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## CONDITIONALITY AND CONSTITUTIONAL CHANGE

FELIX B. CHANG<sup>†</sup>

The burgeoning field of Critical Romani Studies explores the persistent subjugation of Europe's largest minority, the Roma. Within this field, it has become fashionable to draw parallels to the U.S. Civil Rights Movement.<sup>1</sup> Yet the comparisons are often one-sided; lessons tend to flow from Civil Rights to Roma Rights more than the other way around. It is an all-too-common hagiography of Civil Rights, where our history becomes a blueprint for other movements for racial equality.

To correct this trend, this Essay reveals what American scholars can learn from Roma Rights. Specifically, this Essay argues that the European Union's Roma integration policies illuminate a relatively unexplored dynamic of America's post-Civil War Reconstruction: the influence of the Reconstruction Act of 1867 upon the Fifteenth Amendment. The Reconstruction Act imposed conditions upon the readmission of former Confederate states that were out of step with laws governing incumbent states within the Union. Most prominently, Southern states had to uphold the suffrage rights of freedmen, even though Northern states denied African-Americans the vote at almost every opportunity. Similarly, when the European Union ("EU") expanded into post-Communist Eastern Europe, the Union required that accession candidates adopt minority

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<sup>1</sup> See, e.g., James A. Goldston, *The Unfulfilled Promise of Educational Opportunity in the United States and Europe: From Brown v. Board to D.H. and Beyond*, in *REALIZING ROMA RIGHTS* (Jacqueline Bhabha et al. eds., 2017).

protections that were stricter than the obligations of incumbent members.

This Essay begins by framing the readmission of ex-Confederate states as *conditionality*, the process of negotiation over conditions for membership. Conditionality is closely associated with the eastern enlargement of the EU, another federal system that demanded more of candidates than of members. At times, the conditions for readmission and accession elevated the racial equality standards for all states. The U.S. appeared to pass the Fifteenth Amendment, for example, which guarantees the vote to all male citizens, to put to rest the uneven imposition of suffrage.<sup>2</sup> Similarly, the EU incorporated “respect for minorities” into its constitutional order in response to charges of hypocrisy. The conditionality framework therefore shows how the internal and external competences of a federal government can influence one another, illuminating whether bold demands upon candidates can lift up the standards for all member states.

However, Reconstruction failed so spectacularly that a “Second Reconstruction,” as the Civil Rights Movement is sometimes known, was needed to give full effect to the meaning of freedom. This Essay concludes by showing how the incongruence between readmission conditions and the constitutional framework undermined the Reconstruction Amendments. While some scholars have explored the influence of the Northwest Ordinance on the Thirteenth and Fourteenth Amendments,<sup>3</sup> none have ever cast this relationship between the U.S. federal government’s internal and external governance as *conditionality*, that concept which has come to embody the challenge of sustaining reforms once an applicant becomes a full-fledged member.<sup>4</sup>

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<sup>2</sup> See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES*, 74–75 (2000).

<sup>3</sup> E.g., Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119 (2004); George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1372 (2008).

<sup>4</sup> Professor Ackerman has noted the dearth of legal scholarship on the effect of the Reconstruction Act upon the Fourteenth Amendment, though he has not analyzed this dynamic as the influence of external conditions on internal governance. See BRUCE ACKERMAN, *WE THE PEOPLE, VOLUME 2: TRANSFORMATIONS* 190 (1998).

## I. CONDITIONALITY DURING EASTERN ENLARGEMENT AND AMERICAN RECONSTRUCTION

Like any other club, a federalist system can require conditions for membership.<sup>5</sup> Each round that the EU negotiated to bring in a prospective member, the Union imposed terms for accession. The framework for accession lies in Article 49 TEU, a short provision that, prior to the fifth enlargement, began, “Any European State which respects the values referred to in [ex] Article 6 and is committed to promoting them may apply to become a member of the Union.”<sup>6</sup> Because the understanding of the fundamental rights referenced in Article 6, now renumbered as Article 2, is constantly changing, no two rounds of accession are ever the same.<sup>7</sup>

During the fifth enlargement (1993-2004), candidate countries had to abide by a set of conditions devised by the European Council during a 1993 meeting. These conditions encompassed the criteria of “guaranteeing democracy, the rule of law, human rights and *respect for and protection of minorities*.”<sup>8</sup> While the other criteria had appeared in prior rounds of enlargement, the insertion of minority protections in the fifth enlargement was entirely new.<sup>9</sup> And yet, because application for membership in any club is beset by power dynamics, the candidates from Central and Southeast Europe (“CSEE”) had little choice but to acquiesce—even if accession criteria were more exacting than the rules binding current members. For Roma rights, the eastern enlargements of 2004, 2007, and 2013 have been especially consequential; these rounds marked the first time that the EU was willing to use accession conditions to pressure states on Roma policies.

