FEDERALISM AND THE "SECOND FOUNDING:" CONSTITUTIONAL STRUCTURE AS A "DOUBLE SECURITY" FOR "DISCRETE AND INSULAR" MINORITIES

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INTRODUCTION

Constitutional Law courses are usually taught in two phases. The standard course opens with a review of the structural aspects of the Constitution – separation of powers, federalism, procedural due process, and the scope of judicial review – and then turns to the scope of substantive constitutional protection – religious freedom; free speech; privacy; and the equal protection of the laws. Apart from questions about where the power of judicial review comes from,[1] little, if any, attention is paid to the relationship between decisions about constitutional structure and the effective preservation of substantive constitutional rights.[2] Indeed, openly linking a decision about structure to its likely effect on substance

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1. Marbury v. Madison, 5 U.S. 137 (1803) (asserting power of judicial review over structural issues). The early Supreme Court showed little interest in enforcing substantive constitutional rights. *See, e.g.*, Barron v. Mayor of Baltimore, 32 U.S. 243 (1833) (declining to enforce the Bill of Rights against the states). The Supreme Court did not invoke judicial review in defense of a substantive constitutional right until the appalling decision in Prigg v. Pennsylvania, 41 U.S. 539 (1842), enforcing the self-help rights of slave owners under the Fugitive Slave Clause to apprehend alleged escapees residing in Pennsylvania and remove them South without a hearing. The Court's most important pre-Civil War substantive rights case was the racist milestone, Scott v. Sandford, 60 U.S. 393 (1857), enforcing Fifth Amendment property rights in human beings against Congressional efforts to curb the spread of slavery.

2. I base my observations about Constitutional Law courses on experience in teaching Constitutional Law, on occasion, at N.Y.U., Stanford, and Berkeley; and on conversations with my colleagues who teach it routinely, as well as a review of a number of widely used casebooks. At N.Y.U., as at many other schools, the process has reached the point where the basic Constitutional Law course deals solely with structure, leaving the study of substantive rights to advanced elective courses.

would be inconsistent with the Court's insistence that structural decisions are based on neutral structural principles unrelated to the underlying merits.[3]

I will argue in this brief essay that due respect for: (1) the sacrifice of ordinary people, many of whom fought and died to preserve the Union and end slavery; (2) the remarkable achievements of the architects of the 13th, 14th, and 15th Amendments; and (3) the heroic efforts of Black and White citizens to forge a multi-racial democracy in the wake of the Civil War, characterized by many as a "Second Founding" of the United States,[4] requires that hard structural cases, especially federalism cases potentially affecting the enjoyment of rights to equal treatment, should be decided with an eye toward the effective protection of substantive constitutional rights.

"Footnote Four" of *United States v. Carolene Products*[5] already ties the intensity of judicial review to the need to protect "discrete and insular minorities" against the risk of democratic failure.[6] I believe

3. In my experience, legal disputes over constitutional structure, especially about federalism, are rarely driven by neutral principles. Rather, they are usually designed to advance or retard an underlying substantive issue. Witness the repeated structural *pas des deux* executed by the left and right during the Obama, Trump, and Biden administrations on issues of federalism and separation of powers. *See* FRANK J. THOMPSON, KENNETH K. WONG & BARRY G. RABE, TRUMP, THE ADMINISTRATIVE PRESIDENCY, AND FEDERALISM (2020). I am far from the first academic to describe the Court's tendency to harness structural arguments in aid of substantive ends. See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

4. The Second Founding, described more fully at *infra* Part I, is a shorthand for the heroic efforts of the People to preserve the Union and end slavery, and the remarkable work of the architects of the 13th, 14th, and 15th Amendments to introduce equality into the United States Constitution for the first time.

5. 304 U.S. 144, 152 n.4 (1938).

6. *Id. Carolene Products*, an otherwise routine exercise of rational basis scrutiny of governmental regulation of the economy (the case upheld a criminal prosecution for selling "filled" or adulterated milk), announced the New Deal Court's move away from substantive due process. In its place, the Court signaled a commitment to applying rational basis scrutiny to economic regulations, reserving more searching judicial review for enforcing constitutional text (especially the Bill of Rights). The footnote also expresses concern over laws interfering with the proper operation of the political process as a means to repeal bad laws, and for the protection of "discrete and insular minorities" against democratic failure. The full text of Footnote Four, with its numerous citations omitted, reads:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of unde-

that respect for the structural innovations of the Second Founding should lead federalism cases down the same path by allocating disputed exercises of power to the political entity most likely to respect the underlying substantive constitutional rights at issue. As we saw during the Trump Administration, that does not mean that the federal government always wins.[7] But it does free us to ask the most important question – when the dust settles, which competing political entity is more likely to treat the interests of the weak with appropriate respect.

During my more than 50 years as a civil rights/civil liberties lawyer,[8] federalism has always seemed to me less like legal doctrine and more like the map of a complex shoreline, replete with tidal flats, dangerous shoals, coves, beckoning beaches, rivers, islands, bays, inlets, and archipelagos marking the points at which land and water meet. As a constitutional litigator, I had no choice but to consult the map to plot my course, but I never understood why the map looked as it did; how blank spots on the map should be filled in; or how the ebb and flow of the tides would re-shape the map in the future.

I found the map ugly and unsatisfying. Given the textual ambiguity surrounding most federalism disputes and the lack of a coher-

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sirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities, whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

For examples of the vast body of academic work discussing Footnote Four, see, e.g., John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 75–77 (1980); J. Lewis F. Powell, Carolene Products *Revisited*, 82 COLUM. L. REV. 1087, 1087 (1982); Lewis Lusky, Footnote *Redux: A "*Carolene Products*" Reminiscence*, 82 COLUM. L. REV. 1093, 1093 (1982); Jack M. Balkin, *The Footnote*, 83 NW. L. REV. 275, 275 (1988). If you add water to Footnote Four, you have the jurisprudential philosophy of the Warren Court. *See* Burt Neuborne, *The Gravitational Pull of Race on the Warren Court,* 2010 SUPREME COURT REV. 59, 66 (2011).

7. I discuss the two-way role of federalism in protecting discrete and insular minorities in BURT NEUBORNE, WHEN AT TIMES THE MOB IS SWAYED 197-225 (2019). *See also* THE FEDERALIST NO. 51 (James Madison), (discussing the "double security" for substantive rights provided by separation of powers and federalism).

8. All told, I have spent 11 years on the legal staff of the ACLU, beginning in 1967 as a Staff Counsel at NYCLU, eventually serving as ACLU National Legal Director from 1981-86. From 1995-2007, I served as founding Legal Director of the Brennan Center for Justice at N.Y.U. In between, while hiding out in my library at N.Y.U, I was an active public interest lawyer.

ent theory of federalism to help break legal ties, the Supreme Court's Balkanized federalism jurisprudence[9] seemed to me a running Three-card Monte game where litigant/players hunted for government power hidden under cards shuffled by the Justices. The winning federalism card almost always reflected the Justices' view of the underlying legal merits, or the interests of the strong.[10] "States' Rights," the supposed key to the map, has no intrinsic meaning. It has been the mantra of several of the most pernicious movements in American history – the early 19th century effort to preserve slavery; the late 19th century effort to dismantle Reconstruction and restore white supremacy in the states of the old Confederacy; the century-long resistance to federal anti-lynching laws; the "massive resistance" to *Brown v. Board of Education*; resistance to the Voting Rights Act of 1965; and the current war on expanded Black suffrage.[11]

The scope of Congress's most important Article I, Section 8 powers (under the Commerce and Taxation Clauses) have yawed from unjustifiably narrow, shielding unfair or destructive commercial behavior from needed national regulation, to almost comically overbroad, vesting Congress with "necessary and proper" power to tax and regulate just about anything, with no principled path to a middle ground.[12] The Court's most recent major pronouncement

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9. For a highly subjective sketch of the federalism map, see the material *infra* at notes 12-28.

10. *See supra* note 3.

11. *See, e.g.*, Paul Finkelman, *States Rights', Southern Hypocrisy, and the Crisis of Union*, 45 AKRON L. REV. 449 (2012); Jefferson Davis, *The Doctrine of State Rights*, 150 THE N. AM. REV. 205 (1890); MASSIVE RESISTANCE: SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION, (Clive Webb, ed. 2005); NUMEN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S (1999); FORREST MCDONALD, STATES RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, 1776-1876 (2000).

12. For a snapshot of the roller coaster nature of the Supreme Court's Article I treatment of federal regulatory power, see McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436-37 (1819) (recognizing implied federal power despite the 10th Amendment and forbidding states from taxing private bank chartered by Congress); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824) (upholding Congress's plenary power to regulate travel on interstate waterways); United States v. E.C. Knight Co., 156 U.S. 1, 13-15 (1895) (Congress lacks power to regulate monopoly in manufacture, as opposed to transportation); Houston E. & W. Ry. Co. v. United States (The Shreveport Rate Case), 234 U.S. 342, 351-54 (1914) (upholding national power over intra-state rail rates that discriminated against inter-state traffic); Hammer v. Dagenhart, 247 U.S. 251, 276-77 (1918) (invalidating Congressional effort to ban products of child labor from interstate commerce); Carter v. Carter Coal Co., 298 U.S. 238, 303-04 (1936) (invalidating federal law setting maximum hours and minimum wages for coal miners); NLRB v. Jones & Laughlin Steel

in the area, *National Federation of Independent Businesses v. Sebelius*,[13] exemplifies the confused state of the law of federalism. Competing 5-4 majorities invalidated the mandatory coverage aspects of the Affordable Care Act under the Commerce Clause while upholding it under the Taxation Clause with no explanation of why the federalism balance should differ dramatically under the two clauses.[14] The "Dormant" or "Negative" Commerce Clause often impedes states from enacting important regulations aimed at protecting the vulnerable or preserving the environment.[15] Preemption under the Supremacy Clause enables powerful economic entities to: (1) override state objections and impose compulsory arbitration agreements on weak clients, thereby insulating themselves from state judicial scrutiny;[16] and (2) impose arbitrary federal ceilings on state

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Corp., 301 U.S. 1 (1937) (upholding National Labor Relations Act); United States v. Darby, 312 U.S. 100 (1941) (upholding minimum wage/maximum hours regulations under Fair Labor Standards Act); Wickard v. Filburn, 317 U.S. 111 (1942) (upholding federal regulation of wheat grown for feed on farm where grown); Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding application of federal anti-discrimination rules to local family owned barbeque restaurant); Perez v. United States, 402 U.S. 146, 154–57 (1971) (upholding federal criminal statute barring loan sharking); United States v. Lopez, 514 U.S. 549, 551 (1995) (invalidating federal ban on gun ownership in vicinity of school); United States v. Morrison, 529 U.S. 598, 601–02, 617–19 (2000) (invalidating congressional statute creating federal cause of action for gender-motivated violence); NFIB v. Sebelius, 567 U.S. 519, 558, 561, 562–63 (2012) (ruling that imposition of affirmative duty to purchase health insurance violates the Commerce Clause but upholding requirement under Taxation Clause).

13. 567 U.S. 519 (2012).

14. In fairness to the Justices, eight of them thought that the balance should be the same under each clause. Only the Chief Justice perceived a different balance. 567 U.S. at 552, 574 (2012).

15. The "Dormant," or "Negative" Commerce Clause is a gloss on Article I's grant of power to Congress "to regulate Commerce with foreign nations, and among the several States, and with Indian Tribes." It denies a state power to impose discriminatory regulations designed to benefit local commercial interests or to encumber national commercial activity with a patchwork of local rules. *See, eg.*, Reading R.R. v. Pennsylvania, 82 U.S. (15 Wall.) 232 at 279 (1873) (invalidating Pennsylvania's attempt to tax railroads transporting coal within state for ultimate sale elsewhere); Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564 at 571 (1997) (invalidating Maine's effort to favor charities serving Maine residents). *See generally* Martin H. Redish and Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 36 DUKE L. J. 569 (1987).

