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The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and Federal Courts

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THE PARTICULARLY DUBIOUS CASE OF *HANS V. LOUISIANA*: AN ESSAY ON LAW, RACE, HISTORY, AND "FEDERAL COURTS"

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In a number of striking decisions the Rehnquist Court has limited the powers of Congress and substantially insulated the states from federal authority. In doing so, it has repeatedly and explicitly based its jurisprudence on Hans v. Louisiana, *an 1890 decision in which the Court held that the Eleventh Amendment barred citizens from suing their own states in the federal courts for money due on the states' bonds.* Hans *asserted that the Eleventh Amendment, despite its narrow language, was intended to recognize a broad principle of state sovereign immunity which prohibited suits against states absent their consent.*

Whether or not the Rehnquist Court's decisions are wise or desirable in the early twenty-first century, the Court's reliance on Hans *is neither. Although* Hans *invoked the history of the Eleventh Amendment's drafting and ratification, its reasoning and conclusion do not reflect the intent of the amendment's framers but the purposes of the post-Reconstruction settlement. That informal but well understood agreement among white Americans, driven in part by racism, allowed the South a special and limited independence in imposing white rule and repudiating its state debts in exchange for national reconciliation and unity. Thus, as a matter of history,* Hans *gave voice not to the intent of the 1790s but to the compromise of the 1890s.*

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Considered in the light of its own history, then, Hans, *properly merits no authority as a constitutional precedent for three interrelated reasons. First, it was a decision of expedience, not of principle. An examination of the Court's jurisdictional decisions in the late nineteenth century shows that* Hans *was typical of the pervasive jurisdictional instrumentalism that marked the Court's work across the board as well as in cases construing the Eleventh Amendment itself. Second, as an instrument of the post-Reconstruction settlement and an integral part of the Court's general abandonment of southern blacks,* Hans *was both the product and tool of a pervasive racism among white Americans, North as well as South. Third, and legally pivotal,* Hans *was premised on early nineteenth-century procedural assumptions that the Court had already rejected and, decisively, on antebellum jurisdictional and constitutional assumptions that the Fourteenth Amendment had repudiated. Thus,* Hans *was a decision of mere temporary expedience, an instrument of racism and betrayal, and the product of an outmoded and rejected constitutional jurisprudence. As such, it has no claim to enduring authority as a constitutional precedent.*

Four of the Justices on the Rehnquist Court who have repeatedly relied on Hans *to expand the Eleventh Amendment should agree that those grounds are sufficient to require its repudiation. Only three years ago, in a case involving the Establishment Clause, they maintained that a constitutional doctrine "born of bigotry" should be "buried." So, now, should* Hans *be buried.*

INTRODUCTION

What is called the "law of federal courts" has been established through a process that filters, purifies, redesigns, and largely erases decisive historical phenomena—social conflict, politics, racism, sexism, and, of course, change itself. Examples abound. The well-known case of *Railroad Commission v. Pullman Co.*,[1] for one, centered on a fascinating and even lurid episode in American history that involved not only corporations, government, unions, power, and money but also fear, race, gender, the outbreak of world war, and the frightening specter of rape and rampant interracial sexual

1. 312 U.S. 496 (1941). The case involved a suit by railroad interests attacking the constitutionality of a rule of the Texas Railroad Commission that required white conductors aboard all Pullman sleeping cars, each of which was staffed by a black porter. *Id.* at 497–98. Both the conductors and porters intervened, the former supporting the rule and the latter attacking it. *Id.* at 498. With World War II looming, the Court found it advisable to postpone decision on such a potentially explosive domestic issue. *See id.* at 501–02.

encounters.[2] The purification process, however, transformed the case into an authority for an abstruse "doctrine of abstention."[3] As a matter of "law," *Pullman* now stands for the proposition that federal courts will not decide a case which contains an unsettled issue of state law when resolution of the state-law issue by a state court could obviate the need to decide a question of federal constitutional law. Between the original historical episode and the subsequent legal doctrine it does seem that something of significance has been lost.

On one level, of course, this purification process makes perfect sense and is essential in developing a system of law based on rationalized sets of general rules and principles. On another level, however, the process creates an insidious problem. Purifying life and sterilizing the past can strip decisions of their animating purposes and underlying values, thus denying the authentic meanings and practical truths they embody. If purification and abstraction create "rules" and "principles" necessary for general propositions of "law," they also make the resulting rules and principles peculiarly vulnerable to distortion, transformation, and manipulation.

The unfortunate and dangerous side of the purification process is apparent in the Supreme Court's recent reanimation of *Hans v. Louisiana*,[4] an 1890 decision that has become one of the launching pads for the Court's new activist jurisprudence.[5] Since the mid-1980s, a bare five-Justice majority on the Rehnquist Court has worked to reshape American law and overturn much of the constitutional jurisprudence of the past century.[6] The dominant majority has

2. W. J. CASH, THE MIND OF THE SOUTH 113–17 (Vintage Books 1991) (1941); Judith Resnik, *Rereading "The Federal Courts": Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 VAND. L. REV. 1021, 1038–41 (1994).

3. *Pullman*, 312 U.S. at 501.

4. 134 U.S. 1 (1890).

5. *E.g.*, Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 300–19 (2002) (tracing recent expansion of federal judicial power); Laura S. Fitzgerald, *Beyond* Marbury*: Jurisdictional Self-Dealing in* Seminole Tribe, 52 VAND. L. REV. 407, 418–24 (1999) (finding that the Rehnquist Court has limited Congress's power under Article I); Larry D. Kramer, *The Supreme Court 2000 Term: Foreword: We the Court*, 115 HARV. L. REV. 4, 158 (2001) (arguing that the principal characteristic of the Rehnquist Court is its commitment to "judicial sovereignty").

6. The Court's new jurisprudence has produced a massive literature. *See generally* Symposium, *Federalism after* Alden, 31 RUTGERS L.J. 631 (2000) (addressing federalism questions raised by the Rehnquist Court); Symposium, *Shifting the Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity*, 53 STAN. L. REV. 1115 (2001) (examining the shift in the balance of power between the federal government and the states); *The Supreme Court's Federalism: Real or Imagined?*, 574 ANNALS AM. ACAD.

sought, on one line of advance, to expand the institutional power of the Supreme Court and to enhance substantially the independence and sovereign immunity of the states.[7] It has sought, on another line of advance, to handicap or eliminate many different classes of tort, civil rights, and public law claimants and to constrict the powers of both Congress and the lower federal courts.[8] To help justify its ambitious project, the Rehnquist majority has repeatedly invoked a fundamental constitutional "presupposition" that it attributes to *Hans*.[9] That presupposition, "first observed over a century ago in

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POL. & SOC. SCI. 9 (Frank Goodman ed., 2001) (examining various aspects of the Court's federalism revival).

7. Printz v. United States, 521 U.S. 898, 935 (1997); Seminole Tribe v. Florida, 517 U.S. 44, 76 (1996); United States v. Lopez, 514 U.S. 549, 558–68 (1995); *see also* sources cited *supra* notes 5–6 (discussing the Court's new activist jurisprudence) and sources cited *infra* note 9 (summarizing the Court's recent use of *Hans* to constrict the powers of Congress).

8. *E.g.*, County of Sacramento v. Lewis, 523 U.S. 833, 854–55 (1998) (restricting liability under 42 U.S.C. § 1983); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585–86 (1996) (imposing due process limits on punitive damages); Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992) (applying the standing doctrine to limit the ability of Congress and private citizens to enforce environmental protection statutes).

9. Into the 1980s the Court was still limiting *Hans*. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 19 (1989) (holding that Congress could abrogate Eleventh Amendment immunity when it legislated under the Commerce Clause); Parden v. Terminal Ry. of the Ala. State Docks Dep't, 377 U.S. 184, 192 (1964) (upholding a FELA suit against a state railroad on the alternative ground that the statute was within the congressional Commerce Clause power and hence could not be barred by the Eleventh Amendment). Under the leadership of Justice William Brennan, four Justices urged that *Hans* be even more severely circumscribed or overruled. Dellmuth v. Muth, 491 U.S. 223, 233 (1989) (Brennan, J., dissenting with Marshall, Blackmun, and Stevens, JJ.) (stating "I would accept respondent Muth's invitation to overrule *Hans*"); Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 520 (1987) (Brennan, J., dissenting with Marshall, Blackmun, and Stevens, JJ.) (terming the doctrine of *Hans* "pernicious" and arguing that it should be limited or overruled).

At the same time, however, by the 1980s other Justices were beginning to use *Hans* to expand the significance of the Eleventh Amendment and the scope of state sovereign immunity. *E.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985) (denying that a congressional statute abrogated Eleventh Amendment immunity since it lacked unequivocal language indicating the intent of Congress to do so); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 123 (1984) (holding that the Eleventh Amendment prohibited a federal injunction against the state hospital to remedy a violation of state law). By the late 1980s their efforts grew bolder. In 1987 *Welch* overruled *Parden* in part (insofar as *Parden* was inconsistent with *Atascadero* and found congressional intent to abrogate Eleventh Amendment immunity on the basis of statutory language that was less than clear and unequivocal), and nine years later *Seminole Tribe* overruled *Pennsylvania v. Union Gas Co.* and held that Congress could not abrogate Eleventh Amendment immunity when it acted under the Commerce Clause power. In 1991, Justice Antonin Scalia summarized the expansive and untethered new jurisprudence that the Court's five-Justice majority attributed to *Hans*. Since *Hans*, Scalia explained,

Hans v. Louisiana," Chief Justice Rehnquist declared in *Seminole Tribe v. Florida*[10] in 1996, holds that "each State is a sovereign entity in our federal system . . . and . . . ' "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." ' "[11] The following year the same five Justices cited *Hans* for the sweeping proposition that the Eleventh Amendment symbolizes a "broader concept of immunity" that is "implicit in the Constitution" and that transcends the amendment's text, an immunity that substantially insulates the states from federal power.[12]

In justifying its conclusions in both *Hans* and *Seminole Tribe* the Court grounded its reasoning on "history," and that reliance properly directs our attention to the past and raises several distinct, if intertwined, questions. Some are relatively more "legal": What reasoning did *Hans* employ? How did it interpret relevant precedents? How sound were its conclusions? Others are relatively more "historical": What did the Justices actually do in *Hans*? Why did they do it? How did *Hans* relate to the Court's other contemporaneous, though doctrinally distinct, decisions? What were its consequences? Answering those questions, especially the

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> We have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty, [citations omitted], and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the "plan of the convention."

Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991).

Beginning with *Seminole Tribe* in 1996, Chief Justice Rehnquist and Justice Scalia joined Justices Sandra Day O'Connor, Anthony Kennedy, and Clarence Thomas in using *Hans* as a dominant constitutional precedent and extending its reach substantially, thereby enlarging the sovereign immunity of the states and limiting the power of both Congress and the federal courts. *E.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82 (2000) (narrowing congressional power to abrogate Eleventh Amendment immunity when acting under Section 5 of Fourteenth Amendment); Alden v. Maine, 527 U.S. 706, 754 (1999) (holding that Congress cannot abrogate Eleventh Amendment immunity and subject states to suit in their own courts when acting under its Article I powers); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 639 (1999) (narrowing congressional power to abrogate Eleventh Amendment immunity when acting under Section 5 of the Fourteenth Amendment); Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 270 (1997) (limiting, on Eleventh Amendment grounds, the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), and the power of federal courts to enjoin actions of state officials). During this recent period, the majority's expansive use of *Hans* was consistently opposed by a four-Justice minority made up of Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg, and Stephen G. Breyer.

10. 517 U.S. 44 (1996).

11. *Id.* at 54 (quoting Hans v. Louisiana, 134 U.S. 1, 13 (1890) (quoting THE FEDERALIST NO. 81 (Alexander Hamilton))) (emphasis omitted by the Court).

12. *Coeur d'Alene Tribe*, 521 U.S. at 267–68.

relatively historical ones, inevitably leaves many issues open. The answers cannot tell us, for example, whether the substantive policies that the Rehnquist majority seeks to serve through its use of *Hans* are wise or desirable in the early twenty-first century. The answers do, however, tell us one thing. With surprising clarity, they demonstrate that there is no sound reason why we should accord *Hans* itself the slightest weight as a generative constitutional precedent or accept it as a legitimate basis on which either to judge the scope of state sovereign immunity or to limit the powers of the federal government.[13]

This Article is divided into five parts. Part I introduces the Court's decision in *Hans*,[14] and Part II reviews a number of serious criticisms that scholars have directed at the case.[15] The next three parts explore *Hans* in its historical context, identifying the decision as a characteristic product of the late nineteenth-century Supreme Court and the distinctive political and social forces that dominated that era. Part III demonstrates that the late nineteenth-century Court followed a practice of flexible and self-conscious instrumentalism in shaping its jurisdictional decisions and that *Hans* was a typical product of that practice.[16] The decision was a device of judicial expedience, not a product of constitutional principle. Part IV identifies the substantive social policy that directed the Court's jurisdictional instrumentalism when it decided *Hans*.[17] That policy was to accept and legitimate an informal but comprehensive and well-understood national settlement in which the North in general and the Supreme Court in particular—animated in significant part by racist pressures and motives—abandoned the goals of Reconstruction, indulged the South in a special independence, and acquiesced in the region's efforts both to repudiate its bonds and to establish oppressive, white supremacist

13. The doctrine of stare decisis does not counsel otherwise. If the Rehnquist Court were merely applying *Hans* within established parameters, then stare decisis might lend it support. During the past decade, however, the Court has actively reshaped the law, expanded state immunities, and circumscribed the constitutional powers of the federal government. In its campaign it has invoked *Hans* and its "presupposition" to help justify its innovations. Thus, the Rehnquist Court has already moved far beyond stare decisis. That fact compounds the need to reexamine the past in an effort to understand more fully the true historical origins and the authentic constitutional significance of *Hans*. For an argument that stare decisis should not prevent the Court from overruling *Hans*, see Suzanna Sherry, *The Eleventh Amendment and Stare Decisis: Overruling* Hans v. Louisiana, 57 U. CHI. L. REV. 1260, 1262–64 (1990).

14. *Infra* notes 20–41.

15. *Infra* notes 42–95.

16. *Infra* notes 96–186.

17. *Infra* notes 187–512.

regimes. The nation has long since repudiated such racist motives and policies. Part V examines the "legal" reasoning employed in *Hans* and shows that the opinion was rooted in pre–Civil War common-law ideas that the Court had already abandoned and, more fundamentally, in an implicit rejection of the Fourteenth Amendment.[18] Together, the three parts argue that *Hans* should carry no generative authority in American constitutional law because it was the product of unprincipled expedience, a vicious and long-since repudiated racism, and a refusal to accept the constitutional principles embodied in the Fourteenth Amendment. This Article concludes with some brief remarks about the role of historical inquiry in the evaluation of legal rules and principles.[19]

I. *HANS*

Handed down in 1890, *Hans v. Louisiana*[20] was one of the Court's last major decisions in a wobbling line of post-Reconstruction cases involving repudiated southern state bonds. Beginning in the mid-1870s, for a variety of political and economic reasons, many of the white Democratic governments that came to power in the South with the end of Reconstruction began to repudiate or "readjust" their bonds.[21] At the same time, unevenly but unmistakably, the Supreme Court began moving from protecting government bondholders under the Contract Clause to protecting repudiating states through the Eleventh Amendment.[22] By the mid-1880s, the Court was ruling commonly that the amendment barred the federal courts from exercising jurisdiction over suits involving repudiated southern state bonds.[23]

As the legal tide turned against the bondholders, their lawyers tried one of the last remaining legal theories that seemed to remain open. Article III of the Constitution extended the federal judicial

18. *Infra* notes 513–86.

19. *Infra* notes 587–98.

20. 134 U.S. 1 (1890).

21. C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH, 1877–1913, at 86–106 (1951).

22. *See generally* BENJAMIN FLETCHER WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION (1938) (examining the history of the Contract Clause).

23. Between the early nineteenth century and the end of Reconstruction the Court consistently construed the Eleventh Amendment with extreme narrowness, but after 1877 it began using the amendment to dismiss bondholder suits that sought to force Southern States to honor their debt obligations. *See* CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 106–49 (1972); JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 47–109 (1987).

power to all cases arising under federal law, irrespective of the status of the parties, and in 1875 Congress granted the lower federal courts jurisdiction to hear such suits.[24] The Eleventh Amendment provided that the federal judicial power was not to be construed to reach suits against a state brought by "Citizens of another State, or by Citizens or Subjects of any Foreign State."[25] Thus, the bondholders reasoned, two interrelated arguments were open. One was that Article III and the general "federal question" statute conferred jurisdiction on the lower federal courts to hear "federal question" suits against any party, including states. The other was that the Eleventh Amendment was limited to suits brought by noncitizens and aliens and thus did not preclude federal judicial power over suits brought against a state by one of the state's own citizens.[26]

Accordingly, in 1884 bondholders arranged for a citizen of Louisiana to bring suit against the State of Louisiana in a local federal court to recover interest due on the state's bonds. They argued both of their theories together: that the State's repudiation of its bonds violated the Contract Clause of the United States Constitution and hence presented a "federal question" within the meaning of Article III and the general federal question statute;[27] and that the Eleventh Amendment did not preclude the suit because it was brought by one of the state's own citizens. The State answered simply, pleading that the federal court lacked jurisdiction to hear the suit because a plaintiff "cannot sue the state without its permission."[28]

On March 3, 1890 the United States Supreme Court handed down its decision in *Hans v. Louisiana*. Justice Joseph P. Bradley wrote for eight Justices, while Justice John M. Harlan concurred separately.[29] Accepting the questionable proposition that the case did

24. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 (1875).

25. U.S. CONST. amend. XI.

26. For appellant's argument, see *Hans v. Louisiana*, 134 U.S. 1, 4–8 (1890); for the Court's characterization, see *id.* at 9–10.

27. Plaintiff relied on a provision of the state's constitution, adopted in 1874, which declared that the bonds created "a valid contract" between the state and its bondholders and that "the State shall by no means and in nowise impair" the bonds. *Id.* at 2. He further pleaded the fact that in 1879 the State had changed its constitution, purportedly voiding the provisions of both its prior constitution and its bonds. *Id.* at 2.

28. *Id.* at 3.

29. Justice Bradley wrote into law the views he had expressed in dissent five years earlier in the *Virginia Coupon Cases*, 114 U.S. 269, 330 (1885) (Bradley, J., dissenting). Justice Harlan compressed his thoughts into a single brief paragraph, concurring in the judgment but disagreeing with "many things" in the majority opinion, including its claim that *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), had been wrongly decided. *Hans*, 134 U.S. at 21 (Harlan, J., concurring).

present a federal question,[30] Bradley ruled that the Eleventh Amendment and the sovereign immunity of the states deprived the federal courts of jurisdiction. He affirmed the lower court's judgment dismissing the suit.[31]

Justice Bradley easily disposed of the plaintiff's contentions. The "federal question" argument fell quickly. The Court's recent state bond cases had addressed similar challenges based on similar claims of federal law, he explained, and they established that such claims were barred by the Eleventh Amendment.[32] Turning to the citizenship argument, Bradley acknowledged that plaintiff did not come within any of the specific categories itemized in the Eleventh Amendment. He declared, however, that the amendment's text was not dispositive. The amendment, Bradley explained, had been adopted and ratified to overturn the Court's 1793 decision in *Chisholm v. Georgia*,[33] which had allowed a noncitizen to sue a state. *Chisholm*, Bradley asserted, had created "a shock of surprise" that echoed throughout the country because it contradicted a generally accepted assumption, rooted in the common law and honored by implication in the Constitution, that states were immune from all suits by individuals.[34] Thus, shifting the issue away from the amendment's specific language, Bradley sought authoritative guidance in "the manner in which [*Chisholm*] was received by the country, the adoption of the Eleventh Amendment, the light of history and the reason of the thing."[35] On those grounds, he concluded that *Chisholm* was wrongly decided because the Constitution had not been intended "to create new and unheard of remedies."[36] The Eleventh

30. Cautiously, the Court stated that the question presented was based "upon a suggestion that the case is one that arises under the Constitution or laws of the United States." *Hans*, 134 U.S. at 9. Plaintiff's claim was based on the bonds, not on the Constitution itself. The test for determining a "federal question," however, was uncertain and changing in the late nineteenth century. *See infra* text accompanying notes 513–21. *See generally* James H. Chadbourn & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639 (1942) (tracing the history of federal question jurisdiction); Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717 (1986) (examining the history of federal question removal jurisdiction); Donald L. Doernberg, *There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597 (1987) (noting that the boundaries of federal question jurisdiction have remained unclear).

31. The lower court's judgment was reported at 24 F. 55 (C.C.E.D. La. 1885).

32. *Hans*, 134 U.S. at 10.

33. 2 U.S. (2 Dall.) 419, 479 (1793).

34. *Hans*, 134 U.S. at 11.

35. *Id.* at 18.

36. *Id.* at 12.

Amendment was intended to reassert the general principle, widely accepted at the time of the Constitution's ratification, that the states enjoyed sovereign immunity against all suits by individuals, regardless of their citizenship. While the amendment's language was directed specifically at *Chisholm*, Bradley declared, its true meaning was that the Constitution recognized a much broader doctrine of state sovereign immunity.[37] That broader immunity barred suits by citizens as well as by noncitizens.

Hans represented both a determined and a sweeping effort by the Court. It was determined because the Court ignored alternative and readily available ways to decide the case. The Court could have denied plaintiff's claim on a variety of legitimate grounds, including the obvious one that the claim was based on state law and thus did not present a proper "federal question" within the jurisdiction of the lower court.[38] Or, of course, it could have accepted the claim, given effect to the amendment's explicit language, and ruled in favor of plaintiff. Instead, it did neither. In *Hans*, the Court wished not only to rule in favor of the State but to do so on broad and irreversible grounds. Determined to extinguish the southern state bond litigations with a stroke, it sought to achieve that goal by creating a constitutional "principle" that would banish such suits with finality. The Court's effort, consequently, was also sweeping. Its opinion in *Hans* transformed the Eleventh Amendment from a specific, ordinary, and written part of the Constitution into a paratextual loophole that allowed Bradley to infuse into the supreme law a "principle" of state sovereign immunity that was textually unmentioned and therefore amorphous, highly elastic, and manipulable at will.

Although *Hans* was, as we will see, a readily understandable product of the late nineteenth century, its rationale created potentially serious problems for American law. Its nontextual and

37. *Id.* at 10–19.

38. *See infra* text accompanying notes 513–21. Such a ruling would, for example, have followed the Court's two-year-old decision in *Metcalf v. Watertown*, 128 U.S. 586, 588–89 (1888), which held that, in a suit originally filed in federal court (as opposed to a suit removed to federal court), federal question jurisdiction depended on the presence of a claim based on some federal law element that appeared in plaintiff's properly pleaded complaint. In *Hans*, plaintiff's claim was based on state law, and the federal constitutional issue under the Contract Clause arose only by way of reply to the State's anticipated defense that it properly refused to pay on the bonds because of a supervening provision of state law. *See* Collins, *supra* note 30, at 730–34. *But see* Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 448–50 & n.280 (1987) (suggesting the existence of an implied cause of action directly under the Contract Clause).

infinitely plastic "principle" conferred on the Court a powerful tool for expanding the immunity of the states and shrinking the powers of the federal government. It is revealing, as we will also see, that the *Hans* Court itself quickly minimized the significance of that amorphous principle and that, for almost a century, successive Courts kept its elastic potential under tight control.[39] Indeed, in 1953, when Henry M. Hart, Jr., and Herbert Wechsler published *The Federal Courts and the Federal System*, the casebook that long stood as the classic and almost unquestioned authority on "the law of federal courts," the authors did not reprint *Hans* or even include a reference to the decision in their table of cases.[40] It was only the later Burger Court and then, far more vigorously and aggressively, the Rehnquist Court that seized on the potential in *Hans*'s elastic paratextual principle and transformed the decision into an ever more expansive justification for limiting federal power and carving out ever larger realms of state immunity.[41] It is that recent and ideologically driven

39. The Court did follow *Hans* on occasion and on relatively narrow issues. It extended state sovereign immunity to suits brought in federal admiralty courts, *Ex parte New York*, 256 U.S. 490, 497 (1921), and to suits brought by foreign countries, *Monaco v. Mississippi*, 292 U.S. 313, 330 (1934). The latter case had the honor of being the last southern state bond suit to reach the Court. On more critical and far-reaching issues, however, the Court cabined *Hans* strictly. *E.g.*, *Ex parte* Young, 209 U.S. 123, 159 (1908) (holding that the Eleventh Amendment does not bar a suit for an injunction against state officials prohibiting them from enforcing state law); United States v. Texas, 143 U.S. 621, 643 (1892) (holding that the Eleventh Amendment does not bar a suit brought against a state by the United States); *see infra* notes 149–84 and accompanying text.

40. HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953). The index indicates that only ten pages were devoted to the general topic of "Sovereign Immunity: Eleventh Amendment, effect of." *Id.* at 1439.

41. In *Alden v. Maine*, 527 U.S. 706, 713 (1999), the five Rehnquist Justices explicitly embraced, and turned to powerful effect, the amorphous paratextual idea of state sovereign immunity that *Hans* introduced. "[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment," they explained. *Id.* at 713.

> Rather, . . . the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

Id.; *accord* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 751–53 (2002) (noting that the Convention "did not disturb states' immunity from private suits").

Sovereign immunity, the Rehnquist Justices maintained, is essential to maintain the "dignity" of the states, *Fed. Mar. Comm'n*, 535 U.S. at 760; *Alden*, 527 U.S. at 715, a purpose as subjective as it is illimitable. Pre-Reconstruction Eleventh Amendment jurisprudence was quite different. "We must ascribe the [Eleventh] amendment, then," Chief Justice Marshall wrote in 1821, "to some other cause than the dignity of a State." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406 (1821). One could, of course, argue as easily and sensibly—if not more plausibly—that the "dignity" of the United States

use of the case that makes it imperative to understand the essential illegitimacy of *Hans* and its amorphous "principle" of state sovereign immunity.

II. THE DUBIOUS NATURE OF *HANS*

Historians and legal scholars have long criticized *Hans*, and their arguments are familiar and widely accepted.[42] Until little more than a decade ago, moreover, the Supreme Court itself had repeatedly limited the case and subordinated its elastic sovereign immunity doctrine to the requirements of evolving national policy and the mandate of other constitutional provisions.[43] Holding aside subsequent doctrinal developments, however, and taking *Hans* on its own terms, scholars have adduced a good many grounds for doubting its reasoning and conclusions.[44]

A. Considerations of Law: Text, Reason, and Precedent

As a matter of legal analysis, *Hans* is intrinsically dubious. First, there is the awkward matter of the text itself.[45] The words of the Eleventh Amendment quite obviously do not support the meaning that *Hans* attributed to them. Indeed, under the guidance of *Hans* and its "presupposition," the Court's interpretation of the amendment has strayed so far from its actual words that the text has quite literally become a matter of no significance. In *Seminole Tribe* the Rehnquist Court candidly dismissed the text as a possible constraint on the amendment's meaning: An argument relying on the

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government required that states submit to the jurisdiction of the national courts when they were sued on claims authorized by national law.

More broadly, the Rehnquist Justices have used the amorphous idea of sovereign immunity created in *Hans* to enhance their efforts to restrict congressional power under Section 5 of the Fourteenth Amendment, an amendment that came after the Eleventh Amendment and was intended to trump whatever state sovereignty existed. The elasticity and subjectivity of the Court's Section 5 doctrine, like its sovereign immunity doctrine, is apparent. The textual basis on which the Rehnquist Justices have relied in creating a variety of judge-made constraints to negate congressional enactments under Section 5 is the word "appropriate." *E.g.*, Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 634 (1999) (holding that "[t]he legislation must nonetheless be 'appropriate' under Sec. 5").

42. *Infra* Parts II.A, II.B.

43. *Infra* Part III.B.

44. *Infra* Parts II.A, II.B.

45. The text of the Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI; *see supra* notes 32–37 and accompanying text.

text and seeking to limit the amendment's reach, the Chief Justice announced, was a mere "straw man."[46]

Such a result suggests the misguided nature of the Court's approach in *Hans*. Unlike, for example, the Due Process and Equal Protection Clauses—provisions that embody broad and fundamental principles—the Eleventh Amendment contains language that is narrow, specific, and relatively easily understood. No textual basis or interpretive difficulty justifies construing the amendment utterly without regard—let alone contrary—to its explicit terms.[47] The Court's textually untethered approach has understandably encouraged arbitrary and result-oriented uses of the amendment.[48] Indeed, although the Rehnquist Court has dismissed the significance of the amendment's actual text, it readily cites that text when its specific words support the majority's preferred outcome. Emphasizing that the amendment imposes a limit on federal judicial power, for example, *Seminole Tribe* pointed out that the "text of the Amendment itself is clear enough on this point."[49]

A second reason why *Hans* seems dubious is that it conflicts with the Eleventh Amendment jurisprudence that the Court had followed until the end of Reconstruction. From the days of the early Republic and John Marshall's opinions in *Cohens v. Virginia*[50] and *Osborn v.*

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46. Seminole Tribe v. Florida, 517 U.S. 44, 69 (1996). The Court seems to have recognized the implausible nature of its sovereign immunity decisions based on the Eleventh Amendment and to have begun shifting toward an increased reliance on the Tenth Amendment, a vaguer and, at least textually, less obviously inadequate constitutional basis. *See, e.g.*, *Alden*, 527 U.S. at 712–15 (finding that the Tenth Amendment removes doubt that the states are sovereign entities). The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

47. Two critics have emphasized the "plain meaning" of the amendment's text. Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1346–49 (1989); Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 150 (1989).

48. *See infra* Part III.B.

49. *Seminole Tribe*, 517 U.S. at 64. One of the most revealing illustrations of the role that the text of the Eleventh Amendment plays for the Rehnquist majority occurred in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). There, presented with a case that actually came within the express terms of the amendment, Justice Scalia could not resist the opportunity to exploit the textual language even though he readily acknowledged that, given the majority's paratextual jurisprudence, "the following observation has no bearing upon our resolution of this case." *Id.* at 689. Regardless of its doctrinal irrelevance, in other words, the text of the Eleventh Amendment was worth citing when—but only when—it supported the position of the Rehnquist majority.

50. 19 U.S. (6 Wheat.) 264 (1821) (holding that a state is not prohibited by the Eleventh Amendment from bringing a suit against an individual).

Bank of the United States,[51] the Court held that the amendment only applied to suits in which the state was formally named as a party.[52] In the years from 1798 to the Civil War the amendment was seldom even cited, and the Court relied on it but once to dismiss a suit.[53] Further, throughout Reconstruction the Court continued to invoke and apply Marshall's rule.[54] In 1872, for example, *Davis v. Gray*[55] cited *Osborn* as authority for the established proposition:

> Where the State is concerned, the State should be made a party, if it could be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record.[56]

Third, beyond text and precedent, the Court's opinion in *Hans* is inadequate on its own terms. Although it invoked "the light of history"[57] to support its conclusions, the opinion not only failed to consider the full historical record but failed to make any serious or sustained historical inquiry at all.[58] It did not bother to discuss the historical evidence that contradicted its conclusions, and it neither

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51. 22 U.S. (9 Wheat.) 738 (1824) (stating that the amendment only prevented suits in which a state was named as a party); *see also* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139 (1810) (holding, in a suit between private parties, that a State may be restrained by a federal court from revoking a grant of land); United States v. Peters, 9 U.S. (5 Cranch) 115, 139 (1809) (holding that a State cannot assert the Eleventh Amendment on behalf of a private litigant when the State claims a substantial interest in the underlying dispute but is not a party). For a different view of *Hans*, see generally Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485 (2001) (reviewing literature on *Hans* and defending the doctrine of state sovereign immunity).

52. The long-established rule had been modified three years before *Hans* in another major post-Reconstruction southern bond case, *In re Ayers*, 123 U.S. 443, 487 (1887).

53. John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1968 (1983). The single case that relied on the Eleventh Amendment was *Ex parte Madrazzo*, 32 U.S. (7 Pet.) 627 (1833), an original admiralty suit in the Supreme Court brought against a state by an alien.

54. *See* Bd. of Liquidation v. McComb, 92 U.S. 531, 541 (1876) (citing *Osborn* approvingly); Davis v. Gray, 83 U.S. (16 Wall.) 203, 220 (1873) (reaffirming *Osborn*).

55. 83 U.S. (16 Wall.) 203 (1873).

56. *Id.* at 220 (citing *Osborn*).

57. Hans v. Louisiana, 134 U.S. 1, 18 (1890).

58. *See* Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 529–36 (1978) (recounting the background of the Eleventh Amendment); John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1422–41 (1975) (discussing the historical view of Congress and the Eleventh Amendment); James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1323–43 (1998) (arguing that the Eleventh Amendment was intended as an "explanation" of Article III).

examined the English common-law background of sovereign immunity nor the major historical events and political controversies of the 1790s that gave rise to the Eleventh Amendment.[59] It did not cite a single work of historical scholarship. Aside from a few carefully chosen and quite possibly misleading statements from Madison, Hamilton, and Marshall,[60] it relied almost exclusively on general statements in prior Court opinions that had been handed down long after the amendment's passage and, consequently, were of no value as historical sources. As a matter of law, moreover, those opinions provided little or no support for its holding. The brief, unbalanced,

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59. The 1790s was a critical formative decade when the political system, party structure, public policy, and democratic culture of the new nation were beginning to take shape. GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 229–369 (1992). The early actions of Congress were deeply influenced by that new and unsettled context. Maeva Marcus & Natalie Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?*, *in* ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789, at 13, 27–30 (Maeva Marcus ed., 1992) [hereinafter ORIGINS OF THE FEDERAL JUDICIARY].

Hans failed to consider the complex political, social, and economic forces that dominated that decade, determined the purposes behind the Eleventh Amendment, and secured its adoption. *Hans*, for example, gave no attention to the significance of major controversies between the Federalists and Jeffersonians over international trade, policy toward England and France, and the state debts that were owed in significant part to Tories and British creditors. Nowak, *supra* note 58, at 1433–38. Nor did it consider the relevance of other key issues between the parties involving paper currency, credit policy, and the allocation of fiscal responsibility between states and the central government. Pfander, *supra* note 58, at 1273–75, 1307.

With respect to the common law of sovereign immunity, the doctrine in Great Britain protected the Monarch alone, prohibiting routine rights of action. It nonetheless allowed certain "extraordinary" proceedings to address grievances against the Crown and left all other government officials subject to suit. Gibbons, *supra* note 53, at 1895; Pfander, *supra* note 58, at 1303. The *Hans* Court neither explored this law in detail nor explained why and how the text of the Eleventh Amendment was intended to incorporate its different parts.

60. *Hans*, for example, cited THE FEDERALIST NO. 81 (Alexander Hamilton), where Hamilton argued that sovereign immunity protected the states from suits by individuals. *Hans*, 134 U.S. at 12–13. It did not, however, cite or discuss THE FEDERALIST NO. 22, where Hamilton insisted on the need for a federal supreme court "paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort an [sic] uniform rule of civil justice." THE FEDERALIST NO. 22, at 108 (Alexander Hamilton) (Max Beloff ed., 2d ed. 1987). Nor did it cite THE FEDERALIST NO. 80, where Hamilton declared that "in order to the inviolable maintenance of that equality of privileges and immunities, to which the citizens of the union will be entitled, the national judiciary ought to preside in all cases, in which one state or its citizens are opposed to another state or its citizens." THE FEDERALIST NO. 81, at 408 (Alexander Hamilton) (Max Beloff ed., 2d ed. 1987). For additional background, see JACOBS, *supra* note 23, at 27–40; Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1466–92 (1987); Field, *supra* note 58, at 529–36; Nowak, *supra* note 58, at 1427–30. For a useful summary of the legal-historical case against *Hans*, see ROBERT N. CLINTON ET AL., FEDERAL COURTS: THEORY AND PRACTICE 1087–94 (1996).

and superficial nature of the "history" in *Hans* strongly suggests that its discussion, though ostensibly dispositive, was simply "law office history" designed to rationalize a result reached on other, undisclosed grounds.

Fourth, in the face of the Court's inadequate legal and historical analysis, an extensive body of scholarship has developed over the years challenging both the reasoning and result in *Hans*.[61] A substantial majority of scholars have concluded that *Hans* was incorrectly decided.[62] Probing deeply into the framing of the Constitution, events surrounding the Court's decision in *Chisholm*, and the drafting and ratification of the Eleventh Amendment in the context of the politics of the 1790s, these scholars have concluded that *Hans*'s historical analysis is not merely superficial but highly improbable.[63] The "original intent" behind the amendment was much different and far narrower than *Hans* held, and it was likely designed only to prevent the federal courts from hearing suits against states brought by private parties on state-created causes of action. In spite of various disagreements, most of these scholars join in maintaining that the Eleventh Amendment was intended neither to establish, nor to reestablish, any inviolable state sovereign immunity and that it does not, therefore, preclude federal jurisdiction over states in actions based on "federal questions."[64] This scholarship generally concludes, in other words, that the text of the Eleventh Amendment is

61. For citations to the scholarly literature and leading judicial opinions criticizing *Hans*, see Hill, *supra* note 51, at 487 nn.1–2 (listing scholars who believe sovereign immunity has no sound basis in the law). For additional criticism of *Hans*, see generally William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); Vicki C. Jackson, *One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term*, 64 S. CAL. L. REV. 51 (1990); William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372 (1989). For a recent reconceptualization, see Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559 (2002).

62. *E.g.*, "The academic verdict on *Hans* has been overwhelmingly negative." Hill, *supra* note 51, at 517. The "great weight of scholarly commentary" agrees with what is called the "diversity" interpretation of the Eleventh Amendment, the view that the amendment only limited federal judicial power over suits in which jurisdiction was based on the nature of the parties. Seminole Tribe v. Florida, 517 U.S. 44, 110 n.8 (1996) (Souter, J., dissenting). Even Justices who favor a broad interpretation of *Hans* have acknowledged that the historical materials show only that "the intentions of the framers and Ratifiers [of the Eleventh Amendment] were ambiguous." Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 479 (1987).

63. *See* sources cited *supra* notes 53, 58–62.

64. *See* sources cited *supra* notes 53, 58 & 61.

understandably specific and limited because the framers and ratifiers intended to make a change in the law that was specific and limited.

B. *Considerations of History: Reconstruction and Southern Repudiationism*

While scholars have found grave internal flaws in Bradley's opinion, some who explored the decision's historical context have not only questioned its reasoning but offered an explanation for the Court's willingness to hand down such a dubious opinion.[65] Their argument is straightforward and can be summarized as follows. In 1890 Reconstruction had long since ended, and sectional reconciliation was the order of the day. The Southern States had returned to the Union and reasserted their power, and the North was unwilling to try to force them to pay their debts. The Republican Party was divided, based increasingly on an electoral majority outside the South, and concerned with new economic issues rather than with old sectional disputes. The North lacked the political will to force Southern States to honor their debts, and the Court used *Hans* as a way to avoid issuing judgments that would, as a practical matter, likely be unenforceable.[66]

As a general matter, the historical argument seems persuasive. Until the end of Reconstruction, at least, two legal principles relating to government bonds had seemed clearly established. One was that the Eleventh Amendment prohibited suits in the federal courts against states only when the states were formally named as defendants but not when such suits were brought against state officers in their official capacities—that was the doctrine the Marshall Court had established during the early years of the Republic.[67] The other established principle was that the federal courts would enforce the rights of bondholders under the Contract Clause and take whatever measures were necessary to prevent repudiation by government entities.[68] Between approximately 1860 and 1900, for example, the

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65. *See Seminole Tribe*, 517 U.S. at 110 n.8 (Souter, J., dissenting); JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888–1910, at 180 (1995); ORTH, *supra* note 23, at 75–81, 103–05; *see also* sources cited *infra* note 72 (arguing that the Court invoked the Eleventh Amendment to allow states to avoid paying bondholders without federal sanction).

66. *See* sources cited *supra* note 65 and sources cited *infra* note 74.

67. Leading cases included *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) and *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). *See generally* ORTH, *supra* note 23, at 30–46 (discussing the early interpretation of the Eleventh Amendment).

68. The position was based on *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), and *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164 (1812), and regularly followed. For examples of

Supreme Court alone heard about 350 such cases from more than twenty states involving efforts by county and municipal governments to repudiate between $100 and $150 million in bonds.[69] Almost uniformly, the bondholders won, even in the face of substantial evidence that bonds had been issued without lawful authority, secured as part of a corrupt or fraudulent scheme, or held by individuals implicated in illegal or other culpable conduct.[70]

When Reconstruction began to crumble, however, the resulting political realignments opened cracks in those principles. The Civil War devastated the southern economy, and the abolition of slavery destroyed a large part of the region's wealth and its basic system of labor. Prewar bonds, often in substantial arrears as a result of the war, and the large-scale issues floated by postwar Republican governments imposed onerous financial burdens on many states of the old Confederacy. Those burdens were not only heavy but galling,

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the application of this position, see *Washington University v. Rouse*, 75 U.S. (8 Wall.) 439 (1869), and *Woodruff v. Trapnall*, 51 U.S. (10 How.) 190 (1851). *See* WRIGHT, *supra* note 22, at 224–42 (discussing how the early Court used the Contract Clause to prevent states from repudiating their debts); Gibbons, *supra* note 53, at 1974–76 (same).

