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Counting Diversity in an Attempt to Achieve Unity: How the Three-Fifths Clause United and Divided Americans

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The three-fifths clause of the United States Constitution was an attempt to unite a Constitutional Convention divided over the issue of slavery. It was one of the many compromises American political elites made to unite diverse states together. The idea of the three-fifths clause originated from the effort to calculate the wealth of the free and slave states based upon the productivity of persons who worked for themselves compared to that of slaves who were forced to labor for their slaveholders.

Although the clause did not mean that the framers considered slaves to be three-fifths of a whole human, it called attention to slaves' dual character as both persons and property. While slaves were generally deemed property for purposes of business and inheritance, it was impossible not to recognize them as persons in the event of slave insurrections. Slaveholders also could not deny slaves' humanity as they drew upon their skills and services daily, and interacted with them.

During the Civil War, slaves' status continued to be divided. Whether a slave's owner was loyal or not to the Union redefined the nature of their dual status; not as persons versus property but as free versus slave. The Fourteenth Amendment, by counting "the whole number of persons," superseded the three-fifths clause. It, however, fell short of eradicating the division that the three-fifths clause symbolized, a problem later solved by the acts of the Civil Rights Movement.

Introduction

In weighing division, diversity, and unity in American history, there is no better case in point than the United States Constitution itself, especially

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Article 1, Section 2, better known as the "three-fifths clause." The three-fifths clause embodies two tensions that have been fundamental in U.S. history: the first, between slave states and states that would eventually become free states; and the second, between the slave's dual statuses as simultaneously person and property. The three-fifths clause reads:

> "Representatives and direct Taxes shall be apportioned among the several States which may be included within the Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."[1]

With the three-fifths compromise, the framers attempted to reconcile diametrically opposing views among the framers of the Constitution, pitting states dependent on slavery against those whose delegates looked forward to its eventual disappearance. A startling fact about the provision underlines the difficulty that the framers faced in reconciling these opposing positions: although the clause concerns the method of counting slaves, the authors deliberately avoided using the word "slave."[2]

The effort to paper over this division between the framers ultimately failed. In fact, the clause still divides the House of Representatives of the twenty-first century. At a ceremonial reading of the Constitution in 2011, the Republican readers chose to skip the three-fifths clause, which the Fourteenth Amendment superseded. The omission angered some Democratic House members, particularly members of the Congressional Black Caucus, who decried the omission as a deliberate attempt to minimize the historical importance of slavery.[3]

The three-fifths clause did not mean that the framers of the Constitution simplistically considered slaves to be only three-fifths of a whole human, as some commentators today mistakenly contend. Nor did the clause define the status of slaves as either persons or property. It was a compromise between pro-and anti-slavery delegates to the Constitutional Convention, at which slaveholders sought to treat slaves as property, rather than persons, when it came to apportioning responsibility for government expenses, but as persons rather than property, when it came to claiming representation in Congress. Instead of the zero-fifths the slaveholders would have preferred for the former and the five-fifths they would have preferred for the latter, they had to accept three-fifths for both. Because the delegates could not find

a philosophical solution to the problem of the slaveholders' attempt to accept advantages but not disadvantages, they solved it arithmetically. The three-fifths clause was an agreement to count three-fifths of a state's total number of slaves in apportioning representatives, presidential electors, and taxes.

Although each state sent two senators to the Senate, the extra seats that the three-fifths clause provided to slave states in the House and the Electoral College strengthened their political power. Moreover, while the clause theoretically authorized an extra three-fifths tax on slave states, Congress resorted to direct taxes only four times between the presidencies of George Washington and Abraham Lincoln, supporting itself primarily by land sales and tariffs instead.[4] And as the clause affected the entire citizenry of the slave states, it gave non-slaveholding Southerners a stake in slavery.[5]

The first tangible result of the three-fifths clause was the election of Thomas Jefferson to the presidency in 1800.[6] But for the three-fifths clause, John Adams could have interrupted the Virginia Dynasty for four more years, a dynasty that reigned for thirty-two of the first thirty-six years of the republic.[7] The North's population growth through immigration eventually diminished the effect of the three-fifths clause on slave states' percentage of representation in House of Representatives from approximately 30 percent in 1792 to 12 percent by the 1842.[8] However, many of the important pro-slavery acts had been already passed by then: the Missouri Compromise of 1820 without the antislavery Tallmadge amendment, the Indian Removal Act of 1830 making Native Americans' land available for slavery to expand, the gag rule of 1836 prohibiting consideration of anti-slavery petitions, and the annexation of Texas in 1845 adding one more slave state to the Union.[9] As the political power the South derived from the three-fifths clause declined and other forces reduced the South's political power, it became important for the South to increase the number of slave states in order to gain additional slave-state senators to protect slavery.[10]

The so-called Great Compromise at the Constitutional Convention of 1787, which included the three-fifths clause, was the first of the many compromises free and slave states made, followed by the Northwest Ordinance of 1787, Missouri Compromise of 1820, and the Compromise of 1850 to name a few.[11] Slavery economically benefited the nation as a whole and was legal in all thirteen original states at the time of independence, though it was not economically as central in the Northern states as it was in the South because of the gradual abolition of slavery in the North after independence.[12]

Each of these compromises was designed and intended to preserve peace

between contending states in pursuit of a higher goal: to unite diverse states together.[13] These compromises used federal laws to continually balance interests of slave and free states, thereby "demonstrat[ing] Americans' remarkable ability to make pragmatic adjustments in the interest of national stability," according to historian David Brion Davis.[14] Compromises are not, however, always the same as solving the problems. When compromise seemed no longer possible, Americans fought the Civil War.

The three-fifths clause has its roots in the period when the fledgling America was still uncertain about its future. Although basing taxation on population rather than on land seemed a sign of democratization, the fact that the three-fifths clause benefited slave states makes the claim doubtful. It represented an advance for slaveholders, though, from the English constitutional structure, in which slaves in West Indies were represented only as capital, an unstable index subject to change depending on the market.[15] Taxation and representation had been inseparable since the colonial era. Colonists insisted that "a colony or district is not to be taxed which is not represented."[16] After independence, however, the argument came to imply that the number of representatives for each state "shall be ascertained by its quota of taxes," as a correspondent of *Niles*' *Weekly Register* insisted.[17] While the slogan "no taxation without representation" united colonists against England, the issue of tax on and representation of a diverse populace—slaveholders, yeoman farmers, urban artisans, non-landowning farmers, and slaves of the North and South—divided the newly independent Americans.

