us again, and we must fight them out. The clash of arms, it is true has ceased, the physical battle has ended between the North and South, but the old battle of ideas is upon us still."[64] Representative Perham stated: "Instead of accepting in good faith the results of the war, they openly declare they are only subdued for the time being, and they will now rely on their influence inside the organization of the Government to accomplish what they have failed to do outside by the bullet."[65] Representative Myers said: "There is another war being waged, and between the same parties and their respective supporters [i.e., the Northern Democrats] who struggled for ascendancy on the battlefield. It is a war of ideas. . . . The true patriot everywhere will watch with profound interest the result of this great moral and intellectual struggle."[66] Others made similar statements.[67] The Republicans' view that the war had not ended but had transmuted makes sense given their political and economic critique of slavery.

It is important to remember that Republicans had articulated economic and political critiques of slavery before the war. It is easy for the current reader to regard Republicans' assertions about unrepentant rebels and transmuted war as mere rhetoric,

"spirit of the rebellion is not all dead"; 1623 [Hart] (24 Mar. 1866); "I do not believe the southern heart can be changed in a day; perhaps not entirely in a generation . . . "; "must not forget with whom we have to deal."; 2084 [Perham] (21 Apr. 1866); "They are no better now, and we should be false to our high trust to allow these men to come back again to reenact the scenes of 1861. . . . "; 2085 [Perham] (21 Apr. 1866); "treason is still as deep . . . "; 2093 [Miller] (24 Mar. 1866); "the day of our peril is not yet passed . . . "; 2468 (8 May 1866); "vanquished but unconverted rebels . . . . No consideration is more important than the animus of the masses of the Southern people"; 2535 [Eckley] (10 May 1866); "rebels have not changed; 50 year incubation".

63 *Cong. Globe*, 39th Cong., 1st Sess. 2253 [Higby] (28 Apr. 1866); 1113 [Wade] (1 Mar. 1866).

64 *Cong. Globe*, 39th Cong., 1st Sess. 2399 [Ingersoll] (5 May 1866).

65 *Cong. Globe*, 39th Cong., 1st Sess. 2082 [Perham] (21 Apr. 1866).

66 *Cong. Globe*, 39th Cong., 1st Sess. 1618 [Myers] (24 Mar. 1866).

67 "Instead of having subdued the rebellion, you have but . . . transferred the conflict from the field to these halls, with fearful disadvantages to yourselves" (p. 1471, 17 Mar. 1866); you can't "lose by legislation all that it so gloriously achieved by its armies in the field" (p. 1472, 17 Mar. 1866); "How to secure the fruits of that victory and obtain a permanent peace is the question for solution. To admit such members of Congress as they would elect from the States lately in rebellion would secure neither, but lose us both, and we should permit them to gain everything through congressional action that they sought to accomplish by arms" (p. 2535, 10 May 1866); "We have defeated them in arms, but in the proposition of the Democratic party, we invite them to the only field in which they have any chance of success in the contest in which they have been engaged" (p. 2508, 9 May 1866).

as strategic tools used in the service of their political interest. Certainly, the Republicans had an interest in staying in power. But, as William Nelson has argued, Northern Democratic charges that Republicans were only narrowly interested in their own political future should be dismissed. Republican criticisms of the Black Codes, ex-Confederate takeovers of political institutions, and political violence were continuous with their economic and political critiques of slavery. In the Republicans' defense of their reform package, they continued their antebellum condemnations of the Slave Power.[68]

In the post-war years, Richard Henry Dana popularized the "grasp of war" theory, the doctrine that it was up to the national government to decide precisely when peace had arrived. Legal scholar Michael Benedict (1974a:125) has noted that Dana's "'grasp of war' doctrine" gave legitimacy to Northern leverage over the defeated ex-Confederate states. This is certainly true. This doctrine, however, was more than a strategic political device. It was part of the Republican effort to draw the line between the slavery and the post-slavery periods and to adapt to growing recognition of Southern recalcitrance in a way that secured the Republic from the threats of slavery, as the Republicans understood those threats.

On the Status of the Ex-Confederate States

Republican understandings of the problem with slavery also can be seen in their arguments about the status of the ex-Confederate states. Northern Democrats and Republicans made many speeches after passage of the Thirteenth Amendment in which they contested the status of the ex-Confederate states (whether they were "in" or "out" of the Union; whether their secession meant they had, in fact, left the Union). Lincoln called the question of status a "pernicious abstraction" (Donald 1956:140). The Joint Committee on Reconstruction called it a "profitless abstraction" (Foner 1988:260). Echoing Lincoln, Representative Ingersoll said he regarded this "technical question" with "supreme indifference." He stated: "The president [Johnson] and his friends

[68] Sen. James W. Nye of Nebraska referred to the monopoly of wealth and political power of the planters and the "blighting influence and paralyzing effect on the industries of the [slave] states." *Cong. Globe*, 39th Cong., 1st Sess. 1071, 1073 (28 Feb. 1866). He called the war "class upon class" (p. 1074). Rep. Leonard Myers of Pennsylvania said that the war vindicated the dignity of labor and the "laboring masses of the South" *Cong. Globe*, 39th Cong., 1st Sess. 1622–23 (24 Mar. 1866). Scofield stated, "The life habits of these people, their love of ease and domination, their pride, aristocracy, wealth and power were all the outgrowth of an institution" (p. 2247, 27 Apr. 1866). Miller referred back to the antebellum compromises with slavery: "it was 'policy' that induced compromise; it was 'policy' that induced the Missouri Compromise; it was 'policy' that induced the Fugitive slave law. I want no policy. I want principles" (p, 2094, 21 Apr. 1866).

[the Northern Democrats] continually persist in declaring to the people that the issue now is whether or not a State can secede."[69]

Representative Scofield remarked on the absence of "precedents" to guide congressmen on this question: "[O]ur fathers did not provide for what they could not foresee. There are no precedents on file to guide us. This is the first disunion rebellion."[70] "The real issue," was a practical one, "whether those unrepentant rebels shall be represented in Congress, and by their power here defeat the objects of the loyal majority in Congress [and] defeat the restoration of the Union upon a loyal and humane basis."[71] The question of the official status of the ex-Confederate states was simply not an urgent one for Republicans. The untrustworthiness of the ex-Confederates was the immediate Republican concern.[72]

Most Republicans disagreed with Representative Thaddeus Stevens of Pennsylvania that the ex-Confederate states had the status of "conquered provinces,"[73] but the belief that state status was at least suspended was a matter of consensus. Moderate and Radical Republicans alike asserted that exclusion was simply a matter of common sense.[74] Republicans defended Southern exclusion from Congress, warning that readmission would win the South, politically, what it could not win on the battlefield. They issued declarations of the sort cited earlier, about transmuted war and not-yet-triumphed principles.

The Basis of Political Society

For Republicans, the Civil War had thrown the "foundations of public life" open for discussion. Republicans sought to prevent the reestablishment of white oligarchies and black serfdom.[75] The exclusion of ex-Confederates from the 39th Congress was the most basic step toward accomplishing this goal.

> Those gentlemen on the other side of the House . . . think it would be an excellent idea to have the rebels here, to themselves vote upon and fix conditions of reconstruction. A most happy idea! Having failed to destroy the Government by a resort to arms, now only once let them in here under the old

69 *Cong. Globe*, 39th Cong., 1st Sess. 2399 (5 May 1866).

70 *Cong. Globe*, 39th Cong., 1st Sess. 2250 (28 Apr. 1866).

71 *Cong. Globe*, 39th Cong., 1st Sess. 2399 [Ingersoll] (5 May 1866). There were many statements along these lines. See, e.g. p. 2464 [Thayer] (8 May 1866); 2459 [Stevens] (8 May 1866); 2468 [Kelley] (8 May 1866); 2511 [Eliot] (9 May 1866).

72 This is supported by evidence in Hyman 1967:92, 111, 127, 234, 264, 328.

73 *Cong. Globe*, 39th Cong., 1st Sess. 2250 [Scofield] (28 Apr. 1866).

