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NEGLECTED STORIES AND CIVIC SPACE

Peggy Cooper Davis*

Coming to Lexington, Virginia to be the Frances Lewis Scholar in Residence at Washington and Lee's Law School has been a significant personal and professional journey for me. Let me say why.

I spent the first ten years of my life in this state, at a traditionally black college in the Tidewater region.¹ From 1943 until 1953, I was steeped in the beauty of Virginia's landscapes, the gentleness of its climate, the rich subtleties of its etiquette, and the poison of its racial and class hierarchies. I left before *Brown v. Board of Education*² de-legitimized ways of life that were background conditions of my childhood. Returning in the year 2000, I felt a bone-deep comfort with Virginia's temperatures and fragrances. Despite more than thirty years in New York, I remembered how to say "good morning" to strangers and "Sir" or "Ma'am" to anyone over twelve. Despite my transformation from a rather peculiar ten-year-old to retired judge, chaired professor, and scholar-in-residence; despite the end of official segregation; and despite the risk of social sanction that now attends expressions of racial animus, I maintained a reflex for race-related contempt or violence, a set of muscles that tense still—and perhaps too quickly—at certain coded provocations.

I wanted to enter—I thought I *should* enter—this community as intellectual colleague, as teacher and mentor, as citizen, as temporary and partial participant, but participant nonetheless in the ongoing construction of the entities we call Washington and Lee, Rockbridge County, Virginia, and the South. Sense memories of the geographic space helped me to feel at home. But memories of the rules and symbols of caste hierarchy were equally strong. Being at home in Virginia between 1943 and 1953 had meant—for me, for my family, for most of the people I loved—feeling pushed to the margins of civic life. Within our families and within the institutions (churches, schools, civic and social organizations, businesses) that we created and controlled, we held responsibility for what we, individually and collectively, were and what we would become. Our agency was clear; it was encouraged; and it was honored. I think of Ted Delaney's³ great-grandfather and the magnificent Baptist church on Main Street. But in larger communities like Washington and Lee,

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1. Hampton Institute, now Hampton University, is located in the Tidewater Region of Virginia at Hampton Roads.

2. 347 U.S. 483 (1954) (holding that official segregation of public school children violates the Equal Protection Clause of the Fourteenth Amendment).

3. Lexington native Theodore Delaney holds a B.A. from Washington and Lee University and is a Professor of History there.

Lexington, Rockbridge County, Virginia, and the South, we were not seen by the majority as agents. We were not thought of as the players who defined the community. We were often seen as the labor the players used to the community's ends. We were sometimes recognized as margin players, curiosities who provided color but held no power. But we had to struggle against the larger culture to feel ownership of a community-defining role. Of course, I do not mean to suggest that African American people took no part in the making of the South and its mainstream institutions. I mean only to say that our part was neglected when official stories were told. Our part in the history of the South was not honored, and our taking part was always against a sense of custom.

Although I have felt this phenomenon of neglect more powerfully in the South, it is not an exclusively Southern phenomenon. Consider a contemporary Northern example. New York's Metropolitan Museum is now showing a splendid exhibit of Walker Evans' photography.⁴ A section of the exhibit is devoted to photographs taken in the South between 1835 and 1936. Some of the most striking are of African American men standing outside Mississippi shops with names like "New Deal Barbershop." Here is the legend that accompanies these photographs:

Evans' series of photographs of African-American men before a row of barbershops makes his work in Vicksburg, the site of one of the Civil War's bloodiest battles, a high point of his career. This photograph of the New Deal and Savoy shops is also a field portrait of the descendants of those for whom the Union officers fought, with President Roosevelt replacing President Lincoln as the commissioning agent.⁵

I assume the phrase "Union officers" is an oversight and that the writer meant to credit all, officers or not, who fought for the Union cause. But what can I assume about the assertion that Union (soldiers and) officers fought *for*, rather than alongside, African American men? It is significant, of course, that throughout the War, in Mississippi and elsewhere, African Americans deserted plantations in large numbers to disrupt the Southern economy and to be of official or unofficial service to the Union cause.⁶ It is also significant that by the time of the 1863 Battle of Vicksburg, the Union Army and Navy contained many thousands of African American combatants.⁷ We should not forget that at least 186,000 African Americans eventually served in the Union Army, and

