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The Creation and Destruction of the Fourteenth Amendment Duringthe Long Civil War

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INTRODUCTION

The Fourteenth Amendment, "the linchpin of the current constitutional system,"[1] is vital to the integrity of the Constitution. Particularly in the 1860s and 1870s, and again in the 20th century, the Amendment has had the greatest influence on the way American citizens live their lives, and it is cited more often in modern litigation than any other amendment.[2] The Fourteenth Amendment overturned Chief Justice Roger Tawney's notorious 1857 decision, *Scott v. Sanford*.[3] In 1886, the Supreme Court interpreted the Fourteenth Amendment to rule that corporations were persons in *Santa Clara County v. Southern Pacific*

1. Garrett Epps, *The Struggle Over the Meaning of the 14th Amendment Continues*, ATLANTIC (July 10, 2018), https://www.theatlantic.com/ideas/archive/2018/07/the-struggle-over-the-meaning-of-the-14th-amendment-continues/564722/ [https://perma.cc/4KCA-KNY3].

2. *Id.* On the importance of the Fourteenth Amendment, see generally JACOBUS TENBROEK, EQUAL UNDER THE LAW (Collier Books 1965) (1951); DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION 1776–1995 155–56, 164–77, 183–86 (Univ. Press of Kan. 1996); GERARD N. MAGLIOCCA, AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT 2 (N.Y. Univ. Press 2013); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (Duke Univ. Press 1986); GARRETT EPPS, DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA (Henry Holt & Co. 2006); MICHAEL A. ROSS, JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA (LSU Press 2003).

3. Dred Scott v. Sanford, 60 U.S. 393 (1857).

Railroad.[4] In 1954, the courts used the Fourteenth Amendment in *Brown v. The Board of Education of Topeka* to overturn the 1896 decision *Plessy v. Ferguson*, which legalized segregation.[5] In 1962, the Fourteenth Amendment was the basis of the *Baker v. Carr* Supreme Court ruling that legislative bodies must consist of one man, one vote.[6] The Court used the Fourteenth Amendment's guarantee of due process and equal protection in 1963 to desegregate Clemson University.[7] In 1966, the courts used the Equal Protection Clause of the Fourteenth Amendment to overturn the male-only admission policy of the Virginia Military Institute.[8] In 1971, the Court held that a law discriminating against women violated the Fourteenth Amendment and overturned the 1873 *Bradwell v. Illinois* decision, which upheld Illinois's refusal to allow women to become lawyers.[9] In 1973, the landmark *Roe v. Wade* case was based on the Fourteenth Amendment.[10] Finally, in 2000, the Supreme Court decided the presidential election in *Bush v. Gore* on the basis of the Equal Protection Clause of the Fourteenth Amendment.[11]

How, and why, did the Fourteenth Amendment become this extraordinarily wide-ranging in its application and its influence in the United States, when the drafters created the Fourteenth Amendment to protect the rights of the newly freed enslaved people in the South and to provide them citizenship rights? This Article investigates the beginning of the story in the second half of the 19th century, when the Fourteenth Amendment revolutionized the lives and possibilities of African-Americans. It goes on to discuss how the Supreme Court undid most of those gains toward equality and equal rights for black citizens. Revolutions do go backward, and this story stands as a warning for modern times and court interpretations.

This year, 2018, is the sesquicentennial of the Fourteenth Amendment. Congress created, and the states ratified, the Fourteenth Amendment during Reconstruction to protect a group of formerly enslaved people. Although courts interpret laws through cases about particular individuals and not groups of people, the consequences of those individual rulings

4. Santa Clara Cty. v. S. Pac. R.R., 118 U.S. 394 (1886).

5. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954); Plessy v. Ferguson, 163 U.S. 537 (1896).

6. Baker v. Carr, 369 U.S. 186 (1962).

7. *See* Gantt v. Clemson Agr. College of S.C., 320 F.2d 611 (4th Cir. 1963). In addition, the author currently teaches at Clemson University.

8. United States v. Virginia, 518 U.S. 515 (1996).

9. Bradwell v. Illinois, 83 U.S. 130 (1873).

10. Roe v. Wade, 410 U.S. 113 (1973).

11. Bush v. Gore, 531 U.S. 98 (2000).

have major reprecussions for groups of people, especially African-Americans.

I. THE CIVIL WAR, RECONSTRUCTION, AND THE "NEW BIRTH OF FREEDOM"

The Civil War bicentennial has finished and Reconstruction's bicentennial has begun. Historians typically argue that Reconstruction ended with the withdrawal of the few federal troops remaining in the former Confederate states in 1877, but that is not how people viewed the situation or lived their lives at the time. The Civil War and Reconstruction cannot be separated; Reconstruction is part and parcel of the long Civil War.

During Reconstruction, former Confederate generals led paramilitary groups with many former Confederate soldiers.[12] In Louisiana and South Carolina, men too young to fight in the Civil War rode with the terrorists and paramilitary groups in 1876 and 1878 and applied for their states' Confederate War pensions.[13] These soldiers who had not fought in the Civil War believed Reconstruction was part of the Civil War.[14]

Reconstruction ended when the United States Supreme Court reversed gains of freedom for African-Americans during Reconstruction; the Fourteenth Amendment is the centerpiece for understanding this complicated history. In 1896, the Supreme Court sanctioned the "separate but equal" doctrine in *Plessy v. Ferguson*; in 1898, the Court allowed voting disenfranchisement in *Williams v. Mississippi*.[15] After the Supreme Court gave the green light, the former Confederacy rushed to construct state governments based on white supremacy.[16]

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12. *See, e.g.*, ORVILLE VERNON BURTON, THE AGE OF LINCOLN 295 (Hill & Wang 2007); ORVILLE VERNON BURTON, UNGRATEFUL SERVANTS? EDGEFIELD'S BLACK RECONSTRUCTION: PART I OF THE TOTAL HISTORY OF EDGEFIELD COUNTY (1976); Orville Vernon Burton et al., *Defining Reconstruction*, *in* A COMPANION TO THE CIVIL WAR AND RECONSTRUCTION 299–322 (Lacy Ford ed., 2005).

13. *Supra* note 12.

14. *Supra* note 12.

15. Plessy v. Ferguson, 163 U.S. 537 (1896); Williams v. Mississippi, 170 U.S. 213 (1898). Before *Williams v. Mississippi*, 170 U.S. 213 (1898), only Mississippi and South Carolina had created new state constitutions disfranchising and implementing *de jure* segregation.

16. Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 536 n.46 (1973). The classic study of southern state disfranchisement is J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910 (Yale Univ. Press 1974). *See also* MICHAEL PERMAN, STRUGGLE FOR MASTERY:

A. Lincoln's Beliefs Before the War

At a cost of more than 600,000–750,000 dead, and just as many maimed or wounded, the Civil War held the Union together and ended slavery.[17] More than one person died for every six freed in the Civil War.[18] The uprooting of slavery unleashed a broad debate about what freedom signified and what it meant to be an American citizen.

Abraham Lincoln, for example, professed that freedom signified aiming for equality. In Lincoln's Gettysburg Address, given midway through the war, he promised "a new birth of freedom" for a nation "conceived in liberty and dedicated to the proposition that all men are created equal."[19] In Lincoln's two most famous speeches, he spoke of his remaining tasks. In the Gettysburg Address, he spoke of the need to conclude "the unfinished work which they who fought here so nobly advanced."[20] In his Second Inaugural Address, he expressed similar

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DISFRANCHISEMENT IN THE SOUTH, 1888–1908 (Univ. of N.C. Press 2001); ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (Basic Books 2000); R. Volney Riser, DEFYING DISFRANCHISEMENT: BLACK VOTING RIGHTS ACTIVISM IN THE JIM CROW SOUTH, 1890–1908 (LSU Press 2010). Before the Supreme Court's ruling, only Mississippi and South Carolina had legally disenfranchised African-American voters. Louisiana, North Carolina, Alabama, Virginia, and Georgia joined Mississippi and South Carolina in adopting new disfranchising constitutions; other states acted by statute.

17. The historical estimate was 600,000. Historical demographers figure newer estimates between "650,000 to 850,000 . . . with a preferred estimate of 750,000." J. David Hacker, *A Census-Based Count of the Civil War Dead*, 57 CIV. WAR HIST. 307, 348 (2011). *See also* J. David Hacker, *Recounting the Dead*, N.Y. TIMES (Sept. 20, 2011), https://opinionator.blogs.nytimes.com/2011/09/20/recounting-the-dead/ [https://perma.cc/5A94-JWPV] (recounting the dead); STEVEN V. ASH, THE BLACK EXPERIENCE IN THE CIVIL WAR SOUTH 74–75 (Praeger 2010). On the cost of the war, see Phillip Shaw Paludan, *What Did the Winners Win? The Social and Economic History of the North during the Civil War*, *in* WRITING THE CIVIL WAR: THE QUEST TO UNDERSTAND 181–82, 197 (James M. McPherson & William J. Cooper, Jr. eds., 1998); Claudia Golden & Frank Lewis, *The Economic Cost of the American Civil War: Estimates and Implications*, 35 J. OF ECON. HIST. 299–326 (1975); SUSAN PREVIANT LEE & PETER PASSELL, A NEW ECONOMIC VIEW OF AMERICAN HISTORY 360–63 (W. W. Norton & Co. 1994).

18. *See supra* note 17.

19. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863); *see* ORVILLE VERNON BURTON, THE ESSENTIAL LINCOLN: SPEECHES AND CORRESPONDENCE 253–54 (Farrar, Straus & Giroux 2009).

20. *See supra* note 19.

sentiments: "With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in."[21] The Fourteenth Amendment represents the beginning to tackling Lincoln's "unfinished work."

Lincoln expressed his devotion to liberty and to the Declaration of Independence as early as the 1850s. On October 16, 1854, in Peoria, Lincoln proclaimed: "Let us readopt the Declaration of Independence, and with it the practices and policy which harmonize with it. . . . If we do this, we shall not only have saved the Union, but we shall have so saved it as to make and to keep it forever worthy of the saving."[22]

In 1857, the African-American abolitionist Frederick Douglass stated what would become Lincoln's belief:

> The constitution, as well as the Declaration of Independence, and the sentiments of the founders of the Republic give us a platform broad enough, and strong enough, to support the most comprehensive plans for the freedom and elevation of all the people of this country without regard to color, class, or clime.[23]

Further, on July 10, 1858, in an extemporaneous speech in Chicago responding to a call for white supremacy, Lincoln declared:

> I should like to know if taking this old Declaration of Independence which declares that all men are equal upon principle, and making exceptions to it, where will it stop . . . . I have only to say, let us discard all this quibbling about this man and the other man—this race and that race and the other race being inferior, and therefore they must be placed in an inferior position . . . . Let us discard all these things, and unite as one people throughout this land, until we shall once more stand up declaring that all men are created equal.[24]

Douglass and Lincoln agreed—if freedom were to have a new birth, the Constitution would have to be brought into line, and with the ratification of the Fourteenth Amendment during Reconstruction, it was. The six years following the war produced a series of amendments and laws

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21. Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865); *see* BURTON, *supra* note 19.

22. Abraham Lincoln, Peoria Speech (Oct. 16, 1854); *see* BURTON, *supra* note 19.

23. Frederick Douglass, West India Emancipation Speech in Canandaigua, N.Y. (Aug. 3, 1857).

24. Abraham Lincoln, Chicago Speech (July 10, 1858); *see* BURTON, *supra* note 19.

to bring "a new birth of freedom."[25] Lincoln believed that the Emancipation Proclamation was "the central act of [his] administration and the great event of the 19th century," and he stated that if he were to be remembered for anything it would be the Emancipation Proclamation.[26] It was Lincoln's understanding of liberty, however, that became the greatest legacy of the age.[27]

"Equality" was memorialized in the Declaration of Independence, the United States's mission statement, but not the Constitution, the country's rule book. Lincoln revolutionized personal freedom in the United States by assuring that the law protected it. Lincoln essentially inserted the Declaration of Independence into the Constitution.

B. Heading into Reconstruction

The Reconstruction era of American government redefined the role of government as a protector of liberty. In 1864, Abraham Lincoln told a group in Baltimore, "The world has never had a good definition of the word liberty, and the American people just now are much in want of one."[28] Political philosophy involves an analysis of "positive" and "negative" liberty.[29] Several years before political philosopher Isaiah Berlin brought those concepts of positive and negative liberty to the

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25. *See* Abraham Lincoln, Gettysburg Address (Nov. 19, 1863); *see* BURTON, *supra* note 19.

26. *Emancipation Proclamation*, ENCYCLOPÆDIA BRITANNICA, https://www.britannica.com/event/Emancipation-Proclamation#accordion-article-history [https://perma.cc/9ZZ7-SFW6] (last visited Sept. 23, 2018). *See also* BURTON, *supra* note 19.

27. Francis B. Carpenter, *Anecdotes and Reminiscences*, *in* HENRY J. RAYMOND, THE LIFE AND PUBLIC SERVICES OF ABRAHAM LINCOLN: TOGETHER WITH HIS STATE PAPERS, INCLUDING HIS SPEECHES, ADDRESSES, MESSAGES, LETTERS, AND PROCLAMATIONS, AND THE CLOSING SCENES CONNECTED WITH HIS LIFE AND DEATH; TO WHICH ARE ADDED ANECDOTES AND PERSONAL REMINISCENCES OF PRESIDENT LINCOLN BY FRANK B. CARPENTER 764 (Derby & Miller 1865). That Lincoln's greatest legacy was introducing and assuring personal liberty is the thesis of BURTON, THE AGE OF LINCOLN, *supra* note 12.

28. Abraham Lincoln, Address at Sanitary Fair, Balt., Md. (Apr. 18, 1864); *see* BURTON, THE AGE OF LINCOLN, *supra* note 12, at 165–66.