16. *See, e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (barring collective arbitration under union contracts despite FLSA and NLRA); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (enforcing compulsory arbitration in consumer contracts); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013) (requiring individualized compulsory arbitration where cost of proceeding exceeds value of claim). I criticize the use of preemption to impose unfair compulsory

legislative efforts to protect the weak.[17] Judge-made limits on the subject matter jurisdiction,[18] judicial reach,[19] and remedial pow-

arbitration clauses in Burt Neuborne, *Ending Lochner Lite*, 50 HARV. CIV.RTS.-CIV.LIBERTIES L. REV. 183 (2015). *See also*, Gade v. Nat'l Solid Waste Mgmt., 505 U.S. 88 (1992) (invalidating Illinois' licensing provisions for workers handling hazardous waste).

17. For a particularly egregious use of foreign affairs pre-emption to prevent state efforts to help the weak, see Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003) (invalidating California's effort to require German insurance companies doing business in California to allow inspection of their records by Holocaust survivors to determine whether unpaid claims existed. The Court reasoned that Executive Agreements between Germany and the United States (the "Berlin Accords") designed to assist the parties in resolving private litigation against German industry arising out of the Holocaust had imposed an implied ceiling on state assistance to Holocaust victims). The case was particularly galling since I had played a significant role in negotiating the resolution of the private litigation without imagining that I was placing a ceiling on state efforts. *See* Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Related Litigation in American Courts*, 80 WASH U. L. Q. 795 (2002). The negotiations are described in STUART EIZENSTAT, IMPERFECT JUSTICE (2004).

18. For analytically questionable self-imposed restrictions on the subject matter jurisdiction of the federal courts, see, e.g., Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806) (imposing complete diversity); Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 149 (1908) (narrowly interpreting "arising under" to eliminate federal defenses). *See also* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) (declining to apply Alien Tort Statute to conduct occurring outside the United States); *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (declining to apply Alien Tort Statute against corporate defendant); Nestlé USA v. Doe, 593 U.S.___ , 141 S.Ct. 1931 (2021) (declining to apply Alien Tort Statute against domestic defendants for acts committed abroad).

19. For analytically questionable horizontal federalism limits on the geographical reach of federal (and state) courts, see Prigg v. Com. of Pennsylvania, 41 U.S. 539, 608 (1842) (declining to permit Pennsylvania courts to make an initial preliminary determination in case alleging escape of slave from Maryland); Hanson v. Denckla, 357 U.S. 235, 254-55 (1958) (declining to permit Florida to exercise jurisdiction over issues raised by Florida domiciliary's will); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (declining to permit Oklahoma to litigate legal responsibility of seller of car that malfunctioned in Oklahoma); Kulko v. Superior Court, 436 U.S. 84 (1978) (declining to permit California to adjust child support payments for children living in state); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987) (declining to permit California to obtain jurisdiction over foreign manufacturers of items allegedly malfunctioning in California); J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873 (2011) (declining to permit New Jersey to provide forum for victim of malfunctioning machine manufactured abroad and sold in a different state); Walden v. Fiore, 571 U.S. 277, 279 (2014) (declining to permit Nevada to litigate alleged government abuse of Nevada resident taking place in another state); Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1784 (2017) (declining to permit California to entertain drug-related claims by non-residents against national corporation engaged in sale of drug in California).

ers[20] of the federal courts, premised on amorphous concepts like "our Federalism" or "fundamental fairness," shunt important legal issues to politically sensitive state judicial tribunals less likely to protect the weak.[21] The 10th Amendment, lacking principled norms for judicial enforcement, became an ideological weapon in the struggle over gun control.[22] 11th Amendment jurisprudence, bereft of textual or intellectual coherence, exudes arbitrariness and often leaves victims searching for effective judicial remedies.[23]

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20. For analytically questionable federalism-based limits on the remedial powers of a federal court, see Younger v. Harris, 401 U.S. 37, 54 (1971) (barring federal judges from enjoining pending unconstitutional state judicial proceedings); Hicks v. Miranda, 422 U.S. 332 (1975) (blocking pending federal proceeding once state criminal proceedings commence). *But see*, New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350 (1989) (permitting federal proceedings despite pending state court action on the same issue).

21. I have previously noted the substantive Fourth Amendment impact of weakening federal habeas corpus review. *See* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

22. The 10th Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." For most of its life, the 10th Amendment was deemed a mere tautology, judicially unenforceable because it lacks manageable judicial standards. For the modern Supreme Court's tortuous efforts to enforce the 10th Amendment, see, e.g., Nat'l League of Cities v. Usery, 426 U.S. 833 (1976) (invalidating application of federal minimum wage statutes to employees of state and local governments), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); New York v. United States, 505 U.S. 144 (1992) (invalidating aspects of federal statute governing disposal of radioactive waste); Printz v. United States, 521 U.S. 898, 933 (1997) (invalidating federal requirement that state law enforcement official conduct background checks on persons seeking to buy guns); Reno v. Condon, 528 U.S. 141, 143 (2000) (upholding ban on state sale of drivers' license information). For a useful summary of the area, *see* Sharon E. Rush, *Oh, What a Truism the Tenth Amendment Is*, 71 FLA. L. REV. 1095 (2019).

23. The 11th Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The 11th Amendment was enacted in response to *Chisholm v. Georgia*, which had held that Georgia, by entering the Union, had waived any sovereign immunity defense to a diversity case in federal court brought by non-residents of the state. 2 U.S. 419, 452 (1793) Its literal text, confined to diversity or alienage jurisdiction, reverses *Chisholm*. The Court abandoned the literal text in *Hans v. Louisiana*, applying the 11th Amendment to block federal question cases brought by in-state residents while denying any protection to local governments. 134 U.S. 1, 20-21 (1890) In *Ex parte Young*, the Court rejected an effort to impose the 11th Amendment to block constitutionally-based injunctive relief against state officials. 209 U.S. 123, 166-67 (1908). In *Pennhurst State Sch. & Hosp. v. Halderman*, the Court extended the 11th Amendment's jurisdictional bar to state law injunctive claims pending in federal court under pendent jurisdiction. 465 U.S. 89, 121 (1984). In *Seminole Tribe v. Florida*, the Court invalidated Congress'

Unduly narrow readings of Section 1 of the 14th and 15th Amendments, confining constitutional protection to intentional racial and gender discrimination, invite unscrupulous state and local politicians to disguise discriminatory behavior as legitimate "neutral" regulation.[24] At the same time, highly-aggressive readings of Section 1 have allowed business corporations to thwart state regulation[25] and have "incorporated" virtually the entire Bill of Rights against the states "jot and tittle," occasionally at the expense of important and legitimate state interests.[26] Finally, grudging readings of Congress's enforcement powers under Section 5 of the 14th and Section 2 of 15th Amendments have repeatedly blocked a sympa-

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effort to abrogate 11th Amendment immunity under the Commerce Clause and applied it to block a form of statutorily-based federal injunctive relief. 517 U.S. 44, 76 (1996). In *Alden v. Maine*, the Court invoked the 11th Amendment to block efforts to enforce federal statutory law in unconsenting state courts. In recent years, the Court has drawn back somewhat, re-asserting the power of federal courts to issue injunctive relief against unconsenting state officials. 527 U.S. 706 (1999).

24. *See* Washington v. Davis, 426 U.S. 229 (1976) (14th Amendment equal protection claim requires proof of intent or purpose to discriminate against racial minorities); City of Mobile v. Bolden, 446 U.S. 55 (1980) (15th Amendment claim of racial voting discrimination requires proof of discriminatory purpose). *See also* Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979) (upholding preferential treatment of veterans in public employment despite discriminatory impact on women).

25. For the emergence of corporations as highly protected entities under the 5th and 14th amendments, *see* Burt Neuborne, *Of "Singles" Without Baseball: Corporations as Frozen Relational Moments*, 64 RUTGERS L. REV. 769 (2013). *See generally*, Citizens United v. FEC, 558 U.S. 310, 365 (2010) (invalidating restrictions on corporate speech as discriminatory); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 683-84 (2014) (business corporation entitled to free exercise protection).

26. The word magic that transported the Bill of Rights across a Due Process bridge, rendering the first eight amendments applicable against the states can be traced through Twining v. New Jersey, 211 U.S. 78, 98 (1908) (suggesting that aspects of the first eight amendments may be protected against the states because they fall within the scope of due process of law); Gitlow v. New York, 268 U.S. 652 (1925) (applying the First Amendment to the states as an alternative to substantive due process); Palko v. Connecticut, 302 U.S. 319 (1937) (arguing for "selective incorporation;" declining to invalidate state's right to appeal in criminal case); Adamson v. California, 332 U.S. 46 (1947) (applying selective incorporation to uphold state rule permitting comment on defendant's refusal to testify); Malloy v. Hogan, 378 U.S. 1 (1964) (applying 5th Amendment to states, leading to overruling of Adamson); Duncan v. Louisiana, 391 U.S. 145, 149-50 (1968) (applying virtually total incorporation to the Bill of Rights); McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) (Second Amendment fully incorporated against state and local governments); Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020) (unanimous jury requirement incorporated against states – "jot and tittle" approach).

thetic national majority from providing needed protection to victims of state and local discrimination.[27]

But it doesn't have to be that way. The map of federalism can – and should - be re-drawn to enhance federalism's post-Civil War structural role as a protector of "discrete and insular minorities." Much of the raw material that we use to forge the law of federalism – the 1787 constitutional text; the 1791 Bill of Rights, the 10th and 11th Amendments; institutional history, especially the history of the early Republic; and policy articulated in the Federalist Papers - desperately needs updating in light of a "Second Founding,"[28] belat-

27. For a sampling of the Court's narrow reading of Congress' power under Section 5 of the 14th and 15th Amendments, see *The Civil Rights Cases*, 109 U.S. 3, 25-26 (1883) (invalidating Congressional public accommodation law); United States v. Cruikshank, 92 U.S. 542 (1875) (invalidating federal anti-lynching law); City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating Congressional effort to enforce the free exercise clause against the states); United States v. Morrison, 529 U.S. 598 (2000) (invalidating Congress' effort to create private cause of action for gender motivated violence); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (invalidating Congress's attempt to authorize suits against states for age discrimination); Bd. of Tr. v. Garrett, 531 U.S. 356 (2001) (invalidating Congress's effort to authorize suits against states for discriminating against the disabled); Shelby Cnty. v. Holder, 570 U.S. 529 (2013) (invalidating Section 5 of the Voting Rights Act of 1982); and Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021) (narrowly construing Section 2 of the Voting Rights Act). *But see* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) (upholding Congress's power to authorize suits against states for violating the Family and Medical Leave Act).

28. I never heard the words "Second Founding" in law school. The concept was originally described by W.E.B. Dubois in 1903. W.E.B. Du Bois, *The Dawn of Freedom*, The Souls of Black Folk (1903) (discussing the period from 1861 to1872), but too few listened. My attention was drawn to the idea of a Second Founding by Justice Thurgood Marshall's courageous Bi-Centennial address warning that the Constitution was not complete until equality was inserted into the document by the second Founders. Thurgood Marshall, Remarks at the Annual Seminar of the S.F. Patent and Trademark Law Ass'n, (May 6, 1987), available at http://thurgoodmarshall.com/the-bicentennial-speech [https://perma.cc/EH6A-GXWB]. *See also*, Stuart Taylor, *Marshall Sounds Critical Note on Bicentennial*, N.Y. Times, May 7, 1987, at A1. Although a significant body of scholarly material now describes and celebrates the Second Founding, it remains dwarfed by academe's continued preoccupation with the First Founding. Eric Foner's work stands out as a brilliant guide to the momentous events surrounding the formal end to slavery and the constitutional invention of equality. See the magisterial Eric Foner, Reconstruction: America's Unfinished Revolution 1863-77 (2014 ed.) [hereinafter Foner, Reconstruction], and his highly readable synopsis, Eric Foner, The Second Founding: How the Civil War and Reconstruction Remade the Constitution (2019) [hereinafter Foner, The Second Founding]. I rely heavily on Foner's work in this essay. Foner describes the events leading to the ratification of the 13th Amendment in 1865 in Foner, Reconstruction *supra* at 1863-77 and Foner, The Second Founding, *supra* at 21-54. He chronicles the events leading to the ratification of the 14th Amendment in 1868 in Foner, Reconstruction, *supra*,

edly (but magnificently) introducing the prime value o f equality into the Constitution.