4. Walker Evans (1903-1975), The Metropolitan Museum of Art, February 1-May 14, 2000.

5. *Id.*

6. W.E.B. DUBOIS, BLACK RECONSTRUCTION, 112-22 (1935).

7. *Id.*

another 30,000 blacks enlisted in its Navy.⁸ We should not forget that at least 68,000 blacks were killed or wounded in the Civil War.⁹ We should not forget Sergeant Anselino Planciancois of the First Louisiana who carried the colors with orders to “protect, defend, die for [them].”¹⁰ Planciancois responded, “Colonel, I will bring these colors to you with honor or report to God the reason why.”¹¹ It is said that when Planciancois was beheaded by gunfire, his arms still clutched the flag he had sworn not to surrender.¹² We should not forget Captain Andre Cailloux who “led the advance [at Port Hudson] with his left arm dangling, broken above the elbow by a cannonball. Shouting orders in both French and English, Cailloux pressed on until a second shell struck him dead.”¹³

If we imagine the men in the Evans photograph only as descendants of *beneficiaries* of the Union effort, we imagine them and their ancestors on the margins of the great events of American history. We imagine them as rights-seeking civic ghosts who were once given freedom and are now being given a New Deal. A *New Deal*. If we imagine these men and their forebears as descendants of people who fought and died in the Union cause, we *see* them differently. We see them as fellow citizens and civic partners.

My response as a patron walking through the Evans exhibit at the Metropolitan Museum is akin to my response to the marginalizing culture of Virginia in the 1940s. I know that Virginia is richer for the presence of my people. I know the role of black Union soldiers and black Union collaborators in ending the Civil War and gaining emancipation. I have the sense not only that my civic place is being denied *but also that history is being deformed*.

The work that I have published on the theme of “Neglected Stories” exposes this kind of historical deformation.¹⁴ It addresses the civic roles of three overlapping categories of people whose contributions tend to be neglected in popular and official tellings of our history: African Americans, women, and antislavery advocates. It focuses on the roles these groups took

8. *Id.*

9. LAWRENCE LEE HEWIT, PORT HUDSON: CONFEDERATE BASTION ON THE MISSISSIPPI, 146-49 (1987).

10. DUBOIS, *supra* note 6, at 107.

11. *Id.*

12. *Id.* at 108

13. *Id.*

14. PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION & FAMILY VALUES (1997) [hereinafter NEGLECTED STORIES]; Peggy Cooper Davis, Neglected Stories and Progressive Constitutionalism, IV WIDENER L. SYMP. J. 101 (1999); Peggy Cooper Davis, “So Tall Within”: the Legacy of Sojourner Truth, 18 CARDOZO L. R. 451 (1996); Peggy Cooper Davis, Contested Images of Family Values: The Role of the State, 107 HARV. L. R. 1348 (1994); Peggy Cooper Davis, Neglected Stories and the Lawfulness of *Roe v. Wade*, 28 HARV. C.R.-C.L. L. REV. 299 (1993).

in the destruction of slavery and the Reconstruction, in the era of the same name, of the United States Constitution.

I work not as an historian but as a legal scholar and cultural critic. My work is not significant for setting the record straight concerning the neglected civic contributions of African Americans, women, and antislavery advocates; in its "record-correcting" aspect it simply builds on the work of the fine and thoughtful historians beginning with W.E.B. DuBois, who challenged hostile portrayals of the antislavery movement and Reconstruction that for too long dominated thinking in classrooms, in history departments, and in the culture at large.¹⁵ My contribution has been to show how the deformation of history has led to a deformation of our Constitutional tradition and a corollary deformation of our civic culture. Let me explain.

I have said that African Americans, women, and antislavery advocates took a role, not only in the destruction of slavery, but also in the reconstruction of our Constitution.¹⁶ The corrected historical record establishes that the Fourteenth Amendment redefined citizenship and civic liberty to comport with an antislavery vision.¹⁷ The goal was not just to reunite the states, but to recreate the polity so that citizenship would, first, be universal, and second, encompass the liberties that slavery had denied.¹⁸ Universal citizenship would overturn *Dred Scott's*¹⁹ incredulous dismissal of the claim that people of color are members of our body politic.