29. Isaiah Berlin, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY (1959); BURTON, THE AGE OF LINCOLN, *supra* note 12. On positive and negative liberty and Lincoln, see James M. McPherson, *Lincoln and Liberty*, *in* ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION (1990); Don E. Ferhenbacher, *The Paradoxes of Freedom*, *in* LINCOLN IN TEXT AND CONTEST (1987); PHILIP SHAW PALUDAN, THE PRESIDENCY OF ABRAHAM LINCOLN 230–31 (1994).

forefront in 1958, Lincoln knew all about negative and positive liberty. He did not expound on the topic while in front of this Baltimore crowd—instead, he told a simple story:

> The shepherd drives the wolf from the sheep's throat, for which the sheep thanks the shepherd as a liberator, while the wolf denounces him for the same act as the destroyer of liberty, especially as the sheep was a black one. Plainly the sheep and the wolf are not agreed upon a definition of the word liberty.[30]

Lincoln was thankful that "the wolf's dictionary ha[d] been repudiated."[31] Prior to the Civil War, "we the people" wanted freedom from government. The Bill of Rights protected the people from governmental powers. The First Amendment begins: "Congress *shall make no law* respecting . . . ."[32] The First Amendment, therefore, creates an understanding that the government, by non-action, protects freedom.[33] In reality, however, that "repudiation" is a never-ending story still being told through the Fourteenth Amendment.

II. THE THREE RECONSTRUCTION AMENDMENTS

The three Reconstruction Amendments revolutionized freedom in the United States by assuring that freedom was protected by law. Each of the three Reconstruction Amendments—the Thirteenth, which outlawed slavery; the Fourteenth, which granted citizenship to people born in the United States and ensured due process; and the Fifteenth, which granted the right to vote to all male citizens—all specify that "Congress *shall have power to enforce* . . . ."[34] These amendments fundamentally altered the Constitution.

During Reconstruction, the core American belief in the need to limit governmental power was transforming. The cavalcade of amendments and laws from 1865 to 1871 produced a comprehensive structure of freedom, including provisions for racial equality in public and private matters, guarantees of fairness in legal and judicial proceedings, federal protection against public or private invasion of the new guarantees, and—central to

30. Lincoln, *supra* note 28; *see* BURTON, THE AGE OF LINCOLN, *supra* note 12, at 165–66.

31. Lincoln, *supra* note 28; *see* BURTON, THE AGE OF LINCOLN, *supra* note 12, at 165–66.

32. U.S. CONST. amend. I (emphasis added).

33. *See* McPherson, *supra* note 29; Ferhenbacher, *supra* note 29; PALUDAN, *supra* note 29, at 230–31; BURTON, THE AGE OF LINCOLN, supra note 12.

34. U.S. CONST. amends. XIII, XIV, § 1, and XV (emphasis added).

all—the right to vote.[35] These amendments and laws notably lacked, after some early efforts, economic assistance and land reform.[36]

The various passed measures helped to put four million freed people on an uncertain path toward full citizenship. Yet, slavery's death did not automatically confer any positive rights upon African-Americans. Slavery's end liberated African-Americans only from a master's ownership, eliminating, at the same time, the latter's motive for self-interested benevolence, which enslaved people manipulated and tried to use to their benefit.

A. The Thirteenth Amendment

In January 1865, with the war's end in sight, Congress introduced the Thirteenth Amendment.[37] Section 1 states, "Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[38]

The Amendment also included a potent enforcement section stating that "Congress shall have power to enforce this article by appropriate legislation."[39] Amending the Constitution to give Congress more power to enforce laws was based in the Constitution's "necessary and proper" clause,[40] which states that Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution . . . all other powers vested by this Constitution in the Government of the United States."[41] Nevertheless, the 11 words of the enforcement section in the Thirteenth Amendment changed the role of the federal government in securing citizens' rights.

Abraham Lincoln was adamant that a constitutional amendment was necessary to ban slavery. Indeed, the Supreme Court's *Dred Scott* decision

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35. *See* U.S. CONST. amends. XIV and XV.

36. African-American males in the former Confederacy were given the franchise with the Military Reconstruction Acts in 1867 so that they could vote for the new Reconstruction state constitutions after the former Confederate leaders had implemented state constitutions that did not recognize African-American rights. Also notably lacking, or abandoned, were women's rights.

37. *13th Amenment to the U.S. Constitution*, LIBR. OF CONGRESS (July 12, 2018), https://www.loc.gov/rr/program/bib/ourdocs/13thamendment.html [https://perma.cc/7S9N-CH58].

38. U.S. CONST. amend. XIII.

39. *Id.*

40. *Id.* art. I, § 8.

41. *Id.*

of 1857, which declared African-Americans had "no rights which the white man was bound to respect," was still the law of the land.[42] Historians still debate whether Chief Justice Taney, who wrote the Supreme Court's *Dred Scott* opinion, had already drawn up a memorandum to declare that the Emancipation Proclamation was only a wartime measure and would not apply after the war.[43] Whether or not the memorandum existed, it is clear what Tawney thought and what he would have most likely done. Moreover, the Emancipation Proclamation did not address the entire nation. It did not cover those areas that loyal slaveholders held in the Union border states. As a British newspaper, *The Spectator*, wrote, "The principle asserted is not that a human being cannot justly own another, but that he cannot own him unless he is loyal to the United States."[44] Thus, it took military victory *and* the Thirteenth Amendment to abolish slavery officially nationwide.

In April of 1864, the Senate approved the Thirteenth Amendment and sent it to the House of Representatives,[45] where Republicans and Democrats were fundamentally split. Democrats knew slavery's day was done but thought emancipation should do no more than end bondage, leaving African-Americans as second-class people in a white man's

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42. Dred Scott v. Sandford, 60 U.S. 393 (1857).

43. There is a debate among historians; some believe that Chief Justice Taney had already drawn up a memorandum to declare that the Emancipation Proclamation was only a wartime measure and would not apply after the war. Others believe he did not draft the memorandum. We know Taney thought most of what Lincoln did was unconstitutional, and he did draft memos or opinions on some issues before they became cases, so whether he actually did for the Emancipation Proclamation seems a minor matter. *See* HAROLD M. HUMAN & WILLIAM M. WIECKE, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875 252–55, 268, 274, 305, 397 (Harper & Row 1982); DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (Oxford Univ. Press 1978); JAMES SIMON, LINCOLN AND CHIEF JUSTICE TANEY: SLAVERY, SECESSION, AND THE PRESIDENT'S WAR POWERS 222–23, 245 (2006); Timothy Huebner, *"The Unjust Judge": Roger B. Taney, the Slave Power, and the Meaning of Emancipation*, 40 J. OF SUP. CT. HIST. 249, 253–55 (2015); PAUL FINKELMAN, SUPREME INJUSTICE: SLAVERY IN THE NATION'S HIGHEST COURT (Harvard Univ. Press 2018).

44. *The President's Last Proclamation*, SPECTATOR (London), Oct. 11, 1862, at 115.

45. Rick Beard, *The Birth of the 13th Amendment*, N.Y. TIMES (Apr. 8, 2014, 10:35 PM), https://opinionator.blogs.nytimes.com/2014/04/08/the-birth-of-the-13th-amendment/ [https://perma.cc/U62A-CKZB].

country.[46] The Democrats insisted that their opposition to the Thirteenth Amendment was simply a fear that its meaning included the equality they despised.[47] The Democratic party campaigned as the white man's party and as the party of white supremacy.[48]

Republicans ranged over a spectrum, from those who favored limited rights to those who believed in full equality—and were called "radical" for that reason. Supporters of the Amendment assured its opponents that the Amendment's meaning did not go beyond emancipation. In the constitutionally required two-thirds vote, on January 31, 1865, every Republican voted in favor of the Amendment.[49]

The Democratic Party was solidly against the Amendment, except for a handful of Democrats whose "aye" votes President Lincoln secured through methods dramatized in the Steven Spielberg film, *Lincoln*.[50] The Amendment passed 119–56—three votes the other way would have meant the Amendment's defeat. In jubilation over the passage, Representative George Julian of Indiana wrote in his diary: "Members joined in the shouting and kept it up for some minutes. Some embraced one another, others wept like children. I have felt, ever since the vote, as if I were in a new country."[51] Indeed, it was a new country.

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46. *See generally* Abigail Perkiss, *Abraham Lincoln as constitutional radical: the 13th amendment*, NAT'L CONST. CTR. (July 12, 2013), https://constitutioncenter.org/blog/abraham-lincoln-as-constitutional-radical-the-13th-amendment [https://perma.cc/Q3JB-R33D].

47. *See generally id.*

48. *See generally id.*

49. *Passage*, MR. LINCOLN & FREEDOM, http://www.mrlincolnandfreedom.org/civil-war/13th-amendment/passage/ [https://perma.cc/F9VM-7HYP] (last visited Sept. 23, 2018) (quoting journalist Noah Brooks).

50. *See* LINCOLN (DreamWorks Pictures 2012).

51. DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995 162 (Univ. Press of Kan. 1996). *See also* JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA (Oxford Univ. Press 1988); MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT (Cambridge Univ. Press 2001); LEONARD L. RICHARDS, WHO FREED THE SLAVE? THE FIGHT OVER THE 13TH AMENDMENT (Univ. of Chi. Press 2015); ALEXANDER TSESIS, THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT (Columbia Univ. Press 2010); CHRISTIAN G. SAMITO, LINCOLN AND THE THIRTEENTH AMENDMENT (S. Ill. Univ. Press 2015).

B. The South's Response

President Abraham Lincoln signed the proposed amendment—unprecedented and resented by Congress—and sent it to the states for ratification.[52] The Thirteenth Amendment became a part of the Constitution in December of 1865, when 27 states—three-fourths of the 36 states—ratified it.[53] Mississippi did not ratify the Thirteenth Amendment until 1995 and did not submit the official paperwork until 2013, after the *Lincoln* movie.[54] With ratification, the new President Andrew Johnson invited the Southern states to rejoin the Union, and the states fully expected to do so. But as a Democrat who subscribed to the Democratic view that this was a white man's country, Andrew Johnson set virtually no conditions on the Rebel states' return to the Union and Congress.[55]

Johnson opposed nearly all efforts to integrate newly freed slaves into American life.[56] He pardoned thousands of ex-Confederates from the consequences of rebellion and returned to them the right to vote that Congress had taken from Confederate officers and officials.[57] He pushed to restore Southern states swiftly to the Union and required no regulations on race relations to be present in the new state constitutions—effectively allowing Southern governments free rein over determining the roles and status of African-Americans.[58]

Furthermore, Johnson did not issue any federal guarantees of the right to vote for the former enslaved. He claimed to be protecting America, not from ex-Confederates, but from radical Republicans and their African-American allies.[59] As a result, Southern states promptly selected their former

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52. *Passage*, *supra* note 49.

53. *Id.*

54. Stephanie Condon, *After 148 years, Mississippi finally ratifies 13th Amendment, which banned slavery*, CBS NEWS (Feb. 18, 2018, 10:59 PM), https://www.cbsnews.com/news/after-148-years-mississippi-finally-ratifies-13th-amendment-which-banned-slavery/ [https://perma.cc/KFT3-7L3Q].

55. *The Impeachment of Andrew Johnson*, CONST. RIGHTS FOUND., http://www.crf-usa.org/impeachment/impeachment-of-andrew-johnson.html [https://perma.cc/4TLF-HB7Y] (last visited Sept. 23, 2018).

56. W. Fitzhugh Brundage, *Rewconstruction and the Formerly Enslaved*, NAT'L HUMANITIES CTR., http://nationalhumanitiescenter.org/tserve/freedom/1865-1917/essays/reconstruction.htm [https://perma.cc/WF5N-NLXM] (last visited Sept. 23, 2018).

57. *The Impeachment of Andrew Johnson*, supra note 55.

58. *Id.*

59. H. LOWELL BROWN, HIGH CRIMES AND MISDEMEANORS IN PRESIDENTIAL IMPEACHMENT 149 (2010); Elizabeth R. Varron, *Andrew Johnson*

Secessionist and Confederate leaders to fill most of the seats they were regaining.[60] When the states sent these enemies of the Union as their representatives to Washington D.C., however, the Republican-dominated 39th Congress rejected the credentials of every one of the Rebel states' potential Senators and Representatives.[61]

Freedom is a powerful engine. Whatever meaning the Thirteenth Amendment may have had in January of 1865, the South's reaction to the end of slavery changed the dynamics of a rush toward reunion. Although African-Americans were defining and living their new lives with freedom, the Southern states—which their Antebellum and Confederate leaders still controlled—busily enacted thinly disguised versions of slavery.[62] Known as "Black Codes," these systems gave white employers the power to administer "moderate corporeal chastisement"—whipping.[63] Traveling without a pass from one's employer was forbidden. In most states, it became nearly impossible for African-Americans to rent land, market their own produce, or seek effective legal redress against whites.[64] Freed people were not allowed to possess knives or firearms, buy or sell alcohol, or preach the Gospel without a license from white authorities.[65]

More egregious regulations were mere replicas of slave code clauses, with the substitution of "freedmen" for "slaves." Section 40 of the New Orleans Code went further still—it declared "free people of color ought never to insult or strike white people . . . nor presume to think of

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and the Legacy of the Civil War, OXFORD RES. ENCYCLOPEDIA (Mar. 2016), http://americanhistory.oxfordre.com/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-11 [https://perma.cc/27L3-QDL8].

60. *See, e.g.*, Christine Blackerby, *What is Loyalty?: David Patterson's Oath of Office*, NAT'L ARCHIVES (July 28, 2016), https://prologue.blogs.archives.gov/2016/07/28/what-is-loyalty-david-pattersons-oath-of-office/ [https://perma.cc/CLB2-2MJR].

