

Liberalism, the Thirteenth Amendment, and the Seeds of Destruction of Reconstruction

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On February 3, 1875, during debates on the Civil Rights Act of that year, Representative Niblack of Indiana¹ posed this question to Representative Ben Butler of Massachusetts, sponsor of the bill:²

“If the State courts will not guarantee the rights of the citizens of the United States, ought we not in some way to take away from the States the right of self-government and say that self-government is a failure?”

To Butler’s reply that he wanted to use federal law to restrain the bad men so that the good men might have self-government, Niblack then responded: “But if the bad men are in the majority?” He then followed up: “If bad men are so dominant over the good men that we cannot have self-government, then we ought to declare that self-government is a failure.”

Having gathered his wits by this point Butler responded to Niblack, “I say that there is not self-government there; that there is an attempt on the part of the minority to govern [a minority whom Butler had just characterized as “murderers, lawless men, banditti... men who ride at night in uniform and murder Negroes”]. In order to prevent that, we desire this and kindred measures....”

This essay notes (I believe non-controversially) that the unifying impetus behind the Thirteenth, Fourteenth, and Fifteenth Amendments, was the Lockean liberal ideology set forth in the Declaration of Independence. It then goes on to argue that this very ideology, carried within it the seeds of destruction of Reconstruction. By Lockean liberalism I mean not only the belief that all humans are equally entitled to the natural rights of life and liberty, including the freedom to acquire property by labor and by contract, but also the beliefs that society should be structured so as to allow individuals of ability and industrious character (in Locke’s words, “the industrious and rational”) to acquire property and attain respectability and influence, and that society as a whole will benefit thereby. For the Americans who wrote and signed the Declaration, their version of Lockean liberalism also included the view that representative democracy was the form

¹ Niblack was a Democrat representing the district around Evansville, which lies in the southwest corner of Indiana, along the Kentucky border.

² The colloquy that follows is found at *Cong. Record*, 43rd Cong. 2d Sess. 940.

of government that best implemented these principles. There was to be no privileged class--“no titles of nobility”—and also no class stunted by birth under the taint of “bills of attainder.”³

The insight that in a representative democracy the majority could be tyrannical dawned on the American framers, and they attempted to cope with it in a variety of ways not addressed or even available in Locke’s own theory (which offers only the power of the majority’s will to revolt as the check on tyranny by government).⁴ Still, nigh everyone knew that chattel slavery violated natural rights, and the country muddled along with it until the Civil War.⁵ After the Civil War, the Thirteenth Amendment abolished slavery while the Fourteenth created the tools by which the slave through his own efforts would be freed to rise in society. He would be placed under the equal protection of laws, entitled to due process in the courts, and would be protected against state laws abridging his rights as a free person. The Fifteenth Amendment would let him use his own vote to secure these equal rights. The thinking was that these amendments would be used BY the former slave; so long as laws and government enforcement of laws did not discriminate by race, self-help was going to be his salvation. For instance, Horace Greeley wrote in 1866, “Enfranchise the blacks, and further rebellions at the South are impossible...”⁶

On April 9, 1865, Robert E. Lee surrendered on behalf of the Confederacy; on April 14 President Lincoln was assassinated. In this same month, Frederick Douglass delivered a speech to the Massachusetts Anti-Slavery Society wherein he posed and answered the question, “What shall we do with the Negro?” He replied as follows:

“Do nothing with us.... [I]f the negro cannot stand on his own legs, let him fall.... All I ask is, give him a chance to stand on his own legs! Let him alone! If you see him on his way to school, let him alone....If you see him going to the dinner-table at a hotel,

³ U.S.Constitution, Article I, Secs.9 and 10.

⁴ Locke’s *2d Treatise* (cite passages showing no protection for the oppressed when the majority itself does not feel threatened). James Madison emphasized having a large and diversified republic that would control potentially oppressive majorities at the state/local level (Fed #10), combined with the system of checks and balances at the national level (Fed #47-51). Alexander Hamilton emphasized the tool of judicial review to protect the “rights of the individual and the minor party.” (Fed 78) The Anti-federalists emphasized the value of small state and local level government where people would know one another and presumably therefore be less likely to oppress one another. The Anti-federalists pushed hard for a variety of constitutional amendments to rein in the distant-from-the-people federal government, and the Tenth was probably their favorite (although they would have liked a stronger version.).(cit to Storing/Dry book, *What the Antifederalists Were For*).

