

Comments

CHERYL A. BROOKS*

Race, Politics, and Denial: Why Oregon Forgot to Ratify the Fourteenth Amendment

Americans can be notoriously selective in the exercise of historical memory.

—Ralph Ellison¹

SALEM — Oregon's ratification of the 14th Amendment to the Constitution became official Thursday when Senate President Jason Boe, D-Reedsport, and House Speaker Richard Eymann, D-Springfield, signed HJR 13, which had been passed unanimously by the Senate and House.

The 14th Amendment has been part of the Constitution since July 28, 1868. But there was a question if Oregon had ratified it.

The 1866 Legislature ratified it. But the ratification was rescinded by the 1868 Legislature, which noted that two votes for the ratification had been cast by House members who were illegally elected to the 1866 Legislature.

—Full text of article published in *The Oregonian* covering Oregon's 1973 ratification of the Fourteenth Amendment to the U.S. Constitution.²

* Third-year law student, University of Oregon School of Law. The author is indebted to Robert Tsai, University of Oregon School of Law, for providing the inspiration for this Comment, as well as an invaluable critique. It began as a joint project with Seann Colgan and Sarah Drescher. The author thanks Keith Aoki, Garrett Epps, and James Mooney, University of Oregon School of Law; Dana Frank and Alice Yang Murray, University of California, Santa Cruz; Judge David Schuman; and Andrea Nagles for their helpful ideas and encouragement. She also thanks UO Law Library Circulation Assistant Simon Thompson for his assistance and flexibility.

¹ RALPH ELLISON, *GOING TO THE TERRITORY* 124 (1986).

² *State Backs Amendment*, *THE OREGONIAN* (Portland), May 18, 1973, at 30.

While Oregon's attempted rescission of the Fourteenth Amendment in 1868 received widespread coverage, its reratification of the amendment in 1973 was a nonevent.³ It was barely mentioned in the press,⁴ and it has since been overlooked by historians and other scholars.⁵ Nor was Oregon's reratification recorded in the *Historical Notes* to the U.S. Code, though the state's 1868 rescission of ratification is noted.⁶ What is most important about Oregon's reratification of the Fourteenth Amendment is what was left unsaid at the time—namely, the state's veiled and troubling history of racial discrimination and, in particular, its protracted attempts to exclude African Americans and deny them equality.⁷ If we are truly to understand what this remarkable event means for Oregon's constitutional past and

³ 1973 Or. Laws 2865-66; H.J. Res. 13, 57th Leg., Reg. Sess. (Or. 1973).

⁴ In addition to *State Backs Amendment*, *supra* note 2, *The Oregonian* covered Rep. William McCoy's introduction of the resolution to ratify the Fourteenth Amendment five months earlier, focusing on the historical politics of Oregon's withdrawal of ratification in 1868 but not on the majority's desire to deny citizenship rights to blacks. Douglas Seymour, *Ratification Sought for 14th Amendment*, THE OREGONIAN (Portland), Jan. 31, 1973, at 14.

⁵ Historical works published after 1973 that note the Oregon legislature's 1868 withdrawal of ratification of the Fourteenth Amendment all fail to mention the 1973 reratification. *E.g.*, ELINOR LANGER, A HUNDRED LITTLE HITLERS 210 (2003); ELIZABETH MCLAGAN, A PECULIAR PARADISE: A HISTORY OF BLACKS IN OREGON, 1788-1940 68-71 (1980); Ralph James Mooney, *Matthew Deady and the Federal Judicial Response to Racism in the Early West*, 63 OR. L. REV. 561, 572 (1985); K. Keith Richard, *Unwelcome Settlers: Black and Mulatto Oregon Pioneers*, 84 OR. HIST. Q. 29, 52-53 (1983).

⁶ U.S. CONST. amend. XIV, *Historical Notes* (West 1987).

⁷ See *infra* Part I. Oregon has a long history of discrimination toward cultural and ethnic minorities in general, most of which is beyond the scope of this Comment. See generally STEPHEN DOW BECKHAM, THE INDIANS OF WESTERN OREGON: THIS LAND WAS THEIRS (1977); EUGENE H. BERWANGER, THE FRONTIER AGAINST SLAVERY: WESTERN ANTI-NEGRO PREJUDICE AND THE SLAVERY EXTENSION CONTROVERSY (1967); GORDON B. DODDS, OREGON: A BICENTENNIAL HISTORY (1977); NATHAN DOUTHIT, UNCERTAIN ENCOUNTERS: INDIANS AND WHITES AT PEACE AND WAR IN SOUTHERN OREGON, 1820s-1860s (2002); LAUREN KESSLER, STUBBORN TWIG: THREE GENERATIONS IN THE LIFE OF A JAPANESE AMERICAN FAMILY (1993); LANGER, *supra* note 5; MCLAGAN, *supra* note 5; QUINTARD TAYLOR, IN SEARCH OF THE RACIAL FRONTIER: AFRICAN AMERICANS IN THE AMERICAN WEST, 1528-1990 (1998); Kristofer Allerfeldt, *Race and Restriction: Anti-Asian Immigration Pressures in the Pacific North-West of America During the Progressive Era, 1885-1924*, 88 HIST. (U.K.) 53 (2003); Malcolm Clark, Jr., *The Bigot Disclosed: 90 Years of Nativism*, 75 OR. HIST. Q. 109 (1974); Mooney, *supra* note 5; Richard, *supra* note 5; Matthew Aeldun Charles Smith, *Wedding Bands and Marriage Bans: A History of Oregon's Racial Intermarriage Statutes and the Impact on Indian Interracial Nuptials* (1997) (unpublished M.A. thesis, Portland State University) (on file with the Portland State University Library).

its future, we must read between the lines, paying close attention to what seems to have been collectively forgotten.

When societies remember and internalize their history, a common understanding of the past can work as a kind of social cement, binding a community together through shared narrative.⁸ However, some aspects of the past become inimical to modern notions of a regional or cultural identity. Such aspects of history tend to be overlooked or even suppressed, preventing any true reconciliation with the past.⁹ When this occurs with an important aspect of constitutional history it can eliminate the possibility for a reconstitution of the People.¹⁰ This Comment argues that Oregon's failure to face, or even recall, its history with regard to the ratification, rescission, and reratification of the Fourteenth Amendment reveals a selective amnesia when it comes to matters of race. Oregon's Fourteenth Amendment memory lapse not only serves to whitewash the state's history, but also undermines Oregon's role as a constitutional player.

The fact that Oregon's population has remained overwhelmingly white is no accident.¹¹ Rather, the present character of the state reflects a past in which African Americans and other racial minorities were deliberately excluded and publicly hated as a matter of state policy and cultural ethos.¹² Race relations in Oregon have a less familiar storyline than other states of the nation, especially those of the American South.¹³ But Oregon's policies

⁸ See generally David Lowenthal, *Identity, Heritage, and History*, in *COMMEMORATIONS: THE POLITICS OF NATIONAL IDENTITY* 41 (John R. Gillis ed., 1994); *COLLECTIVE MEMORY OF POLITICAL EVENTS: SOCIAL PSYCHOLOGICAL PERSPECTIVES* (James W. Pennebaker et al. eds., 1997); *HISTORY, MEMORY, AND THE LAW* (Austin Sarat & Thomas R. Kearns eds., 1999).

⁹ See *infra* Part III.C. See also DAVID GROSS, *LOST TIME: ON REMEMBERING AND FORGETTING IN LATE MODERN CULTURE* (2000).

¹⁰ See *infra* Part III.B.

¹¹ The 2000 Census reported that Oregonians were 86.6% white, 1.6% black or African American, 1.6% American Indian or Alaska Native, 3% Asian, 0.2% Native Hawaiian or other Pacific Islander, 4.2% other race, and 3.1% mixed race. U.S. Census Bureau, Profile of General Demographic Characteristics: 2000, Data Set: Census 2000 Summary File 1 100-Percent Data, Geographic Area: Oregon, available at http://factfinder.census.gov/servlet/QTTable?_bm=n&lang=en&qv_name=DEC_2000_SF1_U_DP1&ds_name=DEC_2000_SF1_U&geo_id=04000US41 (last visited Aug. 20, 2004).

¹² See LANGER, *supra* note 5, at 208-19. Langer quotes Darrell Millner, former chair of the Black Studies Program at Portland State University and leading authority on the experience of black people in Oregon: "It is not that blacks didn't like rain." *Id.* at 208.

¹³ See TAYLOR, *supra* note 7, at 17-23.

of race-based animus nevertheless have had a devastating effect on those faced with exclusion, discrimination, and denial of civil rights.¹⁴ Although Oregon has developed a modern identity as a progressive Ecotopia,¹⁵ under the surface lies a state that, in many ways, is still at odds with the values of diversity and multiculturalism.¹⁶

Part I outlines Oregon's racial politics from the time of statehood through the Civil War, along with the reasons behind the legislature's ratification of the Fourteenth Amendment in 1866 and its withdrawal of ratification two years later.¹⁷ Part II describes a shift in racial politics during the 1950s and relates the unknown story of the reratification of the Fourteenth Amendment in 1973, spearheaded by Rep. William McCoy, the first African American elected to the Oregon Legislative Assembly. Although a controversy about the election of two members of the legislature had played a minor role in the withdrawal of ratification in 1868, this controversy was cited, in 1973, as the sole reason for Oregon's failure to ratify the Fourteenth Amendment, rather than the racial politics that were the true reason.¹⁸ Part III argues that Oregon's selective amnesia about this history both denies and perpetuates racial animus. The century-long oversight—the fact that Oregon “forgot” to ratify the Fourteenth Amendment—is actually an accurate gauge of the white majority

¹⁴ See generally LANGER, *supra* note 5; MCLAGAN, *supra* note 5; TAYLOR, *supra* note 7.