61. David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 385–86 (2008).

62. For further information on Black Codes, see, e.g., T. B. WILSON, BLACK CODES OF THE SOUTH (Univ. of Ala. Press 2000); WILLIAM COHEN, AT FREEDOM'S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR CONTROL, 1861-1915 (1991); *Black Codes in the Former Confederate States*, SHOTGUN'S HOME OF THE AMERICAN CIVIL WAR, http://www.civilwarhome.com/blackcodes.htm [https://perma.cc/9BAQ-RRNZ] (last updated Feb. 15, 2002).

63. *See supra* note 62.

64. *See supra* note 62.

65. *See supra* note 62.

themselves equal to the white."[66] The system would bind African-Americans to the land, impoverished, uneducated, disenfranchised, and unorganized, in perpetuity. White people who might have thought differently were kept in line by a section of this code that made it a crime for any of them to associate with any African-American "on terms of equality."[67]

It was this Southern, white action against the freed slaves that steadily and rapidly—though not unanimously—propelled the nation toward equality. The *Chicago Tribune* typified Northern Republican outrage over the Black Codes:

> We tell the white men of Mississippi that the men of the North will convert the state of Mississippi into a frog pond before they will allow any such laws to disgrace one foot of soil in which the bones of our soldiers sleep and over which the flag of freedom waves.[68]

Southern action thus actually fueled the Northern response and intervention that Southerners scorned.

In reaction to the Black Codes, and despite misgivings about African-American inferiority, Northern Republicans in the U.S. House and Senate eventually embraced racially neutral suffrage as a legacy of emancipation, and Congress worked on legislation to implement the Thirteenth Amendment by outlawing "badges and incidents" of slavery.[69] African-American votes were also crucial in establishing competitive Republican parties in the South once the ex-Confederate states rejoined the Union. [70] Congress took its first step toward this goal in late 1866 when it mandated black voting rights in the District of Columbia and required Nebraska and Colorado to implement race-neutral suffrage for admission to the Union.[71]

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66. James E. Wainwirght, *William Claiborne and New Orleans's Battalion of Color, 1803-1815: Race and the Limits of Federal Power in the Early Republic*, 57 J. OF LA. HIST. ASS'N 5, 27 (2016).

67. *See supra* note 62.

68. CHICAGO TRIBUNE*,* Dec. 1, 1865.

69. *See generally* Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 J. CONST. L. 561 (2011).

70. HANES WALTON, JR. ET AL., THE AFRICAN-AMERICAN ELECTORATE: A STATISTICAL HISTORY 31 (2012).

71. *Id.*

C. The Fourteenth Amendment

When the 39th Congress reconvened the first week of December 1865, it refused to accept the former Confederate states' elected Representatives under President Johnson's lenient admittance to the Union.[72] The former Confederate states had defiantly elected the old planter elite and former Confederates, such as the Confederate vice president Alexander Stephens, to be their representatives.[73] Thus, some called the 39th Congress the "Rump Congress"[74] because approximately 80 former Confederate state representatives were not allowed to vote. In 1866, however, that so-called Rump Congress proposed the Fourteenth Amendment, and a two-thirds vote passed the Amendment in both the House and Senate, as Article V of the Constitution requires.[75]

In the midterm elections of 1866, Republicans made large gains. The end result was the 1866 Civil Rights Act that began by declaring African-Americans to be citizens of the United States, reversing the noxious ruling in the 1857 *Dred Scott* case.[76] The 1866 Civil Rights Act went on to ban racial discrimination in making and enforcing contracts, buying and selling property, suing and testifying in court, and generally guaranteed to African-Americans the "full and equal benefit of all laws" and protection against unequal "punishment, pains, and penalties."[77] Furthermore, Congress enacted the Reconstruction Acts of 1867 over President

72. *See* Currie, *supra* note 61, at 385–86.

73. *See Stephens, Alexander Hamilton*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=s000854 [https://perma.cc/CHH2-FL7Z] (last visited Sept. 23, 2018).

74. *See, e.g.*, ELLIS PAXSON OBERHOLTZER, A HISTORY OF THE UNITED STATES SINCE THE CIVIL WAR: 1865-68 164 (Macmillian Co. 1917).

75. *See* STEVEN HAHN, A NATION WITHOUT BORDERS: THE UNITED STATES AND ITS WORLD IN AN AGE OF CIVIL WARS 1830-1910 (2016).

76. *See* Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (reenacted by Enforcement Act of 1870, ch. 114, § 8, 16 Stat. 140, 144 (1870) (codified as amended at 42 U.S.C. §§ 1981–82 (2012))).

77. *Id.* § 1. *See* CHRISTIAN G. SAMITO, THE GREATEST AND GRANDEST ACT: THE CIVIL RIGHTS ACT OF 1866 FROM RECONSTRUCTION TO TODAY (S. Ill. Univ. Press 2018).

Johnson's veto,[78] which required African-American male suffrage within the former Confederate states.[79]

The new Reconstruction Act, however, raised questions. Was it constitutional? Was its guarantee of citizenship and equality "appropriate legislation" to enforce the Thirteenth Amendment's ban on slavery? To resolve these questions, Congress began solidifying the guarantees by putting them into the Constitution.

1. African-American Citizenship: Escaping the Dred Scott *Decision*

Before the passage of the Fourteenth Amendment, the definition of African-American citizenship was the one set by the Supreme Court in 1857. Chief Justice Roger Taney wrote the decision in *Dred Scott v. Sandford*.[80] The Court then ruled that African-Americans were not citizens and had no rights. *Dred Scott v. Sandford* is the most reviled case in Supreme Court history. The case is universally condemned for its blundering partisanship, inventing so-called constitutional doctrine out of whole cloth, and, not-so-incidentally, hastening the Civil War.

Above all, the case is forever infamous for the hateful words that African-Americans "had no rights which the white man was bound to respect."[81] If these words had been simply a historical observation, that would have been enough, but Chief Justice Taney used them for the unprecedented deed of fastening racial discrimination squarely into the Constitution. The Constitution of the Founding Fathers included clauses that drew a line between slaves and free people, but Chief Justice Taney, joined by a majority of the Supreme Court, turned that line into a *color* line, and declared explicitly that the "blessings of *liberty*" promised by the

78. President Johnson's veto came as no surprise as he rejected ever other major civil rights bill—14 in total. *See Bills Vetoed by President Johnson*, NAT'L PARK SERV., https://www.nps.gov/anjo/learn/historyculture/vetoed-bills.htm [https://perma.cc/5J4V-UF2A] (last updated Apr. 14, 2015) (calling President Johnson the "Veto President").

79. The Senate narrowly sustained one veto, his first one, of the second Freedmen's Bureau bill, but put most of that bill into the civil rights bill discussed in the text. *See Freedmen's Bureau Acts of 1865 and 1866*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/FreedmensBureau.htm [https://perma.cc/ZP2N-3MPK] (last visited Sept. 23, 2018). He pocket-vetoed two bills, which the Senate could not override. *See generally Andrew Johnson*, U.S. SENATE, https://www.senate.gov/reference/Legislation/Vetoes/Presidents/Johnson A.pdf [https://perma.cc/2EL8-PXT6].

80. Dred Scott v. Sandford, 60 U.S. 393 (1857).

81. *Id.* at 407.

Constitution to all free people, were somehow denied to all those of African descent, even if free and even if born free of free parents.[82]

What led Chief Justice Taney to fill 25 pages establishing that Dred Scott was not a citizen? Surely, it was not the limited question of whether Scott had the "privilege" of bringing a suit in federal court. The answer instead seems to lie in certain rights that Article IV of the Constitution gives to citizens of one state traveling in other states, specifically certain "privileges and immunities"—words later carried over from Article IV and included in the Fourteenth Amendment.

Taney openly expressed his fear that if freed slaves were citizens, their rights would include the following, as he listed them in 1857:

> the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. [83]

These are rights the slave states denied to African-Americans, whether enslaved or free. Chief Justice Taney intended to extend that lack of freedom to all states, and the Supreme Court majority agreed.[84]

To achieve real freedom, Justice Tawney's *Dred Scott* decision would have to be overturned. A "New Birth of Freedom" is what Lincoln called for in his Gettysburg address.[85]

In June of 1866, Congress approved a new constitutional amendment, despite Democrats voting "no," and sent it to the states for ratification as the Fourteenth Amendment.[86] The heart of the Amendment was in Section 1, which contained four distinct clauses.[87] The first clause stated that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State

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82. *Id.* at 412 (emphasis added).

83. *Id.* at 417.

84. *See id.*

85. *See* Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).

86. *See generally 14th Amendment to the U.S. Constitution*, LIBR. OF CONGRESS (June 17, 2018), https://www.loc.gov/rr/program/bib/ourdocs/14thamendment.html [https://perma.cc/B8F2-KPV7].

87. U.S. CONST. amend. XIV, § 1.

wherein they reside."[88] Nearly all African-Americans in the country in 1866 had been born in the United States.

2. "All Persons Born . . . in the United States": Birthright Citizenship

Birthright citizenship in the United States applied not only to former slaves, but also to the children of immigrants, regardless of whether their parents were documented. It reinforced this idea of citizenship status by declaring that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,"[89] with the term "privileges and immunities" borrowed from the original Constitution. This provision constitutionalized the guarantee of African-American citizenship that Congress had created in the Civil Rights Act of 1866. The Amendment excluded Native Americans because they were thought to have sovereignty as tribes, and this classification was not changed until 1887 with the Dawes Act.[90] The Act excluded children of foreign diplomats' wives, as well as children fathered by occupying armies' soldiers, though the United States has not been occupied since the War of 1812.[91]

The concept of "birthright citizenship" is of extreme importance and much debate, and criticism of former President Obama exists for not propagating that American history. Ironically, birthright citizenship, commonly known as *jus soli*, is one of the most unique arguments for American exceptionalism. The United States and Canada—and now countries in South America and Latin America—have birthright citizenship; European countries do not offer birthright citizenship.[92] It was the Republican Party—the Party of Lincoln—that gave the country the

88. *Id.*

89. *Id.*

90. Dawes Act, 24 Stat. 388 (codified at 25 U.S.C. §§ 331–58).

91. Eric Foner, *The Supreme Court and the History of Reconstruction—And Vice-Versa*, 112 COLUM. L. REV. 1585 (2012); Eric Foner, *An American Birthright*, NATION, Sept. 14/21, 2015, available at http://ericfoner.com/articles/082715nation.html [https://perma.cc/9QQA-YFMJ]; Eric Foner, *Who Is an American? The Imagined Community in American History*, 40 CENTENNIAL REV. 425 (1997); ALLAN J. LICHTMAN, THE EMBATTLED VOTE IN AMERICA: FROM THE FOUNDING TO THE PRESENT (Harvard Univ. Press 2018).

92. Foner, *An American Birthright*, *supra* note 91; *see also Countries Who Offer Birthright Citizenship*, WORLDATLAS, https://www.worldatlas.com/articles/countries-who-offer-birthright-citizenship.html [https://perma.cc/AYA6-QPLE] (last updated June 22, 2018).

Fourteenth Amendment. Now, many of the leaders of the Party of Lincoln are calling for revocation of the interpretation of the Fourteenth Amendment that recognizes children born of undocumented immigrants as citizens of the United States.[93]

Citizenship became an issue in the United States only after the Civil War; the original Constitution mentioned citizens, but did not delineate or define who was a citizen. A 1790 law, however, restricted those who wanted to become citizens to any "free white person."[94] Thus, from its beginning, the United States linked race with citizenship. Slaves were never considered part of the body politic, but in 1860, nearly half a million free African-Americans lived in the United States. In the 1857 *Dred Scott* decision, the Supreme Court declared that no black person could be a citizen of the United States.[95] The Emancipation Proclamation and the nearly 200,000 African-Americans that fought for the Union in the Civil War changed that equation.

The Fourteenth Amendment begins with the clear statement, "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."[96] Stated above, the drafters intended the Fourteenth Amendment to address the Supreme Court's *Dred Scott* decision of 1857, but legislators and advocates raised and discussed a number of issues—for example, would it include the children of gypsies or the Chinese? Senator Lyman Trumbell, a friend of Lincoln's, chaired the Senate Judiciary Committee and stated that it meant what it said: "all persons" born in the United States would be citizens.[97] Additionally, George William Curtis, one of the founders of the Republican Party and an influential Republican spokesman, proffered that the Fourteenth Amendment was part of that spirit of the Declaration of Independence that changed the United States from a government "for white people" to one "for mankind."[98]

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93. *See generally* Tom Donnelly, *The GOP's Birthright Citizenship Flip-Flop*, POLITICO MAG. (Aug. 23, 2015), https://www.politico.com/magazine/story/2015/08/the-gops-birthright-citizenship-flip-flop-121646 [https://perma.cc/E4MT-KSQJ].

94. Naturalization Act of 1790, 1 Stat. 103.

95. Dred Scott v. Sandford, 60 U.S. 393 (1857).

96. U.S. CONST. amend. XIV, § 1.

97. CONG. GLOBE, 39th Cong., 1st Sess. 2893 (May 30, 1866).

98. *See* Foner, *The Supreme Court and the History of Reconstruction—And Vice-Versa*, *supra* note 91; Foner, *An American Birthright*, *supra* note 91; Foner, *Who Is an American? The Imagined Community in American History*, *supra* note 91.

3. "Illegal Immigrants"

At the end of the Civil War, there was essentially no regard for illegal immigration; almost anyone who wanted to come to the United States was welcome.[99] Only later would the United States introduce restrictions on lunatics, anarchists, prostitutes, and polygamists entering the country. In 1882, Congress prohibited all Chinese from coming to the United States.[100] Thus, after 1882, the Chinese would be the closest analogy to illegal immigrants, or undocumented workers, at issue today.

