'The Tragic Era': The Supreme Court and the undisturbed memory of Reconstruction

Orthodox interpretations of Reconstruction, propagated by the works of William Dunning and Claude Bowers, portrayed it as a period characterised by Republican venality and incompetence, a tale of scheming Northern carpetbaggers, corrupt Southern scalawags, and sordid, barbaric freedmen who threatened to Africanise the South. Whilst this school of thought was dismissed as largely fallacious by revisionist works published in the 1960s, its influence on the 'popular understanding' of Reconstruction seeped into Supreme Court jurisprudence, raising questions concerning the constitutionality of the era and thereby precipitating a retreat from Reconstruction. These embellished, largely falsified accounts, most notably Bowers' *The Tragic Era,* were undoubtedly embedded into the Supreme Court's culture and memory throughout the 20th century. This essay will argue that, whilst not pervasive, the Supreme Court's unperturbed memory of Reconstruction impacted African American pleas for racial equality, a seeming promise made by the Thirteenth, Fourteenth, and Fifteenth amendments. More thoroughly inspected will be the period beginning in the 1930s and ending right up until the birth of the Warren Court. In order to explain this retreat, I will use Pamela Brandwein's approach in explaining what the 'recipes for acceptable history' are along with the idea posed by Klarman that the Court's racial jurisprudence was a product not only of legal precedent and text but of external factors, such as social and political circumstance.

Reconstruction was undoubtedly a revolution, one that created an interracial democracy, an era which, in its beginnings, represented a road to equality. Indeed, Section I of the Fourteenth Amendment stated that the State should not "deprive any person of life, liberty, or property, … nor deny to any person … the equal protection of the laws."[1] But the extent to which these promises were enforced was at most limited; for instance, African Americans were regularly denied equal voting rights, as was promised by the Fifteenth Amendment. In fact, between 1890 and 1908, every state in the Deep South had redrafted their constitutions, purely for the purpose of disenfranchising blacks. Southern states did so through literacy tests, poll taxes, and fiendishly difficult 'constitutional interpretation tests,' to name a few. This retreat was facilitated by a conservative Supreme Court, which formed a barrier to racial equality through the manner in which they interpreted the Constitution and the 'Reconstruction amendments,' a barrier that remained robust right up until the mid-twentieth century. The Supreme Court's narrow interpretation of Reconstruction legislation famously began with the *Civil Rights Cases,* where they ruled that neither the Thirteenth Amendment (which banned slavery) nor the Fourteenth Amendment was infringed on by the existence of uncodified racial discrimination, which therefore could not be constitutionally prohibited.[2] The Civil Rights Act of 1875, which illegalised racial discrimination in public places and facilities, was declared unconstitutional, a ruling that would remain in place until 1964. Justice Bradley justified these decisions by arguing that the "colored race has been the special favourite of the laws," [3] even warning that "enforced fellowship" would convert the new "freedom of the blacks" into "slavery of

[1] Amendment XVI, *Section 1.1.2*

[2] *Civil Rights Act of 1875*, Civil Rights Act of 1875 | Reconstruction, African Americans, Discrimination | Britannica, Accessed 26 July 2023

[3] *United States v. Stanley,* 109 U.S. 3, 3 S. Ct. 18 (1883)

the whites." Whilst the Dunning school of thought[4] did not constitute the foundation of these rulings, only really dominating popular depictions of Reconstruction from around 1900, it did help fortify them and legitimise them.

Over sixty years later, justices continued to view Reconstruction in a negative light, with the spirit of Justice Bradley and the Dunning School embedded in their thought process. Justice Douglas, for example, invoked an 1894 federal statute which he argued was designed "to restore control of election frauds to the States" by abolishing "detailed federal controls over elections which were contained in the much despised 'reconstruction' legislation."[5] A year later, Douglas's plurality opinion punished racial discrimination in a case which arose when three law enforcement officers in Georgia arrested a black man, Robert Hall, who died whilst in their custody.[6] It was adjudged that Hall had been "deprived of 'rights, privileges, or immunities secured or protected' to him by the Fourteenth Amendment." However, Justices Roberts, Frankfurter, and Jackson argued, in dissent, that "this [Fourteenth] amendment is merely an instrument for striking down action by the States … It does not create rights and obligations actively enforceable by federal law." They go onto to further dismiss the actual utility of the Fourteenth Amendment, attesting that "it is familiar history that much of this legislation was born of that vengeful spirit which to no small degree envenomed the Reconstruction era."[7] They then concluded that this meant "Congress passed laws clearly unconstitutional," in support of which was cited, without comment, the *Civil Rights Cases.*

