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BADGES OF SLAVERY: THE STRUGGLE BETWEEN CIVIL RIGHTS AND FEDERALISM DURING RECONSTRUCTION

By

Vanessa Hahn Lierley
B.A., University of Kentucky, 2004

A Thesis
Submitted to the Faculty of the
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May 2013

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A Thesis Approved on

April 19, 2013

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DEDICATION

This thesis is dedicated to my husband

Pete Lierley

who always showed me support throughout

the pursuit of my Master's degree.

ABSTRACT

BADGES OF SLAVERY: THE STRUGGLE BETWEEN CIVIL RIGHTS AND FEDERALISM DURING RECONSTRUCTION

Vanessa Hahn Lierley

April 19, 2013

This thesis is set in the context of the Reconstruction to examine the United States Supreme Court interpretation of federalism, African American civil rights and the Fourteenth Amendment. This thesis first compares federalism before and after the Civil War and the need to include Africans Americans in post war society. This thesis then explores arguments and debates surrounding the passage of the Fourteenth Amendment and the civil rights legislation. Finally, this thesis analyzes the United States Supreme Court's interpretation of the Fourteenth Amendment and new civil rights legislation. During Reconstruction the United States Supreme Court upheld the traditional values of federalism and, therefore, the federal government could not interfere with state governments' protection of African American civil rights.

TABLE OF CONTENTS

PAGE

ABSTRACT.. iv

CHAPTER ONE: THE CREATION OF THE FOURTEENTH AMENDMENT.......... 1

CHAPTER TWO: AFRICAN AMEIRCANS IN THE COURTS........................... 16

CHAPTER THREE: THE CIVIL RIGHTS CASES.. 38

CHAPTER FOUR: CONCLUSION.. 67

CHAPTER FIVE: HISTORIOGRAPHY... 73

REFERENCES... 83

CURRICULUM VITAE 86

CHAPTER ONE: THE CREATION OF THE FOURTEENTH AMENDMENT

Article XIV

> Section 1. 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 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 laws. . ..
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

This chapter explains the principles of federalism in the United States before the Civil War. Then, this chapter assesses the changes in federalism due to Congress's need to secure citizenship and civil rights[1] for African Americans. Congressional Republicans struggled to provide citizenship and civil rights to African Americans while also trying to maintain the traditional principles of federalism in the post Civil War United States. This chapter explores varying arguments and debates surrounding the creation of the Civil Rights 1866 and Fourteenth Amendment by members of the 39th Congress. Also, it demonstrates that no one original intent of the Fourteenth Amendment exists; rather, Congress left the Fourteenth Amendment to the United States Supreme Court and the

[1] Throughout this essay civil rights will not include political rights. Those will be mentioned separately.

lower federal courts to interpret and determine the rights of African Americans guaranteed by the state and federal governments.

The United States Constitution created a system of federalism in the United States. Federalism delegated powers to the federal government and reserved powers to the states that the federal government could not take away; it created a central government limited by the Constitution itself and the various states. One important power reserved to the state governments was the power to protect the rights of their individual citizens. States had their own power to make laws and preserve and oversee the rights to their citizens. Legal historian William E. Nelson explained in his 1988 book *The Fourteenth Amendment: From Political Principle to Judicial Doctrine,* that the states also, "built and subsidized a transportation infrastructure, set money and banking policies, established a legal structure for business growth, defined and punished crime, alleviated poverty, and determined the extent of people's moral and religious freedom."[2]

Leaders in southern states believed that the right to own slaves was a power reserved to the state government since the determination of what was and what was not "property" lay within the power of the states. By late April 1861, political leaders of twelve southern states claimed to have seceded from the Union in order to protect their states' right to allow slavery. In April 1865, the Civil War ended, and the federal government abolished slavery thus eliminating the states' right to protect its citizens' economic interest in owning persons as property. The Thirteenth Amendment of December 6, 1865 nullified the United States Supreme Court's decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), which protected slavery in the United States and claimed

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[2] William Edward Nelson, *The Fourteenth Amendment: from Political Principle to Judicial Doctrine* (Cambridge, Massachusetts: Harvard University Press, 1988), 27.

that African Americans had no rights or citizenship under the Constitution. The Thirteenth Amendment constitutionalized President Lincoln's Emancipation Proclamation. The Thirteenth Amendment's second section, the constitution's first enforcement clause, provided Congress the power to enforce the abolition of slavery with "appropriate legislation." Americans in former Confederate states feared a slippery slope that the federal government would or might limit other rights reserved to the states.

Changing federal powers frightened southerners. Southern policy makers in their states wanted to make sure that they maintained the same powers that they had before the Civil War, such as the power to protect individual civil rights. They misunderstood that the Civil War and Reconstruction had ushered in a new balance in federalism; states no longer possessed the same powers they held before the war. In time, Congress and the United States Supreme Court determined how the Civil War changed federalism in the United States.

As the political history of that era demonstrated, Congress could not decide how to include newly freed slaves into the new political and economic landscape of the United States.[3] Congress had to determine what rights of African Americans the federal government was going to protect and what rights needed to be left to the states to protect. Before the Civil War, all people who were born in the United States were not considered citizens. African Americans, who were born into slavery, were not citizens of their state or the nation. In 1865, Republican Senator Lyman Trumbull from Illinois introduced a Civil Rights bill that would define citizenship in America and provide civil rights to African Americans. The Civil Rights bill stated, "That all persons born in the United

[3] Information regarding African American civil rights before the Civil War see, Harold M. Hyman and William M. Wiecek, *Equal Justice Under Law: Constitutional Development, 1835-1875* (New York, New York: Harper and Row, 1982).

States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude. . . ."[4] Trumbull's bill provided all people born in the United States citizenship of their state and citizens of the federal government.

Moderate and radical Republicans disagreed over what rights they considered civil rights. Radical Republicans believed that social rights should also be included in the bill. However, moderate Republicans wanted civil rights[5] included in the bill but not social rights. Trumbull defined such civil rights as, "the rights to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and person property and to full and equal benefit of all laws and proceedings for the security of person and property."[6] States could not discriminate or deny a citizen their civil rights due to race. African Americans would be equal before the law, but not equal in social or political terms.

Congressional members had concerns about Trumbull's bill because enforcing individual rights was a power reserved to the states. Congress wanted to continue this principle of federalism, but also protect the civil rights of African Americans. In the late 1860's and early 1870's the federal government withdrew its troops in former Confederate states. Congress needed to determine how to ensure that those states protected African Americans civil rights after the federal troops left.[7] The 1866 Civil

[4] United States Statues at Large, Civil Rights 1866, sec. 1.
[5] These civil rights were defined mostly as economic rights, not rights to public accommodations or against individual discrimination.
[6] *Congressional Globe,* 39th Congress, 1st session, 211 (January 12, 1866).
[7] Herman Belz, *Emancipation and Equal Rights: Politics and Constitutionalism in the Civil War Era* (New York: Norton, 1978), 158.

Rights bill followed the traditional idea of federalism where the protection of individual rights was left to the states. The federal government interfered only when those rights were not being protected by the states or the states created a law discriminating against its citizens due to race. Ohio Senator John Sherman explained that the federal government would not interfere with individual rights unless the state did not protect them saying, "If Kentucky enforces those rights, that is the end of the whole controversy so far as she is concerned: but if Kentucky or any other state should fail to enforce those rights, then we are bound to do it."[8] The federal government would not limit a state's right to protect individual freedoms as long as the state protected all individual freedoms regardless of race.

The 39th Congress passed the Civil Rights Bill; but, on March 27, 1866 President Andrew Johnson vetoed it. President Johnson believed that the bill should not become a law because Congress did not have the power to protect civil rights for African Americans. In Johnson's view, the protection of civil rights should rest with the states. Also, eleven states were not represented in Congress at that time. President Johnson felt that the states should not be held accountable when they did not have a vote on the bill.[9] Congress overrode the veto on April 9, 1866 and the Civil Rights bill became the Civil Rights Act of 1866.[10] The Civil Right Act of 1866 held states accountable to protecting African American civil rights, but the Act could not hold individuals accountable for discriminating against African Americans. The state and local governments held the power to protect African Americans from individual discrimination. Regardless of this

[8] *Congressional Globe,* 39th Congress, 1st session, 744 (February 8, 1866).
[9] Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York: Harper & Row, 1988), 246.
[10] Belz, *Emancipation and Equal Rights,* 171.

public policy and value, violence towards African Americans continued throughout localities in the South as the white majority population sought to re-establish its control as African Americans struggled to gain some legal and social equality in their localities.

The constitutionality of the Civil Rights Act of 1866 concerned congressional Republicans even after the Act became a law. The Thirteenth Amendment provided Congress new powers to enforce the amendment with appropriate legislation; but, did the Thirteenth Amendment provide Congress the power to make the Civil Rights bill guaranteeing citizenship to African Americans? Radical Republicans believed that the Thirteenth Amendment freed African Americans from slavery and therefore granted them national citizenship. Radical Republicans believed that the Civil Rights Act of 1866 was constitutional under the Thirteenth Amendment. More moderate Republicans believed that the Thirteenth Amendment only gave Congress the power to create appropriate legislation to enforce the abolition of only the institution of slavery and not its various associations and badges of slavery. Moderate Republicans did not believe that the Thirteenth Amendment granted citizenship to African Americans and therefore the Civil Rights Act of 1866 was incomplete. Congressional members realized that a new amendment was needed to guarantee national and state citizenship to African Americans and then the legitimacy and permanence of the Civil Rights Act of 1866 would no longer be in question.[11]

The 39th Congress debated a new amendment to the United States Constitution. The proposed Fourteenth Amendment would grant national and state citizenship to African Americans and protect the civil rights guaranteed to all citizens. Some members

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[11] Alfred H. Kelly, "The Fourteenth Amendment Reconsidered: The Segregation Question," *Michigan Law Review 54* (June 1956): 1050.

of Congress believed that the federal government could not determine citizenship and rights of citizens for the states because that power was a power reserved for the state government. Radical Republicans believed that the guarantee clause of the Constitution allowed Congress to make laws granting citizenship and civil rights to African Americans. Under Article IV, Section Four of the United States Constitution it states, "The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence." Radical Republicans believed that this guarantee clause gave Congress the power to guarantee that each state had a true republican form of government.[12]

Congressional member Jacob M. Howard, a Republican from Michigan, believed that by creating the Fourteenth Amendment giving citizenship and civil rights to African Africans, Congress guaranteed the values of a republican government to the states. When Howard spoke in favor of the Fourteenth Amendment to the Senate he began saying:

> It established equality before law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives the most powerful, the most wealthy, or the most haughty. That, sir, is republican government, as I understand it, and the only one which can claim the praise of a just Government. Without this principle of equal justice to all men and equal protection under the shield of the law, there is no republican government and none that is really worth maintaining.[13]

As Howard said in his speech, it was a characteristic of republican government to allow all races to be citizens and have equal protection under the laws. Congress needed to

[12] Foner, *Reconstruction,* 232.
[13] Congessional Globe, 39th Congress, 1st sess. 2766 (1866).

ensure the citizenship and rights of all people so that they can continue follow the values of and ideals of a republican government.