In 1898, the U.S. Supreme Court spoke directly to the issue of children born to Chinese parents in the United States in *United States v. Wong Kim Ark*.[101] The United States government tried to keep Wong Kim Ark out of the country when he returned from a visit to China on the theory that because of his Chinese parents, he was subject to the jurisdiction of China and not the United States.[102] The government decided that he did not fit within the words of the Fourteenth Amendment that specify that a person must be "subject to the jurisdiction thereof," meaning subject to United States jurisdiction.[103] Instead, the Court argued that part of the Fourteenth Amendment refers to the children of diplomats, not individuals like Wong Kim Ark, whose parents were working in San Francisco when he was born.[104] Ark's case dealt with the argument that being born to foreign parents disqualifies children from citizenship, and the Supreme Court declared that Wong Kim Ark was a citizen of the United States.[105]

Interestingly, the supporter of African-American rights in the *Civil Rights Cases* of 1883, as well as *Plessy v. Ferguson* in 1896, Justice John Marshall Harlan, appointed in 1877 and known as the "Great Dissenter," was one of the dissenting justices who supported the United States's right to deny Wong Kim Ark entrance into the United States and birthright citizenship.[106]

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99. *See generally Rise of Industrial America, 1876-1900*, LIBR. OF CONGRESS, http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/riseind/chinimms/ [https://perma.cc/LUN9-KSE3].

100. *Id.*

101. United States v. Wong Kim Ark, 169 U.S. 649 (1898).

102. *Id.* at 649–50.

103. *Id.*; U.S. CONST. amend. XIV, § 1.

104. *See Wong Kim Ark*, 169 U.S. at 682.

105. *Id.*

106. *Id.* at 705–32 (Fuller, C.J., dissenting).

4. Voting Rights

In the mid-nineteenth century, the right to vote was closely tied to citizenship and the ideas of manhood.[107] Congress's debates surrounding the Fourteenth Amendment illustrated that members of Congress did not believe that the right to vote was among a citizen's "privileges and immunities." The Senate rejected a similar provision to the Fourteenth Amendment with a vote of 37–10 that stated, "No state, in prescribing the qualifications requisite for electors therein, shall discriminate against any persons on account of color or race."[108] Republican Senator Jacob Howard presented this argument clearly, explaining that voting was a government-granted privilege, not an inherent natural right.[109] The last clause of Section 1 of the Fourteenth Amendment also prohibited states from denying equal protection of the law.[110] Although the Fourteenth Amendment could be used to prohibit racially discriminatory voting laws, its lack of clarity fostered narrow court constructions that limited its application to suffrage until the late 20th century.

The Fourteenth Amendment did provide sovereign power to the federal government over the states and their various subdivisions as clearly stated in Section 2: "the power to enforce . . . by appropriate legislation," changed the federal government's power to enforce rights guaranteed to citizens by the Constitution that had been understood previously to only be enforced by the state in which the citizen lived.[111] Chief Justice John Marshall's 1833 opinion in *Barron v. Baltimore* held that the Bill of Rights, the first ten amendments to the Constitution, applied only to the federal government and not to the states or the states' political subdivisions.[112] Mississippi legislators feared this enforcement clause would be "a dangerous grant of power" and "might admit federal legislation in respect to persons, denizens and inhabitants of the state."[113] The legislatures in both Alabama and South Carolina were alarmed that

107. *See* Orville Vernon Burton, *Tempering Society's Looking Glass: Coreccting Misconceptions About the Voting Rights Act of 1965 and Securing American Democracy*, 76 LA. L. REV. 1 (2015).

108. 216 SENATE DOCUMENTS 219 (Mar. 9, 1866) (U.S. Gov't Printing Office 1865).

109. CONG. GLOBE, 39th Cong., 1st Sess. 185 (1866).

110. U.S. CONST. amend. XIV, § 1.

111. *Id.* § 2.

112. Barron v. Baltimore, 32 U.S. 243 (1833).

113. MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 230 (Cambridge Univ. Press 2001).

the Fourteenth Amendment "confer[ed] upon Congress the power to Legislate upon the political status of the Freedmen."[114]

Members of the House and Senate focused more time and energy on the second and third sections of the Amendment than the first. Section 2 of the Fourteenth Amendment was the first ever federal enactment to address the right to vote for African-Americans.[115] It did so indirectly, not by granting the right to vote, but by reducing "the basis of representation" in Congress of any state that denied or abridged the right to vote of any "qualified voters," defined as all-male inhabitants over 21 who were not guilty of a disqualifying crime.[116] As such, Section 2 had substantial implications for suffrage and representation. Although it did not directly compel or force former Confederate states to enfranchise black men, it did seem to punish racially motivated disenfranchisement through reduced representation. If African-Americans were not allowed to vote, then their population was not to be counted for representation in Congress.

Proponents of this provision argued that it would keep the Southern states from benefiting from the elimination of the Three-Fifths Clause of the Constitution. The idea, according to radical Republicans such as Thaddeus Stevens, was to give the Southern states a choice—grant universal suffrage or lose their power—forcing the states to be always a minority in the national government. The United States, however, never enforced Section 2 of the Fourteenth Amendment—it remains unenforced today.[117]

5. Sections Three, Four, and Five of the Fourteenth Amendment

The last few sections of the Amendment are simpler. Section 3 of the Amendment declares:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to

114. HAHN, *supra* note 75, at 308.

115. A voting law for the District of Columbia was passed in January 1867. Andrew Glass, *Congress expands suffrage in D.C. on Jan. 8, 1867*, POLITICO (Jan. 8, 2008, 5:57 AM), https://www.politico.com/story/2008/01/congress-expands-suffrage-in-dc-on-jan-8-1867-007771 [https://perma.cc/4LLB-DBGY].

116. *Id.*

117. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

> support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.[118]

Section 3 punished secessionists by denying almost all former U.S. government officials that supported the Confederacy the right to vote or hold any public office.[119] In 1872, Congress softened this impact and allowed all secessionists, except for the former top officials, to hold public office and vote.[120] In 1876, Congress removed sanctions for all former Confederates.[121]

Section 4 of the Amendment also deals with the former Confederacy by requiring repudiation of Confederate debt. This section asserts:

> The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.[122]

Lastly, Section 5 repeats Congress's enforcement power, mirroring the language used in the Thirteenth Amendment and stating, "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[123]

6. Ratification

The Fourteenth Amendment instituted a vast and critical change to the distribution of government power. The majority in Congress wanted the federal government to exhibit its "strong arm of power, outstretched from

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118. U.S. CONST. amend. XIV, § 3.

119. *See id.*

120. ALLAN J. LICHTMAN, THE EMBATTLED VOTE IN AMERICA: FROM THE FOUNDING TO THE PRESENT (Harvard Univ. Press 2018).

121. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 272–78, 294, 412–13, 417, 446–47 (Harper Perennial Modern Classics 1988); LICHTMAN, *supra* note 120.

122. U.S. CONST. amend. XIV, § 4.

123. *Id.* § 5.

the central authority."[124] Even more than the Thirteenth Amendment, this change in the Constitution redefined how power is delegated. The extent of a citizen's social, civil, and political rights, and whether those rights were separate or unitary, remained open to debate; but the Constitution now committed the power of the federal government to the equal extension of those rights.

Congress sent the Fourteenth Amendment to the states for ratification, and in short order, the following states refused to ratify it: Texas, Georgia, North Carolina, South Carolina, Virginia, Kentucky, Louisiana, Delaware, and Maryland.[125] Had it not been for the intransigence and unrepentant course these former Confederate states pursued, significant political change might have been delayed, or altogether derailed, in the South. As it was, Congressman James Garfield of Ohio[126] declared that military authority was necessary to "plant liberty on the ruins of slavery."[127] Congress felt bound to a higher purpose than a simple reconciliation of the sections.

7. The Reconstruction Act

Consequently, as a result of this higher purpose, Congress enacted the Reconstruction Act, putting the Rebel states under federal military control.[128] The Reconstruction Act authorized new state constitutions, and United States military commanders took charge of registering all male voters to elect delegates to state conventions.[129] Senator Charles Sumner, an ardent supporter of black rights, believed the ballot ensured African-Americans' citizenship and effective protection against white

124. LINCOLN LESSONS: REFLECTIONS ON AMERICA'S GREATEST LEADER 87 (Frank J. Williams & William D. Pederson eds., S. Ill. Univ. Press 2009).

125. *See generally Ratification of Constitutional Amendments*, U.S. CONST., https://www.usconstitution.net/constamrat.html [https://perma.cc /Y8HL-CNVL] (last visited Sept. 30, 2018).

126. Garfield was the President for a brief time in 1881 before he was assassinated. *See James Garfield*, WHITE HOUSE, https://www.whitehouse.gov /about-the-white-house/presidents/james-garfield/ [https://perma.cc/TBT8-Y8T9] (last visited Aug. 18, 2018).

127. JAMES GARFIELD, 1 THE WORKS OF JAMES ABRAM GARFIELD 249, (Burke A. Hinsdale ed., 1882).

128. *See The Reconstruction Acts: 1867*, TEX. ST. LIBR. & ARCHIVES COMM'N, https://www.tsl.texas.gov/ref/abouttx/secession/reconstruction.html [https://perma.cc /LVX5-8J9F] (last updated Aug. 25, 2011).

129. *Id.*

supremacy.[130] Believing suffrage would be "immortal," he naively wrote, "The right of suffrage once given can never be taken away."[131]

It is hard to imagine a more momentous occasion, at once deeply conservative and boldly revolutionary, fraught with pathos and irony. African-Americans, most of them illiterate former slaves, responded overwhelmingly, often marching in masses to the very spot where they had been whipped or sold and casting ballots that would determine the political fate of their families, their fellows, and even their former masters.[132] Louisiana was typical—with a fair and efficient system of registration, approximately 90% of African-American men of voting age in the state registered to vote in 1867.[133] In November of 1867 in South Carolina, 80,832 African-Americans and 46,929 whites were registered to vote.[134] Across the South, whites who thought the newly freed slaves would not bother voting were dramatically proven wrong.

The newly adopted state constitutions required by the Reconstruction Act provided for universal male suffrage. These state constitutions, adopted in 1868 and 1869, were forward-looking, providing free public school systems, homestead protection, and married women's rights, among other provisions.[135] The new state legislatures also ratified the Fourteenth Amendment in 1868.[136]

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130. Letter from Charles Sumner to Theodore Tilton (Apr. 18, 1867), *in* 2 SELECTED LETTERS OF CHARLES SUMNER 394 (Northeastern 1990).

131. *Id.* at 394.

132. *See generally* Marsha J. Tyson Darling, *A Right Deferred: African American Voter Suppression after Reconstruction*, GILDER LEHRMAN INST. OF AM. HIST., https://www.gilderlehrman.org/history-now/right-deferred-african-american-voter-suppression [https://perma.cc/SUT8-S629] (last visited Sept. 30, 2018).

133. MYRNA PÉREZ, VOTER PURGES 31, BRENNAN CTR. FOR JUST. (2008), https://www.brennancenter.org/sites/default/files/legacy/publications/Voter.Purges.no%20app.pdf [https://perma.cc/4UZY-Q8Q9].

134. BURTON, THE AGE OF LINCOLN, *supra* note 12, at 276–77.

135. *See* FONER, *supra* note 121, at 316–32; JOSEPH A. RANNEY, IN THE WAKE OF SLAVERY: CIVIL WAR, CIVIL RIGHTS, AND THE RECONSTRUCTION OF SOUTHERN LAW 89–92 (Praeger 2006); DOUGLAS R. EGERTON, THE WARS OF RECONSTRUCTION: THE BRIEF, VIOLENT HISTORY OF AMERICA'S MOST PROGRESSIVE ERA (Bloomsbury Press 2014); BURTON, THE AGE OF LINCOLN, *supra* note 12, at 282–88.

136. "On July 28, 1868, the [Fourteenth] Amendment to the United States Constituion was ratified." *14th Amendment to the Constitution Was Ratified July 28, 1868*, LIBR. OF CONGRESS, http://www.americaslibrary.gov/jb/recon/jb_recon_revised_1.html [https://perma.cc/JCL2-PA3Y] (last visited Sept. 30, 2018). Kentucky did not ratify the Fourteenth Amendment until 1976, and some

D. The Fifteenth Amendment

With the recalcitrance of the former Confederates, many thought the best way to protect this new birth of freedom was enfranchisement—the power of the ballot. Extending the ballot in the Rebel states also raised the question: why not in the other states?

At the outset of the Civil War, only five states in the nation, all in New England, permitted African-Americans to vote on the same basis as whites.[137] Nineteenth century political thought was divided on whether suffrage was a right of citizenship.[138] Many argued that voting was a privilege and that democracy could work only when suffrage was based on education, property, and citizenship.[139] Because citizenship imposed responsibility as well as conferred rights, republicanism excluded those who were "dependent" on others: insane persons, paupers, children, women, and enslaved workers.[140] Many states imposed additional suffrage restrictions, denying the right to Chinese, illiterates, and those too poor to pay property taxes.[141] Fortunately, compelling voices articulated a different vision.[142] Frederick Douglass, for instance, declared that the right to vote was "the keystone to the arch of human liberty."[143]

To secure the right to vote nationwide, Congress proposed the Fifteenth Amendment to the Constitution, stating that, "[T]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[144] In the second clause, the Fifteenth Amendment articulated the now-familiar congressional enforcement clause, stating that "Congress shall have power to enforce this article by appropriate legislation."[145]

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northern states balked as well. New Jersey withdrew ratification in 1868 and ratified only in 2003. Oregon also withdrew ratification and only re-ratified in 1973. Ohio rescinded ratification in 1868 and only re-ratified in 2003.

