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The Fourteenth Amendment and the *Vénus Noire*

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THE FOURTEENTH AMENDMENT AND THE *VÉNUS NOIRE*

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This Essay makes two points. The first is that originalism is not a promising path for progressive causes.[1] The second is that as the Constitution is amended, the meaning of the entire document is altered, and earlier text should be interpreted in light of what has changed. But instead of making these observations in the usual law review style, I'm calling on a figure out of nineteenth-century art, the *Vénus Noire*, to serve as our companion and guide.

Combining legal theory and art in this way is a bit fanciful. So, one question is: why did I choose fancy? Well, I was thinking about what we're doing when we do legal scholarship. While the Court leans conservative, as it does now, should progressive legal scholars like me think of ourselves as a sort of "Court in exile"? That is, should we think of ourselves as an active bench of Supreme Court "extras," scribbling dissents for immediate use and preserving favored lines of doctrine for the decades to come? That would certainly be helpful; I'm not denying it. But this understanding of the scholar's role means committing to the paradigmatic thinking

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1. When this Essay discusses "originalism," it is talking about the originalism actually practiced by judges and the arguments lawyers craft as litigation strategy. I leave unexplored the "many-roomed mansion" of academic originalism—the evolving, competing, purist visions of originalism that have never been tested in the courtroom. *See generally* JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION (2024).

of our current moment and writing within those fixed lines.[2] Is that all that it means to imagine the "law as it could be"?[3]

I think there's no better explanation for my method here than the one given by the postmodernist author Kathy Acker when explaining why she eschewed realism in her fiction. She explained that "those who practice realism want to limit their readers' perceptions ... to a centric—which in this society is always a phallocentric—reality."[4] Behind choices about style and "narrative structure," she said, linger assumptions about "political power."[5]

This strikes me as true—and it is all the more true as a description of legal scholarship, because our scholarship is proximate to power, helps to explain power, and, by providing direct support in the footnotes of legal opinions, justifies the exercise of power. In contrast to realism (and the typical law review article *is* the consummate exercise in fictional realism), those "literary structures" showing a "desire to play"—those "that play into and in unknown or unknowable realms, those of chance and death and the lack of language"—are structures that manifest a "desire to live in a world that is open and dangerous, that is limitless."[6]

This is an Essay that contains pictures. I'm going to discuss the importance of beauty and compare the experience of beauty in art to the interpretation of constitutional text. Why? Says Acker: "To play ... both in structure and in content, is" an expression of a "desire to live in wonder."[7]

I am not satisfied with the world as it is or with constitutional interpretation as it is now practiced. None of us ought to be satisfied. To say that we deserve justice is to say that we deserve more.

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2. My work in the *Yale Law Journal*, *Expounding the Constitution*, made the basic observation that law goes through phases of paradigmatic thought. The fact that the Founders had a paradigm through which they engaged with text under the law, so different from our own, should make us curious about the contours of our own paradigms of law and text. *See generally* Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2 (2020). Above all, it puts us on notice that our own legal paradigm has an end date. This era will end, and another can be imagined and must be dreamed up. Who are the dreamers?

3. I'm thinking, of course, of OWEN M. FISS, THE LAW AS IT COULD BE (2003).

4. Kathy Acker, *The Killers*, *in* BITING THE ERROR: WRITERS EXPLORE NARRATIVE 14, 17-18 (Mary Burger, Robert Glück, Camille Roy & Gail Scott eds., 2004).

5. *Id.* at 18.

6. *Id.*

7. *Id.*

And our political culture may get worse before it gets better. We may soon be living in dark times.[8] Rejecting dictated forms, creating new forms, and thinking anew may be the only means by which we can grope our way back to a style of interpretation more open to just outcomes.

The rejection of convention is not comfortable for lawyers or for law students. But the rejection and subversion of the formal order may become a necessary subject of study in the future law curriculum; at least, that is, if the worst predictions for America's immediate political future come to pass and we want to continue to take the

8. I wrote *Our Constitutionalism of Force* after watching Congressional testimony of police officers who had defended the Capitol on January 6th. *See* 122 COLUM. L. REV. 1539, 1540-41 (2022). These officers had sworn to uphold the Constitution, but during the riot, members of the mob insisted that the police violated their duty by protecting the Capitol Building and the congressmen and congresswomen inside, and that instead the *rioters* were the Constitution's true defenders. *Id.* at 1622. Members of the mob called out to the white officers to join them. *Id.* at 1622-23. The officers were assaulted with American flags. *Id.* at 1622. In that Article, I explained the officers' untenable position, as "the foot soldiers of the constitutional order of today and yesterday, facing a mob that represent[ed]," perhaps, "the constitutional order of tomorrow." *Id.* at 1623. Since then, the leadership and base of the Republican Party has fully embraced the claims the mob asserted on January 6, 2021. *See, e.g.*, Luke Broadwater & Steve Eder, *Johnson Played Leading Role in Effort to Overturn 2020 Election*, N.Y. TIMES (Oct. 25, 2023), https://www.nytimes.com/2023/10/25/us/politics/mike-johnson-2020-election-overturn.html [https://perma.cc/U9J8-TPYX]; Rachel Weiner, Scott Clement & Emily Guskin, *Republican Loyalty to Trump, Rioters Climbs in 3 Years After Jan. 6 Attack*, WASH. POST (Jan. 2, 2024, 6:00 AM), https://www.washingtonpost.com/dc-md-va/2024/01/02/jan-6-poll-post-trump/ [https://perma.cc/8XUA-Y9GB]. Dissent on the right has become increasingly dangerous. *See* Lisa Lerer & Astead W. Herndon, *Menace Enters the Republican Mainstream*, N.Y. TIMES (June 22, 2023), https://www.nytimes.com/2021/11/12/us/politics/republican-violent-rhetoric. html [https://perma.cc/K5BQ-3KS5]. There is no point in closing our eyes to the fact that our constitutional order has changed and is changing to accommodate claims increasingly asserted through violence. I expect that *New York State Rifle & Pistol Ass'n v. Bruen* and its progeny will only exacerbate this renewed social commitment to the rights that sheer might asserts in our society. 597 U.S. 1, 8-10 (2022).

idea of "law" seriously.[9] This Essay, then, is a brief experiment in form.

