JUSTICE THOMAS RECONCEPTUALIZES CIVIL RIGHTS LAWS, AND A RECOVERY OF THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT IS LONG OVERDUE

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The Supreme Court's decision in *Students for Fair Admissions v. President and Fellows of Harvard College*[1] effectively ends race-based affirmative action in university admissions as violations of both Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. The extensive commentary that has followed has largely overlooked how a detail in Justice Clarence Thomas' concurrence prompts a reconceptualization of the constitutional basis for federal civil rights laws.

While laying out an originalist defense of the Court's holding, Justice Thomas makes a historical observation about the Civil Rights Act of 1875,[2] the first anti-segregation statute of national scope. Among other things, the law prohibited racial discrimination in "inns, public conveyances on land or water, theaters, and other places of public amusement."[3] Justice Thomas describes it as "[t]he marquee legislation" among the Reconstruction-era statutes eliminating discriminatory state laws and "criminalizing racially motivated violence." The 1875 law, the Justice recognizes, was grounded by its proponents in the Fourteenth Amendment, and it provided "further evidence for the colorblind view" contained in that post–Civil War amendment to the Constitution.[4] Later in his concurrence, Justice Thomas reiterates that the law had been passed under congressional "authority to enforce the Fourteenth Amendment."[5]

As a historical matter, these are basic observations. As a jurisprudential matter, identifying the Fourteenth Amendment as the basis for the 1875 law is a bold step, because the Supreme Court struck down the law's public accommodations provisions as unsupported by that amendment in the *Civil Rights Cases* in 1883.[6] The Court reasoned that this was an impermissible "direct and primary" regulation of individual conduct and that Congress was limited to passing corrective legislation tailored to address some form of state-sanctioned conduct.[7] (The decision did not go quite so far as to say that Congress cannot regulate the conduct of private individuals,

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[1] 143 S. Ct. 2141 (2023).

[2] 18 Stat. 335.

[3] *Id.*

[4] 143 S. Ct. at 2184 (Thomas, J., concurring).

[5] *Id.* at 2190–91 (Thomas, J., concurring).

[6] 109 U.S. 3 (1883).

[7] *Id.* at 14–20, 23.

but that is nonetheless how the Court's "state action" doctrine would ossify during the twentieth century.[8])

Section One of the Fourteenth Amendment provides, among other things, that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." Section Five establishes that "Congress shall have the power to enforce" the amendment "by appropriate legislation." Viewed in a vacuum, this is broad language susceptible to multiple interpretations. Viewed in historical context, whether the postwar amendment authorized Congress to pass the Civil Rights Act of 1875 is not a difficult question.

Consider the congressional debates that occurred over the course of Reconstruction spanning from the inception of the Fourteenth Amendment, which Congress passed in 1866 with only Republican votes in favor prior to ratification in 1868, to the civil rights legislation passed in 1875. The predominant Republican view held the amendment to be an affirmative conferral of substantive personal rights that Congress could enforce. Those rights included freedom from racial discrimination by entities that were not limited to governmental actors.[9] That view was articulated often during post-ratification debates to refute the notion that congressional power was strictly corrective, which was the theory embraced by Democratic opponents of the Fourteenth Amendment—belying the fear they sometimes stoked while the amendment was pending in 1866 that it would expand congressional power so much that it would rob the States of all their power.[10] As John Bingham, the principal author of Section One of the Fourteenth Amendment, put it during debates over the Ku Klux Klan Act[11] in 1871, laws to enforce the amendment could be "preventive," not merely "remedial and punitive." He asked, "Why not in advance provide against the denial of rights by States, whether the denial be acts of omission or commission, as well as against the unlawful acts of combinations and conspiracies against the rights of the people?"[12]

The Supreme Court's paradigm in the *Civil Rights Cases* disregarded a parallel concern about nonstate actors that occupied much attention from the Reconstruction Amendments' framers from the beginning. While discriminatory state action was certainly a prominent motivation for constitutional change, the Joint Committee on Reconstruction, which drafted the Fourteenth Amendment, collected from the vast majority of witnesses testimony regarding wrongs by private individuals perpetrated against freedmen and their white allies.[13]

As Reconstruction proceeded, this problem persisted with the rise of the Ku Klux Klan and other terrorist organizations that engaged in rampant violence and intimidation. The Fifteenth Amendment, which banned racial discrimination in voting, was passed in that environment by Congress in 1869 and ratified in 1870. It was framed using language similar to that of its

[8] *See* James v. Bowman, 190 U.S. 127, 136–38 (1903); PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 103, 161–70, 186–90, 206 (2011).

