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Patterns of Panic

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PATTERNS OF PANIC

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ABSTRACT

Disruptions in the constitutional order can agitate social anxiety, particularly when an out-group on the rise challenges an in-group's political dominance and position in a constitutional regime. This has been acutely true concerning civil rights expansion, where civil rights opponents have turned to libertarian theories of law when their cultural currency is on the ropes. This essay highlights some of the similarities between libertarian ideological impulses at critical junctures of American constitutional development during Reconstruction and in resistance to the rights of gay, lesbian, bisexual, and transgender Americans in the twenty-first century. In these two crucial moments of constitutional development, a similar pattern of panic emerged whereby opponents to a more progressive constitutional order worked to steer civil rights jurisprudence toward a deregulatory, market-centered theory of rights, favoring live-and-let-live approaches to remedying social inequality over a state-backed right to dignity in the public square.

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INTRODUCTION

Time is frightening. After all, it spares no one and is kind to no one. Personal feelings of triumph or distress can emerge or fade while staring down the ticking clock. The measurement of time, when reflected on, can trigger a deep sense of accomplishment, a sense of falling short, a sense of loss, or a sense of unbridled enthusiasm for the future. However, existential contemplation and reflections on time are not reserved for the individual. Time has a similar effect on the public and changes in the constitutional order.

While the United States has had one amended document governing the nation's affairs since 1789, multiple constitutional orders have come and gone cyclically.[1] There have been at least five constitutional orders in the United States, each coming into power after consequential national elections in 1800, 1828, 1860, 1932, and 1980.[2] These paradigm-shifting moments and the ideologies they swept into the country's political center are triggered by decays in the preexisting regime whereby the dominant political coalition's tenets can no longer manage the country's affairs effectively, and the public sees the mishandling of the national interest as a deep betrayal.[3] Each of these recurrent cycles measures political time between the rise of a constitutional order and its eventual demise.[4]

Disturbances in political time–either that the conditions are ripe to imperil the existing constitutional order or that a critical juncture will alter the direction of the dominant political regime's future–can stir up considerable social anxiety and mobilize reactionary grassroots movements.[5] This dynamic is especially acute when an in-group's hold on political power and constitutional influence is on the ropes as an out-group's social capital is rising.[6] The promise of expanding civil rights and a more progressive constitutional regime has threatened the

1. Georgia State Law Professor to Discuss Constitutional Rot and Reconstruction, Neb. Coll. of L. (Oct. 10, 2022), https://law.unl.edu/node/4088/ [https://perma.cc/M5AN-7JJ3].

2. *Id*.

3. *See generally* Mark Tushnet, The New Constitutional Order (2003).

4. For discussion of American Political Development and the concept of political time, *see generally* ANTHONY MICHAEL KREIS, ROT AND REVIVAL: THE HISTORY OF CONSTITUTIONAL LAW IN AMERICAN POLITICAL DEVELOPMENT (2024), JACK M. BALKIN, THE CYCLES OF CONSTITUTIONAL TIME (2020); KARREN ORREN & STEPHEN SKOWRONEK, THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT (Cambridge Univ. Press ed. 2004); STEVEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON (1993).

5. *See generally* Christopher Sebastian Parker, *A History of American Reactionary Movements: from the Klan to Donald Trump*, 8 POL'Y ADVICE & POL. CONSULTING 38 (2016).

6. For an example of this as it relates to racial equality and constitutional change, *see* Anthony Michael Kreis, *The New Redeemers*, 55 GA. L. REV. 1483, 1527 (2021) (comparing opposition to Black political power during Reconstruction and election denialism in the lead-up to insurrectionist violence on January 6, 2021); Anthony Michael Kreis, *With the Latest Trump Indictment, Mind These Lessons from the South*, N.Y. TIMES, Aug. 15, 2023 (same).

national status quo several times, causing opponents of those rights to tap into libertarian themes in their campaigns against civil rights.[7]

A libertarian spirit has been a steady presence in the conservative legal movement's response to the advancement of rights for gay, lesbian, bisexual, and transgender Americans in the twenty-first century.[8] Curiously, its flavor is not entirely dissimilar to the libertarian arguments proffered in the wake of Reconstruction to limit the rights of Black Americans throughout the latter half of the nineteenth century. This essay highlights the parallel libertarian ideological dynamics at critical junctures of American constitutional development that undergirded the opposition to the rights of Black Americans in the public square in the years following the Civil War and the reactionary forces pushing back against the advancement of anti-sex discrimination norms that seek to erode invidious discrimination based on a person's sexual orientation and gender identity. These two pivotal moments in American history share a kind of libertarian undercurrent that thwarted the full promise of the age in the courts where rights claims enjoy limited success when made against state-imposed discrimination and the preservation of a right to work all the while judges viewed the regulation of private actors in public spaces with greater skepticism.