I.
A TALE OF TWO FOUNDINGS

We are all devotees of the nation's First Founding beginning in Philadelphia in the years after the Revolutionary War.[29] Veneration of George Washington, John Adams, Thomas Jefferson, James Madison, and the rest of the "Founding Fathers" as secular saints begins on the first day of kindergarten and continues through the last time you saw "Hamilton," or read a Supreme Court opinion respectfully seeking the First Founders' original intent.

With the exception of the martyred Abraham Lincoln, though, no similar cult celebrates the thoughts and achievements of the men and women who forged the nation's Second Founding in the wake of the Civil War. The Second Founding took place between 1860-1877 with: (1) the nation's fateful decision to go to war to prevent Southern secession and the indefinite perpetuation of slavery;[30] (2) President Lincoln's January 1, 1863 Emancipation

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and FONER, THE SECOND FOUNDING, *supra* at 55–92. The events leading to the ratification of the 15th Amendment in 1870 are described in FONER, RECONSTRUCTION, *supra*, and FONER, THE SECOND FOUNDING, *supra* 93–123. For a pathbreaking history of the drafting and adoption of the 14th Amendment, *see* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949). *See also* Jacobus tenBroek, THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951).

Alas, the Supreme Court, despite its current obsession with constitutional history, does not yet give adequate weight to the words and actions of the Second Founders, in large part because of the residual effect of the so-called Dunning School of American historians who have mischaracterized the Second Founding as a tragic experiment in radical excess. See *infra* at pp. 12-16 for the impact of the Dunning School on the Supreme Court's treatment of the Second Founding.

29. Somewhat arbitrarily, I date the formal beginning of the First Founding on May 14, 1787, the first convening of what became the Constitutional Convention in Philadelphia. Relevant pre-history of the First Founding encompasses the period of the Articles of Confederation adopted by the Continental Congress on November 15, 1777, ratified by the states on March 1, 1781, and formally terminated on March 4, 1789; as well as the political events occurring during the Colonial period, culminating in the adoption of the Declaration of Independence by the second Continental Congress on July 2, 1776, its public promulgation on July 4, and its principal signing on August 2, 1776. I include the adoption of the Bill of Rights in 1791 and the ratification of the 11th and 12th Amendments in 1795 and 1804 within the First Founding.

30. The nation's decision to use force to prevent secession is described in James M. McPherson, THE BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA (1988). The theoretical case for secession rested on John Calhoun's conception of federal-

Proclamation, a wartime measure freeing enslaved persons held in areas engaged in rebellious efforts to secede;[31] (3) the post-Civil War ratification of the 13th Amendment ending slavery and involuntary servitude (1865), the 14th Amendment guarantying birthright citizenship, the enjoyment of the privileges and immunities of national citizenship, equal protection of the laws, and due process of law (1868), and the 15th Amendment forbidding racial discrimination in access to the ballot (1870);[32] (4) the Presidential elections of 1864 (approving the 13th Amendment), 1868 (approving the 14th Amendment), and 1872 (overwhelmingly approving the 15th Amendment);[33] (5) the emergence in 1866 and 1867 of Congressionally-fostered bi-racial state governments in the Reconstructed South,[34] followed in 1871-73 by vigorous action by Congress and President Grant protecting bi-racial governance against terrorist as-

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ism that viewed the 1787 Constitution as a compact between sovereign states and viewed the idea of sovereignty as indivisible. If the indivisible idea of "sovereignty" resided in the states, each state remained free to withdraw from the compact. *See* RICHARD HOFSTADTER, *John C. Calhoun: The Marxist of the Master Class, in* THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT (2011). One of the earliest formal articulations of the state-sovereignty position that eventually matured into Calhoun's full-blown theory was written by two of our most venerated first Founders, James Madison and Thomas Jefferson, asserting the right of the states to nullify federal law on unconstitutional grounds. *See* James Madison & Thomas Jefferson, THE RESOLUTIONS OF VIRGINIA AND KENTUCKY PENNED BY MADISON AND JEFFERSON (Robert I. Smith ed., Samuel Shepherd 1835) (1798) [hereinafter Resolutions of Virginia and Kentucky]. *See* H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval,* 80 VA. L. REV. 689 (1994) (arguing that Madison's idea of nullification required collective action by the states). Washington was reportedly appalled by Jefferson and Madison's assertions of the power of state nullification. RON CHERNOW, ALEXANDER HAMILTON 574 (2004).

31. The Emancipation Proclamation may be viewed in the National Archives. The operative language is: "all persons held as slaves within [rebellious territory], shall be then, thenceforward, and forever freeFalse" Emancipation Proclamation (Sept. 22, 1862). Since the Proclamation was a wartime measure aimed at rebellious areas, it did not free approximately 800,000 slaves held in non-seceding states, including Tennessee and West Virginia, or in areas of the South under Union control, like New Orleans and the surrounding area, and pockets of Virginia. *See* HAROLD HOLZER, EMANCIPATING LINCOLN *(*2014).

32. For descriptions of the events leading to the ratification of the 13th, 14th, and 15th Amendments, see *supra* note 28.

33. Eric Foner notes the salience of each Amendment in the 1864, 1868, and 1872 Presidential elections in FONER, THE SECOND FOUNDING, *supra* note 28.

34. See *id*. for the Reconstruction Congress's effort to foster bi-racial democracy. Three years before the ratification of the 15th Amendment, Congress enfranchised Black male citizens in the states of the old Confederacy. *Military Reconstruction Act of March 2, 1867*, ch. 153, sec. 5, 14 Stat. 428, 429. It was the votes of this bloc of newly enfranchised Black citizens that enabled the ratification of the 14th and 15th Amendments. *See also*, FONER, THE SECOND FOUNDING *supra* note 28.

sault by the Ku Klux Klan;[35]and (6) the withdrawal of federal troops from the states of the old Confederacy in 1877, pursuant to the Compromise of 1876 that allowed Rutherford B. Hayes to defeat Samuel J. Tilden in the Electoral College by a single vote, despite having lost the popular vote.[36]

The Second Founding was a tectonic event that formally transformed the United States Constitution by adding equality as a prime value and redrawing the map of federalism to preserve it. Not every adoption of a constitutional amendment qualifies as a "re-founding." In order to be treated as a watershed event warranting (indeed, requiring) reassessment of the entire constitutional text, a constitutional "re-founding" requires sustained exercises of popular will that formally invoke Article V to codify constitutional alterations resting on novel structural principles and enriched prime substantive values. To my mind, the sustained Post-Civil War engagement of the people in introducing equality into the Constitution and dramatically altering the federalism conventions underlying the 1787 Constitution in aid of newly minted equality rights clearly qualifies as such a "re-founding," demanding re-consideration of the entire document.[37]

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35. *See supra* note 28 for material describing the successful rescue effort.

36. For discussions of the Election of 1876, *see* Roy Morris, Jr., Fraud of the Century: Rutherford B. Hayes, Samuel Tilden, and the Stolen Election of 1876 (2003); Michael F. Holt, By One Vote: The Disputed Presidential Election of 1876 (2008). The classic account of the Hayes-Tilden election occurs in C. Vann Woodward, *Origins of the New South, 1877 – 1913, in* IX A History of the South (Wendell Holmes Stephenson & E. Merton Coulter eds., 2009). It is, however, burdened by a virtually complete acceptance of the Dunning School's mordant vision of Reconstruction. The rise and fall of the Dunning School is noted *infra* at pp. 12-16.

37. The notion of formal "re-foundings" generated by the cumulative impact of multiple constitutional amendments altering pre-existing structural arrangements and introducing new prime constitutional values into the text differs from the less formal idea of "constitutional moments," which are said to alter the Constitution's meaning without formal amendment. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 Yale L.J. 1013 (1984). Professor Ackerman brilliantly develops his thesis in a multi-volume work. Bruce Ackerman, We the People (2018).

Although it falls outside the scope of this essay, I believe that a "Third Founding" has taken place with the adoption of multiple constitutional amendments (12th, 15th, 17th, 19th, 20th, 22nd, 23rd, 2 4th, 25th, and 26th) designed to preserve the right to vote and to correct flaws in the original 1787 democratic machine. I believe that such a "Third Founding" introduces democratic self-government as an additional prime constitutional value requiring reconsideration of the narrow readings too often given by the Supreme Court to efforts to protect the right to vote in cases like Mobile v. Bolden, 446 U.S. 55 (1980), Shelby Cnty v. Holder, 570 U.S. 529 (2013), Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321

Only the racism inherent in the so-called Dunning School (named after Columbia historian William A Dunning and his students),[38] that misdescribed Reconstruction as an eruption of radical excess that temporarily displaced the "natural" order of life in the South with a short-lived corrupt, tyrannous rule by barely civilized Blacks incapable of self-government,[39] has prevented us (including the Supreme Court) from treating the deliberations and achievements of the Second Founders – patriots like Frederick Douglass, Thaddeus Stevens, John Bingham, Carl Schurz, Edwin Stanton; Charles Sumner, William H. Seward, Susan B, Anthony, Elizabeth Cady Stanton, and Salmon P. Chase – with the same intensity and respect that we quite appropriately lavish on the achievements of George Washington, John Adams, Alexander Hamilton, Thomas Jefferson, James Madison, John Jay, and that intellectual giant, Elbridge Gerry.

The Dunning School fostered the "Lost Cause" vision of the Civil War that romanticized and air-brushed Southern efforts to preserve slavery as principled efforts to preserve individual and state autonomy, and misdescribed the wave of racial terror that swept the South after the removal of federal troops in 1877 as a justified effort to restore good government and the natural racial order.[40] The triumph of the Dunning School in re-writing history

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(2021), Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019), and Crawford v. Marion Cnty, 553 U.S. 181, 204 (2008). *See generally*, Burt Neuborne, *Felix Frankfurter's Revenge: An Accidental Democracy Built by Judges*, 35 N.Y.U. Rev. L. & Soc. Change 602, 608, 662 (2013).

38. For a description and critical analysis of the Dunning School approach to Reconstruction history, see The Dunning School: Historians, Race, and the Meaning of Reconstruction (John David Smith ed., 2013). Professor Smith has assembled a collection of essays surveying current Reconstruction scholarship. Interpreting American History: Reconstruction (John David Smith ed., 2016). *See also*, W.E.B. Du Bois, *The Propaganda of History*, *in* Black Reconstruction in America 711-29 (Free Press ed. 1998) (1935); and Bruce E. Baker, What Reconstruction Meant: Historical Memory in the American South (2007). Eric Foner diplomatically credits the Dunning School with useful innovations in the art of writing history but unequivocally brands it as racist. Foner, The Second Founding, *supra* note 2*8*.

39. For examples of the Dunning school's negative story of Reconstruction, *see* John W. Burgess, Reconstruction and the Constitution 1866-1876 (1902); William Archibald Dunning, Reconstruction, Political and Economic 1865–77 (1907); Claude G. Bowers, The Tragic Era; The Revolution after Lincoln (1929). For a particularly venomous example of the worldwide adoption of White Supremacy as an excuse for colonial exploitation and white racial privilege, see James Bryce, The American Commonwealth (1888).

40. The myth of the "Lost Cause" was launched shortly after the Civil War by Edward A. Pollard in *The Lost Cause*. Edward A. Pollard, The Lost Cause; A New

reached its apogee in 1915 in D.W. Griffith's silent movie epic, *The Birth of a Nation*, a technically brilliant celebration of the Ku Klux Klan's forcible "redemption" of white privilege in South Carolina. *The Birth of a Nation* premiered at the White House, the first movie to be screened by a President. Woodrow Wilson, an ex-academic and a racist, loved it. The movie was an enormous commercial success.[41]

But the ideology of the Lost Cause and the Dunning School's negative depiction of Reconstruction did more than shape public perception of the work of the Second Founders. It poisoned the Supreme Court's official view of the enactment of the 13th, 14th, and 15th Amendments and the heroic efforts of the Second Founders to forge a bi-racial democracy. The poison began its work in 1873 before the ink was dry on the 14th and 15th Amendments in *The Slaughterhouse Cases*,[42] when five members of the Court imposed an extremely narrow reading on Section 1 of the 14th Amendment, especially its privileges and immunities clause, confining it to the protection of a narrow but important category of "national" rights, but refusing to read the 14th Amendment as altering the federalism assumptions held by the First Founders.