Within the Union, however, the EU did not hold its then-current members to the same level of scrutiny. Members with sizeable Romani populations or thorny minority issues did not draw comparable condemnation for treating their minorities badly. In the end, of course, the power disparity between the EU and CSEE

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<sup>5</sup> Karen E. Smith, *The Evolution and Application of EU Membership Conditionality*, in *THE ENLARGEMENT OF THE EUROPEAN UNION* 106 (Marise Cremona ed., 2003).

<sup>6</sup> TEU art. 6 (as in effect 1993) (now TEU art. 2).

<sup>7</sup> DIMITRY KOCHENOV, *EU ENLARGEMENT AND THE FAILURE OF CONDITIONALITY: PRE-ACCESSION CONDITIONALITY IN THE FIELDS OF DEMOCRACY AND THE RULE OF LAW* 11 (2007).

<sup>8</sup> See European Union, *Presidency Conclusions, Copenhagen European Council—21-22 June 1993* (1993).

<sup>9</sup> Marc Maresceau, *Pre-accession*, in *THE ENLARGEMENT OF THE EUROPEAN UNION* 13 (Marise Cremona ed., 2003).

accession candidates required those candidates to accept minority protections under the Copenhagen criteria.

The U.S., too, imposed requirements upon candidates for statehood whenever a new state was inducted. For racial equality, the most important developments came not during admission of any territory as a state, but during the *readmission* of former Confederate states back into the Union after the Civil War. Two of the landmarks of racial equality from this era were the Thirteenth and the Fourteenth Amendments. Yet federal advocacy of racial equality was not limited to Constitutional amendments. During Reconstruction, Congress also passed the Civil Rights Act of 1866, which defined citizenship and its attendant equal protection rights;<sup>10</sup> three separate Reconstruction Acts, which divided the South into districts administered by the U.S. military and imposed conditions upon the readmission of states formerly in rebellion;<sup>11</sup> the Enforcement Act 1871, which allowed the President to use force to suppress the Ku Klux Klan;<sup>12</sup> and the Civil Rights Act of 1875, which ensured equal treatment in public accommodations.<sup>13</sup>

From roughly 1865 to 1870, much of the above legislation framed the Union's conditions for the readmission of Southern states and the seating of their representatives. The Reconstruction Act of 1867, in particular, required that Southern states ratify the Fourteenth Amendment.<sup>14</sup> Further, the seating of each Southern state's representatives was governed by a separate act of Congress; these acts provided for varying degrees of protection of African-American suffrage.<sup>15</sup> All of these terms comprised the conditionality of Southern readmission and representation.

When the conditionalities of EU accession and American Reconstruction are compared, several patterns emerge.

First it was the top rung of the federalist system—the EU and the U.S. federal government—that ushered in the reforms of minority rights and racial equality. The 1990s and early 2000s saw the EU growing more comfortable with fundamental rights. In the U.S., Reconstruction marks the most significant turning point in the nation's federal–state relations, especially in the sphere of racial equality. The succession of Constitutional amendments and federal civil rights legislation was buttressed (if sporadically) by enforcement measures

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<sup>10</sup> Civil Rights Act of 1866, ch. 31, 14 Stat. 27–30 (1866).

<sup>11</sup> First Reconstruction Act, ch. 153, 14 Stat. 428 (1867).

<sup>12</sup> Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (1871).

<sup>13</sup> 18 Stat. 335–337 (repealed in the *Civil Rights Cases*, 109 U.S. 3 (1883)).

<sup>14</sup> ACKERMAN, *supra* note 4, at 199–201.

<sup>15</sup> Biber, *supra* note 3, at 143–44.

such as the dispatching of federal troops to quell racial violence in the South and the creation of the Freedman's Bureau to administer the post-emancipation transition. These innovations were consistent with the defining strategy of EU constitutionalization and Radical Republican lawmaking: confer the federal entity jurisdiction and enforcement authority by defining certain actions against minority groups as infractions of federal law.

