

Civil Rights in Public Service

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Chapter 2

From the Heritage of African American Slavery to Modern Civil Rights Protection

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2 From the Heritage of African American Slavery to Modern Civil Rights Protection

Justice Thurgood Marshall, the first African American to sit on the United States Supreme Court, had been chief counsel for the National Association for the Advancement of Colored People Legal Defense and Education Fund (NAACP LDF).¹ In that role, and following his mentor Charles Hamilton Houston, Marshall led the legal fight to end segregation, including his ultimately successful argument in *Brown v. Board of Education*.² He had also experienced the massive resistance by Southern states for many years after the Supreme Court rulings striking down official segregation. By the mid-1970s, many of those who had resisted began to object that the courts had been involved in these matters for too long.

This issue arose when the first major affirmative action case was discussed by Supreme Court justices in conference. Justice Marshall was outraged at the very idea that the legacy of segregation had been adequately addressed in America. He wrote a memorandum to the other justices which said in part:

I repeat, for next to the last time: the decision in this case depends on whether you consider the action of the Regents as admitting certain students or as excluding certain other students. If you view the program as admitting qualified students who, because of this Nation's sorry history of racial discrimination, have academic records that prevent them from effectively competing for medical school, then this is affirmative action to remove the vestiges of slavery and state imposed segregation by "root and branch." If you view the program as excluding students, it is a program of "quotas" which violates the principle that the "constitution is color-blind."

If only the principle of color-blindness had been accepted by the majority in *Plessy* in 1896, we would not be faced with this problem in 1978. We must remember, however, that this principle appeared only in the dissent. In the 60 years from *Plessy* to *Brown*, ours was a Nation where, by law, individuals could be given "special" treatment based on race. For us now to say that the principle of color-blindness prevents the University from giving "special" consideration to race when this Court, in 1896 licensed the states to continue to consider race, is to make a mockery of the principle of "equal protection under law."

As a result of our last discussion on this case, I wish also to address the question of whether Negroes have "arrived." Just a few examples illustrate that Negroes most certainly have not. In our own Court, we have had only three Negro law clerks, and not so far have we had a Negro Officer of the Court. On a broader scale, this week's U.S. News and World Report has a story about "Who Runs America." They list some 83 persons—not one Negro, even as a would-be runner-up. And the economic disparity between the races is increasing

The dream of America as the melting pot has not been realized by Negroes—either the Negro did not get into the pot, or he did not get melted down. The statistics on unemployment and the other statistics quoted in the briefs of the Solicitor General and other amici document the vast gulf between White and Black America. That gulf was brought about by centuries of slavery and then by another century in which, with the approval of this Court, states were permitted to treat Negroes “specially.”

This case is here now because of that sordid history ... We are not yet all equals, in large part because of the refusal of the Plessy Court to adopt the principle of color-blindness. It would be the cruelest irony for this Court to adopt the dissent in Plessy now and hold that the University must use color-blind admissions.³

He was not able to convince his colleagues and, what was worse, the plurality opinion rejecting his argument was written by Justice Lewis Powell.⁴ It seemed to Marshall that Powell had gone out of his way to dismiss his admonition to his colleagues.⁵ For Marshall, not only was Powell wrong and insensitive, he was a powerful reminder of the kind of urbane and sophisticated Southerner who had maintained and perpetuated the segregated society against which Marshall had fought his entire professional life.⁶ Powell had been a member of the Richmond School Board and later of the Virginia Board of Education during the years of massive resistance. In his dissent to the Court’s opinion, Marshall again tried to explain that there was more at stake than a narrow legal argument. There was a heritage of slavery and discrimination that remained unresolved and only partially addressed.

I do not agree that petitioner’s admissions program violates the Constitution. For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.

Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave

The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro

It is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot.⁷

Nearly ten years later, when the nation was preparing to celebrate the bicentennial of the Constitution, Marshall once again tried to make clear the need to understand the true heritage of slavery and segregation. He gave a speech at the Annual Seminar of the San Francisco Patent and Trademark Law Association that caused considerable consternation among those who wanted to paint the bicentennial and the document it celebrated in glowing terms.⁸ The fact that a justice of the United States Supreme Court was suggesting that the nation should use the occasion of the 200th anniversary to recognize the weaknesses of the Constitution, the efforts to address those deficiencies, and the work that remained to make real the values the nation was preparing to celebrate was startling to many and scandalous to some.

Marshall began by reminding his audience that when the framers began the Preamble to the Constitution by speaking of “We the people,” they were not referring to everyone. Slaves were clearly not included, and women would not be fully included as voting citizens for more than one hundred thirty years after that. It took, he said, a civil war, the post-Civil War amendments, and a long-running battle in the courts for African Americans to begin to enjoy what white Americans had taken for granted. “Thus,” he wrote:

in this bicentennial year, we may not all participate in the festivities with flag-waving fervor. Some may more quietly commemorate the suffering, struggle, and sacrifice that has triumphed over much of what was wrong with the original document, and observe the anniversary with hopes not realized and promises not fulfilled. I plan to celebrate the bicentennial of the Constitution as a living document, including the Bill of Rights and the other amendments protecting individual freedoms and human rights.⁹

Justice Marshall worked diligently to make clear the importance not only of understanding the specific arguments over issues of civil rights law, but of placing those cases into the historical context of the United States. This chapter seeks to do both of those things. It will present the case law that evolved over time in cases of critical importance to African Americans and to civil rights more generally. Second, the cases are edited and presented in an effort to be clear about the relationship between the legal issues and the history that Marshall was convinced needed to be kept in mind.

The Heritage of Slavery and Racism

As Marshall explained, there is a need to come to grips with the heritage of slavery and racism along with the need to see the development of civil rights law. That requires first a recognition of the failure of the Constitution to attack slavery and its actual legalization of that practice for the first two decades of the new country’s life. Second, it is important to read carefully not only the rulings but also the language of early judicial opinions that both supported slavery and demeaned African Americans. Third, it is important to consider the post-Civil War amendments that sought to address that sad heritage and deplorable judicial pronouncements.

Cracks in the Foundation: The Failure to Attack Slavery and its Legitimation in the Constitution

As Marshall said, there is no contradiction in recognizing the positive contributions of the Constitution, particularly as it has evolved over two hundred years, and simultaneously recognizing the serious damage that was done by the unwillingness or perhaps the perceived

inability to address the problems of racism in the original document. Consider the problems that Marshall and other African Americans have recognized in the document, but that others have been unwilling to address.

Marshall started his criticism with the preamble, finding that “We the people” certainly did not include African Americans.¹⁰ In defining those who were to be counted in the apportionment of representatives, Article I, §2, without using the term “slavery,” made clear that each slave was to be counted only as “three-fifths” of a person.

Even worse than the humiliation of the three-fifths compromise was the fact that the Constitution legalized and even protected slavery. Article I, §9, cl. 1 provided that:

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

Slavery was to be protected for twenty years. Further, Article V provided for a process to amend the Constitution, but that same provision stated that “no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article.” Even the extraordinary process of constitutional amendment during those twenty years could not stop it.

Just to make sure that the interests of slave owners were protected, Article IV, §2, cl. 3 added what was known as the fugitive slave clause, which provided that:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Even after importation of slaves was outlawed, the slave trade continued until the Civil War.

Marshall knew that historians had argued that the Constitution was extremely progressive for its time and that the compromises made regarding slavery in the Constitution were essential for obtaining the agreement of Southern states. First, he said, the profits of slavery did not flow only to Southerners. “New Englanders engaged in the ‘carrying trade’ would profit from transporting slaves from Africa as well as goods produced in America by slave labor.”¹¹ Second, “the effects of the framers’ compromise have remained for generations. They arose from the contradiction between guaranteeing liberty and justice to all, and denying both to Negroes.”¹² That legacy of injustice and exclusion would remain a bitter force in American life and public policy for generations.

Early Supreme Court Opinions Support Slavery and Send Terrible Messages to African Americans

One of the first policies that flowed from these flaws came when Congress implemented Article IV, §2 with the Fugitive Slave Act of 1793.¹³ Some officials had tried to support escaped slaves by making it difficult for those who purported to own the slaves to take custody of them. Congress adopted the legislation to make it clearer how slave owners were to legally reclaim an escaped slave. Even so, states with strong abolitionist movements, like Pennsylvania, maintained state policies intended to make it difficult to take those then living in a free state back into slavery.

Prigg v. Pennsylvania

41 U.S. 539 (1842)

INTRODUCTION: In 1780 the state had enacted a law entitled “An act for the gradual abolition of slavery,” which was amended in 1788. Pennsylvania’s legislation placed burdens on those who wanted to assert that someone living in the state was a runaway slave so that he or she could be returned to another state, sometimes known as “personal liberty laws.”¹⁴ To counter these actions, Congress adopted the Fugitive Slave Act in 1793.