The civil liberties that flowed from citizenship and full personhood would be defined as slavery's opposite. They would encompass entitlements that were fully understood, at least from the days of our nation's founding, to be the self-evident right of free people. But they would also encompass entitlements whose meaning had become fuller and more poignant as we experienced their denial in slavery.

In our remaining time together, I want to do three things: give you a short version of the evidence that the Reconstruction Constitution embeds an antislavery vision; speculate about why the Supreme Court has thus far overlooked the antislavery origins of the Reconstruction Amendments; and say a concluding word about what it would mean to our sense of civic place if we were to understand our Constitution in the antislavery terms assumed by those who fought for its reconstruction.

15. W.E.B. DUBOIS, BLACK RECONSTRUCTION, 104-20 (1935).

16. See generally NEGLECTED STORIES, *supra* note 14.

17. *Id.*

18. *Id.*

19. See *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (holding that slaves were not citizens and therefore had no standing to bring suit).

I. *THE ANTISLAVERY VISION EMBEDDED IN THE RECONSTRUCTION AMENDMENTS*

The rhetoric and ideology of antislavery are mirrored in the Congressional debate that culminated in the adoption of the Fourteenth Amendment. Frederick Douglass' description of the civic and economic condition of enslaved people seems, for example, to be directly answered by Senator Stewart's declaration of Congressional purpose as the Reconstruction Amendments were designed. Douglass had said

I will state, as well as I can, the legal and social relation of master and slave. A master is one . . . who claims and exercises a right of property in the person of a fellow man . . . The slave is a human being, divested of all rights—reduced to the level of a brute—of mere “chattel” in the eye of the law . . . He can own nothing, possess nothing, acquire nothing, but what must belong to another. To eat the fruit of his own toil, to clothe his person with the work of his own hands, is considered stealing. He toils that another may reap the fruit; he is industrious that another may live in idleness . . . and to this condition he is bound down as by an arm of iron.²⁰

Stewart said, almost as if in reply,

I do not want to degrade a single man in the rebel States. [But] I do not want them to degrade others, and I do not mean that they shall do it . . . [We] must see to it that the man made free by the Constitution of the United States, sanctioned by the voice of the American people, is a freeman indeed; that he can go where he pleases, work when and for whom he pleases; that he can sue and be sued; that he can lease and buy and sell and own property, real and personal; that he can go into the schools and educate himself and his children; that the rights and guarantees of the good old common law are his, and that he walks the earth, proud and erect in the conscious dignity of a free man, who knows that his cabin, however humble, protected by the just and equal laws of his country.²¹

These passages center on the economic entitlements of free people and the injustice of laws that classify people as if they were property rather than beings entitled to earn and hold property. In part because of this focus, the Stewart passage summons familiar understandings of rights of property and rights to equal protection. Apart from a somewhat uncharacteristic attention to the

20. THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, LECTURE ON SLAVERY, No. 1 135 (Philip S. Foner ed., 1950).

21. CONG. GLOBE, 39th Cong., 1st Sess. 111 (1865) (Senator Stewart).

perspective of workers, the passage can be understood to do no more than extend the universe of those protected by well-worked principles. In other contexts, however, it is clear that the Reconstruction lawmakers' sense of the definition and meaning of inalienable rights had been deepened by the experience of slavery and abolition.

Consider the right to marry or to be a lawful parent. Although the Founders seem to have had a background sense of children and wives as property and of marriage as a right of contract, they did not speak of an independent, conceptually developed body of Constitutionally-protected family rights. Reconstruction lawmakers, by contrast, spoke clearly and directly of family rights, echoing the rhetoric of antislavery and drawing from the experience of slavery.²²

