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What Happens in Vagueness stays in Vagueness

The United States Constitution's Ideas on Race

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Race, Law, and Social Change

Abstract

The United States' Constitution, while it may not explicitly discuss race in detail, has echoes of race throughout both its language and its history. Even during the origination of the Constitution, the inclusion of slavery was a hotly contested subject among the authors of the Constitution. The United States' Constitution only uses the words "race" and "color" once and that is in the Fifteenth Amendment, which essentially gave black Americans the right to vote. While the US Constitution may not explicitly talk about race much, I argue that race is a present theme throughout the Constitution as well as behind many decisions regarding the language of the Constitution. While the Fifteenth Amendment may directly address the issue of race and voting rights within the United States, I believe that the history of the Fifteenth Amendment and its subsequent implementation and tests in the Supreme Court need to be further examined to truly understand the context of the Fifteenth Amendment in American society. The Fifteenth Amendment, while being a moral statement and a push in the right direction, was toothless in its implementation when the federal government usurped their own ability to enforce the amendment in states that were more hostile to its implementation. Not only do the explicit mentions of race within the Constitution need to be examined, but so do the amendments and the context of the Constitution's authorship that are most relevant to the issue of race and slavery within academia today.

An Overview of the Constitution

The United States Constitution was ratified in 1789, making it the longest in use constitution in the world. The constitution was a heavily debated topic that threatened to so

harshly divide the founding authors that some threatened to not sign on to it at all. The constitution was designed to unite several widely different colonies-turned-states into fully functioning members of a united nation, thus forming a central federal government. Prior to the ratification of the constitution, the Articles of Confederation governed the United States and were very state-oriented and limited the powers of the federal government. The constitution and the Articles of Confederation were in stark juxtaposition to one another, as the Constitution placed immense value on a federal government and the Articles of Confederation instead place more value on the autonomy of individual states. This created two factions within American politics that backed their respective styles of governance, which has been a constant theme throughout party politics within the United States. Importantly, the argument over states' rights is a common theme within court cases involving race, as some believe that it is the federal government's job to administer legislation governing race and some believe that legislating race should be an issue left to the states.

In the year 1789, slavery was still a widely accepted practice by many nations in the world and most slaves were of African descent. During the time of ratification, slaves were seen as property and not proper citizens of the United States and thus could not benefit from many of the provisions of the US constitution until the adoption of the Fourteenth Amendment almost 100 years later. This was a widely held notion and was heavily implied throughout the Constitution and the first twelve amendments to the Constitution. The Constitution is remarkably bereft of mentions of race or color, only mentioning them both once within the wording of the Fifteenth Amendment, which I will discuss in larger detail. This has led to a debate upon whether this was intentional or racist notions were implied throughout the constitution, which I will also discuss in further detail.

This is not to say that race and slavery were not debated during the creation of the constitution. During the constitutional convention, the topic of the importation of slaves was discussed. Several people present at the convention believed that the importation of slaves should be explicitly banned within the constitution on moral grounds, some believed that certain states should not be named in the importation of slaves, some argued that the importation of slaves should not be banned lest the federal government encroach on states' rights (see earlier issue), and a variety of other responses. What the convention ended up agreeing on was to not include the words slavery at all, as James Madison argued that it was "wrong to admit in the Constitution the idea that there could be property in men."¹ Instead the importation of slaves is referred to as the "importation of persons". While it is a morally uplifting sentiment to see James Madison fighting for the rights of black slaves almost one hundred years before they would receive their emancipation from slavery, the importation of persons was included the Constitution, nevertheless.

Conservative thinkers and those who interpret the constitution in a more fundamentalist and literal sense as opposed to an ideological sense, including David Azerrad, argue that the constitution cannot be racist because it just simply does not talk about race, so how can it be racist? In his article, "What the Constitution Really Says about Race and Slavery" in the conservative publication the Daily Signal, Azerrad argues that because slaves are constantly referred to as persons (even though it was always in the context of "other persons") it acknowledges slaves' humanity and denies the institution of slavery "constitutional legitimacy"²

¹ Constitutional Convention of 1787, Tuesday August 25, 1787. Found in the Yale Law School Lillian Goldman Law Library, December 5, 2018. http://avalon.law.yale.edu/18th_century/debates_825.asp

² David Azerrad, "What the Constitution Really Says about Race and Slavery," *The Daily Signal*, December 28, 2015. Accessed on December 5, 2018. <https://www.dailysignal.com/2015/12/28/what-the-constitution-really-says-about-race-and-slavery/>

and even goes so far to say that constitutional provisions could have applied to slaves and that slavery was a “peculiar institution” that was only supported by Southern states, which will be later disproven. The error with Azerrad’s argument that it relies too much on the fact that the Constitution says nothing about race, so therefore it is bereft of malignant racial implications. In fact, I believe that because the founding Constitution does nothing to address the issue of race or slavery it lends itself to allowing states to continue the exact same practices they had been practicing up until that point. Slavery was by no means a “peculiar institution” in 1787, in fact it was the norm for Anglo-European nations and thus a norm needs to be addressed to change, not just contemplated upon as immoral. Slavery was long the ugly blemish upon the newly founded democracy in the Western Hemisphere and was very carefully concealed in the Constitution even though many of the founders acknowledged it as wrong. While I do believe it wrong to call the founding Constitution racist, it is incredibly irresponsible to believe that it did not serve a racial system and was worded to do so during its founding.

