



LIBERTY MATTERS

DID WE HAVE A CONSTITUTIONAL REVOLUTION BUT NOT RECONSTRUCT THE SOUTH?

Revolution (n) "a forcible overthrow of a government or social order, in favor of a new system."

How many constitutional revolutions has America experienced? Certainly all agree on the first. Was there another constitutional revolution after the Civil War with Reconstruction? Did Reconstruction actually accomplish the goals it was intended for, or do "old habits die hard?" We posed these questions to a group of scholars to get their takes. Read on as the conversation unfolds in this month's Liberty Matters..

DID WE HAVE A CONSTITUTIONAL REVOLUTION BUT NOT RECONSTRUCT THE SOUTH?

by Jeffrey Rogers Hummel

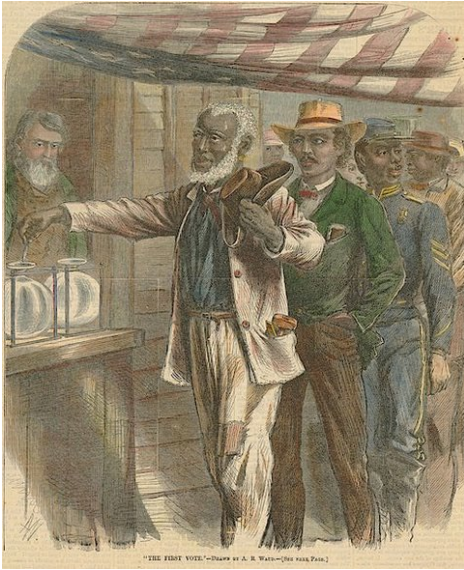
Evaluating the impact of Reconstruction and its Constitutional Amendments is complex. The three decades after the Civil War were a tumultuous time for the American South with several major twists and turns. Identifying the successes and failures of this period necessitates an overview of the sequence of events. The history is not as simple as sometimes portrayed.

The ratification of the [Thirteenth Amendment](#) in December 1865 fully emancipated all slaves within the nation. It took place during a period referred to as Presidential Reconstruction, initiated by [Abraham Lincoln](#) before the war ended, but now under the lenient policies of President Andrew Johnson. Congress, which was then just reconvening, confronted functioning governments in ten out of the eleven former Confederate states. All but two of the ten had contributed to the final ratification of the Thirteenth Amendment, although the Republican controlled Congress was refusing to seat

representatives from any of these states. Their governments were riddled with former Confederate officials, and presidential pardons had enabled former plantation owners to recover nearly all their lands confiscated or abandoned during the war. Nowhere could former slaves vote, and new Black Codes imposed a severe racial subjugation that—while varying from state to state—generally denied African Americans the right to bear arms, assemble after sunset, and practice certain professions, while often subjecting them to imprisonment or forced labor if they were idle or unemployed.

What followed was a struggle between Congress and President Johnson. Congress passed two civil rights acts over his veto and proposed a Fourteenth Amendment that would enshrine those rights into the [Constitution](#). But not until 1867, nearly two years after hostilities had ceased, did Congress initiate a new Reconstruction policy that would actually enforce those rights. All the state governments that Johnson had recognized were dissolved, except for that of Tennessee, which was rewarded for ratifying the [Fourteenth Amendment](#). The remainder of the former Confederacy was divided into five military districts. The vote was taken away from ex-Confederates and given to southern African Americans. New governments were established under

military supervision, and only after the new governments ratified the proposed Fourteenth Amendment did Congress promise to restore them to their former status within the Union.



Reconstruction Voting

Under Congressional (or Radical) Reconstruction, a growing southern Republican party united enfranchised former slaves with both southern whites who were poor or former Unionists and idealistic Northerners who had moved South to help modernize the region and assist the freedmen and women. This Republican coalition initially dominated most of the reconstructed state governments. African Americans filled many elected posts throughout the former Confederacy. In addition to numbering two U.S. Senators, they were the majority in one house of the South Carolina legislature. But nowhere did blacks hold offices in proportion to their numbers, despite constituting a majority of the electorate in three states. New state constitutions eliminated archaic and undemocratic features, and several states revised their penal codes to make them less barbaric. These governments also initiated expenditures for internal improvements, public education, and other social services, such as orphanages, insane asylums, and homes for the poor. By the time Ulysses Grant was elected to the presidency in 1868, seven southern states had already complied with the terms of Congressional Reconstruction and been readmitted to the Union. Their

ratifications of the Fourteenth Amendment are what formally made it part of the Constitution.

The Radical Republicans in Congress meanwhile had enough momentum to go for one goal that they had been unable to add to the Fourteenth Amendment: making African American suffrage permanent and nationwide. The proposed [Fifteenth Amendment](#)'s wording prohibited any denial or abridgment of the right to vote "by the United States or any State on account of race, color, or previous condition of servitude." The Republican majority in Congress then proffered a deal to the three remaining holdout southern states. It would allow ex-Confederate officials from these jurisdictions to cast ballots and hold office if the states would ratify the proposed amendment. Virginia, Mississippi, and Texas accepted the terms. As the [Fifteenth Amendment](#) became official in March 1870, these last states regained their representation in Congress.

But resistance from white Southerners to what they denounced as Black Reconstruction had turned violent. The [Ku Klux Klan](#) was already active in the 1868 presidential election. The resulting atrocities—including tortures, murders, rapes, arson, and beatings—not just against African Americans but also sometimes against white Southerners who supported the Republican Party, denounced as "Scalawags," and transplanted Northerners, labelled "Carpetbaggers," are too well-known and extensive to recount. The Grant Administration passed three successive force acts, each giving Union military commanders greater power to suppress the violence. These measures achieved some temporary success against the Klan, which officially disbanded in 1869, but other paramilitary and vigilante groups soon took its place.

Northerners ultimately grew weary of the expense and frustration of what some self-styled Liberal Republicans were now openly admitting was "bayonet rule." The Amnesty Act of 1872 restored the political rights of all but a few former Confederates. The same year the [Freedmen's Bureau](#), which had been established under the War Department just before the war ended to become the first major federal relief agency aiding the former slaves, was allowed to pass out of existence. The

national government had effectively turned its back as white Southerners engaged in a process euphemistically called Redemption. Continuing physical intimidation—coupled with economic pressures—kept blacks away from the polls, forced whites out of Republican ranks, and drove former Northerners back North. The Redeemers overturned Republican rule in state after state, instituting a regimen of government retrenchment, economy, and partial debt repudiation.

By the end of Grant's term, only South Carolina, Florida, and Louisiana were left in Republican hands. Redemption also contributed to a nationwide resurgence of the Democratic Party, which was reforging the alliance between the South and urban immigrants in the North. This led to the disputed presidential election of 1876. The Republican candidate, Rutherford B. Hayes, was also burdened by an economic depression and his party's notorious political scandals of the Grant era. Democratic candidate Samuel J. Tilden thus won a majority of the popular vote. But the electoral votes in the three unredeemed southern states, along with one electoral vote from Oregon, were disputed—and the Democrats needed only one of them to put Tilden into the White House. The country faced a full-fledged electoral crisis, in which the Democrats darkly hinted at armed resistance to what they feared would become a Republican military coup. But intricate back-room maneuvering that lasted until two days before inauguration gave the Republicans all the disputed electors. In return, Hays agreed to remove the last federal troops from the South and to support bountiful government subsidies for southern railroads in what has become known as the Compromise of 1877^[1].

However that was not quite the end of the story. Although the Redeemers manipulated votes with intimidation, poll taxes—and later the Australian, or secret, ballot—African Americans in the South still successfully went to the polls in large numbers. Within the majority of southern states, the only form of [discrimination](#) legally imposed on private institutions applied to passenger trains. Social segregation was of course pervasive, and public schools were racially segregated, but that had been the case even throughout

Congressional Reconstruction, except briefly in New Orleans. Not until the 1900s, more than a decade after the disputed election, did most of the infamous Jim Crow laws become widespread—mandating segregation in railway stations, street cars, workplaces, hotels, and other public facilities. The first southern state to effectively disfranchise the majority of African Americans was Mississippi, in 1890, with a literacy test. Louisiana did not do so until 1898, and then North Carolina, Alabama, Virginia, and Georgia stepped in line, with Texas last in 1908. Now that the public schools first created during Congressional Reconstruction had been captured by the forces of white rule, spending on black pupils compared with white pupils steadily declined^[2].

Why this new wave of racist measures? One factor was that advocates of the country's latest statist reform movement, Progressivism, with their frequent [embrace of eugenics](#), generally supported these changes. One striking manifestation of Progressive support for Jim Crow was when [Woodrow Wilson](#), soon after his election to the presidency in 1912, segregated the federal workforce and instituted discrimination in federal employment. The Spanish–American War of 1898 was another source of heightened racism. In the [Plessy v. Ferguson](#) case of 1896, the Supreme Court, with only one dissenter, upheld a Louisiana law mandating segregation so long as facilities were “separate but equal.” Southern Democrats had also been alarmed at the growing alliance between southern Populists and Republicans, which threatened to bring about a coalition of blacks and poor whites similar to that during early Congressional Reconstruction. The new voting restrictions likewise disfranchised many poor whites, thereby creating the Solid-Democratic South that would reign for the next half century^[3].

But despite these political setbacks, southern blacks had still achieved major economic gains. One must not underestimate the immense benefits of emancipation itself. The total value of all slaves as of 1860 is estimated at between \$2.7 and \$3.7 billion, making it one of largest capital assets in the U.S. at the time. Emancipation returned all this human capital from slaveholders to the

freed slaves. Although facing onerous legal and social disabilities, the former slaves took more leisure. Women and children abandoned the fields and the elderly were no longer required to work, whereas males gained more control over their labor input. The economic fortunes of the ex-slaves were bound within a region that remained the country's poorest, yet their real incomes increased. By 1879 the average agricultural income of southern African Americans had risen by at least 45 percent, or still more if one attaches a dollar value to their added leisure. Even with Reconstruction's failure to redistribute large plantations to the former slaves, African Americans had purchased 10 percent of the South's agricultural land, at a time when many white farmers had lost title due to the heavy state taxes imposed by the Reconstruction regimes. To be sure, southern blacks remained relatively poor, with per capita income below that of the region's white population. But not merely were African Americans accumulating real estate and other forms of wealth, their real incomes rose at a rate of 2.7 percent per year—faster than that of white income—more than doubling by the time of Jim Crow^[4].

Endnotes

[1] This overview of Reconstruction is now fairly standard in most general accounts of the period. Kenneth M. Stampp's still reliable *The Era of Reconstruction: 1865–1877* (New York: Alfred A. Knopf, 1965) was one of the first works to overturn the older “Dunning School” interpretation that excoriated the state governments that came to be power during Congressional Reconstruction, alleging that a triumvirate of illiterate backs, Scalawags, and Carpetbaggers indulged in an orgy of extravagance and corruption. A later and more comprehensive survey that, in addition, covers contemporaneous events in the North is Eric Foner's *Reconstruction: America's Unfinished Revolution, 1863–1877* (New York: Harper & Row, 1988), an updated edition of which was published in 2014. Many other fine works are available, some going into detail about specific aspects of Reconstruction, but none has significantly altered the interpretation of this period.

