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# Original Intent and the Fourteenth Amendment: Into the Black Hole of Constitutional Law

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# ORIGINAL INTENT AND THE FOURTEENTH AMENDMENT: INTO THE BLACK HOLE OF CONSTITUTIONAL LAW

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The legal history of the Fourteenth Amendment is something of a constitutional black hole. Scholars are drawn to this galactic force of constitutional law, pulled into the virtually endless debates over its meaning and the original intent of its framers.[1] This seemingly irresistible force of (constitutional) nature lured Bill Nelson into writing his book on the Fourteenth Amendment.[2] This article explores some of the ways that Nelson's book illuminates our understanding of the Amendment and ways that we might further explore the Supreme Court's failure to follow through on the general intent and the basic goals of the Amendment's framers.

In Part I of this article, I examine the general problem of understanding the history of the Fourteenth Amendment, noting the difficulties of determining the "intent" of this complicated and complex Amendment. In Part II of this article, I examine the legislative debates and the important research presented in Nelson's book. In Part III, I turn to Nelson's discussion of how the late nineteenth century Supreme Court interpreted the Fourteenth Amendment in economic cases and civil rights cases. Here, and in Part IV of this article, I suggest that Nelson ought to have looked more closely at the way the race cases actually affected African Americans. In Part V, I argue that the Court was deeply disingenuous in this period and was intellectually inconsistent and dishonest in its approach to race cases. The Court ignored its own economic analysis when dealing with race cases, rejected the plain meaning and intent of the framers on many issues involving race, and looked the other way as Southern states made war on civil

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1. I plead guilty to this temptation as well. *See* Paul Finkelman, *The Historical Context of the Fourteenth Amendment,* 13 TEMP. POL. & CIVIL RTS L. REV. 389-409 (2004) [hereinafter Finkelman, *Historical Context*]; Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment,* 36 AKRON L. REV. 671-692 (2003) [hereinafter Finkelman, *John Bingham*]; Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415 (1986) [hereinafter Finkelman, *Prelude to the Fourteenth Amendment*].

2. WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988).

rights and the liberties of former slaves and their descendants. Finally, in Part VI, I argue that the Court did not have to take this direction, and at the very time the Court's majority supported segregation, most northern states passed laws to protect civil rights. This forgotten history of northern civil rights legislation suggests that there was significant support in the nation for rejecting segregation in favor of equality.

## I. THE FOURTEENTH AMENDMENT'S COMPLICATED STRUCTURE

Scholars, lawyers, and jurists interrogate the history, origin, and debates over the passage and ratification of the Fourteenth Amendment. It is in the end a frustrating and not particularly easy task for many reasons. The first interpretative problem with the Fourteenth Amendment is its size.

The Amendment, passed by Congress in 1866 and ratified in 1868, is the longest addition to the Constitution and the only one that is devoted to more than one subject. Indeed, part of the difficulty in interpreting and understanding the Amendment stems from the large number of subjects it covers.[3] The Amendment has five sections, all dealing with separate issues. Complicating an understanding of the Amendment is the different empha-

3. The full text of the Amendment is:

> 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.
>
> 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.
>
> 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.
>
> 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST., amend. XIV.

ses that Congress placed on these provisions. Most of the Congressional debate focused on Sections 2, 3, and 4 of the Amendment,[4] as Congress tried to figure out how to prevent former Confederates from regaining political power in the South and the nation, which would enable them to oppress former slaves and white unionists.[5] As one of the most recent books on the Amendment notes, "[T]he debates did not focus primarily on Section 1, which today is *the* Fourteenth Amendment."[6] Rather, most of the debates were "on Sections 2 and 3, which dealt respectively with Negro suffrage and apportionment and with the exclusion of rebel leaders from office."[7] The Congress focused on these issues because the victorious northerners who dominated Congress wanted to avoid the ironic result of the Civil War that the end of slavery meant the southern states would have *more* representation in Congress than they had had before the War. Before the War, the South's slave population had been counted for representation and in the electoral college under the three-fifths clause of the Constitution.[8] But after the War, the former slaves would be counted as whole persons, which would increase the South's power in national politics. If blacks voted, then this change would have been a legitimate and meaningful outcome of the War. But before the adoptions of the Fourteenth and Fifteenth Amendments,[9] the regulation of voting was left entirely up to the states. Thus, the drafters of the Fourteenth Amendment tried to force the former slave states to enfranchise blacks on the same basis as whites by threatening to reduce their representation in Congress if blacks were not allowed to vote.[10] Nelson's careful history of the drafting of the Amendment and the debates over black enfranchisement[11] shows how cumbersome and ineffective the Fourteenth Amendment solution was.

Congress similarly spent considerable energy trying to prevent former Confederates from regaining political power, although in the end, as Nelson shows, the results were relatively limited.[12] Nelson barely mentions

4. JAMES E. BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT 7-10 (1997).

5. NELSON, *supra* note 2, at 46-48.

6. BOND, *supra* note 4, at 8-9.

7. *Id.*

8. U.S. CONST. art. I, § 2, cl. 3. For a discussion of this history of this clause, see PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON ch. 1 (3d ed., 2014). On the application of this clause to the electoral college, see Paul Finkelman, *The Proslavery Origins of the Electoral College,* 23 CARDOZO L. REV. 1145 (2002).

9. U.S. CONST. amend. XV (prohibiting discrimination in voting on the basis of race, color, or previous condition of servitude).

10. U.S. CONST. amend. XIV, § 2.

11. NELSON, *supra* note 2, at 46-58, 98-100.

12. *Id.* at 47-49.

Section 4 of the Amendment, dealing with the repudiation of Confederate debt and the promise that any legally authorized debt of the United States "shall not be questioned." This is not a criticism of his book, since there has been very little litigation over this section. Ironically, this clause reemerged as an important constitutional provision in 2013 when the government was forced to shut down because of the refusal of the Republican majority in the House of Representatives to extend the debt ceiling of the national government. At this time there were public discussions of whether Congress could repudiate existing federal debt or whether the United States could default on its debt.

While Congress spent a great deal of energy on Sections 2, 3, and 4 of the Amendment, most of the jurisprudence over the Amendment has revolved around on Section 1, dealing with citizenship, fundamental rights, due process, and equal protection, and the power of Congress to enforce Section 1, which is found in Section 5.[13] These clauses have led to almost all civil rights litigation and all cases incorporating the Bill of Rights to the states.

The first section is the most important substantive part of the Amendment for modern scholars and jurists. "Federal constitutional adjudication since Reconstruction can be viewed in large part as commentary on these amendments, in particular the Fourteenth."[14] The section deals with citizenship, privileges and immunities, due process, and equal protection. This section of the Amendment is the basis of most civil rights legislation and litigation in the nation and all Supreme Court decisions focusing on the application of the Bill of Rights to the states and modern civil liberties cases involving state law. Many modern cases dealing with civil rights, civil liberties, and criminal justice in the states are based on this section of the Amendment. Section 1 of the Amendment is also tied to Section 5, which empowers Congress to "enforce by appropriate legislation, the provisions of this article."

While these two sections are at the heart of modern Fourteenth Amendment litigation and of modern scholarly debates over the meaning of the Amendment, the Congress in 1866 devoted comparatively little time and energy to this clause when debating the Amendment.[15] As noted above, most of the debates in Congress were about the other sections of the

13. BOND, NO EASY WALK, *supra* note 4, at 8-9.

14. John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Law*, 3 ASIAN AM. L.J. 55, 61 (1996) (citing NELSON, *supra* note 2).

15. BOND, *supra* note 4, at 8-9.

Amendment, dealing with post-Civil War representation,[16] the disfranchisement of former Confederate leaders,[17] and post-Civil War debt.[18]

Most Fourteenth Amendment litigation has centered on just two parts of Section 1 of the Amendment: the Due Process Clause[19] and the Equal Protection Clause.[20] In part this is because in *The Slaughterhouse Cases*[21] the Supreme Court completely eviscerated the meaning and potential of the Privileges and Immunities Clause of the new amendment, refusing to use it to apply most of the protections of the Bill of Rights to the states.[22] Thus, starting in the 1920s[23] the Court has used the Due Process Clause to apply most, but not all,[24] of the provisions in the Bill of Rights to the states through the arcane and almost incomprehensible doctrine of "incorporation." Under the incorporation doctrine the Court has held that most of the Bill of Rights also limits the states because the liberties found in the Bill of Rights are "incorporated" in the term (or concept of) "liberty" found in the Due Process Clause of Section 1 of the Amendment. Thus, the Due Process Clause prevents the states from abridging most of the liberties found in the Bill of Rights.[25] The Due Process Clause has also been used to strike down state economic regulations, on the grounds that these regulations interfere with the "liberty" of contract, which the Court has also found to be protected by the Amendment.[26] Similarly, the Court has often used the Due Process Clause to limit state economic regulations on the grounds that they deprive people of their "property," which is also protected by the Clause.

Nelson's book, which is at the heart of this article, provides enormously useful information for understanding how Section 1 was written and the motivations behind those who wrote it. The first two thirds of the book cover those subjects, and the last third of the book is devoted to an analysis

16. U.S. CONST. amend. XIV, § 2.

17. U.S. CONST. amend. XIV, § 3.

18. U.S. CONST. amend. XIV, § 4.

19. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").

20. *Id.* ("[N]or deny to any person within its jurisdiction the equal protection of the law.").

21. Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., 83 U.S. 36 (1873).

22. See *infra* Part III (discussing the *Slaughterhouse Cases*).

23. *See* Gitlow v New York, 268 U.S. 652 (1925); Whitney v. California, 274 U.S. 357 (1927).

24. For example, the Court has never incorporated the Seventh Amendment (civil juries). Similarly, by allowing the states to have non-unanimous juries or juries of fewer than twelve people, the Court has not fully incorporated the right to a jury in a criminal trial to the states. The Court has never applied the Third Amendment to the states or for that matter had a case involving the Third Amendment.

25. *See Gitlow*, 268 U.S. at 666.

26. Allgeyer v, Louisiana, 165 U.S. 578 (1897); Lochner v. New York, 198 U.S. 45 (1905); Coppage v, Kansas, 236 U.S. 1 (1915).

of the judicial doctrine that developed around the Amendment in the first four decades or so after its ratification.

The last third of Nelson's book is less satisfactory than Nelson's path breaking research and important analysis of the debates leading to the Amendment earlier in the book. In the end, Nelson does not confront the Court's racism and cynical rejection of liberty in the late nineteenth century, and the serious damage the Court did to American civil liberties and civil rights. Nelson explains what the Court did, but in a narrowly legalistic and doctrinal way. He tells us how the Court created its doctrine but does not explain why the Court took the direction it did. Moreover, in the end I think he is far too kind to the way the Court treated race in this period. Nelson's analysis parses doctrine without explaining the horrors that resulted from the doctrine. Nor does the book explain that the Court need not have taken the route it took in supporting segregation and racism for about half a century after the end of Reconstruction.

## II. LEGISLATIVE DEBATES OVER THE FOURTEENTH AMENDMENT

Let me start by noting that Nelson's book is one of the best—if not *the* best—explorations of the debates over the Fourteenth Amendment in Congress, in the state legislatures, and in the post-Civil War legal community. His research of the drafting of the Amendment, and his analysis of the many changes the wording went through, is the best available. He offers coherent and plausible explanations of why the wording changes were made. But as a careful historian he also notes that there are no certain explanations for all the wording changes. He devotes the first two thirds of this book to these issues. This research and his analysis stand up extraordinarily well. Nelson teaches us that there are some very clear meanings to the intentions of those who wrote the Amendment on some issues but also some rather uncertain meanings for other issues. He deftly explores the many complicated goals and intentions of the framers.

For example, Nelson demonstrates that senators and representatives who came from an abolitionist or antislavery background, as well as more conservative Republicans who were less hostile to slavery, almost unanimously agreed on some goals of the Amendment such as black citizenship and the need to protect fundamental civil liberties from overreaching or oppressive state governments. The majority of Republicans unhesitatingly agreed on birthright citizenship for people born in the United States. The minority on this issue (such as most West Coast Republicans) were hostile to citizenship for the American-born children of Chinese immigrants. But when they lost on this issue, most of them nevertheless supported the entire

Amendment.[27] However, on other issues, such as black enfranchisement, Republicans differed.[28] Virtually all the Republicans in Congress and in the state legislatures that ratified the Amendment understood that they were securing citizenship for all people born in the United States, including all former slaves born before the Amendment's adoption.[29] The majority of the Republicans favored a broad notion of citizenship, as illustrated by the arguments Pennsylvania Senator Simon Cameron made in 1869, after he returned to the Senate following his service as Secretary of War and U.S. Ambassador to Russia during the Civil War. Cameron argued that citizenship and equal voting rights "invites into our country everybody; the negro, the Irishman, the German, the Frenchman, the Scotchman, the Englishman, and the Chinaman."[30] Most west coast Republicans did not want the Amendment to confer citizenship for the children of Chinese immigrants. California Congressman William Higby argued that the Chinese were "a pagan race"[31] incapable of being citizens. Nevertheless, he voted for the amendment,[32] as did every other California and Oregon Republican, know-

27. One exception was Senator Edgar Cowan who spoke out against Chinese immigration and was one of the few Republicans to vote against the Amendment. Cowan was not reelected after his one term in the Senate, and left the party to serve in the administration of Andrew Johnson. He was replaced by Simon Cameron who openly and enthusiastically supported an expansion of rights for people of all races. While not in the Senate during the debates over the Amendment, Cameron exemplifies the Republican push for equal rights for all people in the nation.

