"I AM FREE BUT WITHOUT A CENT": ECONOMIC JUSTICE AS EQUAL CITIZENSHIP

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The Fourteenth Amendment is one of the most-studied parts of the Constitution, but one of its central concerns has been long ignored by courts and scholars: economic justice. As this Article demonstrates, the Fourteenth Amendment's goal of redressing slavery's bitter legacy required sweeping new guarantees aimed at protecting the most exploited Americans—those who had been held in bondage, denied the fruits of their toil, physically violated, and consigned to crippling poverty and degradation. The rights of the poor and powerless to enjoy fundamental freedoms and meaningful equality thus lie at the very core of the Fourteenth Amendment's text and history. This aspect of the Fourteenth Amendment has never gotten its due.

The Fourteenth Amendment embodies three fundamental ideals—citizenship, rights, and protection—that protect the poorest of Americans. First, the Fourteenth Amendment promises equal citizenship to all regardless of race and class. The Amendment fundamentally altered our national charter to protect the equal citizenship stature of the poorest and most marginalized of Americans. Second, the Fourteenth Amendment, along with the Thirteenth Amendment, guarantees a number of economic rights, including the right to the fruit of one's toil, the right to contract, and the right to property, to limit economic domination. These economic rights were viewed as crucial to protecting Americans from economic exploitation, and they limited both governmental and private action. Third, the Fourteenth Amendment wrote the constitutional duty of protection into our national charter, imposing on states an affirmative constitutional obligation to protect their people. Under the Fourteenth Amendment, that protection must be equal for all persons, rich and poor alike.

The Supreme Court has failed to give these fundamental promises their due, producing a jurisprudence that turns a blind eye to the rights of poor people and reads the constitutional promise of economic justice out of our national charter. Recovering the true meaning of the Thirteenth and Fourteenth Amendments, as reflected in their text and history, would open the door to meaningful doctrinal

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changes that would help protect the rights of poor people and advance the effort to redress economic inequality.

INTRODUCTION

Racial and economic inequality are joined at the hip. Centuries of enslavement, racial segregation, economic exploitation, dispossession, and violence, together with the exclusion of Black people from key federal policies that grew white wealth, have produced a staggering, deeply entrenched racial wealth gap.[1] More than 150 years after the abolition of chattel slavery, Black Americans own only 1% of the wealth of the United States, a figure that has barely moved since the end of the Civil War.[2] Black families with children, on average, possess just one cent of wealth for every dollar owned by white families with children.[3] Indeed, across every metric—

[1] *See* Keeva Terry, *Black Assets Matter,* 57 TULSA L. REV. 197, 200-10 (2021); Students for Fair Admissions, Inc. v. President & Fellows of Harvard College, 600 U.S. 181, 387-396 (2023) (Jackson, J., dissenting).

[2] MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP 9 (2017).

[3] Christine Percheski & Christina Gibson Davis, *A Penny on the Dollar: Racial*

from income to homeownership, access to banking to education, employment to health care—race and economic insecurity are inextricably tied.[4]

White Americans, of course, are also afflicted by poverty and economic exploitation. Particularly in rural America, too many white families are left behind. Indeed, the white poor significantly outnumber the Black poor.[5] But Black poverty is uniquely associated with systemic disadvantage. Black Americans are overwhelmingly consigned to poor neighborhoods, which are associated with inequalities in education, environmental quality, credit, policing, and public health.[6] Because of the racial wealth gap, there is a yawning racial opportunity gap in this country.

Can the Constitution's promise of equal citizenship be deployed to redress the racial wealth gap? The account laid out in the U.S. Reports suggests that it cannot. The Supreme Court crafted its modern equal protection jurisprudence in the 1970s to leave untouched material forms of subordination "that may be more burdensome to the poor and to the average black than to the more affluent white."[7] And the Supreme Court's modern cases have, by and large, refused to interpret the Fourteenth Amendment to guarantee any measure of economic equality, or secure affirmative rights to subsistence, housing, education, or medical care.[8] Positive rights to government aid, on the Court's account, are not part of our foundational

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Inequalities in Wealth among Households with Children, 6 SOCIUS 1, 6 (2020).

[4] *See* Patrick Sharkey, et al., *The Gaps Between White and Black America, In Charts*, N.Y. TIMES, June 19, 2020, https://www.nytimes.com/interactive/2020/06/19/opinion/politics/opportunity-gaps-race-inequality.html; *Students for Fair Admissions*, 600 U.S. at 393 (Jackson, J., dissenting) ("The race-based gaps that first developed centuries ago are echoes from the past that still exist today. By all accounts, they are still stark.").

[5] *See* Emily A. Shrider & John Creamer, U.S. Census Bureau, Current Population Reports, P60-280, *Poverty in the United States 2022*, at 5-6 (2023).

[6] MATTHEW DESMOND, POVERTY, BY AMERICA 22-23 (2023); SHERYLL CASHIN, WHITE SPACE, BLACK HOOD: OPPORTUNITY HOARDING AND SEGREGATION IN THE AGE OF INEQUALITY 72 (2021) ("For a majority of Black Americans, segregation and exposure to poverty continue to be a lived reality."); Olatunde Johnson, *Inclusion, Exclusion, and the "New" Economic Inequality*, 94 TEX. L. REV. 1647, 1654 (2016) ("African-Americans are ten times as likely to live in poor neighborhoods as young whites, and . . . this experience of neighborhood poverty is durable, persistent, and inhibits intergenerational mobility.").

[7] Washington v. Davis, 426 U.S. 229, 248 (1976).

[8] *See* Dandridge v. Williams, 397 U.S. 471 (1970); Lindsay v. Normet, 405 U.S. 56 (1972); San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973), Harris v. McCrae, 448 U.S. 297 (1980); Kadrmas v. Dickinson Pub. Schools, 487 U.S. 450 (1988); see Julie A. Nice, *No Scrutiny Whatever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default*, 35 FORDHAM URB. L.J. 629, 629 (2008) ("Across constitutional doctrines, poor people suffer diminished protection, with their claims for liberty and equality receiving the least judicial consideration and functionally being routinely denied.").

charter.[9]

The Constitution's text and history tell a starkly different story, however. In fact, economic justice lies at the core of the Reconstruction Amendments. These Amendments center the rights and dignity of Black people who had long been robbed of the fruits of their labor and left impoverished by enslavement—those, like Peter Johnson, a formerly enslaved North Carolinian who penned a letter to the President in 1865, observing that "I am free but without a cent."[10] Together, they constitute a Second Founding that created a fundamentally new constitutive charter that expanded liberty and equality and bolstered the protective power of the federal government.[11] The Reconstruction Amendments safeguard basic rights—both rights against government oppression and positive rights to government aid and protection—and guarantee equal citizenship for the poorest and most marginalized members of the American populace. While scholars have produced a rich literature on how the Second Founding changed the Constitution, this key point remains obscure and under-appreciated: the Reconstruction Amendments sought to eradicate slavery's racial and economic caste system and guarantee equal citizenship to all Americans regardless of their race or how much money they possessed.[12]

This Article corrects this omission and deepens our understanding of the equal citizenship principle at the core of the Second Founding. It takes a comprehensive look at the text and history of the Reconstruction Amendments that guaranteed equal citizenship to all, protected economic rights and put constitutional limits on economic domination, guaranteed equal protection for rich and poor alike, and gave Congress the responsibility to dismantle caste systems that kept Black Americans and others down. In so doing, it uncovers and lays out a wealth of evidence that the Fourteenth Amendment guaranteed equal citizenship to all regardless of their economic position. This evidence—long slighted by the courts and the scholarly literature—makes plain what is evident from the Fourteenth Amendment's

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[9] Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 GEO. L.J. 1, 12 (2021) (critiquing the "positive-rights exclusion").

[10] *See* Letter from a North Carolina Freedman to the President (Nov. 23, 1865), *reprinted in* FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, 1861-1867, SER. 3, VOL. 1, LAND AND LABOR, 1865, at 724 (Steven Hahn et al. eds 2017); CONG. GLOBE, 39th Cong. 1st Sess. 516 (1866) (quoting letter from a Black Virginian explaining that "we colored people . . . are now left homeless, moneyless, and friendless").

[11] *See* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019).

[12] For helpful discussions, see, e.g., JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY 109-137 (2022); Mark A. Graber, *The Second Freedmen's Bureau Bill's Constitution*, 94 TEX. L. REV. 1361 (2016); James W. Fox, Jr., *Citizenship, Poverty, and Federalism: 1787-1882*, 60 U. PITT. L. REV. 421 (1999).

context: the Amendment guaranteed rights and demanded protection of the poorest, most marginalized members of the populace.

This Article is organized around three fundamental constitutional concepts: citizenship, rights, and protection. These ideas are at the heart of three great constitutional transformations wrought by the Thirteenth and Fourteenth Amendments.

First, the Fourteenth Amendment created a broad, inclusive equal citizenship principle.[13] It is well known that the Fourteenth Amendment established birthright citizenship and equal citizenship for all Americans regardless of race. What is less well known is that Reconstruction's transformation of citizenship did not end there; it also ensured equal citizenship to all regardless of their wealth, status, or class. The Reconstruction debates are replete with affirmations of "the absolute equality of rights of the whole people, high and low, rich and poor, white and black."[14] As the debates reveal, the Fourteenth Amendment changed the Constitution to ensure that "the poorest man, be he black or white, that treads the soil of this continent, is as much entitled to the protection of the law as the richest and proudest man in the land."[15] These broadly egalitarian constitutional principles reflect the Fourteenth Amendment's purpose of protecting the most exploited Americans—those who "had no rights," had been forced to toil the entirety of their lives without pay, and had "nothing" to "call [their] own."[16]

Second, to make the promise of equal citizenship real, the Thirteenth and Fourteenth Amendments, together with landmark enforcement legislation passed during Reconstruction, protect rights essential to economic citizenship—rights designed to ensure full economic participation and prevent economic domination.[17] To the Reconstruction Framers, "[t]he right of American citizenship means something"; it carried with it substantive fundamental rights, including rights critical to economic freedom and

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[13] *See* RANDY E. BARNETT & EVAN BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 376 (2021); Kenneth L. Karst, *The Supreme Court 1976 Term—Foreward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4 (1977).

[14] CONG. GLOBE, 39th Cong. 1st Sess. 1159 (1866).

[15] *Id.* at 343.

[16] *Id.* at 504; Cary Franklin, *The New Class Blindness,* 128 YALE L.J. 2, 96 (2018) (observing that "the Fourteenth Amendment emerged in the aftermath of the Civil War to protect an impoverished and disenfranchised group of people—people whose liberty and equal citizenship were especially vulnerable to infringement").

[17] *See* ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH CENTURY AMERICA 12 (2001) (defining "economic citizenship" as "the achievement of an independent and relatively autonomous status that marks self-respect and provides access to the full play of power and influence that defines participation in a democratic society").

equality.[18] These rights were critical to ensuring economic agency for those who had been held in bondage, forced to work from sunup to sundown, and left with nothing.

Third, the Second Founding amendments gave Congress the job of carrying out the Constitution's new guarantees, unwilling to leave the equal citizenship principle solely in the hands of the Court that had decided *Dred Scott*.[19] Congress had a constitutional duty to protect the new constitutional promises of liberty and equality. Judicially enforceable guarantees of individual rights, of course, were necessary, but they were not sufficient to realize the full promise of equal citizenship. Bold congressional action was needed to "break down all walls of caste" and ensure that "no portion of the population of the country shall be degraded or have a stain put upon them."[20] Thus, while courts had a critical role to play in vindicating individual rights, Congress possessed its own responsibilities that gave it more far-reaching ways to enforce the Constitution.[21] Indeed, the enforcement power expressly granted in each of the Reconstruction Amendments "was born of the conviction that Congress—no less than the courts—has the duty and the authority to interpret the Constitution."[22]

Providing access to essential goods and services was key to Reconstruction's legislative constitutionalism. To make possible the transition from bondage to equal citizenship, Congress acted—conscious of race—to redress entrenched poverty, ensure access to education, and, to a limited extent, broaden the distribution of land ownership. Building on Founding ideals that linked economic independence to freedom, the Reconstruction Framers insisted on the federal government's constitutional duty to redress economic destitution, ensure educational opportunities, and help Black people become self-sustaining economic agents. This was a thick conception of citizenship that demanded an activist state to intervene to protect the economic security of its citizens. "American citizenship," the Reconstruction Framers insisted, "would be little worth it if it did not carry protection with it."[23] Protection was an affirmative right that empowered the federal government to provide access to goods and services essential to equal citizenship stature. The legislation Congress passed to fulfill its

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[18] CONG. GLOBE, 39th Cong. 1st Sess. 1757 (1866).

[19] Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1805 (2010).

[20] CONG. GLOBE, 39th Cong. 1st Sess. 589, 340 (1866).

[21] *See* Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2031 (2003); Goodwin Liu, *Education, Equality and National Citizenship*, 116 YALE L.J. 330, 338-40 (2006); Balkin, *supra* note 19, at 1821.

[22] Michael McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 183 (1997).

[23] CONG. GLOBE, 39th Cong. 1st Sess. 1757 (1866).

constitutional duty of protection provides a critical gloss on the constitutional guarantee of equal protection that courts and scholars have long ignored.

Understanding the story of how the Reconstruction Amendments embedded economic justice in the Constitution is critical. For decades, conservatives have insisted that courts must protect the contract and property rights of the wealthy and the powerful and that any efforts at government redistribution are constitutionally illegitimate. The centerpiece of this is *Lochner v. New York* and other cases of the so-called *Lochner*-era, in which the Supreme Court struck down state and federal statutes that imposed maximum-hour, minimum-wage, and other kinds of economic regulations enacted to protect the health, safety, and welfare of workers.[24] *Lochner* correctly observed that the Fourteenth Amendment provides some protection for liberty of contract, but got everything else wrong, interpreting the Fourteenth Amendment to prevent governments from "alter[ing] the bargaining power between employers or employees, or more generally, the haves and the have-nots, the rich and the poor."[25] *Lochner*'s protection of liberty of contract is a dead letter today, but its anti-redistributionist spirit lives on in a number of different contexts.[26]

Taking account of the history of the Thirteenth and Fourteenth Amendments offers a powerful rejoinder to the anti-redistributionist constitutional accounts favored by conservatives. As this Article shows, the constitutional transformation from bondage to equal citizenship could not be achieved without a massive act of redistribution to those who had been kept in chains and poverty. By abolishing chattel slavery without compensation, the Thirteenth Amendment effectuated what Akhil Amar has called "the largest redistribution of property in American history," turning Southern society upside down.[27] Together, the Thirteenth and Fourteenth Amendments imposed on the government the duty to protect Black Americans in their newly-won freedom and equal citizenship stature, requiring the government to not only guarantee equal property and contract rights, but also to provide access to goods and services to make the promise of equal citizenship real—good and services that would have to be paid for by the American people in the form of higher taxation, as opponents of

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[24] *See* Lochner v. New York, 198 U.S. 45 (1905); Adair v. United States, 208 U.S. 161 (1908); Coppage v. Kansas, 236 U.S. 1 (1915); Adkins v. Children's Hospital, 261 U.S. 525 (1923).

[25] Akhil Reed Amar, *The Constitutional Virtues and Vices of the New Deal,* 22 HARV. J.L. & PUB. POL'Y, 219, 220 (1998).

[26] *See, e*.g. Genevieve Lakier, *The First Amendment's Real* Lochner *Problem*, 87 U. CHI. L. REV. 1241, 1245 (2020); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1455 (2015); Molly S. McUsic, *The Ghost of* Lochner: *Modern Takings Doctrine and its Impact on Economic Legislation*, 76 B.U. L. REV. 605, 609 (1996).

[27] AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 360 (2005).

Reconstruction bemoaned.[28] In the Reconstruction Framers' constitutional vision, it was the federal government's role to redress centuries of enslavement by fostering some minimal measure of economic security and access to education. This redistributive understanding of the Constitution remains critical today to redress systemic inequalities that fly in the face of the Fourteenth Amendment's promises of equal citizenship and equal protection.[29]

Taking seriously the idea that class is a matter of constitutional concern would produce a sea-change in a wide range of constitutional doctrines, potentially affecting criminal justice, education, housing, labor, welfare, democracy, and others. In these areas, the doctrines the justices have devised have fallen short of the Second Founding promise that "the poorest man, be he black or white, that treads the soil of this continent, is as much entitled to the protection of the law as the richest and proudest man in the land."[30] Today's Supreme Court is incredibly conservative and highly selective in its application of originalist analysis, but a Court that gave the Reconstruction Amendments their due would recognize that ending economic domination and ensuring economic freedoms and equality lie at the core of the Thirteenth and Fourteenth Amendments.

And getting this history right matters both in and out of the courts. Whether or not the Supreme Court respects this text and history, Congress has its own constitutional responsibility to make equal citizenship a reality for all. Congress can and should use its express constitutional powers to enacts reforms to help close the racial wealth gap, ensure some measure of economic security for all Americans, and eradicate practices that exploit low-income people and trap them in poverty. Reforms such as these would vindicate the broad, inclusive equal citizenship principle at the Fourteenth Amendment's core.

This Article proceeds as follows. Part I shows that the Framers of the Fourteenth Amendment understood the principle of equal citizenship as a guarantee of both racial and economic equality, reflecting the Framers' aim of securing equal citizenship to rich and poor alike. Part II turns from citizenship to rights, demonstrating that the Thirteenth and Fourteenth Amendments guarantee a bundle of economic rights to vindicate the promise of freedom and protect persons from economic domination. Part III examines the constitutional duty of protection through the lens of the Freedmen's

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[28] CONG. GLOBE, 39th Cong. 1st Sess. 362 (1866) (complaining that "hundreds and thousands of the negro race have been supported out of the Treasury of the United States, and you and I and the white people of this country are taxed to pay that expense").

[29] *See* Johnson, *supra* note 6, at 1665 (urging that "equality frameworks shift away from rights to redistribution" and "offer a new conception of how public goods might be shared").

[30] CONG. GLOBE, 39th Cong. 1st Sess. 343 (1866).

Bureau Act, Congress's effort to help transition Black Americans to their new status as equal citizens. As this history shows, the constitutional duty of protection was broadly understood by those who wrote the Fourteenth Amendment and included a broad range of basic necessities, including food, healthcare, and education. This provides important implications both for Congress's power to protect equal citizenship, but also for the meaning of the constitutional guarantee of equal protection. Part IV asks what it would mean to recover the constitutional ideal of economic justice. It sketches four foundational principles deeply rooted in the text and history of the Thirteen and Fourteenth Amendments. A short conclusion follows.