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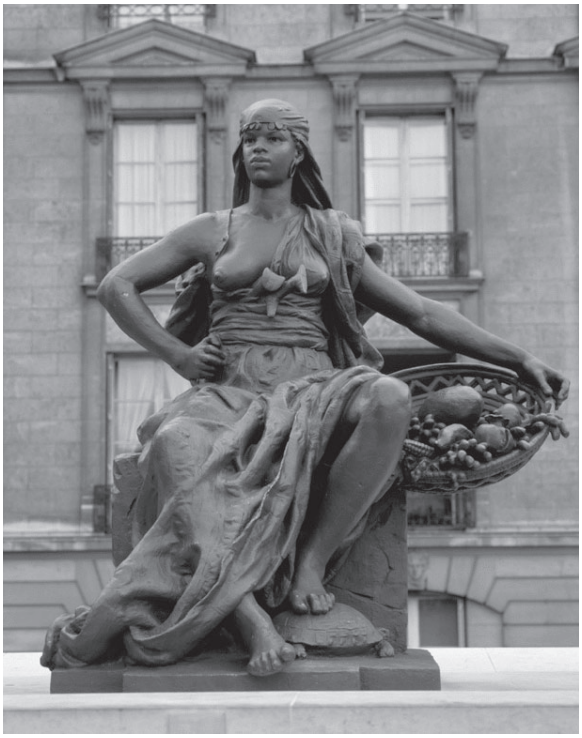
I grew up in Oakland, California, in the 1980s and '90s with my hair in braids, playing with Black baby dolls, and wearing t-shirts printed with Africa in Black Power colors. My school, run by former hippies, taught African drumming in the music class and Negro spirituals in choir. In several consecutive years, the rituals of Kwanzaa were part of my grade school's winter curriculum. My parents could afford travel and while in Paris, I saw examples of the *Vénus Noire* for the first time. I encountered these images of Black women in French art as sympathetic monuments to Black beauty. Stripped of her historic context, she was a pure aesthetic for me. And as an aesthetic, she fit right in with the rest of my Black-is-Beautiful upbringing.[10]

9. Donald Trump, now the Republican presidential nominee, has made no secret of his disdain for the rule of law. *See* Maggie Astor, *Trump's Call for 'Termination' of Constitution Draws Rebukes*, N.Y. TIMES (Dec. 4, 2022), https://www.nytimes.com/2022/12/04/us/politics/trump-constitution-republicans.html [https://perma.cc/5SKK-9SJM] (describing Trump's public call for "the termination of all rules, regulations, and articles, even those found in the Constitution" in response to his 2020 election loss); *see also In His Own Words: The President's Attacks on the Courts*, BRENNAN CTR. FOR JUST. (Feb. 14, 2020), https://www.brennancenter.org/our-work/research-reports/his-own-words-presidents-attacks-courts [https://perma.cc/BLH2-PQL9] (collecting examples of Donald Trump's tweets and other public statements attacking courts, decisions, judges, and the independence of criminal investigations). *Compare* Donald J. Trump (@realDonaldTrump), X (formerly known as Twitter) (Nov. 22, 2018, 7:30 AM), https://twitter.com/realDonaldTrump/status/1065583286188158976 [https://perma.cc/393E-89WL] (warning that "bedlam [and] chaos" will follow the Ninth Circuit's ruling), *with* Brief for Petitioner at 2, Trump v. Anderson, 601 U.S. 100 (2024) (No. 23-719) (appealing the decision of the Colorado Supreme Court and warning that "chaos and bedlam" will follow if the Supreme Court allows state courts to exclude Trump from the ballot).

10. She looked not unlike art produced by what Larry Neal called the "Black Arts Movement," a period from the mid-1960s to the mid-1970s, "the artistic and spiritual sister of the Black Power concept," and an aesthetic that I was steeped in as a child. *See* James Smalls, *Black Aesthetic in America*, GROVE ART ONLINE (Sept. 16, 2010), https://doi.org/10.1093/gao/9781884446054.article.T2088343 [https://perma.cc/V9DP-XQ28].

Figure 1. Eugène Delaplanche, *Afrique*[11]



I found one of my favorites—a bronze giantess meant to portray Africa—sitting with five other female figural depictions of continents on the portico of the Musée d'Orsay.[12] She sat erect, enthroned in loose flowing garments, one foot casually resting on a fat tortoise, the bounty of an African harvest held akimbo against one thigh.[13] Careful details distinguishing her from her sisters, including the specific fruit, her head wrap (actually, it looked like a do-rag), and other minutiae, seemed a special find-it game made to delight children—to delight me.[14] I was proud that she was there. Having

11. Eugène Delaplanche, *Afrique* (sculpture), *in* MUSÉE D'ORSAY, https://www.musee-orsay.fr/en/artworks/afrique-6432 [https://perma.cc/45WJ-3Q99].

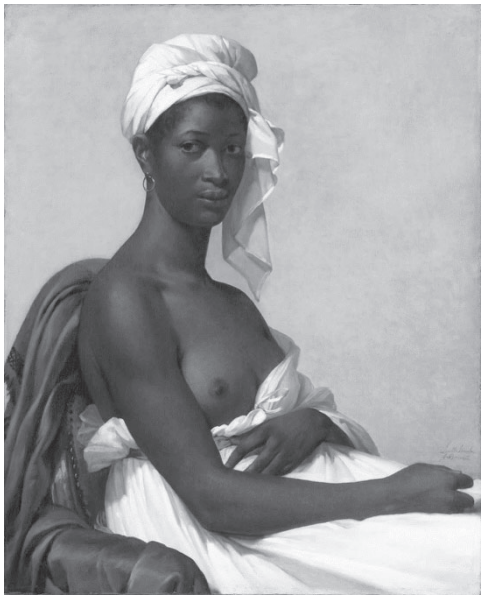
12. *See id.*

13. *See id.*

14. *See id.*

been told my whole life that my link with Africa was living and direct, I believed that she *represented* me.

Figure 2. Marie-Guillemine Benoist, *Portrait d'une femme noire*[15]



Another of my early infatuations was Marie-Guillemine Benoist's *Portrait of a Negress*, hanging in the Louvre.[16] The painting shows a young brown woman seated, half-turned toward the viewer with one breast exposed, her hands gracefully at rest, her glance enigmatic.[17] As a kid, I was accustomed to seeing Black people in modern and contemporary art—in Faith Ringgold's quilts, Jacob Lawrence's collages, Elizabeth Catlett's woodcuts, and Jean-Michel Basquiat's toothy and crowned scrawls. I had begun to develop emotional ties with each of these artists and their works. But in Paris, I also thrilled to Benoist's Vénus and for a different reason. Here, I saw brown skin painted in the style of the artist's

15. Marie-Guillemine Benoist, *Portrait d'une femme noire* (painting), *in Département des Peintures*, LOUVRE MUSEUM, https://collections.louvre.fr/en/ark:/53355/cl010065532 [https://perma.cc/89GX-FG5X].

16. *See id.*

17. *See id.*

mentor, Jacques Louis David—smooth, glowing, and upgathered in bunching white raiment—in the same style, that is, as the façade of the grand palace in which the portrait hung. This *Vénus Noire* carried the suggestion that she and I were not out of place, that our brown loveliness was legible in that setting. This sense of belonging may have been a childish takeaway, but it was a radical and uplifting one. And it made a profound difference to my life.