⁵ Granted, this belief in the universal applicability of the Declaration of Independence became far less widespread as slavery became increasingly entrenched in the U.S. economy.

⁶ Richard Valelly, *The Two Reconstructions* (Chicago: University of Chicago Press, 2004), 32.

let him go! If you see him going to the ballot-box, let him alone....If you see him going to a work-shop, just let him alone.... Let him fall if he cannot stand alone.”⁷

In an address to the same organization the following month, Douglass elaborated his doctrine of self-help as including the necessary tools of a mandate of equality before the laws, the right to testify in court, right of assembly, the right to bear arms, and the right to vote. These, he argued were needed for the black man to secure his liberty, and without these the promise of freedom in the Thirteenth Amendment would amount to a “a delusion, a mockery” (P.Foner, ed. IV, 166-169).⁸

Seven months later, on December 18, Thaddeus Stevens addressed Congress on the need for a Joint Committee on Reconstruction. He urged that the conquered states need a time of federal supervision during which the former rebels can, while mingling with those persons to whom Congress grants suffrage, “accustom themselves to make and obey equal laws.”⁹ He openly stated a legislative goal of arranging representation to adjust for the end of the 3/5 clause in such a way as (via a combination of voting freedmen and Southern loyal Unionists) to impose and perpetuate “the Republican ascendancy” throughout the South.¹⁰ He also insisted on the need for “protective laws” to mitigate the likelihood of the former slaves’ being rendered victims by their resentful former masters.¹¹ He lamented that the commonly heard assertion, “This is a white man’s government,” belied the great principles of the Declaration of Independence: “Our fathers repudiated the whole doctrine of the legal superiority of families or races, and proclaimed the

⁷ P.Foner, ed. *Life and Writings of Frederick Douglass* (NY: International Pub., 1955) Vol.IV, 157-165.

⁸ Of course, once it became apparent in ensuing years that the Southern will to violence necessitated the assistance of the strong arm of the federal government to assure that blacks WOULD be let alone, Douglass then appealed for this assistance. P.Foner, ed., IV, 360-361; 473-476; 492-3, (“[T]here is nothing in the history of savages to surpass the blood-chilling horrors and fiendish excesses perpetrated against the colored people of this country by the so-called enlightened people of the South”); 498; 503-504; 508-512; 520. But the goal of the governmental assistance remained the securing of conditions to permit self-help. P.Foner, ed. 366-367 (“...our destiny is largely in our own hands...”); 477 (“The Negro ... must build up a character for industry, economy, intelligence and virtue”).

⁹ *Cong.Globe*, 39th Cong., 1st Sess., 74.

¹⁰ *Ibid.*; see Section 2 of 14th Amd. As it turned out, Congressional disfranchisement of the disloyal along with electoral boycotts by disgruntled whites, produced electorates that were majority black in five of the militarily reconstructed states. The total of blacks registered throughout the ten Reconstruction states (Tennessee having re-entered the Union in July 1866 after ratifying both the Thirteenth and Fourteenth Amendments) was 703,000 blacks and 627,000 whites. Valelly, 32.

¹¹ *Cong.Globe*, 39th Cong., 1st Sess., 74.

equality of men before the law.”¹² These principles were the foundation, he maintained, and while the desire for union with slave states had created a need to postpone the perfection of the project, its grounding was built into the system and could now be actualized.¹³

Stevens continued as follows:

“This is not a ‘white man’s government’.... It is man’s government; ... not that all men will have equal power and sway within it. Accidental circumstances, natural and acquired endowment and ability, will vary their fortunes. But equal rights to all the privileges of the government is [sic] innate in every [human being]....

“If equal privileges were granted to all, I should not expect any but white men to be elected to office for long ages to come. The prejudice engendered by slavery would not soon permit merit to be preferred to color. But it would still be beneficial to the weaker races. In a country where political divisions will always exist, their power, joined with just white men, would greatly modify, if it did not entirely prevent, the injustice of majorities. Without the right of suffrage in the late slave states, (I do not speak of the free states.) I believe the slaves had better been left in bondage.”¹⁴

These two statements capture the unity of purpose that was understood to link the Thirteenth, Fourteenth, and Fifteenth Amendments. Many members of Congress understood with Frederick Douglass that the former slaves of the South would need new tools to defend themselves against the foreseeable hostility of former rebels amongst whom they lived, who had risked life and limb and lost many loved ones in an effort to keep blacks enslaved. While Congress took longer to assent to Douglass’s [and Charles Sumner’s] view that equal access to vehicles of public transport and to public, albeit privately owned, inns should be secured as properly the common law rights of all free, well-behaved persons,¹⁵ the majority of them did see,

¹² Ibid.

