**The Supreme Court Is Headed Back to the 19th Century**

The justices again appear poised to pursue a purely theoretical liberty at the expense of the lives of people of color.

When the Louisiana State Militia finally arrived at the Colfax courthouse on April 15, 1873, all it could do was bury the bodies. Two days earlier, a large force of white supremacists had taken control of the courthouse from the mostly black faction protecting it. J. R. Beckwith, the U.S. attorney for New Orleans, told Congress that in the aftermath the ground was “strewn with dead negroes,” their bodies plundered by whites who had come to watch the bloodshed. The dead remained “unburied and mutilated,” Beckwith said, until federal troops arrived days later to shovel them into a mass grave.

“Not a single negro had been killed until all of them had surrendered to the whites who were fighting with them,” *The* *New York Times* reported at the time, “when over 100 of the unfortunate negroes were shot down in cold blood.” Some were killed as they tried to surrender, and others as they attempted to flee the courthouse, which had been set on fire. President Ulysses S. Grant called the Colfax massacre a “butchery” that “in bloodthirstiness and barbarity is hardly surpassed by any acts of savage warfare.”

Many white Southerners saw it differently. Robert Hunter, the editor of *The Caucasian*, a Louisiana newspaper, told Congress in 1875 that some of his own staffers had participated in the massacre. “I approved it, as most of our people did,” Hunter testified. “Had not the Colfax affair ended as it did, not less than a thousand niggers would have been killed later.”

Seventy-two men were ultimately indicted for their role in the Colfax massacre, charged under the Enforcement Acts of 1870, which were passed to help the federal government suppress the Ku Klux Klan. But their convictions were overturned by the U.S. Supreme Court, which concluded that the federal government lacked the authority to charge the perpetrators. Justice Joseph Bradley, a Grant appointee, wrote that the United States had not clearly stated that the accused, in slaughtering more than 100 black men, had “committed the acts complained of with a design to deprive the injured persons of their rights on account of their race, color, or previous condition of servitude.” And it wouldn’t have mattered if they had, argued the Grant-appointed Chief Justice Morrison R. Waite, because the Fourteenth Amendment’s powers did not cover discrimination by individuals, only by the state. “The only obligation resting upon the United States is to see that the States do not deny the right,” Waite wrote. “This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.”

This decision, in *United States v. Cruikshank*, the legal historian Lawrence Goldstone argues, provided a guide for the campaign of racist terrorism that would suppress the black vote and enshrine a white man’s government for generations. “The Colfax defendants would have had to announce their plan to violate their victims’ rights on account of the color of their skin in order to be culpable,” Goldstone wrote. “Justice Bradley had thus communicated to any Redeemer with violent intent that to avoid federal prosecution one need simply to keep one’s mouth shut before committing murder.”

Grant was enraged that “insuperable obstructions were thrown in the way of punishing these murderers … and the so-called conservative papers of the State not only justified the massacre, but denounced as federal tyranny and despotism the attempt of the United States officers to bring them to justice.”

The decision in *Cruikshank* set a pattern that would hold for decades. Despite being dominated by appointees from the party of abolition, the Court gave its constitutional blessing to the destruction of America’s short-lived attempt at racial equality piece by piece. By the end, racial segregation would be the law of the land, black Americans would be almost entirely disenfranchised, and black workers would be relegated to a twisted simulacrum of [the slave system that existed before the Civil War](http://www.pbs.org/tpt/slavery-by-another-name/home/).

The justices did not resurrect *Dred Scott v. Sandford*’s antebellum declaration that a black man had no rights that a white man was bound to respect. Rather, they carefully framed their arguments in terms of limited government and individual liberty, writing opinion after opinion that allowed the white South to create an oppressive society in which black Americans had almost no rights at all. Their commitment to freedom in the abstract, and only in the abstract, allowed a brutal despotism to take root in Southern soil.