I. THE CONSTITUTIONAL GUARANTEE OF EQUAL CITIZENSHIP

The opening words of the Fourteenth Amendment declare that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[31] There are widespread disagreements about the meaning of this text, but it is common ground that Section One of the Fourteenth Amendment guarantees equal citizenship. Section Five of the Fourteenth Amendment imposes on Congress the duty to make equal citizenship a reality.[32]

The Fourteenth Amendment begins by guaranteeing birthright citizenship and declaring its primacy. With this concise declaration, the Fourteenth Amendment overruled the Supreme Court's abominable ruling in *Dred Scott v. Sanford*,[33] and rejected Chief Justice Taney's racialized conception of citizenship that excluded Black people from membership in the American polity.[34] Not only did the Fourteenth Amendment nullify *Dred Scott*, but it defined U.S. citizenship as "prominent and dominant instead of being subordinate and derivative," explicitly rejecting the idea that federal citizenship was merely a function of state citizenship.[35] This marked a sea-change from pre-war conceptions of citizenship in which Americans were

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[31] U.S. Const. amend. XIV, § 1.

[32] Fox, *supra* note 12, at 517; Liu, *supra* note 21, at 340.

[33] 60 U.S. (19 How.) 393 (1857).

[34] FONER, *supra* note 11, at 71.

[35] *See* Arver v. United States, 245 U.S. 366, 389 (1918); Philadelphia American, n.d. in SCRAPBOOK OF THE FOURTEENTH AMENDMENT 41 (Edward N. McPherson ed., n.d) ("[I]t specifically places the citizenship of the Republic above that of the States, and makes every man, native or naturalized, a citizen of the United States, so that hereafter there shall be no excuse for Rebels as that their paramount allegiance was due to their respective States.").

U.S. citizens by virtue of being citizens of the State in which they resided.[36] Going forward, the Fourteenth Amendment "put th[e] question of citizenship" into the nation's fundamental law and "beyond the legislative power" of those who would "pull the whole system up by its roots."[37]

While the Amendment's opening words secure equal citizenship as the birthright of all Americans,[38] the Reconstruction Framers did not stop there. Citizenship was not merely a legal status; it carried with it substantive fundamental rights.[39] In the Privileges or Immunities Clause, the Fourteenth Amendment explicitly guaranteed that citizens would enjoy all fundamental rights.[40] This itself was a powerful guarantee of equal citizenship. By demanding that states respect the fundamental rights of all citizens, the Privileges or Immunities Clause forbids states from taking away rights from the most marginalized members of the populace.[41] For decades, Black people had insisted that they were Americans entitled to all the rights of citizens. At long last, the Fourteenth Amendment endorsed the idea that Black people were citizens entitled to equal rights, dignity, and respect.[42]

Citizenship was a thick concept in a second sense as well: it was closely associated with protection. To the Reconstruction Framers, it was a "self-evident" legal principle that "protection by his government is the right of every citizen."[43] Allegiance and protection were "the essential elements of citizenship": "[u]pon whatever square foot of earth's surface I owe allegiance to my country, it owes me protection."[44] Indeed, speakers regularly insisted

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[36] *Dred Scott*, 60 U.S. at 406; *id.* at 577 (Curtis, J., dissenting).

[37] CONG. GLOBE, 39th Cong. 1st Sess. 2896 (1866); Michael Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L.J. 405, 417 (2020).

[38] *See* AMAR, *supra* note 27, at 382 ("Though the word 'equal' did not explicitly appear in the Fourteenth Amendment, the concept was strongly implicit. All persons born under the flag were citizens and thus *equal* citizens."); Kurt T. Lash, *The State Citizenship Clause*, 25 U. PA. J. CON. L. __, __ (forthcoming 2024) ("To the public that ratified the Fourteenth Amendment, the concept of citizenship necessarily involved the principle of equal rights."), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4196204.

[39] Fox, *supra* note 12, at 503.

[40] *See, e.g.,* BARNETT & BERNICK, *supra* note 13, at 43; JACK M. BALKIN, LIVING ORIGINALISM 191 (2011).

[41] David H. Gans, *The Unitary Fourteenth Amendment*, 56 EMORY L.J. 907, 920 (2007).

[42] KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION 337 (2021); James W. Fox, Jr., *The Constitution of Black Abolitionism: Reframing the Second Founding*, 23 U. PA. J. CON. L. 267, 339 (2021).

[43] CONG. GLOBE, 39th Cong. 1st Sess. 1293 (1866).

[44] *Id.* at 570, 1263. As numerous speakers stressed, the reciprocal duties of allegiance and protection were foundational to citizenship. *Id.* at 1152, 1757, 1832, 2799; see Steven J. Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 DUKE L.J. 507, 510 (1991); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863,

that "the first duty of the Government is to afford protection to its citizens."[45] Protection was understood as a positive right that required the government to take affirmative acts—and spend money—to safeguard rights and execute protective laws.[46] To protect meant to enforce the laws to secure the life, liberty and property of all people. As we shall see, protecting Black people in their new status as citizens included providing basic goods and services—such food, medical assistance, and access to education—to make equal citizenship a reality.[47] These cost money, but to the Reconstruction Framers, it was the job of the government to protect its citizenry.

The Equal Protection Clause wrote the right to protection directly into the text of the Constitution, imposing on states the constitutional duty to protect all persons equally in their legal rights. It "h[e]ld over every American citizen, without regard to color, the protecting shield of the law" and gave to "the humblest, the poorest, the most despised of the race the same rights and same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty."[48] This puts limits on state-sponsored discrimination. And equal laws were not enough; states now had a positive constitutional duty to protect the life, liberty, and property of all its residents. States could not turn a blind eye when whites conspired together to subjugate Black people or other marginalized persons.[49] Rather than acting to keep Black people landless, impoverished, and subservient, states now had a constitutional duty to protect their enjoyment of legal rights.

The Fourteenth Amendment thus "settle[d] the great question of citizenship" and embedded in the Constitution three fundamental concepts: birthright citizenship, the guarantee of fundamental rights inherent in citizenship, and the constitutional duty of protection.[50] This represented the

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891 (1986).

[45] CONG. GLOBE, 39th Cong. 2d Sess. app. 101 (1867).

[46] Bernick, *supra* note 9, at 49; Heyman, *supra* note 44, at 530-545; Andrew T. Hyman, *The Substantive Role of Congress under the Equal Protection Clause*, 42 SO. UNIV. L. REV. 79, 109-110 (2014); CONG. GLOBE, 39th Cong. 1st Sess. 588 (1866); CONG. GLOBE, 42nd Cong., 1st Sess. app. 300 (1871).

[47] *See* Part III *infra*.

[48] CONG. GLOBE, 39th Cong. 1st Sess. 2462, 2766 (1866).

[49] CONG. GLOBE, 39th Cong. 1st Sess. 1833 (`866) ("[T]here are two ways a State may undertake to deprive citizens of the[ir] absolute, inherent, and inalienable rights: either by prohibitory laws or a failure to protect any of them."); CONG. GLOBE, 42nd Cong., 1st Sess. app. 71 (1871) (arguing that "the Fourteenth Amendment requires equal laws and protection for all"); CONG. GLOBE, 42nd Cong., 1st Sess. 506 (1871) ("Is there not a positive duty imposed on States by this language to see to it—not only that the laws are equal, affording protection to all alike, but that they are executed, enforced . . . ?"); Bernick, *supra* note 9, at 51-52 (arguing that the Equal Protection Clause "condemns all state and non-state conduct that enables some to control the lives, bodies, and possessions of others").

[50] CONG. GLOBE, 39th Cong. 1st Sess. 2890 (1866).

culmination of decades of struggle over the question of citizenship and the rights of citizens, begun by Black Americans and abolitionists in the 1830s, and brought to fruition in the wake of abolition. No sooner than the Thirteenth Amendment was ratified, Republicans insisted that the Thirteenth Amendment's abolition of chattel slavery obliterated *Dred Scott*'s underpinnings and guaranteed Black Americans full citizenship.[51] To enforce the Thirteenth Amendment, the 39th Congress enacted the Civil Rights Act of 1866, which included an explicit guarantee of birthright citizenship as well as guarantees of equal civil rights. The Fourteenth Amendment made explicit what was implicit in the Thirteenth Amendment: the Constitution promised full citizenship to all.[52]

The 39th Congress debated at length the meaning of the Thirteenth and Fourteenth Amendments and Congress's duty to help realize their constitutional promises of freedom and equality. What is particularly striking about these debates is that, time and again, Reconstruction's supporters drew on principles of economic equality. Class—as well as race—was a matter of constitutional concern. Republicans pushed to change the Constitution to ensure "the poorest man, be he black or white, that treads the soil of this continent is as much entitled to the protection of law as the richest and proudest man in the land," and provide the "amplest guarantees for the liberties of the poor, the weak and the lowly."[53] While their opponents raised fears that, in an America committed to equality, there would be no one to "black boots" and perform "the menial offices of the world,"[54] Republicans pledged that "we shall not peril one single right of the poorest man that treads the soil of the country," insisting that rich and poor alike were entitled to the same rights as equal citizens.[55] Equal citizenship would be illusory if it did not protect those on the margins of society. In the Framers' vision, the Constitution should be "a shield and protection over the head of the lowliest and poorest citizen in the remotest region of the nation."[56] Statements such

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[51] MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 48 (1986).

[52] *See* Fox, *supra* note 42, at 346 (describing "section one of the Fourteenth Amendment" as a "more detailed exposition of the Thirteenth Amendment's establishment of freedom").

[53] CONG. GLOBE, 39th Cong. 1st Sess. 343, 346 (1866).

[54] *Id.* at 342.

[55] *Id.* at 346; *id.* at 343 ("Does he not know we mean that the poor man, whose wife may be dressed in a cheap calico, is as much entitled to have her protected by equal law as is the rich man to have his jeweled bride protected by the laws of the land? Does he not know that the poor man's cabin, though it may be the cabin of a poor freedman in the depths of the Carolinas, is entitled to the protection of the same law that protects the palace of a Stewart or an Astor?").

[56] *Id.* at 586; *id.* at 438 ("[T]he weaker they were the more the government was bound to foster and protect them."); *id.* at 158 (urging that states "shall be bound to respect the

as these were neither accidental nor aberrational. They reflected the Fourteenth Amendment's aim of redressing the degradation and exploitation of the most marginalized members of society. Eliminating slavery's racial and economic caste system required nothing less.

Equal citizenship received sustained consideration during the debates over the Civil Rights Act of 1866, Congress's effort to annul the Black Codes enacted by Southern legislatures to strip Black people of nearly every aspect of freedom and reinstitute slavery in all but name. The Act guaranteed birthright citizenship and safeguarded the equal civil rights of citizens to access the courts, to make and enforce contracts, and to possess and use property.[57] There is a plentiful scholarly literature on the text and history of the Civil Rights Act of 1866 and its relationship to the Fourteenth Amendment,[58] but little attention has been paid to the fact that the Act's equal citizenship principle was designed to protect rich and poor persons alike. During the debates, Representative James Wilson argued that the Civil Rights Act was meant "to protect our citizens from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men."[59] This reflected the idea, as Representative William Windom observed, that "[a] true republic rests upon the absolute equality of rights of the whole people, high and low, rich and poor, white and black."[60] The Act's protections, Windom stressed, were essential to safeguard "a poor, weak class of laborers" and ensure they "enjoy the fruits of their own labor."[61]

Indeed, as numerous speakers highlighted, one of the most pernicious aspects of the Black Codes were vagrancy laws that sought to criminalize Black poverty in order to continue enslaving those freed from bondage.[62] Mississippi's Black Code, for example, criminalized "persons who neglect their calling or employment, misspend what they earn," and "do not provide for the support of themselves of their families"—open-ended prohibitions tailor-made to allow the Southern criminal law apparatus to push Black people back into enslavement simply because they were poor.[63] Other states

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rights of the humblest citizen of the remotest State of the Republic").

[57] *See* 14 Stat. 27 (1866); *see infra* text accompanying notes 137-147 (discussing the rights guaranteed by the Civil Rights Act of 1866).

[58] *See, e.g.*, BARNETT & BERNICK, *supra* note 13, at 117-27; CURTIS, *supra* note 51, at 71-83; FONER, supra note 11, at 63-68.

[59] CONG. GLOBE, 39th Cong. 1st Sess. 1118 (1866).

[60] *Id.* at 1159.

[61] *Id.*

[62] *Id.* at 1123, 1160. On vagrancy laws as a form of criminalization of poverty, see Monica Bell et al., *Towards a Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1480-81 (2020).

[63] An Act to Amend the Vagrant Laws of the State, § 1, *reprinted in* S. EXEC. DOC. 39-

had similarly broadly-worded prohibitions. Alabama criminalized as vagrants a worker "who loiters away his time,"[64] while South Carolina's Black Code made it a crime for workers to lack "some visible and known means of a fair, reputable, and honest livelihood" or fail to "provide a reasonable and proper maintenance for themselves and families."[65] Mississippi's Black Code also authorized localities to levy a poll tax of up to one dollar on every Black man aged 18-60 to support the Freedmen's Pauper Fund and made failure to pay prima facie evidence of vagrancy, criminalizing those too poor to pay.[66]

A critically important—and long ignored—portion of the debate over the Civil Rights Act of 1866 underscores the idea that the equal citizenship principle protects rich and poor alike and imposes on the government the positive duty to protect poor people in their rights. During the debates over the Act, Representative James Wilson objected to a proposal to replace the Act's criminal penalties with a civil remedy. As Wilson explained, eliminating the Act's criminal penalties would short-change poor people, many of whom would be unable to afford the costs of pursuing a civil suit. Wilson's argument is worth quoting at length:

> This bill proposes that the humblest citizen shall have the full and ample protection at the cost of the Government, whose duty is to protect him. The amendment . . . recognizes the principle involved, but it says that the citizen despoiled of his rights, instead of being properly protected by the Government, must press his own way through the courts and pay the bills attendant thereon. This may do for the rich, but to the poor, who need protection, this is a mockery. [67]

Wilson further explained that protection was an affirmative right that required the government to spend money to protect its citizenry:

> The highest obligation which the Government owes to the citizen in return for the allegiance exacted of him is to secure him protection of

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6, at 192 (1867); *reprinted in* S. EXEC. DOC. 39-6, at 192; *see also* David H. Gans, *"We Do Not Want to be Hunted": The Right to be Secure and Our Constitutional Story of Race & Policing,* 11 COL. J. RACE & L. 239, 270-76 (2021).

[64] An Act Concerning Vagrants and Vagrancy, § 2, *reprinted in* S. EXEC. DOC. 39-6, at 170.

[65] An Act to Establish and Regulate the Domestic Relations of Persons of Color, and to Amend the Law in Relation to Paupers and Vagrancy, § 96, *reprinted in* S. EXEC. DOC. 39-6, at 218-19.

[66] An Act to Amend the Vagrant Laws of the State, §§ 6-7, *reprinted in* S. EXEC. DOC. 39-6, at 193.

[67] CONG. GLOBE, 39th Cong., 1st Sess. 1295 (1866).

> his rights. Under the amendment . . . the citizen can only receive that protection in the form of a few dollars in the way of damages, if he shall be so fortunate as to recover a verdict against a solvent wrong-doer. This is called protection. This is what we are asked to do in the way of enforcing the bill of rights. Dollars are weighed against the right of life, liberty, or property. . . . I cannot see the justice of that doctrine. I assert that it is the duty of the Government of the United States to provide proper protection, and to pay the costs attendant on it.[68]

In a lopsided vote, Congress retained the Act's criminal penalties,[69] and it ultimately passed the Civil Rights Act of 1866 over President Johnson's veto. This decision demonstrated Congress's broad understanding of its power to enforce the Thirteenth Amendment, but this fight crystallized the need for new, far-reaching changes to our nation's fundamental charter.

The debates over the Fourteenth Amendment, too, affirmed principles of economic equality, safeguarding equal citizenship for all Americans regardless of their economic status. Introducing the Fourteenth Amendment, Senator Jacob Howard explained that the Fourteenth Amendment "gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty."[70] In the House, Representative Jehu Baker argued that it was "a disgrace to a free country that the poor and weak members of society should be denied equal justice and equal protection at the hands of the law."[71] Adding a constitutional requirement of equal protection for all persons, he thought, "is so obviously right, that one would imagine nobody could be found so hard-hearted and cruel as not to recognize its simple justice."[72]

Similar understandings were voiced repeatedly during the debates over the ratification of the Fourteenth Amendment. On the campaign trail, Representative John Bingham argued that the equal protection guarantee was a "sublime example of a great and powerful people" inscribing in their foundational charter that "the humblest human being anywhere within their limits shall have the same protection under the law as the President himself."[73] It meant that "Lazarus in his rags shall be as sacred before the majesty of the American law as the rich man clothed in purple and fine

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[68] *Id.*
[69] *Id.* at 1296.
[70] *Id.* at 2766.
[71] CONG. GLOBE, 39th Cong. 1st Sess. app. 256 (1866).
[72] *Id.*
[73] *Mr. Bingham's Speech*, WHEELING DAILY INTELLIGENCER, Sept. 5, 1866.

linen."[74] Representative Schuyler Colfax, speaking in Plymouth, Indiana, called the Fourteenth Amendment's affirmation that "the protection of its equal laws could be invoked by the poor as well as by the rich" the "noblest boast of a government."[75] In the Pennsylvania ratification debates, Representative John Mann stressed that the Fourteenth Amendment "makes every person equal before the law" and would ensure impartial judging to persons of all races and classes by "prohibit[ing] any judge in any State from looking at the wealth or poverty, the intelligence or ignorance, the condition and surroundings, or even the color of the skin, of any person coming before him."[76] Finally, conventions of Black citizens, meeting as the nation considered whether to ratify the Fourteenth Amendment, urged Americans to "place justice and equality in your Constitution . . . . Let equality of rights be the foundation of your institutions. Let the rich and poor, the black and the white, the learned and the ignorant, stand on the broad platform of legal equality."[77]

This mass of evidence shows that the Fourteenth Amendment (1) secured equal citizenship stature for Americans regardless of wealth, status, or income; (2) guaranteed to all the same rights and same protection of the law regardless of how much money they possessed; and (3) imposed on the government the duty to protect poor people in their rights, even if that required the government to expend funds to do so. The right to protection was a positive right that imposed on the government the obligation "to pay the costs attendant on it."[78]

What explains these numerous affirmations that the Fourteenth Amendment protected rich and poor alike? The Reconstruction Framers understood that slavery was both a racial and economic caste system that had brutalized Black people, robbed them of the fruits of their labor, and consigned them to poverty—leaving them "without a hut to shelter them or a cent in their pockets."[79] Black people were the poorest of the poor—because of centuries of bondage. "From the beginning to the present time," Representative John Hubbard insisted, "they have been robbed of their

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[74] *Id.*

[75] *Colfax and Turpie in Plymouth*, MARSHALL COUNTY REPUBLICAN, Sept. 27, 1866, at A2.