69. The mid- and late-nineteenth-century bond cases were of great economic and political importance and that fact frequently had an impact on the judges who decided them. Charles Fairman captured some of their special quality in discussing the leading case of *Riggs v. Johnson County*, 73 U.S. (6 Wall.) 166 (1868), which held that a federal court could issue writs of mandamus to local government officials to secure satisfaction of a prior federal judgment concerning local bonds, notwithstanding the fact that a state supreme court had enjoined the officials from levying taxes to pay the judgment.

> One's eye may be arrested at the spectacle of [Justice Nathan] Clifford, sturdy old Democrat, boldly advancing the national flag, while [Justice Samuel] Miller, the Republican, would yield ground to the State courts. Occasionally considerations present in a particular situation—especially economic considerations—prove more compelling than the general tendency of a judge's mode of thought. Municipal bond cases were a very special category.

6 CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864–1888: PART ONE 964 (1971).

70. After an exhaustive review of the Court during Reconstruction, Charles Fairman concluded as follows:

> Preoccupation with the protection of bondholders caused a majority of the Justices to be insensitive to all other considerations in these complex situations. What is more, slovenly work concealed egregious deviations even from professed principles. It would be unwarranted to say that at any rate the Court was enforcing common honesty. So simple an explanation would ignore the misrepresentation, fraud, and illegality that often procured a bond issue, and the carelessness or the sharp discount that commonly attended a purchase.

Id. at 1101. *See generally id.* at 918–1116 (discussing the Court's treatment of municipal bonds after 1870); CHARLES FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT, 1862–1890, at 207–36 (1939) (considering Justice Miller's jurisprudence with respect to municipal bonds); HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835–1875, at 365–70 (1982) (describing the Court's treatment of municipal bonds from 1863 to 1870).

for the bonds issued during Reconstruction stirred intense political hostility as symbols of "Yankee domination," social radicalism, and the alleged corruption that had characterized the era of "black rule."[71] The depression that wracked the mid-1870s compounded the region's economic suffering. Thus, when the Democrats recaptured southern state governments, many of them began repudiating their state bonds, antebellum as well as Reconstruction issues.[72] Adopting a variety of tactics, nine southern states—Alabama, Arkansas, Florida, Georgia, Louisiana, North Carolina, South Carolina, Tennessee, and Virginia—eliminated or unilaterally reduced bonded obligations in an amount that likely exceeded $150 million.[73] Bondholders, not surprisingly, began suing in the federal courts, seeking to compel the Southern States to honor their obligations.

The Court was unwilling to abandon its general position guaranteeing the worth of government bonds, but it was squeezed between two overpowering realities. One was the determination of many post-Reconstruction southern state governments to reassert their power and repudiate their burdensome debts. The other was the fact that the federal government and most Americans had turned their backs on the goals and policies of Reconstruction. Sectional "reconciliation" was the highest good, and the North was no longer interested in attempting to force the South to honor its obligations. In that context, federal judicial orders seeking to compel southern states to pay their full debts would present grave enforceability problems.

Thus, the Court's solution, many historians and legal scholars concluded, was to qualify the protection that the federal courts offered bondholders by invoking the Eleventh Amendment and allowing the Southern States to repudiate without federal sanction.[74] In a series of decisions between 1877 and 1890 the Court began expanding the amendment's reach and holding that it deprived the

71. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 382–88 (1988); WOODWARD, *supra* note 21, at 8–9, 86–98.

72. On the financial activities of the Reconstruction governments, see FONER, *supra* note 71, at 383–88, 512–13, 539–42. *See generally id.* at 346–411, 512–563 (discussing political and economic conflicts during Reconstruction); JAMES M. MCPHERSON, ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION (1982) (discussing the social and economic aspects of Reconstruction).

73. WOODWARD, *supra* note 21, at 86–87.

74. ORTH, *supra* note 23, at 75–81, 103–05; Fletcher, *supra* note 61, at 1033; Gibbons, *supra* note 53, at 1889; Massey, *supra* note 47, at 61; Pfander, *supra* note 58, at 1269. For a particularly thoughtful evaluation of this argument, adding important qualifications and complexities, see generally Michael G. Collins, *The Conspiracy Theory of the Eleventh Amendment*, 88 COLUM. L. REV. 212 (1988) (reviewing ORTH, *supra* note 23).

federal courts of jurisdiction to hear suits seeking to collect on state bonds.[75] Adapting pragmatically to the post-Reconstruction context, the Court followed a cautious and somewhat erratic course. It seemed to support bondholders when it could frame enforceable orders of relief, primarily in cases involving municipalities and counties in the Midwest and West.[76] Indeed, in the same year that it decided *Hans* the Court also held that municipalities and counties did not come within the protection of the Eleventh Amendment.[77] Conversely, when bondholders sought to collect on state bonds—where repudiation was limited to states in the South—and where the Court doubted its power to issue enforceable orders, it used the Eleventh Amendment to dismiss for lack of jurisdiction.[78] In this context, then, *Hans* appeared as the culmination and broadest doctrinal rationalization of a series of state bond cases in which the Court reshaped the law to placate southern repudiationists and avoid rendering judgments that it feared it could not enforce. "The *Hans* decision can best be understood," James W. Ely, Jr., concluded , "as part of the Supreme Court's refusal, on claimed jurisdictional grounds, to confront the widespread repudiation of bonds by southern states."[79]

Finally, beyond these specific historical reasons for doubting *Hans*, there stands another and more general ground for skepticism—the sheer implausibility of the claim that the Court, after ninety-two years of confusion and error, somehow managed in the year 1890 to hit upon the true "original intent" behind the Eleventh Amendment. As a matter of historical explanation, how did it happen that the scales of blindness suddenly fell from the judicial eyes in that particular year? On the one hand, the Justices claimed neither to

75. *See* ORTH, *supra* note 23, at 50–89.

76. *See, e.g.*, Amy v. The Supervisors, 78 U.S. (11 Wall.) 136 (1871) (holding that local officials could be personally liable for damages resulting from their failure to obey a federal writ of mandamus ordering them to levy a tax to pay on bonds); Supervisors v. Rogers, 74 U.S. (7 Wall.) 175 (1869) (holding that a federal court could appoint a U.S. Marshall to levy and collect a tax to enforce a federal writ to town officials to pay on local bonds in Iowa). *See generally* 6 FAIRMAN, *supra* note 69, at 918–1116 (summarizing results of Midwestern cases); ORTH, *supra* note 23, at 110–20 (same).

77. Lincoln County v. Luning, 133 U.S. 529, 530–31 (1890).

78. *See In re* Ayers, 123 U.S. 443 (1887); Hagood v. Southern, 117 U.S. 52 (1886); Louisiana v. Jumel, 107 U.S. 711 (1883). *See generally* ORTH, *supra* note 23, at 58–89 (summarizing the Court's decisions on southern state bonds other than those of Virginia); *infra* notes 131–51 and accompanying text (discussing the Court's line of Eleventh Amendment cases between 1877 and 1908).

79. ELY, *supra* note 65, at 180. The thesis is developed fully and carefully in ORTH, *supra* note 23, at 58–89.

have unearthed any new historical sources nor to have discovered any new historical scholarship capable of justifying their sweeping new interpretation. On the other hand, their lives and their nation's fate had been dominated for more than half a century by a series of consuming ordeals driven by the issue of race—the increasingly virulent conflict over slavery, the upheavals of the Civil War and Reconstruction, and the collapse of Radical Republicanism and the emergence of a virulently Democratic "solid" South. Such Justices were in no position even to try to penetrate back through the mists of a century of American history to identify the authentic "original intent" that had animated the innumerable individuals who designed and ratified the Eleventh Amendment. Given their failure to adduce any new historical evidence, the magnitude and passion of the events that shaped their lives, and the compelling practical considerations that weighed so heavily on them in the post-Reconstruction era, the claim to historical truth they made in *Hans* must seem, at best, a contention of striking dubiety.

C. *On the Importance of the Judicial "Vantage Point"*

These legal and historical objections to *Hans* are familiar, and my purpose is not to reexamine them. It is, rather, to add some additional historical considerations to the discussion. *Hans*, I suggest, is not merely a dubious decision but, rather, a particularly dubious decision because there are other, and even more compelling, historical reasons for doubting its soundness, legitimacy, and authority.

The established historical critique of *Hans*—that it was a response to the political realities of southern repudiation—attracted the attention of the Supreme Court in *Seminole Tribe*. There, Justice David H. Souter, speaking in dissent for himself and Justices Ruth Bader Ginsburg and Stephen G. Breyer, questioned *Hans* and its interpretation of the Eleventh Amendment on the basis of that historical analysis.[80] Responding harshly for the five-Justice majority bloc, Chief Justice Rehnquist dismissed Souter's contentions out of hand. Rehnquist did not, however, address the merits of the historical argument but rather did what any competent criminal lawyer would do when faced by a prosecutor with convincing evidence of his client's guilt. He invoked an exclusionary rule. Souter's "undocumented and highly speculative extralegal

80. Seminole Tribe v. Florida, 517 U.S. 44, 116–23 (1996) (Souter, J., dissenting).

explanation of the decision in *Hans*," Rehnquist charged, "is a disservice to the Court's traditional method of adjudication."[81]

Ironically, however, on the same page of the *United States Reports* where the Chief Justice condemned Souter's approach, he himself invoked the authority of the Court's historical "vantage point" in *Hans*.[82] That "vantage point," Rehnquist noted, was closer in time to the ratification of the Eleventh Amendment than was the "vantage point" of the dissenters in *Seminole Tribe*. Thus, Rehnquist suggested, *Hans*'s closer temporal "vantage point" made it a more informed and reliable construction of the Eleventh Amendment than that expressed by Souter and the dissenters in *Seminole Tribe*.

The Chief Justice's claim seems doubly flawed. Given the fact that *Hans* and the ratification of the Eleventh Amendment occurred almost a hundred years apart, his assumption about the value of temporal propinquity seems, in this particular instance, rather obviously inapt.[83] More striking is the logical implication of the Chief Justice's assumption. If his premise were well-founded, it would mean that Marshall's original views in *Cohens v. Virginia*[84] and *Osborn v. Bank of the United States*[85] would be far more reliable statements of the amendment's true meaning than the contrary conclusions embraced in the Court's temporally far more distant opinion in *Hans*.

In spite of the inapt assumption and faulty conclusion, the Chief Justice's comment nevertheless suggests a profound truth. The Court's "vantage point" in *Hans* is of the greatest salience. Indeed, *Hans*'s "vantage point" is its decisive characteristic. That "vantage point," however, carries a significance far different from the one the Chief Justice proposed. The far more compelling conclusion is that

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81. *Id.* at 68–69.

82. *Id.* at 69.

83. The Chief Justice had previously noted the unreliable nature of noncontemporaneous "historical" sources. Criticizing the Court's jurisprudence and the views of Justice Hugo L. Black, he dismissed the significance of a letter written by Thomas Jefferson, which stated that the Establishment Clause created a "wall of separation" between church and state. Not only had Jefferson been in France when the Bill of Rights was adopted, Rehnquist explained, but he had written the letter fourteen years after its ratification. Jefferson's "short note," he declared, "would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment." Wallace v. Jaffree, 472 U.S. 38, 92 (1984) (Rehnquist, J, dissenting).

84. 19 U.S. (6 Wheat.) 264 (1821) (suggesting that the amendment applied only to diversity cases).

85. 22 U.S. (9 Wheat.) 738 (1824) (stating that the amendment only prevented suits in which a state was formally named as a party).

the Court's particular "vantage point" in *Hans* is precisely what makes its opinion there both legally dubious and morally suspect.

The failure to explore more fully the nature and significance of that "vantage point" has obscured our understanding of *Hans*. Too often, Eleventh Amendment scholarship has limited itself to doctrinal analysis and, even more narrowly, to an analysis of doctrinally defined "Eleventh Amendment issues."[86] *Hans*, however, was not an isolated product of the late nineteenth-century Court, nor was it unrelated to the Court's other contemporaneous decisions. On the contrary, it was an integral part of the Court's broader and quite purposeful effort to reshape federal jurisdiction to serve its evolving ideas of desirable national policy in a new, post-Reconstruction, industrial age. Further, even when Eleventh Amendment scholarship considered *Hans*'s historical context, it generally limited its analysis to factors that related directly to the specific legal issues that the Court's Eleventh Amendment decisions addressed. While rightly stressing the problem of southern repudiationism and the enforcement difficulties that confronted the federal courts, this scholarship tended to ignore the more decisive political and social factors that guided the Court's uneven and highly pragmatic jurisdictional decisionmaking in the late nineteenth century.[87] Most obviously, Eleventh Amendment scholarship has minimized the transforming nature of the post-Reconstruction settlement and the increasingly virulent and politically domineering racism that shaped and impelled that settlement.[88] As a matter of historical dynamics, it was those forces,

86. "The doctrinal decontextualization involved in the conventional strategy of studying a *line* of doctrine from its earliest expression through its most recent is thus fundamentally misguided .... Such an approach too easily blinds us to the dynamics of interdoctrinal connections...." Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1149 (2000).

87. Real-world concerns have often helped shape the Court's decisions and opinions, even when the concerns were unrelated as a matter of legal doctrine to the questions formally at issue in the cases. Foreign policy concerns, for example, played a significant role in domestic racial desegregation cases during the cold war. MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 12–17, 99–108, 250–51, *passim* (2000).

88. Michael J. Klarman, *The* Plessy *Era*, 1998 SUP. CT. REV. 303 *passim*. Professional delicacy, the immense respect accorded judges (particularly those on the United States Supreme Court), and an overpowering commitment to the ideal of judicial law as "neutral," "objective," and "autonomous" seem to have influenced legal scholars in their treatment of late nineteenth-century issues. One prominent and liberal scholar asserted that in the late nineteenth century "the courts were not racist." WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 186 (1988). Another insisted that in addressing the legal problems of Reconstruction "the Justices did not bow to racism." Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39, 41. In fairness, Nelson

far more than the problem of southern repudiationism as an isolated issue, that drove the evolution of Eleventh Amendment doctrine and ultimately inspired the Court's decision in *Hans*.[89]

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acknowledges the general influence of racism, NELSON, *supra*, at 96–100, and Benedict suggests that, toward the end of the nineteenth century, the Fuller Court—unlike the Waite Court—did reflect racist ideas and values. Benedict, *supra*, at 40, 78. Although he too emphasizes the widespread racism of the period, Herman Belz, in effect, defends the Court from charges of racism by arguing that the framers of the Fourteenth Amendment intended to impose a "state action" requirement and held a limited view of the amendment's reach. HERMAN BELZ, A NEW BIRTH OF FREEDOM: THE REPUBLICAN PARTY AND FREEDMEN'S RIGHTS, 1861 TO 1866, at 173–74 (1976). Hence, he argues, the Court's narrow interpretations in the 1870s and 1880s were explicable on doctrinal grounds. *Id.*

The doctrinal argument of these scholars is sharply contested. Other scholars have argued that the framers of the Civil War amendments intended them to change substantially the nature of American federalism and to confer broad national powers on Congress. *See generally* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986) (arguing that the framers of the Fourteenth Amendment intended to provide national protection for the liberty of all and to guarantee that the Bill of Rights applied to the states); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986) (arguing that Reconstruction amendments and statutes were intended to give the federal government primary authority to enforce civil rights).

89. A fine article by Benno C. Schmidt, Jr., exemplifies the reluctance of many legal scholars to deal with the influence of racism on the Supreme Court itself. Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of* Strauder v. West Virginia, 61 TEX. L. REV. 1401 (1983). Schmidt has written extensively on the Court's late nineteenth- and early twentieth-century decisions involving race, and he readily emphasizes the widespread and powerful racism that marked the period generally. *Id.* at 1403–12. Yet in seeking to explain why the strong antidiscrimination principle stated in *Strauder v. West Virginia*, 100 U.S. 303 (1880), did not bear fruit and why blacks were excluded from southern juries and subjected, as a result, to massive abuses, he ultimately seeks to protect the Court as an institution of law. "It cannot be that the Court was indifferent to the consequences," he writes. Schmidt, *supra*, at 1413. Indeed, with respect to the Court itself and its application of *Strauder*, he denies the role of racism and explains the decision's "lost promise" as a result of the logic of formal doctrine. "The explanation seems not to lie in any subsequent acts of repudiation by later Supreme Courts, nor in any retreat into racism of the sort usually ascribed to the Court after Reconstruction. Rather, the explanation for *Strauder*'s lost promise lies in the decision itself." *Id.* at 1414. Thus, Schmidt would explain historical events as a result of doctrinal imperfections.

The point of the present Article is not, of course, that the doctrine has no importance, nor is it that the Court was filled only with rabid racists or that the Court alone "caused" the failure of Reconstruction. The point is simply that the Justices shared the racism of their age and that their racism was a substantial factor in explaining what they did and why they did it. As an institution, in other words, the Court was in significant part responsive to the extralegal motives of the Justices and to the powerful and pervasive extralegal pressures that their society placed on them. *See infra* Part IV.

The same may be said, of course, with respect to issues of gender. There, too, ingrained cultural assumptions—themselves biased, highly political, and substantively inegalitarian—shaped the Court's jurisprudence far more than did the words and structure of the Constitution or the statutes of the United States. *See e.g.*, Bradwell v. Illinois, 83 U.S. 130, 138 (1873) (holding that the Privileges or Immunities Clause of the Fourteenth

A broader and more complete historical analysis of the Court's "vantage point" in *Hans* leads to the conclusion that the decision is particularly dubious for three interrelated and compelling reasons beyond those identified by most Eleventh Amendment scholarship. First, in the late nineteenth century the Court repeatedly and knowingly reshaped federal jurisdiction to serve its evolving views of desirable national policy,[90] and *Hans* was simply one more example of that instrumentalist practice. Thus, like many of the Court's other contemporaneous jurisdictional rulings,[91] *Hans* was based ultimately on neither principle nor "original intent" but on a calculated judgment of passing expedience. As but one of a series of instrumentalist decisions that molded federal jurisdiction to serve the substantive policies the Court honored at the time, *Hans*—despite its constitutional pretensions—has no valid claim to the authority of principle.

Second, *Hans* was designed, in particular, to serve as one of the final building blocks with which the Court legitimated the post-Reconstruction settlement.[92] That settlement embodied the nation's well-understood acquiescence in the South's special, if limited, independence, an independence that allowed the region's states to repudiate their bonds and, far more importantly, to impose their own

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Amendment did not prevent states from barring women from the practice of law); Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888–1921*, 5 LAW & HIST. REV. 249 (1987) (arguing that the Court from 1888 to 1921 manipulated legal doctrine to become "paternalistic patriarchs").

90. *See infra* Part III.

91. *See infra* Part III.

92. It is standard to say that courts do not look to legislative "motive" in evaluating statutes. Such an approach, the Court has said, is subjective and disruptive. Bogan v. Scott-Harris, 523 U.S. 44, 54 (1998). *Compare* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888–1986, at 106–07 (1990) (pointing out that, despite the standard doctrine, courts can and do consider legislative motives in exceptional cases). Holding aside the term "motive," however, courts regularly examine a variety of sources to construe what they call legislative "intent" and "purpose." Indeed, they look to "original intent" to interpret both statutes and constitutional provisions. The Rehnquist Court, moreover, frequently cites evidence of historical practices as an aid in reaching its legal conclusions. Erwin Chemerinsky, *The Constitutional Jurisprudence of the Rehnquist Court*, *in* THE REHNQUIST COURT: A RETROSPECTIVE 195, 203–07 (Martin H. Belsky ed., 2002). Of course, even examining "purpose" and "intent," the Justices disagree about what exactly they are looking for as well as how exactly to find it. Compare, for example, the views of Justice Scalia, concurring in part and dissenting in part, in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 30 (1989) (arguing the Court should seek not "intent" but the "reasonable meaning" of the text), with Justice White, dissenting in the same case, 491 U.S. at 45 (arguing that the Court should seek the actual historical "intent" of Congress when it passed the act in question). Insofar as this Article seeks merely a historical understanding of *Hans*'s origin and significance, such "legal" considerations are not relevant.

systems of white racial supremacy. In effect, the North agreed that Reconstruction had failed, that the South had "suffered enough," and that the financial and racial residues of the disruptive era should, for the most part, be swept aside. Southern States would be allowed to cancel or "readjust" their bonded debt, and the rights of black Americans—rights that the three Civil War amendments had made matters of "national" authority—would be redefined as essentially "local" and given over to state control. The "original intent" that animated the Court in *Hans* was to help facilitate that overall settlement.[93] In terms of the values and principles embodied in the Civil War amendments, *Hans* was an inherently tainted instrument of the post-Reconstruction settlement, a handmaid of racial oppression and constitutional betrayal.[94]

Third, in justifying its doctrinal innovations, *Hans* not only abandoned the established doctrines that had limited the Eleventh Amendment,[95] but it also drew on other prewar ideas about federal jurisdiction and the federal judicial power that conflicted with the import and significance of the Fourteenth Amendment. It looked to a rejected past for its understanding of both. Not surprisingly, then, it

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93. *See* Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 YALE L.J. 2003, 2008 (1999); Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115, 122–40 (1994). *But see* BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 471–74 (1998) (arguing that the political and legal events during the late nineteenth century did not constitute a constitutional "moment" that repudiated Republican Reconstruction).

As a matter of formalist legal theory, of course, the judiciary has no "intent" of its own and exists only to construe the meaning of authoritative rules and principles. As Hamilton explained, courts "have neither FORCE nor WILL, but merely judgment." THE FEDERALIST NO. 78, at 396 (Alexander Hamilton) (Max Beloff ed., 2d ed. 1987). As a matter of historical analysis, and sophisticated legal analysis as well, however, it is clear that courts often—indeed, sometimes must—act on their own intentions and purposes, however much those intentions and purposes may be variously limited and shaped by institutional context, procedural posture, and substantive doctrine.

94. Judge Gibbons was one of the relatively few legal scholars writing about *Hans* and the Eleventh Amendment who directly noted the relevance of race and class to the politics that surrounded the Court's post-Reconstruction jurisprudence. He remained circumspect, however, commenting only briefly that the politics of the 1880s were complicated by the fact that "conservative Southern whites were far more interested in disenfranchising blacks—as well as maintaining the old order of wealth and privilege—than in resisting repudiation." Gibbons, *supra* note 53, at 1982; *see id.* at 1977. Some historians have tended to be more direct. *E.g.*, ORTH, *supra* note 23, at 53–57, 86–88 (suggesting a strong racial component to the general settlement that followed Reconstruction, including the bond cases). The Court's decisions in the late nineteenth century, wrote William M. Wiecek, stemmed from a "results-oriented pro-segregation bias." WILLIAM M. WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 103 (1988).

95. *See supra* note 23 and *supra* text accompanying notes 50–56.

was a decision that the Court itself—after legitimating the racial bargain that sealed the post-Reconstruction settlement—quickly began to qualify, limit, and avoid. Consequently, as a legal and constitutional matter, *Hans* cannot command our allegiance.

In sum, *Hans* was a decision rooted pragmatically in a temporary and passing age, an integral part of the nation's surrender to southern intransigence and racial oppression, and a rejection of both established Eleventh Amendment doctrine and the principles of the new post–Civil War Constitution. Indeed, from a historical viewpoint, *Hans* stands for a proposition that must be dismissed as absurd. If *Hans* were taken at face value in light of the Eleventh Amendment jurisprudence that the Court had established prior to 1877, it would mean that the de facto result of the Civil War and its three constitutional amendments was to broaden the scope of the Eleventh Amendment, expand the immunities of the states, and limit the powers of the federal government.

III. THE PARTICULARLY DUBIOUS NATURE OF *HANS*, I: THE SUPREME COURT AND THE PRACTICE OF JURISDICTIONAL INSTRUMENTALISM

If the Justices on the late nineteenth-century Supreme Court had learned any institutional lesson, it was that federal jurisdiction was a tool of national policy and that the Court had the power to mold that jurisdiction to serve its ideas of proper national interests and values. Hamilton had carefully explained the basic theory,[96] and Chief Justice Marshall had fully understood its import and taught its judicial practice.[97] The sectional struggles that erupted during the early Republic confirmed its centrality. From the Federalist Judiciary Act of 1801 and its quick repeal the following year by the new Jeffersonian Congress,[98] through the removal acts adopted to counter

96. THE FEDERALIST Nos. 80–82 (Alexander Hamilton).

97. Chief Justice Marshall's views on the use of federal jurisdiction to protect national interests and values are exemplified by the following cases: *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) (construing federal jurisdiction broadly to protect a federal institution); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (asserting a broad appellate jurisdiction for the Court over actions involving states); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (construing federal power broadly and protecting a federal institution); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (upholding authority of Court to review decisions of state courts); and *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (construing the federal Contract Clause broadly and limiting state power).

98. *See* RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 96–107 (1971); JAMES F. SIMON, WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE A UNITED STATES 138–72 (2002).

New England's opposition to the War of 1812 and South Carolina's effort to nullify federal law in 1833,[99] to the bitter and extended battles over enforcement of the fugitive slave laws in the 1840s and 1850s,[100] the policy-based character of federal jurisdiction and the instrumentalist nature of its judicial shaping had become obvious. For anyone who had missed the lesson, Reconstruction drove it home with unmistakable clarity, as the Republican Congresses repeatedly extended the jurisdiction of the national courts in a comprehensive effort to use them as tools to enforce their Reconstruction policies.[101] By 1880 the Court had demonstrated that it fully understood both the instrumental nature of federal jurisdiction and its institutional ability to direct that jurisdiction toward its own selected purposes.[102]

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99. In response to both events Congress moved to protect federal interests and ensure the enforcement of federal law by enacting statutes that made any civil suit or criminal prosecution brought against a federal officer in a state court removable to a court of the United States. Law of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 198; Law of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 632, 633–34. During and after the Civil War, acting again to protect federal interests and federal officials, Congress passed a series of new and broader removal acts. *See* Law of Mar. 3, 1863, ch. 81, § 2, 12 Stat. 755, 755–56, *amended* 14 Stat. 46 (1866), 14 Stat. 385 (1867). *See generally* HART & WECHSLER, *supra* note 40, at 1147–50 (1953) (summarizing statutes).

100. *See generally* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975) (chronicling the experiences of antislavery judges); Marc M. Arkin, *The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners*, 70 TUL. L. REV. 1 (1995) (discussing the use of federal habeas corpus in controversies over alleged runaway slaves).

101. STANLEY I. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS 124–42 (1968); William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863–1875*, 13 AM. J. LEGAL HIST. 333, 333–34 (1969).

102. *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859) (upholding the supremacy of the federal courts in reviewing state actions and applying controlling federal law), and *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872) (asserting the supremacy of federal law and federal courts and denying state courts the power to issue writs of habeas corpus to federal officials), illustrated the Court's acute awareness of the need to assert federal jurisdiction to serve what it considered proper national purposes, while *Barber v. Barber*, 62 U.S. (21 How.) 582 (1859) (denying federal jurisdiction over cases involving divorce and child support), and *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875) (denying Supreme Court jurisdiction over issues of state law in appeals from state courts), established the Court's willingness to deny or narrow federal jurisdiction when, in its view, no significant national interests were at stake. *See* William M. Wiecek, Murdock v. Memphis: *Section 25 of the 1789 Judiciary Act and Judicial Federalism*, *in* ORIGINS OF THE FEDERAL JUDICIARY, *supra* note 59, at 223, 223–47. A series of cases in 1880 construing the civil rights removal statute further demonstrated that the Court understood the discretion it had in both construing jurisdictional statutes and shaping them to serve selected policies. *See Ex parte* Virginia, 100 U.S. 339 (1880); Virginia v. Rives, 100 U.S. 313 (1880); Strauder v. West Virginia, 100 U.S. 303 (1880); Tennessee v. Davis, 100 U.S. 257 (1880). In the four cases, the Court construed federal statutes deftly to ensure, as a matter of formal doctrine, the legal supremacy of the federal government, and of the Court itself, while minimizing the impact of that supremacy in the context of de facto southern racial practices. The decisions allowed the states, absent further national

A. Jurisdictional Instrumentalism in the Late Nineteenth Century

In the post-Reconstruction world of industrializing America, one of the Court's most methodical and transparent efforts to adapt federal jurisdiction to new social conditions came in its treatment of diversity jurisdiction, still the most important basis of federal civil jurisdiction.[103] In the Judiciary Act of 1887–88[104] Congress made a number of changes in the jurisdiction of the lower courts, altering provisions relating to general diversity jurisdiction, removal, and venue as well as modifying two specialized diversity statutes, the "separable controversy" act[105] and the "prejudice and local influence" act.[106] It was noteworthy, though hardly surprising, that the Court construed the various altered provisions—in spite of their different terms and prior judicial constructions—in parallel. What was surprising, and particularly revealing, was the fact that within little more than a decade the Court twice reversed its course in construing them, using all of the various provisions together to contract federal diversity jurisdiction, then to expand it, and finally, once again, to contract it.[107]

In the first period, from 1887 to 1892, the Court was avowedly reacting to the problem of overcrowded dockets and to what it fairly considered the manifest intent of the new Judiciary Act to restrict the

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political support and congressional and executive action seeking to enforce federal law more vigorously, wide latitude to act informally and hence outside the scope of that doctrinal supremacy.

For discussions of ways in which the Court has shaped federal jurisdiction, see Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207 (2001) (arguing that the Supreme Court widens federal subject matter jurisdiction when necessary to protect federal interests); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990) (arguing that the Supreme Court has played a major role in shaping federal jurisdiction); Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291 (1986) (arguing that the Supreme Court can broaden the "adequate and independent state grounds" doctrine to hear appeals from state courts involving federal law issues).

103. Edward A. Purcell, Jr., *Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts*, 24 LAW & SOC. INQUIRY 679, 710–11 (1999).

104. Law of Mar. 3, 1887, ch. 373, § 37, 24 Stat. 552, 552–55, *amended and corrected*, 25 Stat. 433 (1888).

105. Law of July 27, 1866, ch. 288, 14 Stat. 306, 306–07, *amended*, 14 Stat. 558 (1867).

106. Law of Mar. 2, 1867, ch. 196, 14 Stat. 558, 558–59.

107. EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958, at 262–91 (1992). Studies of late nineteenth-century law often emphasize its "formalist" or "Langdellian" nature. The instrumentalist and policy-based nature of much federal procedural law in the period suggests the incomplete and misleading nature of such descriptions. *Id.* at 253–54.

jurisdiction of the national courts.[108] What was most striking about its work in this period was not the consistency of its results but, rather, the ruthlessness with which it achieved them. In 1890, for example, it narrowed diversity jurisdiction in two cases where its reasoning seemed highly suspect. *In re Pennsylvania Co.*[109] sharply restricted jurisdiction under the "prejudice and local influence act" on grounds that were, in part, arbitrary and unpersuasive.[110] More troubling, *Northern Pacific Railroad Co. v. Austin*[111] rejected impeccable arguments that the Court should rule otherwise and restricted diversity removal by accepting an unfair and abusive litigation tactic that negated the very purpose of the jurisdiction and the statute.[112] While *Pennsylvania*'s reasoning appeared merely ad hoc and result oriented, *Austin*'s was manifestly obtuse and unjust. Together, the cases demonstrated the Court's unbending determination, as of 1890, to contract federal jurisdiction and reduce the federal docket.

The Court's result-oriented decisions in 1890 were particularly arresting because only two years later the Justices abruptly reversed course and began to expand diversity jurisdiction.[113] The change was not the result of any technical or other formal "legal" consideration, for Congress made no alteration in the relevant statutory provisions. The Court, moreover, refused even to acknowledge, let alone explain, its reversal of direction. Yet the change was undeniable. In a series of decisions it began suddenly to expand diversity jurisdiction, especially diversity removal, and to encourage the lower federal courts to construe their jurisdiction expansively.[114] In the process it baldly ignored *Pennsylvania* and effectively overruled *Austin*.[115]

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108. Clearly designed to limit the jurisdiction of the national courts, the Judiciary Act of 1887–88 was passed in significant part in response to pressures from the South. It was a compromise measure, however, and it did not contract the jurisdiction of the national courts nearly as much as southerners had demanded. FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 77–96 (1928).

109. 137 U.S. 451 (1890).

110. PURCELL, *supra* note 107, at 132–33.

111. 135 U.S. 315 (1890).

112. PURCELL, *supra* note 107, at 95–96. *Austin* allowed plaintiffs to defeat defendants' right to remove suits to federal court by accepting a "delayed upward amendment tactic." *Id.* at 96. Plaintiffs would plead less than the required federal jurisdictional minimum and then, after defendant's time to remove had passed, amend their damages claims and seek amounts that exceeded the jurisdictional minimum. *Austin* held that such delayed upward amendments did not restart defendants' time to remove. *Austin*, 135 U.S. at 316–18.

113. PURCELL, *supra* note 107, at 266–72.

114. *Id.*; *see, e.g.*, Mexican Nat'l R.R. Co. v. Davidson, 157 U.S. 201 (1895) (expanding the ability of corporate defendants to remove suits to federal court while limiting the

The Court reversed its position not for legal reasons but for social reasons. Beginning in the early 1890s two developments convinced the Justices that the federal courts had to be deployed in new ways to serve new social policies. One was that increases in industrial injuries were leading to multiplying numbers of tort suits against national corporations seeking larger amounts in recovery and—more important—that an aggressive new plaintiffs' personal injury bar had developed shrewd and sometimes sharp litigation tactics designed to defeat removal and ensure that tort plaintiffs could litigate their claims in more hospitable state courts.[116] The other development was the increasingly bitter social and political conflicts that wracked the 1890s. The spread of the Farmers' Alliances and the emergence of the Populist Party, the escalating militance of labor and the massive strikes at Homestead and Pullman, and the onset of a severe and extended depression combined to produce an escalating social turmoil that magnified both the economic stakes and social resonance of the increasingly fiercely contested personal injury suits that workers were bringing against their corporate employers.[117] Suspicious of the new and largely immigrant industrial labor force, uneasy about the emergence of an aggressive and professionally suspect urban personal injury bar, and distressed by the acute sense of social conflict that dominated the decade, the Court decided to preserve social order and protect the new national economy by countering plaintiffs' expanded uses of antiremoval tactics and broadening the access of corporate defendants to the haven of the federal courts.[118]

The Court's actions after the turn of the century confirmed the social purpose that guided its decisions in the 1890s. When the depression ended and the decade's bitter conflicts subsided, the Court

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districts where they could be sued); Hanrick v. Hanrick, 153 U.S. 192 (1894) (suggesting expanded removal rights for corporate defendants under a special diversity statute).

115. The de facto overruling occurred in *Powers v. Chesapeake & Ohio Railway Co.*, 169 U.S. 92 (1898).

116. PURCELL, *supra* note 107, at 112–13, 254. On late nineteenth-century tort litigation, see RANDOLPH E. BERGSTROM, COURTING DANGER: INJURY AND LAW IN NEW YORK CITY, 1870–1910 *passim* (1992); WILLIAM G. THOMAS, LAWYERING FOR THE RAILROAD: BUSINESS, LAW, AND POWER IN THE NEW SOUTH 137–63 (1999); Frank Munger, *Social Change and Tort Litigation: Industrialization, Accidents, and Trial Courts in Southern West Virginia, 1872–1940*, 36 BUFF. L. REV. 75 (1987).

117. PURCELL, *supra* note 107, at 107–17.

118. *Id.* at 107–17, 266–72. On the decade's social turmoil, see, e.g., THE PULLMAN STRIKE AND THE CRISIS OF THE 1890S: ESSAYS ON LABOR AND POLITICS *passim* (Richard Schneirov et al. eds., 1999) (discussing the Pullman strike of 1894 and the political turmoil that marked the decade).

abandoned its expansive approach and once again reversed direction. In the first half dozen years of the new century, a period of increasing economic prosperity and social optimism, it returned to its pre-nineties course. Between 1900 and 1906, the Court not only limited diversity jurisdiction substantially and in a variety of ways, but often did so, once again, for unpersuasive doctrinal reasons.[119]

Were there any doubts about the nature of the Court's purposes during the 1890s, its decisions in a doctrinally unrelated jurisdictional area dispelled them. During the 1880s, the use of federal equity receiverships to reorganize financially stricken companies had grown increasingly common, and the hardships caused by the depression of the 1890s accelerated their use. While two hundred companies went through federal receivership in the 1880s, three hundred and fifty sought such protection between 1891 and 1897.[120] The fact that companies were in receivership, however, did not prevent their injured workers from bringing tort suits against them. In 1892, just as the Court was initiating its effort to expand diversity removal jurisdiction, it also altered the jurisdictional law of federal receivers. In *Texas & Pacific Railway Co. v. Cox*[121] the Court held that a suit brought against a receiver appointed by a federal court was, by virtue of the receiver's federal appointment, a suit that raised a federal question. The decision meant that federal receivers could remove tort suits brought against the companies they represented without regard to diversity of citizenship by invoking federal question jurisdiction. The availability of the latter jurisdiction, made possible by the *Cox* rule, thus allowed receivers to negate the antiremoval tactics that plaintiffs' attorneys used to destroy diversity jurisdiction.

If the Court's social purpose in *Cox* was not sufficiently obvious, it was manifest with striking clarity two years later in *Tennessee v. Union & Planters' Bank*.[122] There, determined to restrain the growth of federal question suits in order to offset the swelling diversity docket, the Court announced an expanded "well-pleaded complaint" rule.[123] A federal question sufficient to confer original or removal jurisdiction on the federal courts, *Union & Planters' Bank* held, had

119. PURCELL, *supra* note 107, at 272–91.

120. Albro Martin, *Railroads and the Equity Receivership: An Essay on Institutional Change*, 34 J. ECON. HIST. 685, 705 (1974).

121. 145 U.S. 593 (1892); *see* PURCELL, *supra* note 107, at 269–72.

122. 152 U.S. 454 (1894).

123. The Court had introduced a more limited well-pleaded complaint rule six years earlier in *Metcalf v. Watertown*, 128 U.S. 586 (1888). It had continued, however, to allow removal on the basis of defendant's pleadings until *Union & Planters' Bank*. *See* Collins, *supra* note 30, at 724–30.

to appear on the face of a technically proper complaint. Thus, jurisdiction was to be determined solely on the basis of plaintiff's initial pleading, and any federal-law defense or counterclaim was irrelevant for jurisdictional purposes. The new rule created a potentially fatal problem for receivers. If an issue of federal law had to appear on the face of plaintiff's "well-pleaded complaint" in order to confer federal question jurisdiction, how could a federally appointed receiver use federal question removal when plaintiff's complaint merely pleaded the elements of a state-law tort claim? Anticipating that difficulty and determined during the strife-torn 1890s to guarantee an ample federal question removal jurisdiction for receivers, the Court in *Union & Planters' Bank* took care expressly to preserve the *Cox* rule. When suing a federal receiver, it instructed, a tort plaintiff had to plead the receiver's capacity to be sued, a capacity that was conferred by his federal judicial appointment.[124] Hence, by operation of law, a state-law tort claim against a federally appointed receiver would necessarily contain a federal law element. Notwithstanding its expanded "well-pleaded complaint" rule, then, *Union & Planters' Bank* ensured that *Cox* would continue to allow federal receivers to remove tort suits on the basis of federal question jurisdiction. Throughout the remainder of the 1890s, federal receivers used their right to remove under federal question jurisdiction freely and frequently.[125]

Then, at exactly the same time the Court began to reverse course in its diversity decisions, it reversed direction in its federal receivership decisions, too. In 1900, in *Gableman v. Peoria, Decatur & Evansville Railway Co.*,[126] it suddenly held that the "bare fact" that a federal court had appointed a receiver did not transform an otherwise nonremovable state-law claim against the receiver into a federal question.[127] *Gableman* thus terminated the automatic right of federal receivers to remove ordinary tort suits as federal questions.

The upshot of the receivership decisions was clear. Federal question jurisdiction, the well-pleaded complaint rule, and the law of federal receivers involved legal doctrines that were wholly distinct from, and logically unrelated to, the rules that controlled federal diversity jurisdiction. Yet the Court construed those diverse doctrinal elements in ways that achieved the same social results that it achieved with its construction of the various diversity provisions. In each

124. *Union & Planters' Bank*, 152 U.S. at 463.
125. PURCELL, *supra* note 107, at 271.
126. 179 U.S. 335 (1900).
127. *See id.* at 340.

doctrinal area the Court reversed directions twice, the reversals in both areas coming at precisely the same time and achieving precisely the same social results. The Court's decisions were directed by extralegal concerns. As social conditions changed, so did the Court's practical purposes; and, as its practical purposes changed, so too did the law of federal jurisdiction.

Along a parallel line, the Court contemporaneously molded general federal question jurisdiction in a similarly instrumentalist manner. Initially, after Congress conferred the jurisdiction in 1875, the Court construed it broadly, holding its requirements satisfied by any federal element in a case, and satisfied further regardless of whether the federal law issue was raised by plaintiff or defendant.[128] Then, between 1888 and 1894 it changed course, narrowing the jurisdiction with its "well-pleaded complaint" rule to offset the growth in the diversity docket. By the early years of the twentieth century, however, the Court had come to view federal question jurisdiction as more important to national policy than diversity because the former was more readily adapted to the Court's expanding effort to ensure federal enforcement of the rights of property and contract under the Fourteenth Amendment.[129] Thus, as the Court narrowed diversity jurisdiction after 1900, it began to expand federal question jurisdiction. It did so most strikingly in *Ex parte Young*,[130] where it limited the reach of the "well-pleaded complaint" rule by creating a new cause of action directly under the Fourteenth Amendment. *Young* transformed what had been primarily a defense to a state enforcement action into an offensive weapon, an independent claim that a party who would otherwise have been a defendant in a state court enforcement proceeding could raise in a "well-pleaded complaint" and thereby gain access to a federal court under its federal question jurisdiction.