[9] *See* FRANK J. SCATURRO, THE SUPREME COURT'S RETREAT FROM RECONSTRUCTION: A DISTORTION OF CONSTITUTIONAL JURISPRUDENCE 79–93 (2000).

[10] *See id.* at 132; HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 138–39 (1908).

[11] 17 Stat. 13.

[12] CONG. GLOBE, 42d Cong., 1st Sess. app. 85 (1871).

[13] Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1329–30 (1952); Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1354–55 (1964).

predecessor, stating that the right of citizens "to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." Congressional enforcement of that amendment predictably addressed misconduct by nonstate actors acting on their own as well as by government officials, and even the very Supreme Court Justices who decided the *Civil Rights Cases* did not question that construction. Just one year after confining Fourteenth Amendment enforcement to state-sanctioned conduct, a unanimous Court in *Ex Parte Yarbrough*[14] rejected the argument that a similar standard should apply to enforcement of the Fifteenth Amendment and upheld the conviction of a group of private individuals who had brutally beaten an African-American voter. Years later, however, in *James v. Bowman*,[15] a different group of Justices applied a rigid state action doctrine to the Fifteenth Amendment and struck down a provision that had originated as Section Five of the first Enforcement Act,[16] passed in 1870, that applied to private individuals.

During the Civil Rights Movement of the twentieth century, the Supreme Court would arrive at a different conclusion about congressional power to pass the Civil Rights Act of 1964,[17] which included prohibitions of racial discrimination in public accommodations similar to the provisions of the Civil Rights Act of 1875 involved in the *Civil Rights Cases*. But at that time, case law had stretched congressional power under the Interstate Commerce Clause well beyond its original meaning, and it was under that provision rather than the Fourteenth Amendment that the 1964 law's public accommodations provisions were upheld.[18] The first Supreme Court decision to do so, *Heart of Atlanta Motel v. United States*,[19] involved a motel that advertised extensively on interstate highways with transient interstate travelers comprising 75 percent of its guests. But the Court subsequently upheld the act under the Commerce Clause in circumstances so tenuously related to interstate commerce that, as Justice Hugo Black maintained in dissent in *Daniel v. Paul*,[20] it was "stretching the Commerce Clause so as to give the Federal Government complete control over ever little remote country place of recreation in every nook and cranny of every precinct and county in every one of the 50 States."[21]

Section Five of the Fourteenth Amendment would thus remain relatively dormant. That situation appeared to be on the verge of change in *United States v. Guest*,[22] a case of statutory construction in which a total of six Justices expressed, over the course of two concurrences or partial concurrences, the opinion that the Fourteenth Amendment empowers Congress to punish private conspiracies in the absence of state action.[23] But a majority of the Court made it clear in *City of Boerne v. Flores*[24] and *United States v. Morrison*[25] that Section Five of the Fourteenth Amendment still gave Congress merely corrective or remedial power. In *Morrison*, the Court reaffirmed the state action doctrine that had prevailed over the twentieth century and dismissed

[14] 110 U.S. 651 (1884).
[15] 190 U.S. 127 (1903).
[16] 16 Stat. 140.
[17] 78 Stat. 241.
[18] *See* SCATURRO, *supra* note 9, at 193–98.
[19] 379 U.S. 241 (1964).
[20] 395 U.S. 298 (1969).
[21] *Id.* at 315 (Black, J., dissenting).
[22] 383 U.S. 745 (1966).
[23] *See id.* at 761–62 (Clark, J., concurring); *id.* at 781–84 (Brennan, J., concurring in part and dissenting in part).
[24] 521 U.S. 507 (1997).
[25] 529 U.S. 598 (2000).

the language of the *Guest* concurrences as insufficient "to cast any doubt upon the enduring vitality of the *Civil Rights Cases*."[26]

The endurance of oft-cited precedent is not surprising in the absence of historical understanding to the contrary. A common mistake with respect to the *Civil Rights Cases* is the assumption that a decision handed down a mere fifteen years after the Fourteenth Amendment's ratification reflected its original meaning. But Reconstruction is no ordinary period of constitutional innovation. Within a decade after the ratification of the Fourteenth Amendment came an intense public backlash against federal intervention in the South and the withdrawal of the last remaining troops from their posts in that region by President Rutherford B. Hayes in 1877.[27] That event, traditionally viewed as the end of Reconstruction, came six years before the *Civil Rights Cases* were decided.

