

James M. McPherson. "Reconstruction: The Second American Revolution."

"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. "

McPherson's first sentence hints at the Second American Revolution: the idea that in order for the South to be reconstructed, military rule would be necessary. "[only] the strong arm of power, outstretched from the central authority here in Washington, making it safe for the freedmen of the South." (1)

"For a century or more, Americans had regarded centralized power as the greatest threat to liberty." (2)

...the key insight, shared by most of the vanguard members of the revolutionary generation, is that the very arguments used to justify secession from the British Empire also undermined the legitimacy of any national government capable of overseeing such a far-flung population, or establishing uniform laws that knotted together the thirteen sovereign states and three or four distinct geographic and economic regions. For the core argument used to discredit the authority of Parliament and the British monarch, the primal source of what were called "Whig principles," was an obsessive suspicion of any centralized political power that operated in faraway places beyond the immediate supervision or surveillance of the citizens it claimed to govern. The national government established during the war under the Articles of Confederation accurately embodied the cardinal conviction of revolutionary-era republicanism; namely, that no central authority empowered to coerce or discipline the citizenry was permissible, since it merely duplicated the monarchical and aristocratic principles that the American Revolution had been fought to escape. (Joseph J. Ellis. The Founding Brothers: The Revolution Generation. New York: Random House Inc, 2000. This passage is not in McPherson's article and underlining is added.)

What was the American solution to the threat of liberty in the creation of a central power?

In paragraph 3, McPherson tells us that checks and balances were not enough: "[Whigs] insisted on a Bill of Rights which...imposed a straitjacket of thou-shalt-nots on the federal government." Andrew Jackson, "Jefferson's political heir," "scotched the Second Bank of the United States because [he] believed that such a combination of private wealth and government power would...cause 'our liberties to be crushed.'" McPherson then cites "President Franklin Pierce [who]

vetoed a bill granting public lands to the states to subsidize mental hospitals...to preserve liberty. For if Congress has the power to provide for the insane...[it] would be 'the beginning of the end...of our blessed inheritance of representative liberty.'"

In paragraph 4, McPherson asks "[h]ow could [George Julian] ...advocate the occupation of states by a standing army, that gravest of threats to republican liberty? "So violent and sweeping were these changes [caused by the Civil War and Reconstruction] 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." (4)

Although slavery was a tumor, liberty was a protector of that tumor. The question became, how does slavery become eliminated without destroying liberty? McPherson argues that Lincoln saw "power [as] the protector of liberty—except the liberty of those who wished to do as they pleased with the product of other men's labor." As Lincoln understood the term, "The world has never had a good definition of the word liberty.... We all declare for liberty; but in using the same *word* we don't not all mean the same *thing*." For some, liberty meant doing what one pleases with oneself and one's labor. For others, liberty meant doing what one pleases with other people and their labor. (4)

In paragraph 5, McPherson draws upon "the 20<sup>th</sup>-century political philosopher Isaiah Berlin" who makes a distinction between "negative and positive liberty." "...negative liberty is an absence or limitation of restraint, a freedom from interference by outside authority...described as freedom from [government intrusion]. Positive liberty...can best be understood as freedom to." Berlin argues that a journalist is free from government intrusion, "[b]ut an illiterate person is denied positive liberty, the freedom to read and write." Berlin continues his argument by saying that the solution to illiteracy rest in the power of government— "positive liberties are a form of [power of government]." (5)

"Jeffersonian, Jacksonians and Southerners" were concerned with the "defense of negative liberties from excessive power." Hence the Bill of Rights—Congress shall not.... "Slaveholders relied on the concept of negative liberty to protect

their right of property in human beings from interference by the national government.” “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.” (6)

“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.” In other words, to be free *from* the federal government was an act against the Constitution. Therefore, to stave off that act of treason, a new positive freedom was needed: “they identified the military power of the national government with the ‘new birth of freedom’” to eliminate slavery. (6)

“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 ‘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 (italics in original, not the underlining)]. The first three postwar amendments expanded national power because the Republican majority in Congress believed that liberty [for slaves as full human beings] 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.” (7)

The new American vision of republican liberty encompassed more than simple freedom; it also included the civil and political equality of freemen. (8)

Black leaders and their white allies made this principle the cornerstone of their definition of 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.” (9)

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? (10)

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. (11)

The guarantee clause of the Constitution "vests in the Congress of the United States a plenary, supreme, unlimited political jurisdiction..." 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." 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. (12) (Mississippi and Louisiana reacted with "Black Codes.")

...[t]hese 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. (13)

Democrats invoked traditional libertarian fears of power... 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." (14)

Rubbish! replied Republican leaders. "...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." "...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." (15)

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. ... 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. (16)

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). (17)

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. (18)

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. (19)

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 [sic that], 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. (20)

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. (21)

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." (22)

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. (23)

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. (24)

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.” (25)

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. (26)

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- eighter 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'?" (27)

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. (28)

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