[2] The classic work that first called attention to the late origins of Jim Crow legislation, the first edition of which

was published in 1955, is C. Vann Woodward's *The Strange Career of Jim Crow*, 3rd edn. (New York: Oxford University Press, 1974). Two works that cover suffrage restrictions are Morgan Kousser's *The Shaping of Southern Politics: Suffrage Restrictions and the Establishment of a One-Party South* (New Haven: Yale University Press, 1974) and Michael Perman's *Struggle for Mastery: Disfranchisement in the South, 1888–1908* (Chapel Hill: University of North Carolina Press, 2001).

[3] On the role of Progressives, see David W. Southern's *The Malignant Heritage: Yankee Progressives and the Negro Question, 1901–1914* (Chicago: Loyola University Press, 1968); Southern. *The Progressive Era and Race: Reform and Reaction, 1900–1917* (New York: Harlan Davidson, 2005); and William L. Anderson and David Kiriazis's “Rents and Race: Legacies of Progressive Policies,” *Independent Review*, 18 (2013): 115–133.

[4] Kenneth Ng and Nancy Virts's “The Value of Freedom,” *Journal of Economic History*, 49 (December 1989): 938–965; Roger L. Ransom and Richard Sutch's *One Kind of Freedom: The Economic Consequences of Emancipation* (Cambridge: Cambridge University Press, 1977), pp. 3–7; Richard Vedder, Lowell Gallaway, and David C. Klingman's “Black Exploitation and White Benefits: The Civil War Income Revolution” in *The Wealth of Races: The Present Value of Benefits from Past Injustices*, ed. by Richard F. America (Westport, CT: Greenwood Press, 1990): 125–137; Robert Higgs's *Competition and Coercion: Blacks in the American Economy, 1865–1914* (Cambridge: Cambridge University Press, 1977); Higgs's “Accumulation of Property by Southern Blacks Before World War I,” *American Economic Review*, 72 (Sep 1982), 725–35; and Robert A. Margo's “Accumulation of Property by Southern Blacks Before World War One: Comment and Further Evidence,” *ibid.*, 74 (September 1984), 777–781.

RECONSTRUCTION REVOLUTION

by Orville Vernon Burton

The question posed: “Did we have a Constitutional Revolution but not Reconstruct the South?” The answer: Yes and Yes.

Constitutional Revolution:

A new birth of freedom flourished after the Civil War, one with a constitutional and legal foundation. The guiding principles were citizenship and equality, and there were two modes of protection: prosecutions by the federal government and self-help through the power of the vote.

This was a major Constitutional Revolution. Prior to the Civil War, “we the people” wanted freedom from government. The [Bill of Rights](#) protected the people from governmental powers. Amendment One begins: “Congress shall make no law respecting ...” and left the decisions to the individual states. The Reconstruction Amendments—13th, 14th, and 15th—institutionalized freedom, due process under law, and the right to vote. Moreover, the Amendments state that “Congress shall have power to enforce ...” these civil rights, even against states. This was a basic reconstruction of the [U.S. Constitution](#).



Political philosophy involves an analysis of “positive” and “negative” liberty. Almost a century before [Isaiah Berlin](#) wrote about that concept in 1958, [Abraham Lincoln](#) knew all about negative and positive liberty. In

1864 Abraham Lincoln told a group in Baltimore, “The world has never had a good definition of the word liberty, and the American people, just now, are much in want of one.” As usual, he told a simple story: “The shepherd drives the wolf from the sheep’s throat, for which the sheep thanks the shepherd as a *liberator*, while the wolf denounces him for the same act as the destroyer of liberty, especially as the sheep was a black one. Plainly the sheep and the wolf are not agreed upon a definition of the word liberty.” Lincoln was thankful that “the wolf’s dictionary has been repudiated.” But in effect that repudiation is the story of Reconstruction, actually a never-ending story—still being told.

So, what happened to the Constitutional Revolution, the new birth of freedom and liberty declared in the Constitution? We have three branches of government: Congress makes laws; the President enforces them; the Courts interpret them. Each had a role to play, but I have to blame the judiciary and especially the Supreme Court for not leaning into the new Constitution.

Some Justices were reluctant to embrace the changed meaning of liberty and promised protection for all citizens that the Reconstruction amendments gave the Constitution. An early Court case ([Blyew 1872](#)) basically approved the state’s right to deny certain Black people the right to testify in court. Justice Bradley, joined by Swayne, dissented vigorously. He said that to refuse the evidence of the whole race “is to brand them with a badge of slavery, is to expose them to wanton insults and fiendish assaults.” He added, “Merely striking off the fetters of the slave, without removing the incidents and consequences of slavery, would hardly have been a boon to the colored race.”

The Court’s decision did not go unnoticed. The federal circuit judge in Kentucky, Bland Ballard, wrote, “If Congress meant what the court says they meant, is not all of their legislation which relates to the negro a mockery?” In 1971 the dean of constitutional historians, Charles Fairman, called this case a “forewarning of things in years to come,” and said that “while reconciliation between North and South progressed, the Court would be making some constructions of the law that were anything but

benignant toward those for whose protection they had been adopted.”

Many of you know or can look up the details of the [Slaughter-House Cases](#) 1873. The [Cruikshank Case](#) 1876, which allowed the murder of Black people as long as the state was not involved, validated inherent violence that held racial hierarchy in place and a reign of terror as ways to control Black people in the South until at least 1965. There were more cases, and then *The Civil Rights Cases* (1883) ended the legal remedies. Many cases allowed all-white juries, which would not convict whites who abused or even lynched Black citizens. The Supreme Court allowed the 1896 separate but equal law and in 1898 [Williams v. Mississippi](#) approval of disfranchisement. In spite of enormous setbacks and against all odds, in some places in the South, some African Americans still voted and even found some alliances with whites. And certainly the memory of Reconstruction and its achievements inspired generations of African Americans after Reconstruction, who eventually successfully used the framework of the first Reconstruction’s amendments and laws in the delayed Second Reconstruction of the Civil Rights movement to reconstruct the American South.

In summary, as to whether a Constitutional Revolution occurred, it is difficult to claim it did not. The [14th Amendment](#) alone reconstituted the entire structure of the federal union, allowing the federal government rather than the states to define citizenship. Combined with the 13th and 15th, the United States added three very important amendments to the Constitution in a space of five years—which has only happened twice—in the original Bill of Rights and in Reconstruction.

Reconstruction: Historians agree less about the second part of the posed question: was the South Reconstructed? Before we tackle Southern Reconstruction, let’s clarify that Reconstruction was nationwide. Reconstruction in the North meant that Black men could vote. (Twice before the Civil War New York had voted against allowing Black men the vote). The vote meant political clout. Reconstruction also went West; recent historical literature has focused on the West—anti-Chinese

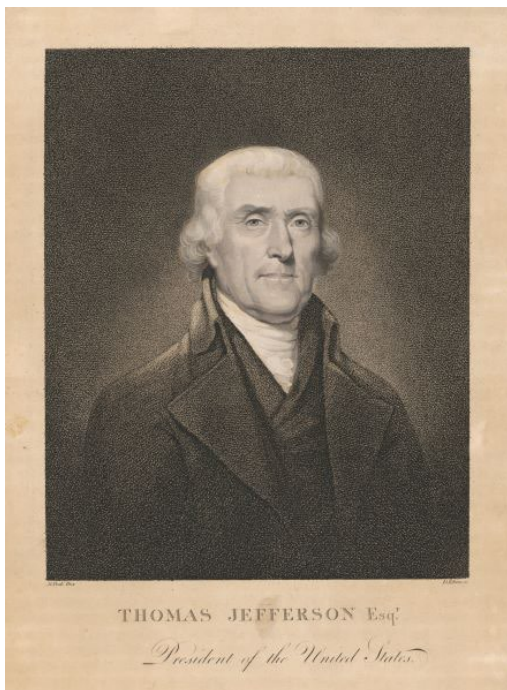
immigration restriction, and the final push for the full extinction of Indian sovereignty—almost to the exclusion of the former Confederacy.

National reconstruction followed the Republican Party’s political success in 1864. It meant that Reconstruction would continue the wartime program of railroad construction, homestead laws, land-grant colleges (sometimes called “Democracy’s colleges” in the 19th century), an income tax, and national banks—in other words, a new commercial order. Republicans demonstrated great consistency in developing and marketing this particular vision of freedom and order. It was a political triumph. If you extend out the time frame for Reconstruction into the Jim Crow era, you have a reconstructed South with an unprecedented number of textile mills, lumber mills and furniture factories, cigarette factories, exponential growth in railroad mileage, land grant colleges (which for whites and in segregated schools for Black people in the South opened higher education to entire social classes who had been shut out, and this also developed new political leaders).

Nevertheless, it was in the South that white and Black people bore the brunt of what Reconstruction would mean to them. Historians synthesize Reconstruction, but every state was different. Tennessee had no Reconstruction; Reconstruction in Georgia basically was 1868 to 1870, Virginia was different from Florida, and so on. Within each state, every locale was different. Yet the uncertainty was everywhere. No one knew what the end of bondage might bring in its wake. Slavery’s death did not automatically confer any positive rights upon African Americans. It was a period of unity and disunity, of racial coalitions and racial hostilities. During Reconstruction a majority of southerners, fractured by class and by race, nevertheless moved uncertainly, incrementally, grudgingly, and enthusiastically along a path of equality. At the same time, an intransigent white minority, increasingly bound together through paramilitary organizations, insisted upon inequality.

The essential character of Reconstruction was based on traditional American values, with parties on all sides concerned with establishing local systems of workable

order in their own communities, according to their own notions of justice and fair play. Like antebellum conflicts between enslaved and master, abolitionist and planter, and Free-Soiler and slaveholder, the conservative drive to resolve practical problems at the local level in Reconstruction generated tremendous unforeseen conflicts that propelled events along a startlingly revolutionary course. This interplay of conservatism and revolution, this interweaving of concerns with order and with freedom define Reconstruction in its achievements and failures both. At Reconstruction's start only one certainty prevailed: thousands had reason to anticipate its advent and thousands had reason to dread it.