Reconstruction lawmakers' attention to family rights was a direct consequence of the conditions of slavery and the terms in which it was opposed. Denial of family was a first principle of the civic death that was slavery. Enslaved people could not marry, and there was no legally recognized relationship between enslaved people and their children.²³ The slave was not born the child of a family; s/he was born the property of a master. Of course, enslaved people bore children and formed life partnerships, but they did so at peril of sudden and unwanted separation. The best evidence now available suggests that one in six slave "marriages" ended in sale or other forced separation.²⁴ Separations from children were at least as frequent.²⁵ One's ability to nurture children was often severely compromised by the demands of labor and the conditions of slaves' confinement.²⁶ One's parental authority could always be undermined by the authority of an overseer or master.²⁷ Spouses and children were at times partnered against family wishes, either for purposes of breeding or to satisfy the lust of a member of the owner caste.²⁸ Indignation about these facts of slave family life was a persistent theme of antislavery rhetoric; "family separation was the greatest perceived sin of American slavery,"²⁹ and it was a consistent theme of antislavery oratory. Reports of an 1859 speech by Sarah Parker Remond confirmed and continued this pattern:

22. See NEGLECTED STORIES, *supra* note 14, at 38-40, 108-17.

23. *Id.* at 30-31, 90-92.

24. See HERBERT GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750-1925* 318 (1976).

25. *Id.*

26. See NEGLECTED STORIES, *supra* note 14, at 92-94.

27. See *id.* at 94-99.

28. See *id.* at 174-81.

29. JAMES ALLEN MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 32 (1988).

Time this evening was too precious to admit of any detail of those sickening and soul-harrowing scenes, which, alas! Are too common in Slave states to command a passing notice. It might be enough to state that at the beck of a cruel master, husband and wife are continually separated and sold, never again to meet in this world; children are torn from their parents, and mothers bereaved of their beloved ones.³⁰

The sexual exploitation of female slaves was reviled in a staunchly patriarchal antebellum culture as a barbaric and corrupting excess of patriarchy.³¹ The want of parental authority was condemned as a denial of personhood.³²

Although slavery's denial of family invited—and got—sentimental treatment in antislavery oratory, protest against the denial of family was not only emotional but also decidedly political. Antislavery people's commitment to family integrity was related to a theory of human entitlement and freedom. As early as 1774, enslaved people petitioning for freedom grounded their claim of the natural rights to family integrity and personal autonomy, describing enslavement as a theft of the self from the family:

[W]e were unjustly dragged by the cruel hand of power from our dearest friends and sum of us stolen from the bosoms of our tender Parents and from a Populous Pleasant and plentiful country and Brought hither to be made slaves for Life in a Christian land.³³

The petitioning eighteenth-century American slaves then noted the repetition of family abrogation in each new generation:

[W]e are deprived of every thing that hath a tendency to make life even tolerable, the endearing ties of husband and wife we are strangers to for we are no longer man and wife than our masters and mistresses thinkes proper married or unmarried. Our children are also taken from us by force and sent many miles from us wear we seldom or ever see them again there to be made slaves of Life . . .³⁴

30. *Miss Remond's First Lecture in Dublin*, 2 ANTI-SLAVERY ADVOCATE (London), Apr. 1859, at 221-24.

31. See NEGLECTED STORIES, *supra* note 14, at 55-57.

32. See *id.*

33. Petition dated January 6, 1773, to the Governor, the Council, and the House of Representatives of Massachusetts, reprinted in HERBERT AP THEKER, DOCUMENTARY HISTORY OF THE NEGRO PEOPLE, vol. 18-9 (1969) [hereinafter DOCUMENTARY HISTORY].

34. See NEGLECTED STORIES, *supra* note 14, at 109-11.

The petitioners argued that slavery's abrogation of family ties made them unable to fulfill religious and moral obligations of family, for they were "rendered incapable of shewing . . . obedience to Almighty God. [H]ow can a slaver perform the duties of a husband to a wife or a parent to his child[?]"³⁵ As a similar petition had explained the year before, when enslaved people were denied rights of family, they were excluded from appropriate human social intercourse and treated as if they were beasts:

[W]e are rendered unable to do, or to possess and enjoy any Thing, no, not even *Life itself*, but in a manner as the *Beasts that perish*. We have no Property! We have no Wives! No children! We have no City! No Country!³⁶

The 1774 petitioners claimed emancipation and restoration of family autonomy as matters of natural and moral right:

[W]e have in common with all other men a natural right to our freedoms without Being depriv'd of them by our fellow men as we are a freeborn pepel have never forfeited this Blessing by aney Compact of agreement whatever.³⁷