28. NELSON, *supra* note 2, at 87.

29. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

30. Cameron quoted in NELSON, THE FOURTEENTH AMENDMENT, *supra* note 2, at 87. Oddly and inexplicably, Nelson uses this quotation from Cameron to show support for the implied expansion of the franchise in the Fourteenth Amendment, even though the speech was made after the Amendment had been ratified.

31. Most of the west coast members of the House and Senate were unabashed in their anti-Chinese positions. Consider the speech by Rep. William Higby of California:

> The Chinese are nothing but a pagan race. They are an enigma to me, although I have lived among them for fifteen years. You cannot make good citizens of them; they do not learn the language of the country; and you can communicate with them only with the greatest difficulty, as their language is the most difficult of all those spoken; they even dig up their dead while decaying in their graves, strip the putrid flesh from the bones, and transport the bones back to China. They bring their clay and wooden gods with them to this country, and as we are a free and tolerant people, we permit them to bow down and worship them.
>
> Sir, they do not propagate in our country. A generation is not growing up in the State, except an insignificant few in comparison with the great number among us. Judging from the daily exhibition in our streets, and the well established repute among their females, virtue is an exception to the general rule. They buy and sell their women like cattle, and the trade is mostly for the purpose of prostitution. That is their character. You cannot make citizens of them.

Cong. Globe, 39th Cong., 1st Sess. 2756 (1866) quoted in John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Law*, 3 ASIAN L. J. 55, at 80 (1996).

32. Cong. Globe 39th Cong., 1st Sess. 3149 (June 13, 1866), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=073/llcg073.db&recNum=270.

ing that they had lost on this issue.[33] In effect, they understood clearly what they were voting for, even if they did not particularly like it.[34] Virtually all supporters of the Amendment agreed that it would protect the "civil rights" of blacks and everyone else,[35] but, as Nelson shows, they did not necessarily agree on the substantive content of civil rights, equal protection, or even due process.

Nelson also notes that during this time ideas, views, and understandings of equality were in constant flux. The changing nature of public and private views on race is illustrated by a constituent letter that ended up in the papers of Ohio's Senator John Sherman, a leader of the moderate wing of the Republican Party and the brother of the great war hero General William Tecumseh Sherman. This correspondent noted that his "*mind in the last few years has undergone some change in regard to the intellect of the negro. I find the negro child just as apt in learning their alphabet as the white and why not anything else*."[36] Thus, he was ready to accept equality of rights and even voting rights for blacks. This letter reflected the sentiments of many in the northern electorate and those who represented them in both houses of Congress.

Senator John Conness of California embodied the complexity of the debates, the changes taking place in the minds of members of Congress, and the uncertain meaning of the language of the Amendment. He began his political career as a Douglas Democrat, and as such he opposed antislavery Republicans and was unsympathetic to racial equality. Almost all white Californians were deeply hostile to civil rights protections or citizenship for Chinese immigrants or their American-born children. When he entered politics, Conness doubtless reflected the views of his constituents

33. *Id.* Indicating the Representatives Donald C. McRuer, William Higby, and John Bidwell of California, and James Henry Dickey Henderson of Oregon all voted yes on the Amendment, even though it failed to exclude Chinese-Americans from birthright citizenship. The Republican Senator from Oregon, George Henry Williams, and the Republican from California, John Conness, voted yes. The Democrat from Oregon, James W. Nesmith was absent and the Democrat from California, James A. McDougall voted no. Cong. Globe, 39th Cong., 1st Sess. 3042 (June 8, 1866). Nelson mistakenly asserts that Oregon had two Republican Senators, and one was Henry W. Corbett (NELSON, THE FOURTEENTH AMENDMENT, *supra* note 2, at 102) and quotes a speech by Corbett. But that speech is from 1869, after the Fourteenth Amendment had been ratified. Corbett was not in the Senate in 1866.

34. The one exception to this was California Republican Senator John Conness. Nelson quotes Senator John Conness of California declaring his support for citizenship for the American-born children of Chinese immigrants. NELSON, *supra* note 2, at 114. Conness was an Irish immigrant and, despite his racism toward Chinese (as indicated in the speech quoted below), he supported birthright citizenship for the children of immigrants. This position probably cost him his seat in the Senate and after his term expired he left politics and later moved to Boston.

35. NELSON, *supra* note 2, at 163.

36. NELSON, *supra* note 2, at 87 (quoting Letter of E.J. Petre to Mr. and Mrs. Hopley, January 25, 1866, which is in the papers of Senator John Sherman) (emphasis in the original). Petre sent this letter to the Hopleys, who in turn apparently sent it on to Senator Sherman.

on this issue. But, during the debates over the Fourteenth Amendment, he declared his support for the idea "that the children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States, entitled to equal civil rights with other citizens of the United States."[37] He urged his Senate colleagues to take "no further trouble on account of the Chinese in California or on the Pacific coast."[38] He asserted that California would be "able to take care of them and to provide against any evils that may flow from their presence among us."[39] He also said that Californians were "entirely ready to accept the provision proposed in this constitutional amendment, that the children born here of Mongolian parents shall be declared by the Constitution of the United States to be entitled to civil rights and to equal protection before the law with others."[40]

Despite Conness's strong endorsement of "equality," we have no idea what he believed would be the substantive rights afforded by the Amendment to the American-born children of Chinese immigrants, other than citizenship. He did not advocate changing the naturalization laws to allow Chinese immigrants to become citizens and his speech is racist and white supremacist in its tone. Nevertheless, Conness's speech, like much of Nelson's other evidence, shows both that concepts of rights and equality were in flux at this time, and that in general, they were becoming more expansive. Even though there were many general ideas about what such phrases as "equal protection" or "privileges and immunities" meant, no one completely described them, and no votes or reports asserted or defined what they meant. Nelson's scholarship underscores the context of the observation that John Bingham, the primary author of Section 1 of the Fourteenth Amendment, liked the term "privileges and immunities" because its "euphony and indefiniteness of meaning were a charm to him."[41] At the same time, he impressively shows that the authors of the Amendment and its leading supporters believed this clause would make what Bingham called the "immortal bill of rights" applicable to the states.[42] Similarly, as Nelson notes,

> Jacob Howard of Michigan, the floor manager of the amendment in the Senate, also contended that the privileges and immunities clause of section one comprehended "the personal rights guaranteed and secured by

37. *Id.* at 114 (quoting Senator Conness).

38. *Id.*

39. *Id.*

40. *Id.* These comments are almost certainly an exaggeration and it is unlikely that most white Californians embraced Chinese citizenship.

41. Quoted in MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863-1869, at 170 (1974).

42. Bingham quoted in NELSON, *supra* note 2, at 117.

> the first eight amendments of the Constitution, such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances . . . ."[43]

Nelson's book is quite different from the work of scholars who have tried to find a single, definitive understanding of the Fourteenth Amendment. Lawyers and judges have often used—or more likely misused—history to reach a certain conclusion without any regard for nuance, complexity, or even the very real possibility that there is no certainty about the intentions of those who wrote the Amendment. Those who think that history will offer them a Rosetta Stone to understand the Fourteenth Amendment[44] are unlikely to be successful in their quest. Some scholars and lawyers have sought a "true" and certain original meaning of the Amendment, often with a self-conscious political agenda to undermine integration, affirmative action, and even substantive racial fairness.[45] Such scholarship is usually narrowly focused, and often not very good.[46] It is law office history—designed to reach a predetermined outcome rather than to actually understand the past. Nelson's book, on the other hand, shows the complexity of the debates and the impossibility of answering many of the modern questions that swirl around the Fourteenth Amendment.[47] Even while ex-

43. NELSON, *supra* note 2, at 118-19. In the rest of the quotation, Howard summarized most of the other rights found in the Bill of Rights.

44. I have discussed this problem elsewhere, including Paul Finkelman, *The Historical Context of the Fourteenth Amendment*, *supra* note 1 and Brief of Paul Finkelman and 75 Other Historians and Scholars as Amici Curiae Supporting Respondents, Schuette v. Coalition to Defend Affirmative Action, 133 S. Ct 1633 (No. 12-682) [hereinafter Finkelman Brief].

45. RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); THE RECONSTRUCTION AMENDMENTS' DEBATES: THE LEGISLATIVE HISTORY AND CONTEMPORARY DEBATES IN CONGRESS ON THE 13TH, 14TH, AND 15TH AMENDMENTS (Alfred Avins ed., 1967).

46. Robert J. Cottrol, *Static History and Brittle Jurisprudence: Raoul Berger and the Problem of Constitutional Methodology*, 26 B.C. L. REV. 353 (1985); Finkelman, *Prelude to the Fourteenth Amendment*, *supra* note 1; *see also* Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349-98 (1989) (discussing the general problem of intentionalism).

47. In this context Nelson's sophisticated history reflects the wisdom of Chief Justice Earl Warren's conclusion in *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954) that it is really impossible to know the intentions of the framers of the Fourteenth Amendment with regard to the specific policy of integrated public schools because in 1866—when the amendment was written—there was not an elaborate public school system in the nation. After acknowledging the "exhaustive" work of attorneys on both sides of the case to find an answer to the questions posed in *Brown* in the debates over the Amendment, Chief Justice Warren concluded: "This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive." *Id.* at 489. Warren noted that there were virtually no public schools in the South before the Civil War or immediately after it, so that it is hard to know what the framers of the Amendment expected it would accomplish for a public school system that did not in fact exist. *Id.* at 489-90. Thus, speaking for a unanimous Court Warren declared: "we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation." *Id.* at 492-93. Had the historical knowledge of schooling, public education, and antebellum

amining the many competing arguments about the Amendment, Nelson demonstrates that there was substantial agreement on some of the goals and purposes of the Amendment, such as citizenship, property rights, fundamental civil liberties, and basic racial equality, even if there may not have been agreement on the details of what all these ideas meant.

## III. THE COURT, THE FOURTEENTH AMENDMENT, AND ECONOMIC ANALYSIS

Having demonstrated the substantial agreement among the framers and ratifiers of the Amendment on many issues and general goals of the Amendment, Nelson also shows that in the late nineteenth century, justices often ignored the plain meaning of much of the Amendment and also ignored the debates over these clauses even when the debates offered very clear guidance about the meaning (or some of the meaning) of a particular clause.[48] Nelson notes that in the Court's first interpretation of the Amendment, in the *Slaughterhouse Cases*[49] in 1873, "[b]oth of Justice Miller's approaches [in his opinion for the majority] for narrowing the reach of section one were flatly inconsistent with the history of its framing in Congress, and its ratification by the state legislatures."[50] Nelson correctly concludes that the arguments in Miller's majority opinion in the *Slaughterhouse Cases* "constituted clear instances of judicial lawmaking of which Justice Miller must have been quite aware."[51]

Nelson's discussion of how the Court interpreted the Fourteenth Amendment focuses on two quite different issues—economic regulations (usually of property and contract) and race. The constitutional history of

race relations been better understood, Warren might however have noted that in the state with the most sophisticated public school system, Massachusetts, segregation was in fact illegal. *See* Finkelman, *Prelude to the Fourteenth Amendment*, *supra* note 2, at 430. Warren might also have noted that some of the strongest supporters of full racial equality in the Fourteenth Amendment debates, such as Senator Charles Sumner, came from that state.

48. One area where this did not take place is in the citizenship clause. At the time of the adoption of the Fourteenth Amendment, naturalization was limited by statute to only white immigrants. Act of March 26, 1790, 1 Stat. 103 (establishing a uniform rule of naturalizations). In 1870, a new act allowed naturalization for people of African ancestry. Act of July 14, 1870, 16 Stat. 254 (amending the naturalization law and punishing crimes against the same). But at this time, immigrants from China and other parts of East Asia could not become naturalized citizens. Opponents of civil rights for Asians (including the officials of the United States) argued that the American-born children of Chinese immigrants were not full citizens despite the first sentence of the Fourteenth Amendment. However, in United States v. Wong Kim Ark, 169 U.S. 649 (1898), the Court correctly held that all people born in the United States (except the children of diplomats) are citizens of the United States.

49. Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., 83 U.S. 36 (1873).