Whether or not the *Morrison* Court, which struck down part of the Violence Against Women Act, reached the correct result under Section Five of the Fourteenth Amendment, it went astray in its embrace of the *Civil Rights Cases*. Failing to explore the years before 1883, the majority's analysis in *Morrison* simply observed that every Justice on the Supreme Court "had been appointed by President Lincoln, Grant, Hayes, Garfield, or Arthur—and each of their judicial appointees obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment."[28] As a matter of originalist analysis, that observation was sloppy and ill-informed. While President Abraham Lincoln obviously did not live long enough to witness the relevant events, President Ulysses S. Grant signed the Civil Rights Act of 1875 into law, with future President James A. Garfield among the congressmen voting in favor of passage.[29] After the Court handed down its decision in the *Civil Rights Cases* striking down that law, former President Hayes wrote Justice John M. Harlan to praise his lone dissenting opinion in the case—as did retired Supreme Court Justices Noah H. Swayne (a Lincoln appointee) and William Strong (a Grant appointee).[30] Incumbent President Chester A. Arthur expressed his disapproval of the Court's decision in his Third Annual Message.[31]

On top of that, the author of the Court's decision, Justice Joseph P. Bradley, used to hold contrary views about the Fourteenth Amendment. In 1871, he wrote to William B. Woods, a circuit judge who sought advice in a case before him involving a challenge to the constitutionality of Section Six of the 1870 Enforcement Act, which criminalized private conspiracies that attack a citizen's federally protected rights and privileges. Justice Bradley advised why he considered the

[26] *Id.* at 624.

[27] *See* SCATURRO, *supra* note 9, at 7–18.

[28] 529 U.S. at 622.

[29] 3 CONG. REC. 1011 (1875) (House vote).

[30] Alan F. Westin, *John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner*, 66 YALE L.J. 637, 681–82 (1957).

[31] *See* 8 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 188 (James D. Richardson ed., 1900).

law to be constitutional. He considered congressional legislation "which will operate directly on offenders and offenses" to be appropriate, and he explained that the Fourteenth Amendment

> prohibits the states from denying to all persons within its jurisdiction the equal protection of the laws. Denying includes inaction as well as action. And denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection.[32]

Judge Woods not only reached the same conclusion as Justice Bradley, but he quoted the above language nearly verbatim in his circuit court opinion.[33] Justice Bradley's own notes in his papers accompanying his correspondence with Woods admit that his views expressed in 1871 "were much modified by subsequent reflection."[34] He was not alone in changing his mind by the time he wrote for the Court in the *Civil Rights Cases*. Judge Woods, who was elevated to the Supreme Court in 1881, made a similar about-face and joined Bradley's opinion.

Like the Fourteenth Amendment itself, the Civil Rights Act of 1875 was passed by Congress with only Republicans voting in favor of passage. While there were Republican defectors who joined Democrats in voting no,[35] 27 out of 28 votes cast by those who had voted for the Fourteenth Amendment in 1866 (combining totals in the House and Senate) were in favor of passage.[36] Even the exception who voted no, Senator William Sprague, cannot be said to have had a track record in favor of the Court's state action doctrine, having voted in 1870 for the first Enforcement Act, which exceeded what the Court's 1883 standard would permit Congress to pass.[37] The same is true of another senator, Lot Morrill, who voted for the Fourteenth Amendment but was absent for the 1875 vote. Additionally, James G. Blaine, who had voted for the Fourteenth Amendment in 1866, did not cast a vote in 1875 as a matter of custom because he was then speaker of the house, but he facilitated the measure's passage,[38] and two Republican House members recorded as not voting in 1866 voted for the 1875 bill.[39]

Viewed as an originalist exercise, the 1883 Court was effectively telling the framers of the Fourteenth Amendment that they did not understand their own amendment. But the Court's opinion in the *Civil Rights Cases* taken on its own terms gave no indication that it was attempting to discern original meaning. How could it when its author was departing from *his own* original understanding? It was Justice Harlan, the dissenter, who articulated his "earnest conviction that the court has departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted."[40] *The New York*

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[32] RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT at xv (2021).