¹³ Ibid. One could quibble that the Declaration of Independence speaks to equality in nature, not under the laws of society, but rather speaks of all men’s equally having natural rights for the securing of which they form government. Still, Stevens could respond by noting that (if not the Declaration itself) the Constitutional guarantees against titles of nobility and against bills of attainder do build in the principles of equality before the law at both the state and federal level (U.S.Const. Art. I, Secs. 9 and 10.)

¹⁴ *Cong.Globe*, 39th Cong., 1st Sess., 74-75).

¹⁵ Such access was written into the 1875 Civil Rights Act. [give cit.] Even in the Supreme Court decision striking down that law, *The Civil Rights Cases*, 109 U.S. 3 (1883), this common law right receives acknowledgment in both the majority opinion by Justice Bradley (at 24-25: “Innkeepers and public carriers, by the laws of all the states, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them.”) and the dissent by (the first) Justice Harlan (at 37-38, quoting and

by the time the Thirteenth Amendment became law, that federal legislation was needed to assure that the basic rights of free persons would be secured to the former slaves.

Congress secured what it saw as the basic rights of free persons via the 1866 Civil Rights Law. Then, confronting one presidential veto after another, Congress was moved to entrench these basic rights against potential shifts of legislative sentiment, by placing them in the Constitution via the Fourteenth Amendment.¹⁶ While the Fourteenth Amendment pended ratification, Congress in March 1867 gave suffrage to freedmen in the ten unrestored Confederate states (where 80% of black American adult males resided),¹⁷ in part to be used as a tool for their self-defense, as Rep. Stevens had advised.¹⁸ This First Reconstruction Act established manhood suffrage, minus participants in the rebellion, for elections of participants in state constitutional conventions. These conventions were to produce constitutions that themselves contained the same manhood suffrage, and that would be valid if approved by a majority of registered voters.¹⁹ In this way the freedman received the tool seen as most needed for them to defend their own freedom, the ballot. It was plain by 1867, that blacks needed not only the ballot-box but also the cartridge-box, for their own self-defense; Republicans in Congress believed they had provided this access in the Privileges or Immunities Clause of the Fourteenth Amendment; the *Slaughterhouse Cases* (1873) decision would move that protection

citing numerous precedents). References to this common law right are replete on both sides of the Congressional debates on the Civil Rights Act (opponents of the Act argued that it should be self-enforced by lawsuits, not by the actions of taxpayer-funded U.S. Attorneys). E.g. *Cong.Globe*, 42d Cong., 2d Sess.3189-3190 (Sen.Lyman Trumbull); *Cong.Record*, 43rd Cong.2d.Sess.940 (multiple speakers).

¹⁶ E. Foner, *Reconstruction America's Unfinished Revolution 1863-1877* (New York: Harper & Row, 1988) 276-277; John Hope Franklin, *Reconstruction After the Civil War* (Chicago: University of Chicago Press, 1961, 1994), 251-252. Congress overrode the veto of the Civil Rights Bill on April 6 and 9. On April 30 the Committee on Reconstruction reported the Fourteenth Amendment, which passed both houses by June 13, 1866. Valelly, 31.

¹⁷ Half of one percent resided in the five New England states where black voting was legal or were qualified as property owners to vote in New York or Ohio; the other twenty percent resided in states where they could not vote. C. Vann Woodward, "Seeds of Failure in Radical Race Policy," pp.125-156 in Harold Hyman, ed. *New Frontiers of the American Reconstruction* (Urbana: University of Illinois Press, 1966) 126; Valelly, 24.

¹⁸ See quotation above.

¹⁹ E. Foner, 70-71. To thwart the tactic by disgruntled white Southerners of registering to vote and then not participating, so the new constitutions would not qualify as having a majority of the *registered* voters, in 1868 Congress amended this rule to require only a majority of the participating voters. Franklin, 80.

against laws depriving blacks of guns from the Privileges or Immunities Clause to the Equal Protection Clause.²⁰