The debate began at the birth of the nation in 1776. The idea of fractional representation, although not three-fifths but one-half, first emerged in 1776 during the Second Continental Congress (1775–81). The occasion was a need to determine the wealth of each state based upon the population, so that the war expenses could be allocated among the states in proportion to their wealth. The ratio rose to three-fifths in 1783 during the Congress of the Confederation (1781–88) but was never used. The value of land, not the population, remained the basis for taxation from independence until the Constitutional Convention of 1787 decided on population as the basis for *both* taxation and representation.[18] Although the Compromise of 1787 appeared to have brought unity to delegates, it never did.[19] The clause not only remained provocative among white people while also affecting the lives of slaves and indeed controversy surrounding the clause continues to this day.

1. How to Count Slaves: The Dual Character of Slaves

Only a few weeks after the Declaration of Independence, wrangling over the process of forming a national government proved the validity of James Madison's quip that "If men were angels, no government would be necessary."[20] The committee to prepare the Articles of Confederation was on the verge of disintegration over the issue of expenses that should be paid "in proportion to the number of inhabitants."[21] Samuel Chase of Maryland argued that "negroes are property, and as such cannot be distinguished from the lands or personalties…that negroes in fact should not be considered as members of the state, more than cattle."[22] Thomas Lynch of South Carolina threatened to abandon the union altogether, "If it is debated, whether their [slaveholders'] slaves are their property, there is an end of the confederation." John Adams remarked that "the number of people" meant "an index of the wealth of the state," not the subjects of taxation, and that whether free or slave, the number of people was "the fair index of wealth" because people were producers.[23]

Exchanges of impassioned opinions continued until Benjamin Harrison of Virginia proposed a compromise to count two slaves as one freeman on the ground that "slaves did not do so much work as freemen" and that the "price of labor" in the South was twelve pounds, while that of the North twenty-four.[24] Perhaps because slaveholders were reluctant to bear the heavy burden of expenses, they tended to understate the productivity of slave labor, prompting some Northerners to suggest that slaves should be freed if they were so unproductive.[25]

Although the one-half ratio was not adopted in the final Articles, the debate marks the beginning of the "fractional" compromise.[26] In the end, with the war for independence still underway, the Articles of Confederation, ratified on March 1, 1781, avoided settling the question of the slaves' status in American society. Article 8 based taxation on the value of all land, "the buildings and improvements" in each state, and Article 5 stipulated that each state should have one vote "in determining questions" of governance.[27] The Congress of the Confederation, however, neither implemented Article 8 nor took a land census, leaving Congress without revenues.[28]

Once the Treaty of Paris in 1783 secured American independence, the new nation was unable to impose a tax to pay for its soldiers, because, as James Madison said, "the value of land could never be justly or satisfactorily obtained."[29] James Wilson of Pennsylvania recalled that they had no choice but to rely on the value of land because, during the Second

Continental Congress, the states could not agree on how to determine the value of slaves "compared with the Whites."[30] Just as determining the value of land proved difficult, so did "fix[ing] the proper difference between the labour and industry of free inhabitants, and of all other inhabitants."[31]

In the meantime, soldiers stationed in New York were about to mutiny in March 1783 over the lack of pay, forcing Congress to do something about raising revenues.[32] Attempting to tackle the financial problem by using population rather than the value of land, Congress resumed the discussion on how to measure slaves' productivity, taking the previous formula of "two blacks be rated as equal to one freeman" as a starting point.[33] Some agreed with two-to-one, others came up with four-to-three, four-to-one, three-to-one, and three-to-two. Madison intervened with five-to-three "in order to give a proof of the sincerity of his professions of liberality."[34] Considering that the issue in question at this point was only taxation, Madison probably meant that as the owner of one hundred slaves, he was willing to compromise by not insisting on one-half or one-third.

The three-fifths ratio passed on April 18, 1783, but did not take effect because there was insufficient support for a change from the value of land to population. Nevertheless, the three-fifths ratio stuck in politicians' minds as a way of counting slaves' share in the population.[35] The debate over the three-fifths ratio was not an attempt by whites to somehow calculate the inherent human worth of slaves compared to themselves in some abstract sense. Instead, as the foregoing elucidates, the particular debate was a dispute over assessing wealth based on the productivity of persons who worked for themselves compared to that of slaves who were forced to labor for their slaveholders.[36]

Five years after the ratification of the Articles of Confederation in 1781, "not a single State in the Union" had paid what it owed, either because they were reluctant to pay taxes at all or because it was difficult to ascertain the value of land.[37] A committee charged with considering a number of matters admitted that determining the value of land was difficult for two reasons. First, the value was "uncertain and fluctuating" as well as "tedious and expensive" to ascertain. Second, the designated value they set was likely to be influenced by "the judgement of men," who would be "biased continually by interest and local connexions." By contrast, they argued, counting people was easy and inexpensive to do. To those who opposed the three-fifths ratio, the committee replied that although it was impossible to compare "the acquisitions and abilities" of freemen with those of slaves, the committee assumed that all would agree on the superiority of free labor

over that of slave because slaves were forced to work for the interest of slaveholders.[38]

Whether superior or not, free labor was not trouble-free. Shays's Rebellion of 1786–87, a debt and tax protest in western Massachusetts, was one of those troubles that forced the delegates from various states to grapple with the defects of the Confederation government in May 1787.[39] To remedy the absence of revenues, a number of delegates suggested that representation be proportionate to the contribution of taxes, "thus connecting the interest of the States with their duty," argued John Dickinson of Delaware.[40] In the end, the population, rather than the value of land, became the basis, with the three-fifths ratio applied to the slave population.[41]

As predicted, however, some delegates from the North questioned the rationale for counting slaves as part of the population, even at the three-fifths ratio. Wilson asked, "Are they admitted as Citizens? Then why are they not admitted on an equality with White Citizens? Are they admitted as property? Then why is not other property admitted into the computation?" Gouverneur Morris of New York asked the same question: "Upon what principle is it that the slaves shall be computed in the representation? Are they men? Then make them Citizens & let them vote?" Roger Sherman of Connecticut explained the philosophy behind the counting of the three-fifths of the slave population: free people of the Southern states were represented "according to the taxes paid by them, and the Negroes are only included in the Estimate of the taxes."[42]

Madison perhaps offered the clearest explanation of whether a slave was considered a person or property in American society during the late 18th century. He said that a slave was in fact both. Madison opined that on one hand, being forced to work for his master and deprived of liberty, a slave "may appear to be degraded from the human rank." On the other hand, Madison asserted that a slave's "life and limbs were protected against violence," "and in being punishable himself for all violence committed against others," he is a member of society.[43]

The federal constitution thus determined the slaves' "true character" to be a mixture of persons and property. Madison justified the inclusion of property (in the form of slaves) in representation on the ground that the government was formed to protect both people and property. He added that "the laws have transformed the Negroes into subjects of property" and even suggested that if "the laws were to restore the rights which have been taken away," a slave should have the same "share of representation with the other

inhabitants."[44] That, however, would have meant the disintegration of the Articles of Confederation.