Moderate Republicans believed that Congress could create the Fourteenth Amendment but, Article IV, Section 4 of the United States Constitution did not allow it. They believed that the federal government must uphold the traditional principles of federalism and allow states the power to protect citizens' rights. Moderate Republicans believed that the power of Congress to create the Fourteenth Amendment arose from the secession of the southern states. When the southern states seceded from the Union they forfeited some of their powers. Congress possessed the power to force states to recognize African Americans citizenship before those states regained their representation in the federal government. Moderate Republicans believed it was the Civil War and the alleged secession of the southern state governments and not Article IV, Section 4 of the United States Constitution that created the environment that provided Congress the power to craft the Fourteenth Amendment. [14]

Creating the Fourteenth Amendment caused more arguments in Congress about federalism. Congress never questioned whose responsibility it was to provide citizenship and protect individual rights. Democrat Congressman from New Jersey Andrew J. Rogers stated that giving the federal government power to enforce citizenship and civil rights caused more conflicts between the states. He believed the proposed amendment:

> Saps the foundation of the Government; it destroys the elementary principles of the States; it consolidates everything into one imperial despotism; it annihilates all the rights which lie at the foundation of the Union of the States, and which have characterized this government and made it prosperous and great during the long period of its

[14] Belz, *Emancipation* 76-79; Foner, *Reconstruction,* 242-243.

> existence. . .. It will result in a revolution worse than that through which we have just passed.[15]

Northern Republican congressional members had to reassure northern and southern Democrats alike that the amendment would not limit the powers of the states to make laws. Under the Fourteenth Amendment a state can make laws regarding the rights of its citizens, but the states could not enact laws that only punish or give rights to one race over the other.[16] States still possessed power to protect the rights of their own citizens; the federal government did not infringe on the power of the states to enact most state legislation as long as that legislation treated all of the state's citizens in an equal fashion.

Some Congressional members were more concern about the equality of races implied in the Fourteenth Amendment than the changes in federalism. The end of slavery did not end racial consciousness and racism in the United States in the South or the rest of the country. Americans had become used to the different treatment of differing peoples in the country and believed that different treatment constituted a valid public policy in dealing with different people. White Americans thought of African Americans as lazy and undisciplined; therefore, African Americans needed the former slave owners to teach them productive work habits. Whites felt intellectually and morally superior to African Americans, and they believed that African Americans would never be equal (by any standard) to the majority White populations.[17] If African Americans gained citizenship then they would be equal before the law to whites by the laws of the federal

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[15] Congressional Globe, 39th Congress, 1st sess. 1271 (1866).
[16] Nelson, *The Fourteenth Amendment,* 115.
[17] Charles A. Lofgren, *The Plessy Case: A Legal-Historical Interpretation* (New York: Oxford University Press, 1987), 95 -96, especially Chapter 5, "The Intellectual Environment: Racist Thought in the Late Nineteenth Century."

government. White Americans held the belief that African Americans would never and should never become equal in any manner with whites including before law and certainly not socially, culturally, or economically.

Racism and discrimination of African Americans did not always come from the southern Democrats; even northern Republicans had a difficult time envisioning a country where whites and blacks lived and worked side by side. Segregation of the races existed in the North before the Civil War. Northerners believed that the institution of slavery was wrong but equality in all aspects of life for the two races was also wrong.[18] Northerners were both antislavery and anti-black. Democrat Indiana Senator Thomas A. Hendricks worried about creating equality between the two races arguing:

> What has this race ever produced? What invention has it ever produced of advantage to the world? You need not say it is because of slavery, for we all know it is not. This race has not been carried down into barbarism by slavery. The influence of slavery upon this race- I will not say it is the influence of slavery but the influence of the contact of this race with the white race has been to give it all the elevation it possesses, and independent and outside of that influence it has not become elevated anywhere in its whole history.[19]

Hendricks's was not alone in his view of the differences between the two races. Many Americans thought that whites had been superior to African Americans historically and whites would continue to be superior to African Americans in the near and far future.

Radical Republicans held the minority view during Reconstruction of racial equality. Radical Republicans in Congress argued that the 1776 Declaration of Independence justified the Fourteenth Amendment. The federal government needed to uphold the values of the Declaration of Independence and provide for equality before the

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[18] C Vann Woodward, *The Strange Career of Jim Crow* (New York: Oxford University Press, 1974), 17.
[19] Congressional Globe, 40th Congress, 3d sess. 989 (1869).

law for all United States citizens. Republican Orris S. Ferry of Connecticut employed the Declaration of Independence to justify the need for a new amendment. Thomas Jefferson wrote in the Declaration of Independence that "all men are created equal" and that "they are endowed by their Creator with certain unalienable rights."[20] Ferry argued that these words were not just created for the white race and that even African Americans had "unalienable rights," endowed to him by his Creator. Ferry discussed the Declaration of Independence and the rights that he believed are guaranteed to all men:

> Democrats sneer nowadays at the Declaration of Independence. But the words are not true merely because they are contained in that instrument. They have an older origin than that. They go back through eighteen centuries to the time when He who spake as never man spake first proclaimed the principles of human brotherhood and human equality to the rude Galilean peasants.[21]

Ferry urged Congress to understand that human equality was a principle given to man by a higher law than government. Congress needed to follow the higher law and create an amendment that provided equality to all men.

Radical Republicans knew that the Fourteenth Amendment would not pass if it created social equality for African Americans. Supporters of the Fourteenth Amendment explained to Congressional members that the Fourteenth Amendment only provide equality before the law for African Americans. Republican Representative James Wilson of Iowa explained:

> The word rights is generic, common, embracing whatever may be lawfully claimed. The definition given to the term "civil rights in Bouvier's Law Dictionary is very concise, and it supported by the best authority. It is this: "Civil rights are those

[20] Declaration of Independence
[21] Congressional Globe 39th Congress, 1 sess. 1159 (1866).

> which have no relation to the establishment, support or management of government." From this it is easy to gather an understanding that civil rights are the natural rights of man; and these are the rights which this bill proposes to protect every citizen in the enjoyment of throughout the entire dominion of the Republic. But what of the term "immunities?" What is an immunity? Simply "freedom or exemption from obligation" and immunity is "a right of exemption only" as "an exemption from serving in an office or performing duties which the law generally requires other citizens to perform." This is all that is intended by the word "immunities" as used in this bill. It merely secures to citizens of the United States equality in the exemptions of the law.[22]

Wilson's explanation of the civil rights and immunities did not include specific rights. He reassured opponents of the Fourteenth Amendment that African Americans would only receive civil rights and not social or political rights.

By July 1868, the 39th Congress approved and the required number of states ratified the Fourteenth Amendment making all people born in the United State citizens of the United States federal government and citizens of their state government- dual citizenship. The Fourteenth Amendment states, "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." Everyone born in the United States, regardless of race, gender or ethnicity, would henceforth be considered a citizen of the federal government and their state government. Citizenship could no longer be denied to African Americans. This section of the Fourteenth Amendment made states accountable for giving citizenship to everyone born in their boundaries regardless of race.

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[22] Congressional Globe, 39th Congress, 1 sess. 1117 (1866).

The second compound sentence of the Fourteenth Amendment stated that, "No state shall make or enforce any law which 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 laws." States had to recognize citizenship to all people born in their boundaries and also provide laws that protected all citizens' privileges and immunities. The Fourteenth Amendment changed the language that was typical in other amendments from "Congress shall have power" to the stronger and more affirmative "No State shall." This change limited the states and changed the balance in federalism. No longer was Congress's powers limited by the Constitution, but now the states would also have limited powers.[23] Some members of Congress and some Americans feared the slippery slope again that as soon as the federal government began taking away rights from the states, then they would have complete control over local and state rule.

Section Five of the Fourteenth Amendment constituted another threat to traditional federalism, the enforcement clause. Section Five stated, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Section Five meant that the federal government could interfere with state issues. If a state did not create laws protecting its citizens then Congress could create "appropriate legislation" to hold the states accountable. Potentially, this language grants the federal government more power than before the Civil War.

In 1868, questions existed that were left unanswered when the states ratified the Fourteenth Amendment. Americans were unsure how much power the federal government had under the Fourteenth Amendment although most persons understood

[23] Jacobus TenBroek, *Equal Under Law* (New York: Collier Books, 1965), 216.

that the federal government was more powerful than it had been relative to the states prior to the Civil War. No one knew exactly what type of legislation Congress would create to enforce the Fourteenth Amendment although the Civil Rights Act of 1866 passes to enforce the Thirteenth Amendment suggested that Congress had wide power to enforce the new Amendment if it so choose to do so.

Republican Senator Jacob M. Howard of Michigan discussed the broad language of the Fourteenth Amendment. He explained:

> It would be a curious question to solve what are the privileges and immunities of citizens of each the States in the several States. I do not propose to go at any length into that question at this time. It would be a somewhat barren discussion. But it is certain the clause was inserted in the Constitution for some good purpose. It has in view some results beneficial to the citizens of the several states, or it would not be found there, yet I am not aware that the Supreme Court have ever undertaken to define either the nature or the extent of the privileges and immunities guaranteed.[24]

Howard recognized that the language of section one of Fourteenth Amendment was vague; therefore , because of its vagueness, Congress left to the lower federal courts and United States Supreme Court the task interpret its meaning. Americans held different interpretations about which rights were included under privileges and immunities, due process, equal protection clauses, as well as the definitions of life, liberty, and property. The Fourteenth Amendment guaranteed property rights and due process of law to all citizens of the United States. Civil and social rights such as the right use public accommodations, run for office, or serve on a jury were not guaranteed or denied to citizens under the Fourteenth Amendment. These questions may have been left unanswered to allow for open interpretation of the Fourteenth Amendment. In the end,

[24] Congressional Globe, 39th Congress, 1 sess. 2765 (1866).

the original intent of section one of the Fourteenth Amendment was and remains unclear. It would be the United States Supreme Court that would interpret and construct meaning of the Fourteenth Amendment, federalism, and civil rights for African Americans as the historical contexts changed and altered over the course of United States history.

CHAPTER TWO: AFRICAN AMERICANS IN THE COURTS

The Thirteenth Amendment abolished involuntary servitude in the United States and the Fourteenth Amendment granted national citizenship to all people born in the United States; but, Americans were still unclear about the specific economic, social and civil rights of African Americans. Congress tried to balance federalism and civil rights for African American by creating the Fourteenth Amendment, but the exact rights of African Americans citizens and powers of Congress to protect those rights would be defined by the lower federal courts and United States Supreme Court. Between 1873 and 1875 the United States Supreme Court justices decided three cases involving the Fourteenth Amendment. This chapter reviews and analyzes *The Slaughterhouse Cases* (1873), the rise of violence against African Americans in the South, the 1870-1871 Enforcement Acts, and the 1876 United States Supreme Court decisions in *U.S. v. Cruikshank* and *U.S. v. Reese.*[25] Due to the Supreme Court justices' decisions in these cases, African Americans experienced setbacks in their struggle for national civil rights within the federal courts. The United States Supreme Court interpreted the Fourteenth Amendment in a fashion that did not provide the federal government the power to protect civil rights of African Americans in their localities; remedies for African Americans rights lay with their state courts.