The Democrats, however, did well in northern state elections in 1867; President Johnson by late 1868 pardoned virtually every member of the Confederacy (undoing their disfranchisement);²¹ and the elected legislature in the restored state of Georgia on September 3, 1868 expelled all of its black legislators and declared blacks ineligible to serve in the legislature (Franklin, 130-131, 222). These events, along with the prospect of protecting black voting rights in the border states where Reconstruction could not reach, prompted the Republicans in Congress to entrench black voting rights on a permanent basis via the Fifteenth Amendment, which the two houses endorsed, respectively, in January and February of 1869.²² (Georgia, along with Virginia and Mississippi, was forced to ratify the Fifteenth as a condition of readmission to the Union. Although several northern states (with very tiny black populations) had defeated black suffrage in recent years in state referenda, the Amendment attained ratification in less than a year, by February 3, 1870.²³

At this point the liberal beliefs in self-help, hard-work-meritocracy, and representative democracy that had fueled the abolitionist movement bit back, motivating voters in the North to turn their backs on Reconstruction in the belief that they had done enough and that now it was time (a) for the former slaves to take care of themselves and (b) for the South to be allowed to return to representative democracy rather than be ruled by an army from the outside paid for by federal tax dollars.

To be sure, this “bite” from liberalism would not have been so devastating against Reconstruction were it not for two accompanying elements: First, the violently vicious race hatred that permeated much of the white South (including border states) and the more mild racism of the North and the Southern “better” classes that fueled a neglect that was anything but benign.²⁴ Second, a will to duplicity and a willingness to be duped (what William Weicek more

²⁰ L. F. Goldstein, “The Spectre of the Second Amendment: Re-reading *Slaughterhouse* and *Cruikshank*,” *Studies in American Political Development* 21 (fall 2007): 1-18.

²¹ C. Vann Woodward, 137-8; Franklin, 82.

²² Franklin 82; Heather Cox Richardson, *The Death of Reconstruction* (Cambridge: Harvard University Press, 2001) 78; E.Foner, 446-449.

²³ Steve Mount, “The Constitution On Line,” <http://www.usconstitution.net/constamrat.html> accessed 2/18/2010

²⁴ And in the even in the North it was not all that mild: many states banned (on paper at least) black in-migration, prohibited black jury service, prohibited blacks from testifying against whites, and had segregated schooling. Moreover, C. Vann Woodward documents numerous instances up through the early 1860s of Republican leaders such as William Seward, Henry Wilson, Lyman Trumbull proclaiming theirs the “white man’s party,” or the U.S. a “white man’s country.” In the House of Representatives in 1866, George W. Julian announced while deploring

politely calls “subterfuge”) which was akin in its degree of preposterousness to the lie told to himself and others by the wife-beater who claims that his wife started the fight by “pushing [his] buttons.”²⁵

Still, the point here is that the liberalism that undergirded the Thirteenth Amendment itself played a role in undoing its success. This liberalism caused the North to keep expecting the former slave to fend for himself and to “cease being the special favorite of the laws.”²⁶ Liberalism also caused the North to tire of paying for military rule in the South (which it had never adequately funded in the first place), giving it up far too soon in the more or less blind hope that representative government could succeed in the South: For the United States to continue indefinitely as a society in which one half ruled over the other by military force would be intolerable.

It is true that the Supreme Court played a role in diminishing the force of Reconstruction, but in this role the Court in fact worked as the ally of majoritarian democracy.²⁷ the four decades following 1865 comprised a period in which the U.S. Supreme Court was particularly conscious

the fact, “The real trouble is that we hate the Negro.” Henry Wilson, Republican of Massachusetts announced in 1867, “There is not a square mile in the United States where the advocacy of equal rights and privileges of those colored men has not been in the past and is not now unpopular.” Woodward, 127-131.

²⁵ William Weicek “Emancipation and Civic Status: The American Experience 1865-1915” pp.78-99 in Alexander Tsesis, *The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment* (New York: Columbia University Press, 2010) (“Southern whites responded [to Reconstruction] first by counterrevolutionary violence, then subversion by subterfuge); Richardson, 142-143.

²⁶ Justice Bradley, *1883 Civil Rights Cases*, 109 U.S.3, at 25

²⁷ See Ellen D. Katz, Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts, 101 *Mich. L. Rev.* 2341, 2350 nn.36, 54, 59, 62, 63, and 85(2003) (listing an abundance of scholarship that stands for the proposition that *Cruikshank* and other case law “thwarted federal power to protect the southern black population and facilitated the end of Reconstruction,” along with scholarship maintaining to the contrary that the Waite Court was careful to provide avenues for future Congressional and executive branch efforts to strengthen Reconstruction in ways that it would find constitutional, avenues that had for the time being lost political traction; and concluding herself at 2360, “The Court’s refusal to foreclose these opportunities for congressional action temper the charge that *Reese* and *Cruikshank* evince the Court’s determination to end Reconstruction and ‘protect[] white supremacy.’”); Darren Hutchinson, “Racial Exhaustion,” *Wash. U. L. Rev.* 86:917-974, 922 (“[*Cruikshank*], along with a series of [other] rulings from the Court, would severely undermine federal enforcement of political and social equality for emancipated blacks.”)

