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## ULYSSES S. GRANT AND THE LOST OPPORTUNITY FOR RACIAL JUSTICE

**GRANT.** By Ron Chernow.<sup>1</sup> New York: Penguin Press. 2017. Pp. xvii + 1074. \$40.00.

*Robert J. Pushaw, Jr.*<sup>2</sup>

Every law student, legal academic, and attorney would benefit from reading Ron Chernow's exhaustive biography of Ulysses S. Grant. At first glance, that recommendation sounds counterintuitive, because Grant was not a lawyer—much less one like Alexander Hamilton (the subject of Chernow's most celebrated study)<sup>3</sup> who articulated and applied influential ideas about the role of law in shaping political, economic, and social forces.<sup>4</sup> Nor was Grant a distinguished intellectual like Woodrow Wilson, whose novel vision of the Constitution reshaped America in ways that reverberate to this day.<sup>5</sup> Rather, Grant was a failed

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1. Writer, New York. Awarded 2011 Pulitzer Prize (Biography) for *WASHINGTON: A LIFE* (2010).

2. James Wilson Endowed Professor, Pepperdine University School of Law. J.D. Yale, 1988.

3. RON CHERNOW, *ALEXANDER HAMILTON* (2005). This bestseller has, of course, achieved immense popular fame as the basis for the Broadway musical, *Hamilton!*

4. As a leader in the Constitution's framing and ratification debates and as America's first Secretary of the Treasury, Hamilton advocated a strongly nationalistic vision of federal government authority that ultimately prevailed in the twentieth century. *See, e.g.,* *Butler v. United States*, 297 U.S. 1, 65–67, 77 (1936) (adopting Hamilton's broad interpretation of Congress's Article I power to tax and spend for the "general welfare" as including anything in the national interest, and rejecting Madison's view that "general welfare" was limited to furthering the other seventeen enumerated powers). *See also* Robert J. Pushaw, Jr., *The Paradox of the Obamacare Decision: How Can The Federal Government Have Limited Unlimited Power?*, 65 *FLA. L. REV.* 1993, 2033–41 (2013) (analyzing the triumph of the Hamiltonian position). Other attorneys who have had Hamiltonian impact and have been studied intensively include John Adams, Thomas Jefferson, James Madison, John Marshall, James Wilson, Joseph Story, Abraham Lincoln, Oliver Wendell Holmes, Benjamin Cardozo, and Earl Warren.

5. As a Princeton professor and president, Wilson championed the Progressive theory that the Constitution, with its cumbersome "model of a decentralized government based on popular sovereignty, separation of powers, and federalism was inadequate to run a government of increasingly national scope." *See* Robert J. Pushaw, Jr., *Justiciability and*

businessman, a ruthlessly effective but not especially brilliant general, and a mediocre President.<sup>6</sup>

Chernow attempts to rehabilitate Grant's military and political reputation. He does so primarily by highlighting Grant's one indispensable contribution to American law and government: spearheading the implementation of Abraham Lincoln's Emancipation Proclamation and the various constitutional amendments and statutes that sought to guarantee former slaves not merely their liberty but also their civil and political rights.

As Chernow details, nothing in Grant's background suggested that he would play this leading role. Grant was ambivalent about slavery—opposed to it in theory, yet fearful (with good reason) that abolition would lead to bloody sectional strife (pp. 68, 99-108, 118-121). Moreover, he married Julia Dent, whose father was a wealthy Missouri slaveowner who disliked Grant and became an unrepentant Confederate sympathizer both during and after the Civil War (pp. 31-40, 93-106, 119-120, 125-128, 133-134, 185, 451, 548, 601-602, 639, 768). Nonetheless, Grant's experience during that war gradually brought about a profound change in his views on race (pp. 132, 228-229, 242-243, 280-285, 440-441, 874-875). Grant's transformation reflects the evolution of the very aims of the Civil War, which began as a fight

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*Separation of Powers*, 81 CORNELL L. REV. 393, 455 (1996) (citing WOODROW WILSON, CONGRESSIONAL GOVERNMENT (1885) and WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES (1907)). Instead, Wilson urged America to emulate England's democratic system, in which the legislature (Parliament) and executive (the Prime Minister) from the majority political party work in concert and possess plenary power, thereby ensuring a government that could act decisively and responsibly in formulating a unified program administered by impartial experts. *See id.* at 455-56. Wilson's ideas were fully realized in the 1930s when President Franklin D. Roosevelt cooperated with his large Democratic Party majority in Congress to adopt the New Deal, which ushered in the huge modern administrative state. *See id.* at 456-57.

