

THE “BLACK AND TAN CONVENTIONS,” DIVERSE ORIGINALISM, AND THE FOURTEENTH AMENDMENT

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INTRODUCTION	1403
I. THE CONVENTIONS AND THE MAKING OF THE AMENDMENT.....	1405
II. THE CONVENTIONS AND THE MEANING OF THE AMENDMENT.....	1410
III. THE JURISTS’ UNJUST NEGLECT	1417
CONCLUSION.....	1421

INTRODUCTION

Our Republic, for a half century now, has officially observed Black History Month. President Gerald Ford began this official observance with a proclamation in February 1976.¹ Since then, every President has done the same and thus established what appears to be an American tradition.²

By the original proclamation, the President announced that “[in the] Bicentennial year of our Independence,” we should “review with admiration the impressive contributions of black Americans to our national life and culture.”³ We must, he elaborated, “seize the

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¹ See Maddy Teka, *Black History Month: An Overview*, FINDLAW (Jan. 28, 2024), <https://www.findlaw.com/legalblogs/law-and-life/black-history-month-an-overview/> [<https://perma.cc/3KSF-RTUM>].

² *Id.*

³ Message on the Observance of Black History Month, 1 PUB. PAPERS 242-43 (Feb. 10, 1976).

opportunity to honor the too-often neglected accomplishments of black Americans in every area of endeavor throughout our history.”⁴

This short essay will speak on one neglected “impressive contribution” to “our national life” —and in this case, the making of our Constitution. In particular, this essay will discuss the work of the so-called “Black and Tan Conventions,” the biracial state constitutional conventions held in the former-rebel states during Reconstruction. Through those conventions, Southern black loyalists, in cooperation with Southern white loyalists, not only drafted new state constitutions but participated substantially in making the Fourteenth Amendment to our national Constitution.⁵

This essay will proceed in three parts, corresponding to the following conclusions: (1) that the work of these Conventions was necessary to the making of the Fourteenth Amendment; (2) that this work provides critical, if not dispositive, evidence as to that Amendment’s original meaning; and (3) that members of the bench, bar, and academy have unjustly neglected this contribution. This neglect has become a deafening silence among those advocating racial diversity or originalism and the combination thereof as “diverse originalism.”

⁴ *Id.* at 243.

⁵ See Susan D. Carle, *Reconstruction’s Lessons*, 13 COLUM. J. RACE & L. 734, 755-56 (2023).

I. THE CONVENTIONS AND THE MAKING OF THE AMENDMENT

At the close of the Civil War, congressional Republicans, with large majorities in both chambers, refused to admit any of the putative representatives from the eleven so-called seceded states. Republicans believed that the white population of those states remained so hostile to the Union that they (and their representatives) could not be trusted with national political authority.⁶ Instead, when Congress formally convened in December 1865, both houses established the Joint Committee on Reconstruction and directed it to “inquire into the condition of the States which formed the so-called Confederate States of America, and report whether they, or any of them, are entitled to be represented in either house of Congress.”⁷

That Committee, in turn, concluded that among the prerequisites to Southern readmission was a constitutional amendment that would, *inter alia*, secure to the former slaves “their rights as free men and citizens” and more generally, “to secure the civil rights of all citizens of the republic.”⁸ On April 30, 1866, the Committee submitted a proposal to the full Congress, and after significant modifications, two-thirds of both houses concurred in formally proposing the Fourteenth Amendment on June 13, 1866.⁹

⁶ See J. COMM. RECONSTR., REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, H.R. REP. NO. 39-30, at IX-X (1866) (explaining that given Southern voters’ preference for men “who made no secret of their hostility to the government and the people of the United States,” the “hasty” readmission of Southern representatives “would have been as dangerous as it was obviously unwise”).

⁷ S. JOURNAL, 39th Cong., 1st Sess. 34 (1865) (approving an amended version of the resolution); see also H. JOURNAL, 39th Cong., 1st Sess. 60 (1865) (concurring in the Senate version).

⁸ See H.R. REP. NO. 39-30, at XIII-XIV, XVIII.

⁹ CONG. GLOBE, 39th Cong., 1st Sess. 3149 (1866) (showing the House vote concurring with the Senate’s version).

Over the next nine months, over three-fourths of the loyal states, voted to ratify the measure.¹⁰ Among the eleven excluded states, Tennessee ratified the measure as well and was promptly rewarded with readmission,¹¹ but in the ten others, the state legislatures rejected the Amendment unanimously or nearly so.¹²

Partly in response to this intransigence, Congress subjected these ten states to extraordinary federal control by the Reconstruction Acts of 1867. Of relevance here, Congress authorized a provisional military government and directed the army to conduct a new registration of voters according to criteria sharply different from that which had yielded legislatures so hostile to the Amendment. That old electorate excluded all non-whites but included the disloyal equally with the loyal.¹³ But the Reconstruction Acts described the *new* electorate:

¹⁰ See John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 398 (2001).

¹¹ *Id.* at 404-05.

¹² See HORACE EDGAR FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 191-204 (Baltimore: Johns Hopkins Press 1908).

¹³ President Johnson had imposed an oath of loyalty as a condition for amnesty and then of eligibility to vote for state constitutional conventions. See Andrew Johnson, *Proclamation 144—Reorganizing a Constitutional Government in Florida*, AM. PRESIDENCY PROJECT (July 13, 1865), <https://www.presidency.ucsb.edu/documents/proclamation-144-reorganizing-constitutional-government-flordia> [https://perma.cc/6XSH-RYBG]; Andrew Johnson, *Proclamation 143—Reorganizing a Constitutional Government in South Carolina*, THE AM. PRESIDENCY PROJECT (June 30, 1865), <https://www.presidency.ucsb.edu/documents/proclamation-143-reorganizing-constitutional-government-south-carolina> [https://perma.cc/NQ9Z-FUBA] (both stipulating that no one will be an eligible voter “unless he shall have previously taken and subscribed the oath of amnesty as set forth in the President’s proclamation of May 29, A. D. 1865). But in drafting the constitutions, those conventions did not impose that same condition on subsequent voters. See FLA. CONST. of 1865, art. VI, § 1 (the Proclamation by William Marvin, Provisional Governor of the State of Florida, extended the suffrage to “free white male” citizens at least 21 years of age and at least one year of residence in the state, but without any requirement of loyalty); S.C. CONST. of 1865, art. IV (imposing similar qualifications).