The Fifteenth Amendment

The United States Constitution only expressly uses the words “race” or “color” only once throughout the entire document. This is inside the fifteenth amendment to the constitution, adopted in 1870, and aims to give suffrage to anyone of any race, as opposed to only white Americans as it was before. The Fifteenth Amendment states that “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude,”³ and it states in the second section of

³ Accessed at https://www.constituteproject.org/constitution/United_States_of_America_1992?lang=en

the amendment that “The Congress shall have power to enforce this article by appropriate legislation.” While this may be the only explicit mention of race throughout the US Constitution, it is almost as vague as not addressing race at all. While the Fifteenth Amendment grants suffrage to every American citizen regardless of race, it loopholes that were quickly exploited and utilized to continue the system of white hegemony in the Southern United States. Very importantly, the US Constitution also does not define race in any way and relies on popular understanding to interpret the definition of race. While the United States now possesses a collective understanding of what the general definition of race is, this was not achieved through a close reading of the Constitution but rather through years of learned and shared experience among a nation that had a very racialized history.

The Fifteenth Amendment itself was a very contentious issue within both the Southern and Northern states of the United States. Prior to its passage in 1870, black male suffrage had already been required for Southern states in 1868 following their readmittance to the union. However, many Northern states had tried and failed to get black suffrage passed as it was not especially popular in the North. During the debate over the wording of the amendment, Democrats (who were the conservative party at the time) argued that the Fifteenth Amendment limited states rights over their own elections, as many had cited the same argument over the maintenance of the slave system that resulted in the four-year civil war just two years prior. The Republicans (the progressive party) were also embroiled in a debate over whether they supported black suffrage. Importantly, it was Republicans’ slimming electoral lead over Democrats that pushed them to give black men the right to vote, since they would vote overwhelmingly for Republicans. This is a continuing theme for race within the US Constitution, as any decisions made about race within the constitution have some ulterior motive.

The Fifteenth Amendment is far from comprehensive and was proven to be very weak until several Supreme Court cases closed loopholes surrounding the amendment. At just two lines long, the amendment only broadly discusses the right of any male citizen to vote regardless of race to vote. It is important to note that while the amendment does read "citizen" it is implied at the time that this only pertained to men, as the nineteenth amendment would give women the right to vote in 1920. Also, the second section of the amendment claims that Congress has the authority to enforce the amendment by appropriate legislation. This means that Congress had the authority to enforce the amendment in almost any way they saw fit and gave them sweeping power over the ability to ensure that black men were unfettered in trying to reach and utilize the polls. For the first few years following the passage of the amendment, Congress was quite vigilant in ensuring that the fifteenth amendment was properly enforced, especially in the Southern states. The federal government maintained troops in Southern states to ensure proper implementation of the fifteenth amendment. However, this would change through political deal making and exchange of suffrage for political advantage. In 1876, Republican Rutherford Hayes trailed Samuel Tilden by twenty votes in the electoral college and in the popular vote. Hayes won the support of the remaining electoral college voters by stating that he would allow states more autonomy, which included the withdrawal of federal troops to safeguard this amendment.

Following this deal, black Americans became subject to targeted discrimination at the polls but was all perfectly legal at the time because the wording of the Fifteenth Amendment was so vague. Southern Democrats began to intimidate black voters through force and impose restrictions that explicitly targeted black citizens including poll taxes, grandfather clauses, and literacy tests. Several Supreme Court cases had to occur to ease the continued barring of suffrage for African Americans that worked around the vague wording of the amendment. However, for

victories for black Americans almost 80 years would have to pass to ease these restrictions and in fact, many Supreme Court cases upheld the broad wording of the Constitution as binding and any law that got more specific thus overstepped the Federal government's bounds.

Take for example *United States v. Reese*, in which the Supreme Court held that poll taxes were constitutional. In his 8-1 majority opinion, Chief Justice Morrison Waite ruled that the Fifteenth Amendment “does not confer the right of suffrage upon any one... [but rather] prevents the States, or the United States, however, from giving preference to one citizen of the United States over another on account of race, color, or previous condition of servitude.”⁴ While I do morally disagree with the decision made by the court, by interpreting the Constitution literally and in a limited way the Court's decision was probably the correct one. The Fifteenth Amendment is just merely too broad of a statement to have airtight and loophole free precedent. Eventually, meaning one hundred years later, the Court would tighten the Fifteenth Amendment to the extent that these practices would become outlawed.