Thomas Jefferson

The story of Reconstruction cannot neglect to emphasize how uncertain, how revolutionary, how conservative, and how profoundly democratic this era of change truly was. Most optimistic of all was the political course that hundreds of thousands of African Americans took in the years after slavery ended. Lincoln's republicanism was taken up anew by freedpeople at the local level across the South. It is fitting that in the years after 1865 those most newly arrived on freedom's doorstep held the clearest sense of its precepts. From [Plato](#) to [Thomas Jefferson](#), James Harrington to Abraham Lincoln, republican

theorists had emphasized the political duties and opportunities of citizenship. Emancipation not only marked the birth of African American freedom, it sparked an African American rebirth of republicanism, argued and defended more cogently and fervently than at any time in American history. Reconstruction is the story of that promise.

While on the federal level the President and Congress worked to reconcile states within the Union, on the local level former enslaved people and rebels could do little except feel their way forward tentatively, staking claims to new ways or old habits in their own communities, defending their choices on a daily basis to those they ran up against in the course of labor and community life. In this way ordinary Americans reconstructed their nation according to their own uncertain, conflicted ideas.

After efforts to find lost family members, and now controlling their own families and communities, establishing their own independent churches and other institutions, Black southerners wanted citizenship—suffrage, equal access to the legal system, security, the confidence that the forces upholding the law would protect them. With the vote, they could ensure education and hopefully independence through land ownership. In 1870, only 5 percent of African American farmers owned their land; in 1900, nearly a quarter had become land owners. Again, it could have been better except for the reversals from President Andrew Johnson. The results in education were also astounding, from Sunday school literacy classes to local schoolhouses to church-sponsored and Black land grant colleges. Black leaders brought a public education system for white and Black children to the South; an appropriate symbol of Reconstruction could very well be the schoolhouse. Voting power also proved effective. The brief period of Reconstruction in the American South produced progressive state constitutions with government services at the state and local level; formerly enslaved people elected Black legislators, judges, and sheriffs. Southern states supported Black militia units for protection. For the first time the South invested in services for its citizens—schools, roads, railroads, prisons, and insane

asylums. Tax reform was necessary, but higher taxes were a major problem for many.

But then, if Reconstruction was such a success, how and why did it end so badly, with too few of the achievements kept in place? Why was there a white counter revolution to the successes of Reconstruction? The answer involves the Rule of Law. A successful interracial democracy was too much for white supremacists to accept. To end Reconstruction, they very effectively organized an authoritarian coup d'état. The Rule of Law ceased to exist for all citizens.

At first President Grant had success enforcing the law against the KKK. In 1873 there were more than 1,200 civil rights prosecutions under the [Enforcement Act of 1870](#) and the Ku Klux Act of 1871. In addition to prosecutions, federal observers ensured honesty at elections. Then the political will dissipated. The presidency no longer used its enforcement powers nor its bully pulpit to stop the lawlessness.

When the Democrats won control of the U.S. House of Representatives in 1874, the first time since the civil war, they were in a position to prevent any new civil rights legislation. Ultimately, they were very successful. In 1888, Republican Representative Henry Cabot Lodge proclaimed, "The Government which made the black man a citizen of the United States is bound to protect him in his rights as a citizen of the United States, and it is a cowardly Government if it does not do it." Well, it did not.

As the Democrats retook the state houses and legislatures of the Southern states in their counterrevolution of 1876–1877, they made small implemental changes at first—closing poll places, reregistration, times of voting, etc.—until Black citizens and their smaller number of white allies were effectively eliminated from legislative decision making. By 1890, white supremacists had gained or regained control of the former Confederate states, and the Democratic Party had become dominant in state government. With legal and governmental machinery now in their hands, they were determined to completely strip African Americans of the opportunities they earned during Reconstruction, drive them from public life, and

restore as much of slavery's caste system as might be allowed. Former slaveholding elite needed to overturn Reconstruction because it was so successful. With no support from the Court to protect the new Constitutional Amendments, the next step was disfranchisement and segregation.

And, as per above, the state, federal, and U.S. Supreme Courts allowed the lawlessness, the disfranchisement, the segregation. The Court showed that federal privileges were pitifully few, that the federal government could not protect even those few privileges, and that if state laws avoided explicit words of discrimination, they would meet little judicial resistance. Laws built to protect the newly freed people were demolished. But far worse was about to come. African Americans entered the 1890s with no meaningful way to protect their rights. The Court gutted the 14th Amendment, now to protect corporations, not people (80 percent of all cases deal with corporations, not the people to which it was intended to give equal citizenship rights under the law).

And yet, the emancipatory fervor unleashed after 1865 was never entirely quashed, and ever since these two Americas have done battle against one another. And isn't that what we are still discussing today with this essay?

SUFFRAGE AND STATES' RIGHTS: HOW FEDERALISM DEFEATED RECONSTRUCTION'S CONSTITUTIONAL REVOLUTION

by Nicole Etcheson

The reinterpretation of federalism as it applied to suffrage constituted a constitutional revolution in the post-Civil War period. That reinterpretation could not be sustained, however, because the states retained significant power over voting rights.

The [United States Constitution](#) is very limited in what it says about voting. Article I, section 4 specifies that the state legislatures will set “the Times, Places and Manner of holding Elections of Senators and Representatives.” And Article IV, section 4 declares that “the United States shall guarantee to every State in this Union a Republican Form of Government.”^[1] Left to the states by these provisions was the absolute right to set electors’ qualifications. During the early nineteenth century, states dropped most property qualifications; universal adult white male suffrage generally prevailed in the “era of the common man.” But the same period saw a loss of voting rights for African American men, who were disfranchised in Connecticut, North Carolina, and Pennsylvania. New York dropped its property requirement for white men, but retained one for black men. As new Western states were admitted, they confined the suffrage to white men. Aside from Connecticut, only the New England states allowed African American men to vote with the same requirements as white men.^[2]



Before the Civil War, African American men and all women campaigned for enfranchisement with no success. In the same 1860 election in which New York pledged its electors to [Abraham Lincoln](#), voters defeated a measure that would have dropped the property requirement for African American men.^[3] The Civil War, however, gave new impetus to African American men’s claim to vote. Many factors contributed to this success, including the advantages Republicans saw in enfranchising a group largely expected to support the Republican party, but black men’s military service was crucial to their enfranchisement. Even Elizabeth Cady Stanton hoped

that women, denied entry through the “Constitutional door” to suffrage, would “avail [themselves] of the strong arm and blue uniform of the black soldier to walk in by his side ...”^[4] Her hope was dashed, but she correctly foresaw that African American military service would be acknowledged as having earned black men the vote.

In the aftermath of the Civil War, many northern states considered expanding the suffrage to include African American men. But in 1865, African American enfranchisement failed in Connecticut, Minnesota, and Wisconsin. And two years later, after a bitter campaign between advocates of African American and woman suffrage, Kansans voted down amendments to enfranchise both groups. The Wisconsin Supreme Court, however, had ruled in 1866 that African American men should have the vote; and both Iowa and Minnesota would adopt black suffrage in 1868.^[5] Such contention over suffrage in the North, occurring as the Union demanded black enfranchisement in former Confederate states, created a strong impression of hypocrisy. Even Tennessee’s Unionist governor, William G. Brownlow, suggested Northerners remove the “beam” from their own eye “before taking the mote out of the eye of their Southern neighbors.”^[6]

Although Brownlow insisted that “Congress has no right to fix the qualification of a voter within a State,”^[7] advocates of African American suffrage in that body disagreed. Invoking the guarantee clause, Senator Charles Sumner told a Republican convention in Worcester, Massachusetts that “national peace and tranquility” required the institution of “impartial suffrage.”^[8] Congress drafted the Fourteenth Amendment to encourage southern states to enfranchise African Americans. Section two asserted that when a state denied any of its adult male residents the “right to vote,” its representation in Congress would be proportionally decreased.^[9] Supporters of African American suffrage disliked this provision that seemed to imply that black men could be denied the vote, but they nonetheless considered it an inducement to enfranchisement. None of the former Confederate states, except Tennessee, would ratify the amendment.^[10]

In response—and also as part of their push to take control of Reconstruction away from President Andrew Johnson—Radical Republicans in Congress passed the [Reconstruction Act](#). Regarded by opponents as completely unconstitutional, the Reconstruction Act required southern states to ratify the [Fourteenth Amendment](#) as a condition of readmission. It also set out a process for former Confederates to be readmitted: they would hold constitutional conventions, write new state constitutions, and apply for readmission. The Reconstruction Act enfranchised African American men as voters in the election of constitutional convention delegates, and it also required the new state constitutions to include universal manhood suffrage. African Americans made up more than a quarter of the delegates to the Radical Reconstruction constitutional conventions.^[11]

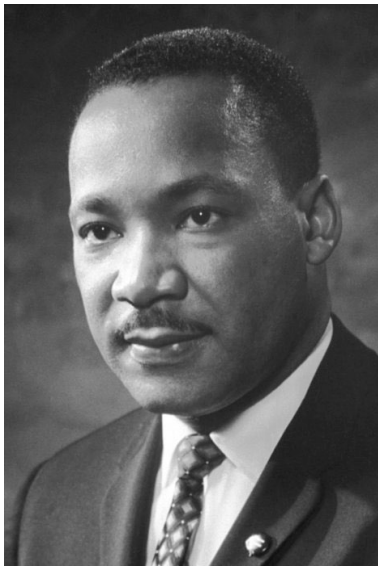
In their 1868 party platform, Republicans insisted that the Union states still retained the power to set suffrage requirements, although Congress could impose African American suffrage on former Confederate states. Nonetheless, after the elections gave the party supermajorities in the House and Senate, congressional Republicans set about nationalizing African American suffrage through the [Fifteenth Amendment](#). Although suffrage could not be curtailed on the basis of race, it could be limited by any number of non-racial factors, such as education, which might have a disparate impact on African Americans or other groups. The Republicans who enacted the Fifteenth Amendment knew of this weakness, but—given that many northern states imposed literacy or taxpaying requirements, and that Western states wished to disfranchise Chinese immigrants—they could not assemble a political coalition supporting a universal declaration of suffrage rights. In response to the objection that the amendment violated a state's right to set suffrage requirements, Republicans contended that submission to a state for ratification satisfied that concern. Congress later required Georgia, Mississippi, Texas, and Virginia to ratify the amendment as a condition of their readmission to the Union.^[12]

Northern and Upper South Democrats in Congress protested against the Reconstruction Act and the Fourteenth and Fifteenth amendments, often on the grounds that these measures unconstitutionally infringed a state's right to set suffrage requirements. They simply lacked the numbers in Congress, however, to prevail. Republicans attained their goal of African American suffrage, but they could not permanently hold the overwhelming majorities in Congress they possessed in the immediate aftermath of the Civil War. Without those majorities, and facing divisions within their own party, Republicans could not sustain the federal power to maintain African American suffrage.