In 1826 Pennsylvania enacted a statute making it a felony to remove a person for the purposes of putting them into slavery.

In April 1837 Edward Prigg and an accomplice were tried for kidnapping a former slave, Margaret Morgan, and her children from Pennsylvania and delivering them in Maryland to the heir of her previous owner, one Margaret Ashmore. Morgan had been in Pennsylvania for some five years by that point. Prigg had previously been refused an order by a magistrate to enforce the federal fugitive slave law against Morgan under state statutes. Prigg was found guilty of kidnapping, but he challenged the state law in light of the Fugitive Slave Act and Article IV, §2 of the Constitution.

Justice Story wrote the opinion for the Court.

[Prigg has] contended that the statute of Pennsylvania is unconstitutional; first, because Congress has the exclusive power of legislation upon the subject-matter under the Constitution of the United States, and under the act of the 12th of February, 1793 ... which was passed in pursuance thereof; secondly, that if this power is not exclusive in Congress, still the concurrent power of the state legislatures is suspended by the actual exercise of the power by Congress; and thirdly, that if not suspended, still the statute of Pennsylvania ... is in direct collision with the act of Congress, and therefore is unconstitutional and void....

... [Art. IV, Section 2 of the Constitution provides:] “No person held to service or labour in one state under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labour; but shall be delivered up, on claim of the party to whom such service or labour may be due.” The ... object of this clause was to secure to the citizens of the slaveholding states the complete right and title of ownership in their slaves, as property, in every state in the Union into which they might escape.... The full recognition of this right and title was indispensable to the security of this species of property in all the slaveholding states; and, indeed, was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union could not have been formed. Its true design was to guard against the doctrines and principles prevalent in the non-slaveholding states, by preventing them from intermeddling with, or obstructing, or abolishing the rights of the owners of slaves.

[I]f the Constitution had not contained this clause, every non-slave-holding state in the Union would have been at liberty to have declared free all runaway slaves coming within its limits, and to have given them entire immunity and protection against the claims of their masters; a course which would have ... engendered perpetual strife between the different states. The clause was, therefore, of the last importance to the safety and security of the southern states.... The clause was accordingly adopted into the Constitution by the unanimous consent of the framers of it; a proof at once of its intrinsic and practical necessity....

The clause manifestly contemplates the existence of a positive, unqualified right on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control, or restrain. The slave is not to be discharged from service or labour, in consequence of any state law or regulation.... [T]he owner must, therefore, have the right to seize and repossess the slave, which the local laws of his own state confer upon him as property.... Upon this ground we have not the slightest hesitation in holding, that, under and in virtue of the Constitution, the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave, whenever he can do it without any breach of the peace, or any illegal violence....

But the clause of the Constitution does not stop here.... Many cases must arise in which, if the remedy of the owner were confined to the mere right of seizure and recaption, he would be utterly without any adequate redress. He may not be able to lay his hands upon the slave. He may not be able to enforce his rights against persons who either secrete or conceal, or withhold the slave. He may be restricted by local legislation as to the mode of proofs of his ownership; as to the Courts in which he shall sue, and as to the actions which he may bring; or the process he may use to compel the delivery of the slave. Nay, the local legislation may be utterly inadequate to furnish the appropriate redress, ... leaving the owner ... not that right which the Constitution designed to secure—a specific delivery and repossession of the slave, but a mere remedy in damages; and that perhaps against persons utterly insolvent or worthless....

And this leads us to the consideration of the other part of the clause, which implies at once a guaranty and duty. It says, “But he (the slave) shall be delivered up on claim of the party to whom such service or labour may be due.”.... If, indeed, the Constitution guarantees the right, and if it requires the delivery upon the claim of the owner ... the natural inference certainly is, that the national government is clothed with the appropriate authority ... to enforce it....

Congress, then, may [give] effect to that right [and] prescribe the mode and extent in which it shall be applied.... [T]he act of the 12th of February, 1793 ... which ... provide[s], that when a person held to labour or service in any of the United States, shall escape into any other of the states or territories, the person to whom such labour or service may be due, his agent or attorney, is hereby empowered to seize or arrest such fugitive from labour, and take him or her before any judge of the Circuit or District Courts of the United States, residing or being within the state, or before any magistrate of a county, city, or town corporate, wherein such seizure or arrest shall be made; and upon proof to the satisfaction of such judge or magistrate ... that the person so seized or arrested, doth, under the laws of the state or territory from which he or she fled, owe service or labour to the person claiming him or her, it shall be the duty of such judge or magistrate, to give a certificate thereof of such claimant, his agent or attorney, which shall be sufficient warrant for removing the said fugitive from labour, to the state or territory from which he or she fled. The fourth section provides a penalty against any person who shall knowingly and willingly obstruct or hinder such claimant, his agent, or attorney, in so seizing or arresting such fugitive from labour, or rescue such fugitive from the claimant, or his agent, or attorney when so arrested, or who shall harbour or conceal such fugitive after notice that he is such; and it also saves to the person claiming such labour or service, his right of action for or on account of such injuries.

[T]his act may be truly said to cover the whole ground of the Constitution ... as to fugitive slaves.... If this be so, then it would seem ... that the legislation of Congress, if constitutional, must supersede all state legislation upon the same subject; and by necessary implication prohibit it. For if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, ... it cannot be that the state legislatures have a right to interfere; and ... to prescribe additional regulations.... In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-matter....¹⁵

But it has been argued, that the act of Congress is unconstitutional, because it does not fall within the scope of any of the enumerated powers of legislation confided to that body.... [T]he argument [is] that although rights are exclusively secured by ... the national government, yet, unless the power to enforce these rights, or to execute these duties can be found among the express powers of legislation enumerated in the Constitution, they remain without any means of giving them effect by any act of Congress.... Such a limited construction of the Constitution has never yet been adopted as correct.... No one has ever supposed that Congress could, constitutionally, ... enact laws beyond the powers delegated to it by the Constitution; but it has, on various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly given, and duties expressly enjoined thereby....¹⁶ We hold the act to be clearly constitutional in all its leading provisions....

The remaining question is, whether the power of legislation upon this subject is exclusive in the national government, or concurrent in the states.... In our opinion it is exclusive.... It is scarcely conceivable that the slaveholding states would have been satisfied with leaving to the legislation of the non-slaveholding states, a power of regulation ... which would ... amount to a power to destroy the rights of the owner.... On the other hand, construe the right of legislation as exclusive in Congress, and every evil, and every danger vanishes. The right and the duty are then co-extensive and uniform in remedy and operation throughout the whole Union. The owner has the same security, and the same remedial justice, and the same exemption from state regulation and control, through however many states he may pass with his fugitive slave in his possession....

[W]e are by no means to be understood in any manner whatsoever to doubt or to interfere with the police power belonging to the states.... We entertain no doubt whatsoever, that the states, in virtue of their general police power, possess full jurisdiction to arrest and restrain runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds, and paupers.... But such regulations can never be permitted to interfere with or to obstruct the just rights of the owner to reclaim his slave, derived from the Constitution of the United States; or with the remedies prescribed by Congress to aid and enforce the same.

Upon these grounds, we are of opinion that the act of Pennsylvania upon which this indictment is founded, is unconstitutional and void. It purports to punish as a public offence against that state, the very act of seizing and removing a slave by his master, which the Constitution of the United States was designed to justify and uphold.... [T]he judgment of the Supreme Court of Pennsylvania upon the

special verdict found in the case, ought to have been that the said Edward Prigg was not guilty.¹⁷

Justice Taney wrote an opinion dissenting in part.

I concur in the opinion pronounced by the Court, that the law of Pennsylvania ... is unconstitutional and void.... But ... [t]he opinion of the Court decides that the power to provide a remedy for this right is vested exclusively in Congress; and that all laws upon the subject passed by a state ... are null and void; even although they were intended, in good faith, to protect the owner in the exercise of his rights of property, and do not conflict in any degree with the act of Congress.... I dissent therefore, ... from that part of the opinion of the Court which denies the obligation and the right of the state authorities to protect the master, when he is endeavouring to seize a fugitive from his service, in pursuance of the right given to him by the Constitution of the United States.¹⁸

Justice McLean dissenting in part.

... The slave, as a sensible and human being, is subject to the local authority into whatsoever jurisdiction he may go. He is answerable under the laws for his acts, and he may claim their protection.... Being within the jurisdiction of a state, a slave bears a very different relation to it from that of mere property.

... The act of 1793 authorizes a forcible seizure of the slave by the master, not to take him out of the state, but to take him before some judicial officer within it. The act of Pennsylvania punishes a forcible removal of a coloured person out of the state. Now, here is no conflict between the law of the state and the law of Congress....