74 *Cong. Globe*, 39th Cong., 1st Sess. 2506 [Schenck; Eldridge] (9 May 1866); 2510 [Miller] (9 May 1866); 2511 [Eliot] (9 May 1866); 2539 [Farnsworth] (10 May 1866); 2542 [Bingham] (10 May 1866).

75 See Cheever's speech, quoted in Hyman 1969:341, regarding worries about "a reconstruction of white oligarchies" and a reduction of blacks to "serfdom."

> apportionment, which makes a rebel of South Carolina as big as two or three loyal men of Illinois, let them in with the blood of slain patriots yet dripping from their fingers, and the doubly damning crime of starving prisoners still blackening their souls, and then talk about amending the Constitution.[76]

Changes in the basis of representation were needed. Restrictions on representation were the "only safe rule," for "the day of our peril is not yet passed."[77] Unless the Constitution prescribed penalties for states that disenfranchised black men (this is what Republicans hoped to accomplish with section two of the Fourteenth Amendment),[78] these states would gain great advantages in national political strength. Southern states, the Republicans predicted, would deny black men the vote. Under a population-based apportionment scheme, however, black citizens would count in the apportionment for assessing the number of representatives that a state sent to the House of Representatives. Thus, Southern states would gain political power at the national level by using a black population that they were disenfranchising at home. The Republicans who spoke on section two of the Fourteenth Amendment voiced support for this section, though many expressed reservations about section three (barring from office rebels who had previously taken an oath to support the Constitution).[79] To forgo restrictions on Southern representation would admit no difference between the "virtue" of Northern soldiers and the "vice" of the ex-Confederates.[80]

Ex-Confederate takeovers of local political offices produced deep concern. Representative Sidney Perham read a clipping from a North Carolina newspaper, the *Raleigh Standard,* that reported the town of Wilmington passing into the hands of the original secessionists. Representative William Lawrence of Ohio remarked: "Already the political ax is falling upon the necks of our friends. Heads are falling in my own State."[81] Former Union General Nathaniel P. Banks of Massachusetts, a Moderate House Republican, did not want "enemies of the country in possession

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76 *Cong. Globe*, 39th Cong., 1st Sess. 2540 [Farnsworth] (10 May 1866).

77 *Cong. Globe*, 39th Cong., 1st Sess. 2092 [Thomas] (21 Apr. 1866).

78 U.S. Constitution, amend. 14, sec. 2: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

79 *Cong. Globe*, 39th Cong., 1st Sess. 2463 [Garfield] (8 May 1866); 2464 [Thayer] (8 May 1866); 2503 [Raymond] (9 May 1866); 2508 [Boutwell] (9 May 1866); 2510 [Miller] (9 May 1866); 2537 [Longyear] (10 May 1866).

80 *Cong. Globe*, 39th Cong., 1st Sess. 2690–91 [Morris] (19 May 1866).

81 *Cong. Globe*, 39th Cong., 1st Sess. 2410 [Lawrence] (5 May 1866).

of political power in whole or in part in the local governments or in representation here." He argued as explicitly as any Republican that the basis of political society had to change in order to secure peace. "It is my belief that reorganization of governments in the insurgent States can be secured only by measures which will work a change in the basis of political society. I do not think this can be done by theoretical constitutional or statutory provisions. Anything that leaves the basis of political society in the southern States untouched leaves an enemy in condition to renew the war at his pleasure."[82]

Republicans tied reforms in the basis of representation to their slavery critique. Illegitimate political power was part of the problem with slavery, and the political process needed to be protected from future abuse by ex-Confederates who sought to accomplish by legislation what could not be accomplished on the battlefield. Political violence against white and black Republicans was also a threat to the political process.

The Slavery Period, Continued

Despite formal emancipation, then, political violence, Black Codes, and denials of Bill of Rights guarantees remained a continuing problem of slavery. Political violence was the subject of many Republican speeches.

> Their policy is to render it so uncomfortable and hazardous for loyal men to live among them as to compel them to leave. Many hundreds of northern men who have made investments and attempted to make themselves homes in these States have been driven away. Others have been murdered in cold blood as a warning to all northern men who should attempt to settle in the South. Officers charged with the execution of the laws have been intimidated by threats of violence and brutally murdered for a faithful discharge of duty.[83]

Representative Thomas Eliot of Massachusetts read aloud reports of brutal violence sent by the generals who were assigned to the Freedmen's Bureau in the states of Texas, Mississippi, Georgia, South Carolina, North Carolina, and Louisiana. According to Eliot, "Manifestly, [intervention] is needed; for if the startling facts that come to us from the recent rebel States of fiendish oppression and brutal outrage were wholly undisclosed, we yet should know that masters who had rioted in the lusts of slavery would not let their bondsmen go in peace; or if they did, we still should know that a race prostrate for generations beneath the heel of tyrannous power could not have their freedom made effectual without our legislative aid."[84] I do not examine debate

[82] *Cong. Globe*, 39th Cong., 1st Sess. 2532 (10 May 1866).

[83] *Cong. Globe*, 39th Cong., 1st Sess. 2082 [Perham] (21 Apr. 1866).

[84] *Cong. Globe*, 39th Cong., 1st Sess. 2773–78 (23 May 1866).

over the Enforcement Act of 1870 and the Ku Klux Klan Act of 1871, which provided for federal jurisdiction over racially motivated rights denials. But Moderate Republicans' condemnation of political violence in 1866 and their votes for the Enforcement Acts of 1870–71 suggest that they viewed Klan violence as among the continued threats of slavery and a threat to the political process.

Thus, Southern rights denials were also a continuing problem.[85] As noted above, Republicans condemned the Black Codes of 1865–66, which, among other things, denied blacks civil rights (more on this later). Republicans saw civil rights (again, the right to own property, to contract, to sue and be sued, to testify in court, and to be subject to the same criminal codes as other citizens) as securing their "free labor" ideal. These rights were necessary in pursuing an economic livelihood. After the war, Moderates embraced civil rights for blacks (Foner 1988:242–44). Senator Lyman Trumbull of Illinois emphasized that political rights, such as voting and holding office, were not included in civil rights. "The granting of civil rights does not, and never did in this country, carry with it . . . political privileges."[86] Foner says clearly (1988:251, 257) that protection of the freedmen's civil rights followed from the suppression of the rebellion because such protection embodied free labor principles.

Senator Fessenden also explicitly condemned the suppression of free speech. Representative Ralph P. Buckland of Ohio seemed to be referring to Southern suppressions of antislavery activists' civil liberties when he said: "The people of the loyal states will never again submit to the indignities and outrages, which were perpetrated upon Northern people at the South previous to the war."[87] Foner (1988: 258) has remarked on the "systematic violations of Bill of Rights guarantees in the South in 1866," arguing that it was "abundantly clear" that Republicans wished to give constitutional sanction to the states' obligation to respect such key provisions as free speech, freedom of the press, trial by jury, and protections from cruel and unusual punish-

[85] *Cong. Globe*, 38th Cong., 2d Sess. 237 [Smith] (12 Jan. 1865); 39th Cong., 1st Sess. 1056 [Higby] (27 Feb. 1866); 1078 [Bingham] (28 Feb. 1866); 1117, 1119 [Wilson] (1 March 1866); 1123–24 [Cook] (1 Mar. 1866); 1151 [Thayer] (2 Mar. 1866); 1159 [Windom] (2 Mar. 1866); 1291 [Bingham] (9 Mar. 1866); 1293 [Shellabarger] (9 Mar. 1866); 1305 [Orth] (10 March 1866); 1306–7 [Thayer] (10 Mar. 1866); 1472 [Hill] (17 Mar. 1866); 1478 [Anderson] (17 Mar. 1866); 1617 [Moulton] (24 March 1866); 1621–22 [Myers] (24 Mar. 1866); 1627 [Buckland] (24 Mar. 1866); 1759 [Trumbull] (4 Apr. 1866); 2082–83 [Perham] (21 Apr. 1866); 2091–92 [Thomas] (21 Apr. 1866); 2404 [Ingersoll] (5 May 1866). See also Foner's reference to "repeated tales of injustice" by "speaker after speaker" (1988:247).

