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REDEMPTION, FAITH AND THE POST-CIVIL WAR AMENDMENT PARADOX: THE TALK

The post-Civil War Amendments raise an important paradox that conventional constitutional theory cannot resolve. Those provisions were adopted in part to reverse the result in *Dred Scott v. Sandford*. The Thirteenth Amendment's declaration that "Neither slavery nor involuntary servitude . . . shall exist in the United States" overturns the ruling that the due process clause of the Fifth Amendment vests persons with a constitution right to bring their slaves into American territories. The declaration in Section 1 of the Fourteenth Amendment that "all persons born or naturalized in the United States are citizens of the United States and of the State where they reside" overturns the ruling that former slaves were constitutional barred from becoming citizens of the United States. These points are well known and uncontested. The paradox concerns why Republicans thought that passing constitutional amendments was a plausible means of achieving those goals. Indeed, the Republican narrative of antebellum constitutional history suggests that constitutional amendments aimed at altering judicial practice were a waste of legislative energy.

Republicans to a person insisted that the justices in *Dred Scott* unreasonably interpreted the Constitution of 1789 when they ruled that Congress had no power to ban slavery in American territories. Wendell Phillips, William Lloyd Garrison and their abolitionist allies aside, members of the party of Lincoln believed Article IV, Section 3 plainly entitled the national legislature to prohibit human bondage in the western regions. The phrase "Congress shall have

Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," in their view, quite plainly vested Congress with the same power over slavery in national territories as state legislatures had within the jurisdiction of the state. This antislavery conclusion was buttressed by more than a half century of federal governance in the territories, which Republicans insisted was authorized by the Territorial clause, by the Missouri Compromise in 1820, which banned slavery in all territories north of the 36°30′ parallel line, and the due process clause of the Fifth Amendment, which many Republicans interpreted as prohibiting slavery in the territories. Few if any Republicans before the Civil War thought the status of slavery in the territories was a close constitutional question upon which persons might in good faith disagree.

The Republican explanation for *Dred* Scott calls into question the decision in the 1860s to reverse that decision by ratifying better constitutional language. The Constitution of 1789 already contained clear constitutional language, at least in the common Republican view,[1] that permitted Congress to ban slavery in the territories. The point of more language, repeating the same points, is therefore obscure. Presumably, the same justices who ignored or perverted the plain meaning of Article IV, Section 3 would in the future ignore or pervert the plain meaning of the Thirteenth Amendment. Pro-slavery justices in 1868 could rule that the federal government had no power to interfere with any relationship a state or state law did not describe as slavery or involuntary servitude. Pro-slavery justices in 1869 could declare the Thirteenth Amendment invalid as an unconstitutional constitutional amendment. Indeed, from the perspective of 1860, Republican behavior in 1865 and 1868 seems analogous to the lost American tourist who is

[1] But see *Dred Scott and the Problem of Constitutional Evil*. I imagine in the talk I just make a face.

convinced that some resident in outer Slobobia will understand English if only they say "where is the nearest gas station" more slowly and more loudly.

The text of the Fourteenth Amendment is particularly puzzling in light of the Republican critique of *Dred Scott*. Many Republicans sought to have a constitutional amendment that explicitly barred racial discrimination. Instead, the framers settled on a provision that declared, "No State shall deny to any person the equal protection of the laws." Contemporary Americans read this passage as expressing a commitment to prohibiting some inequalities in addition to racial inequalities. The language when framed, by comparison, could be plausibly interpreted as expressing a commitment to prohibiting some inequalities other than racial inequalities. As Howard Gillman observes, antebellum constitutional authorities believed government could not pass class legislation unless the legislation was based on real differences between the burdened and benefitted classes and served the public welfare. A great many antebellum constitutional authorities believed real differences between the races justified placing lots of burdens on persons of color. The Fourteenth Amendment, which almost all observers believed did not forbid legislation based on real differences between men and women, says nothing about the constitutionality of legislation that popular majorities believed was based on real differences between the races.