I. SEX AND THE REAGAN REVOLUTION

The origins of the movement to secure rights for LGBT people had a natural ally with libertarian thinking. The libertarian ethos was an ideological meeting place for liberals who aspired for more significant intervention on the part of the government to improve the social and legal standing of LGBT people, with some sympathetic conservatives who represented the dominant ideology of the 1980s, 1990s, and 2000s and were deeply influenced by the anti-statism undercurrents of the Reagan Revolution.[9] Supported by a broad-based social movement, the Supreme Court reshaped the constitutional order and threw off state-backed discrimination toward sexual minorities.[10] This was achieved, however, by a kind of jurisprudential triangulation that worked to remove state-sponsored impediments while leaning into hyper-traditional social constructs and tapping into a libertarian governing philosophy.

7. Christopher W. Schmidt, *Defending the Right to Discriminate: The Libertarian Challenge to the Civil Rights Movement*, *in* SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY (Sally Hadden & Patricia Minter eds., Univ. of Ga. Press 2013)

8. Carlos Ball, Keynote Address at the Saint Louis University Richard J. Childress Memorial Lecture, Progressive Constitutionalism and its Libertarian Discontents: The Case of LGBTQ Rights (Oct. 27, 2023) (available at https://www.slu.edu/law/law-journal/programs/childress-lecture.php [https://perma.cc/HGD6-EDBC]).

9. KREIS, *supra* note 4 at 104-43.

10. *See generally* Anthony Michael Kreis, *Stages of Constitutional Grief: Democratic Constitutionalism and the Marriage Revolution*, 20 U. PA. J. CONST. L. 871 (2018).

In *Lawrence v. Texas*, the Supreme Court emphasized that same-sex couples had a constitutional right to form intimate relationships without the interference of the state because "[t]he State cannot demean their existence or control their destiny by making their private sexual conduct a crime;" not because the state had an affirmative obligation to protect same-sex couples.[11] Justice Anthony Kennedy's opinion striking down state same-sex marriage bans in *Obergefell v. Hodges* echoed *Lawrence*'s libertarian undercurrent, suggesting that same-sex couples would thrive if only the state left them alone:

> Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.[12]

Given that early decisions advancing sexual minority rights were about removing state-imposed forms of discrimination, the libertarian theme in constitutional jurisprudence from this period is unsurprising. However, the antistatist framework is less helpful in confronting liberty claims from third-party dissenters who assert that state mandates requiring equal treatment of gay, lesbian, bisexual, and transgender persons are violative of their constitutional rights.

With a handful of significant successes at the Supreme Court in-hand for same-sex couples and lower federal courts for transgender Americans, rising public support for LGBTQ rights, and the prospect of a critical juncture in American politics that could permanently alter constitutional development, social conservatives expressed fears about losing the culture wars and a need to push back against sexual minority acceptance in the constitutional order. Though efforts to use litigation and legislation to write laissez-faire social conservativism into public accommodations law well predated the Supreme Court's decision in *Obergefell*,[13] legislation to shield religious objectors from

11. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

12. Obergefell v. Hodges, 576 U.S. 644, 670 (2015).

13. *See* Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1457 (2015) (arguing that for-profit religious exemptions in laws providing rights to employees and consumers in the 2010s was a revitalization of *Lochner v. New York*); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 846 (2014) (examining the tension between religious liberty claims and public attitudes on same-sex marriage, contraception, and abortion); Robin Fretwell Wilson & Anthony Michael Kreis, *Embracing Compromise: Marriage Equality and Religious Liberty in the Political Process*, 15 GEO. J. GENDER & L. 485, 490 (2014) (exploring legislative attempts to secure exemptions in public accommodations laws in same-sex marriage recognition legislation). *See also, e.g.,* Elane Photography, LLC v. Willock, 309 P.3d 53, 77 (N.M.

cultural shifts in gender norms gathered steam in between the Supreme Court's decision in *Hobby Lobby v. Burwell* [14] and *Obergefell* and were rebuffed by the American public with extreme prejudice.[15] Social conservatives, however, found renewed hope in a countermajoritarian federal judiciary with the election of Donald Trump, who, after the retirement of Justice Anthony Kennedy and the death of Justice Ruth Bader Ginsburg, was able to radically reorient the Supreme Court into an institution hostile to abortion and the rights of sexual minorities despite trends in public opinion.[16]