When an article in an 1836 issue of the *Antislavery Record* denounced slavery as "nothing but a system of tearing asunder family ties," it said those ties were protected by "sacred law which slavery scornfully sets at nought."³⁸ "The Family," wrote another abolitionist, "is the head, the heart, the fountain of society, and it has not a privilege that slavery does not nullify, a right that it does not counteract, nor a hope that it does not put o in darkness."³⁹

When emancipation came, free people expected, as Eric Foner puts it, "to be able to organize their lives in accordance with their own sense of propriety, establish their families as independent units, and control productive property as the foundation of their new status."⁴⁰ The free African Americans' commitment to family as a badge of freedom was captured in the words of a black soldier who spoke as a Freedmen's Bureau agent began to legalize the marriages of former slaves:

35. *Id.* at 355.

36. See DOCUMENTARY HISTORY, *supra* note 33, at 6-7.

37. *Id.* at 8.

38. *The Disruption of Family Ties*, ANTISLAVERY RECORD 9 (Mar. 1836).

39. RONALD G. WALTERS, THE ANTISLAVERY APPEAL: AMERICAN NATIONALISM AFTER 1830 95 (1976).

40. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 122-23 (1988) [hereinafter FONER, RECONSTRUCTION].

Fellow Soldiers: *I praise God for this day!* I have long been praying for it. The marriage covenant is at the foundation of all our rights. In slavery we could not have *legalised* marriage: *now* we have it. Let us conduct ourselves worthy of such a blessing—and all the people will respect us—God will bless us, and we shall be established as a people.⁴¹

Reconstruction lawmakers spoke in identical terms. Speaker after speaker on the floor of Congress pronounced family rights fundamental, denounced their abrogation in slavery, demonstrated that slavery had deepened our sense of the civic and social worth of family, and resolved that freedom in the United States would entail protection of family integrity. Hear their words:

Representative Creswell: The slave could sustain none of those relations which gave life all its charms. He could not say my wife, my child, my body. It is for God to say whether he could say my soul. The law pronounced him a chattel, and these are not the rights or the attributes of chattels.⁴²

Representative Farnsworth: What vested rights so high or so sacred as a man's right to himself, to his wife and children, to his liberty, and to the fruits of his own industry? Did not our fathers declare that those rights are inalienable? And if a man cannot himself alienate those rights, how can another man alienate them without being himself a robber of the vested rights of his brother-man?⁴³

Senator Eliot: Slavery cannot know a home. Where the wife is the property of the husband's master, and may be used at will . . . where man and woman, after twenty years of faithful service from the time when the priest . . . with mock ceremonies pretended to unite them, are parted and sold at the owner's will, there can be no such thing as home. Sir, no act of ours can fitly enforce their freedom that does not contemplate for them the security of home.⁴⁴

Senator Wilson: [W]hen this [Thirteenth] Amendment to the Constitution shall be consummated . . . the sharp cry of the agonizing hearts of severed families will cease to vex the weary ear of the nation . . . Then the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, will be protected by the guardian spirit of that law which makes sacred alike the proud homes and lowly cabins of freedom.⁴⁵

41. FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION 1861-1867, ser. 1 at 48 (Ira Berlin, et al., eds., 1985).

42. CONG. GLOBE, 38th Cong., 2d Sess. 120 (1865).

43. CONG. GLOBE, 38th Cong., 2d Sess. 200 (1865).

44. CONG. GLOBE, 39th Cong., 1st Sess. 2778 (1866).

45. CONG. GLOBE, 38th Cong., 1st Sess. 1479 (1864).

Senator Trumbull was responsible for offering an early proposal to confer citizenship on former slaves. Addressing the scope of rights that new—and old—citizens should enjoy, he said that it was “difficult . . . to define accurately what slavery is and what liberty is.”⁴⁶ He went on to say that liberty and slavery were “opposite terms” and that liberty meant that one would be no more restrained by human law than was “necessary and expedient for the general advantage of the public.”⁴⁷ Senator Howard, speaking the following day on the same subject was more specific:

[t]he slave had no rights, nor nothing which he could call his own. He had not the right to become a husband or a father in the eye of the law, he had no child, he was not at liberty to indulge the natural affections of the human heart for children, for wife, or even for friend . . . Is a free man to be deprived of the right of . . . having a family, a wife, children, home? What definition will you attach to the word “freeman” that does not include these ideas?⁴⁸