This childhood experience was what Susan Sontag called for in her essay, *Against Interpretation*.[18] There, she asked for less interpretation of art, arguing that we instead need an "erotics" of art.[19] She insisted that art should act on us directly as an aesthetic and emotive encounter, rather than an intellectual challenge or an opportunity for cultural critique.[20] I encountered these Venuses with as close to that purity as is possible because I reacted to them, and they changed me, before I had the sophistication to pick them apart intellectually.[21] Indeed, most of the modern reevaluation of these works had yet to be written.

That modern critique, much of it by Black art historians, amounts to a moral repudiation, largely achieved by placing this figure into her original historical context and looking at her with fresh eyes. It is a powerful intervention, although some of what I think of as these scholars' "original intent" arguments have less traction than what I think of as their "original public meaning" arguments. For instance, there is a chorus of concern with nineteenth-century Black

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18. Susan Sontag, *Against Interpretation*, *in* AGAINST INTERPRETATION AND OTHER ESSAYS 3, 3 (2001).

19. *Id.* at 14.

20. *See id.*

21. I should mention that I see this as Susan Sontag's worst essay. It does not make sense, as it is impossible to encounter art without interpreting it, or at least, interpolating it, through one's own experience. I have just given you my own interpretive context, which was Oakland, California, of the 1990s. And I also disagree with Sontag to the extent that she suggested that art is not itself often a form of interpretation of prior art, or that "mere" interpretation, reduced to a fixed medium, cannot itself be art. *See id.*; Meara Sharma, *Claudia Rankine on Blackness as the Second Person*, GUERNICA MAG. (Nov. 17, 2014), https://www.guernicamag.com/blackness-as-the-second-person [https://perma.cc/4HJA-TWQX] ("I love language because when it succeeds, for me, it doesn't just tell me something. It enacts something. It creates something. And it goes both ways. Sometimes it's violent. Sometimes it hurts you. And sometimes it saves you."(quoting Rankine)); *see also* HAROLD BLOOM, THE BREAKING OF THE VESSELS 28 (1982) ("[W]hat Emerson implies is that the very idea of poetry relies upon the prior idea of criticism.").

models' "lack of agency." One historian criticizes Benoist's *Negress* because Benoist's "overriding concern was to portray her as a symbol more than as an individual," and this is problematic because the model could "be assumed to have had little or no ability to influence the manner of her portrayal."[22] But the historian doesn't explain how this differed from the lack of agency we may assume of any woman poor enough to strip in an artist's studio in nineteenth-century France—for example, the European woman Eugène Delacroix used for his central figure in *Liberty Leading the People* (Delacroix's ledgers mingled his records for paying for art models and sex workers).[23] If the *only* art containing Black figures in nineteenth-century France used poor, enslaved, or anonymous sitters as symbols, the lack of agency would be quite meaningful. Counterexamples come to mind, however—for example, the portraits of Alexandre Dumas and Édouard Manet's portrait of Jeanne Duval (Charles Baudelaire's Black lover).[24]

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22. DENISE MURRELL, POSING MODERNITY: THE BLACK MODEL FROM MANET AND MATISSE TO TODAY 40 (2018). Murrell also criticizes Benoist's portrait for the sitter's nude breast because, she says, by 1800, an exposed breast was considered "too erotically charged to be acceptable in portraits of known living subjects." *Id.* But should this be fine, given that this portrait's subject is unnamed, and thus she was made into a symbol, rather than portrayed as an individual? Not according to Murrell. In this portrait, the Black woman's breast must carry either "strong connotations of illicit eroticism," or recall "the practice of stripping" Black women for the "slave market," or both. *Id.* But this interpretation seems a stretch, given that Benoist's figure is almost the twin of a white Marianne from a few years prior, in a work by another one of David's students. *See* Antoine-Jean Baron Gros, *La République Française* (painting), *in Département des Peintures*, LOUVRE MUSEUM, https://collections.louvre.fr/en/ark:/53355/cl010235112 [https://perma.cc/X62U-VTAF]. The similarity suggests that this was just the way this generation portrayed "The Republic" and supports earlier, less critical historians' understanding that this Marianne's brown skin was meant as a celebration of France's brief-lived abolition of slavery. *See, e.g.*, Hugh Honour, *Studies*, *in* THE IMAGE OF THE BLACK IN WESTERN ART, VOLUME IV: FROM THE AMERICAN REVOLUTION TO WORLD WAR I, PART 2: BLACK MODELS AND WHITE MYTHS 7 (David Bindman, Henry Louis Gates, Jr. & Karen C. C. Dalton eds., 2012). A scan of my footnotes shows just how much I owe to Murrell's scholarship, which these initial critiques should not obscure. In this Essay, I take some of her insights in another direction.

23. *See* Eugène Delacroix, *Liberty Leading the People* (painting), *in* LOUVRE MUSEUM, https://louvre.fr/en/explore/the-palace/think-big [https://perma.cc/JZ7U-NQJ8]. For a broader discussion of the relationship between sex work and nineteenth-century female models, as well as the specific note about Delacroix, see Marie Lathers, *The Social Construction and Deconstruction of the Female Model in 19th-Century France*, 29 MOSAIC: AN INTERDISC. CRITICAL J. 23, 42-43 (1996).

24. Pierre-François-Eugène Giraud, *Portrait of Alexandre Dumas Père* (pastel), *in European Art*, MINNEAPOLIS INST. OF ART, https://collections.artsmia.org/art/142671/portrait-of-

The critique of the "original intent" strain in *Vénus Noire* scholarship—that is, scholarship that focuses on the intent of the art's makers or patrons—is clearest and most compelling when it stresses that these images should make us uncomfortable because, while counterexamples exist, as a group they tend to be so *empty*—so stripped of the wishes and thoughts of the subjects.[25] There is, after all, a distinction between white European models who lacked agency in an artistic project whose symbolism embraced them and Black outsiders in art that often made them look like scientific exhibits or the ornaments of a wealthy household. These images come to us from a world that *used* Black people in so many other ways, and in which Black people were still commodities of exchange. Indeed, these artworks' popularity may well have increased the market demand for Black people as chattel.[26]

This last point also goes to the "original public meaning" revelation of the new history: images of Black men and women in nineteenth-century France, even when lovely, were never "politically neutral," these scholars urge, but rather were deeply "implicated

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alexandre-dumas-pere-pierre-francois-eugene-giraud [https://perma.cc/FJ2Y-EDJB]; Édouard Manet, *Lady with a Fan* (painting), *in Department of Art after 1800*, MUSEUM OF FINE ARTS, BUDAPEST, https://www.mfab.hu/artworks/551/ [https://perma.cc/4LTU-GS5R]. Murrell includes the Manet work in her interesting and incisive book on the Black model in modern French art, of course, along with photographs of Dumas. *See* MURRELL, *supra* note 22, at 28, 31.