Libertarian themes became more prominent now that LGBTQ people began to garner modest protections in the constitutional order, weightier political power, and greater cultural acceptance, especially among young Americans– and these themes were useful for a federal judiciary sitting in a countermajoritarian posture with an antistatist, Reaganist disposition.[17] Oppositional forces to sexual minority rights pivoted from arguing for laws targeting sexual orientation and gender identity and favoring government interventionism[18] toward public policy and constitutional rules that embraced a liberty right for dissenters– freedom of speech, freedom of association, free

2014) (rejecting a religious freedom challenge to New Mexico's public accommodation law as applied to sexual orientation discrimination).

14. 573 U.S. 682, 736 (2014) (invalidating the Affordable Care Act's contraception insurance mandate under the Religious Freedom Restoration Act).

15. Erick Eckholm, *Conservative Lawmakers and Faith Groups Seek Exemptions After Same-Sex Ruling*, N.Y. TIMES (June 25, 2015), https://www.nytimes.com/2015/06/27/us/conservative-lawmakers-and-faith-groups-seek-exemptions-after-same-sex-ruling.html [https://perma.cc/A8YW-328L] ("Within hours of the Supreme Court decision legalizing same-sex marriage, an array of conservatives including the governors of Texas and Louisiana and religious groups called for stronger legal protections for those who want to avoid any involvement in same-sex marriage, like catering a gay wedding or providing school housing to gay couples, based on religious beliefs."); Monica Davey & Laurie Goodstein, *Religion Laws Quickly Fall Into Retreat in Indiana and Arkansas*, N.Y. TIMES (Apr. 2, 2015), https://www.nytimes.com/2015/04/03/us/rights-laws-quickly-fall-into-retreat.html [https://perma.cc/JL9P-6PEW] (documenting a spate of religious freedom legislation in early 2015).

16. *See* Anthony Michael Kreis, *Under Ten Eyes*, 76 WASH. & LEE L. REV. ONLINE 107, 111 (2020) ("The irony of the Trump presidency is that the Republican Party lacked a robust mandate to remake the federal judiciary and entrench arch-conservatives on the bench, but the Trump Administration and Senate have reshaped the composition of federal courts in a dramatically counter-majoritarian fashion.").

17. Kreis, *supra* note 4 at 131 (noting that "the successful social movement paving the way to [same-sex marriage recognition] was not one of radical liberation but a call for acceptance into roles embraced by social conservatives" and that the Supreme Court's "treatment of LGBT civil rights outside relationship decriminalization and recognition was significantly less protective of sexual minorities than it was of social conservatives.").

18. For a discussion about laws criminalizing same-sex intimacy, democratic participation, and same-sex household family formation during the 1980s, 1990s, and early 2000s, see generally Anthony Michael Kreis, *Gay Gentrification: Whitewashed Fictions of LGBT Privilege and the New Interest-Convergence Dilemma*, 31 LAW & INEQ. 117 (2012).

exercise of religion, and parental rights– further justified by a view that a "live and let live" model would allow market forces to do the work anti-discrimination laws naturally would otherwise achieve.[19] The editorial board of *The National Review* argued strenuously in favor of the live-and-let-live position in 2014:

> One of the defects of our civil rights law is the overly broad concept of "public accommodation," which has been expanded to include virtually every business that is open to the public. But a business is not public property; it is private property. People of goodwill ought to allow fairly broad leeway for how people conduct their own lives and their own business — private autonomy is, after all, a large part of the case for gay rights. If gay leaders were willing to extend to those who do not share their views the same tolerance to which they feel themselves entitled, then a modus vivendi could emerge through the healthful operations of civil society. Those who do not wish to participate in gay weddings or other events could decline to do so — and those who believe them to be bigots could take their business elsewhere.[20]

Responding to public accommodations litigation before the Supreme Court, social conservatives advocated the live-and-let-live theme. They embraced a view that the forces of capitalism– not law– should remedy invidious discrimination.[21] As the Supreme Court considered *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, a case about whether the state could require a baker to sell wedding cakes to same-sex couples under the First Amendment, conservatives at the Heritage Foundation proffered that civil rights laws mandating equal service were overkill because "businesses know that being publicly gay-friendly is good for their bottom line" and [s]upporters of same-sex marriage who provide goods to and services for same-sex marriages have a clear competitive advantage over those who do not."[22] Amici briefs before the Court in *Masterpiece Cakeshop* proffered that civil rights laws protecting against sexual orientation discrimination were not about opening up markets to a group previously shut out of the market but about excluding religious objectors from participating in commerce.[23]

19. Carlos A. Ball, *Sexuality, Third-Party Harms, and the "Live-and-Let-Live" Approach to Religious Exemptions*, 15 LAW, CULTURE & HUMANS. 43, 46-48 (2015).