On July 12, 1787, a resolution that "direct Taxation ought to be proportioned according to representation" passed unanimously. The final constitution describes slaves as "persons" in its dealing with tax and representation (Article 1, Section 2), slave trade (Article 1, Section 9), and fugitive slaves (Article 4, Section 2).[45] But it is interesting to note that the three-fifths clause remained controversial not only in the North but also in the slave South. The Massachusetts state legislature unsuccessfully attempted in 1843 to amend the U. S. Constitution in order to repeal the three-fifths clause, while only Georgia, Florida, Maryland for "a few years" and North Carolina after 1834 used the federal ratio in their state constitutions. By contrast, one week after Abraham Lincoln became president in 1861, the Confederate States of America completed its constitution with the federal ratio retained.[46] From the time of the Articles of Confederation to the emergence of the Confederacy, the three-fifths compromise attempted to serve the purpose of reconciling the competing interests of slaveowners and non-slaveowners, even if only temporarily.

2. How Slaves' Dual Character Affected Them: Before the Civil War

At the seventy-sixth anniversary of the nation's independence in 1852, Frederick Douglass was asked to speak to an audience of white abolitionists in Rochester, New York. Feigning confusion as to why he had been chosen for the occasion, Douglass began with a mild reminder to the audience, "This Fourth of July is *yours*, not *mine*. *You* may rejoice, *I* must mourn." It was a day that reminded the slaves of "the gross injustice and cruelty" they constantly suffered. It was so easy to understand that American slavery was wrong, he insisted, that he had nothing to prove. "Must I undertake to prove that the slave is a man?" He did not need to, he said, because the laws slaveholders made "acknowledged it." The laws prohibited teaching of slaves and penalized them for the crimes they committed, but nothing comparable existed for dogs, fish, and reptiles. After seeing the slaves doing all sorts of tasks, such as farming, building ships, and even worshipping God, was it still necessary to prove their humanity? Douglass ended his address in bitter denunciation of the U.S. as the world's worst nation in its level of "revolting barbarity and shameless hypocrisy."[47]

If "shameless hypocrisy" referred to slavery in the land of the free, "revolting barbarity" might have meant reducing a human being to the level

of a beast. Slaves were, no doubt, persons, Douglass reminded his audience. Yet, a slave had a price as a commodity to be determined by age, sex, health, skills, geographic locations, and seasons.[48] Contrary to the notion that slave labor should be valued as three-fifths that of free labor, historian David Brion Davis has argued that slaves' market value came to exceed "the cash value of all the farms in the South," thanks to the importance of cotton, and indeed the gross national product in 1860 was "only about 20 percent above the value of slaves."[49] Within the Southern states, the average wealth of slaveholders in 1860 was $24,748, or 13.9 times the average wealth of non-slaveholders.[50]

The legal categorization of slaves as commodities allowed the separation of slave families, in such a way as to assign individual slaves into, for instance, "Lot 1" and "Lot 2," with little regard to familial relations.[51] For example, upon the death of President James Polk in 1849, fourteen of the twenty-six married slaves he owned experienced disruption of their marriages, while nine of twenty-four slaves who were too young to be married had already been forever separated from both their parents by sale. Polk, who clearly benefited from the rise of the price of slaves after the annexation of Texas—the spoils of "Mr. Polk's Little War" —frequently shuffled slaves he owned between his plantations in Tennessee and Mississippi.[52]

Although the practice was rare, some slaveholders bequeathed even unborn children, described as "the increase" of female slaves, which occasionally courts allowed, depending upon judges and states.[53] At the same time, according to the autobiography of James Thomas, who was a slave of President Polk's cousin Andrew Jackson Polk, being "a piece of property" could perversely benefit a slave, given pervasive racism in the North as well as South. Thomas stated he felt more protected as property than when he was exposed to abuse and discrimination in the ostensibly free North.[54] But slaveholders might also choose not to protect their slaves from abuse. When Douglass was almost killed by Edward Covey, a "Negro breaker," his master refused to protect him either as property or as a man, for fear of losing the wages Douglass would have brought to his master by staying out his year with Covey.[55]

Judging by their testimony, however, slaves seemed to consider the separation of their families to be the worst part of slavery.[56] Douglass, who never knew who his father was and had been separated from his mother in his early childhood, remarked that "[g]enealogical trees do not flourish among slaves" and regarded the obscuring of slaves' parentage as part

of the system's "grand aim" to "reduce man to a level with the brute."[57] The forced separation of slave families provided abolitionists with the most effective weapon to attack the institution. It was so offensive even in the eyes of non-slaveholding white people and even many slaveholders themselves that the slaveholders had to take slaves' humanity into at least minimal consideration when shaping the legal system. This was especially the case because American-born slaves had already outnumbered African-born slaves even before the nation's independence.[58]

As esteemed historian Eugene Genovese argued, the law needed to be made ethically acceptable to both slaveholders and other classes for the system to prevail.[59] The categorization of slaves as real property during the colonial period, with slaves entailed to the eldest son along with land, may have somewhat limited the separation of slave families. Although the framers of the Constitution saw the repeal of primogeniture as a step toward democracy, it increased the risk of separating slave families. Statutory reform began around 1830 when the anti-slavery movement was picking up steam, but slaves' dual status as persons and property, resulting in a conflict between humanity and economic interest, made it difficult to legalize slave marriages. Some states at least managed to forbid the separate sale of young children from their mothers.[60]