25. *See* James Smalls, *Exquisite Empty Shells: Sculpted Slave Portraits and the French Ethnographic Turn*, *in* SLAVE PORTRAITURE IN THE ATLANTIC WORLD 283, 286-87 (Agnes Lugo-Ortiz & Angela Rosenthal eds. 2013) (explaining that "the slave's individuality" was "conveniently neutralized for the ultimate expediency of French national distinction and for the sculptor's egocentric identity," and that these works add up to an eerie catalog of what he calls "exquisite empty shells").

26. *See id*. To illustrate the point, Smalls describes a bronze head an artist sculpted for a slave figure in his aristocratic patron's garden, part of a larger scene featuring the slave attendant pouring water onto a white bathing beauty. *Id.* at 289. The head was incorporated into the intended garden scene, but soon after, the artist's aristocratic patron was guillotined, and the fountain figures were confiscated by the Revolutionary government. *Id.* Fearing for his safety, the artist recast the African head, this time adding a new inscription: "Given Freedom and Equality by the National Convention"—a celebration of the recent vote to abolish slavey in all of France's colonies. *See id.* at 289-90. This artistic display of alignment with the Revolution's principles was meant to save the artist's own neck from the guillotine! *See id.* at 290. What this anecdote reveals, James Smalls argues, is that white artists and patrons felt free to use these images of Black men and women as symbols of whatever might further their own cause or career. *Id.* Even the beauty of the figures, he argues, only made them more *useful*. *See id.* at 301.

with imperial visual agendas."[27] So, my beloved African giantess from the portico of the Musée d'Orsay is Figure 1 in a brilliant book by Robin Mitchell discussing the *Vénus Noire*'s varied cultural utility.[28] In this work, I learned to see the *Vénus Noire* as a situs of nineteenth-century France's "eroticization of the [B]lack female body and the simultaneous need to disavow that body."[29] Mitchell explains that, in her original context, the *Vénus Noire* allowed the French to "fantasize about their [B]lack colonies," and served as a surrogate for "white bodies 'behaving badly'"; she was also a means to "mitigate" a perceived "threat[] to white racial homogeneity," as well as to "bury the anxieties raised by [France's] defeat in Haiti."[30] This is a very far cry from my use of the sculpture as a "find-it game for children."

This new work on the *Vénus Noire*'s place in nineteenth- century French culture helps us understand the original public reception of these works. The Black female model in art, however personally attractive, consistently provoked reviewers' disgust. Critics at the Paris Salon called Benoist's *Negress* "an 'affront to the art of painting'" when first exhibited.[31] Seventy years later, long after Black figures had become more common subjects, Manet gave a Black woman equal space on the canvas of what would become his most famous work, *Olympia*.[32] But the rare critic who mentioned the calm, unobjectionable Black woman holding a bouquet *behind* the imperious white prostitute in the foreground dismissed her as "hideous."[33]

I learned all of this original context fairly late in life, and now I have to make a little confession. My love for Benoist's *Negress* endures. Of course, the groundbreaking research adds fascinating context—which I appreciate, as a historian. But as an art lover, I cannot care whether the *Vénus Noire* was made with anti-Black

27. MURRELL, *supra* note 22, at 43-44 (discussing Delacroix's paintings of Aspasie).

28. ROBIN MITCHELL, VÉNUS NOIRE: BLACK WOMEN AND COLONIAL FANTASIES IN NINETEENTH-CENTURY FRANCE 2 (2020).

29. *Id.* at 7.

30. *Id.* at 3, 6-7.

31. MURRELL, *supra* note 22, at 40 (footnote omitted).

32. Édouard Manet, *Olympia* (painting), *in* MUSÉE D'ORSAY, https://www.musee-orsay.fr/en/artworks/olympia-712 [https://perma.cc/2T4X-4L3M].

33. MURRELL, *supra* note 22, at 70.

intentions any more than I care that Caravaggio killed a man over a tennis match[34] or that the great sculptor Camille Claudel mailed cat feces to France's minister of culture.[35] Thank God art survives the circumstances of its creation. Could I even stand it if anyone judged me by my makers? Shouldn't art define, by taking up space, its own negative space—and set terms in disputes over its merit in *line* and *color*—or by how it plays with its own aesthetic antecedents?

Figure 3. Charles-Henri-Joseph Cordier, *African Venus*[36]

If the art sneered at blackness, as the chintz of minstrelsy does, that would be a different story. But that doesn't seem to be the case with Benoist's *Negress* or with, for example, Cordier's haughty sculptural *Venus*.[37] These artists were skilled enough that they were able to make something bigger and more useful than what they

34. *See* ANDREW GRAHAM-DIXON, CARAVAGGIO: A LIFE SACRED AND PROFANE 314 (2010).

35. *See* ODILE AYRAL-CLAUSE, CAMILLE CLAUDEL: A LIFE 179 (2002).

36. Charles-Henri-Joseph Cordier, *African Venus* (sculpture), *in* THE WALTERS ART MUSEUM, https://art.thewalters.org/detail/15324/african-venus/ [https://perma.cc/D4RN-7WV8].

37. *See id.*

intended, with more dimension than their era was prepared to receive. And that seems a fine way to define greatness in any human art: the capacity to transcend the single moment or impulse—and to connect across time to something greater than the self. Could there be anything sillier than the view that we should understand a masterwork *only* as it was understood by its *original public*?

* * *

Progressives are now turning their eyes to originalism, seizing on Reconstruction as a second Founding. This is a pragmatic turn, given the current makeup of the Supreme Court, on which a majority of members are open to or committed to originalist reasoning. But some progressive lawyers, organizations, and scholars are going beyond strategy and becoming believers.[38] They hope that embracing originalism will, in the long term, serve the cause of equal justice, in part because of the rich historical material available in the Reconstruction Era, which they see as bringing transformative potential to the originalist interpretive project.[39]

One facet of the progressive originalist argument is that the intent of the Reconstruction Amendments' Framers was to incorporate Black people, or at least Black men, fully into the national polity as equal citizens.[40] If true, it is a sad fact that bringing this intent to fruition would be nearly as radical now as it was in the late nineteenth century. Another approach is to urge that the original public meaning of these Amendments must include the views of a

38. *See, e.g.*, *What Is Constitutional Accountability?*, CONST. ACCOUNTABILITY CTR. (June 1, 2008), https://www.theusconstitution.org/blog/what-is-constitutional-accountability/ [https://perma.cc/6N6W-CDB2]; Franita Tolson, *"In Whom Is the Right of Suffrage?": The Reconstruction Acts as Sources of Constitutional Meaning*, 169 U. PA. L. REV. ONLINE 211, 213 (2021); Transcript of Oral Argument at 57-58, Merrill v. Milligan, 143 S. Ct. 59 (Aug. 22, 2022) (No. 21-1086) (Jackson, J.) (invoking the Fourteenth Amendment's history in a Voting Rights Act case) *discussed in* Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Race, Originalism, and Skepticism*, 25 U. PA. J. CONST. L. 1241, 1241 (2024).