[76] APPENDIX TO THE PENNSYLVANIA LEGISLATIVE RECORD xcix (1867), quoted in James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio and Pennsylvania*, 18 AKRON L. REV. 435, 463 (1985).

[77] PROCEEDINGS OF CONVENTION OF COLORED CITIZENS HELD IN THE CITY OF LAWRENCE, OCT. 17, 1866, at 7 (1866), https://omeka.coloredconventions.org/items/show/527.

[78] CONG. GLOBE, 39th Cong. 1st Sess. 1295 (1866).

[79] CONG. GLOBE, 39th Cong. 1st Sess. 74 (1865).

wages, to say nothing of the scourgings they have received."[80] Black Americans had "never been permitted to earn one dollar for themselves" and "are now steeped in poverty."[81] As conventions of Black citizens stressed, all "avenues of wealth and education have been closed to us."[82] And in the wake of the war's end, white Southerners aimed to devise new forms of servitude to "keep" Black Americans "in a perpetual condition of poverty and dependence."[83]

Poor people—whatever their race—were entitled to be treated as equal citizens. The Reconstruction Framers recognized the commonalities between Black and white poor people. While it went unquestioned that Black Americans were the "most oppressed type of the toiling men of this country," the Framers also appreciated that "the same influences that go to keep down and crush down the rights of the poor black man bear down and oppress the rights of the poor white laboring man."[84]

Thus, the Fourteenth Amendment centers the rights of poor people, demanding the protection of fundamental rights and equality for all—regardless of wealth, status, and income. Ensuring some measure of economic justice was necessary to make equal citizenship a reality. That explains why the Reconstruction Framers time and again insisted on protecting the equal citizenship stature of the poorest and most marginalized of Americans.

The Fourteenth Amendment rejected the idea, set out in an 1858 speech by South Carolina Senator James Henry Hammond, that Black Americans were "the very mudsill of society" and were fit only to perform "the menial duties" and "the drudgery of life" at the behest of whites.[85] Under the Fourteenth Amendment, there are no mudsills; there is no class of persons so debased and degraded that they are permanently relegated to performing "the

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[80] *Id.* at 630; *id.* at 319 ("[W]e have thrown upon us four million people who have toiled all their lives for others; . . . who were never permitted to own anything, never permitted to eat the bread their own hands had earned, many of whom are without any means of support.").

[81] *Id.* at 939, 3035; *id.* at 937 ("They have become free without any of the world's goods, not owning even the hats upon their heads or the coats on their backs, without supplies of any kind, not knowing often where to obtain the next meal to save them from starvation."); CONG. GLOBE, 38th Cong. 2d Sess. 693 (1865) ("We have four million people in poverty because our laws have denied them the right to acquire property.").

[82] PROCEEDINGS OF THE COLORED PEOPLE'S CONVENTION OF THE STATE OF SOUTH CAROLINA 27 (1865).

[83] REPORT OF JOINT COMM. ON RECONSTRUCTION, H.R. Rep. 39-30, pt. II, at 427 (1866).

[84] CONG. GLOBE, 39th Cong. 1st Sess. 343 (1866).

[85] CONG. GLOBE, 35th Cong. 1st Sess. app. 71 (1858). Hammonds insisted that a class of menial laborers was necessary in every society, whether founded on chattel slavery or not. According to Hammond, without a class relegated to the bottom of the social structure, "you would not have that other class which leads progress, civilization, and refinement." *Id.*

drudgery of life." On the contrary, as the text and history of the Fourteenth Amendment reflect, all Americans—whether rich or poor—are equal citizens guaranteed the same fundamental rights and same protection under the law. Under the Fourteenth Amendment, there are no constitutionally disfavored classes. As Representative William Lawrence argued, "distinctions were never contemplated or recognized as possible in fundamental civil rights, which are alike necessary and important to all citizens, and to make inequalities in which is rank injustice."[86] In short, equal citizenship is universal. Even the most marginalized persons possess the right to belong as a full and equal member of the American community. As future President James Garfield declared, "the humblest, the lowest, the meanest of our citizens shall not be prevented from passing to the highest place he is worthy to attain."[87]

In declaring poor people to be equal citizens, the Fourteenth Amendment marked a radical departure from pre-war constitutional understandings about the rights of poor people. At the Founding, the Privileges and Immunities Clause of the Articles of Confederation excluded paupers and vagabonds from its protection.[88] This exception did not find its way into the Constitution's text, but the idea that poor people were less than full citizens and could be treated as legal pariahs still loomed large in antebellum America.[89] Using their police powers, state and local governments had broad powers to adopt harsh and punitive rules to govern the poor and poor relief.[90]

The Supreme Court's 1837 decision in *Mayor of New York v. Miln*,[91] which upheld a New York law that required ship owners to post a bond to cover expenses the state might incur in providing poor relief to the ship's passengers, illuminates the status of the poor in the antebellum constitutional order. In upholding the law against a Dormant Commerce Clause challenge, the Court held it was "as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence" arising from "unsound and infectious articles."[92] Justice William Story dissented, but he agreed with the majority that states "have a right to pass poor laws, and laws to prevent the introduction of paupers into the state."[93] In short, *Miln*

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[86] CONG. GLOBE, 39th Cong. 1st Sess. 1836 (1866).

[87] *Id.* at app. 67.

[88] ARTICLES OF CONFEDERATION, art. IV (1781).

[89] Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 338 (1989) (discussing the "classical republican notion that only property ownership conferred independence on a man").

[90] MASUR, supra note 42, at 4-6.

[91] 36 U.S. (11 Pet.) 102 (1837).

[92] *Id.* at 142-43.

[93] *Id.* at 156 (Story, J., dissenting).

held that states could treat poor people as a threat to community safety and well-being—a point it underscored by analogizing poor people to the diseased. *Miln*, as James Fox has argued, "effectively rendered the poor second-class citizens in constitutional law" and made plain that "the poor were properly regulated by the states because of their second-class status."[94] And, as Kate Masur has shown, in pre-war America, state power over the poor was inextricably linked to efforts to subordinate Black Americans.[95]

The Fourteenth Amendment effected a fundamental transformation in the status of poor people as equal citizens. Before the Civil War, poor people were, at best, second-class citizens who could be treated, in *Miln*'s words, as a "moral pestilence."[96] The Fourteenth Amendment jettisoned this brand of tiered citizenship. Against the backdrop of cases like *Miln* that relegated poor people to a degraded form of citizenship, the Fourteenth Amendment guaranteed birthright citizenship, fundamental rights and the equal protection of the laws to the poorest of the poor.[97] Poor people—whatever their race—were entitled to be treated as full and equal members of the populace. States had to respect the basic rights of poor people. But what rights were included in the citizenship bundle guaranteed by the Thirteenth and Fourteenth Amendments? The next Section turns to examine that question.

II. THE SECOND FOUNDING AND THE RIGHTS OF ECONOMIC CITIZENSHIP

Slavery was a system of economic exploitation, and it should thus come as no surprise that the constitutional amendments designed to erase the stain of slavery from the Constitution and ensure equal citizenship protected economic rights.

The Thirteenth Amendment broadly outlaws all forms of coerced servitude, declaring that "[n]either slavery nor involuntary servitude . . . shall exist within the United States."[98] While its promise of freedom was compromised by the permission it gave states to punish those convicted of crime by sentencing them to forced labor,[99] the Thirteenth Amendment is

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[94] Fox, *supra* note 12, at 466.

[95] *See* MASUR, supra note 42, at 12 (observing that "the poor-law tradition . . . gave racist laws legitimacy and made them hard to dislodge").

[96] *Miln*, 36 U.S. at 142.

[97] Fox, *supra* note 12, at 521.

[98] U.S. Const., amend XIII, § 1.

[99] Michelle Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism and Mass Incarceration*, 104 CORNELL L. REV. 899, 933 (2019) (discussing how the Thirteenth Amendment's Punishment Clause "functionally preserved slavery as a means of persistent racial subjugation"). For the argument that the Amendment's framers read the Punishment Clause narrowly, see James Gray Pope, *Mass Incarceration, Convicting Leasing, and the Thirteenth Amendment: A Revisionist Account,* 94 N.Y.U. L. REV. 1465, 1470-1501 (2019).

perhaps the only part of the Constitution that explicitly aims to prevent economic domination and subjugation.[100]

To achieve this goal, the Thirteenth Amendment safeguards certain fundamental rights of free labor. Although phrased as a prohibition on slavery and involuntary servitude, the Amendment was understood from the beginning as a broad declaration of freedom that would guarantee basic fundamental rights and eliminate the badges and incidents of enslavement.[101] Among these rights were a set of free labor rights, including the right to enjoy the fruits of one's labor.[102] During the debates over the Thirteenth Amendment, Representative Ebon Ingersoll argued that the Thirteenth Amendment would "secure to the oppressed slave his natural and God-given rights," including the "right to till the soil, to earn his bread by the sweat of his brow, and enjoy the rewards of his own labor."[103] Senator Timothy Howe likewise stressed that the Amendment would give Black people "the privilege of working for themselves and enjoying the fruits of their own toil."[104] The right to the fruit of one's labors marked the basic difference between free labor and the economic domination and subjugation associated with enslavement and involuntary servitude.[105] By guaranteeing workers the right

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[100] *See* James Gray Pope, *What's Different About the Thirteenth Amendment, and Why Does it Matter?*, 71 MD. L. REV. 189, 196 (2011) ("[T]he Thirteenth Amendment directly attacks relations of domination and exploitation.").

[101] Dorothy Roberts, *The Supreme Court, 2018 Term, Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 71 (2019) ("Abolishing slavery meant guaranteeing everyone's human right to freedom—to be free from domination by state or private masters, to be able to control one's life and labor."); James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 U.C.L.A. L. REV. 426, 428 (2018) (arguing that "badges and incidents" are "*components* of the slavery and servitude outlawed by Section 1").

[102] FONER, supra note 11, at 42 ("No phrase was repeated more in the discussions of the amendment than one Lincoln had himself had long emphasized—the right to the fruits of one's labor, an essential distinction between slavery and freedom."); Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 473 & n.152 (1989) (collecting references).

[103] CONG. GLOBE, 38th Cong. 1st Sess. 2990 (1864).

[104] *Id.* at app. 113; CONG. GLOBE, 38th Cong. 1st Sess. 1313 (1864) (invoking "the right of every man to eat the bread his own hands earned"); CONG. GLOBE, 38th Cong. 2d Sess. 200 (1865) ("What vested rights so high or so sacred as a man's right to himself, to his wife and children, to his liberty, and to the fruits of his own industry? Did not our fathers declare that those rights were inalienable?").

[105] CONG. GLOBE, 38th Cong. 1st Sess. 1200 (1864) ("Slavery is defined to be 'the state of entire subjection of one person to the will of another.'"); CONG. GLOBE, 38th Cong. 2d Sess. 177 (1865) ("[S]ervitude rendered necessary by circumstances which the servile party cannot control, is bondage."); James Gray Pope, *Contract, Race and Freedom of Labor in Constitutional Law of "Involuntary Servitude,"* 119 YALE L.J. 1474, 1506 (2010) (arguing that "'servitude' connotes a subset of employment relations that involve a level of subjugation inconsistent with liberty"); Jack M. Balkin & Sanford Levinson, *The Dangerous*

to enjoy the fruits of their labor, the Thirteenth Amendment put constitutional limits on economic exploitation.

What was the meaning of the right to enjoy the fruits of one's labor? On one level, it meant that workers had to be paid for their labor; there was no going back to the unrequited toil of bondage.[106] But it had a broader meaning as well. To enjoy the fruits of their labor and escape economic servitude, workers had to possess the right to quit employment and end an exploitative working relationship, the right to change employers, and the right to set and bargain over their wages and working conditions.[107] To Black Americans now liberated from enslavement, freedom meant "taking us from under the yoke of bondage and placing us where we could reap the fruit of our own labor and take care of ourselves."[108] From this view, to enjoy the fruits of one's labor required some measure of economic independence. These principles of labor freedom were front and center in 1865 and 1866, when Congress sought to formulate a legislative response to the Black Codes.

As white Southern governments returned to power, they created new forms of economic servitude to force Black Americans to continue to work for their former enslavers. The Black Codes contained a web of interlocking commands and proscriptions, including restrictions forbidding Black people from owning or renting real property, licensing requirements that were priced sky high to prevent Black people from running their own business, and demands that all Black residents enter into year-long labor contracts or face fines, imprisonment, or being sold under new, sweeping vagrancy laws.[109] Indeed, under the vagrancy provisions, even workplace misconduct—such as being stubborn, failing to obey orders, or refusing to comply with a labor contract—could be deemed a crime.[110] Works hours—as in bondage—were set from sunup to sundown, and workers would forfeit their wages by leaving

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Thirteenth Amendment, 112 COLUM. L. REV. 1459, 1484 (2012) ("[T]he true marker of slavery was that slaves were always potentially subject to domination and to the arbitrary will of another person.").

[106] ERIC FONER, THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY 113 (2010) (discussing Lincoln's critique of slavery as "a form of theft" in which the enslaved worker is "illegitimately denied the fruits of his or her labor").

[107] *See* Pope, *supra* note 10599, at 1507 (discussing "the right of freed people to change employers and set their own wages"); VanderVelde, *supra* note 102, at 496 ("[Workers] had to have the right to quit and to secure new employment without the former employer's consent. They also had to have the right to choose employers and the terms on which they would work.").

[108] *Documents: Colloquy with Colored Ministers,* 16 J. NEGRO. HIST. 88, 91 (1931).

[109] *See* FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 199-202 (1988); LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 366-71 (1979).

[110] FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, *supra* note 10, at 57, 916.

the job.[111] To stifle competition, the Black Codes contained anti-enticement laws that made it a crime to hire a laborer under contract to another employer.[112] And legislative measures were only one part of the effort to keep Black people in a state of servitude. Combinations of planters made private pacts to keep wages low, not to contract with any Black worker unless he could produce a certificate of discharge from his prior owner, and to bar Black people from renting land.[113] Chattel slavery might have been formally dead, but white planters still maintained "that men are rightful property, [t]hat emancipation is wholesale robbery, & that the U.S. government is the grandest thief in the world."[114]

The report of the Joint Committee on Reconstruction, which took testimony from those with first-hand knowledge of conditions in the South, confirmed how the white South aimed to keep Black people "in a perpetual condition of poverty and dependence."[115] Through Black Codes, private agreements among landowners and unremitting violence, whites aimed to keep Black people "landless, and as nearly in a condition of slavery as it is possible for them to do,"[116] and "compelled to labor for low wages"[117] set to make it impossible for Black people to "live and support their families on those wages."[118] In many cases, white planters engaged in wage theft, driving Black laborers off the land after the crops were harvested.[119] In others, they

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[111] CONG. GLOBE, 39th Cong. 1st Sess. 39 (1865).

[112] *Id.*

[113] *Id.* at 93, 517, 941; ADDRESS FROM THE COLORED CITIZENS OF NORFOLK TO THE PEOPLE OF THE UNITED STATES 7 (1865) ("[Y]our late owners are forming Labor Associations, for the purpose of fixing and maintaining, without the least wishes to your references and wants, the prices to be paid for your labor."); *The Substitute for Slavery,* NATIONAL ANTI-SLAVERY STANDARD, Sept. 18, 1865, *reprinted in* 1 THE BLACK WORKER: A DOCUMENTARY HISTORY FROM COLONIAL TIMES TO THE PRESENT 341 (Phillip S. Foner & Ronald L. Lewis ed. 1978) ("When we have added to th[e Black Codes] the combination of the planters to pay no wages to the freedmen, or to pay them such wages as they see fit, and at their convenience, and to report any inhabitant who shall hire a negro without his master's permission . . . we shall have slavery reestablished.").

[114] *See* Chaplain of a Black Regiment to Mississippi Freedmen's Bureau Assistant Comm'r, July 4, 1865, *reprinted in* FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, *supra* note 10, at 121.

[115] REPORT OF THE JOINT COMM. ON RECONSTRUCTION, *supra* note 83, pt II, at 259.

[116] *Id.*, pt. III, at 101; *id.*, pt. IV, at 76 ("They are opposed to allowing them to possess land; they are fearful that by so doing they will eventually lose control over them.").

[117] *Id.*, pt. II, at 243; *id.* at 248 ("By controlling wages and keeping them low, they would render the colored man helpless and dependent."); *id.*, pt III, at 45 (observing a "general disposition" among whites "to set wages too low, and to keep the freed people as nearly as possible in their former state of servitude").

[118] *Id.*, pt II, at 56; *id.* at 54 ("They expect colored people down there to work for ten or eighteen cents a day. Six or eight dollars a month is the highest a colored man can get" and "he may have a family of six to support on these wages, and of course he cannot do it.").

[119] *Id.*, pt. II, at 225 (noting "the disposition by the planters to turn off the freedmen

sought to impose manifestly unfair contractual provisions to defraud Black people or restrict their liberty.[120] In all these ways, white planters were "not willing to give" Black Americans "their rights as just laborers."[121]

Congressmen denounced this new form of servitude as a violation of the Thirteenth Amendment, insisting that it makes Black people "serfs, a degraded class, the slaves of society," leaves them "landless and homeless," and "denies them all chance to work except in the employ of their late owners."[122] Republicans argued that "Congress is bound to see that freedom is in fact secured to every person throughout the land" and that "any legislation or any public sentiment which deprives any human being in the land of those great rights of liberty will be in defiance of the Constitution."[123] Senator Henry Wilson insisted that "[t]hese freedmen are as free as I am to work when they please, to play when they please, to work at what they please and to use the product of their labor" and that states "have no right" to trample on these freedoms.[124] The right to work included the right to choose one's calling and to choose when to work, freedoms the Black Codes denied. Senator John Sherman urged his colleagues to "secure to these freedmen the right to acquire and hold property, to enjoy the fruits of their own labor, to be protected in their homes and their family, the right to be educated, and to go and come to pleasure. These are among the natural rights of free men."[125] "When slavery goes," Senator Lyman Trumbull argued, "all this system of legislation, devised in the interests of slavery and for the purpose of degrading the colored race, of keeping the negro in ignorance . . . that he might not think, but know only, like the ox, to labor, goes with it."[126]

Senator Wilson stressed that the Black Codes made those now free into

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without compensation for their labor"); *id.*, pt III, at 43 ("Many of the planters . . . had been unwilling to give their hands a share of the crop or any other recompense for the labor of the past season, generally claiming that they have not worked well enough to deserve any wages.").

[120] *Id.*, pt. II, at 240 ("The planters are disposed . . . to insert into their contracts tyrannical provisions, to prevent the negroes from leaving the plantation without a written pass from the proprietor; forbidding them to entertain strangers or to have firearms in their possessions, even for proper purposes."); *id.* at 259 ("Much fraud has been practiced in bargains and contracts hitherto made with their old masters. Some of the contracts, as drawn by the planters themselves, were purposely constructed to be misunderstood.").