Although the law might have deemed slaves property for purposes of business and inheritance, it was impossible not to recognize them as persons in the event of slave insurrections. After Nat Turner's Rebellion in Southampton County, Virginia in 1831, Henry Berry, a slaveholder in Virginia, was desperate to find a way to "extinguish that spark of intellect which God has given" slaves. He thought that white Virginians closed "every avenue by which light might enter their minds" but found it "impossible" to reduce slaves to "the level of the beasts of the field," which alone would make white people feel safe.[61]

In neighboring North Carolina, Nat Turner's Rebellion not only resulted in strengthened control over slaves but also in disenfranchisement of free black people, because their right to vote "contributes to excite & cherish a spirit of discontent and disorder among the slaves," according to a petition to the state legislature in December 1831.[62] In 1831 white Tennesseans were so threatened by the increase in the number of free black people that the state legislature forbade the emancipation of slaves, except on the condition that freed slaves be immediately removed from the state. However, doing so proved difficult because family members of freed slaves remained in bondage.[63] Slaveholders in Maryland, where free black people were nearly

as numerous as slaves, failed repeatedly to force the expulsion from the state of free black people, because non-slaveholding white people needed their labor.[64]

It was not only when slaves committed crimes or engaged in insurrection that the white public recognized them as persons rather than property. White people often valued the skills and services slaves could offer. For example, more than 120 white people filed a petition in 1832 for an exemption from a law that provided for whipping a slave twenty-five times if he or she visited several counties of Tennessee for the purpose of "healing the Sick." The petitioners asked the legislature to let "Jack, the property of Mr. William H. Macon" continue his practice of medicine, "with a firm belief that the public good will be advanced." The legislature rejected the petition, however, presumably because the memory of Nat Turner's Rebellion was still fresh.[65]

By contrast, in the famous case *Ford vs. Ford*, in which Loyd Ford, Sr.'s white children and his slaves, which he called his "black children," upon Ford's death contested in court his will that emancipated his slaves. The Tennessee Supreme Court accepted the slaves' petition that the will be honored, emphasizing that "slaves are not mere chattels but are regarded in the two-fold character of persons and property."[66] Such cases illustrate the practical challenges, not to mention the incalculable human cost, of viewing slaves as merely objects and reveal that conflicts between legislatures and courts, and among white people themselves, often determined the status of slaves in particular cases.

3. How Slaves' Dual Character Affected Them: During the Civil War

Once war broke out, whether a slave's owner was loyal or not to the Union redefined the nature of their dual status: not as persons versus property but as free versus slave. Lincoln's approach to the abolition of slavery was cautious and gradual because he did not want to antagonize Unionist Southerners; "events have controlled me," he wrote.[67] The Union's complicated effort to balance freedom for slaves with preserving their owners' loyalty to the Union reflected Lincoln's attempt, often at the cost of slaves' freedom, to bring unity out of irreconcilable division between slave and free states.

The evolving nature of how wartime federal laws referred to slaves reveal that Congress performed a similar balancing act. The first Confiscation Act of August 1861 did not mention "slaves" but declared it the president's

duty to seize, confiscate, and condemn—but not "free" — "any property of whatsoever kind or description" used to aid, abet, or promote insurrection against the Union. Seven months later, the additional Article of War of March 1862 forbade officers to return "fugitives," and the second Confiscation Act of July 1862 referred to such fugitives as "slaves" in declaring those who fell within its purview "forever free of their servitude." The Militia Act of July 1862, for the first time, recognized slaves' families. It offered freedom to slave men, if employed by the Union, and to their families, if owned by disloyal masters. It also decreed the employment of "persons of African descent" for the benefit of Union forces.[68]

The Emancipation Proclamation of January 1863 freed slaves in some but not all slave states. It exempted not only the four border slave states that remained in the Union (Delaware, Maryland, Missouri, and Kentucky), but also Union-occupied parts of Louisiana and Virginia, as well as the entire state of Tennessee. Lincoln exempted Tennessee at the urging of Andrew Johnson and other Unionist politicians in Tennessee, who hoped to convince fellow Tennesseans that slavery would be safer under the Union.[69] One Union officer described the disappointment of Tennessee slaves at their exclusion from the Proclamation as "[t]he shadow on the hearts of those creatures…darker than the skin which God gave them."[70]

Enlistment in the Union army afforded slave men in states where slavery remained legal their only path to freedom, as well as a good chance, by fighting for the country, to make the case for their right to citizenship. As a result, black men in Missouri, Tennessee, Maryland, and especially Kentucky enlisted in notably large numbers compared to black men of military age elsewhere. An astonishing 57 percent of black men of military age in Kentucky enlisted in the Union army.[71] The fact that their slave families remained under the control of loyal slaveholders makes their enlistment all the more impressive.[72] At the same time, Major General George L. Stearns received in Nashville, Tennessee, "numerous applications" by owners for the enlistment of their slaves, whom they had come to see as "a nuisance."[73]

In July 1863, Hannah Johnson, the mother of a Northern black soldier, wrote to President Abraham Lincoln, demanding that he ensure that black soldiers were "fairly treated." She was adamant in telling Lincoln that it was "wicked, and a horrible [o]utrage" for "one man to own another" because it was robbery. Robbing black people of their labor was, however, "but a small part of the robbery." Making them brutes by taking "their souls" was worse.[74] That she dared to address the president directly

illustrates how the Civil War undid certain expectations about hierarchy and deference to authority.[75]

Even slaves began writing directly to President Lincoln for help. Slaves came to expect that the federal government and the national army, entities more powerful than individual slaveholders, would protect them, because they believed that the United States was their country as much as it was Lincoln's—and more so than that of slaveholders who had seceded from the Union.[76]

But as Hannah Johnson had feared, black soldiers were not "fairly treated." First, they were not paid the same as white soldiers until March 1865, in part because of the Union's reluctance to resolve the question of the legal condition—free or slave—of confiscated slaves.[77] In spite of a written promise of equal pay at the time of enlistment, black soldiers did not receive "a cent" for more than a year, as Colonel Thomas Higginson, commander of the First South Carolina Colored Volunteers, complained.[78] Unequal pay stipulated in Section 15 of the Militia Act of 1862 was based on the assumption that the function of black troops would be to relieve white soldiers as labor battalions. Unequal pay was also an attempt to appease white soldiers by not placing them on the same level with former slaves.[79]