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128. S. Pac. R.R. Co. v. California, 118 U.S. 109, 110–13 (1886); Pac. R.R. Removal Cases, 115 U.S. 1, 11–17 (1885); Collins, *supra* note 30, at 724–26, 729–30. The broad rule originated in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 817–28 (1824).

129. In the 1890s the Supreme Court began to reconceive the role of the lower federal courts, and in the decade after 1900 it restructured their jurisdiction accordingly. *See infra* text accompanying notes 536–81.

130. 209 U.S. 123 (1908). *Young* represented the culmination of a series of doctrinal transformations that began in the late nineteenth century. *See* Woolhandler, *supra* note 38, at 441–44; *infra* Part V. *See generally* Michael G. Collins, *Before* Lochner*—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263 (2000) (mapping out the development of diversity jurisdiction in the second half of the nineteenth century).

Thus, across a wide range of jurisdictional areas, the Court worked to remold federal jurisdiction to serve its shifting policy goals. In the late 1880s, it sought to curtail federal jurisdiction generally to reduce an escalating caseload. In the 1890s it changed direction, expanding diversity jurisdiction and subordinating federal question jurisdiction to protect corporate defendants from aggressive new litigation tactics and increasingly costly personal injury suits and to secure orderly legal processes in a time of acute economic hardship and social strife. Then, in the years after 1900, when the Court came to see the greatest danger no longer coming from tort suits but from government regulatory actions, it again reoriented federal jurisdiction, subordinating diversity to a newly pivotal and expanding federal question jurisdiction.

In all the different jurisdictional areas the Court's decisions exhibited two defining characteristics. One was that the Justices understood their power to shape federal jurisdiction and reorient the work of the lower federal courts. The other was that the Justices were ready and willing to take such action when they thought it necessary to serve what they viewed as desirable national policies.

B. Jurisdictional Instrumentalism and the Eleventh Amendment

The diversity and federal question cases evidence the Court's purposeful jurisdictional instrumentalism, and they strengthen the proposition that similar instrumentalist calculations lay behind the swerving sequence of decisions that led up to and then away from *Hans*. Indeed, like its rulings on diversity jurisdiction, the Court's Eleventh Amendment decisions veered back and forth from a narrow construction to an expanding one and then back again to a narrow one. Given the pervasive jurisdictional instrumentalism that marked the Court's work, the massive transformation that remade the nation in the decades around the turn of the century, and the changing nature of the substantive legal issues that dominated American law and politics, the Court's swerving line of Eleventh Amendment decisions seems rather too obviously the result of shifting social policies.

Although the Court zigzagged, and its doctrinal explanations were inconsistent,[131] the pattern of its decisions in social and political

131. It seems fair to say that one of the few things almost universally agreed upon is that the Court's Eleventh Amendment decisions in the late nineteenth and early twentieth century were, as a matter of doctrine and logic, particularly erratic and inconsistent. "The lack of a satisfactory rationale for the doctrine of sovereign immunity, and the tension between that doctrine and basic precepts of the American Constitution, account in large

terms was—as in its diversity and federal question cases—quite clear. From *Osborn* through Reconstruction the Court construed the Eleventh Amendment narrowly. Then, from the end of Reconstruction to *Hans*, it expanded the amendment's ambit and held that it denied the federal courts jurisdiction in a number of southern state bond cases. Then, it began to shrink the amendment. As the southern state bond litigations faded in prominence and suits challenging state regulation of business moved to center stage, the Court sharply narrowed its scope. By the second decade of the twentieth century the practical significance of the Eleventh Amendment—outside the residual area of state bondholder suits—had dwindled to little more than what it had been under Marshall's view in *Osborn*.

As Reconstruction ended, the Court's new anxiety about applying the traditional *Osborn* rule quickly became apparent. After the last federal troops withdrew from the South and the southern state bond cases began pressing onto the federal dockets, the Court lurched toward a broader and more immediately expedient concept of state sovereign immunity.[132] In *Louisiana v. Jumel*[133] in 1883, for example, the Court held that a federal court could not order state officials to take actions necessary to ensure that payments were made on state bonds. Although the Court offered a variety of reasons for its decision, none seemed compelling, or even particularly

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part for the erratic course traversed by the Court between 1873 and 1908." JACOBS, *supra* note 23, at 138. By the latter date, "the Court was in the not unusual position of having at hand two sets of precedents supporting opposite results." *Id.* "By the early twentieth century a complete set of contradictory precedents had accumulated." ORTH, *supra* note 23, at 10. "To say that [the Justices] vacillated understates the obvious." HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT 93 (1999); *accord* Gibbons, *supra* note 53, at 1991–2003 (discussing the various positions of the Court on the Eleventh Amendment).

A relatively sympathetic critic of the Court could offer, at best, only a mixed judgment. "Probably the best that can be said of the eleventh amendment cases from the 1877–1890 period is that they reveal a 'muddling through,' " Collins, *supra* note 74, at 243, and that they were less "volatile" than the changes that occurred between 1890 and 1908, *id.* at 241.

132. *Compare, e.g.*, Davis v. Gray, 83 U.S. (16 Wall.) 203 (1873) (reaffirming *Osborn* and traditional Eleventh Amendment doctrine), *and* Bd. of Liquidation v. McComb, 92 U.S. 531 (1876) (same), *with* Louisiana v. Jumel, 107 U.S. 711 (1883) (holding that the Eleventh Amendment barred a federal suit against a State and its officers on state bonds), *and* Cunningham v. Macon & Brunswick R.R. Co., 109 U.S. 446 (1883) (apparently implicitly overruling *Davis v. Gray*, 83 U.S. (16 Wall.) 203 (1873), and holding that the Eleventh Amendment barred a federal suit on repudiated railroad bonds against state officials and a state-owned railway).

133. 107 U.S. 711 (1883).

persuasive.[134] More salient, the Court expressly acknowledged its deep concern that any federal court order directing state officials to ensure payment on southern state bonds would create grave enforcement problems.[135] "The remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law," *Jumel* explained, "and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax in question until the bonds, principal and interest, were paid in full."[136] While the Court sometimes upheld federal jurisdiction in cases where there appeared to be no serious enforcement problem,[137] it commonly found that actions challenging southern repudiation efforts were beyond the authority of the national courts.[138]

Justice Joseph P. Bradley symbolized and helped effectuate the Court's reorientation. In 1872 Bradley joined the Court's muscular reaffirmation of the *Osborn* rule in *Davis v. Gray*,[139] and four years later he wrote for the Court in *Board of Liquidation v. McComb*.[140] There, reaffirming *Osborn* once again before the end of Reconstruction, Bradley upheld the jurisdiction of the federal courts to issue injunctions and mandamus to state officers to prevent them from taking actions that would impair the value of their state's bonds.[141] After the Compromise of 1877 brought Reconstruction to a

134. In dealing with county bonds from the Midwest, for example, the Court had upheld the authority of federal courts to compel local officials by mandamus to collect taxes to satisfy judgments arising from failure to pay on their bonds. Riggs v. Johnson County, 73 U.S. (6 Wall.) 166 (1868).

135. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, at 420–23 (1985); ORTH, *supra* note 23, at 65–71, 117–18.

136. *Jumel*, 107 U.S. at 727.

137. On several occasions the Court enforced the bonds of Virginia. In those cases there was no significant enforcement problem because the Virginia bonds contained provisions making their coupons receivable in payment of the state's taxes. Thus, ruling for bondholders required the Court to do nothing but enjoin the State from prosecuting bondholders who tendered coupons in payment of their taxes. There was no need to try to compel state officials to take any other positive actions. *See* ORTH, *supra* note 23, at 58–109.

138. *See, e.g.*, *In re* Ayers, 123 U.S. 443 (1887) (refusing to enforce southern state bonds); Hagood v. Southern, 117 U.S. 52 (1886) (same); New Hampshire v. Louisiana, 108 U.S. 76 (1883) (same). *But see, e.g.*, Virginia Coupon Cases, 114 U.S. 269 (1885) (protecting taxpayers who tendered bond coupons on Virginia bonds in payment of state taxes as per provisions of bonds).

139. 83 U.S. (16 Wall.) 203 (1873).

140. 92 U.S. 531 (1876).

141. *Id.* at 541.

close, however, his view of the amendment began to shift.[142] By the early 1880s Bradley was prepared to join the Court's opinion in *Jumel* and other cases that expanded state immunities under the Eleventh Amendment, and in 1885 he urged an even more expansive interpretation of the amendment.[143] Perhaps most revealing, in *McGahey v. Virginia*,[144] argued the day before *Hans*, Bradley called expressly for efforts to "relieve the courts" from the burden of the southern state bond litigations. They were the cause, he complained, of "a controversy that has become a vexation and a regret."[145]

In *Hans*, Bradley announced the Court's solution to that vexation.[146] His opinion reflected different values, different reasoning, and different purposes than those that had animated his opinion in *McComb* only fourteen years earlier. Much—essentially the whole legal and political world—had changed in the interim. So, too, had Bradley changed. "With respect to the Eleventh Amendment Justice Bradley was caught in the act of moving," John

142. Bradley played a prominent role in effecting the Compromise. He was the fifteenth and last member appointed to the Electoral Commission, the body of Senators, Representatives, and Supreme Court Justices who decided on the validity of disputed returns in the presidential election of 1876. Bradley sided with the other seven Republicans on the commission in voting to recognize the Republican electors. The seven Democrats on the commission voted to recognize the Democratic electors. *See* 7 CHARLES FAIRMAN, FIVE JUSTICES AND THE ELECTORAL COMMISSION OF 1877, 123–58, *passim* (Supp. 1988); on his changing constitutional views, see text accompanying notes 139–48, Part IV.C.4. In rethinking his position on sovereign immunity, Bradley was influenced by the dissenting opinion of Justice Horace Gray in *United States v. Lee*, 106 U.S. 196, 223 (1882) (Gray, J., dissenting), which first blended sovereign immunity ideas about the federal government with cases construing the Eleventh Amendment. *See* Massey, *supra* note 47, at 137–41.

143. *Virginia Coupon Cases*, 114 U.S. at 330 (Bradley, J., dissenting).

144. 135 U.S. 662 (1890).

145. *Id.* at 721. Although argued before *Hans*, the decision was not handed down until two months after *Hans*.

146. It is noteworthy that the lower court opinion in *Hans*, Hans v. Louisiana, 24 F. 55 (C.C.E.D. La. 1885), acknowledged the practical policy reasons behind its decision to hold plaintiff's suit barred by the Eleventh Amendment. *Id.* at 66–68. Ignoring those reasons ("It is not necessary that we should enter upon an examination of the reason or expediency" involved in construing the amendment broadly, *Hans v. Louisiana*, 134 U.S. 1, 21 (1890)), Bradley strained to make his opinion appear principled and rooted in an original intent. The contrast between the two opinions suggests that Bradley avoided practical matters so completely because he wished to turn attention away from those considerations and that he did so because they were, in truth, the real, if embarrassing, factors that compelled his decision. Everything considered, his effort was unpersuasive. *See* Gibbons, *supra* note 53, at 2000–01.

V. Orth concluded.[147] "His views changed in response to the great events leading to the end of Reconstruction."[148]

As the Court reshaped the meaning of the Eleventh Amendment during the dozen years from the end of Reconstruction to its decision in *Hans*, it did so once again after 1890 when social and political conditions changed and the issues the Court addressed shifted from southern state bonds to state economic regulation. Bradley's opinion, in fact, was itself ambiguous and left open the door for the Court's subsequent recontraction of the amendment. At its end, Bradley appended a cautionary paragraph. "To avoid misapprehension," he explained, certain qualifications should be noted:

> where property or rights are enjoyed under a grant or contract made by a State, they cannot wantonly be invaded. Whilst the State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts, may be judicially resisted; and any law impairing the obligations of contracts under which such property or rights are held is void and powerless to affect their enjoyment.[149]

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147. ORTH, *supra* note 23, at 79.

148. *Id.* It is noteworthy that a thoughtful critic of Professor Orth's interpretation does not challenge the claim that Eleventh Amendment doctrine was erratic and shifting during the late nineteenth century but only the claim that the Court's Eleventh Amendment decisions were the direct result of the Compromise of 1877 and the resulting post-Reconstruction political context. *See* Collins, *supra* note 74, at 212. Focusing on what he calls "the doctrinal trenches" and emphasizing the inherent "strictures imposed by the common-law model," *id.* at 244–45, Professor Collins concludes that

> the best that can be said of the eleventh amendment cases from the 1877–1890 period is that they reveal a "muddling through"—an approach that was reasonably faithful to the common-law tradition within which constitutional rights were then enforced, yet one that struggled with the tensions between state immunity and accountability that still plague the Court today.

Id. at 243. Indeed, he readily acknowledges the unsettled nature of the Court's jurisprudence in the late nineteenth century, giving as one of his reasons for questioning Orth's conclusions the fact that the subsequent period, from 1890 to 1908, was "somewhat more volatile both in terms of doctrinal development and changes in Court personnel than the [1877–1890 period] that preceded it." *Id.* at 241. Finally, Collins concludes perceptively, if too vaguely and abstractly, that it is "possible that jurisdictional questions of the late nineteenth century masked broader but unarticulated substantive questions about the Court's role and state sovereignty in general—not just the problems of national reconciliation after the [Civil] War." *Id.* at 244. That speculation is, in the most general sense, quite right. The *historical* problem is to try to identify and explain the exact nature of those "unarticulated substantive questions" as well as any other factors that helped shape the particular way in which the Court "muddled through" at various times and on various issues. There is, after all, a substantive pattern to the Court's decisions, and that pattern does not appear in the Court's doctrine but in the results it reached.

149. Hans v. Louisiana, 134 U.S. 1, 20–21 (1890). Bradley suggested the same point in his dissent in the *Virginia Coupon Cases*, 114 U.S. at 335–36 (Bradley, J., dissenting).

The statement left the nature of the line between proper and improper suits vague and flexible,[150] and the Court itself subsequently exploited that fact. In *Ex parte Young* it was unusually candid. "That there has been room for difference of opinion with regard to such [Eleventh Amendment] limitations," it remarked, "the reported cases in this court bear conclusive testimony."[151]

In the decades around the turn of the century that "difference of opinion" flowered in the fertile soil of rapid political and social change. New times and new issues demanded a new jurisprudence, and almost immediately the Court began, somewhat uncertainly and haltingly, to limit the scope of state immunity.[152] Between 1890 and 1908 it narrowed *Hans* and the Eleventh Amendment, or simply avoided them, in a variety of ways.

First, on the very same day that it announced *Hans*, the Court made it clear that the Eleventh Amendment was far more limited than Bradley's opinion might have suggested. In a brief but highly significant opinion, it held in *Lincoln County v. Luning*[153] that counties did not come within the bar of the Eleventh Amendment and were thus subject to suit in the federal courts. Not surprisingly, it was Justice David J. Brewer, the indefatigable advocate of an expansive federal judicial power, who wrote for the Court.[154]

Lincoln County was particularly revealing, for it demonstrated that the Court saw its Eleventh Amendment jurisprudence as serving only a narrow and specialized purpose and that it planned to keep the amendment under tight judicial control. As a matter of constitutional text, the Justices in *Lincoln County* enjoyed complete discretion to include or exclude counties, whichever they thought best. On the one

150. For the Court's best efforts to identify the relevant line prior to *Hans*, see *In re Ayers*, 123 U.S. 443, 492, 499–508 (1887), *Hagood v. Southern*, 117 U.S. 52, 67–71 (1886), and *infra* note 160 and text accompanying *infra* notes 174–76. For insightful discussions of the developing legal issues, see CURRIE, *supra* note 135, at 416–28; David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 6–32, 60–79 (1972); Woolhandler, *supra* note 38, at 396; Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 113–21, 126–27 (1997).

151. *Ex parte* Young, 209 U.S. 123, 142 (1908).

152. Once the post-Reconstruction settlement was in place, *infra* Part IV.D, the Court turned to issues of industrialization and government economic regulation, and it expanded the federal judicial power substantially to ensure national supervision in those areas. *See infra* Part V.

153. 133 U.S. 529 (1890).

154. On Brewer, see EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 39–63 (2000).

hand, the language of the Eleventh Amendment referred only to "states" and not to their political subdivisions. Thus, on the facial textual ground that a "county" was not a "state," the two entities could easily be separated and placed in separate legal categories. On the other hand, counties were created and empowered by states, and hence they could readily be considered as merely components or agents of state governments. A county, the Court noted specifically, was "a corporation created by and with such powers as are given to it by the State."[155] Thus, as a matter of constitutional language and legal logic, the Justices were free to decide the issue however they wished. Consequently, their decision to construe the Eleventh Amendment narrowly was the result of judicial choice, and the fact that the decision was unanimous demonstrated the depth of the Court's commitment to holding the Eleventh Amendment to a narrow and specific purpose. The goal in *Lincoln County* was quite obviously to retain federal jurisdiction over suits brought against counties and municipalities that sought to repudiate their bonds.[156] Indeed, the Court acknowledged as much. The federal courts had regularly heard suits against counties on their bonds, it explained, and that jurisdiction had proven necessary and beneficial. "[T]he records of this court for the last thirty years are full of suits against counties," Brewer reasoned in *Lincoln County*, "and it would seem as though by general consent the jurisdiction of the Federal courts in such suits had become established."[157] Thus, *Lincoln County* was not merely an example of judicial choice but one more example of the pervasive instrumentalism that shaped the Court's jurisdictional decisions.

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155. *Lincoln County*, 133 U.S. at 530. Similarly, the Court had long held that the Contract Clause did not apply to contracts between states and their local political subdivisions. WRIGHT, *supra* note 22, at 249. The rule thus suggested that the latter were merely components of the former.

156. The Court defeated state efforts to protect local government units from federal jurisdiction in bond cases. *See* Graham v. Folsom, 200 U.S. 248, 250–54 (1906) (upholding federal judicial power to order county officials to levy taxes to fund bond obligations after the State had abolished a town in the county which had allowed its bonds to go into default); Chicot County v. Sherwood, 148 U.S. 529, 531–34 (1893) (voiding state statute requiring holders of county bonds to bring enforcement suits only in state courts).

157. *Lincoln County*, 133 U.S. at 530. Brewer did not explain why a relatively recent "general consent" given only over "the last thirty years" was capable of conferring subject matter jurisdiction on the federal courts or determining the meaning of a constitutional provision adopted a century earlier. The latter failure was especially curious because, on other occasions, Brewer maintained that the meaning of the Constitution had been established at its adoption and that it was unchanging and eternal. *See, e.g.*, South Carolina v. United States, 199 U.S. 437, 448 (1905) (explaining that the Constitution has the same meaning now as it did at its adoption).

Even more noticeably, the Court in *Lincoln County* went out of its way to identify two additional limits that constrained the Eleventh Amendment. One was the principle that municipalities and other local government entities were to be considered analogous to counties and hence equally beyond the amendment's protection. A county, the Court explained, "is a part of the State only in that remote sense in which any city, town, or other municipal corporation may be said to be a part of the State."[158] Thus, *Lincoln County* made a special point to emphasize that other classes of "local" governmental entities were also excluded from the Eleventh Amendment's immunity.

More striking, the Court made a special effort, wholly unnecessary to its decision, to limit the apparent significance of its opinion in *In re Ayers*,[159] a key Eleventh Amendment decision issued only three years earlier. Another southern state bond case, *Ayers* had seemed to broaden the Eleventh Amendment substantially.[160] *Lincoln County*, however, cited *Osborn* favorably and implied that *Ayers* represented but a slight modification of the traditional doctrine that the Eleventh Amendment applied only to cases in which a state was formally a party of record.[161] Thus, together with the fact that the plaintiff in *Hans* had literally sued the state itself, the Court's language in *Lincoln County* strongly suggested that the narrow *Osborn* rule might still be vibrant and generally controlling.

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158. *Lincoln County*, 133 U.S. at 530.

159. 123 U.S. 443 (1887).

160. *In re Ayers*, 123 U.S. 443 (1887), held that the Eleventh Amendment barred the federal courts from enjoining Virginia's efforts to enforce a law that sought, in effect, to deny bondholders the right to pay their state taxes with the coupons on their bonds, a right prescribed in the terms of the bonds themselves. *Id.* at 492–93. Attempting to bring order to the Court's Eleventh Amendment decisions, *Ayers* declared that state officials were subject to suit in federal court only when they threatened or performed wrongful acts "for which they are personally and individually liable." *Id.* at 500. Merely instituting a prosecution or other enforcement proceeding in a state court, it explained, did not constitute such a wrong. *Id.* at 500–02. Further, *Ayers* explained that only contracting parties could be liable in actions on contracts and that any action involving a contract to which a state was a party could be brought only against the state and, consequently, was necessarily barred by the Eleventh Amendment. *Id.* at 502–03. The decision was important because it seemed to mean that no action could ever be brought against states on contracts, that state officials could be sued only when they performed actions that constituted torts at common law, and that no state official could be sued merely for attempting to enforce a state law through legal processes, regardless of the constitutionality of the underlying law sought to be enforced.

161. *Ayers*, *Lincoln County* announced, held that federal jurisdiction "was limited only in respect to those cases in which the State is a real, if not a [named,] defendant." *Lincoln County*, 133 U.S. at 530.

Lincoln County was thus both important and revealing. It was important because it denied Eleventh Amendment protection to all municipal, county, and other local government entities. It was revealing because it showed the Court's intention to cabin the amendment strictly. *Lincoln County* confirmed the Court's pervasive jurisdictional instrumentalism and highlighted the fact that it designed *Hans* to serve only a highly specific and sharply delimited purpose. In 1890 it was *Lincoln County*, not *Hans*, that was the more fundamental and far-reaching decision.

Second, in developing *Hans*'s theory that the Eleventh Amendment stood for a principle of state sovereign immunity, the Court began to identify and rely on what it considered an implicit corollary—that states could "waive" their immunity and "consent" to suit in a federal court.[162] Such a "consent" theory, of course, was inconsistent with the language of the Eleventh Amendment, which provided flatly that "[t]he judicial power of the United States shall not be construed to extend to any suit" within its scope. The paratextual theory created in *Hans*, however, had established the principle that the amendment's language imposed no limit on the Court's ability to determine its meaning. Consequently, when policy reasons supported the assertion of federal jurisdiction, the Court could readily ignore the text and employ the fiction of "consent" to avoid it.[163]

Only two years after *Hans*, for example, the Court held in *United States v. Texas*[164] that the Eleventh Amendment did not bar a suit against a state brought in federal court by the United States government. Obviously, if the Eleventh Amendment placed the states beyond "the judicial power of the United States," no federal court could hear a suit against a state regardless of the nature of the adverse party. The Court, however, construed *Hans* to mean only that the Eleventh Amendment barred the judicial power from

162. The Court had previously referred to the idea that states could "consent" to suit in the federal courts. *E.g.*, New Hampshire v. Louisiana, 108 U.S. 76, 91 (1883) (asserting that the Eleventh Amendment prohibits citizen suits against states, unless the state consents); Bd. of Liquidation v. McComb, 92 U.S. 531, 541 (1876) (accepting a state's right to waive sovereign immunity).

163. *See* Gunter v. Atl. Coast Line R.R. Co., 200 U.S. 273, 291–93 (1906); Smith v. Reeves, 178 U.S. 436, 445, 449 (1900); United States v. Texas, 143 U.S. 621, 646 (1892). The Court reaffirmed the basic principle that parties could not confer subject matter jurisdiction on a federal court by consent in *Louisville & Nashville Railroad Co. v. Mottley*, 211 U.S. 149 (1908).

164. 143 U.S. 621 (1892).

reaching "suits of *individuals* against States"[165] and ruled that Texas, "when admitted into the Union," had "consented" to suit by the United States.[166] Of course, such a malleable "consent" rationale could just as logically have supported the proposition that states entering the Union consented to suit on any claim that was based on supreme federal law and, consequently, that the Eleventh Amendment did not symbolize any sovereign immunity broader than the immunity its specific words indicated. That logic, however, did not serve the Court's purposes. *United States v. Texas* illustrated once again that the Court was neither "construing" the Eleventh Amendment nor relying on text, history, actual "consent," or any logically necessary "legal" reasoning.[167] Rather, it confirmed that the Court was construing the amendment instrumentally to serve the changing policy goals that it accepted as appropriate and desirable.[168]

Third, the Court made it equally clear that, notwithstanding *Hans* and the Eleventh Amendment, the federal courts would continue to hear suits against state officers and enjoin their actions, even when the officers acted on behalf of the state in performing official duties necessary to carry out the state's authorized policies. The year after *Hans* came down, in fact, the Court upheld an injunction against a state's governor, secretary of state, and treasurer, who together constituted the state's board of land commissioners, preventing them from selling a tract of land over which plaintiff asserted title. Relying on *Osborn*[169] and *Hans*'s "[t]o avoid

165. *Id.* at 644.

166. *Id.* at 646.

167. Chief Justice Fuller and Justice Lamar dissented, noting that no provision in the Constitution authorized a suit (which was filed under the Court's original jurisdiction) by the United States against a state. *Id.* at 648–49 (Fuller, C.J., and Lamar, J., dissenting). The dissenters were correct in the formal premise they advanced, but the Court adopted the sounder view on the dispositive issue, the instrumental policy analysis.

168. The policy-based nature of the Court's decisionmaking was similarly obvious eight years later in *Smith v. Reeves*, 178 U.S. 436 (1900). There, the Court held that a state could consent to be sued and limit its consent to suits in its own courts but that, in so doing, it also "consented" to review of any federal questions in the suit by the Supreme Court of the United States. *Id.* at 445. Further, the Court in effect limited its holding in *United States v. Texas* by ruling that, unlike the United States government, a federally created corporation could not sue a state. *Id.* at 446–49. Again, the "consent" to review was wholly fictitious, and the ruling about federally created corporations was wholly unrelated to the terms of the Eleventh Amendment. The Court's policy analysis seemed compelling on the first issue and at least reasonable on the second issue, but it was still a pragmatic Court-made policy judgment that shaped its decision. *See* Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 27–29 (1988).

169. 22 U.S. (9 Wheat.) 738 (1824).

misapprehension" paragraph,[170] *Pennoyer v. McConnaughy*[171] ruled that the suit was not against the state. Plaintiff "merely asks that an injunction may issue against [the three officials] to restrain them from acting under a statute of the State alleged to be unconstitutional."[172] The officials' planned acts would be "violative of his contract made with the State when he purchased his lands."[173] Thus, *Pennoyer* not only allowed an injunction against officials holding the state's highest governmental offices but also, in effect, compelled performance of a contract to which the state itself was a party. The decision made it clear that the Court could severely limit or negate the Eleventh Amendment whenever it wished.

Finally, the Court broadened the situations in which it would grant injunctive relief against state officials. Three years before *Hans*, the Court had denied federal jurisdiction in *Ayers*,[174] where a party had sought to enjoin the Attorney General of Virginia from bringing an enforcement action, as directed by state statute, against persons who tendered certain repudiated tax-receivable state bond coupons in payment of their state taxes. Recognizing that such suits were often de facto suits against states, *Ayers* sought to explain when such suits were proper. "The vital principle in all such cases is that the defendants, though professing to act as officers of the State, are threatening a violation of the personal or property rights of the complainant, for which they are personally and individually liable."[175] In *Ayers* the Virginia Attorney General had not done or threatened any action that was legally wrong, the Court explained, because he had done nothing but institute an enforcement proceeding that was authorized by state law. To merely compel a person to defend against a lawful proceeding—where he or she could raise defenses and challenge the constitutionality of the state's action—was not a legal wrong for which an official could be personally liable.[176] Thus, *Ayers* held, the lower court was without jurisdiction to enjoin the official.

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170. Hans v. Louisiana, 134 U.S. 1, 20 (1890); *see* text accompanying *supra* note 149.

171. 140 U.S. 1 (1891).

172. *Id.* at 18.

173. *Id.*

174. 123 U.S. 443 (1887).

175. *Id.* at 500.

176. Although the Court did not spell its reasoning out as clearly as it might have, its point seemed clear:

> If a suit may be rightfully brought at all by the State to recover a judgment for taxes, in such a case, certainly, there is nothing in these provisions that violates any legal or contract right of the party sued. If he defends the action on the ground of a lawful tender of payment, he must, of course, plead the tender, and may rightfully be required to bring into court the tender alleged to have been

The *Ayers* rule stood firm for only seven years. In 1894 in *Reagan v. Farmers' Loan & Trust Co.*,[177] the Court affirmed an injunction prohibiting a proceeding to enforce the rate order of a state regulatory commission.[178] The decision ignored the fact that *Ayers* had involved just such a proceeding and had held that state officials committed no independent legal wrong when they merely threatened or began such an enforcement action.[179] Although the Court revived the *Ayers* rule in 1899,[180] it ignored it once again in 1903.[181] Finally, in 1908 the Court in effect repudiated *Ayers* formally in *Ex parte Young*.[182] There, it held that the mere threat of an enforcement proceeding could be the "equivalent to any other threatened wrong or injury to the property of a plaintiff."[183] As a result, an officer who did nothing more than threaten to enforce a state law alleged to be unconstitutional was potentially enjoinable in a federal court suit notwithstanding *Ayers*, *Hans*, and the Eleventh Amendment.

Thus, by the first decade of the twentieth century, the Court had reduced the Eleventh Amendment to narrow and easily managed proportions. Its ambient doctrine remained jumbled, and the courts had precedents available to decide most cases in whatever way they chose. The two practical issues at stake, however—paramount matters of society and governance—were clearly settled. First, the Court would apply the Eleventh Amendment to block bondholders seeking to compel payments on southern state bonds. Second, the Court would not allow the amendment to provide immunity from a federal equity court when states or their agents took economic regulatory actions. The amendment's principal legal significance,

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> made.... If, in pursuance of other acts of the General Assembly, the contract rights of the defendant, as a tax-payer having tendered tax-receivable coupons, are denied to him in that trial, by reason of requirements in regard to the nature and quantity of proof as to the genuineness of the coupons, the errors of law thus committed can only be remedied, according to the common course of judicial proceedings, by a writ of error, which, as it would present a Federal question, might ultimately be sued out in this court. But it is not to be assumed in advance, either, that such questions will arise, or that, if they arise, they will be erroneously decided.

Id. at 494–95.

177. 154 U.S. 362 (1894).

178. *Id.* at 390.

179. CURRIE, *supra* note 135, at 425–28; CURRIE, *supra* note 92, at 51–52; JACOBS, *supra* note 23, at 131.

180. *See* Fitts v. McGhee, 172 U.S. 516, 525 (1899).

181. *See* Prout v. Starr, 188 U.S. 537 (1903).

182. 209 U.S. 123 (1908).

183. *Id.* at 158.

then, turned out to be ironic. In an age when the Court embraced "liberty of contract," it wound up construing the Eleventh Amendment relatively consistently on only one point. The amendment generally barred parties from suing states on contracts to which the state was a formal contracting party.[184]

And yet, the result was not quite as ironic as it might appear. "Liberty of contract," after all, was not a constitutional command but an ideological persuasion rooted in a broad set of evolving political, economic, cultural, and moral assumptions.[185] The Court's narrowing construction of the Eleventh Amendment after *Hans* served that animating persuasion directly and well by enabling the Court to intervene to protect contractual freedom whenever state economic regulation seemed to endanger it. Moreover, the Court's jurisprudence barring contractual actions against states—the apparent doctrinal residue of *Hans* and the southern state bond cases—did not seriously conflict with that persuasion. In a new age of sophisticated national and international financial markets, it was clear that states would have to pay, one way or another, for whatever immunity they enjoyed. Notwithstanding *Hans* and its doctrine of state sovereign immunity, the expanding financial markets of the new industrial world had their own devices to discipline errant borrowers, whether they were private parties or state governments.[186]

Regardless of their impact on state credit, however, the Court's Eleventh Amendment decisions traced a familiar and revealing pattern. Like the Court's jurisdictional decisions involving diversity actions, federal receivership suits, and federal question cases, they traced changes in national politics and adapted the law to the perceived needs of the nation. *Hans* stood in the jurisdictional

184. This was one of the core ideas the Court stressed in *In re Ayers*, 123 U.S. 443, 502–06 (1887). *See, e.g.*, Murray v. Wilson Distilling Co., 213 U.S. 151, 168 (1909) (holding that purchases by state officers constituted purchases by the State and therefore the court had no jurisdiction).

185. Ideas about race and gender, for example, repeatedly shaped and limited the Court's application of the constitutional doctrine of liberty of contract. For race, see *Berea College v. Kentucky*, 211 U.S. 45 (1908), and *Plessy v. Ferguson*, 163 U.S. 537 (1896); for gender, see *Muller v. Oregon*, 208 U.S. 412 (1908), and *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873). *See generally, e.g.*, Soifer, *supra* note 89, at 250 (showing how social attitudes and values shaped the Court's jurisprudence).

186. For an analysis of the protections available to lenders contracting with entities which enjoy sovereign immunity, see James R. Greene, *Financing Foreign Governments and Official Entities*, *in* OFFSHORE LENDING BY U.S. COMMERCIAL BANKS 213, 213–48 (F. John Mathis ed., 2d ed. 1981); ORTH, *supra* note 23, at 118 (noting a decline in the financial ratings of state bonds as compared to municipal bonds).

mainstream, a calculated effort to serve the post-Reconstruction settlement.

IV. THE PARTICULARLY DUBIOUS NATURE OF *HANS*, II: JURISDICTIONAL INSTRUMENTALISM AND THE POST-RECONSTRUCTION SETTLEMENT

If federal jurisdiction was shaped by a flexible judicial instrumentalism, then a recognition of the substantive goals the Justices sought to serve is essential to understand the practical meaning and true significance of the Court's decisions. In the late nineteenth century the policies and values that guided the Court were those embodied in the post-Reconstruction settlement and, closely related, those that inspired the doctrine of substantive due process. *Hans* and the evolving jurisprudence of the Eleventh Amendment can be fully and properly understood only in relation to those two developing policy commitments.

A. The Resonance of the Southern State Bond Litigations

The problem presented by the southern state bond cases, serious and perplexing to be sure, was not sufficient by itself to explain the Court's willingness to distort Eleventh Amendment jurisprudence as obviously and severely as it did. Although the practical challenge was sobering, it was also limited. Neither Mississippi nor Kentucky repudiated or sought to readjust its debts during the post-Reconstruction years.[187] Further, at least two other southern states, Texas and Florida, had relatively small debts which were unlikely by themselves to spur extreme reactions against adverse federal judgments.[188] In addition, Virginia—one of the most determined of the repudiators—repeatedly lost before the Court for special reasons related to the provisions in its bonds.[189] Thus, the bond problem itself was, at its most serious, limited to only a handful of states.[190]

187. WOODWARD, *supra* note 21, at 87.

188. *Id.*

189. Often, though not uniformly, Virginia lost before the Court. The most likely explanation for its losses is that its bonds contained a provision making their coupons receivable by the state in payment of taxes. Thus, the Court could usually rule against the State and for its bondholders without worrying about most enforcement problems beyond the need to prohibit the State from prosecuting taxpayers who tendered bond coupons in payment of their taxes. *See* ORTH, *supra* note 23, at 60–109.

190. The exact amounts involved in the various readjustment efforts are disputed. According to one of the most detailed accounts, excluding Virginia, the two most substantial repudiators were Louisiana and North Carolina, which repudiated total amounts of $23.9 and $29.2 million, respectively, followed by South Carolina ($16.4

More important, even in the repudiating states with significant debts there were often strong internal political pressures for full recognition and payment of state debts. Established conservative groups committed to the protection of property and social order as well as incipient commercial interests seeking financial respectability and ready credit in the North and in Europe fought the repudiationists persistently over state policy.[191] In Arkansas, Louisiana, Tennessee, and Virginia the internal factions supporting full payment were strong enough on occasion to win control of the state government and at least temporarily alter the state's debt policy.[192]

On the bond issue, in short, the South was hardly monolithic. It was divided both from state to state and within several of the individual states that repudiated their bonds.

Moreover, the Court's general determination to enforce the law in the face of political pressures or popular protests was apparent. When the Court faced repudiationist efforts in the towns and counties of some twenty different states in the Midwest and West, it refused to bend in the slightest.[193] In spite of the comparable size of the debt at issue and the large number of local government entities involved, the Court was adamant. Indeed, in adjudicating claims from the Midwest and West, it refused in many cases to accept persuasive arguments that the bonds in question had been issued without lawful authority or that bondholder-claimants were implicated in fraud or other practices that should deny them the status of holders in due course.[194] The Court's contrasting rhetoric in cases coming from the two regions suggested the remarkable difference in its attitude. Addressing southern state repudiation in *Jumel*, the Court bemoaned the difficulties it would face trying to enforce a judgment; addressing municipal repudiation in the Midwest, it declared floridly that it

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million), Alabama ($13.4 million), and Tennessee ($13 million). Three other Southern States repudiated smaller amounts: Arkansas ($8.3 million), Georgia ($7.7 million), and Florida ($4.0 million). B. U. RATCHFORD, AMERICAN STATE DEBTS 192 tbl.15 (1941); *see also* REGINALD C. MCGRANE, FOREIGN BONDHOLDERS AND AMERICAN STATE DEBTS 282–389 (1935) (chronicling the problem of state debts following the Civil War); WOODWARD, *supra* note 21, at 86–87 (summarizing southern state bond repudiations in the post-Reconstruction era).

191. CARL N. DEGLER, THE OTHER SOUTH: SOUTHERN DISSENTERS IN THE NINETEENTH CENTURY 264–315 (1974); WOODWARD, *supra* note 21, at 89–106.

192. WOODWARD, *supra* note 21, at 89. On the complexities of Virginia politics, for example, see JANE DAILEY, BEFORE JIM CROW: THE POLITICS OF RACE IN POSTEMANCIPATION VIRGINIA *passim* (2000).

193. 6 FAIRMAN, *supra* note 69, at 918–1116.

194. *Id.*

"shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice."[195]

Similarly, the Court was not intimidated when it faced increasingly controversial issues of state economic regulation and popular political protests. In the 1880s and 1890s, powerful political forces gathered behind efforts to regulate corporate business, control transportation rates and facilities, and improve the conditions of industrial workers.[196] Those forces exerted growing, widespread, and well-organized pressures, and they were powerful across the South as well as in the Midwest and Far West.[197] Indeed, agrarian protests, the complaints of small business interests, the rapid emergence of the Populist Party, and the organizing efforts of the Knights of Labor and the American Railway Union were concentrated in those regions and seemed to unite the interests of southerners with the interests of those in the rest of the country.[198] Yet, in spite of the intensifying political pressures, the Court remained firm and, indeed, after the mid-1880s showed rapidly declining sympathy for the efforts of the various protest movements. In confronting the demands of those movements the Justices knew, as they did when addressing Midwestern and Western debt repudiation, that they could count on the support of the federal government and the dominant elements of American society.[199] Indeed, in the years after the Civil War the

195. Gelpcke v. Dubuque, 68 U.S. (1 Wall.) 175, 206–07 (1864).

196. These issues are discussed in the following representative historical accounts of the 1880s and 1890s: ROBERT V. BRUCE, 1877: YEAR OF VIOLENCE (1959); SIDNEY FINE, LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT, 1865–1901 (1956); JOHN A. GARRATY, THE NEW COMMONWEALTH, 1877–1890 (1968); SAMUEL P. HAYS, THE RESPONSE TO INDUSTRIALISM, 1885–1914 (1957); MORTON KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA (1977); EDWARD C. KIRKLAND, INDUSTRY COMES OF AGE: BUSINESS, LABOR, AND PUBLIC POLICY, 1860–1897 (1961); CRAIG PHELAN, GRAND MASTER WORKMAN: TERENCE POWDERLY AND THE KNIGHTS OF LABOR (2000); DAVID P. THELEN, THE NEW CITIZENSHIP: ORIGINS OF PROGRESSIVISM IN WISCONSIN, 1885–1900 (1972); IRWIN UNGER, THE GREENBACK ERA: A SOCIAL AND POLITICAL HISTORY OF AMERICAN FINANCE, 1865–1879 (1964).

197. *See* sources cited *supra* note 196.

198. *See* sources cited *supra* note 196.

199. With respect to the Midwestern bond cases, in 1870 President Ulysses S. Grant made it clear that he was prepared, if necessary, to use the army to enforce the judgments of the federal courts. 6 FAIRMAN, *supra* note 69, at 984. To enforce order and a series of federal court injunctions against the American Railway Union and others, President Grover Cleveland ordered federal troops to intervene in the Pullman Strike in 1894. The armed intervention ended the strike and defeated the union's efforts. *See, e.g.*, GERALD G. EGGERT, RICHARD OLNEY: EVOLUTION OF A STATESMAN 133–50 (1974) (discussing the Pullman strike and the role of the federal government in defeating it, focusing on the actions of the U.S. Attorney General); RAY GINGER, ALTGELD'S AMERICA: THE

Court became increasingly aggressive in striking down state legislation that it found inconsistent with certain constitutional mandates. Under the Contract Clause alone, for example, it invalidated state statutes in twenty separate cases between 1865 and 1873, and it did the same in another twenty-nine cases between 1873 and 1888.[200]

Why, then, did the Court bend specifically and only to the pressures generated by the southern state bond cases? Not because that limited challenge was unmanageable in itself. Rather, the Court gave ground because two powerful and compelling conditions swayed its judgment.