[121] *Id.,* pt. II, at 96.

[122] CONG. GLOBE, 39th Cong. 1st Sess. 39, 168 (1865).

[123] *Id.* at 77; *id.* at 1152 ("The amendment to the Constitution gave liberty to all; and in giving liberty it gave also a complete exemption from the tyrannical acts, the tyrannical restrictions, and the tyrannical laws which belong to the condition of slavery.").

[124] *Id.* at 41.

[125] *Id.* at 42; *see also id*. at 504, 599, 1159 1833 (invoking the right to the fruits of one's labor).

[126] *Id.* at 322.

"ignorant, degraded, and dependent laborers," pointing out that "any freedman who makes a contract under it is perfectly at the control and will of the man with whom he makes the contract. . . . He can trump up charges to cheat and defraud the laborer."[127] In the House, Representative William Windom observed that Black people are "denied a home in which to shelter their families, prohibited from carrying on an independent business and then arrested and sold as vagrants because they have no homes and no business."[128] He continued, "Planters combine together to compel them to work for such wages as their former masters may dictate" and "make it impossible for them to seek employment elsewhere."[129] "Do you call that man free," Windom pointedly asked, "who cannot chose his own employer, or name the wages for which he will work? . . . [I]f this be liberty, may none ever know what slavery is?"[130]

Democratic opponents of Reconstruction, in response, insisted that the Thirteenth Amendment "was simply made to liberate the negro slave from his master" and nothing more.[131] The problem, of course, is that the Amendment's text not only abolishes slavery, but all forms of involuntary servitude, and, as even some Democrats had to admit, "[m]ere exemption from servitude is a miserable idea of freedom."[132] Senator Jacob Howard offered the rejoinder to this "absurd construction" of the Thirteenth Amendment: it leaves those freed from bondage "without property, without the implements of husbandry and even without the right to acquire or use any instrumentalities of carrying on the industry of which he may be capable . . . . [H]e has nothing that belongs to him on the face of the earth except solely his naked person."[133] Moreover, Howard continued, this hollowed-out shell of the Thirteenth Amendment would sanction all the oppressive and exploitative features of the Black Codes. It would be permissible for a State to "declare him to be a vagrant, and as such commit him to jail, or assign him to uncompensated service," to deny "the right or privilege or earning or purchasing property; of having a home under which to shelter him and his family if he has one" and "to deprive him of all the fruits of his toil and his

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[127] *Id.* at 340; *id.* at 516 (observing that "there have been contracts made in different States which are as repugnant to our sense of honor and justice as ever any arrangements under the old slave codes could have been").

[128] CONG. GLOBE, 39th Cong. 1st Sess. 1160 (1866).

[129] *Id.*; *id.* at 589 ("[T]he masters have formed combinations and have put down the rate of wages to the freedmen below a living price; the negro refusing to work these is seized as a vagrant" and "sold to service.")

[130] *Id.* at 1160.

[131] *Id.* at 499.

[132] CONG. GLOBE, 38th Cong., 1st Sess. 2962 (1864).

[133] CONG. GLOBE, 39th Cong. 1st Sess. 504 (1866).

industry" and leave him in a "helpless and destitute condition."[134] In short, the Democrats' crabbed construction would cripple the Amendment, and their arguments were roundly defeated. Republicans insisted that, by abolishing slavery and involuntary servitude, the Thirteenth Amendment guaranteed real freedom.

To vindicate the promise of freedom, Congress enacted the Civil Rights Act of 1866 to guarantee basic fundamental rights to Black Americans. As Senator Lyman Trumbull explained, "[t]hey being now free and citizens they are entitled . . . to the great fundamental rights belonging to free citizens, and we have a right to protect them in the enjoyment of them."[135] The Act aimed to secure "the fundamental rights of citizenship; those rights which constitute the essence of freedom, and which are common to citizens of all civilized states; those rights which secure life, liberty and property and which make all men equal before the law."[136] These included basic rights fundamental to economic liberty and self-determination: "the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts and to inherit and dispose of property."[137] According to Republicans, Congress possessed broad power under the Thirteenth Amendment to guarantee civil rights and outlaw badges of servitude, including both state-sponsored and private acts that stripped Black Americans of economic rights that white Americans took for granted. Otherwise, Senator Trumbull declared, "the constitutional amendment proclaiming freedom to all the inhabitants of the land is a cheat and a delusion."[138]

To safeguard rights of economic citizenship, the Civil Rights Act of 1866 declared that persons "of every race and color" born in the United States were U.S. citizens entitled to "have the same right" throughout the United States "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens."[139] Protecting these rights was

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[134] *Id.*

[135] *Id.* at 475.

[136] *Id.* at 1152.

[137] *Id.* at 475; *id.* at 599 ("[T]his bill . . . declares that all persons in the United States shall be entitled to the same civil rights, the right to the fruit of their labor, the right to make contracts, the right to buy and sell, and enjoy liberty and happiness").

[138] *Id.* at 1761.

[139] *See* 14 Stat. 27 (1866); James W. Fox, Jr., *Democratic Citizenship and Congressional Reconstruction: Defining and Implementing the Privileges and Immunities of Citizenship*, TEMPLE POL. & CIV. RTS. L. REV. 455, 463-64 (2004) (noting that the "freedom to contract" established "a fundamental foundation for citizenship in the growing modern capitalist economy" including "the freedom to engage in the market, to carry on a business, and to

necessary to fulfill the Thirteenth Amendment's promise of freedom. The Act's proponents insisted that "when those rights which are enumerated in this bill are denied to any class of men on account of race or color . . . they are not secured in the rights of freedom."[140] With these guarantees, the Act's framers insisted, "all features of slavery which are oppressive in their character, which extinguish the rights of free citizens, and which unlawfully control their liberty shall be abolished and destroyed forever."[141]

Three facets of the Act stand out. First, Congress employed sweeping language to ensure that citizens of "every race and color" would "enjoy" the same economic freedoms as "white citizens." As Eric Foner has observed, "[u]p to this point, the concept of 'whiteness' existed in the law as a mark of privilege . . . . Now, the civil rights of white Americans became a baseline, a standard that applied to all citizens, and freedom from legal discrimination for the first time was added to the list of citizens' rights."[142] In other words, the same fundamental rights that had protected white citizens now had to be extended to Black citizens, a potentially revolutionary change to Southern society that had been organized to coerce Black labor.

Second, the Act imposes a duty on States to realize Black economic freedom and equality, requiring states to secure to Black Americans the "full and equal benefit of all laws and proceedings for the security of person and property." Nondiscriminatory laws were not enough. The Act's Framers understood that "a State may undertake to deprive citizens of the[ir] absolute, inherent, and inalienable rights . . . by a failure to protect any one of them."[143] To protect Black people in their rights of economic citizenship, the Act required states to ensure that Black people enjoyed the full and equal benefit of protective state laws.

Third, the Act's guarantee was designed to constrain both state and private action, forbidding acts taken under color of law as well as customary practices that stripped Black Americans of equal rights to property and contract. Congress understood that private restraints worked hand in hand with the Black Codes to subjugate Black people. Indeed, the Act's text explicitly supersedes "any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."[144] As Darrell Miller has argued, "Congress used the word 'custom' . . . to attack the economic *reality* of the slave system, in addition to the system's legal incidents, by proscribing those privately

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dispose of property").

[140] CONG. GLOBE, 39th Cong. 1st Sess. 1124 (1866).

[141] *Id.* at 1152.

[142] FONER, *supra* note 11, at 64; Nancy Leong, *Enjoyed By White Citizens,* 109 GEO. L.J. 1421, 1426 (2021).

[143] CONG. GLOBE, 39th Cong. 1st Sess. 1833 (1866).

[144] 14 Stat. 27 (1866).

enforced regulations that functioned to perpetuate aspects of the previous slave system."[145]

Congressional opponents argued that the Act "strikes at all the reserved rights of the States."[146] President Andrew Johnson vetoed it. "[E]very subject embraced in the enumeration of rights contained in this bill," Johnson argued, "has been considered as exclusively belonging to the States."[147] President Johnson claimed the bill would "establish for the security of the colored race safeguards which go infinitely beyond any that the General Government has ever provided for the white race" and set the stage for the "centralization and the concentration of all legislative powers in the National Government."[148] Huge majorities of Congress voted to override President Johnson's veto, but this fight convinced the Framers of the need to write citizenship, rights, and protection permanently into our foundational charter.

On the heels of the Act's final passage, Republicans in Congress proposed the Fourteenth Amendment. As this sequence of events suggests, the Civil Rights Act of 1866 is indispensable to understanding the meaning of the Fourteenth Amendment. During the debates, future President James Garfield insisted that the Fourteenth Amendment placed the Civil Rights Act "above the reach of political strife" and "fix[ed] it . . . in the eternal firmament of the Constitution,"[149] while Representative Martin Thayer observed that the Act was "so necessary for the equal administration of the law" and "the protection of fundamental rights of citizenship" that it had to be "forever incorporated in the Constitution of the United States."[150] Others stressed that the Fourteenth Amendment's grant of enforcement power to Congress buttressed the constitutional validity of the Act, eliminating any residual doubts that might exist.[151] As Senator Howard observed, Section 5's grant of enforcement power "gives" Congress the "authority to pass laws which are appropriate to the attainment of the great object of the amendment" and "casts upon Congress the responsibility of seeing to it, for the future, that all sections of the amendment are carried out in good faith and that no State infringes the rights of persons or property."[152] This is precisely what Congress had done in enacting the Civil Rights Act of 1866. The Fourteenth Amendment was added to the Constitution "knowing full well" that its grant of enforcement

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[145] Darrell A.H. Miller, *White Cartels, The Civil Rights Act of 1866, and the History of* Jones v. Alfred H. Mayer Co., 77 FORDHAM L. REV. 999, 1034 (2008).

[146] CONG. GLOBE, 39th Cong. 1st Sess. 1777 (1866).

[147] Andrew Johnson, Veto Message, Mar. 27, 1866, https://www.presidency.ucsb.edu/documents/veto-message-438.

[148] *Id.*

[149] CONG. GLOBE, 39th Cong. 1st Sess. 2462 (1866).

[150] *Id.* at 2465.

[151] *Id.* at 2511, 2961.

[152] *Id.* at 2766, 2768.

power "authorized transformative new federal statutes to uproot all vestiges of unfreedom and inequality."[153]

How did the Fourteenth Amendment incorporate the Civil Rights Act of 1866 into the Constitution? First, the Amendment opens with a declaration of birthright citizenship virtually identical to that contained in the Act. Second, the Privileges or Immunities Clause protects the fundamental rights of U.S. citizens, including, but not limited to the fundamental rights enumerated in the Civil Rights Act of 1866.[154] Under the Fourteenth Amendment, the rights to make and enforce contracts; the right to purchase, possess, and use personal and real property; and the right to sue and enforce rights in court are fundamental rights protected from state infringement by the Privileges or Immunities Clause. Third, the Fourteenth Amendment requires states to guarantee the equal protection of the laws, imposing on states an affirmative constitutional duty of protection.[155] The Act's directive to ensure "the full and equal benefit of all laws and proceedings for the security of person and property" to all regardless of race was now a constitutional command.

As this history shows, the Reconstruction Framers safeguarded economic rights to serve the goal of ending the economic subjugation of Black Americans. The throughline in the debates over the Thirteenth, Amendment, the Civil Rights Act of 1866, and the Fourteenth Amendment was the Reconstruction Framers' insistence on ensuring that Black people could amass wealth and possess property, enjoy the right to the fruits of their labor, exercise true contractual freedom, and "make impossible forevermore the reappearing of the discarded slave system, and the returning of the despotism of the slavemasters' domination."[156] To vindicate the promise of freedom, Black people had to enjoy the right to quit, to change employers, to set the wages and working conditions in which they would labor, and to go into business for themselves, pursuing the calling of their choice.[157] In freedom, the Black worker would be "master of himself" who "can go where he

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[153] AMAR, *supra* note 27, at 363.

[154] BARNETT & BERNICK, *supra* note 13, at 238-39.

[155] Brandon Hasbrouck, *The Antiracist Constitution,* 102 B.U. L. REV. 87, 157 (2022) ("The right to equal protection was not so much a right of equal protection against the government, but the duty of the government to provide protection—including against private action—to the people as equals.").

[156] CONG. GLOBE, 38th Cong. 1st Sess. 1324 (1864).

[157] See Pope, *supra* note 105, at 1527-36; Jeffrey Rosen, *Translating the Privileges or Immunities Clause*, 66 GEO. WASH. L. REV. 1241, 1250 (1998) (noting that "the Framers of the Fourteenth Amendment considered the right to work in the common occupations of life to be one of the privileges or immunities of citizenship protected by the Fourteenth Amendment"); Pauli Murray, *The Right to Equal Opportunity in Employment,* 33 CAL. L. REV. 388, 388 (1945) (discussing "the right to work" as an inalienable and natural right" connected to "the broader interest in freely disposing of one's labor").

pleases; work when and for whom he pleases" and "lease and buy and sell and own property," befitting the "conscious dignity of a free man."[158] This was an inclusive constitutional vision that recognized that some measure of economic independence was fundamental to freedom and equal citizenship and consciously put limits on economic subordination.

Critically, the freedom promised by abolition required limits not only on government, but on private actors as well. As Akhil Amar has observed, "[t]he people who adopted the Thirteenth Amendment provided for rights against the world."[159] The use of private power to entrench white supremacy was just as much a threat to equal citizenship as state-sponsored forms of racial oppression and subordination.

To conservatives, the fact that the Civil Rights Act of 1866 explicitly embraces the right to contract demonstrates that *Lochner* correctly understood the Fourteenth Amendment,[160] but the Second Founding's protection of equal rights to contract and property should not be confused with *Lochner*'s anti-redistributive vision. While the Reconstruction Amendments guaranteed economic liberties in order to protect Black workers from economic exploitation, *Lochner* and other cases constitutionalized unjust working arrangements, striking down state regulations designed to prevent workers from being exploited on the job. *Lochner* held that states could not constitutionally meddle in "the freedom of master and employe to contract with each other in relation to their employment" in order "to regulate the hours of labor between the master and his employes . . . in a private business."[161] This missed that the Fourteenth Amendment aimed to protect workers from economic exploitation. Indeed, if anything, *Lochner*'s vision bears a striking similarity to Andrew Johnson's message vetoing the 1866 Civil Rights Act, which criticized the Act for impermissibly "interven[ing] between capital and labor" rather than leaving white planters and Black workers to "satisfactorily work out the problem."[162] *Lochner* tore the Fourteenth Amendment from its moorings in eradicating economic domination and subjugation.

Rights were critical to the Second Founding's promise of equal citizenship. But equal citizenship required more than simply guarantees of

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[158] CONG. GLOBE, 39th Cong. 1st Sess. 589 (1866); CONG. GLOBE, 39th Cong. 1st Sess. 111 (1865).

[159] Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J. L. & PUB. POL'Y 37, 39 (1990).

[160] *See* Randy Barnett, *Foreward: What's So Wicked About* Lochner, 1 N.Y.U. J. L. & LIB. 325, 333 (2005).

[161] Lochner v. New York, 198 U.S. 45, 64 (1905); *see also* Adkins v. Children's Hospital, 261 U.S. 525 (1923) (striking down minimum wage legislation).

[162] Andrew Johnson, Veto Message, supra note 147, https://www.presidency.ucsb.edu/documents/veto-message-438.

fundamental rights; it also required protection by the government, a constitutional ideal made explicit in the Fourteenth Amendment's Equal Protection Clause. The next part turns to examine how the Reconstruction Framers gave meaning to the constitutional duty of protection.

III. ECONOMIC EQUALITY AND THE CONSTITUTIONAL DUTY OF PROTECTION

Dating all the way back to Thomas Jefferson's 1776 draft Virginia Constitution that provided that citizens should possess a right to fifty acres of land and enjoy universal access to education, our constitutional history has embraced the idea that the government has a critical role to play in broadening economic opportunities and fostering a self-sufficient citizenry.[163] Freedom in a republican system of government was premised on economic independence, and one responsibility of government was to help the populace participate in the economy as independent, productive members.[164] Drawing on these constitutional ideals, Reconstruction witnessed the creation of landmark federal statutes that provided food, shelter, and medical care; access to education; and, to a limited extent, land, to those in need. All this was implied in the constitutional duty of protection. To protect Black Americans in the freedom promised by abolition required not only safeguarding basic fundamental rights, it also required pathbreaking new programs to ensure access to food, clothing, health care, education, and property—what might be called the material foundations of equal citizenship. Congress, as the body explicitly charged with enforcing the new constitutional birth of freedom, used its express constitutional power to provide some measure of economic security to Black Americans seeking to make freedom real. Congress understood its affirmative constitutional role in breaking down the barriers of caste and redressing poverty and powerlessness.

In this regard, the most important piece of Reconstruction-era legislation was the Freedmen's Bureau Act, which created "the first national agency for social welfare" in order to provide goods and services to Black people freed from enslavement and refugees whose lives were uprooted by the devastation caused during the war.[165] Aiming to assist Black Americans in the transition

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[163] *See* FISHKIN & FORBATH, *supra* note 12, at 40-41; William E. Forbath, *Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution*, 46 STAN. L. REV. 1771, 1789 (1994) (noting the "rich history of constitutional concern about the distribution of power over economic resources and about economic dependence, dispossession, and powerlessness").

[164] Amar, *supra* note 159, at 38; Forbath, *supra* note 163, at 1788.

[165] JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 859 (1988).

from bondage to equal citizenship and to redress destitution, the Freedmen's Bureau Act created a federal agency to protect Black people from oppression, supervise the transition to free labor, and provide access to food, medical care, education, land, and other basic goods and services.[166] The goal was to lift Black people and white refugees out of poverty and ensure some measure of economic security and access to education.

To Republicans, the Act was constitutionally required to protect Black people in their new status as free and equal citizens. As Senator Lyman Trumbull argued, "[t]he obligation to take care of them is a constitutional obligation imposed upon us as a government."[167] Without access to food, medical care, or education and excluded from the protective laws of Southern states, the promise of freedom and equal citizenship would be illusory. The Act was a recognition that the federal government had a constitutional responsibility to secure the material foundations of equal citizenship.

W.E.B. Dubois called the Freedmen's Bureau "the most extra-ordinary and far-reaching institution of social uplift that America has ever attempted."[168] Unfortunately, the perpetually understaffed Bureau's execution of its mandate did not always live up to the ideal. At its best, the Bureau played a critical role in vindicating freedom, acting as a frontline protector of civil rights law, redressing racial violence, and reviewing labor agreements to prevent abusive terms, limit economic domination, and ensure that those freed from bondage actually received the fruits of their toil, while also feeding the hungry, healing the sick, and ensuring access to education.[169] Even if it did not always achieve these aims, "without its protection" Black people "would not be permitted to labor at fair prices, and could hardly live in safety," the Joint Committee on Reconstruction concluded.[170]

Black Americans, more than anything else, pinned their hopes for freedom on the redistribution of land—land that they spent their lives working to enrich for whites who had brutalized and exploited them. Only land, as one formerly enslaved man observed, would enable "the poor class

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[166] *See* FONER, *supra* note 109, at 142.

