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RECONSTRUCTION'S LESSONS

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In the current moment in the legal struggle for racial equality in the United States, the nation seems at risk of repeating its history. The Roberts Court has failed to fulfill its charge under the Reconstruction amendments to vigorously promote and enforce civil rights protections, and the other branches of government have proved ineffectual or unwilling to step into the breach. The racist far right is rising and the national electorate appears unable to organize in favor of racial justice priorities. In recognition of these partial analogies between conditions then and now, this Article mines the history of Reconstruction and its aftermath for lessons pertinent to the racial justice struggle today. It asks what lessons racial justice activists and legal scholars might glean from that history to help them grow their tally of gains and shrink their tally of losses despite today's less than ideal legal and political conditions. What the history of Reconstruction teaches is that legal prescription and doctrinal manipulation alone will not bring about greater racial equality; having learned that lesson from Reconstruction's history, today's racial justice activists and scholars should direct their efforts towards exploring what new approaches might be effective despite today's less than optimal legal and political conditions.

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I. INTRODUCTION

In the current moment in the legal struggle for racial justice in the United States, the Nation appears at risk of repeating its history. The country stands at a time of some hope but more cause for pessimism. The current United States Supreme Court has exhibited hostility towards key legal priorities of the racial justice movement,[1] and all indications point to this trend continuing or getting even worse. Leading commentators on race issues have suggested that the United States is headed back to the post-Reconstruction era, sometimes referred to as "Redemption" in reference to southern states' reassertion of white supremacy in their state governments, along with obliterating civil rights gains, after 1876.[2] In that period the Court undid much of the legal work of advocates of racial equality during Reconstruction.[3] Public intellectual and *New York Times* opinion columnist Jamelle Bouie has written, for example: "if the civil rights movement was Second Reconstruction, then—if we need a name for today's push against its key measures—you could do worse than the Second Redemption."[4] *The Nation*'s justice correspondent Elie Mystal argued: "We have literally been here before, when the Supreme Court remained inert as the Fourteenth and Fifteenth Amendments were violated with impunity."[5] According to Mystal, "the conservatives on this [C]ourt have now aligned themselves with the very worst courts that have propped up white supremacy throughout American history."[6] And *The Atlantic* staff writer Adam Serwer, after pointing out a number of analogies between the opinions of post-Reconstruction courts and the Roberts Court, forecast: "Not since the end of Reconstruction has the U.S. government been so firmly committed to a single, coherent program uniting a politics of ethno-nationalism with unfettered corporate power. As with Redemption, as the end of Reconstruction is known, the consequences could last for generations."[7]

Scholars, too, point out that the Roberts Court is failing to fulfill its charge under the Reconstruction Amendments[8] to vigorously enforce civil

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[1] For examples of such cases, see *infra* note 13 and further discussion in Part V.A.

[2] *See Reconstruction vs. Redemption*, NAT'L ENDOWMENT FOR THE HUMANS. (Feb. 11, 2014), https://www.neh.gov/news/reconstruction-vs-redemption [https://perma.cc/PT2G-AA2P] (providing basic information about "Redemption").

[3] *See infra* Part IV.

[4] Jamelle Bouie, *The Next Assault on Civil Rights*, SLATE (Oct. 9, 2014, 10:53 AM), https://slate.com/news-and-politics/2014/10/the-supreme-courts-next-attack-on-civil-rights-the-justices-will-likely-end-the-fair-housing-acts-disparate-impact-rule.html [https://perma.cc/7R5G-NLC4]. Redemption refers to the end of Reconstruction, when "Southern white militants regained control of state governments across the South with murder and terror, successfully disenfranchising the newly emancipated slaves." Adam Serwer, *The Supreme Court Is Headed Back to the 19th Century*, THE ATLANTIC (Sept. 4, 2018), https://www.theatlantic.com/ideas/archive/2018/09/redemption-court/566963/ [https://perma.cc/835F-CWP9].

[5] Elie Mystal, *No Attack on Voting Rights Is Too Racist for This Supreme Court*, THE NATION (Feb. 8, 2022), https://www.thenation.com/article/society/supreme-court-alabama-voting/ [https://perma.cc/C9QM-LMWK].

[6] *Id.*

[7] Serwer, *supra* note 5.

[8] These are the Thirteenth, Fourteenth, and Fifteenth Amendments. U.S. CONST. amends. XIII, XIV, XV.

rights protections.[9] Their work illuminates the problems with the current Court's jurisprudence and offers diverse doctrinal prescriptions for how the Court *could* do better. But their project has not been to ask *why* the Reconstruction Amendments did not work as well as racial justice advocates hoped they would. Nor have they mined the historical record to determine what lessons from that past might help in a situation in which the Court once again appears dead set on rolling back hard-won civil rights protections, thus repeating Reconstruction's history. This Article takes that step, extracting lessons from the partial analogies that exist between now and then to help guide racial justice advocates at this historical moment.

In his classic book on sorting valid methodologies for historical inquiry from the less so, Professor David Hackett Fischer explains that analogies are useful tools for historical inquiry provided they are not stretched beyond their legitimate applicability in changed historical circumstances.[10] Building on the observations of the public intellectuals quoted above coupled with Hackett's enthusiasm about exploring partial analogies for better historical understanding, this Article asks the following questions: What might today's racial justice advocates learn from their abolitionist predecessors' experiences during Reconstruction and its aftermath? Can studying that history provide lessons that may help avoid some of the mistakes of the past? And finally, if so, what specifics might today's advocates gain from the lessons of Reconstruction?

Of course, today's circumstances differ greatly from those of the nineteenth century. As Fischer warns, it is important never to fall into the fallacy of the "perfect analogy."[11] Nevertheless, some repeating themes emerge among the many obvious differences between now and then. One involves the apparent similarities between the perspectives of the Court today and the Court in the post-Reconstruction era, as the commentators quoted above have pointed out. Like the Post-Reconstruction Court, for example, the Roberts Court has struck down legislation Congress enacted under its Fourteenth and Fifteenth Amendment powers and drastically narrowed the interpretation of federal civil rights statutes.[12] It has shown little compunction about reversing voting rights gains, including by

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[9] This literature is too large to cite comprehensively; for several recent, interesting examples, see, e.g., Brandon Hasbrouk, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 108 (2022) (arguing for an "antiracist" interpretation of the Reconstruction Amendments); Alexander Tsesis, *Enforcement of the Reconstruction Amendments*, 78 WASH. & LEE L. REV. 849, 891–907 (2021) (examining the civil rights records of both the Rehnquist and Roberts Courts); Christopher Schmidt, *Thirteenth Amendment Echoes in Fourteenth Amendment Doctrine*, 73 HASTINGS L. J. 723, 725–30 (2021) (discussing the Fourteenth Amendment as a continuation of the commitments made in the Thirteenth Amendment, and suggesting how this insight can improve Fourteenth Amendment interpretation).

[10] DAVID HACKETT FISCHER, HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT 243–44 (1970) (explaining that analogies "are very useful explanatory tools" that play an important role in "intellectual creativity" in all sorts of disciplines; for historians, analogies serve "as heuristic instruments for empirical inquiry" and "as explanatory devices").

[11] *Id.* at 247.

[12] *See infra* Part IV.

invalidating a key provision of the Voting Rights Act of 1965,[13] thus creating a path for states to adopt voter suppression legislation all over again, just as Redeemer state governments did at the end of Reconstruction.[14]

Not only has the Roberts Court proved no friend to the racial justice cause, the other two coordinate branches of federal government have often failed to provide a countervailing force against a regressive Supreme Court. Today a dysfunctional Congress is proving far from a strong ally for racial justice advocates. Current federal executive branch leaders—despite the crucial support they received from racial justice advocates at a watershed electoral moment in 2020[15]—have likewise failed to deliver decisive action on the racial justice front, despite the efforts of reformers from within and outside government.[16]

With the benefit of hindsight, might the current racial justice movement be able to make more progress, despite these current conditions, by learning from Reconstruction's past? For example, why today do racial justice advocates both outside and within academia continue to focus on proposing reforms within civil rights doctrines, given that the current Court has no interest in entertaining such reforms? Might all of this brilliant legal energy be better directed at reforms related to law, but outside the Court's direct supervision?

Additional similarities exist in political and social conditions today as compared to the Reconstruction Era—though it is also extremely important to acknowledge that vast differences exist between these two periods as well. Civil rights advocacy during Reconstruction and the racial

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[13] *See* Shelby Cnty. v. Holder, 570 U.S. 529, 551–57 (2013), discussed further at *infra* Part V.A. For other recent Roberts Court cases that have rolled back or declined to enforce voting rights protections, see Brnovich v. Democratic National Committee, 141 S. Ct. 2321, 2343–46 (2021) (holding that Arizona's bans on out-of-precinct voting and third-party gathering of mail-in and absentee ballots did not violate Section 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301); Abbott v. Perez, 138 S. Ct. 2305, 2326–30 (2018) (upholding electoral maps despite the district court's finding that the maps were drawn with discriminatory intent); Bartlett v. Strickland, 556 U.S. 1, 20–23 (2009) (holding that the Voting Rights Act does not require state officials to redraw election district lines to help allow racial minority groups to elect a candidate of their choice); Crawford v. Marion Cnty., 553 U.S. 181, 202–03 (2008) (upholding Indiana voter identification law that produced racially disparate outcomes); and League of Latin Am. Citizens v. Perry, 548 U.S. 399, 443–47 (2006) (upholding racial gerrymandering that burdened the rights of minority voters in Texas).

[14] *See infra* Part IV.

[15] Without the support of Black civil rights leader and Congressman James E. Clyburn of South Carolina, for example, current President Joseph Biden likely would not have won the Democratic Party nomination. *See* Donna M. Owens, *Jim Clyburn Changed Everything for Joe Biden's Campaign. He's Been a Political Force for a Long Time*, WASH. POST (Apr. 1, 2020, 6:00 AM), https://www.washingtonpost.com/lifestyle/style/jim-clyburn-changed-everything-for-joe-bidens-campaign-hes-been-a-political-force-for-a-long-time/2020/03/30/7d054e98-6d33-11ea-aa80-c2470c6b2034_story.html [https://perma.cc/ZN9Y-MQZH].

[16] *See*, *e.g.*, Matt Zapotosky et al., *Merrick Garland's Goal Is to Restore the Integrity of the Justice Department. His Legacy Will Still Be Defined by Trump*, WASH. POST (Mar. 14, 2022, 6:00 AM), https://www.washingtonpost.com/national-security/2022/03/14/merrick-garland-justice-trump/ [https://perma.cc/N684-Y4QM] (noting that while Attorney General Merrick Garland successfully prosecuted two high profile hate crimes cases, activists fault him for being too slow and cautious in pursuing racial justice issues, including police misconduct investigations).

justice movement today share roots in the same long, complex social movement known as abolitionism.[17] Indeed, in important respects, today's racial justice movement is the direct descendent of abolitionism.[18] In both time periods, racial justice advocates exhibit gradations in thought, espousing approaches ranging from radical to moderate to conservative.[19] Today, as then, tensions sometimes manifest themselves between the perspectives of leaders of color, who have most directly experienced racism, and well-meaning white advocates, who have not.[20] Racial equality movements with these complex features can lay claim to both gains and losses.[21] This Article will argue for striving to improve the tally of gains by examining what went wrong during Reconstruction. To be sure, Reconstruction did achieve important gains, some of which lay dormant for a century but then provided the basis for more gains during the 1960s. An important question today is how to lay further groundwork for more gains once political and legal conditions again become ripe for such progress.

It also bears noting that before, during, and after Reconstruction, the United States was viscerally and violently split on political opinions and fundamental values related to racial equality. The same is true today. Indeed, the chasm today between the perspectives of members of the racist far right, on the one hand, and adherents of the racial justice cause, on the other, have direct roots in the conflicts of Reconstruction and its bitter aftermath.[22] The beliefs and ideologies of those who opposed equal rights for Black persons before and after the Civil War have been transmitted across generations to provide the basis—and often almost the very same arguments—for the rhetoric of the racist far-right today.[23] As this Article will argue, a useful path forward in these conditions might call on legal scholars and others to draw from other disciplines such as social neuroscience, which studies the brain-based reasons for racism, to find new approaches to mitigating racism through the design of law-related institutions and practices.

As in the past, extreme racism is not a regional phenomenon, but a national problem.[24] Such extreme racism manifests itself, among other ways, through violence, often state-sponsored or state-supported, against

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[17] On abolitionism's long roots, see KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION 8 (2021) (tracing abolitionism's roots back to the revolutionary period).

[18] *Id.* at 355–56 (discussing multiple through-lines between today's racial justice priorities and abolitionists' work).

[19] *Id.* at 357 (noting that members of past racial justice movements had "blind spots" and differentiating between those "in the radical vanguard and others [who] proceeded with great caution.")

[20] *Cf. id.* at 114 (noting that Black abolitionists "consistently pushed their white would-be allies to think more expansively about racism and inequality").

[21] *Id.* at 357 (noting that racial justice agitators sometimes won and sometimes lost, but that "[w]hen they failed, they kept trying").

[22] For one personal account of coming to terms with the transmission of racist ideology in a family across generations, see MAUD NEWTON, ANCESTOR TROUBLE: A RECKONING AND A RECONCILIATION xiv, 43, 214–25, 228, 311 (2022).

[23] *Id.* at 214–25.

[24] On the rise of the racist far right in the traditional North of the United States, see *In 2021, We Traced 733 Hate Groups Across the U.S.*, S. POVERTY L. CTR. (July 22, 2022, 2:26 PM), https://www.splcenter.org/hate-map [https://perma.cc/3S8C-U5RN] (offering a map showing the locations of organizations espousing racial hatred ideologies).

persons of color and their allies. Of course, violence against persons of color has never stopped in the United States; it was and continues to be a major mechanism of racial suppression. Any social movement that seeks to address racial injustice must make prosecuting racial violence a priority issue, as this Article will discuss in Part V below.[25]

As this Article will show, Reconstruction-era advocates learned through hard experience that legal prescription by itself—even through fundamental law inscribed in the Constitution through the Thirteenth, Fourteenth, and Fifteenth Amendments[26]—may be insufficient to produce desired change in the face of resistance. Those who championed those Amendments (hereinafter "Reconstruction's advocates") discovered they had been naïve in assuming that adding words to the Constitution would produce racial justice reform in the face of a lack of support from coordinate branches of government including the executive, the courts, the states, and their citizens. Republican Congresses during Reconstruction would gradually reach this understanding. But they did so only after they witnessed the full force of resistance against Reconstruction. That resistance included a hostile federal executive, legal and extra-legal actions of the states, and violent white mobs and organizations. Only after living through those experiences would a congressional majority appreciate the importance of enshrining the right to vote in the Constitution through the Fifteenth Amendment.

Of all the harms the Roberts Court has done to the cause of racial justice, its undermining of the right to vote is arguably the most dangerous development. [27] Voting is a right constitutive of all other rights, as the Black abolitionists first and most clearly envisioned. The members of the National Convention of Colored Men gathered in Syracuse, New York, in 1864, made this perspective clear in proclaiming that the right to vote was the fundamental political right without which other protections would be meaningless.[28] They presciently forecast an insight that Congress would only come to share later—namely, that:

> We may conquer Southern armies by the sword; but it is another thing to conquer Southern hate. Now what is the natural counterpoise against this Southern malign hostility? This it is: give the elective franchise to every colored man of the South who is of sane mind, and has arrived at the age of twenty-one years, and you have at once four millions of friends who will guard with their vigilance, and, if need be, defend with their arms, the ark of Federal Liberty from the reason and pollution of her enemies.[29]

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[25] *See infra* Part II.C.

[26] U.S. CONST. amends. XIII, XIV, XV.

[27] *See, e.g.*, cases cited *supra* note 13.

[28] *See* PROCEEDINGS OF THE NATIONAL CONVENTION OF COLORED MEN HELD IN THE CITY OF SYRACUSE, N.Y., OCT. 4, 5, 6 AND 7, 1864; WITH THE BILL OF WRONGS AND RIGHTS, AND THE ADDRESS TO THE AMERICAN PEOPLE 55–61 (1864).

[29] *Id.* at 61. Although these conventions called themselves "men's" conventions, women also took an active part. *See* Samantha de Vera, *'We the ladies . . . have been deprived of a voice': Uncovering Black Women's Lives through the Colored Conventions Archive*, 19 INTERDISCIPLINARY STUD. IN THE LONG NINETEENTH CENTURY 27, 36 (2018) (reporting that,

A majority of the Reconstruction-era congressmen took much longer to appreciate this insight. In the early years of Reconstruction, most members of Congress opposed granting Black men voting rights by constitutional amendment.[30] Instead, they sought to protect civil rights by granting Congress greater enforcement powers over the states in supervising the protection of fundamental rights already found in the Constitution. But they soon discovered that that strategy would be insufficient. They realized they needed to empower Black citizens to champion their own rights through the political process, and they set out to do this through the Fifteenth Amendment.

The Fifteenth Amendment, ratified in 1870, achieved far too little too late. Rather than establishing a broad positive right to vote, it simply declared that discrimination in voting on the ground of race alone was illegal. Even that limited dictate remained completely unenforced across the South for almost 100 years. The Fifteenth Amendment did, however, signal a new approach to protecting rights by empowering citizens. Its aspirations have not been fully realized, but its potential remains potent, as discussed in Part V.B.4 below.

The fundamental nature of the right to vote was not the only new understanding Congress reached. As this Article discusses below, some Reconstruction advocates began to understand that social welfare supports were essential to supplement a commitment to civic and political equality. They also learned that federal (and ideally state) prosecution of violence to protect citizens' rights to life, safety, and bodily integrity was another fundamental piece of any commitment to civil rights equality. This Article discusses these lessons in Part V.B.3 and 4.

The history of Reconstruction and its aftermath offered still other lessons as well. A core lesson from Reconstruction's tragic history is that legal words on paper alone, even in the form of constitutional amendments, cannot suffice to bring about change.[31] Yet the alternatives, or supplements, to legal prescription and court-supervised enforcement to bring about racial justice reform remain insufficiently explored in legal theory today. Scholars and activists must continue to bring new theoretical insights into play to understand what approaches might be most effective in bringing about greater racial justice despite existing political and legal conditions.

This is the central argument of this Article: Given current conditions, racial justice advocates focused on law-related strategies need to think beyond traditional approaches. History suggests that making laws and urging the Court to robustly enforce them works best when there are strong, effective political majorities in support of them backed by

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at the 1864 Syracuse Convention, Edmonia Highgate was invited to speak and did so, though her address was not recorded in the minutes and only briefly mentioned). On additional and earlier calls of Douglass and other Black abolitionist leaders and groups for granting Black citizens broad voting rights, see Xi Wang, *Black Suffrage and the Redefinition of American Freedom, 1860-1870*, 17 CARDOZO L. REV. 2153, 2171–72 (1995).

[30] *See* WILLIAM GILLETTE, THE RIGHT TO VOTE 31 (1965) (summarizing evidence in the congressional record establishing that, between 1865 and 1868, most Republicans were "completely opposed to Negro voting").

[31] *See infra* Part V.B.1.

enthusiastic, coordinated support from all branches of government. Those conditions do not pertain today. In light of that reality, this time may be best spent *developing new theories* for understanding racism and how to counter it, and then experimenting with those theories in arenas outside the Court's focus, including through voluntary action, best practices formation, new governance, and other democratic experimentalist methodologies.

To develop these themes, this Article will proceed in four Parts. Part II examines the first part of Reconstruction and the hard lessons Reconstruction's advocates learned. Part III traces the latter part of Reconstruction, focusing especially on the seemingly rapid movement of a congressional majority from eschewing proposals protecting Black men's right to vote in the Constitution toward prioritizing the right to vote at the center of the protections needed for the proper functioning of the American political system. It examines the statutes targeted at resisting statutes that Congress passed and their partial success. Part IV sketches the demise of Reconstruction's legal goals with the post-Reconstruction Court's dismantling of much of what Reconstruction Congresses had sought to achieve. Finally, Part V offers a short epilogue and summarizes the lessons racial justice advocates today might extract from the Reconstruction experience.

II. RECONSTRUCTION BETWEEN 1863 AND 1868: LESSONS LEARNED

The first Reconstruction[32] Congress (the 38th), composed of strong Republican/Unionist majorities in both houses, began its first session in 1863.[33] The fact that the secessionist states were not represented there further ensured the pro-Reconstruction Republicans' dominance. As civil rights champion Charles Sumner, Republican senator from Massachusetts,

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[32] One of the clearest starting points for "Reconstruction" (meaning the process of "reconstructing" the South), is President Lincoln's December 8, 1863, Proclamation of Amnesty and Reconstruction. *See* JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR 17 (1961); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 35 (1988) [hereinafter FONER, RECONSTRUCTION]. That proclamation began with the promise of a pardon and return of all property—except in formerly enslaved persons—to all persons who had participated in "the existing rebellion," provided that these persons take an oath to henceforth support the Constitution and all acts of Congress and proclamations of the President having reference to slaves. *The Proclamation of Amnesty and Reconstruction*, FREEDMEN & S. SOC'Y PROJECT (July 27, 2022, 1:01 PM), http://freedmen.umd.edu/procamn.htm [https://perma.cc/B4BK-KSQV]. Congress, however, wanted to take a more aggressive stance, s*ee* FRANKLIN, RECONSTRUCTION, at 17–19.