The first was the fact that the southern state bond cases did not present an isolated issue. To the contrary, they constituted an integral part of a far larger, intractable, and galvanizing phenomenon, the deeply rooted and intensely bitter sectional strife that had long riven the nation, finally erupted in a brutal civil war, and then continued almost unabated through Reconstruction and into the post-Reconstruction world. It was because of that long, ingrained, and emotional conflict that the Southern States would rally to one another's support and present a united front. It was for that same reason, too, that the state bond cases carried a powerful symbolic significance for southerners that transcended the actual amount of money at stake and forged the region into a unified and defiant bloc. The southern debt—much of which originated under postwar Republican regimes—symbolized Confederate defeat and Union victory, the South crushed under the heel of the North and its puppet carpetbag governments. "By 1870," concluded David W. Blight, "most white Southerners viewed Reconstruction as a hated, imposed regime."[201] Most intensely and most viscerally, for white southerners the bonds symbolized the unendurable outrage of "black Reconstruction." They represented what white southerners framed as the corrupt, rapacious, devastating, and utterly intolerable rule of their newly freed—and now uncontrolled—black slaves.[202]

LINCOLN IDEAL VERSUS CHANGING REALITIES 143–67 (Quadrangle Paperbacks 1965) (1958) (same, focusing on the role of the governor of Illinois); RAY GINGER, THE BENDING CROSS: A BIOGRAPHY OF EUGENE VICTOR DEBS 108–51 (1949) (same, focusing on the leader of the American Railway Union).

200. WRIGHT, *supra* note 22, at 93–94.

201. DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY 106 (2001).

202. Both the politics and economics of the southern bond problem were complicated. Many white Democrats profited from their lavish issue, and after Reconstruction black leaders often supported repudiation on economic grounds. The symbolism of the bonds

The South's hostility toward federal judicial enforcement of its state bonds, moreover, was an integral part of its more general opposition to the power of the North, the federal government, and the national courts.[203] Southern hostility to the federal judiciary had grown steadily throughout the late nineteenth century, and it spurred constant attacks on the federal courts, especially on their diversity and removal jurisdiction and on their expanding equity powers.[204] Southern leaders identified the federal courts as tools of an aggressive northern capitalism and blamed them for their region's economic stagnation and poverty.[205] The idea that the federal judiciary might order southern states to honor their bonded debt seemed only one more instance of northern political oppression and economic exploitation. Undergirding the persistent southern opposition to both northern capitalism and the federal judiciary, however, was the driving issue of race and the paramount goal of maintaining white supremacy.[206] Southerners who criticized the federal courts as the tools of northern capitalism, Harry N. Scheiber concluded, directed "their attack in a way that dovetailed well with racist views" and were, in effect, "setting up a smoke screen."[207] The South failed to make serious efforts to establish the conditions necessary to develop an advanced economy, and its leaders focused, instead, on securing their own individual economic advantage while ensuring the continuation of white rule.

White southerners took a variety of diverse and conflicting positions on the economic issues their region faced, including the repudiation of their state bonds.[208] On matters of race, however, they stood as one. It was race, not repudiation, that united the white

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and their close connection with the hated era of "black Republican rule" nevertheless gave them a powerful political and emotional resonance. On the end of Reconstruction, see FONER, *supra* note 71, at 512–601; WOODWARD, *supra* note 21, at 1–174.

203. From the moment they had returned to Congress during and after Reconstruction, southern congressmen began agitating for limitations on the powers and jurisdiction of the federal courts. FRANKFURTER & LANDIS, *supra* note 108, at 88–93. The jurisdictional limitations contained in the Judiciary Act of 1887–88 represented their first significant, if limited, victory in this area. Indeed, one northern federal judge immediately labeled the act a "confederate" measure. Fiske v. Henarie, 32 F. 417, 422 (C.C.D. Or. 1887).

204. Harry N. Scheiber, *Federalism, the Southern Regional Economy, and Public Policy Since 1865*, *in* AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH 69, 73–86 (David J. Bodenhamer & James W. Ely, Jr., eds., 1984).

205. *Id.* at 77–78.

206. *Id.* at 80.

207. *Id.*

208. *See supra* notes 187–92 and accompanying text.

South.[209] It was race, not repudiation, that gave the southern state bond litigations their ominous, overarching, and potentially explosive political significance.

The second fundamental condition that led the Court to bend was the fact that the North had tired of the entire matter of southern racial politics and had concluded that the South should be placated and allowed its own special independence.[210] The North had accepted a post-Reconstruction settlement, and it had done so in large part because it shared the racist ideas and attitudes that dominated the white South.[211] After the terrible war and the tumultuous failure and disillusionment of Reconstruction, most northerners had come to accept the white southern view of race, Reconstruction, sectional reconciliation, and the nation's desired political and social future.[212] It was race that forged the post-Reconstruction settlement, and it was northern racial attitudes that guaranteed that the nation as a whole would accept and honor its terms. "Ultimately," Joel Williamson has written, "the critical factor in the capitulation of the North was its own racism."[213] Northern acquiescence in the repudiation of southern state bonds, then, was merely a corollary of an avidly embraced national reconciliation, one provision of the comprehensive and, by whites, warmly welcomed post-Reconstruction settlement.[214]

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209. As Bertram Wyatt-Brown explained: In the post-Reconstruction era "the Rebel banner was the emblem of a sacralized determination to keep African Americans underfoot. Any means to do so were deemed honorable. The ethic that so long has sustained the racial prescriptions of the white South required no respect or humanity toward those outside its moral boundaries." BERTRAM WYATT-BROWN, THE SHAPING OF SOUTHERN CULTURE: HONOR, GRACE, AND WAR, 1760S–1890S, at 295 (2001). Indeed, it had been race, not abstract principles of federalism, that inspired southern secession. *See* MANISHA SINHA, THE COUNTERREVOLUTION OF SLAVERY: POLITICS AND IDEOLOGY IN ANTEBELLUM SOUTH CAROLINA 187–220 (2000). *See generally* CHARLES B. DEW, APOSTLES OF DISUNION: SOUTHERN SECESSION COMMISSIONERS AND THE CAUSES OF THE CIVIL WAR (2001) (showing that secession commissioners urged secession as a way to protect slavery).

210. *See infra* Parts IV.B, IV.C, & IV.D.

211. *See infra* Part IV.C.

212. *See infra* Parts IV.B, IV.C, & IV.D.

213. JOEL WILLIAMSON, THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION 340 (1984).

214. *See* JOHN W. CELL, THE HIGHEST STAGE OF WHITE SUPREMACY: THE ORIGINS OF SEGREGATION IN SOUTH AFRICA AND THE AMERICAN SOUTH *passim* (1982); WILLIAM COHEN, AT FREEDOM'S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR RACIAL CONTROL, 1861–1915 *passim* (1991); Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 886–95 (1998).

B. Law, Politics, and Race

1. The Post-Reconstruction Era, 1877–1890

The quarter century from the end of Reconstruction to the early years of the twentieth century was a period of massive social transformation. From a largely decentralized, small-town, and agricultural society with a dominant Anglo-Saxon Protestant population and culture, the United States became a centralizing, urbanizing, and industrializing nation with an ever more heterogeneous population and an increasingly secular, pluralistic, and commercial culture.[215] As the nation turned to address unprecedented challenges, it resolved in the process what had been the paramount problem of its immediate past—slavery and the consequences of its abolition—by accepting a de facto political and social resolution.[216] The post-Reconstruction settlement consigned the "race question" to the states. It allowed the South to manage its racial relations as it wished, subject only to the tacit condition that the states not act officially to deprive blacks, in a direct and express

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215. The changes were profound in both scope and nature. As one historian wrote:

> In the decades following the Civil War, American capitalism began to produce a distinct culture, unconnected to traditional family or community values, to religion in any conventional sense, or to political democracy. It was a secular business and market-oriented culture, with the exchange and circulation of money and goods at the foundation of its aesthetic life and of its moral sensibility.

WILLIAM LEACH, LAND OF DESIRE: MERCHANTS, POWER, AND THE RISE OF A NEW AMERICAN CULTURE 3 (1993); *see* FONER, *supra* note 71, at 18–34, 460–601; KELLER, *supra* note 196, at 197–237; T. J. Jackson Lears, *From Salvation to Self-Realization: Advertising and the Therapeutic Roots of the Consumer Culture*, 1880–1930, *in* THE CULTURE OF CONSUMPTION: CRITICAL ESSAYS IN AMERICAN HISTORY, 1880–1980, at 1, 1–38 (Richard Wightman Fox & T. J. Jackson Lears eds., 1983); WOODWARD, *supra* note 21, at 107–174. *See generally* THE GILDED AGE: ESSAYS ON THE ORIGINS OF MODERN AMERICA (Charles W. Calhoun ed., 1996) [hereinafter THE GILDED AGE] (discussing changes in a variety of areas that resulted from the industrialization of America).

216. *See generally* BLIGHT, *supra* note 201 (discussing changing attitudes toward, and interpretations of, the Civil War and Reconstruction); VINCENT P. DE SANTIS, REPUBLICANS FACE THE SOUTHERN QUESTION—THE NEW DEPARTURE YEARS, 1877–1897 (1959) (discussing the evolution of the Republican Party after Reconstruction); STANLEY P. HIRSHSON, FAREWELL TO THE BLOODY SHIRT: NORTHERN REPUBLICANS & THE SOUTHERN NEGRO, 1873–1893 (1962) (discussing the changing political attitudes of northern Republicans during and after Reconstruction); JOSEPH FRAZIER WALL, HENRY WATTERSON: RECONSTRUCTED REBEL (1956) (discussing the politics of Reconstruction from the viewpoint of a southern leader); C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION (1951) (discussing the origins and resolution of the Compromise of 1877).

manner, of certain constitutional rights that the Court would not overtly deny.

As Reconstruction wound down,[217] white southerners intent on overturning its remaining achievements rallied behind the Democratic Party and reasserted their control over the governments of the ex-Confederate states. They heralded their ideology and their coming triumph by identifying their cause with the mission of Jesus Christ—to the world, they announced themselves proudly as the South's "redeemers." Employing a variety of tactics—from violence and intimidation through racially abusive administration to gossamer legal rationales for institutionalized racial oppression—they gradually disenfranchised blacks, eliminated the Republican Party as a serious political rival, and established a rigidly segregated and white-dominated society. Perhaps most telling, the nation's very language and discourse quickly acknowledged their triumph and their virtue, accepting them almost immediately on their own terms, and referring to them widely and commonly as, indeed, the South's "redeemers."[218]

What was happening in the South was clearly observable as early as the mid-1870s.[219] In the South Carolina gubernatorial election of

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217. In 1874 the Democrats won control of the House of Representatives, and for the first time since the Civil War the Republicans no longer held complete control of the national government. "The election of 1874 offered only one indication of a pronounced shift in Northern attitudes toward the South during Grant's second term." FONER, *supra* note 71, at 524. At the beginning of 1875, before the new Congress was seated, Republicans used their control in a lame-duck session to enact the last Reconstruction statutes: the Judiciary Act of 1875, expanding the jurisdiction of the federal courts to hear federal law claims, and the Civil Rights Act of 1875, extending new civil rights protections to black Americans. Support for Reconstruction continued to wane while opposition spread widely. The disputed election of 1876 and the consequent Compromise of 1877 led directly to its negotiated, widely accepted, and clearly understood termination. *See generally* WOODWARD, *supra* note 216 (discussing the origins and resolution of the Compromise of 1877).

218. *See, e.g.*, C. PETER MAGRATH, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER 155 (1963) (quoting Benjamin R. Tillman using the term "redeem" in referring to the effort to restore white rule in South Carolina); WOODWARD, *supra* note 21, at 1–22 (using the term "Redeemers" to refer to white southern Democrats at the end of Reconstruction).

219. Evidence was plentiful. For example:

> Especially affected by continued white hostility were the Negroes in Atlanta and Montgomery, where the black vote had ceased to be a factor in the regular elections since the mid-1870s. At least partially because of the absence of black officeholders in these two cities, there was also far greater disparity in the level of educational and welfare services made available to blacks in comparison to whites.

HOWARD N. RABINOWITZ, RACE RELATIONS IN THE URBAN SOUTH, 1865–1890, at 329 (1978).

1876, for example, while the Union army still occupied the state, whites used intimidation and open violence—what they called "the Mississippi Plan"—to control the black vote.[220] After a group of armed whites attacked blacks in Edgefield County and killed six of them, one of its leaders, Benjamin R. ("Pitchfork Ben") Tillman, a future governor and United States Senator, acknowledged the organized and racist nature of the whites' campaign. "It had been the settled purpose of the leading white men of Edgefield to seize the first opportunity that the Negroes might offer to provoke a riot and teach the Negroes a lesson."[221] White southerners, Tillman believed, had no choice. It "was generally believed that nothing but bloodshed and a good deal of it could answer the purpose of redeeming the state."[222] In neighboring Aiken County the election spurred even more bloodshed near the town of Ellenton. Almost open racial warfare broke out and continued sporadically until federal troops finally arrived to restore a semblance of order. Two whites and as many as 125 blacks were killed. The Democrats, whose gubernatorial candidate had tacitly approved the violence, won the election and took over the state's government. The election and the Aiken County "massacre" quickly became notorious throughout the nation, leading to a federal prosecution and trial in Charleston of twelve whites who were charged with violating the civil rights of the murdered blacks.[223]

> With vigorous and selective enforcement of laws and discriminatory sentencing, the jails and prisons [in the South] came to be filled with unprecedented numbers of blacks. Tens of thousands would be compelled to serve long terms at hard labor, more often than not for petty theft and misdemeanors .... The convict leasing system emerged as early as Reconstruction, matured in the 1870s and 1880s, and soon became in many states the dominant policy of the penal system.

LEON F. LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW 271 (1998).

220. The material in this and the succeeding paragraph is drawn from Stephen Kantrowitz, *One Man's Mob Is Another Man's Militia: Violence, Manhood, and Authority in Reconstruction South Carolina*, *in* JUMPIN' JIM CROW: SOUTHERN POLITICS FROM CIVIL WAR TO CIVIL RIGHTS 67, 67–87 (Jane Dailey et al. eds., 2000); MAGRATH, *supra* note 218, at 155–65; and Lou Falkner Williams, *Federal Enforcement of Black Rights in the Post-Redemption South: The Ellenton Riot Case*, *in* LOCAL MATTERS: RACE, CRIME, AND JUSTICE IN THE NINETEENTH-CENTURY SOUTH 172, 172–200 (Christopher Waldrep & Donald G. Nieman eds., 2001) [hereinafter LOCAL MATTERS].

221. MAGRATH, *supra* note 218, at 155 (quoting Benjamin R. Tillman).

222. *Id.* (quoting Benjamin R. Tillman).

223. Tillman played an active, if somewhat tardy, role in the massacre:

> Tillman led fifty Red-shirts thirty miles to Ellenton but arrived too late for the slaughter. However, two men from his unit were detailed to execute an important prisoner, black Republican state senator Simon Coker, who had come

The episode in Aiken County held particular importance for the Supreme Court of the United States. Sitting on circuit, Chief Justice Morrison R. Waite served as the trial judge, and he drew a profound lesson from his extended and distressing experience in Charleston. Waite learned firsthand about "the bitterness of hate" that southern whites felt for the North and about the "sickening" and "horrid" nature of the violence they used against blacks. "Negroes, so far as the case thus far shows," he wrote his wife, "were shot down in cold blood without any cause or provocation."[224] The whites in South Carolina "are further from reconstruction than they have been since the war," he concluded pessimistically, and they "have gone back to their original idols."[225] At the trial's conclusion a jury of six blacks and six whites split evenly along racial lines. Waite declared a mistrial, and the federal government let the matter drop without a retrial. For the future of American law, however, the South Carolina trial continued to resonate, for Waite saw it as demonstrating the futility of Reconstruction and its goals. "The President's Southern policy, as it is called, is no *policy* at all," he wrote his son shortly after the trial.[226] "He simply accepted what time and circumstance had already accomplished."[227] The return of white rule was a fait accompli, and the North had washed its hands of the matter. It was "perfectly certain," Waite explained, "that the people of the north were tired of keeping men in office by the help of the general government."[228] The jolting lesson of pessimism and defeat that he drew from his Charleston experience colored his remaining years of service as Chief Justice from 1877 to 1888, the pivotal post-Reconstruction era when the Court began yielding to the South by severely contracting the Civil War amendments while rapidly expanding the Eleventh.[229]

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to investigate reports of violence. They shot Coker while he knelt in his final prayer.

STEPHEN KANTROWITZ, BEN TILLMAN & THE RECONSTRUCTION OF WHITE SUPREMACY 74 (2000).

224. MAGRATH, *supra* note 218, at 160 (quoting Chief Justice Morrison R. Waite).

225. Williams, *supra* note 220, at 183 (quoting Chief Justice Morrison R. Waite).

226. MAGRATH, *supra* note 218, at 165 (quoting Chief Justice Morrison R. Waite).

227. *Id.* (quoting Chief Justice Morrison R. Waite).

228. *Id.* (quoting Chief Justice Morrison R. Waite).

229. Waite was one of the "principal architects" of the Court's decisions minimizing the reach of the Civil War amendments. MAGRATH, *supra* note 218, at 133. He was with the majority in almost all of the Court's decisions limiting the Civil War amendments and expanding the Eleventh Amendment. He wrote for the Court in *Louisiana v. Jumel*, 107 U.S. 711 (1883), and *United States v. Cruikshank*, 92 U.S. 542 (1876), for example, and

While the 1870s brought the end of Reconstruction and the return of white rule to the South, the 1880s witnessed the racial tide turn, unevenly but decisively, against the freed persons and their rights.[230] Symbolically, the decade opened with the first "Great Exodus" of blacks fleeing from the region's increasingly hostile racial climate,[231] and it ended in 1889 with the formation of the United Confederate Veterans.[232] During the intervening years racial lynchings rose sharply, reaching their peak in the late 1880s and early 1890s when they averaged well over a hundred per year.[233] Legal victories on behalf of black litigants challenging segregated schools, which had been relatively common in the 1870s, peaked in 1881 and

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joined the majority in the *Civil Rights Cases*, 109 U.S. 3 (1883), and *In re Ayers*, 123 U.S. 443 (1887).

230. *See* JOSEPH H. CARTWRIGHT, THE TRIUMPH OF JIM CROW: TENNESSEE RACE RELATIONS IN THE 1880S *passim* (1976); ROGER A. FISCHER, THE SEGREGATION STRUGGLE IN LOUISIANA, 1862–1877 *passim* (1974); RABINOWITZ, *supra* note 219, *passim*; WILLIAMSON, *supra* note 213; CHARLES E. WYNES, RACE RELATIONS IN VIRGINIA, 1870–1902 (1961); Klarman, *supra* note 88, at 309. For the black response, see AUGUST MEIER, NEGRO THOUGHT IN AMERICA, 1880–1915: RACIAL IDEOLOGIES IN THE AGE OF BOOKER T. WASHINGTON 3–82 (3d prtg. 1969).

231. HERBERT G. GUTMAN, THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750–1925, at 433–42 (1976); HEATHER COX RICHARDSON, THE DEATH OF RECONSTRUCTION: RACE, LABOR, AND POLITICS IN THE POST–CIVIL WAR NORTH, 1865–1901, at 156–82 (2001).

232. WOODWARD, *supra* note 21, at 156; *see* Keith S. Bohannon, *"These Few Gray-Haired, Battle-Scarred Veterans": Confederate Army Reunions in Georgia, 1885–95*, *in* THE MYTH OF THE LOST CAUSE AND CIVIL WAR HISTORY 89, 89–110 (Gary W. Gallagher & Alan T. Nolan eds., 2000).

233. AUGUST MEIER & ELLIOTT M. RUDWICK, FROM PLANTATION TO GHETTO: AN INTERPRETATIVE HISTORY OF AMERICAN NEGROES 204 (3d ed. 1976). David Levering Lewis explained the phenomenon:

> Lynching was race relations by means of a rope, a sanguinary pageant reenacted by community leaders for whom the untruthfulness of accusations was not merely irrelevant but even an essential element in what was but the everlasting apotheosis of white supremacy. For all its violence, mindless solidarity, and unspeakable bestiality, standard Southern lynching was an objectively rational spectacle with a prescribed emotional rhythm and scripted ritual, whose purposes were ultimately political and economic.

David Levering Lewis, *An American Pastime*, N.Y. REV. OF BOOKS, Nov. 21, 2002, at 27, 27. On the transformation of lynching into a distinctive southern racial phenomenon after Reconstruction, see, e.g., EDWARD L. AYERS, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH (1984) (discussing lynching and other criminal punishments in the nineteenth-century South); E.M. BECK & STEWART E. TOLNAY, A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882–1930 (1995) (discussing race and lynching in the South); PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA (2002) (same); UNDER SENTENCE OF DEATH: LYNCHINGS IN THE SOUTH (W. Fitzhugh Brundage ed., 1997) (same).

began an abrupt and drastic decline thereafter.[234] In South Carolina widespread and organized violence made a mockery of the electoral process, and after the Democrats' triumph in 1882 the state's Republicans were reduced to insignificance.[235] The "Readjuster" movement in Virginia—which sought to join the fortunes of whites and blacks against the state's elite-dominated Democratic government—won spectacular electoral victories between 1879 and 1882 but quickly disintegrated in mid-decade under the hammer blows of a concerted Democratic campaign to divide the Readjusters along racial lines.[236] In Louisiana during the mid-1880s, large landowners and other established interests used the same tactic to defeat efforts of the Knights of Labor to organize agricultural workers.[237] In spite of other occasional and ultimately unsuccessful attempts to forge interracial coalitions, the overwhelming majority of white southerners rejected both social and political equality for blacks.[238]

Similarly, the 1880s witnessed the growing de facto disenfranchisement of blacks through intimidation, artifice, and fraud. In Louisiana and Mississippi during the 1870s, for example, the black population grew by thirty-three and forty-six percent, respectively, but from the presidential election of 1872 to the presidential election of 1880 the Republican vote in the two states declined by forty-seven and fifty-nine percent.[239] In Alabama white Democrats retook power in 1874 and the very next year adopted a new constitution designed to reverse Reconstruction by reducing government and its services,

234. J. MORGAN KOUSSER, DEAD END: THE DEVELOPMENT OF NINETEENTH-CENTURY LITIGATION ON RACIAL DISCRIMINATION IN SCHOOLS 23 (1986).

235. KANTROWITZ, *supra* note 223, at 107.

236. *See generally* DAILEY, *supra* note 192 (discussing the Readjuster movement and Virginia politics between emancipation and disenfranchisement); DEGLER, *supra* note 191, at 292–311 (same).

237. Rebecca J. Scott, *Fault Lines, Color Lines, and Party Lines: Race, Labor, and Collective Action in Louisiana and Cuba, 1862–1912*, *in* BEYOND SLAVERY: EXPLORATIONS OF RACE, LABOR, AND CITIZENSHIP IN POSTEMANCIPATION SOCIETIES 61, 72–82 (Frederick Cooper et al. eds., 2000). The "Knights of Labor" was the leading national labor organization in the United States in the 1870s and 1880s.

238. DEGLER, *supra* note 191, at 337, 347, 351, 370 (discussing antiblack attitudes of white southerners); RABINOWITZ, *supra* note 219, at 31–60 (discussing southern white rejection of ideas of racial equality); WILLIAMSON, *supra* note 213, at 104–07, 111–39 (discussing the rise of "radical racism" after the 1880s); Donald G. Nieman, *African American Communities, Politics, and Justice: Washington County, Texas, 1865–1890*, *in* LOCAL MATTERS, *supra* note 220, at 201, 201–24 (discussing race relations in Washington County, Texas, between 1865 and 1890).

239. Charles W. Calhoun, *The Political Culture: Public Life and the Conduct of Politics*, *in* THE GILDED AGE, *supra* note 215, at 185, 189.

lowering taxes, and limiting the political power of blacks.[240] A variety of tactics—from gerrymandering and other "structural" reforms to violence, coercion, and corruption—firmly entrenched white rule during the following decade.[241] Georgia in the late 1870s introduced a facially neutral poll tax that reduced voting generally but had a particularly adverse impact on blacks.[242] While thirty-nine percent of eligible Georgia blacks voted in the presidential election in 1880, eight years later only nineteen percent did so.[243] During the 1880s Georgia, South Carolina, Tennessee, and Florida adopted a variety of electoral rules and practices that complicated voting procedures and gave officials numerous opportunities to disqualify black votes and voters.[244] More broadly, at the beginning of the 1880s Democrats had still lost elections in most predominantly black counties throughout the South, and in the black-belt areas of Arkansas, Florida, North Carolina, Tennessee, Virginia, and Texas they lost by huge majorities, often by more than two to one. By the end of the decade, however, the Democrats had not only effectively suppressed black voting in the black-belt counties, but they had gained such control that they were able to use the returns from those counties to fraudulently inflate their own statewide totals.[245] The laws formally disenfranchising blacks that the Southern States adopted after 1890 were made possible by the de facto disenfranchisement of the region's black voters that had been accomplished during the preceding fifteen years.[246]

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240. Wayne Flynt, *Alabama's Shame: The Historical Origins of the 1901 Constitution*, 53 ALA. L. REV. 67, 68–69 (2001). *See generally* MALCOLM COOK MCMILLAN, CONSTITUTIONAL DEVELOPMENT IN ALABAMA, 1798–1901: A STUDY IN POLITICS, THE NEGRO, AND SECTIONALISM (1955) (discussing how politics, African Americans, and sectionalism have affected Alabama's political conventions and constitutions from 1819 to 1901).

241. *See* sources cited *supra* note 240.

242. J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910, at 66–68 (1974) (discussing South Carolina and Florida's "eight-box law," which essentially served as de facto literacy tests in elections).

243. *Id.* at 68 (providing statistics on black voting).

244. KOUSSER, *supra* note 242, at 50; Leslie H. Fishel, Jr., *The African-American Experience*, *in* THE GILDED AGE, *supra* note 215, at 137, 142. The first of two periods of severe racial disenfranchisement in the South occurred between 1888 and 1893. KOUSSER, *supra* note 242, at 238.

245. KOUSSER, *supra* note 234, at 36.

246. EDWARD L. AYERS, THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION 283–309 (1992); KOUSSER, *supra* note 234, at 139; MICHAEL PERMAN, STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH, 1888–1908, at 5–6, 38, 324 (2001); RABINOWITZ, *supra* note 219, at 305–28.

The 1880s also witnessed the increasingly formalized racial segregation of the South. Though there were substantial differences by time, place, and activity, the overall trend in the decade was clear. In education, a majority of southern and border states had adopted some form of legalized racial segregation in their schools by the late 1870s, and during the 1880s such legislation became even more widespread and rigid.[247] In railroad transportation, by the mid-1880s blacks were commonly forced to travel in less desirable railroad cars in every southern state but two, Louisiana and Arkansas.[248] In 1881 Tennessee adopted the first Jim Crow law for railroad cars, and the practice began spreading widely throughout the South at the end of the decade. Between 1887 and 1892 nine states adopted such laws.[249] "What the white South did," Leon F. Litwack concluded from his study of the Jim Crow era, "was to segregate the races by law and enforced custom in practically every conceivable situation in which whites and blacks might come into social contact . . . ."[250]

As southern racial trends hardened and northern approbation grew, the Supreme Court of the United States embarked on a cautious and acquiescent course.[251] To some extent, it seemed to

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247. LITWACK, *supra* note 219, at 102–05. "The overthrow of the Reconstruction governments, however, fully restored segregation throughout the southern educational system." *Id.* at 103.

248. CHARLES A. LOFGREN, THE *PLESSY* CASE: A LEGAL-HISTORICAL INTERPRETATION 15–16 (1987).

249. *Id.* at 23 (discussing the development of racial segregation in railroad transportation); MEIER & RUDWICK, *supra* note 233, at 202–03 (discussing Jim Crow laws in various states); RABINOWITZ, *supra* note 219, at 182–97 (discussing segregation efforts by various states in public accommodations during Reconstruction). *See generally* Barbara Y. Welke, *When All the Women Were White, and All the Blacks Were Men: Gender, Class, Race, and the Road to* Plessy, *1855–1914*, 13 LAW & HIST. REV. 261 (1995) (discussing the relationship between race and gender in the development of Jim Crow laws in the antebellum South).

250. LITWACK, *supra* note 219, at 233.

251. It may be that in the 1870s the Court was unusually sensitive to shifts in national mood and especially to changes in the attitude of Congress. During the preceding years, the Reconstruction Congresses had overtly and directly challenged the authority of both the President and the Supreme Court. *See generally* MICHAEL LES BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON (1973) (describing the attempt to impeach Andrew Johnson as a step reluctantly taken by Republicans because Johnson's activities threatened to overturn congressional Reconstruction legislation); ERIC L. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION (1960) (discussing how three congressional Acts passed by Congress in 1867 "brought executive power to the lowest point it has ever reached before or since"). Quite likely, the Justices were especially anxious to avoid further confrontations with the legislative branch. *See, e.g.*, United States v. Klein, 80 U.S. (13 Wall.) 128, 141–48 (1872) (cautiously invalidating a congressional statute that restricted the Court's appellate jurisdiction); Texas v. White, 74 U.S. (7 Wall.) 700, 731 (1869) (declining to inquire into the constitutionality of the Reconstruction Acts

anticipate and encourage the trend as much as follow it.[252] Early on, in 1871, it gutted a criminal provision of the Civil Rights Act of 1866 in *Blyew v. United States*,[253] and two years later in the famous *Slaughter-House Cases*—which did not involve black parties or directly raise the issue of race—it did the same to the new Privileges or Immunities Clause of the Fourteenth Amendment.[254] Before the decade was out the Justices added several more significant decisions that ruled against the rights and interests of blacks.[255] Popular reaction in the North was increasingly positive and approving, and scattered criticism from congressional Republicans mild, ineffective,

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or the paramount authority of Congress), *dismissed by* Texas v. Hardenberg, 77 U.S. (10 Wall.) 68, 91 (1869); *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 513–15 (1869) (upholding power of Congress to make "exceptions" to the Court's jurisdiction). In this regard, it is worth noting that in 1874 the Republicans lost control of the House of Representatives for the first time since the Civil War. *See supra* note 217.

252. The Court, for example, construed the various Reconstruction measures far more narrowly than did the lower federal courts that addressed them in the early postwar years. *See* ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866–1876, at xiii (1985) (stating that the Supreme Court's decisions after 1873 "took much of the Civil War victory away from the Union nationalists and transferred it to Southern states' rights proponents"); Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War*, 92 AM. HIST. REV. 45, 68 (1987) [hereinafter *To Begin the Nation Anew*] (discussing how the Supreme Court "rejected the revolutionary congressional Republican theory of constitutionalism and read into the Thirteenth and Fourteenth Amendments the theory of states' rights promoted by congressional Conservative Democrats"). Kaczorowski, who argues that the Republicans intended to "revolutionize" and nationalize American government with respect to civil rights, nonetheless accepts the idea that most Americans—and perhaps most Republicans—were also racists. *See* Kaczorowski, *supra* note 88, at 870–71, 877–79. *See generally* PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH 52–55 (1999) (supporting the view that many Radical Republicans were racist, even though they felt a duty to protect blacks from racially motivated deprivations of civil rights).

253. 80 U.S. (13 Wall.) 581, 593 (1872) (holding that the 1866 Civil Rights Bill did not give the circuit court jurisdiction over a state criminal prosecution for a public offense, merely because two of the witnesses in the case were black); *see* Robert D. Goldstein, Blyew: *Variations on a Jurisdictional Theme*, 41 STAN. L. REV. 469 *passim* (1989) (discussing *Blyew* in the context of the Reconstruction Era).

254. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72–80 (1873). The case may well have involved not only Reconstruction politics but racism as well. *See* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836–1937, at 116–24 (1991).

255. Hall v. DeCuir, 95 U.S. 485 (1878) (invalidating as a burden on interstate commerce a Louisiana statute prohibiting racial segregation in transportation); United States v. Cruikshank, 92 U.S. 542 (1876) (construing the Fourteenth and Fifteenth Amendments and the Enforcement Act of 1870 narrowly to void convictions of whites for murder of blacks); United States v. Reese, 92 U.S. 214 (1876) (declaring two sections of the Ku Klux Klan Act of 1871 unconstitutional). The ready availability of legal and factual grounds for deciding otherwise was obvious from Justice Ward Hunt's solo dissent in *Reese*, 92 U.S. at 238–56 (Hunt, J., dissenting).

and dwindling. As early as 1876 the Richmond, Virginia, *Enquirer* gloated over the "return to reason" that it saw in the "improved temper of the North."[256]

Into the early 1880s, the Court did on occasion provide some highly circumscribed protection for the formal rights of blacks. It struck down official actions that discriminated expressly on the basis of race and occasionally provided relief against those who sought to defeat the right of blacks to vote in federal elections.[257] In one of its most doctrinally significant decisions in this regard, *Strauder v. West Virginia*,[258] the Court invalidated a state statute that excluded blacks from jury service.[259] The decision, however, did not foreclose other slightly less formal but equally effective devices for keeping blacks off juries, and Southern States quickly learned the lesson. After *Strauder*, the states accomplished the racial exclusion they sought by adopting a variety of informal, off-the-book methods that the Court regularly let pass.[260]

In spite of the few limited exceptions, the Court's major decisions continued to narrow the reach of the Civil War amendments, minimize the significance of Reconstruction legislation, and open wide de facto avenues of avoidance to southern white supremacists.[261] In 1882 the Court upheld an Alabama

256. MAGRATH, *supra* note 218, at 130–31 (quoting the *Richmond Enquirer*).

257. *E.g.*, *Ex parte* Yarbrough, 110 U.S. 651 (1884) (upholding federal convictions of individuals who sought to prevent blacks from voting in a federal election); *Ex parte* Siebold, 100 U.S. 371 (1880) (upholding federal convictions of state election officials for stuffing ballot boxes in federal election); *Ex parte* Virginia, 100 U.S. 339 (1880) (upholding federal prosecution of a state judge for overtly excluding blacks from juries). *See generally* HYMAN & WIECEK, *supra* note 70, at 473–515 (discussing various cases decided during the 1870s and 1880s that implicated the Thirteenth and Fourteenth Amendments).

258. 100 U.S. 303 (1880).

259. *Id.* at 310.

260. Schmidt, *supra* note 89, at 1456–76 (examining jury discrimination cases decided after *Strauder v. West Virginia*).

261. *E.g.*, Virginia v. Rives, 100 U.S. 313, 318–21 (1880) (denying the right of a black criminal defendant to remove on the alleged ground that court would, in fact, exclude blacks from the jury even though formal law did not compel such exclusion).

> The Supreme Court decisions on jury service imparted an important lesson to white southern legislators that they would not soon forget. Rather than bar blacks directly, they would have to find other means to keep them off juries. That lesson would subsequently be applied to voting, as legislators searched for ways to disenfranchise blacks without violating the Fifteenth Amendment. The same lesson would be used to affirm the constitutionality of racial segregation in an equally ingenious if devious fashion, as whites eagerly embraced their own version of the separate-but-equal doctrine.

LITWACK, *supra* note 219, at 255–56; *see also* HYMAN & WIECEK, *supra* note 70, at 494–503 (examining cases where the Court struck down the Reconstruction amendments and laws).

antimiscegenation statute on the ground that it punished whites as harshly as blacks.[262] The next year in *United States v. Harris*[263]—where a group of whites had taken several blacks from state custody and beat them, killing one in the process—the Court voided the provision of the Enforcement Act of 1871 that authorized defendants' indictment.[264] In justifying the result, *Harris* seemed to limit the Thirteenth Amendment to its barest possible meaning and to deny Congress the power to legislate thereunder to secure equal protection of the laws against the commonest and most violent forms of racial abuse.

What was perhaps the Court's most significant action came in 1883 in the ironically named *Civil Rights Cases*.[265] There, the Court invalidated the Civil Rights Act of 1875, the final Reconstruction measure that the Republicans had been able to enact, and construed the Fourteenth Amendment to protect only against actions taken by states or their official agents but not against actions taken by "private" individuals or groups.[266] Several of the Court's earlier opinions had suggested that limitation,[267] and the *Civil Rights Cases* imposed it explicitly and gave it a highly restrictive meaning.[268] The North reacted favorably to the decision, and the South was ecstatic. Immediately recognizing the decision's massive importance and passionate appeal, the operators of the Atlanta Opera House interrupted a performance to announce it. The audience erupted with "such a thunder of applause . . . as was never before heard within the walls of the opera house."[269] The ruling was a giant neon arrow

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

263. 106 U.S. 629 (1883).

264. *Id.* at 644.

265. 109 U.S. 3 (1883).

266. *Id.* at 8–26.

267. The Court had pointed to a "state action" idea in earlier cases. *See* Virginia v. Rives, 100 U.S. 313, 318 (1880); United States v. Cruikshank, 92 U.S. 542, 554–55 (1876).

268. *The Civil Rights Cases*, 109 U.S. at 8–26. On the elasticity of the "state action" doctrine, see Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 556 (1985) (arguing that "limiting the Constitution's protections to state action makes no sense" because the historical and jurisprudential underpinnings of the "state action" doctrine are anachronisms); Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMMENT. 329, 377 (1993) (arguing that "private" power is based on "public" laws and hence should be within the power of the state to regulate, notwithstanding a formal "state action" limitation).

269. DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 199 (1973). The reaction in the North, although somewhat mixed, was generally positive and accepting. The reaction in the white South was joyous. "As the survey of the press indicated, the consensus at the time was that the decision was right." 7 CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864–1888: PART II, at 588 (1987). For an extensive compilation of press reports, see *id.* at 568–85. Blacks immediately recognized the gravity

flashing in the sky, directing white southerners toward the road to racial supremacy.[270]

Practically, two other aspects of the Court's decisions may have been of even greater significance. One was the Court's apparent willingness to construe the "state action" requirement stringently, to demand formal and "official" action by a state or its officers, and to ignore for the most part regular and officially condoned "practices"—even those that involved state officials—as insufficient to implicate the Fourteenth Amendment.[271] The Court, in other words, opened the door widely for the lethal alliance of official duplicity and complicity with "unofficial" oppression and abuse. The other key element was the exceptional refinement with which the Court construed and applied the various Reconstruction measures. In spite of its repeated acknowledgment of the broad purposes of the Civil War amendments, as well as the obvious intent of the Reconstruction Congresses, the Court nonetheless found all too frequently—often for reasons of exceptional legal nicety—that statutes or constitutional amendments fell short of providing the legal rights or governmental powers that were necessary to protect blacks in the actual cases that came before it.[272] The delicacy of the Court's reasoning was, at best,

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of the decision and its hostility to their rights and interests. BLIGHT, *supra* note 201, at 309–11 (2001). *See generally* RICHARDSON, *supra* note 231, at 122–55 (discussing the attitudes and actions of African Americans, Northern Republicans and Democrats between 1870 and 1883).

270. John Hope Franklin, *History of Racial Segregation in the United States*, 304 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 5–6 (1956) (arguing that the Supreme Court's decision in the *Civil Rights Cases* was an important stimulus to the enactment of segregation statutes across the South).

271. *E.g.*, Neal v. Delaware, 103 U.S. 370 (1881) (construing the Civil Rights Removal statute more narrowly than the Fourteenth Amendment, compelling blacks needing relief from state courts to seek their remedy solely in the United States Supreme Court, and suggesting that the "state action" requirement could be met only by formal enactments of state law or, possibly, by overwhelming evidence of state sponsored racial discrimination); *Rives*, 100 U.S. at 319–22 (same). For discussions of the flexibility of the "state action" doctrine, see Larry Alexander, *The Public/Private Distinction and Constitutional Limits on Private Power*, 10 CONST. COMMENT. 361 (1993) (arguing that private power is subject to constitutional scrutiny because such power is a product of public laws and affects interests of constitutional significance); Chemerinsky, *supra* note 268 (arguing that "limiting the Constitution's protections to state action makes no sense" because the historical and jurisprudential underpinnings of the "state action" doctrine are anachronisms); and Kay, *supra* note 268 (arguing that "private" power is based on "public" laws and hence should be within the power of the state to regulate, notwithstanding a formal "state action" limitation).

272. *E.g.*, United States v. Harris, 106 U.S. 629, 637–40 (1883) (holding unconstitutional a provision of the 1871 Enforcement Act on the ground that it did not require an allegation of racial motivation, even though the indictment at issue had alleged such motivation and the government had proved it at trial); United States v. Cruikshank,

wholly unsuited to the manifestly remedial purposes of the law and the massive and outrageous abuses that were occurring throughout the South. Indeed, Justice Henry Billings Brown, an overt Anglo-Saxonist with little sympathy for his perceived "racial inferiors,"[273] expressed qualms about the Court's treatment of black defendants. "In some criminal cases against negroes, coming up from the Southern States," he wrote privately, "we have adhered to the technicalities of the law so strictly that I fear injustice has been done to the defendant."[274] Reading the Court's artfully crafted opinions, attorneys sympathetic to the white South could hardly have failed to pick up salient hints about the potential narrowness of federal law and the variety of effective approaches to their "race problem"—legal and otherwise—that the Court's decisions appeared to place beyond existing federal law.