20. *A Live-and-Let-Live Law*, NAT'L REV. (Feb. 24, 2014), https://www.nationalreview.com/2014/02/live-and-let-live-law-editors/ [https://perma.cc/9S99-6P4E].

21. *Id*.

22. John Malcolm & Emily Kao, *Enforcing Tolerance Through Intolerance: Masterpiece Cakeshop, Free Speech, and Religious Liberty*, HERITAGE FOUND. (Dec. 4, 2017), https://www.heritage.org/religious-liberty/report/enforcing-tolerance-through-intolerance-masterpiece-cakeshop-free-speech [https://perma.cc/58YL-PUK2].

23. Brief of *Amici Curiae* United States Senators and Representatives in Support of Petitioners at 27, Masterpiece Cakeshop, Ltd., et al., v. Colo. C.R, Comm'n, et al., 138 S. Ct. 1719 (2018) (No. 16-111) (Rather than improving access to the marketplace, Colorado placed a thumb on the scales against market participation, "Colorado claims to control the marketplace; it cannot force Phillips to abandon or speak contrary to his religious beliefs as the price of entry."); Brief of *Amicus Curiae*

The disposition of *Masterpiece Cakeshop* turned on a narrow question of procedural fairness to people of faith.[24] However, two years later, the Supreme Court did tread new ground in employment discrimination law.[25] In *Bostock v. Clayton County, Georgia*, the Supreme Court did take an important step to expand the federal government's footprint, ruling that discrimination against gay, lesbian, bisexual, and transgender workers on the basis of sexual orientation or gender identity constitutes unlawful sex discrimination under federal law.[26] However, by using a literal, textualist approach to determine whether sexual orientation and gender identity discrimination is a subset of sex discrimination, the majority's interpretation of federal anti-discrimination law bypassed a more progressive option to explore the relationship between gender norms and LGBT persons that could have most easily expanded constitutional protections for sexual minorities as a form of sex discrimination.[27] Perhaps more telling, however, is the Court's willingness to protect an equal opportunity to work that signaled a willingness to curtail that right when it clashed with religious objectors' opposition to equal opportunity.[28]

The Supreme Court's deregulatory First Amendment jurisprudence opened the door to gutting rules requiring equal services in public accommodations law in *303 Creative v. Elenis*.[29] In *303 Creative*, a website and graphic design services provider preemptively challenged the application of Colorado's sexual orientation anti-discrimination law to her because she did not want to provide wedding websites for same-sex couples because of a religious belief that

Sherif Girgis Supporting Petitioners at 13-14, Masterpiece Cakeshop, Ltd., et al., v. Colo. C.R. Comm'n, et al., 138 S. Ct. 1719 (2018) (No. 16-111) ("Freedoms of conscience and religion also serve that market. They help furnish ideas traded on the intellectual market, and empower those hawking them. But to do so, these rights must be protected with an ideologically even hand. The state cannot play the crony capitalist with ideas, giving stronger protections to those it finds congenial.").

24. Masterpiece Cakeshop, Ltd. v. Colo. C. R. Comm'n, 584 U.S. 617, 653-53 (2018).

25. Bostock v. Clayton Cnty., 140 S.Ct. 1731, 1738 (2020).

26. *Id*. at 1754.

27. *See* Anthony Michael Kreis, *Unlawful Genders*, 85 LAW & CONTEMP. PROBS. 103, 104 (2022) ("There was a real cost to Bostock's formalism. The majority opinion correctly understood that it is impossible to divorce discrimination on the basis of a person's sexual orientation or gender identity from their sex assigned at birth. However, beyond noting that a person has to notice and take account of a person's sex before they can take account of their sexual orientation and/or gender identity, the Court did not explain why discrimination is often the result of the connection. Specifically, the *Bostock* decision failed to sufficiently explain why the link between the two kinds of discrimination is non-severable.").

28. *Bostock,* 140 S. Ct. at 1753-54 ("Employers fear that complying with Title VII's requirement in cases like ours may require some employers to violate their religious convictions. We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society.").