Fundamentally, African American suffrage was overturned by violence. Terrorist organizations, operating as the military arm of the Democratic Party, formed throughout the South, the most well-known being the Ku Klux Klan. Attacking both African Americans and white southern Republicans, they targeted political leaders and African American veterans. Through the Reconstruction Act, Republicans had used the military to oversee the process of reconstruction. But once the states were readmitted, the military had a limited ability to counter insurgents. Rapid demobilization of the army after the Civil War had reduced the number of troops available. And those troops were often quartered in cities, far from sites of massacres in the countryside.^[13]

Congress passed the Enforcement Acts in [1870](#) and [1871](#), permitting federal officials and the military to supervise congressional elections in the South (and urban centers in the North) to control fraud. The Constitution only authorized supervision of congressional elections. But since state and local elections often happened at the same time, the legislation was drafted with the idea that supervision would also prevent fraud at those elections. This had some temporary success, and successive administrations brought cases under the Enforcement Acts, but long-term suppression of the Klan required political will that Congress could not sustain. In addition, the Supreme Court invalidated portions of the Enforcement Acts. By 1890, with all the former Confederate states controlled by Democrats, even the

Republican party could not agree on new enforcement legislation. It failed to pass because some Republicans now prioritized economic issues. After Democrats gained control of Congress, they repealed the Enforcement Acts in 1894. As white Southerners realized that federal oversight was no longer a threat, they sought to institutionalize disfranchisement and make violence unnecessary. Accordingly, they wrote new state constitutions or amended existing ones to institute poll taxes, literacy tests, and other measures to disfranchise African Americans and much of the lower-class white population.^[14]



Dr. Martin Luther King, Jr.

It required a second Reconstruction for African Americans to exercise what, in Martin Luther King Jr.'s words to President John F. Kennedy, were simply their "constitutional rights."^[15] Civil Rights leaders such as King could call for the fulfillment of those rights, however, because the first Reconstruction had added three amendments to the Constitution. As Michael W. Fitzgerald has written, despite Reconstruction's "catastrophic overthrow...the postwar amendments stayed on the books, and there was always the possibility that someday enforcement would resume."^[16] That enforcement would come for suffrage in the form of the [1965 Voting Rights Act](#) (VRA), which provided federal supervision of suffrage requirements and registration, vastly expanding African American voting

after its passage. Although the VRA was reauthorized without controversy into the first decade of the twenty-first century, the Supreme Court's 2013 ruling in *Shelby County v. Holder* held that jurisdictions should no longer have their voting measures precleared by the federal government. Critics have maintained that the *Shelby* decision opened the door for the states to disadvantage certain constituencies, including minorities, by enacting voter identification laws, redrawing districts, purging voter rolls, and manipulating polling places.^[17]

Despite expanding the federal government's involvement in the state's right to set suffrage requirements, the Fifteenth Amendment did not repeal federalism or even assert a positive right of suffrage. In an 1875 case arising out of a Missouri woman's efforts to vote, the Supreme Court unanimously declared that "the Constitution of the United States does not confer the right of suffrage upon any one." Chief Justice Morrison Waite wrote, "The United States has no voters in the States of its own creation."^[18] Only states could create voters. After 1890, the former Confederate states weaponized the federalist nature of the Fifteenth Amendment to suppress the African American vote. In 1898, the Supreme Court upheld Mississippi's disfranchising constitution of 1890, holding that disparate impact did not prove an intent to discriminate. That ruling in *Williams v. Mississippi* held until the Voting Rights Act.^[19]

Section two of the Fourteenth Amendment offered a solution to disfranchisement: representation could be reduced in states that denied the vote to a certain portion of their adult male population. The last African American congressman of the Reconstruction era, George H. White of North Carolina, called for this in his 1901 farewell speech. After the 1900 census, Indiana Congressman Edgar D. Crumpacker sought to enact legislation carrying out section two's provisions. This did not receive universal support from African Americans because some feared it would acknowledge the southern states' right to disfranchise. Although "Crumpackerism" attracted some attention in the first decade of the twentieth century, it never received more than minimal support, even in the Republican party.^[20]

When we speak of the balance of power between the states and federal government as having shifted during the Civil War, it is often understood to mean that the Union victory invalidated the states' rights doctrine of secession. That is certainly the case. However, the states still maintained certain rights. The Radical Republicans, seeking to institute their vision of a reconstructed South with universal manhood suffrage, attempted to work around federalism. They did this, first, through a Reconstruction Act which mandated certain suffrage qualifications that previously had been the purview of the states. And secondly, they enacted constitutional amendments that often achieved ratification through compulsion. The federal government, however, never succeeded in protecting African American voters from violence. With waning popular support for enforcement, the executive branch grew hesitant to use the powers granted by the Enforcement Acts; Congress failed to pass new enforcement legislation or to implement section two of the Fourteenth Amendment; and the Supreme Court interpreted the amendments and supporting legislation restrictively. The Civil War may have brought about a constitutional revolution, but the full reconstruction of the South was halted and long delayed.

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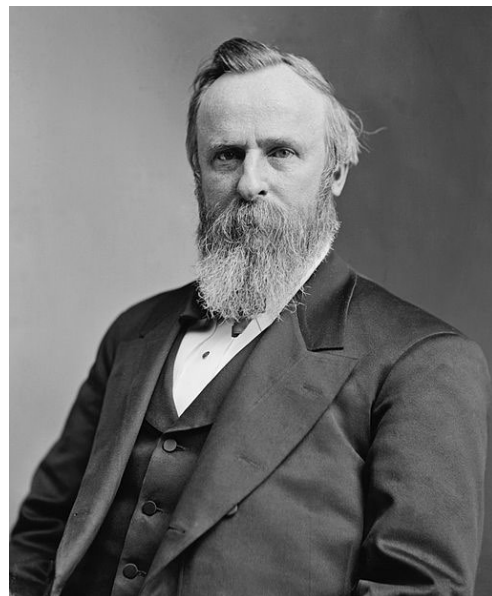
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ARE WE DEVILS OR ANGELS: PRACTICING WHAT THE U. S. CONSTITUTION PREACHES

by Erec Smith

“The nearest approach to justice to the negro for the past is to do him justice in the present.” – Frederick Douglass, “Self-Made Men”^[1]

Much behavior from social justice advocates stems from a lack of trust in American institutions, including government and the document meant to bind them: the [United States Constitution](#). This distrust, starting with the false promise of a “Constitutional revolution” in the late 19th century, has had problematic effects, including compelled speech and the denial of constitutional rights to those considered beneficiaries of the misinterpretations and manipulations of those rights by government officials, most disturbingly illustrated by the failure of [Reconstruction](#) in the post-Civil War South. However, I believe that the Constitution, in itself, is a liberal and just document; those meant to uphold it have always been the problem. What to do about *them* is the real conundrum.



Rutherford B. Hayes

For many, black people owe nothing to the United States Constitution. The 13th, 14th, and 15th Amendments were virtually null and void after the Northern Reconstructionists returned to their side of the Mason/Dixon Line. A backroom deal in which Rutherford B. Hayes traded the wellbeing of black Americans for the U.S. Presidency gave rise to the Ku Klux Klan, legalized segregation, ubiquitous discrimination, and state-sanctioned terrorism. It would be another century before black Americans would be freed from legalized second-class citizenry and dehumanization. Throughout all of this, the right to be free, the right of equal protection before the law, and the right to vote were enforced as frequently as jaywalking in New York City—not much at all.

But what does this mean for us in 2023? At a conference last summer, I conversed with a black academic who insisted that the United States Constitution was inherently racist. This is a sentiment similar to the one in which classical liberal values, in general, are considered racist in that they can be ignored or manipulated to perpetuate oppression. My answer to both sentiments is always the same: the problem has less to do with the tenets of the Constitution or classical liberalism and more to do with the bad-faith actors in charge of upholding them. If a drunk driver is pulled over, we don't get rid of cars; we punish the perpetrator. Likewise, the Constitution—and the classical liberal values reflected in it—are not the problem; we are.

[Frederick Douglass](#), a black man who lived through both slavery and the promises and failures of Reconstruction, embodied a faith in the Constitution from a classical liberal standpoint. Even in the 1850s, Douglass said the Constitution, “interpreted as it ought to be interpreted, is a GLORIOUS LIBERTY DOCUMENT.” The Constitution did not fail to protect all of its citizens, *those charged to uphold it did*. Nevertheless, even with the addition of the Civil War Amendments and other Amendments mandating equal treatment for all Americans, many people still see the Constitution as inherently racist.

So what is to be done? Many progressives, especially those who embrace the tenets of critical social justice, would lean toward a kind of social engineering in which people are mandated into decency by policy (at best) and interpersonal intimidation (at worst). It may be the only way to rid the world of those who would manipulate the Constitution for illiberal ends. However, trying to legislate vice out of human hearts and minds may be akin to trying to separate water from wetness. [James Madison](#) had a similar point in [The Federalist Papers](#): “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.” [2] Is coercion the best way to make people into angels?

This seems to be the justification for compelled expression, exemplified by mandatory diversity statements, most popular in institutions of higher education when applying for employment or promotion. These statements seem to imply, regarding the promotion of diversity, equity, and inclusion, that fashioning oneself as an “angel” of social justice is an attempt to socially engineer the “devils” out of college faculty or administration. But is this not compelled speech and, therefore, unconstitutional? Some may say “Yes, but so what?” If the ends—life, liberty, and happiness for those traditionally denied such things—justify the means, those traditionally denied minorities may insist they have the right to enjoy the benefits of the Constitution while denying it to others . . . in the name of diversity, equity, and inclusion. Ibram X. Kendi reflected this sentiment when he famously wrote, “The only remedy to past discrimination is present discrimination. The only remedy to present discrimination is future discrimination.” [3] In reference to Madison's words, it would seem, we must be devils to produce angels.

The special pleading of those who would compel speech to garner what they see as social justice was on full display at Stanford University when Judge Stuart Kyle Duncan tried to give a talk. In a *Wall Street Journal* article, Duncan explained, “A federal prisoner serving a term for attempted receipt of child pornography (and with a

previous state conviction for possession of child porn) petitioned our court to order that he be called by feminine pronouns. As my opinion explained, federal courts can't control what pronouns people use. The Stanford protesters saw it differently: My opinion had "denied a transwoman's existence."^[4] For not wanting to compel speech, and for simply pointing out that such compelled speech is beyond his power as a federal judge, anyway, Duncan was seen as anti-trans—not pro-freedom. For upholding the Constitution, Duncan took several jeers from student protestors, including one who shouted. "We hope your daughters get raped!"^[5]

However, Duncan goes on to make an inadvertent point about the protestors' justification for their behavior. After admitting that he grew angry and returned some insults to the student protestors, he expressed his refusal to apologize because, as he writes to conclude the article, "Sometimes anger is the proper response to vicious behavior." What Duncan seems to miss is that his concluding statement may be the one point on which he and the protestors can agree. The difference between the two is the definition of "vicious behavior." Remember, what Judge Duncan saw as a promotion of free expression, the students saw as the denial of a transwoman's existence. The students, judging the judge's act as vicious behavior, acted according to Duncan's own sentiments.