This Article's focus is on congressional Reconstruction. The historiography of Reconstruction is vast, and this Article cannot begin to do justice to it. Because this Article's focus is on congressional Reconstruction, it leaves out the vast historiography on Lincoln. For the same reason, it largely leaves out the story of the activists whose work outside Congress contributed so much to the amendment process, though I try not to ignore it completely.

[33] *See Congress Profiles: 38th Congress (1863-1865)*, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Congressional-Overview/Profiles/38th/ [https://perma.cc/L32R-ZFNV] (last visited July 29, 2022); *see also Dates of Sessions of the Congress*, U.S. SENATE, https://www.senate.gov/legislative/DatesofSessionsofCongress.htm [https://perma.cc/Z9GX-H9GW] (last visited July 29, 2022); *Senators of the United States, 1789 - Present*, U.S. SENATE, https://www.senate.gov/artandhistory/history/resources/pdf/chronlist.pdf [https://perma.cc/5T65-Y73T] (last visited July 29, 2022).

put it: "Our whole system is like molten wax, ready to receive an impression."[34] By the end of that year, Congress had begun to consider proposed constitutional amendments to abolish slavery throughout the country.[35]

A. Enacting the Thirteenth Amendment

In January 1864, the Senate took up consideration of an abolition amendment, under the leadership of Senator Lyman Trumbull, who sponsored proposals as chair of the Senate Judiciary Committee.[36] On April 8, 1864, the Senate passed this committee's proposed language for the Thirteenth Amendment, on a vote mostly along party lines but with two Democrats, Reverdy Johnson of Maryland and James Nesmith of Oregon, on board as well.[37]

The House had a harder time obtaining the two-thirds supermajority needed to pass the proposed Thirteenth Amendment, and failed to do so in a June vote that fell largely along party lines.[38] By that point, the 1864 national election campaign was in full swing. In November, Abraham Lincoln won reelection by wide popular and Electoral College margins, in the twenty-five states in the Union at that time, based in part on his administration's recent successes in the Civil War, especially victories in Atlanta in September 1864.[39] Lincoln's opponent, Democrat George McClellan, a former Union general, lost on a platform that proved "too extreme in his Southern sympathies."[40] With a clear message from the national electorate (consisting only of Union voters), Lincoln and more reluctant federal legislators took notice; an end to the war could not be won by compromising with the southern states.[41] Here was a lesson: electoral victories greatly matter to what is possible by way of aspirations for reform.

In the elections of 1864, the Republicans picked up five additional House seats. The losing Democrats faced less public pressure during the waning days of the lame duck session that followed the elections.[42] These conditions made passage of the Thirteenth Amendment more possible. In its vote reported on February 1, 1865, the House passed the Senate's proposed language that would become the Thirteenth Amendment.[43] That

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[34] DAVID HERBERT DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN 192 (1970) [hereinafter (quoting Letter from Charles Sumner to Francis Lieber (May 15, 1864)).

[35] Kurt Lash, *Introduction to Part 2A*, *in* 1 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS 373, 374 (Kurt Lash ed., 2021) [hereinafter 1 ESSENTIAL DOCS.] (describing these various proposals).

[36] See MARK M. KRUG, LYMAN TRUMBULL: CONSERVATIVE RADICAL 217 (1965).

[37] *See* ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 38–39 (2004); *Debate and Passage of Abolition Amendment*, US SENATE (Apr. 8, 1864), *reprinted in* 1 ESSENTIAL DOCS., *supra* note 35, at 434, 442.

[38] *Debates and Failed Vote on Abolition Amendment*, U.S. HOUSE OF REPRESENTATIVES (June 14–15, 1864), *reprinted in* 1 ESSENTIAL DOCS., *supra* note 35, at 447, 463.

[39] NOAH FELDMAN, THE BROKEN CONSTITUTION 309 (2021).

[40] *Id.*

[41] *Id.* at 317 (describing Lincoln's realization after his second election that a "new Constitution would not be a compromise with injustice, but the embodiment of a higher, moral law").

[42] Lash, *Introduction to Part 2A*, *supra* note 35, at 376–77.

[43] *See Debates and Passage of Abolition Amendment*, U.S. HOUSE OF REPRESENTATIVES (Jan. 28–31, 1865), *reprinted in* 1 ESSENTIAL DOCS., *supra* note 35, at

decisive action prompted spontaneous celebrations in the streets and President Lincoln's immediate signature to send the proposed amendment to the states with hopes for quick ratification.[44] Reconstruction's advocates thus learned another lesson that applied when operating from a position of political strength: Decisive action springing from a strong voter base could produce success.[45] (Later, they would learn that the converse of this proposition was also true, i.e., waning national voter support spelled serious trouble, as discussed in Part III.A *infra*).

B. Land and Social Welfare

The Thirty-eighth Congress did not stop with the Thirteenth Amendment's passage. In March 1865, as one of its last actions, it passed Congress's first Freedmen's Bureau Act, which Lincoln quickly signed.[46] That law established the Bureau for the Relief of Freedmen and Refugees, to be organized under the War Department, for a period to continue through "the present war of rebellion, and for one year thereafter." [47] This sub-agency would manage matters related to abandoned lands, freed persons, and refugees.[48] The act authorized the Secretary of War to direct provisions, including clothing, fuel, and temporary shelter to freed persons and refugees; to appoint assistant commissioners for each state in insurrection, who should make reports to Congress; and to set apart tracts of up to forty acres of abandoned land within the insurrectionary states for the use of "loyal refuges and freedmen," which these persons "shall be protected in the use and enjoyment" of for three years.[49]

Although this plan would prove quixotic, the legislators who supported the Freedmen's Bureau bill clearly understood that the resource of land was the Holy Grail—as, indeed, it had been for the Nation's founders who drafted the original Constitution, setting out to build a political order with strong protections for property.[50] The provision of land

485, 495; *Notice of House Vote and Presidential Signature*, U.S. SENATE (Feb. 1, 1865), *reprinted in* 1 ESSENTIAL DOCS., *supra* note 35, at 496, 496.

[44] *Exciting Scene in the House of Representatives*, FRANK LESLIE'S ILLUSTRATED NEWSPAPER 345 (Jan. 31, 1865), *reprinted in* 1 ESSENTIAL DOCS., supra note 35, at 496, 496.

[45] The Thirteenth Amendment's outlawing of all slavery and involuntary servitude was a far more radical step than the gradualist proposals that preceded it, including plans to reimburse slave owners for their economic loss, which Lincoln had supported. *See* Claudia Dale Goldin, *The Economics of Emancipation*, 33 J. ECON. HIST. 66, 74 (1973) (calculating that immediate and uncompensated emancipation—the result of the Thirteenth Amendment—led to an economic loss to slave owners of $2.7 billion, as compared to a gross national product of only $4.2 billion at the time).

[46] First Freedmen's Bureau Act, ch. 90, 13 Stat. 507 (1865) (repealed 1868).

[47] *Id.*

[48] "Refugees" referred to whites displaced by the war, whom Congress included so as to avoid the impression that it intended to confer preferential treatment to Black persons. *See* FONER, RECONSTRUCTION, *supra* note 32, at 69.

[49] First Freedmen's Bureau Act, 13 Stat. at 507–09. The law further provided for an annual rent not to exceed six percent of the value of the land, after which the occupants would be entitled to purchase the land and receive "such title as the United States can convey." *Id.* at 508.

[50] *See* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 206–10 (1990) (describing the constitutional impact of the Federalist concern with protecting private property).

to freed people was a key aspect of the radical[51] Republicans' vision for Reconstruction. They believed this step would establish a material basis for granting citizenship and equal rights to freed persons. But the proposal quickly ran into snags, including conservatives' opposition, which defeated it.[52] The lands that might have been transferred to freed persons shrunk as Lincoln's successor, President Andrew Johnson, issued executive orders pardoning most Confederates and returning confiscated land to them.[53] Other potential avenues for granting freed persons land still existed, such as granting them deeds to government-owned land. That option went nowhere, however, because Congress failed to appropriate funds for both the Freedmen's Bureau and for grants of high-quality federal lands to freed persons.[54] Congress's inaction showed the difficulty of appropriating money to back commitments that were much easier to hold in principle than to achieve in actuality. Lack of funding was responsible for an important lost opportunity: material resources were critical but were not forthcoming.

In the end, the inability to secure material resources to the freed people in the form of land was one of Reconstruction's most significant failures.[55] Many of the approximately four million persons emancipated by

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[51] As used throughout this Article, the term Radical Republican does not refer to congressmen who were necessarily politically radical in a general sense; the term as historians of this period use it refers to "a member of the Republican Party committed to emancipation of the slaves and later to the equal treatment and enfranchisement of the freed blacks." *Radical Republican*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/Radical-Republican [https://perma.cc/GFK8-8QDC] (last visited Feb. 15, 2023). In determining whether to classify the Republican members of Congress as radicals, moderates, or conservatives under this meaning, I rely on the comprehensive study of voting behaviors in DAVID HERBERT DONALD, THE POLITICS OF RECONSTRUCTION 1863-1867, at 12, 29, 63, 100–05 (1965).

[52] *See* DONALD, *supra* note 34, at 298–99 (describing Sumner's numerous proposals to grant land to the freed persons and the opposition of more conservative Republicans to such proposals).

[53] *See, e.g.*, Andrew Johnson, Granting Full Pardon and Amnesty to All Persons Engaged in the Late Rebellion (Dec. 25, 1868) (pardoning "unconditionally, and without reservation," all people involved in the rebellion, and restoring all "rights, privileges, and immunities"); *Timeline of Land Redistribution at the End of the Civil War*, AM. SOC. HIST. PROJECT, https://shec.ashp.cuny.edu/items/show/2032 [https://perma.cc/PCG5-8J23] (last visited Feb. 28, 2023) (noting that President Johnson's amnesty plan allowed southerners to reclaim "abandoned lands occupied by freedmen"); *see also* ERIC L. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 141–42 (1975) (referring to President Johnson's "pardoning policy").

[54] As one of Stevens' biographers, Fawn Brodie, points out, Stevens would have been more effective in his goal of providing real property resources to freed persons if he had focused on obtaining congressional appropriations for land grants rather than pursuing what she proposes was his deep-seated Calvinist lust for punishing the wicked by continuing to push for confiscation of white southerners' property. FAWN BRODIE, THADDEUS STEVENS: SCOURGE OF THE SOUTH 305 (1966). Psychobiography has, of course, been much criticized. *See, e.g.*, DAVID JAMES FISHER, CULTURAL THEORY AND PSYCHOANALYTIC TRADITION 199–200 (1991) (discussing the limits of, but not completely denouncing, historians' use of psychoanalytic theory). Here, Brodie's observations about the lack of congressional funding to support creating the material pre-conditions from which freedpeople could experience civil equality contributes an important insight into how Reconstruction might have been more successful.

[55] *See, e.g.*, WILLIAM S. MCFEELY, YANKEE STEPFATHER: GENERAL O.O. HOWARD AND THE FREEDMEN 297 (1968) (noting that the "original goal of the Bureau" to respond to the freed persons' "passion for the land" was "unsatisfactorily achieved"). Most of the public land offered to freed persons was of poor quality and unsuitable for farming, and only a fraction of freed persons received any kind of land grants. *See* W. E. B. DU BOIS,

the Thirteenth Amendment ended up in highly exploitative laboring relationships with white landowners—a status many scholars have argued was not many steps removed from slavery.[56] In this respect alone, Reconstruction was destined to fail. The Nation's founders had based the original Constitution's design on an assumption that the United States would be a society full of land-owning citizens.[57] Emancipation created a new class of citizens who were free on paper but lacked material resources. Due to the Black Codes, they further lacked the ability to engage in free labor in order to secure their material needs. But such basic security was essential if freed persons were to take part in society on terms of civic equality. This Catch-22 drove Reconstruction's partial failure. It started with the Freedmen's Bureau's inability to carry out its most important assigned mission of getting substantial resources into the hands of emancipated persons so they would have a stable economic basis from which to build new lives as citizens.

The Bureau did only somewhat better at securing free labor rights to newly emancipated persons. One of the chief tasks of the Bureau's overworked agents was to supervise the fairness of the labor contracts under which freed persons were to sell their labor to landowners. But, as numerous historians have documented, the Bureau's record on this task was mixed at best.[58] At times, agents invalidated contracts that specified unduly low wages for workers, but in many other situations they reduced freed persons' bargaining ability by instituting, for example, requirements that they must enter year-long contracts.[59] Such requirements meant that freed persons could not exercise their bargaining power by threatening to withhold labor at key periods such as the harvesting season.[60] In the North, industrial laborers used the threat of a strike to exert economic pressure and thus gain bargaining power in relations with employers. By denying freed persons the ability to bargain from a position of any power, the Bureau negated the very free labor ideology that was so important to many northern abolitionists. Early congressional efforts to use law to bring about

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RECONSTRUCTION 601–04 (1931). *But see* FRANKLIN, *supra* note 32, at 37 (noting that the Bureau did have some positive effect—for example, it provided twenty million rations to white refuges and Black freed persons, established many hospitals, provided health care, and assisted in the settlement of some thirty thousand displaced by the war).

[56] *See* PAUL S. PIERCE, THE FREEDMEN'S BUREAU 68, 131 (1904); *see generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME (2008) (describing similarities between slave institutions and post-emancipation racial violence).

[57] *See* NEDELSKY, *supra* note 50, at 204–05 (noting the importance that various founders placed on protection of rights to property).

[58] For broad assessments of the Freedmen's Bureau in various states, see generally RANDY FINLEY, FROM SLAVERY TO UNCERTAIN FREEDOM: THE FREEDMEN'S BUREAU IN ARKANSAS, 1865-1869 (1996) (describing the Bureau's activities in Arkansas); PAUL A. CIMBALA, UNDER THE GUARDIANSHIP OF THE NATION: THE FREEDMEN'S BUREAU AND THE RECONSTRUCTION OF GEORGIA, 1865-1870 (1997) (describing the Bureau's activities in Georgia); MARTIN ABBOTT, THE FREEDMEN'S BUREAU IN SOUTH CAROLINA: 1865-1872 (1967) (describing the Bureau's activities in South Carolina); Joe M. Richardson, *The Freedmen's Bureau and Negro Labor in Florida*, 39 FLORIDA HIST. Q. 167 (1960) (describing the Bureau's activities in Florida).

[59] *See* BLACKMON, *supra* note 56, at 144.

[60] *Id.*; *see also* ABBOTT, *supra* note 58, at 71–72 (describing the labor contracting system); Richardson, *supra* note 58, at 169–74 (discussing the many inadequacies in the Freedmen's Bureau agents' handling of labor contracts).

change failed in this situation due to a lack of coordination between law's purpose and its implementation on the ground.

Reconstruction legislation also charged the War Department and its sub-agency, the Freedmen's Bureau, with a host of other tasks, including prosecuting civil rights violations. Unlawful acts targeting Black citizens and their allies included assault, murder, and other acts of brutal violence that inflicted terror with impunity on those attempting to exert their civil rights. The Bureau compiled reports about such illegal acts, which, while spotty, serve as the basis for much of what historians know about the vast extent of violence and terror during Reconstruction in secessionist and border states.[61]

Perhaps most promisingly, the Freedmen's Bureau provided emergency basics such as food, fuel, and medical care, and established hospitals and schools for freed persons.[62] Through these schools, many members of the first generation of freed persons learned basic literacy.[63] These schools produced many of the members of the next generation's Black leadership class, including such important figures as Ida B. Wells, T. Thomas Fortune, and many more.[64]

Indeed, the Freedmen's Bureau represented the first United States experiment in federal government-provided social welfare resources to foster human flourishing.[65] Its goal was to create the conditions for successful citizenship for a previously disenfranchised group that otherwise would have no shot at participating successfully in a market-based economic system. The newness of this idea did not escape President Johnson's attention when he argued, in his speech accompanying his February 1866 veto of the second Freedmen's Bureau Act (which Congress then voted to override[66]): "A system for the support of indigent persons in the United States was never contemplated by the authors of the Constitution; nor can any good reason be advanced why, as a permanent establishment, it should be founded for one class or color of our people more

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[61] For a compilation of statistics drawn from local agents' reports, see *Reconstruction in America: Racial Violence after the Civil War*, EQUAL JUST. INITIATIVE, https://eji.org/reports/reconstruction-in-america-overview/ [https://perma.cc/3MQS-P9KV] (last visited July 15, 2022).

[62] DU BOIS, *supra* note 55, at 225–26.

[63] *See id.* at 666 (describing how Freedmen's Bureau schools led to the first institutions of higher education for Black students.

[64] For more about this leadership class, often educated in Freedmen's Bureau primary schools and then at Howard University, see, e.g., SUSAN D. CARLE, DEFINING THE STRUGGLE: NATIONAL ORGANIZING FOR RACIAL JUSTICE, 1880-1915, at 15–16, 32–33, 38, 159 (2013) [hereinafter CARLE, DEFINING THE STRUGGLE].

[65] *See, e.g.*, ABBOTT, *supra* note 58, at 133 (portraying the Bureau "as an attempt, however limited, at social engineering and an expression, however tentative, at social planning by government," that was "contrary to both history and tradition"). For an interesting argument that the Thirteenth Amendment and Freedmen's Bureau Acts reflect a constitutional commitment to the national government playing a role in protecting minimum economic security and education, see Mark Graber, *The Second Freedmen's Bureau Bill's Constitution*, 94 TEX. L. REV. 1361, 1363–64 (2016).

[66] FRANKLIN, *supra* note 32, at 60 (discussing passage and veto override on the second Freedmen's bill); KRUG, *supra* note 36, at 237–39 (discussing passage of the second Freedmen's bill).

than another."[67] Johnson was correct that the Nation's founders had not contemplated such a social welfare system, but incorrect that such a system would necessarily protect only "one class" of citizens, given that the original Freedmen's Bureau Act provided resources for white refugees of the war as well as freed people.[68] In his opposition, Johnson inadvertently put his finger on what the Freedmen's Bureau represented: a new United States government experiment in providing certain basic resources needed for human flourishing in order to achieve civil and political equality. This is yet another of Reconstruction's lessons, as I explore in Part V.B.3 below.

The Reconstruction Congresses did not come to recognize the need to provide sustenance, education, health care, and protection of bodily security to those lacking in these resources through armchair theorizing. The Reconstruction advocates came to this awareness because they faced a dire humanitarian crisis—the challenge of incorporating four million persons who started with no resources into a governmental system that assumed all worthy citizens had acquired at least a baseline of such resources through reasonably endowed families, communities, and opportunities for property ownership. Reality drove theory rather than the other way around. Interesting possibilities, such as public land transfer, might have provided an alternative, more successful history than what actually happened after Reconstruction.

Those possibilities did not materialize, however. One more act, passed on July 16, 1866, extended the Freedmen's Bureau's life to 1868 and allowed it to continue to provide education until 1870, after which the Freedmen's Bureau ended.[69] Congress had by that time fixed on a different plan based on a recognition of the waning energy for Radical Reconstruction, as further explored in Part III.

C. Law's Inefficacy When Not Supported by the National Political Will

Two additional lessons the Reconstruction advocates learned involved the relationship between racial justice reform and support from the coordinate branches of government and the Nation's electorate. These lessons hold equally true today: due to the complexity of the Constitution's structural design, major progress on racial justice through law requires coordinated commitments among the federal branches, and such commitments typically only come after rare moments in which the Nation's electorate communicates such support for racial justice goals through overwhelmingly clear voting behavior.

The Thirty-Ninth Reconstruction Congress learned these lessons in tangling with a hostile executive in the period between 1865 and 1867.

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[67] KRUG, *supra note 36*, at 134 (citations omitted). On the persistent rhetoric of opponents of racial justice about so-called "special" treatment, see Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917, 926–27 (2009).

[68] *See* First Freedmen's Bureau Act, ch. 90, 13 Stat. 507 (1865) (repealed 1868) (referring to beneficiaries of the Act as "refugees and freedmen").

[69] *See* Act of July 16, 1866, Pub. L. No. 39-200, 14 Stat. 173 (repealed 1868) (extending the Bureau's existence); Act of Mar. 11, 1868, Pub. L. No. 40-25, 15 Stat. 41 (discontinuing the Bureau for most purposes). On the Bureau's waning activity, see MCFEELY, *supra* note 55, at 300–04; *see also id.* at 307 (questioning the efficacy of the Bureau's director); *id*. at 313 (noting the weakening of the Bureau in 1868 to "the point of impotence"); *id*. at 327 (describing phases of the Bureau's termination).