29. 303 Creative LLC v. Elenis, 600 U.S. 570, 590 (2023).

marriage should be reserved to unions between one man and one woman.[30] Finding the website to be a form of pure, creative speech, the Court held that Colorado could not compel the production of websites under its public accommodations law.[31]

However, in opening the door to creative exemptions in civil rights laws as a matter of constitutional right, the Court flirted with the views expressed by amici earlier in *Masterpiece Cakeshop* about the widening sweep of anti-discrimination law to protect individuals against dignitary harms. The Court suggested that First Amendment exemptions might be more necessary since state civil rights laws expanded over time to cover many more businesses and for reasons other than preventing market participation harms.[32] The Court's antistatist philosophy pitted dignitary harms against creative expression as a lesser concern than public accommodations laws that serve as a countermeasure to invidious economic harms. The Court signaled that there is a lesser place for social equality in the constitutional hierarchy than the right to work or the right to enter the marketplace. This ideological disposition echoes trends in American law that emerged in another critical period of constitutional development—Reconstruction.

II. RACE, SOCIALISM, AND THE FREE LABOR CONSTITUTION

In 1860, Republicans secured a victory in the presidential election and sent Abraham Lincoln to the White House.[33] The Republican Party envisioned a sharp break from the constitutional order upheld by the Democratic Party and set into motion by Andrew Jackson in 1828.[34] The Jacksonian Era promoted a limited federal government, praised local control, and defended the rights of enslavers.[35] On the heels of the Democratic Party's disjunction in the late 1850s,

30. *Id*. at 580.

31. *Id*. at 592.

32. *Id*. at 590-91. ("Over time, governments in this country have expanded public accommodations laws in notable ways too. Statutes like Colorado's grow from nondiscrimination rules the common law sometimes imposed on common carriers and places of traditional public accommodation like hotels and restaurants. Often, these enterprises exercised something like monopoly power or hosted or transported others or their belongings much like bailees. Over time, some States, Colorado included, have expanded the reach of these nondiscrimination rules to cover virtually every place of business engaged in any sales to the public.") (internal citations omitted).

33. *See generally A speech delivered at the Cooper Institute Last Evening by Abraham Lincoln of Illinois*, THE NEW YORK DAILY TRIB., Feb. 28, 1860, at 6 (on file with library of congress), http://hdl.loc.gov/loc.rbc/lprbscsm.scsm0237 [https://perma.cc/ME9R-FQEH].

34. *See generally* 1860 Republican Party Platform, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/republican-party-platform-1860 [https://perma.cc/2CQT-ZLX6].

35. *See generally* Andrew Jackson, Veto Message Regarding the Bank of the United States (July 10, 1832), http://avalon.law.yale.edu/19th_century/ajveto01.asp [https://perma.cc/C6D5-YUVL].

the Republican Party reset the terms of governing for a period that lasted until the Great Depression.[36] Republicans opposed the Slave Power as an unnatural manipulation of the labor market that harmed white Americans, railed against the oligarchic power held by pro-slavery forces, and lamented the violence unfolding in the Kansas Territory over the introduction of enslaved persons as the nation expanded westward.[37] The Republican Party's core ideological tenet was free labor: the idea that all men should be able to avail themselves of the country's natural bounty to secure prosperity, and the government had a primary duty to protect the right to contract and the right to property.[38]

After the defeat of the Confederacy in the Civil War, having both vanquished the South militarily and gotten rid of rebel sympathizers in Congress, Republicans had the opportunity to remake the constitutional order in their ideological image.[39] The Civil Rights Act of 1866 was the first major piece of legislation to alter the meaning of citizenship in the United States and was meant to respond to Southern states' attempts to reinstate slavery through laws that constrained opportunities for freedmen.[40] The law, a forerunner to the Fourteenth Amendment, declared that all persons born in the United States were citizens regardless of race, color, or previous status of enslavement.[41] The law further protected the core of what Free Labor advocates contemplated civil rights to be: the equal right for all persons to make and enforce contracts and the equal right of all persons to lease, sell, purchase, hold, or convey property.[42] The state had an obligation not to discriminate and a prerogative to safeguard the freedom to work, ideas reflected by the Supreme Court's decisions in the *Slaughterhouse Cases* and *Yick Wo v. Hopkins*.[43]

36. Lamond Godwin, *National Political Realignment Trends: Will Republicans Become the Majority Party*, 17 URB. LAW. 489, 490 (1985).

37. *See generally* 1860 Republican Party Platform *supra* note 34.

