

RECONSTRUCTION: THE SECOND AMERICAN REVOLUTION

After the Civil War, the founders' mistrust of strong federal government yielded to radical Republicans' demands for a central government powerful enough to protect the newly-won liberties of freedmen.

By James M. McPherson

In January 1867, Congressman George W. Julian of Indiana, one of the most radical of Republicans, stood up in the House to speak against a bill that would replace military rule in the South with civil government. Although the measure gave the vote to former slaves and disfranchised many ex-Confederates, Julian warned that restoration of self-government to these states "would be ruinous to the best interests of their loyal people and calamitous to the nation." To withdraw the army at this point would "fatally hedge up the way of justice and equality.... What these regions need, above all things, is not an easy and quick return to their forfeited rights in the Union, but government, the strong arm of power, outstretched from the central authority here in Washington, making it safe for the freedmen of the South."

Julian's words expressed a startling reversal of American political philosophy. For a century or more, Americans had regarded centralized power as the greatest threat to liberty. From the Stamp Act crisis of 1765 to the Jacksonian crusade against the Monster Bank in the 1830s, eternal vigilance against the expansion of power had been the price of liberty. "There is a tendency in all Governments to an augmentation of power at the expense of liberty," James Madison had written, in words echoed by countless Whigs of the Revolutionary generation. To curb this tendency, the framers of the Constitution devised a series of checks and balances that divided power among three branches of the national government, between two houses of Congress and among the state and federal governments as an "essential precaution in favor of liberty."

Even this dilution of authority was not enough for such Whigs as Josiah Quincy, Jr., of Massachusetts, who wished to "restrain...power from swelling into tyranny and oppression." They insisted on a Bill of Rights which, in the first ten amendments to the Constitution, imposed a straitjacket of thou-shalt-nots on the federal government. Two generations later, Jefferson's political heirs scotched the Second Bank of the United States because they believed that such a combination of private wealth and government power would, in Andrew Jackson's words, cause "our liberties to be crushed." No threat of augmented government power was too small to escape the vigilance of libertarians. In 1854, for example, President Franklin Pierce vetoed a bill granting public lands to the states to subsidize mental hospitals. He did so, he said, to preserve liberty. For if Congress has the power to provide for the insane, warned Pierce, "it has the same power to provide for the indigent who are not insane" and would have "all sovereignty vested in an absolute consolidated central power, against which the spirit of liberty has so often and in so many countries struggled in vain" The bill for mental hospitals, therefore, would be "the beginning of the end... of our blessed inheritance of representative liberty."

On the eve of the Civil War, then, most Americans would have agreed with John Stuart Mill that liberty was "protection against the tyranny of the political rulers." Why did George Julian take a position so strikingly at odds with this belief? How could he advocate the occupation of states by a standing army, that gravest of threats to republican liberty? The answer to these questions lies in the wrenching years of the Civil War and Reconstruction, which destroyed the old order in the South, founded on slavery, at the cost of at least 620,000 lives. So violent and sweeping were these changes that they have become known as the Second American Revolution. This revolution transformed the relationship between liberty and power. And the crux of the transformation was slavery, a tumor planted in the body of American liberty from the beginning. As Abraham Lincoln phrased it, with sarcasm, in 1854: "That *perfect* liberty [southern whites] sigh for [is] the liberty of making slaves of other people." A decade later, in the midst of the Civil War, he added, in a speech delivered in Baltimore: "The world has never had a good definition of the word liberty.... We all declare for liberty; but in using the same *word* we do not all mean the same *thing*. With some the word liberty may mean for each man to do as he pleases with himself, and the product of his labor; while with others the same word may mean for some men to do as they please with other men, and the product of other men's labor. Here are two, not only different, but incompatible things, called by the same name—liberty."

