

**“The most awful problem that any nation
ever undertook to solve”:
Reconstruction as a Crisis in Citizenship**

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Reconstruction is the step-child of the Civil War, the black hole of American history. It lacks the conflict and the personalities that make the Civil War so colorful; it also lacks the climactic feuds and battles, and dissipates into a confusing and wearisome tale of lost opportunities, squalid victories, and embarrassing defeats whose ultimate endpoint is the great American disgrace—Jim Crow.¹ It lives with the short end of the historical stick for accomplishing too much, then accomplishing too little, with the result that almost the worst thing that can be said about someone in American history is that they were prominent in Reconstruction, since it throws them into the same mental filing cabinet with Andrew Johnson, Ulysses Grant and the Ku Klux Klan.² Its twelve years, from 1865 to 1877, teem with associations and developments that seem regrettable, if not absolutely subversive:

- The first massive intrusion of federal governmental authority in the affairs of individuals and the states, beginning with the first and second Reconstruction Acts of 1867, which effectively reduced all but one of the states of the defeated Confederacy to the status of conquered provinces and imposed military occupation of those states until the civil populations re-wrote their state constitutions in a way that satisfied Congress;³

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¹ For a chronicle of the history of Jim Crow *see generally* JERROLD M. PACKARD, *AMERICAN NIGHTMARE: THE HISTORY OF JIM CROW* (2003).

² *Id.*

³ JOSEPH A. RANNEY, *IN THE WAKE OF SLAVERY: CIVIL WAR, CIVIL RIGHTS, AND THE RECONSTRUCTION OF SOUTHERN LAW* 6–9 (2006).

- The first expansion of the category of civil rights recognized and enforced by the federal government, and the first limits on other civil rights (free assembly, legislative independence, freedom of the press) since the Alien and Sedition Acts;⁴
- Massive and wholesale graft, corruption and fraud in the civil governments erected by federal force in the rebel states; and (last but very, very far from least)⁵
- The insertion of race as a political consideration into federal politics, by treating blacks as a “distinct class” to be protected and assisted.⁶

That these initiatives concluded, by 1877, in almost total failure, is greeted by the political Left with a sense of regret for the road-not-then-taken, and on the political Right with a sense of anger that they were ever proposed in the first place. So, on the one hand, we have Mark Brandon declaring that:

[T]he Constitutional program of the Radicals in Congress—embodied in the Thirteenth, Fourteenth, and Fifteenth Amendments—proposed a fundamental alteration of the order’s basic forms and values. Consequently, the Radicals’ constitutional program supplanted dominant conventional understandings of the meaning of the original Constitution. In the process, it rendered that Constitution incoherent.⁷

On the other hand, George P. Fletcher argues that Reconstruction “enacted a second American constitution,” that American constitutional law really begins with the 14th Amendment, and that only in our own times have we shown the willingness to come to grips with the fact that the Republic of 1789 is dead, and long live 1867:⁸

This constitutional order stands in radical contrast to the Constitution drafted in Philadelphia and amended by the Bill of Rights in 1791. It defines membership in the American nation, it brings the principle of equality to the fore, and it initiates the process of extending the franchise to virtually all adult citizens. The original Constitution did none of these things.⁹

Is there a better way to look at Reconstruction, which requires neither the repudiation of Reconstruction nor the repudiation of the Constitution? Any realistic answer to that

⁴ *Id.*

⁵ *Id.*

⁶ HERMAN BELZ, *A NEW BIRTH OF FREEDOM: THE REPUBLICAN PARTY AND FREEDMEN’S RIGHTS, 1861-1866* 149 (New York, 2000).

⁷ MARK E. BRANDON, *FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE* 207 (1998).

⁸ GEORGE P. FLETCHER, *OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY* 26 (2001).

⁹ *Id.* at 29.

question has to begin with a willingness to think about the Civil War which preceded it as embodying three pivotal questions:

1. Can a democracy—or any form of popular government that rests ultimate sovereignty in the consent of the majority—actually work in the way the Founders planned? Lincoln saw clearly, and from the outset, that the real issue of the Civil War was the fragility of democratic process.¹⁰ If political minorities, like the slaveholding South, will always withdraw from the *polis* the moment their will is thwarted, then this is a *de facto* confession that democracy does not really work, after all. Nor was Lincoln the only one. George W. Towle, writing in the *Atlantic Monthly* in the summer of 1864, warned that “the failure of man’s self-governing capacity here” must be “the deathblow to its own hopes” everywhere else.¹¹ “Our failure will not be fatal to us alone; it will involve the fate of the millions who are now seeking to plant themselves against the tremendous force of kingly and patrician prestige.”¹²
2. Can democracy endure alongside slavery? Sooner or later, either recognition of natural rights will correct the thinking that justifies slavery and abolish it, or natural rights will wither away and all rights will become dependent on whomever the exercise of power is pleased to bestow them.
3. Can democracy succeed in the face of racial, cultural, linguistic or religious differences? Or, as William Grosvenor wrote more bluntly in *The New Englander* in October 1865, “How shall we deal with four millions of liberated blacks?”¹³ Here, of course, is where the business of race intrudes its ugly snout. For in the political environment of slavery, blacks of African descent were the only permissible objects of enslavement, and in intellectual environment of the 19th century, widespread beliefs in white racial supremacy forbade the integration of blacks and whites on anything approximating civic equality. One popular solution was colonization.¹⁴ But

¹⁰ DON E. FEHRENBACHER, *LINCOLN IN TEXT AND CONTEXT* 127 (1987).

¹¹ G.M. Towle, *Our Recent Foreign Relations*, *ATLANTIC MONTHLY*, Aug. 1864, at 246.

¹² *Id.*

¹³ William Mason Grosvenor, *The Rights of the Nation and the Duty of Congress*, *24 NEW ENGLANDER* 755, 757 (1865).

¹⁴ ALLAN E. YAREMA, *AMERICAN COLONIZATION SOCIETY: AN AVENUE TO FREEDOM?* 26–27 (2006).

this so-called solution collided mightily with the fact that the Civil War had put blacks into federal uniform, and made highly questionable the justice of denying civil rights to those who had fought to defend the civic order.¹⁵ Still, there was no reason to imagine that racism might not prove much stronger than logic. No wonder Grosvenor said, “Rightly considered, it is the most awful problem that any nation ever undertook to solve.”¹⁶

Abraham Lincoln’s answer to the first question was *yes*, and so secession had to be resisted; his answer to the second was *no*, and so the United States could not limp on indefinitely “half-slave and half-free.” His answer to the third question—which is really the question of Reconstruction as much as it is a question of the Civil War—arrived in one word: CITIZEN. It was the word Lincoln paid to inscribe on the gravestone of his free black valet, William H. Johnson, who died of smallpox in January 1864, smallpox he probably caught from Lincoln, who developed a non-lethal form of the disease on his way back from delivering his address at Gettysburg that November.¹⁷ Buried in the Congressional cemetery, William Johnson’s small white marker bears only his name and that single word, CITIZEN.¹⁸ No one noticed it then, but that word is the principle at stake in Reconstruction.

The Constitution does not offer a particularly useful definition of citizenship; in fact, it does not offer one at all. In the five places where the word *citizen* occurs in the Constitution, three of them are used merely to specify that certain officeholders must have been “a Citizen of the United States.”¹⁹ The other two discuss the jurisdiction of the federal courts over “Controversies. . . between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects,” and the “Privileges and Immunities” which “the Citizens of each State shall be entitled to” enjoy equally with all those of “Citizens in the several States.”²⁰ So it appeared that two parallel categories existed—

¹⁵ See *infra* note 33 and accompanying text.

¹⁶ Grosvenor, *supra* note 13, at 757.

¹⁷ James Oakes, *Natural Rights, Citizenship Rights, States’ Rights, and Black Rights: Another Look at Lincoln and Race*, in *OUR LINCOLN: NEW PERSPECTIVES ON LINCOLN AND HIS WORLD* 115–116 (Eric Foner, ed., 2009).

¹⁸ *Id.*

¹⁹ U.S. CONST. art. 1, § 2, cl. 2; U.S. CONST. art. 1, § 3, cl. 3 and U.S. CONST. art. 2, § 1, cl. 5.

²⁰ U.S. CONST. art. 3, § 2 and U.S. CONST. art. 4, § 2, cl. 3. The 11th Amendment also refers to litigation “by Citizens of another State, or by Citizens or Subjects of any

the category of citizens of the United States and the category of citizens of individual states—the first of which the Constitution offered no definition, and the second of which it had no power to define.