It is also worth noting that Wilson was a thoroughgoing racist who believed in the inferiority of African Americans and, accordingly, took concrete steps to reverse their gains that had been hard earned during the Civil War (1861-1865) and Reconstruction (1865-1877). Put differently, Wilson helped destroy the racial advances that Grant and Abraham Lincoln had achieved.

6. *See, e.g.*, WILLIAM S. MCFEELY, GRANT: A BIOGRAPHY (1981) (setting forth this standard view of Grant). Chernow acknowledges that Grant had terrible business skills and made many mistakes as President, but contends that he was a superb military strategist and tactician and that he steadfastly worked as both a general and President to ensure racial equality and justice (pp. xx-xxiii). Chernow thereby follows other revisionist biographers who have cast Grant's service in a more favorable light. *See, e.g.*, JEAN EDWARD SMITH, GRANT (2001) (maintaining that Grant was a great general and good President, with a particularly distinguished record in helping black Americans).

to save the Union but eventually added the goal of ending slavery (pp. 242-243, 440-441, 874-875).

Chernow explains how Grant worked with Lincoln to achieve both objectives, as the unassuming West Point graduate—who had quit the Army in 1854 largely because of drinking problems (pp. 84-87)<sup>7</sup>—improbably rose from heading a small Illinois regiment in 1861 to commanding the entire Union Army a few years later (pp. 123-518). Chernow debunks the notion, popularized by Grant’s contemporaneous detractors (including Lincoln’s wife Mary) and many later historians (often Southern defenders of the Confederacy), that Grant was a “butcher” who ultimately won only because he acted on his cold-blooded calculation that the North, with its overwhelming advantages in manpower and resources, would eventually win a war of attrition (pp. xxi, 207-211, 266-267, 288-290, 295, 325-326, 344, 353-356, 367-370, 395, 405-409, 421, 424, 426, 431, 433, 436, 439, 497, 452, 464, 467, 469, 477, 481, 497, 516-518, 554, 578-579, 839, 866).<sup>8</sup> Rather, Chernow argues that Grant was a master grand strategist whose experiences as a general throughout the Midwest and South gave him an overall perspective that the Virginia-centric Robert E. Lee lacked (pp. xxi, 152, 226-227, 231, 294, 313, 343-344, 348, 355-356, 369-370, 372-376, 396-397, 410-411, 417-418, 443, 447, 457, 459, 462, 472-474, 487-490, 517-518, 671, 958). Similarly, Chernow portrays Grant as an excellent tactician who could improvise in battle and determine the psychological state of the enemy’s leaders and troops, which proved invaluable in knowing when to pursue them relentlessly after the first day of hostilities had ended in a draw—or even a seeming defeat (pp. xxi, 152, 160, 179-181, 187-188, 193, 203-207, 214, 216, 224, 294, 316-317, 324-325, 380-384, 389-406).

Chernow further contends that, contrary to the “butcher” myth, Grant always had genuine concern for the well-being of his troops (pp. xxi, 264-270, 278, 280-285, 325-326, 373, 429). For

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7. Chernow maintains that Grant’s admitted misuse of alcohol never interfered with his military performance or other duties and that he would often go months without drinking, but laments that Grant’s enemies never hesitated to label him a drunkard (pp. xx-xxiii, 58, 67, 69-70, 72-73, 80, 84-87, 97, 117-18, 130, 139-40, 149-50, 164-68, 186-87, 189, 193, 209-10, 217, 219, 225, 237-38, 244, 250-52, 272-73, 282, 293, 300-03, 318-19, 336-37, 350, 368, 415, 422-23, 428, 435, 449, 464, 466, 546, 582, 599, 606, 608-09, 619, 649, 749, 863, 875, 878, 883-84, 888, 892-93, 959).

