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Notre Dame Law School Civil Rights Lectures - Introduction

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NOTRE DAME LAW SCHOOL CIVIL RIGHTS LECTURES*

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I. Introduction

The Law School of the University of Notre Dame has honored itself in establishing an annual series of lectures in honor of its distinguished President, Father Theodore M. Hesburgh, and it has wisely chosen the subject of civil rights—first, because it is the most basic problem of American life today; and, secondly, because Father Hesburgh has done as much as any living American to bring these rights into perspective in order that "Even he who runs may read" and understand our national objectives, our progress, our shortcomings, and the necessities of our times in this troublesome area of national conscience. Because of my high regard for Father Hesburgh and my belief in the importance of the subject to every American citizen, I deem it a privilege to deliver the first lectures of the series.

The subject of civil rights is of such magnitude, laden with so much history, and possessing so many facets as to make it impossible of meaningful discussion in all its aspects in the brief period of time allotted to this occasion.

The civil rights of Americans are all spelled out in the original body of the Constitution, the Bill of Rights amendments, the thirteenth, fourteenth and fifteenth Civil War amendments, and the nineteenth and twenty-sixth suffrage amendments of more recent dates. The greater portion of them, of course, are in the original Constitution and in the first ten amendments to the Constitution known as the Bill of Rights. To the extent that recognition of these rights has been accorded to everyone, life in America has been made more precious than in many parts of the world where similar rights are constitutionally guaranteed in words but ignored in practice.

By the same reasoning, to the extent that we have failed to interpret them for the benefit of any individual or group in our Nation, we have denied to them the freedom upon which our institutions are premised and which we proclaim to the world in our Pledge of Allegiance to the flag as "One Nation indivisible under God, with liberty and justice for all." That we have been guilty of derelictions we must confess. They are self-evident.

The rights protected by the Bill of Rights are old and honored ones which have come down to us as the product of Anglo-Saxon civilization in which we have our roots. Freedom of religion, of expression, of association, participation in government, the privacy of the home, freedom from self-incrimination, and the right to civilized procedures before, during and after civil and criminal trials are basic to our way of life, and with other guaranteed rights are called either civil rights or civil liberties.

Both of these terms are often referred to by the shorthand term of civil

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rights, but that compendious term conceals a technical distinction between the two concepts. Although both terms are associated with national citizenship, civil rights generally refer to affirmative rights conferred upon citizens by a government, while civil liberties refer to freedom from governmental interference conferred upon those same citizens. However, the technical distinction quickly breaks down. For example, the right to vote is clearly a civil right, and freedom of association is as clearly a "liberty" to mingle with persons of one's choosing free from governmental interference. But when freedom of association is exercised to join a group for the purpose of engaging in the voting process, the "liberty" and the right merge and become indistinguishable. In this discussion, the current shorthand expression of civil rights shall be used.

In the main, these rights and liberties have been adhered to and have grown during the almost two hundred years of our national existence in keeping with their development in the English-speaking world since the proclamation of the *Magna Charta* at Runnymede over seven and a half centuries ago. However, these rights and liberties have not been adhered to and have not grown where they affect the lives of American citizens of color. In this respect, we have been woefully deficient throughout our national life. Because I believe these derelictions have spawned problems of such intensity as to reach the crisis stage, it is to them that I shall address myself.

They are rooted in both the social and legal aspects of American life, which sometimes become so enmeshed as to become indistinguishable as a result of which custom, born of social conduct, often replaces or countermands law and condemns to inferior citizenship those whose sole distinction from the majority of us is the color of their skin. Although they are required to pay the same taxes and obey the same laws, and in explicit terms are guaranteed precise constitutional protections, because of discrimination, they are denied meaningful American lives. Perhaps if there were only a few of them, we might assume that time and our better natures would remedy the situation, as it has largely for white immigrants and their offspring as their newness wore off. In that respect, we should all remember that we or our ancestors were once minority groups in this country, and for a time were the subjects of discrimination regardless of our origin. Who can forget the derisiveness of the terms "Shanty Irish, Dago, Polack, Kike, Squarehead, Heinie," and others, or the heartaches that they caused until those minorities became indistinguishable from the rest of the population?

But there is no such easy road for the person of pigmentation. The color which separates them in the minds and hearts of the majority from themselves remains not only through life but to posterity, thus keeping them isolated and, because of the separation, discriminated against. This, of course, could be eliminated entirely if human nature were not tainted with race prejudice, but because it is, we must resort to law to make our civil rights meaningful for all in compliance with the mandates of the Constitution of the United States. It is not sufficient for us to believe that racial equality must be accorded only by the other fellow. It must be subscribed by all of us in making good our proud boast of a plural and open society "with liberty and justice for all."

In discussing the subject, I shall divide it into three segments, and in doing

so shall follow one of the aphorisms of Mr. Justice Holmes to the effect that "A page of history is worth a volume of logic." In the first, I will treat the subject historically from our beginnings to the Civil War. In the second, I will discuss the Civil War amendments and the Reconstruction Period, and in the third, I will follow the treatment of civil rights in the courts and Congress during the past hundred years.

In relating the history of race relations throughout our national life, it should not be assumed that the focus on the past suggests only problems of former days. On the contrary, it is designed to point out the danger of our day. The least relaxation of vigilance on the part of the public, the courts or other institutions of our Government could well result in a revival of patterns of overt racial discrimination.

II. The Basic Problem

Perhaps, before we treat the subject, it would be well to state the basic problem as I view it today. The census of 1970 reports that among our population are 22,580,289 Negroes, 792,730 American Indians, 9,230,000 Latin Americans, and 1,369,412 Asiatics or, in sum, over 34 million citizens who have been discriminated against in varying degrees. The sole question is whether these citizens are entitled to all of the rights, privileges and immunities of American citizenship, to due process of law in the courts of the land, and to equal protection of the laws in all their aspects. If they are not entitled to all of these rights, which ones can constitutionally be denied them? Certainly not all of them. That would mean apartheid. If only some, where can the line be drawn constitutionally?

I ask this question at the outset because many well-intentioned people form opinions on this subject without giving adequate consideration to the consequences. I cannot recall how many people, but I assure you there were many, who said to me during my active years on the Supreme Court, "I agree with your opinions, but don't you believe that you are moving too fast in that direction?" These people were not racists. They were not unfriendly. They were simply uninformed or unthinking. I have no doubt that in the aggregate they constitute a large segment of our citizenry.

There are so many people who make no distinction between the political and the judicial processes. They are so accustomed to witnessing trading, compromising, and postponing in the political process that unthinkingly they attribute the same characteristics to the judicial process. They fail to recognize that whenever the Congress discerns some defect in our society, within its constitutional limits, it can reach out and bring the matter before it for solution. If it cannot achieve consensus on the basis of a complete solution, it may compromise for a half or quarter loaf or even postpone its definitive action to a later day. That is why the political process is said to be "The art of the possible."

But the courts have no such alternatives. They are limited under the Constitution to deciding actual cases and controversies. That prerogative contemplates a law suit with plaintiffs and defendants contending for certain rights in

relation to a given state of facts. When the court determines the relative facts, it must apply the legal principles applicable to them. The judge is not justified in parceling out a portion of the rights established by a statute or the Constitution. It is his duty to afford plenary relief in accordance with the law as written. To do less or more would be a distortion of the judicial process and violation of his oath. The judicial process, therefore, might well be described as "The process of principle" as distinguished from "The art of the possible."

My thesis then is that every group of American citizens is entitled, under precise language in the United States Constitution, to all the rights and privileges of that citizenship or is entitled to none, and who today could be found to say that any minority group is entitled to none?

Our decision to concentrate on race relations in these talks has not been made because the subject is a pleasant one. Indeed, it is a continual reminder to us of the imperfections in our past and of the problems in communication and cooperation that we currently face. The subject has been chosen rather because it offers continuing evidence of the difficulties we have had as a Nation in squaring our ideals with our practices. From our formation, we have been rhetorically dedicated to a philosophy of equal justice for all men and to a belief in human rights. We have continuously reasserted that dedication. Yet, extending these principles to all American citizens, whatever their race or color, has been one of the most difficult and divisive tasks we have faced. And, speaking frankly, we have not performed it as well as we could have.

One way to approach the question is to take a pause for reflection, and ask ourselves why civil rights and race relations have become so profoundly intertwined in recent years; why racism has been fairly called "a special subject in the United States"[1]; and what in our history and culture has made this so. How is it that as we stand only a few years from our Bicentennial, having achieved a measure of religious and ethnic harmony; having made vast strides in health and hygiene since our birth; having seen a series of social and economic privileges successfully attacked, we remain so baffled and divided by the issue of race? And why is it that we, as Americans feel so particularly tortured and perplexed by racial disharmony and so ashamed of our performance in the area of race relations, when there is evidence that we have faced the problem, at least ambivalently in an effort to solve it? Investigating these questions requires looking back into our past, as an offshoot of the community of Western European nations.

In discussing race relations in America, we need to take notice of three facts at the outset. First, as source of national tension race relation has primarily involved relations between whites and sets of nonwhites, rather than, as in some nations, relations between persons of varying degrees of skin color; second, the most persistently troublesome and tension-ridden white-nonwhite relationship has been that betweeen whites and Negroes; third, white-Negro relations have been enormously influenced by the fact that Negroes were originally brought to America as slaves. The evolution of these distinguishing characteristics is one of the longest, most conscious, and most unfortunate "accidents" of history. It is only through

1 Black, *The Unfinished Business of the Warren Court,* 46 WASH. L. REV. 3, 25 (1970).

an understanding of these facts that we can properly and realistically approach the racial problems that are prevalent in our country today.

III. Slavery and the Origins of Racism

Some of the disquieting questions an American finds raised by an examination of his past are why slavery persisted and flourished in North America far longer than in Europe; why it allegedly was far more restrictive and inhumane in the Southern states than in other parts of the Western Hemisphere, such as Brazil; and why neither it nor white-black tensions marked the history of other British colonies settled within a hundred-odd years of America, such as Canada and Australia. Fortunately, at least in the sense of helping whites in America to rid themselves of an obsessive guilt based on the past, none of the questions appear to be capable of being answered by the simple statement that Americans were more prejudiced, benighted, and brutal than their contemporaries in other nations.

The history of Western Europe in the Middle Ages and the Renaissance suggests that the concept of slavery had two discrete aspects—philosophical and economic—which interacted with each other in a variety of patterns. It is that variety of interaction that has led to the notion that some nations were less disposed to support slavery than others. From antiquity until the eighteenth century, a religious and philosophical justification for slavery existed in Europe. Physical bondage was permissible, according to Christian doctrine, although spiritual bondage was not. Man was a sinner, and slavery was a punishment resulting from sin; but man was capable of redemption, and slavery was but a temporal status from which man could search for spiritual fulfillment. On that basis, the principle of one man's absolute possession of another was self-justified throughout Europe until the 1700's.[2]

On the other hand, slavery was an economic state. It assured a slaveowner of an involuntary, immobile labor force at low wages. Where those same results could be produced by an economic system that rested on something other than the treatment of man as a chattel, slavery in its pure form tended to die out. In feudal England, for example, serfdom, the act of tying an individual to the plot of land which he tended, replaced slavery.[3] In Germany and France, somewhat later, membership in workingmen's guilds guaranteed a labor force, but freed the possessor from being tied either to his master or to the soil.[4] Where economic conditions made possible the existence of a supply of cheap, immobile labor for the performance of necessary functions, then slavery tended to disappear, but the principle of involuntary servitude remained.