It is very clear that no power to seize and forcibly remove the slave without claim is given by the act of Congress.... The slave is found in a state where every man, black or white, is presumed to be free; and this state, to preserve the peace of its citizens, and its soil and jurisdiction from acts of violence, has prohibited the forcible abduction of persons of colour. Does this law conflict with the Constitution? It clearly does not....

It is a most important police regulation.... The offence consists in the abduction of a person of colour. The presumption of the state that the coloured person is free may be erroneous in fact; and if so, there can be no difficulty in proving it. But may not the assertion of the master be erroneous also; and if so, how is his act of force to be remedied? The coloured person is taken, and forcibly conveyed beyond the jurisdiction of the state. This force, not being authorized by the act of Congress nor by the Constitution, may be prohibited by the state.

The fight among the states over slavery continued on several fronts, including whether slavery would be permitted in states newly admitted to the United States. The Missouri Compromise of 1820 was an attempt to address this question.¹⁹ Under its terms, Maine was admitted as a free state and Missouri as a slave state, but the territory acquired by the Louisiana purchase was to be free. The Supreme Court addressed the Missouri Compromise in a case that would forever mark a low point in American history because it not only contributed to the likelihood of a civil war as a result of its ruling with respect to the Compromise, but also because of the way that it characterized African Americans. The edited version is relatively lengthy because it is so important to understand not just the ruling in the case, but the message it sent to African Americans—a message, as Justice Marshall made clear, that could never be forgotten.

Dred Scott v. Sandford

60 U.S. 393 (1857)

INTRODUCTION: Illinois had been a free state ever since the passage of the Northwest Ordinance of 1787. The Missouri Compromise of 1820 established Missouri as a slave state, but the territories, later states, west of there that had been part of the Louisiana purchase would be free.

Dred Scott was a slave owned by Dr. Emerson, a U.S. Army surgeon. Emerson took Scott with him when he was reassigned from Missouri to Rock Island, Illinois. Some two years after that, Emerson took Scott with him when he was reassigned to Fort Snelling in what was then called Upper Louisiana, part of the territory acquired in the Louisiana Purchase. While there, Emerson acquired a slave named Harriet who married Dred Scott and had two children. In 1838 Emerson took all of them back to Missouri and eventually sold the family to Sandford, who was also an Army officer.

Scott and his family sued in Missouri courts for their freedom and alleged cruelty by Mrs. Emerson. In this first round of litigation, the state courts ruled that they were free, but that decision was later reversed by the Missouri Supreme Court in 1852. That represented a sharp departure from previous rulings in the state that had held that slaves in situations like Scott's were free.

Mrs. Emerson sold the Scotts to her brother, who was a resident of New York. Scott sued in federal court for their freedom, claiming that, because they had resided in Illinois, a free state, and in a part of the Louisiana Purchase territory that was designated as free under the Missouri Compromise of 1820, they were no longer slaves.

Chief Justice Taney wrote the opinion for the Court.

There are two leading questions presented by the record: 1. Had the Circuit Court of the United States jurisdiction to hear and determine the case between these parties? And 2. If it had jurisdiction, is the judgment it has given erroneous or not?...

The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution....

The words "people of the United States" and "citizens" ... both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether the class of persons described in [this case] compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and ... had no rights or privileges but such as those who held the power and the Government might choose to grant them....

The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a State should be

entitled, embraced the negro African race...? Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a State, and raised there to the rank of a citizen, and immediately clothe him with all the privileges of a citizen in every other State, and in its own courts? The court think the affirmative of these propositions cannot be maintained. And if it cannot, the plaintiff ... could not be a citizen of the State of Missouri, within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts.

[All persons] ... who were at the time of the adoption of the Constitution recognized as citizens in the several States, became also citizens of this new political body; but none other.... [T]he legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics ... without doubting for a moment the correctness of this opinion.

And in no nation was this opinion more firmly fixed or more uniformly acted upon than by the English.... They not only seized them on the coast of Africa, and sold them or held them in slavery for their own use; but they took them as ordinary articles of merchandise to every country where they could make a profit on them, and were far more extensively engaged in this commerce than any other nation in the world.

The opinion thus entertained and acted upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic. And, accordingly, a negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States....

The legislation of the different colonies furnishes positive and indisputable proof of this fact.... The province of Maryland [for example], in 1717, ... passed a law declaring "that if any free negro or mulatto intermarry with any white woman, or if any white man shall intermarry with any negro or mulatto woman, such negro or mulatto shall become a slave during life, excepting mulattoes born of white women, who, for such intermarriage, shall only become servants for seven years, to be disposed of as the justices of the county court, where such marriage so happens, shall think fit; to be applied by them towards the support of a public school within the said county. And any white man or white woman who shall intermarry as aforesaid, with any negro or mulatto, such white man or white woman shall become servants during the term of seven years, and shall be disposed of by the justices as aforesaid, and be applied to the uses aforesaid." [T]he other colonial law to which we refer was passed by Massachusetts in 1705 ... is entitled "An act

for the better preventing of a spurious and mixed issue," &c.; and it provides, that "if any negro or mulatto shall presume to smite or strike any person of the English or other Christian nation, such negro or mulatto shall be severely whipped, at the discretion of the justices before whom the offender shall be convicted."...

[T]hese laws ... show, too plainly to be misunderstood, the degraded condition of this unhappy race. They were still in force when the Revolution began, and are a faithful index to the state of feeling towards the class of persons of whom they speak, and of the position they occupied throughout the thirteen colonies, in the eyes and thoughts of the men who framed the Declaration of Independence and established the State Constitutions and Governments. They show that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes, not only in the parties, but in the person who joined them in marriage.... [N]o distinction ... was made between the free negro or mulatto and the slave, but this stigma, of the deepest degradation, was fixed upon the whole race....

Yet the men who framed this [Declaration of Independence] were great men.... They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery.... The unhappy black race were separated from the white ... and were never thought of or spoken of except as property....

This state of public opinion had undergone no change when the Constitution was adopted, as is equally evident from its provisions and language.... [T]here are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed. One of these clauses reserves to each of the thirteen States the right to import slaves until the year 1808, if it thinks proper.... And by the other provision the States pledge themselves to each other to maintain the right of property of the master, by delivering up to him any slave who may have escaped from his service, and be found within their respective territories....

It is very true, that in that portion of the Union where the labor of the negro race was found to be unsuited to the climate and unprofitable to the master, but few slaves were held at the time of the Declaration of Independence; and when the Constitution was adopted, it had entirely worn out in one of them, and measures had been taken for its gradual abolition in several others. But this change had not been produced by any change of opinion in relation to this race ... for some of the States, where it had ceased ... were actively engaged in the slave trade, procuring cargoes on the coast of Africa, and transporting them for sale to those parts of the Union where their labor was found to be profitable, and suited to the climate and productions. And this traffic was openly carried on, and fortunes accumulated by it, without reproach from the people of the States where they resided....

And we may here again refer, in support of this proposition, to the plain and unequivocal language of the laws of the several States.... The legislation of the States therefore shows ... the inferior and subject condition of that race at the

time the Constitution was adopted, and long afterwards.... It cannot be supposed that they intended to secure to them rights, and privileges, and rank, in the new political body throughout the Union, which every one of them denied within the limits of its own dominion....

The right of naturalization was ... granted to Congress to establish an [*sic*] uniform rule of naturalization is ... confined to persons born in a foreign country, under a foreign Government. It is not a power to raise to the rank of a citizen any one born in the United States, who, from birth or parentage, by the laws of the country, belongs to an inferior and subordinate class.... Congress might ... have authorized the naturalization of Indians, because they were aliens and foreigners. But, in their then untutored and savage state no one would have thought of admitting them as citizens in a civilized community.... Neither was it used with any reference to the African race imported into or born in this country; because Congress had no power to naturalize them....

Undoubtedly, a person may be a citizen, ... although he exercises no share of the political power, and is incapacitated from holding particular offices. Women and minors, who form a part of the political family, cannot vote; and when a property qualification is required to vote or hold a particular office, those who have not the necessary qualification cannot vote or hold the office, yet they are citizens.... [I]n some of the States of the Union foreigners not naturalized are allowed to vote. And the State may give the right to free negroes and mulattoes, but that does not make them citizens of the State, and still less of the United States....

The only two provisions [of the Constitution] which point to them and include them, treat them as property, and make it the duty of the Government to protect it.... The Government of the United States had no right to interfere for any other purpose but that of protecting the rights of the owner, leaving it altogether with the several States to deal with this race, whether emancipated or not, as each State may think justice, humanity, and the interests and safety of society, require....

Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts; and, consequently, that the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous....

We proceed, therefore, to inquire whether the facts relied on by the plaintiff entitled him to his freedom.... [T]wo questions arise: 1. Was he, together with his family, free in Missouri by reason of the stay in the territory of the United States hereinbefore mentioned? And 2. If they were not, is Scott himself free by reason of his removal to Rock Island, in the State of Illinois, as stated in the above admissions?...