The second pattern emerging from the Reconstruction comparison is that the conditions required of aspiring members were far more rigorous than the constraints placed upon incumbent members. This incongruity is related to the first pattern; for the consolidation of power at the federal level gave each union the wherewithal to foist bold demands on aspiring members. Hence, the EU required minority rights of the East which were being flouted in the West. This disjunction became most prominent in 2010, during France's expulsion of Romani populations "back" to Bulgaria and Romania, two states that had recently joined the Union.

Hypocrisy was manifest in the conditions for the readmission of the Southern states and the seating of their representatives in Congress. The Reconstruction Act of 1867 began by reciting that "no legal State governments or adequate protection for life or property now exists in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida."<sup>16</sup> It then divided the "rebel States" into five military districts, where commanders could deploy a military force to "suppress insurrection, disorder, and violence."<sup>17</sup> Rancor toward the Confederacy permeated the Act, which reaffirmed the disenfranchisement of Confederate soldiers and required senators and representatives to take a loyalty oath to the Union—punitive measures that had been circulating in Congressional bills for years.<sup>18</sup> The denial of suffrage to participants in rebellion stood in stark contrast to the expansion of voting rights for African-American men. Finally, the Reconstruction Act of 1867 mandated ratification of the Fourteenth Amendment, passed by Congress the prior year. Clearly, none of these stipulations applied to the Northern states.

Third, the comparison of conditionalities teaches that charges of hypocrisy may eventually prompt harmonization of internal and

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<sup>16</sup> Ch. 153, 14 Stat. 428 (1867).

<sup>17</sup> *Id.* §§ 1–3.

<sup>18</sup> *See, e.g., id.* § 5. Disenfranchisement was also provided in Section 2 of the Fourteenth Amendment. *See also* MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863, 214–16 (1974) [hereinafter LES BENEDICT, A COMPROMISE OF PRINCIPLE].

external governance—specifically, by raising the standards of minority protection within the federalist system. In the U.S., the clearest example is the expansion of voting rights. African-American suffrage had long been a point of contention in Congress, where Radical Republicans sparred with conservative Republicans over how to give full effect to the liberty of emancipated slaves. Yet Congress did manage to pass the Reconstruction Act of 1867, which defended the ability of African-Americans in Southern states to vote. For the next three years, the South had to submit to federal baselines for elections even though Northern states were free to disenfranchise African-Americans. All the while, pressure mounted for a federal solution to take care of the disparity once and for all—a solution that, as Radicals and moderates converged, took the form of a Constitutional amendment. It took some time and much political wrangling for this effort to take off, but eventually Congress drafted—and in 1870 the requisite number of states ratified—the Fifteenth Amendment to guarantee universal suffrage.

As for the EU, the double standards between internal and external governance ultimately propelled the adoption of a Union-wide Charter of Fundamental Rights. Commentators observed that minority protections were more onerous under pre-accession documents than under EU treaties.<sup>19</sup> One episode did more than anything else to catalyze reform of this discrepancy: Austria's election of Jörg Haider's far-right Freedom Party to a governing coalition in 1999.<sup>20</sup> Here was a bout of xenophobia in an incumbent member state that challenged the EU's projection of itself as a defender minority protections. In response to the Haider affair, the EU commissioned a report on the Austrian impasse that recommended three major changes which were ultimately adopted: a change to Article 7 TEU to suspend certain rights if a member engaged in a "series and persistent" breach of fundamental rights; the creation of a new human rights agency; and incorporation of a "bill of rights" into the EU treaties.<sup>21</sup> The Charter of Fundamental Rights was drafted as a response to the third charge. Though the Charter does not expressly address minority rights, it was given effect by the Lisbon Treaty, which added "rights of persons belonging to minorities" to the EU's list of founding values.<sup>22</sup> Finally,

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<sup>19</sup> See, e.g., Editorial, *Fundamental Rights and EU Membership: Do As I Say, Not As I Do!*, 499 COMMON MARKET L. REV. 481, 487 (2012).

<sup>20</sup> See Michael Merlingen et al., *The Right and the Righteous? European Norms, Domestic Politics and the Sanctions Against Austria*, 39 J. COMMON MKT. STUD. 59 (2001).

<sup>21</sup> See *id.* at 697–99.

<sup>22</sup> See TEU art. 2.

it seemed, the time had come to shore up minority protections within EU law.