137. *See generally Introduction to Federal Voting Rights Laws*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/introduction-federal-voting-rights-laws [https://perma.cc/L6KL-LD94] (last updated Aug. 16, 2018).

138. BURTON, THE AGE OF LINCOLN, *supra* note 12, at 278.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*; FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM (Miller, Orton & Mulligan 1855).

144. U.S. CONST. amend. XV.

145. *Id.*

Congress proposed the Fifteenth Amendment in early 1869 and ratified it in early 1870—with the enthusiastic backing of the new President, Ulysses S. Grant.[146] Grant called upon Iowa as "the bright Radical star" to grant suffrage to its African-American citizens, and Iowans met Grant's challenge.[147] In the South, all of the former Confederate states approved the right to vote—except Tennessee, which finally ratified it in 1997—as well as states in the North and West.[148] The Fifteenth Amendment eradicated racial discrimination in voting across the United States.

Suddenly, the Constitution defined the new birth of freedom—citizenship and the right to vote. With citizenship secured by the Fourteenth Amendment and the right to vote secured by the Fifteenth, African-Americans could protect themselves from their former owners through the rule of law, shape those laws by standing for political office, and choose their own leaders with free debate and an honest ballot. With the Fifteenth Amendment backing the new Southern state constitutions that provided universal male suffrage, black political participation mushroomed.

Holding office soon followed voting, including minor offices in various places, as well as state legislative seats in several states, and statewide offices, particularly in South Carolina and Louisiana. Two African-American Mississippians were U.S. Senators and 14 African-Americans served in the U.S. House of Representatives in the 1870s.[149]

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146. Joan Waugh, *Ulysses S. Grant: Impact and Legacy*, MILLER CTR., https://millercenter.org/president/grant/impact-and-legacy [https://perma.cc/FJU5-MH76] (last visited Sept. 30, 2018).

147. Stephen E. Maizlish, Book Review, 43 ANNALS OF IOWA 159 (reviewing ROBERT R. DYKSTRA, BRIGHT RADICAL STAR: BLACK FREEDOM AND WHITE SUPREMACY ON THE HAWKEYE FRONTIER (Harvard U. Press 1993)).

148. *See generally Ratification of Constitutional Amendments*, *supra* note 125.

149. ERIC FONER, FREEDOM'S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION (1993); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 355–63 (Harper Perennial Modern Classics 1988); Xi Wang, *Black Suffrage*, *in* ENCYCLOPEDIA OF RECONSTRUCTION ERA 82 (Richard Zuczek ed., 2006)*;* STEVEN HAHN, A NATION UNDER OUR FEET 219 (Belknap Press 2005); BURTON, THE AGE OF LINCOLN, *supra* note 12, at 282–83. *See also* HOWARD N. RABINOWITZ, SOUTHERN BLACK LEADERS OF THE RECONSTRUCTION ERA (Univ. of Ill. Press 1982). Several other African-Americans served in the House of Representatives in the late 1880s and 1890s. The last one, George White (N.C.), left in early 1901 with a final speech saying, "This is perhaps the Negroes' temporary farewell to the American Congress, but let me say, Phoenix-like he will rise up some day and come again." Congressional Record, 56th Cong., 2d sess., vol. 34, pt. 2, at 1635–36, 1638 (Gov't Printing Office, 1901).

African-Americans in the South were almost unanimously Republican.[150] Local white allies joined them in the Republican Party, scornfully called "scalawags," and some—though not as many as usually portrayed—who were newly arrived and derisively labeled "carpetbaggers" because they supposedly carried all their belongings in a cheap carpetbag satchel, had come to the South to enrich themselves at the expense of the southern people. In fact, scholars have demonstrated that Northerners who came to the South during Reconstruction were well educated, mostly middle class, and very respectable.[151] African-American political strength, in voting and office-holding, led to some economic progress as well.[152]

III. RESISTANCE TO AFRICAN-AMERICAN PROGRESS

Although African-American progress stimulated cooperation from some white people, it prompted extreme violence from others. Fletcher Hodges, a prominent local landowner, offered a cash reward for the death of African-American Benjamin Franklin Randolph, a Methodist Episcopal clergyman and Republican state senator representing Orangeburg, South Carolina.[153] In October of 1868, three white men murdered Randolph in broad daylight in front of witnesses in Hodges, South Carolina, but no one ever identified the assassins.[154] In 1870 in Sumter County, Alabama, men killed Richard Burke, a prominent legislator and black educator who had announced that black men had the same right to carry arms as white

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Congressman White's speech is available online at *An Online Reference Guide to African-American History*, U. OF WASH., http://www .blackpast.org/1901-george-h-whites-farewell-address-congress [https://perma.cc/4AB6-CGTP] (last visited Aug. 18, 2018). Black Congressmen came from northern states beginning in 1928, but no African-American came from a southern state until Barbara Jordan (Tex.) was elected in 1972.

150. *See generally* Karen Grisby Bates, *Why Did Black Voters Flee The Republican Party In The 1960s?*, NPR (July 14, 2014, 5:05 AM), https://www .npr.org/sections/codeswitch/2014/07/14/331298996/why-did-black-voters-flee-the-republican-party-in-the-1960s [https://perma.cc/PZF4-LPXT].

151. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 294 (Harper Perennial Modern Classics 1988).

152. *Id.*

153. *See* ALLEN B. BALLARD, ONE MORE DAY'S JOURNEY: THE STORY OF A FAMILY AND A PEOPLE 137 (2011).

154. JOEL WILLIAMSON, AFTER SLAVERY: THE NEGRO IN SOUTH CAROLINA DURING RECONSTRUCTION, 1861–1877 (1965); RICHARD ZUCZEK, STATE OF REBELLION: RECONSTRUCTION IN SOUTH CAROLINA (1996); GEORGE B. TINDALL, SOUTH CAROLINA NEGROES: 1877–1900 (1970); BERNARD EDWARD POWERS, BLACK CHARLESTONIANS: A SOCIAL HISTORY, 1822–1885 *(*1994).

men.[155] Violence was always a component of United States history, but after the Civil War, terrorism exploded as Southern slaveholders no longer protected African-Americans as their own personal chattel property. Many formed outlaw groups, such as the Ku Klux Klan and the White Knights of the Camellia.

A. Combatting the Ku Klux Klan

Contrary to the stereotypical image of "poor whites" who hated freedmen as economic rivals, Klansmen represented all classes of white society in the South.[156] The Klan attacked the fledgling democratic institutions that African-Americans and white Republican allies had begun to create.[157] Night-riding gangs turned their attention to political activists and appointees, county sheriffs, legislators, and voters.[158] The Klan and its allies struck at African-American churches and smaller groups of citizens, but only groups they outnumbered.[159] They avoided any clash with federal troops. White vigilantes determined that the rule of law grounded in constitutional reform would not be allowed to triumph in the South.[160] White southerners heartily asserted that such terrorism was minimal and that they would take care of the problem, but Supreme Court Justice Samuel Miller, appointed by President Lincoln in 1862, wrote his Southern brother-in-law in 1867, challenging him on such a lie:

> Show me a single white man that has been punished in a State court for murdering a negro or a Union man. Show me any public meeting has been had to express indignation at such conduct . . . . Show me the first public address or meeting of Southern men in which the massacres of New Orleans or Memphis have been condemned . . . . There may be two sides to the stories, but there was but one side in the party that suffered at both places, and the single truth is undenied that not a rebel or secessionist was hurt in either case, while from 30 to 50 negroes and Union white men were shot down precludes all doubt as to who did it and why it

155. ERIC FONER, FREEDOM'S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION 132 (LSU Press 1996).

156. *See generally Ku Klux Klan*, ENCYCLOPÆDIA BRITANNICA, https://www.britannica.com/topic/Ku-Klux-Klan [https://perma.cc/B4G5-9GEE] (last visited Sept. 30, 2018).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

was done.[161]

Killing in the post-Civil War South was almost entirely one-sided—white murders of black victims and their white Republican allies.[162]

The federal government adopted new federal laws after the Fifteenth Amendment and intended them to be pillars of enforcement and protection.[163] The Enforcement Act of 1870 guaranteed the right to vote in all elections without racial discrimination, targeting state election officials with a set of prohibitions of specific racially discriminatory practices.[164] The Act also contained a new innovation: a section aimed at private terrorism, making it a federal crime "to conspire or go in disguise or upon the public highway" for the purpose of interfering with any person's "free exercise or enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States."[165]

A year later, in 1871, following extensive hearings about outrages across the South, Congress enacted the Ku Klux Klan Act.[166] The primary goal of the Ku Klux Klan Act was to organize mob terror that intimidated or overwhelmed the struggling new state or local governments, and sometimes even federal officials.[167] The Act defined interference with government functioning as insurrection or rebellion and authorized presidential action to suppress it, including authorization to suspend habeas corpus where needed.[168] The Act also expanded on the 1870 Act by making it a crime "to conspire or go in disguise on the highway" for the purpose of "preventing or hindering the constituted authorities of any

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161. MICHAEL A. ROSS, JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA 147 (2003).

162. *See generally Lynching in America*, AM. EXPERIENCE, https://www.pbs.org/wgbh/americanexperience/features/emmett-lynching-america/ [https://perma.cc/H3VT-YTVU] (last visited Sept. 30, 2018).

163. *See* Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (reenacted by Enforcement Act of 1870, ch. 114, § 8, 16 Stat. 140, 144 (1870) (codified as amended at 42 U.S.C. §§ 1981–82 (2012)).

164. Enforcement Act of 1870, ch. 114, § 8, 16 Stat. 140, 144 (codified as amended at 42 U.S.C. §§ 1981–82).

165. FONER, *supra* note 121, at 454–59 (Harper Perennial Modern Classics, 1988); Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (reenacted by Enforcement Act of 1870, ch. 114, § 8, 16 Stat. 140, 144 (1870) (codified as amended at 42 U.S.C. §§ 1981–82 (2012)).

166. *See The Ku Klux Klan Act of 1871*, U.S. HOUSE OF REPRESENTATIVES, http://history.house.gov/HistoricalHighlight/Detail/15032451486?ret=True [https://perma.cc/YNQ8-YFC5] (last visited Sept. 30, 2018).

167. Enforcement Act of 1871, ch. 31, 17 Stat. 13.

168. *Id.*

State or Territory from giving or securing to all persons within the State or Territory the equal protection of the laws."[169]

Other provisions and laws supplemented these protections. In particular, several provisions provided remedies that victims of violence could invoke themselves, allowing the victim to bring a lawsuit for damages and make the violator pay for the victim's lawyer—a familiar rule in English law but virtually unprecedented in the American legal system. Another provision allowed a person facing trial in a state court to remove the entire case to federal court if he could not enforce his "equal rights" in the state court.[170]

Thus, the new birth of freedom had a constitutional and legal foundation. The guiding principles were citizenship and equality, and there were two modes of protection: prosecution by the federal government and self-help through the power to vote. As the 1870s began, the federal government actively enforced the new laws.[171] In one year, there were more than 1,200 civil rights prosecutions under the Enforcement Act of 1870 and the Ku Klux Klan Act of 1871.[172] In another year, the federal government spent $3,000,000 dispatching official observers to state elections.[173] President Grant, acting with authorization contained in the newly enacted Ku Klux Klan Act of 1871, suspended the writ of habeas corpus in nine South Carolina counties, and a series of mass Klan trials broke the back of the Klan in that state.[174] Although convictions were few in number, many Klansmen fled the state, and the organization all but dried up in South Carolina.[175] In 1870, at the last official meeting of the American Anti-Slavery Society, Frederick Douglass proffered, "I seem to be living in a new world."[176]

The South was in turmoil, but it seemed there were tools to deal with it—until the Supreme Court ruled otherwise.

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169. *Id.*

170. *See* Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (reenacted by Enforcement Act of 1870, ch. 114, § 8, 16 Stat. 140, 144 (1870) (codified as amended at 42 U.S.C. §§ 1981–82 (2012)).

171. *See generally* LOU FALKNER WILLIAMS, THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS, 1871–1872 (2004).