50. NELSON, *supra* note 2, at 163.

51. *Id.*

these two issues both began with *The Slaughterhouse Cases* in 1873.[52] *Slaughterhouse* was ostensibly about economic rights. The issue before the Court, discussed in greater detail below, was whether Louisiana violated the Fourteenth Amendment by requiring the butchers in New Orleans to rent space in a single central slaughterhouse. The butchers, all of whom were white and many of whom were Confederate veterans, argued this law violated their privileges and immunities, which the new Amendment protected, because the law prevented them from engaging in their chosen profession where they wanted to do business, and required them to pay fees to use the central slaughterhouse. On its face, the case was not apparently about race, but the majority opinion discussed race at length. I will return to the issues of race that began with *Slaughterhouse* later in this article, after first discussing the economic issues of the Fourteenth Amendment and what Nelson teaches us about them.

The economic issues from *Slaughterhouse* focused on whether state economic regulations of property and contract violated the Privileges and Immunities Clause of the Fourteenth Amendment which the butchers claimed protected their economic interests.[53] Eventually the Court would constrict the power of the states to regulate economic activity only to laws that were necessary "for the public welfare,"[54] which the Court would very narrowly define.[55] This line of cases led the Court to allow some economic regulations to protect worker safety,[56] but at the same time the Court struck down numerous state and federal laws to protect the health and welfare of workers, to ban child labor, to protect the right of workers to fair contracts, and laws limiting hours for most workers or setting minimum wages. This line of case would reach its apex in the early twentieth century with such cases as *Lochner v. New York*[57] and *Coppage v. Kansas*.[58] Nelson points out that the Court rejected economic protections in *Slaughterhouse* and

52. 83 U.S. 36 (1873).

53. To put this line of cases and jurisprudence into historical perspective, see WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT LAW AND IDEOLOGY IN AMERICA, 1886-1937 (1998).

54. Holden v. Hardy, 169 U.S. 366 (1898), quoted in NELSON, *supra* note 2, at 198.

55. See, for example, *Lochner v. New York*, 198 U.S. 45 (1905), where the Court struck down a health and safety regulation limited the number of hours that bakers could work on the grounds that the regulation was "unreasonable."

56. See *Holden v. Hardy*, 169 U.S. 366 (1898), in which the Court upheld a state regulation of mine safety and *Muller v. Oregon*, 208 U.S. 412 (1908) upholding a state law limiting the number of hours that women would work in the laundry industry on the grounds that labor in this industry was particularly harmful to the health of women. These of course contrast with *Lochner v. New York*, 198 U.S. 45 (1905).

57. 198 U.S. 45 (1905).

58. 236 U.S. 1 (1915).

then came to accept them just few years later, agreeing that the Amendment "protected property and by implication other rights against infringement by the states,"[59] but that the Justices also "recognized that the states could regulate protected rights as long their regulations were reasonable."[60]

Nelson offers a lawyerly and legalistic analysis of the Court's economic decisions, and his discussion is oddly disconnected from politics and history. This disconnect is particularly strange, because the first two-thirds of the book are so smartly and successfully tied to history. It is almost as if Nelson the historian disappeared after Chapter VI and Nelson the lawyer suddenly took over. In the last few chapters of the book, Nelson explains the Court's decisions on their own terms. He does a very good job of this, although in a quite (and for Nelson unusual) formalistic way.

Nelson's discussion of *Slaughterhouse* illustrates this problem. As I noted above, Nelson persuasively argues that Justice Miller's majority opinion misconstrued the overwhelming view that the new Amendment should protect substantive property rights.[61] He also notes that within a few years after *Slaughterhouse*, the Court accepted the arguments of the dissenters in *Slaughterhouse*, that the Fourteenth Amendment provided substantive protections of private property.[62] This transition was critical to Constitutional development and led to *Lochner* and its progeny.[63] Indeed, the Court's elaboration of the theory of "substantive due process" as a basis for striking down state economic regulations in order to protect property went beyond the Fourteenth Amendment, as the Court struck down federal regulations of child labor,[64] wages,[65] labor conditions,[66] and developed what today seems to be an absurd and cynical distinction between manufacturing and commerce that undermined anti-trust regulation[67] and crippled economic and social reform for almost half a century.[68]

The most important outcome of *Slaughterhouse* was not that the butchers lost, or that Justice Miller misread the Fourteenth Amendment to

59. NELSON, *supra* note 2, at 174.

60. *Id.*

61. *Id.* at 163.

62. *Id.* at 174.

63. For a succinct discussion of the evolution of the law in this period, see 2 MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 591-661, 697-716 (3d ed. 2012).

64. Hammer v. Daggenhart, 247 U.S. 251 (1918).

65. Adkins v. Children's Hosp., 261 U.S. 525 (1923).

66. Loewe v. Lawler, 208 U.S. 274 (1908); Adair v. United States, 206 U.S. 161 (1908).

67. United States v. E.C. Knight Co., 156 U.S. 1 (1895).

68. These changes began in the late 1930s. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

deny property rights to the butchers. Rather, it was Miller's unfortunate and historically problematic reading—or perhaps more correctly his *mis*reading—of the Privileges and Immunities Clause of the Fourteenth Amendment. Indeed, Miller could have reached the same result—that the creation of a central slaughterhouse in New Orleans was constitutional—with a traditional "police powers" analysis, and by so doing avoided altogether the need to give a full blown analysis of the new Amendment.[69] Furthermore, as Nelson shows, the Court soon abandoned Miller's economic analysis, even as the Justices acknowledged that "police regulations, intended for the preservation of the public health and the public order" were not barred by the Amendment, and that "[s]o much of the Louisiana law as partook of this character was never objected to."[70] In other words, if Miller had simply offered a "police powers" analysis the Court might have been unanimous in *Slaughterhouse*, with no need to discuss the meaning of the Privileges and Immunities Clause.[71]

At issue in *Slaughterhouse* was a Louisiana law that created a single place—a central slaughterhouse—for the butchering of livestock in New Orleans. This law, giving a monopoly to the owners of the Crescent City Live-Stock Landing & Slaughter-House Company, was tied to party politics in Reconstruction-era Louisiana. To the extent that American legal traditions frowned on monopolies, a court might have found that this law violated some basic constitutional rights of the butchers who were forced to use the central slaughterhouse. This indeed was the butchers' argument; they asserted that this state-imposed monopoly infringed on their "privileges and immunities" as U.S. citizens by denying them the right to practice their business as they wished.

But the centralization of slaughtering animals was also an important public health regulation in an age when urban sanitation was in its infancy and slaughterhouses were the cause of numerous diseases and epidemics. The independent butchers sued because they claimed it was inconvenient and costly to slaughter their animals in a single place, even though they were only required to pay a modest fee for their use of the slaughterhouse. The butchers claimed the law violated their rights under the Thirteenth Amendment (that it was a form of involuntary servitude) and that it also

69. This argument is best developed in MICHAEL A. ROSS, JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA (2003) [hereinafter ROSS, JUSTICE OF SHATTERED DREAMS]; *see also* RONALD M. LABBÉ & JONATHAN LURIE, THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT (2003).

70. Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129, 136-37 (1873).

71. *See generally* ROSS, JUSTICE OF SHATTERED DREAMS, *supra* note 69.

denied them their privileges and immunities under the Fourteenth Amendment. Miller might have avoided most of the Constitutional issues by applying a "police powers" analysis to uphold the power of the state to regulate public health and safety by creating a central slaughterhouse. Had he done this, Justice Miller would have avoided the Fourteenth Amendment issue since the Fourteenth Amendment, whatever it means, allowed a police powers exception for "reasonable" regulations. He might have had to explain why the Fourteenth Amendment did not trump states' police powers, because no law would be constitutional if it overtly violated the Amendment. But such a strategy would not have required him to give a detailed analysis of what the new Amendment protected, and certainly would not have required him to limit the Amendment's coverage to blacks (which was clearly not the only intent of the Congress or of the ratifiers)[72] nor eliminate any enforceable content from the Privilege and Immunities Clause.

However, Miller did not take the simple and logical path of upholding the Louisiana law. Instead, he offered an elaborate analysis of the Fourteenth Amendment that limited its scope to former slaves, and then eviscerated the meaning of the "privileges and immunities clause," which might have been used to protect the fundamental civil liberties of the very former slaves he claimed the Amendment sought to protect. The result is that the Court has never since used this clause to protect fundamental liberties.[73]

As Nelson shows, it is clear from the Congressional debates and those in the state legislatures that the framers of the Amendment believed that it would protect many groups in addition to African Americans, including "the Chinese, Indians, women, and religious minorities,"[74] as well as protecting "another group—namely, Northern whites who were migrating to the South after the Civil War and were threatened with potentially discriminatory legislation at the hands of Southern states and localities."[75] We could add to this list southern white Unionists, blacks who were free before the War (and thus needed protection from state legislatures in both the North and the South), and a special subclass of all these people, U.S. army veterans, both black and white, who remained in the South after the War.

72. NELSON, *supra* note 2, at 163.

73. Some scholars have argued for a revival of the clause and in sense a reversal of the doctrine from *Slaughterhouse*. *See* Philip B. Kurland, *The Privileges and Immunities Clause: 'Its Hour Come Round at Last?'* 1972 WASH. UNIV. LAW QUARTERLY 405 (1972); Kimberly Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 TEX. REV. OF L. & POL'Y 1 (1998); JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

74. NELSON, *supra* note 2, at 163.

75. *Id.*

As the *Report of the Joint Committee on Reconstruction* (which led to the Amendment) makes clear,[76] they too were threatened by the white electorate in the South, which immediately after the War was dominated by former Confederates. As Nelson writes: "No one who sat in Congress or in the state legislatures that dealt with the Fourteenth Amendment," the actors who ratified the Amendment, "doubted that section one was designed put to rest any doubt about the power of the federal government to protect basic common law rights of property and contract."[77] But they also believed that Section 1 would protect the basic civil liberties of blacks, southern white Unionists, and northerners who were living in the South, including former U.S. Army soldiers who chose to remain there after the War.

Stated another way, the Amendment protected everyone in the United States from arbitrary and capricious abuses by their state governments. This class of protected persons would have included even the Confederate veterans who made up the bulk of the butchers suing in *Slaughterhouse*. But, if the law regulating slaughtering in New Orleans was reasonable, not arbitrary, and not discriminatory, then it would have passed muster under the police powers of the state. Justice Miller failed to pursue this common sense approach. His opinion, as noted above, essentially wrote the Privileges and Immunities Clause out of the Amendment. After *Slaughterhouse*, the Court almost never again applied this clause to a case. This holding, and not the economic analysis of Miller's majority opinion, is the most important aspect of *Slaughterhous*e.

By eviscerating the Privileges and Immunities Clause, the Court prevented any federal protection of civil liberties from state law until the 1920's when the Court began its long and sometimes incoherent journey of "selective incorporation," applying piecemeal provisions of the Bill of Rights to the states.[78] Nelson points out that the failure to understand and apply the Privileges and Immunities Clause to protect basic liberties violated the clear intentions of those who voted for the Amendment, even if their notion of what liberties might be protected was ambiguous. Nelson does not pursue this issue or illuminate what the cost of this strategy was for blacks and white Unionists in the South in the nineteenth century, and everyone else in the United States who faced state deprivations of civil liberties until the mid-twentieth century. Instead, he focuses on how the Court

76. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, 39th Cong., *Resolution and Report of the Committee* (1st Sess. 1866); *see generally*, Finkelman, *Historical Context*, *supra* note 1, at 400-409.

77. NELSON, *supra* note 2, at 163.

78. This process began with Gitlow v. New York, 268 U.S. 652 (1925).

redeemed the property implications of the Fourteenth Amendment. This redemption (if we can call it that) led to the bizarre result that the Court protected the "liberty" to own and use private property and the "liberty" of the right of contract—even when it harmed the least powerful in the nation—but would not protect other liberties that were more fundamental to a democracy, such as freedom of speech, press, religion, or the right to a fair trial.[79]

The question that Nelson fails to address is *why* Miller took the position he did. The answer cannot come from traditional constitutional analysis. Rather, it must come from the political context of the case. The plaintiffs in *Slaughterhouse* were almost entirely Confederate veterans. They were challenging a law passed by a Unionist, Republican legislature that included some black members. The political stakes of the case were high. If the butchers had won, *Slaughterhouse* might have undermined Republican hegemony in the South, destroying Reconstruction and giving the Confederate veterans a victory in Court that they had failed to win on the battlefield.

The political background of the case was highlighted by the background of the lawyer for the butchers, John Archibald Campbell. Before the Civil War, Campbell, a slaveholder from Alabama, had been a member of the U.S. Supreme Court, and the author of a pro-slavery concurrence in *Dred Scott v. Sandford*.[80] When the War began, he was the only member of the Supreme Court to resign his position and join the Confederacy. Two other Justices who came from Confederate states, James Wayne of Georgia and John Catron of Tennessee, remained on the bench. Not only did Campbell leave the Court and return to Alabama, but he then became Assistant Secretary of War in the administration of Jefferson Davis, holding that position until the War ended. As the number-two man in the Confederate Department of War, he in effect actively made war on the United States. As Assistant Secretary of War, he was involved in the decisions of the Confederate government, articulated by his immediate superior Secretary of War James Seddon, to refuse to exchange black prisoners-of-war.[81] Under his watch, the Confederate government enslaved captured black soldiers in violation of accepted and well-recognized rules of modern, civilized war-

79. *See, e.g.*, Frank v. Mangum, 237 U.S. 309 (1915).