The persistence of the servitude principle after the disappearance of actual slavery can be seen in the continued flourishing of the slave trade in Mediterranean Europe in the Renaissance. One of the principal sources of slave acquisi-

2 *See* R. & A. Carlyle, A History of Medieval Political Theory in the West (1928); W. Dunning, A History of Political Theories: From Luther to Montesquieu (1905).

3 *See* E. Lipson, 1 The Economic History of England (1956); P. Vinogradoff, The Growth of the Manor (1951).

4 *See* H. Pirenne, Economic and Social History of Medieval Europe (1937).

tion was the religious war. The conquerors enslaved the infidels for the latter's benefit as well as the former's. In those areas of Europe where different religions continued to interact with each other during the Renaissance, such as the coasts of Southern Italy, Spain and Portugal, the slave trade persisted into the nineteenth century. Sicily abolished slavery in 1812; Spain in 1836; Portugal in 1869. In those regions, economics and religion combined to make slavery viable; in Northern Europe, which was insulated from the non-Christian world, surrogates to slavery developed instead.[5]

The attempts by European nations to explore and discover lands beyond their boundaries in the fifteenth and sixteenth centuries insured that the slave trade would be dispersed over a wide geographic area. Since the principal purpose of the discovery voyages was an economic one, and interactions between Europeans and non-Europeans had traditionally resulted in some form of religious conflict and enslavement, one would suspect that slavery would flourish in the newly discovered lands in the Western Hemisphere if economically feasible.[6]

That is precisely what happened. The Spanish and Portuguese were the first principal settlers of the New World. They brought slaves with them and used them as labor both in passage and in the newly settled areas. In the early seventeenth century, the Dutch began to make inroads on the slave trade. In the latter portions of the century, the French had supplanted the Spanish as colonizers in North America, and by the early eighteenth century, the British made a serious attempt to monopolize the slave trade in the Caribbean.

But slavery was not successful in all parts of the Western Hemisphere. In French Canada, for example, the slave trade was unprofitable, and few slaves were included in the settlement parties. In the British colonies of New England, a moderate number of slaves were brought over in the seventeenth and eighteenth centuries. However, vast numbers of slaves populated the British, French, Dutch, Portuguese and Spanish colonies in the Caribbean and Latin America, particularly in Portuguese Brazil, and in the British colonies located in the southern portion of North America.[7]

The reason for the preponderance of slaves in those areas as opposed to northern North America had little to do with moral attitudes toward slavery of the European colonial population. It was primarily a result of the purchasing power of the various colonies. Because of climate and topography, the southern colonies of North America, the Caribbean colonies, and the Latin American colonies produced marketable commodities such as cotton and tobacco more easily. They were, therefore, able to gain more revenue from trade with Europe and buy more slaves.

Who were the slaves taken to the New World? Almost exclusively African Negroes. The explanations for this fact of great historical significance can largely be found in the interaction of exploration with religious prejudice at the opening of the sixteenth century. Prior to the 1440's, European contacts with Central Africa had been virtually nonexistent, but the Portuguese had built up a slave

5 *See* D. Davis, The Problem of Slavery in Western Culture (1966).
6 *See* E. Williams, Capitalism and Slavery (1944).
7 *See* C. Boxer, The Golden Age of Brazil, 1695-1750 (1962).

trade with the West African coast by the 1460's, and hence at the same time that explorations for the New World were beginning from Spain and Portugal, Negroes were being imported into those countries as slaves, and gradually replacing Arabs as the cheapest and lowest regarded members of the labor force.[8] West African Negroes turned out to be particularly suitable for slavery because, first, they were regarded as infidels; secondly, the tribal customs placed great emphasis on the divine right of kings and the lowly condition of man generally, therefore making slave trade by their chieftains more palatable; thirdly, they were conveniently located with regard to both Mediterranean Europe and the New World. By the fifteenth and sixteenth centuries, the principal years of initial exploration of the Western Hemisphere, the slave trade had come to deal almost exclusively in African Negroes.[9]

When the first British colonists settled America in the early seventeenth century the following situation existed. Slavery had disappeared in northern Europe but not in Mediterranean Europe. The major northern European nations had large investments in the slave trade, the center of which had shifted from the Mediterranean basin to the Caribbean. The slave trade was the primary way that European colonies in the New World responded to their very high demand for cheap labor. The slave trade was made up almost entirely of African Negroes. And certain sections of the New World, notably the southern colonies of North America and the colonies in the Caribbean and Latin America, were in a far better position to purchase slaves than other sections, particularly the northern colonies of North America.

This history goes far to explain why slavery flourished in the southern half of the United States and not in the northern half or in Canada; why it persisted in America after it had disappeared in northern Europe; and why it came to be identified with the enslavement of African Negroes by whites of European origin. It suggests further an explanation for the apparent high incidence of slavery in America in comparison with other British colonies, such as Canada and Australia, in neither of which there were more than a few blacks. As this history indicates, the absence of Negro slavery in Canada was not because the institution of slavery was thought to be morally wrong.

In 1688, the Governor of Canada asked King Louis XIV of France to institute direct shipments of Negro slaves into the country; in 1709, slavery was formally established; but economic conditions prevented the flourishing of African slave trade. Meanwhile, Indian slavery flourished in Canada throughout the eighteenth century.[10] By the time Australia was settled in the eighteenth century, slavery was on its way to extinction throughout the Western World.

As heirs of Western Europe Americans bear the burden of identification with the slave trade; as natives of the New World, the presence of African Negro slaves in their communities was not peculiarly of their own doing. Nor may they be singled out among British colonies as notably indifferent to the moral implications of slavery.

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8 *See* DAVIS, *supra* note 5, at 44-45.
9 *See* B. DAVIDSON, BLACK MOTHER: THE YEARS OF THE AFRICAN SLAVE TRADE (1961).
10 *See* M. TRUDEL, SLAVERY IN FRENCH CANADA (1960).

However, if we as Americans take some solace in the fact that we are neither uniquely responsible for the presence of Negro slavery in our Nation nor peculiar among British colonies in being infected with racism, there are still two additional charges that have been leveled at our past—first, that even if we were not unique among European colonies in having slavery, we were conspicuous, particularly in comparison to the Latin American colonies, in our harsh and restrictive treatment of slaves; and, second, that we have failed to see the obvious contradiction between the principles of human rights that served as the rationale for our declared independence from Great Britain and the continued presence of slavery in America.[11]

The first charge has long been made by historians of slavery in Latin America and rests upon the following features: the greater ease by which slaves in Latin America could obtain their freedom, even through purchase; the freedom of Latin American slaves to marry and to become educated; the ability of slaves to seek relief from cruel treatment by their masters; the religious notion that all human beings, whatever their status, were alike before God; and the greater tolerance of racial differences in Latin America. Recent scholarship, however, suggests that although each of these features was evident in Latin America, their presence is a deceptive testament to the humanity of the slave system there. Many of the liberal principles of Spanish law were subject to exceptions or flouted; examples of extreme cruelty to slaves were common. Alongside greater freedom of manumission in Latin America went a longer survival of the slave system and equally rigid class distinctions based on color.[12]

In short, one historian has concluded, "Throughout the Americas Negro slavery presented more significant similarities than differences."[13] There is little room for comfort in the responsibility for any type of slavery. It was inhumane and contrary to everything we have professed as a Nation.

To the charge that the Founders of our Nation failed to extend their principles of self-determination and human rights to cover Negro slaves, we must plead guilty. The failure to couple the articulation of fundamental rights embodied by the Declaration of Independence and the Constitution with a repudiation of the principle that one man could be considered the property of another, a thing to be held in bondage, was a tragedy of the first proportions. It was particularly grievous given the motivations for American independence—among them hatred of religious intolerance; belief in the inalienable liberties of mankind; and faith that the New World held renewed hope for the human race.

We have examined the above history, neither to excuse Americans from the burden of a despotic and inhumane feature of the Nation's past nor to dwell upon the wrongs against humanity inherent in the system of Negro slavery. Our purpose has been rather to demonstrate that "The past is prologue."

Social scientists have pointed out that one of the offshoots of one culture's enslavement of another is the growth of attitudes of contempt among the domi-

11 *See, e.g.*, F. TANNENBAUM, SLAVE AND CITIZEN: THE NEGRO IN THE AMERICAS (1947); S. ELKINS, SLAVERY (2d ed. 1968).
12 *See*, DAVIS, *supra* note 5, at 223-61.
13 DAVIS, *supra* note 5, at 262.

nant culture for the subordinate one. By asserting that those enslaved are "inferior" or contemptible, the masters attempt to justify their authority over slaves on grounds other than that of physical power.

It is no surprise then that theories of Negro inferiority rapidly accompanied the emergence of Negro slavery in Western Europe, nor that they came to America with the slave trade. Similarly, theories of Indian inferiority accompanied white settlers on their movements westward across the North American Continent, for part of the process of westward expansion involved usurping lands of the Indians and subjecting them to a subordinate status.[14]

Race relations, racism, and white dominance of nonwhite minorities have been a feature of American life from our beginnings as a Nation. A good portion of our early economy made heavy use of Negro slave labor. Exploration of the Nation, development of its natural resources, expansion of its economy, fighting its internal wars invariably involved massive interactions between whites and nonwhites.

And the importance of race relations in America was accentuated by the presence of philosophical ideas that suggested racism and racial dominance were inappropriate. Religious tolerance, theories of inalienable natural rights, and philosophies of nonviolence were influential parts of the intellectual climate in which the American Nation was spawned. Alongside apologies for slavery and racial superiority were placed critiques of the slave system and affirmations of the principle that men were equal without regard to race or color. Therefore, the American Nation began its history with race relations being a central and troublesome issue. History thus made race relations a fundamental and special problem for Americans, and we have continued to wrestle with it, and it continues to divide us.

IV. Slavery as a Political Issue in the United States

It was not long before the presence of slavery became a major political issue in the United States. Despite the strong language in the Declaration of Independence affirming the equality of all men and the value of human rights, political pressures incumbent upon ratification of the Constitution resulted in an exception to those principles being made for Negro slavery. The politics of the situation can be seen in three concessions to slaveholders in the Constitution: the so-called "three-fifths" rule of article I, section 2, which made five Negro slaves the equivalent of three whites for the purposes of determining population for representation; the first clause of article I, section 9, which confined Congress' power to "establish a uniform Rule of Naturalization" (article I, section 8) by providing that "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight"; and the "fugitive slave" clause of article IV, section 2, which provided that "No Person held to Service or labour in one State, under the Laws thereof, escaping into another shall, in

14 *See* A. LAUBER, INDIAN SLAVERY IN COLONIAL TIMES WITHIN THE PRESENT LIMITS OF THE UNITED STATES (1913).