172. *See generally id.*

173. *See generally id.*

174. *See generally id.*

175. *See generally id.*

176. SHARMAN APT. RUSSELL ET AL., FREDERICK DOUGLASS: ABOLITIONIST EDITOR 71 (Chelsea House Pub. 2004).

B. United States v. Hall

In the fall of 1870, a white mob invaded a political meeting of African-American farmers in the town of Eutaw, Alabama, killing two men and wounding several others.[177] John Hall and William Pettigrew were indicted under the Enforcement Act of 1870 for "band[ing] and conspir[ing] together" to keep their victims from exercising their First Amendment rights to free speech and free assembly.[178] In court, the defendants argued that the federal government had no power to prosecute them for two reasons: first, because the First Amendment did not apply to the states; and second, because even if it *did* apply to the states, it did not apply to the actions of private *individuals*.[179] The case came before Judge William B. Woods.[180] Woods came from Ohio as a Union general in the Civil War, stayed in the South, and became a federal judge earlier the same year.[181]

Because *United States v. Hall* was one of the first cases tried under the Enforcement Act, for guidance, Judge Woods wrote to Joseph P. Bradley, the Supreme Court Justice assigned to supervise the lower federal courts in Alabama and other southern states. Bradley wrote back that the Fourteenth Amendment, in his opinion, authorized "direct federal intervention" to protect citizens' fundamental rights.[182]

In a ruling that used language directly from Bradley's letter, Woods decreed that although the defendants would have prevailed in the past, the Fourteenth Amendment had revolutionized the Constitution and rendered their arguments invalid.[183] In particular, the Fourteenth Amendment barred a state from abridging a citizen's "privileges or immunities"; whatever the "privileges or immunities" of a U.S. citizen were, he continued, they certainly included those contained in the First Amendment.[184] Because the Fourteenth Amendment specifically gave Congress the power to pass appropriate enforcement legislation, this federal law that authorized direct

177. *See generally* United States v. Hall, 26 F. Cas. 79 (S.D. Ala. 1871).
178. *Id.* at 79.
179. *Id.* at 80.
180. *See id.*
181. *See generally William Burnham Woods (Aug. 3, 1824 - May 14, 1887)*, SUP. CT. OF OHIO & OHIO JUD. SYS., https://www.supremecourt.ohio.gov/MJC/places/wbWoods.asp [https://perma.cc/5XSP-46LA] (last visited Sept. 30, 2018).
182. S.G.F. Spackman, *American Federalism and the Civil Rights Act of 1875*, 10 J. AM. STUDIES 313, 323 n.34 (1976).
183. *See generally Hall*, 26 F. Cas. 79.
184. *Id.*

prosecution of individuals who interfered with "privileges or immunities" was within Congress's power.[185]

Woods's interpretation could have changed history. It read the Fourteenth Amendment broadly and showed that the Enforcement Act of 1870 could be an effective tool against white terrorism. By the 1872 election, however, when Republican Ulysses S. Grant was reelected president with a minority of the white vote, the post-war zeal for reform that had animated many in the country began to wane. By 1874, the Democrats had retaken the House of Representatives, where they were in a position to block further progress.[186] Anticipating this resistance, the outgoing Republican majority passed the Civil Rights Act of 1875 on its very last day in office.[187]

In 1872, the Supreme Court's views also shifted. The Supreme Court played a major role in undoing the Fourteenth Amendment as the nation began its downward spiral from the New Birth of Freedom to Jim Crow. In the 1870s and 1880s, the Court, unwilling to accept that the Constitution had been turned upside-down, neutered all three wartime amendments and eviscerated Congress's enforcement laws.

IV. THE *SLAUGHTER-HOUSE CASES*

The Supreme Court's first major encounter with the new Cconstitutional amendments did not involve race or Reconstruction, but rather a business dispute about livestock slaughtering. Nevertheless, the way the Supreme Court interpreted the Fourteenth Amendment would have calamitous consequences for African-Americans. In fact, the Court's ruling in the *Slaughter-House Cases* still causes problems in constitutional interpretation today.

In 1869, to combat filth and disease, the Louisiana Legislature designated a single location for all animal slaughtering in New Orleans and gave one company a 25-year license to build and operate a slaughterhouse there.[188] All butchers in the city were required to use that facility and a number of butchers challenged the law, arguing that it

185. *Id.*

186. *See generally On this Day*, N.Y. TIMES, https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/harp/0721.html [https://perma.cc/VYR9-FZ5K] (last visited Sept. 30, 2018).

187. *See generally The Civil Rights Act of 1875*, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Historical-Highlights/1851-1900/The-Civil-Rights-Act-of-1875/ [https://perma.cc/5M4D-ZGHR] (last visited Sept. 30, 2018).

188. 1869 La. Acts No. 118.

created a monopoly and threatened their livelihoods.[189] Their cases were decided by the Supreme Court in early 1873, under the collective name *Slaughter-House Cases*.[190]

The Court's membership had turned over completely since *Dred Scott*.[191] Presidents Lincoln and Grant appointed seven Republicans of the nine Justices; there were no Southerners.[192] Still, a few of the Justices had records supporting the rights of African-Americans; most owed their seats to business or geographical considerations.

If the case had involved race or Reconstruction, it might have turned out differently. The Court used five full pages to provide a sympathetic history of the Thirteenth, Fourteenth, and Fifteenth Amendments, ranging from the valiant service of African-American soldiers in the Union army to the ignoble Black Codes.[193] The Court asserted the "one pervading purpose" in the three Amendments was "the freedom of the slave race" and "the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."[194] Most significantly, the Court recognized that the new Amendments made major changes in the constitutional structure of government: "additional guarantees of human rights," "additional powers to the Federal government," and "additional restraints upon those of the States."[195]

The New Orleans butchers, white Democrats, were not the reason for this new freedom, but they claimed the words of the Amendments still applied to them.[196] A majority of the Court, however, believed the butchers were trying to take advantage of an amendment designed for the benefit of others.[197] The butchers raised several arguments that the Court quickly dismissed, but the main argument was that their ability to carry on their

189. *See generally* Slaughter-House Cases, 83 U.S. 36 (1873).

190. *Id.*; *see generally* RONALD M. LABBÉ & JONATHAN LURIE, THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT (2003).

191. *See generally Justices 1789 to Present*, SUP. CT. OF U.S., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/F39W-TACT] (last visited Sept. 30, 2018).

192. *See generally id.*

193. *See generally Slaughter-House Cases*, 83 U.S. 36.

194. *Id.* at 71.

195. *Id.* at 67–68.

196. *Id.*

197. *Id.*

business was a "privilege or immunity," which Louisiana had "abridged" in violation of the Fourteenth Amendment.[198]

The Court could have relied on a previous interpretation of similar words—"privileges and immunities"—as they appeared elsewhere in the Constitution, specifically in Article IV. There, the Court had interpreted the phrase very broadly, to include those "privileges and immunities" that were "fundamental, which belong of right to the citizens of free governments"—such as the right to acquire and possess property. Such was the interpretation the butchers were hoping the Court would use.[199]

Instead, a 5–4 majority followed a bizarre course of reasoning that interpreted the same words to mean one thing in one clause of the Constitution and the opposite in another.[200] The majority took the first sentence of the Fourteenth Amendment—"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside"—to mean that each person had two separate identities, with separate privileges in each one: "there is a citizenship of the United states and a citizenship of a State, which are distinct from each other."[201]

The Court did not stop there; it held that national and state citizenship privileges were mutually exclusive, thus, any privilege of the former was automatically *excluded* from the privileges of the latter.[202] Because state citizenship privileges were so vast, the only privileges left for national citizenship were a few limited ones, such as the right to travel to the nation's capital or to be protected on the high seas.[203]

The Court read the Fourteenth Amendment's "privileges or immunities" clause this way in order to prevent the national government from overwhelming the states. With this interpretation, the majority, while recognizing the grave events that had provoked the Amendments,[204] adhered to the Constitution they had always known, with strict separation of state and federal roles. The Fourteenth Amendment, they claimed, did not change the fact that most rights "must rest for their security and

198. *Id.*

199. *Id.*

200. Although the Supreme Court has never overruled the *Slaughter-House Cases*, every serious modern scholar has rejected its reasoning as faithless to the words and purpose of the Fourteenth Amendment.

201. *Slaughter-House Cases*, 83 U.S. 36.

202. *Id.*

203. *Id.* at 79–80.

204. The complexity is revealed in the five pages about the rights of African-Americans contained in the decision.

protection where they ha[d] heretofore rested" with the states.[205] Any other reading of the new Amendment "radically change[d] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people."[206]

The four dissenting Justices, ridiculing the majority's approach, retorted that this change from state sovereignty to federal sovereignty and federal authority over the states was precisely the object of the new Amendments.[207] What they conferred were not new rights but new modes of protecting *existing* rights, namely, federal protection against state hostility. As responses to "the spirit of lawlessness, mob violence and sectional hate," Justice Swayne claimed that the new Amendments rose "to the dignity of a new Magna Carta."[208] Justice Page then pointed out that, if the majority was right about the Fourteenth Amendment, "it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people upon its passage."[209]

Justice Samuel Miller, the Court's intellectual leader and author of the majority opinion, generally supported the civil rights of African-Americans. Reacting acidly to the Black Codes passed by the Southern states after the Civil War, he wrote to a friend that:

> [T]he pretence is that the negro won't work without he is compelled to do so, and this pretence is made in a country and by the white people, where the negro has done all the work for four generations and the white man makes a boast of the fact that he will *not* labour.[210]

Miller may well have thought that restricting the "privileges or immunities" clause left ample room for protecting African-Americans, especially under the "equal protection" clause and the specific grant of power to Congress to enact enforcement laws.

It was dissenting Justice Swayne whose point of view proved prophetic. He wrote that any government unable to protect fundamental privileges and rights was "glaringly defective," ending his opinion with a doleful premonition: "I earnestly hope that the consequences to follow

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205. *Slaughter-House Cases*, 83 U.S. at 75.
206. *Id.* at 78.
207. *Id.* at 83–130.
208. *Id.* at 125 (Swayne, J., dissenting)
209. *Id.* at 96 (Field, J., dissenting).
210. MICHAEL A. ROSS, JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA (2003); Letter from Justice Samuel Miller to WPB (Jan. 11, 1866) (emphasis added).

may prove less serious and far-reaching than the minority fear they will be."[211] Unfortunately, those consequences were to be far worse than any Cassandra could have predicted.[212] In fact, it was fewer than three days before such consequences were set in motion, a thousand miles away from the Supreme Court in Washington, D.C.

V. *UNITED STATES V. CRUIKSHANK*

In the sleepy hamlet of Colfax, Louisiana, the whites that held contested offices refused to hand over the courthouse keys to the newly-elected Republicans.[213] Late one night, a group of these victorious Republicans, one African-American and the rest white, went to the courthouse, tore off a shutter, and hoisted a young boy into the crevice.[214] The boy crawled in and opened the front door, and the Republicans seized the courthouse.[215]

Beginning the next morning, white Democrats prepared to besiege the building while two dozen Republicans, mostly African-American, stood guard outside the courthouse door.[216] Over the next several weeks the families of many of those guarding the courthouse joined the contingent inside the building.[217] By Easter Sunday two weeks later, about 300 African-Americans were in the courthouse, half of them women and children.[218] A force of similar size, mostly former Confederate soldiers from neighboring districts, had gathered in opposition, determined to suppress the "negro riot."[219]

On Easter, the standoff reached its boiling point.[220] The Democrats ordered the people in the courthouse to evacuate all of the women and

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211. *Slaughter-House Cases*, 83 U.S. 36, 129–30.

212. *See generally Cassandra*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/Cassandra [https://perma.cc/M7RG-NZCD] (last visited Oct. 1, 2018).

213. *See generally* United States v. Cruikshank, 35 F. Cas. 707 (C.C.D. La. 1874).

214. CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION (2008); LEEANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION (2008).

215. *See* LANE, *supra* note 214; KEITH, *supra* note 214.

216. *See* LANE, *supra* note 214; KEITH, *supra* note 214.

217. *See* LANE, *supra* note 214; KEITH, *supra* note 214.

218. *See* LANE, *supra* note 214; KEITH, *supra* note 214.

219. *See* LANE, *supra* note 214; KEITH, *supra* note 214.

220. *See* LANE, *supra* note 214; KEITH, *supra* note 214.

children because they would be attacking in 30 minutes.[221] Most obeyed, although some of the most vulnerable were unable to make it out by the deadline.[222] Just after noon, the former Confederates fired their cannons, and for two hours, the two sides exchanged volleys.[223] Eventually, the Democrats prevailed, however, hunting down on horseback those Republicans who fled the courthouse for the nearby forest.[224] Then they laid fire to the courthouse to draw the rest of the Republicans out of the building and shot them as they ran from the flames.[225]

After the firing ceased, the Democrats took the surviving Republicans as prisoners and told them that the Democrats would treat them according to the rules of war.[226] Instead, several Democrats, led by William Cruikshank, executed them.[227] Only one, Levi Nelson, survived by pretending to be dead until Cruikshank and his men left the scene.[228] The death toll at Colfax was three white men and more than 150 African-Americans.[229]

The grisly slaughter at Colfax led to a federal indictment of 90 white men under the section of the Enforcement Act of 1870 that made it a crime to "band or conspire together" or "injure" or "intimidate" any person for exercising a federal right—that is, a right protected by the "Constitution or laws of the United States."[230] Most of the defendants were never found, but nine were arrested and went to trial in 1874 in New Orleans.[231] Along with Levi Nelson's testimony, James Beckwith, the white lawyer in the case, used the body of African-American activist Alexander Tillman—who had been found covered in stab wounds, his clothes ripped off, his throat slashed, and his face beaten—as grounds for seeking the death penalty.[232] The wounds on his body, along with its position hundreds of

221. *See* LANE, *supra* note 214; KEITH, *supra* note 214.
222. *See* LANE, *supra* note 214; KEITH, *supra* note 214.
223. *See* LANE, *supra* note 214; KEITH, *supra* note 214.
224. *See* LANE, *supra* note 214; KEITH, *supra* note 214.
225. *See* LANE, *supra* note 214; KEITH, *supra* note 214.
226. *See* LANE, *supra* note 214; KEITH, *supra* note 214.
227. *See* LANE, *supra* note 214; KEITH, *supra* note 214.
228. *See* LANE, *supra* note 214; KEITH, *supra* note 214.
229. Joel M. Sipress, *From the Barrel of a Gun: The Politics of Murder in Grant Parish*, 42 J. OF LA. HIST. ASS'N no. 3 303–21 (2001); BURTON, THE AGE OF LINCOLN, *supra* note 12, at 303; *see supra* note 124.
230. *See generally* United States v. Cruikshank, 92 U.S. 542 (1875).
231. LANE, *supra* note 214, at 124.
232. *Id.*

feet from the courthouse, proved that the Democrats had slaughtered him while fleeing.[233]

An all-white jury returned guilty verdicts for three men, including Cruikshank.[234] The defendants then moved to set the verdict aside, claiming that the rights they were accused of invading were not "federal rights" but state rights that Congress had no constitutional power to protect[235]—precisely the type of argument the Supreme Court accepted in the *Slaughter-House Cases*.