Justices Field, Bradley, Swayne, and Chief Justice Chase dissented, arguing that the majority's microscopic reading of the 14th Amendment's reach gutted the Second Founders' effort to limit the power of the states to act oppressively against the weak. Justice Swayne, protesting the majority's narrow construction, correctly characterized the Reconstruction Amendments as a Second Found-

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SOUTHERN HISTORY OF THE WAR OF THE CONFEDERATES (1866). We live with "The Lost Cause" today in the ubiquitous presence of monuments, buildings, parks, and public works dedicated to glorifying the memory of leaders of the Southern effort to secede in defense of slavery. The myth of "The Lost Cause" is so entrenched in many areas of the South that many state legislators seek to ban efforts to teach non-racist Reconstruction history in the public schools. *See* Rashan Ray and Alexandra Gibbons, *Why States Are Banning Critical Race Theory*, https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/ [https://perma.cc/8UTL-EA5H] (containing appendix listing state legislation).

41. Allyson Hobbs, *A Hundred Years Later "The Birth of a Nation" Hasn't Gone Away*, THE NEW YORKER (Dec. 13, 2015). D.W. Griffith, troubled by criticism from the NAACP, followed *The Birth of a Nation* in 1916 with the equally-technically brilliant film, *Intolerance,* an attack on bigotry. It is a sad commentary on American culture that *Intolerance* flopped financially. *See generally* WILLIAM M. DREW, D.W. GRIFFITH'S *Intolerance*: Its Genesis and Its Vision ((2001). For insight into Wilson's troubling record on race, see generally PATRICIA O'TOOLE, THE MORALIST: WOODROW WILSON AND THE WORLD HE MADE (2018).

42. 83 U.S. 36 (1873).

ing, arguing that "fairly construed, these amendments may be said to rise to the dignity of a new *Magna Carta*."[43]

The poison continued three years later in *United States v. Cruikshank*, [44] when a similarly divided 5-4 Court overrode a dissent by the first Justice Harlan[45] and denied Congress the power under Section 5 of the 14th Amendment to protect persons seeking to exercise their constitutional right to vote against lynching and murder by private mobs.[46] Then, in *United States v. Harris*,[47] the Court declined to recognize Congressional power under Section 5 of the 14th Amendment to protect persons incarcerated in state or local jails from private lynch mobs, even when the lynch mob was led by the Sheriff. In *The Civil Rights Cases*,[48] eight Justices overrode a magnificent dissent by the first Justice Harlan and ruled that the federal government was powerless under Section 5 of the 14th Amendment to protect individuals against acts of private discrimination in access to places of public accommodation. Finally, in *Plessy v. Ferguson*, once again over a magnificent dissent by Justice Harlan, the 19th century Supreme Court completed its dismantling of the Second Founding by upholding the legal foundation of Jim Crow – legally-compelled racial segregation.[49]

It's fair to say that in construing the Second Founders' work, the post-Civil War United States Supreme Court functioned as if it were the Supreme Court of the Confederacy.

The poison continued into the 20th century. In *Giles v. Harris*,[50] even the great Justice Oliver Wendell Holmes, wounded in battle during the Civil War, got into the act of ignoring the Second Founding. Confronted by a massive failure to allow Blacks to vote, Holmes, writing for the Court, simply threw up his hands and sur-

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43. 83 U.S. at 125.

44. 92 U.S. 542 (1876).

45. *Id.* at 559 (Harlan, J., dissenting).

46. *Cruikshank* arose out of the Colfax massacre, when a crowd of Black persons who had sought to vote in the 1872 bitterly contested Louisiana gubernatorial election and who had occupied a local courthouse in Colfax surrendered to ex-Confederate forces on April 13, 1873. As many as 150 were murdered. Three Whites died in the confrontation. Eric Foner characterizes the Colfax massacre as the bloodiest act of mass terrorism in the post-Reconstruction era. *See* FONER, RECONSTRUCTION, *supra* note 28, at 437. I read *Cruikshank* as having been overruled by *United States v. Price*, 383 U.S. 787, 801 and n.9 (1966).

47. 106 U.S. 629 (1883).

48. 109 U.S. 3, 13 (1883).

49. 163 U.S. 537, 555-57 (1896) (Harlan, J. dissenting).

50. 189 U.S. 475 (1903).

rendered.[51] The Dunning School spread the poison well into the 20th century. No less an iconic figure than Justice Robert Jackson, who wrote the majestic opinion in *West Virginia v. Barnette*[52] invalidating compulsory flag salutes, dissented in *Korematsu*, and then served as the United States' Chief War Crimes Prosecutor at the Nuremberg trials, joined Felix Frankfurter and Owen Roberts in describing the work of the Second Founders as a well-intentioned mistake that left whites in the South with the bitter memory of Black tyranny and misgovernment.[53] Justice Jackson wrote for the Court in *Collins v. Hardyman*,[54] continuing to deny victims of violence based on political views a federal remedy. Jackson cited the Dunning School classic by Claude Bowers, *The Tragic Era*,[55] as the sole historical support for the Court's favorable citation to cases like *The Slaughterhouse Cases*, *The Civil Rights Cases*, *Cruikshank*, and *United States v. Harris* that read the Reconstruction Amendments and statutes as narrowly as possible.[56]

Jackson's negative views of Reconstruction, which mirrored the elite white view propounded by the Dunning School, were shared by Justices Felix Frankfurter[57] and Owen Roberts. Hugo Black, the great liberal icon appointed to the Court in 1938 was, as a young politician on the make in Alabama, a member of the Ku Klux Klan until his election to the Senate in 1925.[58] A Supreme Court that

51. *Id.* at 486 (declining to exercise broad equitable power to remedy systemic deprivation of the vote).

52. 319 U.S. 624, 644 (1943).

53. Screws v. United States, 325 U.S. 91, 149 (1945) (Roberts, Frankfurter, & Jackson, JJ., dissenting) (arguing that the beating of a Black prisoner to death by local law enforcement officials was a "local" crime not subject to federal prosecution).

54. 341 U.S. 651 (1951).

55. BOWERS *supra* note 39.

56. *Id.* at 657-58.

57. *See* United States v. Williams, 341 U.S. 70, 81-82 (1951) (plurality opinion) (holding that 18 U.S.C. § 241 (1948), a Reconstruction era statute barring conspiracies between private actors and government officials to deprive victims of constitutional rights, does not apply to actions by state government officials). See also, Justice Frankfurter's opposition to the use of the Civil Rights Act of 1871, 42 U.S.C. § 1983, as a means to redress unconstitutional actions by state and local government officials. Monroe v. Pape, 365 U.S. 167, 258-59 (1961) (Frankfurter, J., dissenting) (arguing that clearly unlawful state or local police activity is not taken "under color of law.").

58. Justice Black, born in 1886, was elected to the Senate from Alabama in 1926, allegedly with Klan support. He claimed to have ended his membership in the Klan in 1925. Shortly after Black's confirmation, it was revealed that he had received – and accepted – a lifetime honorary membership in the Klan. *See* William E. Leuchtenburg, *A Klansman Joins the Court: The Appointment of Hugo L. Black*, 41 U.

included an ex-Klan member and swallowed the Dunning School's racist story of radical excess and Black inferiority was hardly likely to treat the Second Founders as worthy of re-shaping the Constitution.

Not surprisingly, at virtually every turn, the Supreme Court minimized the Second Founders' efforts where racial equality is concerned, saddling the modern Court with a wall of appalling judicial precedents eviscerating the ability of Section 1 of the 14th and 15th Amendments, and sections 5 and 2 of the 14th and 15th Amendments to act, in Justice Swayne's words, as a second *Magna Carta*, while transforming – some might say perverting - the work of the Second Founders to protect large corporations and the wealthy.[59]

Even today, although cases like *Plessy*, *Cruikshank*, and *Harris* have been repudiated long after the damage was done, and although lawyers have built an ungainly Commerce Clause workaround of *The Civil Rights Cases,*[60] the current Court, saddled with appalling precedent and educated under the influence of the Dunning School, continues to ignore the voices of the Second Founders in construing the 14th and 15th Amendments. The false distinction between "state action" and private behavior that is ignored or tolerated by state and local government continues to bedevil the Court and complicate efforts to achieve equality.[61] In *Washington v. Da-*

C??. L. R??. 1, 13 (1973). Justice Black went on to serve with great distinction as a defender of free speech, but equality was not his forte. He wrote the Court's unfortunate opinion in *Korematsu* upholding the openly racist treatment of Americans of Japanese ancestry during World War II.

59. *See supra* note 28for a brief discussion of the Supreme Court's unremittingly grudging readings of Section 1 and 5 of the 14th Amendment and Sections 1 and 2 of the 15th Amendment when racial equality is at stake. *See generally* Eric Foner, *The Supreme Court and the History of Reconstruction – and Vice-Versa*, 112 Column L. Rev. 1585 (2012); Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. R??. 1801 (2010); Robert J. Kaczorowski, The Politics of Judicial Interpretation: The Federal Courts, the Department of Justice, and Civil Rights, 1866-1876 (2005). *See* Neuborne, *supra* note 25, at 775 for a survey of the Court's extremely broad readings of Section 1 of the 14th Amendment to protect corporations and wealthy businessmen.

60. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241, 261 (1964) (upholding public accommodations law under Commerce Clause as applied to interstate motel); Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding public accommodations law as applied to small local restaurant under Commerce Clause; leaving open Section 5 of 14th Amendment).

61. *See* Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 Hofstra L. Rev. 1379, 1388 (2006); Erwin Chemerinsky, *Rethinking State Action*, 80 Nw. U. L. Rev. 503, 504 (1985).

vis[62] and *City of Mobile v. Bolden*,[63] a majority of the Court continued to insist that Section 1 of the 14th and 15th Amendments require proof of discriminatory animus and say nothing about the knowing enactment of laws falling with disparate severity on discrete and insular minorities. In construing Congress's power to enforce the 14th and 15th Amendments, in cases like *City of Boerne v. Flores*,[64] (invalidating Congressional effort to enforce the free exercise clause against the states); *United States v. Morrison*,[65] (invalidating Congress' effort to create private cause of action for gender motivated violence); *Kimel v. Florida Board of Regents*,[66] (invalidating Congress's attempt to authorize suits against states for age discrimination); *Board of Trustees v. Garrett*,[67] (invalidating Congress's effort to authorize suits against states for discriminating against the disabled); *Shelby County v. Holder*,[68] (invalidating Section 5 of the Voting Rights Act of 1982); and *Brnovich v. DNC*,[69] (narrowly construing Section 2 of the Voting Rights Act), the Court has tethered Congress's Section 5 power to acting against behavior that already violates Section 1, leaving only a small, poorly defined window for prophylactic Congressional legislation to deal with historic failures of states to respect the Section 1 rights of discrete and insular minorities.

Test yourselves on the success of the Dunning School in obliterating the legal and moral significance of the Second Founding. Have you ever heard of the Committee of 15, headed by Johnathan Bingham, who drafted the 14th Amendment? Do you know that it was Black voters, enfranchised by Congress in 1867, who secured the ratification of the 14th and 15th Amendments? Do you know why the drafters placed explicit Congressional enforcement powers in the 13th, 14th, and 15th Amendments? How much do you know about the actual operation of the bi-racial state and local governments established under Reconstruction? Have you ever read anything by Frederick Douglass? If you join me in answering "no" or "nothing" to those questions, you have some idea of the racists' suc-

62. 426 U.S 229 (1976) (imposing intent requirement on 14th Amendment Equal Protection Clause).