39. *See* Charles & Fuentes-Rohwer, *supra* note 38, at 1244.

40. *See id.* at 1243-44. See also Kate Masur & Gregory Downs, *Designed to Ameliorate the Condition of People of Color: The Reconstruction Republicans and the Question of Affirmative Action*, 2 J. AM. CONST. HIST. 625 (2024), an excellent recent article urging that the Reconstruction Congress was not race blind.

wider range of actors and interpreters than in the first founding moment, including Black radicals.[41] We have a large record of Black intellectual thought from this era, including the documents from decades of Black constitutional conventions, to provide cues for textual interpretation.[42] As an aside, there is something deflating about this progressive hope emerging now, as leading originalists have started to assert a distinction between originalist method and the truth-seeking of sincere historical investigation.[43] Just as we turn our attention to a moment in history that may have integrationist implications, many originalists announce that they no longer *do* history.[44]

The 2023 Affirmative Action case was a perfect outlet for this hopeful energy. In *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*,[45] amici urged that the historical

41. *See* James W. Fox, Jr., *The Constitution of Black Abolitionism: Reframing the Second Founding*, 23 U. PA. J. CONST. L. 267, 269, 271-72 n.9 (2021).

42. *Id.* at 270-71 n.9 (describing the value of his project for originalists, although Fox himself is not an originalist); *see also* Christina Mulligan, *Diverse Originalism, History & Tradition*, NOTRE DAME L. REV. (forthcoming) (manuscript at 20) (on file with author) ("[I]nterpretations by white women and people of color matter, because they were all part of the public whose understanding creates the meaning of the Constitution.").

43. *New York State Rifle & Pistol Ass'n v. Bruen* recently insisted on this distinction.

> The dissent claims that *Heller*'s text-and-history test will prove unworkable compared to means-end scrutiny in part because judges are relatively ill equipped to "resolv[e] difficult historical questions" or engage in "searching historical surveys." We are unpersuaded. The job of judges is not to resolve historical questions in the abstract; it is to resolve *legal* questions presented in particular cases or controversies. That "legal inquiry is a refined subset" of a broader "historical inquiry," and it relies on "various evidentiary principles and default rules" to resolve uncertainties. For example, "[i]n our adversarial system of adjudication, we follow the principle of party presentation." Courts are thus entitled to decide a case based on the historical record compiled by the parties.

597 U.S. 1, 25-26 n.6 (2022) (alterations in original) (citations omitted); *see also* Patrick J. Charles, *The "Originalism is Not History" Disclaimer: A Historian's Rebuttal*, 63 CLEV. ST. L. REV. ET CETERA 1, 5-6 (2015) (collecting examples of originalists distancing themselves from the rigor of history as a discipline, as well as historians' responses).

44. We may well be skeptical that originalism will constrain its adherents when they hesitate to undertake the rigors of the historical inquiry their method requires. How much *more* skeptical should we be when we realize that originalist jurists only opt into their method when they feel like it? *See* Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221, 223-24 (2023) (pointing out that the Court's reliance on originalist analysis is highly selective, even as "the Justices become more originalist." "In large swathes of cases," Fallon shows, these "Justices make little or no effort to justify their rulings by reference to original constitutional meanings").

45. 600 U.S. 181 (2023).

argument stacked up neatly in Harvard's favor.[46] But that side lost, in an opinion that finally clinched one of the Chief Justice's favorite long-running themes (that is, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race").[47] And on the specific question whether the original understanding of the Fourteenth Amendment allowed for a race-conscious reading, the Member of the Court most consistently committed to originalist interpretation, Justice Thomas, wrote separately to denounce the progressive theory of the case.[48] Here, Justice Thomas's priorities were in some tension, as alongside his commitment to originalist method, he has also long nursed deep opposition to Affirmative Action.[49] Justice Thomas accordingly tied himself into a knot to argue that the Reconstruction Congress—the men who debated and passed the Fourteenth Amendment—never afterward implemented race-conscious legislation.[50] This was meant to prove that the Fourteenth Amendment's authors understood its language to require a race-blind interpretation.[51]

It's a tricky argument to make. His difficulties are adequately summarized by the opinion's assertion, in the face of counter-evidence too obvious to ignore, that the Freedmen's Bureau was "race-neutral" because the word "freedmen" was a "race-neutral category."[52] Never mind that the word "freed" in "freedmen" refers to freedom from "slavery," a condition state laws defined by race and

46. *See, e.g.*, Brief for Constitutional Accountability Center as Amici Curiae Supporting Respondents at 15-16, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 3108865.

47. *Compare* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (plurality opinion), *with Students for Fair Admissions*, 600 U.S. at 206 ("Eliminating racial discrimination means eliminating all of it.").

48. *See Students for Fair Admissions*, 600 U.S. at 232 (Thomas, J., concurring) ("I write separately to offer an originalist defense of the colorblind Constitution.").

49. *See* CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR 73-76 (2007) (remembering that after benefitting from Affirmative Action in his Yale admission, he felt it was "futile" to hope to "escape the stigmatizing effects of racial preference" and describing his "fear that it would be used forever after to discount [his] achievements").

50. *See Students for Fair Admissions*, 600 U.S. at 243-44 (Thomas, J., concurring).

51. *See id.* at 244.

52. *See id.* at 247.

maternity.[53] On the Supreme Court, when one has the numbers, one doesn't also need logic.

Only the dissents gave plausible readings of the history. Justice Sotomayor listed some of the race-conscious measures the Reconstruction Congress passed after enacting the Fourteenth Amendment, including aid for destitute Black women and children, aid for Black veterans, and the Civil Rights Act of 1866.[54] It is significant that these laws faced objections during congressional debate, the hurdle of a presidential veto, or both, on the basis that these were *not* race-neutral, because they singled out Black citizens for special legal privileges.[55] The measures passed over these objections, because a pragmatic congressional majority intended to use law to give Black people the protection and advancement necessary to achieve true equality with whites.[56]

What should we make of this round of originalist pugilism? Justice Sotomayor's opinion is so much more compelling, I fear that it risks giving the progressive originalist movement false hope. For one thing, Justice Thomas's concurrence was completely unnecessary to the victory of the majority's cause. The opinion of the Court rested on a context-stripped understanding of what "equality" means, not on any notion of history. Read fairly, even recent American history would tend to undermine the theory central to the Chief Justice's majority opinion—that it is measures designed to *ameliorate* racial imbalances in society that constitute the *real* racism.[57] But there's another reason this match-up suggests only