The conservative majority on the Supreme Court today is similarly blinded by a commitment to liberty in theory that ignores the reality of how Americans’ lives are actually lived. Like the Supreme Court of that era, the conservatives on the Court today are opposed to discrimination in principle, and indifferent to it in practice. Chief Justice John Roberts’s June 2018 ruling to uphold President Donald Trump’s travel ban targeting a list of majority-Muslim countries, despite the voluminous evidence that it had been conceived in animus, showed that the muddled doctrines of the post-Reconstruction period retain a stubborn appeal.

Roberts wrote that since the declaration itself was “facially neutral toward religion” and did not discriminate against all Muslims, it did not run afoul of the Constitution. In doing so, he embraced the logic of decades of jurisprudence from his predecessors on the high court, whose rulings ensured that the Constitution would not interfere with the emergence of Jim Crow in the American South. The nation’s founding document is no match for a dedicated majority of justices committed to circumventing its guarantees.

“You have the president repeatedly saying this is a ban on Muslims, and the courts agreed with that, and he went back and rewrote it, and the courts seemed to say that was all he had to do to cover up his discrimination. After Reconstruction, the Court refused to see how their rulings encouraged the rise of white supremacists and inhibited the promise of the Fourteenth Amendment,” says Adam Winkler, a legal historian and professor at the UCLA School of Law. “There is in both instances a preference for legal formalities over how we know the law is being implemented on the ground.”

The Roberts Court is poised to shape American society in Trump’s image for decades to come. All three branches of the federal government are now committed to the Trump agenda: the restoration of America’s traditional racial, religious, and gender hierarchies; the enrichment of party patrons; the unencumbered pursuit of corporate profit; the impoverishment and disenfranchisement of the rival party’s constituencies; and the protection of the president and his allies from prosecution by any means available. Not since the end of Reconstruction has the U.S. government been so firmly committed to a single, coherent program uniting a politics of ethnonationalism with unfettered corporate power. As with Redemption, as the end of Reconstruction is known, the consequences could last for generations.

The lesson of the post-Reconstruction Supreme Court is that a determined Court majority can prove stubbornly resistant to short-term swings of political fortune. Even if Democrats win the next election cycle, and the one after that, an enduring conservative majority on the Supreme Court will have the power to shatter any hard-won liberal legislative victory on the anvil of judicial review. It will be able to reverse decades-old precedents that secure fundamental rights. It will further entrench the rules of a society in which justice skews toward the wealthy, and the lives of those without means can be destroyed by a chance encounter with law enforcement. It will do all these things and more in the name of a purely theoretical freedom, which most Americans will never be able to afford to experience.

“For large portions of American life people of color have been treated unjustly, and for most of that period the Supreme Court has found ways to rationalize that, and make us think that is consistent with promises of liberty and equality,” says the Harvard Law professor and legal scholar Randall Kennedy. “That’s what it’s typically done. Is it doing that today? Yup.”

The Supreme Court’s moments of majesty, such as *Brown v. Board of Education*, which outlawed segregated schools; and *Loving v. Virginia*, which struck down antimiscegenation laws; and even *Obergefell v. Hodges*, which legalized same-sex marriage, are few and far between. For most of its existence, the high court has been committed less to upholding the rule of law or the Constitution than to preserving its own legitimacy, unwilling to shield the powerless from the mob unless convinced that it has the political cover to do so. Like many things in America, the ideal rarely resembles the execution.

“We constantly romanticize the Supreme Court of the United States,” Kennedy says. “People think they have more rights than they actually have. They think something’s gonna happen and the Supreme Court’s gonna make things right. It’s just ridiculous.”

During Redemption, Southern white militants regained control of state governments across the South with murder and terror, successfully disenfranchising the newly emancipated slaves. The Republican Party relinquished its commitment to protecting the rights of black voters in the South, even though the party could not be viable there without them. Fearful that a weary nation was tired of expending blood and treasure for the benefit of people whom most whites considered only conditionally American, Republican lawmakers acquiesced to the creation of a separate and unequal society in the South.