Consequence of any Law or Regulation therein, be discharged from Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."

The import of the second concession was clear. It was intended to allow the slave trade to exist until 1808 by prohibiting Congress from interfering with the decisions of states to admit whomsoever they chose. Indeed, after the ratification of the Constitution Congress promptly passed a "uniform Rule of Naturalization," which stated that all free white persons who had resided for two years "within the limits and under the jurisdiction of the United States" could become citizens.[15] This appeared to preclude Negro slaves from holding United States citizenship. On January 1, 1808, Congress abolished the African slave trade, but that law was flagrantly violated through much of the first half of the nineteenth century.

The third concession resulted in the passage of the Fugitive Slave Act of 1793[16] which provided penalties for those abetting the escape of runaway slaves and allowed slaveowners and their agents to recover runaways in states that had outlawed slavery. The constitutionality of the Act was tested in the 1842 case of *Prigg v. Pennsylvania*.[17] Justice Story sustained the validity of the Act, but suggested that the power to cause fugitives to be delivered up could be exercised solely by the national government. This apparently suggested that states could prohibit their own officers from helping federal authorities to enforce the Act, and consequently a number of northern states passed "personal-liberty" laws which prevented residents from giving assistance in the capture of fugitive slaves.

Meanwhile the problem of slavery was becoming involved in national politics in other respects. In 1819, the presence of new slave states in the Union had resulted in an even division of power between the eleven states that had outlawed slavery and the eleven that had retained it. The Territory of Missouri, which had been settled primarily by former residents of Tennessee and Kentucky, applied for admission as a slave state. In response, the House passed a proposed constitutional amendment allowing Missouri entrance as a slave state but prohibiting the introduction of any further slaves into the state and providing for the ultimate emancipation of all the slaves already there. The amendment was defeated in the Senate, and the resulting debate threatened to split the country.

Eventually, a compromise was reached, the so-called Missouri Compromise of 1820: Missouri was admitted as a slave state with no restrictions and Maine was admitted as a free state, thus restoring the numerical balance. Additionally, slavery was "forever prohibited" in the Louisiana Territory, which was then largely undeveloped, north of the line marking 36 degrees 30 minutes north latitude, which was the southern boundary of Missouri.[18]

The Missouri Compromise did not settle the problem of intermingling slavery with westward expansion. In 1846, David Wilmot, a congressman from Pennsylvania, proposed legislation making an express and fundamental condition of acquisition of territory from Mexico that slavery be prohibited in the territory.

15 1 Stat. 103 (1790).
16 1 Stat. 302 (1793).
17 41 U.S. (16 Pet.) 539 (1842).
18 *See* G. Moore, The Missouri Controversy (1953).

The legislation was bitterly debated, twice passing the House and failing in the Senate. In 1850, when California and New Mexico petitioned to enter the Union as free states, the issue was raised again, and this time the question of westward expansion spilled over into more general grievances between slaveholders and abolitionists. The eventual Compromise of 1850 admitted California as a free state, but left New Mexico (and subsequently Utah) without restrictions on slavery; outlawed the slave trade in the District of Columbia; and enacted a more severe fugitive slave law in response to the *Prigg* decision.[19]

In 1854, Senator Stephen Douglas of Illinois introduced legislation to extend the principle of popular sovereignty, which had been used to settle the question of slavery in Utah and New Mexico, to the Territories of Kansas and Nebraska, into which the original Louisiana Territory had been divided. After pressure from delegates from slave states, Douglas rephrased the legislation to extend popular sovereignty on the slavery issue to all hitherto undeveloped territories in the West and to explicitly overrule the Missouri Compromise. Securing help from the Pierce Administration, Douglas' forces managed to get the legislation passed as the Kansas-Nebraska Act of 1854.[20]

The immediate result of the Kansas-Nebraska Act was chaos and violence in Kansas, the portion of the territory adjoining the slave State of Missouri. Both abolitionists and slaveholders encouraged antislavery and proslavery groups of settlers to go to Kansas, paying their expenses and giving them advice on how to further their cause once there. Elections in 1854 and 1855 to choose a territorial delegate to Congress and a territorial legislature were dominated by nonresidents from Missouri, who crossed the border to vote and helped to elect proslavery men for both positions. In response, antislavery forces called a convention to elect their own legislature and governor, so that by 1855 Kansas had two governors and two sets of legislatures, neither with a sound legal footing.

The federal government chose not to intervene, and violence resulted. Residents of Missouri raided Lawrence, a town noted for its abolitionist sentiments. In retaliation John Brown, a fanatical abolitionist, went on a murderous expedition terrorizing proslavery settlers.[21] Finally, the federal government sent in troops, but the quarrel had spread beyond Kansas' borders.

In the Senate, Charles Sumner openly attacked proslavery Southerners, notably South Carolina Senator Andrew Butler. Two days later, Congressman Preston Brooks of South Carolina, Butler's nephew, caned Sumner into unconsciousness in the Senate chamber.

In the election of 1856, the Republicans ran an antislavery man, John C. Fremont, as their candidate, who advocated the containment although not the abolition of slavery, while the Democrats ran James Buchanan who supported the Kansas-Nebraska Act and equivocated on the issue of the expansion of slavery. The Democrats won the election by capturing every southern state plus Pennsylvania, Buchanan's home state, Illinois and Indiana.

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19 *See* H. HOLMAN, PROLOGUE TO CONFLICT: THE CRISIS AND COMPROMISE OF 1850 (1964).

20 *See* J. MALIN, THE NEBRASKA QUESTION, 1852-1854 (1953).

21 *See* C. WOODWARD, *The Burden of Southern History 41-59* (rev. ed. 1968).

Meanwhile, a case came before the Supreme Court[22] which tested the power of Congress to prohibit slavery in the undeveloped territories. It involved one Dred Scott, a Negro who had been born a slave in Virginia and subsequently taken by his master first, to the slave State of Missouri, then in 1834 to the free State of Illinois and the Wisconsin Territory, which at the time was considered free under the terms of the Missouri Compromise. He returned to Missouri in the company of his master in 1838. After his master's death, Scott filed suit in a Missouri state court to have himself and his family—he had married while in the Wisconsin Territory and had two children—declared free. He prevailed at the trial level, but was ultimately denied freedom by the Missouri Supreme Court which held, reversing prior decisions, that during his residence in Illinois and the Wisconsin Territory Scott was still subject to Missouri law.

Scott then filed suit in the United States Circuit Court for the District of Missouri, where the defendant, one Sandford, maintained *inter alia* that Scott was not entitled to bring suit in a federal court because he was not a citizen of the United States. Scott won on the jurisdictional point, but lost on the merits. From that decision Scott appealed to the Supreme Court, which combined the citizenship question with the question as to which law governed Scott, and set the case down for argument.

In his March, 1857, Inaugural Address, President Buchanan urged the American people to allow the Court's decision in Dred Scott to resolve the question of slavery in the western territories. Two days later, the Court announced its decision, finding seven to two against Scott, with each Justice writing a separate opinion. The principal opinion for the majority was that of Chief Justice Taney, which was concurred in by each of the other Justices in the majority.

Taney's opinion contained three separate holdings: first, and least controversial, that the procedure adopted by the circuit court with regard to its finding of jurisdiction had not foreclosed consideration of the citizenship question by the Supreme Court; second, that free African Negroes whose ancestors had been slaves were not United States citizens within the meaning of the Constitution; and, third, that the laws of Missouri, making Scott a slave, took precedence over the law of the Wisconsin Territory, making him free, because the latter law had been promulgated by Congress illegally. Taney's reasoning with regard to the second point was that Negroes were universally regarded at the time of the framing of the Constitution as "beings of an inferior order" and so could not have been meant to be included in the class of persons upon which the Constitution conferred rights. His reasoning on the third point was as follows: slaves were property; the fifth amendment of the Constitution prohibited the taking of property without due process of law; that amendment should be read as forbidding Congress from passing legislation banning the ownership of slaves; therefore, the Missouri Compromise, which had forbidden slaveholding in certain territories, was void. Only the states could outlaw slavery, for they were outside

22 Dred Scott v. Sandford 60 U.S. (19 How.) 393 (1857). *See* V. HOPKINS, DRED SCOTT'S CASE (1951).

the reach of the fifth amendment. Territories could not; they were principalities of Congress until admitted to the Union.[23]

Despite President Buchanan's exhortation, it was clear from the outset that the *Dred Scott* decision could not settle the question of slavery. In the first place, the decision entirely ignored the moral argument against slavery as an intolerable condition in which to hold any man, and an offense to the principles of the Declaration of Independence. That argument, propounded by Lincoln among others, continued to gain in force after the *Dred Scott* decision. Second, the decision, by making statehood a condition for the abolition of slavery, appeared to insure that the series of events which had taken place in Kansas could be repeated in every undeveloped territory in the Union. Third, the decision assured that the slave states and free states would be a permanent part of the American Nation, unless somehow the people in those states either decided to reject slaveholding as an institution or extend it nationwide. And the eradication and extension of slavery were the very issues on which the Nation appeared hopelessly divided. The *Dred Scott* decision came to threaten the fabric of the Union which, as Lincoln said in 1858, seemed incapable of enduring half slave and half free.[24] The problem of race relations was not far from tearing America asunder.

The *Dred Scott* case, which Chief Justice Taney structured to solve the entire slavery problem, had exactly the opposite effect. It aggravated the situation to the extent of being the immediate cause of the bloodiest war in American history. It was characterized by Chief Justice Hughes as a wound self-inflicted by the Supreme Court.

V. Reconstruction and the Aftermath

A. *The Civil War Amendments*

From the *Dred Scott* decision it was a short and bitter slide into Civil War. The Presidential election of 1860 tore the country apart. Within a month after the election of Abraham Lincoln, South Carolina seceded, and before he took office on March 4, 1861, six other southern states took similar action. Following the firing on Fort Sumter April 12, 1861, Arkansas, Virginia, North Carolina and Tennessee joined the seven forming the eleven-state Confederacy. From that time until the surrender by Lee to Grant at Appomattox exactly four years less three days later, America was violently and tragically divided against herself.

The ultimate tragedy of the War, of course, was that Americans fought Americans. The tragic divisiveness of the conflict is well told by Morison and Commager in Volume I of *The Growth of the American Republic,* as follows:

> Yet the issue was not as simple as we relate it. Throughout the Civil War, lines were never strictly drawn between the states that seceded and those that did not. The majority of men went with their neighbors, as most people always do. But there were thousands who chose their side from motives of sentiment and opinion. The Confederate army contained men

23 60 U.S. (19 How.) 393, 407 ff.
24 *See* R. LUTHIN, THE FIRST LINCOLN CAMPAIGN (1944).