II. THE SUPREME COURT'S NEGLECT OF ANTISLAVERY AND RECONSTRUCTION HISTORY

The Supreme Court of the United States has interpreted the Fourteenth Amendment to encompass the right to marry and the right to parent.⁴⁹ But it has done so in dubiously supported opinions that make no mention of the history that I have just set out. Indeed, the Court has seemed to struggle to find a basis for honoring these basic rights. Yet it has never turned to the clear statements of Reconstruction lawmakers that no document fitly defines freedom unless it guarantees the integrity of home and family. How could this be?

Perhaps there is guidance in the cultural theme of marginalization, in the legend accompanying the Walker Evans photo, or in the social feel of Virginia in the 1940s. The Metropolitan Museum legend re-wrote the history of the Civil War to erase the agency and civic participation of former slaves. My account of the social feel of Virginia in the 1940s suggests that here, too, the idea of African American agency and civic participation was repressed. Perhaps interpreters of the Fourteenth Amendment are guilty of a similar oversight.

The Fourteenth and Fifteenth Amendments—and the civil rights laws they were designed to constitutionalize—made manifest the implications of Union

46. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

47. *Id.*

48. *Id.* at 504.

49. *Id.* at 299-302.

victory in the Civil War and the implications of emancipation: While the Thirteenth Amendment simply ended slavery, the Fourteenth and Fifteenth made *voting African-American citizens* of Africans who had been slaves. For racist white citizens, the ideal of universal—now more fully comprehended as multiracial—civil freedom was difficult to accept.

In 1867, every Southern state except Tennessee had refused to ratify the Fourteenth Amendment, and Reconstruction was faltering.⁵⁰ So long as the electorate was imagined as consisting only of white males, there seemed no way to win ratification of the Amendment and achieve unification on Republican (and genuinely republican) terms. Charles Sumner was able to imagine—and dared to propose—a different electorate: if African American men were able to vote, the balance of Southern political power would shift, the Fourteenth Amendment would be ratified, and Reconstruction could proceed. Sumner won Congressional approval of a provision imposing a “requirement of suffrage irrespective of race or color in the election of delegates to the Reconstruction conventions, and as the basis of suffrage for the constitutions of the rebel states.”⁵¹ When this suffrage provision was agreed upon by the Committee, Senator Wilson of Massachusetts remarked: “then and there in that small room, in that caucus, was decided the greatest pending question of the North American continent.”⁵² This bitterly resisted provision survived Presidential veto and became law in the last days of the congressional session. As a result, American-born people of African descent constituted twenty-five percent of those electing delegates to the constitutional conventions by which states of the former Confederacy were reconstituted,⁵³ electoral majorities in the delegate elections of five states,⁵⁴ and delegate majorities in one state. Black voter turnout in the late 1860s was overwhelming, approaching ninety percent in many elections.⁵⁵

This assertion of African American political power evoked a barrage of derisive invective that subsided over the years to quiet disdain before settling as a simple denial of the actions, intentions, and principles of African American political figures in the Reconstruction era. Disgruntled racialists described delegates to constitutional conventions in the former Confederacy as “‘baboons, monkeys, mules,’ or ‘ragamuffins and jailbirds.’ The South Carolina convention, according to a local newspaper, was the ‘maddest, most

50. W.E.B. DuBois, *BLACK RECONSTRUCTION IN AMERICA* 331 (1935).

51. *Id.* at 332.

52. *Id.* (footnote omitted).

53. Richard L. Hume, *Negro Delegates to the State Constitutional Conventions of 1867-69*, in *SOUTHERN BLACK LEADERS OF THE RECONSTRUCTION ERA* 130 (Howard N. Rabinowitz ed., 1982).

54. *Id.* at 134.