Circuit Judge William B. Woods and Supreme Court Justice Joseph Bradley heard the motion. Because these were the two judges who had interpreted the Fourteenth Amendment broadly in *Hall*, everyone expected that they would uphold this indictment and send Cruikshank and his co-defendants to prison.[236] Instead, Justice Bradley, in a mystifying change of heart, agreed with the defendants that the indictment went beyond Congress's constitutional power.[237] Judge Woods disagreed, maintaining the view he had taken in *Hall* and voting to uphold the indictment and conviction.[238] Because the two judges disagreed, the case automatically went to the Supreme Court.[239]

The eight counts of the indictment charged that on April 13, 1873, in Grant Parish, Louisiana, Cruikshank and the others had "banded and conspired together" to injure Levi Nelson and Alexander Tillman.[240] That alone would not have been a federal crime, since ordinary injury or intimidation is a state crime. The key element needed in order to make the conspiracy a federal crime was a showing that the *purpose* of the conspiracy was tied specifically to a federal right or privilege.

Cruikshank seemed to provide the justices with a golden opportunity. They had sharply limited the federal privileges that the Fourteenth Amendment protected in the *Slaughter-House Cases*, but in doing so, the Justices made the point that the case had nothing to do with race.[241] Before the justices now was a case that seemed designed to allow them to use the Fourteenth Amendment to do something about the "onerous disabilities"

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233. *Id.*
234. *See generally* United States v. Cruikshank, 35 F. Cas. 707 (C.C.D. La. 1874).
235. *See generally Cruikshank*, 92 U.S. 542.
236. *See generally* United States v. Hall, 26 F. Cas. 79 (1871).
237. *Cruikshank*, 25 F. Cas. 707.
238. Judge Woods's opinion was not reported.
239. *Cruikshank*, 92 U.S. 542.
240. *See generally Cruikshank*, 25 F. Cas. 707.
241. *See generally Cruikshank*, 92 U.S. 542.

imposed on the "colored race." Instead, the *Slaughter-House* chickens came home to roost.

The decision of the Court was unanimous, including all four justices who had dissented in *Slaughter-House*.[242] The only newcomer, in fact, was Chief Justice Morrison Waite, a man of slender talents who had been President Grant's fifth choice in a nearly year-long search after the death of the former chief justice.[243] Waite himself wrote the opinion, which began with an emphatic description of the separateness of state and national governments, the breadth of state powers, and the dearth of national powers. Against that background, the opinion proceeded to go through each of the eight separate counts of the indictment, methodically rejecting any notion that the national government had *any* significant power to protect Americans, and African-Americans in particular, closing any doors that the *Slaughter-House* Cases might have left open.

One count charged that a purpose of the conspiracy was to interfere with the victims' right to peaceably assemble, which the *Slaughter-House* opinion had listed as one of the few national privileges within the Fourteenth Amendment's protection; but now, the Court took that back. The Court ruled that peaceable assembly in general was a *state* privilege; the only *national* privilege was peaceable assembly *for the purpose of petitioning the national Congress*.[244] If the indictment had specified that "the object of the defendants was to prevent a meeting for such a purpose," the Court said, the indictment would have been valid.[245]

It seems like a simple drafting problem, easily cured, but in fact the Court assigned the prosecution an all but hopeless task. Specifics in an indictment must be proven by evidence at trial, and thus, the Court's rule would have required proof that the white mob had in mind the specific fear that the black gathering might have complained to the federal government, and that they wished to keep them from reporting or complaining to the federal government. Mere proof of racial hostility, or proof of a simple desire to break up a black meeting or harass African-Americans, would not have been enough for a conviction under the Supreme Court's ruling.

Another count of the indictment alleged that the conspiracy was for the purpose of interfering with the African-American victims' rights to equal treatment with white persons.[246] The Supreme Court objected that

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242. *Id.* at 542.

243. PAUL KENS & HEBERT A JOHNSON, THE SUPREME COURT UNDER MORRISON R. WAITE, 1874–1888 (Univ. of S.C. Press, 2012); MORRISON R. WAITE: THE TRIUMPH OF CHARACTER (C. Peter Magrath ed., 1963).

244. *See generally Cruikshank*, 92 U.S. 542.

245. *Id.*

246. *Id.*

"there is no allegation that this was done because of the race or color of the persons conspired against,"[247]—this is utter nonsense. Certainly, a charge that a conspiracy had a purpose of denying African-Americans the same rights as white people is a charge that the conspiracy was done because of race. The opinion went through the entire indictment in this fashion, count-by-count, ticking off the reasons why each count was beyond the power of Congress and ending with a resounding victory for the murderers.[248]

Sadly, the history of 19th century white terrorism continues to burden 21st-century Louisiana. A plaque adorning the courthouse square in downtown Colfax today still reads, "ON THIS SITE OCCURRED THE COLFAX RIOT IN WHICH THREE WHITE MEN AND 150 NEGROES WERE SLAIN THIS EVENT ON APRIL 13 1873 MARKED THE END OF CARPETBAG MISRULE IN THE SOUTH."[249]

VI. *UNITED STATES V. REESE*

On the same day the Supreme Court decided *Cruikshank*, it did even more radical surgery on the Enforcement Act of 1870 in *United States v. Reese*.[250] Whereas *Cruikshank* had severely weakened one section of the statute, *Reese* held that two other sections were unconstitutional and thus completely void.

Part of the Enforcement Act was aimed at the various schemes Southern election officials used to disqualify African-Americans from voting.[251] For example, registration officials often refused to accept an African-American's poll tax payment, and on Election Day, other officials would turn the victim away from the polls for lack of a poll tax receipt.[252] The Act defined two separate crimes: refusing to accept a poll tax payment on account of race and refusing to accept, as a substitute for a poll tax receipt, an affidavit describing the circumstances of such a refusal.[253]

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247. *Id.*

248. *Id.*

249. White citizens erected the plaque in 1950 in opposition to the Civil Rights Movement. *See* Bill Decker, *Colfax riot or massacre*, ADVOCATE (Mar. 7, 2013, 9:32 AM), https://www.theadvocate.com/nation_world/article_6ba52506-ed40-5fa3-a55b-c2ddb54e01f9.html [https://perma.cc/UMA5-XLUL].

250. United States v. Reese, 92 U.S. 214 (1875).

251. *See generally id.*

252. *See generally id.*

253. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (reenacted by Enforcement Act of 1870, ch. 114, § 8, 16 Stat. 140, 144 (1870) (codified as amended at 42 U.S.C. §§ 1981–82 (2012)).

This disenfranchisement scheme came before the Supreme Court in 1876 in *United States v. Reese.*[254] The defendants, two Kentucky state election officials, claimed that the statute was unconstitutional.[255] The Court's opinion, again written by Chief Justice Waite, began by agreeing that a law punishing election officials for rejecting votes on account of race was "appropriate" legislation to enforce the Fifteenth Amendment.[256]

That statement, however, was the only part of the majority opinion that made any sense. In an 8–1 vote, the Court held that Sections 3 and 4 of the Enforcement Act were not limited to race and were therefore unconstitutional.[257] Although Section 2 did say that the registration official's refusal to accept the poll tax *on account of race* was illegal, Sections 3 and 4, instead of repeating the phrase "on account of race," referred to that discriminatory act as "the wrongful act or omission aforesaid of the person or officer charged with the duty of receiving or permitting such performance or offer to perform."[258] It was perfectly obvious that the words "as aforesaid" referred back to the immediately preceding section's words "on account of race."[259] The word "aforesaid" had been used in exactly this way in various federal statutes *over a thousand times* and had also been used by the Supreme Court Justices themselves, without confusion, in nearly 50 other cases that same year—seven of them written by Chief Justice Waite.[260] Nevertheless, in *this one statute*, the Court decreed that "aforesaid" did not mean "aforesaid," and, therefore, the Court pretended it was not clear that Congress had meant race.[261]

The Court's ruling on the meaning of Sections 3 and 4 was dishonest and shameful. Justice Ward Hunt, in one of his rare dissenting opinions, said as much, writing: "What do the words 'as aforesaid' mean?"[262] Unless they referred to racial discrimination, he continued, "they are wholly and absolutely without meaning."[263] Chief Justice Waite, who, before and after *Reese,* wrote many opinions confirming the universal understanding of "aforesaid," did not answer him.

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254. *Reese*, 92 U.S. 214.
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.* at 228.
259. *See generally id.* at 231.
260. On this point, *United States v. Reese* has been overruled by the Supreme Court, unanimously and by name.
261. *Reese*, 92 U.S. 214.
262. *Id.* at 222–38 (Clifford, J., dissenting); *id.* at 238–56 (Hunt, J., dissenting).
263. *Id.* at 242 (Hunt, J., dissenting).

By the end of the day on March 27, 1876, through both *Cruikshank* and *Reese*, the Supreme Court had dismantled the central law protecting African-Americans against both public and private lawlessness, corruption, and mob violence. Whites, in turn, learned a valuable lesson: they could murder African-Americans, overthrow legitimately elected governments, and use fraud and terrorism to impose brutal white supremacy across the entire South.

It was a combination of the Supreme Court's interpretations of the Reconstruction Amendments and a terroristic campaign that ended the experiment in interracial democracy in the ex-Confederate states. Former Confederates, working according to what came to be known as the Mississippi Plan, had already violently overthrown the Republican Mississippi state government in 1875.[264] After *Cruikshank*, the same thing happened in South Carolina, where Democrats followed a 33-point manifesto written by former Confederate General Martin Gary, who said:

> There are certain men . . . you must kill. Go in masses, armed, and try to force the Negroes to vote our ticket. . . . Shoot them down and cut off their ears, and I warrant you this will teach them a lesson. If we are not elected we will . . . surround the statehouse, and tear it down, and show them we will rule.[265]

Armed bands of horsemen, attired in symbolically defiant red shirts, slaughtered African-American voters and their white allies, seized control of the state government, and put the reins of power in the hands of the former Commanding Officer of Gary, Confederate General Wade Hampton.[266]

Before long, Democrats were largely in control of the former Confederate states once more. When the presidential election of 1876 was contested, the Democrats and Republicans worked out a deal whereby Republican Rutherford B. Hayes would become President and immediately withdraw the few federal troops that remained in the South. He did so, and any hope of enforcing the law for African-Americans disappeared along with the soldiers.[267]

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264. *See generally The Mississippi Plan, political deviance!*, AAREG, https://aaregistry.org/story/the-mississippi-plan-political-deviance/ [https://perma.cc/UJ8P-7E8R] (last visited Oct. 1, 2018).

265. *S. C. Democratic Candidate Martin W. Gary's "Plan of the Campaign of 1876"*, *in* FRANCES BUTLER SIMKINS & ROBERT H. WOODY, SOUTH CAROLINA DURING RECONSTRUCTION, app. 564–569 (Univ. of N.C. Press 1932).

266. BURTON, THE AGE OF LINCOLN *supra* note 12, at 307–08.

267. C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION (Little, Brown 1st ed. 1951); ORVILLE

VII. ALL-WHITE JURIES

Violent interference with elections was not the only civil rights issue with which the Court dealt during this period. Four years after *Cruikshank* and *Reese*, the Supreme Court addressed the Fourteenth Amendment ban on jury discrimination in two cases decided on the same day.[268] One came from West Virginia, where African-American Taylor Strauder was charged with murder.[269] The jury that tried and convicted him was, by the specific terms of a West Virginia law, all white.[270]

On appeal, the Supreme Court emphatically declared that under the Fourteenth Amendment, the rights of the races must be "exactly the same," and "the law in the states shall be the same for the black as for the white."[271] The Court held that West Virginia's statute was unconstitutional and reversed Strauder's conviction.[272] This unambiguous decision seemed to indicate that all-white juries were a thing of the past.

The Court had an opportunity to reinforce its ruling of *Strauder* in *Virginia v. Rives*.[273] When police charged Burwell and Lee Reynolds, teenaged African-American brothers, with murdering a white man in

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VERNON BURTON & DAVID HERR, *Defining Reconstruction*, *in* THE BLACKWELL COMPANION TO THE CIVIL WAR AND RECONSTRUCTION 299–322 (Lacy Ford ed., 2005); Michael Les Benedict, *Reform Republicans and the Retreat from Reconstruction*, *in* THE FACTS OF RECONSTRUCTION 53–78 (Eric Anderson & Alfred A. Moss, Jr. eds., 1991).

268. *See* Stauder v. West Virginia, 100 U.S. 303 (1880); Virginia v. Rives, 100 U.S. 313 (1879).

269. *See Stauder*, 100 U.S. 303.

270. CHRISTOPHER WALDREP, JURY DISCRIMINATION: THE SUPREME COURT, PUBLIC OPINION, AND A GRASSROOTS FIGHT FOR RACIAL EQUALITY IN MISSISSIPPI 168 (2010). The law was passed in 1873 and remained in effect until 1875. *Id.* at 164, 168–69; Indictment, July 8, 1873, Record, *State of West Virginia v. Taylor Strauder*, folder 18, Box 24.

271. *Strauder*, 100 U.S. at 307.

272. Sadly, Justices Clifford and Field, the two Democrats, dissented and argued that the explicit discrimination in the West Virginia law was perfectly valid. Their view, never joined by any other Justice after the end of slavery, was that African-Americans were entitled to virtually no rights, so a law keeping them from an important position like a juror was not a denial of equal protection of the laws. Justice Field's record-breaking 34-year tenure was a long, dogged effort, ultimately very successful, to make the Supreme Court the prime protector of laissez–faire capitalism. He led the Court in twisting the Fourteenth Amendment into a weapon against state regulation of business while denying African-Americans any rights from the Amendment that the *Slaughter-House Cases* said was adopted for their benefit. WALDREP, *supra* note 270*,* at 151.

273. *Rives*, 100 U.S. 313.

Patrick County, Virginia,[274] an all-white jury convicted Lee.[275] His attorneys turned to a federal judge, Alexander Rives, to overturn the conviction.