> from every Northern state, who preferred the Southern type of civilization to their own; and fashionable society in Baltimore, Philadelphia, and New York was pro-Southern to the end. The United States Army and Navy contained loyal men from every seceded state, Americans who knew that the break-up of the Union would be the worst blow to the cause of self-government, republicanism, and democracy since the day that Bonaparte assumed the purple. Robert J. Walker, the most efficient Union agent in Europe, was a former senator from Mississippi; Caleb Huse, the most efficient Confederate agent in Europe, was from Massachusetts; Admiral Farragut was an Alabaman by birth and a Virginian by residence. Franklin Pierce sent his one-time mentor Jefferson Davis warm greetings, and his organ of the New Hampshire Democracy attacked the Lincoln administration with a virulence hardly matched by the Charleston *Mercury*. Samuel P. Lee commanded the Union naval forces on the James river while his uncle, General Robert E. Lee, was resisting Grant in the Wilderness. Two sons of Commodore Porter, USN, fought under Stonewall Jackson; Senator Crittenden of the attempted compromise had two sons, Major General T. L. Crittenden, USA, and Major General G. B. Crittenden, CSA. Three brothers of Mrs. Lincoln died for the South, and the President's kinsmen on his mother's side were Southern sympathizers, whilst near kinsmen of Mrs. Davis were in the Union army. In a house on West 20th Street, New York, a little boy named Theodore Roosevelt prayed for the Union armies at the knee of his Georgia mother, whose brothers were in the Confederate navy. At the same moment, in the Presbyterian parsonage of Augusta, Georgia, another little boy named Thomas Woodrow Wilson knelt in the family circle while his Ohio-born father invoked the God of Battles for the Southern cause.[25]

The principal irony of the War was that for many it was being fought over the question of whether all men were created equal, a question that had supposedly been settled at the time of the Nation's birth.

Congress faced the task of "binding up the Nation's wounds," which President Lincoln had articulated in his Second Inaugural Address, in an inauspicious atmosphere. Lincoln, the focus of sectional controversy upon election in 1860, had emerged as the man to be the principal architect of Reconstruction. Five days after Appomattox, he was assassinated.

Andrew Johnson, his Vice President, had neither the confidence of his party nor of the Congress. In the crucial matter of formulating a consistent and comprehensive policy for bringing the South back into the Union and insuring that the institutions and attitudes that had helped produce the War were not perpetuated, Johnson appeared shortsighted and indecisive. Moreover, the defeated southern states were unwilling to alter patterns of race relations that had been familiar to them for generations. Countless Negroes, emancipated by Lincoln's wartime proclamation, faced bleak futures. In this atmosphere of confusion, tension and bitterness, the Congress attempted to take stock of the legacy of the War.

There appeared to be two related problems emerging from the War, one capable of speedy solution, the other much more troublesome. As Congress searched for the root causes of the War, one appeared to be self-evident—there

25 1 S. MORISON & H. COMMAGER, THE GROWTH OF THE AMERICAN REPUBLIC 681-82, (5th ed.) (1962).

was a fundamental division among the American people over the viability of continued expansion of the institution of slavery. During the War, Congress had recognized the close relationship of slavery to the southern war effort, and had passed laws, then of dubious constitutionality in the light of the *Dred Scott* decision, which provided for the seizure of slaves in Confederate states that were being used "for insurrectionary purposes," and for the confiscation of the property of all persons rebelling against the Union.

These laws were not often enforced by the Attorney General because of their suspect constitutionality, but they testified to the determination of the Union Congress to eradicate slavery.[26] In the summer of 1862, when the Union cause was in difficulty, President Lincoln conceived the idea of a general emancipation proclamation based on his emergency war powers. His notion was to formally declare a cause to which the Union was committed as a means of boosting morale. The Emancipation Proclamation was issued in September, 1862, on the heels of the repulse of a Southern advance at Antietam, Maryland. The Proclamation stated that slaves in those areas where the federal government was not recognized or did not have military control over were free. The measure was thus as much a war strategy as well as a moral commitment, but it insured that eradication of slavery would follow upon any Union victory, for the South was intractable on the slavery issue.

As the War drew to a close, with a Union victory anticipated, Congress began to make provisions to secure the result outlined in the Emancipation Proclamation. The result of its deliberations was the thirteenth amendment, which was submitted to the states on January 18, 1865. The amendment provided, in its first section, that "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." By December 18 of the same year, the requisite number of states had ratified the amendment, and ratification was made a condition of reentrance into the Union for Confederate states.

Thus, with the thirteenth amendment, one of the contradictions between the Declaration of Independence and the Constitution was resolved. Slavery had been an affront to the principles of equality announced in the Declaration; with the amendment slavery legally ceased to exist in the United States. A number of difficult problems were raised, however, by the amendment's enactment. An overwhelming percentage of the Negro population in America, most of them residing in the states composing the Confederacy, had been in a state of bondage. The amendment cut them loose from that state, but said nothing about how they were to take their place among the ranks of other Americans. Their citizenship status, with the *Dred Scott* decision still in force, remained in doubt; consequently, their enjoyment of the basic rights of Americans was postponed. They remained in an intermediate state, "free" but not yet able to reap the full benefits conferred upon whites in America.

Congress was well aware of this intermediate status of blacks after the

26 *See* J. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN (1951).

thirteenth amendment, and shortly after its passage took steps to see that true enforcement of the amendment would be achieved in the South. However, congressional efforts toward this end became involved in a more general controversy involving power to supervise the reconstruction of Confederate States and their readmission into the Union. President Johnson, less inclined to move rapidly toward the ideal of true equality for blacks and whites than many Representatives of Congress, asserted that control over reconstructing the South was largely a matter of Presidential discretion. Johnson's intransigence placed many of the particular issues involving Negro equality in the Reconstruction years in sharp relief.[27]

The first issue to be dealt with by Congress after the passage of the thirteenth amendment was the impact of that amendment in those states which had passed so-called "Black Codes," measures intended to control the conduct of the freed Negro population. The Codes, allegedly aimed at discouraging vagrancy among freed Negroes and alleviating conflict between blacks and whites, provided, among other things, that schools and certain public places were to be segregated; that Negro servants could not move about freely from place to place; that Negroes could not own land to the same extent as whites; that Negroes could not bear arms; that they could not serve on juries; and they could be severely punished for terminating labor contracts. These Codes were the result of President Johnson's Proclamations in May, 1865, whereby he allowed the Confederate states license to determine their own internal policies during Reconstruction.[28]

Congress first responded to the passage of the Black Codes by passing a bill allowing the Freedman's Bureau, an agency established in 1865 to provide services for Negroes in the Confederate states, to use military powers to protect Negro rights. President Johnson vetoed the bill, claiming that the Bureau had proven itself corrupt during the War and maintaining that the rights of Negro freedmen could adequately be protected in the courts.

Johnson's veto of the Freedman's Bureau Bill came in February, 1866; in March of that year Congress responded with a civil rights bill also aimed at nullifying the effect of the Black Codes. The bill provided that all persons born in the United States, excluding Indians not taxed, were citizens of the United States, and then spelled out some of the rights of those citizens. These included the same rights enjoyed by white citizens to make and enforce contracts, sue, inherit, purchase, lease, sell, hold, and convey real and personal property, and the right to full and equal benefit of all laws and proceedings for the security of person and property. The bill also declared that these rights were to be conferred notwithstanding any law or custom to the contrary, and provided penalties against those who would deprive nonwhite citizens of their rights "under color of law."

President Johnson vetoed the bill on March 27, 1866. His principal objections to the bill were that it was a usurpation of state congressional power in that it attempted to prevent states from exercising discriminations between persons on the basis of race or color, and that its policy of conferring the privileges and

27 *See* E. McKitrick, Andrew Johnson and Reconstruction (1960).

28 *See* J. McPherson, The Struggle for Equality: Abolitionists and the Negro in the Civil War and Reconstruction (1964); J. Williamson, After Slavery (1965).

immunities of United States citizenship upon freed Negroes, especially in the absence of consent to that proposition by Representatives of eleven out of the thirty-six states, was ill-founded. After debate, Congress in April, 1866, passed the bill over Johnson's veto. While the 1866 Civil Rights Act was being debated, those who were doubtful about the reach of congressional power it purported to assume began preparations to secure the same aims accomplished by the Act in the form of a constitutional amendment.

The story of the framing and eventual passage of the fourteenth amendment, which was submitted to the states in June, 1866, and ratified in July, 1868, has often been told, but its essence bears repeating.

Those concerned with achieving the purpose of the Civil Rights Act of 1866 in the form of a constitutional amendment shared two general beliefs. First, they were concerned about the constitutionality and policy implications of the Act. Their concern stemmed from three distinct sources: first, they questioned the scope of the term "Civil Rights" in section I of the Act, which could be read as extending to cover such areas as state laws prohibiting marriage between whites and blacks and in such guise appeared to assert an overbroad scope of congressional power to regulate the affairs of states. Second, they questioned the scope of the phrase "under color of law" in section 2 of the Act, which appeared, in one reading of it, to take away from state judges the right to obey state laws. Third, they thought that the possible implications of the Act as conferring suffrage on freed Negroes were politically unwise.[29]

Alongside this set of beliefs, the advocates of a constitutional amendment were of the conviction that the aims of the Civil Rights Act—redressing the discriminations against Negroes embodied in the Black Codes—should not be frustrated. Their intention, then, was to strike at the conditions engendered by the Codes without excessively infringing upon the powers of the states to regulate the lives of their citizens.[30]

On December 13, 1865, a Joint Resolution of Congress created the Joint Committee on Reconstruction, made up of nine congressmen and six senators, twelve of the number being Republicans and three Democrats. The Committee assumed jurisdiction over the drafting and reporting out of proposed constitutional amendments regarding the reconstruction of Confederate states, although their initial purpose had been defined more as an organization to supervise the affairs of the Confederacy. From its first meeting on January 6, 1866, the Committee was heavily concerned with the production of an amendment. In late January, the Committee reported out a section of a proposed amendment, providing that Negroes were to be counted equally with whites in determining numbers for the purposes of representation and taxation, except where they were denied the right to vote. This section was defeated in the Senate because it failed to confer suffrage on Negroes.[31]

In February, 1866, the Committee reported out a second section of an amendment, which provided that "Congress should have power to make all

29 *See* J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT (1956).
30 *See id.* at 37-54.
31 *See* Bickel, *The Original Understanding and the Segregation Decision,* 69 HARV. L. REV. 1, 32 (1955).

laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property."[32] This proposed section was in turn defeated by being postponed, probably on the grounds that it gave Congress too much power to overturn state discriminations of any kind, such as distinctions between the property rights of single and married women.[33]

On April 30, 1866, the Joint Committee reported to the House and Senate a proposed amendment in five sections. The first section provided that

> no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The remaining four sections of the amendment eliminated from the basis of representation all persons to whom voting was denied; disfranchised certain Southerners from voting in federal elections until 1870; canceled the war debts of the Confederate States, and removed any obligations on the part of the United States to compensate slaveowners for the loss of their property; and gave Congress the power to enforce the first four provisions by appropriate legislation.[34] On May 10, the House, by a vote of 128 to 37, adopted the draft proposal.

