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Slipping Backwards: The Supreme Court, Segregation Legislation, and the African American Press, 1877-1920

Kathryn St.Clair Ellis
University of Tennessee - Knoxville

To the Graduate Council:

I am submitting herewith a dissertation written by Kathryn St.Clair Ellis entitled "Slipping Backwards: The Supreme Court, Segregation Legislation, and the African American Press, 1877-1920." I have examined the final electronic copy of this dissertation for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, with a major in History.

W. Bruce Wheeler, Major Professor

We have read this dissertation and recommend its acceptance:

Ernest Freeberg, Stephen V. Ash, Fran Ansley

Accepted for the Council:
Carolyn R. Hodges

Vice Provost and Dean of the Graduate School

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A Dissertation
Presented for the
Doctor of Philosophy
Degree
The University of Tennessee, Knoxville

Kathryn St.Clair Ellis
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DEDICATION

To Gram and Grump for teaching me the importance of learning.

To Mom and Dad for encouraging and supporting me in everything I choose to pursue.

To Darren for motivating me, encouraging me, and loving me throughout this entire process – this is as much your accomplishment as it is mine.

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ABSTRACT

This study discusses the role of Supreme Court decisions in shaping the evolution of Jim Crow and African American newspapers' reactions to these decisions. The study focuses on the period between the end of Reconstruction and the United States' entrance into World War I. It looks at several Supreme Court decisions to demonstrate how the Court failed to act as a check on state legislatures' reactionary undertakings and how these legislatures interpreted the Court's judgments. Several of the Supreme Court's decisions served to alert white legislators to the federal government's limited actions to protect the rights of African American citizens. The cases included represent most areas of discrimination faced by African Americans during this period including participation in the court system, Fourteenth Amendment protections, the Fifteenth Amendment, public versus private segregation, transportation segregation, education segregation, and housing segregation. White legislators viewed the Supreme Court as an indicator of the state segregation that the federal government would allow.

African American newspapers failed to offer a significant response to many key decisions. As the Court limited the protections of Reconstruction legislation, black newspapers offered little guidance to the black community about how to salvage their equal rights. The newspapers had the opportunity to reach large portions of the African American community and to lead efforts to protest the Court's potentially detrimental decisions, but the press failed to bring attention to the cases white legislators viewed as signals that the federal government would not interfere with state and local segregation. Through the study of approximately twenty black newspapers, it becomes clear that the newspapers' editors often misread the importance of the Supreme Court's holdings. Cases that historians now recognize as key turning points in the status of African Americans went virtually ignored by the press and cases that receive little more than a footnote garnered extended attention from newspapers for being either a significant blow to the black community or for being cause for hope. It is apparent that the Supreme Court played a significant role in enabling Jim Crow to expand and the African American press did little to counter its effects.

TABLE OF CONTENTS

Introduction

> And thus goes segregation which is the most far-reaching development in the history of the Negro since the enslavement of the race.
>
> ~ Carter G. Woodson
> *The Mis-Education of the Negro*
> (1933)

In his 1933 work, *The Mis-Education of the Negro*, Carter G. Woodson discussed what he viewed as the indoctrination of African Americans in public schools. Woodson believed that African Americans had become too dependant on white America and too accepting of inferior positions in society. The status of black Americans in the 1930s did not reflect the expectations of the African American community following the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments during Reconstruction. Rather, there had been a sense of excitement about the promise of equality that went unattained by the majority of black Americans in Woodson's generation.

Woodson stood out as a success among a generation of blacks who faced increased challenges and increased segregation throughout their lifetimes. Born in 1875, Woodson lived through the peak years of Jim Crowism and observed its effects on blacks in both the South and the North. A graduate of Berea College, which later became the focus of a key Supreme Court case about the segregation of whites and blacks in private colleges, the University of Chicago, and Harvard University, Woodson wanted the role of his people to be acknowledged and respected. Towards this goal, he co-founded the

Association for the Study of African American Life and History in 1915 and began publishing *The Journal of Negro History* in 1916.[1] He also participated in the Washington, D.C. branch of the National Association for the Advancement of Colored People. Despite his education and his political activism, however, his belief that African-American history was unique and deserved to be taught in addition to the "white" history of the United States was not popular among other black intellectuals. In contrast, many of them took the approach that all Americans, regardless of their skin color, had the same history.

As Woodson and other African American leaders struggled to find the best way to advance the status of the black community, state legislatures progressively limited African Americans' standing in society through a variety of segregation legislation. Rather than creating far-reaching laws that established wholesale segregation, white legislators periodically tested the legal waters to determine how much the federal government would allow and where it would draw the line regarding discrimination against blacks. Some of the laws simply codified segregation that already existed through *de facto* means, but the majority of these post-war statutes worked to draw new lines between blacks and whites in every aspect of their lives including transportation, entertainment, education, and housing.

This study looks at several of the Supreme Court's decisions during this period to demonstrate how the Court failed to act as a check on the reactionary undertakings of state legislatures and how these legislatures interpreted the Court's judgments. It

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[1] *The Journal of Negro History* became *The Journal of African-American History* in 2002. The journal has never missed a single issue despite the World War I, the Great Depression, and World War II. The journal has also survived numerous funding issues in its ninety-one years of publication.

becomes evident that several of the Supreme Court's decisions served to signal white legislators about the limited actions the federal government would take to protect the rights of African American citizens. Eleven cases receive the lion's share of discussion, with supplemental information on more than twenty others. These cases taken together cover most of the areas of discrimination faced by African Americans between the end of Reconstruction and the United States' entry into World War I. Among the issues addressed in these cases are African American participation in the court system (*Blyew v. United States* [80 U.S. 581 (1871)] and *Strauder v. West Virginia* [100 U.S. 303 (1879)]), the protections provided by the Fourteenth Amendment and the Enforcement Act of 1870 (*Slaughterhouse Cases* [83 U.S. 36 (1873)] and *United States v. Cruikshank* [92 U.S. 542 (1875)]), the debate about public versus private segregation (*Civil Rights Cases* [109 U.S. 3 (1883)] and *United States v. Harris* [106 U.S. 629 (1883)], the protections provided by the Fifteenth Amendment (*Ex parte Yarbrough* [110 U.S. 657 (1884)]), segregation in transportation (*Plessy v. Ferguson* [163 U.S. 537 (1896)]), segregation in education (*Cumming v. Richmond County Board of Education* [175 U.S. 528 (1899)] and *Berea College v. Commonwealth of Kentucky* [211 U.S. 45 (1908)]), and segregation in housing (*Buchanan v. Warley* [245 U.S. 60 (1917)]). The reactionary state legislation that followed many of these decisions suggests that white legislators of the time viewed the Supreme Court as an indicator of what types of segregation would be deemed acceptable.[2]

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[2] One area of discrimination not discussed in great detail in this study is the disfranchisement of African Americans. Although the subject is touched on briefly, the extent and scope of limitations placed on voting rights during the period from 1871 to 1917 is so great that it deserves, and has received, individual attention. Studies that discuss the issue more specifically include: Thomas Holt, *Black over White: Negro Political Leadership in South Carolina during Reconstruction* (Urbana: University of Illinois Press, 1979);

On the other hand, perhaps because of the belief held by many African American leaders that all Americans shared the same history regardless of their skin color, African American newspapers failed to offer a significant response to key United States Supreme Court decisions between 1871 and 1917. During this forty-six year period, the Supreme Court heard cases that dealt with the rights of African Americans to testify against whites, the ability of blacks to sit on juries, the segregation of public transportation and public accommodations, education segregation, and housing segregation. As the Court presented a train of holdings that increasingly limited the protections of the Fourteenth Amendment and other Reconstruction legislation, black newspapers offered little guidance to the black community about how to salvage as much as possible of the equal rights they had hoped to receive.

Although political activists and educated African Americans like Woodson, W.E.B. DuBois, Booker T. Washington, and Ida B. Wells-Barnett reacted to many of these decisions, it was the newspapers that had the opportunity to reach large portions of the African American community and to lead a mobilization of efforts to protest the Court's potentially detrimental decisions. For the most part, however, the press failed to bring attention to key cases that white legislators viewed as signals from the Court that the federal government would not interfere with state and local decisions to segregate within their communities. Through the study of approximately twenty African American newspapers headquartered throughout the United States, it becomes clear that the

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Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (New York: Basic Books, 2000); Kent Redding, *Making Race, Making Power: North Carolina's Road to Disfranchisement* (Urbana: University of Illinois Press, 2003); Glenn Feldman, *The Disfranchisement Myth: Poor Whites and Suffrage Restriction in Alabama* (Athens: University of Georgia Press, 2004); and, Michael Perman, *Struggle for Mastery: Disfranchisement in the South, 1888-1908* (Chapel Hill: University of North Carolina Press, 2004).

newspapers' editors often misread the importance of the Supreme Court's holdings. Cases that are now recognized as key turning points in the status of African Americans went virtually ignored by the press and cases that receive little more than a footnote by today's historians garnered extended attention from newspapers for being either a significant blow to the black community or for being cause for hope. By studying these reactions, paired with trends in state and local legislation, it becomes apparent that the Supreme Court played a significant role in enabling Jim Crow to expand and the African American press did little to counter its effects.

Previous works have studied in great detail the Supreme Court's decisions in several of the cases included in this study. Nevertheless, there has been little mention of the reactions by the African American press. John R. Howard's *The Shifting Wind: The Supreme Court and Civil Rights from Reconstruction to Brown*, for example, offers insightful analysis of the role of the Supreme Court in shaping race relationships during the nineteenth and twentieth centuries. In the entirety of his study, however, Howard only refers to reactions by the black press on twelve occasions. By ignoring this group of sources, he fails to demonstrate fully the African American community's understanding of the Court's decisions and their influence on black Americans. Other studies of the period as a whole and of specific cases have similar gaps. Thus, the primary goal of this study is to demonstrate that the African American press's failure to react strongly to many of the Supreme Court's decisions likely contributed to the increase in Jim Crowism along with the white lawmakers' reactionary legislation.

Chapter One: African American and White Struggles to Define Their Position in Post-Reconstruction Society

In 1906, in Chattanooga, Tennessee, Ed Johnson stood accused of raping Nevada Taylor. Johnson was a black handyman without a steady job, while Taylor was a twenty-one-year-old single white woman who worked in downtown Chattanooga. Within seventeen days of the attack, the Chattanooga police department and court system had arrested, tried, convicted, and sentenced Johnson to death by hanging. His white lawyers, Lewis Shepherd, W.G.M. Thomas, and Robert Cameron, had been assigned to the case by the judge because of Johnson's inability to hire an attorney of his own. Their failure to appeal the jury's decision at the end of the trial prompted the defendant's father, Skinbone Johnson, to call on attorneys Noah Parden and Styles Hutchins to pursue an appeal on his son's behalf. Parden and Hutchins were black attorneys and partners who represented a majority of the black litigants in Chattanooga.[3]

After discussing the advantages and disadvantages of representing Johnson in an appeal, the partners agreed to do so and turned to one of Johnson's original attorneys, Lewis Shepherd, who was arguably the premier lawyer in Chattanooga at the time, for support and assistance. Subsequent to being turned away in the local court by Judge Samuel D. McReynolds for missing the deadline to appeal, after being forestalled by

[3] Mark Curiden and Leroy Phillips, Jr., *Contempt of Court: The Turn-of-the-Century Lynching that Launched a Hundred Years of Federalism* (New York: Anchor Books, 1999); and, *Chattanooga Times*, "Law and Order Victorious Over Overwhelming Odds," January 26, 1906.

McReynolds the previous day,[4] the three men pursued Johnson's appeal to the Tennessee Supreme Court, the U.S. District Court in Knoxville, and, finally, to the United States Supreme Court. In an unprecedented move, the U.S. Supreme Court granted a stay of execution for Johnson, pending his appeal.[5]

The day after word of the Supreme Court's stay reached officials in Chattanooga and was published in the local newspapers, a white mob assisted by Chattanooga's Sheriff Joseph Shipp and other county officials dragged Ed Johnson from his jail cell and lynched him on the Walnut Street Bridge. This act of defiance by Shipp and other community leaders resulted in unprecedented contempt of court charges being filed by the Supreme Court. In the resulting case, Shipp was found guilty of contempt against the Supreme Court. Nevertheless, he continued to be viewed as a respected leader and hero in Chattanooga by his white constituency. The mob's actions also gained support in Georgia where many whites supported Shipp and where "publicists used the 'Chattanooga lesson' to 'show' Georgia negroes the drastic measures white men would commonly take 'to protect our women.'" Officials never filed charges against Shipp and the other mob participants for the actual crime of murdering Ed Johnson.[6]

In many ways, the story of Ed Johnson is but one dramatic example of the uncertain and often powerless and dangerous situation faced by blacks in American society in the decades following the Civil War. On the one hand, Johnson himself represented the vast majority of southern blacks who had little education, struggled for

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[4] The previous day, Judge McReynolds had told the attorneys to return the following day to file Johnson's appeal. When they returned the next day, he told them they had missed the deadline to appeal by one day.
[5] Curiden and Phillips, *Contempt of Court*, 130-132, 137-139; and, *Chattanooga Times*, "'God Bless You All – I Am Innocent' Ed Johnson's Last Words Before Being Shot to Death By a Mob Like a Dog," March 20, 1906.
[6] Curiden and Phillips, *Contempt of Court*; and, Charles Crowe, "Racial Massacre in Atlanta September 22, 1906," in *The Journal of Negro History*, Vol. 54, No. 2 (April 1969), 152.

economic security, and faced recurrent discrimination at the hands of law enforcement officials, the courts, and, all too often, lynch mobs. The case also demands our attention, however, because of the story of two educated African American men who, despite facing discrimination along their career paths, had come to excel in their profession and attained what they believed was relative security socially, economically, and politically in Chattanooga's growing New South community. Nevertheless, as will be shown later, fear for their lives and an inability to maintain the security they had known for several years ultimately forced Parden and Hutchins to leave their homes in Chattanooga because of their participation in Johnson's case.[7]

Johnson, Parden, and Hutchins all suffered as a result of the inequalities of the southern legislative system. Despite the granting of rights to African Americans through the passage of the Reconstruction Amendments, Congress ultimately was unable, or unwilling, to protect these rights as southern legislators tested the waters and increasingly tightened their hold on black southerners. The passage of segregation acts throughout the South contributed to the continued feeling of white superiority that made many white southerners view the rushed trials of men like Ed Johnson as adequate. Although it did not play a direct role in the passage of such legislation, the United States Supreme Court repeatedly sent the message to white legislators that the federal government would take a limited approach to protecting the civil rights of black Americans. This social and political landscape also affected men such as Parden and Hutchins who were viewed with

[7] Curiden and Phillips, *Contempt of Court*.

respect even by the white community, until they dared to overstep the racial boundaries and question the white system.[8]

Most important, however, Johnson's case demonstrates that while there were some advancements made by blacks after the Civil War, this progress often was short-lived and much of it was dependent on a judicial and law enforcement system that repeatedly ignored the written law. Ed Johnson's case clearly showed the inability, or the lack of determination, of the courts and law enforcement officials to protect blacks from mob violence. Furthermore, it was just one example of the Supreme Court's consideration of questions of race in the Reconstruction Amendments and subsequent legislation. Although in this case the Supreme Court made its decision in favor of the African American defendant, its inability to enforce its decision was devastatingly apparent. It also became evident in news coverage of the case that the vast majority of the white citizens of Chattanooga and its surrounding areas believed the Supreme Court did not have the right to interfere in local issues. The national black press, however, looked at the Supreme Court's actions with a sense of hope that the federal government would finally take a stronger stand against lynching and against the inequalities of the legal system. Three decades after Congress had given African Americans citizenship, the Supreme Court had still not clarified the extent to which the federal government – and especially the federal court system – was committed to energetic enforcement of the Thirteenth, Fourteenth, and Fifteenth Amendments. As we shall see, in the late nineteenth and early twentieth centuries, the balance sheet was disheartening.

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[8] Curiden and Phillips, *Contempt of Court*.

The Deteriorating Status of African Americans, 1877-1920s

In order to appreciate the significance of Ed Johnson's case and what it tells us about African Americans' status at the start of the twentieth century and about the role of the United States Supreme Court in shaping white relations with blacks, it is necessary first to understand the changes that occurred for blacks following the end of the Civil War. Unarguably, the Civil War and Reconstruction marked the most dramatic shift in the legal, social, and political status of a single group in United States history. In a period of less than two decades, African Americans went from being the property of others and from being considered by many to be less than human to being equal citizens . . . at least on paper. Nevertheless, between the Civil War's end and the United States' entrance into World War I in 1917, African Americans experienced an often-bewildering rise and simultaneous fall in their status within American society. The uncertainty of the period came from the desires of African Americans to find a place of equality in society while many white Americans tried to maintain a position of superiority. For both groups, questions of "place" and "status" arose in all aspects of life forcing them to sort through puzzling messages to figure out what American society considered acceptable behavior by and towards blacks.[9] The assortment of messages coming from national, state, and local leaders led to the uncertain nature of African Americans' state and, ultimately, to an increase in extralegal violence exacted upon blacks by whites. Regardless of the initial

[9] For a discussion of the role of gender in the development of behavior trends between whites and African Americans during this period, see Glenda Gilmore's *Gender and Jim Crow* (1996). For a collection of essays that addresses the interactions of race, class, and gender in the post-Civil War South, see *Local Matters: Race, Crime, and Justice in the Nineteenth Century South* (2001), edited by Christopher Waldrep and Donald G. Nieman.

improvements achieved by and for blacks during Reconstruction, laws were unable to force changes in the long-held beliefs of many white Americans, both southern and northern, about the inferiority of blacks. Evidence of this emerged in the late nineteenth and early twentieth centuries as American blacks faced a general decline, sprinkled with a few bright spots of improvement, in their status. Their loss of political, legal, and social rights, most clearly showed this decline, as did the disturbing rise in incidents of racial violence.

Because African Americans did not immediately reach a status of full equality in all spheres, but rather experienced gains and losses, there is no clear answer to the question of when segregation began and how African Americans fared in society. In *The Strange Career of Jim Crow*, C. Vann Woodward addressed the question of when segregation truly developed with his thesis that during the period immediately following emancipation *de facto* segregation existed as many blacks and whites voluntarily and deliberately separated themselves, but that it was not until the 1890s that *de jure* segregation took hold in the region. He argued that during the period of Redemption, blacks and whites coexisted in a largely peaceful and pleasant manner until whites decided to pass legislation restricting the rights of blacks.[10] Woodward, however, had a definite agenda in his writing and hoped to show through his evidence that segregation was not an inevitability in the South. Because of his focus on class, he largely discounted the effects of Supreme Court decisions from the 1870s through the 1890s on the

[10] The period of Redemption refers to the period after Reconstruction when the Democratic Party regained control of the U.S. South. The term was frequently used by white southerners to signify their region's efforts to redeem itself after being controlled by northerners and Republicans. Among the books that discuss the period of Redemption are Stephen V. Ash's *Middle Tennessee Society Transformed, 1860-1870: War and Peace in the Upper South* (2006), John Hope Franklin's *Reconstruction after the Civil War* (1994), Donald G. Nieman's *African Americans and Southern Politics from Redemption to Disfranchisement* (1994), and Nicholas Lehmann's *Redemption: The Last Battle of the Civil War* (2006).

development of segregation as he halfheartedly dedicated less than two pages of his landmark work to the topic. In actuality, many freed slaves did experience some improvement in their position in the South, only to later experience devastating reversals in their status. Many of these reversals came even before Reconstruction ended and in the 1880s, and often they resulted from decisions made by the Supreme Court in what proved to be key civil rights cases.[11]

Politically, blacks experienced unprecedented freedom and power from the late 1860s through the early 1880s. Many blacks participated in state constitutional conventions in 1867 and 1868 by helping to write new laws, many of which repealed existing black codes. Also, during Reconstruction and the 1880s, a number of blacks ran for and won positions as U.S. Senators, U.S. Representatives, and state political officers.[12]

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[11] C. Vann Woodward, *The Strange Career of Jim Crow* [Third Revised Edition] (New York: Oxford University Press, 1978).

[12] In the Senate, both Hiram R. Revels (R-Mississippi, 1870-1871) and Blanche K. Bruce (R-Mississippi, 1875-1881) served. African American members of the U.S. House of Representatives during the same period included Joseph Rainey (R-SC, 1870-1879), Jefferson Long (R-GA, 1871), Robert Elliott (R-SC, 1871-1874), Robert De Large (R-SC, 1871-1873), Benjamin Turner (R-AL, 1871-1873), Josiah Walls (R-FL, 1871-1877), Richard Cain (R-SC, 1873-1875; 1877-1879), John Lynch (R-MI, 1873-1877; 1882-1883), James Rapier (R-AL, 1873-1875), Alonzo Ransier (R-SC, 1873-1875), Jeremiah Haralson (R-AL, 1875-1877), John Hyman (R-NC, 1875-1877), Charles Nash (R-LA, 1875-1877), Robert Smalls (R-SC, 1875-1879; 1882-1883; 1884-1887), James O'Hara (R-NC, 1883-1887), Henry Cheatham (R-NC, 1889-1893), John Langston (R-VA, 1890-1891), and Thomas Miller (R-SC, 1890-1891). It is important to note that only one African Americans congressman, John Lynch, came from a northern state. This suggests that although many northerners pushed the South to accept blacks as political equals they were not necessarily ready to do so themselves.

For more information on African American participation in Reconstruction politics, see Monroe N. Work, Thomas S. Staples, et al., "Some Negro Members of Reconstruction Conventions and Legislatures and of Congress," in *The Journal of Negro History*, Vol. 5, No. 1 (Jan. 1920), 63-119.

Among the most well-known black politicians of the era were Hiram R. Revels and Blanche K. Bruce of Mississippi. Revels was a native of North Carolina who was born free, was educated in Indiana and Illinois, and became a minister in 1845. In 1870, he became the first African American U.S. Senator. Bruce was born a slave in Virginia, but was treated fairly well by his owner and father. During the Civil War, Bruce taught briefly at Oberlin College in Ohio before moving to Missouri and establishing the state's first school for blacks. Although he was the second African American Senator, he was the first to serve a complete term. One successful state officer was Styles Hutchins who later became nationally recognized for his role in the Supreme Court case surrounding Ed Johnson's lynching in Chattanooga, Tennessee, in 1906. Hutchins served as a Republican representative in the Tennessee General Assembly beginning in 1886.[13]

Other African Americans gained appointed positions in the government, demonstrating that for at least some blacks the Reconstruction Amendments brought improved status. For example, in 1880, Richard Etheridge became the first African American appointed to command a major U.S. government installation when he became the keeper of the Pea Island Life-Saving Station in North Carolina. The station was "the first and only all-black station in the history of the U.S. Lifesaving Service," which was the precursor to the modern Coast Guard. Isaac Myers, a native of Baltimore whom Frederick Douglass mentored, received a federal appointment to become a messenger for the customs service in 1870, and in 1872 he became the supervisor of mail service to the

[13] Information about the backgrounds and politics of both Hiram R. Revels and Blanche K. Bruce has been frequently discussed throughout the twentieth century. Studies include Alrutheus Taylor's "Negro Congressmen a Generation After" (*The Journal of Negro History*, Vol. 7, No. 2 [April 1922]), Elizabeth Lawson's *The Gentleman from Mississippi* (1961), Samuel Shapiro's "A Black Senator from Mississippi: Blanche K. Bruce (1841-1898)" (*The Review of Politics*, Vol. 44, No. 1 [Jan. 1982]), Lawrence Graham's *The Senator and the Socialite: The True Story of America's First Black Dynasty* (2006), and Willard B. Gatewood's *Aristocrats of Color: The Black Elite, 1880-1920* (1990).

southern states. Each of these men, whether elected or appointed, reflects the effect of the Fifteenth Amendment that gave African Americans throughout the entire U.S. the right to vote in 1870, although in some states, such as Tennessee, blacks were already exercising this right. With the Amendment's ratification, Congress seemingly opened the doors of opportunity for the newly freed slaves to gain political equality.[14]

Although the Reconstruction Amendments drafted in the 1860s legally ended slavery and presumably drew new legal guidelines for the treatment of African Americans, the white South was determined to develop new means of organizing its racially disparate society. Throughout the era, white southerners often perceived federal legislation, such as the Reconstruction Amendments, as proof that northerners planned to dictate to them how they should deal with the large southern black population. Isolated state laws such as an 1865 Mississippi statute restricting first class rail transportation to whites and an 1875 Alabama state constitutional provision for the establishment of separate schools for whites and blacks demonstrated that white southerners did not intend to abide by the spirit of Lincoln's Emancipation Proclamation or the postwar Reconstruction Amendments. These examples also suggest a flaw in Woodward's argument that *de jure* segregation did not take hold until the 1890s. Rather the southern states' taste for segregation may simply have taken temporary cover, because these southern states were not in a position to excessively challenge Congress and Reconstruction leaders. Their vulnerability could be seen particularly in the requirements set before the former Confederate states for readmission to the United States which

[14] David Wright and David Zoby, "Ignoring Jim Crow: The Turbulent Appointment of Richard Etheridge and the Pea Island Lifesavers," in *The Journal of Negro History*, Vol. 80, No. 2 (Spring 1995), 67. Also see Wright and Zoby's monograph, *Fire on the Beach: Recovering the Lost Story of Richard Etheridge and the Pea Island Lifesavers* (2000) for more details.

included the stipulations that each state had to ratify the Thirteenth and Fourteenth Amendments before it could be readmitted to the Union.

The first of the Reconstruction Amendments, the Thirteenth (1865), made slavery illegal and went largely uncontested in the South because the conclusion of the Civil War had already more or less ended the institution. Therefore, by the end of 1865 all but two of the former Confederate states had ratified the amendment. The only two that had not were Texas, which finally ratified it in February 1870, and Mississippi, which rejected the amendment on December 4, 1865, two days before it gained the support of enough states to become law.[15]

Over the next two years, several events demonstrated the inconsistent position of African Americans in society. To start with, just weeks after the ratification of the Thirteenth Amendment, a group of Confederate veterans gathered in Pulaski, Tennessee, to create the first Ku Klux Klan. An early organizational meeting with the group's eventual leader, Nathan Bedford Forrest, took place in the kitchen of Minor and Elizabeth Avery Meriwether's home in Memphis.[16] The primary goal of the Ku Klux Klan was to oppose Reconstruction, which meant they tried to establish their authority over carpetbaggers and scalawags as well as southern blacks. Although they organized themselves on the pretense of challenging Republicans on political issues, they quickly turned to the use of violence and intimidation against their opponents. Given its purpose,

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[15] U.S. Constitution, amend. XIII (1865). The ratification process for the Thirteenth Amendment is discussed in greater detail in *The Thirteenth Amendment and American Freedom: A Legal History* (2004) by Alexander Tsesis and *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment* (2001) by Michael Vorenberg.

[16] Elizabeth Avery Meriwether was a well-known temperance activist, publisher, and suffragist from Tennessee. Much of her writing, which included both fiction and non-fiction, idealized the Confederate cause and supported the race ideology of the Old South.

the mere existence of the Ku Klux Klan signaled a challenge to African Americans' efforts to achieve equality.[17]

Another indication that black Americans would not easily achieve full political equality came in early 1866. On February 2, Frederick Douglass led a delegation of black leaders in a meeting with President Andrew Johnson at the White House. The delegation's goal was to garner Johnson's support for universal black suffrage. The president, however, expressed his strong opposition to the idea and the meeting ended in controversy. There were also multiple incidents of mass violence against African Americans in 1866. In May, forty-six blacks died after white civilians and police officers attacked them in Memphis. The white attackers also burned almost a hundred houses, twelve schools, and four churches. Several months later, another massacre took place in New Orleans where police officers raided a meeting of black and white Republicans and killed more than forty of the participants. The officers also wounded more than 150 others.

Despite these setbacks for African Americans, there were also a few positive events in the period after the Thirteenth Amendment's ratification. First, Congress overrode President Johnson's veto and passed the Civil Rights Act of 1866 on April 9. The primary purpose of the law was "to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication." The Act declared that all people born in the United States, regardless of their race or color, were citizens of the country and should "have the same right, in every State and Territory in the United

[17] In a recent study, *Carpetbaggers, Cavalry, and the Ku Klux Klan: Exposing the Invisible Empire during Reconstruction* (2007), J. Michael Martinez offers a look at the Ku Klux Klan in South Carolina and the struggle of the state government to challenge the popular group. One of the most useful histories of the Ku Klux Klan is David Chalmers's *Hooded Americanism: The History of the Ku Klux Klan* (1976).

States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." The legislation also made it illegal for any person to subject a citizen to laws or customs that violated the rights previously stated. Those convicted of violating the Civil Rights Act of 1866 could be fined up to $1000 or imprisoned for up to one year. Two months later, Congress once again offered African Americans a sense of hope when it approved the Fourteenth Amendment for consideration by the states. Finally, Congress again went against President Johnson by overriding another of his vetoes and granted African American residents of the District of Columbia the right to vote.[18]

From its proposal on June 13, 1866, to its ratification on July 9, 1868, the Fourteenth Amendment faced stronger opposition from the South than its predecessor. The amendment stated, "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." The amendment also made it illegal for states to limit the rights of United States citizens or deprive these citizens of their rights to life, liberty, and property without the due process of law. Finally, the Fourteenth Amendment guaranteed citizens equal protection of the laws and gave Congress the ability to pass laws to enforce this guarantee. Of the Reconstruction Amendments, this one became the most hotly contested

[18] Robert J. Kaczorowski, "To Begin the Nation Anew: Congress, Citizenship, and Civil Rights after the Civil War," in *The American Historical Review*, Vol. 92, No. 1 (Feb. 1987), 45-68. See also, Paul Moreno's "Racial Classifications and Reconstruction Legislation," in *The Journal of Southern History*, Vol. 61, No. 2 (May 1995), 271-304.

in the courts because it essentially created a new group of citizens that was instantly eligible for all of the rights, and the protection of these rights, previously afforded almost exclusively to white Americans. When Congress originally presented the Fourteenth Amendment to the states for ratification, President Andrew Johnson suggested that southern states would not be required to ratify the amendment as a criterion for readmission to the United States. Johnson's opinion, however, ran contrary to that held by Radical Republicans in Congress who made the ratification of the Fourteenth Amendment a requirement for readmission. The only southern state to respond positively to this criterion was Tennessee. Initially, all other southern states also ratified the amendment, but they did so grudgingly and with a sense of frustration toward the North.[19]

In between the ratification of the Fourteenth and Fifteenth Amendments, African Americans continued to experience both advances and setbacks in their quest for equality and acceptance as American citizens. On the one hand, both the first black Senator and the first black diplomat took their places in the government. Ebenezer Don Carlos Bassett became the first African American diplomat when President Ulysses S. Grant appointed him minister to Haiti on April 6, 1869. American presidents, both Republican and Democratic, followed suit in appointing blacks as ministers to Haiti and Liberia for several years afterwards. The following year, Hiram R. Revels took his seat as the first

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[19] U.S. Constitution, amend. XIV; Howard N. Meyers, *The Amendment that Refused to Die: Equality and Justice Deferred, The History of the Fourteenth Amendment* (Lanham, Maryland: Madison Books, 2000). Other useful sources on the Fourteenth Amendment and its passage include Garrett Epps's *Democracy Reborn: The Fourteenth Amendment and the Fight for Equal Rights in post-Civil War America* (2006), Michael J. Perry's *We the People: The Fourteenth Amendment and the Supreme Court* (1999), Joseph H. Taylor's "The Fourteenth Amendment, the Negro, and the Spirit of the Times," in *The Journal of Negro History*, Vol. 45, No. 1 (Jan. 1960), 21-37, and Joseph B. James's "Southern Reaction to the Proposal of the Fourteenth Amendment," in *The Journal of Southern History*, Vol. 22, No. 4 (Nov. 1956), 477-497.

African American senator. Although he only represented Mississippi for one year, his presence in Congress made many black leaders and citizens believe that political equality was attainable. On the other hand, black Americans in the South continued to face significant violence. Another massacre in Louisiana, the Opelousas Massacre, took the lives of nearly two hundred African Americans in September 1868. Many of the whites who participated in the massacre were Confederate veterans and prominent citizens of the city. The events that led to the slaughter began when a small group of white men attacked a young man named Emerson Bentley. Bentley, who was not a native of Louisiana, edited the city's Republican newspaper and taught for the Freedmen's Bureau. Although Bentley was white, several local blacks tried to help him during the attack. The sheriff had twelve of them arrested, taken into custody, and hung that night. To make sure blacks in the area did not react with violence to the event, armed white men searched the area for the next several days as part of a "Negro hunt." By the time both sides settled down, there had been over two hundred black casualties.[20]

The federal government ratified the last of the Reconstruction Amendments on March 30, 1870. The Fifteenth Amendment provided recently freed slaves with the right to vote by making it illegal for this right to be limited by race, color, or previous status as a slave. This amendment again faced opposition in some southern states, such as Tennessee that rejected it on November 11, 1869. This was actually a step backwards for black Tennesseans who had received the right to vote from the state in 1867 and participated in statewide elections that August. One of the primary arguments against the

[20] Little has been written about the Opelousas Massacre, but there is some additional information about it in "General Lovell H. Rousseau and Louisiana Reconstruction," by Joseph G. Dawson, III. The article appears in *Louisiana History*, Vol. 20, No. 4 (Fall 1979), 373-391.

Fifteenth Amendment was that it would inevitably take away the rights of states to pass laws and regulate voting within their own borders. The southern perception that the Reconstruction Amendments, particularly the Fourteenth, and other legislation of the period were being forced upon them by the North led to increased resentment, but also led to amplified efforts to exert racial control over blacks.[21]

The same year the Fifteenth Amendment gained enough support to be ratified, Charles Sumner and Benjamin Butler proposed a new civil rights act to Congress. Sumner and Butler, both of whom were Radical Republicans who had opposed Andrew Johnson's Reconstruction policies for being too generous to the South, believed the federal government needed to do more to protect the rights of African Americans. The proposed act was intended to grant all citizens equal access to accommodations in "inns, public conveyance on land or water, theaters, and other places of public amusement." Sumner left Congress and then passed away on March 11, 1874, prior to the act's passage. Shortly before his death, he reportedly asked friends to "save my civil rights bill." Despite Sumner's death, Butler continued to push the bill in Congress until it gained enough support to be passed in February 1875. President Grant signed the new Civil Rights Act into law on March 1, 1875. Although at the time of its passage the Civil Rights Act of 1875 offered African Americans another reason for hope, it ended up being the last real attempt by the federal government, until well into the twentieth century, to protect the equality of black citizens.[22]

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[21] U.S. Constitution, amend. XV; and, William Gillette, *The Right to Vote: Politics and Passage of the Fifteenth Amendment* (Baltimore: Johns Hopkins University Press, 1965).

[22] Civil Rights Act of 1875; David Donald, *Charles Sumner and the Rights of Man* (New York: Random House, 1970), 532; and, Moorfield Storey, *Charles Sumner*, American Statesman Series, Vol. XXX (New York: Houghton Mifflin Co., 1900).

In light of events in the latter half of the 1860s and the early 1870s, many blacks in both the North and South became increasingly aware that social equality was still a distant prospect. Although many freed slaves did experience some improvement in their social position in the South following the Civil War, indicated by increased enrollment of black children in public schools during the 1870s and by the establishment of black institutions such as churches and colleges, it soon became clear that this too would be limited. Black student enrollment in South Carolina rose from 33,834 to 72,853 between 1871 and 1880. During the same period, Mississippi black student enrollment increased from 45,429 to 123,710. Although these numbers continued to represent only a small percentage of school-aged children in these states, this upsurge of black student enrollment suggested that a higher percentage of black children were able to obtain an education as the decade progressed and, thus, were likely to be better prepared to further improve their lives. Similar limited improvements were seen in black land ownership statistics for the period and in the number of black officeholders.[23]

Despite these indications of limited improvements for black Americans, the lack of true social equality soon became evident through African Americans' daily interactions with whites who refused to extend common courtesies to them and in the frequent use of *de facto* segregation even where laws did not require it. Even before laws required the separation of the races in most public spaces, such division was the accepted custom in many areas. While blacks accepted, and even supported, separation in some

[23] Roger L. Ransom and Richard Sutch, *One Kind of Freedom: The Economic Consequences of Emancipation* (New York: Cambridge University Press, 1977), 28-29. For more information on the economic status of African Americans and black landownership, see George Tindall, *South Carolina Negroes, 1877-1900* (Columbia: University of South Carolina Press, 1952), Carter G. Woodson, *A Century of Negro Migration* (Washington, D.C.: Association for the Study of Negro Life and History, 1918), and Gavin Wright, *Old South, New South: Revolutions in the Southern Economy since the Civil War* (Baton Rouge: Louisiana University Press, 1986).

areas of their lives, such as churches and parks, this does not suggest that they agreed with the onslaught of restrictions placed upon them in coming decades by southern white legislators. As is generally accepted today, the acceptance of traditionally black churches and traditionally white churches should not be equated to agreement with a law requiring such separation. Furthermore, black support of separation based on the social norms of the times was not equivalent to endorsing restrictions that would affect their livelihood and limit their security.

As Neil McMillen explains in *Dark Journey: Black Mississippians in the Age of Jim Crow*, the color line in the New South was initially drawn by tradition more than it was drawn by laws. The "traditional" segregation was visible throughout the region in such issues as the use, or non-use, of courtesy titles. McMillen states, "In Mississippi, as elsewhere in the South, good manners were emphasized from birth and even close friends often addressed each other formally. Black Mississippians, on the other hand, were generally called – even by much younger whites – only by their first names, nicknames, or simply 'boy' or 'girl.'" In Virginia, social segregation also remained the norm, as white Virginians hoped to prevent the intermarriage and the "mongrelization" of the two races. The existence of *de facto* segregation enabled white southerners to wield power over African Americans without having to work directly within the ever-changing legal system.[24]

Despite the continued development of *de facto* segregation, in the legal sphere, African Americans experienced an initial flurry of new rights afforded them first by the

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[24] Neil McMillen, *Dark Journey: Black Mississippians in the Age of Jim Crow* (Chicago: University of Illinois Press, 1990), 9-12, 23-28; and, Charles E. Wynes, *Race Relations in Virginia, 1870-1902* (Charlottesville: University of Virginia Press, 1961), 77.

Reconstruction Amendments and then by other federal, state, and local legislation geared towards providing them with some of the basic rights of citizenship. Nevertheless, many of these improvements in their legal standing were short-lived and began to disappear as Reconstruction ended and white southerners regained control of their state legislatures. The right to vote gained in 1870 with the Fifteenth Amendment quickly disappeared in much of the South under limitations created by grandfather clauses which often restricted voting rights to citizens who had been eligible to vote in 1867 and 1868, and to their descendents. In addition, after a short period where laws supporting African Americans' rights passed in some state legislatures, a shift away from equality became increasingly apparent in the late nineteenth and early twentieth centuries as more and more laws passed restricting black usage of public transportation, public facilities, and parks among other things. Boundaries were also progressively placed on residential neighborhoods limiting where blacks could live.

Towards the end of the nineteenth century, white southerners increasingly passed Jim Crow laws meant to both intimidate and isolate blacks through legal segregation. These legislative efforts show an attempt to push African Americans out of American society similar to the long-term attempts to push Native Americans away. These new laws applied to all blacks and gave authority in matters of race relations to cities and states rather than to the federal government. Just as *de facto* segregation evolved and became more complex over time, these *de jure* provisions appeared in cycles, as whites tested the waters to determine what the courts and society would deem acceptable. As the cycle of laws continued, it became clear that there was an assumption of black inferiority in the courts that only led to an increase in the number of Jim Crow laws.

Evidence of such an opinion in the United States Supreme Court became evident as cases related to the Reconstruction Amendments and the Civil Rights Act of 1875 reached the courtroom.

Mississippi was one of the first states to test the system to determine how far it could go in limiting the rights of blacks. White leaders hoped to use individual pieces of legislation to see exactly what the northern dominated Congress and Supreme Court would allow. By testing the legislative and judicial landscape of the country in this manner, they could slowly determine how much slack was available for them to reestablish their dominant status in the region. White legislators in Mississippi passed the first Jim Crow law in 1865, but it was repealed in 1870 as the state tried to gain readmission to the Union. The law restricted the use of first class rail transportation to whites. Throughout the 1880s and 1890s, Mississippians passed additional pieces of legislation addressing issues such as the segregation of polling places, the segregation of health care in the state, and the segregation of education. Although there had been earlier social segregation of the polls in Mississippi, usually enforced through fraud and the use of force, the 1890 state constitution supported the legal segregation of the polls and encouraged the disfranchisement of blacks by requiring a reading test for voter qualification. The state constitution, which became a model for most other southern states, also prohibited students with “one drop” of black blood from receiving an education in the same classrooms as white students. Furthermore, the constitution

specifically prohibited whites from marrying persons with one-eighth or more of black blood.[25]

In other states, such as South Carolina, North Carolina, and Virginia, laws dealing with the segregation of railroad passengers emerged as a way to maintain the racially inferior status of blacks. As Edward L. Ayers explains in *The Promise of the New South: Life after Reconstruction,* "the railroads became the scenes of the first statewide segregation laws throughout the South." As the trains were often already divided into two types of cars, a "smoking" car and a "ladies" car, many believed it would be a relatively easy transition to "white" and "colored" cars. In South Carolina, the first law restricting access of blacks to the railways was introduced in 1889. It was not until 1898, however, that such a law actually made it through the South Carolina senate because railway companies strongly opposed such a measure that would place additional burdens on the already overtaxed railroads. According to Ayers, "railroad companies did not want to be bothered with policing southern race relations and considered the division of coaches into black and white compartments as irksome and unnecessary expense." The law that finally did pass "provided that separate first-class coaches or apartments 'separated by a substantial partition,' should be provided for passengers on all railroads more than forty miles in length." Just two years later, the state legislature passed another law that placed the races in separate cars entirely. North Carolina passed a similar law in 1899 that also applied to steamboats and Virginia passed a railroad segregation law in

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[25] Citations of the 1865 rail transportation law and its effective repeal can be found in *Laws of the State of Mississippi* 1865, Chapter 79, and 1870, Chapter 10. Mississippi Code of 1880 of the Public States Laws of the State of Mississippi, Chapter 42, Sections 1145-1147; *Moreau et al., School Trustees v. Grandich* [1917], 114 Miss. 560; *Rice et al. v. Gong Lum et al.* [1925], 139 Miss. 760; McMillen, *Dark Journey*, 8-11; and, *Constitution of the State of Mississippi, Adopted November 1, 1890*, Article 14, Section 263.

1900. As more and more states passed legislation segregating the railroads, "most interstate rail lines simplified their operations [in the South] by segregating all their riders, interstate as well as local, through the use of their own Jim Crow regulations for interstate travelers."[26]

The increase in railroad segregation was a critical step in the ability of white southerners to expand segregation as it led to segregation occurring even in places where it was not required by law, thus making it even more difficult for black Americans to attain equality. Once railroads were segregated in some states and the railroad companies decided to simplify the process by segregating their entire routes, it was easier for whites to call for segregated facilities, including restrooms and restaurants, at railway stations. From there, the segregation spread outward to other areas of the towns. Whites often claimed that although separate from whites, the accommodations available for blacks were equal to those available for everyone else.

As will be discussed in Chapter Four, although many of these laws appear to have been in violation of federal statutes, the Supreme Court continued a trend of limiting civil rights protections for blacks when it upheld such company regulations with its decision that company rules and regulations segregating the railways were reasonable in *Chiles v. Chesapeake & Ohio Railway* (1910). According to the facts of the case, J. Alexander Chiles, a black man, purchased a first-class ticket to travel from Washington, D.C. to Lexington, Kentucky. In Ashland, Kentucky, he changed cars and was told he had to move to a car "set apart for colored passengers." Chiles argued that he was an interstate

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[26] George Tindall, *Emergence of the New South, 1914-1945* (Baton Rouge: Louisiana State University Press, 1967), 299-302; Catharine A. Barnes, *Journey from Jim Crow: The Desegregation of Southern Transit* (New York: Columbia University Press, 1983), 12; and, Edward L. Ayers, *The Promise of the New South: Life after Reconstruction* (New York: Oxford University Press, 1992), 17-18.

passenger with a valid first-class ticket that entitled him to passage in the car designated for ladies and gentlemen. To the Supreme Court, he contended that his removal to the segregated compartment for blacks was based on a Kentucky statute which essentially violated interstate commerce laws. The defendant, the Chesapeake & Ohio Railway Company, defended its actions against Chiles as being in line with company regulations, not a state statute. In the Court's majority opinion, Justice Joseph McKenna stated, "we must keep in mind that we are not dealing with the law of a state attempting a regulation of interstate commerce beyond its power to make. We are dealing with the act of a private person, to wit, the railroad company; and the distinction between the state and interstate commerce we think is unimportant." McKenna thus demonstrated that the Court sided with the defendant regarding the central issue at hand. McKenna concluded that as in *Plessy v. Ferguson* (1896) the Court had considered the reasonableness of legislation, the reasonableness of a carrier's regulations should also be considered because "[r]egulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate cannot be said to be unreasonable." To this end, the Court decided in favor of the railroad company with only Justice John Marshall Harlan supporting Chiles.[27]

Segregation legislation soon swept throughout much of the South. In Tennessee, for example, laws passed in the early 1900s affected blacks in nearly every aspect of their lives. According to Lester C. Lamon in *Black Tennesseans, 1900-1930*, the first decade of the century was particularly difficult, as

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[27] *Chiles v. Chesapeake & Ohio Railway Company*, 218 U.S. 71 (1910); Loren Miller, *The Petitioners: The Story of the Supreme Court of the United States and the Negro* (New York: Pantheon Books, 1966), 241-242; and, John R. Howard, *The Shifting Wind: The Supreme Court and the Civil Rights from Reconstruction to Brown* (Albany: State University of New York Press, 1999), 169.

> the Maryville College Law of 1901 closed the one remaining loophole that permitted interracial education; the Jim Crow streetcar law solidified segregation on public conveyances in 1905; and politically, the growing 'lily white' forces in the Republican Party, the increased rigidity of the de facto Democratic primary, and the trend toward the commission form of municipal government between 1908 and 1913 eliminated blacks from elective office and, in many cases, negated their opportunities for political participation.