To maintain their power in the South, the so-called Redeemers required more than control of state governments and rigged election rules. They also required a compliant executive branch and a sympathetic Supreme Court.

Reconstruction’s experiment in equal rights did not end, and could not have ended, simply by force of arms. Rather, as the Republican Party retreated from its commitment to black rights and the Democratic Party reasserted its historical commitment to white supremacy, the branches of the federal government became aligned toward a single ideological purpose: the protection of white rule. Virtually anyone who might have opposed it in principle acquiesced in practice.

That cause succeeded for a century not simply because of the implacable commitment of the Democratic Party, but also because the federal courts, filled with Republican-appointed jurists, chose to be compliant, painting the scaffolding of segregation with the language of constitutionalism. Together they built Jim Crow, which would last for a century, until it was torn down to its still-intact foundations by the civil-rights movement.

The Colfax massacre is most often remembered as the single worst act of violence during Reconstruction, but it also set a template for the high court’s approach to the bloody restoration of white rule in the South. The men who carried out the massacre had popular support among Southern whites—according to the historian Ted Tunnell, “nearly half the white males” in New Orleans alone belonged to terrorist groups such as the White League, which was willing to use violence to secure political gains or prevent black Americans from voting. With *Cruikshank*, the justices sent the message that if white Southerners wished to overthrow their state government at gunpoint, the Supreme Court would bar efforts to prosecute them. In the 1873 *Slaughterhouse Cases*, the justices drew a distinction between state and national citizenship, concluding that, in the words of the historian Eric Foner, “primary authority over citizens’ rights rested with the states.”

In the 1879 case of *Virginia v. Rives*, Justice William Strong, a Grant appointee, sanctioned all-white juries by ruling that the simple fact that black people in Virginia had never been called upon to serve on a jury was not, absent a law explicitly barring them, evidence of discrimination. The relevant provisions of the Fourteenth Amendment “have reference to state action exclusively, and not to any action of private individuals,” Strong wrote. If blacks were barred from juries by discriminatory custom, not by written law, the Constitution offered no remedy.

In the 1883 case *United States v. Harris*, Justice William Woods cited Strong when he wrote that the federal government had no authority to try a group of white men for lynching four black men they had seized from a jail in Tennessee, where they were being held by the local sheriff prior to being charged. “The section of the law under consideration is directed exclusively against the action of private persons, without reference to the laws of the states or their administration by the officers of the state, we are clear in the opinion that it is not warranted by any clause in the Fourteenth Amendment to the Constitution,” Woods wrote. In the name of limited government and individual freedom, the Supreme Court could not allow the federal government to stop or punish white men determined to enforce racial caste by murdering black men in public.

The reasoning in those cases—that the Fourteenth Amendment did not allow the federal government to legislate against private discrimination—led the Supreme Court to overturn the Civil Rights Act of 1875, which had declared, “All persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement.” The law had rarely been enforced, and similar protections would not become law again until nearly a century later, with the Civil Rights Act of 1964.

The ruling overturning the Civil Rights Act of 1875 came in the 1883 *Civil Rights Cases*, at a time when black Americans were being denied the right to vote, barred from businesses, thrown off train cars, and murdered in the street. Justice Bradley wrote in his majority opinion:

When a man has emerged from slavery, and, by the aid of beneficent legislation, has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected … There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens, yet no one at that time thought that it was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement.

Bradley’s opinion, which gave segregation the explicit approval of the nation’s highest court, doubled as an expression of the era’s bipartisan exhaustion with black Americans who continued to insist that they were entitled to be treated with the same respect and dignity as white people. Justice John Harlan wrote one of his famous lone dissents, arguing that what the Civil Rights Act sought to accomplish was “what had already been done in every state in the Union for the white race, to secure and protect rights belonging to them as freemen and citizens; nothing more.”