After General Robert E. Lee's formal surrender of his army of Northern Virginia to Union General Ulysses S. Grant on April 9, 1865, it was clear that the war was in its final stages. But Lincoln's assassination only six days later squelched any mood of elation at the Union's victory. Lincoln's death meant not only the Nation's loss of a brilliant leader and rhetorician, it also meant that Vice President Andrew Johnson became President. A Democrat, Johnson had established his political bona fides in attacking the large plantation "slave power" in the South and remaining a Unionist despite the secession of his home state of Tennessee while he was serving as a United States Senator.[70] Lincoln appointed Johnson Military Governor of Tennessee, and the Republican Party nominated him to serve on the party ticket in 1864 as a way of signaling to southerners that Unionist sentiments would be rewarded.[71] What Lincoln and others failed to realize was the extent to which Johnson would oppose civil rights initiatives beyond emancipation and use his power to resist congressional Reconstruction and favor southern states.[72]

As one of his first actions, Johnson issued an amnesty proclamation that covered many of those who had taken part in the war of rebellion, thus restoring all of their property rights except in persons who had been enslaved.[73] The effect was to put back in power the same men who had led their communities prior to the war, and thus to wipe out the fragile efforts of Unionists to build new state and local governments committed to the values of the Unionist forces.[74] This is one example of the Reconstruction advocates' experience of the power of the executive to negate their work. To be effective, they would have to be equally forceful in using the powers granted them under the Constitution to push back against the executive.

At the same time, the Thirty-ninth Congress wisely stuck to the Constitution's terms where failing to do so may have backfired. As ratification of the Thirteenth Amendment gradually gained ground over the summer and fall of 1865, for example, it was unclear whether the eleven secessionist states that still had no voting rights in Congress should be counted in determining whether three quarters of the states had voted for ratification as required under the Constitution.[75] The safer legal course was to count all thirty-six states in existence at the time, including the secessionist states of the Confederacy.[76] Counted this way, the last state needed to achieve ratification, Georgia, voted in favor on December 6, 1865,

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[70] MCKITRICK, *supra* note 53, at 90.

[71] *Id.* at 90.

[72] *Id.* at 134–42 (describing Johnson's policies).

[73] DU BOIS, *supra* note 55, at 254.

[74] *Id.* at 256–57 (noting Unionists' concerns that Johnson "was moving too fast" by allowing southern states to return to the Union "without guarantees").

[75] U.S. CONST. art. V (providing for ratification of constitutional amendments by all of the "Several States").

[76] *See* John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 414 (2001) (noting that Congress thought it wise to require ratification of the Reconstruction Amendments by three quarters of *all* states—rather than three quarters of Union states only—to avoid doubts about the Amendment's constitutionality).

and Secretary of State William Seward declared the Thirteenth Amendment to be law.[77]

Abolishing slavery through a federal constitutional amendment did not end slavery-like practices, however. Even before the Thirteenth Amendment went into effect, resisting states had begun to enact the notorious Black Codes. These laws imposed oppressive new forms of subordination on Black persons, prohibiting freedom—in movement, residency, employment, and association—and regulating employment in ways that belied the ideology of free labor rights as discussed above.

It pays off to examine some of the specifics of these state laws in order to see how the law operated to perpetuate extreme insubordination, and thus to better understand what Congress was trying to undo by exercising its new powers under the Reconstruction Amendments. Mississippi's Black Codes,[78] enacted in the last part of 1865, contained numerous draconian restrictions. Its "vagrancy" provisions authorized fining or imprisoning Black persons, whether newly freed or formerly free,[79] if they lacked written proof of employment, assembled together or assembled together with white persons, or interacted with white persons "on terms of equality."[80] White persons were prohibited from living in "adultery or fornication" with persons of another race.[81] If Black persons did not pay fines issued against them, it was "the duty of the sheriff . . . to hire out said freedman, free negro or mulatto, to any person who will, for the shortest period of service, pay said fine."[82] Still other provisions restricted where Black persons could rent or lease land, provided for the arrest of Black persons who quit employment prior to their term of service, and authorized bounty awards and mileage reimbursement for those "carrying back every deserting employee."[83] The Codes also prohibited all Black persons from carrying firearms of any type, or ammunition, daggers, or Bowie knives.[84] In short, these Codes sought to deprive Black persons of basic civil rights in every dimension of life. Congress's extremely difficult task was to enact law that could prevent all of this— especially as states sought to accomplish such goals in the future through discriminatory practices that could be expected to evolve over time.

South Carolina's Black Code, passed the same month as the Thirteenth Amendment's ratification, shows another approach. That law

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[77] ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 39 (2019) [hereinafter FONER, SECOND FOUNDING]; ENCYCLOPEDIA OF THE RECONSTRUCTION ERA 833 app. 3 (Richard Zuczek ed., 2006) [hereinafter RECONSTRUCTION ENCYCLOPEDIA].

[78] *See* Laws of the State of Mississippi, passed at a Regular Session of the Mississippi Legislature, held in the City of Jackson, October, November, and December 1865, at 82–93, 165–167 (1866) [hereinafter Laws of the State of Mississippi].

[79] The exact language defined the persons covered as "all freedmen, free Negroes, and mulattoes." *Mississippi Black Code, 1865*, THE AM. YAWP READER, https://www.americanyawp.com/reader/reconstruction/mississippi-black-code-1865/ [https://perma.cc/7S4Z-SW3V] (last visited Feb. 20, 2023).

[80] LAWS OF THE STATE OF MISSISSIPPI, at 91.

[81] *Id.*

[82] *Id.* at 92.

[83] *Id.* at 82, 84.

[84] *Id.* at 165.

provided that all servants must work from sunrise to sunset, enter long-term employment contracts, and that "no person of color shall pursue or practice the art, trade or business of an artisan, mechanic or shop-keeper, or any other trade, employment or business" unless he had obtained a special license, which would be effective for one year only, after paying a fee of between $10 and $100 annually, depending on the type of trade. Such freed persons must also show that they had served an apprenticeship if practicing any mechanical art or trade. South Carolina's statute had vagrancy provisions much like Mississippi's, as well as provisions subjecting Black persons to punishment for moving locations without a license or hunting or fishing on land they did not own. Other states that passed laws along these lines in the period between 1861 and 1877 included Virginia, Louisiana, and Georgia.[85] In short, these Black Codes gave the lie to any claim that emancipation had led to the realization of "free labor" since they routinely denied Black workers the ability to control their labor and punished attempts to better their economic position through work.[86] Such statutes specifically restricting Black persons' rights to control their labor and advance into skilled employment would continue, usually in a less extreme form but nationwide, well into the twentieth century.[87]

The rise of Black Codes did not escape the attention of Congress. Indeed, one of the first acts of the Thirty-ninth Congress was an effort in the Senate to declare null and void all such laws "wherein any inequality of civil rights and immunities among the inhabitants of said States is recognized," based on "any distinctions or difference of color, race, or descent, or by reason or in consequence of any previous condition or status of slavery or involuntary servitude."[88] This bill, proposed by Republican Senator Henry Wilson of Massachusetts, did not become law, but laid the groundwork for laws that Congress later enacted.[89] Like Sumner and other radicals, Wilson (who would later serve as President Ulysses S. Grant's Vice President) believed that Congress must not only abolish slavery but

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[85] *See generally* ERIC FONER, SHORT HISTORY OF RECONSTRUCTION (UPDATED) 94–95 (2015); DU BOIS, *supra* note 55, at 168–69 (quoting Louisiana's labor laws), 173–74 (quoting vagrancy laws in Virginia and Georgia); EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES DURING RECONSTRUCTION 29–44 (1871) (collecting various states' Black Codes).

[86] *See*, *e.g.*, William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J. S. HIST. 31, 35–37 (documenting the many ways laws deprived freed persons of their free labor rights, including laws that made it a crime to hire away a laborer under contract to another).

[87] It bears remembering that, before, during, and long after the Civil War, states in the North had less harsh but nevertheless oppressive laws that treated persons of color as subordinate to whites in employment. *See, e.g.*, DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS 8–45 (2000) (documenting the employment laws that imposed restrictions and unequal terms on Black persons throughout the country).

[88] *Freedmen's Bureau Bill, Back Codes*, U.S. SENATE (Dec. 13, 1865), *reprinted in* 2 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS 24, 24 (Kurt Lash ed., 2021) [hereinafter 2 ESSENTIAL DOCS.].

[89] Kurt Lash, *Introduction to Part 1A*, *in* 2 ESSENTIAL DOCS., *supra* note 88, at 5, 5 (noting that some Republicans believed that this bill could not pass without an additional constitutional amendment giving Congress the power to nullify discriminatory state legislation).

also confer equal civil rights on the freed people.[90] The manner in which southern states had acted so quickly to re-impose subordination showed moderate and Radical Republicans alike that further federal government action would be needed to protect freed persons as well as the members of free Black communities who suddenly found themselves denied the rights and status they had formerly enjoyed.

By the time the Thirteenth Amendment took effect, Congress had already begun working on the Fourteenth Amendment to address deprivations of civil rights. Congress debated the Civil Rights Act of 1866 and the Fourteenth Amendment intermittently, resulting in much "cross talk" in which ideas and proposals bled from one project to the other.[91] By March 1866, both houses of Congress had passed civil rights legislation, which President Johnson vetoed.[92] By April 7, both houses had voted to override Johnson's veto, and on April 9, the Civil Rights Act of 1866 became law.[93]

On a tandem track, Congress worked to iron out the language for the Fourteenth Amendment. Thaddeus Stevens, a Radical Republican congressman from Pennsylvania, served as chair of several powerful congressional committees and used his power to promote many Reconstruction-era initiatives. Chair of the Joint Committee on Reconstruction, Stevens had wanted a much broader proposal that would have prohibited discrimination in both civil and political rights, thus establishing the right of Black men to vote.[94] Known as an excellent strategist who could be pragmatic when necessary, Stevens agreed to compromise and introduced the Joint Committee's proposed amendment in the House in May 1866.[95] That body passed the measure, which included the basics of the provisions that would appear in the final amendment, including national birthright citizenship, the Privileges or Immunities Clause, and the Due Process and Equal Protection Clauses.[96] On June 8, the Senate passed its version, and by June 13 the House approved the Senate's slightly revised version, with all votes meeting the required two-thirds supermajority, made easier because the representatives of the eleven confederate states remained excluded from both legislative chambers.

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[90] *Henry Wilson, Politician, and Abolitionist Born*, AFR. AM. REGISTRY, https://aaregistry.org/story/henry-wilson-a-political-abolitionist-behind-the-scenes/ [https://perma.cc/GD53-KQD2] (last visited Feb. 20, 2023).

[91] Lash, *Introduction to Part 1A*, *supra* note 89, at 6.

[92] *See Debate, Civil Rights Bill, Vote and Passage*, US HOUSE (Mar. 13, 1866), *reprinted in* 2 ESSENTIAL DOCS., *supra* note 88, at 142, 142–44; *President Andrew Johnson's Message Accompanying Veto of the Civil Rights Bill*, US SENATE (Mar. 27, 1869), *reprinted in* 2 ESSENTIAL DOCS., *supra* note 88, at 144, 144–46.

[93] Civil Rights Act of 1866, Pub. L. No. 39-31, 14 Stat. 27. The vote in the Senate squeaked by with the exact two-thirds margin needed. DONALD, *supra* note 34, at 260.

[94] On Stevens' earlier proposal and his agreement to pull it back, see GILLETTE, *supra* note 30, at 25–26.

[95] *See Proposed Fourteenth Amendment, Speech of Thaddeus Stevens Introducing the Amendment, Debate*, US HOUSE (May 8, 1866), *reprinted in* 2 ESSENTIAL DOCS., *supra* note 88, at 158, 158–60.

[96] *Proposed Fourteenth Amendment, Debate and Passage*, US HOUSE (May 10, 1866), *reprinted in* 2 ESSENTIAL DOCS., *supra* note 88, at 170, 178 (quoting the language of the eventual Fourteenth Amendment).

The proposed amendment did not meet all of the goals of the so-called "Radical"[97] Republicans because it did not explicitly address political rights. Stevens urged his colleagues to vote to approve the version anyway as it was the best they were likely to get. As Stevens famously explained,

> . . . I had fondly dreamed that when any fortunate chance could have broken up for a while the foundation of our institutions, and released us from obligations the most tyrannical that ever man imposed in the name of freedom, that the intelligent, pure and just men of this Republic, true to their professions and their consciences, would have so *remodeled all our institutions as to have freed them from every vestige of human oppression, of inequality of rights, of the recognized degradation of the poor, and the superior caste of the rich*. . . . This bright dream has vanished . . . I find that we shall be obliged to be content with patching up the worst portions of the ancient edifice . . . I accept so imperfect a proposition . . . because I live among men and not among angels. . . [98]

To Stevens, Reconstruction presented the opportunity to address the root causes of inequality, based not only on race and former enslavement but also on poverty and "every vestige of human oppression."[99] Political reality had killed that dream, but broader visions of using law to defeat "caste" in its many forms would germinate in human rights movements far in the future. As Stevens showed, it was sometimes necessary to sacrifice principle for pragmatism, but ideas germinated in one period might take root and grow in different conditions. This is a lesson it behooves contemporary activists to learn too, as discussed further in Part V.B below.

The debate about the proposed Fourteenth Amendment switched to the state legislatures considering ratification just as the 1866 national elections were heating up. Johnson and the congressional Republicans entered into open warfare. In speeches supporting Democrats, Johnson attacked the Amendment, calling into question its legality given that eleven states remained excluded from representation in Congress.[100] When the Republicans won in a landslide, their political power became even stronger. The newly elected Congress would have more than a two-thirds Republican majority in both houses, paving the way for still more Reconstruction legislation.[101] Thus, another lesson arrived for the

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[97] The terms radical and moderate as used in describing Reconstruction-era legislators do not refer to general political orientation but to views on how quickly and aggressively to move on "reconstructing" the south to bring about civil rights equality. For further explanation, see *supra* note 51.

[98] *Proposed Fourteenth Amendment, Speech of Thaddeus Stevens, Vote and Passage of Amended Senate Version*, US HOUSE (June 13, 1866), *reprinted in* 2 ESSENTIAL DOCS, *supra* note 88, at 218, 218 (emphasis added).

[99] *Id.*

[100] *See, e.g.*, *Proposed Fourteenth Amendment, President Andrew Johnson's Message of Transmission*, US SENATE (June 22, 1866), *reprinted in* 2 ESSENTIAL DOCS., *supra* note 88, at 223–24.

[101] DU BOIS, *supra* note 55, at 325 (noting Republican majorities of 42 versus 11 in the Senate and 143 versus 49 in the House).

Reconstruction advocates that remains of great importance today: The Constitution's complex design makes big change hard without massive support from the American electorate.

Ratification of the Fourteenth Amendment proved slow. Unlike the Thirteenth Amendment, which won ratification ten months after Congress sent it to the states, ratifying the Fourteenth Amendment took more than two years.[102] Three states quickly ratified the Fourteenth Amendment: Connecticut and New Hampshire in the North, and the former confederate state of Tennessee, which in doing so gained readmission to the Union. Besides Tennessee, however, every secessionist state initially rejected it, as did the border states of Delaware and Maryland. Most northern states were in no rush either.[103] By the end of 1867, only twenty-two states of the necessary twenty-eight had ratified, thus again raising the question of whether the secessionist states should be excluded from the final count. Again, Congress decided not to risk this step, which would have thrown the Amendment into permanent legal doubt, but instead sought to increase pressure on the resisting states through the exercise of its legislative powers.

To do so, Congress passed several Reconstruction Acts, aiming to bring to bear the full force of its constitutional and situational power[104] on the secessionist states. The first Reconstruction Act put the ten remaining secessionist states under United States military authority until "loyal and republican State governments [could] be legally established."[105] This military authority was to "protect all persons in their rights of person and property," "suppress insurrection, disorder, and violence," and punish "all disturbers of the public peace and criminals."[106] The President was to dispatch a chief military officer to each of these states (which Johnson in fact did), who would, in turn, set up military or civil tribunals to try offenders who violated the protections provided for in the act. The states could remove themselves from such onerous military rule only by forming "a constitution of government in conformity with the Constitution of the United States in all respects," which must include granting the elective franchise to all adult males.[107] Thus, in this first Reconstruction Act of March 2, 1867, Congress imposed the suffrage requirement it had not imposed through the Fourteenth Amendment. In addition, Congress used the Act to exert the best leverage it had over the secessionist states: to gain readmission into the Union and again become entitled to representation in Congress, a state must first ratify the Fourteenth Amendment and create a new government under which Black men would have the right to vote.[108]

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[102] For exact dates, see RECONSTRUCTION ENCYCLOPEDIA, *supra* note 77, at 833 app. 3.

[103] *Id.*; FRANKLIN, *supra* note 32, at 67 (noting that "most of the other Northern states either dragged their feet or gave no immediate consideration to the [Fourteenth] Amendment").

[104] *See* Harrison, *supra* note 76, at 375 (analyzing the lawfulness of Congress's use of the requirements imposed through the Reconstruction Acts to pressure southern states into ratifying the Fourteenth Amendment).

[105] First Reconstruction Act, ch. 153, 14 Stat. 428 (1867).

[106] *Id.*

[107] *Id.* at 429.

[108] *Id.* at 428–29.

A second act, known as the Second Supplementary Reconstruction Act, passed over Johnson's veto on March 23, 1867. It provided more details on how the process of setting up the new state governments would work, including who would be responsible for overseeing voter registration and conducting the elections and how federal presence in the secessionist states would end.[109] It provided the specific process states could use once they had met all of the requirements of the Reconstruction Acts to petition Congress for readmission to the Union, and stated that once Congress had approved the application and readmitted the states' congressional representatives, the federal military presence in the state would end.[110] Then, over yet another presidential veto, Congress passed a Third Reconstruction Act on July 19, 1867.[111] This act provided further prescriptions as to how federal supervision of resisting states' government-building process should occur, and sought to diminish President Johnson's powers to remove federal officials involved in Reconstruction.[112] Johnson in turn retaliated by firing Secretary of War Edwin Stanton, who had been secretly involved in drafting the acts.[113] Stanton's firing became the basis for Congress's impeachment of Johnson in the House and not-quite-successful trial of Johnson in the Senate, which took up much time and attention.[114] A fourth act added still more to Congress's Reconstruction scheme by requiring that the votes of all men casting ballots, rather than only previously registered voters, be counted in the process of ratifying new state constitutions.[115]

The provisions of these Reconstruction-era statutes have taken on new significance in light of the Roberts' Court's focus on original public meaning in interpreting the Fourteenth Amendment.[116] For example, the Reconstruction-era legislation passed contemporaneously with the debate over and ratification of the Fourteenth and Fifteenth Amendments show that Congress did *not* understand those Amendments to impose a "race blind" mandate. Congress's legislation was far from race blind; it was all about focusing on race and preventing harmful consequences to persons that had been subordinated on account of race. The problem was not that Congress did not understand the reality of how race was operating in American society and the need to focus specifically on fixing that, but instead that Congress's legislative fixes from Washington, D.C. could not reach far enough.

Not surprisingly, Congress's mandates *directed exclusively to the former secessionist states*[117] met with strong resistance in those covered

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[109] Act of Mar. 23, 1867, Pub. L. No. 40-6, 15 Stat. 2.

[110] *Id.*

[111] Act of July 19, 1867, Pub. L. No. 40-30, 15 Stat. 14.

[112] *Id.*

[113] *See* MCKITRICK, *supra* note 53, at 495.

[114] For more on the Radicals' impeachment and near conviction of President Johnson, see *Johnson's Impeachment and Trial*, *in* RECONSTRUCTION ENCYCLOPEDIA, *supra* note 77, at 344, 344–45; MCKITRICK, *supra* note 53, at 486–509 (describing Johnson's impeachment).

[115] Act of Mar. 11, 1868, Pub. L. No. 40-25, 15 Stat. 41.

[116] *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122, 2127–28 (2022) (analyzing the Second and Fourteenth Amendments by looking to original meaning).

[117] Note here that Congress was showing its understanding that it could choose some but not all states for remedial measures, a fact that belies Justice Roberts' ground for

states, including further violence and other extralegal as well as law-based means of voter suppression. Nevertheless, Black men did vote in significant numbers, and in doing so changed for a time the secessionist states' political landscape.[118] Historians estimate that 400,000 Black men cast ballots and approximately two thousand Black men held official political office during Reconstruction.[119] In South Carolina, Black men composed a majority of South Carolina's legislature.[120] For a brief moment, Black legislators and Black-supported legislators held significant power.