¹⁵ In his novel *Ecotopia*, Ernest Callenbach envisioned the creation of an ecological paradise when the citizens of Washington, Oregon, and northern California secede from the union. ERNEST CALLENBACH, *ECOTOPIA* (1975). Cf., Ellen Stroud, *Troubled Waters in Ecotopia: Environmental Racism in Portland, Oregon*, 74 *RADICAL HIST. REV.* 65 (1999) (arguing that pervasive and extreme pollution in the Columbia Slough, bordering the minority and immigrant communities of North Portland, is an example of environmental racism). See also Mark Lum, Letter to the Editor, *Racism Drags Oregon Down*, *THE OREGONIAN* (Portland), May 29, 1999, available at 1999 WL 5346922 (letter by Asian American stating, “When I moved to this state 10 years ago, all I seemed to hear was a standard statement from so many white Oregonians: ‘We’re Oregonians. We are progressive.’ When I pointed out to these ‘natives’ that their attitudes were not progressive but racist, I was told that racism was not a problem.”).

¹⁶ E.g., LANGER, *supra* note 5, at 210 (recounting the murder of Mulugeta Seraw, an Ethiopian resident of Portland who was beaten to death by neo-Nazi Skinheads in 1988). See also, e.g., Stroud, *supra* note 15; *Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System*, 73 *OR. L. REV.* 823 (1994) (discussing serious discrimination against minorities within Oregon's criminal justice system).

¹⁷ See *infra* Part I.

¹⁸ See *infra* Part II.

historical views about granting equal protection and full citizenship rights to people of color. The fact that few have wished to openly acknowledge the reasons behind the “mistake” suggests that many Oregonians have not confronted their past and, perhaps, have not fully integrated the constitutional principles of Reconstruction. Remembering and commemorating the full history of Oregon’s ratification, rescission, and reratification of the Fourteenth Amendment will not only set the record straight by removing confusion still evident in the *Historical Notes* to the Constitution, but also open a dialogue that can lead to healing and reconciliation.¹⁹

I

SEARCH FOR A WHITE EMPIRE

A. *Exclusion*

Oregon’s racism during the period leading up to statehood was peculiar to its time and place. Hostilities existed between Indians and white settlers, which sometimes erupted in violence.²⁰ Early legislation made slavery illegal in Oregon, though the institution still existed in parts of the territory. African American immigrants were officially excluded, but those already present were generally allowed to stay. Many of those who traveled west on the Oregon Trail came from the South or border states, such as Ohio and Illinois. Many were non-slaveholding white Southerners and Midwesterners who wished to settle in an area free of racial troubles.²¹

As controversies over slavery intensified during the mid-nineteenth century, whites who settled in the West sought to exclude African Americans from their territories. They hoped to avoid racial conflicts, fearing that white people might become overrun if slavery was allowed to expand. Like activists in the Free Soil party in the West and Midwest, Oregonians’ opposition to slavery was motivated largely by antipathy toward blacks, rather than by any sympathy for their plight.²² Jesse Applegate, leader

¹⁹ See *infra* Part III and Conclusion.

²⁰ For instance, the “Cockstock Affair” resulted in several deaths in 1844. MCLAGAN, *supra* note 5, at 24-26; CHARLES HENRY CAREY, *HISTORY OF OREGON* 542 n.2 (1922).

²¹ Richard, *supra* note 5, at 29; MCLAGAN, *supra* note 5, at 24-31. See also DAVID ALAN JOHNSON, *FOUNDING THE FAR WEST: CALIFORNIA, OREGON, AND NEVADA, 1840-1890* 41-70 (1992).

²² BERWANGER, *supra* note 7, at 125.

of an early migration from Missouri to Oregon Territory,²³ recounted the prevailing attitude among his fellow settlers: “Many [poor whites who migrated to Oregon from slave states] hated slavery, but a much larger number of them hated *free negroes* worse even than slaves.”²⁴

The Oregon Territory’s 1843 Organic Act prohibited slavery but restricted voting and eligibility for political office to “free male descendents of a white man.”²⁵ In 1844, the territorial Legislative Committee excluded free blacks from Oregon Territory; those who entered or remained were subject to a flogging by the constable.²⁶ Although the act was repealed by 1845, other racist legislation followed.²⁷ A second exclusion bill, in effect from 1849 to 1854, allowed free blacks who lived in the territory to stay but barred more from entering.²⁸ One justification for such laws centered around white fears of combined black and Indian hostilities. “This is a question of life and death to us in Oregon,” wrote Samuel Thurston, Oregon’s delegate to Congress, in 1850.

The negroes associate with the Indians and intermarry, and, if their free ingress is encouraged or allowed, there would a relationship spring up between them and the different tribes, and a mixed race would ensue inimical to the whites; and the Indians being led on by the negro who is better acquainted with the customs, language, and manners of the whites, than the Indian, these savages would become much more formidable than they otherwise would, and long and bloody wars would be the fruits of the commingling of the races.²⁹

As Oregon moved toward statehood, it became politically di-

²³ Applegate was among the most racially tolerant of early white settlers. Mooney, *supra* note 5, at 564.

²⁴ Jesse Applegate, Views of Oregon History 74 (1878) (unpublished manuscript, on file with the University of California Berkeley Bancroft Library).

²⁵ D. Duniway & N. Riggs eds., *The Oregon Archives 1841-1843*, 60 OR. HIST. Q. 211, 256 (1959).

²⁶ CAREY, *supra* note 20, at 390. In 1845, the provisional government also levied a tax on employers for every Hawaiian worker who came into the Oregon Territory (many worked for the Hudson’s Bay Company). Smith, *supra* note 7, at 36.

²⁷ Mooney, *supra* note 5, at 565. For instance, an 1854 procedure code prohibited blacks and Indians from testifying in any action brought by or against whites. 1854 Or. Laws 111. An 1857 law required Chinese miners to obtain monthly two-dollar licenses. 1856-57 Or. Laws 13-17.

²⁸ McLAGAN, *supra* note 5, at 26-27.

²⁹ Samuel Thurston, Letter of the Delegate From Oregon to the Members of the House of Representatives, 31st Cong., 1st Sess. (quoted in McLAGAN, *supra* note 5, at 30-31). Thurston’s letter to Congress argued for the restriction of land grants to white people only.

vided among Whigs, centered in Portland, and Democrats, centered in Salem.³⁰ After Congress passed the Kansas-Nebraska Act, which asserted the slavery option for territories, the national Republican party began to grow in prominence. In Oregon during the early 1850s, questions of slavery and statehood fostered divisive political discussion and debate. Democrats agitated for admission to the union, with some members insisting that Oregon should join as a slave state.³¹ Whigs argued that the territory was too sparsely populated and lacked enough taxable property for statehood to be imminently feasible.³² Some free-state Whigs and Democrats united under the Republican banner. The Democratic *Oregon Statesman* decried “Black Republicans,” while acknowledging that Oregon voters were unlikely to support slavery on “practical” and economic grounds.³³

After three popular votes defeating statehood and numerous setbacks in the territorial legislature, Oregon finally set a course to join the union, convening a constitutional convention in 1857.³⁴ The issue of slavery was on the table because of the Kan-

³⁰ See generally CAREY, *supra* note 20; DODDS, *supra* note 7; WALTER CARLETON WOODWARD, *THE RISE AND EARLY HISTORY OF POLITICAL PARTIES IN OREGON, 1843-1868* (1913); Charles H. Carey, *The Creation of Oregon as a State*, 26 OR. HIST. Q. 281 (1925) [hereinafter *The Creation of Oregon*]. The principal Democratic newspaper was the *Oregon Statesman*, edited by Asahel Bush. Its Whig counterpart was the *Weekly Oregonian*, edited by Thomas J. Dryer. *The Creation of Oregon, supra*, at 287-88.

³¹ MCLAGAN, *supra* note 5, at 33-47. The subject of slavery divided the Democratic party, and most party officials deliberately remained silent on the issue to preserve party unity. *Id.* See also JOHNSON, *supra* note 21, at 61-66.

³² *The Creation of Oregon, supra* note 30, at 291.

³³ MCLAGAN, *supra* note 5, at 45-46. Asahel Bush, editor of the *Oregon Statesman*, explained, “[W]e are for a free state in Oregon In arriving at this conclusion we are not influenced by hostility to the institution of African slavery per se. . . . [W]e think that our climate, soil, situation, population, etc., render [it] to any useful extent an ‘impossible’ institution for Oregon.” *Id.* at 46. For an interesting political history of Oregon prior to statehood and the small group of politicians who played key roles, see JOHNSON, *supra* note 21, at 139-88. Johnson notes that Oregon’s Democratic party walked a fine line on slavery, but its avoidance of the issue only delayed the party’s dissolution. In an effort to avoid the question, Bush and his circle “emphasized the weak common ground the Democrats shared: opposition to abolition and ‘black Republicanism.’ This course, however, was sorely insufficient for encouraging party unity. Confusion reigned.” *Id.* at 64.