[167] CONG. GLOBE, 39th Cong. 1st Sess. 323 (1866).

[168] W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA: TOWARD A HISTORY OF THE WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880, at 219 (1935).

[169] For an overview of the Bureau's work, *see* FONER, *supra* note 109, at 142-70; DUBOIS, *supra* note 168, at 219-30; *see also* Daniel Backman, "*A Vast Labor Bureau": The Freedmen's Bureau and the Administration of Countervailing Black Labor Power*, 40 YALE J. REG. 837, 840 (2023) ("[N]ever before or since has the U.S. government played such an active, visible, and explicit role in shaping and governing the relationship between worker and employer in the interest of the workers and in service of racial equality.").

[170] REPORT OF JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 83, at xvii.

to enjoy the sweet boon of freedom."[171] Field Order 15, issued by General William T. Sherman near the end of the Civil War, set aside a portion of coastal South Carolina and Georgia for settlement by Black Americans, and the Freedmen's Bureau Act provided for parceling out abandoned and government-owned land to Black Americans and others left destitute by the war in forty acre allotments.[172] Tragically, the promise of "forty acres and a mule" never came to pass.[173] President Andrew Johnson pardoned huge numbers of ex-Confederate landowners and forced the Freedmen's Bureau to return the vast majority of the land in the Sherman reserve and elsewhere—to the bitter complaints of Black Americans that true freedom required access to land. Congress eventually responded by enacting the Southern Homestead Act of 1866, but the Act proved to be a failure.[174] Congressional efforts to guarantee some measure of economic independence to the "oppressed, wronged, and suffering poor" fell far short.[175]

The Bureau's limitations were real, but that should not blind us to the constitutional ideal it represented: the Freedmen's Bureau was an unprecedented federal institution designed, in the words of one Bureau officer, to "lift" Black people "from subserviency and helplessness to a dignified independence and citizenship."[176] Long before the New Deal and modern debates over the welfare state, the Freedmen's Bureau established the idea that it was the role of the federal government to satisfy just wants essential to citizenship, acting as a backstop against state neglect. While the Bureau was only a temporary fixture, it established the idea that the federal government has a constitutional obligation to redress economic destitution, ensure economic security, provide access to medical care and education, and help citizens become self-sufficient. The Freedmen's Bureau legislation illustrates that Congress possesses broad constitutional powers to promote freedom, redress racial and economic subjugation, and safeguard equal citizenship. Equally important, as the next section shows, the Freedmen's Bureau Acts offer an incredibly important gloss on the constitutional duty of protection.

A. The Freedmen's Bureau Acts and the Constitutional Duty of Protection

The Freedmen's Bureau originated as a wartime measure,

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[171] Eric Foner, *The Meaning of Freedom in the Age of Emancipation*, 81 J. AM. HIST. 435, 458 (1994).

[172] FONER, supra note 109, at 69-71.

[173] *See* CLAUDE F. OUBRE, FORTY ACRES AND A MULE: THE FREEDMEN'S BUREAU AND BLACK LAND OWNERSHIP 22-71 (1978).

[174] FONER, *supra* note 109, at 246; OUBRE, *supra* note 173, at 72-158.

[175] CONG. GLOBE, 39th Cong. 1st Sess. 716 (1866).

[176] *See* LITWACK, *supra* note 109, at 382.

necessitated by the destruction of slavery during the Civil War. As the Union advanced, enslaved people engaged in a mass exodus to Union lines, utterly destitute, but willing to aid the Union cause.[177] What protection would be offered to those now declared to be "forever free" under the terms of the Emancipation Proclamation? The devastation wrought by the Civil War called for innovative solutions to relieve crippling poverty and ensure economic and social empowerment. As Richard Dana made the point, those freed from bondage would be "four million disenfranchised, disarmed, untaught, landless, thriftless, non-producing, non-consuming, degraded men" or "four million landholding, industrious, arms-bearing, and voting population. Choose between the two!"[178] The Freedmen's Bureau represented Republican efforts to make the promise of equal citizenship real, in line with Dana's second option.

Legislation to establish a Freedmen's Bureau was introduced in 1863 but was not enacted into law until the final months of the Civil War, as Congress deadlocked over the Bureau's design. The Freedmen's Bureau Act, enacted in March 1865, created a "bureau of refugees, freedmen, and abandoned lands" within the War Department and entrusted this new agency with "the supervision and management of all abandoned lands, and the control of all subjects relating to refugees and freedmen from rebel states" during "the present war and rebellion and for one year thereafter."[179] The Act authorized the Secretary of War to "direct such issues of provisions, clothing, and fuel" for "the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen and their wives and children."[180] It also empowered the Bureau's commissioner "to set apart, for the use of loyal refugees and freedmen such tracts of land within the insurrectionary states as shall have been abandoned" and permitted the Bureau to rent, and eventually sell, parcels of "not more than forty acres" to Black people and white refugees, giving the Bureau a role in realizing the promises contained in Field Order 15.[181]

The First Freedmen's Bureau Act was passed while war still raged and before the Thirteenth Amendment had been added to the Constitution. The Second Freedmen's Bureau Act, which passed in July 1866 after a grueling eighth month fight, including two presidential vetoes, put enforcement of the Thirteenth Amendment and the promise of equal citizenship front and center.

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[177] *See* MICHELE LANDIS DAUBER, THE SYMPATHETIC STATE: DISASTER RELIEF AND THE ORIGINS OF THE AMERICAN WELFARE STATE 36 (2012).

[178] RICHARD HENRY DANA, JR., SPEECHES IN STIRRING TIMES AND LETTERS TO A SON 250 (1910); CONG. GLOBE, 39th Cong. 1st Sess. app 66-67 (1866) (quoting Dana's speech).

[179] Act of March 3, 1865, ch. 90, § 1, 13 Stat. 507, 507 (1865).

[180] *Id.* § 2, 13 Stat. at 508.

[181] *Id.* § 4, 13 Stat. at 508.

Making explicit the Bureau's role in securing freedom and making citizens self-sufficient, the revised Act charged the Bureau with the duty to provide aid and care "to all loyal refugees and freedmen" in order to "enable them as speedily as practicable to become self-supporting citizens of the United States, and to aid them in making the freedom conferred by the proclamation of the commander-in-chief, by emancipation under the laws of the States, and by constitutional amendment, available and beneficial to the Republic."[182]

The amended Act gave the Bureau new explicit responsibilities to provide access to health care, education, and protect basic fundamental rights for all citizens regardless of race. First, it authorized the Secretary of War "to issue medical stores or other supplies and transportation" and "afford . . . medical or other aid" to those destitute or suffering and unable to obtain employment to "avoid such destitution, suffering, or dependence."[183] Second, it empowered the Bureau to use property "formerly held under color of title by the late so-called confederates states" or "appropriate proceeds derived therefrom to the education of the freed people."[184] Spurring private efforts to provide education to Black Americans, the Act directed the Bureau to "hire or provide by lease buildings for the purposes of education" whenever private associations "provide suitable teachers and means of instruction."[185] To protect schools from white supremacist violence, the Act obliged the Bureau to "furnish such protection as may be required for the safe conduct of such schools."[186] Third, the Act required the Bureau to secure the fundamental rights laid out in the Civil Rights of 1866 to all citizens "without respect to race, or color or pervious condition of slavery," establishing "military protection" and "military jurisdiction over all cases concerning the free enjoyment of such immunities and rights" in states in which "the ordinary course of judicial proceedings has been interrupted by the rebellion."[187]

The Freedmen's Bureau Acts sought to safeguard the enjoyment of fundamental rights, as well as access to constitutionally essential goods and services, including food, clothing, health care, education, and protection from violence, to make full citizenship a reality.[188] The enumeration of judicially enforceable rights—while essential—was not sufficient. The Reconstruction Congress insisted that it was the job of the federal government, acting through

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[182] Act of July 16, 1866, ch. 200, § 2, 14 Stat. 173, 174 (1866).

[183] *Id.* § 5, 14 Stat. at 174.

[184] *Id.* § 12, 14 Stat. at 176.

[185] *Id.*, § 13, 14 Stat. at 176.

[186] *Id.*

[187] *Id.*, § 14, 14 Stat. at 176-77.

[188] *See* Graber, *supra* note 12, at 1364 ("[A] minimum degree of economic security and education were central conditions of freedom and full citizenship."); Fox, *supra* note 139, at 469 (observing that the Bureau "established a fundamental connection between essential governmental services and concepts of free citizenship").

Congress and the executive, to protect those rights and ensure access to the goods and services integral to creating a self-sufficient citizenry. In the face of state refusal to provide poor relief, education, and other public goods to those freed from bondage, Congress stepped in to ensure these constitutionally essential goods and services were available. Thus, while the Civil Rights Act of 1866 declared and safeguarded certain fundamental rights of citizens, the Freedmen's Bureau *protected* the material foundations of equal citizenship, including by ensuring access to health, education, and welfare—what James Fox has called "the breath of needs created by claims to citizenship."[189] The watchword for the Freedmen's Bureau was *protection*.

As the debates over the Freedmen's Bureau show, the Bureau's responsibility was nothing less than to "elevate into independent, self-sustaining, self-governing men and women the freedmen of the country."[190] "Having made the slave a freedman," the Reconstruction Framers recognized that "the nation need[ed] some instrumentality which shall reach to every portion of the South and stand between the freedman and oppression" and "see that the gulf which separates servitude from freedom is bridged over."[191] As far back as 1864, Republicans had argued that "[t]he proclamation of freedom has liberated men oppressed by a life-servitude. These men are now subjects of the Government. They owe to it allegiance, and are as such entitled to its protection."[192] The purpose of the Freedmen's Bureau was to supply that protection.

During the debates over the Second Freedmen's Bureau Act, Republicans repeatedly insisted that "it is our duty to protect" those freed from bondage.[193] In the Senate, Senator Henry Wilson insisted "we want these freedmen protected; we mean to have them protected" and urged to that end "the strengthening of this bureau" and "the enlargement of its powers."[194] Likewise, Senator John Sherman urged that "we are bound to protect these freedmen against the public sentiment and the oppression that will undoubtedly be thrown upon them by the people of the Southern states."[195] Senator Lyman Trumbull, the bill's chief sponsor, insisted that "some protection is necessary" to maintain Black people in their freedom and "that

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[189] Fox, *supra* note 139, at 469.

[190] CONG. GLOBE, 38th Cong. 2d Sess. 692 (1865); CONG. GLOBE, 38th Cong. 1st Sess. 573 (1864) ("It will enable the Government to help into active, educated, useful life a nation of freedmen who otherwise would grope their way to usefulness through neglect and suffering, and with heavy and needless loss to us.").

[191] CONG. GLOBE, 39th Cong. 1st Sess. 585, 2779 (1866).

[192] CONG. GLOBE, 38th Cong. 1st Sess. 572 (1864).

[193] CONG. GLOBE, 39th Cong. 1st Sess. 516 (1866); *id.* at 654 ("[I]t is our duty now to protect these men whom we have emancipated and made free men in our land.").

[194] *Id.* at 341.

[195] *Id.* at 744.

was the object of the Bureau."[196] Congress, Trumbull insisted, had a "constitutional obligation . . . to pass the appropriate legislation to protect every man in the land in his freedom."[197] To Republicans, Congress was duty bound to use its constitutional powers to ensure that Black people were equal citizens in more than name. As Trumbull remarked, "I should feel that I had failed in my constitutional duty if I did not propose some measure that would protect these people in their freedom."[198]

In the House, Representative John Hubbard argued that the Act would "cast the shield of protection over four million American citizens," insisting that "[t]hey need schools and protection" and that "[w]e owe them protection in return for their faithful allegiance."[199] Representative Thomas Eliot, the bill's House sponsor, argued that "the power to free them involved the duty to protect them, and for that protection Congress must provide, and every provision in this bill if fairly called for in order to protect them is thus justified."[200] Representative Samuel Moulton stressed that the Freedmen's Bureau was "absolutely necessary for the protection of the freedmen and refugees in the South" and essential "to protect these men in their civil rights against the damnable violence of the leading men in the southern states,"[201] while Representative Josiah Grinnell argued that it would be unconscionable to "leave these people where they are, landless, poor, unprotected."[202] The tragic reality was that there was not a single state of the former Confederacy in which Black people enjoyed their rights or protection. As Representative Samuel McKee pointedly asked, "is there a single one of these States to have passed laws to give the freedmen full protection? In vain we wait an affirmative answer. Until these states have done so . . . the Freedmen's Bureau is a necessity."[203]

To protect Black Americans in their freedom meant more than just enforcing basic legal rights and eradicating discrimination. It required a federal government actively providing basic necessities, such as food, clothing, and health care, ensuring access to education, bolstering economic independence, and redressing white supremacist violence aimed at keeping Black people poor, ignorant, and exploited. To Republicans who created the Freedmen's Bureau, the enforcement power contained in the Thirteenth Amendment gave Congress broad powers to vindicate the Amendment's

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[196] *Id.* at 941.

[197] *Id.* at 942.

[198] *Id.*

[199] *Id.* at 630-31.

[200] *Id.* at 656; *id.* at 655 ("We owe, as a duty to those who have been set free, the protection which this bill affords.").

[201] *Id.* at 631.

[202] *Id.* at 652.

[203] *Id.* at 653.

promise of freedom, obliterate all badges and incidents of servitude, and ensure economic security to those who had been exploited and relegated to poverty all their lives. By feeding the hungry, healing the sick, providing access to education to those who had long been denied schooling, and helping them find homes, the Freedmen's Bureau would help ensure that "no portion of the population shall be degraded," and it would "break down all walls of caste," and "make real to these freedmen the liberty you have vouchsafed to them."[204] The Freedmen's Bureau was essential to ensure those freed from bondage would be protected in their freedom and citizenship.

To the legislation's Democratic opponents, the Second Freedmen Bureau's Act was cut from the same cloth as the Civil Rights Act of 1866. They attacked the legislation as "an attempt upon the part of the Federal Government . . . to usurp and take from the States their sacred and inalienable right to control and govern their own people in all matters relating to their domestic and local interests" and create a "government within the Government . . . for the colored people."[205] President Johnson vetoed the Act, lambasting the idea of "transfer[ring] the entire care, support, and control of four million emancipated slaves" to a federal agency designed to aid Black people.[206] "The idea on which the slaves were assisted to freedom," Johnson claimed, "was that, on becoming free, they would become a self-sustaining population."[207] According to Johnson, "it was never intended that they should . . . be fed, clothed, educated, and sheltered by the United States."[208] Johnson doubted that Black Americans needed federal protection; because of the workings of the market, he claimed, "[t]he laws that regulate supply and demand will maintain their force and the wages of the laborer will be regulated accordingly."[209]

Johnson's first veto was sustained by a 30-18 vote; a revised Act was not enacted into law until July 16, 1866—a month after congressional passage of the Fourteenth Amendment—when Congress overrode Johnson's second veto.[210] The Fourteenth Amendment, when added to the Constitution, would confirm Congress's power to enact the Second Freedmen's Bureau Act.[211]

The Freedmen's Bureau proved to be a temporary institution, but its

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[204] *Id.* at 340, 589, 2779.

[205] *Id.* at 626, 634; Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment,* 71 VA. L. REV. 753, 763 (1985) (discussing charges that the Act was a form of class legislation "largely, if not exclusively, for the assistance of the freedmen").

[206] CONG. GLOBE, 39th Cong. 1st Sess. 917 (1866) (reprinting veto message).

[207] *Id.* at 916.

[208] *Id.*

[209] *Id.* at 917.

[210] *Id.* at 943; *id.* at 3842.

[211] *See* Graber, *supra* note 12, at 1362; Schnapper, *supra* note 205, at 785.

history provides crucial insight on the constitutional command of protection, a constitutional ideal written directly into the Fourteenth Amendment.[212] There is a rich scholarly literature on the duty of protection, much of which emphasizes the government's obligation to redress private violence.[213] While protection from violence was plainly part of the duty of protection, the debates over the Freedmen's Bureau strongly suggest a broader conception of protection, which includes protection of the citizen's health, education, and welfare. And under the Fourteenth Amendment, that protection had to be equal.

Scholars have long mined enforcement legislation of the Reconstruction-era, such as the Ku Klux Klan Act of 1871, recognizing that it was enacted based on the theory that "it is the solemn duty of Congress to enforce the protection which the State withholds."[214] The Freedmen's Bureau was enacted on a similar theory, as the discussion of the duty of protection in the debates over the Freedmen's Bureau reveals. The Freedmen's Bureau Act was a necessity because white Southerners were not willing to regard Black people as fellow citizens entitled to public goods and services.

Thus, the Freedmen's Bureau legislation is particularly important in understanding how the constitutional concept of protection applied to public state privileges, such as state poor relief or education. The Freedmen's Bureau Act protected access to public good and services, ensuring that Black people could obtain poor relief—what today we might think of as welfare benefits—and education in the face of the refusal of Southern states to treat Black Americans as equal citizens entitled to obtain tax-funded benefits. The idea that public privileges and benefits cannot be allocated in a discriminatory manner, but must be provided on the basis of equality, has its antecedents in the Freedmen's Bureau Act.

The next two subsections explore the Freedmen's Bureau legislation in two key contexts concerning access to state privileges: (1) rights to

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[212] *See* Hasbrouck, *supra* note 155, at 135-36 (observing that the work of the Freedmen's Bureau "recalls the abolitionist concept of equal protection: that the law has a duty to ensure the protection of citizens.").

[213] *See* BARNETT & BERNICK, *supra* note 13, at 320 (arguing that the Fourteenth Amendment "impose[s] an affirmative duty on states to protect against violence by nonstate actors"); Ilan Wurman, *Reconstructing Reconstruction-Era Rights*, 109 VA. L. REV. 885, 896 n.41 (2023) (arguing that the "protection of the laws" was "quite narrow, likely referring only to judicial remedies and protection against violence"); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. C.R.L.J. 1, 3 (2008) (arguing that the equal protection guarantee "imposes a duty on each state to protect all persons and property within its jurisdiction from violence and to enforce their rights through the court system").

[214] CONG. GLOBE, 42nd Cong. 1st Sess. 482 (1871); see Bernick, *supra* note 9, at 37-41 (discussing congressional construction of equal protection in debates over the Ku Klux Klan Act).

subsistence and (2) access to education.