55. FONER, *RECONSTRUCTION*, *supra* note 40, at 314.

infamous revolution in history.”⁵⁶ A Northern journalist described the South Carolina legislature as a “mass” permeated with unimaginable “ignorance and vice.” Immediately after Reconstruction, African American legislators were omitted from the Georgia legislative manual on the ground that “[i]t would be absurd . . . to record ‘the lives of men who were but yesterday our slaves, and whose past careers, probably, embraced such menial occupations as boot-blackening, shaving, table-waiting, and the like.’”⁵⁷

For racialist white citizens, the ideal of universal—now more fully comprehended as multiracial—civil freedom paled. Southern resentment deepened, and Northern sentiment for compromise with the former rebels grew. The Democratic Party consistently and vocally resisted Reconstruction, counseling “magnanimity and generosity to a fallen foe.”⁵⁸ In 1872, white Republicans in substantial numbers joined Democrats to support Horace Greeley’s campaign for “reconciliation and purification.”⁵⁹ For the next four years, Greeley, a Radical Republican turned Democrat and editor of the *New York Sun*, made “No Negro domination!” a constant cry of the paper.⁶⁰

The racialized invective that led to the demise of Reconstruction’s political and social structures lived beyond the 18th Century in the form of an intensely pejorative history of the multi-racial civic coalitions upon which Reconstruction governments were built. This pejorative account of Reconstruction was for many years a staple of American educational systems. A 1924 elementary school text commissioned by the American Legion taught that during Reconstruction “nobody knew what to do with the 4 million ‘ignorant human beings’ who had been suddenly emancipated.”⁶¹ As late as the 1960s,

Alabama fourth-graders, whether white or black, learned that under “terrible carpetbag rule” during Reconstruction, freed slaves were so ignorant that they bought colored sticks from mercenary Northern carpetbaggers in the belief that “they could own the land where they put those sticks.” They also learned that “loyal white men,” trying “to protect their families,” formed the Ku Klux Klan “to bring back law and order.” Never violent, the Klansmen protected Alabamans from “bad lawless things,” persuaded the “lawless men who had taken control of the state” to go back North, and persuaded “the Negroes who

56. KENNETH M. STAMPP, *THE ERA OF RECONSTRUCTION 1865-1877* 170 (1965).

57. ERIC FONER, *FREEDOM’S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION* xii (1993) [hereinafter FONER, *FREEDOM’S LAWMAKERS*].

58. PAUL H. BUCK, *THE ROAD TO REUNION 1865-1900* at 86 (1959) (quoting CONG. GLOBE, Mar. 13, 1867).

59. *Id.* at 97.

60. *Id.* at 101.

61. GARY B. NASH ET AL., *HISTORY ON TRIAL: CULTURAL WARS AND TEACHING OF THE PAST* 60 (1997).

had been fooled by the false promises of the carpetbaggers to get themselves jobs and settle down to make an honest living."⁶²

Disdain for the political leaders of Reconstruction was equally apparent in scholarly literature. There is now a consensus among historians that interpretations of the work and thought of the Reconstruction's political figures were tainted for several decades by the attitudes that are reflected in Greely's cry against "Negro domination."⁶³

As DuBois argued in 1934,⁶⁴ and Foner reaffirmed in 1988, United States historians first told the story of the Reconstruction with "prevailing disdain," grounded in a judgment that Radical Reconstruction was a product of Republican opportunism and vindictiveness and that its implementation of multiracial democracy was folly in the face of "incompetence by black office holders."⁶⁵ A college history text used in the 1930s reported, "[I]n the exhausted [Southern] states already amply 'punished' by the desolation of war, the rule of the Negro and his unscrupulous carpetbagger and scalawag patrons, was an orgy of extravagance, fraud and disgusting incompetency."⁶⁶ Reviewing the legacy of the historians James Ford Rhodes, John W. Burgess, William A. Dunning, and their students, DuBois confirmed the conclusion of Will Herberg, a young labor leader in the 1920s and 1930s:

The great traditions of . . . Reconstruction are shamelessly repudiated by the official heirs of Stevens and Sumner . . . [H]ardly a single book has appeared consistently championing or sympathetically interpreting the great ideals of the crusade against slavery, whereas scores and hundreds have dropped from the presses in . . . measureless abuse of the Radical figures of Reconstruction. The Reconstruction period as . . . the logical culmination of decades of previous development, has borne the brunt of the reaction.⁶⁷

Negative interpretations of Reconstruction had, as Foner puts it, "remarkable longevity and [a] powerful hold on the popular imagination."⁶⁸ A well-received book of the late 1950s that served as a text in college history courses throughout the country reinforced the understanding of Reconstruction as a process by which narrow political motivation led the Republican Party,

62. *Id.* at 61-62 (quoting FRANK L. OWSLEY ET AL., *KNOW ALABAMA: AN ELEMENTARY HISTORY* 176-78 (1968)).