80. 60 U.S. (19 How.) 393, 493. None of the judges who decided that case were still on the Court at this time.

81. As part of the inner circle of the Department of War, Campbell was doubtless part of the decision making process and as Assistant Secretary of War he helped carry out these illegal policies. His complicity in such policies was clear, even if he offered the traditional defense of war criminals that he was "only carrying out orders."

fare.[82] Campbell opposed emancipation, civil rights for blacks, and black citizenship. He was one of three Confederate officials who met with Lincoln at Hampton Roads in 1865 to seek a negotiated peace. These negotiations failed in part because Campbell, like the other two Confederate officials, refused to accept emancipation. By any logical standard, Campbell was a traitor, and by modern standards, a war criminal for his participation in the enslavement of captured troops and for failing to investigate the cold-blooded murder of surrendering U.S. Army troops by Confederates at Fort Pillow and elsewhere.[83] Campbell had spent four years doing everything he could to ensure the death of United States soldiers as part of the rebellion designed to destroy the United States.[84] He was an unrepentant secessionist, and a racist former slave-owner.

Campbell's appearance before the Court was an excellent move from the perspective of those who wanted to derail Reconstruction and the new amendments.[85] Campbell brilliantly pushed the Court into what became a no-win situation for those who favored an egalitarian reconstruction of the former slave states. He successfully manipulated the Court majority into concluding that the only way to preserve Reconstruction in Louisiana was to dramatically limit the scope of the Fourteenth Amendment. Miller and a narrow majority of the Court were lured into Campbell's trap. Miller tried to avoid that trap by claiming that the only purpose of the Amendment was to protect the former slaves. Thus, much of Miller's opinion is persuasively antislavery. But, as Nelson notes, this tactic was a jurisprudential disaster that ignored the history of the Amendment itself. Miller compounded the disaster by refusing to give a broad libertarian interpretation of the Amendment, as Justices Joseph P. Bradley and Stephen J. Field wanted to do. Thus, Miller cut the heart out of the Amendment, and eviscerated the Privileges and Immunities Clause because he thought it was the only way he could rule against the butchers.[86] Alternatively, Miller could have easily concluded that the Louisiana law was constitutionally permissible as a public health measure under traditional state police powers, thus mostly ducking the Fourteenth Amendment questions.

82. Paul Finkelman, *Francis Lieber and the Modern Law of War*, 80 U. CHI. L. REV. 2071, 2122-2123 (2013).

83. *Id.*

84. *Id.*

85. Michael A. Ross, *Obstructing Reconstruction: John Archibald Campbell and the Legal Campaign Against Louisiana's Republican Government, 1868-1873*, 49 CIVILWAR HIST. 235 (2003) [hereinafter Ross, *Obstructing Reconstruction*]; *see also* ROSS, JUSTICE OF SHATTERED DREAMS, *supra* note 69.

86. Ross, *Obstructing Reconstruction*, *supra* note 85; ROSS, JUSTICE OF SHATTERED DREAMS, supra note 69.

But Miller did not figure this out. Campbell simply outsmarted Miller.[87] As a former physician, Miller wanted to uphold the central slaughterhouse as a public health measure. And as a Republican, he supported Reconstruction. So, he ruled against the butchers, but in the process he also ruled against the Fourteenth Amendment. In the end, Campbell was the big winner. His narrow class of clients—the butchers—lost. But his broader set of clients—the former Confederates of the South—won a huge victory. Politics, not law, decided the case, and the traitorous former Confederate Assistant Secretary of War reversed in the courtroom some of what his troops had lost on the battlefield.

## IV. THE DESTRUCTION OF CIVIL RIGHTS AND THE POST-RECONSTRUCTION COURT

Having weakened the power of the federal courts and Congress to protect civil liberties through the Privileges and Immunities Clause of the Fourteenth Amendment—in complete derogation of the goals of those who wrote, passed, and ratified it—the Supreme Court applied the same perverse logic to the Amendment's civil rights provisions. The Court also undermined the Equal Protection Clause of the new Amendment, which proclaimed that the states could not deny anyone within their jurisdiction the "equal protection of the laws." The authors of this clause assumed it would lead to basic racial equality in the nation and give blacks the same rights as whites, but the Court made a mockery of the clause and these expectations.[88]

Nelson demonstrates that the framers and ratifiers had no specific agreement on what the substance of equality might mean in all circumstances under the new amendment. But the impetus for the Amendment came from politicians such as John A. Bingham of Ohio, Thaddeus Stevens of Pennsylvania, Jacob Howard of Michigan, and Charles Sumner of Massachusetts, who had a long history of activism against slavery and in favor of racial equality.[89] The first sentence of Section 1 of the Amendment, "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside,"[90] emphatically overturned Chief Justice Roger B. Taney's

87. *Id.*

88. NELSON, *supra* note 2, at 71-80 (discussing the antislavery arguments and theories that the proponents of the Amendment made); *see also* Paul Finkelman, *Historical Context*, *supra* note 1; Paul Finkelman, *John Bingham, supra* note 1, at 671-692 (2003); Finkelman, *Prelude to the Fourteenth Amendment*, *supra* note 1.

89. *Id.*

90. U.S. CONST. amend. XIV, § 1.

conclusion in *Dred Scott* v. *Sandford* that blacks, even if free, could never be citizens of the United States[91] and that states were free to deny them citizenship as well.[92]

The history of this sentence has important implications for modern politics and law. It is the reason why all children born in the United States are citizens of the nation (unless their parents are in the United States on diplomatic passports).[93] This sentence includes the children of aliens, whether they are documented or not. Thus, birthright citizenship under the Fourteenth Amendment flows from being born in the nation and not from the status of one's parents.[94] Some people misunderstand the phrase "subject to the jurisdiction thereof," to mean that American-born children of undocumented aliens are not citizens of the United States because their parents are not here legally and thus not "subject to the jurisdiction" of the United States. This sort of argument is doubly wrong. First, it is clear that aliens, whether documented or not, can be tried in American courts, incarcerated in American jails, must pay taxes to the states and the national government, and in a variety of other ways are "subject to the jurisdiction" of the United States.[95] Second, the phrase "not subject to the jurisdiction thereof" refers solely to diplomats who have diplomatic immunity from all American law and thus cannot be tried in an American court without the consent of their home country. Under the Fourteenth Amendment, children of aliens in the United States are entitled to citizenship if born here, even if their parents are not legally able to become naturalized citizens.[96] Moreover, all persons in the nation, whatever their immigration status, are entitled to the equal protection of the laws.[97] Thus, immigrant children, as well as the American-born children of immigrants, have access to public schools.[98]

The citizenship clause meant more than just declaring that African-Americans were citizens and had the right to sue in diversity in federal

91. Dred Scott v. Sandford, 60 U.S. 393 (1857).

92. Paul Finkelman, *Was Dred Scott Correctly Decided? An "Expert Report" For the Defendant*, 12 LEWIS & CLARK L. REV. 1219, 1231 (2008).

93. United States v. Wong Kim Ark, 169 U.S. 649 (1898).

94. In many countries, such as Germany, Switzerland, and Japan, citizenship flows from the status of the parents (or the father) and not from the place of birth. Thus there are millions of people of Turkish ancestry born in Germany who are not citizens of Germany. Some American Indian nations also have citizenship based on the tribal citizenship of the father, rather than on where a child was born. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

95. The United States can also alter their immigration status by statute or court decision, give them asylum, give them amnesty for any legal violations connected to their entry into the nation, or deport such persons.

96. United States v. Wong Kim Ark, 169 U.S. 649 (1898).

97. Plyer v. Doe, 457 U.S. 202, 212 (1982).

98. *Id.* at 230.

court—reversing Chief Justice Roger B. Taney's holding in *Dred Scott*. Many northerners understood that "citizenship" implied a set of substantive rights, including the right to franchise, the right to hold federal office, and the right to participate fully in the political process. When the southern states refused to enfranchise blacks after the ratification of the Fourteenth Amendment, Congress passed, and the states ratified, the Fifteenth Amendment to prohibit racial discrimination in voting on the basis of "race, color, or previous condition of servitude."[99]

Northerners also understood that citizenship included the right to a passport,[100] a claim to protection by the government, and other rights, which today we generally call "civil liberties."[101] Thus, the Fourteenth Amendment's second sentence begins by providing that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[102] As Nelson demonstrates in his discussion of the debates over the Amendment, at a minimum this clause was designed to prevent the states from overriding most of the liberties protected by the Bill of Rights.[103] The rest of Section 1 unambiguously applied to everyone in the United States, not just to citizens. In a nation filled with immigrants this protection mattered a great deal. Thus, the second and third clauses of the second sentence of Section 1 applied explicitly to "persons" and not just citizens: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[104]

Northerners may have assumed that there would be some social discrimination in the South after the War, but that it would not be based on

99. U.S. CONST., amend. XV. For elaboration of these issues, see HAROLD M. HYMAN AND WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENTS, 1835-1875 (1982 ) and RICHARD B. BERNSTEIN, AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT? 112-116 (1993).

100. Before the Civil War, blacks were generally not allowed to have passports.

101. Most scholars, including Nelson, agree that the framers of the Fourteenth Amendment believed that the Privileges and Immunities Clause of the Fourteenth Amendment would make most of the Bill of Rights applicable to the states. *See, e.g.*, MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1987).

102. U.S. CONST. amend XIV, § 1.

103. The Supreme Court of course reached a very different conclusion in The Slaughterhouse Cases, This clause is linguistically ambiguous. It could be read to prohibit the states from passing any laws which denied federal privileges and immunities to U.S. citizens, and thus allowed the states to deny such rights to aliens. Such a reading would mean that the states could, for example, abridge the religious free exercise rights of aliens (even those legally resident in the nation) but not abridge those rights for U.S. Citizens. This interpretation would conflict with the equal protection clause, found in the same sentence of the 14th Amendment, which prohibits the states from denying "any person" (without regard to citizenship) the "equal protection of the laws." Alternatively—and I would argue more properly—the clause bars the states from passing any laws which abridge federal privileges and immunities.

104. U.S. CONST. amend. XIV, § 1.

law and that it would not lead to an oppressive system of segregation and disfranchisement. They believed, as Representative Samuel Shellabarger of Ohio thought, that the Equal Protection clause would ensure that "whatever rights . . . the States may confer upon one race or color of the citizens shall be held by all races in equality."[105] While there was some legal discrimination in the North in the 1860's, like segregated schools in some places, there was also a substantial growth of civil rights protection taking place. For example, well before the Civil War, Ohio had repealed most of its discriminatory legislation;[106] in 1855, Massachusetts required that all public schools be integrated;[107] and in many other places, schools were integrated under local options.[108] During the Civil War, California and Oregon repealed their bans on blacks testifying against whites,[109] and Congress required that street-car franchises in the District of Columbia treat all passengers the same, without regard to race.[110] Before the Fourteenth Amendment was adopted, the Iowa Supreme Court declared that segregated schools violated the state constitution,[111] and in a series of subsequent cases, the Iowa court reiterated that segregated schools violated the state constitution.[112]

Thus, whatever the specifics of equal protection meant, those who wrote and supported the Amendment—those who collectively added the Amendment to the Constitution—believed that it would move the nation closer to racial equality and provide substantial protection for blacks. The passage of the Civil Rights Acts of 1866[113] and 1875,[114] and a number of other pieces of civil rights legislation between 1866 and 1875, illustrate the

105. NELSON, *supra* note 2, at 124 (quoting Representative Samuel Shellabarger).

106. Paul Finkelman, *The Strange Career of Race Discrimination in Antebellum Ohio*, 55 CASE W. RES. L. REV. 373-408 (2004).

107. An Act to Protect the Rights and Liberties of the People of the Commonwealth of Massachusetts, ch. 489, 1855 Mass. Acts 924.

108. Finkelman, *Prelude to the Fourteenth Amendment*, *supra* note 1, at 427-30.

109. Practice Act, Title XI of Witnesses and of the Matter of Attaining Evidence, GENERAL LAWS OF THE STATE OF CALIFORNIA FROM 1855–1864 INCLUSIVE 769 (1865); CODE OF CIVIL PROCEDURE AND OTHER GENERAL STATUTES OF OREGON ENACTED IN 1862, at 174-75 (1863). Significantly, these laws did not give such rights to Chinese immigrants or their American-born children. *See* Finkelman, *Prelude to the Fourteenth Amendment*, *supra* note 1, at 422, 425.

110. Act of March 3, 1865, 13 Stat. 536 (1865) (amending an Act entitled "An Act to Incorporate the Metropolitan Railroad Company in the District of Columbia").