In spite of numerous complaints by Higginson and John A. Andrew, the governor of Massachusetts, Lincoln did nothing. With a view to his re-election in 1864, he did not want to offend dissident Republicans or give Democrats a new weapon of attack. Senator James Henry Lane of Indiana rejected the idea of equal pay because he regarded black soldiers' service as not "worth as much as that of white men."[80] A series of protests by officers of black regiments and their men (protests that occasionally resulted in the protestors' execution) finally led the War Department in June 1864 to grant equal pay retroactive to January 1, 1864, provided the soldiers in question had been free on April 19, 1861. Higginson expressed outrage at the proviso.[81] Only toward the end of the war did black soldiers who had not been free on April 19, 1861 receive equal pay.[82]

Even worse than the Union army's paying black soldiers less than white soldiers was the Confederate government's policy of treating black soldiers as property. In anticipation of such treatment, Lincoln issued in April 1863 the General Orders No.100, commonly known as the Lieber Code, to set rules for both the Union and Confederate armies to observe. Article 42 declared that "as far as the law of nature is concerned, all men are equal," notwithstanding the existence in the Southern states of "[s]lavery,

complicating and confounding the ideas of property, (that is of a thing) and of personality, (that is of humanity)." The code provided that, in the case of a slave fighting for the Union Army being captured by the Confederate army, he should be "immediately entitled to the rights and privileges of a freeman."[83]

But the Confederate government ignored the Lieber Code. In April 1864 at Fort Pillow, Tennessee, Confederate soldiers killed 195 black as well as 102 white soldiers of the Union Army *after* they had surrendered in what became known as the Fort Pillow massacre. While denying responsibility for the massacre, Major-General Nathaniel B. Forrest declared, "I regard captured negroes as I do other captured property and not as captured soldiers." In response, Major-General C. C. Washburn of the Union Army sent him a copy of the Congressional report on the massacre, which held Forrest accountable for the atrocity, with a copy of General Orders No.100 enclosed, reminding him that Confederate soldiers would meet retaliation if they failed to follow the rule.[84]

On May 19, 1864, Mary Elizabeth Wayt Booth, the widow of Maj. Lionel F. Booth, commanding officer at Fort Pillow, visited the White House to ask President Lincoln to regard widows and children of colored soldiers killed in the massacre "as if their marriages were legal" so that they, too, could receive pensions. Lincoln referred her to Senator Charles Sumner with his note saying, "She makes a point, which I think very worthy of consideration."[85]

The Fort Pillow massacre, in which most of the black victims were former slaves and the white victims were Tennessee Unionists, prompted Congress on July 4, 1864, for the first time to pay pensions to the widows and children of colored soldiers if "the parties had habitually recognized each other as man and wife" for at least two years prior to enlistment and also if "such widow and children are free persons." The requirement for free status was, according to Congressman Sidney Perham of Maine, intended to eliminate "impositions," such as a female from a loyal slave state (thus, legally in bondage) leaving the state to marry a black soldier.[86]

Disruption of slaves' marriages, often followed by remarriages, occurred frequently in Upper South states such as Tennessee. This prevalent pattern could make it difficult to distinguish legitimate marriages from pretextual ones, sometimes casting doubt on the former and thereby making it hard to determine who was qualified to receive a pension and who was not.[87] Legislature in 1866 removed the language of "free persons" and the two-year requirement, and permitted marriages if they were deemed satisfactory

by the Commissioner of Pensions as those who "habitually recognized each other as man and wife, and lived together as such." An act passed in 1873 included the widows of "colored or Indian soldiers and sailors" with the same requirement as that of 1866.[88]

Within the Confederacy, the idea of enlisting black men had been discussed as early as 1861, but the Union's recruitment of soldiers who were "the property of those against whom they are sent to fight," as one rebel put it, combined with Confederate losses at Gettysburg and Vicksburg, revived interest in the prospect.[89] A slaveholder in Mississippi lamented in a letter to Jefferson Davis, the president of the Confederacy: "Visburg is gone and as a consequence Mississippi is gone and in the opinion of allmost every one here the Confederacy is gone," making it expedient "to call out every able bodied *Negro* man." He considered the matter so urgent he offered to "send off every negro man" he had "tomorrow morning."[90] Another slaveholder wrote to Davis from Georgia that slaveholders there were "willing, *yea anxious* to put their negroes into the war."[91]

In explaining the aptitude of slaves to serve as soldiers, one slaveholder confessed that they were less troublesome than white men.[92] Proponents of enlisting slaves in the military were even willing to accept emancipation as a consequence, resulting in an obvious contradiction that they advocated the Confederacy emancipate slaves in order to maintain a society based on slavery. The Confederacy authorized the enlistment of black men in March 1865, just a month before the end of the war. General Robert E. Lee had endorsed the enlistment of black men with a promise of "immediate freedom" for black soldiers and freedom for their families at the war's end with what he characterized as "the privilege of residing in the South." None of his proposals had come to fruition at the time he surrendered.[93]

Conclusion: "Living Among Men and Not Among Angels"

The Fourteenth Amendment to the United States Constitution is best known today for Section 1, which defines national citizenship and guarantees equality under the law, and not Section 2, which supersedes the three-fifths clause. In counting "the whole number of persons," without a fractional subtraction, the Fourteenth Amendment "connect[ed] the interest of the States with their duty," not by linking representation to taxation but by linking representation to African American men's right to vote.

Although voting requirements remained at the discretion of the states, the provision notionally penalized states for denying African American men the

right to vote. "Notionally" because the penalty was never invoked during the many decades following enactment of the Fourteenth Amendment, during which black people were effectively disfranchised.

The need for the Fourteenth Amendment had become urgent by 1868, the year it was ratified because the Civil Rights Act of 1866 was in danger of been invalidated by the Supreme Court. The Fifteenth Amendment that guaranteed black men's right to vote and was ratified in 1870 was needed to bridge the gap between reconstructed Southern states whose new state constitutions extended suffrage to black men and the Northern states that had yet to enfranchise them.

But the Fourteenth and Fifteenth amendments failed to prevent the disfranchisement of African Americans in Southern states, which had first been carried out by extra-legal violence and subsequently by revisions to state constitutions and enactment of state laws depriving blacks of the ability to vote.[94] Nearly a century after enactment of these amendments, Congress finally addressed the issue comprehensively through passage of the Civil Rights Act of 1964 and Voting Rights Act of 1965.