[25] *United States v. Cruikshank.* 92 U.S. 542 (1875); *United States v. Reese.* 92 U.S. 214 (1875).

The first case that required the United States Supreme Court to interpret the Fourteenth Amendment did not involve African Americans and their civil rights directly, but its decision caused ripple effects for African Americans' rights. The *Slaughterhouse Cases*[26] dealt with white butchers, state police power, and federalism and rose from the city of New Orleans. By, 1869, the numerous slaughterhouses in New Orleans caused health and sanitary issues. The slaughterhouses were located upstream of the city of New Orleans and the livestock contaminated viable water sources. The state of Louisiana adopted the 1869 Slaughterhouse Act which required all slaughterhouses for New Orleans to move downstream of the city to one central location only. All other slaughterhouses had to close thus denying those butchers who were not a part of the state monopoly a means of pursuing their trade and earning a living as a butcher. The Slaughterhouse Act angered some of the owners of slaughterhouse in New Orleans because they believed that it created a monopoly for privileged companies already located in the designated area, prevented them from earning a living, and thus, denied them due process and equal protection of the laws. Former United States Supreme Court Justice John Campbell defended the non-privileged butchers in the state and federal courts and argued that the state violated the Fourteenth Amendment by denying the butchers their due process, equal protection and privilege and immunities. In time, their arguments reached to the United States Supreme Court. The Constitution the Fourteenth Amendment states, "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States." Campbell believed that the state violated the butchers privileges and right to property by creating a law that favored one business over another and denied some butchers the right to earn an honest living.

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

This litigation formed the first time the United States Supreme Court interpreted the Fourteenth Amendment.[27]

A majority of the justices upheld the Slaughterhouse Act. Chief Justice Samuel Miller explained, "the act determines the places where stock was to be landed and slaughtered, but it did not prevent anyone from plying the trade of the butcher."[28] He believed that the law did not deny any rights or privileges because the law stated only where the butchers had to locate their businesses. Also, Chief Justice Miller believed that the Fourteenth Amendment only protected the privileges guaranteed by the federal government, not any state or local fundamental rights. The states, not the federal government, protected the butchers' business rights. Chief Justice Miller believed the Fourteenth Amendment did not expand to the federal government's powers reserved to the states; further, the majority held that the Fourteenth Amendment had not relocated any individual rights from the states to the federal government.

Chief Justice Miller wrote the majority opinion, but Justices Stephen J. Field, Noah H. Swayne and Joseph P. Bradley wrote dissenting opinions. Justice Bradley's believed that the federal government held the power to protect individuals against business monopolies. Bradley argued that Chief Justice Miller interpreted the privileges and immunities clause narrowly. Justice Field agreed and thought the Fourteenth Amendment, "place the common rights of American citizens under the protection of the

[27] Robert M. Labbe and Jonathan Lurie, *The Slaughterhouse Cases: Regulation, Reconstruction and the Fourteenth Amendment* (Lawrence, Kansas: University Press of Kansas, 2003), 185.
[28] *The Slaughterhouse Cases 1873.*

National government."[29] The dissenting justices believed Miller interpreted the Fourteenth Amendment narrowly and diminish the privileges and immunities clause.[30]

Historians Ronald Labbe and Jonathan Lurie explain the importance of Chief Justice Miller's narrow interpretation of the Fourteenth Amendment in their 2003 book *The Slaughterhouse Cases: Regulation, Reconstruction and the Fourteenth Amendment.* They explained that Chief Justice Miller's interpretation, "limited the broad implications of the equal protection clause," and "would later deprive the freedmen of any of its protections," though limiting African American rights was not the majority's intention at the time.[31] African American rights were not involved in the *Slaughterhouse Case;* yet, Chief Justice Miller's interpretation of the Fourteenth Amendment set a precedent for future United States Supreme Court justices to follow in upholding the traditional boundaries of federalism and the location of the protection of "rights."

Three years passed before the United States Supreme Court again interpreted the meaning of the Fourteenth Amendment. While white butchers had argued that the Fourteenth Amendment protected their civil rights in *The Slaughterhouse Cases,* African Americans pursued their civil rights outside of the courts. The South proved a hostile place for African Americans after the Civil War. Eventually, African Americans formed their own organizations for protection against the whites in majority in the South. In the spring of 1865, African Americans organized Union Leagues in areas that the Union troops occupied during the Civil War. Union Leagues joined together with Freedmen's

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[29] *The Slaughterhouse Cases 1873,* 118.
[30] Kevin Christopher Newson, "Setting Incorporationism Straight: A Reinterpretation of the Slaughterhouse Cases," *The Yale Law Review 109* (January 2000): 656.
[31] Labbe and Lurie, *The Slaughterhouse Cases,* 216 and 220.

Bureau agents, black soldiers and local African Americans in the pursuit of civil and political equality.[32]

African Americans also organized militias after the Civil War. Black militias had a different purpose from Union Leagues. African Americans created black militias so that freedmen would have a way to defend themselves against white violence. The creation by African Americans of groups, such as Union Leagues and black militias, demonstrated African Americans' desire fight white dominance in the South and obtain equal civil rights in America after the Civil War. African Americans began to help themselves in their struggle for equal rights rather than wait for the state or federal government to take action.[33]

Unfortunately, these black groups did not reduce violence in the South. Whites grew angrier when Union Leagues and black militias formed. After the Civil War was over, a white supremacy group formed in Tennessee. In time, the group became known as the Ku Klux Klan. The Ku Klux Klan wanted to ensure white dominance and re-impose slavery in everything but name. The KKK was not deterred by the laws the federal government created because the KKK enforced their own laws and "committed to black subjugation and intimidation."[34] KKK membership spread throughout the South and their actions grew violent against African Americans and whites who supported African Americans in their struggle to gain civil rights.

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[32] Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York: Harper & Row, 1988), 110.
[33] For more information about race relationships in the south after the Civil War see: Howard N Rabinowitz, *Race Relations in the Urban South, 1865-1890* (New York, New York: Oxford University Press, 1978).
[34] Mark Stuart Weiner, *Black Trial: Citizenship from the Beginnings of Slavery to the End of Caste* (New York: Random House, 2004), 193.

The KKK intimidated African Americans in all areas of their lives. One tactic of the KKK was stalking and interrogating African Americans at their homes. Members of the KKK came to the homes of African Americans at night to catch them while they slept. The KKK surprised the home owners and the mob attacked the home owner's family members. During some of the attacks, the KKK interrogated the family members, but most of the time intimidation constituted the purpose of the attacks. The KKK searched the houses of African Americans stealing what they wanted especially weapons.[35] Whites who supported African Americans, known as scalawags, also became victims of these attacks and many times stopped supporting African Americans as a result of the violence. Raids increased and became critical in the state of South Carolina. African Americans feared that their houses would be burned and they would be beaten, hanged, whipped or watch their wives raped.[36]

By May 1867, due to a fear of Black uprising, white Democrats formed a group similar to the KKK in Louisiana known as Knights of the White Camilia. The KWC were better organized and more politically involved than the KKK. Both the KKK and KWC were responsible for violence against African Americans in Louisiana and their violence turned towards white Republicans. On October 17, 1868 in Franklin, Louisiana, members of the KWC killed two white Republican leaders, Sheriff Henry Pope and Judge

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[35] Ibid., 194.

[36] This essay will focus on the KKK and KWC violence in the state of Louisiana. For more information on the KKK in other states see: Lou Williams Falkner, *The Great South Carolina Ku Klux Klan Trials, 1871-1872* (Athens, Georgia: University of Georgia Press, 1996).

Valentine Chase.[37] The KKK and KWC were determined to use violence against anyone who supported African American political involvement.

In November 1868, General Edward Hatch, the Freedmen's Bureau chief in Louisiana, reported to Congress that white southerners killed 1,081 African Americans in Louisiana between the months of April and November.[38] Members of Congress thought that the cases being reported from the South involving the KKK were exaggerated. In 1871, Congress sent Major Lewis Merrill to investigate the KKK conspiracies. At first, Merrill agreed with Congress's original opinion that cases against the KKK were exaggerated by African Americans. While Merrill was in the South, the KKK violence shocked him. Merrill saw horrific acts of violence by Klan members and the local authorities did nothing to deter or punish the violence. Merrill reported to Congress, "I am now of the opinion, that I never conceived of such a state of social disorganization being possible in any civilized community as exists in this country now."[39]

After Merrill delivered his report to Congress, President Ulysses Grant urged Congress to create an act that to regulate the KKK and ensure the freedoms of African Americans. The 1865 Thirteenth, 1868 Fourteenth and 1870 Fifteenth amendment contained an enforcement clause that allowed for the creation of "appropriate legislation," so Congress could create acts to help enforce the amendments. In 1870, Congress enacted and President Grant signed the Enforcement Act and which allowed federal officials "to institute proceedings against all and every person who shall violate

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[37] Allen W. Trelease, *White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction* (New York: Harper & Row, 1971), 130.
[38] Ibid., 135.
[39] Weiner, *Black Trials,* 197.

the provisions of this act."[40] The Enforcement Acts contained three major sections. The first part was the most detailed as it outlined the voting rights of all male citizens and forbid anyone from acting or conspiring together to take away the "rights or privileges granted or secured to him by the Constitution or laws of the United States."[41]

The second part of the Enforcement Acts expanded federal power. It made interference with voting rights and violence against African Americans a federal crime. The Enforcement Act also allowed the federal government to send in troops to enforce the act even when local officials did not. Finally, the third part of the Enforcement Acts was also called the Ku Klux Force Act because it affected members of the KKK and other vigilante groups. The Ku Klux Force Act allowed federal officials to regulate the KKK and permit members of the KKK to be prosecuted in federal courts. Congress hoped that the Enforcement Acts would stop the violence in the South and allow African Americans to live freely; but, not everyone agreed.

Several problems with the new Enforcement Acts existed. The first concern was how the federal government intended to implement the acts. Congressmen worried whether enough officials existed to prosecute all of these cases. In time Congress found the manpower and money to enforce and prosecute these new acts. Congress prosecuted more than 2,000 cases during the three years following the creation of the acts. Another concern with the Enforcement Acts was the violence that federal officials faced while they were enforcing the acts. Most whites in the South supported violence against African Americans. Crowds of supporters stood outside the jails when the local federal prosecutor charged members of the KKK with crimes of violence against African

[40] Enforcement Act 1870 section 9
[41] Enforcement Acts 1870

Americans. The KKK threatened and intimidated witnesses and jurors of trials involving the Enforcement Acts. Acts of violence and threats turned to the officials themselves.[42]

Congress's final concern with the Enforcement Acts was the constitutionality of the acts. The Enforcement Acts allowed federal officials to charge individuals, but not states, with crimes. States charge and prosecute criminals in their states, not the federal government. Some Americans wondered if the Fourteenth Amendment allowed the federal government to create laws such as the Enforcement Acts and prosecute individuals when the states did not take action. If the Enforcement Acts were constitutional they expanded the reach of the federal government into the traditional criminal law enforcement power of the states; a major change in traditional federalism.