63. 446 U.S. 55 (1980) (imposing intent requirement on 15th Amendment right to vote free of racial discrimination).

64. 521 U.S. 507 (1997).

65. 529 U.S. 598 (2000).

66. 528 U.S. 62 (2000).

67. 531 U.S. 356 (2001).

68. 570 U.S. 529 (2013).

69. 141 S. Ct. 2321 (2021).

cess in obliterating an exercise in American greatness from our social and legal consciousness. It's long past time to restore it.

In recent years, the racist miasma fostered by the Dunning School's denigrating picture of Reconstruction has finally been swept away by American historians, led by Eric Foner, who have begun to tell a very different story of the remarkable efforts by the Second Founders to replace slavery with a bi-racial democracy founded on the idea that all men are created equal (sadly, most of the Second Founders stopped at men, bitterly disappointing Elizabeth Cady Stanton and Susan B. Anthony).[70] Given the unfolding historical narrative that is rescuing the achievement of the Second Founders from the racist grip of the Dunning School, I believe that it is time for a full-scale reconsideration of more than a century of constricted Supreme Court treatment of the work of the Second Founders, especially in the area where protection of equality intersects with federalism. It is long past time to treat the magnificent handiwork of the Second Founders with the respect it deserves, even if that means overruling the 19th century cases that set the Court on the wrong federalism path.

Just as the Supreme Court finally adopted the magnificent dissent of the first Justice Harlan in *Plessy* about the meaning of Section 1 of the 14th Amendment, so the current Court should finally adopt Justice Harlan's equally magnificent dissent in *The Civil Rights Cases* urging the Supreme Court to respect the voices of the Second Founders in charting the Court's federalism course.[71] Thus, the relevant constitutional text mapping the boundary between state and federal power in the 21st century is not solely the 1787 constitutional text and the 1791 Bill of Rights (plus the 11th and 12th Amendments), read through an originalist lens as the First Founders might have understood them.[72] Rather, the tectonic force of

70. For examples of the current historical rejection of the Dunning School's denigration of the Second Founding, *see supra* at note 38.

71. 109 U.S. at 26 (arguing that in denying Congress the power to protect newly emancipated persons against violence intended to deny their equal status the Court was ignoring the clear wishes of the architects of the Reconstruction Amendments).

72. I have my doubts about the usefulness of originalism as a philosophy of constitutional interpretation. *Compare* Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. Rev. 1 (2009), *with* Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 Nw. U. L. Rev. 703 (2009). But that train has apparently left the Supreme Court station. All nine Justices now give at least lip service to following some aspect of the originalist path, although they often bicker over what the precise path should be. *See, e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1824 (2020) (differing over the appropriate originalist way to read the phrase "because of sex" in the 1964 Civil Rights Act).

the Second Founding so altered the original nature of "our Federalism" as to require resort to a "blended originalism," pursuant to which the originalist understanding of the First Founders is enriched, complicated, and occasionally supplanted by the structural vision of federalism formally codified by the second-Founders, especially when equality is at stake.[73] When, as will often be the case, the use of blended originalism fails to deliver a clear originalist answer to a hard federalism problem, respect for the Second Founders' decision to insert equality into the document as a prime value should lead us to allocate political power to the political majority most likely to respect the equality-based interests of the discrete and insular minorities for whose benefit the Second Founders introduced equality into the constitutional text in the first place.

A. Autonomy, Equality and the Two Substantive Foundings

The First Founders brilliantly (if somewhat reluctantly)[74] protected individual autonomy – the right to be let alone - against democratic excess and official overreaching by drafting and adopting the Bill of Rights.[75] We appropriately celebrate them for it.[76] Respect for individual autonomy is one of the cornerstones of any decent political order. But wholly unchecked autonomy leads to a world dominated by the strong where life is "nasty, brutish, and short" for everyone else.[77] Thus, while the First Founders magnificently protected autonomy and the rule of law as prime values, the First Founders' Autonomy-Based Constitution was woefully incomplete. It said not a word about equality.[78] How could it when the document reinforced and protected the ultimate abuse of autonomy – the power of the strong to enslave another human being?

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73. I sketch the operation of blended originalism *infra* at pp. 26-28.

74. For the first Founders reluctance to include a Bill of Rights in the 1787 Constitution, *see* Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301 (1990).

75. The Bill of Rights was adopted by Congress on September 25, 1789. It was ratified by the requisite number of states on December 15, 1791.

76. *See generally* BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT (2014) (canvassing the first Founders' adoption of the autonomy-laden Bill of Rights, especially the First Amendment).

77. Hobbes's quote from LEVIATHAN, I, xiii, 9, describes the state of nature where one person's individual autonomy is unchecked by anything other than someone else's power to interfere with it.

78. It's not like the idea of equality was absent from late 18th century discourse. The Declaration of Independence, drafted by Thomas Jefferson, opens with the assertion that "all men are created equal," and the contemporaneous French Declaration of the Rights of Man (1789) is saturated with protections of *egalite'*.

Given the first Founders' preoccupation with autonomy and the document's exclusion of equality, it's no surprise that equality arguments fared very badly under the First Founders' Constitution. In *Prigg v. Pennsylvania*,[79] the Court upheld the autonomy-based right of a slave-owner to use self-help to recover an alleged fugitive slave. The equality-based effort by Pennsylvania to require a modicum of judicial process before permitting slave catchers to remove an alleged runaway from the state never had a chance.[80] And, in *Dred Scott v. Sandford*,[81] Chief Justice Taney ruled that no Black person could invoke the diversity jurisdiction of the federal courts in an effort to secure freedom because only whites could be citizens of a state. Given its pro-slavery slant, it is no surprise that the abolitionist leader, William Lloyd Garrison, publicly burnt the First Founders' Constitution, branding it a pact with the devil to preserve slavery.[82]

The Second Founders vastly complicated the constitutional enterprise by abolishing slavery and adding a deeply enriching new prime value – equality – to the constitutional mix. In deference to such a Second Founding, whether the structural constitutional issue is separation of powers, federalism, or the scope of federal judicial power under Article III, constitutional analysis should begin – and perhaps end - with a pragmatic assessment of the impact of a given structural decision on the ability of politically vulnerable persons to protect themselves against democratic failure. I call it "Footnote Four Structuralism."[83]

As we've seen, the two-hundred thirty-four years of our constitutional history have borne witness to at least two formal constitutional "Foundings" by the People. The First-Founding (I call it the "autonomy" Founding) was enabled by the colonists' sacrifice of blood and treasure during the Revolutionary War, and was formally codified by the People, after a false start with the Articles of Confed-

79. 41 U.S. 539 (1842). *See supra* text accompanying note 1.

80. The Justices' majority and dissenting opinions in *Prigg* are masterfully dissected in ROBERT M. COVER, JUSTICE ACCUSED (1975).

81. 60 U.S. 393 (1857). *See supra* text accompanying note 1.

82. FONER, THE SECOND FOUNDING, *supra* note 28, at 9. For Garrison's role in the abolitionist movement, see JOHN L. THOMAS, THE LIBERATOR: WILLIAM LLOYD GARRISON, A BIOGRAPHY (1963).

83. *See supra* at note6 for a brief discussion of Footnote Four in *Carolene Products*. The leading exposition of the link between judicial review and risk of democratic failure is JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

eration, pursuant to Articles VII and V.[84] The Second-Founding (I call it the "equality" Founding) was also enabled by almost inconceivable sacrifices of blood and treasure, this time during the Civil War.[85] As I've noted, the first Founding was all about protecting autonomy - the right to be let alone. Every one of the thirty-one protected activities mentioned in the Bill of Rights shields a category of autonomous behavior from inappropriate government interference.[86] The ultimate abuse of autonomy by the strong – the right to own another human being – was carefully protected by the first Founders' constitution – guaranteed importation of enslaved persons until 1808;[87] the Fugitive Slave Clause;[88] the first Founders' conception of state sovereignty;[89] the protection of private property in the Takings and Due Process clauses that ultimately led to *Dred Scott*;[90] the ban on unapportioned per capita taxation;[91] and the 3/5 compromise.[92] The essence of the Second Founding was the recognition by a new generation that unconstrained autonomy empowers the strong to oppress the weak, with slavery being the ultimate consummation of the process.

Confronted by the largest and richest slave-dependent economy in human history,[93] the Second Founders fought a bloody Civil

84. U.S. CONST. arts. V, VII. Article VII, which establishes the process by which the People adopted the Constitution, provides: "The Ratification of the Conventions of nine States, shall be sufficient for the

Establishment of this Constitution between the States so ratifying the Same." New Hampshire became the 9th state to ratify by Convention on June 21, 1788.

85. Article V is careful to assure that the results of a successful amendment process enjoy equal formal status with the original text adopted pursuant to Article VII. U.S. CONST. art. V. For descriptions of the extraordinary events leading up to ratification of the 13th, 14th, and 15th Amendments, *see supra* note 28.

86. For a listing of the 31 activities protected by the Bill of Rights, *see* Burt Neuborne, "*The House Was Quiet and the World Was Calm the Reader Became the Book" Reading the Bill of Rights as a Poem: An Essay in Honor of the Fiftieth Anniversary of Brown v. Board of Education*, 57 VAND. L. REV. 2007 (2004).

87. U.S. CONST. art. I, § 9.

88. U.S. CONST. art. IV, § 2, cl. 3.

89. The Resolutions of Virginia and Kentucky, drafted in 1798 by Thomas Jefferson and James Madison, asserted the power of the states to nullify federal law. The idea was expanded by John Calhoun to include interposition and eventually secession, all in aid of the owners of slaves. See *supra* note 30 for more on Calhoun and the Resolutions of Virginia and Kentucky.

90. Scott v. Sandford, 60 U.S. 393 (1857). For detail, see *supra* note 1.

91. U.S. CONST. art. I, § 9.

92. U.S. CONST. art. I, § 2, cl. 3.

93. In 1861, four million Black human beings were held in slavery to service a vastly profitable commercial empire based on the labor-intensive growth and exportation of cotton and rice. In 1861, the American South produced nearly 75% of the world's cotton. There were more millionaires *per capita* in the Mississippi River

War to eradicate slavery, and then inserted the idea of equality into the post-Civil War constitutional text to permit (indeed, require) government to limit autonomy where its unbridled exercise enabled the strong to impose unequal treatment on someone else. The 13th Amendment (1864-65) completed the work of Lincoln's 1863 Emancipation Proclamation, formally abolishing "slavery" and "involuntary servitude." The 14th Amendment (1868) formally erased the stain of *Dred Scott* by establishing "birthright citizenship" for all persons born in the United States, requiring states to respect the privileges and immunities of national citizenship, finally codifying the concept of equality before the law, re-stating the principle of due process of law, seeking to blackmail the Southern states into allowing Black people to vote, dealing with the Confederate war debt, and, in the second Founding's version of the "necessary and proper" clause, formally granting Congress the power to enforce the Amendment.[94] The 15th Amendment (1868-70) completed the Second Founding by banning racially-based restrictions on voting. As with the 13th and 14th Amendments, the 15th also formally granted enforcement powers to Congress. President Grant showed what the second Founding could achieve when he unleashed the full power of the United States to crush the Ku Klux Klan's effort to de-stabilize bi-racial government in the South.[95] Enabled by the Reconstruction Act of 1867 and the 15th Amendment, a remarkable flowering of biracial democracy swept the South. Legislatures elected by Black and White voters ratified the 14th and 15th Amendments.[96] More than 600 Black officials were elected to state

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Valley than anywhere in the United States. Indeed, if the Confederacy were a single nation, it would have been the fourth richest nation on earth. *See* Greg Timmons, *How Slavery Became the Economic Engine of the South*, HISTORY (Sept. 2, 2020),www.history.com/news/slavery-profitable-southern-economy [https://perma.cc/F694-WZVR]. For a more scholarly treatment of the economic strength of the slave economy, see ROBERT WILLIAM FOGEL, WITHOUT CONSENT OR CONTRACT: THE RISE AND FALL OF AMERICAN SLAVERY 189 (1989).