(1) *inclusive* as to race (of “whatever race, color, or previous condition”),¹⁴ and (2) *exclusive* as to various factors, including not only citizenship, sex, age, and durational residence (U.S. citizen, male, at least 21 years of age, and at least one year of residence in the state), but also past loyalty (some prominent Confederates were excluded), and robust, even enthusiastic present loyalty—evinced by a pledge not only to be loyal to the Union, but also to “faithfully support the Constitution,” to “obey the laws of the United States,” and even to “encourage others so to do.”¹⁵

Congress further provided that the people of each of these states would be entitled to congressional readmission upon several conditions, including the following:

- (1) the people, via this new biracial loyalist electorate, had to choose delegates to a convention to frame a constitution, that would
 - (a) preserve “the elective franchise” to “all such persons as have the qualifications herein stated for electors of delegates,” and
 - (b) be ratified by that same biracial loyalist electorate;
- (2) that state constitution had to be “in conformity with the Constitution of the United States in all respects”; and
- (3) the state legislature, elected under that new constitution, had to ratify the Fourteenth Amendment.¹⁶

Pursuant to the Reconstruction Acts, the Union army began to register voters according to these biracial loyalist standards. Beginning in late 1867, this new electorate began to choose delegates to state constitutional conventions, ratify the state constitutions proposed by these conventions, and elect legislatures that ratified the national Amendment.¹⁷

¹⁴ Act of Mar. 2, 1867, ch. 153, § 5, 14 Stat. 428, 429.

¹⁵ *Id.*; Act of Mar. 23, 1867, ch. 6, § 1, 15 Stat. 2.

¹⁶ § 5, 14 Stat. at 429.

¹⁷ DAVID HERBERT DONALD ET AL., *THE CIVIL WAR AND RECONSTRUCTION* 577 (2001).

By late June 1868, Congress reviewed and approved constitutions from seven of the ten excluded states (Arkansas, North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida) and statutorily declared these states entitled to representation in Congress on condition that they ratify the Amendment (where they had not already done so).¹⁸

By July 21, 1868, Secretary of State William Seward had received notice of ratification from each of these seven states. Such ratification brought the total number of ratifying states from 23 to 30. These additional ratifications meant the Fourteenth Amendment had crossed, with two votes to spare, the constitutional threshold for ratification—three fourths of the states, or 28 of the 37 states then composing the Union. Accordingly, a week later, pursuant to congressional directive, Seward proclaimed the ratification of the Amendment.¹⁹

The last three states—Virginia, Mississippi, and Texas—completed the process well after Seward's declaration. In late 1869–early 1870, each ratified the Amendment,²⁰ and in March 1870, Congress passed statutes certifying that each of these states had met the conditions for congressional readmission.²¹

In this process, black participation was extraordinary. Across the ten states, African Americans comprised a majority of the biracial loyalist electorate, and over 60% thereof in three states (Louisiana, South Carolina, and Alabama).²² Black turnout was all the more impressive in light of the widespread “terrorism against black voters.”²³

¹⁸ An Act to Admit the State of Arkansas to Representation in Congress, ch. 69, 15 Stat. 72 (1868); An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, ch. 70, 15 Stat. 73 (1868).

¹⁹ Proclamation No. 13, 15 Stat. 708, 709 (July 28, 1868).

²⁰ FLACK, *supra* note 12, at 191.

²¹ Act of Jan. 26, 1870, ch. 10, 16 Stat. 62, 63; Act of Feb. 23, 1870, ch. 19, 16 Stat. 67, 68; Act of Mar. 30, 1870, ch. 39, 16 Stat. 80, 81. For a nice summary of this process, see generally Alon Goldfinger, Note, *The Readmission Acts: Reconstruction's Forgotten Voting Rights Statutes*, 56 COLUM. HUM. RTS. L. REV. 1 (2025).

²² See W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 371 (1935).

²³ Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U.L. REV. 1549, 1598 (2020).

Blacks participated substantially, not only in the elections, but also at the conventions; in every state, they constituted at least a substantial minority of the delegates and in South Carolina, a large majority.²⁴

Black participation was not only courageous but necessary. Had black voters and delegates simply stayed home, the relatively small number of white loyalists could not have provided the conventions with sufficient legitimacy. And without such legitimacy, the conventions could not have established the new constitutions under which new legislatures could meet and ratify the Fourteenth Amendment. And without such ratification, the Amendment would have fallen short of the three-fourths threshold necessary for adoption, for the other ratifying states numbered only 23 of 37. Hence, as Eric Foner has aptly observed, “[n]o black suffrage in the South, no 14th Amendment.”²⁵

This necessity was unprecedented. Never before had the African-American electorate played such a vital role in the making of our Constitution. Before Reconstruction, African-American voters had been very few in number and thus played little role in making the original Constitution and the first thirteen amendments.

And this contribution was not replicated except with the adoption of the Fifteenth Amendment. After Reconstruction, with the Sixteenth through Twenty-Seventh Amendments (ratified between 1913 and 1992), black voters played a marginal role for two reasons: (1) disenfranchisement under Jim Crow and (2) geographic dilution after the Great Migration.²⁶

²⁴ See DU BOIS, *supra* note 22, at 372.

