Opinion

The Lost Promise of Reconstruction

Can we reanimate the dream of freedom that Congress tried to enact in the wake of the Civil War?

By Eric Foner

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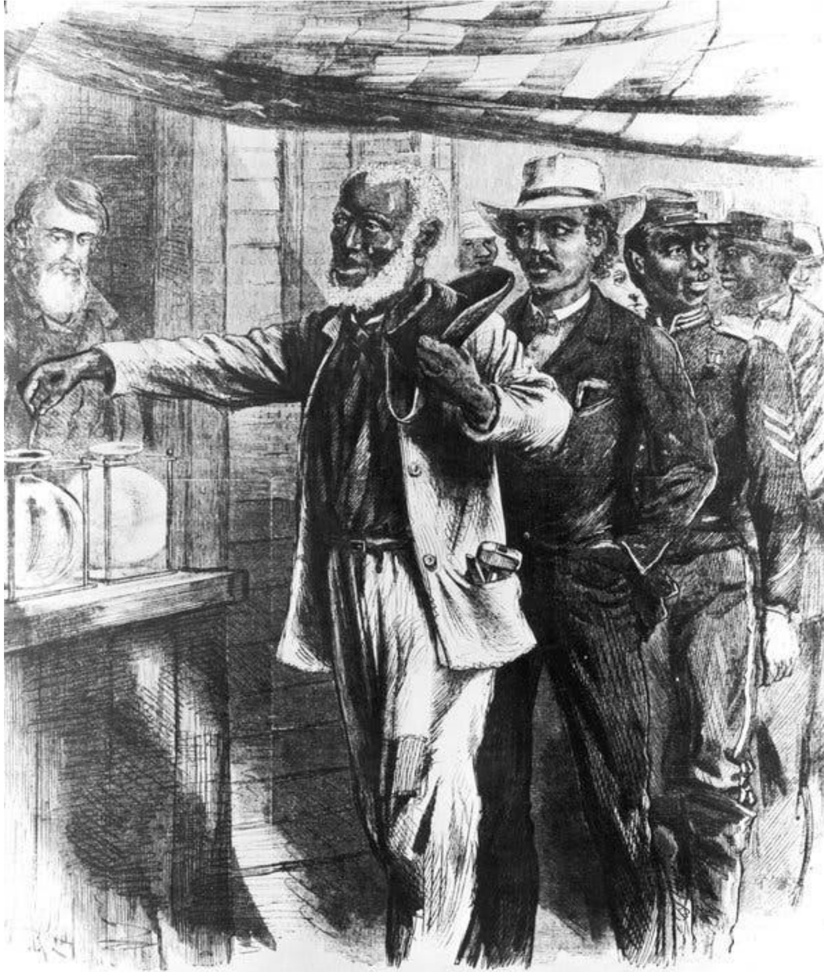

An 1867 illustration from Harper's Weekly of African-American men voting in a state election in the South. Credit...Hulton Archive/Getty Images

Among the unanticipated consequences of the election of Donald Trump has been a surge of interest in post-Civil War Reconstruction, when this country first attempted to construct an interracial democracy, and in the restoration of white supremacy that followed. Many Americans feel that we are living at a time like the end of the 19th century, when, in the words of Frederick Douglass, "principles which we all thought to have been firmly and permanently settled" were "boldly assaulted and overthrown."

Douglass was referring to the rights enshrined in three constitutional amendments ratified between 1865 and 1870. The 13th Amendment irrevocably abolished slavery. The 14th constitutionalized the principles of birthright citizenship and equality before the law. The 15th sought to guarantee the right to vote for black men throughout the reunited nation. All three empowered Congress to enforce their provisions, radically shifting the balance of power from the states to the nation.

The amendments had flaws. The 13th allowed involuntary servitude to continue for people convicted of crime, inadvertently opening the door to the creation of a giant system of convict labor. The 14th mandated that a state would lose part of its representation in the House of Representatives if it barred groups of men from voting but imposed no penalty if it disenfranchised women. The 15th allowed states to limit citizens' right to vote for reasons other than race.

Nonetheless, the amendments should be seen not simply as changes to an existing structure but as a second American founding, which created a fundamentally new Constitution. Taken together, as George William Curtis, the editor of Harper's Weekly, wrote at the time, they transformed a government "for white men" into one "for mankind." Yet they do not occupy the prominent place in public consciousness of other key texts in our history, nor are their authors, Representatives James Ashley, John Bingham and others, widely known.

The amendments were written in broad, sometimes ambiguous language. A series of interconnected questions about their precise meaning cried out for resolution. Did the 13th prohibit only chattel bondage or extend to other elements of slavery, including racial inequality? Did the 14th shield Americans against violations of their rights only by state laws and officials (the so-called state action doctrine), or also against the acts of private individuals? Did the 15th prohibit laws that, even if race-neutral on their face, were clearly intended to limit black men's right to vote?