³⁴ *The Creation of Oregon, supra* note 30, at 303. In its seven years of territorial existence, the question of statehood was voted on nine times by the legislature, four times by voters, and two times by the U.S. Congress. *Id.* By 1857, however, Oregon Democrats realized that the issue of slavery might permanently divide the party. “[T]he Salem machine searched for a way to negate the emotional power of the slavery issue and at the same time secure their hold over the government. Statehood

sas-Nebraska Act's codification of home rule. Popular sovereignty gave Oregonians the right to decide "for ourselves what we will adopt [and] what we will not adopt," wrote Delazon Smith, editor of the *Weekly Oregonian*. But, he added, "there is about as much danger [of establishing slavery in Oregon] as there is of . . . going to the moon."³⁵

More prevalent was the desire for black exclusion, along with denial of rights for all people of color. The constitutional convention in Salem approved articles restricting blacks from military service and from voting. Another provision granted property rights equal to those of U.S. citizens only to white resident foreigners. In addition, Chinese people who arrived in Oregon after 1857 were to be prevented from owning real estate or holding or working a mining claim. As one historian put it, the Oregon constitution "was so thoroughly a 'white man's document' that the provision for the establishment of a 'free and white' militia was offered, debated and rejected as unnecessary."³⁶ A provision to exclude "free negroes" was seriously considered, with one delegate moving to bar the Chinese as well. Although this amendment did not pass, many delegates supported it, including Chief Justice Williams, who urged his colleagues to "consecrate Oregon to the use of the white man, and exclude the negro, Chinaman, and every race of that character."³⁷

promised to do both." JOHNSON, *supra* note 21, at 65. Even after Oregonians decided to join the union, Congress remained reluctant to pass an enabling act for Oregon due to political and sectional considerations. Whigs and Republicans feared the entrance into the Union of a Democratic, possibly pro-slavery stronghold, while Southerners resisted the admission of another free state. See Sarah Drescher, *A Free State with Pro-slavery Politics: Oregon During the Civil War and Reconstruction* (Dec. 1, 2003) (unpublished manuscript, on file with the author).

³⁵ BERWANGER, *supra* note 7, at 85. Indeed, a highly influential *Free State Letter*, written by George Williams, chief justice of the territorial supreme court, explained that while Williams would never reproach the slaveholders of the South, slavery in Oregon would be a burden rather than a blessing. *Id.* at 91-93. He argued that slaves had no ambition compared to the enterprising "free white man"; moreover, few Oregonians would be able to afford to buy slaves. *Id.* at 92. Williams also claimed that if blacks lived among white men, they would corrupt the morals and lower the status of whites who associated with them, because society, "like water, seeks a common level." *Id.* at 93.

³⁶ Richard, *supra* note 5, at 31. See also Mooney, *supra* note 5, at 570-73; David Schuman, *The Creation of the Oregon Constitution*, 74 OR. L. REV. 611, 624-33 (1995).

³⁷ Mooney, *supra* note 5, at 571. The Chinese exclusion measure was opposed largely on the grounds that Chinese made "good washers, good cooks, and good servants." *Id.*

Eventually, the delegates decided to submit the exclusion issue directly to the electorate, along with a referendum on slavery. In November 1857, Oregon voters approved the proposed constitution, rejected slavery (by a vote of 7727 to 2645), and excluded free blacks and “mulattoes” (by a vote of 8640 to 1081).³⁸ As one commentator noted, Oregonians had “no relish for the peculiar institution” of slavery, but they desired less to mingle with free blacks because “we were building a new state on virgin ground; its people believed it should encourage only the best elements to come to us.”³⁹ Oregon joined the union, in 1859,⁴⁰ as the only state ever admitted with a black exclusion clause in its constitution.⁴¹

B. Ratification

Though Oregon was the only state to constitutionalize black exclusion, several Midwestern states also passed exclusion laws or only admitted blacks with certified proof of free status and large bonds guaranteeing good behavior.⁴² But while the policy of exclusion proved futile in places like Illinois, where African Americans rapidly migrated, Oregon’s black population barely rose—growing by less than 75 individuals between 1850 and 1860. During the same period, California’s black population increased by nearly 4000.⁴³

³⁸ CAREY, *supra* note 20, at 533.

³⁹ BERWANGER, *supra* note 7, at 94 (quoting John McBride, *Annual Address Before the Oregon Pioneer Association*, TRANSACTIONS OF THE OREGON PIONEER ASSOCIATION 42 (1897)).

⁴⁰ It took two years for Congress to approve the Oregon Constitution. Oregon’s fate became linked politically with that of Kansas, and several antislavery senators opposed Oregon’s exclusion provision. BERWANGER, *supra* note 7, at 95.

⁴¹ *Id.*

⁴² For instance, Illinois and Indiana passed, and Ohio considered, exclusion laws similar to Oregon’s. MCLAGAN, *supra* note 5, at 24-25. See also BERWANGER, *supra* note 7, at 30-51. Smith writes, “The Oregon constitution was hardly an original document, with the constitutions of Indiana, Iowa and Michigan serving as the principal models. Those states were a great influence because the settlers in Oregon came predominantly from the Mississippi Valley.” Smith, *supra* note 7, at 36.

⁴³ BERWANGER, *supra* note 7, at 94. Berwanger writes that the failure of African Americans to migrate to Oregon cannot be explained solely by racial prejudice. “The territory was in reality too distant to encourage Negro migration or serve as a refuge for fugitive slaves. . . . [And] [n]egroes preferred to migrate to urban centers because the economic opportunities were more attractive and because the majority of them did not have the capital to establish themselves as farmers.” *Id.* However, exclusion laws did keep black settlers out of Oregon. For instance, George Washington Bush, a wealthy African American farmer, came west on the Oregon Trail with his family in 1844 because he was weary of racism in Missouri. Upon arriving in

Nevertheless, Oregon's government continued to harass racial minorities through a series of enactments and official policies. In 1860 the legislature passed another tax against Chinese miners.⁴⁴ In 1862 it issued a five-dollar annual poll tax on every "negro, chinaman, kanaka [Hawaiian] and mulatto," with a day of road work assessed for each half dollar unpaid.⁴⁵ The legislature also passed an anti-miscegenation statute that year, outlawing marriage between a white person and anyone of "one-fourth or more negro blood."⁴⁶ The law stipulated that that anyone who performed a prohibited marriage ceremony faced up to one year in prison and a one-hundred-dollar fine.⁴⁷

During the Civil War, the state's political parties realigned their allegiances to the North or South. Eastern and southern Oregon received an influx of white migrants from Missouri, some of whom had deserted the Confederate army and most of whom were pro-slavery Democrats. Anti-slavery, pro-Union Republicans, Whigs, and Democrats joined forces under the banner of the Union party. Although Unionists supported the North during the war, the party's leaders continued to pass legislation that disparaged and discriminated against free blacks.⁴⁸ Advocates of slavery and the Confederacy, with their political clout diminishing, formed underground militias and secret societies.⁴⁹

In 1865 Oregon Governor Addison C. Gibbs convened a special session of the legislature to ratify the Thirteenth Amend-

Oregon Territory, however, he was forced to settle north of the Columbia River because of Oregon's black exclusion law, which threatened whippings for violators. Bush founded Bush Prairie, near present-day Olympia, Washington and earned a reputation for fairness and generosity. TAYLOR, *supra* note 7, at 82; Steve Mayes, *African American Pioneers' Experiences Brought to Light*, THE OREGONIAN (Portland), Feb. 19, 2004, available at 2004 WL 58856935.

⁴⁴ 1860 Or. Laws 49-52.

⁴⁵ 1845-1864 Or. Laws 815-16.

⁴⁶ 1845-1864 Or. Laws 783.

⁴⁷ Smith, *supra* note 7, at 51-52.

⁴⁸ MCLAGAN, *supra* note 5, at 66; see also WOODWARD, *supra* note 30.

⁴⁹ MCLAGAN, *supra* note 5, at 66-68. Joseph Lane, Oregon's representative to Congress, former territorial governor, and onetime vice presidential candidate, was a rumored member of the Knights of the Golden Circle. But his vocal support of the Confederacy during the war cost him his political career. *Id.* at 67. See also JOHNSON, *supra* note 21, at 269-312 (describing how several pro-slavery, pro-Confederacy politicians in Oregon recast themselves as supporters of a peaceful Union after the conclusion of the Civil War); Mooney, *supra* note 5 (describing how Matthew Deady, Oregon's first federal district judge and a former slavery advocate, became an outspoken champion of immigrant Chinese rights late in his career, in a series of judicial decisions between 1876 and 1893).

ment,⁵⁰ outlawing slavery, after a group of citizens petitioned for political protection from the “hoards of disfranchised rebels and traitors” immigrating from Southern states.⁵¹ The legislature ratified the amendment, despite strong opposition from Democrats, who argued that neither Oregon nor Southern states had been consulted and that the amendment violated states’ rights.⁵²

In 1866 the Oregon legislature was asked to consider ratification of the Fourteenth Amendment, giving citizenship to African Americans and strengthening federal control over state actions.⁵³ Ratification of the amendment became a dominant issue in the nation as America undertook Reconstruction after the Civil War.⁵⁴ The idea of black citizenship and its associated rights, such as voting, education, political participation, and social equality, was horrifying to the vast majority of white Oregonians. In 1865, *The Oregonian* had opined:

The man who—knowing of the African race in our country— favors the extension of the privileges of citizenship to them, is surely reckless of the consequences, and regardless of the future result The Negroes as a class possess no capacity of self-government, and the few who are intelligent enough to take part in public affairs are offset by the multitude who don’t . . . this nation of the white race should well ponder the question before it admits the African, the Mongolian and the Indian to all its privileges.⁵⁵

The *Oregon Statesman*, in an editorial published the same year, raised the specter of a “war of the races” if citizenship rights were granted to blacks: “If we make the African a citizen, we cannot deny the same right to the Indian or the Mongolian. Then how long would we have peace and prosperity when four

⁵⁰ 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. U.S. CONST. amend. XIII, § 1. Congress shall have power to enforce this article by appropriate legislation. *Id.* § 2.