²⁵ Eric Foner, *We Should Embrace the Ambiguity of the Fourteenth Amendment*, THE NATION (July 9, 2018), <https://www.thenation.com/article/archive/embrace-ambiguity-14th-amendment/> [https://perma.cc/3XF6-UPS2].

²⁶ On the political-dilution effects of the Great Migration, see Rachel Garbus, *Charles M. Blow has a Proposition for Black Americans: Reverse the Great Migration*, ATLANTA (Oct. 29, 2024), <https://www.atlantamagazine.com/news-culture-articles/charles-m-blow-has-a-proposition-for-black-americans-reverse-the-great-migration/> [https://perma.cc/DF39-4AUT].

II. THE CONVENTIONS AND THE MEANING OF THE AMENDMENT

These biracial loyalist conventions played a vital role not only in making the Fourteenth Amendment but also in establishing its original meaning. By the presentation and approval process, both the state conventions and the whole Congress seemingly endorsed these constitutions as consistent with the Amendment. If so, these constitutions (hereinafter, “Reconstruction Constitutions”) can provide valuable evidence as to the original understanding.

Recall that the Black and Tan Conventions met under a peculiar mandate: to make constitutions that were in “conformity” with the Constitution of the United States “*in all respects*” and to establish state legislatures that would ratify the pending Fourteenth Amendment.²⁷ By this mandate, each convention had to ensure that its state constitution would conform with the prohibitions of that same Amendment:

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.²⁸

Congress, in turn, reviewed the Reconstruction Constitutions before approving these states for readmission. Hence by approving these elaborate constitutions, the members of both the conventions and Congress certified the full constitutionality of these state constitutions. Because this endorsement occurred during the pendency of the Amendment, the substance of these constitutions can provide powerful evidence of the original understanding of that Amendment. Of special weight are the seven constitutions approved by Congress in June 1868,²⁹ a month *before* Congress declared the Amendment ratified; such evidence seems more authoritative than post-ratification interpretations.³⁰

²⁷ Act of Mar. 2, 1867, ch. 153, § 5, 14 Stat. 428, 429 (emphasis added).

²⁸ U.S. CONST. amend. XIV, §1.

²⁹ See *supra* note 18.

³⁰ On the relative weight of post-ratification evidence, see *United States v. Rahimi*, 602 U.S. 680, 723 (2024) (Kavanaugh, J., concurring) (emphasizing that the value of post-ratification evidence arises “when the text is vague and the pre-ratification history is elusive or inconclusive, post-ratification history becomes especially important”); *id.* at

On the other hand, strictly speaking, the Amendment remained unratified when these seven states made their proposals. Thus, one might argue that the *conformity* required by the Reconstruction Acts extended only to the original Constitution and the first thirteen amendments, not a pending Amendment.

Still, several factors indicate that both the conventions and Congress expected the Reconstruction Constitutions to conform with the Amendment. First, not only did the Reconstruction Acts require the states’ subsequent ratification of the Amendment, but many believed that the Amendment had already been ratified even before the Black and Tan Conventions met. Many contended that only loyal states should be counted in ascertaining the total needed for ratification—so called “loyal [state] denominatorism”—and three-fourths of the loyal states (20 of 26) had ratified the measure by March 1867.³¹ Second, many believed that the Amendment’s first section represented restatements or elaborations of principles already found in the letter or spirit of the existing Constitution, so conformity with the Constitution “in all respects” necessarily implied conformity with the Amendment’s principles. Hence, for instance, at Arkansas’ convention, various delegates successfully opposed a constitutional provision barring interracial marriage, chiefly because such a provision would not be in conformity with constitutional “privileges and immunities” of American citizenship secured by *both* the original Constitution’s Article IV *and* the first section of the pending Amendment.³² For much the same reason, soon after ratification, the Mississippi Supreme Court concluded that conformity with the Constitution required obedience to the pending Amendment’s Due Process Clause. Even though Congress

737-38 (Barrett, J., concurring) (contending that “for an originalist, the history that matters most is the history surrounding the ratification of the text; that backdrop illuminates the meaning of the enacted law” but that “[h]istory (or tradition) that long postdates ratification does not serve that function”).

³¹ Christopher R. Green, *The History of the Loyal Denominator*, 79 LA. L. REV. 47, 50 (2018) <https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=6707&context=lalrev> [https://perma.cc/Y677-7MTR].

³² DEBATES AND PROCEEDINGS OF THE CONVENTION WHICH ASSEMBLED AT LITTLE ROCK, JANUARY 7, 1868, UNDER THE PROVISIONS OF THE ACT OF CONGRESS OF MARCH 2D, 1867, AND THE ACTS OF MARCH 23D AND JULY 19TH, 1867, SUPPLEMENTARY THERETO, TO FORM A CONSTITUTION FOR THE STATE OF ARKANSAS 377, 502-04, 618-619 (Little Rock: J.G. Price 1868) [hereinafter ARKANSAS CONSTITUTIONAL CONVENTION].

had not yet declared the Amendment ratified, the court noted the principles of that Clause were already “*substantially* the law of the land” by force of the Fifth Amendment’s Due Process Clause.³³

Therefore, these ten Reconstruction Constitutions, and especially the first seven thereof, give significant evidence as to the original meaning or understanding of the Fourteenth Amendment. A comprehensive review of these charters is beyond the scope of this essay. Still, a perusal suggests at least three ways these constitutions might inform the original meaning of the Amendment.