53. *See, e.g.*, Act of May 10, 1740, No. 670, § 1, *reprinted in* 7 THE STATUTES AT LARGE OF SOUTH CAROLINA 397 (David J. McCord ed., 1840) (defining slavery by race and status of the mother); Act of March 7, 1755, § 1, *reprinted in* 18 THE COLONIAL RECORDS OF THE STATE OF GEORGIA 102-03 (1910); *see also* Michele Goodwin, *Law and Anti-Blackness*, 26 MICH. J. RACE & L. 261, 270-71 (2021) (using a Virginia law to show matrilineal descent of slave status). It was also not uncommon for nineteenth-century southern codes to regulate slaves and "free persons of color" under the same general heading, subjecting both to strict regulation and harsh penalties—on the basis of race. *See, e.g.*, N.C. REV. STAT., ch. 111 (1837), *printed in* 1 THE REVISED STATUTES OF NORTH CAROLINA 571, 580 (Frederick Nash, James Iredell & William H. Battle eds., 1837); KATE MASUR, UNTIL JUSTICE BE DONE 4 (2021).

54. Congress also established the Freedmen's Bureau, which provided land and funding to create Historically Black Colleges and Universities. *See Students for Fair Admissions*, 600 U.S. at 322-26 (Sotomayor, J., dissenting).

55. *See id.* at 324-25.

56. *See id.*

57. *See id.* at 218-21 (majority opinion).

false promise: it was pure chance that the history of the Fourteenth Amendment supported the progressive argument.

Seventy years ago, lawyers for the petitioners in *Brown v. Board of Education* also reached out to historians for support, and there the record was much less favorable.[58] Advocates of school integration hoped that history would support their legal case that the Fourteenth Amendment required integration—but historians almost uniformly reported bad news.[59] Because the Reconstruction Era Congress was *not* race-blind, and because the late nineteenth century was a world of race, gender, and social stratification, it is hardly surprising that the Reconstruction Congress permitted segregation—for instance, *in the public schools of Washington, D.C.*[60] It took the combined intellectual firepower of historians like John Hope Franklin, working as amici outside of the court, and the talented young law clerk Alexander Bickel on the inside, to find enough counterevidence to suggest that this record was "inconclusive" on the precise question before the Court.[61]

What does all of this have to do with the *Vénus Noire*? It's simple. As a child, when I turned the corner in the Louvre and encountered her for the first time, it was like the aurora. The experience was uplifting and empowering. Because I was not weighed down by the circumstances of her making, Benoist's *Negress* could be what I needed in that moment. Our Constitution is also a palace filled with treasures, also largely omitting the Black subject—that is, until one turns the corner and finds the Reconstruction corrective.[62]

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58. *See* Christopher W. Schmidt, Brown*, History, and the Fourteenth Amendment*, 97 NOTRE DAME L. REV. 1477, 1488 (2022).

59. *Id.*

60. *See id.* at 1487.

61. *Id.* at 1484-85, 1489-91, 1493-95, 1498.

62. One of my colleagues asked me whether an analogy between these forms of interpretation really works, as art interpretation is about "personal enrichment," whereas constitutional interpretation, when you get right down to it, is about "social control." I suppose I don't see either enterprise that way. Dave Hickey, the art critic, once explained that "free citizens cultivate[ ] their responsiveness to works of art in order to mitigate their narcissism" while also "fuel[ing] their imaginative grasp of that which is irrevocably beyond themselves, to transform their anxious discomfort at not-knowing into a kind of vertiginous pleasure." Dave Hickey*, A World Like Santa Barbara*, *in* PERFECT WAVE: MORE ESSAYS ON ART AND DEMOCRACY 40, 41 (2017). In a successful constitutional order, courts provide a forum for contending forces to meet and resolve conflicts without violence over and over again. We can see interpretation in both art and law as a means of dealing with the vertigo of confronting

In the Reconstruction Amendments, the unmentionable is acknowledged; the chattel object becomes a subject; the Black subject is transformed into a citizen.[63] The text is broad, setting standards ("equal protection") that must expand with the generosity of our civic imagination.[64] While the project of justice is essentially forward-looking,[65] it continually involves the trajectory that we see in the Fourteenth Amendment: toward a larger understanding of who counts as a person worthy of the law's protection. The only way to achieve the text's full potential—the inclusive, uplifting potential of a little Black girl seeing Benoist's *Negress* for the first time on the walls of the Louvre—is to bring our current social context to the interpretive project.

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human differences among neighbors. Whenever the high court has resolved cases on social issues in a progressive direction, it is because male justices were able to reach outside of their own gendered experience; or because white justices were able to overcome whatever feelings they may have had about interracial couples; or because straight justices were able to overcome whatever anxiety they may have had about gays; and so on. If the idea of going beyond the comforting close of the past provokes anxiety, it should be some comfort that our best interpretations of the Constitution are likely still ahead of us.

63. The law and philosophy scholar Alma Diamond suggested that this analogy between art and law helps highlight the tension in legal theory between those who would primarily attach the notion of "legality" to the sense being made of something, and those who would attach it to its embodiment—"interpretivism" versus "positivism." The positivist theories, including originalism, see law as necessarily grounded in an embodiment that is verifiable—for example, "the text." These theorists don't deny that the sense we make of a particular embodiment shifts across time, but they consign these shifts to the "political" and the "social," and say that law attaches to the embodiment itself, in formal textual amendments. What Diamond pointed out to me is that the art analogy in this Essay puts strain on the positivist view, because with both art and law, the embodiment is only intelligible in a field of signifiers that is always changing. It is not only that we are always making new meaning of a piece of art—although we are. Rather, the field of signifiers changes across time as we continue making art. The embodiment is not fixed—it depends on its position relative to a range of signifiers that are constantly being added (and dropping away). At the same time there is a certain "thickness" to text, a core meaning that cannot be blinked away, just as there is some durability to embodiment in the art—one is, perhaps, stunned by its beauty across time. Another helpful analogic observation is that art, like law, is always *for* someone (Sol Lewitt's *Paragraphs on Conceptual Art* notwithstanding). We can say that both have an "audience," and that audience mingles its labor with the art/text to create its meaning.

64. *See* U.S. CONST. amend. XIV, § 1.

65. Charles & Fuentes-Rohwer, *supra* note 38, at 1247 ("Reconstruction Originalism and racial justice are deeply incompatible because the equality project is necessarily future oriented and forward looking, whereas Reconstruction Originalism is necessarily about the past and backward looking.").