111. Clark v. Board of Directors, 24 Iowa 266 (1868).

112. Cited in NELSON, *supra* note 2, at 151-52. The Iowa court also applied this reasoning to issue of transportation. *See* Coger v. N.W. Union Packet Co., 37 Iowa 145 (1873) (upholding a judgment against a steamboat for discriminating against a black passenger).

113. Civil Rights Act of 1866, (Act of April 9, 1866), 14 Stat. 27 (1866).

114. Civil Rights Act of 1875, (Act of March 1, 1875), 18 Stat. 335 (1875).

intentions of those who led the fight for the Fourteenth Amendment, as well as the Thirteenth and Fifteenth Amendments.[115]

Despite this history, the Supreme Court in the late nineteenth and early twentieth centuries did not interpret the Fourteenth Amendment to protect black civil rights. Nor would the Court use the Amendment to protect the civil liberties of white Unionists, black and white U.S. Army veterans, or anyone else in the former Confederacy.

Nelson's analysis of the segregation and race discrimination cases, which comes at the end of his book, is narrowly legalistic, as he parses decisions without interrogating their purpose, trajectory, or outcome. He does not endorse the outcomes in these cases—he is no neo-Confederate or apologist for segregation. But, I think Nelson is overly kind to many of the late nineteenth century Justices, when analyzing and explaining their decisions on race and equality. In discussing these issues, his book is so legalistic that it becomes disconnected from history, politics, and the actual results of these cases. His discussion also ignores the blatant hypocrisy—the intellectual dishonesty—of the Court in this period. Thus, while Nelson accurately explains these cases on their own terms, he does not explore beneath their surface.

Nelson observes, for example, that in *Ex parte Virginia*,[116] the Court showed it "was prepared to enforce the Fourteenth Amendment's core principle of equality even when a state judge, without statutory discretion, acted in a racially discriminatory fashion."[117] In this case, J.D. Coles, a Virginia state judge refused to allow blacks to serve on a jury and the Supreme Court upheld a federal prosecution of the judge for this act. Nelson, in a legalistic manner, notes that "*Ex parte Virginia* constituted an important extension of previous Fourteenth Amendment cases because it involved discriminatory practice that was being carried on under a statute that was racially neutral on its face."[118] This analysis is entirely true, and Nelson rightly praises the case for being an extraordinary example of judicial opposition to blatant discrimination. However, Nelson never tells us that this was *the last time* the Court so acted, and that in virtually all subsequent cases, the Court refused to interfere with discriminatory actions or legislation.

115. *See* HAROLD M. HYMAN AND WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENTS, 1835-1875 (1982).

116. 100 U.S. 339 (1880).

117. NELSON, *supra* note 2, at 183.

118. *Id.*

Nelson might have profitably compared the case involving Judge Coles with *Virginia v. Rives*,[119] decided in the same term. In *Rives*, the Court refused to allow two black teenagers convicted of murder to remove their case to federal court, where they were more likely to get a fair trial. No blacks had ever served on a grand jury or petit jury in the history of the county.[120]

The two black teenagers argued

> that a strong prejudice existed in the community of the county against them, independent of the merits of the case and based solely upon the facts that they are negroes and that the man they were accused of having murdered was a white man. From that fact alone, they were satisfied they could not obtain an impartial trial before a jury exclusively composed of the white race. The petitioners further represented that their race had never been allowed the right to serve as jurors, either in civil or criminal cases, in the County of Patrick, in any case, civil or criminal, in which their race had been in any way interested.[121]

Their argument persuaded U.S. District Judge Alexander Rives to remove the case to federal court. The Supreme Court overruled Judge Rives, declaring that the federal removal statutes, designed precisely to protect against the kind of discrimination the two black teenagers faced could not be used in this way. One of the most important scholars of this issue has noted, "Justice Strong's construction of the removal jurisdiction was simplistic. It may well have had a disastrous effect on race relations for more than a half-century by closing federal trial courts to proof of jury discrimination."[122]

These two Virginia cases, decided the same day, illustrate the cynical hypocrisy and narrow jurisprudence of the late nineteenth century Supreme Court. Judge Coles, and other southern state judges might have faced prosecution and even jail for discrimination in choosing juries (although there is no evidence suggesting that any other southern judge was prosecuted for such discrimination), but the black victims of such discrimination whose fate was at stake in *Virginia v. Rives* could find no justice from the Supreme Court and would later be hanged after being denied due process of law and equal protection of the laws.[123]

119. 100 U.S. 313 (1879). This case is also sometimes cited as Ex parte Virginia, but is usually referred to as Virginia v. Rives to avoid confusion with the case of Ex parte Virginia which involved Judge Coles.

120. *Id.* at 315.

121. *Id.*

122. Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 TEXAS L. REV. 1401, 1434 (1983).

123. *Id.* at 1433-34.

Nelson might also have looked at the final jury cases from this period, which reveals the racism of the Court and its utter refusal to face the social and political realities of the emerging horror story of race relations in the post-Reconstruction South. In three jury cases from Mississippi during the 1890's, the Court ignored the blatant and unrestrained racism of segregation and its lethal consequences.[124]

The Mississippi Constitution of 1890 was explicitly designed to eliminate black voting. It 1960 scholars in Mississippi admitted that its "pattern of restrictive requirements" for voting was "more extensive than that of any of the other 49 states."[125] Known as the "disfranchisement Constitution," it was remarkably effective. As Benno Schmidt noted,

> [t]he new [1890] state constitution imposed a variety of suffrage qualifications designed to disfranchise blacks. Some, like the poll tax, tended to exclude many blacks automatically; others, like the literacy test and the requirement to "be able to read and write any section of the Constitution of this State and give a reasonable interpretation thereof to the county registrar," or the requirement to demonstrate "a reasonable understanding of the duties and obligations of citizenship," transparently invited invidious manipulation.[126]

Because jury selection was tied to voter registration, the Constitution had the effect of eliminating virtually all black jurors from the state. "Jury selection in Mississippi was thus open-ended discretion resting on voter rolls that reflected increasingly systematic eradication of black voting."[127] *Williams v. Mississippi* challenged this situation on behalf of Henry Williams, a black man facing execution after being indicted by an all-white grand jury and being convicted by an all-white petit jury.[128]

The Court rejected Williams's claims of discrimination even while quoting from a Mississippi case which openly declared that the purpose of the 1890 state constitution was to discriminate against blacks.[129] The Supreme Court quoted Mississippi's highest Court, which declared that "[w]ithin the field of permissible action under the limitations imposed by the federal constitution, the convention swept the field of expedients, to obstruct the exercise of suffrage by the negro race."[130] The U.S. Supreme

124. Gibson v. Mississippi, 162 U.S. 565 (1896); Smith v. Mississippi, 162 U.S. 592 (1896); Williams v. Mississippi, 170 U.S. 213 (1898). A fourth case from Louisiana led to the same result. Murray v. Louisiana, 163 U.S. 101 (1896).

125. YESTERDAY'S CONSTITUTION TODAY: AN ANALYSIS OF THE MISSISSIPPI CONSTITUTION OF 1890, at 98 (Edward H. Hobbs ed., 1960).

126. Schmidt, Jr., *supra* note 122, at 1462.

127. *Id.*

128. *Williams*, 170 U.S. at 213-14.

129. *Id.* at 214-15.

130. *Id.* at 222 (quoting Ratliff v. Beale, 20 South 865, 868 (Miss. 1896)).

Court might have read this passage and concluded that Mississippi's constitution and laws violated the Fourteenth and Fifteenth Amendments. But the Court did not see any constitutional problems with a state that openly declared its laws were designed to disfranchise black voters.[131] Nor was the Court concerned with the assertion of Mississippi's justices that

> [b]y reason of its previous condition of servitude and dependencies, this race had acquired or accentuated certain peculiarities of habit, of temperament, and of character which clearly distinguished it as a race from the whites; a patient, docile people, but careless, landless, migratory within narrow limits, without forethought, and its criminal members given to furtive offenses, rather than the robust crimes of the whites. Restrained by the federal Constitution from discriminating against the negro race, the convention discriminates against its characteristics, and the offenses to which its criminal members are prone.[132]

Rather than expressing any concern that Mississippi's actions might have been based on racism and a conscious desire to violate the Fourteenth and Fifteenth Amendments, Justice Joseph McKenna, writing for the majority, determined that

> nothing tangible can be deduced from this. If weakness were to be taken advantage of, it was to be done "within the field of permissible action under the limitations imposed by the federal Constitution," and the means of it were the alleged characteristics of the negro race, not the administration of the law by officers of the state.[133]

Astoundingly, the Court concluded that "[i]t cannot be said, therefore, that the denial of the equal protection of the laws arises primarily from the constitution and laws of Mississippi; nor is there any sufficient allegation of an evil and discriminating administration of them."[134]

We must see the *Williams* decision in the context of Nelson's analysis of *Plessy v. Ferguson*,[135] decided two years earlier. Nelson argues that Justice Henry B. Brown's majority opinion in *Plessy*, was "not racist in tone; rather it was legalistic in style."[136] Certainly, Justice Brown avoided the over-the-top racism of some nineteenth century jurists.[137] And his opinion

131. *Id.*

132. *Id.* (quoting *Ratliff*, 20 South at 868).

133. *Id.*

134. *Id.*

135. 163 U.S. 537 (1896).

136. NELSON, *supra* note 2, at 185.

137. Consider Justice William L. Harris's outburst in Mitchell v. Wells, 37 Miss. 235, 264 (1859), holding that a woman who had been born a slave but legally freed by her owner (who was also her father) could not receive a legacy given to her in her father's will. Harris wrote: "Suppose that Ohio, still further afflicted with her peculiar philanthropy, should determine to descend another grade in the scale of *her peculiar* humanity, and claim to confer citizenship on the chimpanzee or the ourang-outang (the most respectable of the monkey tribe), are we to be told that 'comity' will require of the States not thus demented, to forget their own policy and self-respect, and lower their own citizens and institutions

is hardly racist in tone compared to the grotesquely racist quotations from the Mississippi court which Justice McKenna used in upholding the total disfranchisement of blacks in Mississippi. But the outcome of *Plessy* was racist, as were its implications and underpinnings.

Nelson's narrowly legalistic analysis of *Plessy* notes that Justice Brown compared segregation on trains—the issue in *Plessy*—to segregation in public schools.[138] Nelson correctly observes that Justice Brown noted that courts had accepted segregated schools since *Roberts v. City of Boston*,[139] when the Massachusetts Supreme Judicial Court upheld segregated schools in Boston. Nelson certainly does not seek "to provide a justification for *Plessy*"[140] or for that matter to "cast doubt on the holding"[141] of *Brown v. Board of Education*.[142] Rather, Nelson argues:

> The point . . . is that the *Plessy* court acted in much the same fashion as the framers of the Fourteenth Amendment. When confronted with competing claims of principle, each having strong support among different segments of society, the men of both institutions compromised, made concessions to both points of view, and left ultimate issues unresolved.[143]

In effect, Nelson seems to be saying that *Plessy* and other cases like *Williams v. Mississippi* were correct when they were decided and that *Brown* was correct when it was decided.[144] But, was this really true for *Plessy*?[145]

Justice Brown based much of his decision in *Plessy* on the opinion of Chief Justice Lemuel Shaw of the Massachusetts Supreme Judicial Court in *Roberts v. City of Boston*.[146] Chief Justice Shaw was arguably the most influential antebellum state judge in the nation.[147] Justice Brown, who was

in the scale of being, to meet the necessities of the mongrel race thus attempted to be introduced into the family of sisters in this confederacy." *Id.* at 264.

138. *Plessy*, 163 U.S. at 544-45.

139. 59 Mass. 198 (1850).

140. NELSON, *supra* note 2, at 187.

141. *Id.*

142. 347 U.S. 483 (1954).

143. NELSON, *supra* note 2, at 187.

144. *Id.* I should add that this is a conclusion that Nelson privately shared with me at the time his book came out.

145. One curiosity of *Plessy* is that it cannot be squared with earlier decisions, unless the squaring is purely on racist grounds. In Hall v. DeCuir, 95 U.S. (5 Otto) 485 (1877) and Louisville, New Orleans & Texas Railway v. Mississippi, 133 U.S. 587 (1890) the Court struck down southern state statutes that *required* integration in public transportation. If a state could not *require* integration (which would seem to be consistent with the Fourteenth Amendment) it is hard to understand how logically the state could *require* segregation. The Court used commerce clause analysis to strike down the integrationist laws, but this in reality seems pretextual to reach a segregationist outcome.

146. 59 Mass. 198 (1850).

147. *See* LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW (1957); G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION (1976) (3d ed. 2007).

also from Massachusetts, seemed to be saying that if the venerable Chief Justice Shaw approved of segregation, it must be constitutionally permissible. But, such a conclusion was fundamentally at odds with the legal history of Massachusetts as well as with the history of the framing of the Fourteenth Amendment.