Lincoln left no doubt of the version of liberty to which he was committed. By the time he delivered this speech, he was pledged to the abolition of slavery. That task required power. As commander in chief of an army of one million men, Lincoln wielded a great deal of it. And every ounce of that power was needed to accomplish the "new birth of freedom" that he invoked at Gettysburg. As he saw it, power was the protector of liberty—except the liberty of those who wished to do as they pleased with the product of other men's labor. Lincoln thus reversed the conventional antinomy of power and liberty. A distinction between negative and positive liberty, drawn by the 20th-century political philosopher Isaiah Berlin, can shed some light on Lincoln's thinking. According to Berlin, negative liberty is an absence or limitation of restraint, a freedom from interference by outside authority. It can be described as freedom *from*. Positive liberty, on the other hand, can best be understood as freedom *to*. Freedom of the press is generally viewed as a negative liberty—the journalist may write for the press and the citizen read articles in it free from interference. But an illiterate person is denied a positive liberty, the freedom to read and write. The remedy lies not in any removal of restraint but in the achievement of literacy. Press freedom and other negative liberties are vulnerable to power, while positive liberties are a form of it.

The defense of negative liberties from excessive power was a dominant concern of Americans—especially Jeffersonians, Jacksonians and Southerners. Slaveholders relied on the concept of negative liberty to protect their right of property in human beings from interference by the national government. In their vigilance, they manned the outermost ramparts of liberty: "If Congress can make banks, roads, and canals under the Constitution," declared Nathaniel Macon of North Carolina, a Jeffersonian libertarian, "they can free any slave in the United States."

Because Southerners had resisted centralized national authority, seceding in the name of state sovereignty, most Northerners during the Civil War equated the idea of negative liberty with treason; and they identified the military power of the national government with the "new birth of freedom." This shift in thinking radically changed the course of American constitutional development. Six of the seven amendments adopted between 1865 and 1920 strengthened the national government at the expense of states and individuals. In place of the "shall nots" of the first ten amendments that limited the powers of the national government, most of these new amendments contained the phrase "Congress *shall have the power* to enforce this article" [emphasis added]. The first three postwar amendments expanded national power because the Republican majority in Congress believed that liberty could not be sustained without such expansion of national authority. "We must lay the heavy hand of military authority upon these Rebel communities," said Congressman (later President) James Garfield, and "plant liberty on the ruins of slavery."

The new American vision of republican liberty encompassed more than simple freedom; it also included the civil and political equality of freemen. Those "who have *no* Voice nor Vote in the electing of *Representatives, do not enjoy* Liberty," declared a broadside of the Revolutionary period. "To be enslaved, is to have Governors whom *other Men have set over us*, and to be subject to laws *made by the Representatives of Others.* "

Black leaders and their white allies made this principle the cornerstone of their definition of liberty. In October 1864, a National Convention of Colored Men met at Syracuse, New York, and issued an "Address to the People of the United States" written by Frederick Douglass. "In a republican country," said Douglass, "where general suffrage is the rule, personal liberty...and all other rights, become mere privileges held at the option of others, where we are excepted from the general political liberty.... The possession of that right [of suffrage] is the keystone to the arch of human liberty." Without the right to vote, said the abolitionist Wendell Phillips in 1865, "freedom, so called, is a sham.... Our philosophy of government, since the 4th day of July, 1776, is that no class is safe, no freedom is real....which does not place in the hands of the man himself the power to protect his own rights."

But how could the freed slaves acquire this instrument of liberty in a federal system where voter qualifications were—as they had always been—defined by the states?

To solve this dilemma, Republicans resurrected the guarantee clause of the Constitution, Article IV, Section 4 which states that "the United States shall guarantee to every State in this Union a Republican Form of Government." The precise meaning of this clause had never been explored. In the 1840s, some abolitionists had invoked it to argue that slavery was un-republican and therefore unconstitutional. But as late as 1867 the guarantee clause remained, in Charles Sumner's phrase, the "sleeping giant" of the Constitution.

Republicans woke the giant to enforce their notion of liberty in the postwar South. The guarantee clause was "the rampart of human liberty," said Senator Richard Yates of Illinois. It

"vests in the Congress of the United States a plenary, supreme, unlimited political jurisdiction," added Representative Henry Winter Davis of Maryland. "So ample is this power," maintained Congressman William Lawrence of Ohio, "that Congress might frame a constitution and say to Virginia, 'That is your constitution; you shall be and are restored under that.'" And how did Congress define a republican form of government? For Charles Sumner, "equality before the law, and the consent of the governed are essential elements of a republican government." The Republican majority in Congress eventually came to agree with him. In the Civil Rights Act of 1866, the Reconstruction Acts of 1867, and the 14th and 15th Amendments (ratified in 1868 and 1870 and ordaining civil and political rights to all men regardless of race, color or previous condition of servitude), they enacted equality before the law and consent of the governed (the male half, that is) in all states.