Perhaps more important is Duncan's thought on how the protestors, law students at a prestigious university who most certainly know the content of the Constitution, *should* have behaved. He writes, "The most disturbing aspect of this shameful debacle is what it says about the state of legal education. Stanford is an elite law school. The protestors showed not the foggiest grasp of the basic concepts of legal discourse: That one must meet reason with reason, not power. That jeering contempt is the opposite of persuasion."^[6]

What Judge Duncan does not realize is that protestors like this, often driven by critical theory—i.e., thoughts and acts motivated by cultural [Marxism](#)—have given up on reason and persuasion. "Rational, linear thinking" is, after all, considered a white way of knowing^[7]; centering

feeling over reason is the duty of countercultural leaders. What's more, they have given up on persuasion. They abide by an outlook described by rhetorician Wayne Booth as a bad-faith form of listening: the students saw Duncan as the kind of person who would think, when having what *seems* like a good-faith debate, "I know that only by listening closely to my opponent can I hope to outsmart her—and thus gain what I want, no matter what it costs her."^[8] This aligns with the Frankfurt School, a critical Marxist think tank that heavily influenced contemporary modes forms of political protests. Prominent theorists from this organization insisted that any communication coming from a hegemonic source would be "inherently manipulative."^[9] Knowing that protestors of the sort experienced by Duncan see the world through a similar lens, it should not be a surprise that they prefer shouting down the powerful over constructive dialogue; all they have is the former because, for them, the latter cannot be trusted.



So, what does all this have to do with the Constitution and Reconstruction? The Constitution's efficacy took a huge blow with the failure of Reconstruction; one can understand a reluctance to trust its power to protect marginalized groups. Works like Michele Alexander's *The New Jim Crow* show how dishonorable lawmakers found a

loophole in the [13th Amendment](#) to justify a disproportionate number of minorities in the prison system, where they are used as free labor. The 14th and 15th Amendments—due process and enfranchisement, respectively—were simply ignored. Ultimately, the Stanford protestors see the Constitution in the same way they see Judge Duncan: a hegemonic “trick” blatantly disinterested in minority wellbeing. For them, Duncan, in a sense, is the personification of the Constitution: oppression disguised as the defender of life, liberty, and the pursuit of happiness. And all protestors need to do is remind themselves of how the Civil War Amendments are still being manipulated—e.g., the disproportionate number of blacks doing prison labor—to justify racist behavior.

The justification behind these student protestors and other critical social justice activists is that, in order to strengthen society and ensure racial justice, the formerly oppressed must now emulate their historical oppressors and see the Constitution as a set of “suggestions,” at best. They must make a mockery of the [First Amendment](#) because it gives Duncan and anyone else not aligned with their politics the power to express their “erroneous” viewpoint. But what now? Do we succumb to the protestors and accept the cancellations and shout downs that have become their modus operandi? Again, I am inclined to reference Madison: Do we accept as fact the idea that only devils can bring out our better angels?

No, but we need to do other things. First, I think we need to emphasize the positives of our societal progress while not forgetting about the negatives of the past. As Douglass said in “Self-Made Men,”—ironically reminiscent of yet different from Kendi’s conclusions—the best way to deal with the past is to bring justice to the present.^[10] That is, we can discuss how far we’ve come while acknowledging the past, not as a reminder of trauma and guilt but as a cautionary tale. The Civil War Amendments failed, ultimately, because of the behavior of the war’s three subsequent presidents. Andrew Johnson’s revanchist racism, Ulysses Grant’s apathy, and Rutherford B. Hayes’s lack of integrity kept those Amendments from being enforced adequately, if at all.

We must utilize those very Amendments to best ensure such “leaders” do not damage our present in irreparable ways. We are not in the late 19th century; we no longer live in a slave nation.

For this reason, we must follow the lead of people and organizations whose missions are to reinvigorate the idea of a deliberative democracy. We must learn to talk across differences in ways that acknowledge not just our shared laws but the values, attitudes, and beliefs that align or contradict those laws. [Braver Angels](#), an organization that only alludes to Madison inadvertently but still effectively (Their title derives from a play on the words of [Abraham Lincoln](#), who insisted we must abide by “The better angels of our nature” to keep the Union intact) is doing good work to promote constructive dialogue between political competitors. Organizations with similar missions should be highlighted in American society.

Perhaps the most important thing we can do is both remedial and preemptive in nature: bring back and emphasize civic education. The Stanford situation could have been the perfect moment to bring up the efficacy of the Constitution in 2023. Thus, when we do discuss this ignoble time in American history, the discussion should be framed in a comparative (that was then; this is now) or a relational way (we are closer to “a more perfect union” than we once were). The goal of such civic education is to make the people know what the rules are so that they can know when they are being broken and better ensure they are upheld. These laws are for the people, by the people.

A knowledgeable citizenry can hold the government accountable, but this does not mean judicial rulings will always be to one’s liking. What we can do, however, is know the law well enough to make our own way to ensure it is the glorious document of liberty even Douglass thought it was. We can call out violations of the 14th and 15th Amendments and close the loopholes that turn the 13th Amendment into just another kind of legalized forced labor. Our strengths are better used to scrutinize judges *before* their decisions than to heckle them *after* their decisions. One may not be convinced to agree with

judges like Duncan, but I believe seeing him as an opponent looking at the Constitution from a different angle, and not the personification of the law's past inefficacy, is a better way to ensure "a more perfect union."

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RECONSTRUCTION'S FAILURE

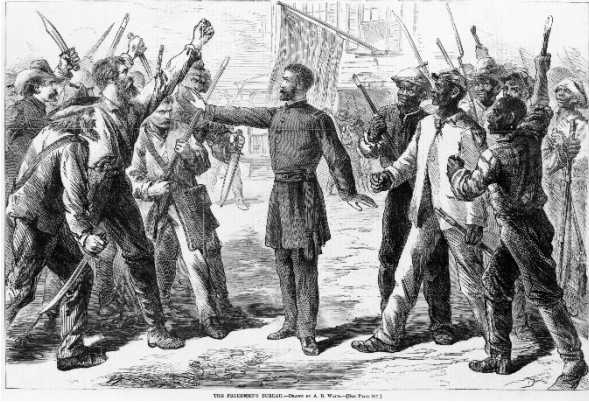
by Jeffrey Rogers Hummel

It goes almost without saying that Congressional Reconstruction did not secure full justice, security, or political equality for African-Americans. All the participants in this discussion are in agreement about that. Given our differing perspectives, we may disagree somewhat about the extent or significance of the genuine gains made by the freed men and women. But Reconstruction was not even able to sustain the goals of its most radical proponents at the time. I therefore would like to explore some sources of Reconstruction's failure. The underlying source was, of course, continuing and pervasive racial prejudice. Yet we can go deeper to examine particular policies, some seemingly unrelated to Reconstruction but others closely associated with it, that contributed to its failure. One of these involves a reform that, if implemented, would have significantly helped the former slaves. The others involve measures that undercut, either directly or indirectly, the success of Reconstruction.

Forty Acres and a Mule

The Union's treatment of abandoned and confiscated lands in the former Confederacy constitutes a major lost opportunity. As early as 1862, well before the Civil War ended, plantation owners were fleeing and abandoning their lands and slaves, most notably in the South Carolina Sea Islands. There the slaves, even before full Union military occupation, began farming self-surveyed plots, and the area then attracted refugee slaves from elsewhere. With the arrival of Sherman's army in January 1865 and his issue of [Special Field Order No. 15](#), 400,000 acres of abandoned coastal plantations were set aside for the exclusive settlement of ex-slaves. Two months later Congress established the Bureau of Refugees, Freedmen, and Abandoned Land (Freedmen's Bureau) to assist with the transition from slavery to freedom. Congress also had already passed two Confiscation Acts in 1861 and 1862, forfeiting the property and slaves of those supporting the

rebellion, thus putting additional acres into Federal hands.^[1]



Once President Johnson began granting amnesty to former Confederates, however, many ex-slaveholders recovered their abandoned plantations. Eventually the Freedman's Bureau was reduced to implementing a paternalistic policy of compelling former slaves to work, for wages and under supervised conditions to be sure, but on plantations owned by white Southerners or leased to Northerners. In the end, only a small number of freedmen hung on to their land through purchasing it. Although the Republican Party dominated Congress, the problem was that it was divided into three factions: a very few conservative Republicans who supported Johnson; moderate Republicans, the largest faction, who opposed Johnson but shied from fully equal rights for blacks; and the Radical Republicans, the most outspoken of whom was the Pennsylvania Congressman Thaddeus Stevens. "Forty acres and a mule" for each adult freedman became his rallying cry. But not even all the Radicals favored wholesale redistribution of southern land. In 1866, Congress did pass a bill that applied the homestead principle to 44 million acres of federal lands in the South, with former slaves and pro-Union whites getting preferential access. Yet most of this land was of poor quality and at distant locations.^[2]

Many Northerners remained opposed to breaking up slaveholder plantations, seeing it as a violation of private property. But Stevens was not advocating land redistribution as a leveling measure to bring about greater equality. He instead employed a natural-rights argument, insisting that the former slaves had rightful title to their

masters' plantations as just restitution for their coerced labor. Even the former slaves who desired land were not, as Eric Foner reveals, challenging "the notion of private property per se; rather, they viewed the accumulated property of the planters as having been illegitimately acquired." Stevens believed that land reform was essential to transform the feudal South into a region of yeoman farmers and free laborers. While his scheme, if adopted, may not have prevented the restoration of white rule, it certainly would have made a difference on the margin. Even the limited experience with land ownership in the Sea Islands created a black community noted for its self-sufficiency, independence, and resilience well into the post-Reconstruction period.^[3]

Counterproductive Policies at the State Level

Another set of policies contributing to Reconstruction's failure were actually some of the vaunted accomplishments of the Republican state governments that came to power in the South. As mentioned in my previous essay, these governments initiated increased funding of internal improvements, primarily railroad construction. The resulting subsidies were among the largest of the new state expenditures, diverting resources away from more urgent needs. Poor farmers, already destitute from wartime losses, found themselves levied upon further by their own states to provide economic tribute to privileged businesses. The reckless extent of these appropriations, moreover, was the occasion of most of the actual political fraud below the Mason-Dixon line during the period.^[4]

Reconstruction's importation of the Yankee system of tax-supported compulsory schools also entailed increased expenditures. This innovation had not even become standard throughout the northern states until the last decade before the Civil War, promoted by the northern Whig party partly to mold social conformity and instill "proper" respect for authority among Catholic immigrants and other ethnic outsiders. Literacy among white Southerners already exceeded 80 percent even before Fort Sumter, slightly below that of Northerners but better than in Britain or any other European country outside of Sweden and Denmark. Admittedly this omits

the slaves, whom it was illegal to educate. After emancipation the former slaves hungered for learning, and during Reconstruction many Northerners volunteered their services or donated money to provide education, usually through the auspices of the Freedmen's bureau.^[5]