The proposal next went to the Senate, where debate on it began on May 23; then was withdrawn and amended by a caucus of Republicans. The two major thrusts of the amendments were to change the section disfranchising certain Southerners to disqualifying some Southerners for federal office, and to define the phrase United States citizenship in section I. The amended proposal was released to the Senate on May 29, and on June 8, by a vote of 33 to 11, the Senate passed the proposal.[35] It then went back to the House, which passed it on June 13, by a vote of 120 to 32. Thus, the fourteenth amendment was submitted to the states. The first section now read:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.[36]

In the years since the fourteenth amendment's passage there has been much debate over the intended scope of its coverage and its implications for continuing discriminations on the basis of race. The collective intention of Congress with regard to the reach of the amendment remains inconclusive. Some proponents

32 CONG. GLOBE, 39th Cong., 1st Sess. 1023 (1866).
33 *Id.* at 1095; Bickel, *supra* note 31, at 35-37.
34 CONG. GLOBE, *supra* note 32, at 2545.
35 *Id.* at 3041-42.
36 *Id.* at 3148-49.

of the amendment wanted its language to be given very broad effect; others, much more limited interpretations. A spectrum of views on the desirability of state discriminations on the basis of race existed at the time. Some believed the first section of the amendment was merely declarative of limitations that could be imposed upon the states; others regarded it as a much more revolutionary step. Many of the potential implications of the amendment for acts of racial discrimination in the states were not discussed at all.

Nonetheless, a few facts emerge with clarity from the history of the amendment's passage. First, the first section of the amendment was undoubtedly directed at the Black Codes in the southern states and comparable acts of states outside the South, such as Oregon. Proponents of the amendment continually referred to the inequities inherent in state laws restricting the right of nonwhites to hold property, enter into contracts, and to have access to the courts.[37] That the first section of the amendment was read as being directed at these difficulties is apparent, not only from the debates in Congress, but also from the reluctance on the part of Confederate States to ratify the amendment, and the insistence on the part of Congress that its ratification be made a condition of readmission to the Union.

Second, it was not clear in the minds of some proponents that the amendment gave Negroes the right to vote, despite a possible reading of its privileges and immunities clause. There were comments to that effect by some of the sponsors of the amendment in the Joint Committee on Reconstruction.[38] The issue was on which many congressmen felt strongly about on either side, and there is evidence that those who favored an immediate grant of suffrage to Negroes decided to bide their time. That time, symbolized by the passage of the fifteenth amendment, was not long in coming.

Third, there is evidence that although many representatives of Congress were divided on the desirability of broad coverage of the language of section I of the amendment, none were certain about the course of that coverage over the years. Although one of the primary purposes of the amendment was to constitutionalize the Civil Rights Act of 1866, the first section of the amendment went beyond the language of that Act. Section I of the Act had enumerated rights that states could not deprive black citizens of. Section I of the amendment used "privileges or immunities," and "equal protection of the laws," potentially much broader phrases. The breadth of this language and the fact that Congress used the amendment process to assure it suggests strongly they were capable of expresssing their desires, and that in the words of Justice Robert Jackson, we should reach an interpretation of it "by analysis of the statute instead of by psychoanalysis of Congress."[39]

With the passage of the fourteenth amendment, the Nation had come close to fulfilling the commitment it had made in the Declaration of Independence. However, efforts were needed to secure for Negroes the right to vote, to insure to

37 *See, e.g., id.* at 1064-65, 1290-93 (remarks of Representative Bingham, Ohio).

38 *See, e.g., id.* at 2459 (remarks of Senator Stevens, Pennsylvania); (remarks of Senator Eliot, Massachusetts) at 2511; *id.* at 2539 (remarks of Senator Farnsworth of Illinois). *See also* Bickel, *supra* note 31, at 46.

39 United States v. Public Utilities Commission, 345 U.S. 295, 319 (Jackson, J., concurring) (1953).

them protection against harassment in the attempted enjoyment of their new rights, and to alleviate remaining state discriminations based on race and color. The Reconstruction Congress, having decisively repudiated the temporizing policies of President Johnson in the election of 1868, set out to achieve these goals. In February, 1869, Congress submitted to the states the fifteenth amendment which declared that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." This amendment was ratified by the appropriate number of states in March, 1870.

Continuing their pattern of protecting Negro rights, the Congress after 1870 passed three pieces of legislation designed to secure that end. In 1870 a Force Act set strict penalties for those who would attempt to deny citizens their right to vote by intimidation, force, or bribery, and placed congressional elections in the South under federal supervision. In 1871, a similar act strengthened the effect of the 1870 Act, and a criminal statute authorized the President to suspend the right of habeas corpus in suppressing organizations conspiring to deprive citizens of their rights. These statutes were primarily directed at the Ku Klux Klan, which had been founded in 1866, and under the pressure of the legislation formally disbanded. Finally, in 1875, Congress passed a Civil Rights Act, which had first been introduced by Senator Charles Summer in 1872. It outlawed state discrimination in certain public places, such as theaters and hotels, and prohibited the exclusion of Negroes from jury duty. Meanwhile, two southern states, Louisiana and South Carolina, had after the passage of the fourteenth amendment outlawed racial segregation.[40]

By the 1870's, then, much had been done toward the rehabilitation of the Negro as a full-fledged American citizen and toward the breaking down of racial discriminations that lingered from the era of slavery. Near the middle of the decade, however, the mood of the Nation began subtly to alter. The passions brought about by the War cooled and energies were directed to other areas, such as the development of the unsettled West and the expansion of industrial enterprise. Advancement of these two aims, particularly as manifested in the westward growth of the Nation's railroads, required cooperation between North and South. Men saw new economic possibilities for the South if it turned away from agriculture to industry, and the presence of a railroad network through the region was felt to be an important step in that direction.[41]

In 1876, federal troops still remained in the South, but the state governments established at the outset of Reconstruction had been replaced by governments dominated by white Southerners in all states except Louisiana, South Carolina, and Florida. Old patterns of states rights showed themselves in the courts. The Supreme Court, after three times refusing to pass upon the constitutionality of congressional control of the southern states during Reconstruction,[42] decided in

40 *See* G. BENTLEY, A HISTORY OF THE FREEDMEN'S BUREAU '(1955); L. & J. COX, POLITICS, PRINCIPLE, AND PREJUDICE, 1865-1877 (1963). *See* LA. CONST. art. 135 (1868); S. C. CONST. Art. X (1868).

41 *See* C. WOODWARD, REUNION AND REACTION (1951).

42 Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1866); Georgia v. Stanton, 72 U.S. (6 Wall.) 50 (1867); Ex parte McCardle, 73 U.S. (7 Wall.) 506 (1869). *See* 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1937).

1873 in the *Slaughter-House Cases*[43] that the restrictions on state conduct implicit in the privileges and immunities clause of the fourteenth amendment should be narrowly construed.

B. *The Tragedy of the Hayes-Tilden Compromise*

Into the midst of this growing atmosphere of indifference to the aims of the Reconstruction period came a crisis of major proportions, the Hayes-Tilden election of 1876. The Republican candidate for President, Rutherford B. Hayes, and the Democratic candidate, Samuel J. Tilden, found themselves at the close of the election in a near deadlock. Tilden held a majority of the popular vote and 184 out of the 185 electoral votes needed for election; Hayes held 165. Of the twenty votes remaining, nineteen came from the three southern states under Reconstruction government, Louisiana, South Carolina and Florida, and the twentieth from Oregon. The Republican forces claimed all twenty votes. They claimed the Oregon elector as rightfully theirs since they had won the other two votes in that state and, therefore, carried it; and they claimed the nineteen votes from the southern states on the ground that the Democrats had deceived and intimidated Negro voters in those states. On December 6, 1876, two sets of electors from the three southern states met, one set casting all the votes for Hayes and the other for Tilden.[44]

Congress now faced the problem of determining which set of electoral votes from the South was legitimate, a problem made more difficult by lack of explicit provision in the Constitution determining who should count the votes and by the fact that the House was controlled by Democrats and the Senate by Republicans. The task of counting the returns in the disputed states was delegated to an electoral commission established for that purpose, made up of fifteen members, five from the Senate, five from the House, and five from the Supreme Court. Of these fifteen, seven were Democrats, seven Republicans, and one, Justice David Davis, an Independent. Just prior to the commission's decision regarding the disputed votes, however, Justice Davis was elected to the Senate from Illinois and resigned from the commission. A Republican was named in his place, and the commission then voted, eight to seven, to accept the Republican slate of electors.

The obviously partisan decision of the commission was repudiated by Democrats, who began a filibuster to prevent the commission's findings from being formally accepted. As the situation worsened in Congress southern Democrats emerged as holding the balance of power. If they could be persuaded to accept the commission's findings, they would undermine the filibuster and insure the election of Hayes. If they held out, a major constitutional crisis seemed likely.

Hayes forces thus searched for ways to make their candidate acceptable to the southern Democrats. In the course of the negotiations, two demands of the latter came to the fore—withdrawal of federal troops from the southern states

43 83 U.S. (16 Wall.) 36 (1872).
44 C. WOODWARD, *supra* note 41, at 19.

where they remained and federal support of internal improvements, especially the construction of railroads and canals. Hayes' supporters agreed to both these demands, and ultimately southern Democrats declared themselves willing to support the commission, thereby undermining the filibuster efforts of their northern colleagues. Hayes was elected, and shortly after taking office withdrew the last of the federal troops from the South.

The principal victim of the Hayes-Tilden affair was the freed Negro. The absence of federal control in the South ensured the return of native governments in all states, and those governments shortly took steps to revive old patterns of racial separation and discrimination. In 1877, President Hayes announced in Atlanta that the rights and interests of Negro freedmen in the South would be better preserved if the federal government remained passive to the affairs of that region. The stage was thus set for a divergence from the ideals of the Reconstruction years. After a brief interlude, white dominance of nonwhites again became an outstanding feature of American life.

We might pause here to reflect briefly on the significance of the Hayes-Tilden affair, not only for the participants but, symbolically, for the various groups of American citizens. Of the political participants, there were some losers and some winners. The northern Democrats, supporters of Tilden, saw their candidate precluded from the Presidency by dubious means. Most historians agree that even taking voting irregularities in the disputed states into account, Tilden should have been conceded the requisite number of electoral votes to secure the Presidency. The northern Democrats were denied this prize by defections in their own Party.

The defectors had a great deal to gain by their acts. First and foremost, they saw in the Hayes-Tilden crisis the opportunity to eliminate the presence of federal troops from the South, thereby removing the most effective mechanism for implementing Reconstruction policies regarding the rights of freed Negroes. Second, they saw revived possibilities for internal improvements and patronage, and pressed for federal appropriations for the construction of railroads and the repair of war-ravaged facilities, as well as for the appointment of a Democrat to the Cabinet. In all of these areas, their demands were met by the Hayes forces.