First, the Reconstruction Constitutions might provide a general sense of the spirit of the Amendment—the background motivating principles. One sees these old, familiar principles deep and broad in the American tradition. Across the documents, one sees a common political anthropology and cosmology, so to speak: (1) God is the author of every human being’s natural rights, (2) those rights include the right to life, liberty, and property, (3) the right of the individual “to worship God according to the dictates of his conscience,” and (4) the right and duty of the political community to give thanks to God for the blessings of their liberty.³⁴ Such principles explained the vital importance of the Due Process and Equal Protection Clauses. These provided to persons legal process and protection as safeguards to the God-given, universal human rights of person and property.

³³ *Lawson v. Jeffries*, 47 Miss. 686, 693 (1873) (emphasis added).

³⁴ See, e.g., S.C. CONST. of 1868, pmbl., art. I, §§ 1, 9 (beginning with a declaration of gratitude to “to Almighty God for this opportunity, deliberately and peaceably of entering into an explicit and solemn compact with each other,” and declaring “[a]ll men” to be “endowed by their Creator with certain inalienable rights, among which are the rights of enjoying and defending their lives and liberties, of acquiring, possessing, and protecting property, and of seeking and obtaining their safety and happiness” and affirming each person’s “right to worship God according to the dictates of his own conscience”); see also LA. CONST. of 1868, tit. I, art. 1, 12 (declaring that “all men are created free and equal, and have certain inalienable rights; among these are life, liberty, and the pursuit of happiness,” that “secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed,” and that “[e]very person has the natural right to worship God according to the dictates of his conscience”); MISS. CONST. of 1868, pmbl., art. I, § 23 (giving thanks to God for the people’s political freedom and declaring “the free enjoyment of all religious sentiments and the different modes of worship shall ever be held sacred”).

On the other hand, one finds something unfamiliar to America’s constitutional traditions: the express endorsement of racial equality as a fundamental right. For instance, several states expressly barred any legal “[d]istinction” on account of race or color.³⁵

Second, the Reconstruction Constitutions may provide some evidence of what procedural and substantive rights were encompassed by the Due Process and Privileges or Immunities Clauses. A decade before the Amendment, the Supreme Court had affirmed unanimously that “due process of law” required conformity with “those settled usages and modes of proceeding existing in the common and statute law of England” that had been preserved by the American colonists.³⁶ Therefore, if the Reconstruction Constitutions all adopted certain usages, such as trial by jury in criminal cases, or the writ of habeas corpus, such unanimity might indicate the procedural usages that were still so prevalent, so “settled” in 1868 so as to be included in the Due Process Clause. Further, under the most authoritative interpretation, the “privileges and immunities of citizens” were “fundamental,” “belong[ed], of right, to the citizens of all free governments,” and had, “at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.”³⁷ Accordingly, if the ten constitutions all indicated that citizens enjoyed some particular right, such as the freedom of speech or the right to an education, as Derek Black has recently argued, then such universal recognition may suggest the inclusion of these rights under the Privileges or Immunities Clause.³⁸

³⁵ See, e.g., FLA. CONST. of 1868, art. XVI, § 28; see also S.C. CONST. of 1868, art. I, § 39; ARK. CONST. of 1868, art. I, § 3 (“The equality of all persons before the law is recognized and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege, or immunity, nor exempted from any burden or duty, on account of race, color, or previous condition.”); TEX. CONST. of 1868, art. I, § XXI.

³⁶ *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276-77 (1856).

³⁷ *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823).

³⁸ Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 744 (2018) (contending that “that at the point in time the Fourteenth Amendment was ratified, education was a right of state citizenship in the constitution of every readmitted state and was thus implicit in the state citizenship requirement set forth in the Fourteenth Amendment”); see also Steven G. Calabresi & Sarah E. Agudo,

Third, and most importantly, the Reconstruction Constitutions provide strong, even dispositive evidence of what the Fourteenth Amendment did *not* prohibit. Various states included in their constitutions provisions that would, under contemporary jurisprudence, be held violative of the Amendment. Various states chose, as Congress had, to condition voting rights on a citizen's durational residence (*e.g.*, of one year)³⁹ and pledge of loyalty not only to the Union and the Constitution but also to certain principles—in two states, racial equality before the law.⁴⁰ Conversely, in sharp contrast, the conventions seemed quite comfortable with sex discrimination. In the constitutions, the drafters not only withheld the suffrage from women but imposed on males militia duty,⁴¹ capitation taxes to support education and relief of the poor,⁴² and higher age requirement (21 instead of 18) for emancipation from a juvenile apprenticeship.⁴³ Finally, the conventions choose not only to publicly honor God but promoted religion by (1) guaranteeing certain privileges to religious

Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights are Deeply Rooted in American History and Tradition?, 87 TEX. L. REV. 7, 13 (2008) (contending that “an inquiry” into the constitutions in force in 1868 “could even be said to shed light on the original public meaning of the Privileges or Immunities Clause”).

³⁹ See, *e.g.*, N.C. CONST. of 1868, art. VI, § 1; Act of Mar. 2, 1867, ch. CLIII, § 5, 14 Stat. 428, 429 (requiring one-year residence before eligibility to vote). *But see* Dunn v. Blumstein, 405 U.S. 330 (1972) (holding a three-month residency requirement to be violative of the Fourteenth Amendment).

⁴⁰ ARK. CONST. of 1868, art. VIII, § 5 (requiring voters to swear that “that I accept the civil and political equality of all men, and agree not to attempt to deprive any person or persons, on account of race, color or previous condition, of any political or civil right, privilege or immunity enjoyed by any other class of men”); ALA CONST. of 1868, art. VII, § 4.

⁴¹ See, *e.g.*, MISS. CONST. of 1868, art. IX, § 1 (“All able-bodied male citizens of the state, between the ages of eighteen and forty-five years, shall be liable to military duty in the militia of this State[.]”).

⁴² See, *e.g.*, N.C. CONST. of 1868, art V, §§ 1-2 (“The General Assembly shall levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty years of age . . . [T]o the purposes of education and the support of the poor[.]”).