To say that the Fourteenth Amendment should be read to answer our current concerns is hardly radical. This is an old wisdom, following Chief Justice John Marshall's admonition in *McCullough v. Maryland* that when "expounding" the "[C]onstitution" we should keep in mind that it was "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."[66] And adapting the Fourteenth Amendment to our current needs is *necessary*, because it is in this text that the Constitution first embraces some of our dearest democratic values. Here, we find a *new* guarantee that the nation doesn't reserve civility for the drawing room while terror reigns just out of sight in kitchens, fields, and factories. Instead, as our laws become more civilized, that civility must extend "equal[ly]" to "[a]ll persons."[67] When we interpret this text, why would we refer back to the "public meaning" of an era of sharecropping, an era when Black radicals placed their highest hopes in a "talented tenth,"[68] an era when few advocated for women's enfranchisement? We have learned too much about liberty, due process, and equality since then. We have gone much too far to go back.

* * *

Here is the second point: generally, new art changes our understanding of prior art. Once we have an advance, once we are embroiled in a new conversation, we don't go back to a state of innocence. When, in Benoist's *Negress*, one of the "legions of [B]lack servants who loom[ed] in the shadows of European and Euro-American aristocratic portraiture"[69] became a main character, revising Raphael's *La Fornarina*, it was shocking to the art public.[70]

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66. 17 U.S. (4 Wheat.) 316, 407, 415 (1819) (emphasis omitted).

67. *See* U.S. CONST. amend. XIV, § 1.

68. *See* W.E. Burghardt DuBois, *The Talented Tenth*, *in* THE NEGRO PROBLEM: A SERIES OF ARTICLES BY REPRESENTATIVE AMERICAN NEGROES OF TODAY 31, 45-46 (1903).

69. Judith Wilson, *Getting Down to Get Over: Romare Bearden's Use of Pornography and the Problem of the Black Female Body in Afro-U.S. Art*, *in* BLACK POPULAR CULTURE 112, 114 (Gina Dent ed., 1992).

70. *See* MURRELL, *supra* note 22, at 40 (making this connection between Raphael and Benoist); *see also* Raphael, *La Fornarina* (painting), *in Paintings*, BORGHESE GALLERY, https://borghese.gallery/paintings/la-fornarina.html [https://perma.cc/CSY4-RU8V].

But those who saw the connection would never be able to see the Raphael with the same eyes again.

Figure 4. Titian, *Venus of Urbino*[71]

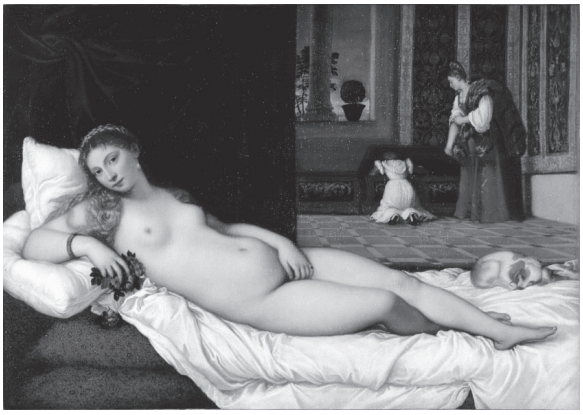


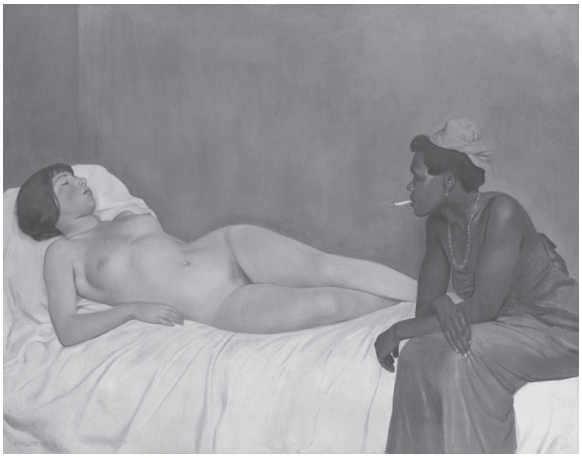
Figure 5. Édouard Manet, *Olympia*[72]

71. Titian, *Venus of Urbino* (painting), *in Painting*, THE UFFIZI, https://www.uffizi.it/en/artworks/venus-urbino-titian [https://perma.cc/FR6W-GZ83].

72. Édouard Manet, *Olympia* (painting), *in* MUSÉE D'ORSAY, https://www.musee-orsay.fr/en/artworks/olympia-712 [https://perma.cc/2T4X-4L3M].

Manet's *Olympia* is another example.[73] For this painting, Manet relied on one of the most famous works in Western art, the *Venus of Urbino*—a supine, svelte concubine with doe eyes, her sleepy puppy representing docile loyalty.[74] He replaced this famous beauty with a stiff, world-wise prostitute and her frazzled cat familiar, accompanied by a Black servant.[75] In doing so, the artist permanently changed prior art. He also added a character to the scene—a woman drawn with such sensitivity that scholars laud her as a landmark moment for the Black figure in modern art.[76] No one who saw the connection between these two paintings would ever be able to see the *Venus of Urbino* again without seeing Manet's comment and revision—and without seeing the addition of Black working-class Paris.

Figure 6. Félix Vallotton, *La Blanche et la Noire*[77]



And then came Félix Vallotton's *La Blanche et la Noire*.[78] Here, after many decades of bathing scenes featuring a white concubine

73. *See id.*

74. *See supra* Figure 4.

75. *See* MURRELL, *supra* note 22, at 7.

76. *See id.*

77. Félix Vallotton, *La Blanche et la Noire* (painting), *in Robert Lehman Collection*, THE METRO. MUSEUM OF ART, https://www.metmuseum.org/art/collection/search/757892 [https://perma.cc/5MCB-GTGS].

78. *See id.*

and a Black servant, the Black woman sits down for a smoke—in effect, saying that the white woman can fetch her own flowers.[79] Who can see Manet's *Olympia* now without adding Vallotton's amendment and comment? And who would want to?

What is true of these scenes is true of art generally. After seeing Picasso's interpretation of war in *Guernica*,[80] we see Rubens's war scenes differently.[81] We now know new ways to express that extreme human experience, and we can't see the prior art without Picasso's intervention in mind. After Modernism, an artist painting in the Baroque style is working outside of, and against, the canon. The result can be technically accomplished, but without some subversive element like, for instance, Kehinde Wiley's revision of Neo-Classical portraiture, the artist may struggle to rise above visual cliché to surprise, disturb, bewilder, or connect to an audience.[82]

This is how all fields work—including law, where it is morally irresponsible to pretend innocence of our hard-won civic insights. We now get that being gay is not a mental illness, and so we approach the puzzle of the phrase "because of sex" in Title VII differently.[83] With fundamental law, designed to endure, it is all the more important to benefit from experience. In 1787, the Founders explicitly discussed the terror and inhumanity of human bondage.[84]

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79. *See* GRISELDA POLLOCK, DIFFERENCING THE CANON: FEMINIST DESIRE AND THE WRITING OF ART'S HISTORIES 294 (1999) (discussing the frequent recurrence of this theme of African women in servitude in harem settings alongside nude or reclining pale-skinned women as a "rhetorical combination of sex and servitude ... 'logical' only in an economy that ha[d] slavery as its political unconscious, and sedimented in its social rituals and erotic fantasies."); *see, e.g.*, Jean-Léon Gérôme, *Moorish Bath* (painting), *in Paintings*, MUSEUM OF FINE ARTS BOS., https://collections.mfa.org/objects/32124/moorish-bath;jsessionid=715DBA6877F842CCD08F2B389EF99BD8?ctx=777a540f-eb06-4ebc-b319-69df03fd153c&idx=4 [https://perma.cc/AJ59-GXJ2]; Eugène Delacroix, *Women of Algiers in Their Apartment* (painting), *in European Paintings*, THE METRO. MUSEUM OF ART, https://www.metmuseum.org/art/collection/search/702474 [https://perma.cc/5U5Y-VJYA].