[86] *Cong. Globe*, 39th Cong., 1st Sess. 1757 [Trumbull] (4 Apr. 1866). A. J. Rogers stated that all rights came under the designation "civil rights" (p. 1122, 1 Mar. 1866). See also p. 1157 [Thornton] (2 Mar. 1866).

[87] *Cong. Globe*, 39th Cong., 1st Sess. 1013–14 [Fessenden] (24 Feb. 1866); 1627 [Buckland] (24 Mar. 1866).

ments. Some portions of the Bill of Rights, he notes, were of little moment in 1866.

In their comments on emancipation and the rights that accompanied it, Republicans expressed their definition of freedom. Definitions of freedom and definitions of the resolution of the problems of slavery were two sides of the same coin. Senator Charles Sumner argued that a group of rights, including the right to education, was "essential to Emancipation. Without [these guarantees]," stated Sumner, "Emancipation will be only half done. It is our duty to see it wholly done."[88]

After formal emancipation was accomplished, Northern Democrats and ex-Confederates made plain their view that formal self-ownership did not carry an automatic package of civil rights and personal rights under the Constitution. It became clear that any such belief in an accompanying package of rights would be challenged. A multitude of Republican comments suggests that they, indeed, held this view.[89] While Moderates did not go as far as Sumner, their support for national protections of black civil rights and incorporation of the Bill of Rights seems clear.

Republicans interpreted Lincoln's Unionism in a distinctive way, one that legitimated federal authority and oversight of certain matters (personal and civil rights) that had been in the hands of the states before the war. The Moderates' dilemma, according to Foner (1988:251), "was that most of the rights they sought to guarantee for blacks had always been state concerns. Federal action to secure these rights raised the specter of an undue 'centralization' of power."

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[88] Sumner and Sen. Henry Wilson cited a "virtually identical" list of such rights: "We must see to it that the man made free by the Constitution . . . is a freeman indeed; that he can go where he pleases; work when and for whom he pleases; that he can sue and be sued; that he can lease and buy and sell and own property, real and personal; that he can go into the schools and educate himself and his children; that the rights and guarantees of the good old common law are his, and that he walks the earth, proud and erect in the conscious dignity of a free man." Quoted in VanderVelde 1989:476. See also Curtis 1986:48–52.

[89] *Cong. Globe*, 39th Cong., 1st Sess. 2084 [Perham] (21 Apr. 1866). (Emancipation "intended to carry with it the common rights of manhood . . . "); 1759 [Trumbull] (4 Apr. 1866), ("if the bill now before us [Civil Rights Bill 1866], and which goes no further than to secure civil rights to the freedman, cannot be passed, then the constitutional amendment proclaiming freedom to all the inhabitants of the land is a cheat and a delusion. . . . "); 1151 [Thayer] (2 Mar. 1866); (Civil Rights Bill "gives practical effect" to the Thirteenth Amendment); 2510, 2511 [Miller; Eliot] (9 Mar. 1866) (suggested that the Civil Rights Bill applied the Bill of Rights to the states). The argument over whether the Thirteenth Amendment provided authority for the Civil Rights Bill of 1866 also provides clues about Republican understandings of formal emancipation/abolition. Wilson argued that the Thirteenth Amendment did provide authority for the Civil Rights Bill of 1866 (p. 1118, 1 Mar. 1866), but Bingham disagreed (p. 1291, 9 Mar. 1866). See also evidence gathered by Amar (1992: 1217, n. 113) on Republican meanings of emancipation and the Thirteenth Amendment. Rogers argued that there was no congressional authority to pass the Civil Rights Bill (p. 1120, 1 Mar. 1866); Rogers asserted that the Privileges or Immunities Clause put the whole terrain of rights under federal supervision (p. 2538, 10 May 1866).

As a strategy to legitimate new federal guarantees for these rights, Republicans argued that the notion of states' rights had been perverted in the antebellum decades. They reiterated their economic and political critiques of slavery developed before the war. Various state powers, such as censorship of antislavery mailings and books, had been exercised illegitimately, they charged, and hence these powers were not legitimately established. In short, Republicans developed and mobilized a distinction between arbitrary (slave) power and (legitimate) established right in order to bring certain traditionally local matters under federal oversight. (Other traditionally local matters, such as marriage laws, remained "properly" under state control. Republicans, with a few notable exceptions, declined to challenge the established status of planters' property rights.)[90]

In 1949, Charles Fairman argued famously that the Fourteenth Amendment did not originally apply the Bill of Rights to the states. He *assumed* that the Supreme Court's 1833 decision in *Barron* (which held the Bill of Rights applicable to the federal government only) defined "established" states rights. William Crosskey (1954) rebutted Fairman and claimed that historical evidence favored the incorporation thesis. Crosskey argued that Republicans rejected the *Barron* decision. At the time, Crosskey's thesis was rejected.

Attention to the competition among Civil War narratives lends credibility to Crosskey's view. Such attention shows that Republicans and Northern Democrats contested the criteria for defining established states rights. In their respective slavery criticisms, Republicans and Northern Democrats argued about sources of authority for defining states rights as "established." Northern Democrats relied on institutional sources such as the Supreme Court (and its *Barron* decision), while Republicans relied on non-institutionally legitimated sources, such as their own slavery critiques and the "declaratory theory" of rights. A great deal, of course, was at stake in providing an authoritative definition of "established" states' rights. If state power over a particular matter was "established," then federal oversight was illegitimate; if that state power was not established, then federal oversight could be legitimate.

Northern Democrats had a rhetorical edge when it came to the contest to define "established" states' rights. After the war ended, Republicans faced a problem that Northern Democrats did not confront. The problem was that Republican policies evolved rapidly during and after the war, especially in response to Southern recalcitrance and Johnson's presidential reconstruction. This meant that Republicans were open to the criticism that

[90] Foner (1980:128–49) discusses Thaddeus Stevens's views on confiscation and reconstruction.

their post-war policies contradicted their pre-war statements and promises.

In 1861, Congress expressed its Unionist stance in the Crittenden Resolution. This joint resolution reflected a unionist stance:

> [T]his war is not prosecuted upon our part in any spirit of oppression, nor for any purpose of conquest or subjugation, nor purpose of overthrowing or interfering with the rights or established institutions of those States, but to defend and maintain the supremacy of the Constitution and all laws made in pursuance thereof, and to preserve the Union with all the dignity, equality and rights of the several States unimpaired; that as soon as these objects are accomplished the war ought to cease.[91]

Interpretation of the Crittenden Resolution was contested in the 39th Congress. The Democrats cited the resolution in arguing that Republican legislation contradicted their antebellum statements of purpose.[92] In a typical statement, Representative Randall asserted that the Republicans "never expressed any purpose before the people to do what they have since done."[93]

Republicans countered by appealing to their own political critique of slavery (that slavery destroyed white civil liberties). Fessenden referred derisively to the "Dogma of supreme State sovereignty," a dogma created by the selfishness, political power, and monetary interests of the Slave Power. Moderate Representative John A. Bingham of Ohio mocked state sovereignty as political disease.[94] Slavery went "against the political rights of the masses of Southern white men."[95] Referring back to their political critiques of slavery, Republicans tried to render their pre-war policy consistent with their post-war reform program. But their critiques of state sovereignty doctrine did not have institutional/Court recognition.

Race

Scholars have noted the twin themes of constitution and race in Democrats' statements, and they have also identified a "closely interrelated set of attitudes" of Republicans, "of which those concerned with constitutional interpretation and race were the most

[91] *Cong. Globe*, 37th Cong., 1st Sess. 222 (22 July 1861). John J. Crittenden was a former Whig.