8. To be clear, Grant surely knew that continuous hard fighting would eventually grind down the South, but he did not shed blood heedlessly.

example, Grant drew on his experience as a quartermaster in the Mexican War and other conflicts to ensure that his men had adequate food, clothing, shelter, and weapons—an especially difficult task when he had to stretch his supply lines deep into Confederate territory to capture Southern strongholds in Mississippi and Tennessee (pp. 46-47, 57, 65, 73, 76-77, 131, 195-288, 313-316, 330-331, 375, 408, 417-418). Moreover, although Grant could compartmentalize by shutting down his feelings during the carnage of battle—a trait shared by all successful generals and soldiers—afterwards he experienced considerable emotional pain upon witnessing the death, injuries, and destruction wrought, and he sought to alleviate the suffering (pp. xxi, 73-74, 158-160, 184, 200-207, 215-216, 246, 264-270, 278, 290, 314-315, 331, 446). Grant’s empathy and compassion extended to Southern soldiers, officers, and citizens, who were always treated humanely (pp. xxi, 48-49, 174, 181-184, 221-222, 288-291, 298, 325-326, 399, 464-468, 475, 485, 495, 508-511, 575, 533, 536, 548-554, 565, 590, 746-747, 951).

Most importantly for present purposes, Chernow documents Grant’s insistence that “Negroes” (as they were then called) be allowed—indeed, encouraged—to serve in the military, often in the face of vehement opposition from other officers, soldiers, and politicians (pp. xxii, 142, 184, 222-223, 243-244, 247, 280-285, 293, 298-299, 303-304, 332, 352, 373, 398, 415-416, 428-430, 441, 450-451, 475-476, 495, 530). Admittedly, Grant’s policy reflected military considerations as well as morality, since he realized that adding over 100,000 ex-slaves would increase the Union’s already huge advantage in manpower (pp. 228, 243, 280-284, 298-299, 332, 450). Nonetheless, Chernow shows that Grant was genuinely impressed by the skill and bravery of African American troops, who were often subjected to unspeakable savagery when captured (pp. 280-284, 293, 298-299, 332, 373, 398, 429-430).

Chernow further maintains that Grant viscerally understood that this military service would eventually prove to be blacks’ strongest argument for freedom and legal equality, particularly if the political and legal rights of white Southern traitors were restored (pp. 228-230, 244, 282-285, 293, 298-299, 352, 441, 467-468, 473, 475-476, 530, 561, 564-565, 584-585).<sup>9</sup> Grant also grasped

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9. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 396 (2005) (“The story of black ballots begins with black bullets. At war’s end, it started to sink in that blacks in blue [uniforms] had helped save the Union.”).

fairly quickly that, even though the Emancipation Proclamation of January 1, 1863, covered only those states (or portions thereof) in rebellion, Lincoln had unleashed forces that would culminate in freeing slaves everywhere, even in border states that had stayed in the Union (Delaware, Maryland, Missouri, and Kentucky) (pp. xxii, 228, 242-244, 280-285, 293, 467-468, 494, 518, 548, 564-565, 644, 685, 744, 851).<sup>10</sup>

Chernow rightfully lauds Grant for his singular leadership in carrying out Lincoln's vision of capitalizing on the war to promote racial freedom and equality. However, Chernow goes a bit overboard in singing Grant's praises and, correspondingly, cutting Lee down to size (pp. 294-295, 349-350, 366-369, 392, 431-437, 447, 517, 554, 839). Lee's superiority as a general was apparent to everyone—including Lincoln, who offered him command of the United States Army at the war's outset and watched in despair as Lee repeatedly defeated a series of Union generals before Grant took overall command in early 1864 (pp. 123-124, 219, 227-231, 368).<sup>11</sup> Had Lee accepted Lincoln's invitation, there is little doubt he would have won the war, likely a lot faster. But one thing the slaveholding Lee never would have done is work to ensure liberty and justice for African Americans, as Grant did.