Justice Brown's use of *Roberts* failed to take into account a significant amount of history and legal change that had taken place since 1850. Chief Justice Shaw decided *Roberts* in 1850 when more than ninety-seven percent of all blacks lived in the South and more than ninety-five percent of them were slaves. At that time, slavery was legal in half the states in the nation, and protected in numerous ways by the U.S. Constitution.[148] Furthermore, and this is critical, at the time the Massachusetts court decided *Roberts*, there were no Constitutional amendments protecting civil rights or guaranteeing equal protection of the law. The states were free to treat their citizens as they wished, emancipating them or enslaving them, segregating them or giving them equality, without any interference from the national government. Thus, Shaw could act completely under state law, and conclude as he did, that nothing in the Massachusetts Constitution or the Massachusetts statutes prohibited Boston from choosing to segregate blacks in its public schools.

In the four and a half decades since Chief Justice Shaw had allowed segregation in *Roberts*, more than 650,000 Americans had died in a war that ended slavery and more than 200,000 black soldiers and sailors had fought to preserve the nation and to end slavery. Congress had passed a myriad of major civil rights laws and many minor laws, such as the District of Columbia law banning segregation on street-cars,[149] all pointing to a national determination to protect the civil rights of blacks and to create substantive equality. The Constitution had been amended three times to create and protect black freedom and racial equality. In his reliance on the *Roberts* case, Justice Brown seemed oblivious to all these changes.

Justice Brown might have used *Roberts* to reach a very different conclusion. The chief attorney arguing for equality in *Roberts* was the young Boston reformer Charles Sumner.[150] A year after Shaw's decision, the Massachusetts legislature elected Sumner to the United States Senate, where, for more than two decades, he was one of the nation's most consistent and articulate supporters of racial equality. He was a prime mover in

148. *See* PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON (3d ed. 2014).

149. *See* Act of March 3, 1865, 13 Stat. 536 (1865).

150. *See generally* DAVID HERBERT DONALD, CHARLES SUMNER (1996).

Congress's adoption of the three Civil War Amendments that ended slavery and created constitutional protections for black liberty.[151] He was the author of the Civil Rights Act of 1875, which Congress passed under the Fourteenth Amendment shortly after Sumner's death as a tribute to the late voice for liberty. That act prohibited segregation in street-cars and other modes of public transportation. The Supreme Court struck down that law in the *Civil Rights Cases*,[152] over the vigorous dissent of Justice John Marshall Harlan,[153] who also dissented in *Plessy*. In the *Civil Rights Cases*, the Court held that Congress lacked the power to regulate private behavior under the Fourteenth Amendment, which the majority of the Justices said regulated only state action, even though the Congress in 1875 (which included many Representatives and Senators who had voted for the Fourteenth Amendment a decade earlier) believed the law was constitutional under the new Amendment. But in *Plessy*, the issue before the Court *was* precisely one of state action. Justice Brown might easily have concluded that the key to understanding the meaning of the Fourteenth Amendment was not a decision written by a Massachusetts jurist who died before the Civil War began, but to the lawyer who lost the 1850 case and then dedicated the next two and a half decades of his life to successfully reversing that precedent at the state and federal level.

Justice Brown also might have considered the history of segregation in Massachusetts *after* the *Roberts* case. A group of black activists in Boston who resented that their children were forced to attend a segregated school, when there were other schools closer to where they lived, filed the lawsuit. At the time, Boston was the only community in Massachusetts with segregated schools. The black community in Boston did not abandon its quest for school equality after *Roberts.* On the contrary, blacks in Boston redoubled their efforts to eliminate segregated schools. A boycott "reduced black [school] attendance dramatically."[154] Blacks "who could afford to establish residence outside the city did so, taking advantage of integrated schools in several of the towns outside Boston."[155] Meanwhile, blacks, who could vote in Massachusetts, petitioned the state legislature to prohibit segregated schools throughout the state.[156] These petitions were successful in 1855,

151. *See generally id.*

152. United States v. Stanley (*The Civil Rights Cases*), 109 U.S. 3 (1883).

153. *Id.* at 26-62.

154. JAMES O. HORTON & LOIS HORTON, BLACK BOSTONIANS: FAMILY LIFE AND COMMUNITY STRUGGLE IN THE ANTEBELLUM NORTH 74 (1979).

155. *Id.* at 74-75.

156. *Id.* at 75.

when the state legislature prohibited segregation in the Commonwealth's public schools.[157]

Thus, Justice Brown might have concluded that the force of history was against segregation. The state legislature had elected the losing attorney in *Roberts* to the United States Senate the following year,[158] which was in part a political rejection of Shaw's opinion. Five years later, Massachusetts emphatically rejected Shaw's decision, with new legislation that the governor signed which prohibited segregations in the Commonwealth's schools. In the next fifteen years, the nation had rejected slavery and racism in a bloody and expensive war, followed by three constitutional amendments writing the results of that war into the Constitution. During this period, Congress passed numerous laws, which unambiguously demonstrated that the will of the nation was moving towards more equality and integration, even if it did not fully endorse all forms of social equality.

The Louisiana law at issue in *Plessy* was enacted by the very people, or their children, who had traitorously tried to destroy the nation by rupturing the nation. They had seceded in the service of slavery and then made war on the nation.[159] They had lost that war, and Brown might have concluded they should not win the peace through laws that harmed the only group of people and their descendants in Louisiana who were truly loyal to the United States during the War.

That Justice Brown and the Court did not choose this direction—indeed the Court had been moving away from this direction since *Slaughterhouse*—was not because the Fourteenth Amendment's framers were uncertain about the general direction of their public policy. It was not, as Nelson argues, because the Court was "confronted with competing claims of principle."[160] Rather it was because the Justices turned their backs on the purpose of the Fourteenth Amendment to protect the fundamental liberties of the former slaves and free blacks in the South, their descendants, and their white and black allies from the North.

Nelson demonstrates that there was enough complexity in the debates over the Fourteenth Amendment for differing views about what equal protection or due process meant. But no one who voted for the Amendment,

157. An Act Concerning Public Schools, ch. 214, 1855 Mass. Act 358; *see also* LEONARD W. LEVY AND DOUGLAS JONES, JIM CROW IN BOSTON: THE ORIGIN OF THE SEPARATE BUT EQUAL DOCTRINE (1974).

158. Before the ratification of the Seventeenth Amendment in 1913, Senators were elected by the state legislatures and not by a direct vote of the people.

159. On the proslavery basis for secession, see Paul Finkelman, *States' Rights, Southern Hypocrisy, and the Crisis of the Union*, 45 AKRON L. REV. 449 (2012).

160. NELSON, *supra* note 2, at 187.

and the Fifteenth that followed it, and the many civil rights acts of the period could have believed these Constitutional and legal changes meant that it was permissible to deny blacks the right to vote, hold office, serve on juries, or sit where they pleased on public transportation. The members of Congress who voted to integrate Washington's public transportation, and a year later passed the Civil Rights Act of 1866 and the Fourteenth Amendment, would have been stunned to learn that, three decades later, the Supreme Court would conclude that nothing that they did was meant to give blacks a right to equal protection of the laws or due process in the courts. They would have been shocked to learn that the Supreme Court had, in effect, rewritten their amendments to protect private property, emerging corporations, and southern white supremacists, but not to protect the civil rights of African Americans.

One way to understand the meaning of the Fourteenth Amendment—and where the late nineteenth century Court went wrong—is to return to the background of the Amendment. The Amendment grew out of investigations into the conditions in the South in the aftermath of the Civil War. To the great shock of northerners, defeated Confederates did not simply lay down their arms, accept the end of slavery, and move forward towards reconstructing the former Confederate states on a biracial and egalitarian basis.[161] Instead, the nation witnessed massive violence in the South directed at blacks, U.S. army soldiers, white southern unionists, and northern whites who had moved to the South after the War.[162] Newly elected southern state legislatures passed numerous laws, collectively known as black codes, which were designed prevent black political activity and economic success. Across the defeated Confederacy new local and state governments and white terrorists did everything they could to reverse the outcome of the Civil War.[163]

161. For a brief discussion of the legal and constitutional background to these events, see 1 MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 490-504 (3d ed. 2011); *see generally*, JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR (3d ed. 2012); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (2002).

162. Illustrative of the nature of southern violence was package that Senator Charles Sumner received in the spring while Congress was debated the Civil Rights Act of 1866. Senator Charles Sumner of Massachusetts received a box containing the finger of a black man. The accompanying note read: "You old son of a bitch, I send you a piece of one of your friends, and if that bill of yours passes I will have a piece of you." JAMES M. MCPHERSON, THE STRUGGLE FOR EQUALITY: ABOLITIONISTS AND THE NEGRO IN THE CIVIL WAR AND RECONSTRUCTION 341 (1964).

163. *See* 1 UROFSKY & FINKELMAN, A MARCH OF LIBERTY, *supra* note 161, at 490-504; *see generally* JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR (3d ed. 2012); FONER, *supra* note 161.

In response to these developments, in December 1865, Congress formed the Joint Committee on Reconstruction to investigate conditions in the South. This committee's report led to the Civil Rights Act of 1866 and the Fourteenth Amendment. During these hearings, Brevet Major General John W. Turner of the United States Army testified about conditions in Virginia. He noted that in Virginia, where the Confederacy had its capital, "all of the [white] people" were "extremely reluctant to grant to the negro his civil rights – those privileges that pertain to freedom, the protection of life, liberty, and property before the laws, the right to testify in courts, etc."[164] Turner noted that whites were "reluctant even to consider and treat the negro as a free man, to let him have his half of the sidewalk or the street crossing."[165] They would only "concede" such rights to blacks "if it is ever done, because they are forced to do it."[166] Testimony like that offered by Turner led to the Fourteenth Amendment, and this is where the Court should have turned to understand the Amendment.[167] This kind of evidence illustrates why a narrow analysis of the Court's race opinions in the late nineteenth century fails to teach what was actually happening when the Amendment was written and why the Court's interpretations of the Amendment were so horrendously off the mark.

## V. THE BETRAYAL OF THE FOURTEENTH AMENDMENT AND THE NATION

Parsing the race cases of the late nineteenth century without examining the social and political context of the cases, as Nelson does, leads to the erroneous conclusion that the Court acted moderately and carefully within well-understood rules of law. Nelson suggests that the Court was making compromises and "concessions to both points of view" at the time.[168] However, he never suggests what those compromises were or what concessions were made to the framers of the Fourteenth Amendment who believed that they were protecting fundamental rights of blacks.

One might wonder how the Court incorporated the "point of view" of blacks, unless it was in the dissents of Justice John Marshall Harlan. Where was the "balance" in failing to protect black civil rights, voting rights, or their right to be jurors? What "concessions" did the Court ask from the segregating South? What compromise was reached over black rights? Were

164. REPORT OF JOINT COMMITTEE ON RECONSTRUCTION, H.R. Rep. 39-30, pt. II, at 4 (testimony of Brevet Major General John W. Turner).

165. *Id.*

166. *Id.*

167. *See* NELSON, *supra* note 2, at 48-60.

168. *Id.* at 187.

there any concessions to due process in the series of decisions that removed virtually all southern blacks from jury boxes and voting booths?

The Court did not ask the white South to make any concessions when the Supreme Court upheld laws that segregated blacks, barred middle-class blacks from riding in first class cars with their white counterparts, or prevented black women from riding in the "women's cars" of trains. Were there concessions and compromises that created grammar schools for blacks while creating high schools for whites?[169] The only rational conclusion, when looking at these cases, is that the Court was uninterested in the rights of blacks, had forgotten what the Civil War was all about, and had no interest whatsoever in why the Fourteenth Amendment was written and ratified.

Two cases—*Lochner* v. *New York*[170] and *Berea College v. Kentucky*,[171]—decided within a few years of each other, just after the turn-of-the-century, illustrate the problematic nature of arguing that there was any sort of balance in the Court's race jurisprudence in the late nineteenth century. *Lochner* demonstrates how the Court was perfectly comfortable rejecting majoritarian state legislation that did not comport with its economic theories, while *Berea College* demonstrates the Court's willingness to abandon its economic theories in support of state laws which denied equality to blacks. These cases represent clear examples of the Court's intellectually dishonest and morally bankrupt jurisprudence.