Race Implicit in the Amendments

The most obvious implicit examples of race within the US Constitution are the Thirteenth and Fourteenth Amendments, which were passed in close proximity to the Fifteenth. The Thirteenth abolishes slavery throughout the republic (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction...”) and the Fourteenth grants

⁴ US Supreme Court, “United States v. Reese, 92 U.S. 214 (1875)”, *United States v. Reese*, Justia. <https://supreme.justia.com/cases/federal/us/92/214/>

equal protection under the law to those who were formerly enslaved and also governed the path back to a united republic following the American Civil War. These amendments were pure in their intentions to finally outlaw slavery throughout the United States, which was a topic that haunted it from its literal conception until that point. Importantly, the Thirteenth Amendment does not outright ban slavery, just restricts it to imposition on criminals who have been convicted and sentenced, which has unfortunate implication on race in the modern United States According to Ava DuVernay's documentary *13th*, the exception clause within the Thirteenth Amendment essentially provided that slavery was not illegal, rather it was a work around to keep black Americans in bondage.⁵ Black Americans make up only 12% of the US adult population but yet are 33% of the prison population,⁶ thus the Thirteenth Amendment's exclusion clause disproportionately hurts the very people it was trying to protect.

Race has also become issues in relation to several other amendments to the US Constitution. The Fourth Amendment, which protect citizens of the United States from unwarranted search and seizure, is invoked quite often in debates in how police actions disproportionately affect black Americans. Devon Carbado, Professor of Law at UCLA, argues that the Fourth Amendment plays a very crucial role in “enabling the very thing it ought to prevent: racial profiling and police violence.”⁷ Carbado argues that the Fourth Amendment is so specific in its wording that “every time the [Supreme] Court determines that a pedestrian check

⁵ Patrick Rael, “Demystifying the 13th Amendment and Its Impact on Mass Incarceration,” *Black Perspectives*, December 9, 2016. Accessed on December 5, 2018. <https://www.aaihs.org/demystifying-the-13th-amendment-and-its-impact-on-mass-incarceration/>

⁶ John Gramlich, “The gap between the number of blacks and whites in prison is shrinking,” Pew Research Center, January 12, 2018. Accessed on December 5, 2018. <http://www.pewresearch.org/fact-tank/2018/01/12/shrinking-gap-between-number-of-blacks-and-whites-in-prison/>

⁷ Devon Carbado, “Race and the Fourth Amendment,” *Reforming Criminal Justice*, accessed December 5, 2018. http://academyforjustice.org/wp-content/uploads/2017/10/6_Reforming-Criminal-Justice_Vol_2._Race-and-the-Fourth-Amendment.pdf

is not a search or a seizure, the Court is ducking the question of whether that pedestrian check is reasonable in the sense of requiring some justification.”⁸ Carbado is essentially saying this: the courts are just trying to analyze pedestrian checks performed by police officers simply in a constitutional originalist point of view, instead of truly asking the question if a pedestrian check defies the spirit of the Fourth Amendment.

The Fifth Amendment is also one that is briefly discussed in the realm of race and the law. The Fifth Amendment essentially guarantees equal protection under the law to all American citizens (including black Americans since the passage of the Fourteenth Amendment). The Fifth Amendment also guarantees the right to an attorney, the right of knowledge of arrest, and general due process rights. While the Fifth Amendment also suffers from being too broad (I am sensing a theme here) it did not pertain to black Americans during the first years of its existence, despite what Azerrad may argue. Slaves were regularly detained and arrested without their proper due process and were not adequately respected in the realm of the courts. The 24th Amendment, while it does not mention race explicitly, directly addresses poll tax and directly rules them unconstitutional. Poll taxes were often levied on black Americans to force them out of the ability to vote, since black Americans are disproportionately poor and the poor are disproportionately black.

In Conclusion

For a country that has as deep and extensive of a racial history as the United States, the United States’ Constitution does not explicitly discuss race very much. The originators of the

⁸ Ibid.

document were hesitant to include slavery to not anger Southern states and also because abolition was not a widely held ideology in 1789 when the Constitution was ratified. The Constitution may not have originally had mentions of slavery or of race until after the Civil War, but the message was certainly implicit within the document that the rights included did not necessarily extend to slaves. The Constitution did this through the still-cited states' rights arguments, and allows some scholars today to cite the Constitution as anti-racist. In actuality, the Constitution really only pushed the responsibilities of racist lawmaking to the state level and can take on a relatively colorblind appearance in the modern world. This, however, is not inherently evil because it allows the United States to still be able to use the document even long after the institutions of slavery and institutionalized racism have fallen out of style. The Constitution does put forth many fantastic ideas and rights of citizens of the United States that can now be appreciated in a nonracial context, even if Americans still do have to understand the Constitution's racial underpinnings. While the US Constitution never truly defines race, it lays out a framework for how to govern both a racist, and a system that is moving away from racist ideas. While the US Constitution includes all sorts of ideas about race, it is intentionally so vague that only the Supreme Court can truly determine what the Constitution means in regard to race, and the racial history of the Supreme Court is not exactly promising.