Thereafter, the guarantee clause fell into disuse as Congress and the courts looked more and more to the 14th and 15th Amendments to sanction continued intervention in state affairs. According to historian Robert J. Kaczorowski, these amendments accomplished nothing less than a revolution in American constitutionalism, for they transferred the primary definition and enforcement of citizenship rights from the states to the national government. This "revolutionary legal theory...so centralized power in the national government that the states as separate and autonomous political entities could have been destroyed." They were not, of course; but for a few years before 1873 the federal courts, backed by the United States army, became the principal agencies for enforcing liberty and equal rights in the South.

Democrats invoked traditional libertarian fears of power to denounce these developments. The 14th Amendment, warned a New Jersey congressman—with the appropriate name of Andrew Jackson Rogers—portended a revolution more "dangerous to liberty" than anything Americans had ever experienced, because it would "take away the power of the States...and centralize a consolidated power...into one imperial despotism."

Rubbish! replied Republican leaders. "This deplorable nonsense cost us the war, and the nation's life within an inch," declared an editor. We cannot "slink any longer behind the sham, the miserable evasion, that the protection of personal rights and liberty for every citizen of the United States within the limits of any State belongs entirely to the State." Republican congressmen were aware of what they were doing, and why. "I admit that this species of legislation is absolutely revolutionary," said Senator Lot M. Morrill of Maine in a speech on the civil rights bill of 1866. "But are we not in the midst of a revolution?... No nation hitherto has cherished a liberty so universal. The ancient republics were all exceptional in their liberty; they all had excepted classes, subjected classes.... [This] civil and political revolution has changed the fundamental principles of our Government." In the debates on the 14th Amendment, several Republicans insisted that "for the security and future growth of liberty" it would be "better to invade the judicial power of the State than permit it to invade, strike down, and destroy the civil rights of citizens.... We must see to it, that hereafter, personal liberty and personal rights are placed in the keeping of the nation...against State authority and State interpretations."

For several years, federal judges upheld the primacy of national citizenship over state citizenship under the Civil Rights Act of 1866 and the 14th Amendment. They sanctioned the prosecution of violators of freedmen's rights in federal courts. This growth of national power to protect liberty reached its apogee in 1870-71 with three enforcement acts, which expanded the jurisdiction of federal courts over civil and voting rights and authorized the President to suspend the writ of habeas corpus and use the army to break up the Ku Klux Klan. The government convicted hundreds of Klansmen under these laws. One historian concluded that "federal judges in the early 1870s were decidedly more successful in enforcing civil rights than the more recent federal judges charged with dismantling the Jim Crow system."

But the existence of that system—which was still waiting to be dismantled a century after the Civil War—raises a question about the dimensions of the transformation from negative to positive liberty. Since the gains were fleeting, some historians have denied that genuinely radical change took place. In so doing, they overlook the realities of black political power and economic leverage wielded for a few years during Reconstruction, as depicted by other historians (most recently, Eric Foner).

Channeled through the Republican Party, with its southern base of black voters, black political power depended on the backing of military force—state militias and the remnants of the Union Army that remained in the South—to protect the political rights of blacks against counterrevolutionary terror by the Klan and other armed auxiliaries of the Democratic Party. So long as this power was employed with determination, blacks exercised their political rights in large numbers and held a larger proportion of offices in the South than they do today.

But during the 1870s, a successful southern counterrevolution wiped out many of the gains made by freedmen during the Second American Revolution. A key feature of this counterrevolution was a revival of negative liberty in the form of a weakened national government. Supreme Court decisions offer a stark illustration of the process. The first step backward came, ironically, in a case that had nothing to do with the civil rights of blacks. A group of butchers in New Orleans challenged a state law regulating slaughterhouses that restricted their freedom to practice their trade. The butchers charged that this law abridged the "privileges and immunities" of citizenship as defined by the 14th Amendment. By a five-to-four decision in 1873, the Court ruled against the butchers. The 14th Amendment gave the national government the right to protect only the rights of national citizenship, said Justice Samuel Miller, speaking for the majority, while the rights claimed by the butchers fell within the province of state citizenship and could be defined and regulated by the states.