Perhaps most significantly, Grant ardently supported the Thirteenth Amendment abolishing slavery and involuntary servitude, which Congress proposed a few months before Lincoln's assassination in April 1865, and which was ratified shortly thereafter (pp. xxii, 467-468, 564-565, 644, 685, 744, 856). Lincoln's death left Grant as the only American with the national stature to lead the effort to translate the military victory into law—federal statutes and constitutional amendments designed to help African Americans (pp. 526-907).<sup>12</sup> Although he had already worked with Lincoln and other Republicans to achieve such racial

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10. Of course, the progression from the Emancipation Proclamation to the Thirteenth Amendment was not inevitable. Indeed, at the time of the Proclamation, Lincoln himself proposed a plan to provide federal compensation for freed slaves to masters who had remained loyal to the Union (including in the border states), not to abolish slavery outright. See AMAR, *supra* note 9, at 357-58.

11. See EMORY THOMAS, ROBERT E. LEE: A BIOGRAPHY 14-20, 187-316, 414-17 (1997).

12. See AMAR, *supra* note 9, at 119 (“[I]t is largely thanks to U.S. Grant’s central army that the Reconstruction Amendments were fairly adopted in a process that included Southern Unionists and Southern blacks.”). Professor Amar provides an especially insightful distillation of how the Civil War and Reconstruction led to a “new birth of freedom” for African Americans. *Id.* at 351-401.

gains, Grant had voted for the Democrat James Buchanan in 1856, and his political affiliation remained mysterious (pp. 99-100, 107, 511, 513, 518, 548-549, 580-581, 591, 597).

Initially, Grant tried to remain neutral between the Republican-dominated Congress and new President Andrew Johnson, a Tennessee Democrat (pp. 531-538, 548-550, 562, 565-566, 572-577, 579-582, 586, 591, 594-595, 605, 607-608). Johnson had remained loyal to the United States and had been chosen as Lincoln's running mate in November 1864 to beef up pro-Union sentiment among "War Democrats" and in the border states (pp. 284, 409, 531-532). Although Johnson did not believe that the Constitution allowed Southern states to secede, he also did not think that it authorized the Republican Congress's Reconstruction agenda—particularly giving blacks (whom he considered inferior) civil and political rights (pp. 531-533, 548-550, 562, 565-614). Accordingly, Johnson repeatedly vetoed Reconstruction bills designed to nullify Southern states' oppressive Black Codes and their encouragement of race-based violence and, after Congress overrode him, refused to properly execute those laws (pp. 562-563, 569-571, 573, 576, 579, 583-598, 600, 609-610, 613). Johnson also assailed—and delayed adoption of—Congress's proposed Fourteenth Amendment, which prohibited States from (1) abridging the "privileges or immunities" (i.e., basic civil rights) of all "citizens," including former slaves; (2) depriving any "person" of "life, liberty, or property without due process of law;" or (3) denying "any person . . . the equal protection of the laws" (pp. 573, 583-585).<sup>13</sup>

Grant was in a delicate situation because he could not publicly criticize Johnson, his Commander-in-Chief (pp. 549, 551-553, 569, 571, 576-577, 579-580, 586, 589, 594, 597, 610). Nevertheless, Grant privately and through his surrogates supported the efforts of Republicans in Congress to ensure racial equality and justice, especially through the Reconstruction Acts of 1867 (pp. xxii-xxiii, 506-507, 561-566, 572, 575-577, 580-606, 611, 613-614, 856). Furthermore, it became known that Grant favored Johnson's impeachment, which narrowly failed in May 1868 (pp. 609-612).<sup>14</sup> By then, Grant's identification with the Republican

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13. Congress proposed the Fourteenth Amendment in 1866, but Johnson's opposition helped delay ratification until July 1868 (pp. 573, 614).

14. An illuminating in-depth study is MICHAEL LES BENEDICT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* (1973). Although I agree with Professor Benedict that

Party had been clearly revealed, and a few months later he became its Presidential candidate (pp. 605-616).