[92] Boyer was among several Democrats who quoted the joint resolution in its entirety in making the argument that Republican legislation was unconstitutional. *Cong. Globe*, 39th Cong., 1st Sess. 2467 (8 May 1866). Cox also made extended use of the 1861 resolution. *Cong. Globe*, 38th Cong., 2d Sess. 241 (12 Jan. 1865).

[93] *Cong. Globe*, 39th Cong., 1st Sess. 2408 (5 May 1866).

[94] *Cong. Globe*, 39th Cong., 1st Sess. 1008, 1012 [Fessenden] (24 Feb. 1866); 1073, 1088 [Bingham] (28 Feb. 1866).

[95] *Cong. Globe*, 39th Cong., 1st Sess. 1075 (28 Feb. 1866).

important" (Bogue 1981:332). Virtually all Republicans held blacks to be naturally inferior to whites. Senator Fessenden noted black inferiority, and went on to condemn the Northern Democrats' "race harangues about a white man's govt."[96] Many Republicans referred to the "prejudices" of Southerners and the "troubling influence" of this prejudice.[97] Ex-Confederates, according to Representative Roswell Hart of New York, were "bred in a school which has taught them that a black man can have no rights which they are bound to respect." Representative Perham stated, "They may accept the fact of emancipation, but they still believe that slavery is the best condition for the colored race, and it is but reasonable to suppose that as far as possible this idea would, if they were allowed to govern, be embodied in law, and carried out in their intercourse with the colored people.[98] Michael Benedict's (1974a:40–41, 107) view that many Republicans were "racist" is not contradictory. It was possible to believe in white superiority, yet be committed to protecting blacks from racially motivated deprivations of civil and personal (and later political) rights.[99] This appears to be Lincoln's position regarding blacks, according to *The New York Times*: "He declares his opposition to negro suffrage, and to everything looking towards placing negroes upon a footing of political and social equality with the whites;—but he asserts for them a perfect equality of civil and personal rights under the Constitution."[100]

Republicans frequently labeled Southern Black Codes as an attempt to re-enslave the freedmen. "[T]he South, being relieved from the military power of the Government, will seek to again enslave [the freedmen] not perhaps by a sale on the auction-block as in the olden time, but by vagrant laws and other laws and regulations concerning the freedmen. . . . Here you have a fair sample of the legislation of a state which has 'accepted the situation.' Is such a State fit to be represented now in Congress? Let the loyal people answer!"[101] Representative Ingersoll quoted portions of Mississippi's Black Codes:

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96 *Cong. Globe*, 39th Cong., 1st Sess. 1012, 1013 (24 Feb. 1866).

97 *Cong. Globe*, 39th Cong., 1st Sess. 2252 [Higby]; 1159 [Windom] (28 April 1866).

98 *Cong. Globe*, 39th Cong., 1st Sess. 1628 [Hart] (24 Mar. 1866); 2084 [Perham] (21 Apr. 1866). In Hyman's collection of Radical Republican speeches and writings, statements to this effect are found consistently. Hyman 1969:258 [Boutwell]; pp. 266–67 [Grosvenor]; p. 297 [Schurz]; p. 324 [Stevens]; p. 361 [Prentiss].

99 For a general discussion of both Republican views on racial differences and Republican policies that demanded basic rights for blacks, see Foner 1970: 261–300. For a discussion of Conservative Republican racial beliefs, see Bogue 1981:156–58, 299–300.

100 Quoted in Foner 1970:294. See also Foner 1970:261–300. This reference to "personal rights" is perhaps a reference to the Bill of Rights. If so, the Moderate Republican position in 1866 appears to match Lincoln's. Support for black civil rights (but not political or social rights) and support for applying the Bill of Rights to the states grew from the economic/free labor critique of slavery and the political critique of slavery (that slavery destroyed white men's civil liberties).

101 *Cong. Globe*, 39th Cong., 1st Sess. 2404 [Ingersoll] (5 May 1866).

> Article fifty-eight, section eleven, page 248, Revised Code, makes it punishable with death for a Negro to murder, commit rape, burn houses, commit robbery or attempt to commit such crimes. White persons are not punishable with death for most of the offenses mentioned in this section, or for the attempt to commit any one of them. . . Article forty-five, page 245, provides that a slave shall receive twenty lashes if he be found away from the place of his employment without a pass. Reenacted for the freedmen. . . . Article fifty-one, page 247, makes it punishable for Negroes to congregate at night, or hold schools. Reenacted for the freedmen.[102]

When they cited the Black Codes in their speeches, Representative Thomas D. Eliot of Massachusetts and Senator Charles Sumner articulated the view that a federal "duty to protect" was inherent in formal emancipation. "The knot which politicians could not untie during eighty years of peace, the sword of Mr. Lincoln cut at one blow. The power to liberate, which is now confessed, involved the duty to protect. . . . No peace will come that will 'stay' until the Government that decreed freedom shall vindicate and enforce its rights by appropriate legislation."[103]

Republicans' condemnations of the Black Codes are open to multiple interpretations. Their critiques can be understood as support of a formal equality jurisprudence, against which the Supreme Court's state action doctrine can appear consistent, as can a color-blind jurisprudence of the sort favored by the Rehnquist Court majority. If Republican condemnations of the Black Codes are viewed in isolation, that is, separately from events that occurred afterward, formal equality/state action models are more easily attributable to Republicans. If such condemnations are viewed with reference to the Enforcement Acts of 1870–71, which brought private, conspiratorial, racially motivated deprivations of nationally protected rights within the direct reach of the federal government, this attribution becomes more difficult. As previously noted, I do not investigate the debates over the Enforcement Acts, though I think that minimal information about them is sufficient to warrant pause in attributing a formal equality/state action model to Republicans. After all, even after the racially specific provisions of the Black Codes had been repealed (they had caused a popular uproar in the North), Republicans believed that Fourteenth Amendment rights *continued* to be denied. They passed the Enforcement Acts of 1870–71 to correct this. This legislation suggests that Republicans held something more than the Supreme Court's formal equality/state action model. This is important because many scholars believe that the Supreme Court's model matched the Republican model. My point is not to argue the weakness of the state action doctrine.

[102] *Cong. Globe*, 39th Cong., 1st Sess. 2404 (5 May 1866).

[103] *Cong. Globe*, 39th Cong., 1st Sess. 2773 [Eliot] (23 May 1866).

My only point here is that alternative readings of Republican arguments about the Black Codes are possible, and that these readings can be used in a variety of ways to support different approaches to citizenship disputes.

The Original Constitution

Republican constitutional theory has attracted attention from scholars who argue that Republicans intended to apply the Bill of Rights to the states. Representative John A. Bingham, principal draftsman of section one of the Fourteenth Amendment and Republican Moderate, made multiple references to the antebellum Constitution (see Amar 1992:1218–26, Aynes 1993:66–74). In Bingham's comments, slavery appears in both rhetorical and constitutional terms. On one occasion, Bingham said,

> The necessity for the first section of this amendment to the Constitution [Fourteenth], Mr. Speaker, is one of the lessons that have been taught to your committee and taught to all the people of this country by the history of the past four years of terrific conflict—that history in which God is, and in which He teaches the profoundest lessons to men and nations. There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.[104]

This passage is quoted by both sides in the debate over whether the Fourteenth Amendment originally applied the Bill of Rights to the states. Charles Fairman, who denied incorporation, asserted (1949:53) that references to the "lessons" of the war were "surely . . . an inapt way" to express the objective of applying the Bill of Rights to the states. While Crosskey never squarely countered Fairman on this assertion, this was not due to an unavailability of evidence. When one is familiar with the idioms of Reconstruction debate, references to the lessons of the war appear to be a perfectly apt way to express intent to incorporate the Bill of Rights.