Although Rives was from a slave-holding family in Virginia, he had supported the Union, and African-Americans sat on his juries.[276] He noted that although the state law in Virginia did not call for all-white juries, no African-American had ever been called for jury duty in the history of the county.[277] This disparity, Judge Rives found, could not "be imputed to chance."[278] Not only did Judge Rives overrule the white jury's conviction, but he ordered the trial judge to be arrested.[279] The case went to the Supreme Court, which issued its ruling on the same day it struck down Strauder's conviction.

Though both cases involved African-Americans convicted by all-white juries, *Rives* was unique. In West Virginia, the law explicitly restricted jury service to "all white male persons."[280] The Virginia law did not mention race; instead, African-Americans had been kept off the juries by simple fraud.[281]

For the Supreme Court, unfortunately, this made all the difference. The justices did not disagree with the facts but simply found that the unbroken history of all-white grand juries and trial juries in Patrick County was not proof of discrimination. According to the Court, the complete absence of African-Americans from Reynolds' jury—and from the entire history of Patrick County juries—fell "short of showing that any civil right was denied, or that there had been any discrimination against the defendants because of their color or race."[282] In other words, the Court

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274. Lee, age 19, and his brother Burwell, age 17, were both indicted. Burwell's case resulted in a hung jury, whereas Lee was convicted; thus, only Burwell appealed his case and went to the Supreme Court.

275. *See generally Ex parte* Reynolds*,* 20 F. Cas. 586 (C.C.W.D. Va. 1878).

276. WALDREP, *supra* note 270*,* at 172–73.

277. *Ex parte Reynolds*, 20 F. Cas. at 291.

278. *See generally id.*

279. Although all-white juries were a universal practice in the South, those who permitted them were committing a crime under the Civil Rights Act of 1875. WALDREP, *supra* note 270*,* at 176.

280. *See* Stauder v. West Virginia, 100 U.S. 303 (1880).

281. *See* Virginia v. Rives, 100 U.S. 313 (1879).

282. *Id.* at 322. The Court gave little or no reason as to why it should apply the removal provision of the Civil Rights Act of 1866 differently with regard to all-white juries resulting from a state statute and all-white juries resulting from unvarying state practice. *See* Anthony Amsterdam*, Criminal Prosecutions Affecting Federally Guaranteed Civil rights: Federal removal and Habeas Corpus Jurisdiction to Abort State Court Trials,* 113 U. PA. L. REV. 793 (1965).

found that "the jury which indicted them, and the panel summoned to try them, [might] have been impartially selected."[283]

Such a statement is flatly contradicted by elementary laws of probability, known even then by schoolchildren. Nevertheless, it removed the most important, and almost the *only* type of, evidence that could prove African-Americans were being systematically excluded from juries. It was now virtually impossible to show jury discrimination. These two cases, taken together, gave the former Confederate states a clear blueprint for what would become known as Jim Crow. As long as the laws did not explicitly mention race, the former Confederate states could do whatever they wanted.

VIII. THE STATE ACTION DOCTRINE

In the early 1880s, after the justices had cut the heart out of the Reconstruction Amendments, they used a pair of cases to cement an extraordinarily effective barrier to African-American civil rights: the State Action Doctrine.

In 1876, a gang of men seized four African-American prisoners in the Crockett County, Tennessee jail.[284] The gang lynched one man and beat the others, and 20 members of the mob were indicted for conspiracy under the Ku Klux Klan Act.[285] They defended themselves with the argument that had failed in *Hall* but succeeded in *Cruikshank*—as individuals, they were immune to prosecution under federal civil rights law.[286] In deciding *United States v. Harris,* the Court unanimously agreed that the Fourteenth Amendment imposed obligations only on the states; that is, it dealt only with *state action*, not with the private action of individuals.[287] The Fourteenth Amendment obligates the states to protect citizens' rights. In *Hall,* Judge Woods, with Justice Bradley's supporting correspondence, reached the reasonable conclusion that the federal government can prosecute individuals who, as individuals, are preventing states from meeting their obligations to protect the rights of all citizens, including African-Americans.[288]

The Supreme Court instead announced a blanket rule that under the Fourteenth Amendment, Congress could regulate state action but had no

283. *Rives*, 100 U.S. at 322.
284. United States v. Harris, 106 U.S. 629 (1883).
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.*

power to punish private citizens.[289] This decision came in spite of the Congressional hearings on which the Ku Klux Klan Act was based, which showed in bloody detail that if the federal government could not punish private citizens, the Fourteenth Amendment was unenforceable. This "State Action Doctrine" filled in the Jim Crow blueprint created by *Rives*. States could already do whatever they wanted as long as they did not mention race—now, private citizens could do whatever they wanted even if they *did* mention race.

The cruel twist is that the unanimous opinion in *Harris* was written by William B. Woods, the man who, as a lower court judge, had recognized the protective power of the Fourteenth Amendment in the early case of *Hall*.[290] Woods stuck by that vision in *Cruikshank,* and was now sitting on the Supreme Court. Whether Woods had changed his position on African-American civil rights since *Cruikshank* or was simply relying on what was now precedent in spite of his view, the result was the same.

IX. *THE CIVIL RIGHTS CASES*

Later that year, 1883, a group of cases came to the Supreme Court that tested the last civil rights law of Reconstruction, the Civil Rights Act of 1875.[291] The law banned racial discrimination in public accommodations: "inns, public conveyances on land or water, theaters, and other places of public amusement."[292] As a measure of the growing presence of African-Americans in "society," the places charged with excluding African-Americans in these cases included the Grand Opera House in New York, the dress circle of Maguire's Theater in San Francisco, and the first-class car of the Memphis & Charleston Railroad.[293] The cases ultimately arrived at the Supreme Court, which the Court decided under the group name *The Civil Rights Cases*.[294]

Each defendant argued that the Civil Rights Act of 1875 was unconstitutional because Congress had no constitutional power to regulate his private conduct.[295] Supporters of the law argued that both the Thirteenth and Fourteenth Amendments gave such power to Congress. Justice Joseph Bradley, writing for an 8–1 majority, invoked the State Action Doctrine saying that Congress had no power under the Fourteenth

289. *Id.*
290. *Id.*
291. The Civil Rights Cases, 109 U.S. 3 (1883).
292. *Id.* at 20.
293. *See generally id.*
294. *Id.*
295. *Id.*

Amendment to keep private theater and hotel owners from discriminating.[296] He elaborated by distinguishing private wrongs from state-imposed injury: "[a]n individual cannot deprive a man of his right to vote . . . [H]e may, by force or fraud, interfere with enjoyment of the right," but "unless protected in these wrongful acts by some shield of state law or state authority, he cannot destroy or injure the right."[297] The wrongdoer, Bradley announced, can only subject himself to punishment under the law of the state and not to federal punishment.[298]

Justice Bradley did agree that the Thirteenth Amendment was not limited to state action and that Congress was empowered to legislate against the "badges and incidents" of slavery. He said, however, that to call something so trivial as white-only public accommodations badges of slavery "would be running the slavery argument into the ground."[299] Justice Bradley concluded his argument:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the law.[300]

This infamous remark missed the point entirely: African-Americans were not seeking to be favorited by the law; they were seeking to be treated *equally* under the law.

Justice John Marshall Harlan dissented.[301] Over the coming years, Justice Harlan, a former slave-owner, Confederate officer, and fundamentalist Christian, would write enough important minority opinions to earn the title "the Great Dissenter." Harlan directly attacked the majority opinion: "The substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism."[302] He said the universal law, recognized for hundreds of years in England and the United States, required innkeepers and similar places of public accommodation to serve all orderly patrons.[303] The states' refusal

296. *See generally id.*
297. *Id.* at 28.
298. *See generally id.*
299. *Id.* at 31.
300. *Id.*
301. *Id.* at 33–62 (Harlan, J., dissenting).
302. *Id.* at 33.
303. *Id.*

to enforce these age-old laws on behalf of African-Americans was state action against which Congress surely had a right to legislate.

Harlan pointed out that the Supreme Court had repeatedly upheld Congress's power to protect slave-owners with exactly the type of legislation it was now saying *could not* protect the former slaves.[304] Although the Fugitive Slave Clause of the Constitution had created a duty only on the states, the Fugitive Slave Acts of 1793 and 1850 imposed both civil and criminal penalties upon private citizens who interfered with the state's duty to return slaves or assisted fleeing slaves—for example, by punishing private citizens who did so much as give a fugitive slave a glass of water.[305] The Supreme Court had upheld punishment of private citizens under those laws repeatedly. The majority opinion, Harlan wrote, reduced the Civil War Amendments, including the Fourteenth, to nothing more than "'splendid baubles,' thrown out to delude those who deserved fair and generous treatment at the hands of the nation."[306]

With the *Civil Rights Cases*, the Supreme Court completed its surgery on the Reconstruction Amendments and Congress's enforcement laws. African-Americans entered the 1890s with no meaningful way to protect their rights.

CONCLUSION

What accounted for the Supreme Court's behavior in this period? Commentators do not really know, but there are several possible factors that contributed.

Some justices, according to a widely held view, simply followed the national mood of white people that were tired of Reconstruction. Some justices were inherently racist. Some adhered to an arid logic, commonly called formalism, that could express shining principles—like the right to fairly selected juries—while easily accepting procedures that destroyed the right.

More fundamentally, many of the justices were unwilling to accept a Constitution that had been turned inside out. Having spent their lifetime under a state-oriented Constitution that reflected a fear of national power, they were unprepared to see the Fourteenth Amendment as a source of vast power for the national government. Justice Miller wrote in the *Slaughter-House Cases* that interpreting the wartime amendments too broadly

304. *Id.*

305. *See generally Fugitive Slave Acts*, ENCYCLOPÆDIA BRITANNICA, https://www.britannica.com/event/Fugitive-Slave-Acts [https://perma.cc/UUC2-SVFV] (last visited Oct. 1, 2018).

306. *The Civil Rights Cases*, 109 U.S. at 48.

"radically change[d] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people."[307]

But even this position makes sense only in the broader context of a national ideology that subordinated African-Americans to white people: every justice, northern and southern, had grown up in a society in which African-Americans mattered less than white people. Chief Justice Taney is rightly condemned for putting his personal racism into the Constitution, but his description of the low esteem in which white people held African-Americans painted an accurate picture of his society. The Supreme Court justices lived in a world in which African-Americans' concerns simply were not particularly important.

In fact, it is possible that asking why the Court did what it did in the late 1870s and 1880s is the wrong question to ask. These decades were business as usual for the Court. It was the burst of egalitarian activity in the decade following the Civil War that was truly exceptional. The Court merely returned to the norm that had prevailed since before the American Revolution.

Perhaps the post-War goals were unrealistic. The task was unprecedented in world history: to go from a bloody war that stripped nine million masters of their dominion over four million slaves to a society in which the two stood on equal footing. Too many misunderstood the problem, thinking it was to make good citizens out of the freed African-Americans. The problem was actually to make law-abiding citizens out of the Confederate rebels.

The following decades would show the difficulty of the task. Inadvertently, perhaps, but no less ironically, the Fourteenth Amendment created to protect African-Americans would be interpreted over the years to restrict African-American citizenship and rights. The Warren Court would use the Fourteenth Amendment again in the mid-20th century to ensure African-American rights and support the modern Civil Rights

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307. Slaughter-House Cases, 83 U.S. 36, 78 (1872). Justice Miller in *The Ku Klux Cases* seems to confirm this notion, as the Court unanimously *did* uphold convictions of private citizens (a mob of Klansmen) under Section 6 of the Enforcement Act of 1870. The Ku Klux Cases, 110 U.S. 651 (1884). What led the Court to allow prosecution of private individuals in *The Ku Klux Cases* was that the victims' right being invaded was their right to vote in a federal election, which the Constitution, in Article I, Sections 2 and 4, specifically grants and authorizes Congress to enforce. The Court said that while private violations "are not within the scope of [the Fourteenth] amendment, it is quite a different matter when congress undertakes to protect the citizen in the exercise of rights conferred by the Constitution of the United States." *Id.* at 666.

Movement, often called the Second Reconstruction. But since the Warren Court and since the 1960s, courts have used the Fourteenth Amendment to roll back gains by African-Americans.

Citizens United v. Federal Election Commission led to large political donations by groups supporting legislation that injured the rights of black citizens.[308] In *Graham v. Connor*, originating from Charlotte, North Carolina, the Supreme Court ruled in a manner that has been used recently to protect law enforcement officers when they injure or even kill African-Americans during arrests.[309] In a 1996 Texas redistricting case, *Bush v. Vera*, the Fourteenth Amendment was used to challenge and discourage the creation of black majority districts that allowed African-Americans to have the opportunity to elect candidates of their choice.[310] Even today, affirmative action is being challenged on the basis of the Fourteenth Amendment.[311]

The history of the Fourteenth Amendment echoes Dr. Martin Luther King, Jr.'s challenge: "I refuse to accept the idea that the 'isness' of man's present nature makes him morally incapable of reaching up for the eternal 'oughtness' that forever confronts him."[312]

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308. Citizens United v. FEC, 558 U.S. 310 (2010).

309. Graham v. Connor, 490 U.S. 386 (1989).

310. Bush v. Vera, 517 US 952 (1996).

311. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)*;* Grutter v. Bollinger, 539 U.S. 306 (2003); Fisher v. Univ. of Tex., 136 S. Ct. 2198 (2016).

312. Martin Luther King Jr., Nobel Peace Prize Acceptance Speech in Oslo, Norway (Dec. 10, 1964). Dr. King's full speech is available in AFRO USA: A REFERENCE WORK ON THE BLACK EXPERIENCE 132 (Harry A. Ploski & Ernest Kaiser eds., 1971).