After his election in November 1868 and reelection four years later, Grant faithfully carried out the letter and spirit of the Thirteenth and Fourteenth Amendments, as well as anti-discrimination legislation (pp. 627, 635, 654-656, 685, 700-701, 733-734, 744-745, 748-749, 755, 759-760, 782-786, 790-795, 827, 839, 842, 850-851, 856-858, 895-896). He also led the fight for the Fifteenth Amendment prohibiting racial discrimination in voting, which was ratified in February 1870 (pp. xxii-xiii, 632, 655-656, 685-687, 744-746, 760-763).<sup>15</sup> Grant vigorously enforced this Amendment—including by military intervention in Southern states that violently opposed black suffrage—until 1875 (pp. 685-687, 700-707, 744-746, 760-763, 784, 786, 791-794, 839, 851, 856-857, 957).<sup>16</sup> Moreover, to give the Reconstruction Amendments practical force, Grant successfully made destroying the Ku Klux Klan a top priority (pp. xxii-xxiii, 588-589, 613, 621, 655, 662, 686, 701-712, 745-746, 785-786, 794, 856-857, 957). Furthermore, he was the first President to welcome African Americans to the White House and to appoint them in large numbers to federal positions, including diplomatic posts (pp. 641-642, 684, 744, 746, 749, 855-856). Finally, Grant helped freed slaves in other areas, particularly education (pp. 656, 690, 748-749, 812, 894-895).<sup>17</sup>

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Johnson was a nasty guy who should have implemented Reconstruction, I disagree with Benedict's conclusion that the President should have been impeached. *Id.* at 26-183. Johnson had not committed any "high crimes or misdemeanors," as his bitter political disagreement with the Republican Congress did not amount to treason or corruption. Furthermore, a key impeachment charge was that Johnson had violated an Act of Congress prohibiting him from removing Secretary of War Edwin Stanton, but Johnson correctly believed that Article II empowered him to remove Cabinet officials at will (pp. 609-11). The classic statement of the President's discretion to remove his executive branch subordinates is *Myers v. United States*, 272 U.S. 52, 63-64 (1926).

15. This effort is not surprising, as Grant had championed black suffrage since the end of the Civil War (pp. 511, 513, 549, 553-54, 568-69, 585, 590, 592, 600-01, 610, 621, 623).

16. Grant finally began to waver in late 1875 because of intense pressure from Northern Republicans (pp. 710, 744-45, 784-87, 792-93, 813-18).

17. Grant focused on ensuring blacks' civil rights (including physical security), political equality, and educational opportunities—but not on their economic development. In March 1865, Lincoln had supported creation of the Freedmen's Bureau, which provided ex-slaves not only with food, clothing, shelter, and education, but also with large plots of land that had been confiscated from rebel soldiers (pp. 475, 562). Shortly after taking office, President Johnson reversed that land redistribution policy (pp. 562-63). In a December 1865 report, Grant backed Johnson's position (p. 565).

Chernow claims that Grant quickly regretted his report (p. 566). If so, however, it is not clear why Grant, when he became President in 1869, failed to reinvigorate

Grant's steadfast commitment to racial progress was obvious to his contemporaries. Most notably, Frederick Douglass repeatedly recognized Grant's unmatched contributions in protecting and assisting black Americans (pp. xxii, 230, 642, 706, 709, 714-715, 718-719, 746, 858).

Unfortunately, this achievement was one of the few bright spots in Grant's presidency. Although he had unquestioned personal integrity, Grant naively entrusted men who lacked this quality with high-level government positions, resulting in scandals and incompetence that plagued his administration.<sup>18</sup> Therefore, Chernow does not, and really cannot, restore Grant's tarnished reputation as President outside the sphere of race relations.<sup>19</sup>

The great tragedy for Grant, and America, is that his heroic efforts to ensure racial freedom, equality, and justice swiftly came to naught. Indeed, during Grant's second term (1873-1877), in the face of implacable Southern hostility, Northern Republicans increasingly grew tired of Reconstruction—particularly Grant's repeated use of military force to vindicate black voting rights, a policy he finally halted in late 1875 (pp. 710, 744-745, 784-787, 792-793, 813-818).

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Lincoln's scheme—and thereby condemned most former slaves to a life of indentured servitude. Chernow ultimately asserts that “extensive land reform . . . [was] a fine idea, but perhaps quixotic in a region dominated by the Klan and other terrorist groups” (p. 857). Yet Grant effectively destroyed the Klan, and so presumably could have prevented it from foiling land redistribution to the former slaves.