⁵¹ MCLAGAN, *supra* note 5, at 65-66.

⁵² 1865 Or. Laws 45; MCLAGAN, *supra* note 5, at 65-66.

⁵³ Section 1 of the amendment reads: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

⁵⁴ Smith, *supra* note 7, at 52.

⁵⁵ MCLAGAN, *supra* note 5, at 68-69 (quoting THE OREGONIAN (Portland), Mar. 3, 1865).

racess separate, distinct and antagonistic should be at the polls and contend for the control of government?"⁵⁶

In 1866 the Union party was still in control of the Oregon legislature, but Democrats were on the political rise.⁵⁷ Twenty-four Unionists held a slim advantage over nineteen Democrats in the House; in the Senate the margin was seventeen to seven.⁵⁸ Democrats spoke out forcefully against ratification. Senator H.C. Huston from Lane County complained in *The Oregonian* that the Fourteenth Amendment would circumvent the Oregon Constitution by granting citizenship to African Americans and Chinese people. "Now it is sought to place the inferior races upon an equality with the superior; to make a mongrel people; to place a negro or greasy Chinaman on the same level with Grant the hero and Johnson the incorruptible Chief Magistrate."⁵⁹ Although some senators tried to refer the issue directly to voters, the legislature ratified the Fourteenth Amendment by a close margin—thirteen votes to nine in the Senate and twenty-five to twenty-two in the House.⁶⁰

However, the 1866 session was marred by a dispute over the election of two Unionist members of the House from Grant County in southern Oregon. One had been the acting county clerk at the time of his election and had certified himself and his cohort as winners of the House race. Later, it was decided that the two seats rightfully belonged to Democrats. Two days after the Fourteenth Amendment vote, the two Unionist members, who had voted in favor of ratification, were expelled and replaced by their Democratic challengers. Had these Democrats been present, the vote would have been twenty-four to twenty-three against ratification. House Democrats clamored that a lawful body had not validly approved the Fourteenth Amendment in Oregon.⁶¹

C. Rescission

Failing to turn the tide of history, the 1866 legislature renewed

⁵⁶ MCLAGAN, *supra* note 5, at 69 (quoting OREGON STATESMAN, Oct. 2, 1865).

⁵⁷ CAREY, *supra* note 20, at 654-55.

⁵⁸ Smith, *supra* note 7, at 52.

⁵⁹ *Id.* at 53 (quoting THE OREGONIAN (Portland), Sept. 17, 1866).

⁶⁰ 1866 Or. Laws 73-75. See Richard, *supra* note 5, at 51-52; Smith, *supra* note 7, at 53. Carey erroneously states that the amendment was ratified "by a large majority." CAREY, *supra* note 20, at 652.

⁶¹ Richard, *supra* note 5, at 51-52; Seymour, *supra* note 4.

arguments over states' rights and racial equality by debating the topic of interracial marriage, or miscegenation.⁶² Their discussion foreshadowed Constitutional arguments that would be made about marriage and states' rights in the century to come and beyond. A broad statute was drafted prohibiting "any white person, male or female, to intermarry with any Negro or Chinese or any person having one-fourth or more Negro or Chinese blood, or any person having more than one-half Kanaka or Indian blood." After one representative criticized the wording of the bill for not simply prohibiting intermarriages of "all persons not entirely of the same blood," a Democrat from Lane County stated his desire to pass the bill as worded in order to test the binding force of the Fourteenth Amendment in the courts.⁶³ Isaac Cox, a Josephine County Democrat, then hammered home the point:

I am in favor of this [anti-miscegenation bill] believing, as I do, that those laws of Congress, and that the late amendments to the Constitution will, in the course of time, be declared null and void. You have interfered with the domestic institutions of the States in one instance and it extends to all instances. When you come down to the truth of the matter, our Legislature does not amount to the snap of your finger.⁶⁴

Cox then engaged in a heated exchange with W.W. Upton, a Multnomah County Republican. "Does the gentleman hold that it is one of the rights and privileges of a negro to marry a white person?" Upton asked.

"I am replying to this thing that you have brought up here to show how ridiculous it is," Cox said. "I can consistently vote for this [anti-miscegenation] bill, but the gentleman who voted for the [Fourteenth Amendment] cannot."⁶⁵

Nevertheless, the anti-miscegenation bill passed as worded, criminalizing marriage between a person who is white and a person who is from several nonwhite racial groups, with violators subject to imprisonment and county clerks charged with inquiring into the racial pedigree of marriage-license applicants.⁶⁶

⁶² Miscegenation is a nineteenth-century term for racial mixing. See Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America*, 83 J. AM. HIST. 44, 48 n.13 (1996).

⁶³ Smith, *supra* note 7, at 54-57.

⁶⁴ *Id.* at 57.

⁶⁵ *Id.* at 57-58.

⁶⁶ 1866 Or. Laws 10; Smith, *supra* note 7, at 59-60. Smith found, however, that

During the ensuing year, the now intertwined issues of Fourteenth Amendment ratification and interracial marriage galvanized the electorate in support of the Democrats. During his 1868 campaign for the U.S. Congress, Democrat Joseph Smith of Marion County played on Oregonians' deep-seated fears,⁶⁷ rhetorically asking voters throughout the state: "Do you want your daughter to marry a nigger?" and "Would you allow a nigger to force himself into a seat at church between you and your wife?"⁶⁸ The Eugene *Democratic Review*, a pro-South weekly that had been suppressed during the war, published this diatribe in 1867:

gaping, bullet pated, thick lipped, wooly headed, animal-jawed crowd of niggers, the dregs of broken up plantations, idle and vicious blacks, released from wholesome restraints of task masters and overseers . . . Greasy, dirty, lousy, they drowsily look down upon the assembled wisdom of a dissevered Union. Sleepily listen to legislators who have given them their freedom and now propose to invest them with the highest privileges of American citizenship.⁶⁹

During the 1868 legislative session, Democrats regained the majority and succeeded in bringing a vote to withdraw ratification of the Fourteenth Amendment, which had already been adopted by Congress.⁷⁰ The resolution to rescind ratification passed both chambers of the Oregon legislature by a combined vote of thirty-nine to twenty-seven.⁷¹ Instead of viewing the resolution as merely symbolic, the resolution's drafters argued that the adoption of the Fourteenth Amendment was illegitimate. The amendment had gained ratification by a three-fourths major-

although the law was apparently never challenged in court, it was routinely violated after passage, especially among white men and Indian women. *Id.* at 66-73.

⁶⁷ One lawyer made the following comment to a colleague about Oregonians' racial attitudes: "Negro equality is their dread—If [the African American] is enfranchised, they are perfectly certain they will have to sleep with him. You might as well bay at the moon as to reason with such men." BERWANGER, *supra* note 7, at 96.

⁶⁸ Richard, *supra* note 5, at 52.

⁶⁹ MCLAGAN, *supra* note 5, at 70 (quoting DEMOCRATIC REVIEW (Eugene), Mar. 2, 1867).

⁷⁰ The Fourteenth Amendment was officially adopted by Congress on July 18, 1868. *Joint Resolution Declaring the Ratification of the Fourteenth Article of Amendment of the Constitution of the United States*, S.R. 166, 40th Cong. (2d Sess. 1868), in *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774-1875*, available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsr&file Name=040/llsr040.db&recNum=146> (last visited Aug. 20, 2004). The Historical Notes in the U.S. Code give July 28, 1868, as the date when the Fourteenth Amendment gained official ratification. *Historical Notes*, *supra* note 6.

⁷¹ 1868 Or. Laws 111-15; S.J. Res. 4, 5th Leg. Reg. Sess. (Or. 1868); MCLAGAN, *supra* note 5, at 70.

ity of the states only through the machinations of Reconstruction, the resolution stated. Furthermore, any state had “a right to withdraw its assent to any proposed amendment.”⁷² Although six Southern states had ratified the amendment, creating a three-fourths majority, the legislatures of these states at the time of ratification “were created by a military despotism, against the will of the legal voters of the said states, under the reconstruction acts (so-called) of congress, which are usurpations, unconstitutional, revolutionary and void.”⁷³ Thus, ratification of the Fourteenth Amendment had not validly occurred, and Oregon had the right to withdraw its assent.⁷⁴

After questioning the legitimacy of the Fourteenth Amendment’s ratification on the federal level, the resolution went on to discount the Oregon legislature’s ratification in 1866 and recount the election dispute in Grant County:

The said resolution . . . was adopted by the house of representatives of the state of Oregon . . . and passed by means of the votes of Thomas H. Brenz and M.M. McKean, who were illegally and fraudulently returned as members of the said house of representatives from the county of Grant

And Whereas, On the 22d day of September, 1866, the said Thomas H. Brentz and M.M. McKean were declared not entitled to the seats which they had usurped, and on the same day J.M. McCoy and G.W. Knisely were declared to be the duly elected members from the county of Grant, and who, on the 29th day of September, 1866, entered their protest on the journals of the house of representatives, and declared therein that, if they had not been excluded from the seats to which they were entitled, they would have voted against the resolution ratifying the said proposed constitutional amendment, and thereby defeated the adoption of the same;

And Whereas, On the 6th day of October, 1866, the house of representatives of this state adopted a resolution, declaring that the action of that body in ratifying the said proposed constitutional amendment, did not express the will of the said house as it then stood, after being purged of its illegal members;

Therefore,

Be it resolved by the Legislative Assembly of the State of Oregon, That the above recited resolution, adopted by the legislative assembly on the 19th day of September, 1866, by fraud, be and the same is hereby rescinded, and the ratification on behalf of the state of Oregon of the above-recited, proposed

⁷² 1868 Or. Laws 111-15.