of avoiding running too far afoul of the Congressional or popular will.²⁸ It was, at base, the American people who turned their back on Reconstruction, and they did so in significant part out of a belief in self-government. In other words, the U.S. Supreme Court, in this period while not, as to African-Americans at least, the heroic savior of “the rights of the individual and the minor party” envisioned by Hamilton in *Federalist* #78, it was also not a demon who blocked a democratic will to maintain Reconstruction.²⁹ In fact, the Court in these decades functioned all too closely as a handmaiden of democracy.

I. Rhetoric of Liberalism Deployed Against Reconstruction

As early as 1870, with the Fifteenth Amendment in place, as stalwart a Republican as Thomas Wentworth Higginson, who had assisted John Brown and had led black troops during the war, warned that freedmen “should not continue to be kept wards of the nation.” Congressman James A. Garfield (future Republican President) wrote in private letters the same year that the African race had now received “the care of its own destiny” and that freedmen’s “fortunes [were now] in their own hands.” Now that the black could vote, wrote an Illinois newspaper in support of the Fifteenth Amendment, “Let him hereafter take his chances in the battle of life.”³⁰ Such talk was temporarily suspended when the ensuing too-prominent-too-ignore Klan reign of terror quickly convinced most (though not all) Republicans of the need for an increased federal military and judicial enforcement presence in the South for the next few years.³¹

The Enforcement Act of 1870 and the KKK Act of 1871 split the Congressional Republicans, several (though not most) of them now siding with the Congressional Democrats’ claim that Section One of the Fourteenth Amendment was meant to restrain state action, not

²⁸ After the victorious 1860 electoral campaign in which overturning the *Dred Scott* decision had been a significant platform plank, the Republican Congress altered the size of the Court three times during the Civil War- Reconstruction period, for obvious policy goals; it stripped jurisdiction from the Court in the *McCardle* case to prevent the Court from declaring unconstitutional military rule over the South; and the Court in turn flatly reversed itself within a year in the *Legal Tender Cases* (decided in 1869 and 1870) as an obvious product of two new judicial appointments. The latter subjected the Court to considerable journalistic derision. Barry Friedman, *The Will of the People* (New York: Farrar, Straus and Giroux), 124-136. In contrast, “For its work in dismantling Reconstruction, the Court received widespread plaudits from an American populace fatigued by the effort to guarantee African-Americans their security, political rights, and some measure of equality.” Friedman, 139. See also 143-149.

²⁹ See note [on Katz] *supra* for citations to the scholarship on both sides of the disagreement. But cf. Hutchinson at 922: “The Court, echoing popular opinion, had reached a point of racial exhaustion.” (Emphasis added.)

³⁰ E. Foner 448-454.

³¹ E. Foner, 454-455.

private crimes, and that it was up to the individual Southern states to deal with such crimes.³² The enforcement bureaucracy for these acts, like the federal army in the postbellum South, was understaffed and underfunded as long as the acts endured, which was until the Democratic resurgence in Congress in 1893 led to the legislative undoing of almost all of these provisions.³³ In the KKK violent rampages of the early 1870s, many thousands participated, a couple thousand were indicted, and then of the few hundred convicted only a tiny number served any time in prison; most received suspended sentences with warnings.³⁴

According to Eric Foner, relying on William Gillette, Robert Kaczorowski, James W. Garner, and Allen Trelease, these federal enforcement efforts by 1872 “had broken the Klan’s back and produced a dramatic decline in violence throughout the South.”³⁵ Unfortunately, C. Vann Woodward sees it differently, insisting that despite the “nominal” dissolution of the Klan, “the campaign of violence, terror and intimidation went forward save temporarily in places where federal power was displayed and so long as it was sustained. For all the efforts of the Department of Justice, the deterioration of the freedman’s status and the curtailment and denial of his suffrage continued steadily and rapidly.”³⁶ Foner himself concedes, and indeed amply documents that egregious election-related violence continued in the South, for instance noting that in Louisiana, “Every election between 1868 and 1876 was marked by rampant violence and pervasive fraud.”³⁷

Despite Grant’s 1872 victory, the splitting off of the Liberal Republicans for this election did signal to Grant the waning national support for Reconstruction, and he began cutting back.³⁸ The political message was underlined by the overwhelming shift to the Democrats at the Congressional and state level in 1874.³⁹ Grant intervened militarily only intermittently on requests for help from Southern Republican governors besieged by racially and politically

³² E. Foner, 455-456.