The [Missouri Compromise], upon which the plaintiff relies, declares that slavery and involuntary servitude, except as a punishment for crime, shall be forever prohibited in all that part of the territory ceded by France, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, and not included within the limits of Missouri. And the difficulty which meets us at the threshold of this part of the inquiry is, whether Congress was authorized to pass this law under any of the powers granted to it by the Constitution....

The counsel for the plaintiff has laid much stress upon that article in the Constitution which confers on Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging

to the United States;"²⁰ but, in the judgement of the court, that provision had no bearing on the present controversy, and the power there given, whatever it may be, is confined, and was intended to be confined, to ... the particular territory [ceded by Virginia], and cannot, by any just rule of interpretation, be extended to territory which the new Government might afterwards obtain from a foreign nation....

There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States.... The power to expand the territory of the United States by the admission of new States is plainly given.... [T]here is no express regulation in the Constitution defining the power which the General Government may exercise over the person or property of a citizen in a Territory thus acquired.... And when the Territory becomes a part of the United States, the Federal Government [takes over] with its powers over the citizen strictly defined, and limited by the Constitution.... [T]he Federal Government can exercise no power over his person or property, beyond what that instrument confers, nor lawfully deny any right which it has reserved....

These powers, and others, in relation to rights of person, which it is not necessary here to enumerate, are, in express and positive terms, denied to the General Government; and the rights of private property have been guarded with equal care. Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States ... could hardly be dignified with the name of due process of law. And if the Constitution recognizes the right of property of the master in a slave, ... no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the Government.

[T]he right of property in a slave is distinctly and expressly affirmed in the Constitution.... Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory....

But ... it is contended, on the part of the plaintiff, that he is made free by being taken to Rock Island, in the State of Illinois, ... and being so made free, he was not again reduced to a state of slavery by being brought back to Missouri.... [In] the case of *Strader et al. v. Graham* ... slaves had been taken from Kentucky to Ohio, with the consent of the owner, and afterwards brought back to Kentucky. And this court held that their status or condition, as free or slave, depended upon the laws of Kentucky, when they were brought back into that State.... As Scott was a slave when taken into the State of Illinois by his owner, and was there held as such, and brought back in that character, his status, as free or slave, depended on the laws of Missouri, and not of Illinois.

It has, however, been urged in the argument, that by the laws of Missouri he was free on his return.... [W]e are satisfied ... that Scott and his family upon their return were not free, but were, by the laws of Missouri, the property of the defendant; and that the Circuit Court of the United States had no jurisdiction [since] the plaintiff was a slave, and not a citizen....²¹

Justice McLean wrote a dissenting opinion.

There is no [basis in this case] which shows ... an inability in the plaintiff to sue in the Circuit Court. It does not allege that the plaintiff had his domicile in any other State, nor that he is not a free man in Missouri. He is averred to have had a negro ancestry, but this does not show that he is not a citizen of Missouri, within the meaning of the act of Congress authorizing him to sue in the Circuit Court. It has never been held necessary, to constitute a citizen within the act, that he should have the qualifications of an elector. Females and minors may sue in the Federal courts, and so may any individual who has a permanent domicile in the State under whose laws his rights are protected, and to which he owes allegiance. Being born under our Constitution and laws, no naturalization is required, as one of foreign birth, to make him a citizen. The most general and appropriate definition of the term citizen is "a freeman." Being a freeman, and having his domicile in a State different from that of the defendant, he is a citizen within the act of Congress, and the courts of the Union are open to him....

In the argument, it was said that a colored citizen would not be an agreeable member of society. This is more a matter of taste than of law. Several of the States have admitted persons of color to the right of suffrage, and in this view have recognized them as citizens; and this has been done in the slave as well as the free States. On the question of citizenship, it must be admitted that we have not been very fastidious. Under the late treaty with Mexico, we have made citizens of all grades, combinations, and colors. The same was done in the admission of Louisiana and Florida. No one ever doubted, and no court ever held, that the people of these Territories did not become citizens under the treaty. They have exercised all the rights of citizens, without being naturalized under the acts of Congress....

We need not refer to the mercenary spirit which introduced the infamous traffic in slaves, to show the degradation of negro slavery in our country. This system was imposed upon our colonial settlements by the mother country, and it is due to truth to say that the commercial colonies and States were chiefly engaged in the traffic....

I prefer the lights of Madison, Hamilton, and Jay, as a means of construing the Constitution in all its bearings, rather than to look behind that period, into a traffic which is now declared to be piracy, and punished with death by Christian nations. I do not like to draw the sources of our domestic relations from so dark a ground. Our independence was a great epoch in the history of freedom; and while I admit the Government was not made especially for the colored race, yet many of them were citizens of the New England States, and exercised the rights of suffrage when the Constitution was adopted, and it was not doubted by any intelligent person that its tendencies would greatly ameliorate their condition.

Many of the States, on the adoption of the Constitution, or shortly afterward, took measures to abolish slavery within their respective jurisdictions; and it is a well-known fact that a belief was cherished by the leading men, South as well as North, that the institution of slavery would gradually decline, until it would

become extinct. The increased value of slave labor, in the culture of cotton and sugar, prevented the realization of this expectation. Like all other communities and States, the South were influenced by ... their own interests.

But if we are to turn our attention to the dark ages of the world, why confine our view to colored slavery? On the same principles, white men were made slaves. All slavery has its origin in power, and is against right.

The power of Congress to establish Territorial Governments, and to prohibit the introduction of slavery therein, is the next point to be considered.... On the 13th of July, the Ordinance of 1787 was passed, "for the government of the United States territory northwest of the river Ohio," with but one dissenting vote. This instrument provided there should be organized in the territory not less than three nor more than five States, designating their boundaries. It was passed while the Federal Convention was in session, about two months before the Constitution was adopted by the Convention.... It provided for a temporary Government, as initiatory to the formation of State Governments. Slavery was prohibited in the territory.

Can any one suppose that the eminent men of the Federal Convention could have overlooked or neglected a matter so vitally important to the country, in the organization of temporary Governments for the vast territory northwest of the river Ohio? In the 3d section of the 4th article of the Constitution, they did make provision for the admission of new States, the sale of the public lands, and the temporary Government of the territory. Without a temporary Government, new States could not have been formed, nor could the public lands have been sold.

... The power to make all needful rules and regulations is a power to legislate.... But it is argued that ... the rules and regulations of Congress are limited to the disposition of lands and other property belonging to the United States. That this is not the true construction of the section appears from the fact that in the first line of the section "the power to dispose of the public lands" is given expressly, and, in addition, to make all needful rules and regulations....

Chief Justice Marshall, speaking for the court, said, in regard to the people of Florida, "they do not, however, participate in political power; they do not share in the Government till Florida shall become a State; in the mean time, Florida continues to be a Territory of the United States, governed by virtue of that clause in the Constitution which empowers Congress to make all needful rules and regulations respecting the territory...."

... If Congress should deem slaves or free colored persons injurious to the population of a free Territory ... they have the power to prohibit them from becoming settlers in it.... The prohibition of slavery north of thirty-six degrees thirty minutes, and of the State of Missouri, contained in the act admitting that State into the Union, was passed by a vote of 134, in the House of Representatives, to 42. Before Mr. Monroe signed the act, it was submitted by him to his Cabinet, and they held the restriction of slavery in a Territory to be within the constitutional powers of Congress. It would be singular, if in 1804 Congress had power to prohibit the introduction of slaves in Orleans Territory from any other part of the Union, under the penalty of freedom to the slave, if the same power, embodied in the Missouri compromise, could not be exercised in 1820.

... If Congress may establish a Territorial Government in the exercise of its discretion, it is a clear principle that a court cannot control that discretion. This being

the case, I do not see on what ground the act is held to be void. It did not purport to forfeit property, or take it for public purposes. It only prohibited slavery; in doing which, it followed the ordinance of 1787....

In this case, a majority of the court have said that a slave may be taken by his master into a Territory of the United States, the same as a horse, or any other kind of property.... A slave is not a mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence.... Illinois has declared in the most solemn and impressive form that there shall be neither slavery nor involuntary servitude in that State, and that any slave brought into it, with a view of becoming a resident, shall be emancipated. And effect has been given to this provision of the Constitution by the decision of the Supreme Court of that State. With a full knowledge of these facts, a slave is brought from Missouri to Rock Island, in the State of Illinois, and is retained there as a slave for two years, and then taken to Fort Snelling, where slavery is prohibited by the Missouri compromise act, and there he is detained two years longer in a state of slavery. Harriet, his wife, was also kept at the same place four years as a slave....