The United States Supreme Court had the opportunity to determine whether the Enforcement Acts were constitutional in two cases. *United States v. Cruikshank* (1876) and *United States v. Reese* (1876) were two separate cases but the United States Supreme Court decided them on the same day. The decisions in these cases determined the power of the federal government to create legislation under the Fourteenth Amendment.

Cruikshank challenged the constitutionality of the Enforcement Acts. This litigation arose from Louisiana, just as *The Slaughterhouse Cases.* Both of these cases involved the interpretation of the new Fourteenth Amendment; yet, Cruikshank tested the civil rights of African Americans where *The Slaughterhouse Cases* involved the civil rights of white butchers. *Cruikshank* was an unusual case for the United States Supreme Court to hear because it involved the murder of over a hundred African Americans. Under the Enforcement Act, the United States Attorneys could investigate and prosecute

[42] Robert M. Goldman, *Reconstruction and Black Suffrage: Losing the Vote in Reese and Cruikshank (*Lawrence: University Press of Kansas, 2001), 23.

criminal offenses of individuals. *Cruikshank* showed the difficulties that the federal government faced reconstructing the South and it also demonstrated the hatred that existed between the two races. Historian LeeAnn Keith describes the importance of *Cruikshank* in her book *The Colfax Massacre: The Untold Story of Black Power, White Terror, & The Death of Reconstruction.* She explained, "The charges in the Colfax case addressed the most fundamental issues of federalism and human rights. What were the privileges and immunities guaranteed by the Constitution? And which agency of government, federal or state, bore the chief responsibility to protect them?"[43] These were important questions not answered by Congress when the states ratified the Fourteenth Amendment. Congress left such issues to the United States Supreme Court to interpret and answer.

The *Cruikshank* case arose from an 1873 event known as the Colfax Massacre which Historian Robert Michael Goldman described as the "most horrific single instance of violence of the Reconstruction era."[44] Meredith Calhoun lived in Colfax, Louisiana with his hundreds of slaves in a plantation along the Red River. Calhoun turned his plantation over to his son William Calhoun. After the Civil War, William Calhoun helped to establish Grant Parish. Many of Calhoun's former slaves lived in Grant Parish. Calhoun believed in equal rights for African American citizens. When Calhoun created the parish lines, he made sure that Grant Parish would have a large number of the African American population. The new parish lines helped more African Americans get voted into local offices. African Americans joined the Republican Party and voted for

[43] LeeAnna Keith, *The Colfax Massacre: The Untold Story of Black Power, White Terror and the Death of Reconstruction* (Oxford: Oxford University Press, 2008), 132.
[44] Goldman, *Reconstruction and Black Suffrage,* 41.

Republican officials. The high African American population meant that the number of Republicans in the area began to equal the number of Democrats.[45]

The local election of 1872 was an important one for both the Republicans and Democrats. The citizens of Grant Parish voted for the offices of sheriff and local judges. Once the election was over no clear winner existed for the offices of sheriff and judge. Columbus Nash and Alphonse Cazabat were the Democratic candidates for these positions and they claimed victory and occupied the courthouse in Grant Parish. On appeal, William Pitt Kellogg, Governor of Louisiana, decided the election and declared that R. C. Register and Daniel Shaw, the Republican nominees, the winners. Both Register and Shaw snuck into the court house so they could claim their office.[46] African Americans from the area took control of the courthouse so that their candidates could begin working. White members of Grant Parish reacted once they heard about the occupation of the courthouse. Members of the KWC told other citizens that the black militias were killing whites for no reasons. In reality, it was whites who were killing innocent black residents of Grant Parish.

On April 13, 1873, whites surrounded and attacked the Grant Parish courthouse. Whites began by shooting from outside the building and African Americans fired back to defend themselves. The whites outside of the court house set it on fire creating a panic inside the courthouse. Two white flags could be seen waving from inside to indicate the surrender of the African Americans. The whites assured the African Americans that they would be safe if they left the burning building. As the African Americans fled from the building the mob shot at them. Those who were not killed were hunted down and

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[45] Keith, *The Colfax Massacre,* 55.
[46] Lawrence Goldstone, *Inherently Unequal: The Betrayal of Equal Rights by the Supreme Court, 1865-1903* New York, New York: Walker & Company, 2011), 88.

murdered. A massacre occurred outside the courthouse and the mob killed from 65 to 175 African Americans during the massacre.[47]

Federal marshalls came to Grant Parish to arrest anyone involved with the crime. Most of the members of the KWC dispersed using the river as transportation. Sheriffs arrested eight men for the massacre and brought them to trial in New Orleans. African Americans of Louisiana thought that this case would hold the murders responsible for their actions in court. White Democrats in New Orleans felt differently. The *New Orleans Picayune* published an article about the Colfax Massacre describing African Americans as "threatening the lives of their political opponents, giving some of them a short time to leave the place on pain of death, shooting at others, breaking open and gutting dwelling houses, driving women out, robbing a female school teacher of her jewels and effects, even rifling the coffin of Judge Rutland's dead babe, and flinging its body in the middle of the highway."[48] Public opinion differed in New Orleans as law enforcement arrested eight white democrats and no African Americans were ever charged with a crime.

United States attorney J.R. Beckwith charged eight people for murder, conspiracy and violation of the Enforcement Acts and Fourteenth Amendment. Beckwith believed that the case should be heard in the federal court rather than the states court. He claimed that the Fourteenth Amendment gave the federal government the power to protect the rights guaranteed in the Bill of Rights. The federal government could prosecute individuals who denied another individual the rights listed in the Bill of Rights. The defendants could therefore be charged with violating sections of the Enforcement Act and

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[47] Keith, *The Colfax Massacre,* 109.
[48] Goldstone, *Reconstruction and Black Suffrage,* 90.

the Fourteenth Amendment. Since the massacre occurred over an election, a violation of the Fifteenth Amendment also occurred.

Federal district judge William B. Woods presided over the first trial. At the end of the first trial the jury could not decide on the charges, so the judge declared a mistrial. Judge Woods presided over the second trial but he was not alone. Supreme Court Associate Justice Joseph Bradley also presided over the trial. Only forty-six district judges existed in the nation so Supreme Court justices would help these judges conduct trials. Each Supreme Court justice would spend time each year in one of the nine circuits to help rule on appeal and conduct trials.[49]

At the second trial, the jury found the eight men innocent of murder, but the jury found three men guilty of conspiracy. The conspiracy charge constituted a federal violation of the Enforcement Act. Robert H. Marr was the lawyer for the defendants and he appealed the jury's decision. Judge Woods denied the appeal, but Justice Bradley approved the appeal. Justice Bradley believed the federal government could not take away powers that were reserved for the states.

> The affirmative enforcement of the rights and privileges themselves, unless something more is expressed, does not devolve upon [the federal government], but belongs to the state government as part of its residuary sovereignty. For example, when it is declared that no state shall deprive any person of life liberty, or property without due process of law, this declaration was not intended as a guaranty against the commission of murder, false imprisonment, robbery, or any other crime, committed by individual male factor. . ..[50]

The states had the power to protect individual freedoms, not the federal government. Crimes by individuals needed to be prosecuted by the state governments. The federal

[49] Charles Lane, *The Day Freedom Died: The Colfax Massacre, the Supreme Court and the Betrayal of Reconstruction* (New York, New York: Henry and Holt Co., 2008), 113.
[50] *United States v. Cruikshank.* 92 U.S. 542 (1875).

government should only intervene when the states are denying the individuals their rights.

Also, Justice Bradley believed that the defendants were only in violation of the Fourteenth Amendment and Enforcement Act if their crimes were racially motivated. Bradley stated, "It should at least have been shown that the conspiracy was entered into to deprive the injured person of their right to vote by reason of their race, color or previous conditions of servitude."[51] The prosecuting lawyers did not argue that defendants' crime was racial motivated; therefore, Bradley approved the appeal. Since the two judges disagreed the case went to the United States Supreme Court.

At the same time another case needed to be decided by the United States Supreme Court arose. The case was *United States v. Reese,* and this case would be decided together with *U.S. v. Cruikshank. Reese* did not involve the massacring of hundreds of African Americans, but it did involve the violation of the Enforcement Acts and it called for an interpretation of the Reconstruction amendments.

Reese did not take place in the deep South like *Cruikshank;* yet, racial tensions existed in Kentucky. Kentucky had remained loyal to the Union; but, it had retained slavery as long as it could. Kentucky was in a unique position after the Civil War. Since Kentucky had never seceded from the Union, they never had to rewrite their state constitution. Kentucky was also the last state to ratify the Thirteenth Amendment. During Reconstruction, Kentucky did not have federal troops taking over the state government and appointing officers like many of the southern states did. Democrats were in charge of the state government before and during the Civil War and they continued to be in charge after the Civil War. Therefore, many racial tensions existed

[51] Ibid.

after the Civil War and African Americans battled those tensions and fought for their equality in the state.[52]

Congress created the Congressional Act of 1865 which freed the wives and children of Union soldiers. In Kentucky, the Congressional Act of 1865 freed around 75,000 African Americans. The freeing of African Americans led to more racial tensions and labor shortages in the state of Kentucky. Some white Kentuckians created white supremacy groups known as Night Riders or Regulators. Regulators intimidated African Americans across the state by burning schools and churches, raping women and robbing homes. The KKK also joined the Regulators violent tactics by hanging African Americans throughout Kentucky without a trial.[53]

In 1871, President Ulysses S. Grant and Attorney General Amos Akerman visited Kentucky to see how influential the Klan activity was in the state. Attorney General Akerman asked for enforcement of federal troops to come to Kentucky and break up the Klan activity after his visit to the state. Although the federal government ordered federal troops in Kentucky, Klan members of the state proved difficult to prosecute because they would intimidate and threaten witnesses and jury members of the trials. In some occasions, the Klan members standing trial would be freed from jail by other white members of the community.[54]

KKK violence increased in Kentucky after the states ratified the Fifteenth Amendment. Northern Republicans created the Fifteenth Amendment to help African Americans gain political rights and also to gain additional support for their political party.

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[52] Ross A. Webb, *Kentucky in the Reconstruction Era* (Lexington: University Press of Kentucky, 1979), 37.
[53] Ibid., 48.
[54] Ibid., 76.

Republicans hoped that African Americans would vote for their political party once they gained the right to vote. In Kentucky and other southern states, the Fifteenth Amendment was not successful in securing African American voting rights due to the lack of state and local authorities enforcing the amendment. Poll taxes, literacy tests and intimidation tactics where used to prevent African Americans from voting.[55] The first election after the Fifteenth Amendment was ratified ended in a riot at the capitol in Frankfort, Kentucky. At the end of the riot a mob lynched two African Americans at the capitol.