The practical social coherence of the Court's Eleventh and Fourteenth Amendment jurisprudence from 1877 to 1890 was painfully clear. The Justices steadily narrowed the reach of the Fourteenth Amendment to an ever slimmer concept of "state action," while steadily expanding the immunity that the Eleventh Amendment offered to "states," the only legal entities which the Fourteenth Amendment restrained. For the rights of black Americans, the combination was fatal.

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92 U.S. 542, 551–59 (1876) (combining statements about the narrow and delegated nature of federal power with finding of narrow failings in indictments that required reversal of convictions below); United States v. Reese, 92 U.S. 214, 220–21 (1876) (finding two provisions of the Enforcement Act of 1870 unconstitutional because they did not require allegation that offenses were motivated by race or previous condition of servitude, even though the indictments themselves did allege such motivation).

One could try to defend the Court by arguing either that it had no realistic choice and simply made the best of a bad situation or that it was shifting responsibility to Congress in the hope of finding political support for efforts to enforce the various Reconstruction measures. The latter hypothesis might have some plausibility for decisions made in the years prior to 1877. After that date, however, it would seem highly doubtful that the Justices could have anticipated any serious congressional response to their decisions of delicacy which, in theory, left national power to deal with racial problems still available. *See, e.g.*, Benedict, *supra* note 88, at 77–79 (arguing that the Court's construction of congressional power under the constitutional amendments hardly subverted Republican intent and actually sustained Congress's power to protect citizens' fundamental civil and political rights).

273. *See infra* text accompanying notes 387–97.

274. Henry Billings Brown to Charles A. Kent, Feb. 27, 1903, *reprinted in* CHARLES A. KENT, MEMOIR OF HENRY BILLINGS BROWN: LATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES 92 (1915).

2. 1890

The year 1890 has held a special symbolic status in American history ever since the historian Frederick Jackson Turner called attention to a statement that appeared in the federal census of that year.[275] For the first time in the nation's history no discernible frontier line existed in the United States, the census noted, and Turner suggested in 1893 that the passing of the frontier meant that America was entering a new and potentially dangerous age.[276] Over the past century the significance of the 1890 census has faded, but the belief that the year did mark a time of profound national transition has not only persisted but sharpened. With respect to the post-Reconstruction settlement, that sense of transition was particularly acute.

In Congress in 1890, a group of Republicans tried belatedly—in what would be the last such effort for well over half a century—to pass major legislation to aid southern blacks. The election of 1888 had given the Republicans control of the presidency and both houses of Congress for the first time since 1874, and many of the party's stalwarts felt they had to carry through on their traditional promises to the party's black supporters. One bill would have provided federal funds to combat illiteracy, a proposal that in the early 1880s had drawn commendations even from some "moderate" white southerners. The possibility of success quickly faded, however, and in 1890 the bill went down to final defeat when Republican leaders abandoned it and the Senate reversed its position and rejected the proposal.[277] The second bill was directly related to black political rights and consequently was far more controversial. It attracted no support from the South. Congressman Henry Cabot Lodge of Massachusetts sponsored a Federal Elections bill, the so-called Lodge Force Bill, designed to protect black voting rights in the South.[278] Directly challenging southern efforts to disenfranchise blacks through intimidation and terror, the bill provided for the use of federal officials to supervise congressional elections in the region. Although

275. HENRY STEELE COMMAGER, THE AMERICAN MIND: AN INTERPRETATION OF AMERICAN THOUGHT AND CHARACTER SINCE THE 1880'S, at 41–54, 293–95 (1950); PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION 93–94 (1988).

276. FREDERICK JACKSON TURNER, THE FRONTIER IN AMERICAN HISTORY 1–38 (1920).

277. KELLER, *supra* note 196, at 480–81; Allen. J. Going, *The South and the Blair Education Bill*, 44 MISS. VALLEY HIST. REV. 267, 275 (1957).

278. GARRATY, *supra* note 196, at 243–44; PERMAN, *supra* note 246, at 38–43.

it passed the House, splits among the Republicans, a Senate filibuster by Democrats, and an increasingly hostile public opinion stymied the bill and then killed it. It was never revived.[279]

The very attempt to pass the Lodge Force Bill exacerbated white resentments by confirming the image of blacks as a disaffected mass of poor laborers who sought to exploit the federal government to gain special political and economic advantages.[280] E. L. Godkin, the liberal editor of the *Nation* and the *New York Evening Post*, spoke for many northerners in 1889 when he opposed the bill and acknowledged his strong and growing sympathies with the white South. Godkin asked his audience to imagine "how it would behave if it suddenly found all its great interests, both moral and material, placed at the mercy of a majority composed of half-barbarous laborers acting through the forms of law."[281] Neither the principles of universal suffrage nor the command of the legislature, he declared, were sufficient to lead any northerner to sacrifice "either himself or his property" for such a destructive purpose.[282]

In the South itself in 1890, Mississippi held a constitutional convention whose work resonated throughout the region. Called in significant part because the state's leading senator, James Z. Gregory, was worried that the Lodge Force Bill might pass Congress, the convention approved a new constitution that cut the state's voter rolls drastically. The new suffrage provisions contained a flexible and potentially lethal literacy test that required voters to be able to read and "give a reasonable interpretation" of every provision in the state's constitution. For good measure, the convention added another provision that required voters to pay a poll tax for two years before the election in which they intended to vote. Depriving many poor whites of the vote, the new constitution essentially eliminated the black vote altogether. On the state's proffered theory that the new constitution was based not on race but on the effort to eliminate unfit and dangerous voters, many northerners expressed their approval.[283] In 1890 there were 190,000 blacks registered to vote in the state; two years later there were 8,000.[284] Other southern states quickly

279. *See* sources cited *supra* note 277.

280. RICHARDSON, *supra* note 231, at 201–08.

281. *Id.* at 204 (quoting E. L. Godkin, editor of the *Nation* and the *New York Evening Post*).

282. *Id.*

283. *Id.* at 209–10.

284. ADAM FAIRCLOUGH, BETTER DAY COMING: BLACKS AND EQUALITY 1890–2000, at 6 (2001); KOUSSER, *supra* note 242, at 139–45.

followed Mississippi's lead, and by the early years of the twentieth century all of them had adopted legal devices that accomplished similar results.[285]

In the Supreme Court in 1890, the Justices announced their decision in *Louisville, New Orleans & Texas Railway Co. v. Mississippi*.[286] At issue was the constitutionality of a Mississippi racial segregation statute that required all passenger trains in the state to provide "equal, but separate, accommodation for the white and colored races."[287] The railroad, convicted of violating the statute, challenged its validity under the federal Commerce Clause. The Court upheld the measure.[288]

Louisville, New Orleans was important for two related reasons beyond the fact that it affirmed the constitutionality of separate-but-equal facilities. One was that it illustrated the Court's willingness to compartmentalize its doctrines to avoid acknowledging the underlying racial realities that forged the post-Reconstruction settlement. The Court maintained its lofty position and preserved the purity of its "law" simply by refusing to concede that it was deciding racial issues.[289] *Louisville, New Orleans*, it blandly pretended, was simply a Commerce Clause case involving a common carrier.

The other reason why the decision was important was that it exemplified the arbitrary and result-oriented nature of the Court's reasoning in race cases. In *Louisville, New Orleans* the Court confronted a then-recent precedent that seemed on all fours, *Hall v. DeCuir*.[290] Decided only a dozen years earlier, *Hall* had invalidated on Commerce Clause grounds a Louisiana statute—enacted while the state was under Republican control—that had *prohibited* racial discrimination against passengers on common carriers.[291] *Louisville, New Orleans* distinguished *Hall* on the ground that the statute in the

285. PERMAN, *supra* note 246, *passim*; C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 82–86 (2d ed. rev. 1966).

286. 133 U.S. 587, 592 (1890) (finding a Mississippi statute requiring separate but equal accommodations constitutional). "In many ways this Mississippi case was more pivotal than the more widely known *Plessy v. Ferguson*." JOHN E. SEMONCHE, CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890–1920, at 15 (1978).

287. *Louisville, New Orleans*, 133 U.S. at 588.

288. *Id.* at 592.

289. *Id.* at 589. The tactic was typical of Justice Brewer, who wrote the Court's opinion in *Louisville, New Orleans*. *See* J. Gordon Hylton, *The Judge Who Abstained in* Plessy v. Ferguson*: Justice David Brewer and the Problem of Race*, 61 MISS. L.J. 315, 332–34, 348, 358 (1991).

290. 95 U.S. 485 (1878).

291. *Id.* at 490.

earlier case had applied to interstate passengers while the statute it addressed was limited only to intrastate passengers.[292] In finding the Mississippi statute so limited, the Court in *Louisville, New Orleans* relied on the fact that the state's supreme court had specifically placed that narrowing construction on the statute.[293] Basing its decision on that distinction, however, the Court ignored two considerations. One was that in *Hall* the Louisiana Supreme Court had placed an identical "intrastate passengers only" construction on the state statute,[294] a construction that the United States Supreme Court had simply disregarded.[295] The second consideration that the Court ignored was that *Hall*'s reasoning applied snugly and directly to the nearly identical fact situation in *Louisville, New Orleans*. *Hall* had reasoned that, in spite of the state's attempt to limit the reach of its statute to intrastate passengers, the provision

> must necessarily influence [the carrier's] conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without.[296]

The Mississippi statute in *Louisville, New Orleans* had identical practical consequences for the carrier, and *Hall*'s reasoning meant that the latter statute should also be unconstitutional. Harlan, dissenting with Bradley, pointed helplessly to the obvious parallel between the cases. "It is difficult to understand how a state enactment, requiring the separation of the white and black races on interstate carriers of passengers, is a regulation of commerce among the States," he wrote, "while a similar enactment forbidding such separation is not a regulation of that character."[297]

There was, in fact, only one ground on which the two cases could be reasonably and fairly distinguished. They embodied contrasting

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292. *Louisville, New Orleans*, 133 U.S. at 589–90.

293. *Id.* at 591.

294. *Hall*, 95 U.S. at 490.

295. Hylton, *supra* note 289, at 333–34.

296. *Hall*, 95 U.S. at 489.

297. *Louisville, New Orleans*, 133 U.S. at 594 (Harlan, J., dissenting). Harlan "was for commerce clause consistency: the rest of the Court, by 1890, was more interested in upholding segregation." LOREN P. BETH, THE DEVELOPMENT OF THE AMERICAN CONSTITUTION, 1877–1917, at 196 (1971). More than a half century later, the Court essentially acknowledged that Harlan's analysis was accurate. Morgan v. Virginia, 328 U.S. 373, 384 & n.29, 385 (1946).

racial policies. Simply put, the Court approved the segregationist policy in the later statute and disapproved the racially egalitarian policy in the earlier one.[298]

Louisville, New Orleans came down on March 3, 1890, the same day the Court announced its decision in *Hans*. On their facts, *Hans* and *Louisville, New Orleans* were unrelated. In terms of the law, they raised entirely different issues. Ideologically, politically, and culturally, however, the two decisions were twins. Decided at the same time by the same Justices, they served the same social values and the same political purposes. *Hans* and *Louisville, New Orleans* stood shoulder to shoulder lifting into place the legal pillars of the post-Reconstruction settlement.

The work of the United States Supreme Court is complicated and uneven, and numerous influences play on the Justices, ranging from the promptings of preexisting doctrine to the pressures of immediate crises.[299] Variations, tensions, inconsistencies, and

298. It has been suggested that the difference between the two cases lay more in the Court's changed view of federalism than in its attitude toward racial segregation. Such a contention seems implausible for several reasons, including the fact that views about "federalism" were themselves often merely corollaries of attitudes about race and the further fact that the social attitudes of the Justices regularly seemed to influence the Court in Commerce Clause cases. *See* BETH, *supra* note 297, at 145–52. *Compare* OWEN M. FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910, at 354–56 (1993) (arguing that *Hall* and *Louisville, New Orleans* were essentially indistinguishable).

299. *Louisville, New Orleans* is a perfect example of the numerous and complex factors that may affect the judgments of individual Justices. Although Bradley wrote *Hans* and played a key role in facilitating the post-Reconstruction settlement, *see infra* Part IV.C.4, he nevertheless joined Harlan's dissent in *Louisville, New Orleans*. It seems likely that he acted as he did because the issue in the latter case appeared less pressing in terms of the need to confirm the post-Reconstruction settlement than did the pivotal issues presented in *Hans* and the *Civil Rights Cases* and because the value of allowing states to impose racial segregation in the context of interstate railroad transportation appeared less desirable to him than the value of maintaining national uniformity in the area and eliminating troublesome burdens on interstate commerce. *See* G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 99 (1988) (Bradley believed that "regulation should not disturb the free flow of interstate traffic," and he wanted economic regulation "to be uniform, and preferred federal to state control where possible."); Jonathan Lurie, *Mr. Justice Bradley: A Reassessment*, 16 SETON HALL L. REV. 343, 371 (1986) (stating that in "Bradley's judicial hierarchy of values, an 'untrammeled' interstate commerce ... ranked extremely high"). Although Bradley accepted broad state regulation of the railroads, he also favored an open national market and tended to give wide sway to the dormant Commerce Clause. Only two years earlier, for example, he had joined the Court's opinion in *Bowman v. Chicago & Northwestern Railway Co.*, 125 U.S. 465 (1888), holding that a state statute which prohibited the importation of liquor was a regulation of interstate commerce and hence unconstitutional. The decision was particularly noteworthy because the Court had, only three months earlier, held that state prohibition laws themselves were valid exercises of the police power. Mugler v. Kansas, 123 U.S. 623 (1887); *see* FISS, *supra* note 298, at 269 n.37, 270–72

surprises are inevitable.[300] In spite of such complexities and crosscutting pressures, however, historical periods forge distinctive "Courts" that enforce across doctrinal lines their own characteristic sets of values and policies. One thinks, for example, of the Marshall Court in 1819 deciding *Dartmouth College v. Woodward*[301] and *McCulloch v. Maryland*;[302] the Taney Court in 1842 deciding *Prigg v. Pennsylvania*[303] and *Swift v. Tyson*;[304] the early New Deal Court in 1937 deciding *West Coast Hotel v. Parrish*[305] and *National Labor Relations Board v. Jones & Laughlin Steel Corp.*;[306] the Warren Court in 1964 deciding *Heart of Atlanta Motel v. United States*[307] and *New York Times v. Sullivan*;[308] and the Rehnquist Court in 2001 deciding

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(suggesting that Bradley gave a broader scope to the dormant Commerce Clause than did Harlan, who dissented in *Bowman*). Further, in *Louisville, New Orleans* Bradley was likely especially sensitive to the force of precedent. He had joined the Court's opinion in *Hall*, and it seems probable that he could not deny the obvious conclusion that Harlan stated in his dissent: *Hall* and *Louisville, New Orleans* were indistinguishable. Leon Friedman, *Joseph P. Bradley*, *in* 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789–1969: THEIR LIVES AND MAJOR OPINIONS 1181, 1197 (Leon Friedman & Fred L. Israel eds., 1969) [hereinafter 2 THE JUSTICES OF THE U.S. SUPREME COURT] (suggesting that Bradley's decision in *Louisville, New Orleans* was based on his broad view of the Commerce Clause and his belief that Hall was properly decided and therefore controlling).

300. In 1944, for example, the Stone Court decided *Smith v. Allwright*, 321 U.S. 649, 664–66 (1944) (expanding the concept of "state action" and holding an "all-white" primary election system unconstitutional), and *Korematsu v. United States*, 323 U.S. 214, 219 (1944) (upholding military order that Japanese-Americans be excluded from designated areas of the western United States). The first struck a resounding blow against institutionalized racial discrimination, while the latter validated one of the nation's most extreme instances of governmental racial oppression. The dramatically contrasting decisions are, of course, readily understandable only in light of the circumstances that existed when they were decided.

301. 17 U.S. (4 Wheat.) 518, 650 (1819) (holding that a state-granted charter was a contract and that the Contract Clause prohibited states from infringing such charters by subsequent legislation).

302. 17 U.S. (4 Wheat.) 316, 423, 436 (1819) (upholding authority of United States to charter a national bank and prohibiting the states from either excluding the bank or taxing it).

303. 41 U.S. (16 Pet.) 539, 608–26 (1842) (holding a state statute unconstitutional, asserting supremacy of federal law, and expanding area in which federal power was exclusive).

304. 41 U.S. (16 Pet.) 1, 18–19 (1842) (upholding power of federal courts to develop a federal common law of commercial transactions and freeing them from obligation to follow the common-law decisions of state courts).

305. 300 U.S. 379, 396–400 (1937) (rejecting doctrine of substantive economic due process and broadening regulatory powers of both the state and federal governments).

306. 301 U.S. 1, 30 (1937) (broadening power of Congress under the Commerce Clause).

307. 379 U.S. 241, 258 (1964) (upholding power of Congress under the Commerce Clause to forbid racial discrimination in facilities that affected interstate commerce).

Alexander v. Sandoval[309] and *Board of Trustees of the University of Alabama v. Garrett*.[310] The cases in each of those pairs are legally and factually unrelated. Yet, in a far more meaningful sense—and, as a matter of historical analysis, in a decisive sense—they are one. So, too, are *Hans* and *Louisville, New Orleans*.

The Court's contemporaneous decisions shaping the scope of federal diversity jurisdiction confirm that unity. It was also in 1890 that the Court handed down its dubious decisions in *Pennsylvania* and *Austin*, cases that were equally of a piece with *Hans* and *Louisville, New Orleans*. All four curtailed federal judicial power. All four deferred to the states. While *Hans* and *Louisville, New Orleans* limited the ability of federal courts to intrude into the decisions of state legislatures, *Pennsylvania* and *Austin* limited their ability to intrude into the work of state courts.[311]

Most important, all four cases were coldly instrumentalist decisions marked by dubious reasoning and unacknowledged social goals. *Pennsylvania* and *Austin* demonstrated that the Court understood full well that it had the power to shape the scope of federal jurisdiction and, further, that it was determined to use that power to serve what it regarded as desirable national policy. *Pennsylvania* and *Austin* suggest, in short, that when the Court decided *Hans* and *Louisville, New Orleans* the same year it not only understood its power to mold federal law but also acted, as it did in the other two cases, for a considered reason of substantive social policy. In *Hans* and *Louisville, New Orleans* that reason of substantive social policy was to accommodate and help finalize the twin components of the post-Reconstruction settlement, honoring the special independence of the South and, implicitly, the dispositive racial bargain that lay at the settlement's core.

308. 376 U.S. 254, 264 (1964) (applying First Amendment to limit state defamation claim, where claim was brought by a southern official who sought damages against individuals for publicly criticizing his efforts in defense of racial segregation).

309. 532 U.S. 275, 293 (2001) (narrowing scope of federal civil rights statute and denying power of federal courts to create private cause of action).

310. 531 U.S. 356, 360 (2001) (applying Eleventh Amendment to limit congressional power and preclude application of federal civil rights statute to state government).

311. *In re* Pennsylvania Co., 137 U.S. 451, 457 (1890); N. Pac. R.R. Co. v. Austin, 135 U.S. 315, 318 (1890).

C. *The Driving Power of Race and Racism*

1. The Intensification of Racism in the Late Nineteenth Century

Racist ideas and attitudes were rooted deeply in the origins and spread of American slavery, and during the antebellum years they increasingly fueled American politics.[312] Three-quarters of a century ago the well-known, racist historian of the South, Ulrich Bonnell Phillips, identified "the central theme of Southern history" as the conviction that the South "shall be and remain a white man's country."[313] If that mandate was not a "central theme" of the nation's other sections, it was often a powerful subtheme.[314]

Before the Civil War not only Democrats, but Whigs, Free-Soilers, and Republicans shared the racist ideas that dominated

312. *See generally* DON E. FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY (completed and edited by Ward M. McAfee, 2001) (arguing that the Constitution did not consider slavery a national institution, but the federal government adopted that position); GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817–1914 (1971) (discussing the intellectual development of racist theory and ideology in the United States); WINTHROP D. JORDAN, THE WHITE MAN'S BURDEN: HISTORICAL ORIGINS OF RACISM IN THE UNITED STATES (1974) (tracing the historical roots of racism in America); WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1580–1812 (1968) (offering an in-depth discussion of the attitudes of white men toward Negroes in the early development of America).

313. Ulrich B. Phillips, *The Central Theme of Southern History*, 34 AM. HIST. REV. 30, 31 (1928). On Phillips, see GUTMAN, *supra* note 231, at 542; WILLIAMSON, *supra* note 213, at 317–22. On the idea of the South, the mythology of its "Lost Cause," and the central role of race, see BLIGHT, *supra* note 201, *passim*; THE MYTH OF THE LOST CAUSE AND CIVIL WAR HISTORY, *supra* note 232, *passim*; WHERE THESE MEMORIES GROW: HISTORY, MEMORY, AND SOUTHERN IDENTITY 88–218 (W. Fitzhugh Brundage ed., 2000). White racial supremacy, David W. Blight concludes, was "the cause that was *not* lost." BLIGHT, *supra* note 201, at 258.

314. African slavery had persisted in the North well into the nineteenth century. As late as 1810 there were 27,000 slaves living in the so-called "free" states. IRA BERLIN, MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA 228 (1998). Throughout the pre–Civil War years, moreover, free blacks in the North lived under severely restricted and discriminatory conditions. *See, e.g.*, GRAHAM RUSSELL HODGES, SLAVERY AND FREEDOM IN THE RURAL NORTH: AFRICAN AMERICANS IN MONMOUTH COUNTY, NEW JERSEY, 1665–1865, at 157–66 (1997) (describing the growth of free black communities and the challenges they faced); JOANNE POPE MELISH, DISOWNING SLAVERY: GRADUAL EMANCIPATION AND "RACE" IN NEW ENGLAND, 1780–1860, at 119–62 (1998) (discussing the political and social implications of the emergence of a class of free blacks in New England); GARY B. NASH & JEAN R. SODERLUND, FREEDOM BY DEGREES: EMANCIPATION IN PENNSYLVANIA AND ITS AFTERMATH 167–93 (1991) (discussing the hardships faced by newly freed blacks in Pennsylvania).

southern values,[315] and those groups often gave voice to their feelings of racial hierarchy and hatred. Although committed to barring slavery from the western territories, the Free-Soil Party was devoted not to racial equality but to maintaining the purity of the West as a "white man's territory."[316] The situation in the East was similar. "So deep ran the current of racism fostered by the Democratic Party [in New York] that the new Republican Party chose to address the issue of land reform, rather than slavery, to gain national standing," Anthony Gronowicz concluded.[317] New York Republicans criticized slavery, but they were not pro-black. "To the contrary, most Republicans were racists who did not believe in social equality of the races."[318] Northerners resented the "Slave Power" because the combination of slavery and the Constitution's "three-fifths" clause gave the Southern States and their dominant planter class disproportionate power in national politics, not because they supported black freedom and equality.[319] Chief Justice Roger B. Taney seemed to speak for the great majority of white Americans when he declared in *Dred Scott* that blacks were "beings of an inferior order, and altogether unfit to associate with the white race."[320] Even Lincoln himself—granted the remarkable nature of his character and the fact that his thinking about race was in many ways ahead of his times—shared widespread ideas about white racial superiority, the

315. *See, e.g.*, DEGLER, *supra* note 191, at 337, 347, 351, 370 (noting that the South was not monolithic and gave rise to a variety of dissenters, but almost all of the dissenters rejected ideas of racial equality).

316. EUGENE H. BERWANGER, THE FRONTIER AGAINST SLAVERY: WESTERN ANTI-NEGRO PREJUDICE AND THE SLAVERY EXTENSION CONTROVERSY 125 (1967) (asserting that some members of the Free-Soil Party opposed slavery "more out of 'repugnance to the presence of the Negro' than to the moral revulsion of slavery"). *See generally* PHYLLIS F. FIELD, THE POLITICS OF RACE IN NEW YORK: THE STRUGGLE FOR BLACK SUFFRAGE IN THE CIVIL WAR ERA 83–85 (1982) (noting the Free-Soilers' disassociation with racial equality); JAMES A. RAWLEY, RACE & POLITICS: 'BLEEDING KANSAS' AND THE COMING OF THE CIVIL WAR (1969) (discussing racial attitudes of antislavery whites before the Civil War); Richard H. Brown, *The Missouri Crisis, Slavery, and the Politics of Jacksonianism*, 61 S. ATL. Q. 55 (1966) (same); Eric Foner, *Racial Attitudes of the New York Free Soilers*, 46 N.Y. HIST. 311 (1965) (discussing the conflicting racial views of the Free-Soil Party in New York State); Ronald P. Formisano, *The Edge of Caste: Colored Suffrage in Michigan, 1827–1861*, 56 MICH. HIST. 19, 35 (1972) (noting the racist attitudes of the Free-Soilers).

317. ANTHONY GRONOWICZ, RACE AND CLASS POLITICS IN NEW YORK CITY BEFORE THE CIVIL WAR 132 (1998).

318. *Id.*

319. LEONARD L. RICHARDS, THE SLAVE POWER: THE FREE NORTH AND SOUTHERN DOMINATION, 1780–1860, at 32–46 (2000).

320. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857) (Taney, C.J.) (noting that at the time of the Declaration of Independence, this was the prevailing sentiment regarding blacks).

propriety of black political and social subordination, and the desirability of sending blacks back "to Liberia—to their own native land."[321]

Racist ideas and attitudes remained strong after the Civil War, fueled much of the opposition to the Fourteenth Amendment,[322] and then began to intensify in the anti-Reconstruction reaction that spread in the 1870s. By 1880, the *Nation* was ready to defend the exclusion of blacks from southern juries because of "the difficulty which exists in many parts of the South of finding negroes mentally and morally qualified to sit on juries."[323] The Chief Justice of Delaware agreed, announcing in open court the same year that "the great body of black men residing in this State are utterly unqualified by want of intelligence, experience, or moral integrity to sit on juries."[324]

In the late nineteenth century racist ideas and attitudes became increasingly common, acceptable, and hard-edged, and these attitudes suffused all levels of American society.[325] Racial discrimination in employment became common, with whites steered into better jobs and blacks—when they were hired—used for the most undesirable and lowest paying work.[326] An outpouring of books and articles, often purporting to be thoroughly "scientific," flooded the country and reached all social classes and subgroups.[327] The "new"

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321. Eric Foner, *The Education of Abraham Lincoln*, N.Y. TIMES BOOK REV., Feb. 10, 2002, at 11. By the end of the war, Lincoln had modified some of his earlier views. *Id.* at 12.

322. NELSON, *supra* note 88, at 96–104. *See generally* RICHARD PAUL FUKE, IMPERFECT EQUALITY: AFRICAN AMERICANS AND THE CONFINES OF WHITE RACIAL ATTITUDES IN POST-EMANCIPATION MARYLAND (1999) (discussing the political and economic opportunities available to newly freed slaves in Maryland); LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY (1979) (discussing the struggles faced by newly freed slaves).

323. Schmidt, *supra* note 89, at 1446 n.221 (quoting the *Nation*).

324. Neal v. Delaware, 103 U.S. 370, 393–94 (1881) (quoting the Chief Justice of Delaware).

325. THOMAS F. GOSSETT, RACE: THE HISTORY OF AN IDEA IN AMERICA 253–86 (2d prtg. 1964); STOW PERSONS, AMERICAN MINDS: A HISTORY OF IDEAS 276–97 (1958).

326. *See, e.g.*, VENUS GREEN, RACE ON THE LINE: GENDER, LABOR, AND TECHNOLOGY IN THE BELL SYSTEM, 1880–1980, at 227–57 (2001) (describing the hiring practices of the Bell System, which channeled black women into segregated positions); WALTER LICHT, WORKING FOR THE RAILROAD: THE ORGANIZATION OF WORK IN THE NINETEENTH CENTURY 223–25 (1983) (describing the almost total absence of blacks hired by railroads in the post-Civil War era); RICHARDSON, *supra* note 231, *passim* (describing the complex relationship between race and labor).

327. *See generally* NICHOLAS WRIGHT GILLHAM, A LIFE OF SIR FRANCIS GALTON: FROM AFRICAN EXPLORATION TO THE BIRTH OF EUGENICS (2001) (tracing the life of

immigration from southern and eastern Europe and Asian immigration on the West Coast nourished nativist and antiforeign sentiments that compounded the force of antiblack attitudes and helped spread the gospel of race and the cult of Anglo-Saxon racial superiority.[328] Gradually, northerners who had supported the Civil War and sympathized with the cause of antislavery changed their views. "It was quite common in the 'eighties and 'nineties,' " C. Vann Woodward reported, "to find in the *Nation*, *Harper's Weekly*, the *North American Review*, or the *Atlantic Monthly* Northern liberals and former abolitionists mouthing the shibboleths of white supremacy regarding the Negro's innate inferiority, shiftlessness, and hopeless unfitness for full participation in the white man's civilization."[329] Eric Foner identified the dynamic of intensifying racism that marked the post-Reconstruction years. "If racism contributed to the undoing of Reconstruction," he explained, "by the same token Reconstruction's demise and the emergence of blacks as a disenfranchised class of dependent laborers greatly facilitated racism's further spread . . . ."[330]

Throughout the last quarter of the nineteenth century, southerners conducted a purposeful and persistent campaign to convince the North that Reconstruction had been a time of outrage, that blacks were intrinsically inferior and a menace to white civilization, and that the South as well as the nation had to control blacks stringently as a matter of basic self-defense.[331] In the 1880s, for

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Francis Galton and his development of the idea of eugenics); GOSSETT, *supra* note 325 (describing the history of racial thinking in America).

328. *See, e.g.*, JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925, at 35–105 (2d ed. 1988) (describing changing American attitudes toward race and ethnicity in the 1880s and 1890s); MATTHEW FRYE JACOBSON, WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE (1998) (discussing the importance of the idea of "whiteness" and its cultural significance in late nineteenth- and early twentieth-century America); LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 122–35 (1995) (discussing the rise of nativism among middle-class white Americans in the early twentieth century); Paul A. Kramer, *Empires, Exceptions, and Anglo-Saxons: Race and Rule Between the British and United States Empires, 1880–1910*, 88 J. AM. HIST. 1315 *passim* (2002) (discussing the use of ideas about Anglo-Saxon racial superiority to support expansive American foreign policy in the 1890s); Edward Shapiro, *Anti-Semitism Mississippi Style*, *in* ANTI-SEMITISM IN AMERICAN HISTORY 129, 137–41 (David A. Gerber ed., 1986) (describing racist and anti-Semitic attitudes of two Mississippi politicians in the early- to mid-twentieth century).

329. WOODWARD, *supra* note 285, at 70. On the racism of the North and the region's acquiescence in southern racial lynching practices, see DRAY, *supra* note 233, at 258–72 (discussing Congress's failure to pass a federal anti-lynching law).

330. FONER, *supra* note 71, at 604.

331. There were "dissenting" southerners who showed sympathy for blacks or sought to create black-white political alliances. The former were relatively few, scattered, and

example, Henry W. Grady, the editor of the *Atlanta Constitution* and a leading spokesman for the "New South," toured the country, lecturing on the need to ensure the "supremacy of the white race of the South" while restoring and modernizing the southern economy.[332] "When you plant your capital in millions," he urged the Boston Merchants' Association in 1889, "send your sons that they may help know how true are our hearts and may help to swell the Anglo-Saxon current until it can carry without danger this black infusion."[333] By the century's last decade most northerners had embraced, or at least acquiesced in, the southern message, and in the name of national reconciliation and racial unity they had accepted the South's efforts to disenfranchise blacks and establish a segregated social order.[334]

Racist convictions marked many of the most thoughtful and cultured individuals in the nation. Henry James, William James, Jack London, Charles Sanders Peirce, Owen Wister, Henry Adams, Woodrow Wilson, Theodore Roosevelt, William Graham Sumner, and Grover Cleveland—the president whom Richard Hofstadter called "the flower of American political culture in the Gilded Age"[335]—were but a few of the prominent and distinguished individuals who in varying ways harbored or proclaimed racist

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ineffective, and they seldom challenged the fundamental premises of white racial superiority and political supremacy. The latter—such as the Virginia Readjusters in the early 1880s and Populists in the 1890s—enjoyed a few victories and raised the possibility of substantial change. Their successes, however, were limited to a mere handful of states and proved to be fleeting. Their ultimate failure was in significant part the result of race-baiting by their Democratic opponents. *See* DEGLER, *supra* note 191, at 264–371. Few of these southern dissenters, moreover, believed in racial equality or urged major changes in the customs and practices of southern race relations. "The Populists, in short, were no more ideologically committed to equality for blacks—even political equality—than most other Southern white men." *Id.* at 337.

332. GOSSETT, *supra* note 325, at 264–65 (quoting Henry W. Grady, editor of the *Atlanta Constitution*).

333. *Id.* at 265 (quoting Henry W. Grady). Despite his "New South" rhetoric, Grady was uncompromising on the subject of race. As he declared in a speech in Dallas, Texas in 1887:

> The supremacy of the white race of the South must be maintained forever, and the domination of the negro race resisted at all points and at all hazards–because the white race is the superior race. This is the declaration of no new truth. It has abided forever in the marrow of our bones, and shall run forever with that blood that feeds Anglo-Saxon hearts.

Id. at 264 (quoting Henry W. Grady).

334. FAIRCLOUGH, *supra* note 284, at 7–17; GOSSETT, *supra* note 325, at 253–86; KOUSSER, *supra* note 234, at 9; MEIER & RUDWICK, *supra* note 233, at 192–93; WILLIAMSON, *supra* note 213, at 327–40; WOODWARD, *supra* note 285, at 67–109.

335. RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION 182 (1948).

attitudes.[336] Northerners " 'no longer denounce the suppression of the Negro vote in the South as it used to be denounced in the reconstruction days,' " proclaimed a *New York Times* editorial in 1900.[337] " 'The necessity of it under the supreme law of self-preservation is candidly recognized.' "[338]

2. Racism and Its Influence on the Legal Profession and the Judiciary

Common throughout American society and its upper reaches, racist attitudes suffused the legal profession as well.[339] The author of one of the most extreme and influential statements of the southern racist ideology was a graduate of the Harvard Law School and a member of the Baltimore bar. In 1889, Philip A. Bruce wrote *The Plantation Negro As Freedman*, a book with a simple and blunt message. Blacks were childlike, driven by "licentious" instincts, and incapable of taking care of themselves or their families.[340] Emancipation had caused a steep, escalating, and dangerous deterioration in all aspects of their lives, a result that was "gloomy and repelling in its moral aspects."[341] Absent the discipline of slavery, their conditions could only continue to worsen, and they would end up living in "anarchy and barbarism."[342] The only remedy, Bruce maintained, was immediate disenfranchisement and, if at all possible, massive deportations.[343]

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336. GARY GERSTLE, AMERICAN CRUCIBLE: RACE AND NATION IN THE TWENTIETH CENTURY 14–80 (2001); GOSSETT, *supra* note 325, at 153–54, 204–08, 280–86, 304–05; GUTMAN, *supra* note 231, at 538; LOUIS MENAND, THE METAPHYSICAL CLUB 144–45, 161 (2001).

337. GOSSETT, *supra* note 325, at 285 (quoting a *New York Times* editorial).

338. *Id.*

339. Such attitudes were particularly prevalent in the late nineteenth century and continued well into the twentieth. *See, e.g.*, JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA ch. 4 (1976) (discussing attempts to "cleanse" the bar following World War I); KERMIT HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 216–18 (1989) (discussing the struggles of blacks and women attempting to practice law in the nineteenth century); A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 127–51 (1996) (discussing racism in the criminal justice system); ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 92–111 (1983) (discussing law schools' efforts to standardize and professionalize the practice of law).

340. The material in this paragraph is drawn from GUTMAN, *supra* note 231, at 534–38. Bruce was the scion of a wealthy slave-owning family from Virginia who, in 1887, left the practice of law for a career in business.

341. *Id.* at 535.

342. *Id.* at 537.

343. *Id.* at 537–38.

For their part, the law schools guarded the professional gates with vigilance. Most remained entirely white, and the few that began admitting blacks after the Civil War accepted no more than a handful.[344] Even during Reconstruction only one publicly supported law school in the entire South, the University of South Carolina, admitted black students, and when Reconstruction ended it quickly reverted to a policy of racial exclusion.[345] Although a dozen black law schools were founded between 1870 and 1896, most failed within a decade or two.[346] Howard, for example, founded in 1868 and destined to become a preeminent national black law school, struggled desperately through the late nineteenth century. In 1887, Howard enrolled only eight black students, and during the depression of the 1890s it teetered on the brink of bankruptcy.[347] No "white" law school hired a black professor until well into the twentieth century.[348]

Similarly, the practicing bar remained almost uniformly white. In many areas black lawyers were virtually nonexistent. Where black lawyers did exist, they occupied the profession's periphery, relegated to serving a small black clientele and entertaining little hope of professional recognition. As late as 1890 there were only thirty-eight black lawyers in Virginia, approximately two percent of the state's total.[349] Texas hosted a bare dozen, scattered for the most part among the state's small towns and rural areas.[350] South Carolina admitted approximately sixty black lawyers to the state bar between 1868 and 1890, but for a variety of practical reasons the great majority did not continue, or often even begin, to practice law.[351] Those who did faced particularly difficult conditions. Well into the twentieth century black lawyers "were consistently frustrated by impoverished clients, local

344. J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844–1944, at 33–40, 64 (1993).

345. *Id.* at 35–36.

346. *See id.* at 41, 56–58 (detailing the early struggles of black law schools throughout the country).

347. STEVENS, *supra* note 339, at 81.

348. SMITH, *supra* note 344, at 41 (recounting Clarence Maloney's review year at Buffalo School of Law in 1925 as the first time a "white" law school hired a black professor).

349. W. Hamilton Bryson & E. Lee Shepard, *The Virginia Bar, 1870–1900*, *in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 171, 173 (Gerard W. Gawalt ed., 1984) [hereinafter THE NEW HIGH PRIESTS].

350. Maxwell Bloomfield, *From Deference to Confrontation: The Early Black Lawyers of Galveston, Texas, 1895–1920*, *in* THE NEW HIGH PRIESTS, *supra* note 349, at 151, 152.

351. John Oldfield, *The African American Bar in South Carolina, 1877–1915*, *in* AT FREEDOM'S DOOR: AFRICAN AMERICAN FOUNDING FATHERS AND LAWYERS IN RECONSTRUCTION SOUTH CAROLINA 116, 126 (James Lowell Underwood & W. Lewis Burke, Jr., eds., 2000).

prejudice, and, except for the fortunate few, lack of business."[352] The situation was hardly better in the North. In Massachusetts there were no more than a handful of black lawyers, and they were scarcely visible to the profession or public at large.[353] The 1890 census identified more than eighty-nine thousand "white" attorneys in the United States but only 431 "negroes."[354] Blacks thus constituted less than one-half of one percent of the nation's bar.[355] The American Bar Association, founded in 1878 as the voice of the profession's elite, simply excluded blacks from membership.[356]

With the rarest and most minor of exceptions, the bench was also exclusively white. While the first black judge ever to sit on a state supreme court was elected during Republican Reconstruction in South Carolina in 1870, he was easily defeated for reelection with the return of white rule six years later.[357] In Washington, D.C., it was not until 1909 that a black was appointed to a judicial post higher than justice of the peace, and then only to the position of municipal judge.[358] In the federal judiciary the pattern was absolute. There was not, and had never been, a single black judge in the courts of the United States. In fact, no African American would be named to the federal bench until the 1930s, and none would sit as a life-tenured Article III judge until 1950.[359]

In such a context, it was not surprising that both state and federal judiciaries reflected the nation's racist attitudes or that they put their racial thinking on public display. In spite of substantial efforts during the 1860s and 1870s to protect the educational rights of blacks, for example, the courts gradually succumbed to racist and segregationist

352. *Id*; *see also* LITWACK, *supra* note 219, at 249–52 (describing the myriad of obstacles facing the black lawyer during Reconstruction); Edward A. Purcell, Jr., *The Action Was Outside the Courts: Consumer Injuries and the Uses of Contract in the United States, 1875–1945*, *in* PRIVATE LAW AND SOCIAL INEQUALITY IN THE INDUSTRIAL AGE: COMPARING LEGAL CULTURES IN BRITAIN, FRANCE, GERMANY, AND THE UNITED STATES 505, 522–23 (Willibald Steinmetz ed., 2000) (explaining the violence and injustice responsible for limiting blacks' ability to pursue tort claims).

353. Gerard W. Gawalt, *The Impact of Industrialization on the Legal Profession in Massachusetts, 1870–1900*, *in* THE NEW HIGH PRIESTS, *supra* note 349, at 97, 103–05.

354. The number of lawyers is drawn from the "Appendix" in Oldfield, *supra* note 351, at 126–29.

355. SMITH, *supra* note 344, at 623.

356. *See* JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 255 (1950) (identifying the administrative practice of the ABA to exclude blacks).

357. SMITH, *supra* note 344, at 216–17.

358. *Id.* at 137–38.

359. SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 101, 183 (1997).

pressures. A study of school desegregation cases in Louisiana and Kansas found that in the 1880s the courts had grown increasingly hostile to black claims.[360] Ultimately "in both states," J. Morgan Kousser concluded, "blacks lost out because a new set of racist judges took office and emasculated constitutional guarantees."[361] In 1890 a federal judge in Georgia upheld the constitutionality of a law forbidding interracial marriages on the simple ground that the law preserved "the home life of the people, their decency and their morality," which was the foundation of the nation's "vast social structure of liberty."[362] The same year the Missouri Supreme Court relied on intrinsic racial differences in upholding educational segregation. "There are differences in races, and between individuals of the same race, not created by human laws, some of which can never be eradicated," it explained.[363] "These differences create different social relations recognized by all well-organized governments."[364]

Similarly, during the quarter century before *Hans*, both state and federal courts had come to accept a "separate-but-equal" doctrine in transportation law. Repeatedly, these courts relied on an 1867 Pennsylvania case, *West Chester & Philadelphia Railroad Co. v. Miles*.[365] There, in extensively cited and frequently quoted language, the judge had upheld racial segregation on the ground of inherent racial differences, the instinctive "aversion" and "repulsion" that whites felt for blacks, and a divinely implanted instinct for racial separation.[366] "By 1890," Charles A. Lofgren concluded, "state and federal courts had extensively cited, quoted, and paraphrased *Miles* in the course of implanting the separate-but-equal doctrine into the common law of carriers of passengers."[367]

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360. *See* J. Morgan Kousser, *Before* Plessy, *Before* Brown: *The Development of the Law of Racial Integration in Louisiana and Kansas*, *in* TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS 213, 239 (Paul Finkelman & Stephen E. Gottlieb eds., 1991).

361. *Id.*

362. KELLER, *supra* note 196, at 451 (quoting a federal judge in Georgia). For a thorough discussion of how a typical southern state treated miscegenation, see Julie Novkov, *Racial Constructions: The Legal Regulation of Miscegenation in Alabama, 1890–1934*, 20 LAW & HIST. REV. 225 (2002).

363. Lehew v. Brummell, 15 S.W. 765 (1891), *quoted in* NELSON, *supra* note 88, at 185–86.

364. *Id.*

365. 93 Am. Dec. 744 (1867).

366. *See* LOFGREN, *supra* note 248, at 118–21 (discussing the importance of *West Chester* in establishing the "reasonableness" of racial segregation).

367. *Id.* at 121.

Justices who served on the Supreme Court of the United States in the late nineteenth and early twentieth century, both before and after *Hans*, embraced those views. Chief Justice Waite's experience in South Carolina was informed by his relatively mild but nevertheless deep belief in the racial inferiority of blacks.[368] Joseph McKenna from California, appointed in 1897, shared the common Western hostility to the Chinese. As a politician and legislator on both state and national levels, McKenna consistently and enthusiastically advocated various types of anti-Chinese legislation, and as a federal judge in California he construed the law rigorously to enforce the exclusion of Chinese, including even those who presented evidence of American citizenship.[369] Once on the Court he had no qualms in citing and following *Plessy*.[370] Oliver Wendell Holmes, Jr., an abolitionist sympathizer from Massachusetts and thrice-wounded Union officer, had quickly lost sympathy for the racial cause of his youth. The experience of battle, he declared, taught him the folly of abolitionism and its moralistic activism.[371] Readily accepting the post-Reconstruction settlement and the ideal of white reconciliation, Holmes declared in 1884 that his wartime experiences had given him an intense feeling of "the same brotherhood for the enemy that the north pole of a magnet has for the south."[372] Some of his later opinions on the Court, one of his biographers concluded, can be explained only on the basis of "notions of white supremacy."[373]

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368. *See* MAGRATH, *supra* note 218, at 153–54 (discussing Justice Waite's conformity with the typical nineteenth-century white person's view of the black race).

369. MATTHEW MCDEVITT, JOSEPH MCKENNA: ASSOCIATE JUSTICE OF THE UNITED STATES 56, 64, 66, 84, 98 (1974).

370. *See, e.g.*, Chiles v. Chesapeake & Ohio R.R. Co., 218 U.S. 71, 77 (1910) (McKenna, J.) (relying on and quoting *Plessy*).

371. 2 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916–1935, at 942 (Mark DeWolfe Howe ed., 1953).

372. Oliver Wendell Holmes, Jr., An Address Delivered May 30, 1884, at Keene, N.H., Before John Sedgwick Post No. 4, Grand Army of the Republic, *in* THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 4, 5 (compiled by Mark DeWolfe Howe 1962).

373. G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 340 (1993); *see* United States v. Reynolds, 235 U.S. 133, 150 (1914) (Holmes, J., concurring) (arguing that the Thirteenth Amendment, on its face, allows peonage); Bailey v. Alabama, 219 U.S. 219, 245 (1911) (Holmes, J., dissenting) (declining to recognize disparate racial impact as a factor in the decision); Giles v. Harris, 189 U.S. 475 (1903) (Holmes, J.) (refusing to grant equitable relief to black citizens demanding to be placed on voting lists). *See generally* SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 257–59, 458 n.15 (1989) (suggesting influence of racist ideas in Holmes's opinion in *Giles*); WHITE, *supra*, at 333–43 (arguing that Holmes's opinions suggest influence of racist ideas); Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833,

Justice Nathan Clifford, a Maine Democrat who joined the Court in 1858 and remained until 1881, was identified with the pro-southern wing of his party before and after his appointment to the Court.[374] He opposed antislavery efforts, fought abolition in the District of Columbia, and attacked "incendiary schemes" to abrogate the three-fifths clause and base representation on free persons only.[375] In *Hall v. DeCuir*,[376] in 1878, where a unanimous Court invalidated a state Reconstruction statute that prohibited racial segregation on common carriers, Clifford was not satisfied. He wrote a separate concurrence to emphasize the law's unreasonable and outrageous nature and to emphasize the utter irrelevance of the Fourteenth Amendment to racial segregation in transportation.[377] Providing separate facilities, he declared, was essential "to prevent contacts and collisions arising from natural or well-known customary repugnancies which are likely to breed disturbances, where white and colored persons are huddled together without their consent."[378] Clifford equated the commands of the law with his personal feelings. The "laws of the United States," he wrote, "do not require the master of a steamer to put persons in the same apartment who would be repulsive or disagreeable to each other."[379]

Chief Justice Edward D. White of Louisiana, named to the Court in 1894 and then raised to the center chair in 1910, exemplified the social realities that helped shape the Court's thinking. During the Civil War White served in the Confederate army, and after the war he worked assiduously to overthrow Republican Reconstruction and

844–48 (1986) (arguing Justice Holmes believed science should be used to produce a better race).

374. *See* William Gillette, *Nathan Clifford*, *in* 2 THE JUSTICES OF THE U.S. SUPREME COURT, *supra* note 299, at 963, 964, 967–68, 970.

375. *See* Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, The Fourteenth Amendment, and the* Slaughter-House Cases, 70 CHIC.-KENT L. REV. 627, 665–66 (1994) (describing Justice Clifford's politics, career and reputation).

376. 95 U.S. 485 (1878).

377. *Id.* at 504–06 (Clifford, J., concurring).

378. *Id.* at 503 (Clifford, J., concurring). In *Hall*, one scholar wrote, Clifford "attempted to establish his prewar racist biases as part of the Constitution." KOUSSER, *supra* note 234, at 11.

379. *Hall*, 95 U.S. at 504 (Clifford, J., concurring). Clifford often wrote separate opinions to elaborate particularly restrictive constitutional doctrine and, in effect, to defend southern racial policies. *See, e.g.*, Tennessee v. Davis, 100 U.S. 257, 272 (1880) (Clifford, J., dissenting) (arguing that the decision should remain a state court matter out of the reach of federal courts); United States v. Reese, 92 U.S. 214, 222 (1876) (Clifford, J., dissenting) (defending voter requirements as legitimate under the Fifteenth Amendment despite disparate racial impact).

return white rule to the South.[380] When D. W. Griffith made his egregiously racist movie *Birth of a Nation* in 1915, the National Association for the Advancement of Colored People ("NAACP") mounted a campaign against it.[381] Thomas W. Dixon, a well-known and highly influential racist ideologue who had written *The Clansman*, the book on which the film was based,[382] sought to counter the campaign by persuading President Woodrow Wilson and Chief Justice White to see, and hopefully approve, the film. Wilson quickly agreed, watched it in the White House, and immediately expressed his admiration. When Dixon met with White, the Chief Justice grew excited as soon as Dixon described the film's subject. "I was a member of the Klan, sir," White blurted out.[383] Immediately, the Chief Justice began to recount how on "many a dark night, I walked my sentinel's beat through the ugliest streets of New Orleans with a rifle on my shoulder."[384] Then, White asked Dixon one dispositive question: "You've told the true story of that uprising of outraged manhood?"[385] When Dixon assured him that he had, White agreed to attend a showing. Subsequently, whenever the NAACP mounted an effort to ban the movie, Dixon showed up with a statement that the President and the Chief Justice had both seen and praised the movie. Neither the White House nor the Supreme Court ever denied his claim.[386]

The racism of Justice Henry Billings Brown, a Michigan Republican who supported Lincoln in 1860 and arrived on the Court the year after *Hans*, was even more overt.[387] In spite of his northern background, Brown was deeply sympathetic toward the South and its "race problem." In 1906—when racial lynchings in the South were frequent, brutal, and utterly notorious—he criticized the nation's criminal laws as, in the words of one report, "deplorably feeble and inefficient" and then, in effect, defended lynching because it showed

380. James F. Watts, Jr., *Edward Douglas White*, *in* 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789–1969: THEIR LIVES AND MAJOR OPINIONS, at 1633, 1636 (Leon Friedman & Fred L. Israel eds., 1969).

381. ERIC F. GOLDMAN, RENDEZVOUS WITH DESTINY 228 (1963).

382. WILLIAMSON, *supra* note 213, at 140; Raymond A. Cook, *The Man Behind 'The Birth of a Nation,'* 39 N.C. HIST. REV. 519 *passim* (1962).

383. The story of Dixon and White is reported in GOLDMAN, *supra* note 381, at 228–29. Goldman found an account of the meeting in a private manuscript Dixon had written that was in the possession of Dixon's family. *Id.* at 229 n.8.

384. *Id.* at 228.

385. *Id.*

386. *Id.* at 229.

387. Robert J. Glennon, Jr., *Justice Henry Billings Brown: Values in Tension*, 44 U. COLO. L. REV. 553, 555 (1973).

"a determination on the part of the people to see that criminals were punished."[388] His argument, sentiment, and rhetoric were those of the turn-of-the-century white South at its most callous and racist.[389]

Brown was, in fact, an ardent Anglo-Saxonist who believed unquestioningly in the innate superiority of the "Caucasian race." He frequently disparaged blacks, Jews, laborers, and "aliens" of all varieties, and he readily invoked the maxim that "Blood will tell."[390] In one of his Supreme Court opinions, he announced the right of "the American Empire" to impose "Anglo-Saxon principles" on "alien races."[391] Not surprisingly, Chief Justice Fuller selected him to write for the Court in *Plessy*, and Brown did not disappoint. "Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences," he declared for the Court, "and the attempt to do so can only result in accentuating the difficulties of the present situation."[392] The superiority of the Anglo-Saxon race dictated the only possible result. "If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."[393] Brown rejected the "underlying fallacy" of plaintiff's constitutional challenge—the assumption that a statute mandating racial segregation stigmatized blacks with "a badge of inferiority"—on the ground that any sense of inferiority would follow only if "the colored race chooses to put that construction" on the act.[394] At that point, his own racial arrogance and racial identification leaped to the surface of the Court's opinion. Were the situation to be reversed and the "colored race" to become the "dominant" power in

388. *Justice Brown's Response, in Retirement of Mr. Justice Henry B. Brown from the Supreme Court of the United States*, 40 AM. L. REV. 548, 551 (1906). The report does not purport to contain a verbatim account of Brown's remarks.

389. "To white Southerners, lynching was a necessary means of law enforcement aimed at a specific threat from a brutalized race." FAIRCLOUGH, *supra* note 284, at 25. *See generally id.* at 23–28 (cataloguing the reason for the rise of lynchings between 1880 and 1910).

390. Glennon, *supra* note 387, at 600–02 (quoting Justice Henry Billings Brown). See the apparently anti-Semitic reference in Henry Billings Brown to Charles A. Kent, Jan. 1, 1912, *reprinted in* KENT, *supra* note 274, at 113.

391. Downes v. Bidwell, 182 U.S. 244, 261, 287 (1901) (Brown, J.). Although Brown's opinion was formally for the Court, his bald statements led the other Justices to write separately. *Id.* at 244.

392. Plessy v. Ferguson, 163 U.S. 537, 552 (1896).

393. *Id.*; *see* Joel Goldfarb, *Henry Billings Brown*, *in* 2 THE JUSTICES OF THE U.S. SUPREME COURT, *supra* note 299, at 1553, 1561 (discussing Justice Brown's critical role in the *Plessy* decision).

394. *Plessy*, 163 U.S. at 551.

the legislature, Brown announced smugly, "[w]e imagine that the white race, at least, would not acquiesce in this assumption."[395]

Privately, Brown was even blunter. "I know nothing more ineradicable than racial antipathy," he wrote, "except, perhaps, national antipathy."[396] Subsequently, he opposed the establishment of self-government in the District of Columbia for the bluntest of reasons. "No suffrage without nigger—no suffrage, no nigger."[397]

3. Racism and the *Hans* Court

The Justices who decided *Hans* were identical to their immediate predecessors and successors in two critical ways. They were white, and they shared the nation's dominant racial attitudes.[398] They shaped the law accordingly.[399]

Chief Justice Melville W. Fuller, appointed in 1888, was a Democrat from Illinois who had supported Stephen A. Douglas in his famous 1858 Senate campaign against Abraham Lincoln.[400] Although

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395. *Id.*

396. Henry Billings Brown to Charles A. Kent, Feb. 27, 1903, *reprinted in* KENT, *supra* note 274, at 92.

397. Henry Billings Brown to Charles A. Kent, May 26, 1913, *reprinted in* KENT, *supra* note 274, at 133.

398. It is worth noting that two of the Justices with the strongest ties to antislavery and abolitionism, Chief Justice Salmon P. Chase and Justice Noah Swayne, had left the Court by 1890. The former died in 1873, and the latter resigned in 1881. Chase had been a major political figure in the antebellum North, a Senator from Ohio and then Governor who served during most of the war as Lincoln's Secretary of the Treasury. More to the point, he had been a dedicated antislavery activist who earned national recognition for his vigorous and repeated defense of fugitive slaves. Aynes, *supra* note 375, at 676–78. Swayne had been born into a slave holding family in Virginia but had emancipated his slaves and moved to Ohio to escape the "peculiar institution." He not only supported Lincoln's war policies and the program for extending suffrage to blacks, but his son subsequently served as director of the Freedman's Bureau in Alabama. *Id.* at 674–75.

399. I have found little relevant information on the racial views of two of the Justices who participated in *Hans*: Samuel Blatchford (1882–1893) of New York and Horace Gray (1881–1902) of Massachusetts. There seems to be no reason, however, to think that either disagreed materially with the views of their colleagues on racial matters. Gray, in particular, shared fairly standard "upper-class Anglo-Saxon prejudices" and showed little interest in or sympathy toward blacks or Chinese. A. E. Keir Nash, *Horace Gray*, *in* THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 197, 199–201 (Melvin I. Urofsky ed., 1994). Both joined the majority not only in *Hans* but in other major decisions establishing the post-Reconstruction settlement, including the *Civil Rights Cases*, 109 U.S. 3 (1883) and *Louisville, New Orleans and Texas Railway Co. v. Mississippi*, 133 U.S. 587 (1890). After Blatchford's death, Gray joined the Court's later decisions in *Plessy* and *Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899). *See generally* Soifer, *supra* note 89 (discussing ways in which racial and other cultural attitudes influenced the Justices).

400. The following discussion is drawn from ELY, *supra* note 65, at 6–9, 155–65; WILLARD L. KING, MELVILLE WESTON FULLER: CHIEF JUSTICE OF THE UNITED

Fuller regarded slavery as an evil, he also believed that it should be kept out of politics.[401] At the Illinois constitutional convention in 1861 he supported a provision to prohibit blacks and mulattoes from immigrating into the state and another proposal to deny the vote to blacks who already lived in the state. Two years later, as a member of the state legislature, he joined the Democratic effort to defeat Lincoln by trying to prevent Union soldiers in the field from voting. Most telling, Fuller introduced a bill to ratify a proposed amendment to the United States Constitution that would forbid the federal government from interfering with slavery. A self-proclaimed Jeffersonian Democrat, he maintained that his party's fundamental principle was that the Constitution should be strictly construed.[402] There "is little doubt," concluded a recent study of the Fuller Court, "that Fuller shared the prevalent racial outlook" of his Court and nation.[403]

Justice Samuel Miller of Iowa, who served on the Court from 1862 until 1890, had been an opponent of both slavery and abolitionism, but after the war he quickly became disaffected with Republican Reconstruction. In particular, he denounced the effort to grant blacks the vote as an "extreme policy,"[404] and in 1873 he wrote the Court's opinion in the *Slaughter-House Cases*, gutting the new Privileges and Immunities Clause of the Fourteenth Amendment.[405] By the late 1880s Miller had lost all concern for the plight of southern blacks and had begun to fix his eyes on the proliferating problems of industrial America. He saw the nation threatened by immigration from southern and eastern Europe and by the spread of communism, socialism, anarchism, and nihilism. "He regarded with mistrust,"

STATES, 1888–1910 (The University of Chicago Press 1967) (1950), and Irving Schiffman, *Melville W. Fuller*, *in* 2 THE JUSTICES OF THE U.S. SUPREME COURT, *supra* note 299, at 1471, 1473–74.

401. Schiffman, *supra* note 400, at 1473.

402. *Id.* at 1476. Although Fuller gave some support to the Northern war effort and denounced secessionism, he remained highly critical of Lincoln and blamed the abolitionists for causing the war. KING, *supra* note 400, at 47–60.

403. ELY, *supra* note 65, at 155.

404. Aynes, *supra* note 375, at 657–65. The quoted phrase is taken from a letter Miller wrote in 1867. *Id.* at 659 n.223. Miller had grown disillusioned with Reconstruction as early as 1867. *See* 6 FAIRMAN, *supra* note 69, at 139–40.

405. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). The significance of the *Slaughter-House Cases* has long been recognized. *See, e.g.*, Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1337 (1952) ("The most far-reaching incident of this counter-revolution came in 1873 in the *Slaughterhouse Cases*."). The extent to which the Court misconstrued the original intent of Congress, moreover, has been documented and generally accepted. " '[E]veryone' agrees the Court incorrectly interpreted the Privileges or Immunities Clause ... of the Fourteenth Amendment." Aynes, *supra* note 375, at 627.

explained his sympathetic biographer, "the growth of a foreign-born population not accustomed to Anglo-Saxon traditions of government."[406]

The Californian Justice Stephen J. Field, who sat on the Court from 1863 to 1897, explicitly acknowledged his racial views. "You know I belong to the class, who repudiate the doctrine that this country was made for the people of *all* races," he wrote privately in 1882.[407] "On the contrary, I think it is for our race—the Caucasian race."[408] Before the Civil War, when running for the California legislature, he had denounced the accusation that he was an abolitionist "as a base calumny."[409] Slavery, he had insisted, "was a domestic institution which each State must regulate for itself, without question or interference from others."[410] On the Court his racist assumptions surfaced vividly in *Neal v. Delaware*[411] in 1880.[412] There, he argued that there was no basis to infer racial discrimination in jury selection from the fact that not a single black had been selected for service in Delaware for the preceding five years. His reason was simple. State law limited jury service to those who were "sober and

406. 6 FAIRMAN, *supra* note 69, at 430.

407. PAUL KENS, JUSTICE STEPHEN J. FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 212 (1997) (quoting Justice Stephen J. Field).

408. *Id.* (quoting Justice Stephen J. Field). Kens points out that Field continued on to say that "[w]e are obliged to take care of the Africans; because we find them here, and they were brought here against their will by our fathers." *Id.* at 327 n.68. Field, he notes, "usually voted against black civil rights." *Id.* at 210. He comments as follows:

> In terms of practical result, [Field] was willing in *Rives* [Virginia v. Rives, 100 U.S. 313 (1880)] to compel a black man to stand trial before a jury from which his race had been systematically excluded. In order to reach that result, Field conveniently had to miss the point that the *Rives* case was about fair process. He focused instead on an abstract right to participate in government. Choosing to ignore the realities of the case, Field, a champion of substantive due process, took a very narrow view of what the guarantee of fair procedure required in this case.

Id. at 193.

409. Manuel Cachan, *Justice Stephen Field and "Free Soil, Free Labor Constitutionalism": Reconsidering Revisionism*, 20 LAW AND HIST. REV. 541, 553 (2002) (quoting STEPHEN J. FIELD, PERSONAL REMINISCENCES OF EARLY DAYS IN CALIFORNIA 58–60 (1893)).

410. *Id.* at 553–54 (quoting STEPHEN J. FIELD, PERSONAL REMINISCENCES OF EARLY DAYS IN CALIFORNIA 58–60 (1893)). In his campaign Field apparently had been accused of being an abolitionist because his brother in New York, David Dudley Field, was a Free-Soiler. He acknowledged his brother's views but immediately informed his audience that "I have another brother who is a slaveholder in Tennessee." *Id.* at 553 (quoting STEPHEN J. FIELD, PERSONAL REMINISCENCES OF EARLY DAYS IN CALIFORNIA (1893)).

411. 103 U.S. 370 (1881).

412. One of Field's biographers has suggested that his opinions at this time were influenced by his presidential ambitions and his efforts to secure southern support within the Democratic Party. KENS, *supra* note 407, at 181–96.

judicious." Thus, Field reasoned, the uniform exclusion of blacks over the five-year period "may be attributed to other causes than those of race and color."[413]

Justice Lucius Quintus Cincinnatus Lamar of Mississippi, whose short tenure on the Court lasted only from 1888 to 1893, was the Court's pragmatic but essentially unreconstructed white southerner. The descendant of a wealthy and aristocratic planter family that had been one of the largest slaveholders in Georgia, Lamar subscribed to all the racial assumptions that underwrote and justified the South's "peculiar institution."[414] Before joining the Court, he had been a political ally of Jefferson Davis, an outspoken defender of *Dred Scott*, a major figure at the Mississippi secession convention, a Confederate army Colonel and diplomatic envoy, and a leader in the long and tumultuous struggle to end Reconstruction and return white rule to the South.[415] Although by late nineteenth-century standards Lamar was a southern moderate who spoke out against violence and the unjust treatment of blacks, his ultimate values and goals were never in doubt. Whites were "the original citizens" of the South, he insisted,

413. *Neal*, 103 U.S. at 401 (Field, J., dissenting). In 1880—joined only by Clifford, who had trumpeted his own racist biases two years earlier in *Hall v. DeCuir*—Field urged an exceptionally narrow construction of the Civil War amendments and the civil rights removal statute, revealing in the process the way in which his attitudes about race guided his legal views. He acknowledged, as the Court had repeatedly affirmed, *e.g.*, *Ex parte* Virginia, 100 U.S. 339, 344–45 (1880); Strauder v. West Virginia, 100 U.S. 303, 306 (1880); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 51 (1873), that the Civil War amendments "were primarily designed to give freedom to persons of the African race," *Ex parte Virginia*, 100 U.S. at 349, 361 (Field, J., dissenting) and, further, that "a person may be denied his rights" by "popular prejudices, passions, or excitements," including the "antagonism of race." Virginia v. Rives, 100 U.S. 313, 324, 332–33 (1880) (Field, J., dissenting). Immediately, however, he negated the significance of both of those propositions. First, he noted that the civil rights removal statute was directed only toward ensuring "equal" rights, and then he generalized the dangers of "prejudice" by suggesting that a "multitude" of other different kinds of "animosities" could also deny persons their legal rights. *Id.* (Field, J., dissenting). On the basis of those assertions, he then ignored both the distinctive purpose of the Civil War amendments and the acute relevance of the "antagonism of race." The removal statute did not protect blacks against the effects of racial prejudice because it "was not designed to relieve [blacks] from those obstacles in the enjoyment of their rights *to which all other persons* are subject, and which grow out of popular prejudices and passions." *Id.* at 333 (emphasis added). Thus, Field argued that the statute did not protect blacks from informal "prejudice" because blacks were already "equal" with "all other persons" because "all other persons" also suffered from one or more of the various kinds of prejudices that marked human life. The argument, logical in form, ultimately made sense in the context, and drew whatever persuasive force it had, only from its clear-eyed and profoundly racist purpose.

414. WIRT ARMISTEAD CATE, LUCIUS Q. C. LAMAR: SECESSION AND REUNION 102–03, 374–75, 399 (1935).

415. Arnold M. Paul, *Lucius Quintus Cincinnatus Lamar*, *in* 2 THE JUSTICES OF THE U.S. SUPREME COURT, *supra* note 299, at 1431, 1431–35, 1437.

and they had suffered enough.[416] "*We white people ought to keep united*," he preached in the 1880s, for "brethren of the same blood must not allow themselves to divide" over political issues.[417] White unity was "a supreme necessity of self-preservation, an only refuge from ruin and woe."[418] Consistently inhospitable to extensions of federal power, Lamar readily joined and encouraged the Court's participation in the post-Reconstruction settlement.

Perhaps most striking were the views of the two Justices who seemed least affected by the racism of their age and most likely to support the enforcement of black rights, Justices David J. Brewer and John Marshall Harlan. Brewer, an offspring of New England abolitionism and a prewar critic of *Dred Scott*, was a recognized supporter of African-American education who also showed sympathy for the cause of Chinese Americans.[419] At the same time, however, he held religious ideas that suggested anti-Semitism, doubted that immigrants from southern and eastern Europe had the capacity to understand American ideas of liberty, and believed unquestioningly in the intrinsic superiority of the Anglo-Saxon "race."[420] With respect to blacks, Brewer did nothing significant, as either a state official or a state and federal judge, to translate his vague benevolence into practice. While still in Kansas, he helped establish and operate racially segregated schools, and as a state judge he voted to uphold their legality. In an 1881 dissent while on the Kansas Supreme Court, he announced that he rejected "entirely" the view that the Fourteenth Amendment barred states from segregating schools by race.[421]

More important, after he took his seat on the United States Supreme Court in 1890, Brewer still failed to turn his ostensible sympathies into tangible legal results for black litigants. Indeed, he consistently found ways—often technical and even quite arbitrary—to avoid the substance of their claims and deny them relief.[422] Perhaps

416. *Id.* at 1437 (quoting Justice Lucius Quintus Cincinnatus Lamar). Underlying Lamar's judicial attitudes "was his perspective of Radical Reconstruction, which reflected the typical Southern upper-class view." *Id.* at 1445.

417. CATE, *supra* note 414, at 400 (quoting Justice Lucius Quintus Cincinnatus Lamar).

418. *Id.* (quoting Justice Lucius Quintus Cincinnatus Lamar).

419. The discussion of Brewer is drawn largely from the excellent study by Hylton, *supra* note 289. For a discussion of Brewer's abolitionist background, see *id.* at 323–26.

420. MICHAEL J. BRODHEAD, DAVID J. BREWER: THE LIFE OF A SUPREME COURT JUSTICE, 1837–1910, at 178–80 (1994).

421. Hylton, *supra* note 289, at 328–31. As a state judge in Kansas, Brewer did decide that the state's constitution, which denied the vote to blacks, did not exclude from the franchise an individual who was one-quarter black. BRODHEAD, *supra* note 420, at 14; *see also id.* at 44, 104–05.

422. Hylton, *supra* note 289, at 333–35, 348–49, 350–55, 358, 362.

the most that can be said for his claimed racial benevolence while on the Court was that, when *Plessy* appeared on the docket, he found a way to absent himself and thereby avoid participating.[423] Brewer's failure to back up what were ostensibly his relatively benevolent views about race is particularly probative because he was one of the most willful, activist, and result-oriented Justices ever to sit on the United States Supreme Court.[424] Indeed, no sooner had he joined the Court than he announced forthrightly that "we must re-cast some of our judicial decisions."[425] In many areas, moreover, he proceeded to try to do just that. If Brewer did not give judicial voice to his purportedly benevolent racial views, it could only mean that those views were jejune if not hypothetical. Essentially, Brewer shared the underlying racism of the age and the general determination to keep blacks in their place. "[H]is attitude toward African-Americans was colored by the very same paternalistic impulse that had led him to accept the legitimacy of separate schools," J. Gordon Hylton concluded from his detailed analysis of Brewer's judicial treatment of blacks.[426] "The status of African-Americans was essentially that of minor children."[427]

Harlan, of course, occupies a special position. A Kentucky slave owner who initially opposed the Civil War Amendments, he came in the late 1860s to accept Republican Reconstruction and most of its underlying goals.[428] When the Republican program collapsed, Harlan continued to carry its flag, standing as the sole dissenter in *Plessy*, the *Civil Rights Cases*, and other decisions where the Court legitimized the post-Reconstruction settlement.[429] Harlan was unquestionably

423. Hylton shrewdly suggests that Brewer used another public commitment and a family tragedy as excuses to purposely absent himself from the Court's deliberations. His goal was to avoid having to take a clear public position on the formal legality of racial segregation. *Id.* at 336–44, 362.

424. *Id.* at 334; PURCELL, *supra* note 107, at 46–63; Kousser, *supra* note 360, at 215–17.

425. David J. Brewer, *Protection to Private Property from Public Attack*, 55 NEW ENGLANDER & YALE REV. 97, 109 (Aug. 1891).

426. Hylton, *supra* note 289, at 361.

427. *Id.*

428. Harlan has been the subject of several fine biographies. *See* LOREN P. BETH, JOHN MARSHALL HARLAN: THE LAST WHIG JUSTICE (1992); LINDA PRZYBYSZEWSKI, THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN (1999); TINSLEY E. YARBROUGH, JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN (1995); *see also* Alan F. Westin, *John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner*, 66 YALE L.J. 637 (1957).

429. Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting) (upholding the separate-but-equal doctrine); The Civil Rights Cases, 109 U.S. 3, 25 (1883) (Harlan, J., dissenting) (invalidating the Civil Rights Act of 1875). Harlan was also the sole dissenter in *United States v. Harris*, 106 U.S. 629, 644 (1883), where the Court invalidated the Ku

ahead of his time in his attitude toward the constitutional rights of blacks. He understood the de facto truth about racism and racial oppression in the South, and he insisted that the Constitution was intended to provide them with meaningful protections against racial discrimination.

Yet, in spite of his unusual qualities and singular position, Harlan, no less than his judicial brethren, was a creature of his age. He shared many of the prevailing prejudices about race in general and African Americans in particular. He accepted a variety of racial stereotypes about blacks, and he used racial humor both in public when campaigning for office and in private when conversing with friends. Indeed, according to one of his recent biographers, he held "doubts about the general integrity of blacks."[430] Further, Harlan shared widespread anti-Chinese attitudes. In *Plessy* he referred to the Chinese as "a race so different from our own that we do not permit those belonging to it to become citizens of the United States."[431] Even more striking, in a private letter to his son written in 1883, he seemed to draw a rigid line that not only separated "our own" race from the Chinese but also from African Americans. The "Chinese are of a different race, as distinct from ours as ours is from the negro."[432]

Although Harlan supported the Reconstruction Amendments, he rejected the idea that they endorsed or required social equality between the races.[433] Several of his opinions and votes on the Court, moreover, reflected the racially oppressive attitudes of the post-Reconstruction settlement. In 1880, for example, he joined an opinion that essentially negated the civil rights removal statute and provided a roadmap for white southerners seeking to institutionalize

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Klux Klan Act of 1871. Harlan was also alone in refusing to join the Court's opinion in *Hans*. Hans v. Louisiana, 134 U.S. 1, 21 (1890) (Harlan, J., concurring in the judgement).

430. YARBROUGH, *supra* note 428, at 139. "Evidence that Harlan shared certain racial attitudes common to those of the most unreconstructed Southerner is not confined to his stances on public issues or infrequent lapses into racial humor on the stump." *Id.* *See generally id.* at 138–45 (discussing Harlan's attitude toward race).

431. *Plessy*, 163 U.S. at 559, 561 (Harlan, J., dissenting). *See generally* Gabriel J. Chin, *The* Plessy *Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996) (assessing Harlan's attitude toward the Chinese).

432. YARBROUGH, *supra* note 428, at 190 (quoting Justice John Marshall Harlan). The author points out that Harlan may have merely been outlining a debating strategy for his son, but he notes that in his letter Harlan "made no effort to separate his own position from the arguments he was advancing." *Id.* at 191. Further, Yarbrough adds that "[o]ther bits of evidence also suggest that the justice was hardly free of ethnocentric attitudes." *Id.*

433. PRZYBYSZEWSKI, *supra* note 428, at 83.

their racial supremacy without running afoul of the Constitution.[434] Similarly, he joined other decisions that ignored racial inequalities and confirmed the prevailing elements of the post-Reconstruction settlement.[435] Indeed, dissenting in *Plessy* itself, Harlan penned words that seem discordant, if not shocking, today:

> Every true man has pride of race, and under appropriate circumstances, when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper.[436]

Thus, like most of his contemporaries, Harlan believed in the centrality of race and in the legitimacy of racial thinking. Often overlooked or ignored, that characteristic helps explain both his inconsistencies in civil rights cases and his easy rejection of broader ideas of social equality between the races.[437] Although Harlan was highly unusual in the courage, integrity, and decency he showed in racial matters, he nonetheless also remained a person of his time.[438]

4. *Hans* and Its Author: Justice Joseph P. Bradley and the Acquiescent Turn

Finally, we come to Justice Joseph P. Bradley, the author of *Hans*. A New Jersey Whig who became a Unionist and then a Republican, Bradley was an ardent advocate of the northern war effort and an early supporter of Reconstruction.[439] In 1865 he defended the Republican position that three-fourths of the states which remained in the Union could amend the Constitution, and he subsequently supported ratification of all three Civil War

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434. Virginia v. Rives, 100 U.S. 313 (1880); *see* PURCELL, *supra* note 107, at 142–47.

435. *E.g.*, Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899) (upholding racially discriminatory funding for public schools); Pace v. Alabama, 106 U.S. 583 (1883) (upholding state antimiscegenation law). On *Cumming*, see BETH, *supra* note 428, at 234–35; KOUSSER, *supra* note 234, at 27–29 (stating Harlan's opinion was "retrograde," "credulous," and "exhibited a disingenuousness which fully matched Justice Brown's breezy assurance in *Plessy* that Jim Crow car laws did not discriminate against blacks").

436. Plessy v. Ferguson, 163 U.S. 537, 554 (1896) (Harlan, J., dissenting). Linda Przybyszewski explores the significance of this statement in her perceptive and subtle examination of Harlan's civil rights jurisprudence. *See* PRZYBYSZEWSKI, *supra* note 428, at 81–117.

437. PRZYBYSZEWSKI, *supra* note 428, at 116–17; *see id.* at 203–07; *Cumming*, 175 U.S. at 544–45.

438. "Harlan had by the 1880s come light years away from the Kentucky slave owner of the 1850s. That he did not go beyond his liberal contemporaries is hardly surprising. The surprise is, in fact, that he went as far as he did." BETH, *supra* note 428, at 226.

439. Leon Friedman, *Joseph P. Bradley*, *in* 2 THE JUSTICES OF THE U.S. SUPREME COURT, *supra* note 299, at 1181, 1184.

amendments. In 1868 he backed Republican Ulysses S. Grant in the presidential election and served as one of his official electors.[440]

If Bradley's politics were northern, unionist, and Republican, his attitudes toward race were hardly advanced. While he supported the abolition of slavery, he neither anticipated nor approved significant changes in relations between blacks and whites. As a Republican candidate for Congress in 1862, according to one scholar, he was "pro-Union, anti-slavery, and anti-black."[441] Even after secession and the beginning of war, Bradley wanted the Constitution to remain unchanged, to "stand just as it is, word for word and letter for letter."[442] Notwithstanding the onset of war and the reality of slavery, he remained unyielding: "I do not want it altered."[443] Long after the war, when Congress passed the Civil Rights Act of 1875, he reacted angrily to its provisions requiring racial equality in places of public accommodation. "[S]urely Congress cannot guarantee to the colored people admission to every place of gathering and amusement," he complained privately.[444] "To deprive white people of the right of choosing their own company would be to introduce another kind of slavery."[445] Bradley's racial feelings were deep-seated. The "antipathy of race cannot be crushed and annihilated by legal enactment," he insisted, and the Civil War "constitutional amendments were never intended to aim at such an impossibility."[446] To Bradley the Civil Rights Act was a bitter and personal affront.[447] "Surely a white lady cannot be enforced by Congressional enactment to admit colored persons to her ball or assembly or dinner party," he exclaimed.[448] It "never can be endured that the white shall be compelled to lodge and eat and sit with the negro."[449]

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440. *Id.* Bradley has been identified as an antislavery justice. William E. Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 551–55 (1974).

441. Jonathan Lurie, *Joseph Bradley*, *in* THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY, *supra* note 399, at 33, 33.

442. Lurie, *supra* note 299, at 349 n.49 (quoting Justice Joseph P. Bradley).

443. *Id.* (quoting Justice Joseph P. Bradley).

444. Lurie, *supra* note 441, at 35 (quoting copybook of Joseph P. Bradley).

445. *Id.* (quoting copybook of Joseph P. Bradley).

446. 7 FAIRMAN, *supra* note 269, at 564 (quoting draft of letter from Justice Joseph P. Bradley to Judge William B. Woods (Oct. 30, 1876)).

447. *Id.*

448. *Id.* (quoting draft of letter from Justice Joseph P. Bradley to Judge William B. Woods (Oct. 30, 1876)).

449. *Id.* (quoting draft of letter from Justice Joseph P. Bradley to Judge William B. Woods (Oct. 30, 1876)).

Appointed to the Court in 1870, Bradley initially seemed committed to enforcing Republican Reconstruction. In 1871 he counseled a lower court judge to construe a Reconstruction statute broadly in order to sustain the prosecution of a group of whites who had broken up a black political meeting and killed a large number of those assembled.[450] The following year he dissented in *Blyew v. United States*,[451] where the Court construed a criminal provision of the Civil Rights Act of 1866 with exceptional narrowness and began its long process of checking Republican Reconstruction.[452] In his first year on the bench he heard the *Slaughter-House Cases* on circuit and gave a relatively broad construction to the Privileges and Immunities Clause of the new Fourteenth Amendment.[453] Three years later, when the case reached the Supreme Court, he maintained his broad view of the amendment in dissent.[454]

The most striking characteristic of Bradley's early Reconstruction opinions was not their doctrinal analysis but their relatively honest recognition of southern realities. Bradley argued that a liberal construction of the civil rights statute in *Blyew* was essential because he admitted the practical consequences of construing it narrowly. To deny blacks access to the courts, he protested, "is to expose them to wanton insults and fiendish assaults; is to leave their lives, their families, and their property unprotected by law."[455] His dissent was precisely on point. In denying federal jurisdiction, he argued, the majority offered "a view of the law too narrow, too technical, and too forgetful of the liberal objects it had in view."[456] Similarly, on Circuit in 1874, Bradley again emphasized that the major threat to black rights came not from formal laws but from a private "war of race" that engulfed the South.[457] The federal government required, and the Civil War amendments conferred, the

450. John A. Scott, *Justice Bradley's Evolving Concept of the Fourteenth Amendment from the Slaughterhouse Cases to the Civil Rights Cases*, 25 RUTGERS L. REV. 552, 556–57 (1971).

451. 80 U.S. (13 Wall.) 581 (1872).

452. *See* Goldstein, *supra* note 253, at 474 ("The appeal of *Blyew v. United States* afforded the Supreme Court with its earliest opportunity—an opportunity that it used—to begin the substantial devastation of the federal government's civil rights powers that followed over the next generation.").

453. *See* Live-Stock Dealers & Butchers' Ass'n v. Crescent City, 15 FED. CAS. 649, 652 (C.C.D. La. 1870).

454. *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 122–24 (1873) (Bradley, J., dissenting).

455. *Blyew*, 80 U.S. at 599 (Bradley J., dissenting).

456. *Id.* (Bradley, J., dissenting).

457. United States v. Cruikshank, 25 FED. CAS. 707, 714 (C.C.D. La. 1874).

power to secure black rights "not only as against the unfriendly operation of state laws, but against outrage, violence, and combinations on the part of individuals, irrespective of the state laws."[458]

During the 1870s, however, like so many other white Americans, Bradley lost what commitment he had to the goals of Reconstruction.[459] A variety of forces—the era's turmoil and disappointments, pressures from colleagues on the Court, the return of the Democrats to power in the South and then in the Nation, the seemingly bottomless depths of white racial animosity, and the passage of what he regarded as the unendurable Civil Rights Act of 1875—combined relentlessly to dilute his earlier sympathies and remold his jurisprudential assumptions. By late 1876 his attitudes toward Reconstruction were apparently understood to have changed so substantially that all seven of the Democrats on the Electoral Commission—the body charged with determining the results of the disputed presidential election of 1876—agreed to accept Bradley as the Commission's critical fifteenth—and ostensibly nonpartisan—member.[460] Although Bradley's votes on the Commission disappointed the Democrats in 1877, his votes on the Court over the years that followed did not.[461]

Bradley's judicial opinions after the Compromise of 1877 reflected the change in national attitudes. Increasingly, they seemed suffused with the deep, if largely unspoken, assumptions that marked the opinions of most of the other Justices in cases involving race, Reconstruction, and the South.[462] Over the years Bradley collaborated repeatedly and closely with Chief Justice Waite,[463] and Waite surely passed on to his friend and colleague the profound

458. *Id.* at 713.