³³ C. Vann Woodward, 144-7; Everett Swinney, “Enforcing the Fifteenth Amendment 1870-1877,” *Journal of Southern History* XXVIII (1962):210-216; E. Foner 456.

³⁴ E. Foner 457-459. That any were convicted at all was achieved despite horrendous odds: harassment by the local police bureaucracy; uncooperative juries; violent intimidation of witnesses [and probably of jurors too]; Southern sympathies among many of the locally resident federal bureaucrats. Swinney, 212-216, cited in Woodward, 145-147.

³⁵ E. Foner, 458-459.

³⁶ C. Vann Woodward, 144.

³⁷ E. Foner, 550.

³⁸ E. Foner, 510-511; 528.

³⁹ Cit Mike McConnell, *Const’l Commentary* article on 1874 elction.

motivated violence, but even these interventions were sometimes not popular in the North.⁴⁰ After he refused early in 1874 to send help to deal with violent disturbances in Mississippi and Texas, the Northern press (*Philadelphia Inquirer* and *New York Daily Tribune*) praised his restraint.⁴¹ The imagery deployed was that of saving democracy at the state level from the oppressive force of “federal bayonets.”⁴²

In April 1874, Grant finally sent federal troops into Louisiana where something of a race war was going on between 3500 White Leaguers, mostly Civil War veterans and the official (black) state militia. After the federal troops ousted the White Leaguers from the city hall and statehouse that they had occupied, now much of the Northern press was critical.⁴³ Only three years earlier the *San Francisco Daily Alta California* had condemned South Carolinians for their violent unwillingness to let blacks participate in government, but now the same paper condemned Grant for using federal troops to settle violent election disputes in Louisiana.⁴⁴ In the Louisiana situation one sees not only the important role of the rhetoric of self-government (at the state level), but also the successful deployment of the Big Lie technique by Southerners. The Colfax massacre took place in April of 1873; it involved the killing of somewhere between one hundred and four hundred blacks, fifty of whom had laid out a white flag of surrender and many of whom were shot in the back, by a group of whites organized to seize the county courthouse in an election dispute.⁴⁵ This massacre by whites was greeted in much of the Northern press with a degree of sympathy that is surprising (at least from the perspective of the twenty-first century); it was depicted “as a self-defense against pillaging ex-slaves who had [fraudulently] cloaked themselves in authority.”⁴⁶ One democratic paper in Missouri even had the ex-slaves “sacking the residences” of whites and “pillaging their plantations.” The killings by the White League

⁴⁰ E. Foner 528.

⁴¹ Richardson, 140.

⁴² *Ibid.*

⁴³ *Ibid.* 551 (citing *The Nation*, a formerly Republican journal, now turned Liberal Republican, according to Richardson, 102); Richardson, 139-140 ; 210 (citing the *San Francisco Daily Alta California* and the *New York Daily Sun*). Although Foner notes the mixed press reaction in the North, he does say that “most Republicans” and at least one anti-Administration paper, the *N.Y Tribune* praised Grant’s firmness. E.Foner, *Ibid.*

⁴⁴ Richardson, 91 and 139-140 (Richardson connects the criticized federal intervention to the 1872 election but the news article she cites is from July 15, 1874).

⁴⁵ Robert Goldman, *Reconstruction and Black Suffrage: Losing the Vote in Cruikshank and Reese* (2001), 42-51; E.Foner, 550. Two white persons were also killed in the battle.

⁴⁶ Richardson, 107-108.

were called in Northern papers “self-defense” against a “reign of terror.”⁴⁷ To be sure, the press was not unanimous. The *New York Times* headline on the story read, “The War of the Races: Nearly Three Hundred Negroes Burned to Death by Whites in Louisiana--A Horrible Affair.”⁴⁸ Still, Northern readers had reason to be confused about what was transpiring in the South.