B. The Freedmen's Bureau and Access to Food, Clothing, and Medical Care

The Freedmen's Bureau marked a decisive change in the role of the federal government in lifting its citizenry out of poverty. Those held in bondage—who had been kept in poverty their entire lives—could not hope to enjoy the promise of freedom and become self-sustaining citizens without efforts to ensure some measure of economic security. With Southern states refusing to provide any relief to impoverished Black Americans or white Unionists, Congress enacted its first major antipoverty program to provide food, clothing, and medical care to Black people and white refugees whose lives were upended during the war. The constitutional duty of protection thus included protection against destitution, as the debates over the Freedmen's Bureau Act show.

Republicans in the 39th Congress championed a broad congressional role in protecting the populace from impoverishment. During the debates over the Second Freedmen's Bureau Act, Senator Trumbull argued that Congress had the responsibility to prevent Americans from slipping into poverty. "Whenever, in the history of the Government, there has been thrown upon it a helpless population which must starve and die but for its care, the Government has never failed to provide for them."[215] Trumbull argued that Congress had the duty to protect from dire poverty "four million" formerly enslaved people "who have toiled all their lives for others, . . . who were never permitted to own anything, never permitted to eat the bread their own hands had earned; many of whom are without any means of support, in the midst of a prejudiced and hostile population who have been struggling to overthrow the government."[216] The Bureau, he stressed, was "designed to aid these helpless, ignorant, and unprotected people until they can provide for and take care of themselves."[217] Republicans refused to leave Black Americans "to perish by the wayside in poverty and by starvation."[218]

The Bureau's role in redressing destitution and sickness was vital because white-led state governments fought tooth and nail to avoid spending a dime on poor Black Americans.[219] The overseer of the poor in one Virginia county

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[215] CONG. GLOBE, 39th Cong. 1st Sess. 319 (1866).

[216] *Id.*

[217] *Id.*

[218] *Id.* at 630; *id.* at 652 (emphasizing that the Act "was to reach those in want").

[219] *See* JIM DOWNS, SICK FROM FREEDOM: AFRICAN-AMERICAN ILLNESS AND SUFFERING DURING THE CIVIL WAR AND RECONSTRUCTION 9 (2012) ("[State and local] institutions, which had historically offered universal support to the poor and dispossessed, began to claim that they would only assist 'citizens,' who, according to their definition,

made the point in stark terms: "Not a *dam* bite will I give them. I would choose hell first."[220] Congress was well aware that the Southern states were willing to let Black Americans die rather than care for them. As Senator Trumbull observed, "you have got on your hands today one hundred thousand feeble, indigent, infirm colored population that would starve or die if relief were not afforded."[221] Evidence poured in that Southern governments would not "take care" of Black people at all; "combinations exist among the local physicians not to give medical attendance to colored people"; and physicians "refuse to render any services" to Black persons "unless compensated in advance," charging rates "very few of the large number of freedmen find it possible . . . to pay."[222] Even as small-pox spread like wildfire in the South, "civil authorities show[ed] a cruel heartlessness and wicked indifference to their wants which does little credit to their humanity."[223] These facts cried out for strengthening the powers of the Bureau to respond to what Eric Foner has called "the postemancipation crisis of health among the former slaves."[224] If the states of the former Confederacy would not protect those now free, Congress would.

Opponents of Reconstruction retorted that it was no business of the federal government to relieve poverty or illness. Democratic Senator Thomas Hendricks argued that Congress lacked the power to provide for a Freedmen's Bureau. He claimed that "it has never been disputed that the duty to provide for the poor, the insane, the blind, and all those dependent on society rests upon the States, and that the power does not belong to the General Government."[225] It did not matter to Senator Hendricks that people would starve to death because states refused to protect them. He maintained the federal government had no power to intervene. In the House,

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referred to white Southerners; they summarily refused to provide assistance to formerly enslaved people."); Letter from Freedmen's Bureau Ass't Superintendent for Sussex County, Va. to the Freedmen's Bureau Superintendent of the 2nd District of Va., Apr. 21, 1866, *reprinted in* FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, 1861-1867, SER. 3., VOL. 2, LAND AND LABOR, 1866-67, at 738 (René Hayden et al. eds., 2013) ("[T]he President [of the Board of Overseers] said he would not vote to support a yankee pauper, much less a 'n---."); Letter from Freedmen's Bureau Acting Ass't Comm'r at Aiken, S.C., to the Headquarters of the S.C. Freedmen's Bureau Ass't Comm'r, Oct. 4, 1866, *reprinted id.* at 774 ("The white people of this district will see them starve unmoved and make no effort to relieve them.").

[220] FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, *supra* note 219, at 717.

[221] CONG. GLOBE, 39th Cong. 1st Sess. 746 (1866).

[222] *Id.* at 656.

[223] *Id.* at 657.

[224] FONER, *supra* note 109, at 151.

[225] CONG. GLOBE, 39th Cong. 1st Sess. 317 (1866); *see also id.* at 935 ("Congress has no power to pass laws to organize a vast system of poor-houses, to endow them, and to establish and support in them the paupers of the United States, black or white.").

Representative Samuel Marshall charged that the federal government lacked the power to lift Black people and white refugees out of poverty. He insisted that Congress lacks "any authority to become the common almoner of the charities of the people. I deny that there is any authority in the Federal Constitution to authorize us to put our hands in their pockets and take therefrom a part of their hard earnings in order to distribute them as charity."[226] "[T]he attempt to thrust your hands into the pockets of the people to raise money for this purpose," Marshall claimed, "is . . . nothing more than robbery."[227] To Marshall, the Freedmen's Bureau was an impermissible form of redistribution of wealth designed to benefit Black people at the expense of white, tax-paying Americans. Along similar lines, President Johnson's veto message argued that "[a] system for the support of indigent persons in the United States was never contemplated by the authors of the Constitution, nor can any good reason be advanced why . . . it should be founded for one class more than the other."[228]

Congressional Republicans argued that "[o]ur authority to take care" of Black people and white refugees "is founded in the Constitution; else it is not worthy to be our great charter."[229] Many pointed to the Thirteenth Amendment's grant of enforcement power, insisting that Congress had the authority to aid Black people who had been consigned to poverty for the entirety of their lives in order to help them to become self-sustaining citizens. Representative Thomas Eliot insisted that the Thirteenth Amendment's Enforcement Clause "confers the power and so creates the duty for just such legislation as this bill contains, to give them shelter, and food, to lift them from slavery into the manhood of freedom, to clothe the nakedness of the slave, and to educate him into that manhood that shall be of value to the State."[230] In other words, Congress did not have to turn a blind eye to the suffering resulting from the blanket refusal of ex-Confederate state governments to protect Black Americans. Senator Lyman Trumbull asked "can we not provide for those among us who have been held in bondage all their lives, who have never been permitted to earn one dollar for themselves, who, by the great constitutional amendment declaring freedom throughout the land, have been discharged from bondage to their masters who had hitherto provided for their necessities in consideration of their services?"[231] To vindicate the promise of freedom, Trumbull insisted, "[s]omething must be done to protect them in their new rights, to find employment for the able-

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[226] *Id.* at 627.
[227] *Id.*
[228] *Id.* at 916 (reprinting veto message).
[229] *Id.* at 652.
[230] CONG. GLOBE, 39th Cong. 1st Sess. 656 (1866).
[231] *Id.* at 939.

bodied, and take care of the suffering, and the Freedmen's Bureau was designed to do that something."[232]

Others stressed the Spending Clause's grant of congressional power to spend money in the pursuit of the general welfare. Representative John Hubbard insisted that "Congress has been at all times charged with the duty of providing for the public welfare, and if Congress shall deem that the public welfare requires this enactment, it is the sworn duty of every member to give the bill his support."[233] Hubbard continued, "there is an old maxim of law . . . that regard must be had to be the public welfare; and this maxim is said to be the highest law. It is the law of the Constitution, and in light of that Constitution as amended I find ample power for the enactment of this law."[234] Likewise, Senator William Fessenden argued that "[w]e have the power to appropriate money; and though we do not find a specific power to appropriate money for this particular purpose, it is yet an object of Government, a thing that the Government and the country must provide, and there is no other way of doing it."[235] To the Act's opponents, Fessenden asked, "[w]ill you make no appropriations for the benefit of these people; not only the colored people who have thus been thrown upon the world, but the refugees who have been driven by the war from their States, out of their possessions, and reduced to poverty and misery?"[236] "All the world," Fessenden insisted, "would cry shame upon us if we did not."[237] The charge that the Freedmen's Bureau Act was unconstitutional because our national charter contained no explicit power to help the poor and powerless, Representative Thomas Eliot argued, "would prove that our Constitution, ordained to promote the general welfare and to secure the blessings of liberty, had not within itself the power to do its work."[238] Republicans took their cue from a Hamiltonian reading of the General Welfare Clause, which emphasized the breadth of Congress's power to spend money to serve the general welfare.[239]

In recognizing that Congress had a duty to provide access to clothing, food, and medical care to redress starvation and suffering and ensure that Black people and white refugees could become self-sustaining citizens, the Freedmen's Bureau Act represented a seismic shift from antebellum

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[232] *Id.* at 937.
[233] *Id.* at 630.
[234] *Id.*
[235] *Id.* at 366.
[236] *Id.*
[237] *Id.* at 365.
[238] *Id.* at 656.
[239] *See* Rebecca E. Zietlow, *Federalism's Paradox: The Spending Power and the Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141, 168 (2002) ("Hamilton . . . argued that the only internal limitation on congressional Spending Power was that Congress must spend to further the general welfare.").

America, during which those who needed poor relief were often viewed as too debased and dependent to be citizens.[240] During Reconstruction, providing basic necessities to poor people was viewed as intimately connected to developing and protecting freedom and citizenship, as the language of the Second Freedmen's Bureau Act confirmed.[241] Federal efforts to ensure economic security, Republicans argued, were not merely constitutionally permissible; they were required to make real the promise of freedom. Congress did not have to have to sit on its hands while the former Confederate states refused to protect those freed from bondage.

Republicans trumpeted the Freedmen's Bureau Acts as landmark, unprecedented legislation required by the abolition of slavery and the need to transition those held in bondage to their new constitutional status as equal citizens. "[N]ever before in the history of this Government," Senator Lyman Trumbull insisted, "have nearly four million people been emancipated from the most abject and degrading slavery ever imposed upon human beings; never before has the occasion arisen when it was necessary to provide for such large numbers of people thrown upon the bounty of the Government, unprotected and unprovided for."[242] Congress had to intervene to redress state neglect—the fact that those held in bondage were "unprotected" and "unprovided for" by white-dominated state governments. Trumbull also stressed the antebellum precedents that supported this new federal antipoverty role. "We have voted hundreds of thousands and millions of dollars, and are doing it from year to year, to take care of and provide for the destitute and suffering Indians. We appropriated, years ago, hundreds of thousands of dollars to take care of and feed the savage African who was landed upon our coast by slavers."[243] To Trumbull and others, federal support to lift Black people and white refugees out of poverty were "in accordance with the practice of the Government, which has its foundations in the Constitution."[244] The Constitution, Republicans insisted, "gives authority to feed Indian tribes, though our enemies, and a just interpretation cannot

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[240] Forbath, *supra* note 163, at 1788 ("Poor relief left 'paupers' dependent and unqualified for citizenship."); Fox, *supra* note 12, at 462-63 (discussing how "poor regulation of the nineteenth century" sought "to transform the pauper into an anti-citizen").

[241] Fox, *supra* note 12, at 530 (arguing that the Freedmen's Bureau represented "federal poor relief as a concept of citizenship: the federal government should try to prevent citizens from living in utter destitution and that it should try to do so in a way that helps citizens move to a citizenship status of self-support"); Graber, *supra* note 12, at 1396 (arguing that "the proponents of the Second Freedmen's Bureau Bill regarded welfare as integral to constitutional civil rights policy").

[242] CONG. GLOBE, 39th Cong. 1st Sess. 939 (1866).

[243] *Id*.

[244] *Id.* at 631.

restrain us in feeding and clothing unfortunate friends."[245]

Received notions about governmental assistance to poor people, however, would die hard. O.O. Howard, the Bureau's commissioner, viewed governmental assistance to poor Americans as "abnormal to our system of government,"[246] and insisted that "[g]reat discriminations will be observed in administering relief, so as to include none that are not absolutely necessitous and destitute."[247] Howard and others leading the Bureau feared that the provision of relief, however necessary in the wake of the destruction wrought by the war, would breed dependency and idleness.[248] Even as the Freedmen's Bureau handed out millions of rations to the destitute, General Howard sought to curtail federal assistance, often prematurely, cuts that proved impossible to implement amidst the widespread poverty and starvation Southerners experienced in the first years after the war.[249] Ultimately, in early 1867, Congress ordered the Bureau "to issues supplies of food sufficient to prevention starvation and extreme want to any and all classes of destitute or helpless persons," legislation that reflected the federal government's "paramount duty" to "protect its citizens," including from economic destitution.[250] All told, despite the Bureau leadership's ambivalence about providing federal aid, in the few years it existed, the Bureau handed out over 21 million rations to Black and white Southerners and treated nearly half a million sick persons.[251]

Despite its limitations, the Freedmen's Bureau set a singularly important precedent, serving as a precursor to the landmark programs enacted during the New Deal and after.[252] As the debates over the Bureau reflect, its passage established a congressional role in lifting Americans out of poverty in order to protect freedom, self-support, and equal citizenship.

C. The Freedmen's Bureau and Access to Education

One of the singular successes of the Freedmen's Bureau was in the

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[245] *Id.* at 652.

[246] 2 OLIVER OTIS HOWARD, AUTOBIOGRAPHY OF OLIVER OTIS HOWARD 226 (1908).

[247] REPORT OF THE COMM'R OF THE BUREAU OF REFUGEES, FREEDMEN, AND ABANDONED LANDS, H.R. EXEC. DOC. No, 39-11, at 15 (1865).

[248] FONER, *supra* note 109, at 152-53.

[249] *Id*. at 152; DAUBER, *supra* note 177, at 38.

[250] Resolution of Mar. 30, 1867, 15 Stat. 28 (1867); CONG. GLOBE, 40th Cong., 1st Sess. 209 (1867); *id*. at 45 ("It is the duty of this Government . . . to lend a helping hand to the suffering.")

[251] DUBOIS, *supra* note 168, at 225-26.

[252] *See* DAUBER, *supra* note 177, at 43 (observing that "those designing and defending the New Deal" viewed "the bureau as a key element in the history of social provision that would validate other relief efforts, both modest and massive").

field of education. In this regard, the Bureau's work ensured access to learning that Black Americans hungered for and understood was essential to freedom. Having been forbidden by the law from being taught during enslavement,[253] Black Americans celebrated the right to education as a basic right inherent in freedom and contested efforts to deny them access to learning.[254] "If I nebber does do nothing more while I live," one formerly enslaved Mississippian insisted, "I shall give my children a chance to go to school, for I considers education next best ting to liberty."[255] Black Virginian Bayley Wyat observed that "[w]e now, as a people, desires to be elevated, and we desires to do all we can to be educated."[256] Without education, Black people insisted, they could not be free. As one formerly enslaved person lamented, "we are denide the right of SCholing our Children" and "are not aloward so much as a Common Scholl for our children."[257] Across the South, Black Americans denounced the fact that "institutions of learning which we help to support are closed to us."[258]

Conventions of Black Americans that met in the wake of the abolition of chattel slavery regularly affirmed that education was fundamental to freedom. Insisting that "[k]nowledge is power" and that "an educated and intelligent people can neither be held in, nor reduced to slavery," a South Carolina Colored People's Convention that met in the fall of 1865 insisted on "the establishment of good schools for the thorough education of our children throughout the State" and urged Congress to ensure "the three great agents of civilized society—the school, the pulpit, and the press—be as secure in South

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[253] FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS AN AMERICAN SLAVE WRITTEN BY HIMSELF 53 (1845, Signet ed. 1968) ("Education and slavery were incompatible with each other.").

[254] *See* STEVEN HAHN, A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION 277 (2003) ("Freedpeople clamored for schooling because they viewed it simultaneously as a rejection of their enslaved past and as a means of power and self-respect in the postemancipation world."); RONALD E. BUTCHART, SCHOOLING THE FREEDPEOPLE: TEACHING, LEARNING, AND THE STRUGGLE FOR BLACK FREEDOM, 1861-1876, at 12 (2010) ("[L]iteracy and other benefits of formal education . . . symbolized freedom from white control, and freedom to think for oneself was deeply and inevitably political. All of those benefits of literacy, the freedmen believed, would contribute to self-respect and independence.").

[255] *See* LITWACK, *supra* note 109, at 472.

[256] Report of a Speech by a Virginia Freedman, Dec. 15, 1866, *reprinted in* FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, 1861-1867, SER. 3., VOL. 2, LAND AND LABOR, 1866-67, *supra* note 219, at 337.

[257] Letter from Mississippi Freedman to the Mississippi Freedmen's Bureau Ass't Comm'r, Jan. 25, 1866, *reprinted in* FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, *supra* note 219, at 104.

[258] *See* PROCEEDINGS OF THE CONVENTION OF THE COLORED PEOPLE OF VA., HELD IN THE CITY OF ALEXANDRIA 12 (1865), https://omeka.coloredconventions.org/items/show/272.

Carolina as in Massachusetts and Vermont."[259] A Georgia convention of Black people affirmed that education was the "safe-guard of human freedom, and the only source of individual and national happiness and prosperity,"[260] while at another Georgia convening, an invited speaker told a gathering of Black people that "you have the right to education, the right to cultivate and expand all the powers of body or of mind, which have been given to you and to receive, and exercise[] that power which knowledge confers."[261] In short, education was a basic civil right and its denial to Black Americans was a badge and incident of enslavement inconsistent with the Thirteenth Amendment's declaration of freedom.[262]

As white-dominated governments took power in late 1865, they sought to dismantle existing educational opportunities rather than recognize Black people as equal citizens. In North Carolina, Governor Jonathan Worth, who had helped to establish public education in the state, moved to abolish the state's public school system, fearing that if white children were to be educated at government expense, "we will be required to educate the negroes in like manner."[263] Instead, the legislature would allow localities to subsidize private academies for well-off white children.[264] In Louisiana, the state destroyed the Black school system set up during the war, insisting that the education system should "vindicate the honor and supremacy of the Caucasian race."[265] In Florida, as Senator Timothy Howe observed, "Black and white are taxed alike" for the education of white children, while "for the education of colored children, a fund is raised only from colored men," a system of discriminatory taxation that shortchanged Black children.[266] The report of the Joint Committee on Reconstruction detailed the deep-seeded animosity toward providing educational opportunities to Black people, and particularly to the idea that white people would be taxed to pay for schooling for Black children.[267]

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[259] *See* PROCEEDINGS OF THE COLORED PEOPLE'S CONVENTION OF THE STATE OF SOUTH CAROLINA, *supra* note 82, at 9, 30.