To help ensure that government schools were permanently fastened upon the South, Congress created a federal Department of Education in 1867, downgraded the next year to a bureau within the Interior Department. By 1872 every southern state had established a school system, and generally these were more centrally administered than in the North, where local districts played a larger role. As mentioned in my previous essay, the public schools created during Congressional Reconstruction were all racially segregated except briefly in New Orleans. Not only did these schools, with the return of white rule, create a mechanism for racial exploitation, in which the taxes of poor blacks helped pay for white education, but also their educational accomplishments were hardly impressive. Fifteen years after the war ended, the literacy rate among southern whites had shown no noticeable gain, and 70 percent of southern blacks still could not read.^[6]

Many of the other new state-level functions that my previous essay covered were also costly. As a result, the war-ravaged South suffered under some of the heaviest state and local taxation in proportion to wealth in U.S. history. Tax rates in 1870 were three or four times what they had been in 1860, even though property values had declined significantly. Many whites who had not lost their land already were forced into bankruptcy. At one point, 15 percent of all taxable land in Mississippi was up for sale because of tax defaults. Coming on the heels of wartime confiscations, Radical Reconstruction foisted upon the biracial South the worst of two worlds: significant turbulence in white land titles with little compensating distribution to African-Americans. Moreover, the fiscal burden of these measures helped galvanize resistance to Reconstruction and undermined the southern Republican Party's promising alliance between poor whites and blacks. Thus

it is no surprise that the demise of the Republican state governments ushered in programs of government economy, expenditure cuts, and partial repudiation of state debts.^[7]

Federal Policies that Impinged on the Defeated South

A third set of policies contributing to Reconstruction's failure was imposed by the national government. In order to finance the war toward its beginning, Congress had imposed a tax of \$20 million on real estate, to be administered through the states. After the war, the tax was levied against the rebellious states, with a 50 percent penalty for their failure to collect it themselves. Special federal tax commissioners assessed the real property of Southerners, selling the land of those unable to pay and keeping all the proceeds—not just the amount due. Although this brought more land into federal hands that in theory could have been sold to the former slaves, and a bit of it actually was, the tax mainly ended up as a further economic burden contributing to the insecurity of land titles. At the same time a particularly onerous increase in the federal excise tax on cotton extracted another \$68 million from the South before being repealed in 1868.^[8]

The Civil War had already been economically devastating for the South. Prior to the war, output per person in the slave states was at least one-fourth below that in the free states—if you include slaves as part of the population. (If you exclude the third of the population that was enslaved, estimates vary, with per capita income of the slave states being just slightly higher or slightly lower than that in the free states.) After the war, the South's total commodity output did not return to its 1860 level until two decades later, and since population had also risen, output per person, including the former slaves, was still 20 percent below its prewar levels.^[9] Yet despite the fact that Southerners had lost between \$1 and \$1.5 billion from property destroyed during the war, economic historians have long agreed that this loss alone cannot explain the persistence of the increased income gap between North and South.^[10]

Economic historians have identified several other factors to explain the slow recovery of southern output, and one

of those was emancipation itself. With the former slaves now free, they consumed more leisure, with their labor input declining by approximately one-third.^[11] This gain in black leisure, however, also does not fully account for the prolonged decline in southern income. Another major factor was some of the policies that Vernon Burton refers to in his essay as “national Reconstruction.” To begin with, northern Republicans took advantage of the war to overturn the prewar policy of relative free trade by jacking up tariff rates. Average duties rose from 20 to 46 percent, and the free list was cut in half. Because the southern economy continued to rely heavily on agricultural exports, which depended on imports, the burden of this catering to special interests fell most heavily on the sector of the southern economy where most African-Americans worked. The South did not recover its world market share of cotton exports until the 1880s.^[12]

Some historians have also put the blame on the new arrangement that came to dominate cotton growing: sharecropping. Southern manufacturing recovered much more rapidly than agriculture, and the states of the deep South, where cotton cultivation predominated, remained the region’s poorest. Sharecropping also became common among white farmers who had lost their land. Economic historians have engaged in an extended debate over the relative efficiency of sharecropping, and at least some of the more extreme economic critiques of this arrangement have been discredited. It did have the advantage of pooling risk. Yet sharing the crop still appears inferior to either hiring wage labor or renting land outright. Under those systems, either the land owner or the renter retains the gains from increased output, whereas under sharecropping each party gets only a predetermined share (usually around one half), thereby reducing incentives to produce more or make investments that would increase productivity. The former slaves however were resolute in their efforts to avoid wage labor in the fields due to its similarity to the gang labor on plantations. This is one reason why large plantations almost never survived emancipation, even in the West Indies and South America.^[13]

Nonetheless a well-developed financial system might have permitted poor farmers to buy or rent land. But Union financial legislation passed during and after the war was riddled with features that interdicted the flow of savings to agriculture. The National Currency Acts of 1863 and 1864 created a new network of national chartered banks, which were required to hold specified quantities of Treasury securities. In exchange they could issue bank notes as currency, while the pre-existing state banks were no longer able to do so because of a prohibitive federal tax on their notes. Moreover, national banks could not legally make real-estate loans at all, while the general prohibition on branch banking, both at the national and state level, made it more difficult to shift credit from areas where interest rates were low to where the demand was the greatest. High capital requirements for national bank charters and initial ceilings on the quantity of bank notes also discriminated against the South. After the ceilings were removed, the requirement that national bank notes be matched by investments in government debt still diverted savings away from other uses and made it less profitable to issue these notes where interest rates were highest.^[14]

State chartered banks could still offer loans in the form of deposits, but modern readers often fail to appreciate how the widespread use of checking accounts today depends upon advanced technologies of credit verification. During the nineteenth century, the privilege of writing a check against a bank was confined to individuals of recognized wealth or unquestioned probity. The poor or undistinguished had to borrow currency, commodities, or nothing at all. The National Banking System contributed to starving the agricultural South not only of credit but also of cash in small denominations. Only silver coins were suitable for small transactions, but wartime inflation had driven them into hoards, reducing their total circulation to one-fourth their prewar level. The lowest denomination permitted for national bank notes was \$1 (equivalent to about \$20 today, during a period when real income per person was about 5 percent of what it is today). Although the government’s paper money (Greenbacks) was printed in lower denominations,

the Treasury contracted its total circulation during Reconstruction.^[15]

This government-induced curtailment of the South's monetary system occurred just at the moment when the South's monetary needs had leapt upward. The slave plantation had been a mini-planned economy, within which food, clothing, and other resources were allocated through the planter's central direction. Upon emancipation most former slaves depended on the market for the first time, now having to purchase their own necessities. Sharecropping, however, was basically a barter transaction—cotton exchanged for the use of land—and even farmers who rented land often paid not “cash rent” but “standing rent” in the form of crops. Croppers and renters also relied almost entirely upon credit from country stores for food, clothing, and agricultural supplies, with crops pledged as security. Markups for the store's commodity credit were between 30 and 70 percent annually, whereas in cities only 50 to 100 miles away, interest rates were one-fifth of that. The South's urban and manufacturing centers fared better because they had higher concentrations of wealth to begin with and because, despite the ban on private mints, individuals had access to various forms of substitute currency illegally issued by municipalities and private firms.^[16]

In short, the National Banking System throttled both financial intermediation and monetary exchange in the South's agricultural sector, which in large part had been reduced to inefficient barter transactions. This financial impact was evident, to a lesser extent, even in northern agriculture. More national bank notes circulated in postwar Connecticut than in Michigan, Wisconsin, Iowa, Minnesota, Kansas, Missouri, Kentucky, and Tennessee combined. Major differentials among regional interest rates that had not existed before the war emerged. The discount rate on commercial paper in the 1890s ranged from less than 4 percent in Boston to 10 percent in Denver. This helped fuel political crusades for inflationary policies, either through printing Greenbacks or coining silver.^[17]

Overall the national government's spending, even after the heavy wartime expenditures had ceased, was twice as high as a percent of GDP as it had been prior to the war. Some of this increase involved lavish subsidies to railroads, with its associated scandals, and other pork-barrel legislation, reflecting the government's neo-mercantilist coalition with business. But by the mid-1870s the largest expenditure was interest alone on the postwar national debt, which commanded about 40 percent of government outlays. As the national debt declined, it was replaced in 1884 by veterans' benefits as the federal government's largest expenditure, constituting 29 percent of federal outlays. Since few in the defeated South received either of these two payments, their net fiscal impact was to extract revenue from the nation's poorest region, with its large population of African-Americans, for transfer to the North.^[18]

Conclusion

If these three forms of detrimental economic policies—the failure of land restitution, the heavy taxation of the state-level Reconstruction governments, and the national government's exploitation of the South and misguided monetary changes—had been different, a beneficial change in all three together might still not have made Reconstruction a total success. The Redeemer governments might still have restored white rule, and Jim Crow laws might still have been imposed in the 1890s. But any salutary alteration of these policies certainly would have made the freed men and women better off economically. And that in turn may have given them greater political leverage. The fact that southern blacks, despite the hindering impact of these policies, nevertheless achieved the major economic gains emphasized at the end of my prior essay, is a testament to their endurance and resilience. It also suggests that the market tended to do much better by African-Americans than government at any level after the Civil War.