This legislative record in Tennessee reflected not only the move toward transportation segregation, but also towards segregation in education and politics.[28]

The Tennessee Education Segregation Act of 1901, sometimes referred to as the Maryville College Law, finalized efforts to segregate schools in the state at a time when other states throughout the country were doing the same. The statute declared it unlawful for any educational institution in the state to allow black and white students to attend the same school. Violators of the law faced fines of $50 and imprisonment from thirty days to six months. This law made it impossible for schools that practiced non-exclusionary admissions such as Maryville College and Knoxville College, both in East Tennessee, as well as Fisk University and Roger Williams College to continue without segregating. A similar law passed in Kentucky in 1904 also prohibited schools from teaching both white and black students. It did, however, allow private colleges to educate both races as long as there were two branches of the school at least twenty-five miles apart from each other. The U.S. Supreme Court upheld the Kentucky law in *Berea College v. Commonwealth of Kentucky* (1908) when the Court decided that state legislatures did have the right to force private schools to segregate. This decision, which is discussed in more detail in Chapter

[28] Lester C. Lamon, *Black Tennesseans, 1900-1930* (Knoxville: University of Tennessee Press, 1977), 4, 6-9.

Four, essentially negated the Court's own standard of "separate but equal" facilities established in its *Plessy v. Ferguson* decision only twelve years earlier.[29]

Both northern and western legislatures also encouraged the use of separate schools for blacks and whites to varying extents. In New Jersey and Indiana, for example, there were both segregated and integrated schools, while other states, including Kansas, required segregation at the elementary school level. An Ohio state law gave individual school districts the discretion to create segregated schools if they believed it was in the best interest of their students. Historian John Hope Franklin explains that although these states did not enforce segregation as strictly as did the South, "separate schools . . . contributed to the perpetuation of a leadership that was devoted not only to the idea of separate education but also to the maintenance of economic and political inequalities between white and black populations."[30]

With the segregation of railroads and schools relatively established, legislators throughout the South also passed laws supporting residential segregation; the first of these passed in Baltimore, Louisville, Richmond, and Atlanta between 1910 and 1913. In Virginia, an act noting, "the preservation of the public morals, public health and public order, in the cities and towns of this commonwealth is endangered by the residence of white and colored people in close proximity to one another," made it possible for cities and towns to create "segregation districts." Such pieces of legislation became increasingly popular as American cities grew. White urban residents believed it was necessary to place restrictions on where African Americans could live in order to protect their own families, jobs, and homes. Quite often, the restrictions began simply by

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[29] *Berea College v. Commonwealth of Kentucky*, 211 U.S. 45
[30] Franklin, *From Slavery to Freedom*, 448.

designating "black blocks" and "white blocks" based on current residents. Officials determined each area's designation based on whether more blacks or more whites already lived in the area. Then they restricted each group from moving to a block designated for the other race. Eventually, with the resultant out-migration of the minority race on each block, segregated white and black neighborhoods emerged. These ordinances often led to unsanitary living conditions for many of the blacks living in urban areas because they only had access to a small percentage of blocks. Their neighborhoods were also often located in the less desirable and less convenient areas of the city. [31]

Residential segregation did not take long to spread into other regions of the country. By 1917, Wilmington, Delaware, city laws allowed real estate developers to include restrictions against non-white buyers in their deeds. Following the Supreme Court's decision in *Buchanan v. Warley*, which is discussed in Chapter Five, a 1927 Chicago law allowed for racially restrictive housing covenants in the city – even though the city was already largely segregated. Similar laws directed at Chinese residents of California cities gained popularity beginning in the 1890s. Despite the existence of similar laws throughout much of the country by the end of the 1920s, such residential segregation remained surprisingly absent through many areas of South Carolina, including Beaufort and Charleston, where blacks and whites often lived in close proximity to each other.[32]

As African Americans faced a decline in their legal rights, they also noticed a reduction in the political rights they had attained during Reconstruction. In particular,

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[31] Ransom and Sutch, *One Kind of Freedom*, 197; John Hope Franklin, *From Slavery to Freedom*, 343-344; and, Wynes, *Race Relations in Virginia*, 66-83.
[32] Tindall, *The Emergence of the New South*, 295.

they faced efforts by several groups of whites to disfranchise them. Each group had different reasons for wanting to limit black access to the polls, ranging from economics to politics to racism, but regardless of their different motivations, each group contributed to efforts that ultimately stripped blacks of their ability to participate actively in the political process. By disfranchising African Americans, whites essentially guaranteed that black representation in all levels of government would be severely limited.

Initial challenges to blacks' political rights often came from southern legislators struggling to redefine their own position in society whose efforts were bolstered by courts that failed to uphold many of the civil liberties recently extended to African Americans. These white legislators hoped to regain power and control they perceived as lost to meddlesome northerners and opportunistic blacks who temporarily held positions of power during Reconstruction. The 1890 Mississippi Constitution included a provision that required would-be voters to pass a reading test and to prove payment of their taxes. In 1898, the case of *Williams v. Mississippi* used the issue of the all-white jury to challenge this provision on the grounds that it was a direct attempt to disfranchise blacks and, thus, was a violation of the Fourteenth Amendment. The complaint challenged both the reading and tax conditions of the provision, but paid particular attention to the reading requirement. The Supreme Court disagreed with the petitioners, however, and said that although there was little doubt that the officials carrying out the reading test for voting qualification would misuse their power to disfranchise a higher proportion of blacks than whites, the law was not specifically worded to support this action and, thus, was constitutional. In his majority opinion, Justice Joseph McKenna wrote

> It is not asserted by the plaintiff in error that either the constitution of the state or its laws discriminate in terms against the [N]egro race, either as to the elective franchise or the privilege or duty of sitting on juries. These results, if we understand the plaintiff in error, are alleged to be affected by the powers vested in certain administrative officials. . . . Besides the operation of the constitution and laws is not limited by their language or effects to one race. They reach weak and vicious white men as well as weak and vicious black men, and whatever is sinister in their intention, if anything, can be prevented by both races by the exertion of that duty which voluntarily pays taxes and refrains from crime. It cannot be said, therefore, that the denial of the equal protection of the laws arises primarily from the constitution and laws of Mississippi; nor is there any sufficient allegation of an evil and discriminating administration of them.

This case, among others, sent a message to both blacks and whites that the Supreme Court did not intend to strictly enforce the Reconstruction Amendments; the door was open for whites to further limit the political rights of blacks.[33]

The Rise of Extralegal Violence against African Americans

Once whites had in effect disfranchised blacks, African Americans were no longer able to vote against segregation, thus ensuring white dominance in the New South for decades to come. During the four decades from 1890 to 1930, every state in the South passed legislation aimed at disfranchising blacks. Like the provision in the 1890 Mississippi Constitution, these laws often had the side effect of disfranchising poor whites as well. Although most of the men in office viewed this as an acceptable outcome, it contributed to poor white resentment of blacks that became one motivation

[33] *Williams v. State of Mississippi*, 170 U.S. 213 (1898); Miller, *The Petitioners*, 132, 159, 299.

for white violence against blacks. Fear of violence against white women and children by black men was another key cause of racial violence.

Such violence represented the most dramatic evidence of the power relationships between blacks and whites as the nineteenth century ended and the twentieth century began. Although lynching, defined as "the practice of citizens taking the law into their own hands to end the lives of other citizens who stepped outside the social norms," remained more widespread in the South, the practice occurred throughout the country. In 1892 alone, over two hundred Americans, the majority of whom were African Americans, fell victim to lynch mobs. Among the crimes attached to the victims were murder, rape, arson, and theft [See Table 1: 1892 Lynching Record]. Quite often, however, the lynch mobs could not prove the guilt of their victims for any crime, only that they were black.[34]

In August 1904, a series of events occurred in Georgia that demonstrated the extent to which lynching had become a common means of crowd justice in the South. In a period of just fifteen days, eight people, all of them African Americans, lost their lives at the hands of angry white mobs. While three of the lynchings, those of Rufus Leseure for assault, Jason Glover for rape, and Scott for murder, appear to have occurred independently of the other five, their occurrence alone would have been enough to suggest that mob justice prevailed in the state. The other five cases, however, related to each other in a way that revealed the unquestionable acceptance of mob justice in the South.

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[34] National Association for the Advancement of Colored People, *Thirty Years of Lynching*; and, Robert L. Zangrando, *The NAACP Crusade Against Lynching, 1909-1950* (Philadelphia: Temple University Press, 1980), 4-8

Table 1: 1892 Lynching Record

	Blacks	Whites	Murder	Rape	Arson	Robbery	Prejudice	Assault	Unclassified	Total
Alabama	19	5	12	4	3	3	----	1	1	24
Arizona	0	2	----	1	----	2	----	----	----	3
Arkansas	19	7	10	8	----	----	4	2	2	26
California	1	3	3	----	----	----	----	----	1	4
Florida	8	0	4	1	1	1	----	----	1	8
Georgia	16	3	5	9	----	3	1	----	1	19
Idaho	0	8	----	----	----	8	----	----	----	8
Illinois	0	1	----	----	----	----	----	----	1	1
Kansas	2	1	2	1	----	----	----	----	----	3
Kentucky	9	1	5	5	----	----	----	----	----	10
Louisiana	22	5	19	3	----	----	1	----	4	27
Maryland	1	0	----	1	----	----	----	----	----	1
Mississippi	15	1	4	3	2	1	----	----	6	16
Missouri	1	3	2	1	----	----	----	----	1	4
Montana	0	4	----	----	----	4	----	----	----	4
New York	1	0	----	1	----	----	----	----	----	1
N. Carolina	3	2	4	1	----	----	----	----	----	5
Ohio	2	1	2	----	----	----	----	----	1	3
Oklahoma	0	1	----	----	----	----	----	----	1	1
S. Carolina	5	0	3	----	1	1	----	----	----	5
Tennessee	17	6	8	11	----	2	1	----	1	23
Texas	10	1	1	6	----	----	----	----	4	11
Virginia	5	2	4	3	----	----	----	----	----	7
Washington	0	4	4	----	----	----	----	----	----	4
West Virginia	5	0	5	----	----	----	----	----	----	5
Wyoming	1	7	----	----	----	5	----	----	3	8
TOTAL	**162***	**68**	**97**	**59**	**7**	**30**	**7**	**3**	**28**	**231**

The December 31, 1904 edition of the Chicago *Tribune* recounted the events of August 1904 in Georgia. The series of lynching incidents began on August 16 when

> For the brutal murder of a white family (the Hodges family) at Statesboro', Georgia, Two Negroes, Paul Reed and Will Cato, were burned alive in the presence of a large crowd. They had been duly convicted and sentenced, when the mob broke into the courtroom and carried them away, in spite of the plea of a brother of the murdered man, who was present in the court, that the law be allowed to take its course. None of the lynchers were [sic] ever indicted.

Reed and Cato were almost assuredly guilty of murdering Henry and Claudia Hodges as well as their children, Kittie Corrine, Harmon, and Talmadge, who burned to death in their home. Although lynching incidents like this one quite often occurred without any further ramifications, in this case the population of Statesboro was not ready to let the issue rest. One day after the lynching of Cato and Reed, two more blacks lost their lives. The *Tribune* explained: "Because of the race prejudice growing out of the Hodges murder by Reed and Cato and their lynching, Albert Roger and his son were lynched at Statesboro', Ga., August 17, for being Negroes." Roger and his son died on August 17, 1904, not for committing a crime, but simply because they were black and in Statesboro where racial tensions were running high.[35]

The aftermath of the Cato and Reed lynching also led to the whippings of several blacks and to the continued presence of violence in the region for several weeks. Whites justified their actions by accusing the blacks of everything from being a "smart nigger" to riding a bicycle on the sidewalk to simply having the wrong color skin. The Cato and Reed lynching influenced the emotions of many white Georgians, leading them to believe that they needed to take justice into their own hands in order to guarantee their own

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[35] Ray Stannard Baker, "Following the Color Line," Chicago *Tribune*, December 31, 1904, as quoted in the NAACP's *Thirty Years of Lynching*.

safety and that of their families. A full fifteen days after the Cato and Reed lynching, another man, Sebastian McBride, lost his life because the white citizens of Statesboro were still determined to prove that they had control of the black population. On August 30, "On account of the race riots which grew out of the [Hodges] murder . . . and lynching, McBride, a respectable Negro of Portal, Ga., was beaten, kicked and shot to death for trying to defend his wife, who was confined with a baby, three days old, from a whipping at the hands of a crowd of white men." It became evident that neither McBride nor his wife had committed any crime to instigate the attacks upon them and, in a rare move, a small group of white men viewed the attack on them as criminal. As McBride lay dying, they asked him to identify his attackers and later arrested four white men for the assault, although the courts never punished them. As with Roger and his son, the white Georgians who attacked McBride viewed him as a threat simply because of the color of his skin and despite evidence that he had committed no discernible crime.[36]

In *Following the Color Line: An Account of Negro Citizenship in the American Democracy*, well-known muckraker Ray Stannard Baker discussed the events of August 1904 in Statesboro, Georgia, in more detail. According to Baker, who was one of the first American journalists to discuss the gap between the races, Statesboro was a town that epitomized the New South in the way it developed "almost exclusively by the energy of Southerners and with Southern money," and in its population which he described as "pure American." On the afternoon of the Hodges murders, Henry drove to a neighbor's house to pick up Kittie Corrine and bring her home. According to Baker, "No Southern

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[36] Baker, "Following the Color Line," Chicago *Tribune*, December 31, 1904; and, Ray Stannard Baker, *Following the Color Line: An Account of Negro Citizenship in the American Democracy* (New York: Doubleday, Page, & Company, 1908), 187-188.

white farmer, especially in thinly settled regions like Bulloch County [where Statesboro is located], dares permit any woman or girl of his family to go out anywhere alone, for fear of the criminal Negro. . . . It is absolutely necessary to understand this point of view before one can form a true judgment upon conditions in the South." Henry Hodges's precautions went unrewarded, however, as two African Americans attacked him upon his return home, then subsequently murdered his wife, and ransacked their home before leaving the scene. Officials believed that later that evening the two criminals returned to the Hodges' home to cover up their crime when Kittie Corrine came out from hiding, likely believing friendly neighbors had come to help. The two men beat her to death and then burned the house with the bodies of Henry, Claudia, and Kittie Corrine Hodges inside, as well as the other two children who were likely still alive at the time. The crime struck at the nerves of a white society that placed ultimate importance on its ability to protect their women and children. The day after the murders, officials arrested Paul Reed and Will Cato, along with several other suspects, for the murders.[37]

Many citizens of Statesboro called for the "calm and proper enforcement of the law," but ultimately mob justice prevailed. During the preliminary phase of the legal process, authorities transferred the black suspects to a jail in Savannah in an effort to prevent a lynching; once indictments were made, the suspects were returned to Statesboro for the trial. In the days leading up to and during the trial, several white members of the community became increasingly vocal about their anger towards the suspects and about their belief that "somehow the courts and the law were not to be trusted to punish the criminals properly." This was an emotion Baker claims to have seen often in towns in

[37] Baker, *Following the Color Line*, 177-181.

which lynchings had taken place. Although Cato and Reed received hanging sentences, many observers believed actual punishment was uncertain. A mob then overtook the courthouse, seized the two prisoners, and took them up the road where they were bound to a stump and burned. Throughout the event, the mob allowed a photographer to take pictures of themselves and the prisoners. Then, after Cato and Reed burned, the mob participants fought for souvenirs.[38]

Baker concluded that "the law of the mob, [is] that it never stops with the thing it sets out to do," and that Statesboro was no different in this case. After the mob lynched Cato and Reed, the white community continued to express its animosity against blacks in the area. This hostility revealed itself in the days following the lynching as other blacks were whipped or beaten for "offenses" such as riding a bicycle on a sidewalk and "seeking legal punishment for the men who whipped his daughters." Not only did white mob violence affect blacks who were guilty of no apparent crime, but it also prevented authorities from asking Cato and Reed for information about any others who may have been involved in the Hodges' murders. Finally, Baker demonstrated that "mob-law . . . not only represented a moral collapse in this community, but it struck, also, at the sensitive pocket of the business interests of the county" as African Americans fled the county to escape the unpredictable actions of angry whites.[39]

The chain reaction of violent events that took place in Georgia in 1904 was representative of the lynching justice that permeated the South, as well as other areas of the country, from 1880 to 1930. From the end of the Civil War until well into the

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[38] Baker, *Following the Color Line*, 181-187; and, Sean Wilentz and Greil Marcus, eds., *The Rose and the Briar: Death, Love and Liberty in the American Ballad* (New York: W.W. Norton & Company, 2004), 49-50.
[39] Baker, *Following the Color Line*, 187-190.

twentieth century, black Americans often feared extralegal punishment in the form of lynching at the hands of angry white mobs. Although these mobs occasionally attacked white victims, the majority of the lynching incidents during this period involved African Americans. During this period, white mobs lynched over 3,200 blacks, primarily in the South. The number of lynching episodes in the United States peaked in 1892 when more than two hundred Americans, the majority of whom were black, died at the hands of lynch mobs. The 1892 lynchings took place throughout the United States and victims faced accusations of committing a variety of crimes, including murder, rape, arson, and theft [See Table 1: 1892 Lynching Record]. Sometimes, however, reporters and witnesses simply attributed lynching to "race prejudice" which suggests the victim died not for committing a crime, but for being black.[40]

Because of both the legal and social means of segregation that developed in the South throughout the period, lynching became a widely used, and generally accepted, means of effecting justice. Lynching increasingly became a way for whites to define acceptable social behavior for African Americans. As noted, lynch mobs killed over 3,000 African Americans in the fifty-year span from 1880 to 1930 [See Figure 1: Lynchings in the United States, 1880-1930]. Defenders of lynching often argued that the victims had committed crimes against women and, thus, deserved the severe punishment given to them. As Arthur Raper notes in the preface to the 1969 reprint of *The Tragedy of Lynching*, however, "alleged rape and attempted rape combined were not the primary reported causes of lynching – less than a fourth . . . were so accused in the press notices."

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[40] NAACP, *Thirty Years of Lynching*, 29. The NAACP conducted this study as part of their larger education and publicity campaign to raise awareness of the lynching problem in the United States in the post-Civil War era.

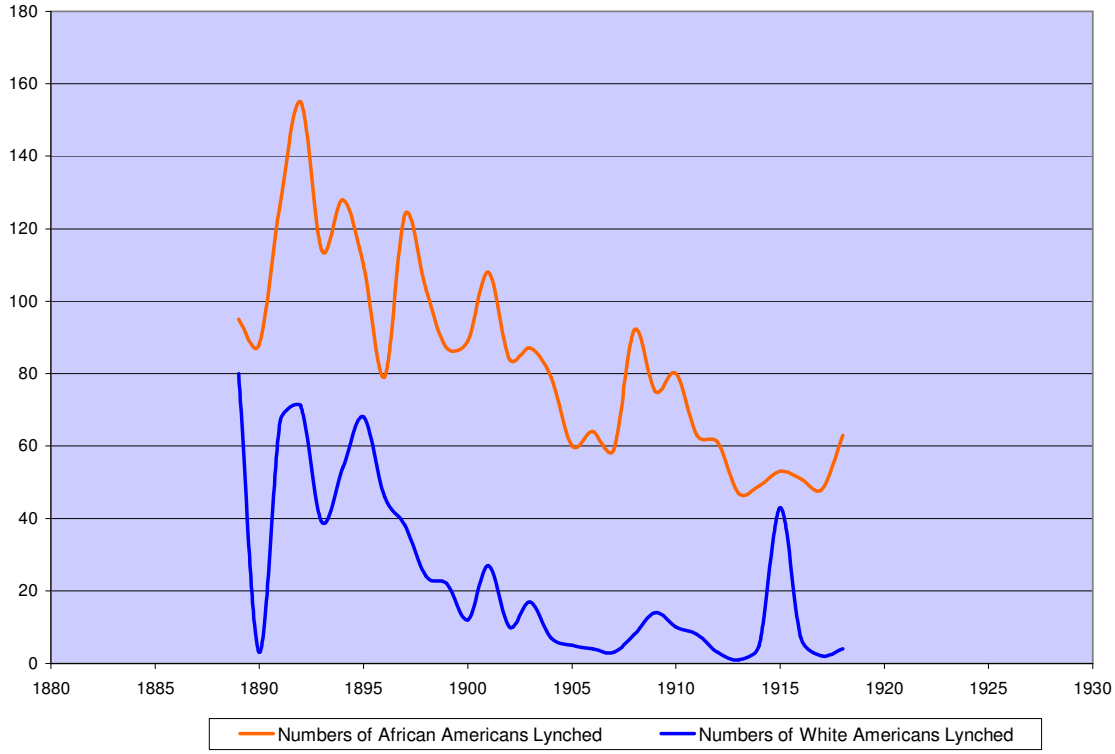

Figure 1: Lynchings in the United States, 1880-1930

Rather, the charged offenses ranged from murder and felonious assault of men to theft to the use of offensive language to simply acting "inappropriately." Despite these statistics, however, many whites convinced themselves that most lynching victims were guilty of rape and other offenses against women.[41]

The lynchers, the majority of whom were white men, often went beyond just doling out justice and executed their victims in ways that could only be described as sadistic. While mobs often hung and burned the accused, images of which continue to be

[41] Mungarro, "How Did Black Women in the NAACP Promote the Dyer Anti-Lynching Bill, 1918-1923?"' Arthur F. Raper, *The Tragedy of Lynching* [Reprint Edition] (Montclair, New Jersey: Patterson Smith, 1969), preface; and, W. Fitzhugh Brundage, *Lynching in the New South: Georgia and Virginia, 1880-1930* (Chicago: University of Illinois Press, 1993), 58-61; and, Mary Jane Brown, *Eradicating This Evil: Women in the American Anti-Lynching Movement, 1892-1940* (New York: Garland Publishing, Inc., 2000), 3, 23.

the common image of lynching even today, they also sometimes beat or shot their victims. In September 1904, such a case occurred in Huntsville, Alabama. A black man, Horace Maples, confessed to the murder of a while peddler named Waldrop when Waldrop's son confronted him in front of the mob that had just set fire to the jail. Upon his confession, the mob took Maples and hung him from an elm tree and then shot him multiple times. In many cases, after the victim died, there was a fight for souvenirs from the event. Men, women, and children who watched scurried to get a piece of the charred body remains or even a piece of the tree the victim hung from. Such a struggle occurred after the Cato and Reed lynching in Statesboro, Georgia in August 1904 and again a month later after the lynching of Maples in Huntsville when "they cut off one of his little fingers and parts of his trousers for souvenirs." Despite the brutality of these events, and the fact that the participants often had an audience, only forty-nine lynchers were indicted and four sentenced for their actions during this period. According to W. Fitzhugh Brundage in *Lynching in the New South: Georgia and Virginia, 1880-1930*, quite often those who were indicted for their participation in a lynching were part of private mobs that "had offended local opinion by cavalierly resorting to summary justice to punish crimes widely perceived to be better left to the courts." This was not the generally held opinion, however, in the lynchings of Ed Johnson, Cato and Reed, or hundreds of other black victims.[42]

An even more extreme example of mob cruelty had occurred five years earlier in Georgia after a mob lynched Sam Hose for murdering his employer after arguing over wages and for raping his employer's wife. Although Hose confessed to murdering his

[42] Raper, *The Tragedy of Lynching*, 2; Baker, *Following the Color Line*, 187; and, W. Fitzhugh Brundage, *Lynching in the New South*, 32.

employer, he never confessed to the rape. Shortly after his capture, a crowd of nearly 2,000 gathered to watch Hose be burned to death at a stake. According to the New York *Tribune*, "Before the torch was applied to the pyre, the Negro was deprived of his ears, fingers and other portions of his body with surprising fortitude. Before the body was cool, it was cut to pieces, the bones were crushed into small bits. . . . The Negro's heart was cut in several pieces, as was also his liver. Those unable to obtain the ghastly relics directly paid possessors that were more fortunate extravagant sums for theirs. Small pieces of bone went for 25 cents and a bit of the liver, crisply cooked, for 10 cents." Regardless of the severity of this case, no one was ever indicted for the cruel treatment of Sam Hose.[43]

Many prominent African Americans of the period argued that the rise in lynching and the reasons given to justify it reflected the increasing desire of whites to separate themselves from blacks and to demonstrate their superiority after Reconstruction-era legislation created the suggestion of equality. David Augustus Straker, who had himself been a candidate for lieutenant governor in South Carolina and was a successful criminal defense lawyer, suggested that the accusation of rape made in relation to lynching cases was meant "to destroy [n]orthern sentiment in favor of the Negro by charging his with committing, as a class, the most heinous offense, next to murder." Others, including Robert C. O. Benjamin, and lawyer and newspaper editor, and Frederick Douglass drew similar conclusions.[44]

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[43] New York *Tribune*, April 24, 1899.
[44] Terence Finnegan, "Lynching and Political Power in Mississippi and South Carolina," in W. Fitzhugh Brundage, ed., *Under Sentence of Death: Lynching in the South* (Chapel Hill: University of North Carolina Press, 1997), 189, 191-193.

In addition to an increase in lynchings, massacres like those of Memphis and New Orleans in 1866 and Opelousas in 1868 continued to take place in the 1870s. One such event, the Colfax, Louisiana massacre on April 9, 1873, eventually led to the Supreme Court case *United States v. Cruikshank*, which is discussed in Chapter Two. Once again, white citizens who were prominent members of the community participated in the attack against blacks that resulted in more than a hundred deaths. In Clinton, Mississippi, another twenty African Americans lost their lives in September 1875. Perhaps the most disturbing example of how prevalent racial violence had become took place in South Carolina in 1876. Rather than a single incident, the state experienced a series of race riots from July through October in counties where there was a slight majority of blacks. The first incident occurred in Hamburg where the local South Carolina State Militia of black soldiers refused to turn over their weapons to attorney Matthew C. Butler who represented white farmers who did not think the blacks should be armed. The disagreement between the two groups resulted in the deaths of seven men. During the next several months, conflicts arose between blacks and whites in Charleston, Ellenton, Cainhoy, Edgefield, Mt. Pleasant, ad Beaufort. More than once, federal troops helped to restore order. The ultimate outcome of the race riots was that white South Carolinians became even more determined to establish control over African Americans in their state.[45]

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[45] Joe G. Taylor, *Louisiana Reconstructed, 1863-1877* (Baton Rouge: Louisiana State University Press, 1974), 268-270; Robert M. Goldman, *Reconstruction and Black Suffrage: Losing the Vote in Reese and Cruikshank* (Lawrence: University of Kansas Press, 2001); Nicholas Lemann, *Redemption*; Philip Dray, *At the Hands of Persons Unkown: The Lynching of Black America* (New York: Random House, 2002); Walter Allen, *Governor Chamberlain's Administration in South Carolina: A Chapter of Reconstruction in the Southern States* (1888), 314-317; and, Thomas Holt, *Black over White*, 199-201.

The Supreme Court Sets the Stage

As African Americans struggled to gain equality in the political, legal, and social spheres, and to protect themselves from white mobs determined to exact their own forms of justice, one American institution had the opportunity to send a message to white America that would help blacks in their struggle. This institution was the U.S. Supreme Court. In many of these cases, however, the Court's opinions merely reflected the discriminatory nature of the legal system rather than offering a black Americans hope for improvement in their situation. In cases such as the *Slaughterhouse Cases* of 1873, *United States v. Cruickshank* (1875), the *Civil Rights Cases* of 1883, and *Plessy v. Ferguson* (1896), which will be discussed in more detail later, the U.S. Supreme Court repeatedly handed down decisions that influenced the development of racial segregation in the United States as much as the class issues that had been discussed by Woodward.

Even before legislative segregation took hold and became commonplace in the late nineteenth century, the Supreme Court interpreted Reconstruction-era legislation in such a way as to encourage state legislatures to increasingly test the limits of state-sanctioned discrimination. Although the Supreme Court could not make or enforce law, its decisions often served as indicators, or guidelines, of how African Americans should be treated under the law. Such decisions were first seen in the 1870s, well before the 1890s when Woodward claimed *de jure* segregation first took hold.

The first civil rights case ever heard by the Supreme Court was *Blyew v. United States* [80 U.S. 581 (1871)] in which the court interpreted the Civil Rights Act of 1866 and set precedents for future judicial evaluations of the Act. The act passed by Congress

in April 1866 had served as a follow-up to the Thirteenth Amendment and a precursor to the Fourteenth Amendment. The facts of the case centered on the events of August 29, 1868, when the bodies of Jack Foster, his wife Sallie, and Sallie's mother Lucy Armstrong were found in their cabin. All three victims were black. Armstrong's head had been cut open with a broad-axe while both Jack and Sallie had been cut almost to pieces. Jack's son, Richard, was almost mortally wounded but managed to crawl to a neighbor's house almost two hundred yards away. The seventeen-year-old survived for two days during which time he made statements indicating that John Blyew and Richard Kennard were responsible for the atrocious crimes against his family. The family knew the two men who had worked for their former owner and had invited them into their home that evening. Thirteen-year-old Laura Foster, who testified against Blyew and Kennard, had been asleep in a trundle bed in the cabin and escaped injury during the attack. Her younger sister Amelia suffered non-mortal injuries but did not testify because of her age[46]

Blyew v. United States dealt with a Kentucky law that prevented anyone of African descent from testifying in a criminal proceeding against a white defendant. Blyew and Kennard, were convicted of murder based on the testimony of Laura Foster, a black girl. An averment had been made by the prosecutor to transfer jurisdiction to the federal Circuit Court for the District of Kentucky on the grounds that Laura Foster was denied the right to testify solely because of her race. The lawyers for Blyew and Kennard

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[46] *Blyew v. United States* [80 U.S. 581 (1871)]; Howard, *The Shifting Wind*, 4-6; Miller, *The Petitioners*, 88; and, Robert D. Goldstein, "'Blyew': Variations on a Jurisdictional Theme," in *Stanford Law Review*, Vol. 41, No. 3 (Feb. 1989), 469-476. The *Blyew* case was mentioned by a historian as early as 1887 when William A. Dunning referred to it, the *Slaughterhouse Cases*, and the *Civil Rights Cases* in his statement that, "The construction of [the Thirteenth] amendment has been narrowed in later opinions, or rather, the tendency to widen it has been checked," in "The Constitution of the United States in Reconstruction," in *Political Science Quarterly*, Vol. 2, No. 4 (Dec. 1887), 558-602.

appealed to the Supreme Court, arguing that the state law preventing blacks from testifying against whites had been violated by improperly granting jurisdiction to the federal court. The Supreme Court determined that Laura Foster was simply a witness, not an affected party of Blyew and Kennard's crime and, thus, did not fall under the protections provided by the Civil Rights Act of 1866. If Amelia Foster had testified, the Supreme Court may have reached a different conclusion because she was a direct victim of the attack. As it was, the end result was that Blyew and Kennard were freed because Laura Foster had no right to testify against them under Kentucky law.[47]

Salmon Portland Chase held the position of Chief Justice of the Supreme Court at the time *Blyew v. United States* was heard. A former participant in the anti-slavery movement and the Free Soilers Party, Chase took his position in the court in December 1864 after being appointed by President Abraham Lincoln. When arguments were presented, however, Chase was not present and, thus, played no part in the case. Ultimately, a 6-2 split with Justice William Strong delivering the majority opinion and Justices Joseph P. Bradley and Noah H. Swayne dissenting decided the case.[48]

In his decision, Justice Strong focused on the question of whether the Circuit Court for the District of Kentucky had jurisdiction in the case. In order to determine this, the Court had to consider whether the case violated the third section of the Civil Rights Act of 1866 which granted such jurisdiction in cases "affecting persons who are denied,

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[47] *Blyew v. United States* [80 U.S. 581 (1871)]; Miller, *The Petitioners*, 88; Howard, *The Shifting Wind*, 4-6; Goldstein, "Variations on a Jurisdictional Theme," 474; and, Victor B. Howard, "The Black Testimony Controversy in Kentucky, 1866-1872," in *The Journal of Negro History*, Vol. 58, No. 2 (Apr. 1973), 158-159.

[48] *Blyew v. United States* [80 U.S. 581 (1871)]; Harold M. Hyman and William M. Wiecek, *Equal Justice Under Law, Constitutional Development, 1835–1875* (New York: Harper & Row, 1982); Charles Fairman *Reconstruction and Reunion, 1864-1888, Part One* (New York: MacMillen Publishing Company, 1971); and, Jonathan Lurie, "Mr. Justice Bradley: A Reassessment," *Seton Hall Law Review* 16 (1986): 343.

or cannot enforce in the courts of judicial tribunals of the State, or locality, where they may be, any of the rights secured to them by the first section of the act." Was Laura Foster an affected person in the case who was denied the right to testify against Blyew and Kennard? Or, was Laura Foster merely a witness who had no direct stake in the case? The answer, in Justice Strong's view, related to the crime itself and how it affected Foster.[49]

Blyew and Kennard's lawyers contended, "there was no [federal] jurisdiction because, whether the enactment was constitutional and valid, or unconstitutional and void, this case was not within it. This case did not affect negroes. It was a proceeding by the State against white men." Justice Strong concurred, arguing that if any possible witness for either the prosecution or defense were considered affected parties to a case all cases, both civil and criminal, could be under the jurisdiction of District and Circuit Courts. According to the Kentucky statute in question, "that a slave, negro, or Indian shall be a competent witness in the case of the commonwealth for or against a slave, negro, or Indian, or in a civil case to which only negroes or Indians are parties, but in no other case." By Strong's logic, granting federal jurisdiction in the case to enable Laura Foster to testify was akin to granting federal jurisdiction for all criminal cases because it was always possible to claim that an African American "was or might be an important witness [in] any suit between white citizens."[50]

In his dissenting opinion, Justice Bradley pointed out that the first section of the Civil Rights Act of 1866 explicitly stated that per the Fourteenth Amendment all persons born in the United States are citizens and, thus, "shall have the same rights, in every State

[49] *Civil Rights Act* of 1866; and, *Blyew v. United States* [80 U.S. 581 (1871)].
[50] *Blyew v. United States* [80 U.S. 581 (1871)].

and Territory in the United States, to make and enforce contracts; to sue, be parties, and give evidence; to inherit, purchase, lease, sell, hold, and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law or custom to the contrary notwithstanding." Although this section addressed several issues, the issue in question in *Blyew v. United States* was the legality of state laws preventing African Americans from testifying in cases where white persons were involved.[51]

Bradley dissented on the basis not that Laura Foster would have been denied the right to testify under the Kentucky law, but that Lucy Armstrong, the elderly woman murdered by Blyew and Kennard, would have been unable to give testimony. He explained that if the attack had been less severe and the charges against the defendants were only assault and battery the Kentucky law would have prevented Armstrong from exercising her right to testify against her attackers. By Justice Strong's logic, Laura Foster was not an affected party, but Lucy Armstrong was most certainly affected and would, therefore, fall under the protection of the Civil Rights Acts of 1866. Based on this, the federal Circuit Court would have been able to obtain undisputed jurisdiction over the case. Lucy Armstrong, however, did not survive the attack and could not testify against her assailants.[52]

Bradley concluded that if the Civil Rights Act protected Lucy Armstrong had she survived the attack it should only seem logical that she would be protected in death.

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[51] *Blyew v. United States* [80 U.S. 581 (1871)].
[52] *Blyew v. United States* [80 U.S. 581 (1871)]; Howard, *The Shifting Wind*, 4-6; and, Miller, *The Petitioners*, 88.

Otherwise, attackers would have more incentive to murder than to only injure. Bradley stated, "If mere violence offered to a colored person (who, by the law of Kentucky, was denied the privilege of complaint), gives the United States court jurisdiction, when such violence is short of being fatal, that jurisdiction cannot cease when death is the result. The reason for its existence is stronger than before."[53]

Bradley, a native of New York and former Unionist candidate for the United States House of Representatives, was joined in his dissent by Justice Swayne. Swayne was originally from Virginia but moved to Ohio in 1824 because of his anti-slavery beliefs. Despite the similar backgrounds of the other justices, Bradley and Swayne stood alone in their dissent. Even if Chief Justice Chase had been present and supported their opinion, they still would have been outnumbered. The apparent willingness of their colleagues, including Strong, Samuel Nelson, Nathan Clifford, Samuel F. Miller, David Davis, and Stephen J. Field, to limit the jurisdiction of federal courts under the Civil Rights Act of 1866, suggested their unwillingness in 1871 to force white Americans to recognize African Americans as equals under the law.[54]

The Supreme Court's decision in *Blyew v. United States* not only indicated the ineffectiveness of the Civil Rights Act of 1866 in protecting the civil rights of African Americans, but also sent a message to law enforcement officials and white citizens that the federal judiciary was not necessarily committed to the protection of equal rights for black Americans. From this first civil rights decision through the first two decades of the twentieth century, the Supreme Court continued to tackle questions of civil rights,

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[53] *Blyew v. United States* [80 U.S. 581 (1871)].
[54] *Blyew v. United States* [80 U.S. 581 (1871)]; Howard, *The Shifting Wind*, 4-6; and, Miller, *The Petitioners*, 88.

segregation, and equal rights through a number of cases surrounding federal, state, and local laws. As will be shown, at no point did the Supreme Court take a consistent stand on these issues, but rather sent mixed messages with its decisions which inevitably contributed to the deteriorating status of African Americans and to the rise of extralegal violence against them.

Chapter Two: Privileges, Enforcement, and Juries

The passage of the Fourteenth Amendment in 1868 resonated throughout the country. Many northern states stood in support of the Amendment as further evidence of the Union's victory in the Civil War. Meanwhile, many white southerners strongly opposed the Amendment that they viewed as proof that the northern Congress was trying to control their lives and limit the power of their state legislatures.

Within the African American community, the Amendment's passage could hardly go unnoticed. In many ways, blacks agreed with both northern and southern views of the Amendment as proof that the North had been victorious and, thus, had the ability to limit the power of the South in legislative decisions. Black Americans could only hope that the Fourteenth Amendment signaled a future of increased rights and equality for themselves, their friends, and their families. It did not take long, however, before challenges to the Amendment reached the courts, forcing African Americans to wait to see whether their newly attained rights would be upheld.

Limitations of the Privileges and Immunities Clause

In the late 1860s, citizens of New Orleans lived in a city rife with filth and disease. By March 1869, when the Louisiana legislature passed the "Act to Protect the

Health of the City of New Orleans," efforts to regulate New Orleans' slaughterhouses had already been attempted several times over the previous seven decades. The first such effort occurred in 1804 when the U.S. territorial government required that all butchers move their operations to the west bank of the Mississippi River. As Michael A. Ross explains in *Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era*, "As the city grew . . . the butchers' political and economic clout increased; after persistent complaints about the inconvenience of shuttling back and forth across the river, they forced their way back to the opposite [east] bank upstream from the city." With the continued growth of New Orleans, it was not long before the slaughterhouses were again surrounded by businesses and houses, leading to renewed outrage by New Orleans citizens who wanted the abattoirs forced out of their neighborhoods. The 1869 law arose from attempts by the Louisiana legislature to deal with these harmful and offensive slaughterhouses of New Orleans. Similar to the 1804 law, the primary requirement of the 1869 legislation was that all of the city's butchers would move to the other side of the Mississippi River where they would work at a new top-of-the-line facility. The Act created the Crescent City Live Stock and Slaughterhouse Company. Under the legislation, this company received a twenty-five year monopoly over the operation of the new facility. To further improve the situation in the city, the law also required that all livestock brought to New Orleans for slaughter would be taken directly to this new facility. Once meat was processed, it had to pass the inspection of a public health official before the abattoirs could send it to the market to be sold. [55]

[55] Michael A. Ross, *Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era* (Baton Rouge: Louisiana State University Press, 2003), 191.

In the opinion of many New Orleans residents and visitors, such an attempt to clean up the city by regulating the slaughterhouses was long overdue. While other factors (including the lack of a public sewer system, unpaved roads, and a tendency to empty toilets in open gutters and to toss garbage into vacant lots) also contributed to the city's infamous squalor, the slaughterhouses that spotted the city's landscape were an easily identifiable problem with an apparent solution. In many neighborhoods slaughterhouses were located next door to schools, crowded apartment buildings, and hospitals. In order to get animals from the river to their facilities, butchers often drove sheep, cattle, and pigs through neighborhoods where the animals raced "wildly and madly through the streets endangering the limbs and the lives of men, women and children."[56]

The spectacle of animals running scared through the streets of New Orleans was only a precursor to the vulgar, bloody, and foul process that took place inside the slaughterhouses themselves. The butchers used primitive means to kill the animals before skinning and gutting their carcasses. Once dead, the animals were placed on hooks where they sometimes remained, unrefrigerated, for days. The butchers' waste management systems consisted of tossing the animals' gory remains either directly into the Mississippi River or onto the streets. In testimony before a legislative committee, New Orleans physician E. S. Lewis stated, "Barrels filled with entrails, blood, urine, dung, and other refuse, portions in an advanced stage of decomposition are constantly being thrown into the river, poisoning the air with offensive smells and necessarily contaminating the water near the bank for miles." To make matters worse, large amounts

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[56] Ronald M. Labbé, "New Light on the Slaughterhouse Monopoly Act of 1869," in *Louisiana's Legal Heritage*, ed. Edward F. Haas (Pensacola, Florida: Peridio Press, 1983), 149-150; and *The State of Lousiana, ex rel. S. Belden, Attorney General v. William Fagan, et al.* (1870).

of the gore disposed of by the slaughterhouses could be seen collecting around the intake pipes used to gather the city's water supply.[57]

In the shadow of protests from citizens and of diseases including cholera and yellow fever, Louisiana legislators passed the March 1869 "Act to Protect the Health of the City of New Orleans." The act was not a rash move by a biracial legislature, nor was it a unique act for the time. Not only had there been previous attempts to regulate the slaughterhouses in New Orleans, but since before the Civil War, the nation had been responding to a sanitary reform movement with passage of slaughterhouse acts from New York City to San Francisco to Philadelphia to Milwaukee. The new law passed in New Orleans closely imitated an 1866 New York "regulation that required all butchers located below 40th Street to use a centralized slaughterhouse [that] operated away from the crowded downtown neighborhoods and allowed for efficient inspection of the city's meat supply." While the New York law did not go wholly unopposed by the affected butchers, it was generally popular among the residents of New York City.[58]

In New Orleans, the reaction to the slaughterhouse legislation was much stronger and much more negative. The butchers' complaints were obvious: they believed the law took away their right to pursue their livelihood. Other New Orleans residents, however, also protested the law. Despite having asked the government just a few years earlier to help clean up the slaughterhouses, many of the residents now cried foul at the apparent monopoly and corruption created by the act. In actuality, "the charges of monopoly and

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[57] Paul Kens, *Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age* (Lawrence: University Press of Kansas, 1997), 118; and Labbé, "New Light on the Slaughterhouse Monopoly Act of 1869," 150.

[58] Ross, *Justice of Shattered Dreams*, 191-192; and John Duffy, *A History of Public Health in New York City, 1866-1966* (New York: Russell Sage Foundation, 1974), 8-48.

corruption served as useful rhetorical devices for white editors and lawyers intent on thwarting every effort, beneficial or otherwise, of a legislature that contained black elected officials." White citizens were grasping for stability and to maintain the power they were accustomed to and, thus, were susceptible to the rhetoric against the slaughterhouse law. Therefore, while the *Slaughterhouse Cases* themselves did not directly deal with issues of race, there was an underlying current of racial tension surrounding them well before they reached the U.S. Supreme Court.[59]

White resentment of the biracial legislature in Louisiana originated with General Philip H. Sheridan's enforcement of Reconstruction voting laws prior to the selection of the state's constitutional convention delegates. The result of this was that many white voters were disfranchised while nearly 83,000 black voters celebrated their new right at the polls. The newly elected delegates proceeded to create a state constitution that guaranteed the right to vote for black men, eliminated black codes passed in 1865, promised blacks equal access to public services, and required the integration of the public school system. Perhaps most importantly, the new constitution included the state's first bill of rights that guaranteed the right to trial by jury, protected to right to assemble peacefully, protected freedom of religion, and guaranteed freedom of the press, and outlawed slavery. In light of the circumstances leading to the constitution's passage, many of Louisiana's white citizens resented it. One New Orleans newspaper declared the new constitution to be the "work of a few white men who were elected to the convention by the votes of ignorant negroes, and by means of disenfranchising those who by their ownership of the soil, their birthright as free men, and their education as citizens ought to

[59] Ross, *Justice of Shattered Dreams*, 195.

be [Louisiana's] masters and its law givers." Obviously, opponents believed that the framers of such a constitution could not be trusted to create the fair and constitutional laws necessary to regulate the slaughterhouses and to create a healthier city for all New Orleans residents.[60]

It was in the shadow of this resentment that the butchers and white citizens of New Orleans reacted to the slaughterhouse act and set into motion the case that would give the U.S. Supreme Court its first opportunity to interpret the meaning and scope of the Fourteenth Amendment. In a group of three lawsuits collectively known as the *Slaughterhouse Cases* [83 U.S. 36 (1873)], the Supreme Court took the first step in limiting the protections of the Thirteenth and Fourteenth Amendments.[61] The primary case involved a group of independent butchers from New Orleans who claimed that the granting of a twenty-five year monopoly to the Crescent City Company violated the Thirteenth and Fourteenth Amendments in four ways: it created a system of involuntary servitude, unlawfully deprived them of liberty and property, discriminated against them in favor of members of the Crescent City Company, and limited their privileges and immunities. The butchers who challenged the law were no longer allowed to operate outside of the Crescent City Company's facilities and had to pay for the right to operate

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[60] *New Orleans Bee*, January 24, 1869; Ross, *Justice of Shattered Dreams*, 195-196; and, Ted Tunnell, *Crucible of Reconstruction: War, Radicalism, and Race in Louisiana, 1862-1877* (Baton Rouge: Louisiana State University Press, 1984), 107.