## II. THE DILUTION OF CONDITIONALITY

So far, the Roma Rights–Reconstruction comparison has suggested that when a federalist system imposes staunch minority protections upon prospective members, comparable protections within the system’s member states can improve over time. Yet the harmonization of conditionality and internal governance is not so straightforward, if it happens at all. Sometimes the laws governing incumbent members weigh conditionality down; other times, internal and external laws meet somewhere in the middle.

During Reconstruction and the fifth enlargement, both unions quickly squandered their advantages over aspiring members. Each did so in its own way: the EU misspent the better part of the 1990s through inconsistency and ambiguity, while infighting sapped the momentum of Reconstruction despite the tail wind of victory from the Civil War. In 1993, the European Council presented accession candidates with a nebulous mandate of minority protection, which the European Commission enforced unevenly. In its 1998 report on Slovakia, for example, the Commission noted that Roma suffered discrimination, harassment, and lack of police protection; the report then lauded the government for approving a “Plan for Solving Romany Problems,” before concluding without further analysis that the program has been criticized for lack of funding and commitment.<sup>23</sup> Similarly in 1999, the Commission remarked that Roma in the Czech Republic continued to suffer discrimination, prejudice, and lack of police and judicial protection; meanwhile, the government had adopted some helpful policies and laws, but those measures too were underfunded, understaffed, and ineffective.<sup>24</sup> Overall, the Commission had no clear formulation of what integration looked like—no guidelines to aspire toward and no benchmarks to measure progress.<sup>25</sup>

If the Commission was inconsistent in its approach, it could at least lead the way on conditionality. During Reconstruction, stark divisions split the Presidency—and frequently Congress itself. Shortly after Andrew Johnson assumed the Presidency, he became a co-

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<sup>23</sup> EUROPEAN COMMISSION, REGULAR REPORT FROM THE COMMISSION ON CZECH REPUBLIC’S PROGRESS TOWARDS ACCESSION 12 (1998).

<sup>24</sup> EUROPEAN COMMISSION, REGULAR REPORT FROM THE COMMISSION ON CZECH REPUBLIC’S PROGRESS TOWARDS ACCESSION 16–17 (1999);

<sup>25</sup> See PETER VERMEERSCH, THE ROMANI MOVEMENT: MINORITY POLITICS & ETHNIC MOBILIZATION IN CONTEMPORARY CENTRAL EUROPE 198–99 (2006).

conspirator of the recalcitrant South, extending leniency at every turn and eventually campaigning as the bulwark against Radical Reconstruction.<sup>26</sup> Betrayed, the progressive faction of the Republican Party assumed control over Reconstruction, shepherding virtually all of the legislation identified with the era, often over Johnson's vetoes.

As the threat of war receded, Congress assumed control of the procedure for admission. This does not mean Congress was unified in its approach to Reconstruction; for deep schisms also cut across the legislative body. Because Radicals and Democrats were bitter antagonists, conservative Republicans played an outsized role in legislation. To cajole conservatives into breaking impasses, Radicals had to compromise, and so the Reconstruction Amendments almost have to be narrowly construed.<sup>27</sup> This means that the Thirteenth Amendment might have done no more than simply abolished slavery, without granting any additional rights;<sup>28</sup> that the Fourteenth Amendment, as originally conceived, might only have endorsed a few basic liberties, rather than broadly prohibiting racial discrimination outright;<sup>29</sup> and that the Fifteenth Amendment might have required only the racially neutral application of voting laws, regardless of disparate impacts.<sup>30</sup> The shortcomings of each amendment necessitated a subsequent amendment—and eventually the Civil Rights Movement.

Thus, laws on racial equality *within* the Union never matched the vigor of demands placed upon territories *outside* the Union. Even if the Reconstruction Act provided a paragon for suffrage, by spelling out the voting restrictions that would be prohibited and the voting expansions that would be encouraged, when it came time for the template to be extended to the entire Union, Congress settled on the Fifteenth Amendment, whose final language was watered down from the initial proposals.<sup>31</sup> The Fifteenth Amendment would foment the ire of women suffragists, tolerate Chinese voting prohibitions in the West, and confer states the freedom to regulate the “privilege” of voting as they saw fit.<sup>32</sup> The poll taxes, literacy tests, and other voting

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<sup>26</sup> See HEATHER COX RICHARDSON, *THE DEATH OF RECONSTRUCTION: RACE, LABOR, AND POLITICS IN THE POST-CIVIL WAR NORTH, 1865–1901*, 16–17 (2001).