When Congress debated the Fourteenth Amendment in 1866, Thaddeus Stevens, a chief architect of Congressional Reconstruction, admitted that the amendment fell short of his hopes of finally eradicating the division that the three-fifths clause symbolized and perpetuated. He had hoped for including the enfranchisement of African Americans in the amendment, dreaming that once "purified," the United States would tolerate "no distinction." When his dream proved unattainable, he accepted "mutual concession," as "our only resort"— just as the framers of the Constitution had done when they agreed to the three-fifths compromise in the first place. Stevens echoed Madison in explaining his acceptance of "so imperfect a proposition," recognizing "I live among men and not among angels." He would, he declared "take all I can get in the cause of humanity and leave it to be perfected by better men in better times."[95] The 2011 disagreement in the House of Representatives over acknowledgement of the three-fifths clause suggests that the United States is still awaiting "better men—and women—in better times."

NOTES

[1] In both the original Constitution ratified in 1788 and the Fourteenth Amendment of 1868, Native Americans were excluded from the calculation for apportionment, with the same wording of "excluding Indians not taxed." They were regarded as belonging to their own tribal groups until they became American citizens in 1924. Claudio Saunt, *Unworthy*

Republic: The Dispossession of Native Americans and the Road to Indian Territory (New York: W. W. Norton & Company, 2020), ch.1.

[2] The other provisions that deal with slavery—the fugitive slave clause and the slave-trade clause—similarly avoided using the words "slave" and "slavery." Indeed, the word "slavery" appears for the first time in the Constitution in the Thirteenth Amendment, the amendment that abolished it.

[3] See "After wrangling, Constitution is read on House floor, minus passages on slavery" The *Washington Post*, February 25, 2011. https://www.washingtonpost.com/national-politics/after-wrangling-constitution-is-read-on-house-floor-minus-passages-on-slavery/2011/01/06/ABLmphD_story.html; and "House to read Constitution out loud again on Thursday," National Constitution Center Blog, January 5, 2017. https://constitutioncenter.org/blog/house-to-read-constitution-out-loud-again-on-thursday.

[4] Leonard L. Richards, *The Slave Power: The Free North and Southern Domination 1780–1860* (Baton Rouge: Louisiana State University Press, 2000), 55. Direct tax was imposed in 1798, 1812, 1814, and 1815.

[5] David Brion Davis, *The Problem of Slavery in the Age of Revolution 1770–1823* (Ithaca: Cornell University Press, 1975), 104.

[6] Davis argues that "neither Jefferson nor Jackson would have been elected." David Brion Davis, *Inhuman Bondage: The Rise and Fall of Slavery* (New York: Oxford University Press, 2006), 17.

[7] Freehling contends that instead of the Age of Jefferson, we could have had the Age of Adams. William W. Freehling, *The Road to Disunion: Secessionists at Bay 1776–1854* (New York: Oxford University Press, 1990), vol. 1, 147.

[8] Richards, *The Slave Power*, 57. However, historians differ as to the proportion. Freehling asserts "only slightly." Freehling, *The Road to Disunion*, 147. Robinson argues the Southern share of congressional representation declined from 46.5% in 1790 to 42.3% after 1820. Donald L. Robinson, *Slavery in the Structure of American Politics 1765–1820* (New York: Harcourt Brace Jovanovich, Inc., 1971), 180.

[9] Freehling, *The Road to Disunion*, 559; Richards, *The Slave Power*, 45, 49–51, 56–59; Davis, *Inhuman Bondage*, 276–78; in the crucial 1830s the three-fifths clause provided an additional 21 votes in Congress to the South. Saunt, *Unworthy Republic*, 77.

[10] Richards, *The Slave Power*, chs.6–7; Robinson, *Slavery in the Structure of American Politics*, ch.11.

[11] Both Fehrenbacher and Ohline disagree with Lynd's theory of conspiracy that the Northerners accepted the three-fifths in exchange for the Northwest Ordinance. Staughton Lynd, "The Compromise of 1787," *Political Science Quarterly* (The Academy of Political Science), vol. 81, no.2, 1966; Fehrenbacher, *The Dred Scott Case: Its Significance in American Law & Politics* (New York: Oxford University Press, 1978), 79–81; Howard A. Ohline, "Republicanism ad Slavery: Origins of the Three-Fifths Clause in the United States Constitution," *The William and Mary Quarterly*, vol. 28, no. 4 (Oct. 1971), 566–67.

[12] Arthur Zilversmit, *The First Emancipation: The Abolition of Slavery in the North* (Chicago: The University of Chicago Press, 1967); Ira Berlin, *The Long Emancipation: The Demise of Slavery in the United States* (Cambridge: Harvard University Press, 2015).

[13] The three clauses of the constitution dealing with slavery "embody no ruling principle except compromise for the sake of union." Fehrenbacher, *The Dred Scott Case*, 26.

[14] Davis, *Inhuman Bondage*, 274; Davis, *The Problem of Slavery in the Age of Revolution*, 103–104.

[15] Davis, *The Problem of Slavery in the Age of Revolution*, 103–104.

[16] *Niles' Weekly Register*, December 4, 1819, 218.

[17] Ibid.

[18] While many historians identify the origin of the clause with the Constitutional Convention, the ratio had emerged during the Congress of Confederation, as indicated by Fehrenbacher and Robinson. Fehrenbacher, *The Dred Scott Case*, 19–20, 601; Robinson, *Slavery in the Structure of American Politics*, 156.

[19] Native Americans were not members of the United States but "residing within its legislative jurisdiction." James Madison, Alexander Hamilton and John Jay, *The Federalist Papers* (New York: J. and Mclean, 1788) Reprint. New York: Penguin Books, 1987, XLII.

[20] *The Federalist Papers.*, LI.

[21] Charles Francis Adams, *Works of John Adams*, vol. 2 (Boston: Little, Brown and Company, 1850), 496.

[22] Ibid., 496fn3. It appears that Chase, unlike others, used "negroes" to mean slaves.

[23] *Journal of the Continental Congress* (hereafter "*JCC*"*)*, vol. 6, 1098–110.

[24] Although Jan Lewis identifies it as 1775 based on the papers of James Madison, it is more likely to be 1776. Jan Lewis, "The Three-Fifths Clause and the Origins of Sectionalism," in *Congress and the Emergence of Sectionalism: From the Missouri Compromise to the Age of Jackson*, eds. Paul Finkelman and Donald R. Kennon (Athens: Ohio University Press, 2008), 25.