38. *Id*.

39. JEFFERY A. JENKINS & JUSTIN PECK, CONGRESS AND THE FIRST CIVIL RIGHTS ERA, 1861-1918, at 84-85 (2021).

40. *Id*. at 95.

41. *Id*.

42. The Supreme Court, however, pared back this right significantly, holding that the Thirteenth Amendment's enforcement power could only be used against state actors when protecting the right to contract. Hodges v. United States, 203 U.S. 1, 4 (1906), *overruled by* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 n.78 (1968).

43. Slaughter-House Cases, 83 U.S. 36, 36-38 (1872) (upholding a Louisiana law requiring New Orleans butchers to use a centralized slaughterhouse on a racially equal basis against a freedom of contract claim); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (holding the unequal enforcement of an ordinance regulating the maintenance of laundries in wooden structures in San Francisco against Chinese residents unlawful under the Fourteenth Amendment).

These civil rights were distinct in the nineteenth-century mind from other silos of rights: political rights and social rights.[44] Political rights consisted of voting, holding elected office, and serving on juries.[45] Social rights were a more amorphous concept, but generally, this category of rights touched on how individuals should be treated equally in interpersonal interactions, including in places of public accommodation.[46] Equality in the public square was the most contentious classification of rights during Reconstruction and the following years. Democrats stood in rabid opposition to social rights, and the Republican Party fractured over the issue.[47] The dominance of free labor ideology and the influence of racial conservatives and anti-socialist forces shaped the meaning of rights in this period to emphasize the Constitution's place to protect an individual's right to work and contract and largely displace social equality from the constitutional order.[48] A powder keg of fears arising from enhanced Black political power and the left-wing politics of organized labor, a libertarian orientation on racial equality rooted in Free Labor had a stranglehold on American political thought during this period– constitutional values did not prioritize social rights because the government could not manifest equality in public spaces and should not force social relationships.[49]

The regulation and promotion of social rights was a cleavage issue within the Republican regime. To reshape the South, some Reconstruction Republicans in ex-Confederate states attempted to embrace social equality and legislation to secure social rights during the late 1860s and early 1870s.[50] While Black Republicans and Radical Republicans in the progressive wing of the Republican Party championed legislation to bar racial discrimination in the private sector, conservatives argued that government interference through class legislation would not only unduly hinder the rights of businesses but would also exacerbate racial tensions.[51] While conservatives argued social equality was not within the ambit of legitimate government action, Republicans straddling moderate and progressive constituencies within their party– and also fearful of alienating white southerners generally– were wary of a full-throated embrace of dignity protective measures.[52] Some of these leaders took refuge in a "live and let live"

44. *See generally* CHRISTOPHER W. SCHMIDT, CIVIL RIGHTS IN AMERICA (2021) (exploring the history of the meaning behind the term "civil rights" throughout American history).

45. *Id*. at 21.

46. *Id*. at 35.

47. *Id*. at 19, 21.

48. *Id*. at 5, 19, 33.

49. *Id*. at 22-23.

50. *Id*. at 39-40.

51. *Id*.

52. *See, e.g.*, JAMES K. HOGUE, UNCIVIL WAR: FIVE NEW ORLEANS STREET BATTLES AND THE RISE AND FALL OF RADICAL RECONSTRUCTION 76-80 (2006) (describing the strain civil rights legislation placed on Louisiana Republicans).

approach, offering that the power of capitalism was more likely to produce a racially egalitarian society than the heavy hand of the state.[53]

In 1868, Florida Governor Harrison Reed stopped a measure that would have required equal access to common carriers as an unnecessary constraint on business.[54] Reed proclaimed that while public suppliers of conveyance lacked the power to deny any privileges or rights on account of race, color, or previous condition as a constitutional matter, he opposed enshrining an enforcement mechanism in state law that would "infring[e] the rights of others" and inhibit "[c]ommon carriers['] . . . power to defend themselves against intrusion of drunken or dissolute persons, of whatever race or color, and to regulate their affairs so as to secure the highest comfort and safety of passengers."[55]