[260] *See* JOSEPH P. REIDY, FROM SLAVERY TO AGRARIAN CAPITALISM IN THE COTTON PLANTATION SOUTH, CENTRAL GEORGIA, 1800-1880, at 171 (1992).

[261] PROCEEDINGS OF THE FREEDMEN'S CONVENTION OF GEORGIA, ASSEMBLED AT AUGUSTA 8 (1866), https://omeka.coloredconventions.org/items/show/524.

[262] *See* Derek W. Black, *Freedom, Democracy, and the Right to Education*, 116 NW. U. L. REV. 1, 41 (2022) (arguing that the denial of education "was a tool for enslaving African Americans and remained a tangible and lingering badge or incident of slavery after the War"); CONG. GLOBE, 39th Cong. 1st Sess. 322 (1866) (arguing that laws that "did not allow" Black people "to be educated" were "badges of servitude made in the interest of slavery").

[263] FONER, *supra* note 109, at 207-08.

[264] *Id.*

[265] *Id.* at 207.

[266] CONG. GLOBE, 39th Cong. 1st Sess. app. 219 (1866).

[267] REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 83, pt. II, at 154,

Just as Black Americans flocked to schools en masse because education promised elevation and advancement, many white Southerners opposed affording educational opportunities to those freed from bondage precisely because it "tend[ed] to inculcate in him principles or ideas of personal advancement beyond his proper status as a laborer."[268] Education, white Southerners feared, would break down the subordination of Black people. One Black resident of Virginia told the Joint Committee that "there were no colored schools" where he lived because whites "would kill any one who would go down there and establish colored schools."[269] In other areas, opposition to educating Black people was more "tacit and concealed, making itself felt everywhere in a sort of combination not to allow the freedmen any place in which a school may be taught."[270] Where schools did exist, they could not function without military protection.[271] As Leon Litwack observed, "the destruction of school houses, usually by fire, only begins to suggest the wave of terror and harassment directed at efforts to educate blacks."[272]

Given this pattern of state discrimination, neglect, and violence, one of the Bureau's most important roles was in securing access to education to Black people yearning to learn. The initial Freedmen's Bureau Act did not make any explicit provision for education, but General O.O. Howard quickly recognized that "[e]ducation is absolutely essential to the freedmen to fit them for their new duties and responsibilities."[273] As noted above, the Second Freedmen's Bureau Act added statutory language that gave the Bureau the responsibility to ensure educational opportunities for Blacks freed from bondage and to protect schools from white supremacist violence, reflecting the view that access to education was essential to equal citizenship.

218, 245; *id*., pt. III, at 7, 9; *id.*, pt. iv at 2.

[268] *Id.*, pt. IV at 161; *id.* at pt II, at 245 ("[T]hey seem to feel that the negro must not become an equal" and "understand that education and property and political privileges will make the negro so, and hence they oppose everything of the kind.").

[269] REPORT OF JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 83, pt. II, at 55.

[270] *Id.* at 252.

[271] REPORT OF MAJ. GEN. CARL SCHURZ ON CONDITIONS OF THE SOUTH, S. EXEC. DOC., No. 39-2, at 25 (1865) ("The consequences of the prejudice prevailing in the southern States is colored schools can be established and carried on with safety only under the protection of our military forces, and where the latter are withdrawn the former may have to go with them.").

[272] LITWACK, *supra* note 109, at 487; *id.* at 279 ("If black teachers and clergymen were not themselves mobbed or threatened, their schoolhouses and churches were often burned to the ground, and black pupils were apt to be assaulted or intimidated even when attending separate schools."); see REPORT OF JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 83, at pt. II, at 58, 86, 143, 154, 183, 203; *id.* pt. IV at 63, 67; CONG. GLOBE, 39th Cong. 1st Sess. 652 (1866) (observing that "[t]heir schoolhouses have been burning since the sitting of this Congress").

[273] REPORT OF THE COMM'R OF THE BUREAU OF REFUGEES, FREEDMEN, AND ABANDONED LANDS, *supra* note 247, at 33.

The debates over the Second Freedmen's Act are replete with statements that the transition from bondage to equal citizenship would be impossible without federal efforts to ensure educational opportunities for Black Americans.

Senator Lyman Trumbull argued that federal efforts to ensure access to education would "save this race from starvation and destruction" and "make them self-supporting" citizens.[274] "[W]hen slavery no longer exists," he declared, "the policy of the Government is to legislate in the interests of freedom. Now, our laws are to be enacted with a view to educate, improve, enlighten," "to make him an independent man," and "to teach him to think and reason."[275] Insisting that "we cannot degrade any portion of our population, or put a stain on them," Senator Henry Wilson urged "the increase of schools, and the instruction, protection, and elevation of a race."[276] "[W]e must see to it that the man made free by the Constitution of the United States," Wilson urged, "can go into the schools and educate himself and his children."[277] In short, education was critical to the Bureau's job of ensuring economic and social uplift.

In the House debates, no one highlighted the importance of education to freedom and equal citizenship more than Representative Ignatius Donnelly. "Education means the intelligent exercise of liberty," Representative Donnelly stressed.[278] "Who can doubt that if a man is to govern himself he should have the means to know what is best for himself, what is injurious to himself, what agencies work against him and what for him? And the avenue to all this is simply education."[279] Education was the essential building block of a nation founded on the promise of equal citizenship. "Education has here fused all nations into one; it has obliterated prejudices; it has dissolved falsehoods; it has announced great truths; it has opened all doors."[280] In the South, without access to education, "a republican Government" was "an impossibility."[281] Donnelly insisted that "[w]e cannot leave the population of the South, white or black, in the condition they are now in. We must educate them."[282] In short, it was essential that "education accompany freedom."[283] Others made similar arguments. Representative John Hubbard argued that one of the Bureau's central objects was "to give" Black people "the opportunity to learn to read," and that those freed from bondage "need

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[274] CONG. GLOBE, 39th Cong. 1st Sess. 322 (1866).
[275] *Id.*
[276] *Id.* at 341.
[277] *Id.* at 111.
[278] *Id.* at 586.
[279] *Id.*
[280] *Id.*
[281] *Id.*
[282] *Id.* at 588.
[283] *Id.* at 589.

schools and protection," while Representative Josiah Grinnell urged his colleagues to bear in mind the example of Russian abolition of serfdom, noting that the "Czar of Russia . . . when he enfranchised his people, gave them lands and school-houses and invited schoolmasters from all the world to come there and instruct them."[284] "Care and education," Grinnell argued, are "cheaper for the nation than neglect."[285]

The work of the Freedmen's Bureau helped lay the foundation for education in the South. As Eric Foner has observed, "[b]y 1869, nearly 3,000 schools, serving over 150,000 pupils reported to the Bureau," making the Bureau's educational assistance "the agency's greatest success in the postwar South."[286] By the time the Freedmen's Bureau discontinued its work in 1870, the Bureau had expended more than five million dollars to jumpstart Black education where formerly schooling was a criminal offense.[287] Among Black Americans, the conviction that "'knowledge is power'" drew "hundreds of thousands, adult and children alike to the freedmen's schools from the moment they opened."[288] With the assistance and protection afforded by the Freedmen's Bureau, hundreds of thousands of Black Americans, who were too poor to pay for an education, were able to obtain schooling denied to them during bondage.

The work of ensuring access to education continued as Congress moved to set up state governments that, for the first time, would live up to the promise of a multiracial democracy. In 1867, Congress passed the Reconstruction Act, which established a process for Southern states to be readmitted to the Union. Under this new process, states would be required to establish new state constitutions that granted the right to vote to all adult men regardless of race and to ratify the Fourteenth Amendment and submit their new charters for approval to Congress.[289] Following the Act's passage, Senator Charles Sumner offered an amendment that would have required Southern states to agree in their new charters "to establish and sustain a system of public schools open to all, without distinction of race or color."[290] "In a republic," Sumner insisted, "[e]ducation is indispensable."[291] Sumner's amendment failed by a evenly-divided vote of 20-20. Republicans agreed that "education . . . is essential to reconstruction" and that Congress had a duty to intervene to redress discriminatory state laws that denied Black

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[284] *Id.* at 630, 652.
[285] *Id.* at 652.
[286] FONER, *supra* note 109, at 144.
[287] BUTCHART, *supra* note 254, at 6.
[288] LITWACK, *supra* note 109, at 473, 474.
[289] FONER, *supr*a note 109, at 273-80.
[290] CONG. GLOBE, 40th Cong. 1st Sess. 165 (1867)
[291] *Id.* at 167.

people educational opportunities,[292] while others assailed Sumner's amendment as an attack on state prerogatives and opposed adding new conditions on readmission to the Union.[293]

In the end, despite the defeat of Senator Sumner's amendment, virtually every Southern state would include in their state constitution a guarantee of a system of public education open to all. As Derek Black has shown, "by 1868, nine of the ten states seeking readmission through the Reconstruction Act of 1867 had enacted a new affirmative education clause in their constitutions. . . . [A]ll of these affirmative education mandates included specific language obligating the state to provide education to 'all' children, the exact concept Senator Sumner had sought to impose as a condition of readmission to the Union."[294] These new constitutions were based on the idea that education was a positive right inherent in citizenship.[295] Across the South, "[r]epresentatives at state constitutional conventions emphasized that they could not break from the continuing effects of slavery and poverty to operate as functioning democracies unless their new and former citizens received education."[296]

A number of Southern states lagged behind. In 1870, when Congress readmitted Virginia, Mississippi, and Texas to the Union, it attached the "fundamental condition" that the state's "constitution . . . shall never be so amended or changed as to deprive any citizens or class of citizens of the United States of the school rights and privileges secured by the constitution of said State."[297] These fundamental conditions reflected Congress's determination "to hold these rights secure for all the people" and its judgment that "in order to uphold and maintain a republican form of government . . . the diffusion of knowledge by means of primary schools is the greatest,

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[292] *Id.* at 168, 169.

[293] *Id.* at 168, 170.

[294] *See* Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 788-89 (2018).

[295] *See* PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA 694 (1868) ("It is republicanism to educate the people, without discrimination."); OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONVENTION, FOR FRAMING A CONSTITUTION FOR THE STATE OF LOUISIANA 289 (1868) (explaining that the new state charter "secures to every good, honest and loyal citizen the rights of citizenship, follows the free school system, and secures to my child and to all children . . . their education which their forefathers have been deprived of for two hundred and fifty years"); DEBATES AND PROCEEDINGS OF THE CONVENTION TO FORM A CONSTITUTION FOR THE STATE OF ARKANSAS 683 (1868) (approving of state constitution because "I see in it a principle that is intended to elevate our families—the principle of schools—of education.").

[296] Black, *supra* note 294, at 743.

[297] Act of Jan. 26, 1870, ch. 10, 16 Stat. 62, 63 (1870) (Virginia); Act of Feb.23, ch. 19, 16 Stat. 67, 68 (1870) (Mississippi); Act of Mar. 30, 1870, ch. 39, 16 Stat. 80, 81 (1870) (Texas).

safest, and the most effectual instrument."[298] These safeguards were "of the most vital importance" to secure "the rights and privileges of citizens," including "rights of education," particularly given concerns that state educational guarantees were in "danger of nullification."[299] The right to education, these enactments made plain, was essential to the promise of equal citizenship the Fourteenth Amendment guaranteed.[300] The throughline from the Freedmen's Bureau to the Readmission Acts was that education was a basic civil right that had to be provided equally to all.[301]

IV. RECOVERING ECONOMIC JUSTICE

The Supreme Court has refused to honor the constitutional promise of economic justice. First, the Court has stripped the Thirteenth Amendment of its liberatory potential as a safeguard against economic exploitation.[302] Second, it has refused to recognize in any meaningful way that economic rights are protected by the Fourteenth Amendment. Third, in the hands of the Supreme Court, the Fourteenth Amendment, written to center the rights of poor people, instead leaves the most marginalized members of the populace unprotected, exposed to victimization and neglect.[303] The constitutional duty of protection—a duty that the Reconstruction framers understood to impose positive duties on government—has been effectively written out of the Constitution, as the Court insists that our Constitution is purely a charter of negative liberties.[304] Fourth, the Court has given an incredibly crabbed

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[298] CONG. GLOBE, 41st Cong., 2nd Sess. 440, 1253 (1870).

[299] *Id.* at 463, 568.

[300] *See* FONER, *supra* note 11, at 108 (explaining that the fundamental conditions reflected that the right to education was "essential to citizenship"); Black, *supra* note 294, at 741 ("The Fourteenth Amendment guaranteed citizenship and citizenship required education.").

[301] Indeed, as Michael McConnell has examined in great detail, in the 1870s, Republicans fought to enact civil rights legislation that promised to Black people equal educational opportunity, insisting that public schooling, supported by public taxation, could not be allocated on a discriminatory basis. See Michael McConnell, *Originalism and the Desegregation Decisions,* 81 VA. L. REV. 947, 984-1049 (1995); Wurman, *supra* note 213, at 958-59 (discussing debates over these bills in arguing that public privileges are included within the protection of the Fourteenth Amendment). Although in the end the legislation did not pass, "half or more of the Congress voted repeatedly to abolish segregated schools under authority of the Fourteenth Amendment." McConnell, *supra*, at 986.

[302] *See* Hasbrouck, *supra* note 155212, at 133 ("Modern interpretations of the Amendment as narrowly abolishing slavery simply do not comport with the intent or context of its passage and ratification.").

[303] *See* Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1284 (1993) (criticizing "[t]he Court's willingness to endorse, in the name of democracy, any legislative burden imposed on the poor").

[304] *See* Bernick, *supra* note 9, at 21 (arguing that "the evidence against the Supreme

reading to Congress's enforcement power, refusing to give effect to the Framers' decision to give Congress—not the Court—the lead role in realizing its guarantees.[305] The result of these many moves is a deeply problematic body of law that is impossible to square with four fundamental principles at the core of the Thirteenth and Fourteenth Amendments.

First, as the debates over the Amendment make plain, the Fourteenth Amendment was designed to protect the poorest, most marginalized members of the American populace, and its broad guarantee of equal citizenship thus protects equally the rich and the destitute. The affirmations of economic equality in the text and history of the Fourteenth Amendment, long ignored, should be the centerpiece of a jurisprudence that recognizes that economic justice is essential to equal citizenship.

The principle of equal citizenship for rich and poor alike includes two key components: (1) it guarantees equal rights under the law for all persons regardless of how much money they possess and; (2) it imposes substantive limits on criminalizing poverty.

The idea of equal rights for rich and poor alike is simple, yet far reaching. Consider some examples. Across the country, communities use cash bail as a system for imposing mandatory pretrial detention on those too poor to pay, turning the bail system, long an aspect of liberty, into an engine of oppression.[306] A system in which one's right to pretrial liberty turns on the amount of money one possesses makes a mockery of the constitutional principle of equal justice for rich and poor alike.

Fourth Amendment doctrine, which repeatedly undercuts the rights of poor people to be secure, provides another. The home is the site of the strongest Fourth Amendment protection, yet under the Supreme Court's interpretation of the Fourth Amendment, the government may conduct warrantless, suspicionless invasions into the homes of those who receive public assistance.[307] On the streets, police have broader authority to stop and

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Court's interpretation as . . . conferring no positive rights is indeed overwhelming"); Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 137 (1991) ("By removing the promise of protection from the equal protection clause, our modern constitutional interpreters have taken from that phrase . . . its specific, distinctive, and constitutional contribution to political debate.").

[305] *See* Balkin, *supra* note 19, at 1818 ("The framers . . . did not wish to leave the fate of blacks to discretion of the Supreme Court, an institution which had failed them so often before.").

[306] *See* Sandra G. Mayson, *Detention by Another Name*, 69 DUKE L.J. 1643, 1645 (2020); Hafsa S. Mansoor, *Guilty Until Proven Guilty: Effective Bail Reform as a Human Rights Imperative*, 70 DEPAUL L. REV. 15, 21 (2020).

[307] Wyman v. James, 400 U.S. 309 (1971); Sanchez v. County of San Diego, 464 F.3d 916 (9th Cir. 2006); *see* Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship,* 105 YALE L.J. 1563, 1577 (1996) ("Th[e] surveillance of welfare recipients' everyday lives is so contrary to the government's respect for citizens that it unmistakably marks these

frisk suspects in so-called "high crime" neighborhoods,[308] which turn out to be poor neighborhoods in which people of color disproportionately reside.[309] Throughout Fourth Amendment doctrine, as Christopher Slobogin has observed, "the poor person's Fourth Amendment rights pale against the wealthier person's."[310] These two examples hardly exhaust the ways in which our legal system gives poor persons fewer and weaker rights than the affluent possess.

Criminalization of poverty remains an entrenched part of criminal law. Vagrancy laws may be a thing of the past, but state laws continue to criminalize poverty in myriad ways.[311] And like the vagrancy laws of the Black Codes, modern forms of criminalization of poverty function as major drivers of racial inequality.[312] Guaranteeing poor people the right to participate in American society as equal citizens means eradicating states policies and practices that punish them for the act of living in poverty.

Second, the Reconstruction Amendments protect economic rights in order to safeguard freedom and limit economic domination and exploitation. Yet the Supreme Court's modern case law reads the Thirteenth Amendment as limited to abolishing chattel slavery or functional equivalents "akin to African slavery,"[313] producing "a parody of originalist particularism" that "single[s] out the Thirteenth Amendment for crabbed, freeze-frame

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families as government subjects.").

[308] Illinois v. Wardlow, 528 U.S. 119 (2000).

[309] *See* David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 677 (1994); Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2448 (2017).

[310] Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 403 (2003); *see also* Alexis Karteron, *When Stop and Frisk Comes Home: Policing Public and Patrolled Housing*, 69 CASE W. RES. L. REV. 669, 670-71 (2019) (noting that residents of public housing "are subject to extensive scrutiny by law enforcement in the hallways, stairwells, courtyards, and other common spaces of their homes—encounters that are simply unimaginable in residences of the well-heeled and wealthy").

[311] *See* Bell et al., *supra* note 62, at 1476 (discussing the ways in which "the criminal legal system punishes and exerts control over poor individuals and communities, resulting in the reinforcement of multiple, interlocking social hierarchies").

[312] *See* Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2337 (2018) (observing that "the burden of America's mass incarceration and criminalization of poverty disproportionately falls on the backs of descendants of American chattel slavery"); Monica C. Bell, *Hidden Laws in the Time of Ferguson*, 132 HARV. L. REV. F. 1, 17 (2018) ("[W]e would not have 'criminalization of poverty' if the particular type of poverty—urban, segregated, related to the withholding of structural opportunity—were not so closed associated with race.")