[A] majority of my brethren have held that on their being returned to Missouri the status of slavery attached to them.... I can perceive no reason why the institutions of Illinois should not receive the same consideration as those of Missouri.... There is no evidence before us that Dred Scott and his family returned to Missouri voluntarily.... It would be a mockery of law and an outrage on his rights to coerce his return, and then claim that it was voluntary, and on that ground that his former status of slavery attached.... The Missouri court disregards the express provisions of an act of Congress and the Constitution of a sovereign State, both of which laws for twenty-eight years it had not only regarded, but carried into effect.... I think the judgment of the court below should be reversed.

Justice Curtis wrote a dissent.

... At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens.... These colored persons were not only included in the body of "the people of the United States," by whom the Constitution was ordained and established, but in at least five of the States they had the power to act, and doubtless did act, by their suffrages, upon the question of its adoption. It would be strange, if we were to find in that instrument anything which deprived of their citizenship any part of the people of the United States who were among those by whom it was established.

I can find nothing in the Constitution which ... deprives of their citizenship any class of persons who were citizens of the United States at the time of its adoption, or who should be native-born citizens of any State after its adoption; nor any power enabling Congress to disfranchise persons born on the soil of any State, and entitled to citizenship of such State by its Constitution and laws....

I dissent, therefore, from that part of the opinion of the majority of the court, in which it is held that a person of African descent cannot be a citizen of the United States; and I regret I must go further, and dissent both from what I deem their

assumption of authority to examine the constitutionality of the act of Congress commonly called the Missouri compromise act, and the grounds and conclusions announced in their opinion....

There was to be established by the Constitution a frame of government, under which the people of the United States and their posterity were to continue indefinitely. To take one of its provisions, the language of which is broad enough to extend throughout the existence of the Government, and embrace all territory belonging to the United States throughout all time ... and narrow it down to territory belonging to the United States when the Constitution was framed ... seems to me to be an interpretation as inconsistent with the nature and purposes of the instrument, as it is with its language, and I can have no hesitation in rejecting it....

But it is insisted, that whatever other powers Congress may have respecting the territory of the United States, the subject of negro slavery forms an exception. The Constitution declares that Congress shall have power to make "all needful rules and regulations" respecting the territory belonging to the United States. The assertion is, though the Constitution says all, it does not mean all—though it says all, without qualification, it means all except such as allow or prohibit slavery.... There is nothing in the context which qualifies the grant of power.... No other clause of the Constitution has been referred to at the bar, or has been seen by me, which imposes any restriction or makes any exception concerning the power of Congress to allow or prohibit slavery in the territory belonging to the United States....

For these reasons, I am of opinion that so much of the several acts of Congress as prohibited slavery and involuntary servitude within that part of the Territory of Wisconsin lying north of thirty-six degrees thirty minutes north latitude, and west of the river Mississippi, were constitutional and valid laws.

The Civil War Amendments: The Attempt to Establish Foundations for Equality

The *Dred Scott* ruling contributed to the growing likelihood of a bloody civil war. During that war, of course, Abraham Lincoln issued the Emancipation Proclamation, which provided: "That on the first day of January, in the year of our Lord one thousand eight hundred and sixty-three, all persons held as slaves within any State or designated part of a State, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever free...."²² Unfortunately, it purported to free those who were not then within the reach of federal authorities and did not free those slaves who were held in other states that were not then in conflict with the national government. That is not to suggest that the proclamation was not profoundly important in symbolic terms and had other effects, but it was a long way from a resolution of the issue of slavery. A more complete effort to achieve that goal came with the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution, often now referred to collectively as the Civil War Amendments.

The Thirteenth Amendment provided in its first section that: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." The second section added that: "Congress shall have power to enforce this article by appropriate legislation."

The Fifteenth Amendment was also brief, providing only that: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any

State on account of race, color, or previous condition of servitude.” Like the Thirteenth Amendment, this one also ensured that: “Congress shall have power to enforce this article by appropriate legislation.”

The Fourteenth Amendment, by contrast, was far more complex and comprehensive. The first section contained a number of provisions that applied not just to former slaves but to all “persons.”

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

The discussion of citizenship at the beginning of the amendment was a direct rejection of the ruling in *Dred Scott*. The second was also to be a rejection of the statements in Taney’s ruling that those with issues about their rights and liberties should look to their states for protection. The amendment repeated the language of Article IV that the privileges and immunities of American citizens were not to be abridged by the states. Finally, Section 1 provided for the now familiar due process and equal protection protections against state violations. Like the other two Civil War Amendments, it also provided in Section 5 that: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”

The U.S. Supreme Court Limits the Ability of Congress to Redress Civil Rights Abuses

The post-Civil War reconstruction era was a tumultuous time, but it was clear that Congress was going to take action to implement the provisions of the Fourteenth Amendment. However, the Supreme Court promptly moved to limit the legislature’s ability to ensure full rights for all Americans. It would also move in other ways to block the realization of full equality for African Americans, barriers that would last for decades.

Two cases in particular quickly limited protections that had seemed to be at hand following the adoption of the Fourteenth Amendment. The first of these was an initial challenge to the amendment that all but erased any meaningful application of its “privileges and immunities” clause. It was known as the *Slaughter-House Cases*, because it involved a set of challenges by slaughterhouses and meat processing businesses in New Orleans.

Slaughter-House Cases

83 U.S. 36 (1873)

INTRODUCTION: Louisiana enacted a law governing slaughterhouses and meat processing facilities in New Orleans as a regulatory policy to protect public health and safety. It created a monopoly under the control of a newly created corporation to be known as the Crescent City Live-Stock Landing Company. In the process, the law ordered the closing of all existing facilities in the city. New Orleans butchers challenged the law unsuccessfully in state courts. Their appeal to the U.S. Supreme Court on all the key provisions of the Thirteenth and Fourteenth Amendments marked the Court’s first opinion interpreting those new additions to the Constitution.

Justice Miller wrote the opinion for the Court.

... This statute is denounced ... as creating a monopoly and conferring odious and exclusive privileges upon a small number of persons at the expense of the great body of the community of New Orleans [and] deprives ... the whole of the butchers of the city of the right to exercise their trade, the business...; and that the unrestricted exercise of the business of butchering is necessary to the daily subsistence of the population of the city....

The power here exercised by the legislature of Louisiana is ... one which has been ... always conceded to belong to the States.... This is called the police power.... [T]he authority of the legislature of Louisiana to pass the present statute is ample, unless some restraint in the exercise of that power be found in the constitution of that State or in the amendments to the Constitution of the United States....

The plaintiffs ... allege that the statute ... creates an involuntary servitude forbidden by the thirteenth article of amendment; That it abridges the privileges and immunities of citizens of the United States; That it denies to the plaintiffs the equal protection of the laws; and, That it deprives them of their property without due process of law; contrary to the provisions of the first section of the fourteenth article of amendment. This court is thus called upon for the first time to give construction to these articles.... [N]o one can fail to be impressed with the one pervading purpose found in them all...; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him....

The first section of the fourteenth article ... opens with a definition of citizenship—not only citizenship of the United States, but citizenship of the States.... [I]t had been held by this court, in the celebrated *Dred Scott* case ... that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States.... To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a State, the first clause of the first section was framed. “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.”... [I]t declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the *Dred Scott* decision....

[T]here is a citizenship of the United States, and a citizenship of a State, which are distinct from each other.... We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section ... speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States.... Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, ... it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment. [T]he latter must rest for their security and protection where they have heretofore rested.... [T]he entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government....

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection ... we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so.

... Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation.... The judgments of the Supreme Court of Louisiana in these cases are affirmed.

Justice Field wrote a dissenting opinion, joined by the Chief Justice and Justices Swayne and Bradley.

... The question presented is ... one of the gravest importance, not merely to the parties here, but to the whole country. It is ... whether the recent amendments to the Federal Constitution protect the citizens of the United States against the deprivation of their common rights by State legislation. In my judgment the fourteenth amendment does afford such protection, and was so intended by the Congress which framed and the States which adopted it....

The first clause of this amendment determines who are citizens of the United States.... It recognizes in express terms ... citizens of the United States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the constitution or laws of any State or the condition of their ancestry. A citizen of a State is now only a citizen of the United States residing in that State. The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State.... They do not derive their existence from its legislation, and cannot be destroyed by its power.

The amendment ... assumes that there are ... privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by State legislation. If this inhibition has no reference to privileges and immunities of this character, but only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing....

What, then, are the privileges and immunities which are secured against abridgment by State legislation? In the first section of the Civil Rights Act Congress ... has there declared that they include the right “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.” That act, it is true, was passed before the fourteenth amendment.... Accordingly, after its ratification, Congress re-enacted the act under the belief that whatever doubts may have previously existed of its validity, they were removed by the amendment.