The same year Florida's legislation failed, Louisiana Republican Governor Henry Warmoth vetoed legislation that banned race discrimination in public accommodations, including common carriers, resorts, and businesses operating under a license, arguing that this was a matter for the free marketplace to sort out.[56] While articulating sympathy for the cause of racial equality in public spaces, Warmoth's veto message argued that government intervention would only harden racial animosity.[57] Warmoth told legislators that while racial prejudices "have no foundation in reason or nature," racial animosity and discrimination would "surely give way to the softening influences of time, unless they are constantly fretted into activity."[58] While elected officials from the Radical Republican wing threatened to exact revenge for Warmoth's betrayal and impeach him, newspaper editorials from the ideological center and the right cheered the veto.[59] The *New Orleans Crescent* decried social equality as being about "no rights at all" and applauded the Warmoth's action as a triumph for individual liberty:

> [Public accommodations laws] are tyrannical restrictions on the rights of every man in the State—white as well as black—that is engaged in any sort of business. They are invasions of that sacred right of property—of the natural right of every citizen to dispose of the proceeds of his own labor, and to conduct his own affairs as he may deem fit—which it is the fundamental object and duty of

53. *Id*.

54. Letter from Gov. Reed to Speaker Moore on the refusal to sign HB 03 (Aug. 8, 1868), *reprinted in* PROCEEDINGS OF THE ASSEMB. OF THE STATE OF FLA., Legis. 4-226, 1st Sess., at 154 (1868), [https://perma.cc/4ZTH-USGL].

55. *Id*.

56. Hogue, *supra* note 52.

57. *Id*.

58. *Veto of the Civil Rights Bill*, NEW ORLEANS REPUBLICAN, Sept. 26, 1868, at 2.

59. *The Louisiana Legislature*, THE TIMES-PICAYUNE, Sept. 27, 1868, at 6 (chronicling Radical Republicans' anger over Governor Warmoth's veto of the civil rights bill including calls for his impeachment).

> the law to maintain and protect. In short, the social rights bill is framed expressly to destroy, and not to protect personal rights.[60]

Similarly, in Mississippi, Governor James Lusk Alcorn vetoed a bill that would have, among other railroad regulations, mandated equal access without regard to race.[61] Echoing the idea that the free marketplace was the answer to producing social equality and not legal prohibitions of discrimination because of race or color, Alcorn said, "[t]he railroad conductor should not look into the face of a man to determine from the color of his skin whether he has a right to travel on his train. He should look to the ticket."[62] Black legislators were resentful of the Republican governor's feckless stance toward securing equal access to public accommodations, perhaps best encapsulated by Representative Aaron Moore's response to the veto: "Although I'm sort of a jack-leg preacher, if Jesus Christ was to come down here and ignore my rights, I'd oppose him."[63]

Laws securing equal rights in the public sphere became more commonplace as Black political power within the Republican Party congealed.[64] In no state did the cause of equality gain a stronger foothold than South Carolina. Nevertheless, in many respects, the progress made in the Palmetto State was the largest source of panic in the constitutional order and redirected the nation toward a more libertarian posture towards equal rights as hysteria over socialism grabbed the nation, Black political power caused agitation among white moderates, and social conservatives worked to yoke the two.

Political turmoil in Europe fueled white Americans' uneasiness with Black-empowered Reconstruction governments in the South.[65] As Europe stirred with anti-capitalist political movements, most notably with the Paris Commune in 1871, industrialists and financiers in the United States worried that free labor ideals that supported pro-business and anti-regulation policies might be in jeopardy.[66] In this critical moment, South Carolina would be a valuable foil for white Southerners to cool enthusiasm for Reconstruction. Majority Black South

60. *Gov. Warmoth's Veto*, NEW ORLEANS CRESCENT, Sept. 29, 1868, at 4.

61. Letter from Gov. Alcorn to the Senate and House of Representatives on the veto of Miss. HB 82 (June 20, 1870), *reprinted in* S. JOURNAL OF THE STATE OF MISS., Apdx. A, at 7 (1870), https://books.google.com/books?id=D9tKAQAAMAAJ&pg=RA3-PT1&dq=mississippi+veto+message+railroad+alcorn+1870&hl=en&newbks=1&newbks_redir=0&sa=X&ved=2ahUKEwioqLrWtJKCAxW5nWoFHe6mAqs4ChDoAXoECAYQAg#v=onepage&q=look%20to%20the%20ticket&f=false [https://perma.cc/7BXG-DUK7].

62. *Id*., Apdx. A, at 3.

63. J. L. Power & Harris Barksdale, *The Weekly Clarion,* THE CLARION-LEDGER, June 30, 1870, at 2.

64. ERIC FONER, FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION 163 (Joshua Brown ed., 2005).

65. *See*, *e.g*., Samuel Bernstein, T*he Impact of the Paris Commune in the United States,* 12 MASS. REV. 435, 437-38 (1971) (discussing how American newspapers spread concern over the Paris Commune's impact).