63. FONER, *FREEDOM'S LAWMAKERS*, *supra* note 57, at xii.

64. DUBOIS, *supra* note 50, at 711-28.

65. FONER, *FREEDOM'S LAWMAKERS*, *supra* note 57, at xii.

66. DUBOIS, *supra* note 50, at 712 (quoting DAVID SAVILLE MUZZEY, *HISTORY OF THE AMERICAN PEOPLE*).

67. *Id.* at 717.

68. FONER, *RECONSTRUCTION*, *supra* note 40, at xxi.

acting with "hatred of the white South,"⁶⁹ "to give the Negro more rights than he possibly could exercise with profit to his advancement,"⁷⁰ and establish "carpetbag governments built upon Negro suffrage."⁷¹ This influential work concludes that abandonment of the tenets of Radical Reconstruction facilitated a healing process that was necessary and noble, albeit grounded in acceptance of a "credo" of white superiority which the author justified, saying, in the final paragraph of a chapter titled "The Negro Problem Always Ye Have with You,"⁷² "[o]nce a people admits . . . that a major problem is basically insoluble they have taken the first step in learning how to live with it."⁷³

Despite the deep appeal of the perjorative interpretations initiated by Rhodes, Burgess, and Dunning, in the years following publication of *Black Reconstruction* historians began a process of research and rethinking by which the derisive view of Reconstruction was "completely rewritten,"⁷⁴ as Foner reports:

Today, not only has the history of the era been completely rewritten, but most scholars view Reconstruction as a laudable, though flawed, effort to create a functioning interracial democracy for the first time in American history, and view Reconstruction's overthrow as a tragedy that powerfully affected the subsequent course of American development.⁷⁵

This revival of the ideals of antislavery and Reconstruction in historical literature has facilitated a revival of the ideals of antislavery and Reconstruction in legal thought. Jacobus tenBroek began in the 1950s to argue that constitutional liberty should be understood in terms of antislavery ideology.⁷⁶ My own work linking abortion and individual and family autonomy was first published in 1988.⁷⁷ More recently, David Richards has argued that the arguments forged by the abolitionists in the antebellum period are crucial to a proper interpretation of the Reconstruction Amendments.⁷⁸

The Supreme Court, on the other hand, has not returned to the traditions of antislavery and Reconstruction as sources of the meaning of civil freedoms.

69. BUCK, *supra* note 58, at 90.

70. *Id.* at 91.

71. *Id.*

72. *Id.* at 294.

73. *Id.* at 308.

74. FONER, *FREEDOM'S LAWMAKERS*, *supra* note 57, at xii.

75. *Id.*

76. See JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951).

77. Peggy Cooper Davis, *Law, Science and History: Reflections on In the Best Interests of the Child*, 86 MICH. L. REV. 1096, 1106-20 (1988).

78. See David A.J. Richards, *Conscience and the Constitution: History, Theory, and Law of the Reconstruction Amendments* (1993).

Like the Dunning school of historical scholarship, and like so many European Americans educated to a pejorative view of Reconstruction, the Court has ignored anti-slavery and Reconstruction ideologies as it has interpreted the Reconstruction Amendments.

Nonetheless, as more recent historical research establishes, the inspiration for Reconstruction's charter of freedom was an ideal of civil freedom, born of a knowledge of civil death.

It is understandable that the Supreme Court did not take the lead in challenging the long-held, derisive view of Reconstruction history. That work was properly done by scholars. But more than sixty years of scholarly work now stand to give the Court confidence in returning to the traditions that reconstructed our Nation and its constitutional premises. And millions of hours of neglected struggle by folks in the overlapping categories labeled African American, woman, and abolitionist warrant recognition as contributions to our Constitutional tradition. This recognition would honor the civic life of people who have been persistently marginalized. More important, it would enrich our civic and constitutional culture and our sense of the meaning of human rights.