The Republicans hoped to gain two objectives by making the compromise. First, and most important, was the Presidency. Not only were the powers of the office to be prized, but the attendant benefits—especially in a time when civil service reform had not been enacted and Party patronage was widespread—were substantial. Secondly, there was an opportunity to end the strained relationship between North and South that had existed since before the Civil War. Reconstruction policy had placed the North in a supervisory position over southern states which, by 1876, had made some Northerners uncomfortable. This was especially true of those interests that looked to the South as a fruitful area for economic expansion and welcomed harmonious sectional relations to that end. The obsession with industrial enterprise that characterized the last quarter of the nineteenth century resulted, among other things, in corporations being designated persons for the purposes of the fourteenth amendment's equal protec-

tion clause,[45] and thus, sectional differences and discords began to pale.

In their zeal to reconcile the Nation, to promote industrial enterprise, and to secure political advantages for themselves, the compromisers of the Hayes-Tilden affair totally abandoned the group on whose behalf the Civil War had been fought and the Reconstruction amendments enacted. The freed Negroes of the South, for whom the compromise meant the effective loss of political rights in that region, were given no heed when the Presidency was swapped for patronage and the withdrawal of federal troops. But they soon learned what the decision meant. In a speech in Atlanta in the fall of 1877, President Hayes, speaking before a mixed audience, told the Negroes assembled to hear him that their rights "would be safer if this great mass of intelligent white men were let alone by the general government." A contemporary account reported that the statement was greeted with "immense enthusiasm" by the whites and "less enthusiasm" by the Negro freedmen.[46]

None of the participants in the Compromise of 1876 admitted the existence of any direct dealings with each other. The alteration in national policy toward the South was explained in terms of statements which suggested that its chief goals were to bind up the Nation's wounds, to forgive and forget, to stress national unity and pride, and to get the country moving forward together.

With these subtleties, the recently acquired rights of the freed Negroes were frittered away without any consideration being given to their cause. Again, the Nation was turning its back on the principles which brought it into being. Again, Negroes were condemned to decades of indignity and penury. It was stark evidence of how, in times of emotion, the President by the power of his position can, through subtle phrases, a tilt of the head, or a wink of the eye in chosen places, actually change the course of history.

C. *Race Relations from the Compromise of 1876 to the 1930's*

Perhaps the saddest aspect of race relations in America in the hundred-odd years since the passage of the three great Reconstruction amendments is that we have taken such a long and circuitous path to arrive at a position where the principles in those amendments have approached realization. In fact, the course of race relations for much of the period since 1876 has been away from rather than toward the extension of the privileges of American citizenship to all persons, regardless of race or color. Rather than pursuing that goal, we came at times perilously close to apartheid.

Before discussing the troubled history of race relations since the Hayes-Tilden Compromise of 1876, I should make plain that this presentation is not an insensitive one. I believe that our Nation is founded on the principles of racial equality and justice. This is not only because of the ideals inherent in the Declaration of Independence, restated forcefully in the Reconstruction or Civil War amendments, as they are interchangeably called, but because of the character

45 Santa Clara County v. Southern Pacific R. R., 118 U.S. 394 (1886).
46 C. WOODWARD, *supra* note 41, at 248-49.

of the pluralistic society which we have consciously and deliberately developed throughout the Nation.

From the beginnings of our history, we have offered ourselves up as a haven for all different kinds of people, whatever their racial or ethnic origins. We have sought out citizens of other nations to become members of our labor force, promising them implicitly that they would have not only desirable economic opportunities in America but would be treated fairly and equally whatever their heritage. Generations of immigrants—first Irish, then Germans and Scandinavians, then Italians and members of the Slavic nations—have come to America from Europe. Japanese, Chinese and Filipinos have come from Asia. We have recruited Mexicans by the millions and natives of other Latin American countries as well. Therefore, as long as racial and ethnic discrimination exists in this country we may not fairly claim that our promises to these groups of peoples have been fulfilled.

We must, therefore, constantly scrutinize developments that would divert our Nation from the path of allegiance to the standards of cultural pluralism and racial equality that we have long professed to hold. In doing so, we need to maintain particular adherence to the mandates of the Constitution that articulate those standards. A strict commitment to those mandates, such as the Civil War amendments, is not always popular; indeed, it is often denounced by those who feel that racial equality or cultural pluralism is against their own personal interests.

However, before we decide to abandon the principles of equality and justice in race relations in the face of specific dissatisfactions with some of their implications, we should consider the alternatives. There are nations in the world which deal with race relations problems by forced separation of races. We should ask whether a nation such as ours that styles itself as dedicated to liberty and democracy can tolerate apartheid. There are nations that have "solved" their race relations problems by the total subordination and even extermination of racial minorities. We should ask whether we could countenance such offenses against humanity. And there are nations, including our own, that have attempted to resolve differences over race relations through civil war. We need only reflect on the tragic consequences of attempting to solve any social problem in that manner.

In the face of these alternatives, we cannot view lightly attempts to subvert or dissemble these portions of the Constitution which confer civil rights on all American citizens, regardless of race or color. I do not believe we can retain our strength as a nation unless we retain a commitment to racial equality and the free enjoyment of the rights of American citizenship by all, and I do not believe we can subordinate that commitment to temporary exigencies and inconveniences.

Much of the history of race relations from the Compromise of 1876 to the 1930's is an example of how minor deviations from the principles of the Reconstruction amendments fed upon themselves to bring relations between the black and white races virtually to a state of apartheid. Perhaps it would be helpful to review the course of that history from this perspective.

We ought, perhaps, to start by stating that although many of the examples illustrating the breakdown of racial equality from the 1870's until the 1930's come

from the South, that region need not bear all the responsibility. Before the outbreak of the Civil War, slavery had been abolished in many northern states, but only in Massachusetts were Negroes not separated from whites in transportation facilities and in some schools, and only in the New England states were they allowed to vote. Elsewhere, again with the exception of Massachusetts after 1855, Negroes were not permitted to serve on juries; or to be witnesses or judges; were segregated from whites on railroads, buses, steamboats and stagecoaches; were excluded from restaurants and hotels, theaters and lyceums; sat in separate pews in churches; and used separate prisons, cemeteries and hospitals. Major Northern cities, such as Boston, Philadelphia, New York and Cincinnati, had segregated Negro housing ghettoes. And after the Civil War and the interlude of Reconstruction, these patterns revived themselves.[47]

The South, however, was where 90 per cent of the Nation's blacks lived until 1900, and is where can best be observed the extraordinary impact of the Reconstruction years on race relations and the gradual retreat from desegregation that began in the 1870's. From 1867, the year Congress gained control of Reconstruction, until 1877, when the last federal troops left the South, blacks voted in state and federal elections; served in state legislatures; traveled together with whites on railroad cars and buses; ate together in restaurants; slept at the same hotels; and, notably in Louisiana, attended the same schools. There was, of course, sporadic and sometimes violent resistance to the intermingling of the races, but there was also considerable tolerance of it by many white Southerners and some evidence that blacks regarded themselves as having wide access to facilities previously denied them.[48]

After the withdrawal of federal troops from the South in 1877, the situation changed largely because of the attitude of national political and literary spokesmen, and of national institutions, toward the notion of racial equality. In the 1880's and 90's, Northern magazines, such as *Harper's Weekly,* the *Nation,* the *North American Review,* and the *Atlantic Monthly,* which had been abolitionist advocates prior to the Civil War, increasingly printed articles stressing the dominance of the white race. Influential Northern writers, such as Herman Melville, Henry Adams and Henry James, treated Southern exponents of white supremacy tolerantly in their poetry and fiction.[49]

None of the Presidential candidates for a half century after the Hayes-Tilden affair stressed the importance of maintaining equality for the freed Negro; in contrast much of their rhetoric emphasized the reunification of North and South and stressed Northern tolerance for Southern habits and customs. Near the turn of the century, moreover, American involvement against the Spanish in Cuba and in the Philippines was accompanied by a flood of white supremacist propaganda. Meanwhile, the American West was settled at the expense of the degradation and segregation of its Indian inhabitants.[50]

To this pattern of deviance from the ideals of Reconstruction should be added the actions of the Supreme Court of the United States. Beginning with

47 *See* L. LITWACK, NORTH OF SLAVERY (1961).
48 *See* C. WOODWARD, THE STRANGE CAREER OF JIM CROW 22-29 (1965).
49 *See* C. WOODWARD, *The Burden of Southern History* 109-140 (rev. ed. 1968).
50 *See, e.g.,* R. UTLEY, THE LAST DAYS OF THE SIOUX NATION (1963).

the *Slaughter-House Cases* in 1873, the Court in a series of decisions continually narrowed the scope of the Civil War amendments, resting either on theories of federalism or laissez-faire. In *United States v. Cruikshank*,[51] decided in 1875, the Court made another narrow reading of the privileges and immunities clause of the fourteenth amendment, this time in the context of harassment of Negroes by private citizens of a state. In *Hall v. DeCuir*,[52] two years later, the Court held that a state could not prohibit racial segregation in common carriers, and in *Ex parte Virginia*,[53] an 1879 decision, it held that states were likewise not precluded from excluding Negroes from jury service.

Meanwhile a broad attack was leveled at provisions of the Civil Rights Act of 1875 which prohibited segregation in public places, and in the *Civil Rights Cases*[54] of 1883, the Court responded to that attack, holding that although the fourteenth amendment prevented states from denying citizens equal enjoyment of their rights, it did not extend to the actions of private citizens. Hence, the defendants in the cases, who had denied Negroes access to hotels and theaters, were found to be beyond the reach of Congress, and the sections of the 1875 Act which prohibited segregation in public facilities and provided penalties for those who refused to admit Negroes to those facilities were declared unconstitutional. With this "subtle and ingenious verbal criticism," the first Justice Harlan wrote in dissent, the way was opened for a retreat from "the substance and spirit of the [Civil War] amendments of the Constitution. . . ."[55]

With the advent of the 1890's, the Court moved to extend fuller protections to those who would subvert the purposes of the thirteenth, fourteenth and fifteenth amendments. In *Louisville, N.O. & Tex. Ry. v. Mississippi*,[56] the Court ruled that Mississippi could require segregation on common carriers, despite the fourteenth amendment. In *Plessy v. Ferguson*,[57] the Court upheld a Louisiana law providing for segregated facilities on railroad trains on the ground that separate but equal facilities were tolerated by the equal protection clause. And in *Williams v. Mississippi*,[58] an 1898 decision, the Court sanctioned the imposition of poll taxes, literacy tests, and residency requirements by the State of Mississippi as a device to prevent Negroes from exercising their rights to vote. With the *Williams* decision, the way was open for the grandfather clauses, good character clauses, and white primaries that resulted in the almost complete disfranchisement of the Southern Negro after 1900.[59]

By the opening of the twentieth century, the momentum of racial separation was clearly under way in the South. The earliest manifestations of the movement came in voting restrictions and public transportation. By the 1900's all the original Confederate States had adopted the poll tax, and seven had enacted versions of the Mississippi plan sustained in the *Williams* case.[60] In addition, by

51 92 U.S. 542 (1875).
52 95 U.S. 485 (1877).
53 100 U.S. 339 (1879).
54 109 U.S. 3 (1883).
55 *Id.* at 26 (dissenting opinion).
56 133 U.S. 587 (1890).
57 163 U.S. 537 (1896).
58 170 U.S. 213 (1898).
59 *See* WOODWARD, THE STRANGE CAREER OF JIM CROW (rev. ed. 1968) 84-85.
60 *Id.* at 85.