[61] The first of the three cases, *The Butchers' Benevolent Association of New Orleans v. The Crescent City Live-Stock Landing and Slaughter-House Company*, was initiated by the butchers in an attempt to challenge the constitutionality of the Crescent City Company's monopoly. In *Paul Esteben, L. Ruch, J. P. Rouedo, W. Maylie, S. Firmberg, B. Beaubay, William Fagan, J. D. Broderick, N. Seibel, M. Lannes, J. Gitzinger, J. P. Aycock, D. Verges, The Live-Stock Sealers' and Butchers' Association of New Orleans and Charles Cavaroc v. The State of Louisiana, ex rel. S. Belden, Attorney General*, Louisiana's attorney general hoped to protect the Crescent City Company by enjoining the butchers from competing with the company. Finally, the third case. *The Butchers' Benevolent Association of New Orleans v. The Crescent City Live-Stock Landing and Slaughter-House Company*, had been initiated by the Crescent City Company in an attempt to prevent the butchers and others from setting up similar businesses in the city.

within the facilities. Thus, they argued that the law was depriving them of their livelihood.[62]

The butchers in the *Slaughterhouse Cases* were members of the Butcher's Benevolent Association. The Association had about four hundred members who were small, independent butchers responsible for filing dozens of cases in both state and federal courts. In general, the butchers were not popular among the citizens of New Orleans because they contributed to the filth throughout the city. Also, for decades the city's butchers had schemed with each other to drive up meat prices. Nevertheless, their "grievances became intertwined with Louisiana whites' opposition to the Reconstruction government."[63]

The butchers turned to John Campbell, a former Supreme Court justice himself who had resigned when his home state of Alabama seceded in 1861, to be their attorney. There was no lack of irony in their choice – "the former Supreme Court justice who had risked death on the battlefield in defense of slavery drew on the amendments intended to protect former slaves in devising a Constitutional argument on behalf of the beleaguered butchers." Prior to his appointment to the Supreme Court in 1853, Campbell represented Alabama at an 1850 Nashville convention "convened to protect southern rights in the face of what they saw as northern encroachment, especially on the slavery question." Before the Civil War broke out, he actually attempted to broker an agreement between the states threatening to secede and the Lincoln administration. Once Alabama seceded, however, his loyalties to the South took precedence and he moved to New Orleans. During the war he served as assistant secretary of war in charge of administering the

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[62] *Slaughterhouse Cases* [83 U.S. 36 (1873)]; and, Howard, *The Shifting Wind*, 90.
[63] Ross, *Justice of Shattered Dreams*, 198.

conscription law for the Confederate government. After the war ended, he stayed in New Orleans to establish and build up his law practice.[64]

By most accounts, John Campbell's arguments before the Supreme Court in the *Slaughterhouse Cases* were masterful. He argued that the Reconstruction-era balance of power between the national government and the states was very different than the balance that had existed before the Civil War. Central to his argument was the claim that the Fourteenth Amendment made it unconstitutional for a state law to limit or encroach on the rights guaranteed to citizens by national legislation. He believed that citizens of the United States are guaranteed the right to pursue their respective occupations and to support themselves and their families. Thus, no state law should be allowed to interfere with this federally granted right. He also sought to portray the butchers as patriotic citizens being punished by the Louisiana law.[65]

Although all of the butchers Campbell represented were white and, thus, the case had nothing to do directly with race, Campbell's arguments before the Court made it apparent that he feared a new democratic system where African Americans would be allowed equal access. He argued that the Fourteenth Amendment was written at a point in history when "more than three millions of a population lately servile, were liberated without preparation for any political or civil [life]. Besides this population of emancipated slaves, there was a large and growing population who came to this country without education in the laws and constitution of this country and who had begun to exert a perceptible influence over our government." Ultimately, Campbell viewed the

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[64] Howard, *The Shifting Wind*, 89; and, David G. Savage, "Campbell, John Archibald," in *Congressional Quarterly's Guide to the U.S. Supreme Court* (4th Edition, Volume 2) (Washington: Congressional Quarterly Press, 2004).

[65] *Slaughterhouse Cases* [83 U.S. 36 (1873)].

Fourteenth Amendment as a tool that could be used to keep the newly freed African Americans and newly arrived immigrants in check because although it protected these groups from state restrictions on their constitutional rights it ultimately strengthened the rights of white Americans and of business in its dealings with the government as well. He argued, therefore, that the Supreme Court had an obligation to the country to declare laws such as the Louisiana slaughterhouse statute unconstitutional. Campbell believed that this law, and others like it, were the result of northern white efforts to control the economy and the politics of the South and he asked the Court to use the Fourteenth Amendment as grounds to nullify Louisiana's Slaughterhouse law.[66]

Despite the fact that Campbell was a former Confederate arguing in front of a Supreme Court appointed by Abraham Lincoln, and the fact that Campbell was asking the Court to support the most expansive reading possible of the Fourteenth Amendment, he nearly succeeded. Four of the justices, Noah H. Swayne, Stephen J. Field, Salmon P. Chase, and Joseph P. Bradley, supported his arguments. Nevertheless, with a slim 5-4 majority, the Court's April 1873 decision against the petitioners severely limited the Privileges and Immunities Clause of the Amendment.

In the majority decision, Justice Samuel F. Miller wrote that based on the first section of the Fourteenth Amendment,

> The distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union. It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each

[66] *Slaughter-House Cases*, [83 U.S. 36 (1873)].

> other, and which depend upon different characteristics or circumstances in the individual.

The establishment of this distinction was crucial to the forthcoming conclusion of the Court. Because the Privileges and Immunities Clause of the amendment relied so heavily on by John Campbell in his arguments only spoke of citizens of the United States, the different nature of citizenship had to be considered. The clause stated, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" and, thus, according to Miller, does not protect citizens of a state from the state. He finally stated, "it is useless to pursue this branch of inquiry, since we are of opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of the clause of the fourteenth amendment under consideration."[67]

By focusing on the Privileges and Immunities Clause and the distinction between state citizenship and United States citizenship, the Supreme Court again set the stage for increased restrictions of the rights of African Americans. Rather than guaranteeing protection of all rights for blacks, Miller narrowly interpreted the Amendment and its protections. By arguing that the Privileges and Immunities Clause prevented states from limiting certain federal rights, which he did not define, but did not protect the basic civil rights of all American citizens, Miller in essence left the fate of former slaves and their families in the hands of the southern states' governments. As long as states did not directly limit the rights of U.S. citizens as explicitly spelled out in the Constitution, they could safely define citizenship and the rights of citizenship within their own borders.

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[67] *Slaughterhouse Cases* [83 U.S. 36 (1873)]; and *U.S. Constitution, Amendment XIV* (1868).

Unfortunately, former slave owners and former Confederates were increasingly controlling these governments. Miller justified this limited interpretation by stating that otherwise the Court was destined to become "a perpetual censor upon all legislation of the states, on the civil rights of their own citizens."[68]

Despite the emphasis placed on the *Slaughterhouse Cases* by legal historians and champions of African American civil rights, as well as the judicial system itself, there was very little contemporary public reaction to the case outside of the New Orleans area. National and regional newspapers, both white and black, that frequently ran columns about the legislative and judicial activities in the nation's capital deemed this decision unworthy of the ink it would take to print it. This lack of coverage is significant, however, because it suggests that African American editors and leaders did not yet recognize some of the subtler challenges they would face in the courts. Additionally, it demonstrates a lack of awareness of the far-reaching effects this decision could ultimately have on their lives.

Miller, a native of Richmond, Kentucky, had no judicial experience when Abraham Lincoln nominated him for the Supreme Court in 1862. He was, however, a strong supporter of Lincoln and a supporter of the gradual emancipation of slaves. He had moved to Iowa, a free state, after Kentucky's 1849 constitutional convention strengthened slavery in the state. In Iowa, Miller denounced slavery as evil "to both white men and the black [calling it] the most stupendous wrong, and the most prolific source of human misery, both to the master and the slave, that the sun shines upon in his

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[68] Paul Finkelman and Melvin I. Urofsky, "The Slaughterhouse Cases" in *Landmark Decisions of the United States Supreme Court* (Washington: CQ Press, 2003); and, *Slaughterhouse Cases* [83 U.S. 36 (1873)].

daily circuit around the globe." Before ever meeting Chief Justice Roger B. Taney, Miller expressed his extreme disgust for the man who had written the majority opinion in the Dred Scott case declaring that blacks were not citizens of the United States. Although the two men quickly became mutually respected and friendly colleagues, Miller's distaste for the Dred Scott ruling and his background in favor of emancipation suggested he would decide cases in a more favorable light for African Americans. Nevertheless, the most significant opinion of his career in the *Slaughterhouse Cases* provided, most likely unintentionally, southern states with an opening to deprive blacks of many of the rights they had hoped were guaranteed under the Fourteenth Amendment.[69]

In response to Miller's majority decision, there were three dissenting opinions. Justice Stephen Johnson Field wrote the primary dissent, which was supported by Chief Justice Chase and Justices Swayne and Bradley. Justice Field, a native of Connecticut who later moved to California and was nominated for his seat on the court by Abraham Lincoln, declared that he was "unable to agree with the majority of the court in these cases [because]. . . . the act of Louisiana presents the naked case, unaccompanied by any public considerations, where a right to pursue a lawful and necessary calling, previously enjoyed by every citizen, and in connection with which a thousand persons were daily employed, is taken away and vested exclusively for twenty-five years, for an extensive district and large population, in a single corporation, or its exercise is for that period restricted to the establishments of the corporation, and there allowed only upon onerous conditions." The essence of his dissenting opinion was his belief that the slaughterhouse

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[69] Clare Cushman, ed., *The Supreme Court Justices: Illustrated Biographies, 1789-1995* (Washington: CQ Press, 1995).

law enacted by Louisiana's state legislature encroached on the rights of all citizens to pursue the profession of their choice.[70]

Field began by describing the key points of the case as he saw them. He explained that the slaughterhouse law affected the approximately 1154 square miles covered by the New Orleans, Jefferson, and St. Bernard Parishes and that this area had a total population of between 200,000 and 300,000 citizens. The plaintiffs in the case, the butchers represented by John Campbell, argued that the law granted a monopoly to the Crescent City Livestock Landing and Slaughterhouse Company at the expense of the approximately one thousand residents of the parishes engaged in the business of landing, housing, and slaughtering animals for the market in New Orleans. According to the majority decision of the Supreme Court, the law was defensible because the creation of the Crescent City Corporation was part of an exercise of the police power of the state to protect the health and welfare of the citizens of New Orleans. Field, however, argued, "under the pretense of prescribing a police regulation the State cannot be permitted to encroach upon any of the just rights of the citizen, which the Constitution intended to secure against abridgment." He expressed his belief that if a corporation of seventeen named men can safely slaughter animals in a designated area outside of the city, any qualified butcher could also do so. He also articulated his concern that if the state government was allowed to create a seventeen-person corporation at the expense of the privileges and rights of other citizens there was no guarantee that the same government would not later grant privileges to a single person at the expense of all others.[71]

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[70] *Slaughterhouse Cases* [83 U.S. 36 (1873)].
[71] *Slaughterhouse Cases* [83 U.S. 36 (1873)].

The most critical question at issue in the Slaughterhouse Cases, according to Justice Field, was the question of the government's responsibility to protect the "equality of rights among citizens in the pursuit of ordinary avocations of life, and a declaration that all grants of exclusive privileges, in the contravention of this equality, are against common right, and void." While the Court's majority decision discounted the plaintiff's claim based on the conclusion that rights protected by the Fourteenth Amendment were violated or abridged by the law in question, Field concluded otherwise. He argued that the equality of right among citizens to pursue their profession of choice is the distinguishing right of United States citizens. The state, therefore, has the right to regulate every profession, but it must leave all professions open to all citizens who can conform to those regulations. In his closing, Justice Field expressed his profound regret that the majority of the Court found it appropriate to support the Louisiana law which he believed so clearly violated the equality of right he found to be central to citizenship.[72]

Although Field was a Democrat, he had been nominated for the Supreme Court by Abraham Lincoln and unanimously recommended by the Californian and Oregonian congressional delegations faced with the task of supporting a nominee for a new seat on the Court to represent the western district. His dissent in the *Slaughterhouse Cases* likely had more to do with his consistent opposition to government interference in private business than with his views on race and the importance of the Fourteenth Amendment for African Americans. In fact, his dissenting opinion made absolutely no mention of the racial issues that brought rise to the need for the Fourteenth Amendment. Ultimately,

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[72] *Slaughterhouse Cases* [83 U.S. 36 (1873)]. Justice Field referenced *The City of Chicago v. Rumpff*, *Norwich Gaslight Company v. The Norwich City Gas Company*, and *Mayor of the City of Hudson v. Thorne* as precedence for the recognition of the equality of right for citizens to pursue their profession of choice.

Field viewed the Reconstruction Amendments in broad terms related to the protection of citizens' economic and property interests, but in narrow terms related to racial discrimination. In reviewing Field's opinion, it is obvious that he was more concerned with protecting economic, property, and private enterprise rights over civil, social, and political rights.[73]

Although they both concurred with Justice Field's dissenting opinion, Justice Joseph P. Bradley and Justice Noah H. Swayne both chose to add additional comments in disagreement with the majority opinion. Bradley opted to reiterate the argument that the Fourteenth Amendment protected all individuals from the limitation of the privileges and rights as granted under the Constitution. According to Bradley, "If a man be denied full equality before the law, he is denied one of the essential rights of citizenship of the United States. . . . [and] in [his] judgment, the right of any citizen to follow whatever lawful employment he chooses to adopt (submitting himself to all lawful regulations) is one of his most valuable rights, and one which the legislature of the State cannot invade, whether restrained by its own constitution or not." Again, like Field, Bradley focused primarily on the economic and private enterprise issues raised by the Louisiana slaughterhouse law, but he did mention his recognition that the original intent of the Fourteenth Amendment was to protect the rights and liberties of African Americans. Nevertheless, he declared, "It is futile to argue that none but persons of the African race are intended to benefit from this amendment. . . . Its language is general, embracing all citizens, and I think it was purposely so expressed." Likewise, Justice Swayne acknowledged the original catalyst for the passage of the Fourteenth Amendment but

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[73] Melvin I. Urofsky, ed., "Field, Stephen Johnson" *Biographical Encyclopedia of the Supreme Court* (Washington: CQ Press, 2006).

argued that in the case before the court and in regards to the issue of personal pursuance of profession, race and color should not be considered. Swayne, the son of antislavery Quaker parents, originally lived in Virginia but moved to Ohio in the 1820s due to his opposition to slavery. Despite his downplaying of race as an issue in the *Slaughterhouse Cases*, his concluding sentence, "I earnestly hope that the consequences to follow may prove less serious and far-reaching than the minority fear they will be," indicated that he and the other dissenting justices were aware that the court's decision may have an adverse affect on the lives of African Americans and other Americans seeking protection from state limitations on their rights.[74]

The immediate consequences of the decision did turn out to be less serious than Swayne and his associates feared. As explained, there was virtually no immediate response to the decision and there was no national coverage of the decision, particularly in the nascent African American press. Just as the justices viewed race as a peripheral issue in the *Slaughterhouse Cases*, so too did the apparent majority of American citizens. Nevertheless, as could be seen after the fact, the decision did open the door for increased limitations on African American rights as state and local legislatures recognized the narrowing of the Fourteenth Amendment's privileges and immunities clause under the Court's interpretation.

[74] *Slaughterhouse Cases* [83 U.S. 36 (1873)].

Limited Enforcement

While the full effects of the Supreme Court's decision in the *Slaughterhouse Cases* were yet to be seen, another case dealing with the Fourteenth Amendment and the Enforcement Act of 1870 came before the Court. In *United States v. Cruikshank* (1876), white leaders of a massacre of African Americans, which occurred in Grant Parish, Louisiana the same month as the *Slaughterhouse* decision was handed down, faced charges of violating the Enforcement Act. Congress had passed the Enforcement Act of 1870 in response to crimes committed against African Americans after the ratification of the Fourteenth and Fifteenth Amendments. The law spelled out several possible crimes that could by committed against potential voters and established the mechanism for federal prevention of such crimes through the Department of Justice. The case before the Supreme Court tested the constitutionality of the federal government's intervention into criminal matters and could have potentially provided a legal foundation for federal intervention when state and local law enforcement failed to protect the rights of blacks.

On Easter Sunday, 1873, 105 African Americans and three whites lost their lives in front of the Grant Parish courthouse in Colfax, Louisiana. After gaining a slight majority of votes in just one of many disputed 1872 elections in the state, the local Republican candidates and their supporters attempted to take occupancy of the courthouse. In January 1873, the outgoing governor, Henry Clay Warmoth, declared the white Democrat candidates as winners, only to have the incoming governor, William Pitt Kellogg, declare the Republican candidates victorious at the beginning of April. The blacks who climbed through a window at the courthouse included many former slaves

who feared that the Democrats would seize control of the Grant Parish government, despite their victory, and who were led by black Civil War veterans. Some, but not all, of the members of the group were armed. A well-organized group of more than three hundred whites, most of whom were armed and disputed Kellogg's interpretation of the election results, confronted the African Americans at the courthouse. Most were also members of the White League, a group similar to the Ku Klux Klan that was active in Louisiana at the time. Among the leaders of the mob was Columbus Nash, the defeated Democratic candidate for sheriff.

Inflamed by a recent event in which a black mob had raided the home of Republican attorney William Rutland and dumped the body of his recently deceased daughter from her casket, local whites believed that blacks were dangerous. Although no one was hurt in the incident, the desecration of the daughter's body was evidence enough for whites to fear the congregation of blacks at the courthouse. As leader of the white mob, Nash tried unsuccessfully to convince the blacks to leave the courthouse on their own. He then asked the women and children who were camped outside the courthouse to clear out within the next thirty minutes. Once they were gone, Nash ordered the whites to fire on the African Americans in the courthouse. After several hours of gun fighting with only a few casualties, the situation took a turn for the worse. Nash and his men placed a cannon behind the courthouse, which meant that the blacks faced gunfire from the front and cannon fire from the back. As many as sixty of them ran into the nearby woods where they were chased down and killed. Under threat of death, Nash and his men convinced an older black man to reenter the courthouse and set it on fire. Faced with this

blaze as well as gun and cannon fire, the remaining black occupants of the church exited the courthouse waving makeshift white flags.

This group of African Americans surrendered themselves to the white aggressors and laid down their arms. Then, James Hadnot, another of the white leaders, was wounded by gunfire. Some witnesses claimed a black man shot him while others argued one of the armed white men shot him from behind. Regardless of the facts, the outcome was the same. The white mob swarmed on the now-unarmed blacks and massacred them. The whites chased down, beat, and mutilated the blacks; approximately fifty of the black men survived the initial massacre and were taken prisoner only to be executed later that night. The following day, under orders from President Ulysses S Grant, federal troops arrived from New Orleans to restore order. Despite the participation of hundreds in the massacre, only about one hundred were initially indicted, of which eight went to trial, and three were convicted on charges of violating the Enforcement Act of 1870. Among the convicted men was William J. Cruikshank.

The convicted men faced thirty-two counts of indictment, but were convicted only on the first sixteen. The indictments charged them with banding together and conspiring with the intent of preventing two African American U.S. citizens, Levi Nelson and Alexander Tillman, from exercising their right to peaceable assembly, preventing them from exercising their right to bear arms, depriving them of life and liberty without due process of law, depriving them of the full rights and privileges enjoyed by white citizens under the law, preventing them from enjoying their full privileges and immunities as citizens of the U.S. and of Louisiana, hindering their right to vote, causing them to fear

bodily harm and injury because they had voted, and preventing their enjoyment of rights and privileges as granted them by the United States Constitution.

In their appeal to the Circuit Court of Appeals, the three men cited six grounds for opposing the judgment against them. First, they argued that the charges against them did not constitute crimes against federal laws and did not fall under the true intent of the Enforcement Act. Second, their lawyers claimed that, because they had not violated any U.S. laws their indictments did not fall under the jurisdiction of the federal courts. Furthermore, the basis of the sixteen counts, Section 6 of the Enforcement Act, was not constitutionally under the jurisdiction of the U.S. courts and should have been under the purview of the state courts. Fourth, the plaintiffs contended that the Enforcement Act in fact violated the Constitution by both defining offences and imposing penalties, which was an infringement on the rights of the states. Fifth, they asserted that the sixteen counts on which they were convicted were too vague for them to have properly pleaded and prepared their defense. Finally, based on all of their claims, they concluded that the jury's verdict was not warranted and supported by law. The appellate judges were unable to reach a decision on the case and, because of their division the case came before the Supreme Court.[75]

The primary focus of the indictments, and, thus, of the appeal, was the sixth section of the Enforcement Act [16 Stat. 141] enacted on May 31, 1870. As mentioned, the primary purpose of the Enforcement Act was to describe possible crimes that could be committed against African Americans and establish the mechanism within the

[75] *U.S. v. Cruikshank, et al.* [92 U.S. 542 (1875)].

Department of Justice to enforce the rights and privileges granted by the Fourteenth and Fifteenth Amendments. Section 6 of the Enforcement Act declared

> That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court,-the fine not to exceed $5,000, and the imprisonment not to exceed ten years; and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the constitution or laws of the United States.[76]

Chief Justice Morrison Waite presented the majority decision of the Court on March 27, 1876. The Court found in favor of the defendants and overturned their convictions. In his decision, Waite explained that he agreed that the right to assemble peacefully is a constitutionally protected right which, when infringed upon on the basis of race, could be protected under the Fifteenth Amendment. He also mentioned that while the First Amendment protects the right, that protection was meant as a limitation on the federal government, not on state governments. Likewise, he explained that the indictments regarding infringement upon the black citizens' right to bear arms were unfounded because the Second Amendment was meant only to prevent Congress from limiting this right of citizenship. He further supported the rights of states to regulate their own citizens in his critique of the indictments based on the failure to secure due process of law for the victims. He stated, "The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this

[76] Enforcement Act of 1870 [May 31, 1870; 16 Stat. 141].; *U.S. v. Cruikshank, et al.* [92 U.S. 542 (1875)].

adds nothing to the rights of one citizen as against another." This conclusion foresees future arguments of the Court, which significantly limit the protections for African Americans from Jim Crow legislation. The bulk of the indictments, therefore, were not based on charges enforceable in the federal courts because they were not in violation of constitutional protections.[77]

In the remaining handful of indictments, the charges dealt with the accused conspiring to impinge upon the rights and privileges of the victims. The charges, however, did not identify any specific right limited by the accused. Because there was no clarification of what rights they were accused of denying the victims, the charged men were not informed enough to be able to develop their defense. On that basis, Waite concluded that the charges "lack the certainty and precision required by the established rules of criminal pleading . . . . that they are not good and sufficient in law. They are so defective that no judgment of conviction should be pronounced upon them." Additionally, he declared that the indictments filed against the three convicted men were not sufficient for conviction under the Enforcement Act because they did not indicate that the men's intent was to violate the victims' rights because of their race. He concluded, "We may suspect that race was the cause of the hostility, but it is not so averred."[78]

This decision fell in line with much of Waite's activities on the Court despite the fact that he publicly worked to improve the lives of African Americans. Waite was a native of Connecticut who, after briefly living in Europe, moved to Ohio where he believed he would have better opportunities. He was admitted to the Ohio Bar in 1839 and focused primarily on business law until his surprise nomination to the position of

[77] *U.S. v. Cruikshank, et al.* [92 U.S. 542 (1875)].
[78] *U.S. v. Cruikshank, et al.* [92 U.S. 542 (1875)].

Chief Justice of the Supreme Court in 1874. Prior to his nomination, Waite was a strong pro-Union voice during the Civil War and served as president of the Ohio Constitutional Convention in 1873. He had also garnered the attention of President Grant in 1871 when he served and counsel for the United States in arbitration negotiations in Geneva. The *Alabama* claims case against Great Britain centered on claims by the United States that the British had enabled the Confederates to utilize British ports during the Civil War. At the end of the negotiations, in large part because of Waite's skill, the United States received a $15.5 million settlement. Nevertheless, his nomination from Grant came as a surprise not only to himself but also to several members of the Court. Despite his success in the *Alabama* negotiations, Waite had never held a judicial position and had never practiced before the Supreme Court, making him one of the most inexperienced justices ever nominated.[79]

Throughout his time with the Court, Waite tended to go along with the majority, dissenting in only 54 of the nearly 3,470 cases heard in his tenure. His majority decision, therefore, was not unexpected. His personal views of race issues and of African Americans in general were in line with the views of moderate white northerners. Furthermore, he agreed with many white Americans that in order for African Americans to succeed in the future they had to have the opportunity to receive a reasonable education. In support of this belief, he supported the Peabody Fund and the Slater Fund, both of which were northern charities focused on providing money to southern black

[79] David G. Savage, "Waite, Morrison Remick," *Congressional Quarterly's Guide to the U.S. Supreme Court, 4th edition, Volume 2*, (Washington: CQ Press, 2004).

schools and colleges. Additionally, Waite approached Congress to approve similar funds from the government, although he was never successful in this goal.[80]

The sole dissenter in the *Cruikshank* case was Nathan Clifford who explained that although he agreed with the result of reversing the convictions, he did not agree with Waite's reasoning. He referred to both Section 6 and Section 5 of the Enforcement Act in his opinion. According to Clifford the effect of Section 5 was that, "persons who prevent, hinder, control, or intimidate, or who attempt to prevent, hinder, control, or intimidate, any person to whom the right of suffrage is secured or guaranteed by [the Fourteenth] amendment, from exercising, or in exercising such right, by means of bribery or threats; of depriving such person of employment or occupation; or of ejecting such person from rented house, lands, or other property; or by threats of refusing to renew leases or contracts for labor; or by threats of violence to himself or family,-such person so offending shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined or imprisoned, or both, as therein provided." He expressed his agreement with Waite that several of the charges filed against the three men were not in the purview of the federal courts and did not violate the intent of the Enforcement Act. He further agreed that other charges were too vague to justify the men's convictions. The remainder of Clifford's opinion, however, focused on declaring the unconstitutionality of the Enforcement Act because of its objective of both defining crimes and penalties – a power not granted to Congress by the Constitution.[81]

Clifford was another northerner sitting on the Supreme Court in the post-Civil War years; however, he differed significantly in his views from many of the other

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[80] Savage, "Waite, Morrison Remick."
[81] [81] *U.S. v. Cruikshank, et al.* [92 U.S. 542 (1875)].

justices. When he received his nomination from President James Buchanan in 1857 opponents expressed concern over his "southern" views on politics. As a staunch Jacksonian Democrat, he was significantly outnumbered in the Court. Following the disputed presidential election in 1876, Clifford argued that Rutherford B. Hayes was an illegitimate president and refused to enter the White House during the entirety of his tenure. Although he was the sole dissenter in the *Cruikshank* case, his opinion signaled the future of limited rights for African Americans in the United States. This was the case even more so in another decision released the same day as the *Cruikshank* opinion.

As with the *Slaughterhouse* decision, the Court's decision in the *Cruikshank* case drew little attention at the time from the growing African American press. Although this case clearly dealt with issues of race in a more direct manner than the earlier case, the African American community was apparently unaware of the impact such a decision could have on their future status in American society. Alternatively, perhaps they were focused more on local issues than on the larger national picture that was fast emerging. In either case, another decision deemed significant by nearly every race historian and civil rights lawyer for the precedent it set managed to go virtually unnoticed by the African American community.

In *U.S. v. Reese* [92 U.S. 214 (1875)], Waite again issued the majority opinion and Clifford, this time joined by Justice Ward Hunt, again dissented. This case centered on the conviction of two Kentucky election inspectors who had refused to allow an African American citizen, William Garner, to vote. While Waite and the majority overturned the convictions arguing that the Fifteenth Amendment did not grant the right to vote to anyone, rather it declared that the right could not be denied on the basis of race.

He concluded that the Kentucky statutes under consideration by the Court did not give preference based on race. Again, Clifford agreed with the outcome of the case, but he expressed different reasoning for his opposition to the convictions. Clifford argued that the Fifteenth Amendment expressly dealt only with limitations to voting based expressly on race. Other limitations, such as poll taxes and literacy tests, were constitutional in his opinion. This opinion again foreshadowed the future of Jim Crowism and of judicial limitations on the rights of African Americans.[82]

A Jury of Your Peers

At the end of the decade, in a rare case showing the Court's *apparent* support of black citizens and upholding the Fourteenth Amendment, the Court decided in *Strauder v. West Virginia* [100 U.S. 303 (1879)] that a state law limiting jury service to "white male persons who are twenty-one years of age and who are citizens of this state" denied black citizens of the states equal protection as promised by the amendment. Cases such as this, however, were not the norm during the late-1800s as the courts increasingly handed down decisions weakening the Fourteenth Amendment and other post-Civil-War-era legislation.

At the center of this atypical case was Taylor Strauder, a black man, who faced charges in Wheeling, West Virginia, for the murder of his wife, Annie Sly Strauder, on April 18, 1872. The two former slaves were married in 1871. Shortly afterwards, friends

[82] *U.S. v. Reese* [92 U.S. 214 (1875)].

began to tell Taylor stories about his wife's infidelity. The couple began to fight and Annie sometimes sought police protection from Taylor. As the stories about Annie increased, Taylor eventually lost control and brutally murdered his wife with a hatchet. Despite his obvious guilt in the case, Strauder pled not guilty to the charges. The only witness to the crime was Annie's four-year-old daughter, Fannie. On May 9, 1873, the jury of his first trial declared him guilty of first degree murder. This decision, however, was appealed to the West Virginia Supreme Court which granted him a second trial. On November 5, 1874, a second jury reached the same verdict and again convicted Strauder of first degree murder. In response to the words of the jury, Strauder "seemed unconscious of their fearful meaning, and wore the same indifferent expression on his face that [had] characterized him since his arrest and imprisonment. Strauder's attorney, George O. Davenport, again motioned for a new trial.[83]

Davenport's motion was finally taken under advisement by the Circuit Court two months later, in January 1875. As the motion was considered, rumors of Strauder's impending execution by hanging spread throughout Wheeling and the surrounding communities. In early March, the case had gained so much attention that "a party of well known young men met at an office [and discussed] the probabilities as to the Court of Appeals interfering in [Strauder's] behalf, [and] one of the gentlemen in the party offered to bet ten dollars that Strauder would not be executed on the 26th of March. The bet was promptly taken up by another of the party."[84]

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[83] *Wheeling Daily Register*, "The Strauder Murder Case, Twelve Men Again Declare Taylor Strauder Guilty of Murder in the First Degree," November 6, 1874 (12: 191), 4.
[84] *Wheeling Daily Register*, "Betting on Death," March 3, 1875 (12:283), 4.

A week after the wager on Strauder's prospects and just two weeks before his scheduled execution, Judge Alpheus F. Haymond of West Virginia's supreme court of appeals granted Strauder a stay of proceedings. The *Wheeling Daily Register* reacted to the stay with a report that they "presume[d] that the ground upon which the stay was granted, was that there were no negroes on the jury which convicted Strauder, the law of West Virginia preventing negroes from sitting on juries, and being in direct violation of the Fourteenth amendment; and now palpably so, since the passage of the Civil rights bill."[85]

Prior to his trial, Strauder had filed a petition to remove his case from the state court to the Circuit Court of the United States on the grounds that in the state of West Virginia African Americans were prohibited from sitting on juries and he, therefore, did not believe that he could receive a fair judgment from a jury of his peers. Strauder's attorneys based their motion on a state law passed on March 12, 1873, which declared that all adult white males who were citizens of the state would be responsible for serving as jurors. The law made no mention, however, of African American citizens of the state. The state court denied his petition and the case went to trial.[86]

Among the questions considered by the Supreme Court were whether every citizen had the right to be tried in front of a jury impaneled without discrimination against members of his race and, if he does have this right, if his case can be moved to the federal courts if his right is apparently being violated in the state courts. Based on these

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[85] *Wheeling Daily Register*, "Taylor Strauder. Another Chance for His Life – Judge Haymond Grants a Stay of Proceedings," March 10, 1875 (12:288), 4.
[86] *West Virginia Acts of 1872-1873*, 102.

questions, the focus of the Court was directed at the Fourteenth Amendment and its application to the selection of juries.

In the majority opinion, Justice William Strong declared that the intent of the Reconstruction Amendments was to "secure[d] to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy." Referring back to the Court's decision in the *Slaughterhouse Cases*, Strong reiterated the justices' belief that the intent of the amendments can only be understood in consideration of the times in which they were adopted. He explained that at the time the amendments were adopted there was no doubt that the blacks were inferior because of their race and because of their background as subordinates; therefore, it was expected that states would pass laws to discriminate against the blacks and the federal government would have to step in to protect the African Americans who "as a race, [were] abject and ignorant, and in that condition [were] unfitted to command the respect of those who had superior intelligence." Based on this understanding of Congress' intent, he maintained that states were supposed to treat blacks and whites equally under the law. Therefore, to deny the rights of citizens to participate in the justice system simply because of their race was "practically a brand upon them, affixed by law; an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."[87]

To strengthen his conclusion, Strong continued to explain that if the tables were turned there would be no doubt as to the discriminatory nature of such a statute. He stated that if a state with a majority black population were to pass a law limiting jurors to

[87] *Strauder v. West Virginia* [100 U.S. 303 (1879)].

African American citizens, he suspected there would be no end to the claims that such a statute violated the constitutional right to equal protection of the law. He further supported his explanation with a hypothetical example of a similar law directed at naturalized Celtic Irishmen. He also questioned the logic of arguing that such a law was not a violation of African Americans' civil rights, stating "how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?" Based on this interpretation, Strong and the concurring majority agreed with the plaintiff that the case should be moved to the U.S. Circuit Court for the purpose of protecting the right to due process guaranteed by the Fourteenth Amendment.[88]

On the surface, the *Strauder* decision appeared to favor protecting the rights of African Americans, but it in fact "signals the white South of ways to work around unconstitutional laws limiting juries." The Court recognized the need to overturn the state law limiting jury participation to white citizens, but it did not preclude the possibility of restricting jury participation in other manners. While race could not be a limiting factor, even Strong suggested that more indirect limitations could be instituted by the states with much the same effect. Among the possibilities would be to limit jurors to a particular gender, to certain ages, to property owners, or to citizens with specific educational qualifications. In doing so, a state would be able to limit significantly the number of blacks eligible to serve on juries without directly discriminating against them on the basis of race. While the Court's decision was a victory for Strauder, the wording

[88] *Strauder v. West Virginia* [100 U.S. 303 (1879)].

of the decision laid the framework for the continuing removal of African Americans from state juries throughout the country.[89]

Justice Strong had also written the majority decision in *Blyew v. United States* less than a decade earlier. At the time, Strong concluded that a case could not be moved to federal jurisdiction simply to enable a black witness to testify against white defendants. He did not view this as a constitutionally guaranteed right and did not believe that it was a violation of this Civil Rights Act of 1866 to prevent and unaffected party to testify. Although his two decisions appear significantly different on the surface, one allowing the federal courts to claim jurisdiction over a state case and the other disallowing such a move, they are very similar at their core. In both cases, Strong advocated the protection of rights for African Americans as Congress had intended them at the time a piece of legislation was adopted. He did not believe that the intent of Congress in passing the Civil Rights Act of 1866 was to guarantee that all criminal cases that might involve a black witness should be moved to federal jurisdiction. On the other hand, he did believe that the intent behind the Fourteenth Amendment was to guarantee African Americans that same protection and treatment under the laws as whites received. He decided both cases accordingly. At the core of both opinions was his apparent belief that while constitutionally protected rights could not be denied African Americans simply because of their race, there was no legal basis for not developing other manners of restriction.

Justice Field, who had written the majority decision in the *Slaughterhouse Cases*, dissented simply by referring to his opinion in *Ex Parte State of Virginia* which was another case dealing with African Americans and juries decided on the same day as the

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[89] Paul Finkelman and Melvin I. Urofsky, "*Strauder v. West Virginia*," *Landmark Decisions of the United States Supreme Court* (Washington: CQ Press, 2003); and *Strauder v. West Virginia* [100 U.S. 303 (1879)].

Strauder case. His primary argument is that the federal District Court had no jurisdiction in the cases before the Court and, therefore, should not be allowed the limit the rights of the states to pass and enforce laws regarding their own citizens.

While this case received a significant amount of coverage in the local paper, *The Wheeling Daily Register*, the interest dealt more with the crime committed and the repeated delays in Strauder's conviction than with the constitutional issues presented to the Supreme Court. As with the other significant cases of the decade, this case received no mention in the prominent African American newspapers again suggesting that the African American community was either unaware of the pending crisis in their legal status or was preoccupied with matters of more local and more immediate concern.

Implications for the Future

As the 1870s ended, the stage had been set for the rise of discriminatory legislation that African Americans were soon to face. Through a series of critical yet largely ignored decisions, the Supreme Court set the stage for white Americans to be able to increase the restrictions on blacks' political and social lives. In doing so, the justices severely limited the protections granted by the Civil Rights Act of 1866, the Fourteenth Amendment, and the Enforcement Act of 1870. While African Americans expressed little recognition of the potential impact of these decisions on their lives, the feeling of hope created by the adoption of the Fourteenth Amendment in the 1860s was undoubtedly beginning to fade. On the horizon were the *Civil Rights Cases* and the Ku

Klux Klan cases that would continue to shape the status of African Americans in the United States.

Chapter Three: Civil Rights and the Ku Klux Klan

At the start of the 1880s, the African American population in the United States had reached just over 6.5 million, many of whom expected to face another decade of challenges because of their race. The decade began with the passage of a new transportation segregation law in Tennessee that Ida B. Wells challenged by the middle of the decade. In addition to new segregation laws, black Americans also faced continued violence at the hands of whites. In 1882, at least forty-nine African Americans, including eleven in Louisiana, were lynched. Although some of the victims in Louisiana faced accusations of attempted rape or murder, David Lee lost his life on November 8, 1882, for stealing a hog from a white farmer. In Alabama, Jack Turner was lynched for allegedly planning a massacre of whites. And, in Madison County, Florida, two black men faced a lynch mob for being Republicans.[90]

On a more positive note, Booker T. Washington became the first principal of the Tuskegee Normal and Industrial Institute in Alabama. Under his leadership, Tuskegee became the premier vocational-education training institute for African Americans in the country. Although many black opposed the idea of having students do manual labor to pay their tuition, "with a great deal of persuasion and by setting the example of clearing

[90] Michael J. Pfeifer, *Rough Justice: Lynching and American Society, 1874-1947* (Chicago: University of Illinois Press, 2004), 162; William Warren Rogers and Robert David Ward, *August Reckoning: Jack Turner and Racism in Post-Civil War Alabama* (Baton Rouge: Louisiana State University, 1973), 83; and, Edward C. Williamson, "Black Belt Political Crisis: The Savage-James Lynching, 1882," in *Florida Historical Quarterly*, Vol. 45, No. 4 (April 1967), 402.

the fields himself . . . Washington manage[d] to persuade most of the students that there was a dignity in common labor. Many white Alabamians questioned the need for an African-American school, but were more accepting of Tuskegee because of its focus on industrial training and manual labor. Washington also required his students to dress neatly and behave well which meant they appeared to be the "polite blacks" white southerners preferred. Ultimately, Washington's policies at Tuskegee faced opposition from other prominent blacks who were embarrassed and angered by his decision to present "a deferential, almost obsequious public image to whites, going so far as to tell racist 'darky' jokes and to join in the ridicule of the 'absurd' policies of Reconstruction that had given political power to ignorant field hands." Nevertheless, at the time of its opening in 1881, the Tuskegee Institute and its gifted leader offered a glimmer of hope to black Americans.[91]

State versus Private Discrimination

After a decade of precedent setting legal decisions, which went largely ignored by the African American press, the 1880s quickly took on a different intensity. The Supreme Court continued to hand down decisions that would inevitably lead to increased discrimination against black Americans, but now African Americans recognized the importance of vocalizing their discontent with such decisions and the need to rally what

[91] Jacqueline M. Moore, *Booker T. Washing, W.E.B. DuBois, and the Struggle for Racial Uplift* (Wilmington, Delaware: Scholarly Resources, Inc., 2003), 25-25; and, Mark Elliott, *Color-Blind Justice: Albion Tourgée and the Quest for Racial Equality, from the Civil War to Plessy v. Ferguson* (New York: Oxford University Press, 2006), 297.

little influence they had in efforts to protect the liberties and rights they had not yet lost. Unfortunately, the mainstream white press also began to take more notice of the Supreme Court's decisions and increasingly vocalized its support of decisions that stuck down legislation geared at protecting the rights of blacks. Two cases, in particular, raised significant response and debate in the African American community. First, in the *Civil Rights Cases* of 1883, the Supreme Court eliminated African Americans' rights when it declared the Civil Rights Act of 1875 unconstitutional. The following year, the Court further reduced the protection of African Americans when it negated a law geared at preventing the activities of the Ku Klux Klan. These two cases exemplified the deteriorating legal status experienced by African Americans in the 1880s.

A key issue in both of these cases was the difference between private action and state action. The Supreme Court also considered whether Congress had the ability to limit both. In the wake of *Blyew v. United States*, the *Slaughterhouse Cases*, and *U.S. v. Cruikshank*, which had opened the doors for increased discrimination of blacks, new Jim Crow laws were passed throughout the country placing limitations on blacks' rights to equal education, voting rights, equal privileges on public carriers, equal access to public accommodations, and marriage. Examples of such restrictions appeared in Alabama's 1875 constitution requiring separate schools for children of African descent; an 1877 Delaware statute establishing a separate tax on blacks to fund schools for African American children; an 1879 Missouri law declaring it illegal for anyone with one-eighth or more black blood to marry a white person, claiming that "A jury could determine the amount of Negro blood from appearance;" and, an 1875 Tennessee statute which gave

anyone who ran a place of amusement, a hotel, or a passenger train, the right to limit access to their business the same as "any private person over his private house."[92]

At the same time, however, several state and local governments also passed laws that appeared to protect the rights of African American citizens. Although by the end of the 1870s the majority of states had laws providing for or requiring separate schools for the races, a handful of states, including Arkansas, Colorado, Illinois, Michigan, Minnesota, and Pennsylvania, made such segregation illegal. The 1876 Colorado constitution, for example, prohibited school districts from classifying students in public schools by race and an 1877 statute in Minnesota made it illegal to prevent students from attending public schools based on "color, social position, or nationality." Likewise, a handful of states and localities passed anti-miscegenation laws (Kentucky 1870 and Mississippi 1871), laws barring segregation of public carriers (Arkansas 1873), and laws barring segregation of public accommodations (Florida 1873).[93]

With the clear differences emerging in protection of African Americans' civil rights and liberties, challenges in the courts became a virtual inevitability in the 1880s. Whites in some states sought to establish further their superiority over blacks through legislation while blacks began to recognize that limitations of their rights were spreading out of the Deep South into states such as Delaware, Ohio, Montana, and California, where a tradition of slavery could not be pointed to as reason for continuing accepted

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[92] Alabama Constitution of 1875, Article XIII: Education, Section 1; Franklin Johnson, *The Development of State Legislation Concerning the Free Negro* (New York: Ph.D. Dissertation, Columbia University, 1919), 82; Irving G. Tragen, "Statutory Prohibitions against Interracial Marriage," in *California Law Review*, Vol. 32, No. 3 (Sep. 1944), 274; and, *Allen v. Pullman's Car Co.*, 191 U.S. 171 (1903), 182-183.

[93] Johnson, *Development of State Legislation*, 85; Colorado Constitution of 1876, Article IX: Education; An Act to Establish and Maintain a System of Public Schools in the State of Minnesota, Chapter VI: Penalties of the Common School Law, Section 1, Approved February 28, 1877; and, Gilbert Thomas Stephenson, *Race Distinctions in American Law* (New York: Association Press, 1910), 78-86, 115, 210.

social norms. Therefore, when the Supreme Court presented its decision in the *Civil Rights Cases* on October 18, 1883, both white and black Americans responded.

Nine months before the Supreme Court handed down its decision in the *Civil Rights Cases*, the decision in *United States v. Harris* [106 U.S. 629 (1883)] served as an indicator of what was to come. The case originated in Tennessee where R.G. Harris and nineteen other white men were accused of violating Section 5519 of the Revised Statutes of the United States when they forced their way into the Crockett County prison and attacked four black prisoners. During the attack, prisoners Robert R. Smith, William J. Overton, and George W. Wells, Jr., were severely injured and P. M. Wells was mortally wounded. The charges against Harris and the other white men centered on their apparent conspiracy to deprive four black men of "the equal protection of the laws" of the state of Tennessee. Following the lower court's inability to reach a consensus in the case, the Supreme Court considered Harris et al's claims that Section 5519, which had been passed by Congress to help enforce the Fourteenth Amendment, was in fact a violation of the Tenth Amendment rights of the state of Tennessee and its residents.[94]

Central to the defendants' argument in the case was that the offenses defined in Section 5519 were not within federal jurisdiction and, therefore, the statute itself was unconstitutional. According to Section 5519, often referred to as the "Ku Klux Law,"

> If two or more persons in any state or territory conspire or go in disguise upon the highway or on the premises of another for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any state or territory from giving or securing to all persons within such state or territory the equal protection of the laws, each said persons shall be punished by a fine of not less than $500 nor more than

[94] *United States v. Harris* [106 U.S. 629 (1883)].

> $5,000, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment.