This two-track system of federal and state citizenship may have seemed more obvious to the Founders than to us, since citizenship, in its classical and liberal forms, has always had a certain two-track aspect anyway.²¹ One of those aspects is *participation*: citizenship is what conveys the right to participate in governance and law-making, the contrast here being between a citizen who is an agent in self-government and a subject who is merely ruled. A citizen, in this sense, is a public person, exercising a public role.²² The other is *status*: citizenship is what conveys certain legal protections and a civic identity.²³ Looked at from this perspective, a citizen is a legal member of the *polis*, and cannot be molested by his government or any other government without judicial consequences.²⁴ And in a rough-and-ready way, federal jurisprudence before the Civil War sorted out the boundary between federal and state citizenship precisely along the lines of the participation/status dividing line. State citizenship spoke most directly to the rules of civic participation—hence, it was not only theoretically but practically possible to exercise certain civil rights, and particularly voting, within the states without being a citizen of the United States. In Lincoln's Illinois, the single requirement for voting was residence in the state for one year, even though the statutory requirement for residence under federal naturalization law was five years.²⁵ Hence, white immigrants who would not be deemed naturalized by the federal government could vote legally in Illinois in the 1850s, provided they could swear an oath to a judge of elections

Foreign State" against the United States, which further aggravates the sense of Citizenship being a state prerogative. U.S. CONST. amend. XI.

²¹ Michael Walzer, *Citizenship*, in *POLITICAL INNOVATION AND CONCEPTUAL CHANGE* 217–220 (Terence Ball et al. eds., 1989).

²² Aristotle defines the citizen as someone who "shares in the administration of justice, and in offices." *THE BASIC WORKS OF ARISTOTLE* 1177 (Richard McKeon ed., 1941).

²³ Walzer, *supra* note 21 at 217–220.

²⁴ 1 *THE POLITICAL WORKS OF MARCUS TULLIUS CICERO: COMPRISING HIS TREATISE ON THE COMMONWEALTH; AND HIS TREATISE ON THE LAWS* 293 (Francis Barham ed., 1841). Cicero describes citizens in *De re publica* as those who are protected by "the laws that constitute just marriages and legitimate progenies, under the protection of the guardian deities, around the domestic hearths. By these laws, all men should be maintained in their rights of public and private property. It is only under a good government like this, that men can live happily—for nothing can be more delightful than a well-constituted state." *Id.*

²⁵ *Illegal Voting—An Explanation*, CHI. PRESS & TRIB., Oct. 29, 1858; Act of Jan. 29, 1975, ch. 20, 1 Stat. 414 (repealed 1802).

that they had been Illinois residents for the previous year.²⁶ Federal citizenship, however, spoke more clearly to status—it spelled out who could be elected, who could sue in federal courts, and to whom “Controversies” between competing state jurisdictions would be referred.²⁷

Even there, however, the Constitution still did not convey a very adequate notion of what qualified someone to enjoy the status of federal citizen. The implication of the Constitution, based on the requirement that the president be a “natural born Citizen, or a Citizen of the United States,” was that federal citizenship was a matter of *jus soli*, of being born on the national land or soil.²⁸ But the infamous *Dred Scott v. Sandford* decision of 1857 inserted the requirement of *jus sanguinis*—citizenship by specific birthright—which it then used to deny Dred Scott any standing in the federal courts as a man of “African descent.”²⁹ And so did many of the state courts: even free blacks, ruled the North Carolina Supreme Court, “cannot be considered as citizens in the largest sense of the term.”³⁰ When South Carolina (in the wake of the Denmark Vesey rebellion plot) required incarceration of black sailors on ships visiting Carolina ports, a federal district court ruled that this was a violation of the “privileges and immunities” clause of the Constitution.³¹ In other words, American seamen of whatever race possessed a federal citizenship status which South Carolina could not arbitrarily ignore. But this was swept aside by an edict from Andrew Jackson’s attorney-general (Roger B. Taney, who would also write the majority opinion in *Dred Scott*): “The African race in the United States even when free . . . were not looked upon as citizens by the contracting parties who formed the Constitution.”³²

So, it might have been possible, on these terms, to have arrived at the end of the Civil War—to emancipate slaves, abolish slavery as a legal institution, and re-unify the nation—and in the process do absolutely nothing about whether the newly-emancipated slaves were citizens of anything. Possible—but not likely. By the end of the war, colonization had turned out

²⁶ *Illegal Voting*, *supra* note 25.

²⁷ See *supra* notes 19–20 and accompanying text.

²⁸ U.S. CONST. art. 2, § 1, cl. 5.