An important dimension of Republican speeches was the criticism leveled at the Founding Fathers, the original Constitution, and the "old" federalism. Representative Thaddeus Stevens represented the Civil War as springing from "the vicious principles

104 *Cong. Globe*, 39th Cong., 1st Sess. 2542 (10 May 1866).

incorporated into the institutions of our country." Stevens continued, "Our fathers had been compelled to postpone the principles of their great Declaration and wait for their full establishment till a more propitious time. That time ought to be present now. But the public mind has been educated in error for a century. How difficult in a day to unlearn it. In rebuilding, it is necessary to clear away the rotten and defective portions of the old foundations, and to sink deep and found the repaired edifice upon the firm foundation of eternal justice."[105] Speaking on section one of the Fourteenth Amendment, Stevens identified a "defect" in the Constitution. "I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted in some form or other, in our Declaration or organic laws. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect and allows Congress to correct the unjust legislation of the States."[106]

Republicans, it is important to note, held varying views of the original Constitution. Whereas Stevens seemed to think that the original Constitution never limited the states (and hence was correctly interpreted by the *Barron* Court), Bingham believed that the original Constitution did impose limitation on the states, but that those limitations were not enforceable. (The next section cites statements from Justices Bradley and Swayne in their *Slaughter-House* dissenting opinions, which appear to acknowledge this non-enforcement doctrine.) Bingham and Stevens agreed, however, that state infringements of Bill of Rights guarantees had to be prevented in the future. The variety of Republican critiques of the original Constitution, all spurred by Republican assessments of the abuses of slavery, went unpreserved in the Supreme Court's account of slavery history.

In 1866, Republicans got warrants for their legislation and "multigenerational synthesis" (Ackerman 1991:83) from their own slavery critiques and the "declaratory theory" of individual rights. These warrants, which included an expanded notion of individual liberty (i.e., personal and civil rights) against majorities and a theory of race that held blacks as suited for civil equality even while regarding them as unsuited for political and social equality, were not yet institutionally validated. Madison worried that majorities could threaten individual property rights, but the idea that majorities could threaten Bill of Rights protections was still new, as was the idea that black civil equality was deserving of federal protection. Most Northerners still held negative views about black capability.

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105 *Cong. Globe*, 39th Cong., 1st Sess. 2459 (8 May 1866).

106 *Cong. Globe*, 39th Cong., 1st Sess. 2459, italics added (8 May 1866). See also Hyman 1967:40 (George Julian citing "error" in the original Constitution). Charles Fairman (1971:1284) asserted that Stevens's remarks give "no aid."

Northerners' outrage at Southerners' recalcitrance was the muscle behind the Republicans' restoration program. During the few short years this outrage lasted, the fate of the freedmen was associated with the Northern victory. In 1865, Northern Democrats began what Hyman (1967:248) calls an "astonishing renaissance."

Reframing Questions about Republican Intent

The examination of slavery rhetoric yields significant results—results that are *not* yielded when scholars use "doctrines of governance" or "constitutionalism" as organizing concepts for the debates. A question traditionally asked in the extensive legal literature on Reconstruction (Benedict 1974b; Hyman & Wiecek 1982; Paludan 1988) is whether the Republicans intended to transform fundamentally or to eviscerate the traditional federal system.[107] This question can take another form; namely, did Republicans intend to protect freemen's rights at the expense of traditional limits of federalism? While scholars have usually entered the fray by answering these questions in the negative or affirmative, I enter it by arguing against these questions. The previous examination of Civil War narratives shows clearly that these questions are ill-suited for investigating original intent.

The term "traditional federal system" is ambiguous in at least two respects. This ambiguity is a rock upon which scholarly debate over original intent has run aground. First, the term can refer, for example, to state license to deny Bill of Rights guarantees and to limited federal power. Both definitions characterized the federal system in the antebellum period. Evidence suggests that Republicans saw themselves as changing the former but preserving the latter. It is crucial to understand that Moderate Republicans saw their reforms, including application of the Bill of Rights to the states, as a narrow grant of federal power *consistent* with traditional limitations of federal power. The Fourteenth Amendment was Moderate legislation. It fell short of the goals sought by Radicals, though they voted for it. A key point is that Moderates tended to assume Southern compliance. They did not predict that the new federal oversight provisions they enacted

[107] Justice Miller, writing for the majority in the *Slaughter-House Cases*, seems to have provided an impetus for the framing of the question in these terms. He stated that the "main features of the general system" were clearly identifiable and undisputed (pp. 78, 82). Changes were "unthinkable." Many cases repeated this declaration. *U.S. v. Cruikshank*, 92 U.S. at 549–550. In *Maxwell v. Dow* (176 U.S. at 593), the Court stated that the Fourteenth Amendment "did not radically change the whole theory of the relationship of the states and federal government to each other." In 1945, Justice Douglas repeated that the Fourteenth Amendment "did not alter the basic relations between the states and the national government" and cited the cases *U.S. v. Harris*, 106 U.S. 629, *In re Kemmler*, 136 U.S. at 436, 438; and *Screws v. United States*, 325 U.S. at 109. The dissenting opinion in *Screws* also denied that fundamental change in the state-national relation was wrought with the Fourteenth Amendment, 325 U.S. at 142–44.

would need to be frequently triggered. On the Moderates' behalf, we should remember that events had not yet taught otherwise. As they accumulated experience with Southern resistance, they began to understand that their twin commitments—to limited, infrequent use of federal power and to civil and personal rights protections—were in deep tension. As Moderates began to appreciate the extent of Southern resistance, they reluctantly passed more legislation to accomplish their initial goals.

Twentieth-century scholars have equated incorporation with a large expansion of federal power. This equation is a problem. Some scholars have concluded from evidence of incorporation that Republicans were comfortable with a large expansion of federal power. Others have concluded from evidence of Republican attachment to limited federal power that Republicans did not apply the Bill of Rights to the states. Both are right by half. The culprit here is the assumed equation between incorporation and big expansion of federal power. Once this equation is broken, that is, once we see that Republicans could hold commitments to both incorporation and limited federal power, we can see that the term "traditional federal system" must be clarified before we can say whether Republicans intended to change it.

The term traditional federal system is vague in a second respect. "Traditional" means pertaining to or in accord with tradition, and "tradition" includes practices, behaviors, modes of thought, and precepts. If tradition is defined solely in terms of practice and behavior, or in terms of what is institutionally approved, then Republican reforms will be seen as a repudiation of the traditional. Indeed, Republicans argued that certain aspects of the state-federal distribution of power, for example, the lack of a federal remedy for state denials of antislavery activists' civil liberties, needed to be changed. Republicans justified this change by arguing that the lack of a federal remedy in such instances reflected the corruption of the "true" federal system. According to Republicans, original constitutional principles associated with the Declaration of Independence had not been securely enacted due to slavery and the Slave Power. Thus, Republicans saw their repudiation of federalism as it was practiced as an affirmation of the "true" federal system. Their reclamation of original ideas was traditional in this respect. In fact, Republicans called their legislation both merely corrective and revolutionary. This is understandable in light of their view of federalism as corrupted by slavery. The return to "original" principles was at once traditional and revolutionary. Because Republican reforms could be traditional in this sense, scholars must be careful not to limit their definition of traditional to what is practiced or institutionally approved; for if they do, the Republicans' repudiation-as-affirmation theme will be obscured.

This leads us back to the question, What evidence is necessary for historical justifications for more aggressive federal protection of rights? Such justifications might be based on a showing that Republicans targeted certain features of the antebellum system for change even if they understood these changes as consistent with the notion of limited federal power. Such justifications might emphasize substantive Republican ends—for example, securing free labor opportunity to blacks and Bill of Rights protections to both blacks and whites—and discuss the Republicans' evolving understanding of how much federal oversight was necessary to achieve these ends. The "might" here is significant. For though such arguments are possible, they are not necessary. This is an important point. Historical justifications for less-aggressive federal protection might continue to be based on a showing that Republicans were not hearty enthusiasts for broad federal power.