Harris and the other defendants contended that the Tenth Amendment[95] protected states' rights from federal dominance in its declaration that states would retain all powers "not delegated to the United States by the Constitution, nor prohibited by it to the States." Therefore, the federal government should not have had jurisdiction over their case and they should not have faced the charges and penalties created by Section 5519.[96]

In an eight-to-one decision, the Court found in favor of Harris and his co-defendants. According to the majority decision, written by Justice William Burnham Woods, the case revisited issues already addressed in *U.S. v. Cruikshank* and *Virginia v. Rives* [100 U.S. 313 (1880)].[97] Woods concluded that because Section 5519 addressed only private actions, not state actions, it was not a constitutional enforcement of the protections guaranteed by the Fourteenth Amendment. This conclusion, however, came from his interpretation of the Thirteenth Amendment and his belief that "the provisions of that section [5519] are broader than the thirteenth amendment would justify. . . . [because

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[95] The Tenth Amendment says, in its entirety, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."
[96] Section 5519 of the Revised Statutes of the United States; and, *United States v. Harris*.
[97] *Virginia v. Rives* was one of several cases decided by the Supreme Court in 1880 that dealt with disagreements between the federal government and southern states over the protection of blacks' rights in the courts. Although most of the cases resulted in increased protection of these rights, this case did not. The two defendants, both black male teenagers, petitioned to have their case removed to the federal court because there had never been any black jurors in the county for either civil or criminal cases. The state court refused to do so. Following one trial in which both were convicted, but the verdict was set aside, and separate trials where one was convicted and the other had a hung jury, U.S. District Court judge Alexander Rives took custody of the defendants with a writ of habeas corpus. Virginia went to the Supreme Court asking that it direct Rives to return the two to the state's custody. Because Virginia law did not prohibit African Americans from serving on juries, the state laws did not deny anyone of their constitutional rights. Essentially, there was no guarantee that a jury would include members of a certain race. This meant, therefore, that the lack of black jurors in any particular case did not constitute a constitutional violation. The Court's holding, written by Justice Strong, "was a huge blow to judicial fairness at the end of the Reconstruction period . . . [because it meant] that, blacks in the South would be left to the tender mercies of the white officials who ran the court system." (Paul Finkelman and Melvin I. Urofsky, "*Virginia v. Rives*," in *Landmark Decisions of the United States Supreme Court* (Washington: Congressional Quarterly Press, 2003)

a] law under which two or more free white private citizens could be punished for conspiring or going in disguise for the purpose of depriving another free white citizen[98] of the right accorded by the law of the state to all classes of persons, – as, for instance, the right to make contract, bring a suit, or give evidence, – clearly cannot be authorized by the amendment which simply prohibits slavery and involuntary servitude."[99]

Although *United States v. Harris* determined there was no constitutional grounding for Section 5519, the impact of the decision was relatively limited for several reasons. First, the direct scope of the case was limited and, thus, drew little attention. Second, Justice Woods was one of the quieter justices of the period who tended to side with the majority. Thus, his majority decision in the case, which was notably short and to the point, did not draw a great deal of immediate attention from either supporters or opponents. Finally, and perhaps most significantly, the sole dissenter in the case, Justice John Marshall Harlan, did not present an explanation for his dissent. It was not until later in the year when he was again the sole dissenter in the *Civil Rights Cases* that he vocalized his disagreement with the majority's limiting interpretation of the Reconstruction Amendments and became a hero to the African American community. The lack of attention given this case can again be explained by the lack of coverage by both the African American press and the white press. Again, there was no noticeable reaction by the increasing number of black newspapers. The white press, on the other hand, did note the case, but only in passing, as seen in a January 23, 1883, article in the *The Atlanta Constitution*. According to the article titled "5519 Reversed," the case of

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[98] Justice Woods believed that the language of Section 5519 could be applied to white citizens limiting the rights of other white citizens just as easily as it could be applied to white citizens limiting the rights of blacks. In his opinion, this went far beyond the scope of the Thirteen Amendment.
[99] *United States v. Harris*.

United States v. Harris was an important constitutional case, but the article continued on to simply summarize Justice Wood's decision with no additional comment, either positive or negative, on the significance of the case.[100]

Unlike the fairly narrow scope of *United States v. Harris*, the *Civil Rights Cases* consisted of five separate cases grouped together by the Supreme Court. The five cases hailed from Kansas, California, Missouri, New York, and Tennessee and thereby represented a good cross-section of the states in the Union. The central issue addressed by all five cases was the constitutionality of the first and second sections of the Civil Rights Act passed on March 1, 1875. More specifically, the cases addressed the power of the federal government to regulate under the Fourteenth Amendment the actions of private citizens and institutions. The cases on hand dealt directly with the rights of African American citizens to equal accommodations and privileges in inns, hotels, theatres, and on railroads. Or, depending on one's perspective, the cases addressed the rights of white business owners to determine who should or should not have full access to their facilities based on any criteria they deemed appropriate, including race.[101]

In two cases, *United States v. Stanley* and *United States v. Nichols*, indictments were filed against the defendants for "denying to persons of color the accommodations and privileges of an inn or hotel." In *United States v. Singleton*, the race of the person denied full accommodations at the Grand Opera House in New York was not disclosed. Solicitor General Phillips, however, explained on behalf of the plaintiff, the United States, that "said denial not being made for any reasons by law applicable to citizens of

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[100] "5519 Reversed," in *The Atlanta Constitution*, January 23, 1883.
[101] *Civil Rights Cases* [109 U.S. 3 (1883)]. The five component cases were: *United States v. Stanley*, *United States v. Nichols*, *States v. Singleton*, *United States v. Ryan*, and *Robinson and wife v. Memphis & Charleston Railroad Company*.

every race and color, and regardless of any previous condition of servitude." Each of these cases came before the Supreme Court because the judges involved were split upon the question of the constitutionality of the first and second sections of the Civil Rights Act of 1875.[102]

In the fourth case, *United States v. Ryan*, an indictment had been filed against Ryan for failing to permit an African American to have a seat in the formal section of Maguire's Theatre in San Francisco. The basis of this case reaching the Supreme Court was a "writ of error to the judgment of the circuit court for the district of California sustaining a demurrer to the information." In other words, the appellate court requested that the trial court provide the trial records related to the lower court's decision to dismiss the case for the plaintiff on the grounds that no legal claim had been asserted.[103]

In the final case, *Robinson and wife v. Memphis & Charleston Railroad Company*, Mr. and Mrs. Robinson took action against the Memphis & Charleston Railroad Company for denying Mrs. Robinson accommodation in the ladies' car because "she was a person of African descent." In the original case, a jury found in favor of the railroad company after the judge allowed evidence that a young white man accompanied Mrs. Robinson and she, therefore, must have been an unsavory person. According to the judge's instructions for the jury, "if this was the conductor's bona fide reason for excluding the woman from the car, they might take it into consideration on the question of the liability of the company." The Robinsons appealed the decision to the Supreme Court on a writ of error that the judge's instructions to the jury assumed an inappropriate

[102] *Civil Rights Cases*.
[103] *Civil Rights Cases*.

connection between Mrs. Robinson and the white man and, therefore, unduly influenced the jury.[104]

The Court's focus in the cases settled on the first two sections of the Civil Rights Act of 1875. Section 1 provided:

> That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude

Section 2 of the Act further provided:

> That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay the sum of $500 to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall, also, for every such offense, be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less that $500 nor more than $1000, or shall be imprisoned not less than 30 days nor more than one year: Provided, that all persons may sue for the penalty aforesaid, or to proceed under their rights at common law and by statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this provision shall not apply to criminal proceedings, either under this act or the criminal law of any state: And provided, further, that a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively.[105]

Advocates of the Civil Rights Act of 1875, which was one last effort by a Republican-dominated Congress to secure equal rights for African Americans, believed that it furthered the steps towards equality taken with the passage of the Thirteenth and

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[104] *Civil Rights Cases*.
[105] Civil Rights Act of 1875, 18 State. Part III, p.335 (Act of Mar. 1, 1875).

Fourteenth Amendments. They took the view that once the Thirteenth Amendment made slavery illegal and the Fourteenth Amendment defined citizenship in the United States that Congress had received the power to pass legislation which would prevent African Americans from losing their rights of citizenship through the discriminatory actions of others. Opponents of the legislation, on the other hand, believed that white superiority was accepted by Americans throughout the country and contended that no civil rights legislation would be able to change such attitudes. Albion Tourgée, who would later argue the case of Homer Plessy before the Supreme Court, told a friend, "The bill with all respect to its author [Sumner], is just like a blister plaster put on a dozing man. . . . If it becomes law, it will constantly be avoided. . . . It will utterly destroy the bulk of our common schools in the South. . . . It simply delays – puts back – the thorough and complete rehabilitation of the South ten or twenty years." The result, therefore, would simply be a piece of legislation that allowed Congress to impose minority held opinions on the majority.[106]

In the Court's majority decision, Justice Joseph P. Bradley, who had dissented in the *Slaughterhouse Cases*, described the majority's reasoning in great detail. He began with a discussion of the pertinent sections of the Fourteenth Amendment and ended not only with a decision in favor of the defendants, but a declaration of the unconstitutionality of Section 1 and Section 2 of the Civil Rights Act of 1875. A mere eight years after its passage, the last great piece of Reconstruction legislation meant to assist in the development of racial equality was no more.[107]

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[106] Howard, *The Shifting Wind*, 66-71; and, Elliott, *Color-Blind Justice*, 184.
[107] *Civil Rights Cases*.

Justice Bradley began his explanation of the Court's decision with a brief summary of the two sections under consideration. He contended that the first section of the law did not allow all persons to receive equal access and privileges in theatres and public conveyances but, rather, only that such access could not be based solely on a citizen's race or previous condition of servitude. The second section of the law then made it a punishable offense to prevent someone from gaining equal access solely based on his or her race. The question then became whether the recent Reconstruction Amendments gave "[C]ongress constitutional power to make such a law."[108]

In this case, the justices focused on the first section of the Fourteenth Amendment which declared 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." This section, which had been lauded by African Americans and by white supporters of equal rights at the time of the Amendment's ratification, now faced a new interpretation in the hands of the Supreme Court. In line with the majority decision in *United States v. Harris*, Bradley and the concurring justices claimed, "It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment." As such, Bradley concluded that the Fourteenth Amendment nullifies all state legislation geared at limiting equal access to inns, amusements, theatres, and railroads for African Americans solely because of their race. The Amendment also invested Congress with the power to enforce the prohibition of such state laws. In other words, Congress did have

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[108] *Civil Rights Cases*.

the constitutional power to legislate against *state* actions that infringed upon African Americans privileges and immunities as United States citizens.[109]

What the Fourteenth Amendment did not do, Bradley claimed, was grant Congress the constitutional power to legislate against *private* actions that limited blacks' privileges, immunities, and rights to equal access. Bradley referred back to the Court's decision in *United States v. Cruikshank* in which Chief Justice Morrison Waite had argued, "The fourteenth amendment prohibits a state from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another." The earlier case, which the growing African American press at the time had virtually ignored, now served as further justification for Justice Bradley's stance in the *Civil Rights Cases*.[110]

To clarify his argument further, Bradley provided examples of constitutional provisions regarding contracts and congressional powers to enforce contracts.[111] This

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[109] *Civil Rights Case*; and, *United States v. Harris*.
[110] *United States v. Cruikshank*; and, *Civil Rights Cases*.
[111] Bradley wrote, "An apt illustration of this distinction may be found in some of the provisions of the original constitution. Take the subject of contracts, for example. The constitution prohibited the states from passing any law impairing the obligation of contracts. This did not give to congress power to provide laws for the general enforcement of contracts; nor power to invest the courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in these courts. It did, however, give the power to provide remedies by which the impairment of contracts by state legislation might be counteracted and corrected; and this power was exercised. The remedy which congress actually provided was that contained in the twenty-fifth section of the judiciary act of 1789, giving to the supreme court of the United States jurisdiction by writ of error to review the final decisions of state courts whenever they should sustain the validity of a state statute or authority, alleged to be repugnant to the constitution or laws of the United States. By this means, if a state law was passed impairing the obligation of a contract, and the state tribunals sustained the validity of the law, the mischief could be corrected in this court. The legislation of congress, and the proceedings provided for under it, were corrective in their character. No attempt was made to draw into the United States courts the litigation of contracts generally, and no such attempt would have been sustained. We do not say that the remedy provided was the only one that might have been provided in that case. Probably congress had power to pass a law giving to the courts of the United States direct jurisdiction over contracts alleged to be impaired by a state law; and, under the broad provisions of the act of March 3, 1875, giving the circuit courts jurisdiction of all cases arising under the constitution and laws of the United States, it is possible that such jurisdiction now exists. But under that or any other law, it must appear, as well by allegation as proof at the trial, that the constitution had been

move likely had two motivations. First, it enabled Bradley to use an issue that had been dealt with in the Constitution from the beginning and, thus, had greater established precedent. Moreover, it gave him the opportunity to use an example that was in no way based on the emotional issue of race or the question of civil rights to demonstrate his point. He explained, "The constitution prohibited the states from passing any law impairing the obligation of contracts. . . . [which gave Congress] the power to provide remedies by which the impairment of contracts by state legislation might be counteracted and corrected." Congress exercised this power by establishing the means for cases regarding state impairment of contracts to be remedied by the Supreme Court. In order for this to occur, Bradley concluded that "Some obnoxious state law passed . . . is necessary to be assumed in order to lay the foundation of any federal remedy in the case, and for the very sufficient reason that the constitutional prohibition is against state laws impairing the obligation of contracts." There was no allowance in the Constitution for federal remedies against private entities that impede the function of contracts.[112]

Likewise, in the *Civil Rights Cases* currently before the Supreme Court, Bradley claimed that until a state law was passed requiring theatres, inns, and railroads to deny the privileges, immunities, and rights guaranteed to all citizens by the Fourteenth Amendment, Congress could not act. He allowed that Congress could, and should, pass legislation in advance to protect against such state laws, but "Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty, and property,

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violated by the action of the state legislature. Some obnoxious state law passed, or that might be passed, is necessary to be assumed in order to lay the foundation of any federal remedy in the case, and for the very sufficient reason that the constitutional prohibition is against state laws impairing the obligation of contracts" (*Civil Rights Cases*).

[112] *Civil Rights Cases*.

defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society."[113]

Finally, Justice Bradley explained that to claim it was equal to slavery to deny a person access to a theatre or equal accommodations in an inn or on the railroad was absurd and was not the intent of the Thirteenth and Fourteenth Amendments. He argued "It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business." Bradley concluded that at some point black Americans must stand and progress on their own without constantly looking to the government for assistance and protection. With that, Justice Bradley and seven concurring justices declared the first two sections of the Civil Rights Act of 1875 unconstitutional and void.[114]

The sole dissenting voice came from Justice John Marshall Harlan. Harlan, a native of Kentucky, joined the Supreme Court on December 10, 1877. Nominated by President Rutherford B. Hayes to replace Justice David Davis, who had joined the majority in *Blyew v. United States*, the *Slaughterhouse Cases*, and *United States v. Cruikshank*, Harlan served until his death on October 14, 1911. The *Civil Rights Cases* was just one instance of his tendency to go against the majority and dissent on key civil rights cases. His father was a Whig politician whose commitment to nationalism passed on to his son. During the Civil War, John Marshall Harlan had supported the Union but opposed rapid emancipation. He went so far as to condemn the Thirteenth Amendment

[113] *Civil Rights Cases*.
[114] *Civil Rights Cases*.

"as an unrepublican assault on the property rights of white slaveholders." After the war, however, his political focus began to shift away from the Whig Party toward the Republican Party. Coupled with this shift was an antislavery stance. Although he ultimately embraced the Republican support for legal equality over the Democrats' white supremacist leanings, Harlan never quite rid himself of paternalistic views of race in America. Nevertheless, for the next three decades, Harlan became the closest thing to a friend the black citizens of the United States had on the Supreme Court.[115]

His first significant dissent came in the *Civil Rights Cases*. He began his dissenting opinion with a declaration that "The opinion in these cases proceeds . . . upon grounds entirely too narrow and artificial." He argued that in the majority decision Justice Bradley went against the tradition of the court by considering only the language of the Thirteenth and Fourteenth Amendments, not the intent of their framers. Harlan contended that the intent of the amendments' authors was to adopt "in the interest of liberty, for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship." He summarized the first two sections of the Civil Rights Act of 1875 as intending to prevent racial discrimination and to punish those who committed such discrimination. In these interpretations, Harlan agreed with the Court's majority. Where Harlan disagreed with the majority was in his interpretation of what power the Thirteenth and Fourteenth Amendments grant to Congress to enforce the two sections under consideration. While

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[115] Melvin I. Urofsky, ed., "Harlan, John Marshall" in *Biographical Encyclopedia of the Supreme Court* (2006); Alan F. Westin, "John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner," *Yale Law Journal* 66 (1957), 637; and, Linda C. A. Przybyszewski, *The Republic According to John Marshall Harlan* (Chapel Hill: The University of North Carolina Press, 1999), 39-43.

Justice Bradley discussed only the language of the Fourteenth Amendment in his determination that it was meant only to deal with state actions, Harlan considered the context in which the amendment was written and ratified to determine the intent of Congress.[116]

Using a more historical interpretation of the Constitution than Bradley's textual interpretation, Harlan considered as far back as 1793 in his dissent. Harlan discussed the fugitive slave law and its consideration before the Supreme Court. The 1793 law established processes for fugitive slaves to be returned to their owners and for penalties to be prescribed against those who impeded the return of such fugitives. Speaking for the majority in *Prigg v. Com. of Pennsylvania* [41 U.S. 539 (1842)], Justice Joseph Story judged the 1793 act to be constitutional on the grounds that

> The fundamental principle, applicable to all cases of this sort, would seem to be that when the end is required the means are given, and when the duty is enjoined the ability to perform it is contemplated to exist on the part of the functionary to whom it is entrusted. . . . It would be a strange anomaly and forced construction to suppose that the national government meant to rely for the due fulfillment of its own proper duties, and the rights which it intended to secure, upon state legislation, and not upon that of the Union. A fortiori, it would be more objectionable to suppose that a power which was to be the same throughout the Union should be confided to state sovereignty which could not rightfully act beyond its own territorial limits.

Despite the claims by Pennsylvania's attorney general in the case that upholding the 1793 act would limit state sovereignty, the Supreme Court still determined that Congress, not the individual states, had the primary legislative power to protect the master's right to ownership of the slave.[117]

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[116] *Civil Rights Cases*.
[117] Keith Whittington, *Constitutional Meaning: Textual Meaning, Original Intent, and Judicial Review* (Lawrence: University of Kansas Press, 1999), 5-10; *Prigg v. Com. of Pennsylvania* [410 U.S. 539 (1842)]; and, *Civil Rights Cases*.

Harlan then discussed the Fugitive Slave Act of 1850, which, he argued, also relied upon congressional power to protect the master's rights to ownership of slaves. Unlike the previous act, however, this updated version essentially put the resources of the nation in the hands of masters who utilized commissioners, posses, and other citizens to assist them in finding their runaway slaves. Again, in *Ableman v. Booth* [62 U.S. 506 (1858)], Harlan explained that the Supreme Court upheld Congress's authority to legislate the matter.[118]

Finally, Justice Harlan discussed the critical case of *Dred Scott v. Sandford* [60 U.S. 593 (1856)] in which Dred Scott attempted to claim citizenship for himself and his family in the state of Missouri. Harlan explained that according to Chief Justice Roger B. Taney's majority decision in the case, under the language of the Declaration of Independence and the Constitution the terms "people of the United States" and "citizens" were meant to refer to a specific body of people in the country who made up and controlled the government. This specific group did not include people of African descent who had been brought to this country and sold into servitude. Therefore, Taney concluded they could "claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States," rather "they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them."[119]

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[118] *Civil Rights Cases*. In *Ableman v. Booth*, the Supreme Court held that state courts could not issue writs of habeas corpus against federal officers.
[119] *Civil Rights Cases*; and, *Dred Scott v. Sandford* [60 U.S. 593 (1856)].

It was in the context of these cases, and others like them, as well as the Civil War, that the Thirteenth Amendment gained passage, according to Harlan. Although he had once opposed the amendment, as a justice Harlan now viewed the piece in terms of both its words and its intent. In Harlan's view, there was no doubt about the meaning of the amendment or of its all-inclusive nature. He declared that the terms of the amendment "are absolute and universal [and] embrace every race which then was, or might thereafter be, within the United States." Because of the universal nature of the amendment, he concluded that the intent of Congress in its passage was to guarantee all rights and privileges for all races in the United States. He further concluded that in light of the precedent set by the fugitive slave laws of 1793 and 1850, Congress was expressly granted the power to enforce the Thirteenth Amendment. Pointing to the majority decisions in *Strauder v. West Virginia* and *United States v. Reese*, in which the court judged that Congress has the ability to protect all rights granted and guaranteed by the Constitution, he did not think the other members of the court should now reverse that stance.[120]

Unlike Justice Bradley, who appeared to focus heavily on the issue of actual slavery, Harlan viewed the Thirteenth Amendment as doing more than ending the institution of slavery. Rather, Harlan contended that the second section of the amendment addressed not only the institution of slavery but also the continuing stigma of slavery and the potential of American society to impose the degradations of slavery upon African American citizens even after they were no longer held in actual servitude. He stated

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[120] *Civil Rights Cases*.

> I do not contend that the thirteenth amendment invests congress with authority, by legislation, to regulate the entire body of the civil rights which citizens enjoy, or may enjoy, in the several states. But I do hold that since slavery, as the court has repeatedly declared, was the moving or principal cause of the adoption of that amendment, and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races.

In Harlan's viewpoint, Congress did have the constitutional authority to enact legislation that would protect African American citizens not only from state action, but also from "at least, such individuals and corporations" who acted either with the authority of or in the name of the state.[121]

Harlan then looked to cases in which the court set the precedent of considering railroads and steam carriers as public conveyances that operated with the authority of the state, if not its direct support. He noted that in *Munn v. Illinois* [94 U.S. 113 (1877)] the court ruled that because the state held the responsibility of creating and maintaining highways for public use and "that no matter who is the agent, and what is the agency, the function performed is that of the state; that although the owners may be private companies, they may be compelled to permit the public to use these works in the manner in which they can be used." He noted several additional cases, including *Township of Pine Grove v. Talcott* [86 U.S. 666 (1873)], *Town of Queensbury v. Culver* [86 U.S. 83 (1873)], and *Erie & N. E. R. Co. v. Casey* [26 Penn. St. 287], which further supported his argument that because the railroads were supported by the state for public use, owners of private railroad companies were still serving the public needs with authority granted to

[121] *Civil Rights Cases*.

them by the state and, therefore, could be subject to congressional legislation under the Thirteenth Amendment. [122]

Regarding inns, Harlan drew similar conclusions. He delineated a distinction between private boarding houses and inns, as defined in the 1875 Civil Rights Act. Again based on judicial precedent, Harlan demonstrated that innkeepers exercise a public service meant to benefit all travelers. As with private railroad company owners, the innkeeper's public responsibility makes him subject to any congressional legislation written in support of the Thirteenth Amendment.[123]

Finally, Justice Harlan addressed places of public amusement. While he understood the arguments of his opponents that owners of such establishments have no clear public responsibilities, he again disagreed with their assessment. He declared, "My answer to that argument is that places of public amusement, within the meaning of the act of 1875, are such as are established and maintained under direct license of the law. The authority to establish and maintain them comes from the public. The colored race is part of that public." Although not grounded in the same degree of judicial precedent as his other conclusions, this view of places of public amusement fell clearly in line with his overall viewpoint.[124]

Having established his opinion of the intent and purpose of the Thirteenth Amendment, Harlan proceeded to discuss the effects of the Fourteenth Amendment on congressional power. He argued that the intent of the amendment was to guarantee basic rights of national citizenship for the new freedmen and their descendants. Referencing

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[122] *Civil Rights Cases*; and, *Munn v. Illinois* [94 U.S. 113 (1877)].
[123] *Civil Rights Cases*.
[124] *Civil Rights Cases*.

the *Slaughterhouse Cases*, he noted that the Supreme Court had previously determined that the common component of all the Reconstruction Amendments was the freedom of the slaves and their protection from "the oppression of those who had formerly exercised unlimited dominion over" them. Based on the language of the first and fifth sections of the Fourteenth Amendment, he explained that in *Strauder v. West Virginia* and *Ex parte Virginia* the Court declared that the amendment secured certain rights and privileges.[125]

At question, and where he disagreed with the majority in the *Civil Rights Cases*, was when Congress could legislate enforcement of the amendment. Harlan summarized the majority opinion as resting upon the reasoning that "the general government cannot, in advance of hostile state laws or hostile state proceedings, actively interface for the protection of any of the rights, privileges, and immunities secured by the fourteenth amendment." He countered that the affirmative language of Section 1 of the amendment, which declares "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," made all African Americans who descended from slaves instant citizens of the country and of their states of residence. This affirmative statement of citizenship could be protected by congressional legislation, as well as by judicial power.[126]

The most clear right, privilege, or immunity granted by the Fourteenth Amendment, Harlan contended, was the right to be free from race discrimination that would deny a black citizen any civil right granted to white citizens of the state. He quoted the Court's majority in *U.S. v. Cruikshank* that "the equality of rights of citizens is

[125] *Civil Rights Cases*.
[126] *Civil Rights Cases*.

a principle of republicanism." Furthermore, in *Strauder v. West Virginia*, the Court referred to the Fourteenth Amendment as "one of a series of constitutional provisions having a common purpose, namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoyed."[127]

Finally, Harlan concluded that the Court itself determined in *U.S. v. Cruikshank* that the protection from discrimination on the basis of race was a newly secured constitutional right. Being a right recently granted by the federal government, Harlan did not understand how the majority of Supreme Court justices could argue that the federal government did not have legislative power to protect this right. Arguing as much was the same as abandoning the court's traditional broad interpretation of the Constitution, which Harlan was not prepared to do. He concluded that the majority's opinion was "repugnant" and that it ignored the well-known understanding that the Fourteenth Amendment was intended to protect citizens not only from state discrimination, but from private and corporate discrimination as well.[128]

Despite agreeing that the intent of the first two sections of the Civil Rights Act of 1875 was to prevent racial discrimination and punish those who carried out such discrimination, Harlan and Bradley differed in their interpretations of how the Reconstruction Amendments should be applied to law and, thus, disagreed in this precedent setting case. The differences in their interpretations came down to historical interpretation versus textual interpretation. In his detailed discussion of the evolution of the fugitive slave acts as well as his understanding of the *intent* of the Thirteenth

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[127] *Civil Rights Cases*; *United States v. Cruikshank*, and, *Strauder v. West Virginia*.
[128] *Civil Rights Cases*.

Amendment, Justice Harlan clearly demonstrated his dedication to a historical interpretation of the Constitution. He believed that honoring the intentions of the Constitution's authors was as important, if not more so, than simply reading the text. On the other hand, Justice Bradley offered a textual interpretation of the Thirteenth and Fourteenth Amendments in which he looked "to the meaning of the words of the Constitution alone, as they would be interpreted by an average contemporary American." Such conflicts of interpretation became common in future decades as the Supreme Court attempted to determine what role the federal government should have in legislating the emotional issue of racial discrimination. For now, the differences in interpretation drew a line in the sand between an increasingly vocal African American community that now viewed John Marshall Harlan as a potential hero and the white majority that favored a narrow interpretation of the Reconstruction Amendments in order to best protect their position of superiority in American society.[129]

Black America Reacts to the Majority

The public response to the *Civil Rights Cases*, compared to the cases discussed earlier, was enormous. This was particularly true in the African American press that had continued to grow throughout the 1870s and early 1880s. By August 1883, the *Cleveland Gazette* declared that there were 127 legitimate black newspapers in the country. In response to an "often asked" question of whether these newspapers had any actual

[129] Philip Bobbitt, "Constitutional Interpretation," in *The Oxford Companion to the Supreme Court*, ed. Kermit L. Hall (New York: Oxford University Press, 1992), 184.

influence and whether they benefited the African American community, the paper responded "It is a fact capable of demonstration that the public mind, in making up its judgment upon many questions, is influenced to a considerable extent by the colored press; for these papers are read not only by colored men, but also by white men. . . . The colored press will be aggressive – it will be vigilant – it will insist in season and out of season upon all the rights of the Negro being granted him." Furthermore, the newspaper noted, "Colored newspapers reflect the opinion of colored men, and, be it remembered, the colored people number more than six millions in this country – surely no insignificant part of the population. . . . [and] Colored men think more than they did a generation ago." With the printing of such statements, it is evident that the African American press had begun to recognize an increase in its own influence. There was also an increase in the understanding of the black community that they would have to fully consider the issues at hand and express their opinions to realize change. [130]

Immediately after the Supreme Court's decision in the *Civil Rights Cases* became public, the African American press reacted. On the one hand, reporters and editors expressed dismay and outrage at the majority opinion, but, on the other hand, they noted Justice Harlan's dissenting opinion as offering their community a glimmer of hope that not all white Americans agreed with the decision. In two articles in its October 20, 1883 issue, the *Cleveland Gazette* summed up the reactions of most blacks in the United States. First, the paper pointed out that "no decision of this [Supreme] Court has for a long time so pleased the [white] South as generally as this," making the editors believe that "the Court is toadying to the South in establishing the Calhoun theory of 'States Rights,' as it

[130] "Our Washington Letter," in *Cleveland Gazette*, September 1, 1883.

does by this shameful decision." Second, the paper voiced its concern that the decision would affect not only southern blacks, but blacks and other minority groups throughout the country as it would "close *hundreds* of hotels, places of amusement and other public places" not only to the African American community, but also to Jews and Catholics. Finally, the newspaper acknowledged that even these threats of additional restrictions on African Americans' rights to access public transportation and accommodations are minor if they "reflect on the unlimited power possessed by the Supreme Court, for the good or evil of our people, and the evident willingness on the part of the judges to use that power, to prejudice and jeopardize our interests in this our native land, [causing] a shudder to pervade us, and we intuitively ask, 'What next?'" Thus, the *Cleveland Gazette* addressed both the immediate and long-term consequences of the decision.[131]

Regarding the first concern raised by the *Cleveland Gazette*, that the Supreme Court was playing to the goals of southern whites, black citizens and other black newspapers recognized the potential problem as well. In a letter to the editor of the *Cleveland Gazette*, a citizen wrote, "In my opinion this decision sets forth the principles that Calhoun [and] Vallandingham . . . contended for. Surely they are not the principles that Abraham Lincoln, Garrison and Sumner contended for. They are the principles which Lee and Jackson fought for, they are not those principles that Grant and Sherman fought for." On the same day, the *Huntsville Gazette* reported that ex-Senator Blanche K. Bruce declared, "It is a most unfortunate decision. . . . and grieves me and thousands of others very much. I think its effect will be to carry the country backward fifteen years, at

[131] "Civil Rights Law: Declared Unconstitutional by the Supreme Court" and "Civil Rights," in *Cleveland Gazette*, October 20, 1883.

least. It does not reflect the people's will as a court decision ought to do, and it is, in my opinion, the revival of Calhoun's theory of State rights." As the first African American to serve a full term in the U.S. Senate, Bruce was currently serving as the first black Register of the Treasury. Based on his positions of respect and influence, many African Americans viewed Bruce as a man to listen to and to follow. Two weeks later, the *Washington Bee* echoed the sentiments expressed in many other black newspapers regarding the Court's decision. Moreover, the editors declared, "We shall follow the leadership of Hon. Blanche K. Bruce because we believe him to be one of the wisest and most judicious leaders of the colored race." In addition to Bruce, African American newspapers expressed their respect for and trust in Frederick Douglass in whom they recognized "the elements of true manhood."[132]

Evidence that the effects of the decision were expected to be felt in all regions of the country was seen in a column published on November 10, 1883, in *The Washington Bee*. The column, titled "Our Colored Exchanges," printed segments of articles from black newspapers in Ohio, Kentucky, Arkansas, West Virginia, Mississippi, and New York. Each newspaper expressed concern over the *Civil Rights Cases* decision and how both whites and blacks might respond. While some, such as the *Arkansas Herald* and New York City's *The Progressive American*, voiced hopes that white Americans would rise "above prejudices [and protect] the colored people in the enjoyment of every civil right" and that "the Republicans [would] plant themselves squarely upon their avowed

[132] "The Civil Rights Bill: An Indignant Citizen Expresses His Views on the Repeal of this Famous Bill," in *Cleveland Gazette*, October 20, 1883; "Civil Rights Decision," in *Huntsville Gazette*, October 20, 1883; and, "Once More," in *The Washington Bee*, November 10, 1883.

principles and retain the colored man's vote," others called on members of their own race to stand strong and take action.[133]

These calls for action within their own community varied from basic requests that black Americans not encourage the continuation of racial discrimination themselves, to calls for the black community to continue to support the Republican party, to more elaborate calls for mass meetings and efforts to gain passage of a constitutional amendment that would spell out blacks' civil rights once and for all. Some journalists feared that even mass protests and political organization against the Court's decision would fail if the black community did not demonstrate to whites in daily settings that they were unified in their fight for civil rights. The *Louisville Bulletin* spoke out against one such divisive group, writing, "The colored men who have barber shops exclusively for white persons stand in the way of progress. How can colored people expect to obtain their civil rights if colored persons make distinctions in their business? The caste barber-shops must go. Mr. colored-only-white-man-shaving barber go into some other kind of business."[134]

A greater concern among many journalists was that black Americans would view the decision by the Republican dominated Court as evidence that the Republican party had abandoned the cause of African Americans. This sentiment emerged in some newspapers, such as the *Cairo Pilot* which proclaimed, "It would have scarcely occasioned a ripple of excitement if a Democratic supreme bench had bridged our civil rights with a shadow – phantom – a technicality – but when our best friends, our Brutus dons the judicial garb of a Taney, with the hand of an adverse sentiment raises the dagger

[133] "Our Colored Exchanges," in *The Washington Bee*, November 10, 1883.
[134] "Our Colored Exchanges," in *The Washington Bee*, November 10, 1883.

– we say with Caesar of old and 'Thou too Brutus.'" Along the same lines, the *Afro-American* in Baltimore maintained "If the Republican continues to be the champion of Federal supremacy over citizens and over States, it must couple with its assertion of supremacy the complementary idea of the defence [sic] and regulation of the rights of citizens. If this last power is not found in the Constitution, and the Supreme Court says it is not there, then it must demand that it be placed there. If the Republican party has not the nerve to take this position, then its mission is ended." These assertions, however, represented a minority opinion in the African American press of the period.[135]

It was more common for newspapers to publish pleas for blacks to not make such rash decisions. Just weeks after the Supreme Court's decision, *The Washington Bee* declared,

> We appeal to the colored men of this country to beware. If freedom is appreciated, if liberty is desired, and a free exercise of the rights which have been guaranteed by the constitution are what we want, then work unceasingly for a republican president in 1884. . . . We shall to the end support the republican party. There is no other party to which the negro should go. Our safety is in our God and the republican party and to look to any other source will be dangerous and to the detriment of the colored men.

Furthermore, the newspaper explained that blacks should not be swept up by any promises made by Democrats at this time or turmoil, because their party had proven over time that its principles would lead to even fewer rights and less respect for African Americans. *The Cleveland Gazette* also encouraged continued black support for the Republicans. On November 3, the newspaper's front page carried an article excerpted from a lecture given by John Mercer Langston. According to Langston, who had served as inspector general of the Freedmen's Bureau and helped to establish Howard

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[135] *Cairo Pilot*, November 3, 1883; and, *The Afro-American* (Baltimore), November 3, 1883.

University's law school, "The leaders of the Republican party have taught that our Constitution is based on equality before the law. They are men who gave us the Thirteenth, Fourteenth and Fifteenth amendments of the Constitution . . . Several of these noble men have gone to their rewards; but their spirits, found in the words and sayings left us, animate us in the present effort to save and conserve our liberty, re-energizing the Republican party, and infusing into it a new purpose, thus lead it unto victory as of old in its glorious days of the past." Although this support for the Republicans was partially framed as opposition to the Democrats and was lightly tainted by an understanding that the Republican party's support for the cause of civil rights appeared to have faltered, it is clear that these newspapers wanted the black community to remain unified and on a track most likely to end in success.[136]

Despite concerns that some members of their race were contributing to their lack of civil rights and that others would be drawn away from the political party that had demonstrated repeated dedication to furthering their civil rights, the most prominent focus in black newspapers in the weeks following the Supreme Court's decision was on rallying the African American community together. Journalists encouraged their readers "to work for a constitutional amendment that will embody the good features of the Civil Rights bill and many additional ones" and to "discard the motive of the acts of the Democratic party and look at the principle." The most vigilant calls, however, were for African Americans to gather at meetings where they could discuss the significance of the

[136] "Once More," in *The Washington Bee*, November 10, 1883; and, "Civil Rights Law: An Extract from Hon. John Mercer Langston's Great Lecture," in *The Cleveland Gazette*, November 3, 1883.

Court's decision and determine how their community could work to improve their situation.[137]

One such meeting was held in Washington, D.C. just days after the decision. Among the African American leaders present at the gathering were: Frederick Douglass; Blanch Bruce; the first African American graduate of Harvard College, Richard Greener; Presbyterian pastor John F. Cook; and, Francis J. Grimké,[138] a well-known minister and activist. As a show of support, white allies including Robert G. Ingersoll, Reverend John Rankin, former congressman Samuel Shellabarger, and Howard University president William W. Patton also attended the meeting. According to press reports, nearly 2,000 people attended the meeting with another 4,000 having to leave when they found Lincoln Hall was too full to accommodate them.[139]

Presiding over the meeting, Professor James M. Gregory of Howard University opened the meeting with a statement of their goals to discuss the effects of the *Civil Rights Cases* decision and to develop a plan of response. Following his greeting and a prayer led by Reverend Grimké, Lewis Douglass read a series of eight resolutions to the crowd, all of which they unanimously adopted. First, they resolved that speaking with "words of indignation or disrespect aimed at the Supreme Court of the United States would not only be useless as a means for [their] main object – namely, the protection due to [their] manhood and citizenship, but, on the contrary, would tend to alienate [their] friends and all who have faith in the honesty and integrity of that august and learned

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[137] "Civil Rights Law: Declared Unconstitutional by the Supreme Court," in *The Cleveland Gazette*, October 20, 1883; and, "A Bait," in *The Washington Bee*, February 16, 1884.

[138] Grimké was a mulatto born to Henry Grimké and Nancy Weston, a slave. His half-sisters, Sarah and Angelina, were well-known abolitionists. His brother Archibald, also a mulatto, was consul to the Dominican Republic from 1894 to 1898.

[139] "Civil Rights Decision: An Immense Mass Meeting of the Colored Citizens and Their Friends at Lincoln Hall," in *Cleveland Gazette*, October 27, 1883.

tribunal." Second, they called on Americans who truly loved their country, regardless of their race or political ties, to support full equality of rights for both whites and blacks.[140]

In their next resolutions, the participants turned their attention specifically toward the Republican and Democratic political parties and their responsibilities to support the protection of African Americans' civil rights. In the third resolution, they brought attention to the Republican party, demanding that it back its own mandate from the 1872 Republican Convention in Philadelphia. According to its platform, the party declared "That complete liberty and exact equality in the enjoyment of all civil, political, and public rights should be established and effectually maintained throughout the Union by efficient and appropriate State and federal legislation; and that neither the law nor its administration should admit any discrimination in respect to citizens by reason of race, creed, color, or previous condition of servitude." Next, the attendees focused on the Democratic party, reminding it of its own "declaration in the National Convention of 1872, 'that we recognize the equality of all men before the law, and hold that is the duty of Government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political.'" Although there was general agreement within the African American community that if either of the two major political parties truly supported equal rights for blacks it was the Republicans, the participants of this meeting clearly wanted to draw the attention of all potential supporters to their cause.[141]

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[140] "Civil Rights Decision" in *Cleveland Gazette*, October 27, 1883.
[141] "Civil Rights Decision" in *Cleveland Gazette*, October 27, 1883.

In the next resolutions, the focus turned toward the black community. To begin with, they resolved "That it is the paramount duty of the colored voter to give his aid and support to that party or coalition of parties that will give force and meaning to the utterances, pledges and demands of the Republican and of the Democratic party in their platform [sic] in 1872 in respect of the protection of colored citizens in their manhood rights." Furthermore, they resolved that in light of the progress African American citizens had made in recent years regarding "morals, education, frugality, industry, and general usefulness," it simply made sense for the nation as a whole to work for the protection of their civil rights. Their general goal was that black Americans continue to make wise and informed decisions regarding politics and that they continue to improve themselves as individuals and as a community.[142]

In their final two resolutions, the gathered supporters called first on states to pass legislation protecting the rights granted by the Civil Rights Act of 1875 and, second, on "the co-operation of all good men and women in securing such legislation as may be necessary to complete our freedom." Most notably, however, was the final segment of their eighth resolution which called for "the immediate organization of civil rights associations throughout the country, through which proper agitation and earnest work for our cause may be inaugurated and carried out." Such a public call was a bold statement by this group as it made clear its recognition that action needed to be taken on a national level. Furthermore, the resolutions as a whole established their hope that blacks, whites,

[142] "Civil Rights Decision" in *Cleveland Gazette*, October 27, 1883.

Republicans, and Democrats would all be able to come together in support of African Americans' civil rights.[143]

Following the reading and adoption of the resolutions, the focus of the meeting turned to speeches by several of the evening's respected guests. The first speaker, introduced by Gregory as "the one leader to whom the colored people had always looked in every emergency, and who had always been found equal to every emergency," was Frederick Douglass. Following lengthy applause, Douglass read a prepared speech he had written so he would be sure to remember everything he wanted to say. He claimed that this decision by the Supreme Court was as significant as the passage of the Fugitive Slave Law, the events of Bleeding Kansas, the disintegration of the Missouri Compromise, and the fateful Dred Scott decision because it "had inflicted upon seven millions of colored people in this country, and had left them naked and defenseless against the action of malignant, vulgar and pitiless prejudice." Moreover, he decried the decision as presenting the United States to rest of the world as a country that was apparently unable and unwilling to protect the rights of all of its citizens.[144]

Other speakers following Douglass included Colonel Ingersoll, Judge Shellabarger, and Reverend Rankin. All three expressed their sympathy for their black compatriots and their support for the resolutions of the evening. Ingersoll, who spoke the longest of the three, expressed his belief that the decision was "unworthy of the Supreme Court" and his belief that "the only recourse for the colored people was in the ballot-box." He also hoped that black Americans would not hastily turn their backs on the

[143] "Civil Rights Decision" in *Cleveland Gazette*, October 27, 1883.
[144] "Civil Rights Decision" in *Cleveland Gazette*, October 27, 1883.

Republicans until the party had an opportunity to show whether it would support the Court's decision or act out against it.[145]

While the large meeting in the nation's capital understandably garnered more attention than meetings held elsewhere, it was not the only such gathering. In Columbus, Ohio, a public meeting of colored citizens took place at the Board of Trade rooms. Plans for a similar meeting in Cleveland's Halcyon Hall were announced in the *Cleveland Gazette*. The organizers' hope was "that the people will attend *en masse* and consider the best course to be pursued . . . since the Civil Rights law has been decided unconstitutional." One speaker at the meeting, Mr. J. T. Hamilton, "tried to impress upon those present the great importance of *unity* – in his own language, '*we must stick together*.'" At a meeting in Pittsburgh, Pennsylvania, a large crowd cheered speakers who asked blacks to show continued support for the Republicans and listened to those who denounced the Supreme Court's decision. In Chicago, Reverend W. A. Polk declared at a mass meeting, "This decision is an insult to our race." He continued to encourage the audience to use their votes to elect representatives who would work to protect their rights. In Keokuk, Iowa, participants of a mass meeting resolved to ask their state legislature to adopt the portions of the Civil Rights Act of 1875 found unconstitutional by the Supreme Court. And, in Memphis, black citizens decided to ask their state legislature to "repeal all its acts discriminating against colored people." These meetings and hundreds like them held throughout the country, signaled that African Americans everywhere finally recognized the significance Supreme Court decisions

[145] "Civil Rights Decision" in *Cleveland Gazette*, October 27, 1883.

could have on their lives, and the increased coverage by the African American press helped to guarantee they would remain informed.[146]

Black America Reacts to the Dissenter

Despite the harsh reactions to the Supreme Court's decision in African American newspapers, one hero did emerge – Justice John Marshall Harlan. Alongside articles damning the Court for reviving Calhoun's states rights mentality, for disappointing black Americans who had believed progress was being made, and for betraying those who had believed the Court supported the ideals of the Republican party, editors ran articles lauding Harlan for his interpretation of the Reconstruction Amendments and for his dedication to protecting the rights of black Americans. Although this was not the first time Harlan had dissented in a case significant for blacks' rights – he had done so just months earlier in *United States v. Harris* – it was the first time his dissent gained such widespread acknowledgement from the African American populace.

Harlan's dissenting opinion gained its initial attention simply because of its anticipated delivery. Although he announced his dissent on the day Justice Bradley read the majority decision, Harlan informed those present that "under ordinary circumstances and in an ordinary case he should not hesitate to set up his individual opinion in opposition to that of his eight colleagues, but in view of what he thought the people of

[146] "State Capital: Gleanings from Columbus" and "A Mass Meeting," in *Cleveland Gazette*, October 27, 1883; "Pittsburgh" and "Civil Rights: The Harmonious and Enthusiastic Mass Meeting at Halcyon Hall Last Monday Evening," in *Cleveland Gazette*, November 3, 1883; "Colored Indignation," in *The Atlanta Constitution*, October 26, 1883; "The Colored People of Iowa," in *The Atlanta Constitution*, November 2, 1883; and, "Tennessee Negroes," in *The Atlanta Constitution*, November 4, 1883.

this country wished to accomplish, what they tried to accomplish, and what they believed they had accomplished by means of [the Civil Rights Act of 1875], he must express his dissent from the opinion of the Court" and would take the time necessary "to prepare a statement of the grounds of his dissent." His desire to take extra time to develop his dissenting statement gave those waiting to hear it time to anticipate his thoughts, which could have led to further disappointment or to elation.[147]

Just on the basis of his dissent, before his detailed explanation for it was made public, African American newspapers pointed towards Harlan as a ray of hope. According to *The Cleveland Gazette*, "Judge Harlan, of the Supreme Court, a Kentuckian, will ever be held in high regard by our race. He was not party to that infamous decision." Meanwhile, *The People's Adviser* out of Jackson, Mississippi declared, "Justice Harlan, of Kentucky, alone stood the colored man's friend, and should the occasion ever present itself, we feel satisfied that the negroes of this country will show to him that we are not ungrateful." Such sentiments were echoed in black newspapers across the country.[148]

After he released his opinion, Harlan received even more respect from the African American community. Many argued that his "opinion of civil rights ought to be read intelligently by every citizen in the United States" and that his words, along with those of Colonel Ingersoll and Frederick Douglass, provided African Americans with a "vast amount of *good* matter and food for thought." Discussion also emerged about Harlan's potential strength as a candidate for the Republican presidential nomination in 1884. Reacting to sentiments repeatedly expressed in black newspapers, *The Atlanta*

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[147] "This Civil Rights Act," in *The Huntsville Gazette*, October 20, 1883.
[148] "Our Colored Exchanges," *The Washington Bee*, November 10, 1883.

Constitution noted, "A new presidential star has appeared in the political firmament. . . . Its name is Harlan, the justice of the supreme court, whose dissenting opinion in regard to the civil rights law has attracted toward him so much attention and especially influenced the colored vote so much in his favor." A general opinion held in both black and white newspapers was that, if there was a fair vote, Harlan could save the Republican Party despite initial feelings among African Americans that a Republican Supreme Court had betrayed them.[149]

From this point until the end of his judicial career, Justice John Marshall Harlan drew the attention of black Americans. While it was not always necessary for him to dissent from the majority in cases related to the Reconstruction Amendments, as was to be seen in his vote with the majority in *Ex parte Yarbrough* [110 U.S. 651 (1884)], there was a constant hope that he would present opinions supporting African Americans' rights. Just over a decade later, in the landmark case of *Plessy v. Ferguson* [163 U.S. 537 (1896)], he did not disappoint.