⁴³ See, *e.g.*, ARK. CONST. of 1868, art. XV, § 13 (“No indenture of any person . . . shall be of the least validity, except those given in cases of apprenticeships, which shall not be for a longer term than until the apprentice shall arrive at the age of twenty-one (21) years, if a male, or eighteen (18) years, if a female.”); *but see* Craig v. Boren, 429 U.S. 190, 209 (1976) (invalidating a virtually identical classification—imputing majority to females at 18, and to males at 21).

associations, as such,⁴⁴ (2) granting conscientious objections exclusively to members of religious associations,⁴⁵ (3) defining religion as the *first* purpose of public education,⁴⁶ and (4) in one state, denying public office to atheists.⁴⁷

By officially endorsing the constitutions containing these provisions, Congress and the Black and Tan Conventions officially declared that such regulations — such *discriminations* as to a citizen’s sex or as to a policy’s religious purpose — did *not* violate the prohibitions of the Fourteenth Amendment’s first section. Upon review of the constitutions, John Bingham, the chief drafter of that section, gave his emphatic endorsement: “[t]he constitutions of these several States, in accordance with the spirit and letter of the Constitution of the United States . . . secure equal political and civil rights and equal privileges to all citizens of the United States, native born and naturalized.”⁴⁸

This official endorsement indicated not merely the Amendment’s “[o]riginal [e]xpected [a]pplication.”⁴⁹ Rather, this record evinces certain *originally certified non-applications*.

⁴⁴ See, e.g., FLA. CONST. of 1868, art. XVI, § 24 (permitting a tax exemption for “religious, educational, or charitable” corporations); S.C. CONST. of 1868, art. I, § 10 (“No form of religion shall be established by law; but it shall be the duty of the General Assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of worship.”); TEX. CONST. art. I, § 4 (1869) (establishing the “duty of the Legislature to pass such laws as may be necessary to protect every religious denomination in the peaceable enjoyment of their own mode of public worship”).

⁴⁵ VA. CONST. of 1869, art. IX, § 1 (providing that “those who belong to religious societies whose tenets forbid them to carry arms, shall not be compelled to do so”).

⁴⁶ See, e.g., ARK. CONST. of 1868, art. I, § 23 (stipulating that because “[r]eligion, morality and knowledge [are] essential to good government, the General Assembly shall pass suitable laws . . . to encourage schools and the means of instruction”); N.C. CONST. of 1868, art. IX, § 1 (providing that because “[r]eligion, morality and knowledge [are] necessary to good government and happiness of mankind, schools and the means of education shall forever be encouraged.”).

⁴⁷ S.C. CONST. of 1868, art. XIV, § 6 (“No person who denies the existence of the Supreme Being shall hold any office under this Constitution.”).

⁴⁸ CONG. GLOBE, 40th Cong., 2d Sess. 2462 (1868).

⁴⁹ JACK M. BALKIN, LIVING ORIGINALISM 6 (2011).

III. THE JURISTS' UNJUST NEGLECT

Despite the importance of the Black and Tan Conventions, the members of the bench, bar, and legal academy have long ignored their work. In courts, judges have rarely relied on the Reconstruction Constitutions in construing the Constitution. A few citations occurred in the 1870s,⁵⁰ but after then, the record seems silent for nearly a century. During the Warren and Burger courts, the Reconstruction Constitutions made brief appearances: in Justice Jackson's dissent in *Beauharnais v. Illinois* (1952) (concerning group libel),⁵¹ in Justice Frankfurter's and Justice Harlan's dissents in the apportionment cases,⁵² and in Justice Rehnquist's opinion for the Court in *Richardson v. Ramirez* (1974).⁵³ Since then, to my knowledge, the record has again fallen silent, except in a recent Fifth Circuit case citing *Richardson*.⁵⁴

Among legal scholars, interest has been sporadic and limited to a few discrete topics. Charles Fairman relied on the Reconstruction Constitutions to show that the Fourteenth Amendment did not incorporate against the states either the Grand Jury Clause or the Seventh Amendment, for the new constitutions of Louisiana and Georgia, respectively, had provisions inconsistent with those provisions.⁵⁵ Michael McConnell featured the Black and Tan Conventions prominently in contending that the Amendment, as originally understood, forbids the states from segregating

⁵⁰ *Lawson v. Jeffries*, 47 Miss. 686, 692-93 (1873) (construing the Due Process Clause); *Gunn v. Barry*, 82 U.S. 610, 622-23 (1872) (affirming that even congressional approval could not authorize a state to violate the Contracts Clause); *accord* *Calhoun v. Calhoun*, 2 S.C. 283, 299 (1870); *but see* *Bender v. Crawford*, 33 Tex. 745, 750 (1870) (citing congressional certification of the state's recent constitution as reason to conclude that one of its provisions was not a law impairing the obligation of contracts).

⁵¹ *Beauharnais v. Illinois*, 343 U.S. 250, 293 n.7, 293 n.8 (1952) (Jackson, J., dissenting) (citing congressional endorsement of the Reconstruction Constitutions to note that "this tolerance of state libel laws by the very authors and partisans of the Fourteenth Amendment shows either that they were not intending to incorporate the First Amendment or that they believed it would not prevent [such laws]").

⁵² *Baker v. Carr*, 369 U.S. 186, 315-17 (1962) (Frankfurter, J., dissenting); *see also* *Reynolds v. Sims*, 377 U.S. 533, 604-08 (1964) (Harlan, J., dissenting).

⁵³ *See* *Richardson v. Ramirez*, 418 U.S. 24, 48-50 (1974) (concerning felon voting rights).

⁵⁴ *See generally* *Hopkins v. Watson*, 108 F.4th 371, 380 (5th Cir. 2024).