The task of definition fell to the Supreme Court. And in a series of decisions familiar today only to specialists (with the exception of Plessy) — the Slaughter-House Cases, Cruikshank, Hall v. DeCuir, the Civil Rights Cases, Plessy v. Ferguson, Giles v. Harris — the court drastically restricted the scope of the second founding. As time went on, outright racism became increasingly evident in the court's decisions. The process was gradual and never total, but the fate of the three amendments offers an object lesson in what can happen to constitutional rights at the hands of an unsympathetic, conservative Supreme Court.

The 13th Amendment quickly fell into disuse. The court assumed that its purpose was fulfilled when chattel slavery vanished and rejected claims that various forms of racial inequality that persisted amounted to "badges of slavery" against which Congress could legislate. The justices reduced the "privileges or immunities" guaranteed to American citizens in the 14th to virtual insignificance, insisting that most rights still derived from state, not national, citizenship. The court elevated state action into a shibboleth, severely restricting federal protection of rights against the assaults of violent individuals and mobs. It refused to intervene as the South's black men lost the right to vote. The justices mainly used the 14th Amendment as a vehicle to protect the "liberty" of corporations, not that of the former slaves, striking down state laws regulating economic activity on the grounds that they violated the rights of "corporate personhood." Only John Marshall Harlan, black Americans' most steadfast friend in the federal judiciary during this period, consistently dissented from what he called the court's "entirely too narrow and artificial" reading of the three amendments.

In the face of these decisions, those who sought to keep alive the egalitarian promise of Reconstruction advanced a counterinterpretation of the amended Constitution. In 1889, a group of black community leaders in Baltimore calling themselves the Brotherhood of Liberty published "Justice and Jurisprudence," the first sustained critique of Supreme Court rulings construing the amendments. Its message was clear: The promise of equal citizenship had been "imperiled by judicial interpretation." The book explored the rights "public and private" that it claimed the amendments were meant to protect. It assailed as unconstitutional racial discrimination by transportation companies and in public accommodations, the exclusion of blacks from skilled employment, housing segregation and lack of access to education.

In his review of the book, the lawyer and political philosopher Thaddeus B. Wakeman declared that too many constitutional rights had been lost when they reached "that grave of liberty, the Supreme Court of the United States."

Why should we care today about these long-ago decisions? Because in a legal environment that relies so heavily on precedent the shadow of the retreat from Reconstruction still hangs over contemporary jurisprudence. To this day, the 13th Amendment has almost never been invoked as a weapon against the racism that formed so powerful a bulwark of American slavery. The right to vote remains insecure. In 2013, the Supreme Court invalidated the 1965 Voting Rights Act's requirement that jurisdictions with long histories of discrimination in voting obtain prior federal approval before changing suffrage rules. Many states have interpreted the decision as a green light to enact laws to restrict the voting population in ways that predominantly affect racial minorities and the poor.

Regarding the 14th Amendment, the record is mixed. In many ways, the amendment has undergone an astonishing expansion, made possible by the fact that its language applies to all Americans, not just blacks. The amendment provided the basis for a series of decisions requiring states to act in accordance with the liberties enumerated in the Bill of Rights — a tremendous enhancement of the rights of all Americans. It was employed in the pioneering legal arguments of Pauli Murray and Ruth Bader Ginsburg that persuaded the courts to apply its Equal Protection Clause to discrimination based on gender. It was recently invoked in affirming the right of gay and lesbian couples to marry.

When it comes to the status of black Americans, however, the 14th Amendment's promise has never been fulfilled. Even at the height of the civil rights movement, the Warren Court, which dismantled the legal edifice of Jim Crow, could not bring itself to admit that for decades the justices had been wrong. Thus, in upholding the Civil Rights Act of 1964, which barred racial discrimination by businesses of all kinds, the court relied on the original Constitution's Interstate Commerce Clause — as if the [1964 Civil Rights] act's purpose had been to facilitate the free flow of goods, not to end demeaning discrimination against American citizens. Basing the ruling on the 14th Amendment would have been more logical, but it would have required the justices boldly to repudiate decades of rulings that the [14th] amendment can be enforced only against actions by the states.

As the court has grown more conservative in recent years, it has become more sympathetic to white plaintiffs complaining of reverse discrimination than to blacks seeking assistance in overcoming the legacies of slavery and Jim Crow. Some of the justices today view "racial classifications," not inequality, as the root of the country's race problems. They therefore oppose all race-conscious efforts to promote equality in education, employment and other realms. The court today, like the justices in the late 19th century, uses the 14th Amendment to expand the rights of corporations, as in the Citizens United decision that ended limits on political spending. And the state action doctrine survives. For example, a 2000 decision, United States v. Morrison, held that the Constitution authorizes federal action to combat violence against women only if the violence is "state-sponsored."

Our Constitution is not self-enforcing, and progress is not necessarily linear or permanent. From his threat to exclude the American-born children of undocumented immigrants from the 14th Amendment principle of birthright citizenship to his silence, or worse, in the face of a resurgent white nationalism, President Trump has routinely exhibited behavior suggesting that the pre-Reconstruction definition of citizenship based on whiteness retains its power in parts of society today. But the Reconstruction amendments survive, as does the interpretation of their meaning advanced by Justice Harlan, the Brotherhood of Liberty and others. In a different political environment their latent power may yet be employed to promote the ideal of equal citizenship for all.

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