The terms, privileges and immunities, are not new in the amendment; they were in the Constitution before the amendment was adopted. They are found in the second section of the fourth article.... The privileges and immunities designated [there] are those ... which of right belong to the citizens of all free governments, and they can be enjoyed under that clause by the citizens of each State in the several States upon the same terms and conditions as they are enjoyed by the citizens of the latter States.... It will not be pretended that under the fourth article of the Constitution any State could create a monopoly in any known trade or manufacture in favor of her own citizens, or any portion of them, which would exclude an equal participation in the trade or manufacture monopolized by citizens of other States....

The privileges and immunities of citizens of the United States, of every one of them, is secured against abridgment in any form by any State. The fourteenth amendment places them under the guardianship of the National authority.... This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex, and condition.... The fourteenth amendment, in my judgment, makes it essential to the validity of the legislation of every State that this equality of right should be respected....²³

Justice Swayne joined the dissents of Justices Field and Bradley but also wrote a separate dissent.

The thirteenth amendment..., the fourteenth..., and the fifteenth ... mark an important epoch in the constitutional history of the country. They trench directly upon the power of the States, and deeply affect those bodies.... Fairly construed these amendments may be said to rise to the dignity of a new Magna Charta....

The first section of the fourteenth amendment is alone involved in the consideration of these cases. No searching analysis is necessary to [illuminate] its meaning.... A citizen of a State is *ipso facto* a citizen of the United States.... "The privileges and immunities" of a citizen of the United States include, among other things, the fundamental rights of life, liberty, and property, and also the rights which pertain to him by reason of his membership of the Nation....

The construction adopted by the majority of my brethren is, in my judgment, much too narrow. It defeats ... the intent of those by whom the instrument was framed and of those by whom it was adopted.... By the Constitution, as it stood before the war, ample protection was given against oppression by the Union, but little was given against wrong and oppression by the States. That want was intended to be supplied by this amendment. Against the former this court has been called upon more than once to interpose.... But this arm of our jurisdiction is, in these cases, stricken down by the judgment just given. Nowhere, than in this court, ought the will of the nation, as thus expressed, to be more liberally construed or more cordially executed. This determination of the majority seems to me to lie far in the other direction. I earnestly hope that the consequences to follow may prove less serious and far-reaching than the minority fear they will be.

Another major opinion, known as the *Civil Rights Cases*, followed and blocked efforts by Congress to enact civil rights statutes expected to provide meaningful protection against

discrimination in a variety of areas of American life. The constraints imposed by the Court in the *Civil Rights Cases* have never been reversed, and this precedent has continued to present limitations on civil rights efforts in the contemporary era, as Congress has sought to use the commerce power under Article I, §8 in order to enact civil rights legislation while avoiding the constraints of the 1883 *Civil Rights Cases*.

Civil Rights Cases

109 U.S. 3 (1883)

INTRODUCTION: This case consolidated several different actions, all of which were brought together to test the constitutional validity of the Civil Rights Act of 1875. The act provides in part:

SEC. 1. 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, theatres, 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.

SEC. 2. 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, and 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 offence forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offence, be deemed guilty of a misdemeanor....

States asserted that these provisions represented an intrusion into the powers of the state, while defenders focused on the enforcement authority provided by the post-Civil War amendments.

Justice Bradley wrote the opinion for the Court.

[I]t is the purpose of the law to declare that, in the enjoyment of the accommodations and privileges of inns, public conveyances, theatres, and other places of public amusement, no distinction shall be made between citizens of different race or color, or between those who have, and those who have not, been slaves. Its effect is to declare, that in all inns, public conveyances, and places of amusement, colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement as are enjoyed by white citizens; and vice versa. The second section makes it a penal offence in any person to deny to any citizen of any race or color, regardless of previous servitude, any of the accommodations or privileges mentioned in the first section.

Has Congress constitutional power to make such a law? ... The power is sought, first, in the Fourteenth Amendment [which] declares 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.” It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.... It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws.... [T]he last section of the amendment invests Congress with power to enforce it by appropriate legislation.... To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous.... It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment....

[U]ntil some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity.... Of course, legislation may, and should be, provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, State laws, or State action of some kind, adverse to the rights of the citizen secured by the amendment.... In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce ... or such acts and proceedings as the States may commit or take, and which, by the amendment, they are prohibited from committing or taking....

An inspection of [this] law shows that it makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the States.... It proceeds ... to declare that certain acts committed by individuals shall be deemed offences, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the States.... In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other....

[C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority.... The wrongful act of an individual, unsupported by any such authority, is simply a private wrong ... and may presumably be vindicated by resort to the laws of the State for redress.... Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offences, but abrogation and denial of rights, which it denounces, and for which it clothes the Congress with power to provide a remedy....

[T]he law in question cannot be sustained by any grant of legislative power made to Congress by the Fourteenth Amendment.... The law in question, without any

reference to adverse State legislation on the subject, declares that all persons shall be entitled to equal accommodations and privileges of inns, public conveyances, and places of public amusement, and imposes a penalty upon any individual who shall deny to any citizen such equal accommodations and privileges. This is not corrective legislation.... What we have to decide is, whether such plenary power has been conferred upon Congress by the Fourteenth Amendment; and, in our judgment, it has not.

But the power of Congress ... is sought, in the second place, from the Thirteenth Amendment, which abolishes slavery.... The only question under the present head, therefore, is, whether the refusal to any persons of the accommodations of an inn, or a public conveyance, or a place of public amusement, by an individual, and without any sanction or support from any State law or regulation, does inflict upon such persons any manner of servitude, or form of slavery, as those terms are understood in this country? ... The Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery....

Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant...? [W]e are forced to the conclusion that such an act of refusal has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the State.... 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 theatre, or deal with in other matters of intercourse or business.... [No] authority for the passage of the law in question can be found in either the Thirteenth or Fourteenth Amendment of the Constitution....

Justice Harlan wrote a dissenting opinion.

The opinion in these cases proceeds, it seems to me, upon grounds entirely too narrow and artificial. I cannot resist the conclusion that the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism.... Constitutional provisions, adopted in the interest of liberty, and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish.... [T]he court has departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted....

The Thirteenth Amendment, it is conceded, did something more than to prohibit slavery as an institution, resting upon distinctions of race, and upheld by positive law.... [I]t established and decreed universal civil freedom throughout the United States. But did the freedom thus established involve nothing more than exemption from actual slavery? ... Were the States against whose protest the institution was destroyed, to be left free ... to make or allow discriminations against that race, as such, in the enjoyment of those fundamental rights which by universal concession, inhere in a state of freedom? ...

That there are burdens and disabilities which constitute badges of slavery and servitude, and that the power to enforce by appropriate legislation the Thirteenth

Amendment may be exerted by legislation of a direct and primary character, for the eradication, not simply of the institution, but of its badges and incidents, are propositions which ought to be deemed indisputable. They lie at the foundation of the Civil Rights Act of 1866.... I hold that since slavery ... 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. Congress, therefore, under its express power to enforce that amendment, by appropriate legislation, may enact laws to protect that people against the deprivation, because of their race, of any civil rights granted to other freemen in the same State; and such legislation may be of a direct and primary character, operating upon States, their officers and agents, and, also, upon, at least, such individuals and corporations as exercise public functions and wield power and authority under the State. What has been said is sufficient to show that the power of Congress under the Thirteenth Amendment is not necessarily restricted to legislation against slavery as an institution upheld by positive law, but may be exerted to the extent, at least, of protecting the liberated race against discrimination, in respect of legal rights belonging to freemen, where such discrimination is based upon race....

Congress has not, in [addressing these places of public accommodation], entered the domain of State control and supervision. It does not ... assume to prescribe the general conditions and limitations under which inns, public conveyances, and places of public amusement, shall be conducted or managed. It simply declares, in effect, that since the nation has established universal freedom in this country, for all time, there shall be no discrimination, based merely upon race or color, in respect of the accommodations and advantages of public conveyances, inns, and places of public amusement.

I am of the opinion that such discrimination practised by corporations and individuals in the exercise of their public or quasi-public functions is a badge of servitude the imposition of which Congress may prevent under its power, by appropriate legislation, to enforce the Thirteenth Amendment; and, consequently, ... [the act] is not repugnant to the Constitution.

It remains now to consider these cases with reference to the power Congress has possessed since the adoption of the Fourteenth Amendment.... The theory of the opinion of the majority of the court ... is, that the general government cannot, in advance of hostile State laws or hostile State proceedings, actively interfere for the protection of any of the rights, privileges, and immunities secured by the Fourteenth Amendment.... The assumption that this amendment consists wholly of prohibitions upon State laws and State proceedings in hostility to its provisions, is unauthorized by its language. The first clause of the first section ... is of a distinctly affirmative character. In its application to the colored race, previously liberated, it created and granted, as well citizenship of the United States, as citizenship of the State in which they respectively resided. It introduced all of that race, whose ancestors had been imported and sold as slaves, at once, into the political community known as the "People of the United States." ...