Historical justifications for *any* Fourteenth Amendment jurisprudence will have to emphasize one Republican commitment over the other. What has happened, however, is that the "limited federal power" element of Republican thought has been institutionally emphasized. This has put "history" on the sides of the Warren Court dissenters and a Fourteenth Amendment jurisprudence *less* sensitive to dynamics of racial hierarchy. This emphasis was not mandated by the events of the 1860s. Using Republican history in different ways is possible once institutionally suppressed elements of it are recovered, such as Republican criticism of Southern denials of civil liberties, Southern political violence, and Republican "free labor" commitments to labor opportunity. The recovery of these aspects would not lead *inevitably* to a Fourteenth Amendment jurisprudence more sensitive to dynamics of racial hierarchy. It would, however, open avenues for building plausible historical justifications for federal curbs on institutionally supported white advantage, avenues that so far have remained blocked.

IV. The Court's Official History

How did the Supreme Court make the link between slavery and Reconstruction? And what role did slavery/war history play in the *Slaughter-House Cases*? This decision dealt with state legislative power and federal judicial authority. While the case involved white butchers and a Louisiana slaughterhouse, not Klan violence or black rights, *Slaughter-House* held implications for federal (congressional and judicial) protections of black rights. Commentators agree that *Slaughter-House* turned the Privileges or Immunities Clause of the Fourteenth Amendment into a "dead

letter"[108] They disagree about whether this was a good thing. Those who believe the Republicans used the Clause as the vehicle to apply the Bill of Rights to the states condemn the Court's interpretation of the Clause.

Justice Samuel F. Miller, writing for the majority, justified his interpretation of the Fourteenth Amendment by placing it in the context of "the history of the times . . . Fortunately that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt."[109] Critically, Miller's version of the war's issues was largely limited (or reduced) to the grounds on which Northern Democrats strategically distinguished themselves from Southern Democrats. His version also submerged the white supremacist component of this Northern Democratic strategy. Miller represented disputes over the structure of federalism as if those disputes were limited to the questions about federal power over slavery in the territories and the right to secession. As we have seen, disputes over the structure of federalism extended well beyond these issues.

Miller's Civil War narrative focused tightly around the Southern effort "to separate from the Federal government, and to resist its authority." Miller spoke of the conflict over extension and secession:

> The institution of African slavery, as it existed in about half the States of the Union, and the contests pervading the public mind for many years, between those who desired its curtailment and ultimate extinction, and those who desired additional safeguards for its security and perpetuation, culminated in the effort, on the part of most of the States in which slavery existed, to separate from the Federal government, and to resist its authority. This constituted the war of the rebellion, and whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery. . . . In that struggle, slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict.[110]

In his recounting of the history of the dispute over the state-federal relation, Miller focused his narrative focus on the act of secession again:

> The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the Federal power. And it cannot be denied that such a jealousy continued to exist with many patriotic men *until the breaking out of the late civil war. It was then discovered that the true danger to the perpetuity of the*

[108] See, e.g., Bork 1990:37, 166; Benedict 1978:60 ("virtually eliminating the Privileges and Immunities Clause as a source of national power"); Murphy 1987:2 ("gutted the privileges or immunities clause"); and Graham 1968:319–35.

[109] *Slaughter-House Cases,* 83 U.S. at 67–68.

[110] *Slaughter-House Cases,* at 68.

> *Union was in the capacity of the State organizations to combine and concentrate all the powers of the State, and of continguous States, for a determined resistance to the General Government.* . . . Whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and even hand the balance between State and Federal power.[111]

When Miller identified secession as the moment when "the true danger" was "discovered," he took a Northern Democratic view of the war. As we shall see, the Civil War narrative presented by the dissenters in the *Slaughter-House Cases* offered a different view of slavery's dangers.

Miller's reference to "fluctuations in the history of public opinion on this subject" might be a reference to the Republicans. If indeed this is the case, it is important to note that Miller privileged the Supreme Court's past decisions (its own "steady and even hand") over the Republicans' critique of decisions like *Barron* articulated during the debates. The Court here refused to recognize a major component of Republican slavery criticism (denials of abolitionists' civil liberties), one that was under construction in the North as early as 1837.

Other statements from Miller erased the Republicans' political critique of slavery in more complete fashion. He asserted that "powers *heretofore universally conceded*" to the states included jurisdiction over Bill of Rights guarantees.[112] The view that slavery destroyed white men's civil liberties was part of the Republicans' reformulation of the problems of democracy. As we have seen, dueling conceptions of liberty were on display during congressional debate over the Fourteenth Amendment, as Northern Democrats and Republicans debated the definition of an "established" state right.

Miller's claim that there existed a settled distinction between state and national citizenship rested on the Northern Democratic war narrative. Miller used this narrative to justify his interpretation of the Citizenship Clause and Privileges or Immunities Clause. The Citizenship Clause was the first clause of the first section of the Fourteenth Amendment. It read, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The "distinction between citizenship of the United States and citizenship of a State is clearly recognized and established." National citizenship and state citizenship were "distinct from each other,"[113] and it was the "privileges and immunities" of the citizen of the United States that the Fourteenth

111 *Id.* at 82, emphasis added.

112 *Id.* at 78, emphasis added.

113 *Id.* at 74.

Amendment placed under the protection of the federal Constitution. "Those [privileges and immunities] belonging to the citizen of the State . . . must rest for their security and protection where they have heretofore rested [i.e., with the states]."[114] The basic protections of person and property, including all Bill of Rights guarantees, were privileges and immunities belonging to citizens of states. These rights then remained under the authority of state laws and state constitutions, some of which were better than others.

Thus it was settled, according to Miller, that state citizenship, not national citizenship, was the source of basic personal rights, which included Bill of Rights guarantees. This meant that if states defaulted in their duty to protect these rights, there was no federal judicial remedy. (If Miller had presented the Bill of Rights as having a "national character," a federal remedy would exist if state legislatures abridged these rights and state courts refused relief.) Foner notes that Miller's distinction between state and national citizenship "should have been seriously doubted by anyone who read the Congressional debates of the 1860s."[115]

The Court's definition of slavery's destruction also bore a Northern Democratic imprint. This can be seen in Miller's statement that the Reconstruction amendments disclose a "unity of purpose." The "one pervading purpose" of the amendments "found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race."[116] For Miller, slavery's destruction meant abrogation of formal slave law. Freedom meant simply self-ownership. When Miller endorsed this definition, the grounds of its plausibility were hidden.[117] A strong strain of white supremacy helped constitute these grounds. As later courts referred back to Miller's version of the war's issues and his definition of slavery's destruction, the racial belief system that provided grounds for these constructions remained a step removed.

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[114] *Id.* at 75.

[115] Incorporation was "a virtually noncontroversial minimum Congressional interpretation of the Amendment's purposes" (Foner 1988:533). Foner (1988:228–80) presents evidence that Republicans aimed to nationalize a segment of "fundamental" citizenship rights, but not the entire body of citizenship rights.

[116] *Slaughter-House Cases*, 83 U.S. at 71. See also *United States v. Mosley* (the Fourteenth Amendment "was adopted with a view to the protection of the colored race."), 238 U.S. at 387; *Screws v. United States* ("Undoubtedly, the necessary protection of the new freedmen was the most powerful impulse behind the Fourteenth Amendment"), 325 U.S. at 140.

[117] Ewick and Silbey (1995:214) generalize: "[N]arratives contribute to hegemony to the extent that they conceal the social organization of their production and plausibility." Quoting Comaroff and Comaroff (1991:214), To the extent that the hegemonic is 'that order of signs and practices, relations and distinctions, images and epistemologies . . . that come to be taken-for-granted as the natural and received shape of the world and everything that inhabits it,' the unarticulated and unexamined plausibility is the story's contribution to hegemony.