1915 statewide white primaries were in effect in all the southern states. Segregated railroad cars, street cars, and steamboats were required in all southern states and Maryland by 1905.[61]

"Once loosened, the idea of equality is not easily cabined,"[62] a constitutional scholar has written. The same, unfortunately, may be said of the idea of racial separation. The first thirty-odd years of the twentieth century bear testament to the fantastic lengths certain Americans were willing to go in order to achieve the principle of segregation of the races. Some of the examples make unconscious use of the device of *reductio ad absurdum*. The examples, however, are not merely absurd; they are tragic.

Southern states required separate entrances and exits to public facilities, separate waiting rooms, separate drinking fountains, and segregation of blacks and whites in hospitals, prisons, mental institutions and nursing homes. Whites and blacks were physically separated at places of public entertainment, including public parks, beaches, playgrounds, libraries, auditoriums and circuses. States provided for separate telephone booths, school textbooks, elevators, barber shops and taxicabs. Negro witnesses in courts took their oath on separate Bibles. Whites and blacks were forbidden from competing with or against each other in athletic contests. Some states extended that principle to include fishing, boating and checkers, and provided that white and black athletic teams could not even compete within a close physical distance from each other.[63] And these developments took place, not in some dim portion of a distant past, but in the twentieth century. The most particularized extensions of the segregation principle occurred in the 1920's and 30's. In 1915, an English visitor to the South felt that black-white relations there were very similar to those in South Africa and would remain so.[64]

Despite the overwhelming tendency toward segregation in race relations in the first three decades of the twentieth century, there were some developments in a counter direction. Special interest groups, such as the National Association for the Advancement of Colored People and the Urban League, grew in membership and prominence after the First World War, and agitated for Negro rights, backed by white financial support. Negro protest literature emerged in the North, especially in New York City, in the 1920's and 30's, and some Southern journalists began advocating the breakdown of extreme forms of segregation. During the depression years of the thirties, the Democratic Party made a deliberate attempt to attract Negro voters through economic assistance programs in the South and a revived interest in the Negro in the urban North.

VI. Race Relations Since World War II

A. *The Supreme Court's Role*

Developments as, for example, the growth of special interest groups and

61 *Id.* at 85-97.
62 *See* A. Cox, The Warren Court 7 (1968).
63 Woodward, *supra* note 59, at 98-102, 117-118.
64 Maurice Evans, quoted in Woodward, *supra* note 59, at 112-13.

increased white support helped set the stage for a reversal of race relations policies that followed the Second World War. That change, however, was fostered primarily by the presence of the War itself. First, the primary enemy of the Allies, Nazi Germany, was perhaps the most conspicuously and brutally racist nation in the history of the world. American war propaganda continually stressed the immorality and viciousness of Nazi policies. The segregation and extermination of non-Aryans in Hitler's Germany were shocking for Americans, but they also served as a troublesome analogy. While proclaiming themselves inexorably opposed to Hitler's practices, many Americans were tolerating the segregation and humiliation of nonwhites within their own borders. The contradiction between the egalitarian rhetoric employed against the Nazis and the presence of racial segregation in America was a painful one.

In 1941, President Roosevelt signed an executive order creating a Fair Employment Practices Committee to oversee hiring in defense industries with the purpose of preventing racial discrimination. Also, in a message to Congress in January of that same year, Roosevelt defined the war effort as directed toward the universal achievement of fundamental egalitarian principles. He envisaged a world linked by "four essential human freedoms—freedom of speech and expression, freedom of worship, freedom from want, freedom from fear." A year later, the United States, Great Britain, the Soviet Union, and China jointly pledged to combine with their war effort the preservation of "human rights and justice in their own lands as well as in other lands."

After the close of the War, an attack on racial segregation in America was mounted in earnest. In 1946, President Truman established a Commission on Higher Education and a Committee on Civil Rights, which published reports the following year. The Commission announced that there would be no fundamental change in the lamentable state of American public education, especially in the South, until segregation legislation was repealed, and the Committee called for the elimination of racial segregation from American life. In 1948, Truman signed an executive order formalizing the desegregation of the Armed Services, a process which had been begun in the Navy and Air Force in 1946. Also, in February, 1948, President Truman called for the establishment of a permanent commission on civil rights and a strengthening of the powers of the Fair Employment Practices Commission, together with the enactment of laws designed to curtail lynching and poll tax discriminations in the South. At the 1948 Democratic National Convention, the President's supporters pushed through a plank of the party platform stating a strong commitment to civil rights, which caused certain southern Democrats to boycott their party.

Meanwhile, the Supreme Court had gradually begun to reverse its earlier permissive attitude toward racial discrimination. Its contributions in that direction in the 1930's and 40's were centered in five areas—transportation, housing, disfranchisement, jury selection and university education. In *Morgan v. Virginia,*[65] a 1946 decision, the Court declared a Virginia statute providing for segregation of passengers on the grounds of race on interstate carriers uncon-

65 328 U.S. 373 (1946).

stitutional as an undue burden on commerce. In *Shelley v. Kraemer,*[66] two years later, the Court found private racially restrictive covenants in the sale of real estate a violation of the equal protection clause where the validity of those covenants had been upheld by state courts.

In the meantime, in two cases—*United States v. Classic*[67] and *Smith v. Allwright*[68]—the Court held that state primaries excluding Negroes from participation essentially denied them the right to vote where the primary was an integral part of the election process. These decisions effectively terminated the use of the "white primary" as a device to disfranchise Negroes.

Another set of decisions, notable among them *Norris v. Alabama*[69] and *Patton v. Mississippi,*[70] held that systematic exclusion of Negroes from juries in criminal cases where Negroes were the defendants was a denial of equal protection to the Negroes.

But it was in university education where the Court made its deepest inroads into segregation, and especially into the doctrine of "separate but equal" announced in *Plessy v. Ferguson.*[71] In *Missouri ex rel. Gaines v. Canada,*[72] decided in 1938, the Court found that the State of Missouri was required to admit a Negro to the state law school where no equivalent Negro law school existed. The state had offered to pay the petitioner's tuition at any qualified law school in a neighboring state. This, the Court found, did not satisfy the equal protection clause. Nor was the Court satisfied that the mere presence of a separate state law school for Negroes necessarily met the requirements of the equal protection clause, if that school was not of sufficiently equal stature to the school reserved for whites. That was the meaning of *Sweatt v. Painter,*[73] a 1950 decision, where the State of Texas had authorized the founding of a separate law school for Negroes, which the Court found to be markedly inferior in quality to the University of Texas Law School from which Negroes were excluded by statute. Finally, the Court held, again in 1950, in *McLaurin v. Oklahoma State Regents,*[74] that a state university could not, after admitting a Negro graduate student, segregate him from other students at meals, in classrooms, and in the library. The conditions under which the Negro student was required to receive his education, the Court found, amounted to a deprivation of his right to the equal protection of the laws.

The import of these three decisions was to erode the *Plessy v. Ferguson*[75] doctrine of "separate but equal," leaving only the necessity of a final thrust to overrule it. This thrust came in 1954 in the *Brown v. Board of Education*[76] decision. That decision may be viewed as the culmination of developments on behalf of racial equality that had been taking place for over a decade before May, 1954. The decision, involving as it did compulsory public education,

66 334 U.S. 1 (1948).
67 313 U.S. 229 (1941).
68 321 U.S. 649 (1944).
69 294 U.S. 587 (1935).
70 332 U.S. 463 (1947).
71 163 U.S. 537 (1896).
72 305 U.S. 337 (1938).
73 339 U.S. 629 (1950).
74 339 U.S. 637 (1950).
75 163 U.S. 537 (1896).
76 347 U.S. 483 (1954).

affected a very large number of Americans, and because it openly repudiated the principle of segregation in public schools, forecast major adjustments in the relationship of blacks to whites in America. In this sense, the decision can be seen as marking a reversal of the trend toward governmental permissiveness with regard to discriminations based solely upon race that had begun in the 1870's.

With the late 1950's came a new stage in the history of race relations in America. After a temporarily moderate response to the *Brown* decision, several southern states gradually moved to the point of open resistance to federal desegregation orders. From approximately 1957 until 1960, progress toward desegregation of the South's public facilities slowed. Beginning in 1960, Negroes in the South openly resisted the stalling tactics, using protest strategies of their own, such as sit-ins, freedom rides, and other nonviolent demonstrations. The violent reaction in some Southern states to these strategies and to efforts by the federal government to enforce desegregation produced a national response of shock and horror, which in its turn gave stimulus to the growing movement for full-scale civil rights for Negroes. By the early 1960's, the struggle for Negro equality had become the principal domestic issue in the Nation.

B. *The Role of the United States Commission on Civil Rights*

The United States Commission on Civil Rights played a most important part in the development of race relations during the 1960's. Its work, since its creation in 1957, has symbolized a growing conviction among Americans of all races that the principle of racial equality is one that can be neither partially nor temporarily implemented, nor rhetorically espoused and subverted in practice. The efforts by the Civil Rights Commission have gone far to carry forward the mandate of the Civil War amendments in contemporary America.

The Commission was established by the Civil Rights Act of 1957, which also provided for a new Civil Rights Division in the Department of Justice and gave the federal government power to seek court injunctions against alleged interference with the right to vote. The section of the Act creating the Commission charged it with the responsibility of investigating allegations that United States citizens were being deprived of the right to vote by reason of race, color, religion, or national origin; of collecting information regarding attempts to deny persons equal protection of the laws in the courts; to assess the laws and policies of the federal government with regard to civil rights; and to issue a report of its findings to the President and Congress within two years. The Commission was created only on a temporary basis; it was to be bipartisan and independent; and its appropriation was to expire in two years.

The Commission's personnel were carefully chosen by President Eisenhower to represent a balance in a variety of areas. Politically, the six commissioners consisted of three Democrats, two Republicans, and one Independent. One of the six commissioners, J. Ernest Wilkins, an Assistant Secretary of Labor, was a Negro; three commissioners were from the North and three from the South. Despite the President's staffing policy, the Commission was from its outset regarded by advocates of Southern resistance to desegregation as biased in the

direction of furthering civil rights. This claim was wholly unwarranted unless it can be said that the very presence of a federal agency charged with the responsibility of investigating segregationist practices in the South was bound to keep racial discrimination uppermost in the public eye. On the other hand, the Commission's representatives repeatedly stated that they viewed their purpose as investigative much more than policy-making, and that they had no one view on civil rights.