One of the most fascinating takeaways from this dissent is the reference to "familiar history," a clear allusion to the then-still studied and accepted Dunning school of thought. The 'popular memory' of Reconstruction was reinforced by Bowers' *The Tragic Era,* published in 1929, which, among other things, argued that Reconstruction was flawed as an idea, and portrayed Southern Democrats as victims of unscrupulous, uncouth freedmen. Since this suggested 'reconstruction' of America was a supposedly flawed proposal before it even began, why should the changes made to the Constitution in this 'flawed' era be interpreted as truly constitutional? In time, distorted views of Reconstruction were no longer confined to inconsequential dissents, now making their way into majority judgements. For instance, Justice Frankfurter, writing for a plurality of the Court in 1951, highlighted the limitations of the usefulness and reliability of Reconstruction legislation. He argued that the era's "dominant conditions," likely a reference to the supposedly tyrannical Republican rule, "were not conducive to … carefully considered and coherent legislation." [8] As a result of passionate "post-war feeling" and "inadequate deliberation," the era's laws were often "loose and careless," and so did not deserve to be treated as just and therefore constitutional.[9] Bowers' colourful and fast-

[4] Just to reiterate, the "Dunning School" was a historiographical school of thought which, in a series of dissertations and monographs, emphasised the noxious nature of Radical Reconstruction, denouncing the freedmen, carpetbaggers, and scalawags as corrupt and inept.

[5] Quoted in Justin Collings, *The Supreme Court and the Memory of Evil,* Stanford Law Review, Vol. 71, February 2019, p292 (*United States v. Saylor*, 322 U.S. 385, 64 S. Ct. 1101 (1944))

[6] *Screws v. United States*, 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495, 162 A.L.R. 1330 (1945)

[7] Quoted in Eric Foner "The Supreme Court and the History of Reconstruction – and Vice-Versa." *Columbia Law Review*, vol. 112, no. 7, 2012, p1594. *JSTOR*, http://www.jstor.org/stable/41708159. Accessed 18 July 2023.

[8] *United States v. Williams*, 341 U.S. 58, 71 S. Ct. 595, 95 L. Ed. 747 (1951)

[9] Quoted in Justin Collings, *op cit.* p294

paced writing style facilitated this retreat, producing a narrative which many found both compelling and convincing, in turn encouraging Supreme Court justices to question Reconstruction legislation.[10]

The Tragic Era became a resounding success, reaching a wider audience than the Dunning school had, and was taken very seriously by the public (Arthur Krock, an American journalist, went as far as calling it an "immensely important contribution to history"[11]) and especially by the Court. For example, in 1951, Justice Jackson cited *The Tragic Era* when delivering the opinion of the Court in a case concerning the dismissal of a damages suit resulting from a conspiracy by American legionaries to disrupt a left-wing meeting. Jackson commented that the Ku Klux Klan Act of 1871, under which the claimants had sued, "was passed by a partisan vote in a highly inflamed atmosphere. It was preceded by a spirited debate which pointed out its grave character and susceptibility to abuse, and its defects were soon realised when its execution brought about a severe reaction."[12] Although now accepted as nonsensical by modern historians, Bowers' denouncement of Reconstruction did, at the time, undoubtedly influence justices; his book was a popular success and remained strong in the memory of the courts even as the civil rights movement dawned in the 1960s. In a 1960 Texas district court case concerning whether school integration should be voluntary or mandatory, Judge Davidson gave his answer as to why Southern people so vehemently resisted integration. "Fear!" he said, "Fear of that which was, and which may happen again. Memory of the tragic era, the ten years of Reconstruction, is still green in the minds of the old South." He goes on to encourage Texans to "Listen to the stories that have been told and written and preserved by the surviving inhabitants of this era," and to "Read 'The Tragic Era' by Claud Bowers … and you will be astonished by what took place."[13] Popular memory thus served as a powerful tool in undermining the African American quest for equality – if justices still held the view that Reconstruction was a mistake, an era which tainted America, why would they want to repeat that process by enforcing Reconstruction legislation?