The citizenship thus acquired, by that race ... may be protected, not alone by the judicial branch of the government, but by congressional legislation of a primary direct character; this, because the power of Congress is not restricted to

the enforcement of prohibitions upon State laws or State action. It is, in terms distinct and positive, to enforce “the provisions of this article” of amendment; not simply those of a prohibitive character, but the provisions—all of the provisions—affirmative and prohibitive, of the amendment. It is, therefore, a grave misconception to suppose that the fifth section of the amendment has reference exclusively to express prohibitions upon State laws or State action....

This court has always given a broad and liberal construction to the Constitution, so as to enable Congress, by legislation, to enforce rights secured by that instrument. The legislation which Congress may enact, in execution of its power to enforce the provisions of this amendment, is such as may be appropriate to protect the right granted.... Under given circumstances, that which the court characterizes as corrective legislation might be deemed by Congress appropriate and entirely sufficient. Under other circumstances primary direct legislation may be required. But it is for Congress, not the judiciary, to say that legislation is appropriate—that is—best adapted to the end to be attained....

I insist that the national legislature may, without transcending the limits of the Constitution, do for human liberty and the fundamental rights of American citizenship, what it did, with the sanction of this court, for the protection of slavery and the rights of the masters of fugitive slaves. If fugitive slave laws, providing modes and prescribing penalties, whereby the master could seize and recover his fugitive slave, were legitimate exercises of an implied power to protect and enforce a right recognized by the Constitution, why shall the hands of Congress be tied, so that—under an express power, by appropriate legislation, to enforce a constitutional provision granting citizenship—it may not, by means of direct legislation, bring the whole power of this nation to bear upon States and their officers, and upon such individuals and corporations exercising public functions as assume to abridge, impair, or deny rights confessedly secured by the supreme law of the land? ...

My brethren say, that when a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men’s rights are protected. It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws. The statute of 1875, now adjudged to be unconstitutional, is for the benefit of citizens of every race and color. What the nation, through Congress, has sought to accomplish in reference to that race, is—what had already been done in every State of the Union for the white race—to secure and protect rights belonging to them as freemen and citizens; nothing more.

Separate but Equal: The Start of a Half-Century Battle

The Supreme Court also erected a barrier to challenges to a variety of laws at the state level designed to ensure segregation in a wide range of fields of endeavor. These laws, collectively referred to as “Jim Crow” segregation, were in many important respects intended to twist the meaning of the equal protection of the laws so as to maintain inequality by pretending to create separate but supposedly equal facilities and services.²⁴ It was clear to any reasonable observer that while they were separate, they were most assuredly not equal. In any case, how could enforced segregation of the races ever be equal under the Constitution

when it operated to demean and hold back African Americans? That was the core of the battle against the separate but equal doctrine that would continue until *Brown v. Board of Education* in 1954.

The origins of the separate but equal doctrine reach back well before the adoption of the Fourteenth Amendment and, indeed, before the Civil War. In fact, they grew out of a case decided by the supreme court of a Northern state, Massachusetts. For many Southerners there was a kind of cynical humor about the fact that the separate but equal doctrine arose in a Northern state. Of course, no such case could have arisen in a Southern state, since the African Americans were slaves and entitled to no rights to education comparable to those contested in the Massachusetts case.

Sarah C. Roberts v. City of Boston

59 Mass. (5 Cush. 198) 198 (1849)

INTRODUCTION: African American parents in Boston had petitioned the school board for the creation of schools for their children since they had been the victims of discrimination in the community. However, over time parents concluded that their children were being excluded from fine schools and kept in segregated and inadequate schools. In 1846 a group of African American parents petitioned the school authorities to eliminate segregated schools. The school committee not only refused, but concluded that: "the continuance of the separate schools for colored children, and the regular attendance of all such children upon the schools, is not only legal and just, but is best adapted to promote the education of that class of our population." Benjamin F. Roberts sued on behalf of his five year old daughter, Sarah C. Roberts, to challenge the segregated schools, claiming that she had been denied admission and would be forced to attend an all-black school further from her home when there was an excellent white school closer to their residence.

Chief Justice Shaw wrote the opinion for the Court.

The plaintiff has commenced this action ... against the city of Boston, upon the statute of 1845, c. 214, which provides, that any child unlawfully excluded from public school instruction, in this commonwealth, shall recover damages therefor, in an action against the city or town, by which such public school instruction is supported. The question therefore is, whether, upon the facts agreed, the plaintiff has been unlawfully excluded from such instruction.... The plaintiff had access to a school, set apart for colored children, as well conducted in all respects, and as well fitted, in point of capacity and qualification of the instructors, to advance the education of children under seven years old, as the other primary schools; the objection is, that the schools thus open to the plaintiff are exclusively appropriated to colored children, and are at a greater distance from her home. Under these circumstances, the plaintiff [has not] been unlawfully excluded from public school instruction? ...

The great principle, advanced by the ... plaintiff, is, that by the constitution and laws of Massachusetts, all persons without distinction of age or sex, birth or color, origin or condition, are equal before the law. This, as a broad general principle, such as ought to appear in a declaration of rights, is perfectly sound.... But, when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the

same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law, for their maintenance and security. What those rights are, to which individuals, in the infinite variety of circumstances by which they are surrounded in society, are entitled, must depend on laws adapted to their respective relations and conditions...

We must then resort to the law, to ascertain what are the rights of individuals, in regard to the schools.... The statute, after directing what length of time schools shall be kept in towns of different numbers of inhabitants and families, provides that the inhabitants shall annually choose, by ballot, a school committee, who shall have the general charge and superintendence of all the public schools in such towns.... The power of general superintendence vests a plenary authority in the committee to arrange, classify, and distribute pupils, in such a manner as they think best adapted to their general proficiency and welfare.... [W]hen this power is reasonably exercised, without being abused or perverted by colorable pretenses, the decision of the committee must be deemed conclusive. The committee, apparently upon great deliberation, have come to the conclusion, that the good of both classes of schools will be best promoted, by maintaining the separate primary schools for colored and for white children, and we can perceive no ground to doubt, that this is the honest result of their experience and judgment.

It is urged, that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion. This prejudice, if it exists, is not created by law, and probably cannot be changed by law. Whether this distinction and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compelling colored and white children to associate together in the same schools, may well be doubted; at all events, it is a fair and proper question for the committee to consider and decide upon ... and we cannot say, that their decision upon it is not founded on just grounds of reason and experience, and in the result of a discriminating and honest judgment.

In 1896 the U.S. Supreme Court would refer to the argument from the *Roberts* case and use it to make "separate but equal" lawful under the U.S. Constitution in *Plessy v. Ferguson*.

Plessy v. Ferguson

163 U.S. 537 (1896)

INTRODUCTION: In 1890 Louisiana enacted a separate car act which required that railroad passengers be segregated into separate cars on the basis of race. The act made it a criminal violation for a person to refuse to sit in the segregated coach if asked. The separate car act was also referred to as an Act for the Comfort and Convenience of Passengers. A group decided to challenge the law and selected Homer Adolph Plessy to test its constitutionality. Plessy appeared to be white and was by his own account only one-eighth non-white. The group purchased a ticket for Mr. Plessy and then informed the railroad of his heritage.

Plessy refused to move from the whites only coach to the segregated coach when asked to do so. He was arrested and the ensuing legal action provided the basis for a challenge to the separate car law.

Justice Brown wrote the opinion for the Court.

The constitutionality of this act is attacked upon the ground that it conflicts both with the Thirteenth Amendment of the Constitution, abolishing slavery, and the Fourteenth Amendment, which prohibits certain restrictive legislation on the part of the States.

That it does not conflict with the Thirteenth Amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument. Slavery implies involuntary servitude—a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another.... [I]n the *Civil Rights Cases*, ... [Justice Bradley wrote:] “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 theatre, or deal with in other matters of intercourse or business.” 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 reestablish a state of involuntary servitude....

By the Fourteenth Amendment ... the States are forbidden from making or enforcing any law which shall ... deny to any person within their jurisdiction the equal protection of the laws.... 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. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.

[In] *Roberts v. City of Boston* the Supreme Judicial Court of Massachusetts held that the general school committee of Boston had power to make provision for the instruction of colored children in separate schools established exclusively for them, and to prohibit their attendance upon the other schools.... Similar laws have been enacted by Congress under its general power of legislation over the District of Columbia ... as well as by the legislatures of many of the States, and have been generally, if not uniformly, sustained by the courts....

Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the State....

[E]very exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class.... So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the

question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it 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. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. 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.... If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals.... If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane. The judgment of the court below is, therefore, affirmed.

Justice Harlan wrote a dissenting opinion.

... In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights.... I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. Indeed, such legislation, as that here in question, is inconsistent not only with that equality of rights which pertains to citizenship, National and State, but with the personal liberty enjoyed by every one within the United States.