⁵⁵ *See* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 5, 126-28 (1949).

students by race.⁵⁶ More recently, Derek Black and Anthony Sanders have given extended attention to the Reconstruction Constitutions in arguing that the Amendment, as originally understood, requires that states establish schools⁵⁷ or secure an indeterminate set of unenumerated rights.⁵⁸

Still, in the courtroom and the academy, the general rule has been silence — a silence that has grown deafening. In the recent affirmative-action cases, virtually no one — whether judge, litigant, or amicus — mentioned the Reconstruction Constitutions.⁵⁹ The sole exception was former Attorney General Edwin Meese, appearing as *amicus*.⁶⁰ More generally, despite all our focus on “originalism,” “diverse voices,” or both (“diverse originalism”),⁶¹ legal scholars, lawyers, and judges have seemed disinterested in the voices of those African Americans who directly participated, as public officials, in establishing the original meaning of our Constitution. The reason cannot be the absence of materials because there are abundant records — thousands of pages recording both the proceedings of the Black and Tan Conventions and the resulting Reconstruction Constitutions. As political scientist Paul Herron has noted, with reference to nineteenth-century constitutions in general, “there are thousands of pages from state convention debates that reveal the struggles between delegates and among coalitions during the process of constitutional creation, so...the words and arguments of the framers are available for our consideration. These convention notes have not been sufficiently investigated.”⁶²

⁵⁶ See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 963-67 (1995).

⁵⁷ See Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 741-44 (2018).

⁵⁸ See Anthony B. Sanders, *Baby Ninth Amendments Since 1860: The Unenumerated Rights Americans Repeatedly Want (and Judges Often Don't)*, 70 RUTGERS U. L. REV. 857, 868-69 (2019).

⁵⁹ See generally, e.g., *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181 (2023).

⁶⁰ See generally Brief of Amicus Curiae Former Attorney General Edwin Meese III Supporting Petitioner at 14-15, *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141 (Nos. 20-1199).

⁶¹ See generally Christina Mulligan, *Diverse Originalism*, 21 U. PA. J. CONST. L. 379 (2018).

⁶² Paul E. Herron, *Upon the Shores of an Unknown Sea*, 69 RUTGERS L. REV. 1433, 1435 (2017)(reviewing AMY BRIDGES, *DEMOCRATIC BEGINNINGS: FOUNDING THE*

Is there any good cause for this neglect? Four justifications could be offered, but they seem unpersuasive.

First, by some accounts, the Black and Tan Conventions are uninteresting because their work was “unfree.” Because Congress required the states to from these new constitutions and ratify the Fourteenth Amendment, the delegates were not “free” in their deliberations.⁶³

But the delegates to Conventions as well as the state legislatures that subsequently ratified the Amendment did not seem very unfree. The record suggests, instead, outright enthusiasm with congressional reconstruction.⁶⁴ Republicans dominated the conventions because Republicans dominated the electorate.⁶⁵ Congress, through the Reconstruction Acts, did not “impose” these voters on the South. Rather, Congress protected the true “people” of the South — the loyalists, black and white — by securing their right of sovereignty against disloyalty-based violence.

Second, these Conventions are uninteresting because the members were so uncreative. Constitutions, some have said, aim at innovation — to throw out the old and bring in the new.⁶⁶ The job of constitution-makers is to remake the world, or at least engage in

WESTERN STATES (2015)). Herron elsewhere has written an extensive survey but not with an eye toward original meaning. *See* PAUL E. HERRON, FRAMING THE SOLID SOUTH: THE STATE CONSTITUTIONAL CONVENTIONS OF SECESSION, RECONSTRUCTION, AND REDEMPTION, 1860-1902, at 154-188 (2017).

⁶³ According to Fairman, though congressional approval mattered, the thoughts of the state delegates did not. Fairman, *supra* note 55, at 126 (arguing that it is “what Congress said and did—rather than what transpired in state legislatures having no real choice in the matter—that merits our attention”); *see also* Jonathan L. Marshfield, *America’s Misunderstood Constitutional Rights*, 170 U. PA. L. REV. 853, 907 (2022) (“These conventions ostensibly embodied the people of each state, but they were really the work of Congressional agents who ‘brought the South into compliance with the nation.’” (citing HERRON, *supra* note 62, at 123)).

⁶⁴ *See generally* Harrison, *supra* note 10.

⁶⁵ *Id.* at 452 (noting that the federal “coercion” was immaterial because the “coalitions that dominated most of the [Reconstruction] governments had excellent reasons to ratify, including, for example, protection of their black constituents from renewed Black Codes”).

⁶⁶ *See* Jason Mazzone & Cem Tecimer, *Interconstitutionalism*, 132 YALE L.J. 326, 331 (2022) (“Missouri Senator Roy Blunt invoked the Articles at President Biden’s 2021 inauguration in praise of what he called ‘determined democracy’ as the Constitution’s signal political innovation.”).

a “second founding.”⁶⁷ By this standard, the Reconstruction Constitutions were a failure, as they seem so old and familiar. The authors decided to include a preamble, followed by an introductory bill or declaration of rights filled with familiar procedural and substantive rights, and then proceeded to establish elected governments divided into the three familiar branches.

But this novelty standard is highly debatable. One could say that the delegates at the Black and Tan Conventions seemed to have a different opinion as to their enterprise. They seemed devoted not to *creation* but to *preservation*. Hence, they began their work with an expression of gratitude to God for the blessings of liberty and a determination to safeguard the same. Mississippi’s convention, for instance, authored the following preamble to the Mississippi constitution of 1868: “To the end that justice be established, public order maintained, and liberty perpetuated, we, the people of the State of Mississippi, grateful to Almighty God for the free exercise of the right to choose our own form of government, do ordain this constitution.”⁶⁸

Third, the Convention’s work was unnecessary. Because the Amendment was already fully ratified by the loyal states in 1867, the subsequent conventions and ratifications were merely superfluous. At most, they provide merely *post-ratification* evidence.