²⁹ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

³⁰ *State v. Newsom*, 27 N.C. (5 Ired) 250 (1844).

³¹ *Elkison v. Deliesseline*, 8 F. Cas. 493 (Cir. Ct., D.S.C. 1823).

³² DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 70 (1978); Michael Vorenberg, *Reconstruction as a Constitutional Crisis*, in RECONSTRUCTIONS: NEW PERSPECTIVES ON THE POSTBELLUM UNITED STATES 167 (Thomas J. Brown ed., 2006).

to be a “humbug,” and 180,000 free blacks stood in federal uniforms and had earned federal honors for their fighting.³³ There was also a political consideration in the minds of the victorious Republican party that urged them to establish a definition of citizenship which embraced both *status* and *participation*.³⁴ Practically speaking, the end of slavery meant an end to the 3/5ths clause in the Constitution; and far from that being the end of a racial humiliation for blacks, what it meant politically was that the Southern states could now return to Congress, demanding full (rather than 3/5ths) representation for their black population, without actually giving those blacks the right to vote for the now-increased representation the South would enjoy.³⁵ Tactically speaking, it would be possible for the white South to emerge from the Civil War in an even stronger position in Congress than it had enjoyed *before* the war, with blacks still disenfranchised, but their numbers now awarding Southern states larger delegations in the House of Representatives. The result would be the rolling-back of every initiative the Republicans had achieved in their brief dominance of the wartime Congress—protective tariffs, government assistance to the railroads, the homestead act, the national banking system—as well as assumption of the Confederate war debt.

On the other hand, if the freedman could be transitioned from non-citizen to citizen, then (promised Frederick Douglass) “he will raise up a party in the Southern States among the poor, who will rally with him,” and so establish a long-term Republican political hegemony in the formerly all-Democratic South.³⁶ But this would go for nothing if, with the end of hostilities, political pardons were handed out widely to former rebels, allowing them to mobilize their old pre-war political resources and get themselves elected to Congress; and if blacks could be confined to a no-man’s-land where they were no longer slaves but not legally

³³ Burton D. Wechsler, *Black and White Disenfranchisement: Populism, Race, and Class*, 52 AM. U. L. REV. 23, 44 (2002).

³⁴ Donald G. Nieman, *From Slaves to Citizens: African Americans, Rights Consciousness, and Reconstruction*, 17 CARDOZO L. REV. 2115, 2120 (1996).

³⁵ Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L. J. 259, 265 (2004).

³⁶ *Interview with a Colored Delegation Respecting Suffrage*, in THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 1865–1870 55 (Edward McPherson ed., Da Capo Press, Inc. 1972) (1871); HEATHER COX RICHARDSON, WEST FROM APPOMATTOX: THE RECONSTRUCTION OF AMERICA AFTER THE CIVIL WAR 52 (2007); KENNETH STAMPP, THE ERA OF RECONSTRUCTION 1865-1877 96 (Alfred A. Knopf 1972) (1965); GARRETT EPPS, DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA 33 (2006).

citizens of either the states or the federal Union. Sure enough, no sooner had Andrew Johnson, a former Democrat and Southern Unionist, been sworn in as president after the assassination of Lincoln, than Johnson, on May 29, 1865, issued a broadly-drawn amnesty proclamation, offering pardons to all but the uppermost echelons of the former Confederate leadership—and even they were permitted by “special application” to be pardoned.³⁷ And to smooth the path to restoration, Johnson added a series of proclamations, appointing interim provisional governors and urging the writing of new state constitutions based upon the voter qualifications in force at the time of secession in 1861—which meant, in large but invisible letters, NO BLACKS.³⁸

What this insured was that Reconstruction would be fought as a struggle over citizenship—in effect, to settle whether citizenship could trump race in the same way, at the time of the Founding, it had trumped religion, through the First Amendment. So, from the moment it became clear that Andrew Johnson intended nothing more than the re-creation of the pre-war status quo, minus only slavery, the Republican congressional leadership—Thaddeus Stevens of Pennsylvania in the House, Charles Sumner and Henry Wilson of Massachusetts in the Senate—reached over Johnson’s hands, first to replace the old Confederate order with a free-labor economy, and then to define citizenship in such a way as to secure the freedmen’s place within the politics and economy of a new South.³⁹

It is a good measure of how critical the notion of citizenship was to Reconstruction that the first resistance the ex-Confederates offered took the form, not of the race war that had been so often predicted as the likeliest result of emancipation, but of guarding the precincts of *participation* in the states from black intrusion.⁴⁰ The “Black Codes” enacted in the wake of Johnson’s amnesty proclamation were aimed at defining blacks as ‘vagrants’ or ‘paupers’ who could be excluded from citizenship by excessive poll taxes, forbidding black-white intermarriage, curtailments of free speech (including “insulting gestures”), and most ominous of all, ownership of “fire-arms of any kind, or any ammunition, dirk or bowie knife.”⁴¹ It also underscores the

³⁷ *By the President of the Untied States of America: A Proclamation*, in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897 310–12 (James B. Richardson ed., 1897).