The Court and the Ku Klux Klan

In the months following the Supreme Court's decision in the *Civil Rights Cases* other events that drew the attention of black Americans included a conflict between white conservatives and a popularly elected integrated local government in Danville, Virginia, and the arrest of Ida B. Wells in Tennessee for violating the public transportation

[149] *The Cleveland Gazette*, December 1, 1883; and, "Harlan in Training," *The Atlanta Constitution*, October 26, 1883.

segregation law passed at the start of the decade. Each of these events represented a continuing struggle faced by African Americans. First, the Danville riot demonstrated the difficulties blacks had in attaining political equality in a society that traditionally viewed them as inferior and unsavory. Then, following her arrest. Wells challenged the Tennessee segregation law and became the first African American to file such a suit since the Supreme Court's declaration that the Civil Rights Act of 1875 was unconstitutional.

In Danville, Virginia, the roots of the conflict came from a victory for the Readjuster Party in 1882. The Readjusters were a biracial political party that gained political success in Virginia between 1879 and 1883. Their two primary goals were to break the hold of the politically privileged and wealthy on the state's government and to promote public education. In the summer of 1882, the Readjusters won a majority of seats in the Danville Common Council. With eight Readjusters, four white and four black, on the Council, they easily outvoted the council's four white Democrats. The Common Council then elected four black city councilmen and appointed a black police officer. While still completing the Common Council's traditional responsibilities, the group now focused more attention on providing better neighborhoods and schools for the town's African American population.[150]

As the statewide elections of November 1883 approached, Danville's Democrats increased their efforts to defeat the Readjusters. In October, they "published a pamphlet entitled *Coalition Rule in Danville*. . . . designed to lay before that rural white, predominantly Readjuster population [of southwestern Virginia] 'a few facts from which

[150] Jane Dailey, "Deference and Violence in the Postbellum Urban South: Manners and Massacres in Danville, Virginia," *The Journal of Southern History*, Vol. 63, No. 3 (Aug. 1997), 567-568; and, Carl N. Degler, "Black and White Together: Bi-Racial Politics in the South," *Virginia Quarterly Review*, Vol. 47, No. 3 (1971), 421-425.

you can form some idea of the injustice and humiliation to which our white people have been subjected and are daily undergoing by the domination and misrule of the Radical or negro party, now in absolute power in our town.'" The pamphlet raised issue with the presence of blacks as police officers, as weigh master of the public scales, and as magistrates to the police court. Ultimately, the Democrats' primary complaint was that the "presence [of African American men] in public and official settings served as a constant reminder of the political participation of black men and may have . . . encouraged other forms of African American assertion and outspokenness."[151]

Another issue raised in the pamphlet was that Danville's blacks were no longer giving whites the respect they deserved. Black men and women allegedly forced white ladies and gentlemen off sidewalks. As Jane Dailey explains in her article "Deference and Violence in the Postbellum Urban South: Manners and Massacres in Danville, Virginia,

> both whites and blacks in Danville [interpreted] sidewalk shoving matches as political statements. When "leading white men" in Danville later recalled witnessing altercations between the races on the sidewalks, they associated the disputes with Readjuster rule. William N. Ruffin, a real estate agent, insisted that black-white relations had not always been so highly charged and asserted that only since Danville's black population had been "under Readjuster dictation or training" had such incidents occurred. Black narratives of public altercations in Danville also linked them with politics but put the blame on white shoulders. Walter Gay, a black Danville resident, reported being shoved off the sidewalk by white Democrats.

The Democrat's pamphlet also complained that Danville's black citizens had taken it upon themselves to refer to other blacks as "ladies" and "gentlemen." As Neil McMillen

[151] Dailey, "Deference and Violence," 568-570.

discusses in *Dark Journey*, the use of such courtesy titles was an important aspect of *de facto* segregation in the South.[152]

The result of the racial tensions in Danville was a riot on November 3, 1883, in which the white men of the city regained control of the city with violence. The white men reestablished "the boundaries of black 'place' in a bloody confrontation on Main Street." The immediate cause of the riot was an exchange between a young white man, Charles Noel, and a young black man, Hense Lawson, on the sidewalk of Main Street, but the clash escalated because of the tensions between the Readjusters and the Democrats in the city. After Noel tripped on Lawson's foot, Lawson explained that he had stepped in Noel's path to get out of the way of a white lady. Noel responded in a way that angered Lawson's companion, Davis Lewellyn, who declared that Lawson did not need Noel's pardon. Noel and Lewellyn exchanged punches before the two black men left the scene. That same afternoon, Danville's Democrats had gathered to discuss the Readjusters. After fighting with Lewellyn, Noel went to the Democrats' meeting where he got two friends to go with him to confront the black men. The three white men came up behind Lawson and Lewellyn, who had been joined by a friend of their own, on the street. A fight ensued between the two groups and continued until a black police officer broke it up. Things appeared to be calming down when a black bystander attacked one of Noel's friends who pulled a gun and shot towards his attacker. At this point, a black crowd gathered and the white Democrats came out of their meeting. Ultimately, the white men opened fire on the blacks. The first victim of their volley was a young white Democrat, Walter Holland. Three black men died on the scene and

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[152] Dailey, "Deference and Violence," 572-574; and, McMillen, *Dark Journey*, 9-12, 23-28.

another died later from his wounds. After the African American fled to avoid being shot, the white men organized patrols that traversed the streets for the next two days to signal black citizens who was in control. Three days later, the Democrats declared victory for themselves at polls throughout the state.[153]

The following year the arrest of Ida B. Wells in Tennessee represented the legal struggle of African Americans just as the Danville riot represented their social and political struggle. On May 4, 1884, Wells purchased a first-class ticket on the Chesapeake and Ohio Railroad Company's train from Memphis to Woodstock, Tennessee where she had a job teaching the first grade. The train's conductor asked Wells to leave the ladies' car and to take a seat in the smoking car. She refused to give up her seat and three men had to remove her physically. Rather than take a seat in the smoking car, Wells got off the train at the next stop. She returned to Memphis, hired a lawyer, and filed suit against the railroad company for denying her the right to use the ladies' car despite having a first-class ticket. The district court found in favor of Wells and order the railroad company to pay her $500 in damages. The company appealed the decision, however, and the Tennessee Supreme Court held in 1887 that under the 1881 Tennessee law requiring the segregation of public transportation, the company had the right to require black passengers to sit in the smoking car. Despite this decision against her, Wells was invigorated by the entire experience and an article about the event for black church weekly. This article started her illustrious career as a journalist.[154]

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[153] Dailey, "Deference and Violence," 574-582.
[154] Ida B. Wells, *Crusade for Justice: The Autobiography of Ida B. Wells*, edited by Alfreda M. Duster (Chicago: University of Chicago Press, 1991), 18-24; and, David M. Tucker, "Miss Ida B. Wells and Memphis Lynching," *Phylon*, Vol. 32, No. 2 (2nd Quarter, 1971), 112-113.

Although the 1880s appeared to be a decade full of steps backwards for black Americans, there were occasional bright spots. One had been Justice Harlan's dissenting opinion in the *Civil Rights Cases*. A second one came in the year after the Supreme Court declared that Civil Rights Act of 1875 was unconstitutional and after the Supreme Court determined in *United States v. Harris* that Section 5519 did not apply to private acts of discrimination. On March 3, 1884, in the case of *Ex parte Yarbrough*, the Supreme Court justices, for all practical purposes, demanded that the right to vote for African Americans be upheld.

Ex parte Yarbrough, which revolved largely around the Fifteenth Amendment, dealt with Jasper Yarbrough and seven of his relatives who were Ku Klux Klansmen and members of the "Pop and Go Club." This group, a Democratic paramilitary organization, beat Berry Saunders, a former Georgia slave, to prevent him from casting his vote in a federal congressional election. Unlike thousands of similar incidents throughout the South, "Justice Department officials speedily managed to arrest and indict Yarbrough and then successfully prosecuted him in federal court" before sending him "to prison in upstate New York for two years of hard labor." In the petition to the Supreme Court, Yarbrough requested a *writ of habeas corpus* to challenge the constitutionality of their conviction.[155]

According to the facts of the case presented to the Court, Yarbrough and the other defendants did

> Combine, conspire, and confederate together, by force, to injure, oppress, threaten, and intimidate Berry Saunders . . . on account of his race, color, and previous condition of servitude, in the full exercise and enjoyment of the right and privilege of suffrage in the election of a lawfully qualified

[155] *Ex parte Yarbrough* [110 U.S. 651 (1884)]; and, Ross, *Justice of Shattered Dreams*, 247.

> person as a member of the Congress of the United States of America, and because the said Berry Saunders had so exercised the same, and on account of such exercise, which said right of privilege and suffrage was secured to the said Berry Saunders by the constitution and the laws of the United States, the said Berry Saunders being then and there lawfully entitled to vote in said election; and, having so then and there conspired, the said [defendants] did unlawfully, feloniously, and willfully beat, bruise, wound, and maltreat the said Berry Saunders, contrary to the form of the statute is such case made provided, and against the peace and dignity of the United States of America.

Furthermore, the defendants faced charges of conspiring to "feloniously go in disguise on the highway" in their efforts to prevent Saunders from lawfully casting his vote.[156]

Although Yarbrough and the other defendants did not deny beating Saunders to prevent him from voting in the congressional election, they questioned whether the statutes they had been charged and convicted under were constitutional. Similar to the case of *United States v. Harris*, this petition raised questions about two sections of the Revised Statutes of the United States passed for the purpose of protecting the rights granted by the Reconstruction Amendments. The petitioners argued that if the Supreme Court found Section 5508 and Section 5520 to be invalid, the court that sentenced them would have had no jurisdiction to do so, and, thus, the Supreme Court should discharge their convictions.[157]

Section 5508, which addressed conspiracies to infringe upon rights and privileges guaranteed by the Constitution, was the first statute questioned by the petitioners. According to Section 5508,

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States, or because of his so having exercised the same, or if two or more persons go in

[156] *Ex parte Yarbrough* [110 U.S. 651 (1884)].
[157] *Ex parte Yarbrough* [110 U.S. 651 (1884)].

> disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right of privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office of place of honor, profit, or trust created by the constitution or the laws of the United States.

Furthermore, Section 5520 specifically addressed the punishment of those who attempted to prevent citizens from exercising their right to vote. The statute declared,

> If two or more persons in any state or territory conspire to prevent, by force, intimidation, or threat, any citizen who is lawfully entitled to vote from giving his support or advocacy in a legal manner, towards or in favor of the election of any lawfully qualified person as an elector for president or vice-president, or as a member of the congress of the United States, or to injure any citizen in person or property on account of such support or advocacy, each such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment.

The petitioners believed that Congress did not have the authority to establish penalties for private citizens. [158]

In light of the Court's decision in *United States v. Harris*, Yarbrough and his fellow petitioners almost surely were confident that their convictions would be overturned. In a unanimous decision, however, the Court determined that the federal government had the power to punish private actions meant to impede an individual's right to vote. In the majority opinion written by Justice Samuel F. Miller, the panel of judges held that there were sufficient clauses in the Constitution, in particular in the Fifteenth Amendment, which guaranteed the right to vote for black Americans. Miller, who had previously represented the Court's majority opinion in the *Slaughterhouse Cases*, explained that the conspiracies described in the charges against Yarbrough and the

[158] Section 5508 of the Revised Statutes of the United States; and Section 5520 of the Revised Statutes of the United States.

other petitioners were exactly the type of actions meant to be "embraced within the provisions of the Revised Statutes" under consideration. He contended that if the government of the United States was to survive as an essentially republican government made up of elected legislators, "it must have the power to protect the elections on which its existence depends, from violence and corruption." He further explained that the petitioners' claim that Congress had no right to legislate this issue because it was not expressly granted such power was a fallible argument based on Article 1, Section 8, Clause 18 of the Constitution.[159]

As an example of the absurdity of the petitioners' claim, Miller turned to the issue of the United States Treasury. He presented the questions of whether, since Congress was not expressly granted the power to punish theft or burglary of the treasury, "the mails of the United States, and the money carried in them, [should be] left at the mercy of the robbers and of thieves who may handle the mail." He concluded that if this was the case, and, thus, the petitioners' claim about protection of voting rights was also true, then there must not be any need for criminal jurisdiction in the federal courts. He drew similar conclusions based on laws regarding counterfeiting, piracy, and the protection of government officers. Moreover, Miller demonstrated that during the later years of the Civil War it was necessary for Congress to pass laws protecting officers who had to enter hostile neighborhoods to enforce congressional draft requirements. Although Congress did not have express permission to pass these enforcement laws, when a man was

[159] This clause grants Congress the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution on the Government of the United States, or in any Department or Officer thereof" (*United States Constitution*, Article 1, Section 8, Clause 18); and, *Ex parte Yarbrough* [110 U.S. 651 (1884)].

convicted in Iowa of murdering an enrolling officer,[160] "It was never suggested that congress [sic] had no power to pass the law under which he was convicted." Similarly, the decision by Congress to set dates for the election of electors for president and vice-president, as well as for members of Congress, was not a power expressly granted by the Constitution. Nonetheless, states did not challenge it because it was an understood necessity to guarantee that elections were properly carried out and, in most cases, the states scheduled their own elections for the same dates to simplify the process.[161]

Miller continued with the contention that there was no question that regarding federal elections, Congress had the power to "protect the act of voting, the place where it is done, and the man who votes from personal violence or intimidation, and the election itself from corruption or fraud." Thus, although they do not have the direct power to guarantee these protections at state elections, when both state and federal ballots were considered on the same day, federal authorities could not be expected to ignore the rights of federal voters. This meant, according to Miller, that Berry Saunders did have a guaranteed right to vote at the election in Banks County, Georgia. Although Saunders was not an officer of the United States, Miller concluded that the responsibility of the government to provide safe and free elections "does not arise solely from the interest of the party concerned, but from the necessity of the government itself that its service shall be free from the adverse influence of force and fraud practiced on its agents, and that the votes by which its member of congress and its president are elected shall be the free votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice." Furthermore, Miller argued that, contrary to

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[160] *United States v. Gleason, Woolw.* [75 S.C. Id. 128].
[161] *Ex parte Yarbrough* [110 U.S. 651 (1884)].

the beliefs of some state government officials and citizens, the right to vote in federal elections was dependant on the Constitution rather than being directly dependant on state regulations. He explained that the Constitution says, "The house of representatives shall be composed of members chosen every second year by the people of the several states; and the electors in each state shall have the same qualifications requisite for electors in the most numerous branch of the state legislature." This meant not that the states determine voting qualifications for federal elections, but that the Constitution adopts the qualifications determined by the states. Although this distinction may appear miniscule at first glance, it supports the Supreme Court's overall conclusion in this case that Congress did have the authority to define the charges and punishments Yarbrough and the other defendants faced.[162]

Miller further supported this conclusion by referring to the Fifteenth Amendment, which he argued "by its limitation on the power of the states in the exercise of their right to prescribe the qualifications of voters in their own elections, and by its limitation of the power of the United States over that subject, clearly shows that the right of suffrage was considered to be of supreme importance to the national government, and was not intended to be left within the exclusive control of the states." Although the Supreme Court had previously declared in *U.S. v. Reese et el* [92 U.S. 214 (1876)] that the Fifteenth Amendment did not specifically grant the right to vote to African Americans, Miller explained that in instances where legislators in former slave-holding states had not yet deleted the words "white man" from their constitution's voting qualifications, the Amendment had, in fact, granted such a right. Thus, Congress had the power to protect

[162] *Ex parte Yarbrough* [110 U.S. 651 (1884)].

this right when it was threatened. As for the petitioners' claims that Congress did not have such power regarding private actions, Miller again disagreed. He explained that the Court's previous distinctions between public and private actions, including his own majority decision in the *Slaughterhouse Cases*, related directly to the Fourteenth Amendment, not the Fifteenth. Miller, along with many of the Court's justices, believed that the Fifteenth Amendment could safely be interpreted more broadly than the Fourteenth. The former included language "explicitly limited . . . to matters involving race and voting rights" while the latter could be used inappropriately against state regulations if interpreted too broadly. In order to ensure free and fair elections, therefore, the Fifteenth Amendment had to be applied to both public and private actions. Thus, the Supreme Court denied Yarbrough's petition for a *writ of habeas corpus*.[163]

Although this case had the potential to affect the lives of African Americans throughout the United States, particularly in the South, there was again no apparent notice of it in the nation's black newspapers. The outrage and despair seen after the *Civil Rights Cases* was not called for, but there was also no praise offered to Miller and the other justices who had unanimously upheld the conviction of a known member of the Ku Klux Klan for violating the civil rights of a black man. The vocal and largely unified voice presented by the black press just months earlier disappeared as African American journalists reverted to their silence of the 1860s and 1870s.

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[163] *Ex parte Yarbrough* [110 U.S. 651 (1884)]; and, Ross, *Justice of Shattered Dreams*, 249.

Conclusion: The Supreme Court's Influence on Jim Crow in the 1880s

Again, the Supreme Court spent a decade sending mixed messages to Americans about the status of civil rights for black citizens and the role the federal government would play in protecting these rights. In the key civil rights cases of the 1880s, the Supreme Court had first determined that Congress did not have the authority to limit private actions in its efforts to enforce the Fourteenth Amendment, second declared the Civil Rights Act of 1875 unconstitutional, and third interpreted the Fifteenth Amendment broadly enough to allow Congress to regulate private actions as well as public actions in relation to federal elections. The first two decisions suggested to Americans that the federal government would not be allowed to override the traditions of both *de facto* and *de jure* segregation in the South. And, while the third decision offered a small semblance of hope that the rights granted by the Reconstruction Amendments might be protected by the Supreme Court, its scope was so narrow as to include only federal voting rights.

In response to the mixed message from the Court, the states of the Union responded with diverse reactions through the mid-1890s. Many states responded by not making any significant changes to their segregation laws while others passed legislation to either enforce the Reconstruction Amendments within their state borders or to execute the state's rights to legislate civil rights. Among the states with no significant new segregation laws between 1885 and 1895 were Arizona, Connecticut, Delaware, Maryland, Nevada, New Hampshire, North Carolina, Rhode Island, and West Virginia.

The majority of states that passed laws offering equal access to public accommodations during this period were in the northeastern, midwestern, and western sections of the country. The earliest statutes passed in 1885 focused on inns, restaurants, theatres, public transportation, and places of public amusement. Later laws included barbershops, ice cream parlors, bathhouses, music halls, and cemeteries. Some of these laws specifically mentioned race. In Colorado, for example, an 1885 act guaranteed full access to inns, churches, barbershops, theatres, and restaurants for all people regardless of their race. In New Mexico, a similar statute established a fine of up to $100 for anyone who denied another person access to inns, public transportation, or public entertainment based on their race, color, or previous servitude. In Washington, perhaps reflecting the rising number of Asian immigrants in the western states, an 1890 statute guaranteed full access regardless of race, color, or nationality. Other states, including California, Illinois, Indiana, Michigan, Nebraska, and New York, guaranteed full access to "all persons" with no mention of race, color, or nationality. Tennessee, the one southern state to pass a law protecting access to public accommodations during this ten-year period, did give some room to owners to limit access to their establishments. First, the 1885 law provided access to theatres, parks, and other types of public amusement for all "well-behaved" persons. The determination of what constituted good behavior was left up to the business owners. Second, the statute allowed owners to provide separate accommodations within their establishments for blacks and whites.[164]

In the South, there was a greater focus on requiring separate schools for black and white children. The legislatures in Florida, Georgia, Kentucky, Mississippi, Missouri,

[164] http://www.jimcrowhistory.org/scripts/jimcrow/

and South Carolina all passed laws between 1885 and 1895 that made it illegal to teach black and white children in the same schools. At the same time, states in other parts of the country were making it illegal to segregate schools. Although the Supreme Court had not addressed issues of education in the *Civil Rights Cases*, *United States v. Harris*, and *Ex parte Yarbrough*, southerners likely viewed the establishment of segregated schools as a way to guarantee the continued separation of the races in future generations. Furthermore, because the Supreme Court had not yet ruled on the segregation of schools, it was an area where the states could still test the boundaries of Jim Crow.

Chapter Four: Railways and Schools

At the turn of the century, the Supreme Court considered two more key areas of segregation: railways and schools. The justices' decisions helped to further cement Jim Crow's place in the United States. In four critical cases, the Court further weakened the protections of African Americans' civil rights and made it increasingly clear that the federal government would yield to the states on most issues related to racial segregation. Although Justice John Marshall Harlan again emerged as a potential hero for black Americans, there was little else coming out of the Supreme Court for them to applaud.

Although these two areas, transportation and education, directly affected different groups of African Americans, they were important to the black community as a whole. On the one hand, segregated transportation had a greater affect on black adults. On the other hand, the issue of education inherently affected African American children. Both dealt with rights necessary to become full and equal citizens of the United States. Without the right to travel freely and without the right to obtain an education, African Americans believed that they would continue to be at a disadvantage for generations to come. This meant that the Supreme Court's decisions regarding railways and schools had the potential to significantly influence their lives and should have drawn the attention of black Americans throughout the United States.

In the preceding decades, the African American press had been only sporadic in its responses to the Supreme Court. Following the *Civil Rights Cases* in 1883, black newspapers called for unity and for action in the black community. Specifically, they asked black Americans to stand strong in their efforts to maintain civil rights guaranteed them by the Reconstruction Amendments and to show continued support for the Republican Party at the polls. Following the *Slaughterhouse Cases*, *U.S. v. Cruikshank*, and *Ex parte Virginia*, however, the black press was virtually silent expressing neither opposition nor support. Now, as the nineteenth century ended and the twentieth century began, the African American press once again had the opportunity to educate the black community about the Supreme Court's influence on legislation and to help African Americans realize the importance of working for new laws to protect further their civil rights.

African American Issues in the 1880s and 1890s

In the decade between *Ex parte Yarbrough* (1884) and *Plessy v. Ferguson* [163 U.S. 537 (1896)], African Americans continued to face significant violence. From 1885 to 1895, more than eleven hundred blacks were lynched. In addition, there were race riots in Carrollton, Mississippi, and in New Orleans. The Carrollton massacre on March 17, 1886, resulted in the deaths of twenty-three blacks. The massacre occurred when sixty white men stormed into a courtroom where two black men, Ed and Charley Brown, were testifying against a white man accused of attempted murder. The courtroom was

full of black spectators when the white mob rushed in firing their guns. Twenty African Americans died on the scene and three died later from their injuries. Despite the fact that the attack took place in a courtroom in front of the judge and several police officers, no one ever faced charges for the murders. Nine years later, white attackers killed six black workers in New Orleans on March 11 and March 12, 1895. The fifty whites were strikers and their supporters who were angered by blacks who reported for work at a New Orleans levee. The whites fired into the group of black workers killing six and injuring at least twenty more. This continued violence served as a constant reminder to African Americans that many whites still viewed them as unequal and inferior.[165]

Southern blacks also began officially to lose their right to vote when Mississippi's constitutional convention approved the Mississippi Plan on November 1, 1890. Under the plan, potential voters had to pass literacy and "understanding" tests. Although such tests inevitably deprived some poor, illiterate whites of the vote, the primary goal was to keep potential black voters away from the polls. To pass the test, prospective voters had to be able to read and interpret the Constitution. The constitutional delegates designed the plan to address two key concerns while accomplishing the goal of preventing blacks from voting. First, there was the question of "How was a suffrage clause to be framed which would effectively disfranchise the majority of Negroes and, at the same time, not violate the Fifteenth Amendment or disqualify large numbers of whites from voting?" The second issue was that "there was a possibility of having the state's representation in Congress reduced under the operation of the Fourteenth Amendment if the state's electorate was decreased." To limit the number of whites who would lose their right to

[165] "Negroes Shot Down by a Mob, The Negroes Were on Their Way to Work on the Levees – Mob of White Opened Fire Without Warning," *The Hartford Courant*, March 13, 1895.

vote under these tests, white pollsters would administer the test and determine who qualified under the "understanding" qualification. The convention delegates believed that their plan would be their best option for addressing these issues and following its general success other states followed suit.[166]

The same year Mississippi delegates developed their plan to prevent blacks from voting, African Americans in Chicago founded the National Afro-American League. T. Thomas Fortune, editor of the *New York Age*, led the militant group that originated from plans he first developed in 1887. Fortune wanted the League to address six key grievances. First, he wanted to do something about southern attempts to limit black Americans' voting rights. Fortune believed such efforts were directed at stopping blacks from participating in politics in the states where they had the greatest numbers and, thus, the greatest possibility of making a difference. Second, Fortune hoped to stop the lynchings taking place throughout the South. He found this issue particularly important because lynch mobs were so prevalent in areas where law and judicial officers participated in such extralegal activities. Third, he wanted to establish a better funding balance for black and white schools. Fourth, Fortune wanted the League to advocate the reorganization of the South's penitentiary system. He believed the system was "odious and demoralizing . . . with its chain gangs, convict leases, and indiscriminate mixing of males and females." Fifth, he wanted the organization to challenge the practices of segregating passengers on the railways and of allowing "white passengers to subject [black travelers] to indignities." Finally, Fortune targeted the practice of segregating

[166] Statutes similar to the Mississippi Plan were passed in South Carolina (1895), Louisiana (1898), North Carolina (1900), Virginia (1901), Alabama (1901), Georgia (1908), and Oklahoma (1910). Woodward, *The Strange Career of Jim Crow*, 152; and, William Alexander Mabry, "Disfranchisement of the Negro in Mississippi," *The Journal of Southern History*, Vol. 4, No. 3 (Aug. 1938), 324-326.

hotels and theatres. Although some of the issues Fortune identified occurred in the North, most of them transpired primarily in the South.[167]

One hundred forty-one delegates gathered in Chicago in January 1890 to form the League Fortune had dreamed about. Most of the delegates came from northern states, but Georgia, North Carolina, South Carolina, Tennessee, Texas, and Virginia also had representation. Unlike the later National Association for the Advancement of Colored People, the National Afro-American League had only black participants. In her brief history of the League, Emma Lou Thornbrough notes that even though a few white men sent "messages of good will . . . such expressions were viewed with suspicion by some of the delegates, who were convinced that white men interested themselves in the affairs of [African Americans] only to dominate them." The constitution adopted by the delegates reflected the six issues Fortune had raised earlier. The first president and vice-president hailed from North Carolina and Georgia respectively. By the second convention in Knoxville in 1891, it had become evident that the League was not attracting the amount of support for which Fortune had hoped. The group continued to decline and became essentially extinct by 1893.[168]

Fortune revived the League in 1898 under the name National Afro-American Council. Again, however, the organization failed to gain significant support. Under the leadership of Fortune and Alexander Walters, and the behind-the-scenes presence of Booker T. Washington, the Council tried to reach out to the public and convince African

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[167] New York *Freeman*, June 4, 1887; Emma Lou Thornbrough, "The National Afro-American League, 1887-1908," *The Journal of Southern History*, Vol. 27, No. 4 (Nov. 1961), 495-496; and, August Meier, *Negro Thought in America, 1880-1915: Radical Ideologies in the Age of Booker T. Washington* (Ann Arbor: University of Michigan Press, 1991), 70-71, 128.

[168] Thornbrough, "The National Afro-American League," 496-501; and, Meier, *Negro Thought in America*, 130.

Americans to take action. Nevertheless, Washington's reputation as a conservative who took a conciliatory approach to race relations drew the indignation of many blacks.[169] This meant that the Council was sometimes viewed as an extension of debates over whether Washington should be a leader for the race and the Council's activities often went unnoticed.[170]

Railways and "Separate but Equal" Accommodations

One of the most discussed cases in the Supreme Court's history is *Plessy v. Ferguson* [163 U.S. 537 (1896)] in which the majority decision established the standard of "separate but equal" that was eventually applied to all forms of public transportation, as well as to public accommodations, entertainment, and education in large sections of the country. Six years prior to hearing the Plessy case, however, the Supreme Court heard a legal action dealing with the impact of railway segregation on interstate commerce. In *Louisville, New Orleans & Texas Railway Co. v. Mississippi* [133 U.S. 587 (1890)] the justices heard arguments based on the railroad's challenge to a Mississippi law it said placed an undue burden on the company and, thus, would have a significant impact on interstate commerce.

The case originated with the indictment of the Louisville, New Orleans & Texas Railway Company for violating a Mississippi state law requiring separate

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[169] In 1895, Washington had delivered his "Atlanta Compromise" speech at the Atlanta Cotton States and International Exposition. In the speech, he advocated the policies of gradualism and accommodationism as the means for solving the "Negro problem" in the South.
[170] Thornbrough, "The National Afro-American League," 501-503.

accommodations for black and white passengers. According to the first section of the law, passed on March 2, 1888, "all railroads carrying passengers in [Mississippi], other than street railroads, shall provide equal, but separate, accommodation for the white and colored races, by providing two or more passenger-cars for each passenger train, or by dividing the passenger-cars by a partition so as to secure separate accommodations." The second section of the law gave conductors the right and the responsibility to assign passengers to the appropriate car or compartment to guarantee proper separation of the races. It also gave the conductor the authority to remove passengers who refused to ride in their assigned areas. In such instances, "neither [the conductor] nor the railroad company shall be liable for any damages in and court fees in" Mississippi. Finally, and most important in the case presented to the Supreme Court, Section 3 of the statute declared "That all railroad companies that shall refuse or neglect, within sixty days after the approval of this act, to comply with the requirements of section one of this act, shall be deemed guilty of a misdemeanor, and shall, upon conviction in a court of competent jurisdiction, be fined not more than five hundred dollars; and any conductor that shall neglect to, or refuse to, carry out the provisions of this act, shall, upon conviction, be fined not less than twenty-five, nor more than fifty, dollars for each offense." After refusing to provide the required separate accommodations, the railroad company faced charges in the Mississippi courts.[171]

Once convicted and fined, the railroad appealed its case to the Supreme Court on the grounds that the Mississippi law, in effect, regulated interstate commerce, which was a role granted only to Congress by the Constitution. In an 1878 case, *Hall v. DeCuir* [96

[171] Mississippi Acts, March 2, 1888; and, *Louisville, New Orleans & Texas Railway Co. v. Mississippi* [133 U.S. 587 (1890)].

U.S. 485 (1878)], the Court considered a similar law and determined that it was unconstitutional. In the earlier case, the law brought into question was a Louisiana statute requiring that the races have separate sleeping quarters on steamships. Both races, however, would enjoy full access to all other parts of the ship. The Court determined unanimously that "this law imposed a burden on interstate commerce and was an unconstitutional violation of congressional jurisdiction." Based on this precedent, the Louisville, New Orleans & Texas Railway Company undoubtedly felt confident about their challenge to the Mississippi statute.[172]

In the twelve years since *Hall v. DeCuir*, however, the makeup of the Court had started to change and, most importantly, the Court had started to define the role of the federal government in increasingly narrow terms. The justices were regularly reevaluating the Reconstruction Amendments and supporting statutes, as seen in the *Slaughterhouse Cases*, *U.S. v. Harris*, and the *Civil Rights Cases*. It was in light of this new shift of interpretation that Justice David J. Brewer presented the majority opinion of the Court.

Just two months after taking his Supreme Court oath, Justice Brewer concluded that the Mississippi law did not interfere with interstate commerce because it applied only to trains traveling inside the state of Mississippi. He contended that in order to comply with the law, a railroad company would simply have to add a couple of passenger cars to their trains before entering the state. And, despite the railroad company's claims to the contrary, he did not believe this was an undue burden. Furthermore, he explains that *Hall*

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[172] *Hall v. DeCuir* [96 U.S. 485 (1878)]; Paul Finkelman and Melvin I. Urofsky, "Hall v. DeCuir" and "Louisville, New Orleans & Texas Railway Co. v. Mississippi" in *Landmark Decisions of the United States Supreme Court* (Washington: CQ Press, 2003).

v. DeCuir was not relevant for considering the present case because it "was a civil action to recover damages from the owner of a steam-boat for refusing to the plaintiff, a person of color, accommodations in the cabin specifically set apart for white persons; and the validity of a statute of the state of Louisiana prohibiting discrimination on account of color . . . was a question for consideration." In contrast, the case now before the Court was limited to the question of "the power of the state to compel railroad companies to provide, within the state, separate accommodations, for the two races." Because this case was not a civil action dealing with personal injury, Brewer determined it also had no relevance to civil rights and the Reconstruction Amendments.[173]

Brewer was a native of Connecticut and a graduate of both Yale University and Albany Law School. Although his father was a reverend known for opposing slavery, he himself had a reputation for defending the interests of businesses and railroads in the Kansas territory. His opinion in this case was the first evidence of two major trends in his time on the Court. First, he believed that the Tenth Amendment guaranteed states freedom from federal interference. Second, he "believed strongly that the court should limit government interference in the economy and permit the marketplace to distribute the inevitable rewards produced by capitalism." These beliefs undoubtedly shaped his first opinion, which was supported by six of his new colleagues.[174]

Once again, Justice John Marshall Harlan presented the dissenting opinion. Joined by Justice Joseph P. Bradley, who had written the majority opinion in the *Civil*

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[173] *Louisville, New Orleans & Texas Railway Co. v. Mississippi*.
[174] Melvin I. Urofsky, ed., "Brewer, David Josiah" in *Biographical Encyclopedia of the Supreme Court* (Washington: CQ Press, 2006). The concurring justices in *Hall v. DeCuir* were Melvin Weston Fuller, Samuel Freeman Miller, Stephen Johnson Field, Horace Gray, Samuel Blatchford, and Lucius Quintus Cincinnatus Lamar.

Rights Cases, Harlan argued that the expectation that railroad companies would attach additional cars to their trains on the Mississippi border was a clear burden on interstate commerce. He explained that in his opinion the observations made by the Court in *Hall v. DeCuir* that

> No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy that same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business; and, to secure it, congress, which is untrammeled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be

should not be ignored by the justices in the current case before them. As with Brewer's majority opinion, Harlan addressed the case at hand without any consideration for the civil rights guaranteed by the Fourteenth Amendment. Nevertheless, he and Justice Bradley determined that the Mississippi statute should be voided because of its attempt to regulate interstate commerce.[175]

As with most other cases heard by the Supreme Court in the previous two decades that had the potential to affect the African American community, this case received little notice from the black press. For example, both the *Washington Bee* and the *Huntsville Gazette* made no mention of the case. The *Washington Bee* was much more focused on the upcoming celebrations of the twenty-eighth anniversary of Emancipation Day on April 16. Other papers, including the *Cleveland Gazette*, the *Indianapolis Freeman*, and the *Detroit Plaindealer*, briefly mentioned the case in their March 7 and March 8 editions, but did not follow up on it in later editions. The *Cleveland Gazette* stated, "This decision deserves to stand with the Supreme Court's civil rights edict and is a recognition

[175] *Hall v. DeCuir*; and, *Louisville, New Orleans & Texas Railway Co. v. Mississippi*.

of the States' rights doctrine which many supposed to have been wounded unto death, if not killed, in the rebellion. So it goes." Rather than echoing the outrage and the calls for action and unity seen after the *Civil Rights Cases* holding, this statement sounds more like a declaration of concession. The *Indianapolis Freeman* failed to offer even a similar weak commentary on the decision in its brief summary of the majority opinion. It also failed to make mention of Harlan's dissenting opinion. In contrast, the *Detroit Plaindealer* stood out in its commentary on the case, or rather on the trend of Republican judges making anti-civil rights decisions. Declaring, "just so sure as the world moves a [political] party will arise whose fundamental principle shall be equal justice without qualifications. The Afro American will be found in that party. It will come for the public conscience is awakening and the Afro American is helping to sound the alarm," the paper briefly reflected the energy of the post-*Civil Rights Cases* period. With no additional mention of the case in later editions, however, this paper also fell short of showing the African American community what was at stake.[176]

Although the African American press expressed minimal interest in the case of *Louisville, New Orleans & Texas Railway Co. v. Mississippi*, it soon became evident that southern white legislators had taken notice. Seven states passed laws similar to the Mississippi statute in 1890 and 1891. All seven states were in the South, demonstrating that white southerners had taken the signal from the Supreme Court that, when phrased properly, the segregation of public transportation by individual states was acceptable. In 1890, Kentucky and Louisiana led the way with laws requiring railway companies to provide separate accommodations for their white and black patrons. Both laws allowed

[176] *Detroit Plaindealer*, March 7, 1890; *Cleveland Gazette*, March 8, 1890; and, *Indianapolis Freeman*, March 8, 1890.

for fines of $100 to $500 for companies that did not comply and a $25 fine or 20-day imprisonment for passengers and conductors who failed to respect the law. The following year Alabama, Arkansas, Georgia, Tennessee, and Texas added their own segregation laws to the mix. In Alabama, railroad companies had to have either a minimum of two passenger cars on each train or adequately partition the passenger area. Additionally, conductors received the power to assign passengers to certain cars. As a nod to the issue of interstate commerce, however, Alabama legislators exempted passengers who rode into the state from areas with no similar law. Arkansas's law placed the burden on railroad employees who had to assign all passengers to the proper car and waiting room. Then, two years later Arkansas began requiring the use of separate waiting rooms. Georgia required separate cars for black and white passengers, but the restrictions did not apply to sleeping cars. Finally, Tennessee's law mirrored those of Kentucky and Louisiana in its simplicity. According to Kenneth Mack, "Unlike the 1880s legislation [under which Ida B. Wells had been removed from the train in 1884], the new statute was drafted in clear terms that required almost complete separation of passengers by race, and the new statute contained no language asserting that it protected the rights of black passengers." Also, the new Tennessee law specifically gave conductors the power to remove passengers from the train for riding a car designated for the other race and "prohibited such passengers from challenging the conductor's decision in any Tennessee court." Texas established requirements for separate passenger cars and sleeping cars.

Although each state varied somewhat in its criteria, the overall goal of keeping the races apart prevailed.[177]

This new trend of segregation laws faced challenges almost immediately. The most well known challenge resulted in the landmark case of *Plessy v. Ferguson* when Homer Adolph Plessy challenged Louisiana's 1890 law. The case developed from Plessy's arrest and conviction for violating the state's separate caw law on June 7, 1892. Plessy, who was one-eighth black, refused to move to the car designated for black passengers when ordered to do so by the train's conductor. The origins of the case demonstrate an awareness of the significance of these new laws that had not been shown by the black press after the *Louisville, New Orleans & Texas Railway Co. v. Mississippi* decision. A group of African Americans and Creoles in New Orleans formed the Citizens' Committee to Test the Constitutionality of the Separate Car Law. When Homer Plessy boarded the train and sat in the white car, he did so hoping to be arrested so that the group could have the opportunity to challenge the law, and Jim Crowism in general, in front of the Supreme Court.[178]

The Citizens' Committee, organized in September 1891, included Republicans, writers, ex-Union soldiers, a jeweler, and a former Louisiana lieutenant governor in its ranks. They prepared for their test case by raising money both locally and from other cities throughout the nation. They also held rallies to gain support and printed their opinions in *Crusader*, a Republican newspaper run by attorney Louis Martinet. The

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[177] Kenneth W. Mack, "Law, Society, Identity, and the Making of the Jim Crow South: Travel and Segregation on Tennessee Railroads, 1875-1905," *Law & Social Inquiry*, Vol. 24, No.2 (Spring 1999), 399-400; Patricia A. Schechter, *Ida B. Wells-Barnett and American Reform, 1880-1930* (Chapel Hill: University of North Carolina Press, 2001), 43-44; and, Tenn. Acts 1891, chap. 52.

[178] Miller, *The Petitioners*, 165-166; Mark Elliott, "Race, Color Blindness, and the Democratic Public: Albion W. Tourgée's Radical Principles in *Plessy v. Ferguson*," *The Journal of Southern History*, Vol. 67, No. 2 (May 2001), 289-290;

Citizens' Committee declared in one pamphlet that challenging the separate car law before the Supreme Court was the only option left before them and that they "must have recourse to it or sink into a state of hopeless inferiority." It was with this fear of losing all hopes of equality that the Citizens' Committee chose Homer Plessy to ride in the whites-only car on June 7, 1892.[179]

Plessy was a man who did not clearly fit into the distinct definitions of black and white in New Orleans. Unlike many members of the city's African American community, he was not born into a slave family. Rather his father was a freeman who had been allowed access to wages, property, and education. Plessy's ancestors had been "property-owning blacksmiths, carpenters, and shoemakers" and his "genealogy was not found in dusty, plantation, breeding books, but in the city-records room." The thirty-year-old shoemaker further stood out from the other Citizens' Committee members, many of whom were older and had more political experience than Plessy, as a strong candidate for the test case because of his skin choice. The Committee members agreed his skin was fair enough to make it possible for him to board the white section of the train, but dark enough to be arrested once he was discovered. As other members prepared legal strategies, finances for his defense, and forums for publicity, Plessy's task was simple. He needed to board the East Louisiana Railroad's local train, which was not scheduled to leave the state and, thus, was directly affected by the state's 1890 separate car law, and get arrested.[180]

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[179] Keith Weldon Medley, *We as Freemen: Plessy v. Ferguson* (Gretna, Louisiana: Pelican Publishing Company, 2003), 13-16.

[180] Medley, *We As Freemen*, 16-17; Elliott, "Race, Color Blindness, and the Law," 308; Howard, *The Shifting Wind*, 144; Sidney Kaplan, "Albion W. Tourgée: Attorney for the Segregated," *The Journal of*

With his successful completion of that task, the plan developed by the Citizens' Committee to challenge the separate car law, and segregation laws in general, before the United States Supreme Court was set into motion. Following his arrest, Plessy stood before Judge John H. Ferguson in the Criminal District for New Orleans Parish for his arraignment. Over the next several months, the case was fought out in the state courts until 1893 when Plessy finally requested that the Supreme Court review his case. Although the Citizens' Committee included lawyers Louis Martinet and James C. Walker, who had represented Plessy at the local and state levels, the case was going to be handled at the national level by Albion Tourgée.[181]

Tourgée was a former Union soldier and native of Ohio who had served as a judge in North Carolina during Reconstruction and had since become a well-known advocate for black rights and equality. At various times, he edited two radical newspapers in North Carolina, the Denver *Evening Times*, and a weekly literary magazine titled *Our Continent* in Mayville, New York. More notably, he wrote three books, *Toinette: A Tale of the South*, *A Fool's Errand*, and *Bricks Without Straw*, which all dealt with race relations. The first of these, *Toinette* addressed the difficult subjects of race prejudice and caste prejudice with "much subtle persuasiveness and candor." Five years later, in 1879, Tourgée wrote *A Fool's Errand* about how little Reconstruction had done for racial justice. The story centered on the character Comfort Servosse who had fought for the Union in the Civil War and then moved his family to the South. Once settled in the South, Servosse became known as a radical Yankee who openly opposed

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Negro History, Vol. 49, No. 2 (Apr. 1964), 128-129; and, Bernard R. Boxill, "Washington, DuBois, and 'Plessy V. Ferguson,'" *Law and Philosophy*, Vol. 16, No. 3 (May 1997), 299-300.

[181] Howard, *The Shifting Wind*, 144; Elliott, "Race, Color Blindness, and the Law," 287-291; Medley, *We As Freemen*, 16-17; and, Kaplan, "Attorney for the Segregated," 131-132.

the Ku Klux Klan and supported equality for the former slaves in the community. Largely autobiographical, *A Fool's Errand* quickly became a bestseller. The following year Tourgée completed *Bricks Without Straw*, which became another popular novel based in Reconstruction and dealing with prejudice.[182]

Before the presentation of the case before the Supreme Court began, Tourgée demonstrated his understanding of the potential significance of Plessy's case. He declared in a letter to Louis Martinet dated October 31, 1893, that "it was of the utmost consequence that we should not have a decision against us." Also, although he could have asked the Supreme Court to move the case forward on its overcrowded docket to hear it in 1893, he chose to wait with the hope that some of the judges he believed would vote against them would leave and be replaced by judges more like Justice Harlan in their opinions on race issues. He recognized that if the Supreme Court decided against Homer Plessy segregationists would view the decision as giving legitimacy to their cause. Furthermore, he acknowledged, "it is a matter of boast with the Court that it has never reversed itself on a constitutional issue."[183]

By 1896, when the Supreme Court finally heard the case, there were two new justices, Edward D. White and Rufus W. Peckham. Peckham was a dedicated Democrat who would be known as an ultraconservative throughout his tenure as a justice, but had little in his background to indicate whether he would be for or against Plessy. White,

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[182] Howard, *The Shifting Wind*, 144; *The Nation: A Weekly Journal Devoted to Politics, Literature, Science, and Art*, Volume XXIX (New York: E.L. Godkin & Co., 1879), 278; Medley, *We As Freemen*, 59; Kaplan, "Attorney for the Segregated," 131-132; and, Elliott, "Race, Color Blindness, and the Law," 295-300, 309-310.