80. *See* Pablo Picasso, *Guernica* (painting), *in Painting*, MUSEO NACIONAL CENTRO DE ARTE REINA SOFIA, https://www.museoreinasofia.es/en/collection/artwork/guernica [https://perma.cc/WY7Z-HDBG].

81. *See* Peter Paul Rubens, *Consequences of War* (painting), *in Palatine Gallery*, PITTI PALACE, https://commons.wikimedia.org/wiki/Category:Consequences_of_War_by_Rubens#/media/File:Los_horrores_de_la_guerra.jpg [https://perma.cc/ZBW2-47JZ].

82. *See* Kehinde Wiley, *Napoleon Leading the Army over the Alps* (painting), *in Contemporary Art*, BROOKLYN MUSEUM, https://www.brooklynmuseum.org/opencollection/objects/169803 [https://perma.cc/Y9Z9-BTD2].

83. *See* Bostock v. Clayton Cnty., 590 U.S. 644, 683 (2020).

84. *See generally* Paul Finkelman, *Slavery and the Constitutional Convention: Making a*

In convention, Gouverneur Morris even suggested it might be better to part ways than to found a nation on the basis of so much human suffering.[85] But those men overcame their qualms and wrote a Constitution that gave Southern slave-owners powerful electoral advantages designed to protect their morally indefensible way of life.

It took a bloody war to undo the political settlement the Founders made in Philadelphia in the summer of 1787. With the Reconstruction Amendments, new characters, including the former slave and the birthright citizen, entered the Constitution as equal rights-bearers. Considering the Constitution before and after these changes, we see a dramatic reinterpretation of the prior work. Black people of the prior text were objects of trade,[86] internal enemies,[87] and pawns.[88] After the war, we entered new-figured as citizens,[89] beneficiaries,[90] and governors.[91]

Covenant with Death, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 188 (Richard Beeman, Stephen Botein & Edward C. Carter II eds., 1987) (describing the Framers' larger conversation about slavery).

85. *Id.* at 204 (quoting Morris's initial skeptical position on the three-fifths compromise: if he was "reduced to the dilemma of doing injustice to the Southern States or to human nature," he must ... do it to the former); *see also id.* at 205 ("As much as Morris wished 'to form a compact for the good of America,' he seemed ready to risk failure on the issue of slave representation.").

86. *See* U.S. CONST. art. I, § 9, cl. 1 ("The Migration or Importation of [enslaved] Persons ... shall not be prohibited by the Congress prior to [1808], but a Tax or duty may be imposed on such Importation.").

87. *See id.* art. I, § 8, cl. 15 (authorizing Congress to "suppress Insurrections").

88. *See id.* art. I, § 2, cl. 3 (Three-Fifths Clause).

89. *See id.* amend. XIV, § 1 (Birthright Citizenship Clause).

90. *See id.* (Privileges or Immunities Clause).

91. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, 537-39 (Henry Steele Commager & Richard B. Harris eds., HarperCollins Publishers, 2014) (1989) (discussing widespread Black office-holding during Reconstruction).

Originalists isolate the Constitution's earlier text in order to read it in the lexical context of an era innocent of this hard-won civic maturation.[92] But why would we want to? The Fourteenth Amendment's innovations changed the Constitution from a system protecting caste to one tearing it down. This was more than a technical change, a change in word choice, or even a change in era. It represented the establishment of a bolder, more generous form of republicanism, along with the extension of the ballot to a new citizenry. It made us a new people.[93] Of course this should affect how we interpret material held over from a prior regime.[94]

We are becoming a new people, turning corners, and encountering new visions all the time.[95] Our Fourteenth Amendment is not the same as the Fourteenth Amendment of the late nineteenth century, or of the *Brown v. Board* Court, or of the 1970s. We should be open

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92. *See* Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J. L. & PUB. POL'Y 65, 66 (2011) (defining originalism as "the belief that (a) the semantic meaning of the written Constitution was fixed at the time of its enactment, and that (b) this meaning should be followed by constitutional actors until it is properly changed by a written amendment") (footnote omitted); *see also* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 37 (2022) (rejecting evidence of meaning of the Second Amendment gathered from nineteenth-century sources, in part because "we have generally assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791" in spite of the fact that it is the Fourteenth Amendment that makes the Second Amendment applicable against the States). There are problems with this, as others have discussed, starting with unjustified assumptions about the *positivism* of eighteenth-century American legal culture: for instance, originalism rests on the false premise that eighteenth-century Americans believed that reducing constitutional principles to writing "automatically altered their legal status, transformed constitutional content into linguistic content, or erected ... boundaries between what was *in* and what was *outside* of a constitution." Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 L. & HIST. REV. 321, 334 (2021).

93. As a matter of textual interpretation, "We the People" of the Constitution's preamble means something different. *See* U.S. CONST. pmbl. But we need not tie everything to changes in how text should be interpreted.

94. Perhaps the incorporation of the Bill of Rights to the states implicitly recognizes the force of this point.

95. I have written before about how the Constitution changes in *Our Constitutionalism of Force*, although there I wrote about how it can change as a result of dark visions—and their implementation through violence, rather than through aspiration for further inclusion. *See generally* Peterson, *supra* note 8. But this is just another happy opportunity for analogy, because "[a] [t]ruth in art is that whose contradictory is also true." Oscar Wilde, *The Truth of Masks: A Note on Illusion*, *in* INTENTIONS 219, 263 (Brentano's 1905) (1891). It's hard to see how it could be otherwise, when we speak of the governance of a large, fractious, contradictory people over centuries.

to realizing, with delight, what problems those words can now resolve and what generosity they newly demand of us. The Constitution, if it is to be useful, must be a rope cast out to save us now.[96]

96. For a full-color version of this Article, see https://wmlawreview.org/fourteenth-amendment-and-V%C3%A9nus-noire.