³⁸ *Id.* at 313–14.

³⁹ Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 *FORDHAM L. REV.* 981, 1008–10 (2002)

⁴⁰ *The Freedmen: Laws of the Southern States Concerning Them*, *NEW YORK TIMES*, June 10, 1866, at 6.

⁴¹ *Id.*, MAJOR GENERAL O. O. HOWARD, COMMISSIONER BUREAU OF REFUGEES,

centrality of the place of citizenship in any discussion of Reconstruction to notice that the first objections from Republicans, when the first session of the new 39th Congress assembled in December 1865, were also based on citizenship. “I deny the right of these States to pass these laws against men who are citizens of the United States,”⁴² erupted Henry Wilson, seconded by Lyman Trumbull of Illinois, who introduced a Civil Rights bill just after the New Year which contained a forthright definition of federal citizenship, based on *jus soli*: “[A]ll persons born in the United States . . . are hereby declared to be citizens of the United States,” declared the new bill, “and such citizens, of every race and color . . . shall have the same right, in every State and Territory in the United States . . . as is enjoyed by white citizens.”⁴³ Offences against those rights would be adjudicable in federal courts.⁴⁴

But this would require some serious re-negotiating of the assumptions about citizenship which had prevailed up until the Civil War. Wilson was promptly interrupted by John Sherman of Ohio, who pointed out that “[t]here is scarcely a State in the Union that does not make distinctions on account of color . . . Is it the purpose of this bill to wipe out all these distinctions?”⁴⁵ And in the House of Representatives, Wisconsin Democrat Charles Eldridge accused the promoters of the civil rights bill of an “insidious and dangerous” plan to “lay prostrate at the feet of the Federal Government the judiciary of the States.”⁴⁶ The only citizenship Eldridge knew was the citizenship of the states: “I hold that the rights of the States are the rights of the Union, that the rights of the States and the liberty of the States are essential to the liberty of the individual citizen.”⁴⁷

Trumbull’s civil rights bill was eventually passed in March 1866, but finally stopping short of including among the rights of federal citizenship the right to vote.⁴⁸ Andrew Johnson vetoed it anyway on March 27th.⁴⁹ Granting federal citizenship to “our

FREEDMEN, AND ABANDONED LANDS, LAWS IN RELATION TO FREEDMEN, S. Exec. Doc. No. 6, at 170, 192-99 (39th Cong. 2d Sess. 1867); JOHN C. RODRIGUE, RECONSTRUCTION IN THE CANE FIELDS: FROM SLAVERY TO FREE LABOR IN LOUISIANA’S SUGAR PARISHES 1862–1880 67 (2001).

⁴² CONG. GLOBE, 39th Cong., 1st Sess. 41–42 (1865).

⁴³ Act of Apr. 9, 1866, ch. 31, 14 Stat. 27.

⁴⁴ ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877 243 (1988).

⁴⁵ CONG. GLOBE, 39th Cong., 1st Sess. 41–42 (1865).

⁴⁶ *Id.* at 1154.

⁴⁷ *Id.*

⁴⁸ Act of Apr. 9, 1866, *supra* note 45.2.

⁴⁹ *To the Senate of the United States*, in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897 413 (James B. Richardson ed., 1897).

entire colored population” when the states had refused to do likewise in terms of state citizenship, argued Johnson, either made federal citizenship null and void, or else overrode state citizenship to the point where it was a useless concept.⁵⁰ And it was clearly the latter which Johnson saw as the bill’s strategy: “Federal law, whenever it can be made to apply, displaces State law” and interferes with “relations existing exclusively between a State and its citizens.”⁵¹ Congress ignored him and overrode the veto.⁵²