[183] Medley, *We As Freemen*, 180-81; Letter from Albion Tourgée to Louis Martinet, October 1893 (Chautauqua County Historical Society, Westfield, New York); Howard, *The Shifting Wind*, 144; Elliott, "Race, Color Blindness, and the Law," 306; and, Charles Lofgren, *The Plessy Case: A Legal Historical Interpretation* (New York: Oxford University Press, 1987), 149.

however, was a native of Louisiana who had fought for the Confederacy during the Civil War. Prior to his 1894 Supreme Court nomination, he served as a Democratic Louisiana state senator, as an associate justice on the Louisiana Supreme Court, and as a U.S. senator for one term. He was also rumored to have been a one-time member of the Ku Klux Klan, although there is no surviving evidence to support this claim. While this background undoubtedly influenced his opinion in cases such as *Plessy v. Ferguson*, little of his personal papers survived, so there are no clear records of his opinions on race issues. What mattered to Albion Tourgée and his client was that the changes to the Supreme Court that had occurred by 1896 did not sufficiently change the makeup of the Court enough to guarantee victory as they had hoped.[184]

To the Louisiana Supreme Court, Plessy petitioned for a writ of prohibition and a writ of certiorari against the Louisiana judge, John H. Ferguson, who had upheld his arrest and conviction. In essence, he wanted the court to order Ferguson to supply records of the case and then to prevent Ferguson from overstepping his jurisdiction by upholding an unconstitutional law. Plessy based his petition on the fact that he had been forced to move to a passenger car designated for non-whites "for no other reason than that [he] was of the colored race." Plessy then contended that his arrest should be vacated because the Louisiana separate car law under which he was charged was unconstitutional. The state court determined that the writ of prohibition was not needed and that the law in question was constitutional. It was with this determination that the

[184] Robert B. Highsaw, *Edward Douglass White: Defender of the Conservative Faith* (Baton Rouge: Louisiana State University Press, 1981); and, Paul Kens, *Lochner v. New York: Economic Regulation on Trial* (Lawrence: University of Kansas Press, 1998).

case moved on to the United States Supreme Court where seven justices decided against Plessy and Justice Harlan again stood alone in dissent.[185]

In the Court's majority opinion, Justice Henry Billings Brown, who had replaced Samuel F. Miller in January 1891, focused first on the constitutionality of Louisiana's 1890 law establishing the requirement of separate passenger cars on trains traveling within the state (Louisiana Acts 1890, No. 111). Section One of the statute was nearly identical to the law that the Court considered in *Louisville, New Orleans & Texas Railway Co. v. Mississippi*. The section required "that all railway companies carrying passengers in their coaches in this state, shall provide equal but separate accommodations for the white and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations. . . . No person or persons shall be permitted to occupy seats in coaches, other than the ones assigned them, on account of the race they belong to." The second section established the power of the railroad's officers and conductors to enforce this regulation and established penalties for its violation. Finally, the third section established penalties for officers of the company who failed to enforce the regulations. Overall, the language of the law was very similar to that seen in the *Louisville* case just a few years earlier.[186]

Justice Brown noted that Plessy's petition challenged the law's constitutionality in two areas. First, Plessy argued that the law violated the Thirteenth Amendment that abolished slavery. Second, he claimed that it violated the Fourteenth Amendment's

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[185] *Plessy v. Ferguson* [163 U.S. 537 (1896)]; and, Elliott, "Race. Color Blindness, and the Law," 312-313.
[186] *Plessy v. Ferguson* [163 U.S. 537 (1896)]; Louisiana Acts 1890, No. 111; Medley, *We as Freemen*, 196-197; and, David W. Bishop, "*Plessy v. Ferguson*: A Reinterpretation," *The Journal of Negro History*, Vol. 62, No. 2 (Apr. 1977), 127-18.

prohibition of state laws that restricted the civil rights of American citizens. Brown quickly dismissed the claim regarding the Thirteenth Amendment declaring "A statute which implies merely a legal distinction between the white and colored races – a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color – has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude" as prohibited by the amendment. In reaching this conclusion, Brown referred to the opinions presented in both the *Civil Rights Cases* and the *Slaughterhouse Cases*.[187]

Brown's dismissal of Plessy's challenge to the law in light of the Fourteenth Amendment took longer to develop and made up most of his opinion. Again, he looked to earlier cases, including the *Slaughterhouse Cases*, *Strauder v. West Virginia*, *Virginia v. Rives* [100 U.S. 313 (1879)], *Neal v. Delaware* [103 U.S. 370 (1880)], *Hall v. DeCuir*, the *Civil Rights Cases*, and *Louisville, New Orleans & Texas Railway Co. v. Mississippi*, for support. He explained that with the earliest of these, the *Slaughterhouse Cases*, the Court showed that "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either." Brown argued, therefore, that a law that required the separation of the races in certain settings did not consequentially imply that one race was superior to the other. He pointed to the establishment of separate schools for the races throughout

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[187] *Plessy v. Ferguson* [163 U.S. 537 (1896)]; Medley, *We as Freemen*, 202; and, David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888-1986* (Chicago: University of Chicago Press, 1990), 83.

the country as evidence of this. He also noted that laws prohibiting miscegenation were common and generally accepted. In his viewpoint, laws related to schools and marriage, as well as those related to accommodations and amusement, related to issues of social equality, not political.[188]

Brown drew the closest parallel between Plessy's case and the *Louisville* case from 1890. In the earlier case, Justice Brewer had determined that the law in question did not affect interstate commerce and, therefore, the state legislature had the power to require railroads within the state's boundaries to provide separate cars. In the case at hand, Brown explained, "A like course of reasoning applies to the case under consideration, since the supreme court of Louisiana . . . held that the statute in question did not apply to interstate passengers, but was confined in its application to passengers traveling exclusively within the borders of the state." Because Homer Plessy boarded a train that never left the state of Louisiana, there was no issue of interstate commerce involved in the case. Brown noted that similar laws had been upheld as constitutional by courts in Pennsylvania, Michigan, Illinois, Tennessee, and New York, among others.[189]

Brown pointed out that Plessy claimed, "that, in a mixed community, the reputation of belonging to the dominant race, in this instance the white race, is 'property,' in the same sense that a right of action or of inheritance is property." Brown explained, however, than even if the justices were to agree with this claim, it would have no bearing on the case being considered. He argued that if Plessy were indeed a white man who had been assigned to a car for blacks he would have grounds to seek damages for his loss of social "property." Because Plessy was a black man who had been assigned to a car for

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[188] *Plessy v. Ferguson* [163 U.S. 537 (1896)]; and, Currie, *The Constitution in the Supreme Court*, 40.
[189] *Plessy v. Ferguson* [163 U.S. 537 (1896)].

black passengers, however, he had not lost any such "property." In summary, Plessy could not seek damages for the loss of a reputation he would have never had based on his race.[190]

Furthermore, Brown expressed his disagreement with Tourgée's claims in the petition that allowing states to require segregated railway cars would open the possibility of other forms of segregation. According to Brown, Tourgée claimed

> that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color.

Brown's reply was that states would only be allowed to enact laws that were for the public good, not ones that would simply be "for annoyance or oppression of a particular class." He pointed to the Supreme Court's decision in *Yick Wo v. Hopkins* [118 U.S. 536 (1886)][191] in which the majority determined that a San Francisco ordinance regulating

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[190] *Plessy v. Ferguson* [163 U.S. 537 (1896)].

[191] The case of *Yick Wo v. Hopkins* dealt with a San Francisco ordinance that required laundry operators to have a permit for any business operated in a wooden building. Although the ordinance appeared reasonable, in practice it was used to discriminate against Chinese laundry operators in the city. With only one exception, all of the non-Chinese operators who applied for the permit were successful. In contrast, every single Chinese applicant, a total of two hundred, failed to obtain the necessary permit. Some of the Chinese applicants had run their laundries for close to two decades. The plaintiff in the case, Yick Wo, had lived in California for twenty-four years, twenty-two of which he had been running his laundry, before being denied a permit. The previous year his business had passed a safety inspection. After being arrested for continuing to run his laundry without a permit, Yick Wo appealed his case to the Supreme Court. His claim was that the San Francisco ordinance denied him his Fourteenth Amendment rights to equal protection – evidence of this was the fact that only Chinese applicants had been denied permits. In its holding, the Court found that the implementation of the ordinance was discriminatory and, thus, unconstitutional. Although this decision appeared to have the potential to benefit other minorities, such as African Americans, the makeup of the Court soon changed and the direction of civil rights decisions shifted until the middle of the twentieth century.

public laundries within the city's boundaries was unconstitutional. In this case, Brown explained, the ordinance did not consider the skills of those running the laundries and, therefore, was a "covert attempt on the part of the municipality to make an arbitrary and unjust discrimination against the Chinese race." Brown clearly did not view the use of separate passenger cars as arbitrary or as an unjust discrimination against African Americans.[192]

Finally, Brown addressed the question of whether the Louisiana separate car law was reasonable. He claimed that "In determining the question of reasonableness, [the legislature] is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order." This interpretation allowed for legislatures to take instances of *de facto* segregation that developed from years of customs and make them into law. Brown again compared the use of separate railway cars to the use of separate schools, a practice that was widely used at the time without its constitutionality being questioned. Brown noted that the "underlying fallacy" of Plessy's argument was that it assumed separating the races on trains highlighted African Americans as an inferior race to which he responded, "If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." Brown believed that legislation cannot create inequality just as it cannot create social equality. With that, the Supreme Court upheld Plessy's conviction

[192] *Plessy v. Ferguson* [163 U.S. 537 (1896)]; and, *Yick Wo v. Hopkins* [118 U.S. 536 (1886)].

and presented the concept of "separate but equal" that would become a centerpiece of Jim Crow.[193]

As in the *Civil Rights Cases* of the previous decade, John Marshall Harlan stood alone in his dissent. In his dissenting opinion, he quickly summarized the requirements of the law and determined that it was an effort by the Louisiana state legislature to regulate "the use of a public highway by citizens of the United States solely upon the basis of race." He proceeded to address the question of whether such a restriction was constitutional. He established the common belief that although private companies constructed and managed railroads, they did so for public use and, thus, the railroads constituted public highways.[194]

Regarding the issue of civil rights, Harlan argued that all people should show pride in their race and that "the constitution of the United States does not . . . permit any public authority to know the race of those entitled to be protected in the enjoyment" of their civil rights. He believed the Louisiana separate car law, and others like it, infringed not only on the equal rights of citizenship, but also on the personal liberty championed for all Americans. Unlike Brown, who strictly interpreted the Thirteenth Amendment, Harlan argued, "It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country." He further claimed that the Fourteenth Amendment "added greatly to the dignity and glory of American citizenship." Harlan believed that the men who framed

[193] *Plessy v. Ferguson* [163 U.S. 537 (1896)].
[194] *Plessy v. Ferguson* [163 U.S. 537 (1896)].

these amendments intended for them to protect the freedom and civil rights of all American citizens regardless of their race.[195]

Referring to several of the same cases mentioned by Brown in his majority opinion, including *Strauder v. West Virginia*, *Neal v. Delaware*, and *Virginia v. Rives*, Harlan expressed his belief that the Reconstruction Amendments had previously been viewed by the Supreme Court as guaranteeing "that the law in the states shall be the same for the black as for the white; that all persons whether colored or white, shall stand equal before the laws of the states; and in regard to the colored race . . . that no discrimination shall be made against them by law because of their color." He also noted that in *Gibson v. State of Mississippi* [162 U.S. 565 (1896)], decided just months earlier by an identical Court, the majority opinion referred to the above cases and "declared that 'underlying all of those decisions is the principle that the constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the general government or the states against any citizen because of his race. All citizens are equal before the law." Harlan argued, therefore, that precedent established that the Reconstruction Amendments were far-reaching and that they were meant to protect black Americans and other minorities from discriminatory laws.[196]

Harlan also debunked claims from defenders of the Louisiana law that it was not discriminatory because the requirement to occupy separate cars applied to both black and white passengers. He argued that no one familiar with the law could honestly claim that its intent was to equally restrict blacks and whites. Rather, he explained, "the statute . . . had its origins in the purpose, not so much to exclude white persons from railroad cars

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[195] *Plessy v. Ferguson* [163 U.S. 537 (1896)].
[196] *Plessy v. Ferguson* [163 U.S. 537 (1896)]; and, *Gibson v. State of Mississippi* [162 U.S. 565 (1896)].

occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons." This separation effectively limited the movement of black passengers and forced them to isolate themselves. In Harlan's opinion, these restrictions interfered with the personal freedom of African Americans traveling in Louisiana.[197]

He conceded that states could require railroads to provide equal accommodations for all of their passengers, but to restrict passengers from choosing their seat went too far. He foresaw that if such a law was upheld the state would be set for other restrictions of personal liberties. Like Tourgée, Harlan was able to see the possible progression from requiring separate cars on a train to requiring the races to walk on different sides of the street, to ride in separate vehicles on public roads, or to sit on opposite sides of a courtroom. He also questioned the limits of such laws and whether they would one day be extended to restrict the personal liberties of Roman Catholics, naturalized citizens, and other groups viewed as inferior by the dominant members of society. Countering Justice Brown's argument that such laws would not be upheld because they would be deemed unreasonable by the courts, Harlan pointed out that "A statute may be unreasonable merely because a sound public policy forbade its enactment," but the courts should not "have anything to do with the policy or expediency of legislation."[198]

Whether whites made up the dominant race in the United States, and whether they would continue to maintain that status in the future, was irrelevant in Harlan's opinion. He believed that the United States Constitution is color-blind and that the passage and interpretation of laws should not be influenced by who is, or is not, a dominant member of society. To this end, he proclaimed that "The law regards man as man, and takes no

[197] *Plessy v. Ferguson* [163 U.S. 537 (1896)].
[198] *Plessy v. Ferguson* [163 U.S. 537 (1896)].

account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved" and expressed his concern that the majority's opinion in this case would one day rival the Dred Scott decision in its negative effects on society.[199]

Harlan agreed that the Court's decision was, in essence, reinvigorating some of the beliefs presented in the Dred Scott decision which had presumably been eradicated by the Reconstruction Amendments. He believed that in some states Brown's words would "not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but [would] encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the constitution." He expressed his belief that the sixty million white citizens of the United States should not fear being dominated by the eight million black Americans. Also, he explained, the races were going to be ever linked in America's future and, therefore, state governments should not be allowed to enact laws that would contribute to racial hated. He proclaimed the Louisiana separate car law to be such a law because it "proceed[ed] on the ground that colored citizens [were] so inferior and degraded that they [could not] be allowed to sit in public coaches by white citizens."[200]

Harlan believed it was critical to the peace of the United States that the government secure equality for all citizens regardless of their race and that the Court's decision to uphold the Louisiana law was contrary to this goal. Each attempt by the individual states to regulate "the enjoyment of civil rights upon the basis of race . . .

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[199] *Plessy v. Ferguson* [163 U.S. 537 (1896)].
[200] *Plessy v. Ferguson* [163 U.S. 537 (1896)].

[with] the pretense of recognizing equality of rights" would move the nation backwards one step closer to the pre-Civil War status of race relations. Harlan explained, furthermore, that he was not advocating social equality because he did not believe that could, or even should, exist between white and black Americans. His focus was purely on the existence of equality before the law for both races. Despite Harlan's lack of support for social equality between the races, many African Americans believed that the first step toward absolute equality was equal legal rights and, therefore, they viewed Harlan's support from the bench as a significant opportunity to make gains.[201]

Noting that, as the Louisiana law was worded, Chinese men, who were widely viewed as inferior and not recognized as citizens, could ride in the same car as white passengers, Harlan concluded that black Americans should continue to protest such laws until their legal equality was fully recognized. Otherwise, they would forever be forced to follow laws that branded them with "a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the constitution." Such a situation could not be legally justified in Harlan's opinion.[202]

Prior to this case, the Supreme Court had determined that it was unconstitutional to prevent qualified blacks from serving on a juries with white men. If, however, the Court now believed, as Brown's majority opinion indicated, that states could prevent black citizens from sitting with white citizens on trains, what would prevent white men from encouraging their legislators to enact statutes requiring a partition between blacks and whites in the jury box and in the deliberation room? Harlan believed that such laws would be enacted on the basis of hostility and with the goal of humiliating African

[201] *Plessy v. Ferguson* [163 U.S. 537 (1896)].
[202] *Plessy v. Ferguson* [163 U.S. 537 (1896)].

American citizens, but that the Supreme Court would consider them "consistent with the constitution" based on the majority's current opinion.[203]

Finally, Harlan noted that many of the state cases noted by Justice Brown had been decided before the passage of the Fifteenth Amendment and before it would have been safe to push for equality for African Americans and were, therefore, inapplicable to the case at hand. By 1896, he believed a new era had begun in which "the recent amendments of the supreme law, which established universal civil freedom, gave citizenship to all born or naturalized in the United States, and . . . obliterated the race line from our systems of government, national and state, and placed our free institutions upon the broad and sure foundation of the equality of all men before the law." In this new era, Harlan thought the Supreme Court had a responsibility to all American citizens to find the Louisiana separate car law unconstitutional.[204]

While today *Plessy v. Ferguson* is one of the first cases mentioned when discussing the Supreme Court and civil rights, both the majority opinion and Harlan's dissent received very little attention at the time. Despite Harlan's own comments that the decision would have far-reaching consequences to rival those of the Dred Scott decision, few Americans recognized the case's significance in 1896. In *The Shifting Wind*, John Howard notes that the *New York Times* mentioned the decision only in passing several days later and that it was not "perceived at the time that a formula had finally been adduced for reconciling the egalitarian language of the Civil War amendments to the

[203] *Plessy v. Ferguson* [163 U.S. 537 (1896)].
[204] *Plessy v. Ferguson* [163 U.S. 537 (1896)].

reality of an evolving caste system." Howard makes no mention of a black response to the landmark case.[205]

In the days following the Supreme Court's May 18, 1896, decision, most African American newspapers directed their focus elsewhere. In the several months prior to the Court's consideration of the case, many African American journalists focused on anti-lynching campaigns throughout the country. In the *Cleveland Gazette*, the journey of Ohio's Anti-Lynching bill (H.B. No. 123) gained front-page coverage throughout March and April. The bill gained initial passage in the House on March 24 and an amended version attained final approval on April 8. In the March 28 edition of the *Gazette*, the bill's author, H. C. Smith, recounted with elation the outcome of the House's vote. The final vote was 61 yeas and 22 nays. The primary goal of the bill was to hold counties responsible for allowing lynchings and mob violence to occur. The bill defined what made up a mob and declared, "that any person suffering serious injury at the hands of such an assemblage shall be entitled to receive $1,000 from the county where the act is committed, and $5,000 if death ensues." The money was intended to help victims provide for their families and pay for their children's education. In addition, the bill allowed the responsible counties to take action against individual members of the mob to recover the fines. [206]

This law was significant in two ways. First, it made it possible for the victims of mob violence to avoid having to directly confront their attackers to gain payment for their injuries. Second, it allowed, "the decent people of a community [to] see to it that there

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[205] Howard, *The Shifting Wind*, 142.

[206] "It Passed: Ohio's Anti-Lynching Bill Half Way Through the Assembly," "It Ought to Pass: That is What Leading Ohio Daily Newspapers Say," and "Ohio's Anti-Lynching Bill," in *Cleveland Gazette*, March 28, 1896.

were no lynchings in the various communities, for no appeal is so potent as that which touches the pockets of the taxpayers." The *Cleveland Gazette* also noted support for the bill from mainstream white newspapers including the *Ohio State Journal* and the *Cleveland Daily Leader*.[207]

Although Representative H. C. Smith of Cuyahoga County presented the bill, he based it upon a proposal presented at the state's recent constitutional convention. The author of that proposal was none other than well-respected Ohioan Albion W. Tourgée, whose petitions on the behalf of Homer Plessy were before the Supreme Court at the time of the bill's passage. The *Cleveland Gazette*'s editors noted that Tourgée was currently editing a magazine, *The Basis*, and encouraged their readers to subscribe as a show of "practical appreciation" for his work. The paper described the bill as the leading piece of anti-lynching and anti-mob violence legislation in the nation. Other bills on the same issue under consideration in South Carolina and Virginia were declared not "even an approach to the Ohio law, the author of which is that sterling and constantly aggressive friend of the race, Judge Albion W. Tourgée."[208]

Despite the newspaper's apparent respect for Tourgée and for his work on behalf of African Americans, the decision based on his work before the Supreme Court went virtually ignored. In the May 23 edition of the *Cleveland Gazette*, the first published after the decision was handed down, there was no mention of the case. Focus continued to be placed on the anti-lynching movement based on Tourgée's opinion of South

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[207] "It Passed: Ohio's Anti-Lynching Bill Half Way Through the Assembly," "It Ought to Pass: That is What Leading Ohio Daily Newspapers Say," and "Ohio's Anti-Lynching Bill," in *Cleveland Gazette*, March 28, 1896.

[208] "It Ought to Pass," in *Cleveland Gazette*, March 28, 1896; and, "It Passed: Ohio's Anti-Lynching Bill Passes the Senate," in *Cleveland Gazette*, April 11, 1896.

Carolina's anti-lynching law. The newspaper agreed with Tourgée that "the South Carolina law [was] more likely to prove an incentive to mob violence than assistance in its suppression." This opinion was based on the fact that the newly passed law applied only to lynchings in which the victim was removed from the custody of officers. Several other articles in the edition focused on the debate between free silver and gold that dominated national politics leading up to the 1896 presidential election.[209]

It was not until May 30 that the *Cleveland Gazette* mentioned the *Plessy v. Ferguson* case. The article contained two brief paragraphs. The first addressed Justice Brown's opinion that upheld the Louisiana Supreme Court's decision that the Louisiana separate car law was constitutional. The second paragraph briefly discussed Harlan's "very vigorous dissent" and his belief that "no power in the land had the right to regulate the enjoyment of civil rights upon the basis of race." The only commentary in the article came in its last sentence: "And Justice Harlan is right." Beyond that, the newspaper made no mention of this case that Harlan believed would prove to be as important as the Dred Scott decision.[210]

Articles in *The Freeman* of Indianapolis followed a similar pattern. On February 15, the newspaper ran a letter to the editor titled "The Anti-Lynching Bill: Congress Should Legislate Against Such Crimes" that filled nearly the entire front page. The letter's author, D. Augustus Straker, questioned the editor's recently expressed opinion that anti-lynching laws should fall within the jurisdiction of the states. Straker argued

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[209] "South Carolina's Anti-Lynching Law," "The Question of the Day," "Bryan Wins His Suit," and "The Treasury," in *Cleveland Gazette*, May 23, 1896.
[210] "That 'Decision': The Constitutionality of the Louisiana 'Jim Crow' Law Sustained by the Supreme Court," in *Cleveland Gazette*, May 30, 1896.

that Congress should make it a federal crime to murder any United States citizen. He wrote,

> To lynch is more, Mr. Editor, than to murder. It is the law of the revolutionist, against good government and constitutional rights. He who slays his brother, violates the law, but the usual murderer does not use the method of the lyncher. Against him the indictment charges malice aforethought, if we give the lyncher the benefit of this he can only be convicted of manslaughter, because of sudden passion; but he is more than the violator of a statute, he is the defier of the right of trial by jury, and when the State fails to punish him, it disregards its own constitution, and the organic law of the land. . . . Our citizenship is dual. It is that of the state, as well as the general government. A denial of the rights there under is the legitimate business of either or both jurisdictions, and it is giving away our cause to say Congress has no power. Why? Because it is not expressed in the constitution?

He also warned that anti-lynching laws, like the one recently considered in South Carolina, could provide false hope to black Americans.[211]

In the following months, *The Freeman* continued to focus heavily on the debate over anti-lynching, but on May 23, the newspaper included an article about the *Plessy* decision that offered more commentary than most other papers. In "The 'Jim Crow' Case," which appeared on the second page, the writer proclaimed that the Court's "decision [would] have a demoralizing effect" and that it would "do much towards destroying the faith that Negroes may have in any institutions that white men control." The author also predicted that African Americans would respond by pondering their current status – a far cry from the expectations for action seen after the *Civil Rights Cases*. With a declaration that "If the race is debased in this latent tribute of contempt it will be but momentarily," the paper suggested black Americans would survive the decision and move forward. With that, the newspaper moved on to an article about the

[211] "The Anti-Lynching Bill: Congress Should Legislate Against Such Crimes," in *The Freeman*, February 15, 1896.

first class of graduates from Lincoln High School in Fayetteville, Tennessee, and made no further mention of the *Plessy* decision in future editions.[212]

The Washington Bee, published in the shadow of the Supreme Court chambers, also offered only a brief mention of the justices' decision. In an article about the importance of African Americans casting their votes for candidates sympathetic to their cause, the newspaper noted, "The separate coach law has been sustained by a Republican Supreme Court" and asked, "Where do we stand?" Concluding that blacks needed to insist on a constitutional amendment that would protect their rights and hold up to the scrutiny of the Supreme Court, the newspaper appeared ready to protest the decision and rally the community for further action. Future editions of the paper, however, failed to make any mention of the case and presented no calls for group meetings and unity.[213]

In one final example of how the African American press failed to recognize the significance of the Court's opinion in *Plessy v. Ferguson*, *The Richmond Planet* made no mention of the decision. On February 8, 1895, the newspaper devoted nearly a full column to a United States Circuit Court's decision in another test case that Kentucky's separate car law was unconstitutional. Nevertheless, it ignored the Supreme Court's contrary decision regarding Louisiana's separate car law one year later. In the intervening months, the paper published articles about voting rights, lynchings, the growing anti-lynching movement, the decision of an Ohio judge not to release a black prisoner accused of murder to Kentucky officials, and the case of Pokey Barnes, Mary Abernathy, and Solomon Marable. All three stood accused of murder, but the newspaper's editors strongly pled the women's innocence and offered detailed coverage

[212] "The 'Jim Crow' Case," in *The Freeman*, May 23, 1896.
[213] "Why Should We Care?" in *The Washington Bee*, May 23, 1896.

of their case from the time of their arrest in July 1895 through their last appeals in 1896. The case became a central fixture in the newspaper for nearly a year and superceded the *Plessy* opinion, which garnered no mention.[214]

The lack of attention given to the Supreme Court's decision, although surprising from our current perspective, was not astonishing at the time. The African American press had demonstrated in the previous twenty-five years that it did not deem every civil rights case important enough to dedicate significant space to. In light of the high number of lynchings that occurred across the nation in the early 1890s, black journalists and editors likely found the developing anti-lynching movement to be more newsworthy than a case about segregation in the South. In 1892 and 1893, the number of African Americans lynched peaked at 241 and 240 respectively. Shortly before the *Plessy* decision, Ida B. Wells published *A Red Record* in which she "profoundly and systematically attacked the false beliefs that resigned southerners to the acceptance of lynching as a necessary part of the culture." Despite the fact that in 1887 she had gone all the way to the Tennessee Supreme Court with her own challenge to segregated railroads, her focus had now turned towards lynching as a more immediate concern. At the same time, Mary Church Terrell took the lead of the National Association of Colored Women's Clubs, which was committed to its anti-lynching campaign, and British reformers turned their focus towards the lynching problem in the United States.[215]

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[214] "Ohio Refused to Deliver Him," (January 26, 1895); "Declared Unconstitutional," (February 9, 1895); "Silenced the Witnesses!" (March 16, 1895); "Men and Women Lynched," (April 27, 1895); "The Supreme Court," (September 14, 1895); and, "They Did Not Hang, (September 21, 1895), in *The Richmond Planet*.
[215] Wells, *Crusade for Justice*; Ida B. Wells, *A Red Record: Tabulated Statistics and Alleged Causes of Lynchings in the United States, 1892-1893-1894* (1895) in *Selected Works of Ida B. Wells-Barnett*, ed. Trudier Harris (New York: Oxford University Press, 1991); Brown, *Eradicating Evil*, 3, 62-72; and, Schechter, *Ida B. Wells-Barnett and American Reform*, 74, 78, 112-114, 123-124.

In addition, with a presidential election on the horizons, black newspaper editors apparently felt an obligation to keep their readers informed about the key issues being debated by Republicans, Populists, and Democrats. Thus, their decision to dedicate significant space to the free silver versus gold debate served their goal of making sure African American voters made informed decisions at the polls. While the segregation of public transportation was undoubtedly an important issue for many African Americans, it was not at the political forefront in 1896.

Although many historians, following in the footsteps of C. Vann Woodward, have claimed that the *Plessy* decision sparked a flood of new segregation laws, it is evident that this trend had begun well before 1896. A large number of states, for example, had already passed railroad segregation laws in the wake of the Supreme Court's decision in *Louisville, New Orleans & Texas Railway Co. v. Mississippi* in 1889. In the years immediately following *Plessy*, there actually was a lull in new segregation legislation. Between 1896 and 1900, only fifteen states passed laws related to segregation, but five of those actually banned certain forms of segregation and discrimination. In Illinois, an 1896 statute prohibited school officials from turning away students on the basis of color and an 1897 statute strengthened a twelve-year-old law banning segregation in public accommodations. The new law added places such as bicycle rinks, elevators, railroads, stages, cafes, bathrooms, hotels, and concert halls to places that had to be available to all people regardless of their race. In 1899, Michigan legislators passed a law reconfirming the state's 1883 anti-miscegenation law that had made all marriages between whites and anyone with African blood legal. Both New Jersey and Minnesota passed laws prohibiting certain forms of public accommodation segregation. In Minnesota, the state

legislature added soda fountains and ice cream parlors to a previous law preventing segregation in 1897 and in New Jersey it became illegal for a cemetery to refuse to bury someone because of his/her race. Finally, New York repealed its 1864 school segregation law. In a unique incident for the period, North Dakota's 1899 constitution granted the state's legislature the power to institute an educational qualifying test for voters, but the legislators chose not to do so.[216]

The majority of states passing segregation laws were, once again, in the South. The rate at which they passed these laws had slowed somewhat since the sudden increase after the *Louisville, New Orleans & Texas Railway Co. v. Mississippi* decision. In addition, several states shifted their focus from transportation to education. Only four states, Virginia, North Carolina, Georgia, and South Carolina, passed new laws addressing segregation on public transportation. All of them waited between two and four years after the *Plessy* opinion before doing so, which suggests that their decisions were hardly reactive. Three of the states focused solely on railroads while Virginia required the separation of passengers on both trains and steamboats. The new focus, however, was on education with six states passing legislation requiring separate schools between 1896 and 1898. The first two states to do so were South Carolina and Mississippi, followed the next year by Arkansas and Oklahoma and finally by Louisiana and Kentucky in 1898. Each state required separate schools for black and white children, with the exception of Arkansas that focused on establishing separate teachers' colleges

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[216] Woodward, *The Strange Career of Jim Crow*, 97-102; Moore, *Booker T. Washington, W.E.B. DuBois, and the Struggle for Racial Uplift*, 11-13; Johnson, *The Development of State Legislation Concerning the Free Negro*; Jack Greenberg, *Race Relations and American Law* (New York: Columbia University Press, 1959); and, Charles Mangum, Jr., *The Legal Status of the Negro* (Chapel Hill: The University of North Carolina Press, 1940).

for the races. Thus, at the turn of the century, legislators passing segregation legislation began to turn their focus away from areas that black Americans could avoid if necessary to areas, such as schools, where there was no such choice. The desire to send one's child to school for an education was nearly universal among Americans by 1900, but African Americans soon found out that doing so would not be easy.[217]

Education in Black and White

The shift by some southern states towards legislating school segregation proved to be another attempt to see what the federal government would allow. In 1899, a case dealing with an African American high school in Augusta, Georgia, which was in Richmond County, had reached the Supreme Court. Although this case was not directly related to one of the newer pieces of legislation, it helped to set the stage for future court challenges to school segregation. In *Cumming v. Richmond County Board of Education* [175 U.S. 528 (1899)], black students and their parents wanted to prevent the county board from using tax dollars to support white high schools after it closed Ware High School for financial reasons. The black families argued that the county's claims of not having adequate financial resources to keep Ware High School open while helping white

[217] Johnson, *The Development of State Legislation Concerning the Free Negro*; Greenberg, *Race Relations and American Law*; Mangum, *The Legal Status of the Negro*; and, Moore, *Booker T. Washington, W.E.B. DuBois, and the Struggle for Racial Uplift*, 12.

students to attend segregated schools constituted a violation of the Fourteenth Amendment's Equal Protection Clause.[218]

The case originated before the Richmond County Superior Court, which decided in favor of the students and their parents. Based in part upon the standards set forth in the *Plessy* opinion, the superior court ordered the school board to "provide or establish equal facilities in high school education as are now maintained by them for white children for such colored children of high school grade . . . as may desire a high school education." Following this decision, the board of education appealed to the Georgia Supreme Court, which reversed the lower court's decision. The students and their families appealed, thus bringing the case before the United States Supreme Court.[219]

In the petition presented and argued before the Supreme Court on October 30, 1899, the plaintiffs explained that when the Richmond County Board of Education levied a $45,000 tax on residents "for the support of primary, intermediate, grammar, and high schools" they refused to pay the portion of the tax designated for high schools. They did so because with the recent closure of Ware High School, which had served the black community since 1880, they believed that "the tax for the system of high schools was illegal and void for the reason that that system was for the use and benefit of the white population exclusively." They argued that the law granting the board power to levy taxes also prevented it from levying "any tax for the support of a system of high schools in which the colored school populations of the county were not given the same educational facilities as were furnished the white school population." The complainants declared that

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[218] Paul Finkelman and Melvin I. Urofsky, "Cumming v. Richmond County Board of Education," in *Landmark Decisions of the United States Supreme Court* (Washington: CQ Press, 2003).
[219] *Cumming v. Richmond County Board of Education* [175 U.S. 528 (1899)]; and, Howard, *The Shifting Wind*, 151-155.

of the $45,000 levied in taxes, $4,500 was designated for such high schools. In addition, they proclaimed that

> although the board was not authorized by law to use any part of such funds or property for the support and maintenance of a system of high schools in which the colored school population were not given the same educational facilities as were furnished for the white school population, it was using such funds and property in support and maintenance of its existing high-school system, the educational advantages of which were restricted wholly to the benefit of the white school population of Richmond county to the entire exclusion of the colored school population, and that by such use of those funds and property a deficiency of educational purposes would inevitably result.[220]

Making it even more difficult for the plaintiffs to accept the use of tax money on a high school system devoted solely to the education of white children was that, until the day the $45,000 tax was levied, there had been a public high school widely used by African Americans. On that same day, however, the school board announced its decision to close Ware High School. The decision reportedly came from the county's need to devote additional funds to an elementary school designated for black students. Nevertheless, the plaintiffs found that their children who had already been enrolled at Ware were now being denied access to additional education. Their petition declared "that the action of the board of education was a denial of the equal protection of the laws secured by the Constitution of the United States, and that it was inequitable, illegal, and unconstitutional for the board to levy upon or for the tax collector to collect from them any tax for the educational purposes of the county from the benefits of which [they] in the persons of their children of school age were excluded and debarred." On the basis of these complaints, the petitioners proceeded to court.[221]

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[220] *Cumming v. Richmond County Board of Education* [175 U.S. 528 (1899)].
[221] *Cumming v. Richmond Board of Education* [175 U.S. 528 (1899)].

In response to the petitioners' complaint, the Board of Education discussed several schools available in their county and recounted the events leading up to their decision to close Ware High School. According to the board, it was not responsible for establishing a system of high schools in the county, but it did have the authority to set up individual schools as needed by the people of the community. In this role, the board established Neely High School in 1876; this school became Tubman High School in 1878 after a significant donation from a private citizen. The purpose of this school was to provide an education for female students alongside the already existing Richmond Academy for male students. In 1876, the board also established Hephzibah High School in a corner of the county previously not serviced by a high school. Finally, in 1880, "there being no high school in the county for the colored race, the funds of the board justifying it, and other schools of lower grade having been established by the local trustees in Augusta sufficient to accommodate the colored children, the board deemed it wise and proper to establish the Ware High School." The board's account was made in an effort to demonstrate to the Court that its decisions were based on the most prevalent needs of the community, not on a responsibility to manage a comprehensive system of high schools.[222]

In defense of its decision to close Ware High School in June 1897, the board summarized the findings of a special committee established to research the status of the county's high schools, the condition of each school, and the overall usage of each school. Based on this committee's findings, the board decided to close Ware. They declared that they based their decision on "purely economic reasons in the education of the negro

[222] *Cumming v. Richmond County Board of Education* [175 U.S. 528 (1899)].

race." It was not a question of white versus black, however, according to the board. Rather it was a question of how best to serve the largest number of African American students. The board explained their decision was made

> Because 400 or more negro children were being turned away from the primary grades unable to be provided seats or teachers; because the same means and the same building which were used to teach 60 high-school pupils would accommodate 200 pupils in the rudiments of education; because the board at this time was not financially able to erect buildings and employ additional teachers for the large number of colored children who were in need of primary education, and because there were in the city of Augusta at this time three public high schools – the Haines Industrial School, the Walker Baptist Institute, and the Payne Institute – each of which were public to the colored people.

Thus, the board decided to close Ware High School with the intent of using its facilities and resources to educate a greater number of black children at the elementary level. Additionally, the board left open the option to reinstate the high school should additional funds become available.[223]

In response to the board's claim that there were three public high schools available to black students in Augusta, the plaintiffs declared that the Payne Institute, the Walker Baptist Institute, and the Haines Industrial Institute "are purely private and pay educational institutions under sectarian control, and have been in existence for years past, and have no connection, whatsoever, with the public-school system" run by the board. Confronted with this claim, the board admitted that the mentioned schools were, in fact, private schools under sectarian control and were not part of the public school system under its supervision. Furthermore, the petitioners argued that if there was a shortage of financial resources available to maintain a high school for black students in Augusta, it was the result of "the illegal action of said board in appropriating to the white school

[223] *Cumming v. Richmond County Board of Education* [175 U.S. 528 (1899)].

population of said city largely more of the public-school fund than it is legally entitled to, to the corresponding detriment of the colored school population of said city, and but for such illegal action there would be no such deficiency as said board avers." To this claim, the board responded that the lack of funds for the Ware High School was not the result of any actions it had taken.[224]

Nearly seven weeks after listening to both sides of the case, the U.S. Supreme Court presented its unanimous decision. In the opinion, surprisingly written by Justice Harlan, the Court upheld the Georgia Supreme Court's decision in favor of the board of education. According to Harlan, the plaintiffs in the case argued that the board of education had used a disproportionate amount of available funds for white schools and they requested "an injunction that would either impair the efficiency of the high school provided for white children or compel the board to close it . . . . [and] the result would only be to take from white children educational privileges enjoyed by them, without giving to colored children additional opportunities for the education furnished in high schools." He explained that this option would not benefit either group of high school students in Augusta. Furthermore, Harlan summarized the board's claim that it could educate several hundred black students at the elementary level with the same funds used to educate only sixty students at the high school. He concluded that the board made the decision that was "in the interest of the greater number of colored children, leaving the smaller number to obtain a high-school education in existing private institutions" for not much more than it cost them to attend the public school.[225]

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[224] *Cumming v. Richmond County Board of Education* [175 U.S. 528 (1899)].
[225] *Cumming v. Richmond County Board of Education* [175 U.S. 528 (1899)].

Harlan further explained that the evidence before the Court did not allow the justices to consider whether the board's decision came out of racial hatred. He stated that if the board of education had been wrong to decide to try to educate three hundred black children at one level rather than sixty black children at a higher level, "that was not an error which a court of equity should attempt to remedy by an injunction that would compel the board to withhold all assistance from the high school maintained for white children." In order for such an injunction to be justified, the Court would need to see evidence that the plaintiffs had asked the board to create and maintain an African American high school with available funds and that the board refused to do so because of its hostility towards blacks. Such evidence was not available for the Court.[226]

Therefore, Harlan and the other Supreme Court justices agreed with the Georgia Supreme Court's view that the board of education's actions did not justify an injunction that would negatively affect the white high schools as well. They also agreed with the lower court, which "rejected the suggestion that the board proceeded in bad faith or had abused the discretion with which it was invested by the statute under which it proceeded or had acted in hostility to the colored race." Based on the evidence presented to them, the justices determined that the Georgia Supreme Court's decision did not violate the Fourteenth Amendment by denying the plaintiffs equal protection of the laws or by denying them any privileges guaranteed by the Constitution for citizens of the United States. Finally, and most importantly in the message it sent to the people of the South, Harlan declared, "the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of Federal

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[226] *Cumming v. Richmond County Board of Education* [175 U.S. 528 (1899)].

authority with the management of such school's cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land." With that, the Supreme Court signaled to the states, the southern ones in particular, that the requirement of "separate but equal" alluded to in the *Plessy* decision was flexible and that the federal authorities would not prevent them from spending a disproportionate amount of available funds on schools for white children.[227]

Once again, the African American press provided minimal comments on the Supreme Court's decision. Popular newspapers, including Baltimore's *Afro-American*, Indianapolis's *The Freeman*, and Chicago's *The Broad-Ax*, failed to make any mention of the *Cumming* decision. The newspapers that did mention it did so only in passing.

In "No Negro Need Apply: The Courts Say No," published on December 23, 1899, just five days after Harlan presented the majority opinion, *The Washington Bee* summarized the Court's decision. With the exception of one sentence, "The court failed to see that this was a violation of the fourteenth amendment to the Constitution," the article offered no commentary, only summary. Even that one sentence could have been read as either a reaction to Harlan's opinion or a summary of it.[228]

Likewise, *The Cleveland Gazette* presented only a brief summary of the case in its December 30, 1899, article "Georgia School Case: The Supreme Court Sustains the Action of the Richmond County School Board." Following a brief summary of the facts of the case, the article explained that Justice Harlan believed "the supreme court was not permitted from the record to assume" that the actions of the school board were "based upon opposition to colored schools or the colored race," but that they were "taken for

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[227] *Cumming v. Richmond County Board of Education* [175 U.S. 528 (1899)].
[228] *The Washington Bee*, "No Negro Need Apply: The Courts Say No," December 23, 1899.

financial reasons and [were] within the just discretion of the board." The article's author failed to show any reaction to the decision and made no effort to rally the African American community behind the issue of equal education for black children.[229]

Thus, the black press failed again either to recognize the potential significance of the Supreme Court's influence or to draw attention to an issue that was likely to affect many members of the black community. Rather than focusing on an issue that appeared too many nonexistent prior to *Cumming*, many African American newspapers continued to focus on national politics and on lynching. The latter, obviously, was an important issue for African Americans throughout the United States and was a high profile subject for activists such as Ida B. Wells-Barnett to speak out about. Nevertheless, as shocking and objectionable as lynchings were, they had little direct effect on the lives of most black Americans. The debate between a Democrat and a Republican presidential candidate also was unlikely to have a significant effect on the lives of most black citizens, or most whites for that matter. For most Americans, state and local ordinances were more likely to affect their future and their children's future. Thus, the Supreme Court's decision effectively granting states permission to spend tax money disproportionately on schools for white and black students warranted much more coverage and reaction from the black press than it received.

In the five years following the *Cumming* decision, from 1900 to 1905, the number of states prohibiting black and white children from attending the same schools nearly doubled suggesting that the decision served as a signal to state legislators that the federal government would not prevent such segregation. Meanwhile, only four states passed new

[229] *The Cleveland Gazette*, "Georgia School Case: The Supreme Court Sustains the Action of the Richmond County School Board," December 30, 1899.

or updated legislation banning such racial discrimination. In one example of a state banning segregation, New York repealed an earlier law in 1900 to make it illegal for anyone to refuse a student admission to a school based on the child's race. The following year, New Mexico passed a similar law banning discrimination because of race or nationality. Those convicted of violating the New Mexico law faced fines, imprisonment, and were "forever barred from teaching school or from holding any office of honor or profit" in the territory. New Jersey and Minnesota each strengthened previous bans of segregation in 1903 and 1905, respectively.[230]

Meanwhile, ten states primarily in the South but spreading into the Midwest and West, passed legislation strengthening or instituting school segregation during the same five-year period. In 1901 alone, North Carolina, Alabama, West Virginia, and Tennessee redefined and clarified their requirements for keeping students of different races separated in the classroom. In North Carolina, the state used codes prohibiting interracial marriage from the 1875 state constitution to define how children should be separated. According to the codes, "persons of Negro descent to the third generation inclusive" were black. Two years later, the state went even further and declared that no child who had "Negro blood in its veins, however remote the strain, shall attend a school for the white race, and no such child shall be considered a white child." In Alabama, a clause of the state's new constitution clarified that no child of either race would be allowed to attend a school intended for the other race. In addition, West Virginia amended an 1873 law to change the number of African American students needed to require a district to establish

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[230] Johnson, *The Development of State Legislation Concerning the Free Negro*; Greenberg, *Race Relations and American Law*; Mangum, *The Legal Status of the Negro*; and, Robert K. Carr, *Federal Protection of Civil Rights* (Ithaca, New York: Cornell University Press, 1947).

a separate school for blacks from fifteen to ten. Finally, Tennessee's 1901 law expanded the 1873 requirement that "white and colored persons shall not be taught in the same school, but in separate schools under the same general regulations as to management, usefulness and efficiency" from including not only elementary and high schools, but colleges as well.[231]

The influence of the 1901 Tennessee law, sometimes called the Maryville College Law, was particularly noticeable in East Tennessee's Knoxville where two schools supported by the United Presbyterian Church had maintained open enrollment policies for decades. Maryville College, founded in 1819, and Knoxville College, founded in 1875, each had a majority student population of one race, white and black respectively, but had traditionally offered an education to both races. They had been able to do so because previous state laws regarding education had been focused on public schools and on schools for children, not colleges. Maryville College had started to admit students regardless of their race after the Civil War ended with assistance from the Freedmen's Bureau. Following the passage of the Tennessee Education Segregation Act of 1901, however, both schools had to turn away students for the first time or face fines. Individuals who violated the new law by allowing white and black students to enroll at the same school also faced imprisonment for up to six months. Once forced to segregate in 1901, Maryville College contributed one-fourth of its endowment to Knoxville College as a show of its support for educating African Americans. Both schools immediately

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[231] Carr, *Federal Protection of Civil Rights*; Greenberg, *Race Relations and American Law*; and, Johnson, *The Development of State Legislation Concerning the Free Negro*.

integrated again after the Supreme Court's 1954 decision in *Brown v. Board of Education* [347 U.S. 483 (1954)].[232]

Farther west, two states passed education segregation laws to address their unique needs. Alaska had a more sparse population and, thus, allowed for white children and "children of mixed blood who lead a civilized life" to attend school together. This allowed districts to maximize use of their resources while still preventing full blood black students, Native American students, or mulatto students with questionable backgrounds from attending schools with white children. The most unique segregation law instituted between 1900 and 1905 was in California. The state's 1902 statute did two things. First, it repealed an 1880 law that declared students from ages six to twenty-one could attend public schools regardless of their race. Second, the new law made it illegal for not only black students, but for Japanese and Chinese children as well, to enroll in schools designated for white children. These two laws demonstrated that the form of racial segregation often related to the needs and makeup of the state's population.[233]

The next education segregation law challenged in the Supreme Court, however, came in 1904 in Kentucky. According to Section 1 of the Day Law, passed March 22, 1904,

> it shall be unlawful for any person, corporation, or association of persons to maintain or operate any college, school, or institution where persons of the white and negro races are both received as pupils for instruction, and

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[232] Robert Booker, *And There Was Light! The 120-Year History of Knoxville College: Knoxville, Tennessee, 1875-1995* (Virginia Beach, Virginia: The Donning Company, 1994), 81, 87; and Ralph Waldo Lloyd, *Maryville College: A History of 150 Years, 1819-1969* (Maryville, Tennessee: Maryville College Press, 1969).

The 1901 Tennessee law did not affect a third school in the Knoxville area. The University of Tennessee, which was a land-grant institution under the Morrill Act of 1862, did not admit its first African American students until 1952. At that time, a handful of black students entered the university's graduate and law programs by order of a federal district court.

[233] Greenberg, *Race Relations and American Law*; and, Carr, *Federal Protection of Civil Rights*.

> any person or corporation who shall operate or maintain any such college, school, or institutional shall be fined $1,000, and any person or corporation who may be convicted of violating the provisions of this act shall be fined $100 for each day they may operate said school, college, or institution after such conviction.