Upon such hairsplitting as this did great issues turn. Did the framers of the 14th Amendment intend "to transfer the security and protection of all the civil rights" of citizens "from the States to the Federal Government" asked Miller. Despite evidence that many of the framers had intended precisely what, Miller answered his own rhetorical question with a resounding no. "So great a departure from the structure and spirit of our institutions" would "constitute this court a perpetual censor upon all legislation of all the States." No such "radical changes" in "the

relations of the State and Federal Governments" could have been intended. Miller then proceeded to define national citizenship so narrowly that nearly all civil rights and liberties important to the freedmen were left to primary state jurisdiction.

A five-to-four majority in a case that ostensibly had nothing to do with Reconstruction seemed a narrow mandate for counterrevolution. The four dissenters expressed their conviction that the 14th Amendment had placed all rights and liberties of American citizenship, state or national, "under the guardianship of the national authority." Several framers of the 14th Amendment who were still in Congress also denounced the majority opinion as a "great mistake." The amendment, one of them insisted, accomplished "a revolution in our form of government in giving Congress a control of matters which had hitherto been confined exclusively to state control." Nevertheless, after *Slaughterhouse*, the United States attorney general suspended prosecutions of Klansmen under the enforcement acts of 1870 and 1871 until the Supreme Court further clarified the Justice Department's powers in this area.

That clarification was not long in coming. In 1876 the Court handed down its ruling in *U.S. v. Cruikshank*. Also originating in Louisiana, this case stemmed from the most outrageous carnage of Reconstruction, the "Colfax massacre" of 1873. About a 100 blacks and three whites had been killed in a shoot-out that was, in fact, a deliberate massacre. The Justice Department indicted nearly 100 whites for conspiracy to deprive the black victims of their civil rights. The Supreme Court unanimously dismissed these indictments and declared the relevant sections of the Enforcement Act of 1870 unconstitutional on grounds that the 14th Amendment empowered Congress to legislate only against statutory discrimination by state governments, not against discriminatory actions even murder —by individuals. It was a reaffirmation of the *Slaughterhouse* ruling that primary jurisdiction over most civil rights and wrongs remained with the states. "There can be no constitutional legislation of congress for directly enforcing the privileges and immunities of citizens of the United States by original proceedings in the courts of the United States," pronounced the Court. The 14th Amendment gave Congress no power to enact "laws for the suppression of ordinary crime within the States.... That Duty was originally assumed by the States; and it still remains there."

In effect, the Court agreed with the argument of John Campbell of Alabama—a former Supreme Court Justice who had resigned in 1861 to join the Confederate government and who had argued the Colfax defense—that in matters of political and civil rights, "THE AUTHORITY OF A STATE IS COMPLETE, UNQUALIFIED, AND EXCLUSIVE." To convict the perpetrators of the Colfax massacre would lead to the "entire subversion of the institutions of the States and the immediate consolidation of the whole land into a consolidated empire"—and empires, as everyone knew, were the enemies of liberty.

Supreme Court decisions do not take place in a political vacuum. The ruling reflected a growing northern disillusionment with the disorder and violence of Reconstruction. Democrats were winning converts to their argument that the retention of a standing army in the South subverted liberty—of whites. The economic depression following the Panic of 1873 added to

Republican woes. The loss of the House in 1874 (the first time in 16 years) caused many Republicans to speak of "unloading" the dead weight of "Carpetbag-Negro" governments before they sank the party. When the Republican governor of Mississippi telegraphed for federal troops to protect black voters from white "rifle clubs" during the state election campaign of 1875, the U.S. attorney general rejected the request, saying "the whole public are tired out with these annual autumnal outbreaks in the South, and the great majority are now ready to condemn any interference on the part of the government." White Mississippians, in what they frankly called their "Revolution of 1875," drove blacks from the polls and regained control of the state. The last three Republican state governments in the South collapsed in 1877 when newly elected President Rutherford B. Hayes, no longer willing to sustain "bayonet rule," withdrew federal troops and resumed the South to "home rule"—that is, rule by white Democrats.