Speeches by politicians, too, contributed to the confusion. Democratic politicians, according to Heather Cox Richardson, “insisted that the South was peaceful and less violent than the North. Republican politicians maintained that South Carolina was (in 1870-71) a bloodbath.” Horace Greeley’s *New York Daily Tribune* and the *San Francisco Daily Alta California*, both Republican papers theretofore staunchly supportive of black rights somehow became convinced that the violence in South Carolina in the early 1870s was at bottom about poor, non-industrious blacks trying to use their voting power via the taxing power to obtain benefits for themselves at the expense of the productive members of society.⁴⁹ Contributing to this image that Southern violence was being started by blacks of bad character, unwilling to work their way up in society and instead trying to seize government power by force and fraud were the wires sent out by Associated Press, at the time controlled by Southerners. In the months preceding the 1874 elections, wire reports circulated warnings of a “war of the races” supposedly initiated by “black mobs led by demagogues” attempting to seize power. These accounts “explained” the fact that the casualties were almost always those of (generally black) Republicans by claiming that white Democrats had successfully risen up in self-defense against Negro mobs of several hundred (See above for analogy to self-justifying wife-beaters). The firmly Republican *Boston Evening Transcript*, for instance, would publish these wire reports and then critique them as Southern propaganda, but meanwhile the images of blacks attempting to use their power to undermine true, liberal democracy were being spread throughout the Northern press.⁵⁰

Even the drastically watered down Civil Rights Act of 1875, which for two years of Congressional debate had been highly controversial because of inclusion of a now-deleted school (and church) desegregation requirement, for which many now-disappointed black leaders had been earnestly lobbying, received distorted press coverage in otherwise pro-Republican newspapers.⁵¹ The *New York Times*, for instance, wrote that in the South there were blacks “who delight in scenes and cheap notoriety,” such as the “[N]egro politician, ...the ignorant field

⁴⁷ *Ibid.*, citing *Cincinnati Daily Gazette*, *Missouri Republican*, *New Orleans Picayune*, *Boston Evening Transcript*.

⁴⁸ *New York Times*, April 16, 1873, pp.1,6. See also Leslie F. Goldstein, “The Second Amendment, Slaughterhouse, and Cruikshank,” *Albany Government Law Review* 1(2008):367-418, 387.

⁴⁹ Richardson, 91-101.

⁵⁰ Richardson, 142-143. See also 54-55, 68-69.

⁵¹ Alfred H. Kelly, “The Congressional Controversy over School Segregation, 1867-1875,” *American Historical Review* 64 (1959): 537-563.

hand, who by his very brutality has forced his way into, and disgraces, public positions of honor and trust” who would now use this new federal law to “take every opportunity to inflict petty annoyances upon...former masters.”⁵² The thinking here was that individuals of talent and character who worked hard would in fact rise socially and be welcomed at public establishments, while others should earn respectability on their merits, and until then not impose themselves on their supposed betters.

II. Welcoming Reception of Court Decisions Against Reconstruction

It is correct that the Supreme Court undercut federal enforcement efforts beginning with Justice Bradley’s Circuit Court decision in 1874 of *U.S. v. Cruikshank*,⁵³ throwing out the only three convictions (of three white murderers) that resulted from the Colfax massacre.⁵⁴ The Supreme Court upheld Bradley on appeal on March 27, 1876.⁵⁵ The essence of the problem identified by Bradley and seconded by the Supreme Court was that the murderers were charged without a specific allegation that the murder was racially motivated. Using murder to prevent someone from voting in a state election could not be a crime under the Fifteenth Amendment unless the government charged and proved that the murder was not only to block the person from voting but also was racially motivated.⁵⁶

On the same day the Court struck down for the first time as unconstitutional a section of a Reconstruction Civil Rights Act in the decision, *U.S. v. Reese*.⁵⁷ This decision pronounced unconstitutional Sections Three and Four of the May 31, 1870 Enforcement Act on the grounds that the phrase “as aforesaid” was insufficient indication of the phrase “on account of race, color or previous condition of servitude” that appeared earlier in the statute. The majority’s was plainly a perverted reading of the statute as Justice Ward Hunt points out in dissent, and this decision is one of the pieces of evidence commonly used to depict the Court as blocking a

⁵² Richardson, 144.

⁵³ 25 F.Cas.707.

⁵⁴ There was also an earlier case where the Court rendered difficult the prosecution of white marauders against blacks, *Blyew v. U.S.*, 80 U.S. 581 (1872). There the Court, over Bradley’s dissent, issued a narrow interpretation of the statutorily created category of cases where jurisdiction could be removed from state to federal court on grounds of civil rights deprivations. This was a matter of federal statutory interpretation; both houses of Congress and the Presidency were in Republican hands in 1872. Congress initiated no attempt to alter the statute.