During this period, Black male voting and escalating violence occurred simultaneously. Resisting states engaged in legal and extralegal practices designed to subordinate Black persons and suppress voting, such as imprisoning Black persons for petty crimes for no reason at all, and then auctioning them as laborers without pay.[121] Thus, Reconstruction's advocates learned the lesson that motivating compliance with anti-racism mandates would be extremely difficult; shockingly forceful resistance could be predicted to continue long term.

Following the enactment of the Reconstruction Acts, three southern states—North Carolina, Louisiana, and South Carolina—voted to ratify the Fourteenth Amendment after having initially rejected it. The simple reason for this switch was Black voter enfranchisement. As historian Eric Foner points out, "[w]ithout black suffrage in the South, there would be no Fourteenth Amendment."[122] With South Carolina's ratification in July 1868, the Amendment finally became part of the United States Constitution.

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invalidating key Voting Rights Acts provisions on an "equal state sovereignty" rationale. *See* Shelby Cnty. v. Holder, 570 U.S. 529, 535 (2013), discussed further at *infra* Part V.A and text accompanying note 262.

[118] Black women, of course, could not vote but were politically engaged in many ways, both during and after the Civil War. *See* THAVOLIA GLYMPH, THE WOMEN'S FIGHT: THE CIVIL WAR'S BATTLES FOR HOME, FREEDOM, AND NATION, 88, 90–91, 122–23 (2020) (pointing out such forms of engagement); *see generally* MARTHA JONES, VANGUARD: HOW BLACK WOMEN BROKE BARRIERS, WON THE VOTE, AND INSISTED ON EQUALITY FOR ALL (2020) (tracing Black women's activism from antebellum times through Reconstruction and beyond).

[119] *See, e.g.*, FRANKLIN, *supra* note 32, at 133–38 (helping begin this historiography of Black Reconstruction leaders); Eric Foner, *South Carolina's Black Elected Officials during Reconstruction*, *reprinted in* AT FREEDOM'S DOOR 166, 167 (James L. Underwood & W. Lewis Burke Jr. eds., 2000). A fascinating historiography investigating the lives of some of these Reconstruction-era Black elected officials is DOUGLAS R. EGERTON, THE WARS OF RECONSTRUCTION 93–96 (2014) (discussing the life and career of Tunis Campbell, a Georgia activist who served as a state senator and in other roles during Reconstruction, suffered incarceration, and eventually fled the state); *id*. at 245–47 (discussing formerly enslaved Senator Blanche Bruce of Mississippi and Congressman Robert Smalls of South Carolina).

[120] FONER, RECONSTRUCTION, *supra* note 32, at 354; *see also id*. at 355–56 (noting that every state had Black elected and local officials); EGERTON, *supra* note 119, at 267 (describing South Carolina's legislature as "dominated by men of color"); *id*. at 268 (providing more details on Black elected officials in South Carolina); *id.* at 269 (discussing the prevailing coalition of Black and progressive white legislators in Louisiana); *id*. at 277–80 (discussing various Black legislators who sought federal office in the 1870 elections); *id.* at 279 (discussing Senator Hiram Revels of Mississippi).

[121] PIERCE, *supra* note 56, at 147–49.

[122] FONER, SECOND FOUNDING, *supra* note 77, at xxvii. Thus, Foner further notes, it is strange—and, one might add, arguably illegitimate—that in construing the Amendment the Court has failed to consider Black Americans' interpretation of its meaning. *Id.*

In June 1868, Congress enacted legislation to readmit the secessionist states that had ratified the Amendment and allow their representatives to retake their seats in Congress.[123] By playing hardball, Congress had achieved its objective of Fourteenth Amendment ratification. But there was a Catch-22 in this strategy: Now that the resisting states had obtained readmission to the Union and representation in Congress, they could use their political power to oppose congressional Reconstruction. Congress's best leverage had been its power to deny rebel states readmission into the Union unless they voted for the Amendment. Once they were readmitted, however, Congress lost this leverage and developed a voting bloc against Reconstruction to boot.

That same year, Congress also tried to use its best ammunition against an uncooperative executive. On February 24, 1868, the House voted to impeach President Johnson after he fired Secretary of War Edwin Stanton for opposing Johnson's lenient policies toward the secessionist states. But despite the Senate prosecutors' best efforts, the Senate failed to convict Johnson in a vote that fell one vote shy of the two-thirds majority needed. In sum, the institutional participants—Congress, the President, and the secessionist states—had played hardball to the extreme. The Reconstruction Congress had, it seemed, achieved its objective of adding civil rights protections to the Constitution, but had failed to take out the obstructionist head of the federal executive branch. These general strategic questions of which political fights to take on remain a perennial conundrum, hard to evaluate except with 20/20 hindsight. But some lessons are more clearly extractable from this history. One is that hardball politics should not be eschewed in the face of hardball tactics coming from the other side. I discuss that lesson further in Part V.B.1 below.

Another lesson is abundantly clear in hindsight—and would appear to have been evident at the time had all eyes not been on the question of whether the Fourteenth Amendment would pass at all. That lesson was that passage of the Amendment could offer little long-term civil rights protection without vigorous enforcement. Both before and after the Amendment's ratification, astounding levels of terrorist violence continued in many resisting areas.[124] This violence took many forms, from large-scale public massacres of people attempting to exercise their legal rights, to clandestine acts of terror at the homes of freed persons and on roads and

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[123] *See* An Act to Admit the State of Arkansas to Representation in Congress, ch. 69, 15 Stat. 72 (1868); *see also* An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, ch. 70, 15 Stat. 73 (1868).

[124] It is important not to sensationalize this violence by exploiting "'the shocking spectacle' of an abused black body." Hannah Rosen, *In the Moment of Violence: Writing the History of Post-Emancipation Terror*, *in* BEYOND FREEDOM: DISRUPTING THE HISTORY OF EMANCIPATION 145, 145 (David W. Blight & Jim Downs, eds., 2017) (quoting SAIDIYA HARTMAN, SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA 4 (1997)). It is also important to appreciate freed persons' agency in sometimes exercising rights to self-defense in the face of such violence. *Cf.* JOSEPH BLOCHER & DARRELL A.H. MILLER, THE POSITIVE SECOND AMENDMENT 41 (2018) (describing freed persons' recognition of their rights under the Second Amendment). On the history of the Second Amendment in Reconstruction, see Robert J. Cottrol, *Introduction*, *in* GUN CONTROL AND THE CONSTITUTION xxi–xxiv (Robert J. Cottrol ed., 1993). These subjects are beyond the scope of this Article but deserve mention as important aspects of the historical literature.

byways—often through "night riding," where domestic terrorists hid themselves both to avoid accountability and inflict maximum fear.[125] Historians have only partial information about the full extent of this violence.[126]

This massive resistance undoubtedly contributed to the seemingly rapid change of mind that moderate Republicans displayed in 1868 about supporting a constitutional amendment to protect the rights of Black men to vote. A key aspect of this switch involved the rhetoric of self-help. Advocates argued for giving Black men a secure right to vote in the Constitution on the ground that this would allow Black men to protect the rights of their race rather than having to rely on Congress to do so. A Fifteenth Amendment, they argued, would help ensure that civil rights protections could not be taken away in the future by Congresses less committed to civil rights. Indeed, this prospect had already materialized as the former secessionist states gained readmission to the Union and began to reassert power in Congress. If Congress could not be counted on to vigorously push for racial justice in the long run, then perhaps the freed people could protect themselves through voting. This is another key lesson pertinent today: Law in the books, even in an amendment to the Constitution, may be insufficient by itself, especially in the face of

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[125] For general treatments, see generally PAUL ORTIZ, EMANCIPATION BETRAYED 9–32 (2005) (describing Reconstruction era violence in Florida and Black persons' resistance); GEORGE C. RABLE, BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION (2d ed. 2007) (summarizing violence in Reconstruction and its political effects).

[126] Although historians have found it difficult to determine with precision the scope of this violence, a brief sketch can help illustrate the enormous gap between what the Fourteenth Amendment's drafters regarded themselves as setting out to do and what was happening on the ground. Some incidents are well known, such as the May 1866 massacre in Memphis, Tennessee, which involved a white mob attack on that city's Black community, resulting in the deaths of approximately four dozen persons, as well as the rape of five Black women, severe beatings, robberies, and massive destruction of Black owned property. James Gilbert Ryan, *The Memphis Riots of 1866: Terror in a Black Community during Reconstruction*, 62 J. NEGRO HIST. 243, 243 (1977). The Major in charge of the Freedmen's Bureau in Memphis attributed the cause of the violence to labor conflict; historians also point to the inversion of the usual social hierarchy that came from Black soldiers wearing uniforms and carrying firearms before the conflagration. *See* Kevin R. Hardwick, *"Your Old Father Abe Lincoln Is Dead and Damned": Black Soldiers and the Memphis Race Riot of 1866*, 27 J. SOC. HIST. 109, 109–10 (1993).

Two months later, on July 30, 1866, an even bigger massacre occurred in New Orleans, Louisiana, an incident that had its roots in unionists' attempts to develop a new constitution for that state. *See generally "An Absolute Massacre" – The New Orleans Slaughter of July 30, 1866*, NAT'L PARK SERV., https://www.nps.gov/articles/000/neworleansmassacre.htm [https://perma.cc/2FC7-9867] (last updated July 30, 2020); JAMES G. HOLLANDSWORTH, JR., AN ABSOLUTE MASSACRE: THE NEW ORLEANS RACE RIOT OF JULY 30, 1866 (2001) (discussing the massacre, its causes, and its consequences).

If racial conflagration constituted one type of violence, another more hidden, individualistic form of terror also appears in Freedmen's Bureau reports. *See, e.g.*, *Letter to the Freedmen's Bureau following the Murder of a Teacher (1867)*, OXFORD AFR. AM. STUD. CTR. (May 31, 2013), https://oxfordaasc.com/display/10.1093/acref/9780195301731.001.0001/acref-9780195301731-e-34109;jsessionid=7ACC3A69C1EA20992835612C6C0B9AFF [https://perma.cc/KHC4-C6R4] (reporting the shooting of a teacher); *Report on Freedmen Murdered in Houston County, Texas (1866)*, OXFORD AFR. AM. STUD. CTR. (May 31, 2014), https://oxfordaasc.com/display/10.1093/acref/9780195301731.001.0001/acref-9780195301731-e-34157 [https://perma.cc/6Q8Y-AR2L] (reporting on two dozen attacks by whites on freed persons).

substantial resistance on the ground. The People affected need a means of self-help to give such law reality, and the key means of self-help in the political process is the right to vote and run for office. This is a lesson racial justice advocates would do well to take to heart today as the country witnesses the rise of the racist extreme right. Politics matters. All of the doctrinal brilliance of our Nation's top scholars means little if the members of the political branches charged with enforcing law lack sympathy with reformers' goals.

In arriving at this insight, the Thirty-ninth Reconstruction Congress began the process of developing a new political psychology connecting human nature to government functioning that was very different from the political psychology reflected in the original Constitution. The Reconstruction advocates realized what the Black abolitionists had been saying all along: No rights are safe without the ability to exercise political power. The Nation's founders had thought that the political elite could be counted on to best protect everyone's rights and avoid the influence of factions,[127] but the Reconstruction advocates saw that local leaders would only protect the rights of their own class. They began, in other words, to arrive at new understandings of the relationship between socio-political psychology and the working of law. Put less abstractly, the Nation's founders believed in republican government run by a limited electorate of white, landed men. United States history showed the evil consequences of that assumption. Under an electorate that did not include everyone whose interests were affected by government, those who lacked voting privileges were at risk of—and suffered—severe abuse by the groups who were granted political power through the vote. That insight revolutionized key foundational assumptions underlying the United States constitutional system. It became increasingly clear that those affected by law should vote on who should represent them in making law.

It was in the Fifteenth Amendment that this transition began to occur in the articulation of rights in the Nation's foundational law. The transition was, of course, only partial in the Fifteenth Amendment, since it left in place many voting exclusions based on, for starters, sex—thus continuing to disenfranchise fifty percent of the population[128]—as well as education, religion, and taxes, as discussed in Part III below.

III. RECONSTRUCTION AFTER 1868: THE FIFTEENTH AMENDMENT AND THE FORCE ACTS OF 1870 AND 1871

Ratification of the Fifteenth Amendment and passage of additional Reconstruction–era legislation brought new lessons relevant today, including the need for both strong federal civil rights oversight and

[127] *See* Susan D. Carle, *Why the U.S. Founders' Conceptions of Human Agency Matter Today: The Example of Senate Malapportionment*, 9 TEX. A&M L. REV. 533, 550–54 (2022) (discussing the founders' views about the political elite's leadership role).

[128] The importance of continued political exclusion on the basis of gender is thus an enormously important topic deserving its own extended treatment. Here it will have to suffice to point out that gender is a big part of Reconstruction's story, which a focus on law tends to make invisible given gender exclusion from the making of law. The basic point for purposes of this Article is that the Fifteenth Amendment promoted a discourse that would extend far into the future about the limits of law alone in protecting rights.

empowering citizens to protect their own rights through voting and otherwise participating in the political process without impediment.

Six months after the difficult two-year process of ratifying the Fourteenth Amendment, Congress took up drafting the Fifteenth Amendment. Although some radicals in Congress had been arguing for Black men's voting rights starting with the Thirteenth Amendment,[129] as already noted, Republican moderates had opposed requiring Black men's suffrage in the Constitution.[130] These legislators were not convinced that the majority of newly emancipated freedmen were "ready" to exercise the franchise.[131] They still viewed voting as a privilege to which only well-educated men should be entitled, rather than a right that should be extended to all citizens affected by the laws that elected officials make or enforce. Black activists and white radicals were far ahead of Congress on these questions. As Mary Ann Shadd Cary told Congress, "The colored women of this country though heretofore silent in great measure upon this question of the right to vote . . . have neither been indifferent to their own just claims under the amendments, in common with colored men, nor to the demand for political recognition so justly made every where throughout the land."[132]

Shadd Cary's view encompassing both women and men in the fundamental right to vote was ahead of its time in comparison to the views of the congressional majority. Her vision saw the greater potential for near universal voting that would eventually be realized four decades later with enactment of the Nineteenth Amendment.[133] Although the majority of members of Congress were unable to appreciate that vision, they started

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[129] *See* Wang, *supra* note 29, at 2178; KRUG, *supra* note 36, at 222–23 (noting that very few senators favored Black suffrage in 1863). Even Stevens, as several historians note, had been somewhat lukewarm on this idea until about 1867. *See, e.g.*, GILLETTE, *supra* note 30, at 34 (calling Stevens "markedly cool on the subject in 1865"); BRUCE LEVINE, THADDEUS STEVENS: CIVIL WAR REVOLUTIONARY, FIGHTER FOR RACIAL JUSTICE 187 (2021) (noting that Stevens "had not stood in the vanguard on the question of black voting"); *id.* at 189 (surmising what reasons accounted for Stevens' equivocation on Black voting, including fears that this issue would jeopardize other goals and that "freedmen, as an uneducated, propertyless, and impoverished class, might become political putty in the hands of their wealthy employers," and noting that Stevens had opposed universal male suffrage earlier in his life out of concern for the dangers of "landless class[es]"). Sumner, too, initially favored what he called impartial, rather than universal, suffrage, which would have prohibited racial discrimination but allowed for some literacy qualifications; he changed his mind, according to his biographer, after noticing the high intelligence of many freed persons who could not read or write. DONALD, *supra* note 34, at 201. As early as 1864, Sumner also saw that without Black votes Reconstruction was doomed. *Id.* at 201 (quoting Sumner stating that "[t]heir votes are as necessary as their musquets [sic]. . . . Without them, the old enemy will reappear and under forms of law, take possession of the governments.").

[130] *See* HEATHER COX RICHARDSON, THE DEATH OF RECONSTRUCTION 42 (2004) ("Unlike radicals, moderate and conservative Republicans initially joined Democrats in disapproving of black suffrage. . . . [t]he argument for African-American suffrage ran counter to the traditional belief that, to understand his interests, a voter must be educated.").

[131] For a compilation of members of Congress's statements along these lines, see GILLETTE, *supra* note 30, at 31–32.

[132] JONES, *supra* note 118, at 117 (quoting Shadd's congressional testimony). Many other key Black activists saw the same necessary connection between voting rights for Black men and all women. *See, e.g.*, *id.* at 65, 103 (discussing Sojourner Truth and Frederick Douglass's outspokenness about the need to grant both Black men and all women the vote).

[133] U.S. CONST. amend. XIX.

in motion, through their adoption of the Fifteenth Amendment, a process that would eventually lead there.

The first step in that process required Congress to consider a new amendment. The change of heart among members of Congress on the question of constitutionalizing Black men's voting rights took place in a striking short time. By early 1869, less than a year after the Fourteenth Amendment's ratification, the opinions of enough members of Congress had taken a 180-degree turn to see a draft of the Fifteenth Amendment emerge from committee. The reason for this sudden shift lay in a lesson members of Congress learned in the battle for the Fourteenth Amendment's ratification and the widespread defiance of the principles that Amendment embodied: Words in the Constitution alone would be insufficient to bring about civil rights equality.

Another important point of note here is that the Republicans in Congress initially believed they had created sufficient incentives for Black men's enfranchisement in adopting Section 2 of the Fourteenth Amendment, [134] which purported to reduce states' representation in federal elections in proportion to their disenfranchisement of adult male citizens.[135] Stevens had put this provision into the Fourteenth Amendment as an alternative to an outright grant of voting rights, believing it would lead states to stop disenfranchising voters on the basis of race.[136] But Stevens turned out to be dead wrong on this; the Fourteenth Amendment's Section 2 has never been enforced.[137] Here again, a lesson for today emerges: without enforcement, even the clearest laws are only as effective as the will that exists to enforce them. The clear words of Section 2 of the Fourteenth Amendment stand as a legal nullity.

A. Congress's Changed Perception

A lot had happened in the short intervening period between Congress's consideration of the Fourteenth and Fifteenth Amendments. Resisting states had repudiated the Fourteenth Amendment until the Reconstruction Acts compelled them to ratify it to gain reentry into the

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[134] On activists' later debates about whether to push for Section 2 enforcement, see CARLE, DEFINING THE STRUGGLE, *supra* note 64, at 141–44 (discussing the Crumpacker Resolution, which would have called for reducing states' electoral strength according to their disenfranchisement of Black male voters). In the end, the decision was against such a campaign because success would simply encode race discrimination in the Nation's electoral system rather than eliminate it. *Id.*

[135] Section 2 provides: " . . . when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." U.S. CONST. AMEND. XIV, § 2.

[136] *See* LEVINE, *supra* note 129, at 178–80 (discussing Stevens' compromise proposal).

[137] *See* Eden Bernstein, *The Worrisome Ghost of the Fourteenth Amendment's Second Section*, U. CHI. L. REV. ONLINE (April 12, 2020), https://lawreviewblog.uchicago.edu/2020/04/12/worrisome-ghost-eden-bernstein/ [https://perma.cc/Z4V9-DUB2] ("Section Two's mechanism for punishing states has never been invoked.").

Union, and an epidemic of violence continued in resisting states.[138] These developments vividly demonstrated that resisting states would not cooperate with the goal of achieving civil rights equality for freed persons based merely on new words added to the Constitution.[139]

The realpolitik of the Republican Party's likely future on a national scale mattered too. Unlike the 1866 national elections, the 1868 elections saw diminishing votes for the party. To be sure, Republican presidential nominee Ulysses S. Grant prevailed convincingly in electoral votes over his Democratic opponent, but the popular vote in many states had been close.[140] In a number of the secessionist and border states that Grant carried, he needed the votes of the freedmen to win.[141] Grant also benefited from the fact that Virginia, Texas, and Mississippi still had not ratified the Fourteenth Amendment and thus were not yet "restored" into the Union at the time of the election. At the same time, significant numbers of southern white men remained ineligible to vote because of their prior Confederate leadership roles. These circumstances would not exist much longer.[142] Thus, in a classic example of critical race theorist Professor Derrick Bell's interest-convergence thesis,[143] the Republicans became acutely aware that their party's future depended on maintaining high levels of Black voter participation in the South.[144] The Reconstruction Acts and the new state constitutions written to comply with their requirements provided for voting rights for Black men, but these forms of law could easily be changed. What was needed, most congressional Republicans came to believe, was an amendment protecting Black suffrage as a federal constitutional right.[145]

This change in perception based in experience and political reality also gave rise to a sense of urgency. With its end of session fast approaching

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[138] FONER, RECONSTRUCTION, *supra* note 32, at 342–43 (discussing violence and the rise of the Ku Klux Klan).

[139] BRODIE, *supra* note 54, at 299 (noting the growing Republican belief that "the freedmen could never get police protection without suffrage"); DONALD, *supra* note 34, at 428 (noting that it was the "recalcitrance of the Southern whites" rather than Sumner's persuasiveness that led senators to eventually vote with his radical bloc).