This brings about a few questions. What, apart from popular memory, led to such narrow and limited constitutional interpretations of the Reconstruction amendments? Whilst a biased view of the era was certainly to blame, how did some justices manage to particularly denounce the fourteenth amendment and virtually ignore or hold an extremely narrow interpretation of its contents? What does this tell us about the nature of judicial decision-making in general? To begin, it is important to remember the words of the lone dissenter in the *Civil Rights Cases* and *Plessy v. Ferguson* (1896): John Marshall Harlan of Kentucky. Following Justice Bradley's announcing of the Court's majority opinion, Harlan declared they had adopted an "entirely too narrow and artificial" reading of the recent amendments. Thirteen years later, in the groundbreaking 'separate but equal' judgement in *Plessy v. Ferguson,* Harlan argued "Our Constitution is color-blind … In respect of civil rights, all citizens are equal before the law, [which] regards man as man, and takes no account of … his colour."[14] What can be discerned from Harlan's dissents is that constitutional clarity is itself hugely

[10] David E. Kyvig. "History as Present Politics: Claude Bowers' *The Tragic Era*." *Indiana Magazine of History*, vol. 73, no. 1, 1977, p21, *JSTOR*, http://www.jstor.org/stable/27790172. Accessed 1 July 2023.

[11] Quoted in ibid., p22

[12] Quoted in Foner, *op cit*., p1595

[13] *Borders v. Rippey*, 184 F. Supp. 402 (N.D. Tex. 1960)

[14] *Plessy v. Ferguson*, 163 U.S. 537, 16 S. Ct. 1138 (1896)

ambiguous in that it is largely open to interpretation. For instance, Oklahoma judges, who were dedicated to disenfranchising blacks, did not regard the grandfather clause[15] as an obvious violation of the Fifteenth Amendment, because it was not explicitly racial classification since some blacks remained eligible to vote.

Because constitutional clarity "lies in the eye of the beholder," in Klarman's words, no judicial interpretation can ever be a result of the legal axis alone; rather, all such interpretations are a product of the intersection of both the legal and political axes.[16] *Brown* illustrates just that. To the justices who were most committed to traditional legal sources, such as original intent and precedent, *Brown* should have been a simple case for *maintaining* school segregation. Justice Jackson conceded that barring segregation could be defended only in political, not legal, terms; thus, the legal axis alone can never determine a constitutional interpretation, as judges always have to choose whether to adhere to that axis.[17] For example, in 1954, the year of the groundbreaking *Brown* decision, a majority of the justices considered racial segregation to be unjust and patently evil, an opinion that was undoubtedly influenced by Hitler's doctrine that all races apart from the Aryan 'master' race were inferior. The justices were understandably determined to forbid segregation, even though traditional legal sources supposedly did not warrant such a decision. Several justices inevitably disagreed on permissible and legitimate sources of interpretation, which meant different interpretive results proved unavoidable. For instance, Justice Harlan argued that the reading of the fourteenth amendment was too "narrow and artificial" whereas Justice Douglas argued such a reading was sanctioned due to how reconstruction legislation was so "despised." Because of constitutional law's indeterminacy, social and political context matters greatly to constitutional interpretation; resultantly, the justices reflect dominant public and political opinion too much for them to protect truly oppressed groups.[18] After all, as Klarman argues, the "conservative justices could not have foisted such a regressive racial jurisprudence on the American people without their acquiescence."[19] Whilst from the 1960s discrimination against blacks lessened (albeit gradually), during the years of Jim Crow, an era spanning from 1896 to 1954, the justices approved and enforced segregation laws, most notably through the *Plessy v. Ferguson* ruling.