Lawrence Goldstone notes that the decision drew praise from the white North as well as the white South. Sectional differences were reconciled in a common frustration over having to share the country with black people. Northern newspapers such as *The New York Times* and *The Brooklyn Daily Eagle* praised the ruling. *Harper’s Weekly* [described](https://books.google.com/books?id=tMA4AQAAMAAJ&pg=PA66) it as “another illustration of the singular wisdom of our constitutional system.”

The Supreme Court’s growing hostility to federal efforts to protect black rights would come to its logical conclusion in the 1896 case of *Plessy v. Ferguson*, which upheld segregation in public transportation. Justice Henry Billings Brown, a Rutherford B. Hayes appointee, wrote that “if one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.” Separate was not inherently unequal, he insisted. “A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude.” As the historian Ibram X. Kendi has written, “Brown relied on racist ideas to support a policy that was clearly discriminatory in intent. It was his job to obscure those intentions.”

In 1898, in *Williams v. Mississippi*, the William McKinley–appointed Justice Joseph McKenna would write for a unanimous Court that literacy tests and grandfather clauses, two cornerstones of Jim Crow–era disenfranchisement, were constitutional because they also affected some whites. That the devices were consciously used to bar black voters from the polls was of no significance—the Court would avert its eyes and plug its ears. “They do not on their face discriminate between the races,” McKenna wrote, “and it has not been shown that their actual administration was evil; only that evil was possible under them.”

In the name of limited government and individual freedom, the Supreme Court would deny black people both. But it’s not as if the Redemption Court was sincerely committed to those principles. “Some commentators have praised the justices’ rulings during this period for applying ‘restraint,’ for voluntarily restricting their own power rather than resorting to ‘activism’ to artificially rewrite the Constitution. In fact, the justices were engaging in nothing of the sort,” Goldstone argues. “The judges were simply finding justification, no matter how flimsy, for declining to enforce constitutional amendments with whose principles they philosophically and politically disagreed.”

The Fourteenth Amendment’s guarantee of due process, however, did not go to waste. As the Republican Party abandoned its black constituency in the South, it became more dependent on, and shaped by, its corporate benefactors, which profited handsomely from being granted rights and protections denied to black Americans. As the historian Nell Irvin Painter has written: “The Court increasingly used the due process clause of the Fourteenth Amendment to protect corporations from state regulation rather than the civil rights of persons.” In case after case, “the U.S. Supreme Court had come to embrace the logic of corporations,” Painter wrote in [*Standing at Armageddon*](https://www.amazon.com/dp/B004RI1EX8/ref%3Ddp-kindle-redirect?_encoding=UTF8&btkr=1), her history of the Gilded Age. “These decisions outlawed virtually any attempt by states to limit maximum hours of work, of unions to strike, and of the federal government to curb or regulate monopolies or to curb the accumulation of vast fortunes.”

As Adam Winkler documents in [*We the Corporations*](https://www.amazon.com/dp/B01M64LRDJ/ref%3Ddp-kindle-redirect?_encoding=UTF8&btkr=1), from 1868 to 1912 the Supreme Court heard 604 Fourteenth Amendment cases. Fewer than 5 percent involved the civil rights of black Americans, and civil-rights advocates lost nearly all of those. “More than half of all the Fourteenth Amendment cases decided by the Supreme Court—312 in total—involved corporations,” Winkler writes, “which succeeded in striking down numerous laws regulating business, including minimum wage laws, zoning laws, and child labor laws.” The redistribution of civil rights from American citizens to American corporations helped create the greatest disparities in wealth in the nation’s history, until the present day.