[140] *See* Wang, *supra* note 29, at 2213–15 (describing the importance of southern Black men's votes to Grant's victory in the 1868 election); GILLETTE, *supra* note 30, at 40 (noting Grant's dependence on Black votes).

[141] FONER, SECOND FOUNDING, *supra* note 77, at 98; EGERTON, *supra* note 119, at 241 (observing that the Republicans attributed their success in the 1868 presidential election to what they estimated as 400,000 Black votes).

[142] *See generally* CHARLES HUBERT COLEMAN, THE ELECTION OF 1868: THE DEMOCRATIC EFFORT TO REGAIN CONTROL (1933) (describing the resurgence of the Democratic Party's popularity in the 1868 election, particularly among southern white men).

[143] *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (arguing that the "interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites").

[144] BRODIE, *supra* note 54, at 299 ("Most Republicans were now convinced . . . that the party needed the Negro vote"); FONER, SECOND FOUNDING, *supra* note 77, at 98 (noting the connection between the statistics regarding Grant's election and broader calls for enfranchising Black voters); FONER, RECONSTRUCTION, *supra* note 32, at 344 (describing a changed mood in Congress as the radical generation faded from the scene).

[145] *See, e.g.*, FONER, SECOND FOUNDING, *supra* note 77, at 101 (noting the rapid change of heart on Black enfranchisement by conservative Republican Senator William M. Stewart of Nevada).

on March 4, 1868, the Fortieth Congress saw that it had little time left.[146] The next Congress would retain an overwhelming majority of Republicans in the Senate, but Republicans had lost twenty seats to Democrats in the House, retaining their majority by a slimmer margin.[147] The mood among Republicans had also changed. As the Radical Republicans aged, the idealism with which Reconstruction had begun faded as well, replaced by younger Republicans' pragmatic concerns about the future of the party and their political careers.[148] Stevens' death in August 1868 personified this shift.[149] And because participants sensed that this might be their last chance to secure protections for the country's formerly enslaved citizens, even many radicals became pragmatic. The great abolitionist anti-compromiser Wendell Phillips expressed this change of heart in his national abolitionist paper, *The National Anti-Slavery Standard*, when he exclaimed on February 20, 1869: "For the first time in our lives we beseech . . . to be a little more *politicians* and a little less *reformers*." [150]

A flurry of activity in both chambers took place as various drafts changed hands and the members debated the content of another constitutional amendment.[151] Even though the Radical Republicans had previously argued that voting rights could be secured without an amendment,[152] and the moderates had opposed a constitutional amendment, almost all now agreed that the better approach would be to inscribe voting rights in the Constitution.

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[146] Kurt Lash, *Introduction to Part 2A*, *in* 2 ESSENTIAL DOCS., *supra* note 89, at 435, 436.

[147] COLEMAN, *supra* note 142, at 363–64.

[148] *See* BRODIE, *supra* note 54, at 301 (describing Stevens as "feverishly intent on creating before he died what he called 'a political paradise,' and . . . racked with fear that he would not live long enough"). Sumner, too, was reaching the end of his life and career, though his uncompromising personality and distaste for compromise led him to have less influence than Stevens in Congress. *See* DONALD, *supra* note 34, at 238–39 (noting that "Stevens was an organization man, who worked through committees and exerted influence through his control of the machinery of the House of Representatives," whereas Sumner "announced principles, as from on Mount Sinai, and deplored the compromises needed to transform ideals into legislative reality"); *see also* FONER, RECONSTRUCTION, *supra* note 32, at 229–230 (discussing the very different styles, personalities and roles of Stevens and Sumner in Congress). On "liberal" Republicans' retreat from the goals of Reconstruction, see HAROLD M. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION 530–34 (1973).

[149] FONER, RECONSTRUCTION, *supra* note 32, at 344.

[150] Wendell Phillips, *The Senate and the Proposed Amendment*, NAT'L ANTI-SLAVERY STANDARD, Feb. 20, 1869, *reprinted in* 2 ESSENTIAL DOCS., *supra* note 88, at 532, 532.

[151] Kurt Lash, *Introduction to Part 2A*, *supra* note 146, at 436.

[152] Sumner spoke against adopting any amendment at all, laying out three reasons for his position: (1) it was not needed because the Constitution already secured the right of all citizens to vote so that, with the abolition of slavery, Black men already possessed this right; (2) future Congresses need not be checked because Black male suffrage "will be a permanent institution as long as the Republic endures;" and—perhaps his most salient and strategic concern—(3) proposing a constitutional amendment conceded that this right did not exist without an amendment. *See Suffrage and Office Holding Amendment, Speech of Charles Sumner*, US SENATE (Feb. 5, 1986), *reprinted in* 2 ESSENTIAL DOCS., *supra* note 88, at 498, 500 (quoting Sumner that "nobody has yet been able to enumerate the States whose votes can be counted on to assure its ratification"); *see also* DONALD, *supra* note 34, at 352–53 (adding more details about Sumner's opposition and Republicans' frustration with him for it).

A key question Congress debated concerned the scope of a voting rights amendment. Should it cover discrimination based only on race or also on related factors such as education and property? Should the amendment articulate a positive right to vote or merely prohibit discrimination in voting? Again, the Republicans disagreed on how far to go in modifying traditional principles of federalism that granted the states control over voter qualifications. The original Constitution saw voting as a political privilege, which states had the authority to bestow as they saw fit without federal government interference. The Democrats invoked these arguments to oppose an amendment.[153] Some Republicans were hesitant to go too far in upsetting traditional federalism as well.[154] They felt more comfortable prohibiting states from discriminating on the basis of race in voting but otherwise wanted to allow states to continue to exercise broad authority over setting voter qualifications. Many of the same legislators involved in drafting the Fourteenth Amendment took the lead in drafting the Fifteenth as well. One of these was moderate Republican John A. Bingham of Ohio, who had been the Fourteenth Amendment's chief drafter. Displaying his faith in law to solve racism, Bingham argued that, if Congress adopted a broad voting rights amendment, "abuses by states will hereafter be impossible."[155] But Bingham had also come to understand that *how* Congress wrote the law would be of great importance. Showing prescience in forecasting how states would dodge a federal voting rights mandate, Bingham warned that states could easily avoid granting voting rights to Black men by imposing education and property qualifications. For this reason, Bingham argued for language that would require nearly universal adult male suffrage (except for persons who in the future engaged in rebellion or had been convicted of serious crimes).[156] The language he proposed would have stated: "The right of citizens of the United States to vote and hold office shall not be denied or abridged by any state on account of race, color, nativity, property, creed, or previous condition of servitude."[157] Bingham acknowledged that this approach would prohibit states from enforcing many other popular qualifications for voting, such as education and religious qualifications (as imposed in New Hampshire).[158] Nevertheless, Bingham argued, without his proposal, "an aristocracy of property may be established, [or] an aristocracy of intellect. . ."[159]

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[153] *See, e.g., Suffrage Amendment, Speech of Charles A. Eldridge (D-WI), Debate*, US HOUSE (Jan. 27, 1869), *reprinted in* 2 ESSENTIAL DOCS., *supra* note 88, at 463, 465 (arguing that "[t]he long-conceded right of the States to determine for themselves who of their citizens shall exercise the right of suffrage within their respective jurisdictions is now for the first time to be taken away").

[154] *See, e.g*., RALPH J. ROSKE, HIS OWN COUNSEL: THE LIFE AND TIMES OF LYMAN TRUMBULL 139, 154 (1979) (explaining why moderate Republican Trumbull was not enthusiastic about the Fifteenth Amendment as an unconstitutional encroachment on states' rights to set voter qualifications, though he did in the end vote for it).

[155] *Suffrage Amendment, Speech of John Bingham, Debate*, US HOUSE (Jan. 29, 1869), *reprinted in* 2 ESSENTIAL DOCS., *supra* note 88, at 485, 486 [hereinafter *Bingham Speech*].

[156] *See id*. at 486 (quoting the language of Bingham's proposal).

[157] *Suffrage Amendment, Addition of Language Protecting the Right to Hold Office*, US HOUSE (Feb. 20, 1869), *reprinted in* 2 ESSENTIAL DOCS., *supra* note 88, at 532–33 [hereinafter *Feb. 20 House Debate*].

[158] *Bingham Speech*, *supra* note 155, at 486.

[159] *Id.*

Bingham's language was similar to what Senator Henry Wilson proposed in the Senate, which would prohibit "discrimination in the exercise of the elective franchise and right to hold office on account of race, color, nativity, property, education, or creed."[160] But others, including Republican Congressman George Boutwell of Massachusetts, demurred,[161] and it was their view that prevailed. The version of the Fifteenth Amendment that Congress ultimately approved prohibited discrimination solely on the basis of race and color in the states' decisions about granting suffrage rights. This language neither defined voting as a fundamental constitutional right nor covered the kinds of closely related qualifications, such as education and property ownership, which former confederate states would soon use to disenfranchise virtually all Black citizens for almost a century.[162]

In retrospect, the Fortieth Congress's drafting decisions on the Fifteenth Amendment stand as yet another example of a missed opportunity to more effectively safeguard civil and political rights.[163] But the Amendment also represented a start to a process of expanding the franchise that continued far into the future.[164]

Like the Thirteenth and Fourteenth Amendments, the Fifteenth Amendment placed great faith in the United States Supreme Court and lower federal courts to energetically enforce legislation Congress would promulgate through its specified enforcement powers. Even at the time of its drafting, however, there were signs that the Court could not be counted on as an ally. Staunch abolitionist Salmon P. Chase was the Chief Justice of the Court, but its record had not been notable for supporting congressional Reconstruction.[165] After dissenting in the *Slaughter-House*

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[160] *Suffrage and Office Holding Amendment, Debate*, US SENATE (Feb. 8, 1869), *reprinted in* 2 ESSENTIAL DOCS., *supra* note 88, at 500, 511.

[161] *See, e.g.*, *Feb. 20 House Debate*, *supra* note 157, at 533 (quoting Boutwell noting that similar proposals was already rejected by the House and Senate).

[162] One consideration the Amendment's drafters thought about was the fact that women lacked voting rights. To this point, some Republicans responded that they were all for granting women voting rights too. *See, e.g.*, *Suffrage and Office Holding Amendment, supra* note 160, at 516. Others found the proposition that women should vote absurd, *id*. at 515, demonstrating that Reconstruction-era prejudice involved not only race but also gender.

[163] Of course, the Court may have disregarded more robust language in any event, just as it ignored the antidiscrimination mandate in the Fifteenth Amendment for so many years, as discussed further in Part IV *infra*.

[164] These later Amendments include the Nineteenth Amendment granting women the right to vote, the Twenty-fourth Amendment banning poll taxes as a voter qualification in federal elections, and the Twenty-sixth Amendment granting the right to vote to citizens eighteen years of age or older. U.S. CONST. amends. XIX, XIV, XXVI. The Voting Rights Act of 1965, as amended, is one example of expansive voting rights legislation. Pub. L. No. 89-110, 79 Stat. 437.

[165] In *Ex Parte Milligan*, 71 U.S. 2, 127 (1866), for example, the Court ruled that Congress and the federal executive could not establish trials by military commission in any location in which civilian courts were operating—in other words, in any location except actual theaters of war. This ruling thus invalidated the provisions of the 1863 Freedmen's Bureau Act that established such trial procedures and knocked out one of the tools the federal government had to protect freed persons against violence and other deprivations of their civil rights (though the case is also important in the broader picture in protecting United States civil liberties). After this decision, Johnson issued orders dismissing pending military trials of civilians, thus granting impunity to many who had committed atrocities and were awaiting trial or had already been convicted in military courts. *See* CHARLES

Cases,[166] Chase died in 1873, and his successor would preside over the Court's dismantling of many legal aspects of Reconstruction, as discussed further in Part IV.

One virtue of the Fifteenth Amendment was that Congress's intent was clear. In plain language, the Fifteenth Amendment declared it unlawful to deny the right to vote based on race, color, or previous condition of servitude. To the extent that this Amendment was to be the self-help prong of the Reconstruction advocates' agenda, strong enforcement could have made a real difference. In different political circumstances, the Court might have had little problem understanding Congress's unambiguously stated intent, which was very different from the vague and general language used in the Fourteenth Amendment. In the end, however, that made little difference, as discussed in Part IV below. The Court was bent on dismantling Reconstruction regardless of what the Amendments said.

On February 25 and 26, 1869, the House and Senate, respectively, voted with the requisite margins to pass the stripped-down, narrow version of the Fifteenth Amendment that became law.[167] The states' ratification of the Fifteenth Amendment presented the next challenge. Ironically, it was not the southern states that posed the most difficulty on this score, because the Reconstruction Acts had forced them to enfranchise Black male voters and establish Reconstruction governments that could be expected to support the Amendment. The states quickest to ratify were southern states that had recently won readmission to the Union. These states had substantial Black voting populations in 1868 as well as Republican majorities in their state legislatures, composed of a mix of Black and white legislators—an image offering a glimpse, during its brief existence, of what a nascent post-Reconstruction era political world might have looked like if history had turned out differently.

The anti-amendment states were in the North and West, because most of these states did not grant—and were adamantly against granting—equal voting rights on the basis of race. In other words, racism was rife in

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WARREN, THE SUPREME COURT IN UNITED STATES HISTORY VOLUME 3, at 164–65 (1926). Following *Ex Parte Milligan*, Congress passed legislation over presidential veto to strip the Court of its jurisdiction to hear habeas corpus appeals. *See* Act of March 27, 1868, Pub. L. No. 40-34, 15 Stat. 44. In *Ex Parte McCardle*, 74 U.S. 506, 511–12 (1868), the Chase Court held that it lacked jurisdiction to hear a habeas appeal in a Reconstruction Act case, thus in effect signaling an implicit truce, for a time, between the Court and Congress over the constitutionality of Reconstruction-era legislation. The Chase Court did not consider a case raising the constitutionality of Reconstruction legislation until the Slaughter-House Cases, 83 U.S. 36 (1873), as discussed in Part IV *infra*.

[166] In the *Slaughter-House Cases*, the Court majority held, inter alia, that the Privileges or Immunities Clause of the Fourteenth Amendment granted only a very limited set of national citizenship rights, such as the rights to access seaports and travel to the seat of government. *Slaughter-House Cases*, 83 U.S. at 78–80. In response, dissenting Justice Stephen J. Field remarked that, if this is all the Fourteenth Amendment had been designed to accomplish, Congress and the People had worked themselves up about practically nothing. *Id.* at 96 (Field, J., dissenting). For further discussion, see Part IV *infra*.

[167] *Suffrage Amendment, Debate and Passage*, US SENATE (Feb. 26, 1869), *reprinted in* 2 ESSENTIAL DOCS., *supra* note 88, at 536, 536–38 (showing dates and tallies of the final votes for the Fifteenth Amendment).

the "free states" too.[168] Those states did not direct their racism exclusively at Black Americans; California, Nevada, and Oregon rejected the Fifteenth Amendment because it would enfranchise their substantial Chinese populations.[169] The border states of Delaware, Maryland, and Kentucky voted it down out of fears that enfranchising Black voters would alter their electoral dynamics.[170] After Democrats won a majority in New York's state legislature, they voted to rescind the state's prior ratification (and then rescinded that vote, too).[171]

Georgia's vote on February 2, 1870, along with Iowa's vote the next day, pushed the state ratification tally over the three-quarters hurdle. President Grant, in a special message to Congress on March 30, 1870, announced that the Fifteenth Amendment was law, describing it as "a measure of grander importance than any other one act of the kind from the foundation of our free Government to the present day."[172] Supporters were of course jubilant about the Amendment's ratification, but the situation in the secessionist and border states presented little to celebrate. By 1870, the Klan and like-minded groups had spread across the region, changing moderate Republicans' calculus as to what additional steps would be necessary to protect Black citizens' civil rights.[173] Alert to the threats such violence posed both to its Reconstruction work and future electoral prospects, the still solidly Republican Congress passed three additional laws to enforce the provisions of the Fourteenth and Fifteenth Amendments, acting under the authority these Amendments granted in their enforcement clauses.

B. The Enforcement Acts

The first of Congress's new statutes aimed at protecting freed persons' rights—including the now constitutionally enshrined right of Black men to be free from discrimination in voting—was the Enforcement Act of May 31, 1870.[174] That law made it a federal crime to interfere with a person's right to vote without "distinction of race, color, or previous

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[168] States outside the South that restricted or denied voting rights on the basis of race included Connecticut, Pennsylvania, New Jersey, New York, Illinois, Iowa, Ohio, Michigan, Minnesota, Oregon, Nevada, and California. *See* Wang, *supra* note 29, at 2162–63 (examining which states restricted or denied suffrage on the basis of race at the time of the Fifteenth Amendment's ratification process); *see also* ALLAN J. LICHTMAN, THE EMBATTLED VOTE IN AMERICA 79 (2018) ("Paradoxically, while most northern states denied black people the ballot, in former Confederate states many southern blacks voted in the presidential election of 1868"); GILLETTE, *supra* note 30, at 25–27 (discussing many northern state referenda rejecting Black male suffrage by substantial majorities in the Reconstruction era).

[169] *See id.* at 153–55 (analyzing western patterns of opposition to the Fifteenth Amendment).

[170] *See id.* at 80 (noting worries about the political effects of the Fifteenth Amendment in closely divided northern and border states); *see also id.* at 105 (providing more demographic statistics showing the political consequences provoking border states' opposition).

[171] *Ratification of the Fifteenth Amendment Rescinded*, NY TIMES, Jan. 6, 1870, at 1, *reprinted in* 2 ESSENTIAL DOCS., *supra* note 88, at 585, 585–86.

[172] Ulysses S. Grant, *Message to Congress Announcing the Ratification of the Fifteenth Amendment* (Mar. 30, 1870), *reprinted in* 2 ESSENTIAL DOCS., *supra* note 88, at 595, 596.

[173] FONER, RECONSTRUCTION, *supra* note 32, at 454–56.

[174] Act of May 31, 1870, Pub. L. No. 41-114, 16 Stat. 140.

condition of servitude"[175] and to prevent or intimidate a person from exercising the suffrage right.[176] It further prohibited persons to "band or conspire together, or to go in disguise upon the public highways, or upon the premises of another" with the intent to violate citizens' constitutional rights.[177] A second act, which became law on February 28, 1871, decreed that the administration of national elections in specific jurisdictions would fall under the control of the federal government and that federal judges and United States marshals had authority to supervise local polling places.[178] A third act, enacted in April 1871, sometimes referred to as the Ku Klux Klan Act, authorized the President both to use federal armed forces against persons engaged in conspiracies to deny equal protection of the law and to suspend habeas corpus rights to enforce the acts.[179] All three Enforcement Acts defined conspiracies to deprive persons of their civil and political rights as federal crimes.

Instead of leaving enforcement to local officials, the Enforcement Acts assigned prosecutorial power to federal attorneys. To facilitate the United States Attorney General's prosecution of violations of the Enforcement Acts, Congress passed yet another act to establish the Department of Justice.[180] Congress thus brought the power of the federal government to bear against state and local officials who interfered with Black voting as well as against private parties who used violence to intimidate persons attempting to vote or otherwise exercise their rights. These acts, along with President Grant's support of federal prosecutions of the Klan and other white-supremacist terrorists, produced an impressive spate of indictments, totaling somewhere between 1,000 and 2,500 cases in the early 1870s, along with more than 600 convictions.[181] According to Reconstruction historian Eric Foner, this effort "crush[ed] the Ku Klux Klan" while it was occurring.[182] Thus, Reconstruction provides a further pertinent lesson: federal prosecution of civil rights violations can help fight racist violence.

Four years later, the Forty-third Congress passed a final piece of Reconstruction legislation expanding the specific civil rights protected under federal law. On February 4 and 27, 1875, the House and the Senate,

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[175] *Id.* § 2.

[176] *Id.* §§ 3, 4, and 5.

[177] *Id.* § 6. The Act also made it unlawful for anyone to interfere with the civil rights protected in the Civil Rights Act of 1866, Pub. L. No. 39-31, 14 Stat. 27, including the right to make contracts and enjoy equal protection of the laws. Act of May 31, 1870, at § 16.

[178] Act of Feb. 28, 1871, Pub. L. No. 41-99, 16 Stat. 433. As this Act demonstrates, Congress clearly selectively targeted its enforcement powers under the Fourteenth and Fifteenth Amendments to some states and not others. *Compare id. with* Shelby Cnty. v. Holder, 570 U.S. 529, 535 (2013) (holding portions of the Voting Rights Act of 1965 unconstitutional for treating various states differently, violating states' "equal sovereignty").

[179] Act of Apr. 20, 1871, Pub. L. No. 42-22, 17 Stat. 13.