Therefore, as Foner notes, it is important to understand that this retreat from Reconstruction was "gradual and never total,"[20] perhaps a result of the wider influence of the political axis, as opposed to an overarching reinterpretation of legal material. The 'World War II Era' consisted of a climate conducive to racial reform, leading to numerous successes for the civil rights movement.

[15] The Grandfather clause provided that those whose descendants had enjoyed the right to vote prior to the Civil War would be exempt from recently enacted literacy tests, or tax and property requirements for voting. Since former slaves had not been granted the right to vote until the adoption of the Fifteenth Amendment in 1870, the grandfather clause effectively excluded black people from the vote, since many were unable to pass the literacy test and/or too poor to pay the poll tax. Although the Supreme Court declared it unconstitutional in 1915, it was only with Lyndon Johnson's introduction of the Voting Rights Act of 1965 that Congress was able to fully eradicate it.

[16] Michael J. Klarman, *From Jim Crow to Civil Rights - The Supreme Court and the Struggle for Racial Equality,* p447

[17] Ibid.

[18] Ibid., pp. 448-9

[19] Michael J. Klarman "Has the Supreme Court Been More a Friend or Foe to African Americans?" *Daedalus*, vol. 140, no. 2, 2011, p108. *JSTOR*, http://www.jstor.org/stable/23047454. Accessed 26 July 2023.

[20] Foner, *op cit*., p1588

With regard to voting, the justices invalidated Oklahoma's effort to grandfather its grandfather clause, struck down Texas's white primary, and condemned the exclusion of blacks from pre-primary elections conducted by a "private political club" in an East Texas County.[21] Progress was also made in both the housing area and in transportation. The justices ruled that court injunctions enforcing racially restrictive covenants were unconstitutional and *Mitchell v. United States* (1941) and *Henderson v. United States* (1950) interpreted the Interstate Commerce Act to bar railroads from denying blacks equal luxury accommodation on account of their lower per capita demand.[22] Civil rights organisations enjoyed countless successes, with the NAACP possessing a winning record of over 90% in the high court by 1950. Even with the Supreme Court regularly ruling in favour of racial equality, the justices still remained reluctant to criticise previously accepted historical narratives, such as *The Tragic Era* which greatly influenced interpretations of Reconstruction.

The Warren Court did, however, end the practice of citing Dunning School authors, instead referring to more accurate revisionist works such as Stampp's *The Era of Reconstruction,* and McKitrick's, *Andrew Johnson and Reconstruction.* For example, in *Jones v. Mayer Co.* the justices used Stampp to reveal the horrors of Reconstruction and the "need to protect them [negroes] from the resulting persecution and discrimination."[23] Later in the same case, works by Brock *('An American Crisis')*, McPherson *('The Struggle for Equality')* and Stampp were cited to illustrate how "private outrage and atrocity" were "daily inflicted on freedmen." The body of scholarship named after William Dunning painted Reconstruction-era Republicans as vindictive incompetents who imposed the horrible mistake of Reconstruction on the South. It was an academic expression that valorized Andrew Johnson, demonised figures like Charles Summer, and celebrated the return of Democratic rule in the South.[24] Revisionist history of the 1950s and 1960s rescued Reconstruction-era Republicans from these strands of scholarship; recasting Reconstruction as a second American Revolution, scholars reclaimed antislavery constitutionalism, Radical Republicanism, black autonomy and agency, and, perhaps most importantly, the principled effort to protect black rights.[25] Nonetheless, Pamela Brandwein supports that "it is difficult to know for sure whether the justices in the Warren majority accepted (or believed in) the authorised account of Reconstruction. It is difficult to know whether they had doubts about that story but were unwilling to overtly challenge it."[26] Perhaps if they had challenged these previously accepted accounts, it would suggest that the Court had been wrong about its own history for over eighty years, which would, in turn, damage its legitimacy.