The Civil Rights Act of 1866 was a landmark in the expansion of the notion of federal citizenship, because it forced into the open for the first time since the Constitutional Convention the inherently problematic linkage of the divided sovereignty of the states and the Union, and the divided tracks of a citizenship of status and a citizenship of participation. The argument of Andrew Johnson and the wartime Democrats in Congress implied that state citizenship covered virtually every ground worth calling citizenship—office-holding, contract, marriage, and, of course, voting. But what this left as the realm of federal citizenship was anyone’s guess. The opponents of the civil rights bill and other Reconstruction legislation were opposing federal jurisdiction over both rights of *participation* as well as *status*. If participation *and* status were up to the states to define, was there any worthwhile meaning to the phrase, ‘citizen of the United States’? It had been the plea of Charles Sumner in 1854, in his provocative speech on “The Crime Against Kansas,” that the crime of Gaius Verres—which had been that he ignored his victim’s protest, *civis Romanus sum*—was not less treasonous than the depredations of pro-slavery Border Ruffians who ignored their victims’ protests of “I am an American citizen.”⁵³ That plea got Sumner assaulted on the floor of the Senate; those who opposed the Civil Rights Bill of 1866 were, if only metaphorically, doing much the same.⁵⁴

One solution to the deadlock over state and federal citizenship in the former Confederacy was to deny that the one-time Confederate states were any longer states of the Union—that they had, in effect, committed state-suicide by secession, and were to be governed as the western territories were governed,

⁵⁰ *Id.* at 406.

⁵¹ *Id.* at 410, 413.

⁵² CONG. GLOBE, 39th Cong., 2d Sess. 313, 344 (1866).

⁵³ THE CRIME AGAINST KANSAS: SPEECH OF HON. CHARLES SUMNER, IN THE SENATE OF THE UNITED STATES, 19TH AND 20TH MAY, 1856 4–5 (1856).

⁵⁴ *Id.*

directly by federal law.⁵⁵ In turn, then, *federal* citizenship could assume the burden of defining both status and participation for the inhabitants of the occupied Confederacy. This was the strategy behind the two Reconstruction Acts of March and July 1867, which declared that “no legal state governments or adequate protection for life or property now exists” in any of the old Confederate states except Tennessee and reduced them to “military districts” where “civil tribunals” would operate only at the behest of the military district commander.⁵⁶ But even before the bills were passed, they were placed under fire from a new quarter, the Supreme Court, which released its opinions in *Ex parte Milligan* in December, 1866.⁵⁷ *Ex parte Milligan* reversed the convictions of Lambdin Milligan and two others who had been imprisoned by a federal military tribunal in 1864, and thus called into question the entire constitutional legitimacy of military authority.⁵⁸ Fearful that “the first time that the South with their copperhead allies obtain[ed] command of Congress,” they would repeal the civil rights bill and appeal to the Court to overturn the Reconstruction Acts, congressional Republicans leapt ahead in the second session of the 39th Congress to armor-plate the status of federal citizenship with two amendments to the Constitution,⁵⁹ the fourteenth (which eliminated any distinction between state and federal citizenship and welded them together on the basis of *jus soli*: “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”⁶⁰) and the fifteenth in 1869 (which annexed *participation* to federal citizenship by preventing any state or federal authority from denying the right to vote on account “of race, color, or previous condition of servitude”).⁶¹ This was, as future president James Garfield announced in the House, the first time that the federal government “proposes to hold over every American citizen, without regard to color, the protecting shield of law.”⁶² Taken together, the Reconstruction amendments cemented firmly into place the basic Republican conviction that “no distinction would be tolerated in this purified Republic, but what arose from merit and conduct.”⁶³

⁵⁵ OriginalIntent.Org, Original Intent Treatise, Citizenship, <http://www.originalintent.org/edu/citizenship.php> (last visited August 1, 2009).

⁵⁶ Act of Mar. 2, 1867, ch. 152, 14 Stat. 428 (1867).

⁵⁷ *Ex parte Milligan*, 71 U.S. 2 (1866).

⁵⁸ *Id.* at 135.

⁵⁹ Thaddeus Stevens, CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

⁶⁰ U.S. CONST. amend. XIV, § 1.

⁶¹ U.S. CONST. amend. XV, § 1.

⁶² James Garfield, CONG. GLOBE, 39th Cong., 1st Sess. 2462 (1866).

⁶³ Thaddeus Stevens, CONG. GLOBE, 39th Cong., 1st Sess. 3148 (1866).