The issue is enormously complex, and Christopher Green presents this complexity fairly and fully in his work supporting loyal state denominatorism.⁶⁹ Still, for the following reasons, I think that ratification by the Southern states was necessary to the validity of the Amendment. First, Article V requires ratification by three-fourths of all the states,⁷⁰ and as the First Reconstruction Act indicates, each of the ten states remained “states” as of 1867 but lacked the republican government necessary to send representatives to Congress and otherwise enjoy full political equality with the other states.”⁷¹ Hence, the appropriate

⁶⁷ See generally ILAN WURMAN, THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT (2020).

⁶⁸ See, e.g., MISS. CONST. of 1869, pmbl.

⁶⁹ See generally Green, *supra* note 31.

⁷⁰ U.S. Const. art. V.

⁷¹ Act of Mar. 2, 1867, ch. 153, 14 Stat. 428, 428 (“no legal State governments or adequate protection for life or property now exists in the [ten] rebel States . . . [and] it is

denominator was thirty-seven. Second, by the same Act, Congress formally indicated that the Amendment remained unratified,⁷² and Congress did not formally say otherwise until the concurrent resolution of July 21, 1868, which listed the ratifications of six of the Southern states.⁷³ Third, in provisions of some of the Reconstruction Constitutions drafted before July 1868, the Amendment is still identified as merely “proposed,”⁷⁴ but in the one drafted *after* that date, Texas’, the qualifier “proposed” was dropped.⁷⁵

Fourth, the Conventions’ work was illegitimate because the delegates did not authentically represent the people in their respective states.⁷⁶ The Reconstruction Acts, one might say, did not properly define the electorate. There were both too many voters and/or not enough voters; that is to say, Congress should not have included black persons because they were not citizens until the adoption of the Amendment and its Citizenship Clause, and Congress also should not have excluded *bona-fide* citizens on the basis of sex and/or loyalist creed.

This challenge is quite thorny, and countless volumes have been written to define the scope of democratic legitimacy. For present purposes, the following reflections may suffice. As to the unjust inclusion of black voters, the citizenship of such persons born in the United States was presupposed throughout the process. The Civil Rights Act of 1866 did not confer but merely “declared” the

necessary that peace and good order should be enforced in said States until loyal and republican State governments can be legally established . . .”).

⁷² See § 5 (requiring, for any state’s readmission, not only the state’s endorsement of the Amendment but also that “said article shall have become a part of the Constitution of the United States”).

⁷³ CONG. GLOBE, 40th Cong., 2nd Sess. 4266 (July 21, 1868) <https://www.congress.gov/congressional-globe/congress-40-session-2-part-5.pdf> [<https://perma.cc/H9JX-Z945>].

⁷⁴ See ARK. CONST. of 1868, art. VIII, § 3 (referring to disqualifications under the “proposed amendment to the Constitution”); see also FLA. CONST. of 1868, art. XVII, § 1 (also using “proposed” when referencing the amendment).

⁷⁵ See TEX. CONST. of 1869, art. III, § 36 (requiring the state legislature, once formed, to “proceed to ratify the thirteenth and fourteenth Articles of Amendment to the Constitution of the United States of America”).

⁷⁶ See, e.g., William A. Russ, Jr., *Registration and Disenfranchisement Under Radical Reconstruction*, 21 MISS. VALLEY HIST. REV. 163 (1934) <https://www.jstor.org/umiss.idm.oclc.org/stable/1896889?seq=1> [<https://perma.cc/C96A-34GG>].

status;⁷⁷ and the Fourteenth Amendment’s Citizenship Clause, the governing verb of which — “are” — indicates the declaration of a present fact rather than a future prescription.

As to unjust exclusion of others, the question goes to the legitimacy of our entire political order. To cite but one consideration, if the exclusion of women from the electorate rendered the Black and Tan Conventions illegitimate and its decisions invalid, the same rule would render invalid not only the original Constitution, but also any of the amendments adopted by all-male legislatures elected by an all-male electorate. The objection would invalidate even the Nineteenth Amendment.⁷⁸

Nonetheless, this objection cannot excuse the lawyers’ disregard of the Black and Tan Conventions. Lawyers take an oath to *support* the Constitution, and judges take an oath to administer justice *under* the same. In their *official* capacities, these persons cannot indulge in speculation as to the legitimacy of the laws. Lawyers and judges must assume this legitimacy.

CONCLUSION

If there is no *legitimate* reason for the jurists’ neglect of the Black and Tan Conventions, one might well wonder what *illegitimate* factors have motivated the disrespect. To pursue this question is outside the scope of this essay. Still, the history sketched above suggests a simple answer. Jurists have ignored the message because they found it so uncongenial to their jurisprudence.

Under Jim Crow, the very example of the racially integrated conventions was an affront to the prevailing norm of racial segregation and supremacy. Additionally, under the *Warren* and *Burger* Courts, the Reconstruction Constitutions were at odds with the new holdings that the Fourteenth Amendment barred the states from promoting religion or from discriminating on bases

⁷⁷ See Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (“That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States . . .”).