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RESPONSE TO THREE SCHOLARS' ESSAYS ANSWERING "DID WE HAVE A CONSTITUTIONAL REVOLUTION BUT NOT RECONSTRUCT THE SOUTH?"

by Orville Vernon Burton

Errata: In my original essay I stated "Twice before the Civil War New York had voted against allowing Black men the vote." There were actually three state-wide referenda on Black male suffrage in New York state, in 1846, in 1860, and 1869, and Black suffrage was defeated each time. The [15th Amendment](#) meant that when African Americans moved North they could vote and fairly quickly had a seat at the table, and soon moved into the room where it was happening. In states with competing political parties the Black vote mattered and was courted. While the Civil War itself inspired intense hatred, it also brought extraordinary idealism, especially in race relations. When the Supreme Court ([Civil Rights cases of 1883](#)) struck down the Civil Rights Act of 1875, and in 1884 when the Court ruled in *Hurtado v. California* that the [14th Amendment](#) did not guarantee enforcement of the Bill of Rights, states led by the Midwest passed their own state civil rights statutes: Iowa and Ohio 1884; Illinois, Indiana, Michigan, and Nebraska 1885. Pennsylvania did in 1889 as well. Massachusetts and some other northeastern states already had these civil rights statutes. It is no coincidence that the first Black Congressman of the modern era came out of Illinois, as have two Black senators. With the vote and state laws protecting civil rights, Black citizens who migrated from the South benefitted from the 15th Amendment and then led in pushing for laws for the Second Reconstruction. Burton Response Essay: I enjoyed and learned from each of these scholars' three essays. I provide comments and raise questions in the spirit of a community of scholars. I hope that none of my comments or criticisms are taken

personally; they are intended only to encourage exchange and academic debate. Thank you for challenging me and giving me an opportunity to react to your exciting essays. Dr. Jeffrey Hummel states "the history is not as simple as sometimes portrayed." I agree wholeheartedly. When I wrote *The Age of Lincoln* (2007), I chose as one of my sources a book recommended by my libertarian brother-in-law. It was Hummel's *Emancipating Slaves, Enslaving Free Men: A History of the American Civil War* (1996). I enjoyed and learned from that book, which has an interesting perspective. The essays in this discussion are understandably more argumentative than a history text. Yet, his article, "Reconstruction's Twists and Turns," simply has too many twists and turns of its own. Context and timing of Reconstruction measures are essential in understanding the passage of laws. I am fascinated by Hummel's wording, transition, and use of active or passive voice. Hummel writes, "By the end of Grant's term, only South Carolina, Florida, and Louisiana were left in Republican hands." I think it is more clear to say that in these three states, where Black men were still able to have a meaningful vote, they and white Republicans elected Republican state legislatures. With the federal government no longer sending supervisors to assure voting rights, with the murder of Republican office-holders, with fraudulent registration and fraudulent ballot boxes, the Democrats, sometimes even a minority, could then control the election outcome. Hummel writes, "Their (seven southern states) ratifications of the Fourteenth Amendment are what formally made it part of the [Constitution](#)." The implication is that the ratification was not valid. If he thinks it was not fair that the states returning to the union of the United States had to agree that the former slaves were to be citizens, I would like him to clarify the reasoning. Hummel writes, "But resistance of white Southerners to what they denounced as Black Reconstruction had turned violent." Hummel had earlier mentioned the Black Codes, but he does not assign them the probative value they are due. In Reconstruction chronology, the Black Codes, instituted in the immediate aftermath of war, were the cause for federal intervention. It was not "Black Reconstruction" that brought white violence; it was violence against the

freed people that brought the [Reconstruction Act of 1867](#). Hummel's discussion of Progressivism, which apparently was not from the people but was a "statist reform movement," implies that the movement was the cause of the disenfranchisement and segregation. It was not, although I might agree that Progressivism gave cover to some white southerners. Some tactics also were imported from northern cities to the South. At-large elections, for example, a northern Progressive era strategy to dilute the vote of ethnic minorities, were repurposed in the South to do the same against Black citizens. But again, Progressivism was not the cause. Long before the Progressive era movement white Democrats had been finding innovative ways, including violence, to keep Black people from having an equal opportunity to elect candidates of choice. Hummel concentrates on eugenics, and this abomination did flourish throughout the U.S., including on the Supreme Court. And I agree with Hummel that the early 1900s did indeed bring on the nadir of America's race relations. Nevertheless, the argument that eugenics made race relations in the South worse, 1900–1930, than the pre-eugenic era, 1880–1900, is a stretch. Many white southerners did not need eugenics to be convinced of Black biological inferiority. As Winthrop Jordan and a host of other scholars have demonstrated, anti-Black racism long preceded the Progressive era or the eugenics movement. Well before the science of the eugenics movement all mixed race children in the South were considered Black. I believe Hummel, as do most historians, misses the central, simple question of "Reconstruction": Why should we think that the war was "over?" That very much depends on what we think the war was *about*. And for someone interested in understanding how the war "enslaved free men" from what Hummel wrote here he does not appear to be interested in studying that process from below, or thinking about how ordinary Americans contested that new enslavement he suggests. Which is to say that he misses the central achievement of the North's, that is the United State's victory: the destruction of slavery as a labor system and the imposition of wage labor capitalism as the dominant system of economic organization of society. As my brilliant former Ph.D. student Dr. Lawrence

McDonnell argues in a book he is writing appropriately titled "War Work," the war itself, of course, was most Americans' first sustained experience of wage labor or supervision by a boss, and they endured it only in the belief that they were saving the Union. Few could have imagined that their own actions were giving birth to a world so antithetic to ideals of liberty and equality for all. Hummel does not really explain why he thinks white Southern violence continues after Appomattox—since it does continue in a hundred localities throughout 1865 and beyond. The emergence of the KKK is just the most widespread organized resurgence of planter power. USCT troops draw active violent responses wherever they appeared in the South in the spring and summer of 1865, and it is their attempts to suppress ex-Confederates that spur the political intransigence which solidifies as Black Codes that fall. The war *was not* over, probably not before 1877 or 78, and later in other locales; violent local political conflicts were the driving force behind the endless "twists and turns" he rightly sees; the 14th and 15th Amendments are intelligible only as attempts to curb both conservative white violence and racist legislation (aimed at controlling white and Black laborers in the South). In a revolutionary period such as "Reconstruction," what mattered was not what any particular legislative majority managed to enact. Rather, what mattered was the ability of Americans, often armed, to make their claims stick at the local level. I have known and admired the work of historian Dr. Nicole Etcheson for decades, and as with Dr. Jeff Hummel, I relied on some of her previous work when I wrote *The Age of Lincoln*. Etcheson offers a good discussion of how federalism was reinterpreted in the post-Civil War period. She and I agree about the role of white violence like the Ku Klux Klan, but I could quibble over the lack of context for passage of the Reconstruction Act. Instead, however, I will focus on the following statement: "the Fifteenth Amendment did not repeal federalism or even assert a positive right of suffrage." Etcheson shows later in the paper that it was the Supreme Court that stated, "the Constitution of the United States does not confer the right of suffrage upon any one." And yet, Section 1 of the Fifteenth Amendment reads, "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.” I maintain that this section does indeed assert a positive right of suffrage. Moreover, as I wrote in my initial essay, “Congress shall have power to enforce” is Section 2 of the 13th, 14th, and 15th Amendments. I appreciate Etcheson’s explanation of the Enforcement Acts and the role of the Supreme Court in invalidating key portions of those laws. Even more, Etcheson has brought the debate over suffrage to the modern Supreme Court. Its decision in *Shelby County v. Holder* (2013) invalidated Section 4, and basically rendered Section 5 unconstitutional, as well as key portions of the Voting Rights Act of 1965. I would also add that *Brnovich* (2021) and the Alabama redistricting cases before the Supreme Court now are taking direct aim at Section 2, which, if the State of Alabama is successful, would basically get rid of the Voting Rights Act.

Etcheson’s essay correctly notes the central role of violence in overturning Black voting rights during Reconstruction, but as with Hummel’s argument, this claim needs to be placed within the larger and longer context of violence waged against Blacks and whites who aimed at land redistribution, access to education, political reform, and labor rights from the spring of 1865 onward. The Klan was opposed to Black voting, but was also opposed to a lot of other things as well—control of land and labor galvanized white paramilitary activity originally (which is why whites were targeted alongside Blacks). Black institutions like churches and schools (and white supporters) were targeted next, and black voting came with the elections in 1868–1878. A Black man in a Union uniform might even be as offensive to KKK types as a Black man with a vote; but I agree with Etcheson that it is the vote that is crucial, and that is the main thing Black people wanted as citizens. This recognition of Reconstruction violence can also guide us as we interpret the gains of the Civil Rights Movement after 1954. Widespread popular support and victories on particular issues like access to transportation, restaurant facilities, and so forth—that is to say, consumer rights—were won because advocates like SCLC avoided the kinds of labor

and land reform that more radical groups—the Communist Party, first and foremost—worked so passionately for in the decades before the Civil Rights Movement supposedly “began.” Which brings us back to the matter of “Lincoln’s Unfinished Work,” that he spoke of in his two greatest speeches, what it might entail in 2023, where it might be taken up, and who will undertake it. The final steps will play out in the halls of Congress, no doubt, but gains enshrined by formal legislation will only be the final product of countless local battles over informal law waged at the community level to achieve something like a common ground of tolerance and understanding. Which brings us to Erec Smith’s what I believe is an upside-down concern about un-angelic social justice warriors. Until this forum I had not been familiar with the scholarship of Dr. Smith. I appreciate being introduced to Dr. Smith’s work and writings. However, in this essay, I find his beginning a problematic statement. Who are his “social justice advocates”? In America most people, myself most definitely, believe in “liberty and justice for all.” Dr. Smith states that these believers in justice lack “trust in American institutions....” Not so. Most justice advocates ask that the Constitution (and the Declaration of Independence) be followed for all. Advocates ask, for example, that “due process” and “equal protection of the law” apply to all citizens equally. In his argument about angels and government, Smith sets up a typical straw man fallacy. He makes a pronouncement rather than a historical fact and then demolishes that pronouncement. No one expects that laws can turn people into angels. Abraham Lincoln had a hope that “the mystic chords of memory” will swell in the hearts of the people and they will be “touched...by the better angels of our nature.” It is within the hearts of people who care about others, and not by federal decree. Smith’s claim that the 13th, 14th, and 15th Amendments were “essentially null and void” once Federal troops pulled out of the South could hardly be more wrong. Moreover, the federal troops did not pull out in 1877, they just quit protecting the Republican elected officials and legislatures, and quit supporting their legitimacy. Of course, white southern counterrevolutionaries swooped in to roll back legislative advances at the state and local

level, and lynchers terrorized Black citizens and white allies across the South. But they did not nearly undo all the good that Reconstruction achieved. Within the parameters of Jim Crow, as Mark Schultz and Adrienne Petty have shown in *Lincoln's Unfinished Work*, a book I recently co-edited, Black farmers held on to independent landholdings throughout the South (perhaps 20% of all Black farmers by 1900) and reached all sorts of other accommodations with powerful whites to maintain a measure of freedom and independence—even voting in local, state, and federal elections. Here, again, what mattered was what local communities deemed acceptable, and that informal law needs much greater attention from scholars going forward. In exactly the same way, as novelists like William Faulkner explored in his novels, Robert Warren Penn, and especially Harper Lee brilliantly showed in *To Kill a Mockingbird*, values of tolerance and acceptance have long been recognized as essential to maintaining a functioning—and Christian—community, regardless of clashing economic interests or personal aesthetics. Without any sort of legal protection for a range of identities and behaviors that deviated from the majority, there has always been an understanding that it is wrong on multiple levels to harm people “like that.” Men and women, then, may never be turned into angels, but they do not require the restraint or the prodding of formal law to make them behave less like devils. The community itself is more tolerant and perhaps more progressive than Smith allows in his paper. And fiddling with the Constitution may be quite beside the point. As to Smith’s “cultural Marxism,” from the bottom up, conservatives and Marxists agree, men and women wield—and forebear to wield—power in order to create a more perfect Union, according to their own notions of how that might look in practice. Both sides can deplore the recent kerfuffle at Stanford, if from opposite vantage points, and embrace Smith’s call for encouragement of folks seeking common ground. And to his list we ought to add the social realism of warriors like North Carolina’s Rev. William Barber, of the Poor People’s Campaign, and the appeal to civility, common purpose, and simple decency of the mayor of Jackson, Mississippi, Chokwe Lumumba. These are leaders very much in the mold

of [Frederick Douglass](#) himself. In these and other arguments, intellectuals (including historians) absolutely must be fair-minded. Let our biases be known. Let our agendas be clear and not used to vilify. I agree with Smith about a very important issue he raises—freedom of speech. Let us continue to use reasoned discourse, even as we agree to disagree.