**“**When impoverished Southern workers were not protected as voters, they could not vote to influence policies that would protect them economically or bodily,” Painter said**.**

“The Supreme Court contributed to the inequality of the Gilded Age by reinforcing and encouraging racial segregation. By refusing to read the Fourteenth Amendment broadly for minorities, they allowed a system of racial apartheid to go up in the South,” Winkler said. “On the other side, the corporate rulings enhanced inequality by entrenching the power of industrialists, financiers, and wealthy elites at the expense of immigrants and the working class."

One episode in particular stands out. In 1881, the Republican attorney Roscoe Conkling, a former legislator who helped write the amendment, insisted, in a case involving the Southern Pacific Railroad, that the text guaranteeing all “persons” equal protection under the law was meant for corporations rather than black people, raising a journal of congressional deliberations in the courtroom as proof. [It was complete hokum](https://www.theatlantic.com/business/archive/2018/03/corporations-people-adam-winkler/554852/); the journal contained nothing of the sort.

The Conkling story illustrates the trajectory of the Republican Party, born in the fires of abolition. Black voters were the conscience of the party, the only constituency for whom the commitment to American pluralism was ironclad. Without them, it was inevitable that the party would sell its soul to the corporate powers that sustained it.

In December 2015, five days after 14 people were killed by Islamic State–inspired shooters in San Bernardino, California, Donald Trump called for a “total and complete shutdown” of Muslims entering the United States. Trump [read his declaration](https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?noredirect=on&utm_term=.ac8e0d31cd6b) for a crowd in South Carolina, and it cheered wildly.

Sensing Republican voters’ hostility to Muslims, and their anger over being called anti-Muslim, Trump would make generalizations about Muslims as terrorists a [regular feature of his campaign rhetoric](https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/?utm_term=.cdb814e5b457). He told stories about American soldiers shooting terrorists with [bullets smeared in pig’s blood](https://www.snopes.com/fact-check/general-pershing-stop-islamic-terrorists/), as if Muslims were werewolves or vampires in some horror film and could be stopped with silver or garlic. He invoked Franklin D. Roosevelt’s [internment of Japanese Americans](http://time.com/4140050/donald-trump-muslims-japanese-internment/) as a model policy. He proclaimed, “[Islam hates us](https://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/index.html).” Rudy Giuliani would later say that, as president, Trump asked his advisers to [show him how to implement](https://www.thedailybeast.com/giuliani-trump-asked-me-how-to-do-a-muslim-ban-legally) his “Muslim ban” in a manner that was legal.

Faced with all this evidence of the president’s intent, Chief Justice Roberts upheld the ban, writing that it was “facially neutral” and that “the text says nothing about religion.” His decision echoed the logic of the Supreme Court’s rulings in Redemption-era cases such as *Cruikshank* and *Williams*: that as long as the legal language itself did not explicitly mention the group being discriminated against, intent and effect were irrelevant. The implications are larger than one religion: As with the Redemption Court, which gave the Redeemers a blueprint for creating a segregated society through laws that “do not on their face discriminate between the races,” Roberts and the conservative majority have indicated that Trump’s bigotries can be made policy as long as they appear “facially neutral.”

With Anthony Kennedy’s retirement, there is no discriminatory voting restriction the justices will be unable to sanction, no immigration law born in animus they will be unable to approve, no expansion of corporate power they will be unable to accept, no grant of presidential immunity they will be unable to uphold, no financial or environmental regulation they will be unable to strike down, no religious objection to an antidiscrimination law they will be unable to recognize, no worker protection they will be unable to repeal, no limitation on abortion they will be unable to allow, and no abuse of power by law enforcement they will feel compelled to restrict. While the Roberts Court will never explicitly endorse a white man’s government in the way the Redemption Court did, in pursuit of other cherished ideological goals it will be asked to pave the road for a white man’s government by another name.

The justices of the Redemption Court “had a very limited and restricted view of racial justice. They lacked imagination, and because their view was so limited, they ended up destroying Reconstruction,” says Anderson Francois, the director of the Civil Rights Clinic at NYU. “In the travel-ban case, Roberts tries to pull the same stunt, pretending not to know or understand the social context in which Trump ran and which he has used to govern. The Trump administration, without exaggeration, is committed to maintaining some form of white supremacy and white control.”