However, this raises a fundamental question: what criteria define the acceptability of a historical work? In discussing the checks that operate on historians, intellectual historian Martin Jay suggests that two kinds of checks "militate against the unfettered freedom of historians to narrativize arbitrarily": statements concerning the plausibility of historians' narratives and the "community of

[21] Klarman, *From Jim Crow to Civil Rights.,* p172
[22] Ibid.
[23] *Jones v. Mayer Co.*, 392 U.S. 409, 88 S. Ct. 2186 (1968)
[24] Pamela Brandwein, *Rethinking the Judicial Settlement of Reconstruction*, p227
[25] Ibid.
[26] Pamela Brandwein, *Reconstructing Reconstruction – The Supreme Court and the Production of Historical Truth*, p176

scholarship" which forms as a result.[27] History, Jay argues, "is not a single historian's employing of the past, but rather the institution of historians … trying to convince each other about the plausibility of their reconstructions. It is not so much the subjective imposition of meaning but rather the intersubjective judgement of meanings that matter."[28] The community of scholarship in the late 19th and early 20th century largely believed the Dunning school of thought and Bowers' later more decorated account as the objective truth. This led Larry Kincaid, writing in 1970, to characterise Bowers as "the best, or worst, example" in the late 1920s of "unabashedly partisan historians" who "reduced the politics of Reconstruction to a personal war between an honest, generous, statesmanlike President and dishonest, hateful, partisan 'Radicals'."[29] Communities of judges, justices, and law professors then read and evaluate different histories under a set of institutional constraints relative to the political and social climate of that time, but also, for better or for worse, their own personal values. Perhaps what encouraged the Court to employ *The Tragic Era* as a historical narrative was (1) a persisting acceptance of the Dunning interpretation as one that was 'plausible,' (2) the extent to which professional historians (and the public) lauded Bowers' 'thorough' research and dazzling presentation, and (3) the inherently racist attitude of some justices, which was rationalised by *The Tragic Era*. However, there was an increasing awareness and condemnation of racial ideologies in the 1950s and 60s, partly due to the emergence of the civil rights movement. This coincided with the historiographical revolution which took place in the 1960s, where revisionists argued against Bowers' unbased arguments. With this 'revolution' in Reconstruction scholarship, legal communities, exemplified by the Warren Court, ended the long-standing process of citing myths about this so-called *Tragic Era*, previously popularised by Bowers.

Although the full scope of knowledge about Reconstruction is thankfully not limited to what the courts have taken to be knowledge about Reconstruction,[30] the manner in which they employed certain histories like *The Tragic Era* up until the early 1960s unquestionably impacted the civil rights movement. It allowed the courts to maintain judgements from the *Civil Rights Cases* and strengthened and justified their narrow constitutional interpretations. Later, in upholding the constitutionality of the Civil Rights Act of 1964, which outlawed any form of discrimination based on race or colour, the Court made no reference of the Reconstruction amendments, instead using the Constitution's Interstate Commerce Clause. When in 2009 Congress enacted a federal "hate crimes" law allowing for federal prosecution of acts of violence motivated by bias related to race, gender, religion, and national honour, it too mainly based its action on the Commerce Clause.[31] The Court has thus continued to erode the significance the Reconstruction amendments *should* hold in American society.

Justin Collings refers to two modes of memory: the redemptive mode, and the parenthetical mode. The former responds to the past by stressing continuities with an older tradition, while the latter highlights repudiation rather than continuity, and underwrites aggressive judicial action to

[27] Quoted in ibid., pp. 152-3

[28] Quoted in ibid., p153

[29] Quoted in Kyvig, *op cit.*, p23

[30] Brandwein, *Reconstructing Reconstruction*, p153

[31] Foner, *The Second Founding*, p172

eradicate any lingering vestiges of past evils.[32] The parenthetic mode of memory, as Collings argues, must always come *after* the redemptive mode. But in the United States, the parenthetic mode has often come first. For the first half of the twentieth century, the memory of Reconstruction remained undisturbed, with most justices maintaining that it was a despised and evil era which tarnished the South. It was discussed earlier that the Warren Court did not outwardly challenge jaundiced interpretations of Reconstruction, interpretations which have yet to have been properly confronted by the Court. To paraphrase Henry Gates, it is important that the Court celebrates both the triumphs of African Americans following the Civil War and explain how the forces of white supremacy did their best undermine those triumphs – then and in all the years since, through to the present.[33] Without, therefore, a more accurate and whole understanding of Reconstruction, the Court will never be able to fully execute its intended purpose and properly enforce its promises.

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