The law, however, did allow private schools and colleges to maintain separate and distinct branches for the exclusive education of each race. To guarantee that these branches were independently operated, they had to be located at least twenty-five miles from each other.[234]

On October 8, 1904, a grand jury in Madison County, Kentucky indicted Berea College for "unlawfully and willfully permit[ting] and receiv[ing] both white and negro races and pupils for instruction" in violation of the new statute. Founded in 1855, Berea College was the creation of the Reverend John G. Fee and the noted abolitionist Cassius M. Clay, who both favored gradual emancipation before the Civil War. In 1866, the school was incorporated and opened its doors with 187 students, of whom 91 were white and 96 were black. Until the 1904 law requiring segregation, Berea College continued to have a student body divided equally between the races. Many of the school's graduates went on to teach at schools for African American students.[235] The composition of Berea College's student body changed, however, after Representative Carl Day's bill became law.[236]

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[234] Kentucky Acts 1904, Chapter 85.

[235] One notable graduate of Berea College was Carter G. Woodson who graduated in 1903 with a degree in Literature. He later earned an M.A. at the University of Chicago and a Ph.D. at Harvard University before publishing the first *Journal of Negro History* in 1916 and co-founding Negro History Week, which later became Black History Month.

[236] Jacqueline J. Burnside, "Philanthropists and Politicians: A Sociological Profile of Berea College, 1855-1908," (Ph.D. Dissertation, Yale University, 1988); and, Hambleton Tapp and James Klotter, *Kentucky Decades of Discord* (Frankfort, Kentucky: 1977).

When Day, a Democrat, presented his bill to the Kentucky House of Representatives, groups both in favor of and against it traveled to Frankfort to express their opinions. The first to address the committee considering the bill was a group of Berea citizens who supported it. Among them was J. M. Early who was a white merchant and president of Berea's Democrat Club. According to Early, who claimed to speak on behalf of the town's business interests, segregating Berea College would "be in the best interests of the community as well as of the State." State Superintendent of Education Marry McChesney argued that Day's bill would simply force Berea College to comply with the state's constitution and laws that already regulated enrollment at public schools. McChesney also mentioned Booker T. Washington's recent visit to the White House as evidence that "if the Berea ideas were carried out to logical conclusion, there would be social equality of the races in Kentucky." Day defended his bill to the committee by explaining that it was meant to prevent "the contamination of the white children of Kentucky."[237]

In contrast, Berea College President William G. Frost, his wife Eleanor Frost, and members of the college's faculty spoke to the committee in opposition to the bill. The delegation "presented an historical overview of the College, striving to show how racial coeducation had been maintained for four decades without harm to white or black students." The college's supporters also tried to convince moderate Republicans and Democrats to defeat the bill. Frost and the others were no match, however, for the law's supporters who organized a public meeting at the Richmond Courthouse and told citizens that they "should support the bill because Berea was teaching African-Americans to be

[237] *Louisville Courier Journal*, February 2, 1904; and, Burnside, "Philanthropists and Politicians."

the social equals of the white man and woman." Despite the claims of James A. White, a black alumnus of Berea, that the school stressed not social equality but the importance of becoming "accustomed to each other as fellow human beings," Day's bill made it through the legislature and became law.[238]

Following its indictment by the grand jury of Madison County and conviction in the circuit court, Berea College appealed first to the state court of appeals and then to the United States Supreme Court. After hearing arguments for the case on April 10 and 13, 1908, Justice David Josiah Brewer delivered the opinion of the Court on November 9, 1908. Brewer, who had also written the majority opinion in *Louisville, New Orleans & Texas Railway Co. v. Mississippi*, began his opinion by establishing that the facts of the case were not being disputed. Both parties of the case agreed that the Day Law did not violate Kentucky's constitution as was decided by the state's highest court. The only question before the Supreme Court, according to Justice Brewer, was whether the law conflicted with the U.S. Constitution. One portion of the state court's decision held that "as a corporation created by this state, [Berea College] has no natural right to teach at all." In response to this, Brewer explained that issues of what powers a state conferred upon its corporations was a local issue and that states had the right to decide if they would treat corporations and individuals differently. He concluded that "In granting corporate powers the legislature may deem that the best interests of the state would be subserved by some restriction, and the corporation may not please that, in spite of the restriction, it has more or greater powers because the citizen has." Based on this conclusion, Brewer explained that the 1904 Kentucky law might be considered in conflict

[238] *Louisville Courier Journal*, February 2, 1904; and, Burnside, "Philanthropists and Politicians."

with the Constitution regarding its limitations on the actions of individuals, but did not violate the Constitution regarding corporations created by the state.[239]

Based on the belief that the state had the right to regulate corporations it created and on evidence that Berea College was incorporated under an act that allowed the state to amend its provisions, the Court decided to uphold the judgment of the Court of Appeals of Kentucky. The Kentucky court had declared that the wording of the law would have allowed the same school to teach the different races at different times in the same place. Therefore, Brewer wrote, "an amendment to the original charter, which does not destroy the power of the college to furnish education to all persons, but which simply separates them by times or place of instruction, cannot be said to 'defeat or substantially impair the object of the grant.'"[240]

Justice Harlan, once again, took on the role of dissenter.[241] Harlan's primary concern with the majority opinion was that it suggested the Kentucky law may be illegal when applied to individuals, but was lawful when applied to corporations. Harlan wrote,

> Upon a review of the judgment below this court says that the statute is 'clearly separable, and may be valid as to one class, while invalid as to another;' that 'even if it were conceded that its assertion of power over individuals cannot be sustained, still the statute must be upheld so far as it restrains corporations.' 'It is unnecessary,' this court says, 'for us to consider anything more than the question of its validity as applied to corporations. . . . We need concern ourselves only with the inquiry whether the 1st section can be upheld as coming within the powers of a state over its own corporate creatures.' The judgment of the state court is now affirmed, and thereby left in full force, so far as Kentucky and its courts are concerned, although such judgment rests in part upon the ground that the statute is not, in any particular, in violation of any rights secured by the Federal Constitution. In so ruling, it must necessarily have been assumed by this court that the legislature may have regarded the

[239] *Berea College v. Commonwealth of Kentucky* [211 U.S. 45 (1908)].
[240] *Berea College v. Commonwealth of Kentucky* [211 U.S. 45 (1908)].
[241] Justice William Rufus Day joined Justice Harlan in his dissent.

> teaching of white and colored pupils at the same time and in the same school or institutions, when maintained by private individuals and associations, as wholly different in its results from such teaching when conducted by the same individuals acting under the authority of or representing a corporation. But, looking at the nature or subject of the legislation, it is inconceivable that the legislature consciously regarded the subject in that light. It is absolutely certain that the legislature had in mind to prohibit the teaching of the two races in the same private institution, at the same time, by whosoever that institution was conducted. It is a reflection upon the common sense of legislators to suppose that they might have prohibited a private corporation from teaching by its agents, and yet left individuals and unincorporated associations entirely at liberty, by the same instructors, to teach the two races in the same institution at the same time. It was the teaching of pupils of the two races together, or in the same school, no matter by whom or under whose authority, which the legislature sought to prevent. The manifest purpose was to prevent the association of white and colored persons in the same school. That such was its intention is evident from the title of the act, which . . . was 'to prohibit white and colored persons from attending the same school.' Even if the words of the body of the act were doubtful or obscure, the title may be looked to in aid of construction.

He continued to explain that the Court did have the power to strike down one part of a statute as unconstitutional while leaving another part intact; it could only do so if the sections were distinct and separable. In this case, however, the law in question included restrictions on individuals, corporations, and associations in the same section making it impossible to separate them.[242]

Harlan also pointed to earlier cases to show that, in this case, the Court had a responsibility to strike down the Day Law in its entirety. He showed that in *Huntington v. Worthen* [120 U.S. 97 (1887)] Justice Stephen J. Field had written that if one segment of a statute was invalid the entire statute should be declared unconstitutional "where 'it is evident the legislature would not have enacted one without the other.'" He identified two other examples, *Spraigue v. Thompson* [118 U.S. 90] and *Marshall Field & Co. v. Clark*

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[242] *Berea College v. Commonwealth of Kentucky* [211 U.S. 45 (1908)].

[143 U.S. 649 (1892)] where the Court made similar points. Finally, he referred to *Connolly v. Union Sewer Pipe Co.* [184 U.S. 540 (1902)] as "a case very much in point here." In that case, which dealt with promissory notes and an open account, the Court determined that Section 9 of the law in question was unconstitutional because it exempted agriculturalists from the requirements of the law. In response to the question of whether the Court could then allow the remaining portions of the law to stand, the Court wrote, "If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But, if an obnoxious section is of such import that the other sections, without it, would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative." Based on these criteria, the Court determined that it "must hold that the legislature would not have entered upon or continued the policy indicated by the statute unless agriculturalists and live-stock dealers were excluded from its operation and thereby protected from prosecution. The result is that the statute must be regarded in its entirety, and, in that view, it must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the 9th section." In view of established precedent, therefore, Harlan concluded that the Day Law should be declared unconstitutional in its entirety. He did, however, note that his opinion had "no reference to regulations prescribed for public schools, established at the pleasure of the state and maintained at the public expense," because such schools were not included in the case before the Supreme Court.[243]

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[243] *Berea College v. Commonwealth of Kentucky* [211 U.S. 45 (1908)]; and, *Connolly v. Union Sewer Pipe Co.* [184 U.S. 540 (1902)].

The significance of this case was that it cemented the states' rights to regulate both public and private education. On the one hand, the entire Court, including Harlan in his dissenting opinion, upheld the states' rights to legislate public education. As demonstrated in *Cumming v. Richmond County Board of Education*, the Court believed the control of public schools was a local issue. In *Berea*, the justices confirmed this decision. On the other hand, the Court granted control of private schools to the state in the *Berea* decision with its determination that states had the power to regulate corporations.

Unlike the *Cumming* decision, the *Berea* decision garnered wide attention from the African American press, showing once again that the press was inconsistent in the message it sent to the black community about the influence of the Supreme Court. Now that the number of states with school segregation laws had already increased in the wake of *Cumming*, black newspapers chose to bring the issue to the forefront. The coverage ranged from a single article to as many as seven articles published over five weeks as seen in *The Freeman* and *The Cleveland Gazette*.

The Washington Bee offered only a single article on November 14, 1908. In "Separate School Law," the newspaper offered strong opinions and little summary. According to the article, "The decision of the United States Supreme Court, upholding the Kentucky Separate School law, was no surprise to the Bee [because] to prevent a state from passing laws of a discriminatory nature, there must be an amendment to the Constitution of the United States." Such an amendment, the article declared, was necessary to put an end to the doctrine of state's rights. Asking "What right has a state to say that certain citizens will not be permitted to vote for president and vice president of

the United States?" and "If the Constitution guarantees rights to citizens what right has a state to say mixed schools shall not exist, and such laws are upheld by the United States Supreme Court?" the article raised important issues for the African American community's consideration. The only answer, according to *The Washington Bee*, was for black Americans to find enough liberal allies in the legislature to guarantee equality of citizenship in the future. Despite raising such important issues in response to the *Berea* decision, the paper made no further mention of the decision in subsequent editions and made no further effort to rally Washington's black population around the issue of equal education.[244]

Baltimore's *Afro-American* also expressed its discontent with the Supreme Court's decision in its November 14 edition only to ignore the issue afterwards. The headline of the newspaper's front page article left no question as to the editor's opinion: "Jim Crowism Spreading: As Invaded the Sacred Precincts of the Supreme Court of the United States, According To A Recent Decision States can do Almost Anything To The Negro It Likes – State Can Prevent The Coeducation Of White And Colored People – Grants Even More That The South Has Ever Asked – Berean College Loses Its Case – Justice Harlan Dissents." The article itself, however, offered no comment on the decision and only summarized the facts of the case, Brewer's majority opinion, and Harlan's dissent. More reactionary articles and statements appeared on the paper's second page where one sidebar declared, "No disfranchisement law, no 'Jim Crow' law, no Supreme Court decision, no discriminatory laws of any kind can keep the Negro down unless he himself decides to state down. He can, if he will, rise superior to them all and become a

[244] *The Washington Bee*, "Separate School Law," November 14, 1908.

factor that the whole country will have to reckon with; but he will have to do it himself." Two other segments applauded Justice Harlan for being a friend to African Americans.[245]

The issue's primary editorial focused more on the Supreme Court's "tradition" of decisions against civil rights and equality for black citizens. Quoting Justice Harlan who characterized the majority opinion as "mischievous and cruel, and inconsistent with the great principle of the equality of citizens before the laws," the author exclaimed that the decision had effectively given all states the authority to discriminate against blacks. The possibility of states requiring blacks to walk on the opposite side of a street, to use separate doors to a building, and to shop in separate stores now existed. The article concluded that "Only white men made [the Declaration of Independence], and it was made only for white men, for even at that time the Negro, no matter how much of his blood had been shed to assist in making it possible that men should meet in the State House in Philadelphia without having the fear of having their heads cut off for daring to promulgate such a treasonable paper as was this very same declaration of independence." Once again, the Supreme Court had showed that it believed black men were inferior to whites.[246]

It was not until a month later that the *Afro-American* mentioned Berea College again. In a one paragraph article titled "For Berea College," the newspaper reported that a woman had donated $35,000 to the school to help build a new school for black students. Building the new school was the only option for Berea to continue providing an

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[245] *Afro-American*, "Jim Crowism Spreading: As Invaded the Sacred Precincts of the Supreme Court of the United States," November 14, 1908.
[246] *Afro-American*, "A Jim Crow Decision," November 14, 1908.

education for all students following the Supreme Court's decision. Beyond this mention, however, the *Afro-American* followed in the footsteps of *The Washington Bee* in its failure to further discuss the decision and to rally the African American community on the issue.[247]

Meanwhile, the Court's decision continued to be an important topic for several weeks in other newspapers. The *New York Age* ran articles about *Berea* for three weeks. The first article simply summarized the Court's majority opinion and Harlan's dissent, but the following week an article discussing the potential impact of the decision ran. As the *Afro-American* had argued, the *New York Age* declared that the decision was "consistent with that high tribunal's past evasion on technical grounds of the grave issue of Negro protection." The author argued that the Supreme Court was too cowardly to uphold the promises of equality spelled out in the Reconstruction Amendments. Furthermore, he declared, "The consequences of Berea, damning to the Negro and disgraceful to America, will bring their own reaction. Built on the shifting sands of race prejudice, in future storms this whole wicked structure will pass away. Judge Brewer, like Judge Taney, has not settled the question of human rights in this republic. Judge Brewer has simply postponed the dreadful day of reckoning between human rights and race wrongs." On the same day, the newspaper reported Berea College's plans to build a new school exclusively for black students. Finally, on December 10, the newspaper published a speech given by the Reverend Jenkin Lloyd Jones[248] in which he condemned the Court's decision. Although the *New York Age* continued to discuss the *Berea*

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[247] *Afro-American*, "For Berea College," December 19, 1908.

[248] Reverend Jenkin Lloyd Jones, the uncle of Frank Lloyd Wright, was Unitarian minister in Chicago who supported several reform efforts including early trade unions, the Hull House Settlement, women's rights, and improvements to education.

decision for several weeks, it too failed to seize the opportunity to gather African Americans together for a common cause.[249]

The Freeman from Indianapolis also ran a number of articles about the case from November 14 to December 26, 1908. While most of the articles simply discussed the primary points of the case and the decision, one printed on December 12 proclaimed, "The decision of the Supreme Court in the Berea College case simply illustrates that the nation's highest tribunal can always manage somehow to keep in line with the anti-Negro sentiment of the country and yet square itself with the law. That antiquated makeshift, the doctrine of state's rights, is seldom appealed to except to do things to the black folks without doing damage to the constitution."[250]

One of the African American newspapers that was most vocal about the *Berea* decision was *The Cleveland Gazette*, which had contributors and readers from the Oberlin College community. Berea College had been modeled largely on Oberlin where black students had been admitted since well before the Civil War began. In its first article on the subject, the paper accused the Supreme Court of "simply carrying out President 'Brownsville' Roosevelt's policy toward our people which President-elect Taft unqualifiedly endorsed." This "dig" referred to the Brownsville, Texas incident in which thirteen African American soldiers rioted against segregation on August 13, 1906. A few months later, President Theodore Roosevelt discharged the three companies of the black soldiers involved in the riot and at the time of the *Berea* decision that incident was being

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[249] *New York Age*, "Separate Schools Legal," November 12, 1908; "Issue Only Postponed" and "Funds of Berea College," November 19, 1908; and "Courageous Talk on Berea Case," December 10, 1908.
[250] *The Freeman*, "The Supreme Court Decides That States May Maintain Separate Educational Institutions," November 14, 1908; "Views on the Recent Supreme Court Decision," December 5, 1908; and, "Short Flights," December 12, 1908.

replayed in the press because several of the accused rioters were standing trial. The article concluded with a plea for African Americans to realize that there was no real difference between the Republicans of Roosevelt's and Taft's administrations and the southern Democrats of the time.[251]

Two weeks later, *The Cleveland Gazette* accused Berea College president William Frost of encouraging Representative Day to introduce his bill that led to the Supreme Court case. The paper claimed that after arriving in Kentucky from Oberlin Frost was "like all other northern white men who find themselves suddenly elevated to positions which are out of all proportion to their ability to grasp and qualify and harmonize with southern traditions, straightaway proceeded to out-herod Herod in proscription, discrimination, and a degree of general cussedness never dreamed of my southern 'white folks.'" His attitude and belief that Berea could develop into an outstanding whites-only institution allegedly led to the Supreme Court case.[252]

Although the African American press devoted more space to the *Berea* decision than it had to most cases since the *Civil Rights Cases* in 1883, the coverage lacked any real sense of purpose. For the most part, the newspapers simply summarized the case and its decision. Those that did offer a commentary or critique of the decision tended to introduce issues that could have been strongly debated in African American community only to drop the topic by the next edition. This meant that, once again, black Americans missed an opportunity to unify in support of a common cause that was more likely to have a significant and direct effect on their lives than railroad transportation or even lynching.

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[251] *The Cleveland Gazette*, "'Jim Crow' Law Upheld," November 14, 1908.
[252] *The Cleveland Gazette*, "The Truth in a Nutshell," November 28, 1908.

Conclusion: The Post-*Plessy* and Post-*Berea* Period

After *Berea*, there were only a handful of states left to pass statutes related to school segregation. By 1915, twenty-three states and territories required some form of separation of the races in schools. Fifteen states specifically banned school segregation while eleven had no specific laws addressing the issue. The same year as the *Berea* decision, North Carolina passed a law requiring separate schools not only for blacks and whites, but for descendants of the Croatan Indians as well. In 1909, the Arizona legislature gave school districts the authority to create separate schools when there were at least eight African American students in the district. In Florida, a 1913 law extended the requirement of separating students based on their race to teachers. The new law made it illegal for black teachers to instruct white students and for white teachers to instruct black students. Violators of the law faced fines and imprisonment. Finally, in 1915, Delaware became the only state in the northeast to require racially segregated schools. Parts of the South, however, had already moved on to the next area of segregation to be tested on a national stage – segregation districts for residential areas.[253]

This last flurry of school segregation legislation was yet another example of how Supreme Court decisions could serve as an indicator to legislators of what the federal government was willing to accept. In the period of twelve years, the Court had opened the doors to increased segregation in two areas that affected the lives of many African Americans. In order to travel and in order to ensure their children received an education, black Americans now had to contend with laws that limited their access to institutions

[253] Carr, *Federal Protection of Civil Rights*; Johnson, *The Development of State Legislation Concerning the Free Negro*; and, Greenberg, *Race Relations and American Law*.

designed for the benefits of citizens. Despite their initial hopes that the Reconstruction Amendments had ushered in a period of equality, it was increasingly evident that equality would not be achieved. In the next decade, the Supreme Court would address one last area of African Americans' lives: where they lived.

Chapter Five: "A Law Which Forbids a Negro to Rise is Not Made Just because It Forbids a White Man to Fall"

Beginning in the 1890s, African Americans faced another form of segregation as whites sought to regulate where blacks lived. Although throughout the South the two races had lived in close proximity to one another for generations, the nature of growing cities led to new tensions. In a rural setting, whites often accepted blacks who lived near them because the blacks worked for them, worked their land, or, quite simply, "knew their place." As Edward L. Ayers notes in *The Promise of the New South*, however, "Increasing residential segregation accompanied the emergence of more modern cities. . . . [and] the newer a Southern city, the more likely it was to be consistently segregated by race." By the beginning of the twentieth century, several southern cities, including Richmond and Atlanta, already consisted of a patchwork of all-white and all-black blocks. By the 1910s, the belief that spending too much time around African Americans would be detrimental to a white person's character, morality, and health seemed to pervade certain areas of the country. In response to this growing concern, local legislators introduced resolutions to separate the races within their cities. It no longer seemed to be enough to segregate the exceptional aspects of life, such as travel. Now white America felt the need to segregate the mundane as well.[254]

[254] Ayers, *The Promise of the New South*, 67.

America in the First Ten Years of the Twentieth Century

The advent of the twentieth century in the United States brought with it more than just growing cities. From 1900 to 1910, the country's black population grew from 8.8 million to 9.8 million, yet blacks made up a decreasing percentage of the overall population. This resulted, in part, from heavy migration by Europeans and by efforts by some whites to have large families as a way of offsetting the growing African American population. For example, during the same ten-year period, more than two million Italians arrived in the United States. There were more than 300,000 Greek immigrants in the country before the outbreak of World War I and nearly 150,000 new immigrants from Portugal in the opening decades of the twentieth century. Overall, the foreign-born population of the United States increased from 10,341,276 in 1900 to 13,515,886 in 1910, with the majority of the new immigrants coming from Europe. Thus, although most of these European immigrants settled in the northern United States, the increase of the white population through migration negated the increase in the African American population. In addition, white Americans from the north became increasingly focused on racial purity as they dealt with these immigrants from southern and eastern Europe.[255]

The new century also brought with it a further decline in African American representation in the federal government. Following several decades of black participation, albeit small, in Congress, a twenty-eight year absence of blacks began in 1901 after George H. White gave up his seat. White, a Representative from North Carolina and graduate of Howard University, served two terms in Congress from 1897 to

[255] Campbell J. Gibson and Emily Lennon, "Historical Census Statistics of the Foreign-born Population of the United States: 1850-1990," Population Division Working Paper No. 29 (Washington, D.C.: U.S. Bureau of the Census, February 1999).

1901.[256] He did not run for reelection for the next term and realized that in making this decision he was ending an era of southern black representation in the federal government.

Nevertheless, in his January 1901 farewell address to Congress, White expressed his belief that African Americans had made great strides since Reconstruction. Speaking to his fellow congressmen, he said,

> I would like to advance the statement that . . . what the Negro was thirty-two years ago, is not a proper standard by which the Negro living on the threshold of the twentieth century should be measured. Since that time we have reduced the illiteracy of the race at least 45 percent. We have written and published nearly 500 books. We have nearly 800 newspapers, three of which are dailies. We have now in practice over 2,000 lawyers, and a corresponding number of doctors. We have accumulated over $12,000,000 worth of school property and about $40,000,000 worth of church property. We have about 140,000 farms and homes, valued in the neighborhood of $750,000,000 and personal property valued about $170,000,000. We have raised about $11,000,000 for educational purposes, and the property per-capita for every colored man, woman, and child in the United States is estimated at $75. We are operating successfully several banks, commercial enterprises among our people in the South land, including one silk mill and one cotton factory. We have 32,000 teachers in the schools of the country; we have built, with the aid of our friends, about 20,000 churches, and support 7 colleges, 17 academies, 50 high schools, 5 law schools, 5 medical schools and 25 theological seminaries. We have over 600,000 acres of land in the South alone. The cotton produced, mainly by black labor, has increased from 4,669,770 bales in 1860 to 11,235,000 in 1899.

White's pride in the accomplishments of his fellow African Americans was obvious.[257]

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[256] George White gained his North Carolina seat as a result of a Fusion politics movement in the state that combined the Populist and Republican parties. The idea of Fusion politics was that the involved parties would remain entirely independent of each other, but would work together to form joint electoral tickets when possible. These joint tickets would focus on issues that the two parties agreed on. In the case of North Carolina's Populists and Republicans, such topics included education and voting rights. One result of the Fusion politics was that a large number of African Americans were elected. In North Carolina, there were nearly 1,000 elected or appointed officials who were black. Once the Fusion politics in North Carolina disintegrated following a Democratic victory and the disfranchisement of blacks, White undoubtedly knew that his reelection was unlikely.

White further noted that the accomplishments made by black Americans since the Civil War had been made under extremely adverse conditions. He declared, "We have done it in the face of lynching, burning at the stake, with the humiliation of 'Jim Crow' laws, the disfranchisement of our male citizens, slander and degradation of our women, with the factories closed against us, no Negro permitted to be conductor on the railway cars. . . . Labor unions – carpenters, painters, brick masons, machinists, hackmen and those supplying nearly every conceivable avocation for livelihood – have banded themselves together to better their condition, but, with few exceptions, the black face has been left out." In response to this adversity, White expressed both pride and indignation. He continued his speech and exclaimed, "With all these odds against us, we are forging our way ahead, slowly, perhaps, but surely . . . You may use our labor for two and a half centuries and then taunt us for our poverty, but let me remind you we will not always remain poor! You may withhold even the knowledge of how to read God's word and . . . then taunt us for our ignorance, but we would remind you that there is plenty of room at the top, and we are climbing!"[258]

White concluded his farewell address by proposing a "recipe" for further improving the states of African Americans. According to White, the American black

> asks no special favors, but simply demands that he be given the same chance for existence, for earning a livelihood, for raising himself in the scales of manhood and womanhood, that are accorded to kindred nationalities. Treat him as a man. . . . open the doors of industry to him . . . Help him to overcome his weakness, punish the crime-committing class by the courts of the land, measure the standard of the race by its best material, cease to mold prejudicial and unjust sentiment against him, and . . . he will learn to support . . . and join in with that political party, that

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[257] George H. White's Farewell Address to Congress, Congressional Record, 56th Cong., 2d session, vol. 34, pt. 2 (Washington, D.C.: Government Printing Office, 1901), 1635-1638.
[258] George H. White's Farewell Address to Congress, 1901.

> institution, whether secular or religious, in every community where he lives, which is destined to do the greatest good for the greatest number. Obliterate race hatred, party prejudice, and help us to achieve nobler ends, greater results and become satisfactory citizens to our brother in white.

Finally, White predicted that he would not be the last African American to serve in Congress: "phoenix-like he will rise up some day and come again."[259]

Just months after White's farewell address to Congress, the nation became embroiled in debate over an event involving the nation's top politician, President Theodore Roosevelt. Roosevelt, a supporter of the growing eugenics movement in the United States agreed with many whites who believed African American were responsible for their own predicament and opposed interracial marriage because of the need to preserve racial purity. Nevertheless, Roosevelt respected Booker T. Washington whom he considered "the most useful, as well as the most distinguished member of his race in the world." Roosevelt asked Washington to come to the White House on October 16, 1901, to advise him on the issue of race in America. During their meeting, the two took a break and ate dinner together, along with Edith Roosevelt and Philip S. Stewart, a friend of the Roosevelt's. News of the dinner went out across the Associated Press wire: "Booker T. Washington, of Tuskegee, Alabama, dined with the President last evening."[260]

The reaction to news of Roosevelt's dinner with Washington was particularly strong in the South. According to the *Memphis Scimitar*, "The most damnable outrage which has ever been perpetrated by any citizen of the United States was committed yesterday by the President, when he invited a nigger to dine with him at the White

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[259] George H. White's Farewell Address to Congress, 1901.
[260] "The Night President Teddy Roosevelt Invited Booker T. Washington to Dinner," in *The Journal of Blacks in Higher Education*, No. 35 (Spring 2002), 24-25.

House." The newspaper continued to accuse Roosevelt of disgracing his mother, a native of Georgia, and the South. The editorial declared, "By inviting a nigger to his table he pays his mother small duty. No Southern woman with a proper self-respect would now accept an invitation to the White House, nor would President Roosevelt be welcomed today in Southern homes. He has not inflamed the anger of the Southern people; he has excited their disgust." Roosevelt's actions also drew the outrage of segregationists in Congress, such as Senator James K. Vardaman from Mississippi. Expressing his disgust, Vardaman exclaimed, "the White House was so saturated with the odor of the nigger that the rats have taken refuge in the stable" Senator Ben Tillman of South Carolina claimed, "The action of President Roosevelt in entertaining the nigger will necessitate killing a thousand niggers in the South before they will learn their place again." In response to the outrage, Roosevelt reinvented the truth with stories that the men had worked through lunch and that his wife had not sat at the table with them. Although Roosevelt continued to consult Washington on issues of race, he never again offered Washington a meal.[261]

The first years of the 1900s also saw the growth of debate between W.E.B. DuBois and Booker T. Washington. In 1903, DuBois published *The Souls of Black Folk* in which he discussed the effect of emancipation on African Americans and the roles he believed black leaders should play. In response to Washington's idea of gradualism, DuBois wrote that Washington's "doctrine has tended to make the whites, North and South, shift the burden of the Negro problem to the Negro's shoulders and stand aside as critical and rather pessimistic spectators; when in fact the burden belongs to the nation,

[261] "The Night President Teddy Roosevelt Invited Booker T. Washington to Dinner," 24-25.

and the hands of none of us are clean if we bend not our energies to righting these great wrongs." DuBois also expressed his belief that Washington's approach and teachings were, at least in part, responsible for the declining status of African Americans. DuBois believed that the right to vote, social equality, and education were all necessary for African Americans to continue to progress.[262]

Just two years later, DuBois joined with other black leaders at a meeting on the Canadian side of Niagara Falls.[263] All of the participants opposed Washington's accommodationism and hoped to form an organization that would offer an alternative approach for black Americans. The first meeting of the Niagara Movement took place July 11-13, 1905, with twenty-nine delegates. The participants published a "Declaration of Principles" that spelled out the basic rights of black citizens to vote, to not be segregated on public transportation and in public accommodations, and to enjoy the same civil liberties as white Americans. The manifesto reflected the ideals of the Declaration of Independence and the hope that the federal government would protect the rights guaranteed by the Thirteenth, Fourteenth, and Fifteenth Amendments. According to the manifesto, the members of the Niagara Movement "refuse[d] to allow the impression to remain that the Negro-American assents to inferiority, is submissive to oppression and apologetic before insults. Through helplessness we may submit, but the voice of protest of ten million Americans must never cease to assail the ears of their fellows, so long as

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[262] W.E.B. DuBois, *The Souls of Black Folk* (Chicago: A.C. McClung & Co., 1903), **[Chapter 3, pp. ??]**.
[263] Among the other attendees of this meeting were H. A. Thompson (New York), Alonzo F. Herndon (Georgia), John Hope (Georgia), Fred McGhee (Minnesota), J. Max Barber (Illinois), Robert Bonner (Massachusetts), Henry L. Baily (Washington, D.C.), Clement G. Morgan (Massachusetts), W.H.H. Hart (Washington, D.C.), and B.S. Smith (Kansas).

America is unjust." Known as the "Negro Declaration of Independence," this manifesto served as the foundation of the Niagara Movement.[264]

At this first meeting, the Niagara Movement created a formal organization and developed eight primary objectives. First, the group emphasized the importance of freedom of speech and criticism. They believed that to obtain the same civil liberties as whites, they needed to be able to openly express and disseminate their ideas. Their second objective, which was closely related to the first, was that the black press should be able to operate without restrictions and without subsidies from groups that may expect a certain attitude or opinion in the newspaper's coverage of events. Next, the Niagarists wanted to obtain suffrage for black men as guaranteed by the Fourteenth Amendment. Their fourth and fifth objectives were to achieve "the abolition of all caste distinctions based simply on race and color [and] the recognition of the principles of human brotherhood as a practical present creed." The organizers also wanted to show Americans that being educated, talented, and deserving of recognition was not the monopoly of a single class or race. Furthermore, African Americans needed to be shown that they should take pride in their work and that it should be carried out with dignity, not in a constant state of oppression and degradation. Finally, members of the Niagara Movement expressed their hope that achieving each of these objectives under the leadership of wise and courageous individuals was possible.[265]

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[264] Zhang Juguo, *W.E.B. DuBois: The Quest for the Abolition of the Color Line* (New York: Routledge, 2001), 61; and, Herbert Aptheker, ed., *Pamphlets and Leaflets by W.E.B. DuBois* (Millwood, New York: Kraus Thomas Organization Limited, 1986), 55.58.

[265] Zhang, *The Quest for the Abolition of the Color Line*, 61; and, Aptheker, ed., *Pamphlets and Leaflets*, 59.

From 1906 to 1909, the Niagara Movement held four more annual conferences. In 1906, the meeting took place in Harper's Ferry, West Virginia, where the participants walked barefoot across the same land John Brown has crossed during his infamous raid. DuBois presented an "Address to the Country" in which he declared, "We will not be satisfied to take one jot or tittle less than our full manhood rights. We claim for ourselves every single right that belongs to a freeborn American, political, civil and social; and until we get these rights we will never cease to protest and assail the ears of America. The battle we wage is not for ourselves alone but for all true Americans. It is a fight for ideals, lest this, our common fatherland, false to its founding, become in truth the land of the thief and the home of the Slave – a by-word and a missing among the nations for its sounding pretensions and pitiful accomplishments." DuBois's address reflected the ideals of the Fourteenth and Fifteenth Amendments, as well as the objectives spelled out by the Niagara Movement at its inaugural meeting a year earlier. Although he had many supporters, DuBois also faced criticism from both blacks and whites who preferred Washington's approach to race issues. One northern philanthropist, George Foster Peabody, expressed his concern that DuBois was belittling others and encouraging black Americans to follow "false views." In his letter to DuBois, Peabody also suggested that DuBois was harming his own work and reputation by coming across as petty and ashamed of his race. A southern African American, Ben Davis, wrote that DuBois was "simply one of those over-educated theorists. . . . In fact, the poor devil is crazy and ought not be taken seriously." Despite this criticism of DuBois, however, the Niagara Movement garnered a relatively large amount of support from African Americans and experienced increasing membership in its first two years with nearly two hundred active

members. As a means of disseminating the ideas and objectives of the movement, DuBois founded a weekly newspaper, *The Moon*, and a monthly newspaper, *The Horizon*. The group then held meetings in Boston (1907), Oberlin, Ohio (1908), and Sea Isle City, New Jersey (1909).[266]

Although the Niagara Movement attained some measure of success, it failed to become the strong national movement its founders had wanted. The movement's failure to achieve its objectives stemmed from several factors, including disagreements within the organization, lack of money, the deep-rooted racism of many white Americans at the turn of the century, and the ultimate inability of the movement to reach the African American masses. Nevertheless, the importance of the Niagara Movement cannot be denied. According to sociologist and historian Elliot Rudwick, "The men of Niagara helped to educate Negroes to a policy of protest and taught the whites that there existed a growing number of Negroes who were dissatisfied with anything less than a full measure of manhood rights. The Niagara men came from the wilderness and hewed a spiritual path for younger men to follow." Most importantly, the Niagara Movement laid the groundwork for the National Association for the Advancement of Colored People (NAACP) with nearly all of the Niagarists becoming members of the new group. The creation of the Niagara Movement also effectively divided African American intellectuals into those who supported DuBois and those who supported Washington.[267]

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[266] Zhang, *The Quest for the Abolition of the Color Line*, 61-62; Aptheker, ed., *Pamphlets and Leaflets*, 63-64; John Dittmer, *Black Georgia in the Progressive Era, 1900-1920* (Urbana: University of Illinois Press, 1977), 173; and, W.E.B. DuBois, *Darkwater: Voices from within the Veil* (New York: Schocken Books, 1969), 22.

[267] Zhang, *The Quest for the Abolition of the Color Line*, 62; Elliot Rudwick, "The Niagara Movement," in August Meier and Elliot Rudwick, eds., *The Making of Black America*, Vol. 2 (New York: Athenaeum, 1969), 147; W.E.B. DuBois, *Dusk of Dawning: An Essay toward an Autobiography of a Race Concept* (New York: Schocken Books, 1968), 95; and, W.E.B. DuBois, *The Autobiography of W.E.B. DuBois: A*

In February 1909, the same year as the last Niagara Movement meeting, the NAACP formed on Abraham Lincoln's one hundredth birthday. The group emerged, at least in part, as a response to a race riot the previous year in Lincoln's hometown of Springfield, Illinois. The riot began on August 14, 1908, and lasted for three days. The initial cause of the riot was the accusation of a white woman that a well-spoken, young African American man, George Richardson, had raped her. The extent of riot, however, likely resulted from tensions between whites and a growing black population in the area. Springfield's sheriff attempted to transfer Richardson out of the city in an effort to protect him, but when whites found out about this perceived deception it only fueled their anger. A group of white men gathered outside the jail and was encouraged to act by boardinghouse keeper Kate Howard. According to historian David Levering Lewis, Howard yelled at the men, "What the hell are you fellas afraid of? . . . Women want protection!" By the end of the riot, the men Howard had goaded into action had caused two lynchings, six fatal shootings, over eighty injuries, the flight of thousands of African Americans from the city, and more than $200,000 in damages. Although the National Guard was able to restore order, African Americans continued to fear for their safety and their businesses suffered from white boycotts.[268]

The riot gained attention from across the country, with one of the most widely read commentaries coming from William English Walling. Walling was a socialist who

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Soliloquy on Viewing My Life from the Last Decade of Its First Century (New York: International Publishers, 1968), 254.

[268] David Levering Lewis, *W.E.B. DuBois: Biography of a Race, 1868-1919* (New York: Henry Holt and Company, 1993), 387-388; Zhang, *The Quest for the Abolition of the Color Line*, 87; and, "Frenzied Mob Sweeps City," *The Illinois State Journal*, August 5, 1908.

had rushed to St. Petersburg, Russia, following the "Bloody Sunday" massacre.[269] In the September 3, 1908, edition of the *Independent*, Walling wrote, "Either the spirit of the abolitionists, of Lincoln and Lovejoy, must be revived and we must treat the negro on a plane of absolute political and social equality, or Vardaman and Tillman will soon have transferred the race war to the North." He further warned that if the South's ways of dealing with African Americans spread to the North, "every hope of political democracy will be dead, other weaker races and classes will be persecuted in the North as in the South, public education will undergo an eclipse, and American civilization will await either a rapid degeneration or another profounder and more revolutionary civil war, which shall obliterate not only the remains of slavery but all other obstacles to a free democratic evolution that have grown up in its wake." With this appeal, Walling contributed to the founding of the NAACP.[270]

In response to Walling's article and the reactions of others who supported equal rights for African Americans, Oswald Garrison Villard distributed an invitation to a national conference to develop solutions to the ever-growing race problem. Villard, the grandson of fames anti-slavery activist William Lloyd Garrison, believed that Abraham Lincoln would be disappointed by the condition of black Americans at the time. In the meeting announcement, Villard asked "all the believers in democracy to join in a national

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[269] "Bloody Sunday" occurred in January 1905 in Petersburg, Russia. Father Gapon organized a march of Petersburg workers with the government's permission. When the unarmed workers approached the Winter Palace to ask for reforms, the Tsar's ministers called out troops who fired upon the crown and killed hundreds of the workers. The incident help to lead to the October Revolution of 1905 and it destroyed any remaining faith the Russian people had in their Tsar.

[270] William English Walling, "The Race War in the North," in Arthur Weinberg and Lila Weinberg, eds., *The Muckrakers: The Era in Journalism That Moved America to Reform – The Most Significant Magazine Articles of 1902-1912* (New York: Capricorn Books, 1964), 238-239; Zhang, *The Quest for the Abolition of the Color Line*, 87-88; Lewis, *Biography of a Race*, 388-389; and, Aptheker, ed., *Pamphlets and Leaflets*, 534.

conference for the discussion of present evils, the voicing of protests, and the renewal of the struggle for civil and political liberty." The two-day National Negro Conference commenced on May 31, 1909, in New York City and its participants included both white and black reformers. Out of the conference emerged the NAACP whose early members included DuBois, Villard, Mary Talbert, Mary Church Terrell, Ida Wells-Barnett, George White, Mary White Ovington, Charles Darrow, and Lincoln Steffans. Several participants from the Niagara Movement joined the NAACP; eight of them served as board members in the new organization. The primary goals of the NAACP were "To promote equality of rights and eradicate caste or race prejudice among citizens of the United States; to advance the interests of colored citizens; to secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability, and complete equality before the law." These goals, as well as the plans for achieving them, were very similar to those used by the Niagara Movement. First, the NAACP planned to present facts about racism to the public through the press, other publications, and rallies. The purpose of spreading this information would be to change public opinion and to convince Americans they needed to support change. Their second means of achieving their goals would be to convince state and federal legislators to pass legislation correcting the wrongs committed against African Americans by Jim Crow laws. Finally, and most important for the purposes of this study, the NAACP planned "to litigate at all levels of the judicial system

to assure African Americans equal opportunities in voting, housing, education, and public accommodations.[271]

Residential Segregation

The organization's opportunity to use the court system to attain equal opportunities in housing quickly showed itself. Once the states believed they had received permission from the Supreme Court to regulate how black citizens traveled, where they sought entertainment, and where they could attend school, it was only logical that the states would try to control where African Americans lived. Thus, on December 10, 1910, Baltimore became the first city to pass a residential segregation law. The ordinance designated the boundaries of white and black neighborhoods throughout the city. Over the next several years, numerous cities including Dallas, Texas, Greensboro, North Carolina, Louisville, Kentucky, Okalahoma City, Oklahoma, Norfolk and Richmond, Virginia, and St. Louis, Missouri enacted similar pieces of legislation. A new trend of residential segregation had taken hold. Many of these laws simply turned *de facto* segregation that had been largely self-imposed for decades into *de jure* segregation. The decisions of several cities to require such segregation demonstrated two things. First, as Edward Ayers noted in *The Promise of the New South*, as the South became

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[271] Mary White Ovington, "How the National Association for the Advancement of Colored People Began," in John Hope Franklin and Isidore Starr, eds., *The Negro in Twentieth Century America: A Reader on the Struggle for Civil Rights* (New York: Vintage Books, 1967), 97-100; Langston Hughes, "The Formation of the NAACP," in Joanne Grant, ed., *Black Protest: History Documents and Analysis, 1619 to the Present* (Greenwich, Connecticut; Fawcett Publication, Inc., 1968), 212; Zhang, *The Quest for the Abolition of the Color Line*, 88-89; and, Lewis, *Biography of a Race*, 389-396.

increasingly urbanized whites felt a greater need to establish boundaries that had not been as necessary in rural living. Second, following decades of the Supreme Court upholding Jim Crow legislation, white legislators once again hoped to test the boundaries of the federal government's commitment to what they viewed as state and local matters.[272]

A new Virginia statute declared, "The preservation of the public morals, public health and public order, in the cities and towns of this commonwealth is endangered by the residence of white and colored people in close proximity to one another." With this, the state gave its cities and towns the authority to create "Segregation Districts." For each of these districts, the city would create a map showing where whites lived and where blacks lived. If, at the time of the district's creation, whites occupied a majority of the district's residences it would be designated a "white district." Districts with a higher percentage of black residents would be designated "colored districts." One year after the creation of such segregation districts, it would become illegal for African Americans to move into a white district and for whites to move into a black district. Violators of this law faced progressive fines. One effect of this law was that it guaranteed a shrinking minority in all such districts. For example, each time African Americans moved out of a white district he or she would be replaced by white citizens. This meant that over time the district would, in the hopes of the legislators, become fully segregated. In instances where a member of the minority group in a segregated district refused to move, there was often an increasing chance of racial tension. The first two cities in Virginia to make use

[272] Ayers, *The Promise of the New South*, 67.

of segregated district legislation were Norfolk and Richmond where whites felt threatened by growing black populations.[273]

Rather than focusing on pre-existing residences, the legislators of Louisiana focused on the construction of new houses. The state's 1912 law prohibited the building of houses for black citizens in white districts and the building of houses for white citizens in black districts. Again, the ultimate goal of this law was to create fully segregated neighborhoods. Violators faced fines from $50 to $2,000 and each town maintained "the right to cause said building to be removed and destroyed."[274]

In Kentucky, a similar law gave individual cities the authority to regulate residences within segregation districts. Based on this, Louisville passed an ordinance in 1914 prohibiting blacks from living in houses where a majority of homes in the area were occupied by whites and vice versa. The legislators attempted to design the ordinance to satisfy constitutional requirements. The title of the ordinance was "An ordinance to prevent conflict and ill-feeling between the white and colored races in the city of Louisville, and to preserve the public peace and promote the general welfare, by making reasonable provisions requiring, as far as practicable, the use of separate blocks, for residences, places of abode, and places of assembly by white and colored people respectively." The first section of the ordinance made it illegal "for any colored person to move into and occupy as a residence, place of abode, or to establish and maintain as a place of public assembly any house upon any block upon which a greater number of houses are occupied as residences, places of abode, or places of public assembly by white

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[273] Wynes, *Race Relations in Virginia*, 77; Greenberg, *Race Relations and American Law*, 285; and, Johnson, *The Development of State Legislation Concerning the Free Negro*, 57.
[274] Greenberg, *Race Relations and American Law*, 287; Johnson, *The Development of State Legislation Concerning the Free Negro*, 57; and, Carr, *Federal Protection of Civil Rights*, 200.

people than . . . by colored people." The second section created the same restrictions for whites in predominantly black neighborhoods. Another section of the ordinance made it illegal to force people from their home if they had lived there prior to the law taking effect. It also declared that if a landlord currently rented a residence to the minority race in that district he could continue to do so, but once they rented the residence to someone of the majority race they lost the option of renting to the minority in the future.[275]

As historian Loren Miller explains in *The Petitioners: The Story of the Supreme Court of the United States and the Negro* (1966), the Louisville legislation attempted to address not only weaknesses of other city ordinances, but also to fit within the criteria laid out by the Supreme Court in earlier decisions. First, the Louisville law endeavored to avoid the constitutional flaw of a San Francisco ordinance that had been overturned. The law in question had singled out the Chinese as a unique group and placed restrictions on just them, whereas the Louisville law appeared to place the same restrictions on both blacks and whites. Second, the Louisville ordinance " embodied the curious concept that the Fourteenth Amendment's command for equal protection of the law was satisfied if both Negroes and white persons were equally discriminated against in the same statute . . . [an] ingenious interpretation [that] was first announced by the Court in an opinion written by Justice Field in 1883, upholding an Alabama statute which punished adultery for both participants more severely when one of the adulterers was white and the other colored than when both were members of the same race." In his opinion, Field explained that because both whites and blacks were punished uniformly, there was no violation of

[275] *Buchanan v. Warley* [245 U.S. 60 (1917)]; and, Miller, *The Petitioners*, 246-247.

the equal protection clause of the amendment. The authors of the Louisville law clearly hoped that by allowing both whites and blacks to buy property anywhere, within the rules for use and occupancy, they would avoid claims from opponents that the law violated property rights and that it unjustly singled out African Americans for less protection under the law.[276]

Shortly after the passage of the Louisville ordinance, members and allies of the city's NAACP chapter set up a test case with hopes of making it to the Supreme Court. Charles Buchanan, a white man, agreed to sell a lot to William Warley, a black man. Buchanan was a well-respected realtor in the community and an ally of the NAACP who owned a piece of property on a block where there were eight white residences and two black residences. Warley was the editor of *Louisville News*, which he founded in 1913, and president of Louisville's NAACP chapter. On October 31, 1914, the two men entered into a contract with each other. The contract of sale, written by Warley, stated, "It is understood that I am purchasing the above property for the purpose of having erected thereon a house which I propose to make my residence, and it is a distinct part of this agreement that I shall not be required to accept a deed to the above property or to pay for said property unless I have the right under the laws of the state of Kentucky and the city of Louisville to occupy said property as a residence." Buchanan accepted these terms. Then, as arranged by the two men in advance, Warley refused to pay Buchanan for the property because Section 1 of the new Louisville ordinance would prevent him from occupying a house at the address in question.[277]

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[276] Miller, *The Petitioners*, 246-247.
[277] *Buchanan v. Warley* [245 U.S. 60 (1917)]; and, Howard, *The Shifting Wind*, 184-186.

