Freedom Still Awaits

A century and a half after Reconstruction, fights over voter suppression and police brutality reveal that it remains an unfinished project.

The Atlantic

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OCT 28, 2015

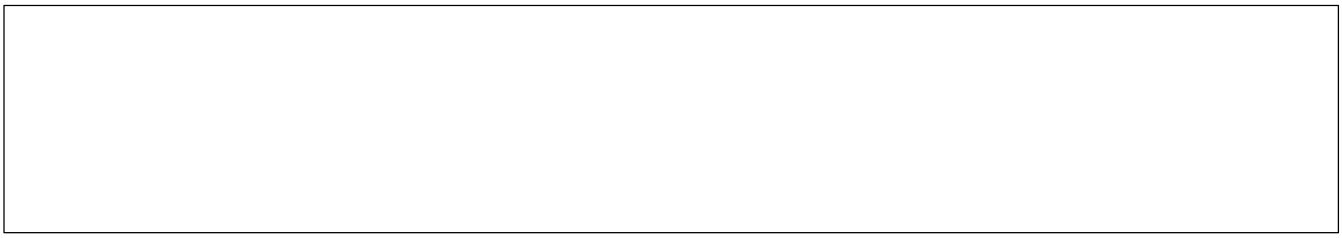
The Civil War and the Thirteenth, Fourteenth, and Fifteenth amendments to the Constitution that were ratified in its wake created a new America as imaginative and fraught with controversy as the country founded after the Revolutionary War. It is no exaggeration, therefore, to describe this period as America's "Second Founding." But neither the enduring power of the Second Founding nor its limitations can be fully understood without an examination of the Third Founding—the civil-rights movement of the mid-20th century.

The extraordinary courage, vision, and commitment of civil-rights lawyers and activists in the period between 1954 and 1968 rooted an America as new and bold as the one forged from the battles of the 18th-century Revolutionary War and 19th-century Civil War. But that the battles of the civil-rights movement continued nearly 100 years after the passage of the Civil War amendments demonstrates the limitations of the rights articulated in the Reconstruction amendments, which proved to be the least self-executing of all of the Constitution's rights-expanding amendments.

This was not lost on the framers of the Reconstruction amendments. They understood from the outset that the rights of suffrage, equal protection, due process, and freedom from slavery would need to be protected from the actions of the state and enforced by the federal government. This is, in no small measure, the essence of the Second Founding—a fundamental reordering of the relationship between the states and federal government. "States' rights" were to be tempered and cabined where they undermined black citizenship. The powerful enforcement clauses and

unequivocal “no state shall” language of the Reconstruction Amendments is the textual evidence of the framers and the clear intention to recalibrate state power in relationship to blacks.

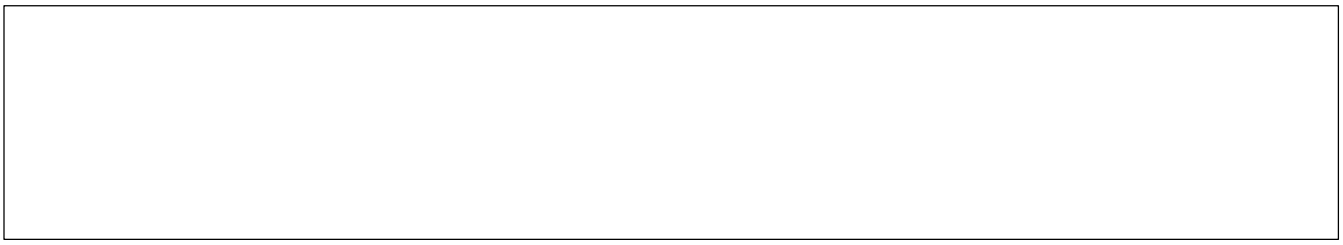
To protect black citizenship, the Reconstruction Amendments opened a new front in the unfinished battles of the Civil War. The federal courts would do the hard work of securing the victory for newly freed slaves. As the historian Eric Foner notes in his seminal treatment of the Reconstruction period, the protections of the Civil War amendments “placed an unprecedented—and unrealistic—burden of enforcement on the federal courts.” Certainly until the Warren Court in the mid-20th century, the Supreme Court showed itself to be both unprepared and unwilling to take up the full measure of that responsibility. Indeed, the Supreme Court’s devastating 1876 decision in *U.S. v. Cruikshank* (in which the Court vacated the conviction of three white men who participated in the massacre of 300 blacks protecting the federal courthouse in Louisiana), the widespread white-supremacist violence in the South, and the removal of federal troops from Louisiana and Mississippi are among the leading factors that ended Reconstruction.



A decade later, when in the *Civil Rights Cases* the Supreme Court exhibited what the scholar Darren Hutchinson calls “racial exhaustion,” it was clear that it was simply not up to the exercise of robust enforcement power contemplated by the architecture of the Reconstruction Amendments. Just 20 years after the end of slavery and during a period of intense white-supremacist violence, the court declared in the *Civil Rights Cases* that there must be a time when former slaves “cease to be the special favorite of the laws” and instead “take the rank of mere citizens.”