Although the Democratic opposition raged that the Reconstruction amendments were nothing but what Garret Davis of Kentucky called “a bald, naked attempt to usurp power and to bring all the sovereign and reserved powers of the States to the foot of a tyrannical and despotic faction in Congress,” and that it gave the vote “to a race of men who throughout their whole history, in every country and condition in which they have ever been placed, have demonstrated their utter inability for self-government,” it was ultimately neither a demonic thirst for centralized government nor an idealized passion for racial egalitarianism which were the drivers of that opposition, but the question of citizenship.⁶⁴ Even some of the most radical Republicans were surprisingly uninterested in turning their Reconstruction legislation into a social revolution.⁶⁵ “This doctrine does not mean that a negro shall sit on the same seat or eat at the same table with a white man,” Thaddeus Stevens replied in 1867, “[t]hat is a matter of taste which every man must decide for himself. The law has nothing to do with it.”⁶⁶ But insofar as the black man born in the United States and the white man born in the United States were considered politically equal, their identity was based, not on being black or white, but on being citizens.⁶⁷

Unhappily, the history of Reconstruction—like more recent reconstructions—contains within itself a warning that bills and amendments do not carry with them guarantees about security.⁶⁸ Military reconstruction was pock-marked by racial violence in Southern cities, aimed largely at intimidating blacks from voting and restricting them to various forms of economic peonage.⁶⁹ Congress attempted to contain the violence with the three Force Acts of 1870 and 1871; and Ku Klux Klan violence ensured the election of Republican governments in the former Confederate states, and of Ulysses Grant in 1868 and 1872.⁷⁰ But by 1876, many of the old wartime Republican guard were gone—Thaddeus Stevens died in 1868, Henry Wilson left the Senate in 1872 to run as Grant’s vice-president, and died in 1875, and Charles

⁶⁴ Garrett Davis, Cong. Globe, 40th Cong., 3d Sess. 1630–31 (1869); on the larger context of the conservatism of Reconstruction, see Michael Les Benedict, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction*, 61 J. Am. Hist. 65, 83–84 (1974).

⁶⁵ ERIC FONER, *FOREVER FREE* 113 (2005).

⁶⁶ Thaddeus Stevens, CONG. GLOBE, 39th Cong., 2nd Sess. 252–53 (1867).

⁶⁷ U.S. CONST. amend. XIV, § 1.

⁶⁸ FONER, *supra* note 65, at 194–95.

⁶⁹ *Id.*

⁷⁰ *Id.* at 171, 175, 177–80.

Sumner died in 1874.⁷¹ Also gone was the Republican majority in the House, which was replaced in 1874 by the first Democratic majority since the beginning of the Civil War, and the Republican majority in the Senate, which was lost in the elections of 1878.⁷² By then, the full weight of an unsympathetic Supreme Court had finally descended in the *Slaughter-House Cases*, which re-established “that there is a citizenship of the United States, and a citizenship of the State, which are distinct from each other.”⁷³ Hence, the “privileges and immunities” attached to federal citizenship had no application to state governments.⁷⁴ The second blow came in *U.S. v. Cruikshank* in 1875, which re-affirmed *Slaughter-House Cases* and added that “the Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the States.”⁷⁵ An effort to circumvent *Cruikshank*, in the form of the Civil Rights Act of 1875, lasted only until 1883, when the Supreme Court overturned the Act in the *Civil Rights Cases*.⁷⁶

By that time, even the Republican faithful had lost heart in the fight. The Panic of 1873 pulled the financial rug from under the government’s resources, and the cries for help from southern blacks for government intervention increasingly came to sound in Republican ears like the demands of populist farmers for currency inflation or unionized workers for economic regulation.⁷⁷ “Is it not time for the colored race to stop playing the baby?” asked the *Chicago Tribune* irritably in 1875.⁷⁸ Finally, the deal struck by the electoral compromise of 1877, which gave the presidency to Rutherford B. Hayes and mandated the withdrawal of the last Reconstruction military authorities; in their absence, a lethal combination of strong-arm politicking and economic fragility sent the feeble Reconstruction state governments crashing down.⁷⁹ Not until 1888 would Republicans regain sufficient numbers in Congress to renew their efforts to interpose federal supervision of Southern voting with a fresh “Force Bill,”

⁷¹ *Id.* at 146; RICHARD NELSON CURRENT, THOSE TERRIBLE CARPET BAGGERS: A REINTERPRETATION 278, 285 (1988).

⁷² FONER, *supra* note 65, at 190; Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself Into the Presidency*, 90 VA. L. REV. 551, 635 n.232 (2004).