⁷⁸ Prior to the ratification of the Amendment, only a minority of state extended the suffrage to women as to state legislative elections. *Women’s Suffrage in the U.S. by State*, CTR. AM. WOMEN & POL. (Aug. 2024), <https://tag.rutgers.edu/wp-content/uploads/2014/05/suffrage-by-state.pdf> [<https://perma.cc/SLX5-8NCH>].

commonplace in 1868, such as sex and durational residence.⁷⁹ In those pioneering times, only the cautious stand-patters, in their feeble dissents, considered the original understanding as any obstacle to progress.⁸⁰

Indeed, the absurdity of any such originalism was manifest in its only appearance in a majority opinion. In *Richardson v. Ramirez* (1974), the Court noted that at the time of the adoption of the Amendment, many state constitutions excluded felons from the suffrage.⁸¹ Among these, the Reconstruction Constitutions provided the most compelling evidence:

More impressive than the mere existence of the state constitutional provisions disenfranchising felons at the time of the adoption of the Fourteenth Amendment is the congressional treatment of States readmitted to the Union following the Civil War. For every State thus readmitted, affirmative congressional action in the form of an enabling act was taken, and as a part of the readmission process the State seeking readmission was required to submit for the approval of the Congress its proposed state constitution.⁸²

Yet Justice Thurgood Marshall provided a devastating reply. It was, he said, highly anomalous for the majority to rely on the Reconstruction Constitutions to limit the scope of the Amendment.⁸³ Two years earlier, he noted, the Court had just invalidated durational-residency requirements despite the fact that Congress had emphatically approved such requirements in 1868.⁸⁴ The Court had, he said, properly declined “to freeze the meaning of other clauses of the Fourteenth Amendment to the conception of voting rights prevalent at the time of the adoption of the Amendment.”⁸⁵ Quoting a recent case, Marshall explained that judges are not bound by the original understanding of the Amendment’s authors:

⁷⁹ See *supra* notes 12-14, 39-43 and accompanying text.

⁸⁰ See *supra* note 51-52.

⁸¹ *Richardson v. Ramirez*, 418 U.S. 24, 48-49 (1974).

⁸² *Id.*

⁸³ *Id.* at 75-76.

⁸⁴ See *id.* at 76 (citing *Dunn v. Blumstein*, 405 U.S. 330 (1972)).

⁸⁵ *Id.*

[T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights.⁸⁶

Given our evolutionary and progressive jurisprudence, jurists cannot and should not afford much weight to the opinions of the Black and Tan Conventions. The Fourteenth Amendment cannot remain “shackled” to the views of the Amendment’s authors.

Justice Marshall had the last word, sending the Black and Tan Conventions to judicial oblivion. For a half-century now, no member of the Supreme Court, nor virtually any other court,⁸⁷ has consulted the Conventions and the constitutions they framed in assessing the meaning of the Fourteenth Amendment. The dominant jurisprudence was and remains simply too anti-originalist to give much weight to the work of the Black and Tan Conventions.

But apart from progressive jurisprudence, there is perhaps another factor at work: our yet-unresolved questions of racial justice. As indicated by the text of the Reconstruction Constitutions, the Conventions were committed to establishing a Republic where all would enjoy equal rights *regardless* of race.⁸⁸ At the same time, however, many delegates seemed to believe that, at least for some time, this work required some accommodation to deep-seated racial prejudice, on the one hand, and some allowance for racially-defined remedies to redress racially-defined injustices, on the other.⁸⁹ Accordingly, in all our disputes as to race, from

⁸⁶ *Id.* at 76-77 (quoting *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 669 (1966)).

⁸⁷ Judge Edith Jones, in a recent majority opinion for the Fifth Circuit, sitting en banc, has recently cited the conventions with approval in construing the Fourteenth Amendment. *See Hopkins v. Watson*, 108 F.4th 371, 380 (5th Cir. 2024) (en banc) (quoting with approval *Richardson*, 418 U.S. at 48-50).

⁸⁸ *See supra* note 35.

⁸⁹ For instance, the Arkansas convention refused to include any ban on interracial marriage in the constitution but still resolved, unanimously, that “this Convention is utterly opposed to all amalgamation between the white and colored races, whether the same is legitimate or illegitimate . . .” ARKANSAS CONSTITUTIONAL CONVENTION, *supra* note 26, at 507. And in Alabama, the Convention adopted an ordinance to provide race-specific remedies to race-specific injustices. *See generally Ordinance For the Relief of Congregations of Colored Persons*, at No. 25 (Dec. 2 1867), reprinted in J. OF THE ALA. CONST. CONVENTION OF 1867, at 263-64 (1868)

segregation to affirmative action, the Conventions cannot provide what the advocates have craved—good law-office history, complete with slam-dunk arguments.

To illustrate the ambiguity, consider an anecdote that W.E.B. Du Bois shared in his landmark study. As in many other states, the Louisiana Convention approved a constitution that was “colorblind,” so to speak: “*without regard* to race, color, or previous condition . . . [t]he citizens of this State . . . [s]hall enjoy the same civil, political, and public rights and privileges, and be subject to the same pains and penalties.”⁹⁰ But as it turns out, *regard* for race governed the selection of delegates to that same convention:

By agreement, the 98 delegates to the Louisiana convention consisted of 49 Negroes and 49 whites. Among the Negroes were many free colored men of intelligence, property, and character. But when it was suggested that subordinate officers be equally divided between the races, P.B.S. Pinchback, of the colored leaders, objected, and declared that was *placing race above merit*.⁹¹

How does one account for this apparent hypocrisy? Why would naked racial quotas be appropriate in selecting delegates but not certain subordinate officers? Why this partial regard for racial diversity, this *partial* and only partial, sacrifice of “merit” to “race”?

To explore these questions would require a long analysis of the historical record. Nonetheless, the anecdote suggests that the answer is complicated. This very complication indicates perhaps the most important lesson we might receive from the Black and Tan Conventions. Rather than providing jurists today with any trump card or mike-drop moment, the black and white loyalists can instead teach us something in short supply: *moderation*.

<https://digital.archives.alabama.gov/digital/collection/constitutions/id/123>
[<https://perma.cc/JP9Q-QVG8>].

⁹⁰ LA. CONST. of 1868, art I, § 2 (1868).

⁹¹ DU BOIS, *supra* note 22, at 467-68 (emphasis added).