<sup>27</sup> See LES BENEDICT, *A COMPROMISE OF PRINCIPLE*, *supra* note 18, at 222, 325–35.

<sup>28</sup> EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869*, 27–28 (1990).

<sup>29</sup> *Id.* at 96.

<sup>30</sup> *Id.* at 156.

<sup>31</sup> ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877*, 446 (1988).

<sup>32</sup> See *id.* at 447–49.

restrictions that sprang up would endure for nearly a century until the federal government definitively intervened again with the Voting Rights Act of 1965.

Nor were new EU members from CSEE on equal footing with incumbents in Western and Northern Europe. Despite attaining accession in the sixth enlargement in 2007, Bulgaria and Romania could not join the Schengen zone of visa-free travel within the EU. One of the principal reasons was the fear of influxes of Romani migrants.<sup>33</sup>

The conditionalities of the U.S. and EU also resembled each other how the lofty aspirations of external standards fell prey to dissension, sabotage, and lack of conviction. For instance, the Charter of Fundamental Rights, which the EU championed in part as redress for conditionality's incongruence, was slow to take effect and rather unsatisfactory when it did. The drafters managed to complete the Charter quickly, within a year of the Haider affair. Yet because its status was intertwined with the Union's contemporaneous project to adopt a Constitutional Treaty, the Treaty's inability to secure ratification cast the status of the Charter into doubt for nearly a decade.<sup>34</sup> The Charter only entered into force with the Lisbon Treaty in 2009. Even then, the Charter did not address minority rights.<sup>35</sup>

These results are to be expected, with conditionality pursued only halfheartedly and the "bar" for minority rights inside the Unions only half-raised. After all, the coalitions that adopted these reforms were disparate, and the convergences of interests that held them together were narrow and temporary.<sup>36</sup> Minority protections under conditionality were spurred by the EU's desire to stabilize its Eastern front and, later, to stem the flow of Romani refugees into Western Europe and Canada. Once the candidate countries joined, they would be subject to the same Treaty obligations as other members; hence, even if Western Europe wanted to contain refugee movement, the ability to do so was more limited.<sup>37</sup>

In the U.S., the conditions imposed upon the reconstructed South derived from several interests: to punish the Confederacy,<sup>38</sup> to

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<sup>33</sup> Tony Todd, *France Opposes Border-Free Travel for Romania, Bulgaria*, FRANCE24, Sept. 30, 2013.

<sup>34</sup> See PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS* 393 (5th ed. 2011).

<sup>35</sup> *Id.* at 395.

<sup>36</sup> See Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

<sup>37</sup> EU citizens enjoy freedom of movement and residence within the Union. TFEU arts. 20–21.

<sup>38</sup> FONER, *supra* note 31, at 254.

secure Republican votes,<sup>39</sup> to limit the movement of African-Americans into the North,<sup>40</sup> and to guarantee rights for emancipated slaves.<sup>41</sup> These concerns were thought to be resolved by the Fourteenth Amendment, which barred Confederates from political office and threatened to shrink Congressional representation in the event of voter suppression, and the various Reconstruction acts, which conditioned readmission on ratification of the Fourteenth Amendment and set standards for the treatment of African-Americans. To further shore up loyal Republican votes, Congress passed the Fifteenth Amendment, expanding suffrage to African-Americans.<sup>42</sup> By then, the hypocrisy of civil rights was becoming moot—over half the former Confederate states had been admitted by 1869, and the rest would soon follow. Civil rights could never command Republican attention for long; it alienated white voters and split the Republican coalition.<sup>43</sup> With the Fifteenth Amendment's passage, a fractious and tired Republican Party heralded it as a panacea that was to solve the race problem at last.<sup>44</sup>

Evaluated from the perspective of institutional enforcers, conditionality led to unexpected results. The U.S. had federal troops at its disposal, while the EU could only punish transgressions by withholding, or threatening to withhold, Union membership, technical assistance, and funds through programs such as PHARE.<sup>45</sup> The fact that CSEE adopted the *acquis* and internalized its norms more readily than the American South did federal laws and norms signals a willingness on the part of CSEE to join the EU and espouse its vision of Europe. The CSEE accession candidates were often led by dissidents from the Communist era who were keen to join the EU “club” and adopt all the liberal values it represented; the Southern states were merely vanquished rebels. Truly, EU accession candidates were supplicants and the ex-Confederate states only malcontents. This willingness on the part of applicants could overcome even dysfunction in the central government to usher in something as unpopular as minority rights.