⁷³ *Slaughter-House Cases*, 83 U.S. 36, 74 (1873).

⁷⁴ *Id.*

⁷⁵ *United States v. Cruikshank*, 92 U.S. 542, 555 (1875).

⁷⁶ FONER, *supra* note 65, at 194; HEATHER COX RICHARDSON, THE DEATH OF RECONSTRUCTION: RACE, LABOR, AND POLITICS IN THE POST-CIVIL WAR NORTH, 1865–1901 150 (2001).

⁷⁷ RICHARDSON, *supra* note 76, at 137.

⁷⁸ *Id.*

⁷⁹ FONER, *supra* note 65, at 198.

drafted by Henry Cabot Lodge.⁸⁰ The bill passed the House, only to die a lingering death in the Senate.⁸¹ It had all been, in the memorable title of Judge Albion Tourgee's memoir, "A Fool's Errand."⁸²

We should not fool ourselves, however, into thinking that this was an unavoidable, much less an appropriate, conclusion to Reconstruction. Although Reconstruction has more recently been portrayed as a kind of radical fairy-tale, or a Paris Commune in gumbo, Reconstruction's fundamental issue—citizenship, rather than race or centralization, or even civil rights—was a profoundly conservative one.⁸³ The kind of citizenship imagined by the Reconstruction Republicans is based on the *jus soli* and by the rational assent to a series of propositions (starting with the natural rights proposition of the Declaration of Independence, that all men are created equal), not blood, soil, race or ethnicity, the *jus sanguinis* so beloved of German Romanticism.⁸⁴ The cry, *I am an American citizen*, is what must make any power stand down, whether it comes in the form of centralized federal governments or (what is no less exempt from the blandishments of power) centralized state governments, centralized municipal governments, boss-driven school boards, or one-party faculties.⁸⁵ Writing online for his magazine, *The American Interest*, Francis Fukuyama has said:

Americans traditionally distrust strong central government, and champion a federalism that distributes powers to state and local governments. The logic of wanting to move government closer to the people is strong, but we often forget that tyranny can be imposed by local oligarchies as much as by centralized ones. In the history of the Anglophone world, it is not the ability of local authorities to check the central government, but rather a balance of power between local authorities and a strong central government, that is the true cradle of liberty.⁸⁶

⁸⁰ Edward E. Purcell, *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and "Federal Courts,"* 81 N.C. L. REV. 1927, 1994–1995 (2003).

⁸¹ *Id.*

⁸² EDWARD L. AYERS, *THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION* 50–51 (1992); RICHARD NELSON CURRENT, *THOSE TERRIBLE CARPETBAGGERS: A REINTERPRETATION* 368–375 (1988).

⁸³ WILLIAM C. HARRIS, *WITH CHARITY FOR ALL: LINCOLN AND THE RESTORATION OF THE UNION* 262 (1997); ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 111 (1987).

⁸⁴ Steve D. Shadowen, et al., *No Distinctions Except Those Which Merit Originates: The Unlawfulness of Legacy Preferences in Public and Private Universities*, 49 SANTA CLARA L. REV. 51, 92, 93 (2009).

⁸⁵ *THE CRIME AGAINST KANSAS*, *supra* note 53 at 5.

⁸⁶ Francis Fukuyama, *Strong States and Liberty*, *THE AMERICAN INTEREST ONLINE*, Apr. 25, 2008, available at <http://the-american-interest.com/contd/?p=648>.

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Reconstruction as a Crisis in Citizenship

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The price we have paid for ignoring this balance lives on not only in the ugly history of poll taxes, literary tests and grandfather clauses, but also in the federal overreach with which that history has been responded to, in the form of racial gerrymandering and proportional representation schemes. Neither the illness or its maladroit cure—whether local or federal—has much to offer beside the fundamental honor of citizenship; and refusing to recognize the implications of *civis Americanus sum* in the era of Reconstruction is what has helped bring us to our present muddled condition over voting rights, statistical “triggers,” and the racial balkanization of the nation.⁸⁷ At the end of the day, there is only one political honor any American should aspire to, and only one political privilege that any of us should be permitted to enjoy, and it is contained in that singular and laconic word that President Lincoln engraved on William Johnson’s headstone: CITIZEN.

⁸⁷ Abigail Thernstrom, *Reviewing (and Reconsidering) the Voting Rights Act*, 7 ENGAGE 35, 35–36 (2006).