[25] Robinson, *Slavery in the Structure of American Politics*, 148.

[26] *JCC*, vol. 6, 1100; Fehrenbacher, *The Dred Scott Case*, 601.

[27] Howard A. Ohline, "Republicanism and Slavery: Origins of the Three-Fifths Clause in the United States Constitution," *The William and Mary Quarterly*, vol. 28, no. 4 (Oct. 1971), 564.

[28] Margo J. Anderson, *The American Census: A Social History*, 2nd ed. (New Haven: Yale University Press, 2015), 11.

[29] *JCC*, vol. 25, 948.

[30] Ibid. Whites is capitalized here because of the eighteenth-century convention of capitalizing nouns.

[31] Ibid., vol. 24, 281.

[32] Ibid., vol. 24, 295–311.

[33] It appears that a "black" meant a slave. In fact, during the era under discussion, *black* and *slave* were often used interchangeably.

[34] *JCC*, vol. 25, 949.

[35] Ibid.; Robinson, *Slavery in the structure of American Politics*, 157.

[36] Diana Schaub calls it "condition-based." Diana Schaub, "Three Fifths of All Other Persons," Law& Liberty, February 5, 2018. https://lawliberty.org/three-fifths-of-all-other-persons/.

[37] *JCC*, vol. 30, 102.

[38] Ibid., 105–108.

[39] Article 1, Section 8, Chapter 15 of the U.S. Constitution providing that Congress shall have power "to provide for calling forth the Militia" is the direct result of Shays's Rebellion. Earl M. Maltz, "The Idea of the Proslavery Constitution," *Journal of the Early Republic* (Philadelphia: University of Pennsylvania Press), Spring, 1997, 40.

[40] Max Farrand, ed., *The Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1911), vol. 1, 196

[41] Ibid., 208, 589–91.

[42] Ibid., vol. 2, 223.

[43] *The Federalist Papers*, LIV.

[44] Ibid.

[45] Orlando Patterson contends that "there has never existed a slaveholding society, ancient or modern, that did not recognize the slave as a person in law." Orlando Patterson, *Slavery*

and Social Death: A Comparative Study (Cambridge: Harvard University Press, 1982), 22.

[46] Don E. Fehrenbacher, *Constitutions and Constitutionalism in the Slaveholding South* (Athens: University of Georgia Press, 1989), 11–13, 88–89; Freehling, *The Road to Disunion*, 410–11.

[47] David W. Blight, Introduction to *My Bondage and My Freedom*, by Frederick Douglass (New Haven: Yale University Press, 2014), 368–73. Italics in original.

[48] Robert William Fogel, *Without Consent or Contract: The Rise and Fall of American Slavery* (New York: W. W. Norton & Company, 1989), 68–72; Robert Fogel and Stanley Engerman, *Time on the Cross: The Economics of American Negro Slavery* (New York: W. W. Norton & Company, 1974), 233.

[49] Davis, *Inhuman Bondage*, 298.

[50] Peter Kolchin, *American Slavery 1619–1877* (New York: Hill and Wang, 2003), 180.

[51] Thomas D. Morris, *Southern Slavery and the Law 1619–1860* (Chapel Hill:The University of North Carolina Press, 1996), 76–77.

[52] William Dusinberre, *Slavemaster President: The Double Career of James Polk* (New York: Oxford University Press, 2003), 5, 103–104.

[53] Morris, *Southern Slavery and the Law*, 89–93.

[54] Loren Schweninger, ed., *From Tennessee Slave to St. Louis Entrepreneur:The Autobiography of James Thomas* (Columbia: University of Missouri Press, 1983), 214.

[55] Douglass, *My Bondage and My Freedom*, 185–87.

[56] Michael Tadman, *Speculators and Slaves: Masters, Traders, and Slaves in the Old South* (Madison: The University of Wisconsin Press, 1989), ch.6; Steven Deyle, *Carry Me Back: The Domestic Slave Trade in American Life* (New York: Oxford University Press, 2005), 269–75.

[57] Douglass, *My Bondage and My Freedom.*, 30 & 32.

[58] Kolchin, *American Slavery*, 23; "Slave Marriages," *DeBow's Review*, August 1855, 130.

[59] Eugene D. Genovese, *Roll, Jordan, Roll: The World the Slaves Made* (New York: Vintage Books, 1972), 27.

[60] Morris, *Southern Slavery and the Law 1619–1860*, 66–68, 83; Genovese, *Roll, Jordan, Roll*, 53.

[61] *The Speech of Henry Berry in the House of Delegates of Virginia, on the Abolition of Slavery*, January 16, 1832, 3–4.

[62] Petition of Inhabitants of New Bern to the General Assembly, 15 December 1831, in Loren Schweninger, ed., *The Southern Debate over Slavery* (Urbana: University of Illinois Press, 2001), vol. 1: Petitions to Southern Legislature, 1778–1864, 131–34. Free black people of North Carolina were disfranchised in 1835. Ibid., 134.

[63] Oliver P. Temple, *East Tennessee and the Civil War* (Nashville: Fisk University Library Negro Collection, 1899) Reprint. New York: Books for Libraries Press, 1971, 108–10.

[64] Barbara Jeanne Fields, *Slavery and Freedom on the Middle Ground: Maryland during the Nineteenth Century* (New Haven: Yale University Press, 1985), 71.

[65] Petition of Residents of Maury, Bedford, Giles, Hickman, Williamson, Lincoln Counties to the Tennessee General Assembly, 1832, in Schweninger, *The Southern Debate over Slavery*, 137–39.

[66] Arthur F. Howington, " 'Not in the Condition of a Horse or an Ox': Ford v. Ford the Law of Testamentary Manumission, and the Tennessee Court's Recognition of Slave Humanity," *Tennessee Historical Quarterly*, vol. 34, no. 3 (Nashville: Tennessee Historical Society, 1975).

[67] Eric Foner, *The Fiery Trial: Abraham Lincoln and American Slavery* (New York: W. W. Norton & Company, 2010), 244–45.

[68] *Statues at Large*, 37th Congress, 1st sess., 319 (First confiscation act of 1861): 37th

Congress, 2nd sess. 355 (additional Article of War of 1862): Ibid., 591 (Second confiscation act of 1862): Ibid., 599 (Militia Act of 1862).