The Thirteenth Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. 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.... [It] was followed by the Fourteenth Amendment, which added greatly to the dignity and glory of American citizenship, and to the security of personal liberty.... These two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship. Finally, ... it was declared by the Fifteenth Amendment that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude."

These notable additions to the fundamental law were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems. They had, as this court has said, a common purpose, namely, to secure "to a race recently emancipated, a race that through many generations have been held in slavery, all the civil rights that the superior race enjoy." They declared, in legal effect, this court has further said, "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, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color.”...

It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Everyone knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons.... The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary. The fundamental objection, therefore, to the statute is that it interferes with the personal freedom of citizens.... If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so, and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each.

It is one thing for railroad carriers to furnish, or to be required by law to furnish, equal accommodations.... It is quite another thing for government to forbid citizens of the white and black races from traveling in the same public conveyance, and to punish officers of railroad companies for permitting persons of the two races to occupy the same passenger coach. If a State can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street and black citizens to keep on the other? ...

The white race deems itself to be the dominant race in this country.... But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case.... The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will 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.... The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored

citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

The sure guarantee of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, National and State, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States without regard to race.... The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds....

The *Plessy* case was about segregation in transportation, but the Supreme Court later extended the *Plessy* doctrine to schools as well in *Cumming v. Richmond County Board of Education*²⁵ and *Gong Lum v. Rice*.²⁶

Conclusion

Justice Marshall pressed Americans to concentrate on the need to work together toward a Constitution in daily life that would live up to the promise of the great rhetoric it presents, not only as it was issued originally, but with all of the important improvements made to it over its more 200 year history. That includes not only the document itself, but the interpretations and application of that law by the courts of the United States so that all Americans, including African Americans, can be confident that they truly enjoy the equal protection of the laws.

At the same time Marshall argued passionately that Americans need to understand what the failures of our Constitutional history have meant for the ways in which many African Americans understand their nation and place in it. To do that, it is necessary to pay attention to what our founding documents and our case law have said to and about African Americans as well as the way in which their experiences over time have been described by officials whose task it is to ensure equal protection of the laws. This chapter has provided some of the saddest of lessons about that history and meanness of rhetoric from the very justices whose responsibility it was to do equal justice to all.

Chapter 3 presents the long struggle forward from *Plessy* to *Brown v. Board of Education* and beyond. It is a story of struggle and endurance with many steps forward, but it is also a story that Justice Marshall was quick to say is far from successfully completed.

I. Issues for Policy and Practice

- A. Given the limitations imposed by the Supreme Court's opinion in the *Civil Rights Cases*, what can Congress do, if anything, using the enforcement powers of Section 5 of the Fourteenth Amendment to address discriminatory behavior by anyone other than government?
- B. What are the implications of a requirement that Congress use the power to regulate interstate commerce to get at discrimination by businesses or individuals?
- C. On the one hand, there is a longstanding goal of ensuring that policies are "color blind," in the sense that they are not discriminatory. On the other, there is a need to ensure that resources can be targeted to get to those who need them, which often involves policies designed to assist African Americans, Latinos, Native Americans, women, or persons with disabilities. What policy design approaches are available to accomplish both goals?

II. Discussion Questions

- A. Justice Marshall pointed out that, although it is easy to point to the Southern states where slavery was officially sanctioned and so much a part of life as the problem for both slavery and ultimately racism in the United States, Northern states were fully engaged in the slave trade and profited greatly from it. Is this unwillingness to see that the whole country was implicated in the history of slavery part of the contemporary difficulty with coming to grips with racism?
- B. Contemporary slavery prosecutions (often presented as human trafficking cases) show once again that race and economics are tied together. Is there a willingness to address the demand for cheap products and services and a desire to assert class status that is supporting this modern version of the historic problem? If so, what can be done to address those tendencies?
- C. The ruling in the *Slaughter-House Cases* that effectively nullified the “privileges and immunities” clause of the Fourteenth Amendment has never been overturned. However, Article IV also contains a privileges and immunities clause, and that clause has actually been used to strike down some state and local action. (See *United Building & Construction Trades Council v. Camden*, 465 U.S. 208 (1984); *Hicklin v. Orbeck*, 437 U.S. 518 (1978).) What do you think are (or should be) the privileges and immunities of an American citizen protected by the Constitution?
- D. Justice Marshall wrote of Justice Powell’s comments about getting beyond history and not focusing on race. How can we deal with the fact that some Americans take the attitude that historic discrimination has been outlawed and it is a new day, while for many African Americans, and persons of other ethnocultural or racial minorities for that matter, things have not changed in many important respects? In any case, they are quick to note, the historical trauma of a legacy of discrimination is still very real in people’s lives. Are there steps that we can take to recognize that there have been some changes and yet there remains discrimination, and also the impact of a long history of unequal protection of law and policy?
- E. Most Americans have encountered references to the *Dred Scott* decision at some point in their education. Now you have read the language of that opinion and the way it describes African Americans, something few Americans have done. What are your reactions to it? What do you think are the reactions that African Americans are likely to have to it?

Notes

- 1 See Howard Ball, *A Defiant Life: Thurgood Marshall & the Persistence of Racism in America* (New York: Crown Publishers, 1998); Michael D. Davis and Hunter R. Clark, *Thurgood Marshall: Warrior at the Bar, Rebel on the Bench*, revised edn. (New York: Citadel Press, 1994).
- 2 See Richard Kluger, *Simple Justice* (New York: Vintage, 1977).
- 3 Thurgood Marshall, “Memorandum to the Conference,” April 13, 1978, Brennan Papers, Box 465, pp. 1–3.
- 4 *Regents v. Bakke*, 438 U.S. 265 (1978).
- 5 See John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.* (New York: Charles Scribner’s Sons, 1994), p. 688.
- 6 Discussed further in Phillip J. Cooper, *Battles on the Bench* (Lawrence, KS: University Press of Kansas, 1995), pp. 11–17.
- 7 *Regents v. Bakke*, 438 U.S., at pp. 387–401, Marshall, J., dissenting.
- 8 Thurgood Marshall, “The Constitution’s Bicentennial: Commemorating the Wrong Document?” *Vanderbilt Law Review* 40 (No.6 1987): 1337–1342; Commentary: “Reflections on the Bicentennial of the United States Constitution,” *Harvard Law Review* 101 (Nov. 1987): 1–5; “We the People: A Celebration of the Bicentennial of the United States Constitution,” *Howard Law Journal* 30 (1987): 623–628.
- 9 Thurgood Marshall, “Commentary: Reflections on the Bicentennial of the United States Constitution,” p. 5.

- 10 *Id.*, at 2.
 11 *Id.*
 12 *Id.*, at 3.
 13 1 Stat. 302 (1793).
 14 See Abraham L. Davis and Barbara Luck Graham, eds., *The Supreme Court, Race, and Civil Rights* (Thousand Oaks, CA: Sage Publications, 1995), p. 6.
 15 NOTE: In contemporary case law, this concept is known as pre-emption and is justified under the supremacy clause of Article VI. Specifically, when Congress is said to have intended to occupy the whole field, leaving no room for the state legislatures to act, it is known as “field pre-emption.” See *Arizona v. United States*, 132 S. Ct. 2492, 2501–02 (2012); *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000).
 16 NOTE: The “necessary and proper” language is a reference is to Article I, §8, cl. 18 which provides that Congress shall have 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 in the Government of the United States, or in any Department or Officer thereof.”
 17 NOTE: Justice Wayne wrote a concurring opinion omitted here.
 18 NOTE: Justices Thompson and Daniel issued separate opinions similar to the argument advanced by Taney.
 19 16 Stat. 545 (1820).
 20 NOTE: He is referring here to Article IV, §3, cl. 2 of the Constitution.
 21 NOTE: Justices Wayne, Nelson, Grier, Daniel, Campbell, and Carton issued concurring opinions that have been omitted here.
 22 Abraham Lincoln, Emancipation Proclamation, January 1, 1863, http://avalon.law.yale.edu/19th_century/emancipa.asp, April 6, 2013.
 23 NOTE: Justice Bradley also filed a dissenting opinion on grounds similar to Justice Field’s opinion.
 24 The term Jim Crow is commonly traced to a routine performed in the 1830s and 1840s by a popular white entertainer named Thomas Dartmouth Rice, who sang and danced in blackface, affecting a demeaning caricature of African Americans named Jim Crow. In that act he sang a song entitled “Jump Jim Crow.” This term later was used to refer to a series of laws enacted in the South during the reconstruction era to ensure segregation and inequality among African Americans. See Ferris State University, “Jim Crow Museum: Origins of Jim Crow,” www.ferris.edu/jimcrow/origins.htm, June 14, 2014.
 25 175 U.S. 528 (1899).
 26 275 U.S. 78 (1927).

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