[33] United States v. Hall, 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871).

[34] CHARLES FAIRMAN, 7 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864–88, pt. 2, at 192 (1987).

[35] Pamela Brandwein maintains that Republicans were "not a unit" when it came to "the principles, political wisdom, or constitutionality of this bill." BRANDWEIN, *supra* note 8, at 68. But she does not differentiate between the voting record of more recent arrivals in Congress during this era of backlash against Reconstruction and that of those who had previously served in 1866.

[36] *See* CONG. GLOBE, 39th Cong., 1st Sess. 3042 (1866) (Senate vote); *id.* at 3149 (House vote); 3 CONG. REC. 1011 (1875) (House vote); *id.* at 1870 (Senate vote).

[37] CONG. GLOBE, 41st Cong., 2d Sess. 3809 (1870) (Senate vote).

[38] ALAN FRIEDLANDER & RICHARD ALLAN GERBER, WELCOMING RUIN: THE CIVIL RIGHTS ACT OF 1875, at 525–28 (2019).

[39] The two members were Representative John A. Kasson of Iowa and Representative William Lawrence of Ohio. *See* CONG. GLOBE, 39th Cong., 1st Sess. 3149 (1866) (House vote); 3 CONG. REC. 1011 (1875) (House vote).

[40] The Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

Times editorialized at the time, "The tendency during the war period was toward the construction which" Harlan "favors. Since then, a reaction has set in, which, so far, is beneficent." The Court's opinion thus "has satisfied public judgment, and Justice HARLAN's will hardly unsettle it."[41]

Living constitutionalists, take note: as time moves forward, changing attitudes do not necessarily improve. The retreat from Reconstruction demonstrates this. If original meaning should be discarded to suit the times, the Court during this period was simply proceeding as it naturally should. And in this case, the regression that enabled the *Civil Rights Cases* intensified in future years. During the years after the Court handed down its "state action" doctrine, States would in fact act to compel racial segregation in public accommodations and conveyances, and the Court would take a further step away from the Fourteenth Amendment's egalitarian meaning by validating the notion of "separate but equal" in *Plessy v. Ferguson*.[42] There again, Justice Harlan was the lone dissenter, and his opinion, which among other things invoked the "intent of the legislature,"[43] would be repeatedly vindicated between *Brown v. Board of Education*[44] and the recent affirmative action decision.

What are we to make of the modern Supreme Court's largely unchanged jurisprudence on congressional power under the Fourteenth Amendment? When the Court decided *Boerne* and *Morrison*, there was so little awareness of the relevant history that even the dissenters made no historical argument to challenge the *Civil Rights Cases*. The three dissenters in *Boerne*, a decision that invalidated the Religious Freedom Restoration Act's application to the States, focused on the right to free exercise and other arguments.[45] The four *Morrison* dissenters were content to rest their argument on the ahistorical expansion of the Commerce Clause.[46] (Justice Stephen Breyer, joined by one other dissenting Justice, briefly touched on the Fourteenth Amendment in *Morrison* but confined himself to what the majority had said in 1883.[47])

Although Justice Thomas joined the Court's opinions in *Boerne* and *Morrison*, it is he who, over the course of his concurring and dissenting opinions, ended up leading the way in recent years to arguing for the correction of lingering distortions of the Fourteenth Amendment's original meaning. He has criticized the Court's decision in the *Slaughter-House Cases*[48] for eviscerating the amendment's Privileges or Immunities Clause.[49] He identified that provision as the true means by which rights mentioned in the Bill of Rights were incorporated and applied to the States.[50] In *Students for Fair Admissions*, he recognized it as a source of the Fourteenth Amendment's prohibition against racial discrimination along with the Equal Protection Clause while the Court has largely confined itself to the latter clause for the nondiscrimination principle.[51]

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[41] N.Y. TIMES, Nov. 19, 1883, at 4 (typeface in original).

[42] 163 U.S. 537 (1896).