459. One student of the history of the Fourteenth Amendment charged that Bradley "completely changed positions." CURTIS, *supra* note 88, at 179. For discussions of Bradley's changing views, see generally Robert L. Hayman, Jr., *The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism*, 30 HARV. C.R.-C.L. L. REV. 57 (1995); Scott, *supra* note 450. For a defense of Bradley and an argument that he did not change, see WILLIAM E. NELSON, THE ROOTS OF AMERICAN BUREAUCRACY, 1830–1900, at 70–71 (1982).

460. Lurie, *supra* note 441, at 33.

461. The most extensive treatment of the commission's work and Bradley's involvement in it appears in 7 FAIRMAN, *supra* note 142.

462. For a thoughtful defense of Bradley's doctrinal consistency based on a close analysis of his opinions, see generally Michael G. Collins, *Justice Bradley's Civil Rights Odyssey Revisited*, 70 TUL. L. REV. 1979 (1996). For the argument that Bradley did not change in the *Civil Rights Cases* because he was hostile to blacks and the idea of racial integration in public places, see Lurie, *supra* note 299, at 349–50, 366–68.

463. *See* MAGRATH, *supra* note 218, at 182–84, 208, 298–99.

lesson he had drawn from his experience in 1877 trying to enforce black civil rights in Charleston, South Carolina. By 1883 Bradley was prepared to write for the Court in the *Civil Rights Cases*, severely limiting the reach of the Fourteenth Amendment, rejecting the idea of "primary" national citizenship rights, and largely abandoning southern blacks to post-Reconstruction oppression.[464]

More telling, in construing Reconstruction measures Bradley moved from articulating a deep concern with the de facto dangers and abuses that southern blacks faced to exhibiting a cold disregard for whatever fate they might be compelled to suffer.[465] Indeed, he seemed to transfer his efforts to combat the practical evils of "prejudice" in the judicial system from safeguarding blacks from

464. *See* The Civil Rights Cases, 109 U.S. 3, 24–25 (1883). At the same time that he showed his respect for state sovereignty by limiting the power of Congress to protect black rights, Bradley did the opposite by reaffirming his belief in the power of the federal courts to make "general" federal common law. Burgess v. Seligman, 107 U.S. 20, 33–34 (1883); *accord* R.R. Co. v. Lockwood, 84 U.S. (17 Wall.) 357, 367–68 (1873) (expanding scope of federal common law to control issues of railroad liability for injuries to passengers and goods). The federal common law constituted a well-established and substantial intrusion into "state" law and state sovereignty. It could have been, but was not, used to support expanded national powers to protect black rights. *See, e.g.*, Note, *Federalism and Federal Questions: Protecting Civil Rights Under the Regime of* Swift v. Tyson, 70 VA. L. REV. 267, 273–75, 280–81 (1984) (discussing federal common law in the context of the Ku Klux Klan Act).

465. Some supporters of black rights have attempted to broaden the idea of "state action" in Bradley's opinion in the *Civil Rights Cases* (and thus to expand opportunities for federal action under the Fourteenth Amendment) by citing "an interesting series of letters written prior to the 1883 opinion" in which Bradley advanced a relatively expansive view of "state action." Arthur Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387, 416 (1967) (citing Bell v. Maryland, 378 U.S. 226, 286, 308–10, 338 nn.29–31 (1964) (Goldberg, J., concurring)). Several considerations undermine such a use of Bradley's letters. One is that the letters in question were written in the early 1870s, a full decade prior to the *Civil Rights Cases* and, more importantly, during what was still the height of Republican Reconstruction. The early 1870s were part of a political and social era far distant, and radically different from, the era of the early 1880s. There is, moreover, no reason to assume that Bradley's views in the early 1870s remained unchanged during the course of the tumultuous years prior to 1883. A second reason to discount the argument is that there is, as this Article discusses, a considerable amount of evidence suggesting that Bradley did, in fact, change his views substantially during the decade between the early 1870s and the early 1880s. Finally, there is the fact that sometime between 1871 and 1883, Bradley wrote a memo explicitly recording the fact that he had changed his earlier views about the power of Congress under the Fourteenth Amendment. In his papers, there is a memo attached to a draft of one of his earlier letters (this one written in 1871) that states: "The views expressed in the foregoing letters were much modified by subsequent reflection, so far as relates to the power of Congress to pass laws for enforcing social equality between the races." Bell v. Maryland, 378 U.S. 226, 309 n.30 (1964) (Goldberg, J., concurring) (quoting draft of letter from Joseph P. Bradley to Circuit Judge William Woods).

white repression to safeguarding interstate railroads from tort suits.[466] For sheer callousness, too, few statements in the history of American law can match his assertion in the *Civil Rights Cases* that "there must be some stage" when those who have "emerged from slavery" would "cease[] to be the special favorite of the laws" and be content with "the ordinary modes by which other men's rights are protected."[467] The statement was not only callous and dishonest but also deeply personal, an acknowledgment of exasperation and exhaustion, a de facto admission that he had abandoned any effort to achieve the goals of Reconstruction.

Another statement Bradley made in the *Civil Rights Cases* was even more revealing. In rejecting the idea that the law could grant blacks equal social rights, he wrote for the Court with a telling specificity, and a multiplicity of concrete social references, that conveyed his own deep sense of personal involvement and private outrage at the Civil Rights Act. Applying the strictures of the Thirteenth Amendment to any and all discriminatory acts that "a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business," he exclaimed for the Court, "would be running the slavery argument into the ground."[468] The statement was particularly revealing, and its significance undeniable, because it was a resounding public echo of the bitter private condemnation he had penned eight years earlier when he recorded—with the same outpouring of specific social references—his own personal anger at the act's passage. "Surely a white lady cannot be enforced by Congressional enactment to admit colored persons to her ball or assembly or dinner party," he had then exclaimed.[469] It "can never be endured that the white shall be compelled to lodge and eat and sit with the negro."[470] Such "enforced fellowship," he had raged, would "require the slavery of the whites."[471]

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466. PURCELL, *supra* note 107, at 142–43.

467. *The Civil Rights Cases*, 109 U.S. at 25.

468. *Id.* at 24–25.

469. 7 FAIRMAN, *supra* note 269, at 564 (quoting draft of letter from Justice Joseph P. Bradley to Judge William B. Woods (Oct. 30, 1876)). Bradley made other such statements that implied he endorsed the separate-but-equal principle. *See id.* at 288–89, 563–67; LOFGREN, *supra* note 248, at 133–34; Lurie, *supra* note 299, at 367.

470. 7 FAIRMAN, *supra* note 269, at 564 (quoting draft of letter from Justice Joseph P. Bradley to Judge William B. Woods (Oct. 30, 1876)).

471. *Id.* (quoting draft of letter from Justice Joseph P. Bradley to Judge William B. Woods (Oct. 30, 1876)).

The very "essence" and "purpose" of the Civil Rights Act, Bradley declared in the *Civil Rights Cases*, was to ensure that in places of public accommodation "no distinction shall be made between citizens of different race or color."[472] He identified the act's very "essence," then, as exactly what he had privately condemned as a personally intolerable result, the imposition of "slavery" itself on "the whites." In the *Civil Rights Cases*, Bradley wrote an opinion for the Court that tracked his own highly personal, intensely felt, and overtly racist rejection of the very idea that blacks and whites could assemble as social equals.[473]

That profound change in Bradley's civil rights jurisprudence paralleled the change that transformed his Eleventh Amendment jurisprudence.[474] In the 1870s, while Republicans continued to support Reconstruction and Bradley was still defending the rights of southern blacks, he had readily joined the Court's muscular reaffirmations of *Osborn* and traditional Marshallian Eleventh Amendment doctrine. As late as 1876, he wrote for the Court upholding the jurisdiction of the federal courts to issue mandatory orders prohibiting state officers from taking actions that would impair the value of their states' bonds.[475] As Reconstruction ended, the contours of the post-Reconstruction settlement took shape, and his commitment to the enforcement of black civil rights flagged, however, Bradley's view of the Eleventh Amendment turned in a direction that paralleled precisely the direction of his shifting civil rights jurisprudence. In 1883, when Bradley authored the *Civil Rights Cases*, he also joined the Court's opinion in *Jumel*, invoking the Eleventh Amendment to deny federal jurisdiction over a southern

472. *The Civil Rights Cases*, 109 U.S. at 9, 10.

473. The extent to which prevailing cultural attitudes and values influenced Bradley's jurisprudence was equally apparent from his concurrence in *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139 (1873) (Bradley, J., concurring). There, Bradley agreed with the Court's decision to reject the claim that the Fourteenth Amendment prevented states from denying females admission to state bars on the grounds of gender. His reasoning flowed directly from his acceptance of prevailing cultural preconceptions and stereotypes: "The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood." *Id.* at 141 (Bradley, J., concurring). Similarly, the predominant influence of common cultural attitudes and values was equally apparent in Bradley's opinion in *Late Corp. v. United States*, 136 U.S. 15 (1890), which addressed issues involving the Mormon Church. *See, e.g.*, SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA 208–20 (2002) (arguing that Bradley's opinion in *Late Corp.* was charged with antipolygamy and anti-Mormon sentiment).

474. *See supra* text accompanying notes 139–48.

475. Bd. of Liquidation v. McComb, 92 U.S. 531, 541 (1876).

state bondholder suit and confessing the Court's fear about its ability to enforce a judgment against the state.[476] Thereafter, Bradley consistently joined the Court's opinions expanding state sovereign immunity in such suits.[477] In 1885, he suggested that state sovereign immunity be extended even further, and in 1890 he issued his plea that the courts be relieved from the "vexation" of the southern bond suits.[478] Then, he wrote *Hans*.

Thus, Bradley's views of both black civil rights and the scope of the Eleventh Amendment evolved in tandem—contemporaneous in time, identical in purpose, and single in result. He moved from vigorous support for both Republican Reconstruction and the enforcement of southern state bonds in the early 1870s to the adoption, a decade later, of a series of cold and callous rationales for abandoning both.

By 1890, Bradley held no illusions about Reconstruction, the enforceability of southern state bonds, or the future of blacks in the Democratic South. When he wrote for the Court in *Hans*, he regarded the post-Reconstruction settlement as wholly acceptable, probably highly desirable, and in any event an essentially accomplished fact. Bradley was by all accounts an extremely intelligent man and an unusually able judge. There is every reason to believe that he understood exactly what he was doing and why he was doing it.

D. Hans, *Racism, and the Post-Reconstruction Settlement*

Racism in its multitudinous forms has been a ubiquitous if fluctuating force in American history.[479] At various times and places it has been particularly virulent, and at others mild or subtle. Its

476. Louisiana v. Jumel, 107 U.S. 711 (1883).

477. *See supra* notes 118–25.

478. *See supra* notes 139–45.

479. Recent studies have revealed that racial and ethnic bias, both real and perceived, continues to exist in both state and federal courts and that in some cases it still influences the behavior of lawyers and judges. *See, e.g.*, Elissa Krauss & Martha Schulman, *The Myth of Black Juror Nullification: Racism Dressed Up in Jurisprudential Clothing*, 7 CORNELL J. L. & PUB. POL'Y 57, 57–60, 72–75 (1997) (examining the way courts have treated participation of minorities in the jury system); Willy E. Rice, *Insurance Contracts and Judicial Discord Over Whether Liability Insurers Must Defend Insureds' Allegedly Intentional and Immoral Conduct: A Historical and Empirical Review of Federal and State Courts' Declaratory Judgments—1900–1997*, 47 AM. U. L. REV. 1131, 1208 (1998) (stating that judges are influenced by litigants' ethnicity in deciding lower courts' holdings in duty-to-defend cases); Suellyn Scarnecchia, *State Responses to Task Force Reports on Race and Ethnic Bias in the Courts*, 16 HAMLINE L. REV. 923, 927–40 (1993) (describing findings of task forces of five states that investigated race and ethnic bias in the judicial system).

power has sometimes dominated, while at other times it has been moderated, opposed, and even defeated. Its relative force, content, and direction have shifted in response to a wide variety of factors: immigration, urbanization, economic conditions, class antagonisms, demographic movements, sectional tensions, cultural pressures, religious beliefs, considerations of foreign policy, and prevailing scientific theories and political ideas.[480] Regardless of changes and complexities, however, the fact remains that racism was particularly powerful and pervasive in the United States during the last quarter of the nineteenth century and the first quarter of the twentieth.

That potent and pervasive racism influenced the United States Supreme Court and helped shape its jurisprudence.[481] Unless one assumes that judicial "law" is automatic and autonomous—that it involves logically necessary conclusions drawn from indisputably clear and controlling principles—it would be hard to understand how the Justices could possibly have avoided its influence. The proposition that racism influenced the Court, however, rests on far more than a plausible inference. Racist ideas and attitudes were directly influential because most of the Justices—including an overwhelming majority of those on the *Hans* Court—shared the predominant racial views of other white Americans.[482] Indeed, some held racist attitudes that were particularly intense and incorrigible. Racist ideas were also influential, moreover, because they pervaded not only American society generally but also the social and professional classes from which the Justices came and in which they lived, worked, and advanced to professional preeminence.[483] Further,

480. This complexity is a major theme of Eric Foner's superb study of Reconstruction. *See* FONER, *supra* note 71, at xxiii–xxiv. For a similar complex and nuanced discussion of race relations, see WILLIAMSON, *supra* note 213.

481. Lawyers and judges in the late nineteenth century "were not sexist or racist to a greater degree than other elites," William M. Wiecek has written:

> They were merely in accord with the dominant assumptions of their era, which consigned women to the homemaking and nurturing roles dictated by the ideology of "separate spheres." Similarly lawyer elites shared in the contemporary Euro-American loss of confidence that African Americans could assume a status of equality in American society. Classical judges readily relinquished black Americans to domination by southern white supremacists, who, after all, had accumulated a certain expertise in the matter of racial control.

WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937, at 150 (1998).

482. *See supra* Parts IV.C.3, IV.C.4.

483. Supreme Court Justices seem often to reflect the ideas and values of social elites. *See, e.g.*, John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 325–26 (2001) (discussing the Justices' concern for elite opinion in the context of the controversy over school prayer); Michael J. Klarman, *What's*

racist ideas and attitudes influenced the Justices because they shaped the actions of the other branches of government, not only in the states but at the federal level as well. Even Justices with the mildest racial views were pressed to recognize that judgments enforcing black civil rights in the South would provoke bitter and determined opposition and would likely be unenforced and unenforceable.

The Court's decisions in other areas, moreover, evidence the pervasive sway of racist ideas. In the late nineteenth and early twentieth century, racist and nativist attitudes appeared in its opinions dealing not just with black Americans but also with a variety of other "non-Anglo-Saxon" groups, including Native Americans, Chinese, Japanese, Indians, and those from other Asian countries. In such cases, Lawrence Friedman concluded, "the popular idea of race was dominant."[484]

Further, alternate explanations for the Court's behavior are unpersuasive. Some scholars have argued, for example, that the Court's decisions were the result of ambiguous constitutional or statutory drafting, the Court's commitment to older ideas of federalism, or the difficulties of construing the Fourteenth Amendment in a way that would give it reasonable effect without wholly subverting the authority and prerogatives of the states.[485]

So Great About Constitutionalism?, 93 NW. U. L. REV. 145, 189–91 (1998) (attributing such elitism to prominent upbringings and political associations of the Justices).

484. LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 125 (2002); *see id.* at 111–37. In *United States v. Sing Tuck*, 194 U.S. 161 (1904), Justice Brewer himself charged the Court with racist behavior when he protested a decision allowing the exclusion of persons of Chinese ancestry who claimed United States citizenship: "No such rule is enforced against an American citizen of Anglo-Saxon descent, and if this be, as claimed, a government of laws and not of men, I do not think it should be enforced against American citizens of Chinese descent." *Id.* at 178 (Brewer, J., dissenting); *see, e.g.*, SALYER, *supra* note 328, at 94–116 (describing the effect of laws in the 1880s on Chinese immigrants); WIECEK, *supra* note 481, at 151–52 (describing late nineteenth-century cases that embodied racist attitudes against Asians and indigenous peoples).

485. *See, e.g.*, MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863–1869, at 315–24 (1974) (explaining the split among politicians between commitment to state power and commitment to national power); NELSON, *supra* note 459, at 80 (arguing that the Court's behavior was driven by concerns of federalism); Benedict, *supra* note 88, at 41–45, 79 (arguing that the Court's commitment to ideas of federalism drove many of the Justices' decisions); Michael Les Benedict, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction*, 61 J. AM. HIST. 65, 69–77 (1974) (describing Fourteenth Amendment jurisprudence and political occurrences as driven by concerns over federalism). In the *Civil Rights Cases*, Bradley had suggested the same point: "If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop." 109 U.S. 3, 14 (1883). This argument has been broadly attacked by other scholars. *See, e.g.*, CURTIS, *supra* note 88 (criticizing the federalism argument); Kaczorowski, *supra* note 88 (arguing that the commitment to "national primacy" explains

Neither separately nor together do those explanations seem adequate. Ambiguous drafting does not limit but rather expands the discretion of courts, and statutes can easily be construed to reach desired results while still constraining them sufficiently to ensure their constitutionality. Further, neither older ideas of federalism nor difficulties in construing the Fourteenth Amendment explain the specific ways in which the Court shaped American constitutional law over the course of the late nineteenth and early twentieth century. It was, for example, quite possible both to retain the basics of an older federalism and to limit the Fourteenth Amendment sharply—with or without a "state action" requirement—on the straightforward ground suggested in the *Slaughter-House Cases*: The amendment was intended to protect blacks.[486] Thus, the amendment could either have been limited to enforcing the civil and political rights of blacks or, if applied more generally, used in nonracial contexts only when highly demanding conditions were met. The *Slaughter-House Cases*, after all, suggested a kind of "strict scrutiny" idea.[487]

Moreover, there stands another undeniable fact. Once the racial issue was consigned to the states and eliminated from the relevant constitutional calculus, the Court began promptly to constrict the immunity it attributed to the Eleventh Amendment and allow substantial expansions of the lawmaking powers of the national government. More to the point, it expanded both the reach of the Fourteenth Amendment and the judicial remedies available to enforce the amendment's guarantees. In 1880, when addressing a southern race case, the Court had declared that the Fourteenth Amendment authorized Congress alone to protect the rights the amendment guaranteed.[488] Further, the Court expressly disclaimed federal judicial power—absent authorizing legislation—to enforce the amendment: "It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to

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why early racist politicians helped blacks gain more civil rights); Kaczorowski, *To Begin the Nation Anew*, *supra* note 252 (arguing that the Court rejected the "revolutionary" intent of the Civil War amendments and construed them to protect prewar ideas of state sovereignty).

486. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 51 (1873). The Court reiterated the idea that the specific purpose of the Fourteenth Amendment was to protect blacks in *Ex parte Virginia*, 100 U.S. 339, 344–45 (1880) and *Strauder v. West Virginia*, 100 U.S. 303, 306 (1880).

487. It was possible to resolve the problems of limitation, for example, by adopting the principle that the federal government would act only when racial discrimination or violence went uncorrected by state authorities.

488. *Ex parte Virginia*, 100 U.S. at 345–48.

protecting the rights and immunities guaranteed," it declared in *Ex parte Virginia*.[489] "It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions."[490] A mere ten years later, however, addressing issues of state economic regulation, the Court began to enforce the Fourteenth Amendment rights of substantive due process and liberty of contract and to create judicial remedies—even in the absence of congressional legislation—for violations of the amendment.[491] Indeed, by the early twentieth century it had moved the law so far that it could declare sweepingly that "the Federal courts are charged under the Constitution" with the duty of protecting rights under the "comprehensive" Fourteenth Amendment.[492] In spite of older ideas and difficulties construing the Fourteenth Amendment, in other words, when finally freed from the complicating issue of race, the Court quickly moved to reshape the assumptions and practices of American federalism and substantially broaden national authority—especially national judicial authority.[493]

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489. *Id.* at 345.

490. *Id.* The Court continued: "It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective." *Id.*

491. *Ex parte* Young, 209 U.S. 123 (1908); Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418, 457 (1890); *see infra* Part V.

492. Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 284–85, 288 (1913). That position remained the law throughout the twentieth century. The Fourteenth Amendment limited state power "and so permits a federal court to disestablish local government institutions that interfere with its commands." Missouri v. Jenkins, 495 U.S. 33, 55 (1990).

493. While the Court ambitiously expanded the federal judicial power and the reach of federal equity between 1890 and 1908, it remained peculiarly and characteristically enfeebled when it addressed challenges to southern racial practices, even as those practices became increasingly overt and formal. Compare the decisions in which the federal courts dealt with state regulation of business, such as *Ex parte Young*, 209 U.S. at 167–68 (recognizing broad federal power to enjoin state officials from enforcing unconstitutional acts); *Smyth v. Ames*, 169 U.S. 466, 516–17 (1898) (holding that state rate regulation must be reasonable and striking down a state scheme on due process grounds); *Allgeyer v. Louisiana*, 165 U.S. 578, 591, 593 (1897) (exercising power to strike down state law that violated the Fourteenth Amendment); and *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 395 (1894) (stating that state legislatures cannot abridge the power of federal courts), together with the cases in which the federal courts addressed labor matters, such as *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (invalidating state law that voided yellow-dog contracts); *Loewe v. Lawlor*, 208 U.S. 274, 303–04 (1908) (enforcing the federal government's power over interstate commerce against a labor union); *Lochner v. New York*, 198 U.S. 45, 56 (1905) (voiding state law limiting hours of work as a violation of due process); *In re Debs*, 158 U.S. 564 (1895) (upholding the authority of the federal courts to enjoin strikes and related actions by labor union), with the Court's contemporaneous decisions in cases involving race, for example, *Berea College v. Kentucky*, 211 U.S. 45, 53–54 (1908) (denying equal protection claim and upholding state power to prohibit racially

Indeed, it seems likely that the Court's acceptance of the post-Reconstruction settlement was an essential prerequisite for that subsequent reshaping of federal law. Had the Justices sought to deny the constitutional terms on which the North and South reunited after Reconstruction, their actions would have provoked bitter and widespread opposition that would have severely undermined the Court's political support and institutional authority. That, in turn, might well have dissuaded or prevented it from adopting the increasingly expanded supervisory role it began playing in other areas of American politics and government in the late nineteenth and early twentieth century.

What stood in the way of enforcing black civil and political rights, then, was not doctrine, logic, drafting, inherited constitutional ideas, or the problem of drawing lines that could limit the Fourteenth Amendment. The problem was that the Justices, and the nation, were unwilling to protect and secure black rights.[494] That unwillingness

integrated education); *Giles v. Teasley*, 193 U.S. 146, 164–67 (1904) (denying federal jurisdiction over state court's judgment of a Fourteenth Amendment claim denying relief to a black plaintiff); *Giles v. Harris*, 189 U.S. 475, 486–88 (1903) (refusing to protect right of black plaintiffs to vote because doing so would require federal courts to "supervise the voting in that state"); *Cumming v. Richmond County Board of Education*, 175 U.S. 528, 545 (1899) (deferring to state discretion on matter of pubic education in funding white high school but not funding black high school); and *Williams v. Mississippi*, 170 U.S. 213, 219, 225 (1898) (stating that federal courts can strike state law as unconstitutional only if the law is being challenged as a result of the state constitution or state statute, but not if it is being challenged on the basis of administration of the law).

494. Notwithstanding concerns over "federalism," for example, legal concepts fundamental to nineteenth-century jurisprudence—the federal common law, the "independent system" of federal equity, and the all-encompassing concept of a "federal question" enshrined in *Osborn*—expanded national power over the states and were readily available to help justify the power of Congress and the federal judiciary to protect black rights. *See, e.g.*, Note, *supra* note 464, at 280–81 (stating that federal courts could use their remedial power as an "independent basis for federal question jurisdiction"). Together with the Civil War amendments, those jurisprudential foundations provided an ample basis on which to uphold the constitutionality of the Republican Reconstruction program.

Similarly, from another perspective, the Court's treatment of women under the new Fourteenth Amendment further confirms the fact that it was largely cultural preconceptions and social biases, not legal logic or principles of federalism, that explained the nature and results of the Court's decisions. *See, e.g.*, Minor v. Happersett, 88 U.S. (21 Wall.) 162, 171, 174–76, 178 (1875) (holding that state did not have to allow women to vote because suffrage is not one of the privileges and immunities of citizenship); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 138–39 (1873) (holding that state government has discretion to control and regulate the granting of licenses to pass bar and thus allowing state to refuse to grant such a license to a woman); *accord* GORDON, *supra* note 473, at 119–45 (arguing that antipolygamy and antislavery sentiment influenced the Court in its interpretation of the Fourteenth Amendment); AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE

was, in significant part, the result of the racist ideas and attitudes that pervaded the South, the nation, the legal profession, the legislative and executive branches of government, the state and federal courts, and the Justices who sat on the United States Supreme Court itself.[495]

Racism was not, of course, the "sole cause" of *Hans*.[496] Rather, it was an enveloping and almost unquestioned condition of American life that profoundly shaped legal and constitutional thinking in all areas during the late nineteenth and early twentieth century. It is impossible to understand the contours of the era's thinking about

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EMANCIPATION 175–263 (1998) (examining ways in which political and cultural forces shaped legal ideas and doctrines).

495. *See supra* Part IV.C. In 1898 the Court heard a challenge to the Mississippi Constitution of 1890 that was used to disenfranchise the state's black voters. The Court rejected the challenge, declaring in *Williams v. Mississippi* that the state constitution and its implementing statutes "do not on their face discriminate between the races." 170 U.S. at 225. Further, in spite of the massive disenfranchisement that had taken place since 1890, the Court declared that "it has not been shown that their actual administration [of the state's voting laws] was evil, only that evil was possible under them." *Id.* at 225.

In contrast, consider *General Oil Co. v. Crain*, 209 U.S. 211 (1908). There, in a case involving state taxation of corporate property, the Court rejected a claim that states had the power to deny their own courts jurisdiction to hear suits against state officials. If states had such power, the Court declared, "an easy way is open to prevent the enforcement of many provisions of the Constitution, and the Fourteenth Amendment, which is directed at state action, could be nullified as to much of its operation." *Id.* at 226. It refused to accept such a possibility and argued that it had to stand vigilant against any such potential state scheme. "And it will not do to say that the argument is drawn from extremes," it announced. *Id.* at 226. "Constitutional provisions are based on the possibility of extremes." *Id.* at 226–27.

The difference between *Williams* and *Crain* is nothing but the difference between a determination to find excuses to acquiesce in state transgressions and a determination to scrutinize state actions rigorously to ensure that they comply with the law. Logic and doctrine have little to do with the difference, beyond, of course, serving as malleable tools of judicial rationalization. Ideas about federalism and the Constitution, and legal doctrines and concepts in general, cannot explain such decisions. Only history, in the fullest sense of that word, can do that.

496. Some northerners, for example, may have sympathized with the South because of the vast economic devastation the region suffered as a result of the war and the destruction of its labor system. An unusual leniency with respect to southern debts might have seemed warranted as providing a kind of "fresh start" for nearly bankrupt states. Similarly, racial considerations were usually filtered through a variety of other social factors. *See generally* Richard Jensen, *Democracy, Republicanism, and Efficiency: The Values of American Politics, 1885–1930*, *in* CONTESTING DEMOCRACY: SUBSTANCE AND STRUCTURE IN AMERICAN POLITICAL HISTORY, 1775–2000, at 149, 149–80 (Byron E. Shafer & Anthony J. Badger eds., 2001) (discussing ways in which certain "core values" shaped the political and societal issues of the time), just as other social factors were often shaped in part by racial considerations. Complexity is the rule, but so too is the profound and pervasive significance of race. *See generally* RICHARDSON, *supra* note 231 (discussing the causes for Northern abandonment of Reconstruction efforts); STANLEY, *supra* note 494 (discussing the influence of contract theory on social relations in the Reconstruction South).

federalism, state sovereignty, the Fourteenth Amendment, or the federal judicial power without recognizing and accounting for the powerful and sustained impact of those racist ideas and prejudices.[497] They were common and public. They were accepted and respectable. They were scientific and authoritative. They were intrinsic elements of the nation's underlying cultural consensus, dominant in the South and highly influential everywhere else. The Justices of the United States Supreme Court were fully of a piece with their nation's life and culture, and by and large they shared its racist assumptions and attitudes. To whatever extent any of them harbored doubts or disagreements, they fully recognized, understood, and at least acquiesced in the racial consequences that followed. They may have had little leeway and few practical alternatives.[498]

Thus, *Hans* was a corollary not of constitutional principle but of political compromise.[499] Allowing the repudiation of southern bonds, it helped to cement in place the post-Reconstruction settlement. Floating on the high tide of racism, it was a practical jurisdictional device that seemed, everything considered, useful in the circumstances.

Indeed, both *Hans*'s practical utility and its integral role in the post-Reconstruction settlement were nowhere more vividly illustrated

497. The point is not, of course, that constitutional ideas and principles are without significance or meaning. Those scholars who have emphasized the role of traditional nineteenth-century ideas about dual Federalism have established that. *See supra* sources cited in notes 88–89. The point is, rather, that such ideas and principles are general, malleable, and changing, and that different people have given them a wide range of different meanings at different points in time. The key historical question is always: At any specific time, what particular meanings and particular applications have those terms been given, by what specific individuals and groups, for what underlying reasons, for what practical purposes, and with what practical consequences?

498. For views of the Court's historical role stressing its close relation to society and politics, see Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 293–95 (1957); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 614–15 (1993); Klarman, *supra* note 214, at 883; Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEX. L. REV. 1881, 1925–26 (1991).

499. It is, of course, impossible to know the extent to which each of the Justices was influenced by institutional concerns about the Court's authority as opposed to a substantive agreement with the terms of the post-Reconstruction settlement. As a general matter, it seems likely that all of the Justices were concerned with the need to preserve the Court's position, that most (if not all) of them shared the racist assumptions that underwrote the abandonment of southern blacks, and that few if any were entirely comfortable with the bond cases. Most probably sympathized with the economic plight of the South but remained quite uneasy with the repudiation of government bonds.

than in the Court's 1903 decision in *Giles v. Harris*.[500] There, as the movement for legalized racial segregation and disenfranchisement swept across the South, a black citizen of Alabama invoked the Fourteenth Amendment to challenge the validity of provisions in the state's constitution that were being used to disenfranchise black voters.[501] Plaintiff sought an order directing that his name and the name of other qualified black voters be placed on the state's voting lists.[502] Passing methodically over various technical objections that could have allowed it to avoid the merits, the Court relentlessly marched to "the substance of the complaint" and then declared bluntly that it was "impossible to grant the equitable relief which is asked."[503] With little camouflage, its reasoning invoked the hard proposition that the Court simply lacked the de facto power to enforce any order that would provide plaintiff a meaningful remedy.[504] In such a situation, *Hans* provided the perfect legal rationale. "This is alleged to be a conspiracy of a State, although the State is not and could not be made a party to the bill," *Giles* declared.[505] As authority, it cited *Hans*. The necessary conclusion followed logically. "The Circuit Court has no constitutional power to control its [the State's] action by any direct means."[506] The Justices affirmed the dismissal of plaintiff's suit.

In *Giles* the Court's ready recognition and acceptance of its helplessness was striking:

> The bill imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff's name to be inscribed upon the lists of 1902 will be needed. If the

500. 189 U.S. 475 (1903). Justice Holmes, the Union war veteran who had come to scorn his earlier abolitionist faith, wrote for a six-Justice majority. Justices Brewer and Harlan dissented in separate opinions. *Id.* at 488 (Brewer, J., dissenting), 493 (Harlan, J., dissenting). Justice Brewer, not surprisingly, argued that the federal courts had jurisdiction to hear the suit, while Justice Harlan found other jurisdictional problems. *Id.* at 488–504 (Brewer and Harlan, JJ., dissenting). Unlike Justice Brewer, however, Justice Harlan noted his belief that, on the merits, plaintiff was entitled to relief. *Id.* at 504 (Harlan, J., dissenting). Surprisingly, Justice Brown also dissented, but without opinion. *Id.* at 493.

501. *Id.* at 482.

502. *Id.*

503. *Id.* at 486.

504. Although the Court offered what purported to be legal reasons for its decisions, it relied ultimately and explicitly on its own institutional helplessness, implying that a grant of relief would have received no support from either the state or the legislative or executive branches of the United States government. *Id.* at 487–88.

505. *Id.*

506. *Id.* at 488 (citation omitted).

> conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States.[507]

That recognition and acceptance of helplessness was also familiar. Those same characteristics had marked the Court's opinion in *Jumel*, where it had begun expanding the Eleventh Amendment to avoid the problem of southern repudiationism:

> The remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax in question until the bonds, principal and interest, were paid in full, and that, too, in a proceeding in which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place.[508]

The parallel stance and rhetoric, and the ultimate judicial abdication, in *Giles* and *Jumel* was hardly surprising, for *Giles* was a response to the same overarching problem that *Jumel* had addressed—the need to accept, rationalize, and legitimize the components of the post-Reconstruction settlement. On neither race nor bonds would the South be dissuaded from its course, and on neither race nor bonds would the North insist on compliance with the relevant constitutional provisions. *Giles* merely echoed *Jumel* in announcing the Court's recognition and acceptance of those practical truths. Thus, it was both natural and appropriate that *Giles* would find authority for its surrender to southern racism in *Hans*, the opinion that most broadly theorized *Jumel* and the Court's surrender to southern repudiationism. *Giles* confirmed the central role that *Hans* played in weaving the cloak of constitutional legitimacy that the Court draped over the twin components of the post-Reconstruction settlement.

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507. *Id.*

508. Louisiana v. Jumel, 107 U.S. 711, 727–28 (1883).

A decade after *Hans*, and three years before *Giles*, United States Senator "Pitchfork Ben" Tillman took the Senate floor. An enthusiastic participant in the racial violence that enabled the Democrats to seize control of South Carolina, and the model for the hero of Thomas W. Dixon's novel *The Clansman*,[509] Tillman felt free to brag about the achievements of the white South: "We took the government away [from the blacks]," he boasted, "We stuffed ballot boxes. We shot them. We are not ashamed of it."[510] He did not stop with praise for the efforts of his beloved South, however, but pointed to parallel actions in the North.

> The brotherhood of man exists no longer, because you shoot negroes in Illinois, when they come in competition with your labor, as we shoot them in South Carolina when they come in competition with us in the matter of elections. You do not love them any better than we do. You used to pretend that you did, but you no longer pretend it, except to get their votes.[511]

The North, Tillman charged bluntly, was fully and knowingly complicitous in the nation's systemic racial abuses. While he spoke, and when he took his seat afterward, not a single senator rose to dispute his claims or utter a word of protest.[512] They all lived comfortably together in the world of the post-Reconstruction settlement.

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509. KANTROWITZ, *supra* note 223, at 284–86.

510. HAROLD U. FAULKNER, POLITICS, REFORM AND EXPANSION, 1890–1900, at 7 (1959) (quoting Tillman's speech to the Senate in 1900). Tillman was a major force in leading the South to restore white rule.

> Democratic ringleaders threatened to spill blood to assert their right to rule. Tillman harassed black voters as they arrived [at the polls in 1876], declaring that he was manager of the poll and would notice if any Republican votes were cast. Robert Chandler, a black Republican who later testified that he had been driven off his land five weeks earlier, described a "whooping and holloing" group of men, including Tillman, who drew pistols and told Chandler to stay away from the ballot box. They warned him that if he came any closer, he "would come through blood." Chandler said, "Benny Tillman said they had been the rulers of Carolina and they intended to rule it."

KANTROWITZ, *supra* note 223, at 76.

511. FAULKNER, *supra* note 510, at 7–8 (quoting Tillman's speech to the Senate in 1900).

512. *Id.* at 8.

V. THE PARTICULARLY DUBIOUS NATURE OF *HANS*, III: A BYGONE JURISPRUDENCE AND THE RECONCEPTUALIZATION OF THE FOURTEENTH AMENDMENT

As a key element of the post-Reconstruction settlement, *Hans* helped close an era in the nation's history, the age when Americans addressed the problems caused by slavery and its abolition. An integral part of that bygone era, *Hans*—its purpose accomplished—quickly faded in importance as the nation turned to meet the new problems created by the emerging world of industrialization and internationalization. The insignia of *Hans*'s origins in both the passing age and the necessities of the post-Reconstruction settlement, however, were chiseled on its face, like angels of death on Puritan gravestones.

Most striking, *Hans* was based on two older jurisdictional approaches that the Court already had rejected. In *Metcalf v. Watertown*,[513] decided two years before *Hans*, the Court had announced a "well-pleaded complaint" rule that limited federal question jurisdiction, in suits originally brought in federal court, to those that presented "federal questions" on the face of properly pleaded complaints.[514] In *Hans*, which had been filed originally in federal court in 1884, the federal law issue was not part of a "well-pleaded complaint." Plaintiff's claim was based not on federal law but on state law—it was a straightforward contract claim for money due on bonds.[515] The federal law involved, the Contract Clause, became relevant only as a possible reply to the state's anticipated plea that it had a valid defense under state law for its refusal to honor the state-law claim for money due. Thus, two years before it rendered final judgment in *Hans*, the Court had announced a jurisdictional rule

513. 128 U.S. 586 (1888).

514. *Id.* at 588; *see* Collins, *supra* note 30, at 730–34. Six years later, in *Tennessee v. Union & Planters' Bank*, 152 U.S. 454 (1894), the Court extended that plaintiff's pleading rule to cases brought originally in state court and removed to federal court under federal question jurisdiction. *See* Collins, *supra* note 30, at 734–37; *supra* notes 122–25 and accompanying text.

515. Hans v. Louisiana, 134 U.S. 1, 1–3 (1890) (plaintiff pleading contract, breach, and money due under state law). It is possible to conceive of *Hans* as impliedly recognizing a federal cause of action directly under the Contract Clause. *See* Woolhandler, *supra* note 38, at 448–50 & n.280. It seems unlikely, however, that the Court shared that conception. First, it did not articulate that concept or use that term until well into the twentieth century. Second, its opinion in *Hans* and other similar late nineteenth-century cases suggest that the Justices were living through a time of drastic social and jurisprudential change and that they were unclear and uncertain about a great number of things. The law of federal jurisdiction was unsettled and changing, and the Justices were in many ways simply struggling along.

that held claims such as those raised in *Hans* to be insufficient to present federal questions for jurisdictional purposes. Yet, to reach its desired result, the Court ignored *Metcalf* and regressed to an outmoded rule.

Similarly, the Court in *Hans* accepted a complaint of a type that it had already determined was insufficient to establish federal jurisdiction and that properly required the suit's dismissal. In 1884, in *Mansfield, Coldwater & Lake Michigan Railway Co. v. Swan*,[516] it had ruled that a federal court could not hear a case unless the party invoking its jurisdiction affirmatively pleaded, and if necessary proved, a proper basis of federal subject matter jurisdiction.[517] Actions should be dismissed and judgments on appeal reversed, *Mansfield* declared, "not only in cases where it is shown negatively, by a plea to the jurisdiction, that jurisdiction does not exist, but even when it does not appear affirmatively that it does exist."[518] Under that requirement, *Hans* did not present a proper federal question for jurisdictional purposes, and thus *Mansfield* also called for *Hans*'s dismissal. Indeed, Justice Bradley's opinion in *Hans* acknowledged as much. It brazenly ignored the problem by accepting what the Justice slyly termed plaintiff's mere "suggestion" that the court below had subject matter jurisdiction over the action.[519] As the *Hans* Court ignored *Metcalf* to reach its goal, it also ignored *Mansfield.*

In addition to relying on outmoded doctrines on those two issues, *Hans* also reflected two other doctrines that the Court would reject in the early decades of the twentieth century. First, it embraced a broad and amorphous concept of a "federal question" that was rooted in Justice Marshall's opinion in *Osborn*. The older concept considered a case within federal question jurisdiction if, in the words of *Hans*, "it

516. 111 U.S. 379 (1884).

517. *Id.* at 382–84. The *Mansfield* rule is usually traced to *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126 (1804).

518. *Mansfield*, 111 U.S. at 384. In their classic casebook, Henry M. Hart, Jr., and Herbert Wechsler maintained that the "principle declared in the Mansfield case and codified in the Federal Rules can properly be called the first principle of federal jurisdiction." HART & WECHSLER, *supra* note 40, at 719. In the twentieth century no federal court would allow a party to proceed on a mere "suggestion" that subject matter jurisdiction existed. *Id.* "The first duty of counsel is to make clear to the court the basis of its jurisdiction as a federal court," Hart and Wechsler explained. *Id.* "The first duty of the court is to make sure that jurisdiction exists." *Id.*; *accord* CLINTON ET AL., *supra* note 60, at 159 (affirming foundational nature of the *Mansfield* rule).