18. These problems began immediately when Grant, a political neophyte, personally selected his Cabinet without any vetting or consultation with Congress or other experienced advisors (pp. 624–29, 634–36). His appointments to government positions great and small often reflected cronyism and nepotism (pp. 636–41). Predictably, incompetence and scandals proliferated. Chernow acknowledges these problems, but maintains that Grant succeeded in other areas—not merely racial justice, but also foreign affairs and economic policy (pp. 690–857).

19. Moreover, he airbrushes Grant's virulent antipathy towards non-Protestants. For example, although Chernow does mention Grant's infamous order banning Jews from trading in his military district in 1863, he asserts that Grant later deeply regretted it, apologized, appointed many Jews to positions in his administration, and always reached out to them (pp. 233–36, 620, 642–44, 836–37, 956). But Grant's order reflected his anti-Semitism. SMITH, *supra* note 6, at 225–27. Similarly, Chernow accepts at face value Grant's claim in an 1875 speech that he was merely promoting church-state separation by supporting free public education and decrying government assistance to religious schools (pp. 811–12). In fact, Grant's rhetoric disguised his anti-Catholic bias, as manifested in his support for the federal and state constitutional “Blaine Amendments” that prohibited government aid to sectarian educational institutions, which targeted Catholic schools serving large urban immigrant communities. See Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 41–43, 47–57, 67–69 (1992).

This weariness culminated in the “Compromise of 1877”: Republicans agreed to remove federal troops from the South and end Reconstruction, and in return Democrats awarded all nineteen disputed Electoral College votes (in South Carolina, Florida, and Louisiana) to Republican presidential candidate Rutherford B. Hayes (giving him a one-vote margin over his Democratic rival Samuel Tilden, the popular-vote winner) (pp. 828, 838, 843-850, 890-891).

White racist Democrats quickly took control of all Southern state governments, enforced draconian “Jim Crow” segregation laws, allowed a revived KKK to thrive, and destroyed blacks’ political rights through subterfuges like poll taxes and literacy tests—all of which plunged America into a racist abyss (pp. 817-818, 840-841, 853-858). In fact, it was not until *Brown v. Board of Education*<sup>20</sup> in 1954, followed by the Civil Rights Act of 1964 and the Voting Rights Act of 1965, that the legal promises of the Fourteenth and Fifteenth Amendments were fulfilled (pp. 795, 858).<sup>21</sup>

Of course, announcing equality under law did not magically result in a level playing field in politics, society, economic matters, or education. Indeed, the continuing struggles of African Americans in all those areas are a reminder of the legacy of slavery and legalized race discrimination. Thus, Chernow’s history helps illuminate modern debates over a spectrum of racial issues.

Most obviously, two recent events have focused the national spotlight on the treatment of Confederate symbols and monuments. First, after a racist massacred black congregants at a church in Charleston, South Carolina in 2015, then-Governor Nikki Haley successfully demanded removal of the Confederate flag—which she called “a deeply offensive symbol of a brutally

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20. 347 U.S. 483 (1954).

21. For complex legal and political reasons, Congress formally enacted the Civil Rights Act of 1964 as an exercise of its Article I power to regulate interstate commerce, not its Fourteenth Amendment power to guarantee racial equality. See Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 86, 124–25 (1999). Nonetheless, Congress’s true goal was to eliminate the moral evil of race discrimination—the vital purpose of the Fourteenth Amendment. *Id.* at 125.

offensive past”—from the State House.<sup>22</sup> Second, in 2017 white nationalists protesting Charlottesville’s proposed removal of its Robert E. Lee statue sparked a riot that turned deadly.<sup>23</sup>

Such high-profile incidents, however, are merely the tip of the iceberg. For example, profound legal and political questions have been raised about the actual effectiveness of the modern welfare state in helping black Americans; the constitutionality and practical viability of race-based affirmative action programs; and policing in predominantly black neighborhoods. Reasonable people can disagree on the appropriate responses, but such opinions should be informed by studies like Chernow’s.<sup>24</sup>

Ultimately, his magisterial and crisply written biography leaves us to ponder what would have happened if Grant’s legal advances in race relations had taken root immediately instead of

22. Frances Robles, Richard Fausset & Michael Barbaro, *Nikki Haley, South Carolina Governor, Calls for Removal of Confederate Battle Flag*, N.Y. TIMES, June 22, 2015, at A1.