[43] *Id.* at 558–59 (Harlan, J., dissenting).

[44] 347 U.S. 483 (1954).

[45] *See* 521 U.S. at 544–65 (O'Connor, J., dissenting); *id.* at 565–66 (Souter, J., dissenting); *id.* at 566 (Breyer, J., dissenting).

[46] *See* 529 U.S. at 628–55 (Souter, J. dissenting); *id.* at 655–66 (Breyer, J., dissenting).

[47] *Id.* at 664–66 (Breyer, J., dissenting).

[48] 83 U.S. (16 Wall.) 36 (1873).

[49] *See* Saenz v. Roe, 526 U.S. 489, 521–28 (1999) (Thomas, J., dissenting).

[50] *See* McDonald v. City of Chicago, 561 U.S. 742, 805–51 (2010) (Thomas, J., concurring in part and concurring in the judgment).

[51] 143 S. Ct. 2141, at 2182–83, 2203 (2023) (Thomas, J., concurring).

Justice Thomas has already rejected a major premise of *Boerne*—the cramped conception of free exercise that the Court handed down in *Employment Division v. Smith*,[52] the overruling of which he advocated in *Fulton v. City of Philadelphia* in 2021.[53] In another case two years ago, *Biden v. Knight First Amendment Institute*,[54] Justice Thomas wrote a concurrence in the dismissal of the case as moot in support of his suggestion that a digital platform like Twitter might be subject to the government's power to limit the right of a private company to exclude. Such power, he explained, derives from the longstanding regulation of common carriers as well as the related ability to "limit[] a company's right to exclude when that company is a public accommodation," *i.e.*, "companies that hold themselves out to the public but do not 'carry' freight, passengers, or communications."[55] For that proposition, Justice Thomas cited Justice Harlan's dissent in the *Civil Rights Cases*, which tracked the same rationale advanced by proponents of the Civil Rights Act as it was being debated during the 1870s.[56]

Concurring in *United States v. Vaello Madero*[57] last year, Justice Thomas also favorably cited Justice Harlan's dissent along with the great Justice's other judicial opinions articulating a right to equal treatment inherent in citizenship under the Fourteenth Amendment.[58] So his citation of the 1875 Civil Rights Act in *Students for Fair Admissions* as authorized by that amendment should have come as no surprise. It does deserve attention, because Justice Thomas' opinions suggest an originalist case for reconceptualizing the Fourteenth Amendment as the constitutional basis for federal civil rights laws. Also noteworthy is that the newest member of the Court, Justice Ketanji Brown Jackson, sided with Justice Harlan's *Civil Rights Cases* dissent in her dissenting opinion in the *Students for Fair Admissions* companion case involving the University of North Carolina.[59]

The Reconstruction historian Eric Foner asserted, "The elevation of the Commerce Clause into a 'charter of human rights,' a way of compensating for the Supreme Court's cramped view of the Reconstruction amendments, has made the judiciary look ridiculous."[60] Foner is not an attorney, but he is correct on that point. The long, dark chapter in American history that came with the retreat from Reconstruction should teach a lesson to judges who would change the Constitution's original meaning to conform to the times: conditions can regress over time, and constitutional rights must not be diminished when the times deem it acceptable to disregard them.

In an appropriate future case, the Court should overturn the blight on Fourteenth Amendment jurisprudence that is the *Civil Rights Cases*. And the senior associate Justice appears to have the vote of the junior associate Justice for doing so. Who else among the Justices may join them?

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[52] 494 U.S. 872 (1990).

[53] 141 S. Ct. 1868, 1883–1926 (2021) (Alito, J., concurring in the judgment); *id.* at 1926–31 (Gorsuch, J., concurring in the judgment).

[54] 141 S. Ct. 1220 (2021).

[55] *Id.* at 1222–23 (Thomas, J., concurring).

[56] *Id.* at 1223 (Thomas, J., concurring); *see, e.g.*, CONG. GLOBE, 42d Cong., 2d Sess. 382–85 (1872) (statement of Sen. Sumner).

[57] 142 S. Ct. 1539 (2022).

[58] *See id.* at 1550–51 (Thomas, J., concurring).

[59] 143 S. Ct. at 2265, 2268 (2023) (Jackson, J., dissenting).

[60] ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 172 (2019).