After the states ratified the Fifteenth Amendment local governments in Kentucky interfered with African American voting rights. The Fifteenth Amendment only limited states from denying citizens the right to vote due to race. States could still limit voting for other reasons.[56] The Kentucky state government created laws that did not single out the African American race, but made it more difficult for African Americans to vote. Some laws forced all voters to own property, which many African American did not, or required residents to pay a poll tax. One such law was the capitation tax in Lexington Kentucky. In order for anyone to vote in the local elections, they would have to pay a $1.50 capitation tax before coming to the polls. Even though more Republicans showed up to vote then Democrats, it was the Democrats who won the local election, because many of the Republicans were African Americans and could not afford or were not allowed to pay the capitation tax.[57]

William Garner was an African American who could afford to pay for the capitation tax. When he went to pay the tax, James Robinson told him that he would not

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[55] William Gillette, *The Right to Vote: Politics and the Passage of the Fifteenth Amendment* (Baltimore: John Hopkins Press, 1965), 163.
[56] Everette Swinney, "Enforcing the Fifteenth Amendment, 1870-1877," *The Journal of Southern History* 28 (May 1962): 204.
[57] Goldman, *Reconstruction and Black Suffrage,* 66.

accept his money on account of Garner's race. Robinson signed an affidavit stating that Garner did try to pay the tax; but, Robinson denied Garner because of his race. Garner then went to voting polls where he was confronted by Mathew Fouchee and Hiram Reese who were working the voting polls. Fouchee and Reese had decided before Garner arrived, that they would not allow any African American to vote that day. When Garner tried to vote, Fouchee and Reese asked to see his evidence that he had paid for the capitation tax. Garner explained that he did not have the receipt for the tax, but did show them the affidavit that was signed by Robinson. Reese and Fouchee still would not allow Garner to vote.[58]

The federal district attorney indicted Reese and Fouchee claiming that the two were working as officials of the state and did not accept Garner's vote. Therefore they had intentionally prevented African Americans from voting. Lawyers, Henry Stanbery and B.F. Buckner became the defense lawyers for Reese and Fouchee. They believed that "all four counts of the indictment were insufficient in stating a defensible case in law and should therefore be thrown out."[59] Stanbery and Buckner argued sections 2, 3 and 4 of the Enforcement Acts were unconstitutional and therefore the charges against their clients should be dropped.

When Stanbery and Buckner argued their case to the federal Circuit Court, Judges Edmunds and Ballard could not agree on a ruling for the motion. District Attorney General Wharton argued in defense of Garner's rights, decided to appeal the case to the United States Supreme Court. On February 3 1874, the United States Supreme Court heard the case of *United States v. Reese*.

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[58] Ibid., 67.
[59] Ibid., 68.

During the Supreme Court hearing of *United States v. Reese*, attorneys Stanbery and Buckner argued that the actions of their defendants could not be held accountable under the Fourteenth or Fifteenth Amendment. Both of these amendments specified that the states could not perform certain actions and the amendments did not reach the actions of individuals. Reese and Fouchee were not the state or agents of the state. They were individuals and their actions did not constitute sufficient state's actions. The defense attorneys also claimed that the Enforcement Acts were not constitutional under the Fifteenth Amendment. The Fifteenth Amendment stated that no man shall be denied the right to vote on account of race. The Enforcement Acts were more general and said that no one can prevent a voter from voting by using "bribery, force or threats."[60] Since the Enforcement Acts left out race, they are unconstitutional; therefore Reese and Fouchee should not be charged with a crime.

Attorney General George Williams argued for Garner. He pointed out that the Enforcement Acts may be unconstitutional under the Fifteenth Amendment, but they were constitutional under the Fourteenth Amendment. The Fourteenth Amendment was not specific to voting rights and race it says that no state shall make laws that take away the "privileges or immunities of citizens."[61] Williams also argued that Reese and Fouchee acted on behalf of the state and therefore their actions should be held accountable as state actions. The United States Supreme Court listened to both arguments, but did not make a decision until a year later, when they ruled on both *Reese* and *Cruikshank.*

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[60] Enforcement Act of 1870 section 4
[61] Fourteenth Amendment

On March 27, 1876, The United States Supreme Court handed down its decision in both *Reese* and *Cruikshank.* Historian Robert Goldman believed both cases, *Cruikshank* and *Reese*, "represented a test of the future of the Republican Party's and the federal government's commitment to protect voting rights for African Americans in the South."[62] The United States Supreme Court's decision in *Reese* and *Cruikshank* was an important interpretation of the Reconstruction amendments and reaffirmation of traditional federalism in the United States.

United States Supreme Court Chief Justice Morrison Waite wrote the Supreme Court's unanimous decision to *United States v. Cruikshank.* He considered sections of the Enforcement Act invalid and asked Congress to revise the acts. Chief Justice Waite discussed in his decision the value of federalism in the country and how each person in the United States had dual citizenship because they were both a citizen in country and also a citizen of their state.

> We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each had citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other.[63]

The state government had powers that the federal government cannot take away. The protection of the right to assembly and bear arms fell within the state powers. Chief Justice Waite stated, "No rights can be acquired under the Constitution or laws of the United States, except such as the government of the United States has the authority to

[62] Goldman, *Reconstruction and Black Suffrage,* 70.
[63] *United States v. Cruikshank.* 92 U.S. 542 (1875).

grant or secure. All that cannot be so granted or secured are left under the protection of the States."[64] The Fourteenth Amendment did not expand to the federal government the power to regulate these rights; it just states that the federal and state government cannot interfere with these rights. Therefore the indictments which stated that Cruikshank violated these rights were thrown out, since the federal government could not support it.

The decision in *United States v. Reese* would be similar to *Cruikshank.* Again, Chief Justice Waite wrote the majority opinion for the Court. Chief Justice Waite believed that Congress did have the power to protect those "rights and immunities created by or dependent on the Constitution."[65] Chief Justice Waite even agreed that Congress could use different ways to protect these rights depending on the need and the right that needed protection, but the rights presented in *United States v. Reese* were not any of the rights that the federal government could protect.

Chief Justice Waite declared in his decision that the, "Fifteenth amendment did not confer the right of suffrage upon anyone."[66] The Fifteenth Amendment only required that the states cannot deny people the right to vote based on race, but they can use other means to deny a person the right to vote. Gender, education, property, and years in residency were all legal ways that a person could be denied the right to vote. Garner was not denied the right to vote because of his race, he was denied the right to vote because he did not pay the capitation tax.

United States v. Reese was different from *Cruikshank* because one judge dissented. Associate Justice Ward Hunt wrote a dissenting opinion where he disagreed with Chief Justice Waite. Hunt believed that the United States Supreme Court did not

[64] Ibid.
[65] *United States v. Reese.* 92 U.S. 214 (1875).
[66] Ibid.

consider the intent of the Reconstruction amendments or of the Enforcement Acts. Chief Justice Waite was too focused on the wording of the Enforcement Acts and the fact that the term "on account of race"[67] was left out of one section. Hunt also believed that the Fifteenth Amendment made the Enforcement Acts constitutional and it was the Supreme Court's duty to protect the civil rights of Americans.

Congressional Republicans applauded Justice Hunt's dissent, but it did not have any impact on the outcome of the cases. These decisions constituted a setback for the African Americans in their struggle to gain equal civil rights in America. Chief Justice Waite and a majority of the Supreme Court held a narrow interpretation of the Fourteenth Amendment and state action. The United States Supreme Court wanted to preserve America's tradition of federalism. It was not the federal government's job to grant and protect civil rights to all citizens. African American and radical Republicans believed that the narrow interpretation of the Reconstruction Amendments empowered individuals and white supremacy organizations because they could not be held accountable by the federal government. The states needed to take action against individuals and many did not.

Majority of Americans favored the United States Supreme Court's interpretation of the Reconstructions amendments and the protection of traditional federalism. A fear existed after the Civil War that the federal government would take away too many powers of the states. The decisions in *Cruikshank* and *Reese* validated the states powers to protect the civil rights of its citizens and hold individuals accountable for violating those rights. Also, majority of Americans thought that African Americans were inferior and therefore the power of the federal government should not be expanded to protect

[67] *United States v. Reese,* 92 U.S. 214 (1875).

them. They did not want their central government to focus on a group of individuals who they felt would never be given full equality socially.

After the United States Supreme Court decisions in *Cruikshank* and *Reese* the Reconstruction amendments were less ambiguous. The Reconstruction amendments only provided the federal government powers to hold states accountable for their actions. Slowly, the national conversation about African American civil rights diminished. Only Radical Republicans and African Americans continued to pursue civil rights for African Americans. They held out hope that the Civil Rights Act approved by the president in 1875 would still be considered constitutional by the United States Supreme Court.

CHAPTER THREE: THE CIVIL RIGHTS CASES

This chapter examines the final years of Reconstruction and the declining national attention to African American rights. This chapter analyzes the creation of the Civil Rights Act of 1875 and then reviews the United States Supreme Court decision on its constitutionality in *The Civil Rights Cases* 1883. The majority decisions will be analyzed and American newspapers' reaction to those majority decisions. Then, the chapter examines Associate Supreme Court Justice John Marshal Harlan's dissenting opinion in the *Civil Rights Cases.* Finally this chapter argues that the *Civil Rights Cases* ended the national concern and involvement for African American civil rights due to the United States Supreme Court's traditional understanding of federalism.

By 1870, enthusiasm from Republicans in Congress for African American equality before the law in their localities was fading. The United States Supreme Court had interpreted the Fourteenth Amendment narrowly and upheld traditional federalism in *The Slaughterhouse Cases* (1873), *United States v. Cruikshank* (1876) and *United States v. Reese* (1876). Yet, Republican Charles Sumner from Massachusetts tried to gain support from fellow Congressional members for a new civil rights bill. Sumner proposed that the new bill would include, "equal rights in railroad, steamboats, public conveyances, hotels, licensed theaters, house of public entertainment, common schools, and institutions of learning authorized by law, church institutions and cemetery associations incorporated

by national or State authority; also in jury duties, national and state."[68] His proposed bill allowed the federal government to prosecute individuals for denying African American the rights to public accommodations. Individuals found guilty in federal court of violation the law would pay five hundred dollars to a thousand dollars and/or spend up to a year in prison. [69]

In 1871, Charles Sumner failed to get his Civil Rights bill passed. Many conservative Republicans in Congress felt that education and churches should not be regulated by the federal government. Traditionally, the rights of such institutions lay with the localities, or at most with the states. Also, conservative Republicans and Democrats felt that the bill took away rights of the state government. Republican Thomas W. Tipton of Nebraska asked, "If the General Government takes to itself the entire protection of the individual in his rights on the railroad, in the theater, in the church, in the cemetery, what is the need of the State governments at all?"[70] Sumner needed to justify the power of the federal government over individuals to gain additional support for his bill in Congress.

However, Radical Republicans in Congress supported Sumner and his Civil Rights bill. Supporters of the bill believed that the federal government could regulate, in fact had a duty to regulate, not only state discrimination, but individual discriminations as well. Sumner believed that the Fourteenth Amendment provided the federal government this new power. In Section Five, the Fourteenth Amendment enabled the federal government power to enforce the Fourteenth Amendment "by appropriate legislation."