In 1905, in *Lochner v. New York*, the Court struck down a New York law limiting the hours that a baker could work on the grounds that the law interfered with the baker's "liberty of contract" under the due process clause of the Fourteenth Amendment.[172] Three years later, in *Berea College v. Kentucky*, the Court upheld a Kentucky law that prevented Berea College, a private institution of higher learning, from operating on an integrated basis.[173] Counsel in *Berea College* argued that "[a]bsolute arbitrary power over the lives, liberties and property of the people cannot exist in this country, under any name or in any form, and it is always the duty of the courts to disregard mere names and forms in determining whether the legislature has or has not exceeded its authority."[174] Citing *Lochner,* the lawyers for Berea College argued that "[t]he statute is unnecessary and unreasonable, and therefore an arbitrary interference with the rights of the

169. Cumming v. Richmond County Bd. of Ed., 175 U.S. 528 (1899).
170. 198 U.S. 45 (1905).
171. 211 U.S. 45 (1908).
172. 198 U.S. at 64.
173. 211 U.S. at 57-58.
174. 211 U.S. at 48.

people in the conduct of their private business and in the pursuit of their ordinary occupations." The attorney for the College acknowledged that the legislature could regulate property interests and economic liberty for noxious commerce, such as that involving liquor, gambling, the "maintenance of nuisances, the keeping of disorderly houses,"[175] and similar activities. But operating a college could not be considered such an enterprise, and the fact that it was integrated was irrelevant because the "Constitution makes no distinction between the different races or different classes of the people."[176] In dissent, Justice John Marshall accepted these arguments, asserting that the Kentucky statute was "an arbitrary invasion of the rights of liberty and property guaranteed by the Fourteenth Amendment against hostile state action and is, therefore, void."[177]

The Court majority in *Berea College* rejected these arguments with a simplistic analysis that a state had a right to alter a corporate charter.[178] Such a power did not exist, of course, if it was arbitrary or violated the United States Constitution. Three years earlier, in *Lochner*, the Court found that a state was arbitrary in prohibiting employers—including presumably corporate employers—from making bakers work more than sixty hours a week. But the Court found nothing arbitrary about forcing a private college that had long been integrated to segregate. And, the Court found nothing in the Constitution that prohibited states from passing legislation which forced private individuals and companies to practice segregation against their will. In the *Civil Rights Cases*, it is worth remembering, that the Court held that the Fourteenth Amendment only limited state action. But, here the Court found that state action requiring segregation, when both the blacks and the whites involved wanted integration, did not violate the equal protection or due process clauses of the Fourteenth Amendment.

One wonders what the "compromise" was when the Court that almost always protected the rights of private property, upheld this Kentucky law, which in effect undermined Berea College's property rights and liberty of contract. It is virtually impossible to square the liberty of contract arguments in *Lochner* with the outcome in *Berea College*. Surely, the trustees of Berea College had the right to contract with whoever they wanted to sell their product—a college education. Similarly the purchasers of this product—the students—had a right to contract to buy the product. If whites and blacks chose to buy an education in an integrated context, the students

175. *Id.* at 49.
176. *Id.* at 49.
177. *Id.* at 67.
178. *Id.* at 57.

should have had such a right under *Lochner*. That they did not have such a right underscores the racial bias of the court in this period and its refusal to honestly interpret and enforce the Fourteenth Amendment. Blacks and white integrationists did not apparently have freedom of contract.

Finally, Nelson suggests that the Court may have acted as it did because the Justices thought it was what the American people wanted. This argument assumes that the Justices in the late nineteenth and early twentieth centuries shaped their decision to comport with popular will.[179] Nelson implies this by arguing that the race decisions in this period gave concessions to both sides, when in fact they gave nothing to blacks. Tied to this conclusion is the implication that the Court was just following accepted rules and precedents. Such an analysis would lead to the conclusion that the Justices had no choice and that therefore, whatever we think of the decisions in the *Civil Rights Cases* or in *Plessy*, they were the right decisions at the time. Nelson, for example argues that in its race jurisprudence "deferential judges . . . understood their obligation to accept legislative fact-finding," and thus upheld segregation as reasonable.[180] Therefore, supporting segregation "might not have seemed outrageous in the context of the 1890's."[181]

This analysis falls apart on close scrutiny. The Court of the late nineteenth and early twentieth century was notoriously never worried about being popular or "deferential" to the state legislatures or the national legislature.[182] Some of its decisions on antitrust[183] were clearly unpopular and not deferential. Most Americans favored a graduated income tax. Twice Congress passed laws allowing it, but Nelson's notion of "deference" did not stop the Court from striking down such laws, not once but twice.[184] Underscoring the fundamental unpopularity of these decisions is the framing and adoption of the Sixteenth Amendment in 1913.[185] *Lochner v. New York* showed how little the Court deferred to the legislature of the nation's largest state. The decision was one of the most unpopular decisions in the Court's history, and scholars and politicians alike have ever since called the

179. *See generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

180. NELSON, *supra* note 2, at 186.

181. *Id.* at 186-187.

182. For a succinct discussion of the evolution of the law in this period, see 2 UROFSKY & FINKELMAN, A MARCH OF LIBERTY, *supra* note 63, at 591-461.

183. United States v. E.C. Knight Co., 156 U.S. 1 (1895).

184. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895); Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895).

185. BERNSTEIN, *supra* note 99, at 117-122.

court in this period "The *Lochner* Court."[186] Most Americans reacted with hostility to the Lochner Court's decisions adversely affecting bans on child labor, limiting the rights of workers, and striking down numerous other popular state and federal laws. The succession of Progressive presidents—Theodore Roosevelt, William Howard Taft, and Woodrow Wilson—illustrated that the electorate favored progressive reforms, and not the reactionary, narrow jurisprudence of the Lochner Court. But, the Court did not think it needed to worry about public opinion, nor did it. The Court in this period was rarely deferential to any legislature, state or federal. Thus, we cannot explain the Court's support for segregation and racism on the grounds that it was deferential to the majority or to state legislatures.

It is also important to note that the Court was not particularly deferential to state or federal legislation that supported equality. Unfortunately, Nelson's book does not consider this issue, which once again illustrates that the Court was not deferential to legislatures, and thus its race jurisprudence was not rooted in deference but was based on the animus the Court had to the rights of African Americans. Thus, over Justice Harlan's dissent, the Court found the Civil Rights Act of 1875 unconstitutional,[187] without giving any deference to the national legislature. Two cases involving segregation in public transportation after the court struck down the Civil Rights Act of 1875 illustrate the hypocrisy and intellectual dishonesty of the Court in this period and demonstrates that when it came to race the Court did not make "concessions to both points of view," but virtually always supported segregation. These two cases, *Hall v. DeCuir* and *Louisville, New Orleans, & Texas Railway Co. v. Mississippi* are discussed in turn below.

During Reconstruction, the Louisiana legislature prohibited segregation on all public transport and in 1869 allowed aggrieved travelers a right of private action.[188] Under this law, Josephine DeCuir successfully sued a steamboat that had refused to allow her to occupy a private room she had paid for, because she was black.[189] At trial she was awarded $1,000 dollars in damages, but she lost her judgment in *Hall v. DeCuir*,[190] where the Supreme Court held that the Louisiana law interfered with interstate com-

186. PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF *LOCHNER V. NEW YORK* (1990); HOWARD GILMAN, THE CONSTITUTION BESIEGED: THE RISE AND FALL OF LOCHNER EAR POLICE POWER JURISPRUDENCE (1993).

187. 109 U.S. 3 (1883).

188. Act of Feb. 23, 1869, No. 38, 1869 La. Acts 37 ("An Act to Enforce the Thirteenth Article of the Constitution of this State, and to Regulate the Licenses mentioned in the said thirteenth article").

189. Decuir v. Benson. 27 La.Ann. 1, 2 (1875).

190. 95 U.S. 485 (1877).

merce, since boats crossing into Louisiana from other states would have to allow black passengers to move to non-segregated sections of the ship, and when leaving Louisiana they might have to move black passengers as well.[191] There was no deference here to Louisiana, which wanted to provide integration within its state boundaries. The bias of the Court was obvious. The Court would not allow Louisiana to mandate integration within its own boundaries, because other states might mandate segregation.[192] The case implied that segregation trumped integration—this was hardly balanced.

The hypocrisy of the Court in this period and the failure to balance "both points of view" became clear a few years later in *Louisville, New Orleans, & Texas Railway Co. v. Mississippi.*[193] This case involved a Mississippi law that *required* segregation on trains. The Louisville, New Orleans, & Texas railroad brought suit because it did not want to go to the trouble and expense of having separate cars for blacks. Had the Court applied the logic of *Hall v. DeCuir*, the Court would have struck down the Mississippi law. This would have been a concession to "both points of view," and would have left segregation or integration entirely in the hands of the railroad. But, that is not what happened. The Court upheld mandatory segregation, and did not find that it placed a burden on interstate commerce, unlike the mandatory integration in *DeCuir*.

These two cases illustrate that there was no balancing by the Court on issues of race, and the "deference" in race cases was a one-way street. If the legislature sought to harm civil rights, the Court was deferential even when, as in *Williams v. Mississippi*, the racial animus of the state was naked and completely out in the open. In his discussion of a Georgia school district that abolished its high school for blacks,[194] Nelson asserted that the "courts were not racist" and that they "demanded that black children receive an equal education."[195] Here, the Court said it would side with the black plaintiffs if the school board's motivation was "hostility to the colored population because of their race."[196] But, the Court in this period *never* demanded that educational opportunity be equal and never questioned the motivations of segregationist actors. Indeed, after 1881 the Court would

191. *Id.* at 497-98.

192. *Id.* at 498.

193. 133 U.S. 587 (1890).

194. Cumming v. Richmond County Bd. of Ed., 175 U.S. 528 (1899).

195. NELSON, *supra* note 2, at 186.

196. *Id.* (quoting *Cumming*, 175 U.S. at 545). It is possible to argue that this case was decided correctly, because the remedy the black plaintiffs requested—closing the white high school until a black school was opened—was inappropriate and beyond the power of the Court. But the case can hardly stand for the principle of equality except to the extent that the court in theory says it would strike down a law that was racially motivated to harm blacks.

not side with black plaintiffs in a Fourteenth Amendment case until World War I,[197] and the Court would not use the equal protection clause to protect black civil rights until the 1930's.[198]

We cannot explain the Court's race jurisprudence in this period on a theory of deference, nor will an appeal to the uncertainties of the Fourteenth Amendment work. The appeal to history is unconvincing, since the major prop for this argument was an antebellum case, *Roberts* v. *City of Boston*, which had been long relegated to the dustbin of history by the state where it was decided. Racism may seem like too simplistic an explanation, and Nelson offers many alternatives. But to casually dismiss racism is wrong. The Court in this period demonstrated little interest in protecting the rights of blacks or preserving their liberties.

## VI. THE ROAD NOT TAKEN: THE CIVIL RIGHTS TRADITION IN THE NORTH

The implication of the narrowly legalistic analysis of the race cases is that they fit within the cultural preferences of the nation and thus the Court, which was otherwise never very deferential to the public, was in fact giving Americans what they wanted. This argument, however, is problematic.

It is not clear that the Court's attack on black civil rights from *Slaughterhouse* to *Plessy* and beyond, was necessarily popular throughout the nation. In 1883, the Court declared the Civil Rights Act of 1875 unconstitutional, because it affected individual actions, rather than state action.[199] In dissent, Justice Harlan argued that public accommodations were traditionally regulated under the common law and thus discrimination in hotels, restaurants, street-cars, theaters, and the like constituted a form of state action.[200] In that year the Court also upheld an Alabama law criminalizing interracial marriage, despite claims that this state law denied the parties to the marriage equal protection of the law.[201]

197. Buchanan v. Warley, 245 U.S. 60, 82 (1917) (involving property rights under the Fourteenth Amendment's Due Process Clause, and not the Equal Protection Clause). The court also supported two federal prosecutions under the Fifteenth Amendment in this period. *See* Ex parte Yarbrough (The Ku Klux Klan cases), 110 U.S. 651 (1884) (upholding prosecution of white terrorists who attacked black voters); Guinn v. United States, 238 U.S. 347 (1915) (striking down Oklahoma's grandfather clause that allowed whites, but not blacks, to vote, even if they could not pass a literacy test).

198. *See* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

199. The Civil Rights Cases, 109 U.S. 3, 17-18 (1883).

200. *Id.*

201. Pace v. Alabama, 106 U.S. 583, 585 (1883).

Even the claim that these cases were "popular" is suspect. They were surely popular among most white Southerners.[202] But, they were certainly not popular among blacks, the vast majority of whom lived in the South. Many white northerners also would have opposed these decisions, judging from the many civil rights laws passed by northern states in this period. Almost every northern state passed an equal accommodations law after the *Civil Rights Cases* struck down such protections at the federal level.[203] In the same year that the Court upheld the criminalization of interracial marriage in Alabama, Michigan legalized such marriages, despite the fact that most of the members of the legislature personally disapproved of such unions.[204] In 1899, three years after the Court in *Plessy* upheld railroad segregation in Louisiana, Michigan passed another law reiterating its commitment to allowing interracial marriage.[205]

In the aftermath of the *Civil Rights Cases*, most mid-Atlantic states passed civil rights laws rejecting "separate but equal"[206] and prohibiting private acts of discrimination. Pennsylvania's law of 1887, for example, imposed fines of fifty to one hundred dollars (a significant sum of money at the time) for denying equal access to public transportation, theaters, hotels, restaurants, and concerts "or [any] place of entertainment or amusement."[207] New Jersey's act of 1884 imposed larger fines, of from $500 to $1,000 for the same denials of equal access.[208] This law also created a right of the complaining witness to pursue a private action of debt for up to $500.[209] The statute further provided for the possibility of jailing offenders for up to one year.[210] In addition to civil rights, the law protected the right to serve on a jury, and allowed for a fine of up to five thousand dollars for any official who refused to call African Americans for jury service. This is a dramatic alternative to the acts of Virginia judges who refused to call

202. *But see* Berea College, where white southerners litigated to preserve their integrated institution. Similarly, the white woman who was involved in a romantic relationship with a black man in Pace v. Alabama would not have been happy with the Supreme Court's decision.