⁵⁵ *U.S. v. Cruikshank*, 92 U.S.542 (1876).

⁵⁶ 25 F.Cas. 707, 715 (“It should, at least, have been shown that the conspiracy was entered into to deprive the injured persons of their right to vote by reason of their race, color or previous condition of servitude.”)

⁵⁷ *U.S. v. Reese*, 92 U.S. 214 (1876).

Congress interested in Reconstruction. However, a close look at the U.S. Code reveals that a year before the *Reese* decision, in the work that went into producing the Revised Code, adopted March 3, 1875, the phrase “as aforesaid” was removed from both these sections, in an apparent effort to protect white Republicans in the South whose public meetings were being broken up along with those of blacks.⁵⁸

The *Reese* decision makes little sense as applied to the statute as written when the culprit Reese was charged but makes good sense as applied to the law as the Court (likely) knew it to currently read. And the Court’s idea of this good sense was precisely the sense of the Congress who debated at considerable length how to word the Fifteenth Amendment: versions guarantying some form of adult male suffrage *versus* the version chosen, which allowed all sorts of restrictions on voting **so long as** they were not racially based. By 1876 The Supreme Court was not thwarting a Congress bent on Reconstruction; rather it was narrowly interpreting statutes and constitutional powers in a way that fit the temper of the times. The Court allowed some leeway in these decisions (prior to the 1890s) for Congress to strengthen the Reconstructions statutes if it had chosen to.

In the summer of 1876 Frederick Douglass chided the Republican Convention for inadequate efforts to protect Southern blacks from “the slaveholder’s shotgun.” The response of the Republican *New York Evening Post* reflected popular Northern views of the day: “It is to be regretted that Frederick Douglass will not teach to colored people the lesson of self-dependence, instead of always demanding for them fresh guarantees, by proclamation, by statute, and by bayonet, of the rights which they must largely maintain for themselves.”⁵⁹

III. Invitations from Congress to Undermining of Jury and Suffrage Rights

The 1875 Civil Rights Act from the Republican lame duck Congress explicitly permitted exactly the kind of qualifications of jurors that were facially neutral as to race but later used to exclude blacks that the U.S. Supreme Court has been criticized by modern scholars for having permitted in its 1880 decisions. Its Section Four reads as follows:

SEC. 4. That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid

⁵⁸ Goldstein (2007), at 142, n.64.

⁵⁹ Philip A. Klinkner with Rogers Smith, *The Unsteady March: The Rise and Decline of Racial Equality in America* (Chicago: University of Chicago Press, 1999, 88.

shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars.

Qualifications based on individual attainments such as education or property were acceptable in terms of Lockean liberalism, but the birth-based attribute of race was not. [here discuss cases briefly?]

Moreover, the Congressional debates on the 15th Amendment openly anticipated the kinds of qualifications on voters that were later deployed to keep blacks, along with many poor and poorly educated whites, from voting in the South. Wording that would have forbidden such regulations was voted down by Congress after extensive debate on the issue. In fact, Congress members explicitly anticipated all of the various barriers to voting that Southern states deployed with success to remove blacks from the ballot box (apart from the technique of blatantly discriminatory manipulation of the rules with racist intent and effect). These included literacy and property tests, the understanding clause, the poll tax, as well as complicated and/or deliberately confusing registration requirements.⁶⁰ [here discuss cases briefly?]

Both the regulations on jury service and those on voting--had they been *administered* with racial neutrality, which of course they were not--are expressions of Lockean liberalism. They pertain to individual attainments rather than a birth-based group trait. The Supreme Court opinion in *Yick Wo v. Hopkins* (1886), by the way, seems to have been an invitation to someone to bring a lawsuit on the unequal administration of such laws. Had the federal government been motivated to do so, and had the Court stuck to the promise of *Yick Wo* that it would oppose practices administering laws “with an evil eye and an unequal hand” as to race, Southern practices in the late nineteenth century U.S. might have come closer to being genuinely liberal.⁶¹ But then nineteenth century ideas about state-level self-government may still have gotten in the way. The U.S.A. really was not the united country that it turned into in the twentieth century. And that newer, tighter union may have come as much from things like television and air-conditioning and industrialization of the South and jet planes, as it did from Court opinions.

[I stop here for limits of time.]

⁶⁰ C. Vann Woodward, 141.

⁶¹ Get page ref. in *Yick Wo v. Hopkins*, 118 U.S. 356.