[313] United States v. Kominski, 487 U.S. 931, 942 (1988) (quoting Butler v. Perry, 240 U.S. 328, 332 (1916)).

interpretation."[314]

Those who pushed to add the Thirteenth Amendment to the Constitution and enforce its promises understood the constitutional imperative to ensure real freedom and eliminate root and branch new forms of economic domination and exploitation that might arise in the wake of the abolition of chattel slavery. To this end, the Thirteenth Amendment safeguards a bundle of economic rights in order to vindicate the rights of workers to the fruits of their labor and to prevent the wealthy and powerful from imposing exploitative working conditions. These protections against economic domination remain critical today, as new forms of peonage increasingly threaten the constitutional ideal of free labor.[315]

At the core of the Thirteenth Amendment is the right to quit,[316] but even this most basic aspect of labor freedom is under attack today. Across the country, employers are forcing workers to sign employment contracts that require employees to compensate the company if they quit within a certain period of time. [317] Provisions such as these, which impose a financial penalty—sometimes as much as tens of thousands of dollars—for exercising the right to quit are becoming increasingly commonplace.[318] They hamper worker freedom and mobility, particularly for workers without the financial means to pay to quit, and lead to economic domination. This is a modern form of indentured servitude inconsistent with the Thirteenth Amendment's guarantee of freedom.

The Fourteenth Amendment also protects a number of economic rights, including rights to contract, property, and to pursue a common livelihood of one's choice. Progressives have shied away from recognizing that economic rights are fundamental, fearful that this might embolden conservatives pushing to rehabilitate the *Lochner*-era's jurisprudence, but this is, at long last, beginning to change.[319] Recognizing constitutional protection for economic freedoms does not require dismissing broad state power to regulate businesses in the interest of worker health, safety, and welfare. A proper

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[314] Balkin & Levinson, *supra* note 105, at 1499; Pope, *supra* note 100, at 200.

[315] *See* Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595 (2015); Noah D. Zatz, *A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support and Beyond*, 39 SEATTLE UNIV. L. REV. 927 (2016).

[316] Pope, *supra* note 105, at 1478 (observing that "the inalienable right to quit work" is especially "prominent in our constitutional consciousness").

[317] Robin Kaiser Schatzlein, *The Stay-or-Pay Trap*, N.Y. TIMES, Nov. 23, 2023, https://www.nytimes.com/2023/11/20/magazine/stay-pay-employer-contract.html.

[318] *Id.*

[319] *See, e.g.* Lina Khan, *Noncompetes Depress Wages and Kill Innovation*, N.Y. TIMES, Jan. 9, 2023 ("Economic liberty . . . is at the heart of the American experiment. You're not really free if you don't have the right to switch jobs or choose what to do with your labor."), https://www.nytimes.com/2023/01/09/opinion/linakhan-ftc-noncompete.html.

approach to the protection of economic rights both recognizes that economic rights are fundamental to participating in our market-based society and that governments possess broad powers to regulate businesses in the interest of safeguarding health, safety, and welfare and redressing exploitative practices. Courts can give appropriate deference to state economic regulation, while also holding the government to its burden of justifying restraints on liberty.[320]

In fact, enforcement of economic rights, as during Reconstruction, can serve the goal of protecting the powerless. Consider state occupational licensing regimes, which fall hardest on the poor and communities of color, "contribute to legal immobility," and relegate those with the fewest financial resources to "jobs with less opportunity for growth and less opportunity to move into more lucrative positions."[321] Some licensing regimes may, in fact, serve a legitimate need, but there is good reason to think that quite a few erect unnecessary roadblocks to pursuing a livelihood.[322] Annulling limitations that close off job opportunities can serve to protect marginalized persons from abuse of state power.

Third, the citizenship guaranteed by the Fourteenth Amendment means more than the possession of natural rights; it includes equal rights to access and enjoy public goods and services. Yet the Supreme Court insists that the Fourteenth Amendment "confer[s] no affirmative right to governmental aid" and "imposes no affirmative obligation" on the government to safeguard basic rights.[323] This view is flatly contradicted by the text and history of the Fourteenth Amendment.

The Privileges or Immunities Clause guarantees equal access to public privileges, such as state-supported education.[324] Equal citizenship would be illusory if communities of color and other marginalized communities could

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[320] *See* Walter Dellinger, *The Indivisibility of Economic Rights and Personal Liberty*, 2003-04 CATO SUP. CT. REV. 9, 13-16 (2004); *cf.* Whole Women's Health v. Hellerstedt, 579 U.S. 582 (2016) (finding state regulation of abortion clinics served no legitimate health-related interest).

[321] Sara S. Greene, *A Theory of Poverty: Legal Immobility*, 96 WASH. U. L. REV. 753, 777 (2019).

[322] *Id.* at 776-77.

[323] DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195-96 (1989).

[324] *See* BARNETT & BERNICK, *supra* note 13, at 249 ("Implicit in the concept of Republican citizenship is the unenumerated right not to be treated unfairly by public institutions, which are there to protect and serve everyone."); Wurman, *supra* note 213, at 943 ("Although a state did not have to provide public privileges at all, if it did choose to provide them, it had to do so equally."); *see also* K. Sabeel Rahman, *Constructing Citizenship: Exclusion and Inclusion Through the Governance of Basic Necessities*, 118 COLUM. L. REV. 2447, 2502 (2018) (arguing that struggles over "access to basic necessities are very much about the scope and content of the privileges and immunities of citizenship: who is a full member of the polity and what that membership entails").

be denied equal access to the public goods their taxes funded.[325]

On top of that, the right of protection, written into the Amendment's Equal Protection Clause, is an affirmative right that imposes on the government the obligation "to pay the costs attendant on it."[326] Indeed, the text and history of the Fourteenth Amendment, together with contemporaneous landmark enforcement legislation, demonstrate that constitutional duty of protection was broad and included protecting the health, welfare, and economic well-being of the citizenry, ensuring access to education, and redressing private violence and other legal wrongs. Under the Fourteenth Amendment, that protection had to be equal for all persons, rich and poor alike.

Thus, while the Fourteenth Amendment does not make courts responsible for creating positive rights on their own, it does give them a critical role in ensuring that state-created programs that provide access to basic necessities and other goods and services, including public assistance and education, respect the constitutional guarantee of equal protection for all persons.[327] When state educational systems or public assistance programs shortchange poor people—such as by offering them lesser educational opportunities or excluding them from care for reasons unrelated to need—courts properly enforce the constitutional guarantee by mandating that protective state laws be equal.[328] Indeed, as the debates over the Freedmen's Bureau Act show, the Framers of the Fourteenth Amendment were particularly concerned about state laws and practices governing poor relief and access to education that left Black people and their allies unprotected and unprovided for. The theory of the Second Freedmen's Bureau Act was that Congress had to intervene to protect Black Americans and their allies in the face of state failures to protect.

The Supreme Court's case law has, all too often, disavowed the

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[325] *See* S. EXEC. DOC. 39-6, at 154 (1867) ("The proposition that a Black man is to be taxed to create a county fund for the relief of unfortunate whites, and which he is not to share when under similar misfortune, is as false in law as it is reprehensible in morals."); PROCEEDINGS OF THE NATIONAL CONVENTION OF THE COLORED MEN OF AMERICA 34 (1869) (attacking the fact that Black people "are taxed to support common schools while their children are denied the privilege of attending those in their respective wards"), https://omeka.coloredconventions.org/files/original/e81115ebeb5a39bd684cc7b98e98512e.pdf.

[326] CONG. GLOBE, 39th Cong. 1st Sess. 1295 (1866).

[327] *See* Frank I. Michaelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, 663 (1979); Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 215, 252 (2008).

[328] West, *supra* note 304, at 135 ("Protection is the nub of equal protection. The state must protect, and it must protect equally."); Bernick, *supra* note 9, at 36 ("'[E]qual protection of the laws' did not merely guarantee impartial execution of states' protective laws and impartial state adjudication of violations of those laws. It required as well that states' protective laws be nondiscriminatory and that states comply with protective federal laws.").

responsibility to enforce this root understanding of equal protection, repeatedly insisting that inequalities in the administration of public assistance, education, housing, and other state-run programs "are not the business of this Court."[329] Rather than ensuring poor people are protected equally, the Court's doctrinal rules leave those on the margins of society unprotected virtually all the time, even when what is at stake are "the most basic economic needs of impoverished human beings."[330] On the Court's view, the Constitution simply has nothing to say about access to food, shelter, education, or medical care. The Court maintains the fiction that the Constitution is purely a charter of negative liberties even though the right to protection is a positive right that imposes on the government affirmative obligations to care for and safeguard the life, liberty, and property of the entire populace, whether rich or poor.

Restoring an understanding of equal protection faithful to constitutional text and history can provide new ways of thinking about how the Fourteenth Amendment can be employed to redress systemic inequalities in access to public goods in poor and racially marginalized communities. Consider, in this regard, the Flint water crisis, in which state failures to properly treat drinking water left a poor, majority Black community exposed to dangerous drinking water. The federal courts provided some measure of accountability, finding that the conduct of state and local officials was so egregious that it shocked the conscience.[331] That standard was met in the appalling facts presented in the case of Flint, but will rarely secure racial, economic, and environmental justice to marginalized communities. A better, and more constitutionally grounded, approach would treat the Flint water crisis as a denial of equal protection: state and local officials neglected their constitutional duty to protect the life and health of all its residents and turned a blind eye to environmental legal protections designed to ensure access to clean, safe water.[332]

Fourth, Congress has broad powers to realize the constitutional promise of economic justice. The Supreme Court has treated the enforcement power as a disfavored, second-class power, insisting that searching review of congressional enforcement measures is necessary to protect the Court's role as the Constitution's primary interpreter, but this view is unfaithful to the text and history of the Reconstruction Amendments.[333] The Thirteenth and

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[329] *See* Dandridge v. Williams, 397 U.S. 471, 487 (1970); San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 42 (1973); Maher v. Roe, 432 U.S. 464, 479-80 (1977); Harris v. McRae, 448 U.S. 297, 326 (1980).

[330] *Dandridge,* 397 U.S. at 485.

[331] *See* Guertin v. Michigan, 912 F.3d 907 (6th Cir. 2019).

[332] For an argument along these lines, see David A. Dana & Deborah Turkheimer, *After Flint: Environmental Justice as Equal Protection*, 111 NW. U. L. REV. ONLINE 93 (2017).

[333] *See* Balkin, supra note 19, at 1808-31; McConnell, supra note 22, at 170-95.

Fourteenth Amendments do not leave enforcement of the Constitution solely in the hands of courts. On the contrary, the Framers were clear that remedying constitutional violations "was expressly not left to the courts. The remedy was legislative, because in each the amendment itself provided that it shall be enforced by legislation on the part of Congress."[334] Thus, the drafters of those amendments gave Congress sweeping power to carry into effect the constitutional promises of freedom, equal citizenship, and equal protection. They understood that Congress would use its legislative authority to help realize the constitutional guarantees contained in those Amendments in far-reaching ways that courts could not, as exemplified by the Civil Rights Act of 1866 and the Freedmen's Bureau Act. The Court has simply refused to respect the Framers' structural design.

With a deeply conservative Supreme Court increasingly hostile to enforcing equal citizenship, new pathbreaking congressional enforcement measures are more important than ever. Congress can and should use its express constitutional powers to safeguard economic security for all Americans, ensure equal access to basic necessities for all persons regardless of race and class, such as education, housing, food, and healthcare, and work to eradicate the economic exploitation of less affluent Americans in labor, housing, and financial markets. The hard work necessary to achieve reforms like these begins with recognizing that Congress has a constitutional duty to eliminate economic domination and protect the equal citizenship stature of all Americans, including the powerless and downtrodden.

Administrative constitutionalism should play a critical role in this project.[335] The Freedmen's Bureau offers a singular example of the role agencies can play in the enforcement of constitutional values. The Bureau was dedicated to the pursuit of both racial and economic justice, aiming to provide basic necessities, attack forms of economic domination, and redress racial oppression and violence. It understood that threats to freedom and equal citizenship came from both state and private forces and required remedies that transcended the public-private divide. The precedent set by the Freedmen's Bureau provides an important reminder that administrative approaches to racial and economic inclusion are likely to be more effective

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[334] CONG. GLOBE, 42nd Cong. 2d Sess. 525 (1872).

[335] See Gillian E. Metzger, *Administrative Constitutionalism,* 91 TEX. L. REV. 1897, 1903-15 (2013) (discussing different varieties of administrative constitutionalism); Rahman, *supra* note 324, at 2456 n.24 (observing that "economic equality and racial and gender-based inclusion have often depended on the creation of administrative institutions and the creative deployment of regulatory tools"); Blake Emerson, *Affirmative Furthering Equal Protection: Constitutional Meaning in the Administration of Fair Housing*, 65 BUFFALO L. REV. 165, 165-66 (2017) ("[C]ivil rights agencies have been the paradigmatic site for our history of 'administrative constitutionalism,' in which constitutional norms permeate administrative law, and evolve in response to administrative action.").

than court-centered approaches in countering enduring patterns of racial and economic exclusion, particularly given all the ways the Supreme Court has curbed the reach of key federal civil rights laws. For example, what Olatunde Johnson calls regulatory "equality directives,"[336] such as HUD's Affirmatively Furthering Fair Housing rule, which requires grantees to take affirmative steps to promote racially integrated housing,[337] can serve as powerful tools to tackle systemic inequalities and help realize the promise of equal citizenship. Today, the administrative state is under attack in a multitude of ways,[338] but as the Freedmen's Bureau Acts demonstrate, the robust role agencies play is fundamental to our constitutional order.

CONCLUSION

As the work of the first session of the 39th Congress drew to an end, Representative Thaddeus Stevens summed up the momentous constitutional and legal changes that lawmakers had set in motion: "I know it is easy to protect the interests of the rich and powerful; but it is a great labor to guard the rights of the poor and downtrodden; it is the eternal labor of Sisyphus forever to be renewed."[339] Stevens's remarks highlighted a fundamental idea that has been sorely lacking in the Supreme Court's jurisprudence: the rights of the poor and powerless to enjoy fundamental freedoms and meaningful equality lie at the very core of the Fourteenth Amendment's text and history. This text and history has never gotten its due.

What would it mean to recognize that the rights of poor people lie at the center of the Fourteenth Amendment's transformative guarantees? As this Article demonstrates, the key ideas running through the Fourteenth Amendment—citizenship, rights, and protection—were reshaped by the Reconstruction Framers in far-reaching ways to safeguard the liberty and equality of the poor and powerless.

First, the Fourteenth Amendment's guarantee of equal citizenship—a principle reflected throughout the text of Section 1—promises equal

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[336] Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1345 (2012) ("Equality directives do more than combat discrimination and bias: They also seek to promote economic and other opportunities, full participation in government-funded programs, and social inclusion for excluded groups.").

[337] Emerson, *supra* note 335, at 167 (describing the AFFH's requirement that recipients of federal aid engage in a "racial-conscious planning process to promote residential integration, reduce housing disparities, and increase access to opportunity in racially or ethnically concentrated areas of poverty").

[338] See Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreward: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 8-51 (2017).

[339] CONG. GLOBE, 39th Cong. 1st Sess. 4305 (1866).

citizenship to all regardless of race and class. To redress slavery's racial and economic caste system, the Amendment holds out the promise of full participation in our polity to all persons, particularly those on the margins of society. The Reconstruction Framers recognized that redressing slavery's bitter legacy required sweeping new guarantees of liberty and equality aimed at protecting the most exploited Americans—those who had been held in bondage, denied the fruits of their toil, physically violated, and consigned to crippling poverty and degradation. Time and again during the debates over the Fourteenth Amendment and contemporaneous landmark federal civil rights legislation that informed it, the Framers of the Fourteenth Amendment affirmed principles of economic equality as fundamental constitutional ideals and recognized that ensuring some measure of economic justice was necessary to make equal citizenship a reality. That explains the Reconstruction Framers' consistent demand that our national charter be changed to protect the equal citizenship stature of the poorest and most marginalized of Americans.

Second, Reconstruction reshaped the protection of economic rights, safeguarding labor rights, including the right to the fruit of one's toil, and rights to contract and to property, to limit economic domination. These economic rights were crucial to protecting working Americans from economic exploitation, and they limited both governmental and private action. The Thirteenth Amendment's promise of freedom demanded economic rights against all actors to eliminate the labor coercion and domination inherent in bondage. These rights were crucial to enable marginalized workers to quit working for an oppressive boss, demand a living wage, follow their calling, rise in the world, and enjoy the freedom and equal citizenship secured by the Thirteenth and Fourteenth Amendments. While conservative accounts of economic rights generally view the Constitution as a bulwark against unwarranted state intervention, that is only half the story: the Reconstruction Framers recognized that private forms of domination were just as much a threat to freedom as governmental abuse of power and oppression. Indeed, because the Thirteenth Amendment applies to all actors, whether public or private, the Reconstruction Framers understood that the federal government has a constitutional duty to intervene in private markets to enforce constitutional limits on economic subjugation.

Third, the Fourteenth Amendment wrote the constitutional duty of protection into our national charter, placing on states an affirmative constitutional obligation to protect its populace and to do so on the basis of equality. In other words, a state's protective laws have to shield everyone, not merely the rich and powerful, but the poor and the needy as well. The Supreme Court has effectively read protection out of the Fourteenth Amendment, but this constitutional principle is fundamental. It requires

states to protect the populace from violence, redress deprivations of their legal rights, and provide public goods and services on the basis of equality. When states refuse to protect the poor and powerless, Congress has the power to secure the equal protection the Constitution demands. To that end, the Reconstruction Framers passed pathbreaking legislation to provide basic necessities to those held in bondage and relegated to poverty. Food, clothing, medical care, and access to educational opportunities were essential to the promise of self-sustaining citizenship. With states refusing to aid Black Americans and their white allies, Congress stepped into provide some measure of economic security, health care, and education. This is what equal protection entailed. The Freedmen's Bureau legislation provides important insight on what protection meant to those who wrote the constitutional guarantee of the equal protection of the laws.

Repudiating a nation built on the backs of those who had been held in bondage and consigned to the cruelest of deprivations, the three interlocking safeguards of citizenship, rights, and protection were designed to ensure equal rights and equal citizenship for all Americans, equally protecting the humblest, poorest persons dwelling in our land. The Supreme Court has failed to give these fundamental promises their due, sometimes ignoring them outright, something blunting their force, and sometimes converting them into protections for the wealthy and powerful at the expense of the powerless. The first step to restoring the constitutional promise of economic justice is to engage with the text and history of the Thirteenth and Fourteenth Amendments and understand what has been lost by the Supreme Court's crabbed reading of the constitutional guarantees of freedom, equal citizenship, and equal protection for all. Engagement with the history detailed in this Article is essential if we are to revitalize the Thirteenth and Fourteenth Amendment's project of ensuring true freedom, repudiating slavery's legacy of economic domination, and guaranteeing equal citizenship to all, particularly those who live on the margins of society. We cannot hope to meet the challenges of rampant economic inequality and the enduring racial wealth gap without understanding that our Constitution's most important guarantee of liberty and equality puts poor people at its center.