Ironically, the centerpiece of the Third Founding was also a Supreme Court decision—*Brown v. Board of Education*. The Court’s decision to strike down racial segregation in public education (and soon in all aspects of public life) began the deconstruction of Jim Crow—the system of legal apartheid that had become the principal means of enforcing 20th-century white supremacy. *Brown* and the civil-rights movement that followed it, ushered in the promise of a new America—one that included unprecedented opportunities for many African Americans and other

racial minorities, a lexicon of equality and racial justice that endured, and black political power not seen since the early days of Reconstruction.



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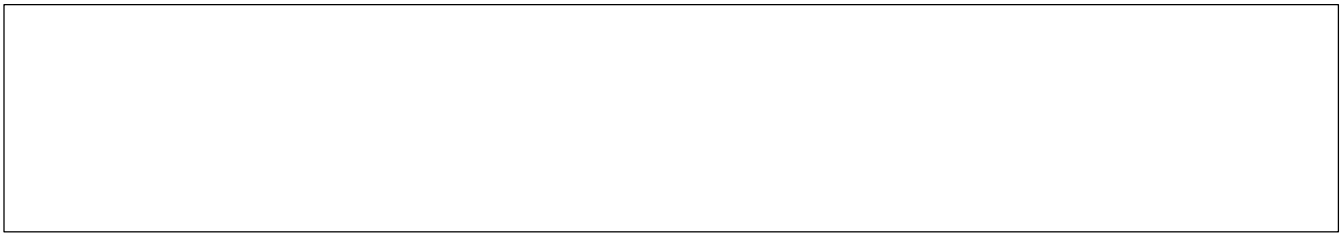
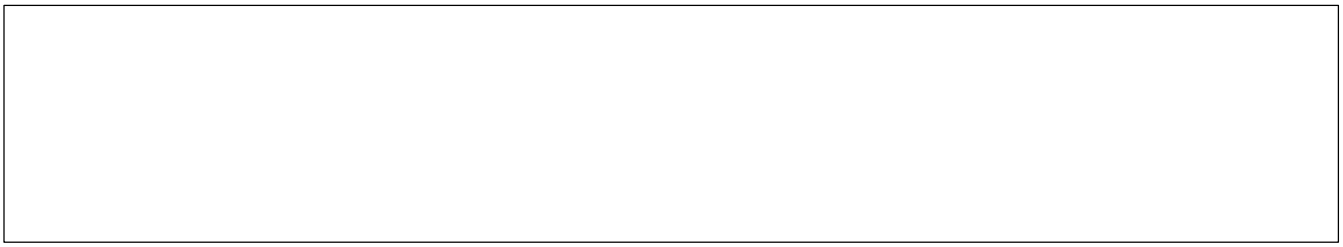
Yet *Brown*, like the Civil War amendments, faced its own opposition—a concerted movement named "Massive Resistance" by integration opponents. The resistance to *Brown* from Congress to towns and hamlets in the South was so rabid that counties were willing to close public schools rather than have black children attend school with white children. Black children were spat upon, cursed, and assaulted on the way to school by white teenagers and housewives. The homes of civil-rights lawyers and activists were fire-bombed. Resistance to *Brown* became yet another front in the battle over black citizenship. In the courts, the battle became a war of attrition, with the Supreme Court at first robust and then increasingly cautious and timid, and ultimately hostile to the project of integration. By the time the Court decided in *Milliken v. Bradley* that desegregation plans could not cross city lines into suburban counties to stem the effects of white flight on integration, the project of integrated schools in urban centers was dealt a crushing blow. For good measure, the Supreme Court scuttled even voluntary integration efforts in 2006 in *Parents Involved In Community Schools v. Seattle School District*, with Chief Justice Roberts' tautological and tone-deaf instruction that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."



The decades-long resistance by whites to school integration doomed the full promise of the civil-rights movement. Massive resistance spawned even more deeply entrenched housing segregation, the abandonment of support for public institutions, white flight from U.S. cities, and a renewed hostility to the federal government. The hope held by the most visionary civil-rights leaders and activists for a unified country of racial equality has been put off for future generations, even as the vision articulated by those men and women has become central to America's public self-narrative.

The U.S. is at the dawn of a new battle in the Third Founding. This year's high profile civil-rights battles against voter suppression and police killings of unarmed African Americans has proven, with stark clarity, the necessity of a renewed fight. If the right to vote is, as the Supreme Court said just a decade after Reconstruction ended, "preservative of all rights," then concerted and sustained state-based voter-suppression efforts, combined with the Supreme Court's 2013 invalidation of key voting protections in the Voting Rights Act, constitute a powerful threat to the core vision of the Civil War amendments.



Likewise, sustained police violence against unarmed African Americans—as has been captured on film—offers a sobering challenge to claims that the project of the Second Founding has been completed. African Americans continue to face suspicion, challenges, and violence from the state for engaging in the most routine daily activities. The term "driving while black" has spawned references—at once ironic and devastating—to "walking," "laughing," "staring," and even "breathing" while black, which demonstrate the ongoing precariousness of African American freedom. Foner cites Henry Adam's statement to his former master in 1865 to define what freedom meant to newly emancipated slaves: "If I cannot do like a white man, I am not free." By this definition, freedom still awaits.