203. Many of these laws are discussed below. A summary of some of them is found in Paul Finkelman, *Civil Rights in Historical Context: In Defense of* Brown, 118 HARV. L. REV. 973 (2005).

204. Act of April 11, 1883, 1883 Mich. Pub. Acts 16. The politics of this law are discussed in Paul Finkelman, *The Promise of Equality and the Limits of Law: From the Civil War to World War II*, *in* THE HISTORY OF MICHIGAN LAW 187-213 (Paul Finkelman & Martin J. Hershock eds., 2006).

205. Act of June 15, 1899, No. 247, 1899 Mich. Pub. Acts 387, 387-388; *see generally* Finkelman, *supra* note 204.

206. For a good discussion of these acts, see David McBride, *Mid-Atlantic State Courts and the Struggle With the "Separate but Equal" Doctrine: 1880-1939*, 17 RUTGERS L.J. 569 (1986).

207. Act of May 19, 1887, 1887 Pa. Laws 130.

208. Act of May 10, 1884, 1884 N.J. Laws 113.

209. *Id.*; *see also* McBride, *supra* note 206, at 584-85.

210. 1884 N.J. Laws at 113.

black jurors. In *Miller v. Stampul*[211] the New Jersey Supreme Court upheld the application of this law, imposing a $500 fine (a huge sum of money at the time), against a theater owner who refused to admit blacks on the same basis as whites.

This support for civil rights was not limited to the east coast. In 1881, a Cincinnati jury awarded a black woman $1,000—an enormous sum of money at the time—when a railroad forced her to ride in a smoking car instead of honoring her ticket for the first-class car.[212] This is in dramatic contrast to the Mississippi statute at issue in *Louisville, New Orleans, & Texas Railway Company v. Mississippi*.[213] Three years after the Cincinnati jury gave such a resounding endorsement to equality, Ohio adopted a new civil rights law declaring that all its citizens were "equal before the law," and that such a status was "essential to just government."[214] The statute prohibited private businesses from discriminating, and specifically prohibited discrimination in all "inns, public conveyances on land or water, theaters and other places of public amusement."[215] Later that year, Ohio amended this law to also cover "inns, restaurants, eating-houses, and barber-shops, and all other places of public accommodation and amusement."[216] Three years later, Ohio repealed its last remaining black laws, by enacting the "Arnett bill," a law sponsored by Benjamin Arnett, a black state legislator who represented predominately white Green County.[217] In 1894, Ohio raised the maximum fines for violations of its civil rights laws from $100 to $500, raised the maximum jail time from 30 days to 90 days, and most important, imposed for the first time a statutory minimum for violators of $50 or 30 days in jail.[218] The year before the Supreme Court upheld segregation in *Plessy*, Wisconsin passed a law "to protect all citizens in their civil and legal rights."[219]

In May 1885, Michigan passed "An Act to protect all citizens in their civil rights."[220] The law declared that all persons "within the jurisdiction"

211. 84 A. 201, 202 (N.J. 1912).

212. *See* Gray v. Cincinnati S. R.R. Co., 11 F. 683 (C.C.S.D. Ohio 1882); *see also* Patricia Hagler Minter, *The Failure of Freedom: Class Gender, and the Evolution of Segregated Transit Law in the Nineteenth-Century South*, 70 CHI-KENT L. REV. 993 (1995).

213. 133 U.S. 587 (1890).

214. Act of February 7, 1884, 1884 Ohio Laws 15; *see also* DAVID A. GERBER, BLACK OHIO AND THE COLOR LINE, 1860-1915, at 46 (1976).

215. 1884 Ohio Laws at 15.

216. Act of March 27, 1884, 1884 Ohio Laws 90.

217. GERBER, *supra* note 214, at 241-42.

218. Act of Feb. 7, 1894, 1894 Ohio Laws 17.

219. Act of April 13, 1895, 1895 Wis. Sess. Laws 428.

220. Act of May 28, 1885, No. 130, 1885 Mich. Pub. Acts 131. For a more detailed discussion of the Michigan experience, see Finkelman, *supra* note 204, at 187.

of Michigan were "entitled to the full and equal accommodations, advantages, facilities, and privileges of inns, restaurants, eating-houses, barber shops, public conveyances on land and water, theaters, and all other places of public accommodation and amusement."[221] The law provided one hundred dollar fines and up to thirty days in jail for anyone who violated the law.[222] The law also imposed similar fines and punishments for "any officer or other person charged with any duty in the selection or summoning of jurors" who excluded potential grand jurors or petit jurors on the basis of race.[223] With this law, Michigan seemed to have created a society where race did not matter, at least in the public sphere.

In 1890, the Michigan Supreme Court upheld this law in a suit against a restaurant that refused to seat a black man in its main dining room.[224] In supporting this suit, Justice Allen B. Morse offered an extraordinary denunciation of racism and prejudice. The opinion reflected the age in which Morse lived, when even the most egalitarian whites probably did not *truly* believe that the races were equal. Morse implied that being black was similar to having a birth defect or "deformity." But Morse paternalistically rejected treating people differently simply because they have a "deformity." Nevertheless, despite its paternalism and mild racism, Morse's opinion was a profound rejection of segregation and race prejudice. In the end, he declared that racism "is not only not humane, but unreasonable."[225] Thus, Morse asserted:

> [I]n Michigan there must be and is an absolute, unconditional equality of white and colored men before the law. The white man can have no rights or privileges under the law that is denied to the black man. Socially people may do as they please within the law, and whites may associate together, as may blacks, and exclude whom they please from their dwellings and private grounds; but there can be no separation in public places between people on account of their color alone which the law will sanction.[226]

Morse argued that under the common law white men had always had "a remedy against any unjust discrimination to the citizen in all public places" and that since the adoption of the Civil War Amendments, and especially in light of the Michigan Civil Rights Act,

> the colored man, under the law of this state, was entitled to the same rights and privileges in public places as the white man, and must be

221. 1885 Mich. Pub. Acts at 131-32.
222. *Id.* at 132.
223. *Id.*
224. *See* Ferguson v. Gies, 46 N.W. 718 (Mich. 1890).
225. *Id.* at 721.
226. *Id.* at 720.

> treated the same there; and that his right of action for any injuries arising from an unjust discrimination against him is just as perfect and sacred in the courts as that of any other citizen.[227]

Emphatically denouncing racism, Justice Morse declared that "any discrimination founded upon the race or color of the citizen is unjust and cruel, can have no sanction in the law of this state."[228] Morse believed that this sort of discrimination, which could be found in other states, "taints justice."[229] Morse then demolished the racist notion that God had made blacks inferior to whites. He argued that such ideas were founded on reasoning that "does not commend itself either to the heart or judgment."[230]

As he wrote this opinion, Morse may have reflected on his own life. As a young man, he had served in the 16th Michigan Regiment and lost an arm storming Missionary Ridge. Thus, he understood the cost of equality: "The humane and enlightened judgment of our people has decided—although it cost blood and treasure to do so—that the negro [sic] is a man; a freeman; a citizen; and entitled to equal rights before the law with the white man."[231]

In 1889, in *Messenger v. State*,[232] the Nebraska Supreme Court upheld a Nebraska law enacted "to provide that all citizens shall be entitled to the same civil rights, and to punish all persons for violations of its provisions."[233] The Court explicitly mentioned slavery, and by doing so indirectly recalled the Civil War and the way it had forever changed American society and American law. The case involved a white barber who refused to shave a black man. The court remanded the case for further proceedings on technical grounds, but significantly supported civil rights, noting:

> The statute will not permit him to say to one: "You were a slave or a son of a slave; therefore I will not shave you." Such prejudices are unworthy of our better manhood, and are clearly prohibited by the statute. In this state a colored man may sit upon a jury, cast his ballot at any general or special election where he is entitled to vote, and his vote will be counted, and he has the right to travel upon any public conveyance the same as if he were white. The authority of the state to prohibit discriminations on account of color in places of public resort, as a barbershop, is undoubted, and the proprietors of such shops can adopt and enforce no rules which will not apply to white and colored alike.[234]

227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.* at 721.
231. *Id*.
232. 41 N.W. 638 (Neb. 1889).
233. Act of Mar. 4, 1885, 1885 Neb. Laws 393.
234. *Messenger*, 41 N.W. at 639.

In 1905, the Iowa Supreme Court upheld a judgment against a restaurant that refused to serve a black man.[235] This case was decided three years before the Supreme Court upheld Kentucky's law requiring segregation of private colleges in *Berea College*. This case reflects the Iowa cases of the 1860s and 1870s supporting integration.[236] Similarly, in 1902, an Ohio court upheld the right of a black man to sue under a state civil rights statute after he was denied the right to use a bowling alley at a public resort.[237] The court cited the Michigan court's decision in *Ferguson v. Gies*.[238]

The Northern laws and decision supporting civil rights in this period illustrate that there was a powerful cultural and legal alternative to the racism of the Supreme Court and its refusal to apply the Fourteenth Amendment as its framers intended—to create a more just and racially fair society. That the Court did not do this was not as function of the logic of the law,[239] it was more a result of the lack of experience that these Justices had with liberty, equality, and racial fairness, and their insensitivity to racial prejudice. They represented a narrow swath of elite white culture, and they were not willing to see that blacks were entitled equality or justice. Possibly, as Nelson charitably suggests the justices "were not racist,"[240] but their decisions certainly were, and it seems fair to suggest that so were a number of the members of the Court.

Judge Morse of Michigan better understood the meaning of the Civil War and the Constitutional changes it led to than did most of the more famous justices of the United States Supreme Court in this period. Indeed the only Justice on the Court who recognized the changes brought about by the Fourteenth Amendment and its two companion Amendments—the Thirteenth and the Fifteenth—was John Marshall Harlan, who like Morse had served in the United States Army in the War of the Rebellion and fought not only to preserve the Union but also to end slavery and move the nation closer to equality.[241]

Harlan dissented in many of the race cases of the late nineteenth and early twentieth centuries. He accurately compared the Court's decision in

235. Humburd v. Crawford, 105 N.W. 330 (Iowa 1905).

236. NELSON, *supra* note 2, at 151-52.

237. *See* Johnson v. Humphrey Pop Corn Co., 24 Ohio C.C. 135 (1902).

238 . *See id.* at 54.

239. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881) ("The life of the law has not been logic; it has been experience.").

240. NELSON, *supra* note 2, at 186.

241. *See generally* LINDA PRZYBYSZEWSKI, *THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN* (1999).

*Plessy* to the most proslavery decision of the antebellum period: "In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case."[242] He correctly argued: "The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the constitution. It cannot be justified upon any legal grounds."[243] Nor, as the first part of Nelson's book shows, could it be justified by the history of the Fourteenth Amendment.

## VII. CONCLUSION

Despite my disagreement with his analysis of the Court's race cases, I stand in awe of Nelson's book for its stunning research and analysis of the drafting and adoption of the Fourteenth Amendment. A quarter of a century after he wrote it, Nelson's book remains a powerful and important contribution to our understanding of how the Fourteenth Amendment became part of Constitution. Indeed, the first two thirds of this book ought to be required reading for the members of the Supreme Court who insist on applying an originalist interpretation of the Fourteenth Amendment, but who apparently have not bothered to actually learn its historical origins.[244]

Similarly, the current justices could learn much from Justice Harlan's final statement in *Plessy*, because it was much closer to the meaning of the Fourteenth than the crabbed, overly constricted, and often deeply racist opinions of the rest of the Justices in this period, and our own time as well.

> I am of opinion that the state of Louisiana is inconsistent with the personal liberty of citizens, white and black, in that state, and hostile to both the spirit and letter of the constitution of the United States. If laws of like character should be enacted in the several states of the Union, the effect would be in the highest degree mischievous. Slavery, as an institution tolerated by law, would, it is true, have disappeared from our country; but there would remain a power in the states, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom, to regulate civil rights, common to all citizens, upon the basis of race, and to place in a condition of legal inferiority a large body of American citizens, now constituting a part of the political community, called the 'People of the United States,' for whom, and by whom through representatives, our government is administered. Such a system is inconsistent with the guaranty given by the constitution to each state of a republican form of gov-

242. Plessy v. Ferguson, 163 U.S. 537, 559 (1896).

243. *Id.* at 562.

244. *Compare* Schuette v. Coalition to Defend Affirmative Action, 134 S. Ct. 1623 (2014), *with* Finkelman Brief, *supra* note 44.

> ernment, and may be stricken down by congressional action, or by the courts in the discharge of their solemn duty to maintain the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding.[245]

245. *Id.* at 563-64.