66. *Id*.

Carolina adopted aggressive measures equalizing land ownership, imposing tax burdens on planters, and providing strong anti-discrimination protections in the private sector.[67] The Black majority government was attacked by racial conservatives as an archetype of socialism, with significant effect, while Americans wearily watched socialist movements in Europe unfold.[68] As Heather Cox Richardson describes it, "Northerners gradually came to accept the idea that black workers were plundering South Carolina landowners in a class struggle against capital."[69]

Trepidations proliferated across the country that Black political power was rabidly anti-capitalist and unruly and that the egalitarian political agenda of Black Southerners was anathema to American healthy society.[70] The fear of socialism coming to America's shores was a significant force that spoiled the political will to continue Reconstruction and advance policies to enhance the rights of Black Americans.[71] Constitutional jurisprudence mirrored the panic. A libertarian impulse reverberated through the body politic and, soon after that, the United States Supreme Court.

When the Supreme Court ruled on the constitutionality of federal civil rights legislation and state segregation laws, justices echoed notions that the burden of public dignity and equal footing in the marketplace was a matter of individual responsibility.[72] In 1870, Charles Sumner introduced a civil rights bill barring racial discrimination at several types of public accommodations, including railroads, steamboats, theaters, public schools, churches, and cemeteries.[73] Republicans failed to move Sumner's anti-discrimination bill until after Sumner died in 1874.[74] Notwithstanding lukewarm support for the measure, Benjamin Butler rallied Congress to pass a diluted version of Sumner's bill that fell short of requiring school and cemetery integration during the lame-duck session in 1875.[75]

67. *See generally* THOMAS HOLT, BLACK OVER WHITE: NEGRO POLITICAL LEADERSHIP IN SOUTH CAROLINA DURING RECONSTRUCTION (1977) (documenting the politics and policies of the Reconstruction era government in South Carolina).

68. *See id*.

69. HEATHER COX RICHARDSON, THE DEATH OF RECONSTRUCTION: RACE, LABOR, AND POLITICS IN THE POST-CIVIL WAR NORTH, 1865-1901, at 89 (2001).

70. Kreis, *supra* note 4 at 52.

71. *Id*.

72. *C.R. Cases*, 109 U.S. 3 (1883).

73. *See* John Hope Franklin, *The Enforcement of the Civil Rights Act of 1875*, 6 PROLOGUE 225 (1974) (detailing attitudes about the legislation).

74. *Id*.

75. "That 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; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and

The 1875 law's life was short. In 1883, the Supreme Court held that Congress lacked the power to enforce anti-discrimination norms against private actors under the Civil War Amendments because the Constitution only empowered Congress to legislate against constitutional violations at the hands of state actors.[76] Writing for the majority, Justice Joseph Bradley expressed that Black Americans' desire for an egalitarian society was not the category of civil or political rights Reconstruction intended to secure but an aspiration the government could not force. According to Bradley, "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."[77]

Less than a decade later, in *Plessy v. Ferguson*, the Supreme Court recycled the libertarian ethos when it ruled in favor of Louisiana's Separate Car Act, which mandated that all railway companies provide racially segregated transportation.[78] Writing for a seven-to-one Court majority, Justice Henry Billings Brown wrote: "The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals."[79] The pernicious work of supplanting a right-expansive democratic project for a libertarian ethos where the interests of big business and Southern whites intersected reared its ugly head.

CONCLUSION

Social change and the prospect of tectonic shifts in the constitutional order can stir up deep-seated anxieties among groups who fear their stranglehold on power slipping away. During the 1870s and the 2010s, major changes in American life emerged, and out-groups began to contest their right to be treated equally under the law and in society more broadly. In these two critical periods of constitutional development, constitutional panic pushed conservatives toward libertarianism to stave off new trajectories in American law and steer civil rights jurisprudence toward a market-centered theory of rights that favored live-and-

color, regardless of any previous condition of servitude." Civil Rights Act of 1875, Ch. 114, 18 Stat. 335 (1875), *invalidated by* C.R. Cases, 109 U.S. 3 (1883).

76. *C.R. Cases,* 109 U.S. at 26.

77. *Id*. at 25.

78. *Plessy*, 136 U.S. at 538-39.

79. Plessy v. Ferguson, 163 U.S. 537, 551 (1896*), overruled by* Brown v. Bd. of Educ. 347 U.S. 483 (1954).

let-live approaches to social inequality over a right to dignity in the public square.