The *Slaughter-House* Dissenters

The dissenting justices in *Slaughter-House* presented a different version of the slavery experience and the Civil War.[118] Justice Field (joined by Bradley, Swayne, and Chase) emphasized "free labor" principles and unfettered small-scale capitalism. The state-granted monopoly on slaughterhouses was class legislation (which fettered small-scale capitalism) and Field's opinion supported federal judicial resistance to class legislation. In separate, additional opinions, Bradley and Swayne put special emphasis on state abuses during the slavery period. State abuses of rights in the antebellum years were part of the problem with slavery and a danger to democracy, and the Reconstruction amendments were meant to fix this problem. The Fourteenth Amendment addressed this issue by invigorating the notion of national citizenship.

Justice Field wrote the first dissenting opinion, which was joined by Chief Justice Chase, Justice Bradley, and Justice Swayne. Field's opinion is quoted most often for its assessment of the Court majority's interpretation of the Privileges or Immunities Clause. If the Clause did no more than what the majority suggested, it was a "vain and idle enactment." Field drew on Republican principles of free labor (Bradley too made much use of the term "freeman." *Slaughter-House* at 114, 116, 119). Field, of course, dissented in *Strauder,* a decision in which the Court struck down a legislative exclusion of black men from jury lists. Legislative racial classifications (*de jure* discrimination, such as in the Black Codes) were not a problem for him. Field defined "freedom" more broadly than Miller, but in a way that helped whites, not blacks. Field was a Lincoln appointee and a Civil War Democrat. According to Richard Aynes (1994:671 n.190), he was "maybe a Unionist but not a Republican and certainly not a Radical Republican." Field, according to Amar (1992:1271), favored a refined model of incorporation.

Justice Bradley wrote separately, in addition to joining Field's opinion.[119] Contrary to Miller, Bradley asserted that the Fourteenth Amendment made national citizenship "primary" and state citizenship "secondary."[120] According to Bradley, the "spirit

[118] There were four dissenters (Chase, Field, Bradley, and Swayne) and three dissenting opinions (written by Field, Bradley, and Swayne). See William Nelson (1988:156–74) and Michael Curtis (1986:176–78) for two different views of the dissenting opinions.

[119] Bradley's views on the Fourteenth Amendment shifted. He started out with a broader vision, but later supported a narrower vision. Charles Fairman was an admirer of Justice Bradley, but only after Bradley's views of the Fourteenth Amendment shifted. Fairman (1971:1379 n.211) attributes Bradley's shift to a continuing search for the truth. Hyman (1975:415–16) states that Bradley's shift "mirrored the national mood which wanted stability and national reconciliation."

[120] *Slaughter-House Cases,* at 112. See also Bradley's opinion in *U.S. v. Hall,* 26 Fed. Cases 79 (No. 15, 282) C. C. S. D. Ala. (1871) ("By the original constitution citizenship in

of lawlessness, mob violence and sectional hate" had not been "completely repressed as to give full practical effect" to citizenship rights.[121] His description of the conditions of affairs that produced the Fourteenth Amendment was certainly more Republican than Democratic,[122]

> The mischief to be remedied was not merely slavery and its incidents and consequences; but that spirit of insubordination and disloyalty to the National government which had troubled the country for so many years in some of the States, and that intolerance of free speech and free discussion which often rendered life and property insecure, and led to much unequal legislation. The amendment was an attempt to give voice to the strong National yearning for that time and that condition of things, in which American citizenship should be a sure guaranty of safety, and in which every citizen of the United States might stand erect on every portion of its soil, in the full enjoyment of every right and privilege belonging to a freeman, without fear of violence or molestation.[123]

Bradley's references to Southern "intolerance of free speech and free discussion," and his view of political history generally, distinguished it from Miller's version. Indeed, Bradley stated that Miller's view of citizenship "evince[s] a very narrow and insufficient estimate of constitutional history."[124]

Bradley also endorsed a version of the Republican non-enforcement doctrine associated with Article IV, Section 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States"). This view was that citizens had a body of fundamental rights, but that the national government did not have the power or authority under the original Constitution to enforce or protect these rights. Northern Democrats and Republicans had disputed the criteria for defining an "established" state right. When Bradley drew a (Republican) distinction between "force" and "right," he argued that "force" did not establish a state right.

> The right of a State to regulate the conduct of its citizens is undoubtedly a very broad and extensive one, and not to be lightly restricted. But there are certain fundamental rights which this right of regulation cannot infringe. . . . I speak now of the rights of citizens of any free government. . . . In this free country, the people of which inherited certain traditionary rights and privileges from their ancestors, citizenship means something. It has certain privileges and immunities attached to

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the United States was a consequence of citizenship in a state. By this [citizenship] clause, this order of things is reversed.") 26 Fed. Cases at 81.

121 *Slaughter-House Cases* at 113.

122 Aynes (1994:642) offers a similar observation: "In essence, Bradley argued that Miller had missed the purposes and result of the Union victory in the Civil War."

123 *Slaughter-House Cases* at 123.

124 *Id.* at 116.

> it which the government, whether restricted by express or implied limitations, cannot take away or impair. *It may do so temporarily by force, but it cannot do so by right.*[125]
>
> Can the Federal courts administer relief to citizens of the United States whose privileges and immunities have been abridged by a State? Of this I entertain no doubt. Prior to the fourteenth amendment this could not be done, except in a few instances [a reference, probably to the fugitive slave cases], for the want of the requisite authority. . . . In my judgment, it was the intention of the people of this country in adopting that amendment to provide National security against violation by the States of the fundamental rights of the citizen.[126]

Bradley looked to the rights specified in the Constitution to find an authoritative declaration of "fundamental" privileges and immunities of citizens. The Bill of Rights, of course, was listed. "Admitting . . . that formerly the States were not prohibited from infringing any of [these] privileges and immunities . . . that cannot be said now, since the adoption of the fourteenth amendment."[127]

In *United States v. Hall,* a Circuit Court case, Judge William Woods, under the guidance of Bradley, had stated clearly that the Bill of Rights are the privileges and immunities of citizens of the United States.[128] "[T]he right of freedom of speech, and the other rights enumerated in the first eight articles of amendment to the constitution of the United States, are the privileges and immunities of citizens of the United States."[129] Even after *Slaughter-House* in 1874 Bradley reaffirmed this view: "The fourteenth amendment declares that no state shall by law abridge the privileges or immunities of citizens of the United States. Grant that this prohibition now prevents the states from interfering with the right to assemble, as being one of such privileges and immunities."[130]

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125 *Id.* at 114, emphasis added.

126 *Slaughter-House Cases* at 121.

127 *Id.* at 122.

128 In this case, a federal grand jury in Mobile, Alabama, found that during the fall 1870 election campaign the suspects raided a political meeting of black Republicans out of political and racial animosity. Two people were killed and over 50 others were injured. As a result of the grand jury's findings, the defendants were indicted and charged under the Enforcement Act of 1870, which was primarily aimed at securing the Fifteenth Amendment right of citizens to vote, free from racially motivated interference by the state and private individuals and groups. The Ku Klux Klan Act of 1871 was a more elaborate legislative attempt to ensure against violations of nationally enforceable political and civil rights of U.S. citizens by conspiratorial terrorist groups such as the Klan.

129 26 Fed. Cases at 82.

130 *United States v. Cruikshank,* 25 Fed. Cases 707 (No. 14,897) C. C. D. La. (1874), at 714. Michael Benedict (1978:73) notes that "Waite took the position which Bradley had developed in his *Cruikshank* circuit court opinion," but makes no mention of this quote from Bradley. Waite acknowledged that the right to assemble *for the purposes of petitioning Congress* was a right of national citizenship, but Waite expressly denied that that the general assembly right was a right of national citizenship. "[T]he right of the people to assem-

Justice Swayne agreed with Bradley's view that state abuses during the antebellum period were part of the conditions of affairs that produced the amendments. Swayne's version of the slavery experience was similar to Bradley's. This experience showed Swayne that states posed a danger to the republic. In the *Slaughter-House Cases,* Swayne said, "These amendments are all consequences of the late civil war. The prejudices and apprehension as to the central government which prevailed when the Constitution was adopted were dispelled by the light of experience. The public mind became satisfied that there was less danger of tyranny in the head than of anarchy and tyranny in the members" (p. 128). And, "By the Constitution, as it stood before the war, ample protection was given against oppression by the Union, but little was given against wrong and oppression by the States. That want was intended to be supplied by this amendment" (p. 129). A suspicion of state control over citizenship was now more immediate than older suspicions of centralized power. The amendments were "a new departure . . . They trench directly upon the power of the States."[131]

Swayne had written similarly about political history in his opinion in *United States v. Rhodes* (1867), which upheld the constitutionality of the Civil Rights Act of 1866 under the Thirteenth Amendment. Swayne gave a version of slavery history in this opinion, and this version was markedly different than Miller's. Swayne discussed many dimensions of slavery politics that Miller had ignored.