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[68] Lawrence Goldstone, *Inherently Unequal: The Betrayal of Equal Rights by the Supreme Court, 1865-1903* (New York, New York: Walker & Company, 2011), 99.
[69] Bertram Wyatt-Brown, "The Civil Rights Act of 1875," *The Western Political Quarterly* 18 (December 1965): 764.
[70] *Congressional Globe*, 42th Congress, 2nd session, 915 (February 9, 1872).

Republican Senator Matt Carpenter from Wisconsin supported Sumner and his Civil Rights bill. Carpenter defended the Act in Congress saying:

> I entertain, as strongly as any Senator, the sentiments which have inspired this bill; and in the present unhappy condition of the South, I would go to the extreme limit of our constitutional power to support any bill calculated to protect the colored people of the South or to restore order in that distracted section. . .. This bill is intended to repress all manifestations of . . . prejudice, and to secure the colored mane the rights he ought to enjoy. If it could go upon the statute book and accomplish a complete eradication of the deep and long-existing prejudice of the white race against [the black] . . . it would be a signal triumph of humanity. And in the history of the colored race since the beginning of the war there is abundant reason for the desire to create . . . a feeling of fraternity between the two races. . ..
> If the bill, when passed through the forms of enactment should be declared unconstitutional . . . it would delay. . . the end desire . . .. [71]

Sumner never got a chance to see his Civil Rights bill signed into law. He died on March 11, 1874 and with his death also died the passion of the Republican Party for African American equality. In November 1874 Republicans lost majority in the House of Representatives to the Democrats and their numbers in the Senate decreased.[72] Regardless, Senator Benjamin Butler of Massachusetts was determined to pass Sumner's civil rights bill in memory of his colleague. Butler knew that he needed to gain approval from Republicans for the civil rights bill before they left office. Butler revised the bill and took out the requirement of federally mandated integration for schools and churches. In February 1875 a lame duck Congress passed the Civil Rights bill as a tribute to Sumner, even though many Republicans did not agree with civil equality of among the

[71] Charles Fairman, *History of the Supreme Court: Reconstruction and Reunion* (New York: New York: Macmillan, 1971) 553.
[72] Goldstone, *Inherently Unequal,* 101.

races. President Ulysses Grant signed the bill into law on March 1, 1875 and it became known as the Civil Rights Act of 1875.[73]

The Civil Rights Act of 1875 faced several obstacles. First, the law required forced integration of places of public accommodations by the federal government. Integration challenged the southern way of life and many white southerners were not willing to accept African Americans into their businesses. The federal government provided limited protection for African Americans in the South. It was the individual responsibility of African Americans to sue private persons or businesses in federal court when they were not given equal access to public accommodations. Many African Americans did not have the money or knowledge of the court system to follow through with their claims.[74]

The biggest problem of the 1875 Civil Rights Act was many white American believed that the Act was unconstitutional because it upset the balance of American federalism. The Civil Rights Act of 1875 limited some of the powers reserved to the states. Historian S. G. F. Spackman discussed the changes in federalism in his 1976 article entitled, "American Federalism and the Civil Rights Act of 1875." He claimed that the regulation of private businesses "had traditionally been under state control, but the claims made for bringing them under federal control were justified by a constitutional doctrine which assumed the existence of a primary national citizenship and which implied that the fundamental privileges and immunities of the citizen were under the protection of the national government."[75] The Civil Rights Act of 1875 allowed the

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[73] Wyatt-Brown, "Civil Rights Act 1875," 772.
[74] Wyatt-Brown, "The Civil Rights Act 1875," 764.
[75] S.G. F. Spackman "American Federalism and the Civil Rights Act of 1875," *Journal of American Studies* 10 (December 1976): 325.

federal government to intervene with the state governments' protection of civil rights and individual actions.

Across the country, Americans reacted to the creation of the Civil Rights Act. In some states whites allowed African Americans into places they were once forbidden from entering. Washington D.C. and Chicago, Illinois, were two localities where whites allowed African Americans to enter their businesses. In Washington D.C. owners of the Willard Hotel allowed African Americans to use the accommodations of their hotel. In Chicago, owners of the McVicker's Theater allowed African Americans to attend a show.[76]

Although a positive reaction occurred in northern areas to the Civil Rights Act, not all Americans felt this way. Many of the areas in the southern United States were not happy with the law. In Louisiana, steamboat captains did not allow African Americans on steamboats; in Alabama, the owners prohibited African Americans from their businesses, and some hotels in Tennessee closed down rather than allow African Americans to visit their establishments.[77] The federal courts had a large number of cases involving whites violating the Civil Rights Act of 1875. The United States Supreme Court would not make a decision on the constitutionality of the Civil Rights Act until 1883.

African Americans believed that the Civil Rights Act of 1875 guaranteed new rights so they tested the new law. In 1875, an African American woman, M.L. Porter wanted to ride on the railroads in the same cars as whites. The train's conductor, James Hamilton, denied her access to the white car when she tried to board the train owned by

[76] Alan F. Westin "The Case of the Prejudice Doorkeeper," *Quarrels That Have Shaped the Constitution* (New York: New York: Harper & Row, 1964) 145.
[77] Ibid., 145.

the Nashville Chattanooga and St. Louis Railroad Company. Porter believed that Hamilton denied her equal enjoyment to accommodations on the train. Porter wished to travel from Nashville to Lebanon Tennessee. She purchased a first class ticket which allowed her to ride on a "comfortable and agreeable car."[78] Hamilton would not allow Porter to travel on the first class car because of her race. Instead he told her to go to the smoking car, a less well maintained car and a car usually reserved for men.

In response to Porter being denied access to the first-class car, she sued Hamilton and the Nashville Chattanooga and St. Louis Railroad Company in federal court. The judges of Middle District of Tennessee federal court found that Hamilton violated Porter's right to accommodation under the Civil Rights Act of 1875. The judges of the Middle District of Tennessee believed that the railroad company violated Section 1 and 2 of the Civil Rights Act because it denied her access to the first class car on account of her, "race, color, and previous condition of servitude the full and equal enjoyment of the accommodations advantages and facilities and privileges of said train cars accorded to other citizens."[79] On October 28, 1880, Judge John Baxter and Judge David M Key heard the case. The judges divided in their opinions because they could not answer the following questions: Was the Civil Rights Act of 1875 constitutional? Could the act hold individuals accountable? Did the Fourteenth Amendment hold only states and their agents accountable; or did it hold common carriers and their agents accountable as well?[80] Since the judges were divided in their opinions, federal procedure held that they case and its issues must be appealed to the United States Supreme Court to interpret the constitutionality of the 1875 Civil Rights Act. But, Hamilton's case would not be

[78] *James Hamilton v. United States.* 6th District Circuit Court U.S. 1371 (1880).
[79] Ibid.,1371.
[80] Ibid., 1375.

decided right away by the Supreme Court; they waited 8 years before the Supreme Court handed down a decision in their case.

George M Tyler and Charles Green lived on the opposite side of the country from Porter; yet, they too experienced racial discrimination. Green and Tyler lived in San Francisco, California and were delighted when the Tennessee Jubilee singers came to town. The Tennessee Jubilee singers were an African American group who toured the country singing about life as a slave in the South; so, many African Americans in San Francisco were excited about attending the show. On January 4, 1876, Thomas Maguire's New Theater in San Francisco scheduled the Tennessee Jubilee singers to perform.

Charles Green arrived at the theater with his white friend, James H. Whiting and approached the ticket-taker, Michael Ryan. Ryan allowed Whiting into the theater, but would not allow Green to enter. When Green asked why he could not attend the performance, Ryan replied, "We don't admit negroes into this theater."[81] After some argument, Ryan admitted Green into the upper gallery of the theater, but not the dress circle. George M. Tyler was not with Charles Green that evening, but experienced the same situation when he tried to enter the theater's dress circle. Ryan also denied Green to right to enter the dress circle, but allowed him to sit in the upper gallery.

This encounter did not go unnoticed by the citizens of San Francisco. Many people, both black and white, were upset by the discrimination that Green and Tyler faced. The Tennessee Jubilee Singers wrote to the San Francisco newspaper, *The Chronicle,* to express their anger and called for a boycott of Maguire's theater. Even the

[81] Mark Stuart Weiner, *Black Trials: Citizenship from the Beginnings of Slavery to the End of Caste* (New York, New York: Random House, 2004), 219.

writers and editors of *The Chronicle* were upset by Maguire and the theater's policies, so they issued a public statement in their newspaper on January 9, 1876.

> We say it is an absurd and unjust one, ought to be eradicated from the minds of all just and generous persons . . .. We see no just reason why this prejudice against color should not be banished as one of the discarded and unworthy relics of an unenlightened and barbarous past.[82]

Eventually the black leaders in San Francisco met with Green to discuss how he could take legal action against Maguire and the theater. People in support of San Francisco's African American community sent Green money to help pay for lawyers and the trial. Green hired George Lemuel Woods, former governor of Oregon and Utah, as counsel during his trial. Before the trial the following resolution was published in *The Chronicle*:

> Whereas, we are American citizens, the American flag is our flag; we behold it with pride; it floats over us; we yield it our homage and devotion; we glory in its unsullied purity; it assures to us the plenary rights of free men and free women , and we cannot, and we will not, in the sight of that glorious emblem, degrade it and ourselves by accepting anything less than all the liberty it assures to us . . . [therefore] be it resolved . . .. That Thomas Maguire, in this act has violated the laws of the land, infringed the just rights of American citizens, and insulted the honor and patriotism of the colored people of the city and coast, and of the United States.[83]

During the trial, Green's lawyers had a difficult time proving that Maguire was in violation of the 1875 Civil Rights Act because it was Ryan's actions that denied Green access to the theater and not Maguire's. Ryan claimed that he did not allow Green into the theater because of the color of his ticket and not the color of his skin. Green's lawyer,

[82]*The Chronicle,* 9 January 1876.
[83] *The Chronicle,* 19 January 1876, p.3 col. 6.

Woods, argued that the, "ticket taker being there as the agent of Maguire made a prima facie case, and one which the defendant ought to explain."[84] Woods felt that the actions taken by the ticket-taker were representative of the policies of the owner of the theater, Maguire. Also, Green's white friend Whiting testified that he heard Ryan say that it was a policy that Negroes were not allowed in the dress circle. Regardless, the jury acquitted Maguire.

Woods decided to try another approach and case to get equal treatment for African Americans in San Francisco. This time he took a different approach. Rather than hold Maguire responsible for the discriminatory policy, he filed charges against Ryan. This time it was not Charles Green who was the victim, but George M. Tyler and the case would be heard in federal court. The judges dismissed this action because they believed that the city had no authority to charge Ryan with the alleged crimes. Woods disagreed with the judges then submitted a brief of the case to be heard by the United State Supreme Court.[85] The case would be heard by the United States Supreme Court, but Tyler, Ryan and the city of San Francisco had to wait several years to hear the decisions of the justices.