⁷³ *Id.*

⁷⁴ *Id.*

amendment to the constitution of the United States is hereby withdrawn and refused.⁷⁵

At about the same time it rescinded ratification of the Fourteenth Amendment, the legislature passed resolutions calling for the resignations of Oregon's two U.S. senators, George Williams and Henry Corbett. Both senators had voted to impeach President Johnson and supported Reconstruction. Williams also had helped to frame and gain Congressional approval for the Fourteenth Amendment. The resolutions charged that the senators "had misrepresented the people and supported measures in violation of the Constitution, known as the Reconstruction Acts." Charles Henry Carey, a historian of early twentieth-century Oregon, noted, "The resolutions demanding the resignations of the senators were forwarded to the United States Senate, which returned them to their source."⁷⁶ Williams went on to become attorney general in President Grant's cabinet but was denied elevation to the Supreme Court because of the bitter feelings that continued to surround Reconstruction.⁷⁷

II

THE ROAD TO RERATIFICATION

A. *Voting Rights*

When the Fifteenth Amendment was submitted to the states in 1869,⁷⁸ Oregonians were overwhelmingly hostile to the concept

⁷⁵ *Id.* The U.S. Senate noted in passing that Oregon withdrew its assent to the Fourteenth Amendment on December 14, 1868. JOURNAL OF THE SENATE OF THE UNITED STATES OF AMERICA, 1789-1874 (Dec. 14, 1868). The Fourteenth Amendment had, however, already been officially adopted by Congress. See *supra* note 70.

⁷⁶ CAREY, *supra* note 20, at 656. After the "Resolutions of the Legislative Assembly of Oregon instructing their Senators in Congress to resign, having voted for measures plainly and palpably unconstitutional, which have overthrown civil liberty and free government, and consigned the citizens of eleven States to odious and despotic military dictatorship, &c" were read in the U.S. House of Representatives, the House passed a resolution in response, which read: "Resolved, That the paper just read be returned to the presiding officers of both houses of the Oregon Legislature, the same being scandalous, impertinent, and indecorous." CONGRESSIONAL GLOBE, 40th Cong., 3d Sess., 15-16 (Dec. 8, 1868).

⁷⁷ *Dark Chapter*, THE OREGONIAN (Portland), Jan. 30, 1959, at 18. Note that Williams also had been chief justice of Oregon's territorial supreme court and author of the "Free State Letter." He also had been supportive of Oregon's black exclusion laws. See *supra* note 35.

⁷⁸ The right of citizens of the United States to vote shall not be denied or abridged by the United States or by an State on account of race, color, or previous condition of servitude. U.S. CONST. amend. XV, § 1. The Congress shall have power to enforce this article by appropriate legislation. *Id.* § 2

of black voting rights.⁷⁹ In 1870 the Oregon legislature opposed ratification by a large margin.⁸⁰ However, by the time it met that year, the Fifteenth Amendment already had been ratified by a three-fourths majority of the states and was the law of the land.⁸¹ With the adoption of the Fifteenth Amendment by Congress, Oregon fell firmly on the losing side in the fight to legally deny voting rights to African Americans and, thus, only grudgingly accepted the legitimacy of such rights.⁸²

Although the Fifteenth Amendment made it legal for black men to vote, African Americans in Oregon could not necessarily vote freely. Legally they had voting rights, but “the legal and technical does not reflect the real-life experience of Black people at that time,” according to Oregon’s leading scholar of black studies.⁸³ African Americans across the state still had to contend with a five-dollar poll tax and intimidation at the ballot box, especially in Oregon’s more rural areas. However, African Americans in Portland enjoyed a degree of relative collective safety, which allowed them some participation in the political process. Between 1880 and 1920, black political clubs organized in the metropolitan area and lobbied the legislature to repeal anti-black provisions in the state constitution.⁸⁴

After the Fifteenth Amendment was ratified by Congress, Oregon’s race-based policies turned increased attention toward the Chinese. Enticed West by the mines and railroads, Chinese laborers became the target of violence as anti-Chinese sentiment

⁷⁹ “The Albany *Democrat* declared in September 1869 that the mountains would fall before the Fifteenth Amendment would become a part of the fundamental law.” Richard, *supra* note 5, at 54 (quoting ALBANY DEMOCRAT (Or.), quoted in THE OREGONIAN (Portland), Sept. 27, 1869).

⁸⁰ 1870 Or. Laws 190-91.

⁸¹ The Fifteenth Amendment became official in February 1870. U.S. CONST. amend. XV, *Historical Notes* (West 1987). The Oregon legislature denied ratification in October 1870. JOURNAL OF THE SENATE PROCEEDINGS OF THE LEGISLATIVE ASSEMBLY OF OREGON 664 (6th Reg. Sess. 1870).

⁸² In *Wood v. Fitzgerald*, 3 Or. 568, 580 (1870), the Oregon Supreme Court acknowledged that the Fifteenth Amendment was the “supreme law of the land” and served to nullify those portions of the Oregon constitution and other laws that restricted the right of suffrage to white people.

⁸³ Angela Wilson, *The Black Vote in the Northwest: Then and Now*, PORTLAND SKANNER, Feb. 28, 1996, available at 1996 WL 15821922 (quoting Darrell Millner, Professor of Black Studies, Portland State University).

⁸⁴ *Id.* Many of the anti-black constitutional provisions were removed in 1927. *Id.* Other racist language was not removed until 2003. James Mayer, *Oregonians Decide to Increase Minimum Wage*, THE OREGONIAN (Portland), Nov. 7, 2002, available at 2002 WL 3981844.

spread.⁸⁵ By the 1880s, mobs of angry Oregonians were participating in “anti-coolie” riots and engaging in violence against Chinese workers, after the state’s Chinese population grew rapidly and a nationwide depression caused widespread unemployment.⁸⁶ Anti-Catholic sentiment also was strong, targeting especially the Irish-American working class, though fear of “the papal superstition of Europe” had long been a theme in state politics.⁸⁷ After settling the territory by displacing Indians, excluding blacks, and taking advantage of Chinese laborers, white Protestant Oregonians came to esteem what historian Malcolm Clark calls “nativism.” Clark describes the mind-set of the state’s “dedicated xenophobe” who

is prepared to set off as alien large sections of native-born: Blacks because of their color, their alleged inferior intellectual capacity and their equally alleged sexual superiority; Indians because they had the temerity to resist the rape of their lands; Orientals because of their skin, their eyes, their customs, their gods; Jews because of their racial and religious exclusiveness; Catholics because they owe allegiance to the Pope of Rome. To the complete bigot any of these, or all of them, are permanently strangers in the land.⁸⁸

As the new century dawned, Oregon’s nativism carried on, both officially and unofficially. The sweeping ban on interracial marriage stayed on the books. People of color faced limited career opportunities and restricted housing options. After World War I, the Ku Klux Klan found a stronghold in Oregon, with recruits numbering as high as 200,000. Burning crosses in communities throughout the state, including Portland and Eugene, the Klan campaigned for the incongruent virtues of public schools, Protestantism, racial purity, and “100 percent Americanism.”⁸⁹

During the 1930s and 1940s, unprecedented numbers of Afri-

⁸⁵ See generally Allerfeldt, *supra* note 7; Clark, *supra* note 7, at 119-31; Mooney, *supra* note 5.

⁸⁶ Mooney, *supra* note 5, at 575-76. Cf., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that a local ordinance in California selectively enforced against Chinese laundry owners violated the Equal Protection Clause of the Fourteenth Amendment, as it was “applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances”).

⁸⁷ See Clark, *supra* note 7.

⁸⁸ *Id.* at 109.

⁸⁹ *Id.* See also LANGER, *supra* note 5; Rudy Pearson, “A Menace to the Neighborhood”: Housing and African Americans in Portland, 1941-1945, 102 OR. HIST. Q. 159 (2001). Langer notes that another Klan position was opposition to “Koons, Kikes, and Catholics.” LANGER, *supra* note 5, at 211.

can Americans migrated to Portland to work in the ship-building trade, increasing the city's black population by 3000 percent. The newcomers were greeted by signs of "Whites Only," housing discrimination, and Klan threats.⁹⁰

B. Marriage

Despite the provincial rhetoric that greeted newcomers and plagued people of color who remained, racial politics in the West contains layers of complexity not found in Eastern states. The historian Quintard Taylor notes that four major communities of color—African Americans, Asian Americans, Latinos, and Native Americans—have interacted with whites in different ways throughout the region and have worked "both competitively and cooperatively among themselves."⁹¹ In post-World War II Oregon, such interactions helped to turn the tide away from official endorsement of institutionalized racism.