94. The full text of the 14th Amendment is annexed as Appendix 1. Justice Swayne's dissent in *The Slaughterhouse Cases,* contains a thoughtful overview of how the various components of the 14th Amendment fit together. 83 U.S. 36, 124-29 (1873) (Swayne, J., dissenting). For a pathbreaking history of the drafting and adoption of the 14th Amendment, see Joseph Tussman and Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 341 (1949); TENBROEK, THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT, *supra* note 28.

95. President Grant's successful assault on the Klan is described in Richard Zuczek, *The Federal Government's Attack on the Ku Klux Klan: A Reassessment*, 97 S.C. HIST. MAG. 47, 47 (1996). Eric Foner describes and assesses Grant's efforts in FONER, THE SECOND FOUNDING, *supra* note 28, at 115–22.

96. FONER, THE SECOND FOUNDING, *supra* note 28.

legislatures. Fifteen Black members of Congress appeared. Two Black Senators were sworn in. In Mississippi, 80% of eligible Blacks voted in the 1870 gubernatorial election. In 1875, eight Black members of Congress were elected from six states.[97]

And then, it all fell apart. Terrorism swept the South, crushing hopes for bi-racial democracy.[98] Spurred by the latent racism that has never disappeared from American life, academic historians of the Dunning School de-legitimated the monumental achievements of the Second-Founders,[99] the Supreme Court decimated the legal force of their magnificent work,[100] and the American people, following the path set by academic and legal elites, allowed the Second Founding to drift into oblivion. Instead of a great silent film celebrating Lincoln's success in persuading Congress to approve the 13th Amendment, or the Committee of 15's extraordinary achievement in drafting the 14th Amendment, or the Byzantine history of the 15th Amendment, we got *The Birth of a Nation*.

B. Institutional Structure and the Two-Foundings

As we've just seen, the Second Founding revolutionized – and complicated - the value structure of the first Founders' Constitution by adding equality to the mix. But the Second Founders did not stop with adding equality as a prime value. They revamped the first Founders' idea of federalism in order to provide equality with structural, as well as substantive protection.

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97. *Id*. For the story of the rise and fall of biracial democracy in the Reconstruction South, *see* Daniel Byman, *White Supremacy Terrorism, and the Failure of Reconstruction in the United States*, 46 INT'L SECURITY 53 (2021). *See also*, ALLEN W. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION (1971).

98. *See* Byman, supra note 97.

99. The work of the Dunning School is described *supra* at pp. 10-16.

100. Eric Foner succinctly tells the sad legal tale in FONER, THE SECOND FOUNDING, *supra* note 28, at 125–67. First, the Court decimated the 14th Amendment "privileges and immunities" clause in the *Slaughterhouse Cases*. . 83 U.S. 36 (1873). Then, in *United States v. Cruickshank*, it eliminated the Section 5 personal security guaranties. 92 U.S. 542 (1875) In the *Civil Rights Cases*, it wiped out the public accommodation protections under section 5 of the Fourteenth Amendment. 109 U.S. 3, 25-26 (1883). In *Giles v. Harris*, it crushed the 15th Amendment dream of bi-racial democracy. 189 U.S. 475 (1903). Finally, in *Lochner v. New York*, it deployed the Contracts Clause and Substantive Due Process to invalidate minimum wage and maximum hour legislation in the name of autonomy. 198 U.S. 45 (1905). Thus, a magnificent effort to achieve racial equality for the weak was delegitimated by academic racists, mugged by the Supreme Court, and hijacked by corporate lawyers operating in defense of the strong. Lincoln would weep.

Three brilliant structural innovations rest at the heart of the "First-Founders'" Constitution. The first was an enrichment of the idea of separation of powers, moving from the pre-Revolutionary British view, championed by John Locke,[101] that recognized two governmental "powers" – the power to enforce the law; and the power to make the law[102] - "separated" between the King and parliament;[103] to the more complex view propounded by Montesquieu that identified three governmental "powers" – the power to make law; the power to enforce existing law; and the power to resolve disputes about the law's meaning and applicability – "separated" between and among Congress, the President, and the Supreme Court.[104]

Once the more complex idea of three discrete forms of government "power" separated between and among three branches was

101. Locke's theory of separation of powers is initially stated in his Two Treatises of Government. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, §§ 134 (Legislative), 144 (Executive). It is thoughtfully summarized in M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (Liberty Press 2d ed. 1998) (1967). *See also* Burt Neuborne, *Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 370 n.21 (1982).

102. Judges, in Locke's model, were lumped with Sheriffs as Executive branch law enforcers appointed by the King. That's why judicial review of parliament never formally evolved in Great Britain. VILE, *supra* note 101.

103. In fact, the role of judges in Locke's world is considerably more complex than mere law enforcers. British judges were – and are – responsible for the care and feeding of the mysterious, residual body of law called "the common law," consisting of a body of judge-revealed rules that exist as a matter of pure reason. As a matter of British legal theory, judges do not make the common law. They merely reveal it and apply its logical corollaries. Somehow, the eternal legal verities of the common law always seemed to reinforce the power of the strong to dominate the weak – master-servant; husband-wife; parent-child; man-woman; King-commoner. The first Founders adopted Locke's view of the common law as a timeless judge-revealed river of law in the sky. *C.f.* Swift v. Tyson, 41 U.S 1 (1842) (rejecting the idea of a timeless common law waiting to be discovered by thoughtful judges as a violation of federalism and separation of powers); Erie R.R. v. Tompkins, 304 U.S 64, 78 (1938) (holding that there is no federal common law; except when there is); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) (holding that the judiciary will not examine the validity of an act by a foreign sovereign government recognized by the United States, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law); Boyle v. United Techs. Corp., 487 U.S. 500 (1988) (military contractors defense).

104. Montesquieu sets forth an enriched theory of separation of powers. BARON DE MONTESQUIEU, SPIRIT OF THE LAWS (Thomas Nugent trans., Batoche Books 2000) (1749). It is described in VILE, *supra* note101. Montesquieu's great innovation was the recognition of a free-standing judicial power to resolve disputes over the meaning and application of law on an equal footing with the powers of the Legislative and Executive branches. *See* Marbury v. Madison, 5 U.S. 137 (1803).

launched, it became important to generate a theory of allocation in doubtful cases about exactly how the government's "powers" should be "separated." At least two major theories emerged – a theory of negative separation aimed at preventing any group of officials from assembling a dangerous concentration of government power; and a theory of positive separation aimed at lodging governmental functions in a body of officials structured to perform them well.[105] A third, more radical theory – representation-reinforcing separation of powers – allocates power to officials in an effort to enhance the power of vulnerable groups to hold their own in the rough and tumble of democratic politics.[106] In Great Britain, the allocation of power to the House of Lords performs that function, vesting the British aristocracy with an ever-diminishing checking power.[107] The Senate's Article V Equal Suffrage clause, especially when reinforced by a super-majority filibuster rule, functions as our version of the British House of Lords, vesting small groups of rural voters with enhanced checking power often amounting to a veto.[108] It is also possible, though, to generate representation reinforcing theories of separation of powers in aid of "discrete and insular minorities" threatened by democratic failure.[109] Indeed, I believe that much of the Warren Court's jurisprudence can best be understood as enhancing the ability of certain victim groups – principally racial minorities - to punch above their respective weights in the political arena.[110]

The First Founders' second structural innovation was the equally revolutionary idea of an enforceable Bill of Rights protecting a set of autonomy-based individual rights. The first Founders

105. *See* VILE, *supra* note 101. Negative separation flows logically from Madison's "double security" argument in Federalist 51 briefly discussed *infra* at notes 145-147. Positive separation is implied from Madison's defense of the constitution's structure in Federalist 10. The two theories usually reinforce each other but the possibility of collision is always present. *See* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

106. VILE, *supra* note 101. See also, Neuborne, *supra* note 101, at 373.

107. PHILIP NORTON, REFORM OF THE HOUSE OF LORDS 3 (2020).

108. Burt Neuborne, *One State/Two Votes: Do Supermajority Senate Voting Rules Violate the Article V Guaranty of Equal State Suffrage?*, 10 STAN. J. CIV. RTS. AND CIV. LIB. 27, 33 (2014).

109. Footnote Four of *Carolene Products* is explicitly representation reinforcing, viewing courts as owing a special duty of care to "discrete and insular minorities" likely to be treated unfairly in the political process. 304 U.S. at n.4.

110. See Burt Neuborne, *The Gravitational Pull of Race on the Warren Court,* 2010 Supreme Court Review 59.

were initially lukewarm about a Bill of Rights, declining to place one into the 1787 text. It was the People's refusal to accept the 1787 Constitution without the promise of a Bill of Rights that induced Madison and the rest of the first Founders to draft the first 10 Amendments.[111] Once a basket of textually complex individual rights were added to the already complex 1787 text, questions about which group of officials should have the final word in exercising the important power to interpret and enforce the text could not be ignored. The result was – and continues to be - a rich outpouring of theory justifying, challenging, limiting, defining, and describing the role of the Article III judiciary as the ultimate interpreter/enforcer of the structural and rights-bearing provisions of the Constitution. Four competing interpretative theories have emerged.

The first, "literalism," claims to be able to resolve disputes about constitutional meaning by using a dictionary to enforce the "plain meaning" of the text. When it works, literalism resolves counter-majoritarian difficulties associated with judicial review by turning it into an exercise in subordination to the commands of the Founders. Unfortunately, given the necessarily abstract nature of constitutional text, literalism doesn't work very often and risks robotic oversimplification.[112]

"Originalism" then steps in to deal with text that resists literal reading by asking what an ill-defined but privileged group of Founders thought the text meant.[113] Originalists initially asked what the drafters and enactors of a constitutional provision intended it to mean. That approach has been abandoned in favor asking what the contemporaneous "general public" would have understood the text to mean. Not once in the 153 years since the adoption of the 14th Amendment in 1868 has anyone asked what Black voters newly enfranchised by the 1867 Military Reconstruction Act, understood the text to mean when they elected the state legislatures needed to ratify the 14th and 15th Amendments. Whoever gets chosen as the

111. The story of the reluctant drafting of the Bill of Rights is told in IRVING BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING (1965). *See also Reluctant Paternity, supra* note 72.

112. For an explanation of the "plain meaning" rule, *see* David A. Strauss, *Why Plain Meaning*, 72 NOTRE DAME L. REV. 1565 (1997). For a critique of the plain meaning rule, *see* Erwin Chemerinsky, *Chemerinsky: The Myth of "Plain Meaning,"* ABA JOURNAL (Oct. 31, 2017), https://www.abajournal.com/news/article/chemerinsky_plain_meaning_is_a_myth [https://perma.cc/HBX8-JJSL].

113. Originalism is closely associated with Justice Antonin Scalia, who vigorously propounded it as an alternative to theories granting significant discretionary power to unelected judges. *See*, Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857 (2017).

privileged Founder, though, honestly applied, originalism usually fails to deliver clear answers about what the Founders believed the text to mean.[114]

A third theory, "constructive originalism" (or "purposivism") rejects the idea of looking backward to what the Founders actually meant the text to mean, in favor of a more flexible notion of what they would probably want the text to mean today.[115] Unfortunately, such a sensible approach involves a level of subjective choice that troubles committed majoritarians.

Finally, "judicial pragmatism" does not purport to link a judge's opinion to the commands of the Founding generation. Instead, it seeks to choose the best modern judicial reading of the constitutional text,[116] despite the obvious tensions with democratic political theory.

Suffice it to say that, given the unruly nature of much constitutional text, the murky and contested historical record, and the competing theories of interpretation, clearly correct textual answers to most hard constitutional disputes are rarely apparent.

The third extraordinary innovation was "concurrent federalism" - the idea of a political union between and among a unitary center (the national government) and multiple political units at the periphery (the states), dividing a shared "sovereign" power between and among the center, the periphery, portions of the periphery, and all of the above to perform discrete governmental functions.[117]

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114. For examples of the inability to agree on a clear "originalist" meaning, see District of Columbia v. Heller, 554 U.S. 570, 603, 637 (2008) (dividing 5-4 on originalist meaning of Second Amendment); and Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741, 1755 (2020) (disagreeing intensely over original meaning of "because of sex" in Title VII).