[180] Act of June 22, 1870, Pub. L. No. 41-150, 16 Stat. 162.

[181] *See 150 Years of the Department of Justice*, THE U.S. DEP'T OF JUST., justice.gov/history/timeline/150-years-department-justice#event-1195101 [https://perma.cc/V3XH-8PBV] (last updated Aug. 17, 2022); ROBERT M. GOLDMAN, RECONSTRUCTION AND BLACK SUFFRAGE: LOSING THE VOTE IN *REESE* AND *CRUIKSHANK* 38 (2001) (discussing case statistics); FONER, SECOND FOUNDING, *supra* note 77, at 121 (putting the total number of cases at 2,500).

[182] FONER, SECOND FOUNDING, *supra* note 77, at 121.

respectively, approved, on party-line votes,[183] the Civil Rights Act of 1875, named in honor of Senator Sumner, who had recently died after pushing for such legislation for many years.[184] The new act reaffirmed the basic rights in the Civil Rights Act of 1866, including protection of the rights to make contracts, use the courts, hold property, and enjoy equal protection of law, but also expanded antidiscrimination protections to the use of public accommodations and transportation.[185] It also provided for federal court jurisdiction over all cases brought under the Act.[186] President Grant, at the midpoint of his only term in office, signed the measure into law on March 1, 1875.[187]

Yet even as Congress and the executive expanded federal civil rights protections and aggressively pursued enforcement, the end of Reconstruction was almost at hand. An economic depression in 1873 caused hardship in many regions of the country; that situation became far more salient in white voters' minds than protecting civil rights.[188] In the 1874 midterm elections, voters delivered landslide victories to Democratic candidates at both state and federal levels.[189]

Two years later, in the Compromise of 1877 that resolved the disputed presidential election of 1876, Republican President-elect Rutherford B. Hayes ended Reconstruction, removing the federal presence and allowing free reign to the so-called Redeemer Democrats who already controlled a number of southern state governments.[190] At this point, the folly of the Reconstruction-era leaders' faith in the national government's commitment to civil rights equality became clear. As longstanding radical abolitionist and president pro tempore of the Fortieth Senate Benjamin Wade expressed, Hayes' conduct left him with "indignation and a bitterness of soul that I never felt before. . . I had been deceived, betrayed, and even humiliated . . . I feel that to have emancipated these people and then to leave them unprotected [is] a crime as infamous as to have reduced them to slavery once they are free."[191]

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[183] *See To Pass H.R. 796*, GOVTRACK, https://www.govtrack.us/congress/votes/43-2/h380 [https://perma.cc/Y8Z2-UFGH] (showing the House's Feb. 4, 1875, vote); *To Pass H.R. 796*, GOVTRACK, https://www.govtrack.us/congress/votes/43-2/s379 [https://perma.cc/H8XK-9A5Q] (showing the Senate's Feb. 27, 1875, vote, with no Democrats voting yes and four Republicans voting no).

[184] *See* DONALD, *supra* note 34, at 531–39, 586–87 (explaining this sequence of events). True to form, more moderate Republicans such as Senator Trumbull initially opposed the measure on the ground that it was a "social equality bill." *Id.* at 545.

[185] Act of Mar. 1, 1875, Pub. L. No. 43-114, 18 Stat. 335.

[186] *Id.* at § 3.

[187] *Landmark Legislation: Civil Rights Act of 1875*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/CivilRightsAct1875.htm [https://perma.cc/HFK9-HE6J] (last visited Feb. 25, 2023).

[188] FONER, RECONSTRUCTION, *supra* note 32, at 512–18 (describing the effects of this Depression nationwide).

[189] For a general discussion of the 1874 election season and representative incidents of violence that occurred, see *id*. at 549–53.

[190] *Id.* at 587–98 (describing the southern Redeemer movement); FRANKLIN, *supra* note 32, at 196–97 (noting how quickly Redemption occurred after some states' readmission into the Union).

[191] Letter from Benjamin Wade to Uriah Painter, N.Y. TIMES (Apr. 9, 1877), *reprinted in* ALBERT GALLATIN RIDDLE, THE LIFE OF BENJAMIN WADE 363 (1886).

Almost an entire century would pass until the inception of what is sometimes referred to as the "Second Reconstruction."[192] This brief period included the Eighty-eighth Congress's enactment of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, with President Lyndon B. Johnson's enthusiastic backing followed by approval by the Warren Court. President Johnson's "Great Society" social welfare legislation played a part too.[193] Until then, the Reconstruction Amendments and related legislative initiatives stood as promises made on paper, which the Nation had failed to uphold.

IV. RECONSTRUCTION'S DEMISE

As Reconstruction drew to a close, the Supreme Court wasted little time in demolishing the near-term potential force of the Reconstruction Amendments and related civil rights legislation.[194] In 1873, the Court's majority made it plain that it had no interest in giving the Fourteenth Amendment anything but the most crabbed interpretation, opining in *the Slaughter-House Cases* that the rights protectable under the Fourteenth Amendment were so narrow as to be virtually nonexistent.[195] As former Unionist Democrat Justice Stephen J. Field argued in dissent, the majority's reading rendered the Amendment "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the People on its passage."[196] Field pointed out that, on the majority's reading, "no constitutional provision was required" whereas, if the Amendment was in fact intended to protect "the natural and inalienable rights which belong to all citizens," then the work of the Amendment's drafters "has profound significance and consequence" indeed.[197]

The *Slaughter-House Cases* eviscerated the potential of the Privileges or Immunities Clause in a manner that continues to distort the Fourteenth Amendment's interpretation to this day, as a vast body of literature has explored.[198] While it is beyond the scope of this Article to pursue that line of analysis, a basic point about what the Court did in that case does matter to the analysis here. Note how quickly the Court cut short the Fourteenth Amendment's doctrinal development—in just one case with

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[192] *See generally* MANNING MARABLE, RACE, REFORM, AND REBELLION: THE SECOND RECONSTRUCTION AND BEYOND IN BLACK AMERICA, 1945-2006 (3d ed. 2007).

[193] *See generally* JOSHUA ZEITZ, BUILDING THE GREAT SOCIETY: INSIDE LYNDON JOHNSON'S WHITE HOUSE (2018) (describing Johnson's Great Society's programs); RANDALL B. WOODS, PRISONERS OF HOPE: LYNDON B. JOHNSON, THE GREAT SOCIETY, AND THE LIMITS OF LIBERALISM (2016) (describing the rise and fall of the Great Society initiative); JULIAN E. ZELIZER, THE FIERCE URGENCY OF NOW: LYNDON JOHNSON, CONGRESS, AND THE BATTLE FOR THE GREAT SOCIETY (2015) (analyzing the factors that made the Great Society initiative possible).

[194] *But see* PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 30 (2011) (arguing that the Court's goal during this period was not to gut the Reconstruction Amendments and statutes but to preserve a space for these laws to address "state neglect" by remedying "unpunished interference on account of race" in civil and political rights).

[195] Slaughter-House Cases, 83 U.S. 36, 78–80 (1872).

[196] *Id.* at 96 (Fields, J., dissenting).

[197] *Id.*

[198] *See, e.g.*, John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L. J. 1385, 1387 (1992) (noting that the *Slaughter-House Cases* "virtually read out" the Privileges or Immunities Clause from the Fourteenth Amendment).

bad facts (the plaintiffs were contesting legislation related to their business interests, not discrimination against them on the basis of their race) and even worse results. The Court had not needed to render an opinion on the Privileges or Immunities Clause's meaning to decide it did not apply to the plaintiffs' case, but it took the opportunity to reach that broad question nonetheless, in a way that badly damaged the original public meaning of that Amendment. The Court, in other words, refused to acknowledge Congress and the People's instructions in amending the Constitution to bring the federal government into the protection of civil rights equality. The Court was acting politically, just as the Roberts Court did in eviscerating Congress's constitutionally authorized acts to protect voting rights and other legacy aspects of the Reconstruction Amendments.[199]

In *The Slaughterhouse Cases,* the Court signaled its unwillingness to embrace the change Congress and the People called for through the Fourteenth Amendment. In short order, the Court started to invalidate key provisions of the legislation enacted under the enforcement provisions of the Fourteenth and Fifteenth Amendments as well. The Court took those steps in cases such as *United States v. Reese*,[200] *United States v. Cruikshank*,[201] *United States v. Harris*,[202] and the *Civil Rights Cases* of 1883.[203] These decisions struck down key provisions of both the Enforcement Acts of 1870 and 1871 and the Civil Rights Act of 1875.

Because these cases are not well known today, a short discussion of them is worthwhile here. The underlying facts in *Reese* arose from the denial of the right to vote to Black male citizens in citywide elections that took place in January 1873 in Lexington, Kentucky.[204] The Court, with brand-new Chief Justice Morrison Waite writing the opinion, struck down as overbroad Sections 3 and 4 of the Enforcement Act of 1870, on the ground that the language of the two provisions "does not confine their operation to unlawful discriminations on account of race."[205] Therefore, under the Court's archaic logic, even though the prosecution at issue in fact *did* aver unlawful discrimination on account of race in voting, the statutory provisions were not a lawful exercise of Congress's enforcement authority

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[199] *See generally*, Shelby Cnty. v. Holder, 570 U.S. 529, 551–57 (2013), discussed further the in Part V.A *infra*.

[200] United States v. Reese, 92 U.S. 214, 220–22 (1876) (striking down portions of the Enforcement Act of Mar. 31, 1870, Pub. L. No. 41-114, 16 Stat. 140).

[201] United States v. Cruikshank, 92 U.S. 542, 552–59 (1875) (striking down an indictment under § 6 of the Enforcement Act of 1870).

[202] United States v. Harris, 106 U.S. 629, 644 (1883) (finding no "constitutional authority" for § 2 of the Enforcement Act of Apr. 20, 1871, Pub. L. No. 42-22, 17 Stat. 13).

[203] The Civil Rights Cases, 109 U.S. 3, 12–15 (1883) (overturning the first two sections of the Civil Rights Act of 1875, Pub. L. No. 43-114, 18 Stat. 335).

[204] In these elections, Black residents outnumbered whites in the city, but a white Democrat won the election handily. GOLDMAN, *supra* note 181, at 66. The local press reported that this was due to the suppression of the Black vote by operation of a poll or capitation tax the city had enacted a few years before. *Id.* A federal grand jury indicted several election officials, including Hiram Reese, who refused to accept the poll tax tendered by William Garner, a qualified Black voter, and then refused to receive and count Garner's vote. *See Reese*, 92 U.S. at 215. The circuit court sustained the defendants' demurrer to the indictment and certified the case to the Supreme Court for an opinion on the constitutionality of Sections 3 and 4 of the Enforcement Act of 1870. *Id.*

[205] *Reese*, 92 U.S. at 220.

under the Fifteenth Amendment.[206] The Court's modern practice would generally call for narrowing the statute to constitutional limits rather than striking it down entirely, especially when its application would be constitutional on the facts in the case under review.[207] Indeed, as a matter of logic alone, the *Reese* Court had this option even in 1874. But it declined to do so, stating, "[w]e are not able to reject a part which is unconstitutional. . . This would to some extent substitute the judicial for the legislative department of the government."[208] That faulty reasoning ignored the fact that, by striking down the provisions *in toto,* the Court was rejecting Congress's intent far more broadly than it would have if it narrowed the statute's interpretation to cover only acts that clearly deprived Black persons of civil rights. Again, the weakness of the Court's reasoning suggests its political motivations. It was not doing its best to preserve Congress's work but instead was reaching to knock it down.

These were the points the Court's sole dissenter made, noting that the facts alleged in the case *did* involve the denial of the right to vote on account of race, [209] the statute *did* recite that the unlawful acts prohibited were denials of voting rights on account of race, and the intention of Congress on this subject "is too plain to be discussed."[210] Congress had, after all, just passed the Fifteenth Amendment, the object of which plainly was to "secure to a lately enslaved population protection against violations of their right to vote on account of their color or previous condition."[211] But this logic did not move the Court's majority, predisposed to find ways of curtailing the Enforcement Acts in light of their broad reach and interference with traditional federalism principles.

In *Cruikshank*, the Court engaged in an even more transparent dodge of Congress's intent under the Enforcement Acts, holding that the prosecutors there had failed to allege that the defendants—who were none other than the leaders of the Colfax massacre, regarded as the worst instance of mass violence during Reconstruction[212]—had violated *any* federally protected rights.[213] *Cruikshank* involved an indictment filed

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[206] *Id.*

[207] *See, e.g.*, Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987) (noting that the Court generally will presume "that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision," unless Congress has indicated otherwise).

[208] *Reese*, 92 U.S. at 221.

[209] *Id.* at 238, 243 (Hunt, J., dissenting) (noting that Garner's "race and color" prevented the election officers' acceptance of his tax).

[210] *Id.* at 241.

[211] *Id.*

[212] FONER, RECONSTRUCTION, *supra* note 32, at 437. Professor Carol Anderson's graphic description of this incident puts it thus:

> . . . there was simply death. Buzzards, dogs, and insects feasting on what was left of the Black militia. Brains splattered all over the ground. Faces missing. Bullets that had made Swiss cheese of men's backs, especially those who had surrendered. Bodies upon bodies upon bodies that had clearly undergone unspeakable torture all on the battleground of democracy.

CAROL ANDERSON, THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA 97 (2021).

[213] In addition, seeming to whipsaw the federal prosecutors who were attempting to pursue civil rights violations under the Enforcement Acts, the Court stated that, in *Reese*, it

under Section 6 of the Enforcement Act of 1870, which, as already noted, made it unlawful for "two or more persons" to "band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to . . . injure, oppress, threaten, or intimidate any citizen, with the intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States."[214] The defendant participants in the Colfax massacre had been involved in murdering an estimated one hundred freed persons who had been meeting in a courthouse to discuss political strategy following a contested gubernatorial election in that state.[215] A federal attorney had secured an indictment against some of the ringleaders of the massacre, and the federal circuit court certified questions concerning the indictment's legality to the Supreme Court.

The indictment contained numerous counts, which the *Cruikshank* Court divided into two categories. One category involved counts that averred that the defendants' intent was to prevent the victims in the "exercise and enjoyment of rights, privileges, immunities, and protection granted and secured to them respectively as citizens of the United States, and as citizens of the said state of Louisiana . . . for the reason" that they were "persons of African descent and race, and persons of color, and not white citizens."[216] This language was as explicit as it could be about race being the reason for the denial of rights, but the Court held that it failed to pass legal muster because in these counts "[t]here is no specification of any particular right."[217]

In a second category, the Court placed all counts that *did* aver specific rights—namely, interference with the victims' rights to peaceably assemble, bear arms, and enjoy security in their persons and property under the due process right to life, liberty, and property. The Court held that none of these rights were rights of national citizenship, which were all that the Fourteenth Amendment protected.[218] Even the right to peaceably assemble for lawful purposes was not a right of national citizenship, since it "existed long before adoption of the Constitution" and was "not, therefore,

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had just explained that "exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude" *was* a right of national citizenship (ignoring the fact it had just struck down much of that protection), but "as it does not appear in these counts that the intent of the defendants was to prevent these parties from exercising the right to vote on account of their race, &c., it does not appear that it was their intent to interfere with any right granted or secured by the constitution or laws of the United States." United States v. Cruikshank, 92 U.S. 542, 556 (1875). In an exercise of judicial formalism that blinks reality, as was quite common in the Court's jurisprudence of the period, the Court concluded, "we may suspect that race was the cause of the hostility, but it is not so averred." *Id.* This conclusion can only be called astonishing given that the case involved armed conflict between whites and a hugely outnumbered group of Black citizens who had gathered to assert their political rights.

[214] *Cruikshank*, 92 U.S. at 548.

[215] On the Colfax massacre, see generally CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION (2008).

[216] *Cruikshank*, 92 U.S. at 557.

[217] *Cruikshank*, 92 U.S. at 557.

[218] *Cruikshank*, 92 U.S. at 553–55.

a right granted to the people by the Constitution."[219] The Court used similar logic to dismiss the other counts alleging specific violations of rights listed in the Constitution.

Legal historians sometimes characterize the *Reese* and *Cruikshank* rulings as signaling the end of the Reconstruction era, but, as experts in this period have pointed out, the subsequent history is more complicated.[220] Federal prosecutors continued to pursue cases under the provisions of the Enforcement Acts that the Court had not struck down, trying to draft their indictments to avoid the pitfalls the prosecutors in the *Reese* and *Cruikshank* cases had encountered. But the Court continued to invalidate civil rights prosecutions when opportunities presented themselves, as in *United States v. Harris*, where the Court again used the specious logic of *Reese* to invalidate provisions of the Ku Klux Klan Act on the grounds that those provisions could, in some *other* case, potentially be applied to conspiracies against whites.[221] The Court reached this conclusion despite the facts in the case before it, involving a lynch mob that beat and murdered Black men being held in a local jail.[222]

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[219] *Id.* at 551. The Court acknowledged that the right to peaceably assemble to *petition Congress* for redress of grievances was an attribute of national citizenship, but since the indictment had not stated that this was the specific purpose of the freedmen's meeting in the courthouse, the Court held that it would not sustain these counts on that ground. *Id.* at 552–53.

[220] *See, e.g.*, GOLDMAN, *supra* note 181, at 124 ("Race relations during the last quarter of the nineteenth Century were in fact characterized by their 'variety and inconsistency.'") (quoting C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1955)).

[221] United States v. Harris, 106 U.S. 629, 641 (1883).

[222] *Id.* at 629–32. More specifically, an armed group of white men stormed a Tennessee jail and captured four Black prisoners, beating them and murdering one. *Id.* Prosecutors charged them with violating Section 2 of the Second Force or Ku Klux Klan Act, which made it unlawful for two or more persons to "conspire together, or go in disguise upon the public highway or upon the premises of Another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws." Act of Apr. 20, 1871, Pub. L. No. 42-22, 17 Stat. 13, §2. The Court held this provision unconstitutional because, first, following the specious logic of *Reese*, the law "covers cases both within and without the provisions of the amendment," since conspiracies between white men to violate other white men would also be punishable under it. *Harris*, 106 U.S. at 641. Second, the Court cited its "state action" logic from Virginia v. Rives, 100 U.S. 313 (1880). *Harris*, 106 U.S. at 639. In a decision that portended the invalidation of the Civil Rights Act of 1875 three years later, *see* The Civil Rights Cases, 109 U.S. 3, 12–15 (1883), the *Rives* Court held that the protections of the Fourteenth Amendment could only apply to state action and not actions of individuals, even those acting with state authority. *Rives*, 100 U.S. at 318. Thus, the Black defendants in *Rives* were not entitled to Black jury members because, for one, a "mixed jury" was "not essential to the equal protection of the laws," *id.* at 323, and, second, the allegation in the case had not been that state law discriminated against Black citizens in jury selection, but instead that "*the officer* to whom was entrusted the selection of person" had "confined his selection to white persons." *Id.* at 321 (emphasis supplied). The *Rives* Court acknowledged that "[i]n one sense, indeed, his act was the act of the State," but nevertheless concluded that the officer had been engaged in "criminal misuse of the state law" and thus "cannot be said" to have denied rights to the Black defendants. *Id.* Note how this logic further narrowed the scope of the Fourteenth Amendment so that denial of rights *by state officials*, exercising discretion granted them *under state law*, could not constitute state action where discrimination was not patent on the face of the law.

As experts point out, Reconstruction unwound in locally varied ways and timelines so that blanket generalizations oversimplify.[223] But there is no denying that, by the mid-1870s, the key institutions necessary for Reconstruction to succeed—the Court, the Congress, state governments, republican state constitutions, and, after the election of 1877, the federal executive branch—either opposed by every means possible (as in the former secessionist and border states) or failed to continue to press forward the Reconstruction agenda.

In 1883, in *The Civil Rights Cases*, the Court struck down the Civil Rights Act of 1875, declaring it unconstitutional because it reached private actions.[224] In so doing, it rejected the perspectives advanced by dissenting Justice John Marshall Harlan, a former slaveholder who had become a civil rights advocate.[225] First, Justice Harlan argued that the Thirteenth Amendment, which clearly covered private action, prohibited discrimination that perpetuated the "badges and incidents" of slavery.[226] He argued that segregation in places of public accommodations was such a badge or incident of slavery.[227] Second, Justice Harlan suggested that, in public transportation and accommodations, where owners of conveyances were clearly providing *public* goods, discrimination against passengers on the basis of race or color violated the civil rights to free movement and personal agency that all citizens should enjoy.[228]

The Court's record of blazing defiance of Congress's intent under the Reconstruction Amendments continued through the nineteenth century. In *Giles v. Harris*, cynical Civil War veteran and father of legal realism Justice Oliver Wendell Holmes[229] rejected test case litigation that racial justice advocates filed to challenge the patently racist voter disenfranchisement device of grandfather clauses.[230] These clauses provided that only men whose grandfathers had voted before the Civil War could vote, thus patently perpetuating racial exclusion in voting.[231] Justice Holmes invoked the political question doctrine to conclude that the injury alleged constituted *too great* a harm for the judiciary to address. Of course, the Fifteenth Amendment's purpose was to prevent precisely this type of harm, but Holmes' concern about the Court's institutional capacity to police resisting states took precedence in his view. Thus, with only a few victories

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[223] GOLDMAN, *supra* note 181, at 124, 128; RECONSTRUCTION ENCYCLOPEDIA, *supra* note 77, at 833 app. 3 (listing the dates of "redemption" of each of the secessionist states, defined as the date on which white Democrats again achieved control over state government). *See also id*. at 520–22 (defining Redemption and its characteristics throughout the South).