Plessy v. Ferguson is the foreseeable outcome of this Post-Civil War Amendment paradox. The plurality opinion in *Planned Parenthood v. Casey* and Professor Jack Balkin may correctly assert that the Supreme Court's decision was wrong in 1896 that the equal protection clause did not prohibit racial segregation and that *Plessy* was wrong the instant that ruling was made. Republicans certainly thought *Dred Scott* was wrong the instant that ruling was made. Nevertheless, the Republican critique in 1860 of *Dred Scott* provides reason for thinking that

ratification of the equal protection clause in 1868 had no effect on the judicial decision in *Plessy*. Most contemporaries think the justices in *Plessy* did exactly when what Republicans maintain the justices did in *Dred Scott*. They did not engage in a good faith interpretation of the constitutional provision. The post-Civil War Amendment paradox reminds us that no good reason exists for thinking that justices who ignore the plain language of a Constitution will change their behavior merely because additional plain language is added to the constitutional text.

Conventional constitutional theories do not resolve and may exacerbate this constitutional paradox. Originalism in all varieties, aspirationalism in all forms, and all variations of the theme of judicial supremacy explore what constitutional provisions mean, how constitutions should be interpreted, and the relationships among constitutional decisions makers. Such inquiries are, by the very nature, directly only at sincere constitutional interpreters. Republicans in 1860, however, did not believe *Dred Scott* was the consequence of Justice Taney adopting the wrong theory of constitutional interpretation. They insisted that Taney made no good faith effort to make use any legitimate method of constitutional interpretation. Few contemporary commentators chalk up to a bad constitutional theory *Plessy's* claim that "the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority" was not a consequence "of anything found in the act, but solely because the colored race chooses to put that construction upon it." The post-Civil War amendment focuses on the problem of the insincere constitutional interpreter. Providing better language and better constitutional theory is no more likely to deter the insincere constitutional interpreter than hanging in a more prominent place in sign declaring "Please do not steal classified nuclear secrets" is likely to deter spies.

Constitutional Redemption and *Constitutional Faith* push us towards a better answer to the Post-Civil War Amendment Paradox. Professor Jack Balkin calls on constitutionalists to spend as much time studying constitutional movements as constitutional courts. Professor Sanford Levinson would have constitutionalists spend more time on constitutional structures than constitutional rights. *Constitutional Redemption* suggests that increased political strength of the antislavery movement helps explain why Republicans at the end of the Civil War believed new constitutional amendments provided more secure foundations for racial equality. *Constitutional* Faith, at least in the revised addition, asks scholars to consider whether Republicans believed such constitutional institutions as the Supreme Court were likely to function differently after the Civil War. These insights move scholarship past a constitutional theory that is exclusively about interpretation toward a constitutional theory that integrates political movements, political institutions and constitutional aspirations into a coherent whole.

This paper pushes these insights further by suggesting that we resolve the post-Civil War Amendment paradox by asking questions about how constitutions work rather than questions about how constitutions are interpreted. Instead of asking what do particular amendments mean, we might consider what particular framers were trying to do when they framed and ratified particular texts. In particular, we should consider what Republicans thought went wrong when *Dred Scott* was decided and why Republicans believed they had cured the constitutional defect responsible for *Dred Scott*, and why the Republican cure failed to present *Plessy v. Ferguson*. The brief analysis that follows has implications for both constitutional redemption and constitutional faith.

The Republican explanation for what went wrong in *Dred Scott* differed from their explanation for was wrong with *Dred Scott*. As noted previously, Republicans believed that the

justices made no sincere effort to interpret either the Territorial Clause in Article IV, Section 3 or the due process clause of the Fifth Amendment. When Republicans explained what went wrong in *Dred Scott*, however, they turned to constitutional politics, to political movements and to political structures. Abraham Lincoln, Salmon Chase, William Sewart and others insisted that *Dred Scott* was a consequence of a slaveholding oligarchy, a political association of prominent slaveholders who sought to control national institutions and make their perverted views of human bondage the official constitutional law of the land. Slaveholders were successful in this endeavor before the Civil War, Republicans believed, for three reasons. First, the three-fifths clause augmented slaveholding power in the national government. Second, by requiring a two-thirds vote to capture the presidential nomination, the dominant Democratic Party guaranteed that the President of the United States would be beholden to slaveholders for election. Third, the Judiciary Act of 1837 combined with the practice of appointing Supreme Court justices who resided in each judicial circuit, guaranteed a 5-4 slaveholding majority on the Supreme Court. These political structures, Republicans repeatedly charged, explained why the government of the United States consistently favored slaveholding interests and why the Supreme Court of the United States in 1858 ruled that Congress could not prohibit slavery in American territories.