CONFRONTING OUR RACIAL PAST

by Nicole Etcheson

I am grateful to Vernon Burton for covering the United States Supreme Court’s role in undoing Reconstruction, an area of discussion that I, pressed by word limits, could not discuss fully. I endorse his statement that “slavery’s death did not automatically confer any positive rights upon African Americans.” He is certainly correct that, ultimately, most white Southerners failed to accept an “interracial democracy” and “organized, very effectively, an authoritarian coup d’etat.”



Burton emphasizes the gains that African Americans did make under Reconstruction: many became land owners, acquired an education, and—albeit briefly—wielded political power. Both he and Jeffrey Rogers Hummel mention the problem of what Hummel characterizes as “heavy state taxes.” But as Burton points out, the Reconstruction state governments were funding public institutions such as schools and prisons (which replaced the coercive penal structure of the plantations) that simply had not existed before the Civil War. Southern

Republicans were well known to have invested hopes in economic growth, especially through railroads. Those hopes proved illusory. Democrats, meanwhile, used taxation as a political issue very effectively against Republicans. Michael W. Fitzgerald points out, however, that, even with the sizable increases in southern state taxation during Reconstruction, the rates were “moderate by national standards.” Southerners correctly perceived their taxes as going up, but the perception that tax rates were onerous perhaps had more to do with the very low pre-war rates and opposition to the public services—including schools for African Americans—those new taxes funded.^[1]

I am frankly baffled at Hummel’s connection of Reconstruction’s failure to Progressivism and eugenics. One need not wait until the Progressive period to find the racist language and policies of white supremacy. White North Carolinians dubbed their Reconstruction convention “the gorilla convention,” because fifteen of the delegates were African American.^[2] When African American men received the vote and women did not, Elizabeth Cady Stanton burst forth with resentment that “Patrick and Sambo and Hans and Yung Tung who do not know the difference between a Monarchy and a Republic, who never read the [Declaration of Independence](#)” would make laws for educated white women.^[3] Segregation predated Progressivism. Frances Ellen Watkins Harper spoke of Harriet Tubman’s ejection from a segregated car in 1866 when she rebuked white women for their focus on the vote.^[4] Progressives presented intelligence and educational tests in voting as reform measures, but in so doing they applied to whites, including immigrants and the poor, as well as African Americans anti-democratic measures that had long been used to justify denying black rights.

Erec Smith defends the Constitution as “a liberal and just document,” while blaming those who have bent the document to the needs of white supremacy. He invokes [Frederick Douglass](#)’s defense of the Constitution as a “glorious liberty document.” I certainly do not join with those who see the Constitution, and the Declaration of Independence, as “inherently racist,” but

one has to acknowledge their limitations. The framers of the Constitution eschewed the word “slavery,” but accommodated its existence in the three-fifths and fugitive slave clauses. Smith writes that “the Constitution did not fail to protect all of its citizens, those charged to uphold it did.” But the Constitution did not define national citizenship: African Americans were frequently denied passports in the pre-Civil War era and the *Dred Scott* decision infamously declared that even free-born African Americans were not citizens and “had no rights the white man was bound to respect.” Douglass spoke as he did about the Constitution precisely to counter the abolitionist argument that the Constitution was a proslavery document. Smith states that the [Fourteenth](#) and [Fifteenth](#) Amendments “were simply ignored” and there is some truth to this, but while Smith would like to blame individuals, I argue that structure matters. I fear it is too easy, using Smith’s formulation, to lose sight of how universal white supremacy was in both the North and South. Simply put, the constitutional structure did not enable the federal government to protect minority rights from majorities that were fundamentally hostile to those rights. The question for us today is how to protect those rights against the remaining forces of white supremacy.

Endnotes

[1] Eric Foner, *Reconstruction: America’s Unfinished Revolution, 1863-1877* (New York: Harper & Row, 1988), 413-14; Michael W. Fitzgerald, *Splendid Failure: Postwar Reconstruction in the South* (Chicago: Ivan R. Dee, 2007), 154.

[2] Mark Elliott, *Color-Blind Justice: Albion Tourgée and the Quest for Racial Equality from the Civil War to Plessy v. Ferguson* (New York: Oxford University Press, 2006), 127.

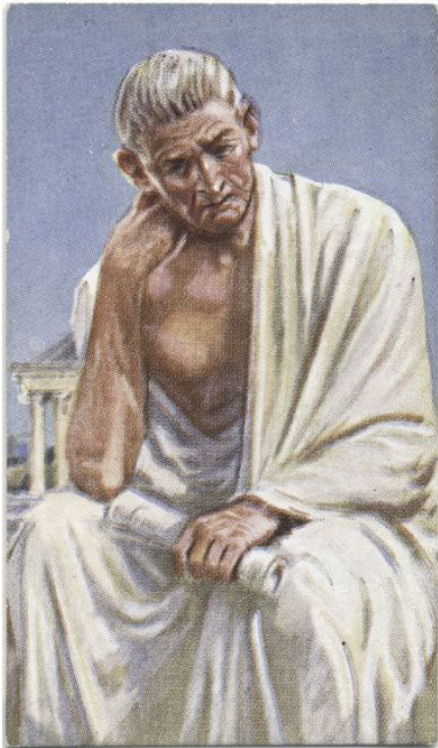
[3] Elizabeth Cady Stanton, “Manhood Suffrage,” *Revolution*, Dec. 24, 1868.

[4] *Proceedings of the Eleventh National Woman’s Rights Convention, Held at the Church of the Puritans, New York, May 10, 1866* (New York: Robert J. Johnston, 1866).

“WE THE PEOPLE” ARE RESPONSIBLE FOR UPHOLDING THE CONSTITUTION

by Erec Smith

What may be the elephant in the room for all four essays is that no reified document is immune from human imperfection. In *Rhetoric*, Aristotle wrote, “it is proper that laws, properly enacted, should themselves define the issue of all cases as far as possible, and leave as little as possible to the discretion of the judges.” This sounds like a push for universal law devoid of contingent considerations, a point taken up by lawyers and scholars responsible [for legal realism and critical legal studies](#), schools of thought that share the common denominator of holding that legal decisions should not be made outside of their social contexts. Documents like the [Constitution](#) are unavoidably a-contextual and a-temporal in nature. What is to be done?



Aristotle

[Aristotle](#) believed that lawmakers should define as much as possible and leave as little as possible to future judges. He had several reasons for this. He wrote,

in the first place, because it is easier to find one or a few men of good sense, capable of framing laws and pronouncing judgements, than a large number; secondly, legislation is the result of long consideration, whereas judgements are delivered on the spur of the moment, so that it is difficult for the judges properly to decide questions of justice or expediency.

The Constitution is, indeed, the result of “long considerations,” consisting of much contention and disagreement. Not everyone had the wherewithal to carry out such a foundational endeavor. The founding fathers found themselves with a lofty task of creating a document that could *live*—i.e., could be revised through several steps—because they were wise enough to know they could not predict every future legal situation and that most citizens did not have the wherewithal to legislate and administer justice. Nevertheless, what must not be revised was the American resolve to follow the Constitution regardless of personal and subjective desires.

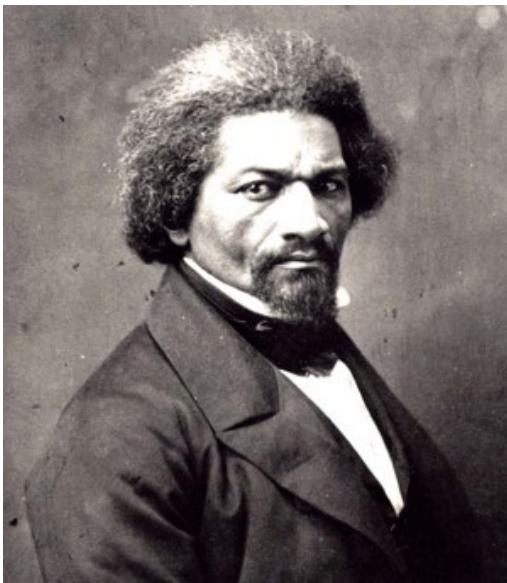
Aristotle elaborates on this last point in his subsequent statement.

But what is most important of all is that the judgement of the legislator does not apply to a particular case, but is universal and applies to the future, whereas the member of the public assembly and the diecast have to decide present and definite issues, and in their case love, hate, or personal interest is often involved, so that they are no longer capable of discerning the truth adequately, their judgement being obscured by their own pleasure or pain.

Aristotle and, apparently, those who composed the Constitution, knew that the contingencies of context could alter the connotations of a law and that human emotion would often taint [the color of law](#). They considered most humans too emotionally erratic to be trusted to make decisions on the spot, based on

contemporary contingencies. They had to be beholden to a set of rules that could keep their emotions in check.

However, isn't Reconstruction's failure the result of such unchecked emotion? Rutherford B. Hayes's desire to be President at the expense of black Americans, Ulysses S. Grant's alcoholism, and Andrew Johnson's Southern resentment were all emotional obstacles to the just administration of the law. I conclude that the issue is not that the Constitution is inherently oppressive in nature, as critical legal theorists may conclude. It is not. The issue is that those left to uphold it *can be* and *have been* oppressive.



Frederick Douglass

In "[Speech on the Dred Scott Decision](#)," [Frederick Douglass](#) insisted that "Slavery lives in this country not because of any paper Constitution, but in the moral blindness of the American people, who persuade themselves that they are safe, though the rights of others may be struck down." Douglass reiterates Aristotle's point. The problem is not the Constitution; it's the people responsible for upholding it.

"We, the people"—not we, the white people—not we, the citizens, or the legal voters—not we, the privileged class, and excluding all other classes but we, the people; not we, the horses and cattle, but we the people—the men and women, the human inhabitants of the United States, do

ordain and establish this Constitution, &c. I ask, then, any man to read the Constitution, and tell me where, if he can, in what particular that instrument affords the slightest sanction of slavery? Where will he find a guarantee for slavery?

The Constitution must be followed to the letter to prevent people from making decisions based solely on selfish wants. If laws are inherently unjust, we must work to revise them accordingly. The Constitution did not fail black Americans. People did. Reconstruction did not fail because Americans followed the Constitution; it failed because they did not.

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