[224] *Civil Rights Cases*, 109 U.S. at 11–12.

[225] *See generally* PETER S. CANELLOS, THE GREAT DISSENTER: THE STORY OF JOHN MARSHALL HARLAN (2021). Canellos suggests that Harlan's close relationship to his Black half-brother, Robert Harlan, contributed to his development of racial equality commitments. *See id.* at 355.

[226] *Civil Rights Cases*, 109 U.S. at 35 (Harlan, J., dissenting).

[227] *Id.* at 34–36.

[228] *Id.* at 37–43.

[229] For more on Holmes, see *infra* notes 241–243 and accompanying text.

[230] Giles v. Harris, 189 U.S. 475, 482, 488 (1903).

[231] For a description of the wave of grandfather clauses adopted by southern states in the period between 1890 and 1915, see Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 3: Black Disfranchisement from the KKK to the Grandfather Clause*, 82 COLUM. L. REV. 835, 845–47 (1982).

along the way in the first half of the twentieth century,[232] both the Fourteenth and Fifteenth Amendments would lie dormant—in the words of historian Foner, as "sleeping giants"[233]—for almost 100 years.

Although most of the Framers were doers rather than scholars, they did leave behind some reflections offering their insights into how and why their efforts had failed. Former Free Soil party founder, longtime radical senator, and eighteenth Vice President of the United States, Henry Wilson wrote a three-volume analysis entitled *The Rise and Fall of the Slave Power in America*, in which he observed that, even if all constitutional questions had been correctly resolved, there "remains the far more serious difficulty of constituency" and "man's ability to govern himself."[234] Exhibiting the longstanding ambivalence about universal suffrage even radicals displayed during Reconstruction, Wilson repeated his worries about illiteracy given full "[m]anhood suffrage"; on the other side of the coin, he observed pessimistically that "[t]he fact, too, that the South . . . still contends that this is a white man's government, in which the freedmen have no legitimate part, and from which they shall be excluded, even if violence and fraud be needful therefor, may well excite alarm in the most sanguine and hopeful."[235]

Law, in other words, had not been enough. As Wilson put it:

> The demon of slavery has indeed been exorcised and cast out of the body politic, but other evil spirits remain to torment, if not destroy. The same elements of character in the dominant race . . . still remain to be provided for, guarded against or eliminated, in our efforts to maintain a free form of government. Perhaps, indeed, legislation has done its best or utmost, and all that now remains or can be done, is to bring up the popular sentiment and character to its standard. Can it be done?[236]

If the difficulty of changing human hearts and minds through prescriptive law was one of Wilson's insights, another was the need for social welfare to make the ideal of civil rights equality work in actuality. Wilson called on "the members of the Republican Party to take a new departure and incorporate philanthropic and patriotic action with political action; [in] other words, to engage individually and socially, and outside of party organization, in missionary work to prepare those made free to use intelligently and wisely the power their enfranchisement has given them."[237] The policies of Reconstruction had been "'[i]nadequate, almost ludicrously so, to the great and manifold exigencies of the situation, except as the beginning and earnest of greater and more systematic efforts."[238]

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[232] *See. e.g.*, Guinn v. United States, 238 U.S. 347, 356–68 (1915) (striking down Oklahoma's grandfather clause, though by this time states had moved to using fake education tests to disenfranchise Black voters).

[233] FONER, SECOND FOUNDING, *supra* note 77, at xxviii.

[234] HENRY WILSON, 3 HISTORY OF THE RISE AND FALL OF THE SLAVE POWER IN AMERICA 737 (1875).

[235] *Id.*

[236] *Id.* at 738–39.

[237] *Id.* at 739.

[238] *Id.* at 740.

Wilson closed his analysis with a call for "human instrumentalities," as he put it, to do much more.[239] As discussed in Part V, that "much more," as seen through the lenses of the present, might include more work in voluntary, collaborative, and civil society arenas that allow for experiments with new approaches to social welfare outside the strictures of law.

The demise of Reconstruction undoubtedly left its advocates despondent, but the lessons they took from their experiences do not appear to have led them to renounce their beliefs in the potential for greater justice through law. Leaders such as James Ashley and Lyman Trumbull, for example, went on to pursue other social reform causes, including northern workers' labor rights and economic reform legislation to curb the excesses of capitalism.[240]

To be sure, changes were afoot in late nineteenth century jurisprudence. In 1881, jurist Oliver Wendell Holmes would write his important book rejecting legal formalism's conception of law as a logical system and emphasizing instead the extra-legal factors—including politics, ideology, and personal prejudice—that influence judges' decisions.[241] Young enough to have felt the duty to enlist to fight in the war and develop a deep cynicism based on what he experienced, [242] Holmes' life spanned the nineteenth to the twentieth centuries and his ideas reflected a new generation's perspective; most of the key advocates of congressional Reconstruction, whose lives did not extend beyond the nineteenth century, retained a more humanitarian and idealistic outlook. Their ideas, combined with the legal realism Holmes introduced, would be passed forward to later generations of racial justice and human rights activists.[243]

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[239] *Id.* Wilson incorporated religious references as well, referring to "God's hand in American history" and "the many Divine interpositions therein recorded," while also noting, consistent with his call for people to do more, that "no faith, personal or national, is legitimate or of much avail that is not accompanied by corresponding works." *Id.*

[240] *See* REBECCA E. ZIETLOW, THE FORGOTTEN EMANCIPATOR: JAMES MITCHELL ASHLEY AND THE IDEOLOGICAL ORIGINS OF RECONSTRUCTION 157–77 (2018) (detailing Ashley's work on northern labor rights after losing his congressional seat in 1868); KRUG, *supra* note 37, at 346–47, 349–50 (discussing Trumbull's work on labor rights, legislation to curb monopolies, defense of Eugene Debs, and promotion of the populist People's Party following his Senate defeat in 1873); ROSKE, *supra* note 154, at 172–73 (describing Trumbull's work against monopolies and "the money power"). Bingham, on the other hand, did not continue to be involved in domestic political reform; instead, he served for twelve years as United States ambassador to Japan, where he "took a firm anticolonial stance" but, according to his biographer, "said virtually nothing about constitutional law" after he retired from Congress in 1873. GERARD N. MAGLIOCCA, AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT 167, 169 (2013).

[241] *See, e.g.*, OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881) (espousing his famous adage that the "life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.")

[242] *See, e.g.*, LOUIS MENAND, THE METAPHYSICAL CLUB 59 (2001) (arguing that Holmes and other men of his generation come back from the war disdainful of the "individualism, humanitarianism, and moralism that characterized Northern intellectual life before the war").

[243] Holmes' cynicism, in contrast, contributed to his rejection of law's potential use as a moral tool that could be employed to protect the vulnerable. In authoring cases such as *Giles v. Harris*, 189 U.S. 475, 482 (1903), which, as discussed, rejected a carefully crafted

V. EPILOGUE & CONCLUSIONS

What are we to make of the objectives of the Reconstruction advocates, their fifteen-year battle, and its many failures (along with some important successes, including permanently abolishing slavery and involuntary servitude and instituting the concept of birthright citizenship in the United States)? What were the key lessons they learned and what might be their application to the present times? To explore these questions, this section first presents a short epilogue sketching the aftermath of Reconstruction in racial justice advocates' work over the next century, and then assesses what continuing relevance Reconstruction's history may have today.

A. A Short Epilogue

The Framers passed their ideas on to the next generation of post-Reconstruction racial justice advocates.[244] These advocates developed a multitude of strategies, some based on the Reconstruction Amendments and others not, to tackle racial injustice during the so-called "nadir" period in national race relations following Emancipation, typically dated between 1880 and 1915.[245] They did not get very far on the legal front, but a few victories did occur. For example, a handful of states, including New York and Minnesota, passed state civil rights statutes modeled on the Civil Rights Act of 1875, and advocates brought a few successful cases under these laws.[246] They also won several Supreme Court civil rights cases, though these cases at first changed little on the ground.[247]

T. Thomas Fortune, son of Florida Reconstruction politician Emmanuel Fortune and educated in Freedmen's Bureau schools, articulated the idea that became the template for a series of organizations intended to provide a national nonpartisan structure for racial justice reform.[248] These organizations, which grew directly out of Black abolitionists' meetings in the 1830s and beyond, included the Afro American League, the Afro American Council, and the Niagara Movement, which then flowed into the founding of the NAACP in 1910.[249] This biracial group ended up having staying power, led in its first years by Oswald Garrison Villard, grandson of abolitionist William Lloyd Garrison, and having as its chief litigator Moorfield Storey, former secretary to Charles

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challenge to Alabama voter disenfranchisement law, and *Buck v. Bell*, 274 U.S. 200, 205–08 (1927), which upheld sterilization of the "feeble minded" in the interest of eugenics (of which Holmes was an enthusiastic advocate), Holmes articulated a jurisprudence unsympathetic to the goal of using law to create a more justice social order. Holmes' proto legal realism would pave the way for sociological jurisprudence and then the legal realist movement, and some of the participants of those movements, including Charles Hamilton Houston, would contribute important ideas about to how to use law for social change that blended Holmes' anti-formalism with humanitarian and abolitionist values. On Houston's intellectual influences and civil rights work, see generally GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983).

[244] *See generally* CARLE, DEFINING THE STRUGGLE, *supra* note 64 (discussing racial justice advocacy work of the post-Reconstruction generation of Black leaders).

[245] *See, e.g.*, *id.* at 2–3.

[246] *Id.* at 58–62.

[247] *Id.* at 133–35.

[248] *Id.* at 31–54.

[249] *Id.* at 54–121, 174–92, 252–56.

Sumner.[250] W. E. B. Du Bois provided important intellectual vision based on the combination of his sociological, historical, and early critical race theory genius.[251]

In its early years, the NAACP won a few cases, including *Guinn v. United States*, which struck down Oklahoma's grandfather clause as unconstitutional under the Fifteenth Amendment,[252] and *Buchanan v. Warley*, which invalidated a Louisville, Kentucky housing segregation ordinance.[253] These wins fueled the organization's growth, which, in turn, propelled a plethora of experiments with a wide variety of tactics. These included, unsuccessfully, legislative[254] and international human rights advocacy[255] and, more successfully, court-based approaches on issues including housing, criminal defense, and voting.[256] That work culminated, most famously, in the case that stands in the public memory for the end of *de jure* race classifications, *Brown v. Board of Education*.[257]

At the same time, ideas about the relationship between law and socio-political psychology continued to develop. In the 1920s, sociological jurisprudence helped inspire the NAACP's legal director, Charles Hamilton Houston to conceptualize lawyers as social engineers.[258] Philosophical pragmatism and its offspring, United States legal realism, further advanced thinking about how to use law for social change.[259]

Almost one hundred years after the Reconstruction Amendments' passage, American national political institutions lined up in a perfect storm in which the three branches of national government worked in tandem, for a short but significant time, on a so-called "Second Reconstruction."[260] That period, as already noted, saw passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965 as well as significant social welfare legislation. The lasting damage done by Reconstruction's demise emerged in the ways the Court upheld these laws. To take but one example, the Warren Court's decision to uphold the Civil Rights Act under the Commerce Clause rather than the Enforcement Clause of the

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[250] *Id.* at 251–66.

[251] *Id.* at 27, 260.

[252] United States v. Guinn, 238 U.S. 347, 356–68 (1915).

[253] Buchanan v. Warley, 245 U.S. 60, 82 (1917).

[254] *See, e.g.*, ROBERT L. ZANGRANDO, THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950 at 38–50 (1980) (tracing some of the NAACP's advocacy for federal anti-lynching legislation).

[255] *See* CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS 1944-1955 (2003) (describing the NAACP's work at the United Nations).

[256] *See, e.g.*, LOREN MILLER, THE PETITIONERS: THE STORY OF THE SUPREME COURT AND THE NEGRO 258–62 (1966) (introducing an account of this broad-ranging litigation work).

[257] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

[258] *See generally* MCNEIL, *supra* note 243 (describing Houston's influences, ideology, and practices).

[259] *See, e.g.*, Susan D. Carle, *John Dewey and the Early NAACP: Developing a Progressive Discourse on Racial Injustice*, *1909-1921*, *in* DEWEY'S ENDURING IMPACT: ESSAYS ON AMERICA'S PHILOSOPHER 249, 249–50, 255–62 (John R. Shook & Paul Kurtz eds., 2011) [hereinafter Carle, *John Dewey*] (describing Dewey's influence on movements for racial justice).

[260] *See* MARABLE, *supra* note 192, at 38–40 (describing how the Supreme Court, Congress, and President Johnson all contributed to the desegregation effort).

Fourteenth Amendment, was due to the negative precedent set by the *Civil Rights Cases,* discussed in Part IV above, which held that the Fourteenth Amendment did not authorize Congress to regulate private conduct.[261]

Like the Reconstruction Era, this period lasted less than two decades. It came to an end with the Burger, Rehnquist, and Roberts Courts, together with the elections of Presidents Ronald Reagan, George H.W. and George W. Bush, and Donald J. Trump. A critical blow to the federal legislative gains of the 1960s occurred when the Roberts Court, in *Shelby County v. Holder*,[262] invalidated a key provision of the Voting Rights Act, despite the virtually unanimous bipartisan support of both Houses of Congress in their votes to renew the act. More specifically, the Court invalidated Section 4 of the Act, which provided that any state that in 1964 had voter participation levels below fifty percent of the voting eligible population must submit proposed changes to their voting procedures to the Department of Justice pursuant to the provisions of Section 5 of the Act. This ruling in effect rendered Section 5's preclearance program inoperative.

The Court's ruling in *Shelby County* employed specious logic just as post-Reconstruction Courts did in the decisions discussed in Part IV above. Chief Justice Roberts' opinion for the majority invented a concept he termed "equal state sovereignty"; that principle, he claimed, barred Congress from using its Fourteenth and Fifteenth Amendment enforcement powers to impose requirements on some states but not others.[263] But this assertion ignored the fact that all of the Reconstruction-related legislation Congress passed in the period contemporaneous with its passage of the Reconstruction Amendments, as detailed in Parts II and III above, singled out some states—namely, those that had seceded and were continuing to resist civil rights equality—for different, targeted treatment.[264] An originalist Court should very much care about such contemporaneous evidence of original public meaning,[265] but in this case the desired result, not any principled methodology of constitutional interpretation, drove the majority's analysis. As Judge Richard A. Posner pointed out, "the [C]ourt's invocation of 'equal sovereignty' is an indispensable prop of the decision," but "there is no doctrine of equal sovereignty."[266]

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[261] *See* Heart of Atlanta Motel v. United States, 379 U.S. 241, 250–52 (1964) (upholding the Civil Rights Act of 1964 under the Commerce Clause, rather than the Enforcement Clause of the Fourteenth Amendment, which would have required overruling *The Civil Rights Cases*, 109 U.S. 3 (1883)).

[262] Shelby Cnty. v. Holder, 570 U.S. 529, 556–57 (2013).

[263] *Id.* at 535, 544–45.

[264] *See supra* note 178.

[265] *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122, 2127–28 (2022) (looking to historical evidence of original public meaning); Dobbs v. Jackson Women's Health Org., No. 15-1392, slip op. at 79–101 app. A (U.S. June 24, 2022) (surveying state laws in existence in 1868 to determine the scope of the right to abortion under the Fourteenth Amendment).

[266] Richard A. Posner, *The Supreme Court and the Voting Rights Act: Striking Down the Law Is All about Conservatives' Imagination*, SLATE (June 26, 2013), https://slate.com/news-and-politics/2013/06/the-supreme-court-and-the-voting-rights-act-striking-down-the-law-is-all-about-conservatives-imagination.html [https://perma.cc/G9SD-66BM]; *see also* Eric Posner, *John Roberts' Opinion on the Voting Rights Act is Really Lame*,

In *Shelby*, Chief Justice Roberts reassured that "[o]ur decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in §2" of the Voting Rights Act.[267] That assurance proved hollow when the Roberts Court then narrowed Section 2's application as well.[268] Since then, the Court has continued to uphold state legislation designed to restrict voting,[269] and as of this writing promises to do more such damage in the future.

At the same time, the Nation has endured a blatantly racist President whose rhetoric invoked the worst of the Redeemers' ideology.[270] Congress has shown no signs of being able to take up, much less move forward, a racial justice agenda, and future control of the federal executive branch and Congress is very much up in the air. Nothing close to the perfect alignment of the stars necessary for a "Third Reconstruction" exists or can realistically be expected to arise in the foreseeable future.

B. Conclusions

In these times, as during Reconstruction, the Nation lacks the rare alignment of all three federal branches pushing strongly in favor of progress on racial justice issues that characterized the 1960s. Given these political conditions, racial justice advocates may wish to draw on some of the hard lessons the Reconstruction advocates learned as discussed above, including the following.

1. Be Skeptical About the Effect of Words on Paper Alone

As discussed above, Reconstruction's advocates learned through their experiences attempting to enforce civil rights equality through the Fourteenth Amendment that mere words on paper, even when put into the Constitution, cannot be counted on to produce intended effects without the enthusiastic support of the branches of federal and state government charged with interpreting and enforcing the law. This is not to say that words on paper do not matter; they obviously do, and nothing about this Article's argument is intended to downplay the value of the Fourteenth Amendment. Two key lessons emerge from the Reconstruction Amendments' partial failures, however. First, at the level of horizontal separation of powers, it is clear that successful achievement of the goals

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SLATE (June 25, 2013) https://slate.com/news-and-politics/2013/06/supreme-court-on-the-voting-rights-act-chief-justice-john-roberts-struck-down-part-of-the-law-for-the-lamest-of-reasons.html [http://perma.cc/UH7N-98E4] ("Roberts is able to cite only the weakest support for this [equal sovereignty] principle . . . . None of the usual impressive array of founding authorities show up in his analysis").

[267] *Shelby Cnty.*, 570 U.S. at 557.

[268] *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2336–43 (2021) (rewriting traditional standards for proving Section 2 cases to make it harder for plaintiffs to succeed).

[269] *See, e.g.*, cases cited *supra* note 13.

[270] *See, e.g.*, Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016, 11:35 AM), http://time.com/4473972/donald-trump-mexico-meeting-insult/ [https://perma.cc/M4UG-JLDQ] (quoting Trump saying, *inter alia*, "[t]hey're bringing drugs. They're bringing crime. They're rapists"); Roque Planas, *Donald Trump Blames Crime on Blacks, Hispanics*, HUFFPOST (June 5, 2013, 8:04 PM), https://www.huffpost.com/entry/donald-trumpblames-crime_n_3392535 [https://perma.cc/9DHW-MJLV] (quoting Trump's comment that Black and Latino people commit the "overwhelming amount of violent crime in our major cities").

articulated in the Fourteenth Amendment would have required words on paper *backed by* strong support from the Court, the Executive, and Congresses far into the future. The twin examples of Reconstruction in the 1860s and the Second Reconstruction of the 1960s teach that advantageous alignments of all three federal branches are rare and, when not present, preclude major change through legislative dictate under the complex structure of United States government. Incremental progress may occur and much important ground can be laid in nadir periods to create the conditions to move forward when conditions change.[271] The reverse is also true; major backsliding is also expectable when blatant racists control the executive branch, whether they be Andrew Johnson,[272] Woodrow Wilson,[273] or Donald Trump.[274]

Second, at the level of vertical separation of powers, Reconstruction failed due to powerful resistance from states, local governments and private citizens. Law does not necessarily change human minds and hearts, as contemporary behavioral theorists are starting to study empirically using sophisticated new data analysis tools.[275]

In light of these realities, scholars and other public intellectuals whose job it is to generate ideas to advance racial justice goals must refrain from engaging in naive faith in law on the books.[276] To be sure, they must fight hard to protect doctrines that appear in great jeopardy today in light of the proclivities of the Roberts Court.[277] Smart defensive litigation and doctrine-focused scholarship must continue, if only to minimize the harm the current Court may wreak. But today's racial justice advocates in the academy and beyond sometimes seem insufficiently attentive to the reality that doctrine by itself is necessary but not sufficient. Doctrinal tweaking probably will not result in much, if any, positive change given the ideological and political commitments of the current majority on the Court. Given these current conditions, the now-traditional public impact litigation techniques the NAACP first developed,[278] and especially affirmative test

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[271] *See* CARLE, DEFINING THE STRUGGLE, *supra* note 64, at 297–98 (describing how Black activists' multi-dimensional, ground-laying efforts during the nadir period between 1880 and 1915 at multi-dimensional ground-laying that permitted the later, classically conceived "civil rights" movement to burst forth when political conditions improved).