519. *Hans*, 134 U.S. at 9. Because *Mansfield* and *Metcalf* set the boundaries of federal subject matter jurisdiction, they should have been applied in the Supreme Court, regardless of the time at which the suit below was filed. The Court's decision to rely on a "suggestion" of jurisdiction and to proceed to judgment evidenced the Court's determination to use *Hans* to settle the southern state bond litigations once and for all.

necessarily involves a question under said Constitution or laws."[520] Indeed, it was indicative of the instrumentalist and even willful way that Justice Bradley constructed his opinion in *Hans* that he embraced *Osborn*'s authority on one point—the jurisdictional nature of a "federal question"—while rejecting it on another—the scope of the Eleventh Amendment itself. In any event, in the early years of the twentieth century the Court would abandon that unmodulated concept of a federal question and substitute a narrower and more highly focused approach designed to determine whether the federal law element in a case was sufficiently important and central to warrant the national courts taking jurisdiction over it.[521] Under that approach, *Hans* would likely have been dismissed for want of a federal question.

Second, *Hans*'s analysis of the Eleventh Amendment was informed and crimped by the doctrine of *Swift v. Tyson*[522] and the "general" federal common law. In *Hans* the Court failed even to consider whether the amendment's specific language referring to aliens and noncitizens might have been intended to limit its denial of federal judicial power to cases in which jurisdiction was based on citizenship. It failed to consider that possibility, in part, because

520. *Id.*; *see, e.g.*, Pac. R.R. Removal Cases, 115 U.S. 1, 11 (1885) (holding that a case against a corporation organized under the laws of the United States is within federal question jurisdiction); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 756–57 (1824) (finding the case to be within federal question jurisdiction because the controversy arose under the Constitution).

521. In a series of cases in the early twentieth century the Court narrowed *Hans*'s conception of a federal question by holding that federal law issues were not sufficient to confer jurisdiction if they involved relatively peripheral or subsidiary issues that were unlikely to be dispositive. Only those federal law issues that were central to plaintiffs' claims were sufficient to confer federal question jurisdiction on the lower courts. *See* Gully v. First Nat'l Bank in Meridian, 299 U.S. 109, 112–13 (1936); Moore v. Chesapeake & Ohio Ry. Co., 291 U.S. 205, 209–11 (1934); Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199–202 (1921); Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 259–60 (1916). The Court has essentially stayed with this narrowed concept of federal question jurisdiction to the present day. *See* Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 807–12 (1986).

522. 41 U.S. (16 Pet.) 1, 18–19 (1842) (creating a special "federal common law" by holding that the federal courts could make "independent" judgments on common-law questions and were not bound by the common-law decisions of the state courts). For general discussions of the growth of the federal common law see the following: ALLAN RANDALL BRIDWELL & RALPH U. WHITTEN, THE CONSTITUTION AND THE COMMON LAW: THE DECLINE OF THE DOCTRINES OF SEPARATION OF POWERS AND FEDERALISM (1977); TONY FREYER, FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY (1979); TONY FREYER, HARMONY & DISSONANCE: THE *SWIFT* AND *ERIE* CASES IN AMERICAN FEDERALISM (1981); William P. LaPiana, Swift v. Tyson *and the Brooding Omnipresence in the Sky: An Investigation of the Idea of Law in Antebellum America*, 20 SUFFOLK U. L. REV. 771 (1986).

under *Swift* the substantive law that governed the bonds would have been the same—"general" federal common law—regardless of whether jurisdiction was based on citizenship or the presence of a federal question.[523] Thus, *Hans* understandably overlooked what was arguably a more plausible construction of the Eleventh Amendment because it was partially blinded by a doctrine of federal substantive law that the Court would subsequently reject as not only misguided but "unconstitutional."[524] Its implicit reliance on the *Swift* doctrine further marked its roots in a passing age and a jurisprudence that the Court itself would eventually repudiate.[525]

Thus, *Hans* bore the marks of its historical origin. It incorporated a variety of rules, procedures, and assumptions that the Court had already rejected or would do so in the coming decades. More significant, its recurrence to the outmoded rules rejected in *Metcalf* and *Mansfield* evidenced its instrumentalism and its determination to use *Hans* to accomplish the important national results it sought.

While those doctrinal marks identified *Hans* with both a bygone jurisprudential age and the compulsions of the post-Reconstruction settlement, another of its characteristics did far more, not only stamping *Hans* as outmoded and instrumentalist but also revealing it as fundamentally inconsistent with the post–Civil War Constitution. *Hans* also implicitly rejected the principle that the Fourteenth Amendment had altered the nature of American government and the reach of the federal judicial power. While the Court's other decisions implementing the post-Reconstruction settlement adopted a variety of devices to constrict the Fourteenth Amendment, *Hans* was the most peremptory. It simply ignored the amendment as though it did not exist.

From the nation's early years the Court had assumed that a central purpose of the federal courts was to foster national unity and commercial expansion by providing fair and neutral forums to resolve disputes between states or their citizens on one side and other states and nations or their citizens and subjects on the other. Through their admiralty and diversity of citizenship jurisdiction the federal courts protected outsiders from discrimination based on local prejudice,

523. *See* Sherry, *supra* note 13, at 1265.

524. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 77–78 (1938); *see also* PURCELL, *supra* note 107, at 172–91 (discussing the overruling of *Swift* in *Erie*).

525. "Because the legitimacy—to say nothing of the correctness—of *Hans* depended on its integration with the related constitutional theory of an expanded *Swift* doctrine, the *Hans* rule lost its legitimacy in 1938." Sherry, *supra* note 13, at 1271.

parochial favoritism, and narrow, hostile, or anticommercial state policies.[526] Neither their authorized jurisdiction nor their presumed role called for them to hear suits brought against states by a state's own citizens.[527]

Then came the Civil War and the three constitutional amendments that were intended to secure the fruits of Union victory. All three amendments imposed radical new limitations on the states, expanded the power of Congress substantially, and broadened the scope of the federal judicial power.[528] Even with the narrowed construction the Court gave the amendments in the 1870s and 1880s, and even with the severely constraining "state action" requirement it imposed on the Fourteenth, the three amendments still wrought a major change in the nature of American government and the constitutional relationship between federal and state power.

Hans ignored the import of those amendments.[529] It cemented the post-Reconstruction settlement by rejecting their mandate and clinging to an early nineteenth-century understanding of the role and scope of the federal judicial power. At its core, *Hans* was based on the outmoded assumption—repudiated by the Civil War Amendments—that the federal courts were not authorized to hear suits between states and their own citizens. The critical textual problem that *Hans* addressed, after all, was that the Eleventh Amendment prohibited only suits against states brought by noncitizens or aliens. "It is true, the amendment does so read," the

526. The Court served the same policies through the federal common law developed under *Swift*, 41 U.S. at 18–19. *See, e.g.*, Baltimore & Ohio R.R. Co. v. Baugh, 149 U.S. 368 (1893) (deciding a negligence case based on federal common law). The "general" federal common law was not available in state courts nor in the United States Supreme Court in cases appealed from state courts. *See, e.g.*, Davidson v. New Orleans, 96 U.S. 97, 104–06 (1878) (stating that the Court might consider the general federal common law if it were reviewing the decision of a federal court).

527. Justice Field illustrated the extent to which the assumption remained fundamental in 1880. Noting that the judicial power of the United States extended "to cases in law and equity arising under the Constitution, laws, and treaties of the United States, and to various controversies to which a State is a party," he nevertheless proceeded without hesitation to declare that the Constitution "does not include in its enumeration controversies between a State and its own citizens." Virginia v. Rives, 100 U.S. 313, 336 (1880) (Field, J., dissenting).

528. CURTIS, *supra* note 88, at 57–91; 6 FAIRMAN, *supra* note 69, at 1117–1206; Kaczorowski, *supra* note 88, at 938–40; Schmidt, *supra* note 89, at 1420–29, 1497–99. Even those who argue for a narrow interpretation of the amendments maintain that they restricted the states and expanded federal power significantly. BELZ, *supra* note 88, at 115–17, 157–77; NELSON, *supra* note 88, at 114–47; Benedict, *supra* note 88, at 49–51, 63–79.

529. For a similar argument involving the appellate jurisdiction of the Supreme Court, see Matasar & Bruch, *supra* note 102, at 1345–55.

Court acknowledged, "and if there were no other reason or ground for abating [plaintiff's] suit, it might be maintainable."[530] There was, however, an "other reason."[531] If the amendment allowed such a suit, *Hans* explained,

> then we should have this anomalous result, that, in cases arising under the Constitution or laws of the United States, a State may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States, or of a foreign state; and may be thus sued in the federal courts, although not allowing itself to be sued in its own courts.[532]

Such an "anomalous result," the Court continued, would be "startling and unexpected."[533] Indeed, it declared in seeming shock, such a conclusion was "almost an absurdity on its face."[534] It was, the Court finally exploded as it reached the zenith of its stunned disbelief, "an attempt to strain the Constitution and the law to a construction never imagined or dreamed of."[535]

Those escalating expressions of astonishment and indignation were rooted in a pre-Fourteenth Amendment view of the federal courts' role, in the outmoded assumption that their primary purpose was to protect noncitizens and aliens, not a state's own citizens.[536] Revealingly, *Hans*'s antiquated assumption about the role of the

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530. Hans v. Louisiana, 134 U.S. 1, 10 (1890).

531. *Id.*

532. *Id.*

533. *Id.* at 10–11.

534. *Id.* at 15.

535. *Id.* The extremity of the Court's rhetoric could be taken to suggest that the Justices recognized that such an "anomalous result" was, in fact, quite plausibly called for by the Civil War amendments.

536. This is not to suggest that the older view denied the federal courts any other roles, but only that the settlement of disputes involving diverse citizens and aliens—most commonly involving state-created, private-law rights—was seen through most of the nineteenth century as a major function. *See* Purcell, *supra* note 103, at 691–93. Among the other roles the federal courts played was the enforcer of federal law, especially laws involving crimes and taxation, and the protector of federal officials acting in their official capacities. Frequently, the national courts enforced federal law through their diversity jurisdiction. *See* Woolhandler, *supra* note 150, at 89–92. Many rules and "rights" that have come to be governed by federal law since the late nineteenth century were in earlier periods issues of "state" law. *See, e.g.*, GORDON, *supra* note 473, at 224–25 (discussing the federal absorption of state law in the controversy over polygamy). Finally, the statement in the text is not meant to suggest that views about the role of the federal courts did not change during the nineteenth century. They, of course, did change in a variety of ways. The point in the text is that as late as the 1890s, the older view still resonated among the Justices and proved useful—perhaps essential—in helping them in *Hans* to find a way around the language of the Eleventh Amendment.

federal courts was consistent with the Court's efforts during the 1890s to subordinate federal question jurisdiction to diversity jurisdiction, contracting the former while expanding the latter.[537] At the time of *Hans* and into the 1890s, in other words, the Court still tended to conceive of the lower federal courts as instruments designed primarily to protect "outsiders" acting beyond their states or nations against the dangers of local prejudice and discriminatory policies established by other states.[538]

Far more importantly, in the 1890s—once the post-Reconstruction settlement had been firmly locked in place and issues of government economic regulation came pushing to the fore—that pre–Civil War assumption about the role of the federal courts quickly began to crumble. Striking evidence of its disintegration in the aftermath of *Hans* emerged from two pathbreaking cases announced within the decade, *Reagan v. Farmers' Loan & Trust Co.*,[539] decided in 1894, and *Smyth v. Ames*,[540] handed down four years later. The two cases revealed the profound and rapid way in which the Court began in the years after *Hans* to reconceive the role of the lower courts, the nature of the federal judicial power, and the meaning and significance of the Fourteenth Amendment.

In *Reagan*, the Court voided as unreasonable railroad rates imposed by the Texas Railroad Commission and upheld an injunction barring the state from enforcing the rates.[541] *Reagan* thus constituted a critical step in establishing what became the doctrine of substantive due process. The Court asserted its authority to judge the fairness and reasonableness of state-established rates, and it defined that authority as inherently within "[t]he province of the courts."[542]

Most significantly for present purposes, *Reagan* revealed a Court in jurisprudential transition. Looking to the future, the decision illustrated the Court's willingness to set the Eleventh Amendment aside when policy demanded. First, *Reagan* avoided the amendment on a potentially sweeping theory. The suit filed against the state's attorney general and its railroad commission, it explained, was not a suit against the state because the state itself had "in a pecuniary sense

537. *See supra* text accompanying notes 120–30.

538. PURCELL, *supra* note 107, at 266–91. On the broad importance of diversity jurisdiction in the nineteenth century, see generally Collins, *supra* note 130; Woolhandler, *supra* note 150, at 84–108.

539. 154 U.S. 362 (1894).

540. 169 U.S. 466 (1898).

541. *Reagan*, 154 U.S. at 412–13.

542. *Id.* at 397.

no interest at all" in the suit.[543] The state's interest was nothing more than its interest in conducting governmental affairs. "There is a sense, doubtless, in which it may be said that the State is interested in the question, but only a governmental sense," the Court explained.[544] "It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws . . . ."[545] That interest—the essential interest in carrying on the governmental affairs of the state—was insufficient to make the state a proper or necessary party to a suit designed to enjoin the state's officials from conducting "governmental" affairs. Hence, the interest was insufficient to implicate the state's Eleventh Amendment immunity. Consequently, the federal courts could ignore the amendment and enjoin a state's officers from taking any unconstitutional action even though their action was taken pursuant to law, on the state's behalf, and in the conduct of "governmental" affairs. Second, *Reagan* ignored *Ayers*[546] and its holding that the initiation of legal enforcement proceedings by state officials was not by itself a legal wrong sufficient to warrant the intervention of federal equity.[547] By 1894 the Court was prepared to affirm an injunction that prohibited state officials merely from instituting suit to recover penalties due under the state's authorizing statute.[548] Third, *Reagan* illustrated the Court's ability to conjure state "consent" to federal jurisdiction when it seemed useful. The statute at issue provided that judicial challenges to the commission's rates should be brought "in a court of competent jurisdiction in Travis County, Texas."[549] The statutory language seemed to specify a state court. Moreover, a further provision of the statute, mandating that any action under the provision "shall have precedence over all other causes on the docket"[550] at both the trial and appellate levels, seemed to confirm that conclusion, for states could not so dictate concerning the jurisdiction and docket of the federal trial and appellate courts. *Reagan* nonetheless construed the provision as the state's "consent" to suit in a local federal court. The United States court for the Western District of Texas, it announced, "is 'a court of competent

543. *Id.* at 390. "Not a dollar will be taken from the treasury of the State, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered." *Id.*

544. *Id.*

545. *Id.*

546. 123 U.S. 443 (1887).

547. *Id.* at 500.

548. *Reagan*, 154 U.S at 367, 369–70, 413.

549. *Id.* at 365.

550. *Id.*

jurisdiction in Travis County' " and "comes, therefore, within the very terms of the act."[551] Thus, *Reagan* made clear that there were a variety of ways to circumvent the Eleventh Amendment when federal judicial action seemed necessary.

While *Reagan* looked toward the future in minimizing the Eleventh Amendment and in expanding federal judicial authority over state actions, it nonetheless also remained rooted in the past, constrained and perplexed by older assumptions. First, in identifying the nature of the controlling substantive law, *Reagan* remained uncertain. It suggested, in fact, three different possibilities: the Due Process Clause, the Equal Protection Clause, and some inherent common-law judicial power to evaluate the "reasonableness" of rates charged by common carriers.[552] At no point did it clearly decide among them. Second, confirming the Court's uncertainty about the source and nature of the controlling substantive law, *Reagan* repeatedly spoke as if the case were in federal court on the basis of diversity jurisdiction. It did not, in any event, identify the case as one raising a federal question for jurisdictional purposes.[553] Third, and perhaps most telling, the Court repeatedly stressed the importance of the fact that plaintiff was a noncitizen of Texas: Unlike a state's citizens, the Justices believed, noncitizens of a state had an unquestioned right to use the federal courts:

> For it may be laid down, as a general proposition that, whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, *a citizen of another State* may invoke the jurisdiction of the Federal courts to maintain a like defence. *A State cannot tie up a citizen of another State*, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts.[554]

Four pages later *Reagan* reiterated the point.

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551. *Id.* at 392 (quoting the Texas Railroad Commission Act).

552. *Id.* at 398 (citing Chicago, Milwaukee & St. Paul Railway v. Minnesota, 134 U.S. 418, 458 (1890) and suggesting a due process basis). The Court referred to the "constitutional right" of "equal protection," *id.* at 399; and it claimed that "it has always been recognized" that "the courts had jurisdiction to inquire" into the reasonableness of the rates charged by common carriers, *id.* at 397. *See* Collins, *supra* note 130, at 1292–93.

553. The Court's opinion retained a studied vagueness. It stated at one point, for example, that the lower court had jurisdiction "whether we rest upon the provisions of the [state] statute or upon the general jurisdiction of the court existing by virtue of the statutes of Congress, under the sanction of the Constitution of the United States." *Reagan*, 154 U.S. at 393.

554. *Id.* at 391 (emphasis added).

> So that if in any case, there should be any mistaken action on the part of a State, or its commission, injurious to the rights of a railroad corporation, *any citizen of another State*, interested directly therein, can find in the Federal court all the relief which a court of equity is justified in giving.[555]

Finally, announcing its holding, the Court declared that it was "within the competency of the Circuit Court of the United States for the Western District of Texas, at the instance of the plaintiff, *a citizen of another State*, to enter upon an inquiry as to the reasonableness and justice of the rates."[556] Thus, the fact that plaintiff was a noncitizen was of compelling importance to the *Reagan* Court. It not only gave the lower court jurisdiction but also brought the case within what the Court still considered the core purpose of the federal courts, providing protection for noncitizens operating in interstate commerce.

Within a bare four years, both the Court and its doctrines had evolved substantially.[557] In upholding another federal injunction against unreasonable railroad rates, *Smyth v. Ames* embodied the transformation. As in *Reagan*, the Court looked to the future by disposing of the state's Eleventh Amendment objection. By 1898, however, it was able to do so quickly and easily—a perfunctory pronouncement sufficed. "It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff," the Court declared, "is not a suit against the State within the meaning of that Amendment."[558] Unlike *Reagan*, however, *Smyth* no longer seemed tied to the past. The change was apparent in its treatment of both substantive law and plaintiff's citizenship. On the question of substantive law, the Court was prepared by 1898 to identify the nature of the controlling substantive law clearly and at length. Invoking both the Due Process and Equal Protection Clauses, *Smyth* held explicitly that the Fourteenth Amendment controlled the case.[559] The opinion explained that the amendment protected corporations as well as individuals, that it prohibited states from imposing unreasonable rates, and that it

555. *Id.* at 395 (emphasis added).
556. *Id.* at 399 (emphasis added).
557. *See* PURCELL, *supra* note 107, at 40–46; Collins, *supra* note 130, at 1310–20.
558. Smyth v. Ames, 169 U.S. 466, 518–19 (1898).
559. *Id.* at 522–27.

mandated a full "judicial inquiry" into such regulatory issues.[560] The Court's new understanding of the nature of the controlling substantive law transformed its understanding of the significance of plaintiff's citizenship. *Smyth* ruled that the lower court had jurisdiction not only on the ground of diversity but also "upon the further ground" that the suit challenged the state statute as "repugnant to the rights secured to the plaintiffs by the Constitution of the United States" and hence "may be regarded as arising under that instrument."[561] Given the fact that plaintiff's claim was based on the Constitution and, consequently, that general federal question jurisdiction existed, in other words, diversity jurisdiction was superfluous and the citizenship of the parties irrelevant. The role of the federal courts under the Fourteenth Amendment, *Smyth* recognized and announced, was to enforce the Constitution regardless of citizenship. Whether the state acted against its own citizens or against citizens of other states no longer made a difference. Citizenship and diversity jurisdiction were irrelevant when plaintiff raised a claim under the Fourteenth Amendment.

Thus, in the brief four years from *Reagan* to *Smyth* the Court's conception of the role of the federal courts had shifted markedly. From a focus on their older core role protecting noncitizens, the Court began recognizing and articulating their new role as protectors of federal rights irrespective of citizenship. To the Court that decided *Reagan*, it was still understandable that *Hans* could express astonishment at the idea that a citizen could sue his or her own state. To the Court that decided *Smyth*, it was already understandable that it should make no difference—in a suit brought under the Fourteenth Amendment—whether a state through its officials was sued by one of its own citizens or by a citizen of another state. The Court had come to see the problem anew, the controlling law anew, and the very role and purpose of the federal courts anew.[562]

The change in the Court's assumptions and jurisprudence became increasingly apparent in subsequent cases when it addressed the relationship between the Eleventh and Fourteenth Amendments. During the years when the Court helped structure the post-

560. *Id.* at 526. The Court identified and explained the controlling constitutional law in an extended discussion. *Id.* at 522–27.

561. *Id.* at 518.

562. Only two years after *Smyth*, the Court began the process of turning the lower courts away from traditional common law tort and contract actions and toward federal question suits involving government regulatory actions. *See* PURCELL, *supra* note 107, at 262–91.

Reconstruction settlement, it had construed the Eleventh Amendment liberally and sympathetically and the Fourteenth—particularly in the context of black rights—narrowly and begrudgingly. "To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment," *Ayers* had announced in 1887, "requires that it should be interpreted not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose."[563] Conversely, the Fourteenth Amendment was to be read strictly and literally. The federal courts could not enforce it without legislation, *Ex parte Virginia* declared, because in the amendment "[i]t is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed."[564] *Ayers* and *Virginia* stated principles well suited to legitimize the post-Reconstruction settlement and justify the failure of the federal courts to provide remedies for constitutional violations.

As the Court moved beyond the task of resolving the problems of race and repudiation to address the problems of industrialism and government regulation, however, it found that it had to invert its interpretative principles. As *Reagan* and *Smyth* illustrated, the Eleventh Amendment was waning as the Fourteenth Amendment waxed. The idea that the former had "breadth and largeness" began to wither, and the Court's commitment to its "manifest purposes" quickly faded. Conversely, the idea that the latter was "comprehensive" began to spread, and the Court began—outside the context of race—to embrace enthusiastically the Amendment's guarantees of nationally protected liberty and property.

In 1903, *Prout v. Starr*[565] captured the change. "It would, indeed, be most unfortunate," the Court there declared in its new voice, if the Eleventh Amendment "were to be interpreted as nullifying" either the constitutional powers of Congress or the constitutional limitations on the states.[566] Such a double nullification would result, it continued, "if the judicial power of the United States could not be invoked *to protect citizens* affected by the passage of state laws disregarding

563. *In re* Ayers, 123 U.S. 443, 505–06 (1887). A decade later, without using quotes or even referring to *Ayers*, the Court reaffirmed the same principle in virtually identical words. "To secure the manifest purposes of the constitutional exemption guaranteed by the Eleventh Amendment," it declared in *Fitts v. McGhee*, "requires that it should be interpreted not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose." 172 U.S. 516, 528 (1899).

564. *Ex parte* Virginia, 100 U.S. 339, 345 (1880).

565. 188 U.S. 537 (1903).

566. *Id.* at 543.

these constitutional limitations."[567] *Prout* declared that the Eleventh Amendment could not be used to so limit the federal judicial power and, further, that it could most certainly not be used to limit that power when Fourteenth Amendment rights were at issue. "Much less can the Eleventh Amendment be successfully pleaded as an invincible barrier to judicial inquiry whether the salutary provisions of the Fourteenth Amendment have been disregarded by state enactments."[568] Most directly to the point, *Prout* made it undeniably clear that the federal judicial power under the Fourteenth Amendment was intended "to protect citizens."[569]

The culminating moment came on March 23, 1908, when the Court handed down its paired decisions in *Ex parte Young*[570] and *General Oil Co. v. Crain*.[571] The former accomplished several interrelated doctrinal results. First, *Young* dispensed with the requirement that state officials had to threaten or commit some independent legal wrong before they could be enjoined. The decision authorized federal injunctions against state officials for merely threatening to enforce statutes claimed to be unconstitutional, severely qualifying if not overruling *Ayers*. Second, *Young* created a federal cause of action for injunctive relief against state officials directly under the Fourteenth Amendment. It dismissed as irrelevant the fact that there was no diversity of citizenship, and it dispensed with any need for statutory authorization for a cause of action. Rejecting the language of *Ex parte Virginia* which had left enforcement of the Fourteenth Amendment to Congress,[572] the Court held that the federal courts were authorized to enforce the amendment—even in the absence of statutory authorization—by creating judicial remedies against state officials. Finally, by creating a cause of action under federal law, *Young* broadened federal jurisdiction by hewing a wide bypass around the well-pleaded complaint rule. It enabled those who wished to challenge the constitutionality of state actions to plead a federal claim and thereby invoke federal question jurisdiction. Thus, it allowed them to initiate

567. *Id.* (emphasis added). Interestingly, in its comments about the powers of Congress, the Court hinted that the express terms of the Eleventh Amendment—barring suits by noncitizens—might be considered the appropriate limit on the amendment's scope. *Id.*

568. *Id.*

569. *Id.*

570. 209 U.S. 123 (1908).

571. 209 U.S. 211 (1908).

572. *Ex parte* Virginia, 100 U.S. 339, 344–48 (1880); *see also supra* text accompanying note 564.

preemptive proceedings against state officials in federal court, thereby controlling the timing and especially the forum where citizens could bring their challenges to state actions.[573]

If *Young* was pivotal as a formulation of constitutional doctrine, *Crain* was eloquent as a display of judicial mood. There, Tennessee argued that the Eleventh Amendment precluded federal jurisdiction over the actions of a state official and, further, that the amendment might prevent the United States Supreme Court from reviewing challenges to such actions that had been brought in the state's own courts. Responding bluntly, the Court dispensed with its customary delicacy and rejected the argument out of hand for a practical and compelling reason. If the state's position were accepted, it warned, "it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution."[574] The Court was explicitly pointing to the possibility of state duplicity and bad faith. Without review by the federal judiciary, *Crain* asserted, "the Fourteenth Amendment, which is directed at state action, could be nullified as to much of its operation."[575] That result would be intolerable, and it could not be allowed.

Crain thus made it crystal clear that sometime between *Ayers* and *Hans* at the end of one era and *Reagan* and *Smyth* at the beginning of another, the Court had begun to reconceive the role of the federal courts and radically readjust the balance between the Eleventh and Fourteenth Amendments. It had become wholeheartedly committed to the principle that the exercise of federal judicial power over state actions was a paramount necessity and that enforcing the guarantees of the Fourteenth Amendment was the highest duty of the federal courts. Further, it had also become committed to the principle that the Amendment protected "citizens" and authorized federal judicial relief against unconstitutional actions by officials of the citizen's state. *Crain* demonstrated the Court's commitment to Fourteenth Amendment protections, its suspicion of the states and their courts, and its determination to oversee and

573. *See* PURCELL, *supra* note 107, at 42–44. From its inception *Young* has been the target of severe and wide-ranging criticism as well as the object of glowing praise. Attitudes toward it have varied largely as a result of the changing political orientation of the federal courts and the practical impact of their jurisdiction. *See, e.g.*, OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION (1978) (describing how the popularity of *Young* and the federal injunctions it allowed waxed and waned); Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289 (1995) (criticizing *Young* for creating the fiction that plaintiffs could sue the government by suing a government official).

574. *Crain*, 209 U.S. at 226.

575. *Id.*

constrain their economic regulatory actions. "And it will not do to say that the argument is drawn from extremes," it insisted with obvious passion.[576] "Constitutional provisions are based on the possibility of extremes."[577]

The transformation in the relationship between the Eleventh and Fourteenth Amendments was completed and celebrated five years later in *Home Telephone & Telegraph Co. v. Los Angeles*,[578] the Court's culminating paean to the Fourteenth Amendment and to the federal judiciary as its "primary" enforcer. *Home Telephone* reversed the constitutional values asserted in *Ayers*, giving the Eleventh Amendment scarcely a nod and underscoring the "completeness" and "comprehensive inclusiveness" of the Fourteenth.[579] The Fourteenth Amendment reached not only the actions of all state officials but of all municipal or local government officials as well. It reached not only actions that were authorized by state law but those that were unauthorized as well, even actions that were clearly unlawful under a state's own law. The Fourteenth Amendment, *Home Telephone* proclaimed sweepingly, "embraces every manifestation of state power."[580] Indeed, it cut the Gordian Knot of constitutional jurisdiction that the Court had tied in its earlier efforts to legitimate the post-Reconstruction settlement: It ruled bluntly that actions by state officials constituted "state action" for Fourteenth Amendment purposes but did not constitute "state action" for Eleventh Amendment purposes. Expressly reversing the constitutional language about the judicial power set forth in *Ex parte Virginia*, *Home Telephone* announced that the federal courts were to see that the Fourteenth Amendment was enforced whenever and wherever it might be applicable. They "are charged under the Constitution" with that "duty," the Court proclaimed, and they—not the state courts—were properly the "primary source for applying and enforcing the

576. *Id.*
577. *Id.* at 226–27; *see* PURCELL, *supra* note 107, at 272–91.
578. 227 U.S. 278 (1913).
579. *Id.* at 288.
580. *Id.* at 295. The Court held that the

> provisions of the Amendment as conclusively fixed by previous decisions are generic in their terms, are addressed, of course, to the States, but also to every person, whether natural or juridical who is the repository of state power. By this construction the reach of the Amendment is shown to be coextensive with any exercise by a State of power, in whatever form exerted.

Id. at 286–87.

Constitution of the United States in all cases covered by the Fourteenth Amendment."[581]

Thus, by the second decade of the twentieth century the Court had reversed its treatment of the relationship between the Eleventh and Fourteenth Amendments. A broad Eleventh Amendment and a narrow Fourteenth Amendment—*Hans* and the *Civil Rights Cases*—had blended nicely to underwrite and institutionalize the post-Reconstruction settlement. Times and issues, however, had changed. As the plight of the freed persons was submerged from view and the complex challenges of industrialism advanced to the fore, a new balance was required, one that drastically shrank the Eleventh Amendment while raising the Fourteenth to a position of dominance. As *Young* and its cohort remolded the scope of the two amendments, however, the Court left the state action requirement of the *Civil Rights Cases* in place. That doctrine—necessary to guarantee the racial bargain that sealed the post-Reconstruction settlement—proved to be ideally shaped, for it insulated the southern system of white supremacy while welcoming the Court's new Fourteenth Amendment jurisprudence that checked economic regulation. The new administrative and legislative challenges of the industrial age, after all, involved precisely the kind of formal government behavior that clearly and obviously constituted "state action." Thus, the turn-of-the-century transition retained the doctrine of the *Civil Rights Cases* in its full vigor. *Hans*, however, needed to be deflated, reshaped, and severely limited. By 1913, after *Young*, *Crain*, and *Home Telephone*, that remodeling had been fully accomplished.

Indeed, from the new vantage point of *Young*, *Crain*, and *Home Telephone*, *Hans*'s backward orientation was once more manifest and even embarrassing. In its final paragraph *Hans* had soared to the height of constitutional principles as they had reigned at the beginning of 1890:

> The legislative department of a State represents its polity and its will; and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent (*of which the legislature, and not the courts, is the judge,*) never fails in the end to incur the odium of the world, and to bring lasting injury upon the State itself. But to deprive the legislature of the power of judging what the honor and safety of the State

581. *Id.* at 284–85.

> may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause.[582]

The statement echoed the legal and political world of the *Slaughter-House Cases* and *Munn v. Illinois*,[583] the constitutional world of the 1870s and early 1880s.

That world, of course, had begun to disintegrate long before *Young*, *Crain*, and *Home Telephone*. It had, in fact, barely lasted to 1890 itself. Only a fleeting three weeks after *Hans* came down, the Court announced its landmark decision in *Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota*[584] initiating the new era of Fourteenth Amendment substantive due process. There, the Court had declared that the "question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation."[585] Whether "reasons most cogent" were sufficient to justify government action, in other words, had—a mere twenty-one days after *Hans* proclaimed the opposite—turned out to be a "judicial" question after all. Moreover, and again contrary to *Hans*'s three-week-old declaration, it turned out to be a question over which the judiciary, and not the legislature, was to be the final judge.[586] On this fundamental issue, too, *Hans* manifested its roots in a rapidly expiring age that did not survive the century's end.

If ever a case was the ad hoc creature of a distinctive time, it is *Hans*. If ever a case was quickly trimmed, pruned, cut away, and nearly chopped off at its roots by the subsequent age, it is *Hans*. If ever a case had roots that were themselves rotten, it, too, is *Hans*.

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582. Hans v. Louisiana, 134 U.S. 1, 21 (1890) (emphasis added).

583. 94 U.S. 113 (1877). On the passing of the older constitutional world, see WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA (1996) (describing the nineteenth-century constitutional world of the predominance of the state and local government and their extensive regulation of economic and social behavior).

584. 134 U.S. 418 (1890).

585. *Id.* at 458. The decision came down on March 24, 1890, while *Hans* had come down on March 3.

586. In 1893 the Court again contradicted its sweeping pronouncement of principle in *Hans*, declaring that the amount of compensation due private parties affected by government regulation was also "a judicial and not a legislative question." Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893).

CONCLUSION: A PLACE FOR HISTORIANS' HISTORY

In retrospect, Frederick Jackson Turner seems to have been right, even if for the wrong reasons. The decades around 1890 did mark a pivotal transition in American history. During those years *Hans* meshed with *Ayers*, *Jumel*, *Plessy*, the *Civil Rights Cases*, and *Louisville, New Orleans* to help structure and legitimize a fundamental and well-understood politico-constitutional settlement. That settlement helped resolve, to the satisfaction of most white Americans for the next half century and more, the question of southern independence and the complex issues that slavery and its abolition had thrust to the center of American life. *Hans* was a monument to the end of an era, and its primary significance was—literally as well as figuratively—to settle accounts from the past.

Indeed, with respect to the law of the Eleventh Amendment, the modern age began quite apart from, though almost contemporaneously with, *Hans*. That new age produced an increasingly vigorous reaffirmation of the right of the federal judiciary—notwithstanding *Hans* and the Eleventh Amendment—to scrutinize the actions of states and their officials.[587] After *Hans*, in fact, the dawning age of modern industrial America led to a new jurisprudence of the federal judicial power, a jurisprudence that quickly led from *Chicago, Milwaukee* to *Reagan* and *Smyth* and then on to *Young*, *Crain*, and *Home Telephone*. It led to a jurisprudence that constrained the Eleventh Amendment and accepted the fact that the Civil War amendments had altered the structure of American government.[588] Ultimately, those new principles of federal jurisdiction—reshaped to the needs and values of a new mid-twentieth-century age—helped inspire a powerful and long-delayed movement for racial justice that, more than a century after the Civil War, wiped away many of the remnants of the post-Reconstruction settlement.[589]

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587. *E.g.*, Pennoyer v. McConnaughy, 140 U.S. 1, 9–19 (1891) (upholding federal injunction against state officials); Lincoln County v. Luning, 133 U.S. 529, 530–31 (1890) (holding that counties did not come within the scope of Eleventh Amendment immunity).

588. That jurisprudence, of course, had its own long, evolving, complex, and politically contested history. *See generally* PURCELL, *supra* note 107 (reviewing the history and expansion of federal judicial power from the late nineteenth century to the modern era).

589. The origins of the Civil Rights Movement of the mid-twentieth century were, of course, complex, and the courts played only a limited, if nevertheless quite important, role. *Compare, e.g.*, Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994) (asserting that the civil rights movement and end of legalized segregation was the result of social and political change, not judicial decisions), *with* FISS, *supra* note 573 (describing *Brown* and federal courts as critical to civil rights movement).

The Civil War amendments and the various Reconstruction measures that followed had posed a wide range of complex and fundamental problems for the Court. The fact that the nation was undergoing a profound transformation in its political dynamics, racial attitudes, social conflicts, economic relations, and ethnic and religious composition only compounded the difficulties that the Justices faced. Small wonder that their decisions were so sensitively attuned to social changes,[590] and small wonder that they reshaped the contours of federal jurisdiction in ways that they thought would best serve the nation's changing values and needs.

The Rehnquist Court has followed the same course, serving the nation's changing values and needs according to its lights. Its majority Justices seized upon *Hans* and inflated its significance because it was useful in their efforts to check federal power, preserve the institutional autonomy of the states, and limit a wide range of disfavored federal statutes and rights. The Rehnquist Court's policies and choices may be wise; they are unquestionably well-intentioned. Its policies and choices, however, should be placed openly on their own foundations and justified publicly on their own merits. They should not, in any event, stand on *Hans*.[591]

An historical analysis of *Hans*'s origins shows that the decision lacks authority as a constitutional precedent for three interrelated reasons. First, despite its covering rhetoric, it was the product of neither constitutional principle nor the intent of the framers but of judicial instrumentalism, a result of the Court's shifting and pragmatic efforts to shape the jurisdiction of the federal courts to serve its evolving ideas of desirable national policy. It represented not the intent of the 1790s but the compromise of the 1890s. Second, the purposes the Court designed *Hans* to serve—powerful and, perhaps at the time, beyond the power of the judiciary to deny—were base and ignoble. The nation has long since rejected them. Third, *Hans* was not only outdated from its birth but misconceived in its essence. As a matter of legal doctrine, it reflected conceptions that were

590. *See, e.g.*, Benedict, *supra* note 88 (analyzing the decisions of the Court in the 1870s and 1880s with regard to social and political change); Eric Foner, *Reconstruction Revisited*, 10 REVS. AM. HIST. 82 (1982) (discussing the political and social effects of the Reconstruction Era on both blacks and whites throughout the nation).

591. In *Seminole Tribe*, Chief Justice Rehnquist claimed that the Court had long and consistently followed *Hans*. Seminole Tribe v. Florida, 517 U.S. 44, 54 n.7 (1996). As this Article suggests, and as a review of its prior decisions shows, *Hans* has been avoided more often than followed, criticized more often than defended, and, prior to the Rehnquist Court, narrowed more often than broadened. It is not *Hans* that has directed the Court but the policy inclinations, conscious or not, of its majority Justices.

outmoded when it was announced or became so soon thereafter. Most important, as a matter of constitutional principle, it embodied assumptions that conflicted with the mandate of the Fourteenth Amendment.

Those reasons suggest that *Hans* itself should be discarded.[592] Indeed, four of the five Justices who have labored to expand *Hans* should be disposed to agree with that argument. Only three years ago Chief Justice Rehnquist and Justices Scalia and Kennedy joined Justice Clarence Thomas's opinion in *Mitchell v. Helms*.[593] There, the four called for a substantial change in the Court's Establishment Clause jurisprudence, in part because the historical origins of that jurisprudence lay in late-nineteenth-century anti-Catholicism. The Court's doctrine developed "at a time of pervasive hostility to the Catholic Church and to Catholics in general," the four explained.[594] It originated in "hostility to aid to pervasively sectarian schools," and it was "an open secret that 'sectarian' was code for 'Catholic.' "[595] Thus, the Court's Establishment Clause jurisprudence had "a shameful pedigree,"[596] a discredited origin that undermined its legitimacy. "This doctrine, born of bigotry," the four Justices concluded bluntly, "should be buried now."[597]

That reasoning applies a fortiori to *Hans*. By any reasonable standard antiblack racism and racial oppression in America have been far more cruel, brutal, widespread, continuing, exclusionary, and utterly destructive to us all than has anti-Catholicism.[598]

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592. The point is that *Hans itself* lacks any claim to generative authority, not that some limited version of state sovereign immunity might not be desirable. More broadly, the point is that *Hans*'s ignoble origins helped induce the Court to invent an amorphous and elastic paratextual rationale and that the decisions of the Rehnquist Court have demonstrated the dangerous, unpredictable, and illimitable possibilities that such an exceptionally malleable rationale can be made to serve. *Hans* has proved a charter of judicial subjectivism.

593. 530 U.S. 793 (2000).

594. *Id.* at 828.

595. *Id.*

596. *Id.*

597. *Id.* at 829. In support of its point, the opinion cited only one scholarly article. *Id.* at 828. While the general principle the four Justices advanced seems sound, a far more comprehensive and compelling record should be required before it can be wisely and properly applied. *Compare, e.g.*, Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673 (2002) (arguing that the Establishment Clause was designed to protect liberty of conscience, but not the equality of religious minorities).

598. There are, of course, critical differences between the problems presented by the Court's Establishment Clause jurisprudence and those presented by its Eleventh Amendment jurisprudence, especially the constitutional jurisprudence that has relied on *Hans*. In neither area should arguments about "historical origins," by themselves, be

As the product of long-since abandoned doctrines and a mere device of expedience, *Hans* carries no authority of principled reasoning or "original intent." As an instrument of the post-Reconstruction settlement, a henchman of racism and racial oppression, it carries no authority of the nation's political or moral values. As an implicit rejection of the Fourteenth Amendment, it carries no authority of constitutional right or principle. There seems no reason to consider *Hans* authority for anything.

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determinative of normative "legal" issues. Indeed, as a matter of "law," *Hans* lacks authority because it was rooted in and shaped by pre-Civil War concepts that were repudiated by the three post-Civil War amendments and subsequently abandoned by the Supreme Court. An understanding of *Hans*'s "historical origins" is necessary to understand *why* the Court acted as it did in deciding the case and *why* it was prepared to turn its back on both traditional Eleventh Amendment jurisprudence and on the Civil War amendments. *Compare* Jeffries & Ryan, *supra* note 483 (framing the Court's Establishment Clause jurisprudence in political terms and suggesting its political origins), *with* GORDON, *supra* note 473 (analyzing the Court's use of history in its decision in a landmark Establishment Clause case as it applied to the Mormon practice of polygamy).