

It's Not Your Founding Fathers' Republic Any More

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Several benighted Supreme Court rulings subverted the Fourteenth Amendment and crushed President Lincoln's dream of binding up the nation's Civil War wounds with malice toward none and charity for all.

Before we scramble, though, we had better understand just what happened. There's no single villain. As these books show, all branches of government conspired over more than a century to turn the Constitution that the Framers wrote in 1787, plus the Bill of Rights that James Madison shepherded through the first Congress in 1789 and the Fourteenth Amendment ratified in 1868, into something their authors would neither recognize nor endorse.

The signal feature of the 1787 Constitution was its prudent restraint. The Framers learned from hard Revolutionary War experience that their new nation needed a more powerful central government than the Articles of Confederation authorized. But they bestowed the requisite powers with a trembling hand, knowing that the men who would exercise them were not angels but humans, as fallible as all other men—and usually more so, since overweening ambition and self-interest, not patriotism, are the standard spurs to seeking office. Recognizing that electing your officials doesn't ensure that they won't become as tyrannical as the hereditary monarchs the colonists had fled, the Framers' hemmed in and divided government authority, giving Congress only 19 specific powers that mostly concerned raising taxes, coining money, spending it on “the common Defence

and general Welfare of the United States” (meaning keeping the country safe), building post offices and post roads (but not turnpikes and canals), regulating the armed forces, and making laws necessary and proper to carry out these limited functions. Constitution architect James Madison, always at the vortex of the fierce disputes over what measures these enumerated powers implied as necessary and proper, concluded—after serving for a quarter-century as a congressman, secretary of state, and president—that the bedrock constitutional principle was simply to ensure that America does not “convert a limited into an unlimited Govt.”

But before the nation started making just that transformation, it took a wrong turn in the opposite direction. Everyone knows that, for all its virtues, the Constitution—which George Washington thought “approached nearer to perfection than any government hitherto instituted among Men”—was nevertheless not perfect. It was born with the congenital flaw of slavery. As was almost inevitable in a nation that believed that all men are created equal but nevertheless allowed some men to hold others in perpetual bondage, it took a war to resolve the irreconcilable conflict, despite the increasingly desperate search for a peaceful compromise that consumed American politics from 1820 to 1850. After that stunningly costly war, the American people also fine-tuned their Constitution between 1865 and 1870 to undo its original sin, ratifying the Thirteenth Amendment to free the slaves, the Fourteenth to assure black Americans citizenship and civil rights, and the Fifteenth to prohibit any state from denying black citizens the right to vote.

But as early as 1873, the Supreme Court began to subvert the Fourteenth Amendment in the *Slaughter-House Cases*, in the process shredding the amendment’s key protections of the civil rights of Southern blacks. Going way beyond the

particular grievances of the Louisiana butchers before it, the court declared that, while the amendment had indeed extended the Constitution's protection of the privileges and immunities of citizens from federal infringement to protection against infringement by state governments as well, that new protection did not include all the rights that the amendment's Framers had meant it to include: to own property; to have access to the courts; to pay taxes at the same rate as everyone else; to vote (subject to the qualifications of your particular state); to live, work, and travel where you want; and, above all, to have the protection of the Bill of Rights against state as well as federal violation. All the additional protection the amendment granted to freed slaves, as well as to other citizens, the court held, according to Epstein's constitutional-law history (which could have been titled *Constitutional Law Versus the Constitution*), was the right to travel on interstate waterways and to petition the federal government for redress of grievances.

It's worth noting, as Epstein observes, that when Chief Justice John Marshall declared in 1803 in *Marbury v. Madison* that "it is emphatically the province and duty of the judicial department to say what the law is," he didn't mean that it is the business of the Supreme Court, or a bare majority of it, to *make* the laws—and to the extent he implied that it might be, Epstein notes, he was wrong. But while the Court made that incorrect implication about its own omnipotence explicit in 1955 in *Cooper v. Aaron*, it had been moving in that direction for a very long time.

In 1876, *United States v. Cruikshank* made starkly clear just how unprotected the Supreme Court's misrepresentation of the Fourteenth Amendment in the *Slaughter-House Cases* had left Southern blacks. After a Louisiana mob killed more than 100 freedmen and state authorities wouldn't prosecute white murderers of blacks, the Supreme Court threw out the

federal indictment of some of the murderers for conspiracy to deprive their victims of their constitutional rights, since the killers had violated no federal rights that extended to the states, the court held, with numerous citations of the *Slaughter-House Cases*. The decision helped embolden Southern Democrats to enact Jim Crow laws. From *Cruikshank*, it took but a short step to *Plessy v. Ferguson*, the infamous 1896 decision in which the Supreme Court obliterated still more of the rights that the Fourteenth Amendment had given blacks, by allowing the Southern states to legislate segregated transportation and schools and to outlaw interracial marriage. So much for Abraham Lincoln's dream of finishing the work the Civil War had begun and binding up the nation's wounds with malice toward none and charity for all.