To Democrats everywhere, these events marked a return to the system of constitutional liberty instituted by the founding fathers. That they took this position scarcely qualifies as news. What really turned the Second American Revolution full circle—back to the first Revolution's dread of power as the enemy of liberty—was the conversion of numerous Republicans to the same viewpoint. No man was more emblematic of this process than Carl Schurz. A republican revolutionary while a student in Germany at Bonn University in the heady days of 1848, Schurz, like many other forty-eighters, came to the United States seeking the liberty republicans had failed to establish in Germany. Finding slavery as well as liberty in America, Schurz helped launch the Republican Party, rose to major general commanding an army corps in the Civil War, and became one of the leading Republican senators during Reconstruction. He did as much as anyone to mold Reconstruction, which he called—in a speech supporting a bill to enforce the 15th Amendment—"a great revolution" to "ensure the fundamental rights and liberties upon which the whole fabric of free government rests." He scorned the Democrats' incessant harping on what they euphoniously called local self-government and...State sovereignty.... In the name of liberty [they] asserted the right of one man, under State law, to deprive another man of his freedom." But now "the great Constitutional revolution" had brought "the vindication of individual rights by the National power. The revolution found the rights of the individual at the mercy of the States... and placed them under the shield of National protection." And how did Democrats respond? "As they once asserted that true liberty implied the right of one man to hold another man as his slave, they will tell you now that they are no longer true freemen in their States because...they can no longer deprive other men of their rights."

Thus spoke Schurz the advocate of power to protect liberty. But in 1875, he sang the very tune he had ridiculed five years earlier when the Democrats piped it. Those five years had produced both Schurz's disillusionment with President Ulysses S. Grant and with southern Republicans, as well as his alliance—in 1872—with Democrats as the founder of the Liberal Republican Party. In 1875, when federal troops in New Orleans arrested several Louisiana legislators on the floor of the state legislature, Schurz denounced the action. The arrests were but one incident in the state's bloody and Byzantine Reconstruction history. In the previous two years, two Louisiana governments had contended for legitimacy—one Republican, elected by black voters and protected in the capital at New Orleans by the army, and one Democratic, supported by white

voters and controlling the countryside with armed guerrillas organized in "White Leagues." Fighting had flared all over the state, leaving hundreds dead. Federal troops had done little to control the violence because rules of engagement restrained them. Legislative elections in 1874 resulted in the usual disputed returns. But by a parliamentary coup, Democrats managed to organize the lower house and swear in their representatives from disputed districts in early January 1875. The Republican governor appealed to the army commander, who marched a detachment of soldiers into the legislature and arrested several of the Democrats. The Grant administration upheld the army's action.

This affair caused an uproar around the country. Protest meetings adopted angry resolutions. Many Republicans joined the swelling chorus of concern that "bayonet rule" was undermining traditional liberties. Carl Schurz gave voice to this concern in a speech to the Senate on January 11, 1875. "Our system of republican government is in danger," he proclaimed. "Every American who truly loves his liberty will recognize the cause of his own rights and liberties in the cause of Constitutional government in Louisiana." The "insidious advance of irresponsible power" had drawn sustenance from the argument that it was "by Federal bayonets only that the colored man may be safe." Schurz conceded that "brute force" might make "every colored man perfectly safe, not only in the exercise of his franchise but in everything else.... You might have made the National Government so strong that, right or wrong, nobody could resist it." That is "an effective method to keep peace and order.... It is employed with singular success in Russia." But "what has in the meantime become of the liberties and rights of all of us?" asked this forty-eight year old who had left Germany to escape just such tyranny. "If this can be done in Louisiana...how long will it be before it can be done in Massachusetts and in Ohio?... How long before a soldier may stalk into the National House of Representatives, and, pointing to the Speaker's mace, say, 'Take away that bauble?'"

A compromise kept Louisiana's Republican administration afloat for two more years. But like those in other southern states, it collapsed when federal bayonets were removed. Schurz had pronounced the epitaph of the Second American Revolution. The positive liberty of centralized power gave way to the negative liberty of decentralized federalism. The pendulum did not swing back until another Republican President—who also happened to be a famous general—launched the "second Reconstruction" three-quarters of a century later by sending units of the 101st Airborne Division into Little Rock, Arkansas, to protect nine black students at Central High School.

James M. McPherson, Edwards Professor of American History at Princeton University, is the author of the Pulitzer Prize-winning book Battle Cry of Freedom: The Civil War Era.