During and immediately after the Civil War, the Republicans cured the structural defects that they believed explained the *Dred Scott* decision. Abraham Lincoln in 1860 put together a coalition of free state voters that could control the presidency without any southern support. As important, although far more obscure, the Judiciary Act of 1862 reconstructed the federal judicial system in the image of the free states. By 1865, 8 judicial districts were located within the free states and only 2 judicial districts were within states in which slavery was legal when the Civil War began. Republicans in office also abandoned the practice of appointed one justice for each

judicial circuit. The nine justices appointed during the Civil War and Reconstruction all hailed from free states.

The post-Civil War Amendments both directly and indirectly continued this attack on slaveholding power. The constitutional abolition of slavery weakened the power of slaveholders and ended the three-fifths bonus southern states had enjoyed from the beginning of the Republic. The enforcement clauses of the Thirteenth, Fourteenth and Fifteenth Amendments were all designed to facilitate federal policy making that promoted the remaking of the south in the image of the north. When southern voters again joined national majorities, Republicans thought, they would likely be joining national Republican majorities.

These changes in constitutional and political processes wrought by a successful political movement explain why Republicans believed that constitutional language drafted in 1865 and 1868 was not vulnerable to the same perversion of constitutional language that took place in 1857. *Dred* Scott was a consequence of southern dominance of the national government. That problem was cured by a political movement that first, achieved northern dominance of the national government, revised constitutional and statutory practices to entrench that northern dominance, and began to reconstruct the south in ways likely to establish a strong Republican Party in that part of the country. The admission of Kansas, West Virginia, Nevada, Nebraska and Colorado from 1860 until 1876 further entrenched what seemed like a permanent northern majority. In this political environment, northerners did not have to worry about bad faith interpretations of the post-Civil War Amendments. The people interpreting the Thirteenth, Fourteenth, and Fifteenth Amendments would not give pro-slavery interpretations of those texts because they people interpreting those amendments were opposed to slavery.

We solve the Post-Civil War Constitutional paradox, this analysis suggests, by recognizing that constitutional theory is a practice that connects political movements, government institutions, and constitutional aspirations rather than a practice that either focuses on the latter or treats each as a distinct unit of analysis. Republicans in 1865 and 1868 did not place their faith in the Republican Party, in a Supreme Court a majority of whose members hailed from the north or in the equal protection clause of the Fourteenth Amendment. The pledged allegiance to and equal protection clause that would be implemented primarily by northern officials (and their southern black allies) elected by the Republican Party.

Balkin is correct to treat political movements as the primary engines of constitutional change, but *Constitutional Redemption* is more backward looking that American constitutional politics. The post-Civil War Amendments did not commit Americans to anti-classification, anti-subordination, or any other particular theory of equality. Indeed, those provisions did not really commit Americans to anything that resembled a coherent principle. In 1868, equal protection was an only partly coherent jumble of different presidential addresses, judicial decisions, and other precedents that could be formed and reformed in different ways. What Americans apparently did in 1865 and 1868 was put a northern dominated Republican Party in charge of charting the path of that partly coherent practice. What Republicans were trying to do during Reconstruction was not simply enshrine a clear constitutional commitment, but fashion a constitutional politics that would privilege some understandings of equality over others, and some political movements over others.

Our constitutional faith, if we have constitutional faith, is in the ways in which constitutional politics integrates political movements, government institutions, and constitutional aspirations. Levinson's profound mediation goes awry, I think, in too sharply distinguishing

structures from rights or the Constitution of Settlement from the Constitution of Discussion. The Republican experience of 1865 and 1868 highlights how the Constitution of Settlement structures the Constitution of discussion. One cannot have faith in a constitutional order merely because a hypothetical political order using some hypothetical institutions might generate good, or at least tolerable answers to questions of constitutional right. To have faith in the Constitution is to have faith that the Constitution of Settlement when combined with the political movements of the day will consistently generate good or tolerable answers to questions of constitutional right.

Levinson has lost faith in the capacity of the Constitution of Settlement to generate good government. My loss of faith is more profound. Good populist that he is, Levinson sees the United States as populated by good people who must endure bad institutions. I think the institutions are perfectly good. I no longer believe the American people are capable of operating the institutions necessary for a good constitutional democracy. May I be proved wrong.