115. *See* Siegel, *supra* note 111.

116. *See id.*

117. The academic literature on American federalism is vast. I have found David L. Shapiro's characteristically elegant FEDERALISM: A DIALOGUE (1995) both informative and challenging. Professor Shapiro, a consummate lawyer who served as Deputy Solicitor General from 1988-1991, organized his work in three parts – a lawyer's brief arguing for national power (14-57); a responsive brief arguing for state power (58-106); and an effort to chart a course between the two extremes (107-140). He also assembles a useful bibliography on federalism at the close of the work. Unfortunately, the book predates the resurgence of state power beginning with United States v. Lopez, 514 U.S. 549 (1995) (invalidating federal Commerce Clause ban on gun ownership in vicinity of school), and United States v. Morrison, 529 U.S. 598, 601–02, 617–19 (2000) (invalidating federal Commerce Clause and Section 5 of 14th Amendment civil cause of action for gender-moti-

The idea of structuring governing power with a center and political units at periphery was well known long before the American Revolution. Leagues of City States in Ancient Greece, the Roman Empire, the Holy Roman Empire, Great Britain itself, the Swiss Confederation, the Hanseatic League, the Hapsburg Empire, the Kingdoms of France and Spain - all were organized around a center in tandem with political units at the periphery. But ultimate "sovereign" power always existed in either the center or at the periphery – it was never shared with even a pretense of equality.[118]

At the time of the First Founding, the prevailing British model consisted of "devolved" peripheral entities (England, Scotland, Wales) and the colonies functioning as decentralized units of administration, with the ultimate "sovereign" power to govern concentrated in the London metropole.[119] Occasionally, as with the Swiss Confederation, a formal central governmental unit existed with sovereign power exercised by the units at the periphery (the cantons). But whether it was the center or the periphery, there was always a dominant partner where ultimate "sovereignty" resided. Indeed, prevailing legal theory at the time of the first Founding, rejected the possibility of sharing "indivisible" sovereignty.[120]

The first Founders' innovative vision of shared sovereignty sought to avoid both the British model of concentrating power in the center, and the excessive diffusion of sovereign power to the periphery that had doomed the Articles of Confederation. Instead, the First Founders envisioned a novel, untidy federal structure composed of a strong center and a powerful periphery each exercising a shared "sovereignty" over discrete tasks. Given the path-breaking notion of "shared sovereignty," virtually no theories existed to guide

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vated violence). *See also* Printz v. United States, 521 U.S. 898 (1997) (invalidating under 10th Amendment Congressional imposition of duty on local enforcement officials to conduct background checks before gun purchases); Alden v. Maine, 527 U.S. 706 (1999) (invalidating under 11th Amendment effort by private parties to enforce federal minimum wage law in non-consenting state court).

118. *See* Ronald L. Watts, *Federalism, Federal Political Systems, and Federations*, 1 ANN. REV. OF POL. SCI. 117 (1998).

119. The highly centralized British approach drove the dispute over "taxation without representation" that eventually led to the America Revolution. British political theory could not imagine colonial parliaments exercising an autonomous power to tax and refused to grant the colonists representation in the British Parliament. *See* Department of State, Office of the Historian, *Parliamentary Taxation of the Colonies, International Trade, and the American Revolution, 1763-1775*, www.history.state.gov./milestones/1750-1775/parliamentary-taxation [https://perma.cc/QB5M-MYTK].

120. SHAPIRO, *supra* note 115 (citing H.J Powell, *The Modern Misunderstanding of Original Intent*, 54 U. Chi. L. Rev. 1513, 1524-26 (1987)).

hard allocative choices. Pre-Revolutionary disputes about federalism in an autocracy provided only limited guidance. Choosing between two competing sets of autocrats turns on relative efficiency, force, control of riches, and maintenance of stability. But post-American Revolutionary democracy-based federalism asks, in addition, which political majority, local, state, or national, *ought* to have the final say on a given political issue.

Not surprisingly, unlike the first two structural innovations – separation of powers and enforceable individual rights – the First Founders did not develop a general theory of shared sovereignty, in large part because profound disagreements over slavery precluded a consensus on where ultimate sovereignty should reside in the new nation. Slave-owning interests and a few New England High Federalists argued that ultimate sovereignty resided in the states.[121] Mercantile leaders and abolitionists centered it in the nation.[122] Pragmatists, like Madison and John Marshall sought to split the atom of sovereignty by vesting sovereignty over discrete tasks in both the states and the nation, without asking questions about where ultimate sovereignty resided. Ambiguity reigned.

The pre-Civil War Republican Party's approach to federalism (and slavery), espoused by Abraham Lincoln, was similarly ambiguous, vesting sovereign power in the states to decide whether to abolish slavery within their respective borders but recognizing sovereign power in the nation to prevent the spread of slavery to the territories.[123] The ambiguity surrounding federalism inherent in the First

121. *See* The Resolutions of Virginia and Kentucky, *supra* note 30 for the federalism position of slave-owners; Mark Janis, *The Hartford Convention and the Specter of Secession*, UCONN TODAY (Dec. 15, 2014), www.today.uconn.edu/2014/12/the-hartford-convention-and-the-specter-of-secession/#[https://perma.cc/BA76-VWNR].

122. Hamilton's mercantile-centered views on federalism are set out in THE FEDERALIST NO. 17 (Alexander Hamilton). Frederick Douglass' abolitionist views are discussed in Paul Finkelman, *Frederick Douglass's Constitution: From Garrisonian Abolitionist to Lincoln Republican,* 81 MO. L. REV. 1 (2016).

123. The pre-Civil War Republican Party's program of barring slavery from the territories but conceding its perpetuation to the Southern states would have left the vast bulk of enslaved persons in indefinite bondage. The Republican's hope that slavery would wither away once it was surrounded by a cordon of freedom overlooked the staying power of the vast Southern economic engine driven by cotton and rice plantations dependent on slave labor. For a description of the Republican position, *see* ERIC FONER, THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY (2010). In a desperate bid to avoid secession and Civil War, the newly elected Lincoln appeared to support a proposed 13th Amendment (the Corwin Amendment) in 1861 that would have granted an unamendable power to the states to perpetuate slavery. The Amendment was enacted by both Houses of Congress and was on its way to the states for ratification when war broke out at Fort

Founding was resolved by a bloody Civil War. In the wake of the defeat of secessionist, pro-slavery forces, the "Second Founders" – political leaders like Frederick Douglas, Thaddeus Stevens, Edwin Stanton, Johnathan Bingham, and Ulysses S. Grant – tinkered with increasing Executive power[124] and made a disastrously bad bet on judicial power to enforce the 14th and 15th Amendments;[125] but did not fundamentally alter the First Founders' structural vision of separation of powers and judicial review. Indeed, they doubled down on it, and lost.[126]

It was the first Founders' third structural innovation – concurrent federalism – that was most dramatically altered by the Second Founding. Just as the first Founders had tweaked Locke's vision of separation of powers to move towards Montesquieu, the Second Founders trashed John Calhoun's idea of indivisible 'sovereignty' rooted in the states.[127] In its place, they forged a new vision of fed-

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Sumpter. Secession may have spared Lincoln from being remembered as the 19th century version of Neville Chamberlain. *See* BRUCE CATTON, THE COMING FURY 128, 197-98 (1961).

124. The exigencies of war and Reconstruction led Presidents Lincoln and Grant to assert broad Presidential power. Lincoln suspended the writ of *habeas corpus* and pressed Executive power to the limit in issuing the Emancipation Proclamation in 1863 and asserting broad power to try civilians in military tribunals. *See Ex parte* Milligan, 71 U.S. 2 (1866). President Grant exercised vigorous Executive authority in his successful campaign 1871-73 campaign against the Ku Klux Klan. *See* FONER, THE SECOND FOUNDING *supra* note 27.

125. The Second Founders dramatically increased the subject matter jurisdiction of the federal courts. In 1875, they activated "arising under" general federal question for the first time in the nation's history in the expectation that Article III courts would be a refuge for the newly emancipated seeking to enforce the promise of equality in the Reconstruction Amendments. They expanded federal habeas corpus jurisdiction and granted civil rights subject matter jurisdiction and remedial authority to federal courts to assure protection of the newly minted equality rights of the weak. Unfortunately, late 19th century American judges were not equal to the task. Reconstruction-era legislation enhancing the pes of the federal courts is described in RICHARD H. FALLON JR. ET AL. HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (7thed., 2015).

126. The keystone of the Reconstruction program was the enunciation of new equality-based legal rights, both constitutional and statutory, and the grant of jurisdiction and remedial power to life-tenured federal judges to enforce the fragile rights. Thus, the Second Founders placed all their chips on the willingness of the Article III judiciary to play the counter-majoritarian role carved out for it by Chief Justice John Marshall in *Marbury*. The bet was a spectacular and tragic failure, with the Article III judiciary collapsing under the weight of majoritarian racism. Courts played a counter-majoritarian role all right under the 14th Amendment. But the beneficiaries were corporate America, not freedmen and women.

127. Calhoun had drawn on Madison and Jefferson's Resolutions of Virginia and Kentucky to build a full-blown theory of indivisible state sovereignty justifying secession in defense of slavery. For more on Calhoun's position *see supra* note 30.

eralism that moved towards Frederick Douglass' vision of indivisible "sovereignty" rooted in the national government, at least where protection of equality was concerned. But, once national protection of equality was provided for, the Second Founders recognized state authority over "police power" functions not directly related to the protection of equality. In short, with slavery off the table, the second Founders adopted a modified version of Lincoln's pre-Civil War idea of shared sovereignty – substituting national protection of equality for national prevention of the spread of slavery; but preserving substantial state sovereignty over traditional local concerns.[128]

As the first Justice Harlan realized, a principal jurisprudential issue raised by the (now, long overdue) recognition of a "Second Founding" worthy of serious attention and respect is how we should read a complex, chronologically unfolding document like the 1787 Constitution and its 26 (or 27) Amendments,[129] written over time by successive generations formally manifesting the popular will and codifying it as constitutional text. The answer is easy in settings where: (1) a later text explicitly repeals an earlier text, like the repeal of Prohibition;[130] or where (2) a later text collides with and supersedes an earlier provision.[131] In those settings, the last in time

128. For a description of the Republican Party's pre-Civil War vision of shared federalism see, FONER, THE SECOND FOUNDING, *supra* at note 28.

129. U.S. CONST. amend. XXVII. A 27th Amendment was ratified on May 5, 1992, barring a sitting Congress from raising its own pay without an intervening election. Its legal status is complicated by the fact that it was initially submitted to the states under Article V in on September 25, 1789. Whether the 27th Amendment expired at some point during its ratification Odyssey of 202 years, 7 months, and 10 days is an open question. The next longest ratification period – for the 23rd Amendment, allowing residents of the District of Columbia to vote in Presidential elections, lasted three years and 343 days.

130. The 21st Amendment explicitly repeals the 18th. U.S. CONST. amend. XXI, § 1; U.S. CONST. amend. XVIII, § 1 (repealed 1933). The 12th Amendment re-writes the provisions of Article II describing the balloting of the Electoral College for President and Vice President. U.S. CONST. amend. XII. The 13th Amendment obliterates the Fugitive Slave Clause. U.S. CONST. amend. XIII; U.S. CONST. art. IV, § 2, cl. 3. Section 2 of the 14th Amendment obliterates the Three-Fifths Compromise. U.S. CONST. amend. XIV, § 2; U.S. CONST. art. I, § 2, cl. 3. The unamendable constitutional right to import slaves in Article 1, Section9 expired in 1808. U.S. CONST. art. 1, § 9, cl. 1.