In the short term, that means that in states where Republicans dominate the government, women and religious and ethnic minorities will find their rights further curtailed. Where it is necessary to restrict the electorate in order to maintain political dominance, Republicans will be able to do so without much interference. This will not be a simple matter of reasserting states’ rights. If the past is any guide, Republicans will find the lure of using federal power to impose their ideological goals on the blue states that choose to reject them difficult to resist, should they even attempt to resist it.

The Roberts Court need not be any more consistent than the Redemption Court. Where federalism meets its goals, it will employ federalism. Where the supremacy of the federal government must be invoked, it will invoke the supremacy of the federal government. A Court that concludes that anti-Christian animus motivated the decision to uphold an antidiscrimination law protecting gay and lesbian couples but is deaf to the anti-Muslim statements of a president imposing a ban on Muslim travelers is not interested in consistency. A Court that says it is a violation of the First Amendment for California to make crisis pregnancy centers provide patrons with information about the availability of state abortion services but allows South Dakota to force doctors to read from an anti-abortion script is unconcerned with integrity. A Court that preaches fidelity to the Constitution but strikes down part of the Voting Rights Act without so much as naming [what part of the founding document it violates](https://www.usatoday.com/story/opinion/2013/06/25/supreme-court-justice-roberts-column/2456969/) regards honesty as a disposable virtue.

The Court will do what is necessary to bring its ideological project to fruition, a vision of the law in which the federal government does not intercede with the strong on behalf of the weak, because that would be unfair.

But there are limits to the comparison. The Redemption Court was arguably constrained by the broad public consensus among white people of all political stripes that black people were inferior and undeserving of full citizenship, a consensus that hobbled enforcement of the Civil Rights Act of 1875 even before it was struck down. The new Roberts Court will pursue its ideological agenda even in the face of majoritarian opposition. “In the Reconstruction cases, the Supreme Court is made up of Republicans who are facing the political facts of life and trying to do the best they can under those circumstances,” the Yale Law professor Bruce Ackerman told me. “Here, that's not the case. What we have is a Court of radical originalists who understand the dominant jurisprudence of the postwar era as a betrayal by big government on behalf of values that the Founders would not recognize.”

The Redemption Court was “naive to issues of racial justice, but not necessarily hostile to them … That Court could not also imagine a world in which blacks were fully equal; it could not imagine a world not subject to white supremacy and white control,” Francois says. “To the extent that the Roberts Court succeeds—and I think it will—in keeping down black political power, it will not be because of a lack of imagination. It will be deliberate.”

Some legal experts, such as the Harvard Law professor Jack Goldsmith, have argued that Kennedy’s departure may not meaningfully change the shape of the Court. “There is little doubt that Kennedy’s replacement will be conservative and little doubt, too, that the Court will have a conservative bent for the next few years,” Goldsmith wrote [in *The* *Weekly Standard*](https://www.weeklystandard.com/jack-goldsmith/the-post-kennedy-supreme-court-isnt-likely-to-be-as-conservative-as-liberals-fear). “Beyond that, it is too early to tell.”

This analysis mistakes the Court for a fulcrum of change, rather than the Republican Party itself. The GOP’s partisan incentives have realigned around a man who believes black and Latino [immigrants are from “shithole countries,”](https://www.theatlantic.com/politics/archive/2018/01/trump/550454/) whose very name is a [battle cry for white nationalists](https://www.theatlantic.com/politics/archive/2016/11/richard-spencer-speech-npi/508379/), and whose demonization of Muslims on the campaign trail ended in a grand victory on the Supreme Court. The Justices may not share Trump’s vision for America. But they appear unwilling to restrain him. Kennedy’s final opinion before retirement upheld Trump’s travel ban while pleading with Trump to “adhere to the Constitution and to its meaning and its promise.” It showed that, while there may be varying degrees of commitment to Trump’s ideological project within the Republican Party, conservative resistance is all but finished. Even those who might disagree with the president’s agenda are no longer willing to be significant obstacles to it.