In the 1950s the marriage statute again became a fulcrum for discussion about states' rights and equal rights. It started when Oregon began to implement President Truman's policy of "termination," which sought to end federal control of Indian affairs and return Indian governance to the states.⁹² Governor Douglas McKay, a moderate Republican, scheduled an Oregon Conference on Indian Affairs in July 1950, bringing together state and federal officials, the superintendents of Oregon's four Indian reservations, and tribal leaders. The conference agenda proposed a mutual objective of abolishing the reservation system and creating an assimilated Indian society. However, Oregon's 1866 anti-miscegenation law became an issue at the meeting. Boyd Jackson, a Klamath tribal representative, spoke against the law, as well as a state prohibition against alcohol use by Indians. "You have . . . discriminated against us by prohibiting intermarriage among your people," Boyd told state officials.⁹³

The conference galvanized those eager to promote Indian assimilation, including the governor, and created momentum for

⁹⁰ Pearson, *supra* note 89, at 161-64. See also Stroud, *supra* note 15.

⁹¹ TAYLOR, *supra* note 7, at 18.

⁹² The discussion, *infra*, in this section is based entirely on the unpublished original research of Matthew Aeldun Charles Smith, which he completed in furtherance of a M.A. in History at Portland State University. Smith, *supra* note 7, at 148-72. The author thanks Peggy Pascoe, University of Oregon Department of History, for alerting her to Mr. Smith's important work.

⁹³ Smith, *supra* note 7, at 148-52.

repeal of the marriage law. A.H. Wright, Director of Indian Education in Oregon and chair of the newly formed Advisory Committee on Indian Affairs, said, "I would like to remove the miscegenation law from the Oregon statutes. Any Oregon statute that is discriminatory in nature should be abolished."⁹⁴

At the governor's direction, the state attorney general looked into the matter and reported that the California Supreme Court had recently overturned a similar anti-miscegenation law on equal protection grounds in the 1948 case of *Perez v. Lippold*.⁹⁵ He recommended that the governor press for repeal of Oregon's 1866 anti-miscegenation law.⁹⁶

To push the repeal through the legislature, Wright enlisted the help of Tom McCall, Oregon's future governor, then Governor McCay's secretary. The prospect of intermarriage between blacks and whites created the biggest hurdle to repeal. Instead of overt revulsion to such unions, as expressed by legislators during the nineteenth century, twentieth-century politicians argued that racial intermarriage would hinder black advancement and be "a crime to unborn children."⁹⁷ However, Senator Philip Hitchcock, a Republican from Klamath Falls who led the fight for repeal, told the Oregon Senate that the 1866 marriage ban was "a disgrace to the state of Oregon, which violates the constitution and the laws of God."⁹⁸

Senator Marie Wilcox, a Republican from Grants Pass, added that "many Oregon veterans are marrying girls of dark skin from foreign lands" and reported that she had been asked by several of them to support the repeal "so they could bring their wives home."⁹⁹ Despite strong opposition by three senators from the Portland area, who told *The Oregonian* that "they had no objections to the action of principals in white and colored marriages, but that they considered such marriages unfair to the resulting children,"¹⁰⁰ the legislature repealed the marriage ban in May 1951 by a wide margin.¹⁰¹

The repeal of the 1866 anti-miscegenation law represents a

⁹⁴ *Id.* at 154.

⁹⁵ 198 P.2d 17 (Cal. 1948).

⁹⁶ Smith, *supra* note 7, at 154-56.

⁹⁷ *Id.* at 159.

⁹⁸ *Id.* at 161.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 162.

¹⁰¹ 1951 Or. Laws 792, 854; Smith, *supra* note 7, at 162-65.

crossroads in Oregon's racial politics. The state began turning away from the overt practice of systematic racism and pursuing the stated policies of equality and colorblindness. In 1959, as part of the Oregon's centennial celebration, the legislature finally ratified the Fifteenth Amendment.¹⁰² "Ratification of the amendment is particularly important at this time, as it will lend moral support to those persons in the South who feel it is time we accept people as people," remarked Senator William Grenfell, one of the authors of the resolution. "[I]t is time Oregon accepts her rightful role in the union and it is appropriate in our Centennial year."¹⁰³

In an unsigned editorial, published January 30, 1959, *The Oregonian* wrote that the denial of ratification for the Fifteenth Amendment recalled "a bitter era in Oregon politics," when sentiment for the South "was bolstered by emigration from the southern and border states." The editorial went on to comment:

Looking back over 90 years, it is difficult to appreciate the sentiment that prevailed at the time in Oregon's majority party. But it must not have been unlike that characterized by the massive resistance programs conducted currently by southern states against the Supreme Court's ruling on integration of the schools, which is based on the 14th amendment.¹⁰⁴

The editorial confidently asserted that "current Oregon sentiment is overwhelmingly to the contrary."¹⁰⁵ Ironically, although the article mentioned the 1868 rescission of the Fourteenth Amendment, it did not call on the legislature to remedy the situation, like it had for the Fifteenth Amendment.

C. Reratification

By the second half of the twentieth century, Oregon had begun to actively distance itself from its ugly history of racial discrimination and sought a more progressive identity. Oregonians of all races participated in and were inspired by the Civil Rights Movement. Portland's black community had established a branch of the NAACP in 1913, though the movement suffered setbacks during the Klan heyday of the 1920s and 1930s.¹⁰⁶ However, responding to the new credo of colorblindness and a rapidly grow-

¹⁰² 1959 Or. Laws 1511.

¹⁰³ *Solons Ask Ratification*, THE OREGONIAN (Portland), Jan. 23, 1959, at 17.

¹⁰⁴ *Dark Chapter*, *supra* note 76.

¹⁰⁵ *Id.*

¹⁰⁶ LANGER, *supra* note 5, at 211.

ing urban black population,¹⁰⁷ Oregon passed key pieces of Civil Rights legislation during the 1940s and 1950s, including a fair employment act (1949), a ban on discrimination in vocational schools (1951), and a public accommodations law (1953), along with the 1951 repeal of the ban on interracial marriage.¹⁰⁸

In 1966 Gladys McCoy was elected to the Portland School Board, the first African American to hold public office in Oregon.¹⁰⁹ In 1972, Gladys' husband, William McCoy, was elected to the Oregon House, making him the first African American to serve in the state legislature.¹¹⁰ As one of his first actions as a member of the House, McCoy asked his colleagues to ratify the Fourteenth Amendment. "He thinks Oregon should be on record as supporting full citizenship for black people," *The Oregonian* stated, without quoting McCoy directly.¹¹¹ The article, which featured a photo of McCoy, focused on the "strange chain of events" linked to the state's 1866 ratification of the Fourteenth Amendment. The article provided a detailed account of the disputed elections of the Unionist House members from Grant County who were recalled subsequent to ratification.¹¹² With regard to the rescission, the article observed that that the "political tide turned in Oregon," and "[m]any of the Democrats who were elected in 1868 had strong southern sympathies."¹¹³

In 1973 it came as a surprise to Oregon politicians that their state was not on record in support of the Fourteenth Amendment.¹¹⁴ Indeed, *The Oregonian* stated at the time, "Most Oregonians have long assumed that the state had ratified the

¹⁰⁷ See MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960s TO THE 1990s 95-112 (2d ed. 1994); Pascoe, *supra* note 62.

¹⁰⁸ Smith, *supra* note 7, at 151.

¹⁰⁹ Wilson, *supra* note 83.

¹¹⁰ Osker Spicer & Jeff Mapes, *Sen. Bill McCoy, Leader in Black Community, Dies*, THE OREGONIAN (Portland), Apr. 20, 1996, available at 1996 WL 4131169. This obituary states that McCoy was elected to the House in 1973, but it is more likely that he was elected in the 1972 November election, given the fact that he already had introduced his resolution to ratify the Fourteenth Amendment by January of 1973. McCoy was appointed to a vacant seat in the Oregon Senate in 1974 and, prior to his death in 1996, was the longest serving Oregon state senator. Steve Law, *Lawmakers Say Minority Ranks Are Far Too Low*, STATESMAN JOURNAL (Salem), Feb. 12, 2004, available at 2004 WL 64183959. Law's article also states that McCoy was not only the first African American but the first person of color to serve in the Oregon state legislature.

¹¹¹ Seymour, *supra* note 4.

¹¹² See *supra* Part I.C.

¹¹³ Seymour, *supra* note 4.

¹¹⁴ Telephone Interview with former House Speaker Richard O. Eymann, Oregon

amendment.”¹¹⁵ However, the move to correct the situation was conducted in such a way as to minimize any possibility of public education or reconciliation—quickly, in an almost embarrassed silence. When asked why the issue never garnered much attention or debate, Les Aucoin, one of the co-sponsors of the joint resolution to ratify the amendment in 1973, indicates that politicians wanted to quickly rectify the oversight before too many people found out.¹¹⁶

On April 19, 1973, McCoy briefly testified before the Senate State and Federal Affairs Committee in support of the resolution. He also recounted the old Grant County dispute, describing how two Unionist members of the House had been fraudulently elected and later replaced by Democrats who would have opposed ratification. He also noted that, at the time, the Oregon Legislature was “hopelessly entangled . . . in the bitter aftermath of the Civil War reconstruction controversy.” McCoy stated, according to meeting minutes, that while “he realized that ratification at this time has no real effect on what has been done constitutionally, . . . he wished by passage of HJR 13 to set the Oregon record straight.”¹¹⁷

House Joint Resolution 13 passed overwhelmingly but without fanfare on May 21, 1973.¹¹⁸ After quoting the text of the Fourteenth Amendment, the resolution explained that whereas Oregon had “rescinded” ratification to the Fourteenth Amendment in 1868:

- Be It Resolved by the Fifty-seventh Legislative Assembly of the State of Oregon
- (1) The Fourteenth Amendment to the Constitution of the United States, as set forth herein, hereby is ratified.
 - (2) The Governor shall send certified copies of this resolution to the Administrator of General Services of the United States, to the presiding officer of the United States Senate and to the Speaker of the House of Representatives of the United States.¹¹⁹

House of Representatives (Jan. 2004); Telephone Interview with former State Representative Les Aucoin, U.S. House of Representatives (Dec. 2003).