William R. Davis had a similar experience to Tyler and Green. Davis was twenty six years old and a former slave from South Carolina when he decided to test his right to public accommodations under the 1875 Civil Rights Act. On November 22, 1879, Davis decided to take a female friend with him to the Grand Opera House in New York City. The brother of John Wilkes Booth, Edwin Booth, was appearing in the play, *Ruy Blas.*[86]

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[84] Weiner, *Black Trials*, 223.
[85] Weiner, *Black Trials,* 223.
[86] Westin, "The Case of the Prejudice Doorkeeper," 141.

Davis's female friend was described as "bright octoroon, almost white,"[87] and could pass as a white citizen. She was the one who went to purchase the tickets, not Davis. The conflict began when the doorkeeper, Samuel Singleton, told Davis that his tickets were no good and would not allow him or his friend to enter. Davis sold back his tickets. Rather than buy new ones himself, he asked a small boy to buy the tickets for him. This time Davis's female friend entered the theater before him and the usher allowed her admission to the theater. Once Davis tried to enter, Singleton again said that his ticket was not good. Davis became so angry and defiant that a police officer was called to the theater. The police officer said to Davis, "the managers did not admit colored people to their theater."[88] Davis replied, "Perhaps the managers did not admit colored people to the house, but that the laws of the country did admit them, and he would try to have them enforced."[89]

The *New York Times* wrote an article about the incident entitled, "The Color of Prejudice." The article described Davis as a "tall good looking man, intelligent and educated, converses and dresses well."[90] Davis was a smart man and knew that his effort to enter the theater would cause conflict, but he was prepared for the battle. He was an agent for a business newspaper entitled *Progressive America.* Radical African Americans established this newspaper to help inform the public about the treatment of African Americans and their struggles to gain full equality in America. Davis was an activist for his race and used his education and knowledge of the laws and courts to help fight for his cause. His denial of admission to the Grand Opera-house was not the first

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[87] *New York Times,* 25 November 1879.
[88] Ibid.
[89] Ibid.
[90] Ibid.

time that he had been to court. Five years earlier, Davis had brought a civil suit against the business "Jarrett & Palmer" when it denied him access to a theater. This action never came to trial due to the absence of witnesses, so Davis was ready for a second chance to test in court another theater's discriminator policy.

Davis contacted Assistant United States Attorney Fiero because he wanted to make a criminal charge. Fiero suggested bringing a civil suit against Singleton in the federal district court. Davis's case would be the first case involving the 1875 Civil Rights Act in New York State. Davis and Fiero had many reasons to be optimistic that the judges in their case would rule in favor of Davis because "most state and federal court rulings on these statues between 1865 and 1880 held in favor of black rights."[91] African Americans took action to protect their civil rights and many times the state and federal courts ruled in favor of African Americans.

On the opposing side of the issue were Singleton and his defense council, Louis Post, who argued that the Civil Rights Act of 1875 was unconstitutional. Post's argument was that, "it interferes with the right of the State of New York to provide the means under which citizens of the State have the power to control and protect their rights in respect to their private property."[92] Post believed that business owners had the right to make rules and requirements to protect their businesses and the state had the duty to protect those rights. Therefore, the 1875 Civil Rights Act was unconstitutional because it limited and infringed upon the power of states.

In defense of Davis, Fiero argued that the state and federal government needed to protect the individuals of the state and their rights to public facilities and

[91] Westin, "Quarrels that Shaped the Constitution," 142.
[92] Ibid., 146.

accommodations. Fiero believed that it was unconstitutional when "the United States could not extend to one citizen of New York a right which the States itself gave to other of its citizens."[93] Therefore the 1875 Civil Rights Acts was constitutional because it forced states to protect those rights of individual citizens. The case was heard by the Southern District of New York court where the judges disagreed on the question of the constitutionality of the Civil Rights Act. Like in the Porter case, the federal circuit judges remanded the question up to the United States Supreme Court and the Supreme Court combined it with Hamilton's and Ryan's case all of which questioned the constitutionality of the 1875 Civil Rights Act.

The final case that constituted *The Civil Rights Cases* involved Sallie J. Robinson who was an African American woman in her twenties. In May 1879, she decided to take the train from Grand Junction Tennessee to Lynchburg, Virginia with her nephew. Her nephew was mistaken as a white man due to his blue eyes and fair skin. When Robinson and her nephew boarded the train in Grand Junction, the conductor refused to allow Robinson into the ladies car. Joseph Robinson, Sallie Robinson's nephew, described the encounter and said the conductor, "took the lady by the arm and jerked her around very roughly attempting to push her into another car and then closed the door in our faces."[94] Joseph Robinson was embarrassed by this event and felt insulted by the conductor.

Later the conductor approached Sallie Robinson and Joseph Robinson in the smoking car. He asked Joseph Robinson why he would be traveling with a colored woman. Joseph Robinson informed the conductor that the woman he was traveling with was his aunt. Upon that news the conductor replied, "She is your aunt? Then you are

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[93] Ibid.
[94] *Sallie Robinson v. M & C. R.R.* Circuit Court of U.S. Western District of Tennessee, 2611.

colored too?"[95] With this new knowledge of the relationship between Sallie Robinson and Joseph Robinson, the conductor allowed them to return to the ladies car.

Sallie Robinson rode the rest of the train ride in the ladies car, but felt insulted and ashamed. She decided to sue the railroad company for $500, because she felt that they violated her right use public accommodations under the Civil Rights Act of 1875. The railroad conductor, C.W. Reagin, claimed that he did not violate the Act through his actions. He had a different story to tell about his interactions with Sallie and Joseph Robinson.

Reagin agreed that he did not allow Robinson into the ladies car at first, but he denied that he pushed her away from the door. Reagin "denies doing anything that would hurt a child," but he did tell Sallie Robinson that she was not allowed in the ladies car. His reason for not allowing Sallie and Joseph Robinson into the ladies car was not because of her race, but because of her character. Reagin believed that anytime "a young man traveled in company with young colored woman it was for illicit purposes."[96] Joseph Robinson was thought to be a white man and Reagin did not know that the two were related, so he assumed that Sallie Robinson was a prostitute. Reagin said that when he realized the real manner of the relationship between the Robinsons, he then allowed them to proceed to the ladies car.

In court, Reagin's lawyer argued three reasons why Reagin's actions did not violate the Civil Rights Act of 1875. First, Reagin did not remove her because of her race but because of her questionable character. Reagin claimed that in the past, pursuant to the Railroad's policy, he had denied access to a white women suspected of being

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[95] Ibid.
[96] Ibid.

prostitutes. Second, Reagin allowed Sallie Robinson to move once he realized that she was not a prostitute and was instead traveling with a male relative. Third, the smoking car provided the same accommodations as the ladies car, therefore, Sallie Robinson was not denied any privileges.

Sallie Robinson's lawyer argued that the actions taken by the conductor violated the 1875 Civil Rights Act, because he based his actions on her race and the assumption of the race of her nephew. He argued that the conductor should not assume that just because a white man travels with a colored woman that woman is a "woman without virtue or that an improper relationship existed between her and the said Joseph Robinson."[97] The jury sided with the railroad company and believed that the actions of the conductor were not based on the race of Sallie Robinson. Sallie Robinson appealed her case and the United States Solicitor General Samuel F. Phillips prepared a brief of the case for the United States Supreme Court.[98]

The United States Supreme Court joined Sallie Robinson's case with four other African Americans who felt that their rights had been violated when they were denied access to private businesses. These cases became known as *The Civil Rights Cases* (1883). Some of the citizens in these cases had waited seven years for their case to be heard by the United States Supreme Court. Solicitor General Samuel Field Phillips led the defense of the rights of the five African Americans citizens in *The Civil Rights Cases.* Phillips used both the Fourteenth and Thirteenth Amendment to argue why the constitutionality of the Civil Rights Act of 1875.

[97] Ibid.
[98] Westin, "The Case of the Prejudice Doorkeeper," 148.

The Fourteenth Amendment states that, "No state shall make or enforce any law which abridge the privileges or immunities of citizens of the United States." The Fourteenth Amendment did not say that the state must force individual business owner to respect "the privileges or immunities of citizens." Phillips argued that the individual business owners acted as part of the state and should therefore be held accountable to allow access to all individuals regardless of race. A business must get their licenses through the state and they must follow state regulations once they open their business; therefore, they acted under the state guidelines. If a state cannot deny the privileges and immunities to citizens, then under state authority, businesses could not deny privileges and immunities to citizens.[99]

On October 10, 1883 the United States Supreme Court handed down their eight to one decision in *The Civil Rights Cases;* the majority held the Civil Rights Act of 1875 unconstitutional. Associate Justice Joseph P. Bradley wrote the majority opinion for the United States Supreme Court. Bradley began by questioning the constitutionality of the 1875 Civil Rights Act. He claimed that if "the law was unconstitutional, none of the prosecutions can stand."[100] Bradley interpreted what the law regulated and he interpreted the meaning of civil rights. The Civil Rights Act of 1875 did not say that all citizens in the United States deserved access to places of public accommodations and amusement argued Bradley. Further, the 1875 Civil Rights Act made it illegal to deny access to places of public accommodations and amusement based on race. Next, Bradley questioned if Congress had the power to create such an act. For the answer to that question, Bradley turned to and interpreted the Fourteenth Amendment.

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[99] John R. Howard, *The Shifting Wind: The Supreme Court and Civil Rights from Reconstruction to Brown* (Albany, New York: State University Press, 1999) 128.
[100] *The Civil Rights Cases.* 109 U.S. 3 (1883), 9.

The Fourteenth Amendment limited the states from making laws that discriminated against citizens due to their race. The Fourteenth Amendment did not make any mention about private individuals and their actions.

> 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.[101]

Bradley referred to the *Cruikshank* decision as precedent for his interpretation of the Fourteenth Amendment. In *Cruikshank,* the Supreme Court decided that the Fourteenth Amendment did not provide the federal government additional powers to regulate individuals, and Bradley continued that interpretation.

Another problem that Bradley discerned with the 1875 Civil Rights Act was the increase power to the federal government. Under traditional ideals of federalism, states had the power to prosecute individual actions and create laws for local businesses. The 1875 Civil Rights Act expanded federal government powers that belonged to the states.

> It would be to make Congress take the place of State legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty, and property (with include all civil rights that men have) are, by the amendment, sought to be protected against invasion on the part of the State without due process of law, Congress may therefore provide due process of law for their vindication in every case, and that, because of the denial by a State to any persons of the equal protection of the laws is prohibited by the amendment, therefore Congress may establish laws for their equal protection.[102]

Bradley believed that if the federal government limited the power of the states to prosecute individual actions, then the federal government would assumed powers that

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[101] Ibid., 11.
[102] Ibid., 13.

belonged to the states. Congress would then create more laws that would help them regulate individual actions, and the states would be left powerless.