[69] Address of Hon T. A. R. Nelson to the People of East Tennessee, 3 Oct. 1862, *The War of the Rebellion: A Compilation of the Official Records of the Union and the Confederate Armies*, ser. I, vol. xvi, pt.2, 909–11. Readers wishing to learn more about Lincoln's composition of the Emancipation Proclamation and his decision to exempt Tennessee and other areas may consult John Hope Franklin's classic, *The Emancipation Proclamation* (New York Harlan Division, Inc. 1994; org. ed. 1963), as well as Foner, *Fiery Trial*, 241–42, and Joseph P. Reidy, *Illusions of Emancipation: The Pursuit of Freedom & Equality in the Twilight of Slavery* (Chapel Hill: The University of North Carolina Press, 2019), 35–37.

[70] William D. Bickham, *Rosecrans' Campaign with the Fourteenth Army Corps or the Army of the Cumberland: A Narrative of personal Observation, with An Appendix, consisting of official reports of the Battle of Sone River* (Cincinnati: Moore, Wilstach, Kerp & Co., 1863), 115–16.

[71] Ira Berlin et al., *Slaves No More: Three Essays on Emancipation and the Civil War* (Cambridge: Cambridge University Press, 1992), 203.

[72] Belin et al., *Freedom*, ser.2, 657–60.

[73] "Testimony by the Commissioner for the Organization of Black Troops in Middle and East Tennessee before the American Freedmen's Inquiry Commission," in Ira Berlin et al., *Freedom: The Wartime Genesis of Free Labor* (Cambridge: Cambridge University Press, 1993), vol.1, ser. 2 The Upper South, 420.

[74] Ira Berlin et al., *Freedom: A Documentary History of Emancipation 1861–1867* (Cambridge: Cambridge University Press, 1982) ser. 2: Black Military Experience, 582–83.

[75] Reidy, *Illusions of Emancipation*, ch.3.

[76] Berlin et al., *Freedom*, ser. 2, 1–34.

[77] An Act making Appropriation for the Support of the Army for the Year ending thirtieth June, eighteen hundred and sixty-five, and for other Purposes. *U.S. Statues at Large, Treaties and Proclamations of the United States*, vol. 13 (Boston, 1866), 126–30; Berlin et al., *Freedom*, ser. 2, 362–68; Black soldiers received ten dollars, minus three dollars for clothing, whereas white soldiers received thirteen dollars plus clothing. Berlin, *Freedom*, ser.2, 363.

[78] Thomas Wentworth Higginson, *Army Life in A Black Regiment* (Boston: Fields, Osgood & Co., 1869), Appendix D.

[79] Dudley Taylor Cornish, *The Sable Arm: Black Troops in the Union Army, 1861–1865* (Kansas: The University Press of Kansas), 185–86.

[80] Henry Greenleaf Pearson, *The Life of John A. Andrew, Governor of Massachusetts, 1861–1865* (Boston: Houghton, Mifflin and Company,1904), 2 vols, II, 105.

[81] Higginson, *Army Life in a Black Regiment*, Appendix D.

[82] Section 5 of the Enrollment Act of 3 March 1865. Cornish, *The Sable Arm*, 194–95.

[83] John Fabian Witt, *Lincoln's Code* (New York: Free Press, 2012), 381.

[84] *Official Records*, ser.1, vol.32, pt.1, 590–602; John Cimprich and Robert C. Mainfort, Jr., "The Fort Pillow Massacre: A Statistical Note," *The Journal of American History*, vol. 76, issue 3 (December 1989), 830–37.

[85] Roy P. Basler, "And for His Widow and His Orphans," *Quarterly Journal of the Library of Congress*, 27 (Oct. 1970), 290–94. There has been confusion about the ancestry of Lionel and Elizabeth Booth. Although John R. Sellers of the Manuscript Division of the Library of Congress identified Lionel as African American, Basler, Chief of the Manuscript Division, revealed that Booth was born in Philadelphia, "five feet inches high, Fair complexion, Blue eyes, Brown hair." Basler mentions an episode in which Elizabeth, who had "a lovely white skin," was surprised at finding "a Negro man" in a coffin when she visited the grave

containing hastily buried corpses at Fort Pillow. Exchanges of letters between Booth and Forrest and his rank, major, indicate that Booth was white. Elizabeth's being white would not preclude her appeal to Lincoln on behalf of African American widows. Berlin, *Freedom*, ser. 2. 303, 542–45.

[86] 38th Congress, *Senate Journal*, 1st sess., 3534.

[87] McClintock, "Civil War Pensions and the Reconstruction of Families," *The Journal of American History*, vol. 83, issue 2 (September 1996), 474; Gutman reveals that "youthful unions lasting between two and seven years," and soldiers were between 18 and 45 of age. Herbert G. Gutman, *The Black Family in Slavery and Freedom, 1750–1925* (New York: Vintage Books, 1976), 147–54; Tadman, *Speculators and Slaves*, ch.6.

[88] 39th Congress, 1st. sess., 56 (Act of June 6, 1866), 42nd Congress, 3rd. sess., 570 (Act of March 3,1873); see also McClintock, "Civil War Pensions and the Reconstruction of Union Families," 476; Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (New York: Belknap Press, 1992), ch.2.

[89] Berlin et al., *Freedom*, ser. 2, 279–81. Italics in original.

[90] Ibid., 284–85 (doc. 116). Italics in original.

[91] Ibid., 285–86 (doc. 117).

[92] Ibid., 283 (doc. 115).

[93] *Official Records*, ser. 4, vol. 3, 1012–13.

[94] For explication of disfranchisement and violence, see J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South 1880–1910* (New Haven: Yale University Press, 1974); Stephen Kantrowitz, *Ben Tillman & the Reconstruction of White Supremacy* (Chapel Hill: The University of North Carolina Press, 2000); Stephen A. West, *From Yeoman to Redneck in the South Carolina Upcountry, 1850–1915* (Charlottesville: University of Virginia Press, 2008); C. Vann Woodward, *Origins of the New South 1877–1913* (Baton Rouge: Louisiana State University Press, 1971).

[95] *Congressional Globe*, 39th Cong. 1st sess., 2459 & 3148; Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (New York: W. W. Norton & Company, 2019), ch.2.