For its initial statutory report, to be delivered in 1959, the Commission proposed to concentrate on three areas—voting, housing and education. In voting rights, it restricted its investigations to the South, but in housing it decided to undertake investigative hearings and fact-gathering expeditions in the North as well. It also decided to limit its consideration of educational problems to developments in public schools that had adopted a program of integration in compliance with the orders of federal courts. Montgomery, Alabama, was selected as the focus of the first voting rights hearings; New York, Chicago and Atlanta for the housing hearings; and Nashville, Tennessee, for a conference on developments in education.

Of the three public sessions held by the Commission in connection with the production of its 1959 report, that on voting rights was the most dramatic. The contrast between the eloquence of Negro witnesses who spoke of their fervent desire to participate in the political processes of their Nation and the sullen recalcitrance of certain of the individuals employed by the State of Alabama was striking. At times, it appeared as if the men responsible for passing on the eligibility of Negro voters were not even aware of the content of the applications they purportedly evaluated. Alongside this was the determination of individual Negroes to qualify as voters despite obstacles, as was evidenced in the testimony of a farmer named Sellers who told of his repeated failures at attempting to register. Father Hesburgh, who was one of the original appointees to the Commission, asked Sellers, "Mr. Sellers, are you going to keep trying?" "Oh, yes, I'm determined to register," came the reply. "God bless you," said Father Hesburgh.[77]

After also conducting sessions on housing and education, the Commission prepared its report for 1959. That report was submitted on September 9, 1959. It was remarkable for three reasons: First, the general cooperation and unity evidenced by its members, despite differing views on specific issues; second, its eloquent reaffirmation of principles of racial equality and justice; and, third, the violence with which it was attacked by advocates of segregation in Congress. The introduction to the report announced the timeless commitment on the part of the American Nation to principles such as the right of all persons to equal protection of the laws, called for a return "to these fundamental principles" and stated that "[o]ver the years the Court has given differing interpretations of the Constitution, and men may honestly differ about the wisdom of these interpretations. But the principles remain steadfast." It also stated that "[i]n a world where colored people constitute a majority of the human race, where many new

77 UNITED STATES COMMISSION ON CIVIL RIGHTS, HEARINGS BEFORE THE UNITED STATES COMMISSION ON CIVIL RIGHTS: VOTING, MONTGOMERY, ALABAMA, DEC. 8-9, 1958, AND JAN. 9, 1959, 275 (1959).

free governments are being formed, where self-government is everywhere being tested, where the basic human dignity of the individual person is being denied by totalitarian systems, it is more than ever essential that American principles and historic purposes be understood. These standards—these ideas and ideals—are what America is all about."[78]

Southern apostles of segregation were quick to denounce the 1959 report and to suggest that the Commission's tenure, which had lapsed at the same time the report was submitted, not be renewed. Several senators from the Deep South referred to the report as radical, vicious, irresponsible and vindictive.[79] The Commission was accused of using its fact-finding mandate to preach their own views on race relations. To their credit, Senate Majority Leader Johnson and Senate Minority Leader Dirksen ignored calls for the dismemberment of the Commission, and it was given a two-year extension on September 14, 1959. The contempt in which it was held by segregationists testified to its effectiveness in making the American people aware of the continued gap between the principles of the Constitution and their implementation in the area of race relations.

Between the time of the Commission's first report in 1959 and its second report which was presented to the President and Congress in 1961, the atmosphere of race relations underwent a change. Negroes became more active in pursuit of their rights, sporadic violence continued in the Deep South, occasionally with tragic results, and public opinion became galvanized around the issue of Negro equality. Meanwhile, the Supreme Court had occasion to decide two cases directly involving the Commission's activities. In the 1960 decision, *United States v. Raines,*[80] the Court upheld the validity of sections 131 (a) and (c) of the Civil Rights Act of 1957, which allowed the Attorney General to grant injunctive relief or institute civil actions on behalf of citizens allegedly deprived of their voting rights. This decision underlined the import of the Commission's investigative operations. That same year, in *Hannah v. Larche,*[81] the Court sustained the constitutionality of the Commission's procedures involving witnesses subpoenaed to appear before it against a due process challenge. The Commission, the Court found, was charged only with fact-finding. It could not adjudicate, indict, punish, or impose legal sanctions.

By 1961, the work of the Commission was receiving considerable praise throughout the country. It had expanded and broadened its coverage through state advisory committees, which conducted investigations of local conditions and promoted harmony in race relations, and through closer relationships with the Civil Rights Division of the Justice Department. In 1960, it produced an interim report entitled Equal Protection of the Laws in Public Education,[82] in which it recommended that federal funds should be disbursed only to public educational institutions that did not discriminate against Negroes. The public took note of these and other accomplishments and called for a further extension of the Com-

78 UNITED STATES COMMISSION ON CIVIL RIGHTS, WITH LIBERTY AND JUSTICE FOR ALL, 15 (1959).
79 *See* 105 CONG. REC. 16878-18024, 19482-508 (1959).
80 362 U.S. 17 (1960).
81 363 U.S. 420 (1960).
82 UNITED STATES COMMISSION ON CIVIL RIGHTS, EQUAL PROTECTION OF THE LAWS IN PUBLIC HIGHER EDUCATION (1960).

mission's tenure after 1961.[83] That extension, again for two years, was secured in September 1961.

Between 1961 and July 2, 1964, when its mandate was extended and somewhat altered by the passage of the Civil Rights Act of that year, the Commission emerged as one of the leading institutional advocates of racial integration in America. Its style, as evidenced in its 1961 and 1963 biennial reports and its continuing hearings, conferences, and investigations on voting, education, employment, housing, and the administration of justice, was to let the facts speak for themselves. It continually dramatized in those years the extent to which Negroes were deprived of basic conditions of American citizenship and tolerable standards of living. It brought these lessons home, not through inflamed rhetoric, but often by merely collecting the testimony of Negro witnesses and comparing it with that of persons allegedly responsible for denying them basic rights. The physical and mental suffering of the Negroes and the brutality and ignorance of some of their alleged harassers were evidence enough of the need for more stringent enforcement of the civil rights of all Americans. In 1963, Senator Philip Hart of Michigan called it the common conscience of the Nation.[84]

The backdrop to the Commission's activity was continually changing and explosive. Demonstrations at institutes of higher learning, mass arrests, violence and peaceful marches contributed to keep civil rights a matter of urgent public concern. In July, 1963, President Kennedy submitted to Congress an omnibus civil rights bill, the most significant portion of which attempted to enforce the right of all persons to equal access to public accommodations regardless of race or color. As the bill lingered in Congress, President Kennedy was tragically assassinated; four days after the assassination, President Johnson said that "[n]o memorial oration or eulogy could more eloquently honor President Kennedy's memory than the earliest possible passage of the civil rights bill for which he fought so long."[85] The bill was eventually passed in July, 1964, and included among its provisions an extension of the life of the Commission for four years.

By the middle of the 1960's, the Commission had emerged as one of the major vehicles for implementing civil rights legislation in the Nation. That function was dramatized in the passage of the 1965 Voting Rights Act, whose announced purpose was to eliminate restrictions on Negro suffrage. The Act's most far-reaching provision provided for the appointment of federal examiners to supervise voter registration in those states where literacy tests were in effect and where less than 50 per cent of the population of voting age had been registered or had voted in the 1964 election. This proposal, in general form, had been recommended by the Commission in its first biennial report in 1959.

After 1964, the Commission's activities broadened, as it was given the additional responsibility of acting as a clearinghouse of information on civil rights questions, both for other governmental agencies active in the field and for the public at large. In this capacity, the Commission has published over twenty-five

83 *See, e.g.*, Washington Post, June 23, 1961; St. Louis Post Dispatch, Aug. 8, 1961; Edward P. Morgan, ABC News Release, Oct. 18, 1961.

84 N. Y. Times, April 29, 1963.

85 Quoted in CONGRESSIONAL QUARTERLY SERVICE, REVOLUTION IN CIVIL RIGHTS 41 (1965).

documents since 1965, covering such areas as federal rights under school desegregation laws, social and economic mobility in the Negro community, and equal employment opportunities under federal law. In addition, the Commission's investigative concerns have paralleled the directions race relations and civil rights have taken since 1964. A 1967 two-volume report considered the topic of racial isolation in the public schools,[86] demonstrating how continued separation of white and black children has adverse effects on both. Two 1970 reports, one on Mexican Americans and the administration of justice in the southwestern states,[87] and another on the current state of equal opportunity in housing,[88] reflect increased public concern with these two areas.

In summation, the Civil Rights Commission has been both an index of the state of race relations in America from its founding in 1957 until the present and an active agent for change toward the achievement of greater racial equality. In the midst of a climate of race relations that has remained troubled and emotion-ridden, the Commission, under the leadership of Father Hesburgh, has been a voice for reason and fairness.

VII. Conclusion

It should be remembered that regardless of how meticulous the Constitution or statutes may be for the eradication of racial discrimination, the problem will not be solved until the spirit of reason and fairness, mentioned by the Commission, prevails.

Some recent cases decided by the Supreme Court suggest that the patterns of racial discrimination die very hard. Despite the Court's condemnation of the principle of racial segregation and outlawing of it in public schools in 1954, it was not until 1962 that the segregation of Negroes and whites in state courtrooms was likewise outlawed. It was not until 1964 that a Negro witness was given the right to be examined by counsel in the same spirit of deference accorded to white witnesses. It was not until 1968, over one hundred years after the passage of the civil rights statute on which the Court relied, that Negroes were determined to have been granted by the thirteenth amendment the same rights to live where they choose as whites. Despite a twenty-five year old holding by the Court that systematic exclusion of Negroes from juries is unconstitutional, that problem still persists. As late as 1969, after I had retired from the Court, Justice Black was moved to say in the case of *Alexander v. Board of Education*[89] that "there are many places still in this country where the schools are either 'white' or 'Negro' and not just schools for all children as the Constitution requires."[90] In Justice

86 UNITED STATES COMMISSION ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS (1967).
87 UNITED STATES COMMISSION ON CIVIL RIGHTS, MEXICAN-AMERICANS AND THE ADMINISTRATION OF JUSTICE IN THE SOUTHWEST (1970).
88 UNITED STATES COMMISSION ON CIVIL RIGHTS, FEDERAL INSTALLATIONS AND EQUAL HOUSING OPPORTUNITY (1970).
89 396 U.S. 1218 (1969).
90 *Id.* at 1222.

Black's view, there was "no reason why such a wholesale deprivation of constitutional rights should be tolerated another minute."[91]

These recent examples illustrate the fact that harmony in race relations is not simply or easily achieved. No matter how comprehensive and clear the law is on this subject, there will always be some who desire to promote tensions and patterns of resistance. But the vast majority of our people must realize that racial equality under law is basic to our institutions, and we cannot and will not have tranquility in our Nation until the race issue is properly settled. We have, it bears repeating, 34 million members of minority groups whose racial rights have not been but must be fully accorded. That calls for a combination of effective law and good will. In the absence of either of these elements, we can only expect chaos. If there is one lesson to be learned from our tragic experience in the Civil War and its wake, it is that the question of racial discrimination is never settled until it is settled right. It is not yet rightly settled.

91 *Id.*