¹¹⁵ Seymour, *supra* note 4.

¹¹⁶ Telephone Interview with Les Aucoin, *supra* note 114.

¹¹⁷ *HJR 13—Ratifies Fourteenth Amendment to the United States Constitution*, Senate State and Federal Affairs Committee, Apr. 19, 1973 (statement of Rep. William McCoy).

¹¹⁸ H.J.R. 13, JOURNAL OF HOUSE PROCEEDINGS OF THE LEGISLATIVE ASSEMBLY OF OREGON C-754 (57th Regular Session, 1973).

¹¹⁹ 1973 Or. Laws 2865-66.

It is not clear from the record if certified copies of the resolution ever were sent to the General Services Administration, but Congress did note Oregon's reratification when the Speaker of the House announced a "memorial" of the Oregon Legislature, "ratifying, again (after rescinding previous ratification) the 14th Amendment."¹²⁰ However, the *Historical Notes* in the annotated U.S. Code mention only the rescission, not the reratification.¹²¹ The *Notes* list the dates on which each state ratified the amendment and observe, "The States of New Jersey, Ohio and Oregon 'withdrew' their consent to the ratification of this amendment on Mar. 24, 1868, Jan. 15, 1868, and Oct. 15, 1868, respectively."¹²² The *Notes* do record that New Jersey "expressed support" for the amendment in 1980.¹²³

Apparently, McCoy's desire to "set the record straight" was never fulfilled. Politicians got their wish—hardly anyone found out about Oregon's embarrassing oversight. *The Oregonian* buried a brief follow-up story at the bottom of page 30, mentioning neither the issue of race nor McCoy's role in introducing the resolution.¹²⁴ However, the "illegal" Grant County episode was again rehashed.¹²⁵ At his death in 1996, McCoy was the longest

¹²⁰ 119 CONG. REC. 14, at 17,393 (1973). The microfilm at the National Archives preserves records for the Ratified Amendments of the U.S. Constitution. National Archives Microfilm Publication M1518, Roll 3, Frames 333-48 includes records concerning Oregon's ratification and withdrawal of the Fourteenth Amendment. The Oregon frames consist of letters from 1866-88 from the Governor and Secretary of State stating that they have received a certified copy of the Congressional Joint Resolution proposing the Fourteenth Amendment, that the resolution will be transmitted to the Regular Legislative Session for voting, that the resolution was passed and ratified, and that ratification is being withdrawn. However, there are no documents pertaining to Oregon's 1973 reratification of the amendment. Email from Jane Firtzgerald, Reference Archivist, Old Military & Civil Records, National Archives (June 16, 2004) (on file with author).

¹²¹ *Historical Notes*, *supra* note 6.

¹²² Oregon ratified the amendment on September 19, 1866; it was the fifth state to do so. *Id.*

¹²³ *Id.* However, this is outdated, because on February 2002, a New Jersey state senate committee voted to fully revoke New Jersey's 1868 rescission of ratification of the Fourteenth Amendment. Herb Jackson, *Senate Panel Rights a 133-year-old Wrong Revokes Resolution Against 14th Amendment*, THE RECORD (Bergen County, NJ), Feb. 22, 2002, at A3. In addition, on February 11, 2003, students and faculty at the University of Cincinnati's Urban Justice Institute called on the Ohio General Assembly to ratify the Fourteenth Amendment. The Fourteenth Amendment Ratification Project, Report to the General Assembly of the State of Ohio Recommending Ratification of the Fourteenth Amendment to the United States Constitution (Feb. 11, 2003) (unpublished report, on file with author).

¹²⁴ *State Backs Amendment*, *supra* note 2.

¹²⁵ *Id.*

serving state senator in Oregon. Even his obituary did not mention the contribution, early in his career, of seeing that Oregon finally ratified the Fourteenth Amendment.¹²⁶

III

SETTING THE RECORD STRAIGHT

A. *Validity*

Political extremists,¹²⁷ as well as some academics,¹²⁸ continue to argue that the Fourteenth Amendment was never validly ratified and, thus, should have no legal effect. Arguments made against the legitimacy of the Fourteenth Amendment often follow a line of reasoning similar to that made by the Oregon legislature when it withdrew its ratification of the amendment in 1868.¹²⁹ Fourteenth Amendment detractors focus on the machinations of Reconstruction, the mathematics of obtaining a three-fourths majority of the states at any one time, and the fact that some states—like Oregon—changed their votes.¹³⁰ Many scholars have responded to such arguments using the principles of constitutional law.¹³¹

Oregon's rescission is sometimes cited in support of those who insist that the Fourteenth Amendment was never validly ratified by three-quarters of the states.¹³² Such arguments tend to be thinly disguised attacks against Fourteenth Amendment jurisprudence and its associated guarantees of equal protection, substan-

¹²⁶ Spicer & Mapes, *supra* note 110.

¹²⁷ See, e.g., David Lawrence, *There is No 14th Amendment*, U.S. NEWS & WORLD REPORT, Sept. 27, 1957, at 140, available at http://www.texasls.org/reading_room/constitution/constitution0024.shtml (last visited on Sept. 15, 2004).

¹²⁸ See, e.g., Douglas H. Bryant, *Unorthodox and Paradox: Revising the Ratification of the Fourteenth Amendment*, 53 ALA. L. REV. 555 (2002).

¹²⁹ See *supra* Part I.C.

¹³⁰ For a summary of these arguments, see Ferdinand F. Fernandez, *The Constitutionality of the Fourteenth Amendment*, 39 S. CAL. L. REV. 378 (1966).

¹³¹ See, e.g., *id.*; David Chang, *Conflict, Coherence, and Constitutional Intent*, 72 IOWA L. REV. 753 (1987) (discussing how arguments against the Fourteenth Amendment can be reconciled to maintain "constitutional coherence"). See also JOSEPH B. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* (1956); Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386 (1983).

¹³² See, e.g., Lawrence, *supra* note 127; Dr. Michael Hill, *President's Message*, at <http://www.dixienet.org/spatriot/vol6no6/prez32.htm> (last visited Sept. 15, 2004); Shield of Faith, *Fraudulent Fourteenth Amendment*, at <http://www.shieldoffaith.frehomepage.com/world/freedom/14amendment.htm> (last visited Sept. 15, 2004).

tive due process, and fundamental rights,¹³³ which have led to landmark—and controversial—Supreme Court rulings over the last half century.¹³⁴ Past ambiguities about whether Oregon ever validly ratified the Fourteenth Amendment—as well as the general lack of knowledge about or record of the 1973 reratification—lend credence to such arguments.

B. Symbolism

On the other hand, others may consider the withdrawal of ratification to be merely a symbolic act. Two months before Oregon's rescission, the Fourteenth Amendment had been officially adopted by the U.S. Congress and the Secretary of State.¹³⁵ Thus, the Oregon legislature had irrevocably helped to ratify a now legally binding Fourteenth Amendment, despite its protestations to the contrary. Like its fruitless rejection of the Fifteenth Amendment in 1870,¹³⁶ Oregon's rejection of the Fourteenth Amendment came too late to affect national policy. By this logic, the legislature's 1973 reratification of the Fourteenth Amendment can be seen as even more pointless: a futile correction of a moot point.

However, symbolic acts are important when it comes to constitutional interpretation and legitimacy. If Americans do not believe they have a role in the continual framing and reframing of the Constitution, the document loses its legitimacy as the custodian of the true will of "the People."¹³⁷ As the scholar Reva Siegel explains, a collective sense of participation in constitu-

¹³³ *E.g.*, Hill, *supra* note 132, who is president of the League of the South, makes a typical remark: that "the fraudulent 'ratification' of [the Fourteenth Amendment] in 1868 . . . looms large because most of the judicial mischief of the present century has been done under vague interpretations of the language of the amendment." Dr. Hill adds, "[W]rong-headed liberal interpretations of the 14th Amendment have turned Abraham Lincoln's malignant egalitarianism into rights-based social policies. And the evil genie of universal 'human rights,' once loosed from its bottle, can never be restrained because 'rights'—for women, racial and ethnic minorities, homosexuals, pedophiles, etc.—can be manufactured endlessly." *Id.*

¹³⁴ *E.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roe v. Wade*, 410 U.S. 113 (1973); *Loving v. Virginia*, 388 U.S. 1 (1967); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹³⁵ In contrast, the withdrawals of ratification by New Jersey and Ohio occurred prior to July 28, 1868, when the amendment gained official ratification. *Historical Notes, supra* note 6.

¹³⁶ See *supra* Part II.A.

¹³⁷ See generally BRUCE ACKERMAN, *WE THE PEOPLE 1: FOUNDATIONS* (1991); Robert L. Tsai, *Fire, Metaphor, and Constitutional Myth-Making*, 93 *Geo. L.J.* (forthcoming 2004).

tional construction is essential for adherence to the Constitution's authority:

We might ask: why do Americans experience themselves as authors of a constitution that in turn binds the government that "represents" them? Wouldn't it be more reasonable to observe that Americans who are born under the Constitution are "subject" to its authority? The experience of citizenship as authorizing government depends on an act of identification with "the Founding Fathers"—those who drafted and ratified the Constitution that constitutes us as a nation. Stories about the drafting and ratification of the Constitution supply the basis for claims about the authority of the state. We tell and retell these stories over time, recreating from generation to generation the experience of identification with the acts of the "Founders" on which the authority of the national government rests.¹³⁸

The story line perpetuated by Oregon's anachronistic, partially lost history of the Fourteenth Amendment is that the state never ratified the Fourteenth Amendment, or that its initial ratification of the amendment was null and void due to political machinations. Thus, Oregonians may be less likely to feel bound by the Fourteenth Amendment and the principles for which it stands. However, if the story is that the state initially resisted ratification but later collectively embraced it—at the urging of a pioneering man of color in the state legislature—then perhaps Oregonians can assure themselves that the Fourteenth Amendment completely belongs to them, and that they are reconstituted and bound by its dictates.