131. The "birthright citizenship" provisions of the 14th Amendment supersede the ugly vision of white-only constitutional citizenship set forth in *Scott v. Sandford*, 60 U.S. 393 (1857). The 16th Amendment's grant of power to Congress to levy taxes supersedes the ban on unapportioned income taxes recognized in *Pollock v. Farmers' Loan & Tr. Co.,* 157 U.S 429 (1895). The 11th Amendment supersedes the vision of waiver of state sovereign immunity effected by Article III,

clearly governs. But where, as with aspects of the Second Founding's treatment of federalism, the structural visions of federalism underlying several chronological layers of constitutional text differ dramatically but do not formally collide, I believe that appropriate weight should, if possible, be given to each successive founding generation's constitutional vision.[132] I call such an effort to use originalist analysis to serve at least two historical masters "blended originalism."

The closest example of such a layered interpretive process is the Court's tortured effort to interpret the 11th Amendment. As we've seen, the 11th Amendment sought to overturn Chief Justice John Jay's opinion in *Chisholm v. Georgia* that the states, by deciding to join the Union, had impliedly waived their sovereign immunity defense against suits in federal court. Despite the 11th Amendment, the current Supreme Court continues to apply aspects of Jay's reasoning, recognizing that the 11th Amendment does not bar the exercise of appellate jurisdiction by the Supreme Court over criminal appeals from state courts,[133] or block suits by the United States or another state against a state in federal court.[134] Until recently, the Court recognized, as well, that states had waived sovereign immunity defenses to suits in each other's state's courts.[135] The Court has also denied an 11th Amendment defense to local government entities, even though their political power rests solely

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section 2 embraced by the Supreme Court in *Chisholm v. Georgia*, 2 U.S. 419 (1793); but Section 5 of the 14th Amendment authorizes Congress to override 11th Amendment immunity. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). Since the 11th Amendment is later in time than the Article 1, section 8 Commerce Clause, the current Court refuses to permit Congress to supersede the 11th Amendment pursuant to legislation enacted under the Commerce Clause. Seminole Tribe v. Florida, 517 U.S. 44 (1995) (reversing the plurality opinion in *Pennsylvania v. Union Gas Co.,* 491 U.S. 1 (1989)).

132. As the first Justice Harlan noted in his dissent in the *Civil Rights Cases*, the great flaw in the Supreme Court's late 19th and early 20th century federalism jurisprudence was a failure to acknowledge the impact of the "Second Founding" on the vision of federalism permeating the "First Founding." A similar failure by the current Court to acknowledge the change in constitutional structure effected by an equality driven Second Founding is at the heart of several deeply unfortunate decisions by the current Court severely circumscribing the explicit grant to Congress of power to enforce the 14th and 15th Amendments. *See* City of Boerne v. Flores, 521 U.S. 507 (1997); United States v. Morrison, 529 U.S. 598 (2000; Shelby County v. Holder, 570 U.S. 529 (2013); Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021).

133. Cohens v. Virginia, 19 U.S. 264 (1821).

134. Principality of Monaco v. Mississippi, 292 U.S. 313, 329 (1934).

135. Nevada v. Hall, 440 U.S. 410 (1979), rev'd, Franchise Tax Board v. Hyatt, 139 S. Ct. 1485 (2019).

on delegation from protected state governments.[136] And, in *Ex Parte Young*[137] and *Home Telephone and Telegraph v. City of Los Angeles,*[138] the Court twisted and turned to rule that the while the Attorney General of Ohio was not a state actor for the purpose of 11th Amendment immunity from suits seeking injunctive relief against efforts to enforce allegedly unconstitutional state law, Los Angeles city officials seeking to enforce the law were state actors for the purposes of Section 1 of the 14th Amendment. Finally, in *Fitzpatrick v. Bitzer*,[139] in a rare recognition of the importance of Section 5 of the 14th Amendment, the Court ruled that Congress could supersede a state's 11th Amendment immunity, but only if it acted pursuant to Section 5 of the 14th Amendment. For 30 years the Court had ruled, as well, that Congress could override 11th Amendment immunity by enacting legislation under the Commerce Clause. Then, in *Seminole Tribe*[140] , the Court retracted its Commerce Clause override, but reaffirmed Congress's power to override the 11th Amendment with legislation premised on Section 5 of the 14th Amendment, presumably because the 14th is later in time than the 11th.

It borders on *hubris* to pretend to make sense out of the Court's gnarled 11th Amendment jurisprudence, but there appears to be a recognition that, regardless of its limited text, the 11th Amendment froze aspects of state sovereign immunity in its pre-*Chisholm* state, subject to alteration and override by post-11th Amendment activity under the 14th Amendment. In short, a recognition that the last-in-time constitutional event can require reassessment of all that went before, even in the absence of an explicit conflict. That's exactly how I believe that the Reconstruction Amendments should be read—imposing retroactive effects on the entire document, including the First Founders' conception of federalism.

Thus, when the enjoyment of a substantive constitutional right rooted in equality is in play in federalism cases like *United States v. Morrison*,[141] and *Shelby County v. Holder* [142] we should recognize that the Second Founders adopted James Madison's vision of federalism and separation of powers as a "double security" against government

136. Lincoln Cnty v. Luning, 133 U.S. 529 (1890)
137. 209 U.S. 123 (1908)
138. 227 U.S. 278 (1913)
139. 427 U.S. 445.
140. 517 U.S. 44, 76 (1996).
141. 529 U.S. 598 (2000).
142. Shelby Cnty. v. Holder, 570 U.S. 529 (2013).

overreaching.[143] According to Madison, when one federalism partner becomes tone deaf to a constitutional right, it should be possible for an affected person to seek more effective protection of the right in the partner polity.[144] While Madison, writing in 1788, was discussing structural protection of rights rooted in individual autonomy,[145] his "double security" reasoning is even more salient when applied to protecting rights rooted in equality, the luminous prime value added to the Constitution by the Second Founding.[146]

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143. In THE FEDERALIST NO. 51, at 67 (James Madison) (Lester DeKoster, ed., 1976), Madison wrote:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allocated *allotted* to each is subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

144. Current examples of Madison's shared-power vision of federalism are: (1) the power of state courts to construe state constitutions more broadly than the federal constitution, allowing potential victims to seek heightened state or local constitutional protection; (2) the "incorporation" of the Bill of Rights against the states, allowing potential victims to appeal from state or local oppressive regulation to a more protective national standard; (3) the presumption of concurrent legislative power, permitting autonomous state and local regulation of commercial activity in the absence of Congressional pre-emption; (4) the doctrine of implied preemption allowing over-regulated entities to appeal to a less intrusive national standard; and (5) the doctrine of express preemption allowing Congress to impose a single national standard in place of a race to the bottom by each state. Taken to its extreme, of course, Madison's shared-power vision morphs into his theory of state power to "nullify" allegedly unconstitutional federal actions set forth in 1798 in the Resolutions of Virginia and Kentucky. See *supra* note 31.

145. Madison's approach to federalism was, to be generous, highly flexible. *Compare* THE FEDERALIST NO. 10 (James Madison and Alexander Hamilton) *with* THE FEDERALIST NO. 51 (James Madison). Madison argues in both Federalist 10 and 51 that larger political units, like the national government, are less likely to be captured by "factions," while also implying in Federalist 10 that smaller units are more responsive to the people. After championing a strong national government at the Constitutional Convention, Madison joined with Jefferson in 1798 in drafting The Resolutions of Virginia and Kentucky asserting state power to "nullify" federal laws on constitutional grounds. *See* supra note 31. For Madison's views on federalism, see LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON & THE FOUNDING OF THE FEDERAL REPUBLIC (1995).

146. While it is well beyond the scope of this brief essay, I believe that much of our constitutional heritage since the Civil War can be viewed through the lens of the interplay between autonomy and equality as prime constitutional values. Every Supreme Court Justice in the modern era has professed to believe in both; but in settings where the two prime values are in tension with one another, as in campaign finance regulation, affirmative action, and religious freedom conservative Justices have tended to favor legal doctrine advancing the First Founders' protection of autonomy, while liberal Justices have tended to adopt legal positions ad-

Sadly, the Supreme Court's failure, beginning in 1873 with the *Slaughterhouse Cases* and continuing to the present day, to integrate the voices of the Second Founding into its reading of federalism concepts dating from the First Founding has badly eroded the Second Founders' equality-driven federalism edifice. Except for a single extraordinary case, *Jones v. Alfred H. Mayer Co.*,[147] the Court has failed to read Sections 1 and 2 of the 13th Amendment[148] as a broad authorization to Congress to eliminate the "badges and incidents" of slavery, as well as the institution of slavery itself. Although the road is officially open, no Supreme Court opinion in the more than 50 years since *Alfred H. Mayer* has sought to buttress Congressional power to take on the lingering consequences of centuries of enslavement by arguing for a broad power to legislate against racial subordination as a continuing badge and incident of slavery.[149] As we've seen, in 1873, in the *Slaughterhouse Cases*,[150] the Supreme Court gutted the centerpiece of the 14th Amendment's protection of newly emancipated citizens against hostile state behavior by giving a microscopic reading to the 14th Amendment's "privileges and immunities" clause. The 19th century Court then invalidated the Second Founders' effort to protect against racially motivated lynching[151] and proceeded to dismantle Congress's effort to protect equal access to public accommodations.[152] In *Plessy v. Ferguson*, the Court read section 1 of the 14th Amendment narrowly and upheld racial segregation, rejecting the argument that "separate but equal" laws constituted a badge or incident of slavery. In 1903, the Court announced itself incapable of protecting the right of Black citizens to vote.[153]

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vancing the Second Founders' embrace of equality. I discuss the dynamic in BURT NEUBORNE, WHEN AT TIMES THE MOB IS SWAYED (2019).

147. 392 U.S. 409 (1968) (upholding the equal housing guaranty in the Civil Rights Act of 1866).

148. The 13th Amendment provides in relevant part:

Sec 1 "Neither slavery nor involuntary servitude . . . shall exist within the United States . . . ." U.S. CONST. amend. XIII, § 1.

Sec 2 "Congress shall have power to enforce this article by appropriate legislation." *Id.* at § 2.

149. *See* James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426 (2018); James Oakes, *The Only Effectual Way": The Congressional Origins of the Thirteenth Amendment*, 15 GEO J. L. & PUB. POL'Y. 115 (2017).

150. 83 U.S. at 124.

151. United States v. Cruikshank, 92 U.S. 542 (1875)

152. *The Civil Rights Cases*, 109 U.S. 3, 25-26 (1883)

153. Giles v. Harris, 189 U.S. 475 (1903).

The modern Court has continually construed Section 1 of the 14th Amendment narrowly to require proof of intentional discrimination as opposed to knowing disparate impact[154] and to require affirmative behavior by a state actor instead of a failure to protect against private assaults on equality.[155] Finally, the modern Court has insisted on tethering Congress's Section 5 enforcement power to violations of Section 1, tolerating only limited efforts at prophylactic protections of equality that go beyond behavior already deemed illegal under section 1.

Such a weary litany of federalism-based limits on the protection of equality could not survive a reconsideration where the voices of the Second Founders were respected; not ignored.

CONCLUSION

As we gain a deeper historical understanding of the moral decency and intellectual brilliance of the equality-driven work of the Second Founders, I hope that the Supreme Court will display the wisdom and courage needed to take a fresh look at its disappointing jurisprudence that has wrongfully ignored the Second Founders' vision of federalism as a structural protection of equality. I dream of a day when the Supreme Court venerates all our Founders – Washington, Jefferson, and Madison, born to plantation privilege; Hamilton, born to provincial want; Lincoln, born to rural poverty; Frederick Douglass, born a slave; and Susan B. Anthony, born a woman. We owe them – each of them - gratitude for the remarkable, untidy mix of democracy, autonomy and equality that is our constitutional birthright; and the earned respect of listening to their voices – all their voices - in reading the constitutional text.

154. *See e.g.*, Washington v. Davis, 426 U.S. 229 (1976) ((imposing intent requirement on 14th Amendment Equal Protection Clause); City of Mobile v. Bolden, 446 U.S. 55 (1980) (imposing intent requirement on 15th Amendment right to vote free of racial discrimination).

155. United States v. Harris, 106 U.S. 629 (1883).