As if to send that very message, Trump’s handpicked replacement for Kennedy, Brett Kavanaugh, introduced himself to the country with the preposterous falsehood that “no president has ever consulted more widely, or talked with more people from more backgrounds, to seek input about a Supreme Court nomination.” Even if Kavanaugh were not a [post–Bill Clinton convert](https://www.nytimes.com/2018/07/05/us/politics/brett-kavanaugh-supreme-court-impeachment.html) to the belief that the [president is above the law](http://www.chicagotribune.com/news/nationworld/politics/ct-kavanaugh-presidential-powers-20180710-story.html), his decision to ritually debase himself before the president who selected him is an act that should end any fantasy that Kavanaugh possesses the necessary personal integrity to hold the position, let alone to defend the constitutional rights of Americans from a government determined to strip them away.

The end of the Reconstruction era was not an inevitable outcome. It was a political choice. Republicans might have committed themselves to arming and organizing black citizens to resist the campaign of terrorism that ended Reconstruction. But the Republican Party was not as committed to pluralism as the Democrats were to white supremacy. White Republicans such as Louisiana Governor Henry Clay Warmoth saw their role as not just resisting the violence and despotism of the Democratic Party but also preventing the newly emancipated from attempting to, in Warmoth’s words, “Africanize the state.”

Or, as Ted Tunnell writes, “Reconstruction failed on the lower Mississippi mainly because Louisiana whites believed more devoutly in white supremacy than the Radicals believed in the rights of man.” It is hard to look at the leaders of today’s Democratic Party and avoid a similar conclusion: that the intensity of their commitment to fighting the president’s agenda is not equal to the passion of those who carry the banner of Trumpism.

After Trump intimidated the NFL into banning protests against police brutality during the national anthem, House Minority Leader Nancy Pelosi could not even muster a defense of the players’ right to protest the murder of their countrymen by agents of the state. “I love the national anthem. I love the flag, and I love the First Amendment, and I'll just leave it at that,” [Pelosi said at a CNN town hall in May](https://www.washingtonpost.com/news/the-fix/wp/2018/05/25/nancy-pelosis-refusal-to-condemn-nfl-decision-shows-why-democrats-struggle-with-black-millennials/?noredirect=on&utm_term=.5e9e9bc4fa5d). During a month in which the Trump administration’s horrifying policy of shattering undocumented families and placing children in cages was revealed, Senate Minority Leader Chuck Schumer [took to the floor to denounce](https://www.realclearpolitics.com/video/2018/06/26/chuck_schumer_slams_maxine_waters_incitement_to_harass_political_opponents_not_american.html) Representative Maxine Waters for calling on Americans to protest Cabinet officials when they see them in public. Steny Hoyer, the second-highest-ranking Democrat in the House, [condemned as “inappropriate”](https://www.cnn.com/2018/06/21/politics/steny-hoyer-chc-protest/index.html) his Latino colleagues’ protest of the president when he visited Congress. Senator Bernie Sanders of Vermont, the leader of the party’s left flank, [rebuked a restaurateur in Virginia](https://www.gq.com/story/bernie-sanders-restaurants) for refusing to serve White House Press Secretary Sarah Huckabee Sanders. The leadership of the opposition party is moved to shock, embarrassment, and even anger when its lower-ranking members are mildly intemperate in their opposition.

While the leaders of the Democratic Party do not share the Trump-era Republican enthusiasm for a white man’s government, their unwillingness to fight fiercely for the constituencies threatened by Trumpism suggests a reluctance to take the necessary measures to win the political battle ahead of them, because unlike those constituencies, the stakes for them are not existential.