Justice Swayne began with the founding period. During this period, people saw "many perils of evil in the center, but none elsewhere. They feared tyranny in the head, not anarchy in the members."[132] He went on to consider "the state of things which existed before and at the time the amendment was adopted, the mischiefs complained or apprehended, and the remedy intended to be provided for existing and anticipated evils. Slaves were imperfectly, if at all, protected from the grossest outrages by the whites. Justice was not for them. The charities and rights of the domestic relations had no legal existence for them. The shadow of evil fell upon the free blacks. They had but few civil and no political rights in the slave states. Many of the badges of the bondman's degradation were fastened upon them. Their condition, like his, though not so bad, was helpless and hopeless."[133] Swayne put emphasis on Southern censorship and the

ble for lawful purposes . . . was originally placed [with the States], and it has never been surrendered to the United States" (92 U.S. at 552).

[131] *Slaughter-House,* at 125. See also Swayne in *United States v. Rhodes* 27 Fed. Cases 785 (No. 16, 151) C.C. Ky (1867) ("The thirteenth amendment . . . trenches directly upon the power of the states and *of the people* in the states.") 27 Fed. Cases at 788.

[132] 27 Fed. Cases at 788.

[133] 27 Fed. Cases at 793.

treatment of free blacks during the antebellum period. These were dimensions of the slavery problem. In this emphasis, his history was Republican. He went on to discuss the conditions after formal emancipation, and the resurgence of the "worst effects of slavery":

> [The] simple abolition [of slavery], leaving these laws [presumably the Black Codes] and this exclusive power of the states over the emancipated in force, would have been a phantom of delusion. The hostility of the dominant class would have been animated with new ardor. Legislative oppression would have been increased in severity. Under the guise of police and other regulations slavery would have been in effect restored, perhaps in a worse form, and the gift of freedom would have been a curse instead of a blessing to those intended to be benefited. They would have had no longer the protection which the instinct of property leads its possessor to give in whatever form the property exists. It was to guard against such evils that the second of the amendments was framed.[134]

In his opinion, Swayne also offered a characterization of the Republicans: "Those who insisted upon the adoption of this amendment were animated by no spirit of vengeance. They sought security against the recurrence of a sectional conflict. They felt that much was due to the African race for the part it had borne during the war. They were also impelled by a sense of right and by a strong sense of justice to an unoffending and long-suffering people."[135]

In later histories of Reconstruction, those written in the early decades of the twentieth century, Republicans would be portrayed as motivated by vengeance and hatred. (Charles Fairman was educated while these histories were prominent [Aynes 1995:1204].) It should be noted that Swayne's views seemed to go against his own political proclivities (Aynes 1994:672–74), and so political affiliation cannot be regarded as determinative of a preferred history.

Conclusion

As we have seen, the statement that the Civil War was "about slavery" produces more questions than answers. Many views of the problem with slavery were possible. Justice Miller presented his slavery/war narrative against a clean slate, a *tabula rasa.* There were no prior Supreme Court decisions saying what the Civil War was about. Over time, Justice Miller's history took on an objective, that is, point of viewless, quality. In 1900, the Court looked backward to the "known conditions of affairs" that produced the

[134] 27 Fed. Cases at 794.

[135] 27 Fed. Cases at 788.

Fourteenth Amendment.[136] Miller's history, which drained institutional memory of many dimensions of Republican slavery criticism, was definitive.

William Riker, a political scientist, has studied the processes by which political ideas are transmitted and approved. In his studies of political rhetoric, he has found that it is critical to understand how alternatives are set up. "People win politically," states Riker (1986:9), "by more than rhetorical attraction. Typically they win because they have set up the situation in such a way that other people will want to join them—or will feel forced by circumstances to join them."

The competing war narratives of the Republicans and Northern Democrats set up alternatives for the Supreme Court that were very far apart. The Republican narrative, because it was based firmly in real-life examples, contained a preview of sorts for the Court (in terms of what it would mean to apply Republican constitutionalism). These examples showed the more-bounded Republican prescriptions (e.g., incorporation of the Bill of Rights) linked tightly to less-bounded prescriptions (free labor opportunity for blacks). The potential justification for labor rights generally also made the Republican narrative difficult to contain.

In the 1870s, corporate energy was about to be "released." The fact that Republicans linked more-bounded and less-bounded prescriptions in a principled manner meant that Courts would have a hard time "working forward" from the Republican narrative; that is, extending even the narrowest Republican objective. It was easier to extend the Democratic narrative. The Democratic narrative was more extensible; that is, more capable of being extended in law. Indeed, this would later happen as the Court denied states the right to pass laws explicitly excluding blacks from juries (the Democrats would have supported these laws), while keeping national power over citizenship rights clearly contained.

This extensibility of the Democratic account was not an inherent quality. It was a quality determined by institutional values and structure. The Republican declaratory theory of rights directly challenged Court precedent—the "deposit of [the Court's] work" (Llewellyn 1930:63). If the legal field is imagined as "a set of declarations by other people about how ethically serious people ought to respond to situations of conflict," this set of messages carries normative force when judges identify with the "ancients" (Kennedy 1986:548). Indeed, Republican slavery criticism challenged the Court's antebellum *nomos,* or normative universe, in which states were viewed as the best overseers of rights.

136 *Maxwell v. Dow,* 176 U.S. 581, 601–2 (1900).

The "new departure" taken by Democrats in the early 1870s helped their war narrative to win politically and helped shape the context for the *Slaughter-House Cases*. Grossman (1976) describes the new departure as a symbolic surrender or theoretical capitulation to the validity of the amendments, combined with a fierce opposition to practical enforcement. The taint of disloyalty had been on the Democrats since the beginning of the Civil War, and opposition to the amendments maintained this stigma. With the "new departure," stated August Belmont, "[t]he game of charging us with disloyalty and Copperheadism is played out" (quoted in Grossman 1976:27). Grossman comments, "As Republican interest in the seemingly intractable Southern problem declined through the 1870s, the new departure strategy of allowing the subversion of [black] rights while pledging verbal fealty to those rights was on the road to success" (1976:45). Indeed, the Democrats gained control of the House of Representatives in 1874. In the 1878 elections, they gained a majority in the Senate as well.

The success of Justice Miller's reconstituted history meant that traditional sources of law (legislative history and original understanding) became unavailable for legitimating the application of the Bill of Rights to the states, the federal supervision of "process defects," and federal intervention in white supremacist practices where states had a history of abuses. Republican Civil War narratives can qualify as "subversive" stories under the Ewick and Silbey definition,[137] though since I have not examined the impact of Miller's official history perhaps it is best if I simply borrow the notion of "exiled narratives" from Robert Cover (1992b:113 [1983]). Of course, the fact that the narrative is not exiled among historians has made this article possible.

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[137] Ewick and Silbey define subversive narratives as those that "recount particular experiences as rooted in and part of an encompassing cultural, material, and political world that extends beyond the local" (1995:219). They also suggest that particular conditions may generate subversive narratives: the social marginality of the narrator, an understanding of how the hegemonic is constituted as an ongoing concern, and the opportunity to perceive and articulate the collective organization of personal life (1995:221–22).

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