23. Jacey Fortin, *The Statue at the Center of Charlottesville’s Storm*, N.Y. TIMES, Aug. 13, 2017, at B1.

24. For example, proponents of preferential treatment for African Americans, Latinos, and Native Americans (particularly in state universities) argue that such affirmative action is both constitutionally permissible and socially necessary, for two reasons. The first is to remedy the present lingering effects of past *de jure* discrimination. *See, e.g.*, *Gratz v. Bollinger*, 539 U.S. 244, 298–305 (Ginsburg, J., dissenting). The second is to achieve the educational benefits of diversity by considering race or ethnicity as a “plus” factor as part of an individualized assessment of each candidate. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 311–44 (2003). Opponents have responded that (1) the Equal Protection Clause forbids all race discrimination, including against whites; (2) states do not have a compelling interest in achieving “diversity;” (3) program beneficiaries tend to be well-off blacks, Latinos, and Native Americans; (4) minority students who do not meet a school’s ordinary academic admissions standards cannot effectively compete with their classmates who do; and (5) minority students who meet those standards are stigmatized as undeserving. *See, e.g.*, *Grutter*, 539 U.S. at 349–78 (Thomas, J., dissenting). *See generally* Robert J. Pushaw, Jr., *Partial-Birth Abortion and the Perils of Constitutional Common Law*, 31 HARV. J.L. & PUB. POL’Y 519, 582–84 (2008) (discussing these competing rationales and contending that the Court’s decisions in *Gratz* and *Grutter* are incoherent as a matter of constitutional law).

Chernow’s study might be cited to support Justice Ginsburg’s view that affirmative action is needed to address the legacy of slavery and legal discrimination from 1865 to 1965. But his book might also be invoked to defend two more limited positions. First, perhaps these programs should focus on helping descendants of former slaves who are currently experiencing socioeconomic disadvantages. Second, even more narrowly, perhaps governments should follow the advice of Frederick Douglass (whom Chernow identifies as Grant’s most influential black supporter) and “do nothing” for or against African Americans. *See Grutter*, 539 U.S. at 349–50, 378 (Thomas, J., dissenting) (quoting Douglass).

Fully engaging the foregoing debate would, of course, require a lengthy analysis. My modest point is that Chernow’s work can usefully shed light on these issues.

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being delayed for nearly a century.<sup>25</sup> As with all counterfactuals, we can never know. But we can safely speculate that America today would be in much better shape.

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25. Chernow acknowledges other scholars who have tried to restore Grant's reputation:

[T]he appraisal of Grant's presidency rests upon posterity's view of Reconstruction. . . . For a long time after the Civil War, under the influence of Southern historians, Reconstruction was viewed as a catastrophic error, a period of corrupt carpetbag politicians and illiterate black legislators, presided over by the draconian rule of U.S. Grant. For more recent historians, led by Eric Foner, it has been seen as a noble experiment in equal justice for black citizens in which they made remarkable strides in voting, holding office, owning land, creating small businesses and churches, and achieving literacy. . . . Since Grant was president during this period, his standing was bound to rise with this revisionist view (p. 856).

Professor Foner's pathbreaking work portrays the newly freed slaves as important and active participants in Reconstruction, who ultimately could not consolidate their gains because the federal government stopped supporting them. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (updated ed. 2014). He recognizes that Grant helped Lincoln and Congress in implementing the Emancipation Proclamation and employing black troops, and that Grant's 1868 election guaranteed that Reconstruction would continue. *Id.* at 337-38, 344, 383, 412, 444. However, Foner criticizes Grant for rejecting the Radical Republicans' ideological vision of full equality for blacks—including in the economic and social spheres—in favor of a more moderate approach focused on formal legal and political equality. *Id.* at 344, 445-47, 485, 496, 524-63.