There is hope for the Democratic Party in its base. The black and brown workers intimately acquainted with the two-faced nature of American liberty, the [rebellious teachers](https://www.huffingtonpost.com/entry/americas-growing-teacher-strikes-were-decades-in-the-making_us_5ac8f468e4b0337ad1e8979c) whose surprise strikes brought red-state politicians to heel, the young leftists whose cold-eyed understanding of power mirrors that of their Republican opponents, and the feminists who flooded the streets after Trump’s inauguration forced the nation to reckon with the ascension of predatory men to the highest levels of culture, clergy, and state. But they will have to contend with a party establishment that is so divorced from the lives of those the Trump administration has put in peril that it cannot comprehend what will be required to defeat Trumpism. Democracy is a fight, and the Democratic Party’s leadership has yet to show that it can even wrap its hands.

“Punishment is not how this place works,” Schumer [told *The Washington Post*](https://www.washingtonpost.com/powerpost/schumer-plays-long-game-avoids-hardball-with-centrist-democrats-over-supreme-court-pick/2018/07/27/f3fb86dc-90d2-11e8-b769-e3fff17f0689_story.html) in late July, explaining his reasons for not pressuring red-state Democrats to oppose Kavanaugh. The Democratic leadership is allowing Trump to solidify his hold on the federal judiciary and offering token opposition to the Supreme Court nominee of a president under at least two federal investigations [whom half the country wants impeached](https://www.washingtonpost.com/politics/poll-60-percent-disapprove-of-trump-while-clear-majorities-back-mueller-and-sessions/2018/08/30/4cd32174-ac7c-11e8-a8d7-0f63ab8b1370_story.html?utm_term=.76bd99c006f4), while castigating its own lower-ranking party members for protesting Trump officials.

Americans have an unfortunate tendency to see U.S. history as an epic, sweeping narrative with a Hollywood-style happy ending. That false promise of the final triumph of the forces of good is one reason why America’s struggles with racism remain so persistent, and why Americans seem so surprised when what they see as a distant, shameful history emerges in the present.

That false promise has also manifested in an unfortunate tendency to imagine the Trump administration in retrospect from some hypothetical future in which its worst excesses—its corruption, discriminatory agenda, and reckless policies—are held to account. President Barack Obama frequently invoked Martin Luther King Jr., saying that the arc of history is long but it bends toward justice. Focusing on justice, though, one can forget just how long the arc can be. In his first major speech since leaving the presidency, in Johannesburg, South Africa, in July, Obama exchanged his once-favored metaphor for Nelson Mandela’s “long walk to freedom,” acknowledging that “the previous structures of privilege and power and injustice and exploitation never completely went away.”

Millions of enslaved people lost their lives during the long night of American chattel slavery, without so much as a hint of dawn. Those who lived to see emancipation would see the darkness fall again within a generation. The Redemption Court would ensure that in the century between emancipation and the Civil Rights Act of 1964, millions were deprived of the right to vote, thousands were lynched, and entire generations were lost to [the neo-slavery of convict leasing](https://www.nytimes.com/2008/04/10/books/10masl.html). Those who fled the South for greater opportunity were herded into ghettos in the North, shut out of good schools and jobs, and systematically deprived of whatever meager wealth they were able to gather.

Perhaps members of Trump’s inner circle will face genuine consequences for their acts. But American history suggests that they are more likely to go on to lives of comfort and celebrity, beloved by the political faction that placed them in power. Whatever enlightenment may come, those who suffer most in this era are unlikely to see it. Their children are unlikely to see it.

Whether the Trump project, with its dehumanization of people of color, relentless corporatism, authoritarian vision of justice, and staggering personal corruption, comes to an end is a task for politics, not history. The arc of history does not bend toward justice on its own. It can be bent only by those with the power to do so. As Frederick Douglass once said, power concedes nothing without demand. Those who wish to see justice in their lifetime will have go to the polls and seize it.