C. *Memory*

Unfortunately, Oregonians do not tell this story because they do not know it. Instead, after William McCoy exposed Oregon's failure to properly ratify the Fourteenth Amendment, his discovery and the state's reratification were quickly and quietly forgotten. Rather than taking advantage of the "constitutional moment,"¹³⁹ the resolution's drafters chose to sweep the matter under the rug. Whether they acted intentionally or instinctively, most elected officials and the media were reluctant to fully deal

¹³⁸ Reva B. Siegel, *Collective Memory and the Nineteenth Amendment: Reasoning about "the Woman Question" in the Discourse of Sex Discrimination*, in HISTORY, MEMORY, AND THE LAW, *supra* note 8, at 134.

¹³⁹ On constitutional moments, see ACKERMAN, *supra* note 137.

with the truth behind—or appreciate the significance of—Oregon’s belated ratification.

A related problem is that Oregonians lack the vocabulary to talk about race. Living in a predominantly white state magnifies the phenomenon of race blindness among the majority of Oregonians. “Race-blindness,” according to the legal scholar Ian F. Haney López, describes an illusion that race does matter or is not a factor.¹⁴⁰ The average white citizen of Oregon probably would say that racism is not a problem in the state, except in isolated circumstances.¹⁴¹ Because exclusion policies served to keep minority numbers low, racial discrimination has not been evident to white Oregonians and many outsiders.¹⁴² The ideal of liberal race neutrality—that society can be or should be color-blind—suits those who wish to be blinded to racial differences. Perhaps that is why Oregonians have a special problem with race-blindness: it tends to afflict most those who are unaccustomed to seeing themselves in racial terms.¹⁴³

Race-blindness may signify more than a mere avoidance of an issue. Historians such as George Lipsitz argue that public policy and private prejudice create a “possessive investment in whiteness” that perpetuates ingrained hierarchies.¹⁴⁴ Whiteness in Oregon, as elsewhere, has a cash value. It translates into advantages for white families through profits made through discriminatory housing markets, unequal educations allotted to children of different races, intergenerational transfers of inherited wealth, insider networks in employment contacts, access to political power, and relative immunity from heightened suspicion within the criminal justice system.¹⁴⁵ By ignoring racism, Oregonians simultaneously protect white privilege while denying it exists.

López points out that pretending racism does not exist makes

¹⁴⁰ IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 176-79 (1996).

¹⁴¹ See, e.g., Lum, *supra* note 15; Eckhard Toy, Jr., *Uncovering Oregon’s Tarnished Past*, *THE OREGONIAN* (Portland), Jan. 5, 2003, available at 2003 WL 3800857.

¹⁴² See, e.g., Lum, *supra* note 15. Of course, one does not need to look too far below the surface to find overt signs of racism in Oregon’s modern era. See LANGER, *supra* note 5.

¹⁴³ LÓPEZ, *supra* note 140, at 179.

¹⁴⁴ GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS* 1-23 (1998).

¹⁴⁵ *Id.*

it impossible to acknowledge or combat.¹⁴⁶ Most insidiously, race-blindness weakens efforts to combat racial discrimination, such as affirmative action programs, labeling them “reverse discrimination.” As legal scholar Keith Aoki notes, “It is only through willful and selective amnesia that highly formalistic and abstract arguments about ‘reverse racism’ and ‘color blindness’ can achieve even the slightest plausibility.”¹⁴⁷ Selective amnesia about Oregon’s ratification, rescission, and reratification of the Fourteenth Amendment not only perpetuates race-blindness but also obscures the role of Oregonians as constitutional actors.

A common mechanism for distorting collective memory involves the “selective omission of disagreeable facts.”¹⁴⁸ Events that make a social group look bad are simply ignored or expunged from memory. Selective omission can especially occur as a society’s values change.¹⁴⁹ America, in general, is “infamous for its brash will to historical forgetfulness.”¹⁵⁰ While African Americans have borne the burden of remembering slavery and its bloody aftermath, white Americans “could act as if by leaving the Old World they had escaped the burdens of the past in favor of a vigorously principled new place where only the vividness of the present and promise of the future really mattered.”¹⁵¹ But the African American story in Oregon—and that of other communities of color—is part of Oregon’s story; it is not separate. Its omission only serves to make Oregon’s official history less rich, less complex, and far less meaningful.

It is not enough to quietly seek to remedy historic wrongs. A culture must come to terms with its past, and the past must be reconciled with the present.¹⁵² Instead, well-intentioned leaders in Oregon facilitated a process of collective self-deception. It

¹⁴⁶ LÓPEZ, *supra* note 140, at 177.

¹⁴⁷ Keith Aoki, *No Right to Own?: The Early Twentieth-Century “Alien Land Laws” as a Prelude to Internment*, 40 B.C. L. REV. 37, 71 (1998).

¹⁴⁸ Roy F. Baumeister & Stephen Hastings, *Distortions of Collective Memory: How Groups Flatter and Deceive Themselves*, in COLLECTIVE MEMORY OF POLITICAL EVENTS: SOCIAL PSYCHOLOGICAL PERSPECTIVES, *supra* note 8, at 280.

¹⁴⁹ *Id.* at 281.

¹⁵⁰ Robert O’Meally & Geneviève Fabre, *Introduction*, in HISTORY AND MEMORY IN AFRICAN-AMERICAN CULTURE 3 (Geneviève Fabre & Robert O’Meally eds., 1994).

¹⁵¹ *Id.*

¹⁵² For examples of how this has worked or can work, see YASUKO I. TAKEZAWA, *BREAKING THE SILENCE: REDRESS AND JAPANESE AMERICAN ETHNICITY* (1995); Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279 (2003).

was as if the repeal of the anti-miscegenation statute in 1951 began to recast Oregon, smoothing over the rough lines of its racist past. Although ratification of the Fifteenth Amendment in 1959 elicited some self-reflection,¹⁵³ ratification of the Fourteenth Amendment in 1973 was accomplished in a kind of historic vacuum. By the 1970s, Oregon's "dark chapter" no longer fit its progressive identity.

The early-twentieth-century African American scholar W.E.B. Du Bois, an ardent proponent of accurately remembering the events of Reconstruction, said that if history is to be the proper guide for a better future, it had to distinguish between "fact and desire."¹⁵⁴ In Oregon's case, the desire for a white empire and the desire to maintain the illusion of an empire with no color lines does a disservice to those who lived and worked to change the racist landscape. Forgetting the Fourteenth Amendment also does a disservice to Oregonians and other Americans who have been part of the process—throughout Oregon's history—of framing the Constitution. It is time finally to set the record straight.

CONCLUSION

Nativism is still prevalent in Oregon. The state is divided in many ways by geography, class, race, and politics. Today, the feared "other" might be a gay man or lesbian, the most recent targets of organized animus.¹⁵⁵ It took Oregon more than a century to ratify the Fourteenth Amendment. It will take longer to fully incorporate its principles.

At the very least, the record should reflect William McCoy's contribution. Oregon should seek to change the *Historical Notes* in the next edition of the annotated U.S. Code to record the 1973 reratification. This will reduce confusion about whether Oregon really is the only state in the union never to have ratified the Fourteenth Amendment.

The checkered history of the Fourteenth Amendment also should be told by means of a public display at the state capitol, or another prominent location. The memorial should explain why

¹⁵³ See *Dark Chapter*, *supra* note 77.

¹⁵⁴ David W. Blight, *W. E. B. Du Bois and the Struggle for American Historical Memory*, in *HISTORY AND MEMORY IN AFRICAN-AMERICAN CULTURE*, *supra* note 150, at 64.

¹⁵⁵ In fact, Langer draws several parallels between the Portland skinheads' racism and their anti-gay rhetoric. *E.g.*, LANGER, *supra* note 5, at 67.

Oregon rescinded and then reratified the Fourteenth Amendment, giving the historic context without unduly focusing on the Grant County dispute. Perhaps Oregonians also should celebrate a “Fourteenth Amendment Day,”¹⁵⁶ commemorating the first and primary extension of the equality principle to the states.

William McCoy should be celebrated as an Oregon pioneer. At the time of his death in 1996, the state senator was working to bring a monument honoring the late Dr. Martin Luther King, Jr., to grace the front of the Oregon Convention Center in North Portland.¹⁵⁷ Others worked to bring this project to fruition after McCoy’s death.¹⁵⁸ It would be a fitting tribute to include a commemoration of McCoy’s work on the Fourteenth Amendment as part of this monument.

¹⁵⁶ In May: the month it was ratified by Congress in 1868 and the month of Oregon’s reratification.

¹⁵⁷ Spicer & Mapes, *supra* note 110.

¹⁵⁸ Osker Spicer, *Sculpture of King Inches Toward a Home*, THE OREGONIAN (Portland), Jan. 15, 1997, available at 1997 WL 4133370.