Buchanan proceeded to sue Warley for payment in the Jefferson County Circuit Court and requested a court order requiring Warley to honor the terms of their agreement. Buchanan's primary argument before the court was that the Louisville ordinance was unconstitutional under the Fourteenth Amendment and, therefore, could not be used by Warley as a defense for failing to pay him for the property. On the basis of the Louisville ordinance and the Kentucky statute, however, the local court and the Kentucky Court of Appeals decided in favor of Warley. Judge J.B. Hannah of the state court expressed the court's unanimous opinion on June 18, 1915. He explained that, as its framers had hoped, the Louisville ordinance was consistent with the Fourteenth Amendment because "It bore equally on both races, it had a rational basis related to the maintenance of racial peace, and it entailed the exercise of zoning powers which, undeniably, the state had." He further pointed to the Supreme Court's holding in *Berea v. Kentucky* that "the Fourteenth Amendment is not offended where 'the State is fully committed to the principle of the separation of the races whenever and wherever practicable and expedient for the public welfare.'" Thus, Buchanan appealed to the Supreme Court, making the argument that the Louisville ordinance violated the Fourteenth Amendment of the Constitution "in that it abridge[d] the privileges and immunities of citizens of the United States to acquire and enjoy property, [took] property without due process of law, and denie[d] equal protection of the laws." Throughout the South, blacks and city officials looked on and waited for the Supreme Court to decide the fate of residential segregation.[278]

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[278] *Buchanan v. Warley*, 245 U.S. 60 (1917); Howard, *The Shifting Wind*, 186; and, *Berea v. Kentucky*, 211 U.S. 45 (1908).

The irony of this legal challenge was that it placed a white realtor in the position of challenging the constitutionality of Louisville's ordinance while a black man, in essence, sided with the Louisville City Counsel and used the segregation ordinance as his defense for not paying for the property. Essentially, the NAACP had created a situation where the challenge to an anti-black law came from a respected white man. Nevertheless, all of the parties involved understood what was at stake. Even representatives from other cities with similar laws filed supporting briefs on behalf of Louisville with the Supreme Court in hopes of persuading the justices to uphold the law. In *The Shifting Wind*, John Howard explains that Baltimore referred to Justice Field's opinion in its brief. The city "contended that there was 'no such discrimination as is prohibited by the Constitution or statutes securing civil rights' to be found in racial zoning ordinances. What was denied one race was denied the other. What was allowed one race was allowed the other. Blacks could not buy or live in white zones, but then, whites could not buy or live in black zones. Hence, both races were being treated equally." Furthermore, those who supported Louisville's ordinance argued that it passed the Court's reasonableness test because it was designed to create racial peace and it was necessary for the safety of all Americans to require the residential separation of the races.[279]

Moorfield Storey, who had served as the first president of the NAACP from 1909 to 1915, argued the case on behalf of Charles Buchanan. Storey was a graduate of Harvard Law School and, at the time of this case, was president of the national Anti-Imperialist League. More important for this case was his dedication to civil rights for

[279] Howard, *The Shifting Wind*, 186-187; and, *Buchanan v. Warley* [245 U.S. 60 (1917)].

African Americans, immigrants, and Native Americans. He once said, "When the white man governs himself that is self-government, but when he governs himself, and also governs another man, that is more than self-government – that is despotism." With his participation in the NAACP and his work to protect civil rights for all Americans, Storey had repeatedly proven his dedication to achieving the goals of the NAACP.[280]

With assistance from Clayton Blakely and Harold Davis, Storey strove to differentiate residential segregation from other types of Jim Crow laws because it dealt a direct blow to a central tenet of the United States government: property rights. The attorneys for Buchanan explained, "The general assumption is that a law is enacted in good faith for the purposes declared, but where, as in this case, it is obvious that the real purpose was very difference, the courts will determine the purpose for the natural and legal effect of the language employed when put into operation." According to Storey, the effect of the Louisville ordinance was to prevent Buchanan from selling his property. He elaborated that, because the lot Buchanan contracted to sell to Warley was situated between two lots occupied by blacks, if he were not allowed to sell the land to a black man he would never be able to sell it because "the lot is so situated . . . that no white man would buy it." Furthermore, Storey pointed out that even if Warley did pay Buchanan for the property, he would not be able to live on it or rent it to another black, even though he would face the same problems as Buchanan in finding a white buyer or renter for the property. The Louisville ordinance had turned Buchanan's property into something that he could not sell or use. By focusing on the issue of property rights, something had

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[280] William B. Hixson, Jr., *Moorfield Storey and the Abolitionist Tradition* (New York: Oxford University Press, 1972), 171; Robert L. Zangrando, *The NAACP Crusade Against Lynching*, 24-30; and, Howard, *The Shifting Wind*, 188.

nearly always been fundamentally protected by the federal government, Storey distinguished this case from the civil rights cases heard earlier by the Supreme Court.[281]

After hearing the arguments of both sides, the Court reached a unanimous decision that was presented by Justice William Rufus Day. Justice Day, a Republican who joined the Court in 1903 as a nominee of Theodore Roosevelt, had written only one key opinion prior to *Buchanan v. Warley*.[282] In *McLean v. Arkansas* [211 U.S. 539 (1909)] he had represented the Court's majority in upholding mining safety regulations. Originally from Ravenna, Ohio, where he was born in 1849, Justice Day spent the first forty years of his life in the state, except for his time at the University of Michigan as an undergraduate and as a law student. His family had a strong judicial background with three generations before him serving as prominent justices in Connecticut and Ohio. As a lawyer in Canton, Ohio, Day focused on litigation. His partner introduced him to his future wife and to William McKinley who became governor of Ohio and then president of the United States. Day followed McKinley to Washington and served as Assistant Secretary of State, Secretary of State, and as head of the U.S. delegation to the Paris Peace Conference at the end of the Spanish-American War. From 1899 to 1903, when he was chosen by Roosevelt to replace Justice George Shiras, Jr., Day served as a judge for the U.S. Court of Appeals for the Sixth District. His focus throughout his career as a justice was on the federal government's commerce power, which he believed should be

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[281] Hixson, *Moorfield Storey*, 171; Howard, *The Shifting Wind*, 188-189; *Buchanan v. Warley* [245 U.S. 60 (1917)]; and, Zangrando, *The NAACP Crusade*, 24-30.

[282] At the time Day received his nomination, the Supreme Court included Chief Justice Melville W. Fuller and Associate Justices John H. Harlan, David J. Brewer, Henry B. Brown, Edward D. White, Rufus W. Peckham, Joseph McKenna, and Oliver Wendall Holmes. By the *Buchanan* decision, the following justices had taken their seats on the court: William H. Moody (1906), Horace H. Lurton and Charles Evans Hughes (1910), William Van Devanter and Joseph R. Lamar (1911), Mahlon Pitney (1912), and Louis D. Brandeis and John H. Clarke (1916).

limited. As a liberal formalist, he believed that "within limits . . . government regulation of economic and social activity" was acceptable and that the states should yield greater police power than the federal government.[283]

In his *Buchanan v. Warley* decision, Day opened with a summary of the pertinent sections of Louisville's ordinance and of the contract between Warley and Buchanan. After establishing that the case came before the Court on an assignment of error that condemned the city ordinance for violating the privileges and immunities clause and the equal protection clause of the Fourteenth Amendment, Day proceeded to summarize the determinable issues before the Court. In response to an argument that Buchanan's writ of error should be dismissed because he, as a white man, was not included in the protections of the Fourteenth Amendment, Day explained, "This court has frequently held that while an unconstitutional act is no law, attacks upon the validity of laws can only be entertained when made by those whose rights are directly affected by the law or ordinance in question. Only such person, it has been settled can be heard to attack the constitutionality of the law or ordinance. But this case does not run counter to that principle." Rather, the lower courts had determined that Buchanan was directly affected because, if it were not for the city ordinance, Warley would have been compelled to purchase the property. Based on this determination, the Supreme Court decided not to dismiss the case.[284]

In considering the merits of the case, Day discussed the city's claim that "such legislation tends to promote the public peace by preventing racial conflicts; that it tends

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[283] Joseph E. McLean, *William Rufus Day: Supreme Court Justice from Ohio* (New York: New York University Press, 1946); Melvin I. Urofsky, "Day, William Rufus," in *Biographical Encyclopedia of the Supreme Court* (Washington: Congressional Quarterly Press, 2006); and, Vernon W. Roelofs, "Justice William R. Day and Federal Regulation," in *The Mississippi Valley Historical Review*, Vol. 37, No. 1 (June 1950), 39-60.

[284] *Buchanan v. Warley* [245 U.S. 60 (1917)]; and, Howard, *The Shifting Wind*, 189-190.

to maintain racial purity; [and] that it prevents the deterioration of property owned and occupied by white people, which deterioration, it is contended, is sure to follow the occupancy of adjacent premises by persons of color." Referring to the state's authority to exercise its police power, Day brought up one of the themes most commonly seen in his work. He explained that the states should have the authority to exercise such power for protecting public safety, welfare, and health. He concluded, however, "that the police power, broad as is it, cannot justify the passage of a law or ordinance which runs counter to the limitations of the federal Constitution . . . [which] are by the express terms of that instrument made the supreme law of the land." Focusing on the Fourteenth Amendment, he explained that its purpose was to protect the life, liberty, and property of citizens from being infringed upon by the states without due process of law. According to Day, the right to property was more than just the right to ownership. It was "the right to acquire, use, and dispose" of property as one saw fit.[285]

The central question before the Supreme Court, according to Day, was "May the occupancy, and, necessarily, the purchase and sale of property of which occupancy is an incident, be inhibited by the states, or by one of its municipalities, solely because of the color of the proposed occupant of the premises?" Making a reference to the Reconstruction Amendments, Day explained that since the Civil War they had become an integral part of American law that guaranteed certain fundamental rights for citizens and that placed certain limits upon state legislatures. In the *Slaughterhouse Cases*, the Court had decided that the language of the Fourteenth Amendment was broad enough to protect the civil rights of all citizens, not just African Americans. In *Strauder v. West Virginia*,

[285] *Buchanan v. Warley* [245 U.S. 60 (1917)].

Justice Strong had declared that the Fourteenth Amendment guaranteed both citizenship and the privileges of citizenship to African Americans. He also explained, however, that the Fourteenth Amendment was in effect "declaring that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states." In addition to discussing the previous Supreme Court decisions that supported the idea that the Fourteenth Amendment was meant to apply to all citizens, Justice Day also drew attention to legislation passed in support of the Reconstruction Amendments. One stated, "All citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property." Another declared, "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens." On this foundation of legislation and judicial decisions, Justice Day reached the Court's preliminary conclusion that the Louisville ordinance did, in fact, violate Buchanan's rights because it prevented him from disposing of his property to Warley for the sole reason that Warley was black. According to Day, the legislation mentioned dealt not with social rights, but "with those fundamental rights in property" viewed as so important by American citizens. The combination of the Fourteenth Amendment and these supporting laws was meant to guarantee the right of African American citizens to acquire property without interference from state legislators.[286]

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[286] *Buchanan v. Warley* [245 U.S. 60 (1917)].

Day proceeded to briefly discuss the precedents of *Plessy v. Ferguson* and *Berea College v. Commonwealth of Kentucky*. He explained that in *Carey v. City of Atlanta*, the Supreme Court of Georgia had dealt with those two cases in such a way, as he did not feel the need to use his own words. Rather he quoted the lower court's decision from the case that had dealt with similar principles as those now facing the U.S. Supreme Court. According to the Georgia court,

> In each instance the complaining person was afforded the opportunity to ride [*Plessy*] or to attend institutions of learning [*Berea*], or afforded the thing of whatever nature to which in the particular case he was entitled. The most that was done was to require him as a member of a class to conform to reasonable rules in regard to the separation of the races. In none of them was he denied the right to use, control, or dispose of his property, as in this case. Property of a person, whether as a member of a class or as an individual, cannot be taken without due process of law. In the recent case of *McCabe v. Atchison, etc., Ry. Co.*, 235 U.S. 151 [35 Sup. Ct. 69], where the court had under consideration a statute which allowed railroad companied to furnish dining cars for white people and to refuse to furnish dining cars altogether for colored persons, this language was used in reference to the contentions of the Attorney General: 'This argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal right.' . . . The effect of the ordinance under consideration was not merely to regulate a business or the like, but was to destroy the right of the individual to acquire, enjoy, and dispose of his property. Being of this character, it was void as being opposed to the due process clause of the Constitution.

Day added that while "there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control," the solution to the problem was not to deprive citizens of their constitutionally protected rights and privileges.[287]

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[287] *Buchanan v. Warley* [245 U.S. 60 (1917)]; *Carey v. City of Atlanta* [143 Ga. 192, 84 S. E. 456, L. R. A. 1915D, 684, Ann. Cas. 1916E, 1151]; and *McCabe v, Atchison, Topeka, & Santa Fe Railway Company* [235 U.S. 151 (1914)].

Although the Supreme Court had upheld legislation requiring separate but equal accommodations on public transportation and in public schools, Day argued there had to be limitations to such concessions in order to protect the rights guaranteed by the Fourteenth Amendment. He maintained that "such legislation . . . cannot be sustained where the exercise of authority exceeds the restraints of the Constitution." The Supreme Court, he declared, "think[s] these limitations are exceeded in laws and ordinances of the character now before us." Thus, the Court reversed the decision of the Kentucky Court of Appeals. Day concluded that laws such as the Louisville residential ordinance existed for the express purpose of separating the races in order to maintain the purity of the races. Nevertheless, the ordinance expressly allowed black servants to work in the homes of white families and for current black residents to continue living on "white blocks," which brought into question the motivation for separating the races. Furthermore, the case of *Buchanan v. Warley*, as it was presented to the Court, dealt with the civil rights of a white man as much as with the civil rights of a black man. It was, after all, Buchanan who was unable to sell his property to the buyer of his choice. Finally, Day explained that the claim that having African Americans move into a neighborhood would depreciate the value of property owned by white persons was faulty because property values were just as likely to decrease in value if "undesirable white neighbors" moved in. Ultimately, Day returned to his favorite topic and declared that the law in question could not stand because "this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the state" and was a clear violation of the Fourteenth Amendment.[288]

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[288] *Buchanan v. Warley* [245 U.S. 60 (1917)].

Elation in the African American Press:

For the first time in several decades, the Supreme Court had presented an opinion that seemed to favor African Americans over Jim Crow and the black press responded accordingly. Despite Justice Day's focus on property and his argument that the right to property included not only ownership, but also the ability to sell one's property freely, many African Americans viewed his opinion as a decision focused on racial segregation. Throughout the country, African American writers and editors quickly told their readers about the decisions, popular among the black community, in articles with headlines such as "Supreme Court Declares Segregation Void" and "Segregation Annulled." The general response to the decision was one filled with elation and with hope that it signified a change in the Court's treatment of black citizens.

Just days after the decision, Baltimore's *Afro-American* published four articles related to the case. On the front page of its November 10 edition, "Supreme Court Declares Segregation Void: Renders Sweeping Decision Regarding Property Rights of American Citizens" offered the text of Day's decision. It also pointed out that while the decision dealt directly with the Louisville ordinance, it meant that all similar laws passed to segregate white and black residences were also void. Another front page article told the story of a black man, Sidney Burrell, who had appeared in court two days after the Supreme Court's decision to face charges of violating Baltimore's own residential segregation law. According to the article, a white man complained after Burrell moved to a street that already had a mixed population. One black resident, Mrs. Dickerson, had lived on the street for almost thirty years. Nevertheless, when Burrell moved to the street

it violated a Baltimore ordinance which made it illegal for blacks to move onto a street where the majority population was white. In light of the new Supreme Court decision, Burrell told the *Afro-American* that he was "going to stand pat and let the courts decide the question."[289]

Inside the same edition, two other articles addressed the Court's decision. An article titled "Segregational Ordinance Illegal" opened with a declaration that "The joy in Bunkville when home run Casey came to bat in the final inning of a famous game with the bases loaded, is nothing compared with the rejoicing in Baltimore, Richmond, St. Louis, and several other Southern towns over the outcome of the Louisville Segregation decision handed down by the Supreme Court last Tuesday." The author praised the NAACP and Moorfield Storey who "in his splendid fight before the Court, set forth arguments on this case which will stand as long as human rights are in jeopardy." He further noted that Day's opinion represented a great step forward from the Dred Scott decision, but that it would not result in a huge shift of the African American population from "colored districts" to "white districts." On the contrary, he expected very little to change in the makeup of most neighborhoods because most black Americans would prefer to live among their family and friends. He likely expressed this opinion which, while true, would hopefully help to calm the fears of white Americans concerned that blacks would being rushing to move into their neighborhoods. The option to move, however, now existed for those who wanted it. Finally, the article that opened with an expression of jubilation closed with a declaration of hope: "Let us hope it is but a forerunner of the future decree which shall declare all discrimination between citizens as

[289] *Afro-American*, "Supreme Court Declares Segregation Void: Renders Sweeping Decision Regarding Property Rights of American Citizens" and "Burrell to Stand Pat," November 10, 1917.

contrary to the principles of free democracy as set down in our constitution and its amendments."[290]

One final article, that was again likely intended to, in part, calm white Americans' fears while also unifying black Americans, beseeched Baltimore's African American community to take things slowly. Following an expression of satisfaction that the current residential segregation laws had been voided, the author warned that "To rush headlong into white neighborhoods, simply for the sake of getting back at the white folks is not good policy. Rather, blacks should move forward at a reasonable pace so as not to cause unnecessary friction."[291]

In Chicago's *The Broad Ax* the decision only captured one article in the November 10 edition, but its large and eye-catching headline declared, "The United States Supreme Court, the Majority of Its Members Being Dyed in the Wool Democrats, Has Handed Down a Decision to the Effect That Segregation Laws or Ordinances of Baltimore, Maryland; Richmond, Virginia; St. Louis, Missouri; Louisville, Kentucky, and Many Other Southern Cities Are Unconstitutional." The newspaper offered this decision as proof that if the ten million African Americans in the United States would pool their political and financial resources they would be capable of ridding the South of all of its Jim Crow legislation. Apparently missing the focus on property rights in Justice Day's opinion, the article declared, "The members of the Supreme Court . . . [have] dealt all kinds of 'Jim Crow' legislation a staggering blow and the narrow minded race prejudice ridden whites residing throughout the southland will never be able to completely recover from its effect." The author praised the black citizens of Louisville

[290] *Afro-American*, "Segregational Ordinance Illegal," November 10, 1917.
[291] *Afro-American*, "Lets Go Slow," November 10, 1917.

for standing up and fighting for their rights and encouraged others to follow their example.[292]

Another example of the fast response by the African American press appeared in *The New York Age* only three days after Justice Day presented his opinion. According to a front page article, "Segregation was given a black-eye by the United States Supreme Court" in its far-reaching opinion. The article also explained that one of the primary complaints made by the black citizens of Louisville had been that the ordinance forced them to live in neighborhoods with "disagreeable and worthless neighbors" and that it barred them from moving into areas that were more desirable. Another article in the same edition discussed the significance of the decision for African Americans throughout the United States. It declared, "The segregation movement was of wider scope [than Oklahoma's attempts to limit voting with a grandfather clause] and if its validity had been established, there was no limit to the evils following its propagation."[293] The author, while supporting the decision, also recognized that the Court had couched its decision in terms that only literally applied "to the civil rights of a white man to dispose of his property to a person of color and of a colored person to make such disposition to a

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[292] *The Broad Ax*, "The United States Supreme Court, the Majority of Its Members Being Dyed in the Wool Democrats, Has Handed Down a Decision to the Effect That Segregation Laws or Ordinances of Baltimore, Maryland; Richmond, Virginia; St. Louis, Missouri; Louisville, Kentucky, and Many Other Southern Cities Are Unconstitutional," November 10, 1917.

[293] *The New York Age* article refers to an Oklahoma statute that inserted a grandfather clause into a literacy test requirement for voting. On the surface, the statute treated African Americans and whites equally because it required members of both races to pass a literacy test before voting. The inclusion of a grandfather clause exempting anyone who's ancestors had been able to vote prior to January 1, 1866, from the literacy test, however, meant that the statute was clearly directed at blacks. In *Guinn v. United States* [238 U.S. 347 (1915)], the Supreme Court held that the only reason for the grandfather clause's inclusion in the statute was to prevent African Americans from voting and, thus, the statute was unconstitutional.

white person." Nonetheless, the decision imparted a sense of hope for legal equality long missing from the African American community.[294]

The Washington Bee took a somewhat different approach than most of the black press in its first edition after the decision. Rather than publishing articles that directly referred to the opinion and that expressed excitement for the Supreme Court's apparent impartiality, the newspaper ran an article discussing the positive aspects of "colored colonies." While admitting that the passage of residential segregation legislation by white legislators was insulting and unjust for black citizens, the journalist argued that such colonies, or neighborhoods, were in some ways better for black Americans. Pointing to Washington, D.C. as an example, he noted that twenty years earlier when there had been no true separation of the races it had been difficult for blacks to buy or rent homes in better neighborhoods at a fair price. Over time, however, "colored people gradually controlled more money and took on more refinement," which made it possible for them to buy nicer homes. Rather than living next to blacks who appeared to view themselves as their equals, many white families responded by moving to suburbs on the outskirts of town. The result was that entire areas previously occupied by whites became so-called "colored colonies." In the opinion of the article's author, there were "no more orderly sections in the city than these self-same colored colonies and the surroundings [were] usually refined." Furthermore, he noted that once blacks moved into

[294] *The New York Age*, "Segregation Ordinance is Declared Invalid: United States Supreme Court Renders Important Decision in Louisville Case" and "Segregation Annulled," November 8. 1917.

neighborhoods such a Ledroit Park,[295] housing prices became much more manageable than the costs of living in white neighborhoods.[296]

Over the next several weeks, most African American newspapers continued to discuss the importance of the Court's decision. Surprisingly, in the shadow of the Supreme Court, *The Washington Bee* dedicated little space to the case. On November 17, it printed Justice Day's opinion in its entirety but offered absolutely no commentary. A bigger issue for the African Americans in the nation's capital appeared to be the recruitment and treatment of black soldiers for World War I.

Nearby in Baltimore, the Court's opinion remained a hot topic of discussion for over a month, largely because Baltimore had a similar ordinance in place. A unique article in the city's *Afro-American* included a review of Day's opinion written by Warren T. McGuinn. McGuinn was a well-known member of the Maryland bar. He argued that when Day concluded, "that the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution," he had effectively ended segregation in the United States. McGuinn believed that although segregationists would respond with anger towards the Court and with promises to create even stronger Jim Crow laws, segregation was dead. He explained, "the right of personal

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[295] LeDroit Park is a neighborhood in Washington, D.C. that is situated directly south of Howard University. The community was founded in 1873 by Amzi Barber, one of the founders of Howard, and his brother-in-law, Andrwe Langdon. Named after Barber's father-in-law, Le Droit Park was a white's only development with houses designed by James H. McGill. The homes were originally marketed to businessmen and professionals. The development's early residents included McGill, Ohio Congressman Benjamin Butterworth, Howard University professor of law Arthur Birney, and geologist Henry Gannet. Eventually, residents of the neighboring black community, Howard Town, began to resent the fence that surrounded Le Droit Park. After African Americans repeatedly climbed the fence and then tore it down, Le Droit Park residents abandoned the fence idea in 1891. Afterwards, the community became integrated as blacks including Mary Church Terrell, Robert Terrell, and Paul Laurence Dunbar moved into the neighborhood. The neighborhood became known as a center for African American cultural and intellectual life in Washington during the first half of the twentieth century.

[296] *The Washington Bee*, "Colored Colonies," November 10, 1917.

security, the right of personal liberty, and the rights of private property are original rights" that were not created by the Constitution, but that the framers of the Fourteenth Amendment had intended to protect those rights.[297]

A week later, the *Afro-American* told the story of a man who faced charges of violating Baltimore's residential segregation law after city official failed to recognize the Supreme Court's decision. The case of Dr. William T. Coleman went before the United States District Court. Coleman faced charges for moving to a white block in violation of Baltimore's ordinance. His attorney was none other than Warner T. McGuinn whose interpretation of Justice Day's opinion had appeared in the newspaper only a week earlier. In a petition for habeas corpus proceedings filed on Coleman's behalf, McGuinn argued that Coleman had "bought the property sometime ago but did not move therein, being advised that the segregation law prevented such." He contended that Coleman moved into the residence only after the Supreme Court annulled Louisville's ordinance. Although the outcome of Coleman's case was not yet available, the fact that he faced charges at all suggested that white southerners did not view the Court's decision as the death of segregation.[298]

Other black newspapers throughout the North and South also expressed joyous reactions to the decision. William Warley's own newspaper, the *Louisville News*, exclaimed, "It is a glorious victory for the colored people of the city of Louisville, and a fitting reward for the sacrifices we have made to test this case in the highest court in the land." Nashville's *Globe*, again demonstrating that many African Americans failed to

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[297] *Afro-American*, "Segregation in the U.S. is Dead: Opinion of the Supreme Court Not Only Pronounced But Sealed Its Doom," November 17, 1917.
[298] *Afro-American*, "Segregation in U.S. Court: City Authorities and Police Dept. Fail to Recognize Recent decision of Supreme Court," November 24, 1917.

take notice of Justice Day's focus on property rights, expressed the belief that segregation laws had borne nothing but hatred and that the Court's decision was likely to end the racial tensions that threatened many American cities. In Savannah, Georgia, the *Tribune* declared that the Supreme Court had finally, and correctly, dealt with the issue of segregation. A voice of caution emerged from Shreveport, Louisiana, however, where the *News Enterprise* warned, "Don't jump to conclusions and don't try to move too fast. Do not hurrah too loud or talk or act too fast. We are coming into what belongs to us and by prudence we can retain it." Such words of caution were rare, nonetheless, in a community of Americans that had been searching for hope for a long time.[299]

Although it had offered detailed coverage of the decision in its November 8 edition, a week later *The New York Age* noted that other national and world issues had taken "the public attention away from one of the most important decisions ever rendered by the Supreme Court." One issue that had drawn attention away from the opinion was women's suffrage. In November 1917, the effort to gain the vote for women strengthened as Arkansas, Indiana, Nebraska, North Dakota, Ohio, and Rhode Island approved statewide women's suffrage. In the newspaper's own backyard, the state of New York, which was the largest state in the nation, also passed women's suffrage. In New York City, there were 100,000 votes in favor of the issue. Events in other parts of the world also drew the attention of New Yorkers away from the Supreme Court's decision. From Italy, news of the country's largest military disaster in history emerged. The Italians lost 10,000 soldiers and the Austro-Hungarians captured an additional 293,000 in the Battle of Caporetto, putting Italy on the defensive in World War I. Even

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[299] *The New York Age*, "Negro Press on Court Decision," November 15, 1917.

more captivating for many Americans were the events taking place in Russia where, in less than a month, the Bolsheviks overthrew Alexander Kerensky's Provisional Government and took control of Moscow.[300]

Despite these key events, *The New York Age* hoped to make certain that its readers knew about the decision in *Buchanan v. Warley* and understood its significance. The newspaper declared, "The decision was vital because so much for the Negro depended upon it. Had the case been lost, there is no doubt that eventually segregation ordinances would have been passed by every city in the country where there was a considerable proportion of colored population, North and South." Once again, a voice of the black press indicated a belief that the Supreme Court had effectively put an end to Jim Crow legislation. As evidence of how many white Americans were expected to react to the decision, however, *The New York Age* also ran an article that originally appeared in New York's *Evening Mail*. According to that newspaper, "If there was any discrimination in the [Louisville] law, the whites were discriminated against as much as the blacks. . . . An ordinance like this of Louisville should never be declared invalid, based as it is upon the deepest race instincts – and race instincts which in this case have merely a social aim." *The New York Age* countered that line of reasoning with a quote from Moorfield Storey's pleadings before the Supreme Court: "A law which forbids a Negro to rise is not made just because it forbids a white man to fall."[301]

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[300] *The New York Age*, "Vital Decision," November 15, 1917.
[301] *The New York Age*, "A Vital Decision" and "Race Legislation from New York *Evening Mail*," November 15, 1917.

Rays of Hope:

Regardless of whether black journalists failed to recognize Justice Day's focus on property rights, the fact is that many African Americans viewed the decision in *Buchanan v. Warley*, as evidence that a new day was dawning. Blacks throughout the United States seemed to believe that the Supreme Court had finally made a decision that favored blacks and went against Jim Crow. For them, this meant there was hope that Jim Crow legislation would soon become a thing of the past and African Americans would finally attain the equality promised to them by the Reconstruction Amendments. The growing strength of the NAACP, African-American participation in the war effort during World War I, and the 1918 introduction of the Dyer Anti-Lynching Bill to the House of Representatives all contributed to this feeling of hope in the African American community. As the country prepared for a new decade, African Americans prepared for what many believed would be the beginning of a new era.

Conclusion: A Look Forward

For fifty-six years, from the Supreme Court's first civil rights decision in *Blyew v. United States* to its decision in *Buchanan v. Warley*, African Americans watched as the Court continually influenced the status of black Americans in the United States. Although the Supreme Court was not a legislative body, its decisions often served as indicators to white legislators, many of whom wanted to maintain a superior status over black Americans, that the federal government would allow them to pass restrictive legislation. When the Court announced its opinion in *Buchanan* just months after the United States entered World War I, African Americans were at a critical point in their history.

Black Americans debated among themselves, publicly and privately, about the merits of participating in the American war effort in World War I to "make the world safe for democracy." As the debate within the African-American community developed, black leaders and African American newspapers vocalized both sides of the debate. The debate, however, extended beyond such leaders and included citizens of all walks of life both as active participants and as observers influenced by the words of their respected community leaders. Supporters of black participation in the war effort tended to argue that this was an opportunity for African Americans to improve their position in the United States and that such patriotic participation would benefit the African American community as a whole. On the other hand, those opposed to black participation claimed

that assertive avoidance was necessary to gain the attention of government and social leaders who could work to help improve their overall situation. This side tended to believe it would be contradictory for African Americans to fight to protect democracy and freedom abroad while they were increasingly unable to participate in the democratic process at home and faced increasing restrictions on their own rights and freedoms. The questions raised in the debate forced African Americans to choose not only where they stood in regards to the American war effort, but also how they wanted to affect change in the status of African Americans in the years to come. In the previous decades, they had already come out on both sides of the accomodationism debate. Now, these Americans who were regularly dishonored and largely disenfranchised had to decide what role, if any, they should play in the war effort. Leaders of the African-American community including newspaper editors and writers, as well as average citizens, faced the dilemma of balancing patriotism and support for the war with the need to assert more personal demands that the United States government protect African Americans from lynching, disenfranchisement, and segregation. Their positions in this debate helped to set the stage for both the struggles and triumphs experienced by black Americans in the decades following World War I.

For those who supported African American participation in the war effort as a means to prove their patriotism and to gain the respect of white citizens, the *Buchanan* decision reflected another cause for hope. There was a sense, as was seen in the African American newspapers, that the Supreme Court had finally decided a case in favor of blacks' civil rights and that this would be the start of a new judicial trend. Many

members of the African American community, therefore, ended the year 1917 with a general feeling that their status was finally on the verge of improving.

By the following year, one of the most prolific African American leaders of the period had come out in support of black participation in the war effort. In his "Close Ranks" editorial, which appeared in the July 1918 *Crisis*, DuBois wrote

> This is the crisis of the world. For all the long years to come men will point to the year 1918 as the great Day of Decision, the day when the world decided whether it would submit to military despotism and an endless armed peace – if peace it could be called – or whether they would put down the menace of German militarism and inaugurate the United States of the World.
>
> We of the colored race have no ordinary interest in the outcome. That which the German power represents today spells death to the aspirations of Negroes and all darker races for equality, freedom and democracy. Let us not hesitate. Let us, while this war lasts, forget our special grievances and close our ranks shoulder to shoulder with our own white fellow citizens and the allied nations that are fighting for democracy. We make no ordinary sacrifice, but we make it gladly and willingly with our eyes lifted to the hills.[302]

In this single, short editorial, DuBois summed up the argument that patriotic participation in the war effort was the right thing for African Americans.

The publication of DuBois's editorial in the *Crisis* exposed thousands of black Americans to the pro-participation side of the debate and suggested to many that one of the most prominent and respected leaders of the national African American community supported patriotic participation in the war effort. Although there has been some debate about whether DuBois had an underlying intention in the writing the editorial, he inevitably contributed to the decisions of many to participate in whatever ways they

[302] *The Crisis*, 16 (July 1918).

could.[303] His request that black Americans "close [their] ranks shoulder to shoulder with [their] white fellow citizens and the allied nations that are fighting for democracy" likely convinced many young black men to volunteer to fight in the war and other blacks to support the war effort from the home front. By war's end, approximately 400,000 black men had served in the war, almost 40,000 in combat positions.[304]

Robert Abbott, editor of the *Chicago Defender*, likewise encouraged African Americans to support and participate in the war effort. By the beginning of America's involvement in World War I, Abbott had successfully turned the *Defender* into one of the most largely circulated African American newspapers in the country, selling close to 200,000 copies a week. More than two-thirds of these were read outside of the Chicago

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[303] In a series of articles published in *The Journal of American History* between 1992 and 1995, historians Mark Ellis and William Jordan debated the deeper meaning of this editorial. In "'Closing Ranks' and 'Seeking Honors': W. E. B. DuBois in World War I," published in 1992, Ellis argued that rather than being an example of DuBois accepting an accommodationist viewpoint, "[t]he editorial was a conscious deviation in the trajectory of his wartime writings and was specifically included in the July 1918 issue of the *Crisis* to help get him into military intelligence" spurred on by pressure from Emmett Scott and Joel Spingarn who hoped to successfully lobby for DuBois to gain a military commission. Ellis concluded that the editorial was neither "an adequate summary of DuBois's response to the war," nor "a summary of the views of black Americans." Three years later, in "'The Damnable Dilemma': African-American Accommodation and Protest during World War I," William Jordan countered that the "Close Ranks" editorial was, in fact, evidence of DuBois's "decision to adopt an accommodationist position during the war" as "a sensible choice in 1918 for a majority of blacks who faced the dilemma of assertively demanding their rights and risking white backlash or scaling back demands and perhaps gaining white support." Ellis then summed up their disagreement in a response piece stating "[w]here William Jordan detects prudent accommodationism and principled submission to pressure, I observe utilitarianism and fatal miscalculation." In 2002, Theodore Kornweibel, Jr. weighed in on the issue concluding that DuBois wrote the "Close Ranks" editorial in response to pressures on the NAACP from the army to release the names of all of its officers; releasing these names was likely to result in some local leaders in the South leaving the organization. According to Kornweibel, prior to the "Close Ranks" editorial, the NAACP was facing the possibilities of both "an outright ban of the *Crisis* and . . . federal prosecution [making] abject acquiescence . . . the only realistic avenue." He concludes that the result of the editorial was to relieve government pressure on the journal for the remainder of the war.

[304] William Jordan, "'The Damnable Dilemma': African American Accommodation and Protest during World War I." *The Journal of American History*, Vol. 81, No. 4 (March 1995), 1562-1583; Mark Ellis, "W.E.B. DuBois and the Formation of Black Opinion in World War I: A Commentary on 'The Damnable Dilemma,'" *The Journal of American History*, Vol. 81, No. 4 (March 1995), 1584-1590; Theodore Kornweibel, Jr., *"Investigate Everything": Federal Efforts to Compel Black Loyalty during World War I* (Bloomington: Indiana University Press, 2002), 142, 145-146; and, *The Crisis*, 16 (July 1918).

area. According to Emmett Scott in his 1920 work *Negro Migration during the War*, the *Defender* "voiced the unexpressed thoughts of many [southern African Americans] and made accusations for which they themselves would have been severely handled." Early in the war, the *Defender* published articles suggesting that the South controlled the government and, thus, contributed to widespread discrimination by the government. According to one article, the newspaper was "loathe to believe that it is the sentiment of the majority to belittle and discredit one-eighth of the entire population. The South being in the saddle, we can expect anything from that source, however." Nevertheless, Abbott ultimately called for blacks to support the war effort; he did so, however, while continuing to push for racial equality. Throughout the war period, Abbott's paper continued to publish lynching statistics and to encourage black migration, thus keeping major issues of black Americans on the forefront. Before the United States entered the war, in an article titled "How Much Longer," the *Defender* responded to lynching statistics from 1914, 1915, and 1916. During that three year period, 153 African Americans lost their lives to lynch mobs. The article stated "As ghastly as are the horrors of the European war, man's inhumanity to man is not confined to our brethren across the sea." Under pressure from the federal government, however, Abbott tempered his calls for racial equality, an end to lynching, and northern migration by also encouraging blacks to support the American war effort. He did so, in large part, to ensure the continued presence of the *Chicago Defender* as a voice for African Americans.[305]

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[305] Emmett J. Scott, *Negro Migration during the War* (New York, 1920 [reprint 1969]); *Chicago Defender*, June 30, 1917, 12; NAACP, *Thirty Years of Lynching in the United States*, 29; and, "How Much Longer," *Chicago Defender*, February 12, 1916, 8.

On the other side of the debate, A. Philip Randolph and Chandler Owen of the *Messenger* stood out in their strong opposition to black participation in the war. The socialist pair published the first edition of their journal in August 1917, several months after the United States entered the war. In the same month that DuBois published his "Close Ranks" editorial, Randolph responded to claims by some whites that black refusal to participate in the war effort reflected a pro-German stance when he wrote "the Negro may be choosing between being burnt by Tennessee, Georgia or Texas mobs or being shot by Germans in Belgium. We don't know about this pro-Germanism among Negroes. It may be only their anti-Americanism – meaning anti-lynching." Because of this and other outspoken comments that questioned the war itself as well as the need for blacks to participate in the war effort, the federal government viewed Randolph and Owen as a threat to the government's efforts in the war. [306]

Randolph and Owen directed most of their writings and speeches towards what they dubbed the "New Crowd Negro" which historian Theodore Kornweibel, Jr. identified as a group of "young blacks [who] had freed themselves from Bookerite restraints and were determined to prevent the ascendancy of a new national accommodationist leader and to forthrightly criticize the remaining generation of conservative spokesmen. . . . [and] would demand much more meaningful alterations to the racial status quo that the incremental requests begged by the previous generation." In the summer of 1918, the two men even scheduled a national speaking tour in which they planned to inform the black public about the exploitive nature of the war effort in relation to African Americans. Their tour was temporarily cut short, however, when Bureau of

[306] "Pro-Germanism among Negroes," *Messenger*, July 1918, 13.

Investigation agents arrested them on August 4 for two disloyal editorials in the *Messenger*. The first suggested that there should be a tax on war profits so that there would be no economic motivation to go to war. The second was the "Pro-Germanism among Negroes" article in which Randolph had written that perhaps blacks were more "anti-American" than "pro-German." Randolph and Owen raised the question of why African Americans should fight to "make the world safe for democracy" when they did not have access to "economic, political, educational and civil democracy" at home. The Bureau agents arrested the two men under Title 1, Section 3, of the Espionage Act. The two men "escaped trial through an ironic expression of racism. He refused to believe that the two twenty-nine-year-old 'boys' were intelligent enough to have written such articulate, if inflammatory, editorials, and was convinced others must have used their names so as to conceal their own nefarious deeds." After the judge released them, the two men continued with their speaking tour and continued to publish provocative articles in the *Messenger*.[307]

Ultimately, African Americans participated in nearly every aspect of the war effort. Thousands of black men, such as those who joined the Fifteenth New York Voluntary Infantry Regiment, or the Harlem Hell Fighters, answered President Wilson's call for citizens to fight in the war to make the world safe for democracy. Black citizens in America also did what they could to support the fight from the home front. Nevertheless, few African Americans could ignore the irony of their situation. While blacks gave their lives in the fight for democracy overseas, African Americans at home

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[307] Kornweibel, *Investigate Everything*, 74-75, 183; and, "Pro-Germanism among Negroes," *Messenger*, July 1918, 13.

continued to face discrimination and violence. Additionally, black soldiers faced mistreatment from both officers and white citizens, and the government initially refused to train black officers to command African American units. The rays of hope seen after the Court's *Buchanan* decision seemed to quickly disappear.

In the months after World War I ended, the loss of hope became even more apparent as African Americans faced increased violence at the hands of whites. In 1918, the final year of the war, sixty African Americans were lynched. That number increased to seventy-six in 1919. In addition, there were more than twenty race riots throughout the country in the summer of 1919, which was dubbed "Red Summer." Among them were riots in Charleston, South Carolina (May 10), Washington, D.C. (July 19), Chicago (July 27 through August 2), Knoxville, Tennessee (August 30), Omaha (September 28), and Elaine, Arkansas (October 1). In Chicago, thirty-eight people died, twenty-three African Americans and fifteen whites, and another 537, of whom 342 were African Americans, suffered injuries. In Elaine, Arkansas, the riot began when a white deputy sheriff and a railroad detective interrupted a meeting of black sharecroppers who had gathered to discuss the possibility of joining the Progressive Farmers and Household Union of America. The deputy and detective both carried guns and, when they interrupted the meeting, a fight broke out in which the detective died and the deputy was wounded. The violence spread and continued for the next three days. White citizens in neighboring states believed that there was an insurrection taking place. The governor, Charles Hillman Brough, received a request that he help squelch the "Negro uprising." He contacted the federal government and, after a delay, six hundred federal troops arrived in

the city. It took several days for the troops to restore order and by the time they did as many as eight hundred African Americans were dead.

More details of the events in Elaine spread after a member of the NAACP who was able to pass for white, Walter F. White, managed to interview Governor Brough and published his findings in the *Chicago Defender* and *Crisis*. At the end of October, a grand jury indicted 122 African Americans on multiple charges including murder, conspiracy, and insurrection. A month after the riot, the trial began in a courthouse surrounded by armed whites. The black defendants were not put on the stand by their lawyers and twelve of them faced death by electric chair after being convicted of murder. At this point, the NAACP stepped in to assist the convicted blacks with their appeals. The cases reached the Supreme Court as *Moore v. Dempsey* (261 U.S. 86 [1923]) and, in a departure from its typical avoidance of overseeing the actions of state courts, the Court reversed the convictions and ordered new trials for the defendants. According to Justice Oliver Wendell Holmes in the majority opinion, "the case is that the whole proceeding is a mask-that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights."[308]

Although this Court's decision in *Moore v. Dempsey* was somewhat of a victory for African Americans and for the NAACP, it did not represent a wholesale shift in the treatment of black Americans by the Court. There was a greater scrutiny in later criminal

[308] Richard C. Cortner *A Mob Intent on Death: The NAACP and the Arkansas Riot*. Middletown, Connecticut: Wesleyan University Press, 1988; and, *Moore v. Dempsey*, 261 U.S. 86 (1923).

cases, such as the trials of the Scottsboro boys in *Powell v. Alabama*, but the Court continued to uphold segregation legislation for several more decades. It was not until 1941 and 1946 respectively that the Supreme Court began to encourage the desegregation of the railways with its decision in *Mitchell v. United States* (313 U.S. 80 [1941]) and the desegregation of other public transportation with its holding in *Morgan v. Virginia* (328 U.S. 373 [1946]). In each of these cases, the Court focused more on the economic issues of interstate commerce than on the social issues of race relations but nevertheless the outcome was a loosening of restrictions on African Americans' ability to travel. In 1948, the Court began the process of desegregating neighborhoods when it decided in *Shelley v. Kraemer* (334 U.S. 1 [1948]) and *Hurd v. Hodge* (334 U.S. 24 [1948]) that restrictive covenants turned to by whites after the Court's decision in *Buchanan v. Warley* were unconstitutional. For thirty years, white property owners used restrictive covenants as private agreements between buyers and sellers to guarantee that property was not sold to blacks. In 1950, the Supreme Court took the first steps towards desegregating schools when it determined that a university that required a black student to sit only at designated tables was making it more difficult for the black student to obtain his degree. In the *McLaurin v. Oklahoma State Regents fro Higher Education* (339 U.S. 637 [1950]), the Court explained that although it appeared on the surface that McLaurin received the same education as his classmates, the state school could not treat him differently. On the same day, the Court decided *Sweatt v. Painter* (339 U.S. 629 [1950]) with a similar conclusion regarding a Texas law school. The Court's move towards desegregating schools culminated in its 1954 *Brown v. Board of Education* decision (347 U.S. 483 [1954]).

As much as they had misread the significance of *Plessy v. Ferguson*, African Americans misinterpreted the impact that *Buchanan v. Warley* would have on their lives. Despite their apparent expectations that the Supreme Court's decision in the housing case signaled a shift in favor of black Americans and that they were finally going to attain the equality they had sought since the ratification of the Reconstruction Amendments, it was still another three decades before the Supreme Court finally took on the task of undoing what it had begun with its decision in *Blyew v. United Sates* in 1871.

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