If conditionality can succeed on the enthusiasm of applicants, then it can fail from their recalcitrance. During Reconstruction, racial equality faced resistance from white Southerners, though the difference was in degree. In response to the gains of African-

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<sup>39</sup> Biber, *supra* note 3, at 146.

<sup>40</sup> WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION: 1869–1879, 372 (1979).

<sup>41</sup> FONER, *supra* note 31, at 256–59.

<sup>42</sup> See RICHARDSON, *supra* note 26, at 42.

<sup>43</sup> See Michael Les Benedict, *The Rout of Radicalism: Republicans and the Elections of 1867*, 18 CIV. WAR HIS. 334 (1972).

<sup>44</sup> See LES BENEDICT, A COMPROMISE OF PRINCIPLE, *supra* note 18, at 335–36.

<sup>45</sup> See Maresceau, *supra* note 9, at 35–36.

Americans, whites joined the Klan and other white supremacy groups, terrorizing African-Americans and occasionally their Republican allies. Today, historians attribute the failure of Reconstruction largely to the violence inflicted by white Southerners upon their neighbors.<sup>46</sup> Violence, terror, and exclusion against Romani neighbors also plagued CSEE countries when they were accession candidates. Police and vigilantes alike killed Roma and burned their homes, while cities built walls around Romani neighborhoods—not to mention all the manners in which Roma were excluded from participation and representation in society. Persecution was severe enough to cause Roma to flee into Western Europe and North America to seek asylum.<sup>47</sup> Yet until the recent crises engulfing Europe, anti-Romanyism generally did not translate into organized campaigns or the platforms of major political parties.<sup>48</sup> In the American South, persecution of African-Americans was the way of life under the prior social order; when Reconstruction threatened to upend that order, whites resorted to fraud, sabotage, violence, and downright insurrection to restore it.

By itself, the majoritarian impulse to attack minority rights does not necessarily doom progress on equality. It is against the backdrop of disorganized and lackluster federal (or, in the EU's case, supranational) leadership that local resistance prevails. The determination of member state governments plays an important role as well. Here the distinction between CSEE and the American South was not in degree but in kind. In 1865, none of the newly reconstituted Southern state governments reflected popular will, if "popular" be measured by the desires of *all* citizens within the state. In CSEE, national governments were cut from an entirely different cloth. They legitimately represented their citizens, some political leaders having braved incarceration under Communism. These leaders *did* speak for the populace, reflect liberal democratic values, and, even if Romani rights were unpopular, side philosophically with human rights. They would stand in stark contrast to the governors and lawmakers who succeeded the initial batch of Unionists ensconced by Lincoln and Johnson; many of these successors had fought for the Confederacy. Where CSEE nations in the 1990s were led by artists and dissidents, Southern states in the 1870s and onward would be led by Confederates, Democrats, and segregationists.

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<sup>46</sup> See DOUGLAS R. EGERTON, *THE WARS OF RECONSTRUCTION: THE BRIEF, VIOLENT HISTORY OF AMERICA'S MOST PROGRESSIVE ERA* 19 (2014).

<sup>47</sup> See Sean Rehaag et al., *No Refuge: Hungarian Romani Refugee Claimants in Canada* (2015), available at <http://ssrn.com/abstract=2588058>.

<sup>48</sup> *But see* Matthew Rhodes, *Slovakia after Mečiar*, 48 *PROB. POST-COMMUNISM* 3 (2001).

### III. CONCLUSION

The evolution of Roma Rights teaches that conditionality can be an agent of a federalist system's constitutional change. At times, the disparity in how applicants versus incumbents are treated spurs the system to raise the bar for incumbents (thereby lifting the floor); other times, this disparity weakens the ambitious mandates placed upon the applicants (thereby lowering the ceiling). For the U.S. during Reconstruction, the second pattern is more apt. The Union confused reconstruction with reconciliation too frequently.<sup>49</sup> It would take a century and new, external threats for the federal government to move past the specter of reconciliation and demand minority protections with the same vigor exhibited by the EU toward CSEE states.

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<sup>49</sup> MICHAEL PERMAN, REUNION WITHOUT COMPROMISE: THE SOUTH AND RECONSTRUCTION 1856–1868, 7 (1973).