[272] *See supra* text accompanying notes 53, 70–74.

[273] On Woodrow Wilson's racism and its legacy, see, e.g., Dick Lehr, *The Racist Legacy of Woodrow Wilson*, THE ATLANTIC (Nov. 27, 2015), https://www.theatlantic.com/politics/archive/2015/11/wilson-legacy-racism/417549/ [https://perma.cc/KYG2-G6PN].

[274] *See supra* note 270.

[275] *See generally* BENJAMIN VAN ROOIJ & ADAM FINE, THE BEHAVIORAL CODE: THE HIDDEN WAYS THE LAW MAKES US BETTER . . . OR WORSE (2021) (describing studies about when law does—or, more often, does not—work in directing human behavior).

[276] The distinction between law on the books and law in action is a longstanding precept of sociological jurisprudence, pioneered by Roscoe Pound and others. *See generally* Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910) (exploring this distinction).

[277] *See, e.g.*, Matthew B. Lawrence*, Subordination and Separation of Powers*, 131 YALE L. J. 78, 78 (2021) (calling for the application of anti-subordination principles to separation-of-powers questions).

[278] On the earliest work of the NAACP in developing public impact litigation strategies, see Susan Carle*, Race Class and Legal Ethics in the Early NAACP*, 20 LAW & HIST. REV. 97, 106–28 (2002). On the predecessor organizations that first experimented with these strategies, see generally CARLE, DEFINING THE STRUGGLE, *supra* note 64.

case litigation, should be carefully thought through. The risks of harm from bad results often may outweigh the low probability of positive ones.[279] Put most bluntly, racial justice advocates in and outside the legal academy should wean themselves from the dual habits of looking to the Court for significant progress on racial justice issues *and* teaching students to venerate the Court as a key locus of racial justice progress.

Relatedly, one may wonder whether the Framers' experiences with hardball politics provide a lesson for the present moment as, for example, when commentators debate whether to use Congress's constitutional powers to reform the structure of the Court within the constitutionally prescribed bounds of Congress's authority to do so.[280] In periods of deeply clashing perspectives between the branches and with the Nation's future on racial justice (and other deeply important constitutional questions) very much at stake, refraining from hardball politics may turn out to be the province of fools.

2. Prosecute Violence

Yet another lesson identified in Part III.B above concerns the importance of the government's vigorous *enforcement* of the civil rights laws on the books. As discussed above, one of the lasting gains of Reconstruction, replete as it was with horrific resistance through violence, was the creation and enforcement of the civil and criminal provisions of the Enforcement Acts, which, the evidence suggests, had an impact on reducing hate-based violence. Successor statutes exist today.[281] The current times obviously call for devoting priority attention and resources to prosecuting hate-based violence. Law may not change hearts and minds simply because it exists, but enforcement matters.

3. Promote Social Welfare Rights

As Justice Harlan pointed out in his *Plessy v. Ferguson* dissent, civil rights and access to goods provided through the so-called "social" realm are not easily divisible categories. Today a great deal of theoretical work has been done in theorizing the fundamental right to the core resources needed for human flourishing, including rights to basic sustenance, education, adequate health care, and safe housing. The tentative efforts of Reconstruction's advocates in establishing the Freedmen's Bureau represented a first step in this complex history of social welfare legislation

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[279] For a recent example of this conundrum, see the Twitter thread started by Matthew Stiegler (@Matthew Stiegler), TWITTER (May 16, 2022, 10:38 AM), https://twitter.com/MatthewStiegler/status/1526210583145635841?s=20&t=S_2XsOGRaIu44-9Fdu6KYA [https://perma.cc/3UYN-LTAF], debating a University of Virginia Law clinic's pursuit of an important case about awards of public interest attorney's fees before the Court, despite a likely result harmful to public interest lawyers.

[280] *See, e.g.*, Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. F. 398, 402–14 (2021) (outlining some of the leading proposals for structural reform of the Supreme Court).

[281] These provisions, some inherited directly from the Reconstruction Era and some passed in later eras, include 18 U.S.C. §§ 241, 242, 245, 247, 248, 249, 294. *See generally What We Investigate: Federal Civil Rights Statutes*, FBI, https://www.fbi.gov/investigate/civil-rights/federal-civil-rights-statutes [https://perma.cc/WLA8-ZF23] (last visited July 24, 2022).

in the United States.[282] Then, the "Great Society" initiatives of the 1960's and 1970's enacted in tandem with federal civil rights legislation pursued these connections more explicitly.[283]

Contemporary legal scholars have continued to explore the constitutional dimensions of federal and state governments' duties to care for the material welfare of the Nation's inhabitants. In *A New Birth of Freedom*, Charles Black riffs on arguments of the abolitionist constitutionalists to argue that the Declaration of Independence's reference to the right to the pursuit of happiness, along with the Ninth and Fourteenth Amendments, provide a basis for finding a fundamental right "to be in a situation where that pursuit has some reasonable . . . chance of moving toward its goal."[284] Black insists that the government has an affirmative constitutional duty "to devise and prudently to apply the means necessary to ensure . . . a decent livelihood for all."[285] And, as he presciently states in words on point for this new time, this duty on the part of Congress is not one the Court must approve or enforce[286] (though one might hope the Court at least would stop undermining it[287]).

In the United States, social welfare rights have developed in complex legislative, as opposed to constitutional, frameworks. From this perspective, it is not substantive rights but the federal constitutional *structure* that protects the social welfare dimensions of racial justice and equality more generally. Federalism continues to play an important part, as in states' provision of rights to education and other social welfare supports. But Reconstruction-era changes to the constitutional structure with respect to the federal government's responsibility for civil rights, as discussed above, are important as well. That changed structure establishes that Congress has an important role to play where states either will not—or, often, cannot, due to problems of coordination—act to provide the underlying social welfare resources that are necessary to promote civil and political equality among a thriving citizenry.[288]

Today, however, the current Court improperly downplays the alterations to the federalist structure the Reconstruction Amendments wrought.[289] When the current Court has failed to uphold social welfare

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[282] *See* Graber, *supra* note 65 at 1363–66.

[283] On these Great Society initiatives, see generally ZELIZER, *supra* note 193, at 85–130 (2015) (describing the civil rights efforts taken as part of the Great Society initiative of President Lyndon Johnson's administration)

[284] CHARLES L. BLACK, A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 131 (1999).

[285] *Id.* at 133.

[286] *Id.* at 138.

[287] *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 542, 586 (2012) (striking down Congress's attempt through the Affordable Care Act to cover more poor Americans under shared state and federal Medicaid funding).

[288] *See* LAURA F. EDWARDS, A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS 10, 18 (2015) (presenting the thesis that Reconstruction transformed "people's relationship to the federal government" as they began to look "to the federal government, not just state or local governments, to protect, support, and further their interests.") *See also* U.S. CONST. amend. XIII, § 2; U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.

[289] *See, e.g.*, *Sebelius*, 567 U.S. at 533–35 (referring to federalist principles as interpreted by Chief Justice Marshall, years before the Reconstruction Amendments

protections, it has often invoked federalism. The Roberts Court did so, for example, in invalidating the important Medicaid extension provisions of the Affordable Care Act.[290] The lesson learned involves the importance of attending to the structural aspects of the Constitution rather than rights *per se*. Racial justice scholars should oppose the ways in which the Court has failed to acknowledge that the enforcement provisions of the Reconstruction Amendments *altered* the federalist structure in significant (though still limited) respects.

4. Emphasize the Fundamental Nature of the Right to Vote

As discussed in Part III above, one crucial insight the Reconstruction advocates achieved in the second half of Reconstruction involved the importance of protecting citizens' right to vote and otherwise participate meaningfully in political processes. While Congress in the end protected voting rights only with respect to discrimination on the basis of race, many of the congressional radicals, including Ashley, Stevens, and Sumner, along with key activists, such as Douglass and Shadd Cary, recognized that the arguments supporting Black men's suffrage logically required granting suffrage to women as well.[291] In this change of mindset towards universal suffrage rights, the Fifteenth Amendment heralded an important change. To be sure, the members of Congress fell short of creating a robust positive right to political participation when they decided to prohibit discrimination on the basis of race only, rather than covering property and education restrictions as they had considered doing. Nevertheless, the idea that voting is a fundamental right—first understood clearly by the Black abolitionists, then by the white radicals, and finally by most congressional Republicans as reflected in a limited sense in the Fifteenth Amendment—was new, important, and potentially transformative. It stands today as an important step in defining a fundamental political right with enormous yet unfulfilled potential.

5. Further Explore the Relationship Between Law and Human Psychology

At bottom, I have argued, the Reconstruction advocates in part failed to achieve their goal of creating foundational law that would further racial equality due to their unwarranted faith in the power of words on

changed the federalist structure). Chief Justice Roberts also failed to acknowledge that the Reconstruction Amendments altered the principle of equal state sovereignty on which he based his rationale for striking down important provisions of the Voting Rights Act in *Shelby County v. Holder*, 570 U.S. 529, as discussed *supra* at text accompanying notes 262–269. At the time of the enactment of the Amendments and supporting legislation, Congress and the People of course appreciated that federal supervision of states' grant of voting rights to their citizens would have to be greater in some jurisdictions than others, depending on the history of voter suppression in particular jurisdictions. *See supra* note 178.

[290] *Sebelius*, 567 U.S. at 533–35.

[291] *See, e.g.*, JONES, *supra* note 118, at 65 (noting Douglass' support of women's suffrage); *id.* at 117 (quoting Shadd's congressional testimony calling for suffrage for Black men and women); LEVINE, *supra* note 129, at 101 (describing Stevens' "democratic radicalism" as including "publicly endorsing the right of women to vote and hold public office"); ZIETLOW, *supra* note 240, at 13 (noting James Mitchell Ashley's support for women's suffrage); DAVID W. BLIGHT, FREDERICK DOUGLASS: PROPHET OF FREEDOM 488 (2018) (describing Douglass as an "old ally" of the women's suffrage movement); DONALD, *supra* note 34, at 251–52, 577–78 (noting Sumner's support for women's suffrage).

paper, without more, to achieve legal reform. But we cannot fault them for this today because *they lacked adequate theoretical tools* to help them think through how law could be brought to bear effectively, in the face of resistance, to solve the complex and intractable problem of racism.

A century of further intellectual inquiry into the nature of law and connected issues of human psychology provides contemporary racial justice theorists with far greater resources to think about these questions. Nevertheless, too little of the enormous brainpower being devoted to racial justice questions in the legal academy goes towards thinking about approaches to law and legal change other than traditional doctrinal analysis. We still know far too little about how and when law can work effectively to eradicate racism (as well as oppression and subordination more generally, as Stevens wanted to do), and what kinds of law, in what contexts, work best to those ends.

Reconstruction's history teaches that these questions falling outside the realm of traditional doctrinal analysis urgently need attention. Most basically, as an empirical matter, what kinds of regulatory strategies work best in reducing racism and in what circumstances? What can—and, more importantly, what can't—law do as a matter of prescription? What promise do the new ideas of today hold, including ideas arising from 20th Century sociological jurisprudence, the Legal Realist movement, and various interdisciplinary law-and-social-science approaches that grew out of these legal movements?

These approaches today include the many strands of "new governance" theory,[292] related in turn to "democratic experimentalism," often characterized as derived from John Dewey's classical pragmatist philosophy, which heavily influenced the American Legal realists.[293] Another example, derived from behavioral economics, is Cass Sunstein and others' "nudge" theory, which studies the ways in which human decision-making is rife with non-rational behavior and suggests that law sometimes works best when it is not prescriptive but instead "suggestatory," to coin a

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[292] A classic collection on new governance theory is LAW AND NEW GOVERNANCE IN THE EU AND US (Gráinne de Búrca & Joanne Scott eds., 2006) [hereinafter LAW AND NEW GOVERNANCE]. These editors define new governance as "a construct which has been developed to explain a range of processes and practices that have a normative dimension but do not operate primarily or at all through the formal mechanism of traditional command-and-control-type legal institutions. The language of governance rather than government signals a shift away from the monopoly of traditional politico-legal institutions, and implies either the involvement of actors other than classically government actors, or indeed the absence of any traditional framework of government . . . A further characteristic often present in new governance processes is the voluntary or non-binding nature of the norms"). *Id.* at 2, 3.

[293] Dewey argued that action and ideas must relate to each other, and that any evaluation of ideas must take place in relation to action. *See generally* Susan D. Carle, *Theorizing Agency*, 52 AM. U. L. REV. 307, 354–63 (2005). On the connection between democratic experimentalism and John Dewey's pragmatist philosophy, see, e.g., Charles Sabel, *Dewey, Democracy, and Democratic Experimentalism*, *in* DEMOCRATIC EXPERIMENTALISM 35, 37–38 (Brian E. Butler ed., 2012). On Dewey's influence on legal realism, see generally JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995) (analyzing various realists' interpretations and responses to Dewey's philosophy). On what John Dewey's philosophy meant for early twentieth century social reform efforts, see generally Carle, *John Dewey*, *supra* note 259, at 249–50, 255–62.

term.[294] A host of related ideas combine hard and soft law, and public and private law, especially in the realm of international law where prescription often is not an option.[295] These ideas have proved useful in domestic legal contexts as well, such as in workplace law, environmental law, and more.[296] They may similarly provide promising new directions in the racial justice arena, but need to be prioritized to counterbalance the legal academy's continued exaltation of Court-focused, doctrinal analysis of racial justice issues.

Yet another important approach taps the now highly sophisticated fields of public relations and marketing analysis, which recognize the importance of "framing" ideas in public consciousness to effectively support law reform campaigns. Examples include gay rights activists' use of public relations techniques in their campaign for marriage equality. In a surprisingly short time, reformers were able to turn public opinion in their favor. Activists reframed the issues to focus equality, individual autonomy, and freedom from government intrusion, and substantially erase from mainstream public discourse prejudice against same sex marriage rooted in phobias about social "deviance."[297] With this dramatic shift over less than a decade, gay rights activists built the groundwork for a quite striking achievement—namely, persuading the Roberts Court to protect same-sex marriage as a constitutional right anchored in the Fourteenth Amendment.[298] So too have activists for low-wage workers in Los Angeles used sophisticated public relations techniques, as documented in Professor Scott Cummings' study of these activists' "comprehensive campaign" strategies.[299]

Racial justice advocates should also turn more attention to interdisciplinary fields seeking to understand the causes of racism in the function of the human brain. Science today may be poised to help in generating the theory Reconstruction advocates lacked. For example,

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[294] RICHARD THALER & CASS SUNSTEIN, NUDGE: THE FINAL EDITION 18–32 (2021).

[295] *See generally* LAW & NEW GOVERNANCE, *supra* note 292.

[296] For a case study of "hybrid" new governance and rights-based approaches to race antidiscrimination law in the European Union, see Gráinne De Búrca, *EU Race Discrimination Law: A Hybrid Model?*, *in* LAW AND NEW GOVERNANCE, *supra* note 292, at 97, 118–20; for a case study of the injection of new governance ideas into occupational safety and health law in the United States, see Orly Lobel, *Governing Occupational Safety in the United States*, *in* LAW AND NEW GOVERNANCE, *supra* note 292, at 269, 275–87.

[297] *See* David L. Trowbridge, *Engaging Hearts and Minds: How and Why Legal Organizations Use Public Education*, 44 LAW & SOC. INQUIRY 1196, 1201–14 (2019) (discussing how marriage equality activists used public education strategies in their campaigns); *see also* Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1315–18 (2010) (noting how marriage equality advocates used public relations and education techniques to change the national narrative about gay marriage).

[298] Obergefell v. Hodges, 576 U.S. 644, 664–73 (2015).

[299] SCOTT CUMMINGS, AN EQUAL PLACE 460 (2021). And just as social justice advocates have used these techniques to shape public consciousness and bring about change, so too have business interests, such as Uber, used similar campaigns to shape the terms of debate about employment fairness in the gig economy. *See, e.g.*, Sarah Ellison, *When Foreign Markets Resisted, Uber Launched a Media Charm Offensive*, WASH. POST (July 11, 2022, 12:00 PM), https://www.washingtonpost.com/media/2022/07/11/uber-germany-india-media-campaigns/ [https://perma.cc/3JF7-2E7L] (describing Uber's "aggressive global influence campaign that was the company's strategy for powering its way into skeptical local markets around the world").

advances in neuroscience are helping legal scholars understand the brain basis for racism. These discoveries may help the same scholars use their particular expertise in fashioning legal institutions (conceived of much more broadly than simply courts and laws) to develop practices to counter racial exclusion.

Especially promising along these lines are advances in the subfield of social neuroscience.[300] Social neuroscience refers to an interdisciplinary field that looks to a wide range of empirical, science-based research to better understand the brain-based dimensions of human social behavior.[301] Among many other topics, social neuroscience investigates what causes bias in human judgment, including racial prejudice; how bias might be countered with effective interventions; and how law might be used to accomplish these goals. It investigates, for example, what techniques work to mitigate bias in decision-making when applied—as research shows most effective—right before the point of decision.[302] Might more effective judicial remedies be fashioned for racial discrimination on the basis of this research? Might the development of best practices help build into institutional design methods of curtailing implicit bias without resort to courts? Could policy articulated in state and federal laws push institutions to adopt such practices through incentives and the creation of safe harbor provisions?[303] In the same way that the disparate impact analysis now codified in Title VII arose from the social science thinking of the leaders of the National Urban League in the 1940s,[304] might the social neuroscience of the 2020s lead to creative new approaches for the 21st Century?

Interdisciplinary collaboration along all these lines provides promising routes for developing new insights. But those collaborations require that more legal scholars interested in racial justice devote their attention to these topics rather than remaining fixated on neo-formalist doctrinal analysis of the vagaries of the current Court's rulings in an era in which little help can be expected to come from that direction.[305] The Court gravely disappointed the cause of civil rights in the wake of Reconstruction. It is taking a similar direction now. Law-based racial justice advocates would do well to learn from that history and avoid making the same mistake of slipping back into legal formalism in looking to

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[300] *See* Susan D. Carle*, Acting Differently: How Science on the Social Brain Can Inform Antidiscrimination Law*, 73 U. MIAMI L. REV. 655, 661–70 (2019) [hereinafter Carle, *Acting Differently*] (exploring the relevance of social neuroscience to antidiscrimination law).

[301] *See* John T. Cacioppo & Jean Decety, *An Introduction to Social Neuroscience*, *in* THE OXFORD HANDBOOK OF SOCIAL NEUROSCIENCE 3, 6 (Jean Decety & John T. Cacioppo eds., 2015) (defining the field of social neuroscience).

[302] Carle, *Acting Differently*, *supra* note 300, at 727–29 (discussing research on effective interventions against bias and group think).

[303] *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 480–83 (2001) (discussing how federal sexual harassment law creates safe harbor incentives that motivate employers to adopt best practices in stopping workplace sexual harassment).

[304] *See* Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 Florida L. Rev. 251, 270-80 (2011).

[305] On the revival of formalism in law, see Tomas C. Grey, *The New Formalism* STAN. L. SCH., PUB. L. & LEGAL SERIES 16–27 (1999).

doctrinal development as a means of persuading a hostile Court to take a different tack.

VI. CONCLUSION

The aim of this Article has been to argue that contemporary advocates focused on law-related strategies for racial justice need to think beyond traditional approaches. Reconstruction's history suggests that advocates need to think beyond courts to experiments with voluntary approaches, best practices guidance, rolling rule regimes, institutional design incentives and much more. They should think about public education campaigns to change public narratives, opinion polling, media campaigns and more. This is not, of course, to say that the racial justice movement is not thinking in this way; advocates very much are doing so. But legal academia could be doing so much more in support of these initiatives if racial justice scholars spent more time thinking about topics other than the Court.

The problem of racial injustice, though identified and addressed by Reconstruction's advocates almost a century and a half ago, has drastically evaded solution. Its persistence is due in part to the lack of sufficient theoretical support Reconstruction's advocates faced as they undertook their enormously ambitious task of using law to counter racism. Today it is time to pursue better understandings of the relationship between legal theory, human psychology, and both traditional and less traditional uses of law-related strategies to attain that goal.[306]

[306] An example of a leading scholar who *is* looking to social science for help in theorizing racial injustice is Darren Hutchinson. *See* Darren Hutchinson, *"With All the Majesty of the Law": Systemic Racism, Punitive Sentiment, and Equal Protection* 110 CAL. L. REV. 371, 372–79 (2022).