Another issue the majority considered was which rights the 1875 Civil Rights Act and the Fourteenth Amendment protected. The Fourteenth Amendment was broad when it stated that no state can abridge the privileges and immunities its citizens. Bradley acknowledged that certain rights existed to all citizens that the federal government could regulate and individuals could not interfere. Those rights were "the right to vote, hold property, to buy and sell, to sue in courts, or to be a witness or a juror."[103] If the state did not protect these rights then the federal government could prosecute the offenders. The right of access to places of public accommodations was not listed among those rights. The States could make laws guaranteeing these rights to citizens, but not the federal government. Civil rights were not rights guaranteed by the federal government; therefore, the 1875 Civil Rights Act was unconstitutional.

Justice Bradley then discussed the Thirteenth Amendment and individual actions. The Thirteenth Amendment allowed Congress to abolish "all badges and incidents of slavery in the United States;"[104] but did the denial of access to places of public accommodations qualify as badges of slavery? Bradley said no. Bradley provided examples of what would be considered badges and incidents of slavery:

> Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities were the inseparable incidents of the institution. Severer punishments for crimes

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[103] Ibid., 17.
[104] Ibid., 20.

> were imposed on the slave than on free persons guilty of the same offences.[105]

The federal government created laws to prohibit these actions of individuals under the Thirteenth Amendment, and Bradley stated that the Civil Rights Act of 1866 constituted one such law. The right to allow African Americans in all places of public accommodation constituted social or civil rights. Denials of these rights were not badges of servitude, and Congress could not create laws to regulate the individuals who denied these rights to African Americans. States had the power to create legislation to regulate those actions of individuals, and if the state legislatures did not protect all races, then the federal government had the power to regulate the state, not the individual.

Bradley finished his majority opinion stating that African Americans needed to accept the "rank of a mere citizen and ceases to be the favorite of the law."[106] The Thirteenth Amendment abolished slavery, it was time for the federal government to stop creating legislation intended to benefit one race over another. Bradley explained that freemen lived in the United States before the Civil War and the Reconstruction amendments and no legislation existed to aid these men. If African Americans wanted to be American citizens, then they would have to live with the same legislation as white citizens. Discrimination occurred in the United States but Bradley did not consider federalism to limit such behaviors as local discrimination by private persons. The federal government did not protect the rights of American citizens when those rights were denied by private individuals.

The Supreme Court decision in the *Civil Rights Cases* was not unanimous. Associate Justice John Marshal Harlan dissented in the case. Justice Harlan argued that

[105] Ibid., 22.
[106] Ibid., 25.

the majority opinion was "entirely too narrow and artificial."[107] He thought that the majority interpreted the Civil War Amendments narrowly and that they did not leave room for the legislative intent of the amendments.

Justice Harlan discussed in his dissenting opinion the relationship between the federal government, states and individuals before the Civil War. He emphasized decisions made by the United States Supreme Court to demonstrate how the federal government held individuals accountable to protect slavery before the Civil War. He first discussed the 1850 Fugitive Slave Act. The passing of the Fugitive Slave Act gave Congress the power to hold individuals accountable for aiding fugitive slaves. Congress regulated individual actions when the states would not. Justice Harlan used the case *Prigg v. Commonwealth of Pennsylvania* (1842) to demonstrate the expansion of powers given Congress to protect slavery and limit individual actions:

> The obligation to surrender fugitive slaves was on the States and for the States, subject to the restriction that they should not pass laws or establish regulations liberating such fugitives; that the Constitution did not take from the states the right to determine the status of all persons within their respective jurisdictions; that it was for the state in which the alleged fugitive was found to determine . . . whether the person arrested was, in fact, a freeman or a fugitive slave . . . and that, for the general government to assume primary authority to legislate on the subject of fugitive slaves, to the exclusion of the states would be a dangerous encroachment on state sovereignty. But to such suggestions, this court turned a deaf ear, and adjudged that primary legislation by Congress to enforce the master's rights was authorized by Congress.[108]

Harlan believed that the United States Supreme Court set a precedent before the Civil War by allowing the federal government to regulate individuals within states to protect the rights of slavery. He believed that United States Supreme Court should allow the

[107] Ibid., 26.
[108] Ibid., 29.

federal government in the post Civil War United States to regulate individuals in order to protect civil rights for African Americans.

In the *Slaughterhouse Cases* (1873) and *Strauder v. West Virginia* (1880) the Supreme Court interpreted the rights granted under the Thirteenth and Fourteenth Amendments. Harlan believed that those decisions protected African American Civil rights against private discriminations. African Americans freedoms 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 freedmen of the same state, and such legislation may be of a direct and primary character operating upon the 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 states.[109]

Those discriminations could be by the state or by individuals; and, in Justice Harlan's opinion, Congress could regulate both.

If the federal government had the power to protect civil rights of all Americans then Harlan needed to explain what rights were civil rights. Harlan agreed with the majority that civil rights included basic rights, such as the right to buy and sell property, testify in court; but, Harlan also believed that citizens had the right to use railroads, be admitted into inns, and places of amusement. Harlan argued that the right to ride railroads was a civil right protected by the federal government. Harlan quoted eighteenth century English legal treatise writer William Blackstone in his dissent saying, "Personal liberty consists in the power of locomotion, of changing situation, or removing one's person to whatever places one's own inclination may direct, without restraint unless by

[109] Ibid., 36.

due course of law."[110] Harlan believed that the federal government should protect all citizens' right to use public transportation regardless of race.

According to Harlan, civil rights included the right to be admitted in an inn or places of public amusement. An inn keeper is public accommodation and therefore should not turn away anyone. He argued, "The public nature of his employment forbids him from discriminating against any person asking admission as a guest on account of the race or color of that person."[111] The same rule was true for places of public amusement such as theaters. Theaters must be approved by and follow the guidelines of local government. They are created by the public and therefore they must meet the needs of the public. Harlan continued, "The authority to establish and maintain them comes from the public. The colored race is part of that public."[112] Both inns and theaters needed to provide the same accommodations to the public regardless of race.

Harlan then discussed the Fourteenth Amendment and Congress's power to enforce the new amendment. Harlan believed that under the Fourteenth Amendment, Congress could regulate businesses run by the state because they acted as agents of the state. It was constitutional for Congress to regulate the states to protect civil rights just as it had regulated the states to protect the rights of slave owners before the Civil War.

Finally, Harlan addressed Bradley's opinion that African Americans could not always be the special favorites of the law. Harlan believed that Congress created the 1875 Civil Rights Act to help all citizens, not just African Americans. While the 1875 Civil Rights Act does not allow discrimination on account of race, the act did not refer to the African America race specifically. Even if the law aided African Americans more

[110] Ibid., 39.
[111] Ibid., 41.
[112] Ibid.

than white Americans, it was not making them the favorites of the law. Harlan stated, "The difficulty has been to compel a recognition of the legal right of the black race to take the rank of citizens, and to secure the enjoyment of the privileges belonging, under law, to them as a component part of the people whose welfare and happiness government is ordained."[113] The 1875 Civil Rights Act allowed African Americans to enjoy the same freedoms and liberties as white Americans in areas of public accomidations. Harlan believed the Act made African Americans equal before the law not special favorites before the law. Yet, at the time, few Americans agreed with Harlan's interpretation of the 1875 Civil Rights Act and Fourteenth Amendment.

On October 15, 1883, the United States Supreme Court announced the decision of The *Civil Rights Cases.* Newspapers across the nation reported the case. Some newspapers favored Bradley's majority opinion and some opposed. Not surprisingly, many Republican newspapers in the North did not support the majority opinion. Other newspapers considered Southern Democratic newspapers supported the majority. The *Wilmington Gazette* stated that the 1875 Civil Rights Act was "a dead letter from its enactment, aside from the power it placed in the hands of malicious negroes to make trouble with white business men . . .."[114] Many of the newspapers that supported the majority opinion, such as the *Wilmington Gazette,* believed that the 1875 Civil Rights Act was unconstitutional and the United States Supreme Court reaffirmed their opinion.

The *Tallahassee Weekly Floridian* argued that civil rights never included rights to public accommodations. October 23, 1883 they explained the misinterpretation of civil rights in America by saying, "For about eight years several millions of [colored] people .

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[113] Ibid., 61.
[114] *Wilmington Gazette,* 17 October 1883.

. . have been under the impression that if they were denied certain privileges. . . they were wronged in their "legal rights" . . .. And now they ascertain from the head quarters at Washington that they have been laboring under a grievous mistake . . .."[115] African Americans still had their legal and economic rights, but civil rights were not protected by the federal government.

Other newspapers claimed that the United States Supreme Court decision in The *Civil Rights Cases* was not a surprising decision to educated Americans who understood the Constitution. The *Philadelphia North American* claimed on October 17, 1883 that, "not many intelligent and thoughtful people will be surprises by the judgment . . . Sounder and more sensible ideas now prevail as to what can and what cannot be done by legislation to ameliorate the condition of the negro than was dominate when the Civil Rights bill of 1875 was placed upon the statue-book."[116]

The *Chicago Tribune* believed that it was not the job of the federal government to regulate individuals, but they were also sympathetic to the rights of African Americans. On October 20, 1883, *The Chicago Tribune* published an article that stated, "The Constitution in its present shape does not warrant Congressional regulation of social affairs nor does it authorize Congress to say what company any man shall keep or who he shall eat with, sleep with, sit beside in theaters, churches, colleges, hotels, or sleeping cars. All these are social matters which individuals regulate to suit themselves . . .. Time and better education will wear away the existing social prejudices between whites and blacks. Much of this prejudice has been obliterated since the end of the slaveholders'

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[115] *Tallahassee Weekly,* 23 October 1883.
[116] *Philadelphia North American,* 17 October 1883.

rebellion, and nearly all that remains will be extinct at the end of another generation."[117] *The Chicago Tribune* believed citizens had to regulate themselves and it would take time for people to change their actions and views. *The Chicago Tribune* believed that Harlan's dissent supported more powers to the federal government rather than the state government. It editorialized:

> If the Supreme Court strained the Constitution before the War to give its sanction to Congressional legislation in behalf of the slave-owner, that is not a good reason why it should now, strain the Constitution in order to support Congressional legislation which looks to the protection of the freedman beyond the scope of the amendments . . .. The Supreme Court has merely denied a special interference of Congress to protect the Negro's exercise of social rights which cannot be invoked for the white man's protection.[118]

If Congress created an unconstitutional act before the war, then they do not have the right to continue unconstitutional legislation. The writers of *The Chicago Tribune* believed that Harlan wanted to uphold unconstitutional legislation.

Not all newspapers in America agreed with the majority decision in The *Civil Rights Cases.* Some newspapers expressed opinions of Americans who were surprised at the outcome of the case. The *Whig & Courier* newspaper in Washington D.C. believed that the United States Supreme Court's narrow interpretation of federalism did not allow for civil rights in the United States. On October 22, 1883, the *Whig & Courier* explained that, "virtually gives away one of the great principles for which the war was fought. It carries the doctrine of 'state rights' to the Democratic extreme, and renders necessary either another amendment or a new court."[119] Americans who supported the 1875 Civil Rights Act worried that the states would not protect civil rights for African Americans.

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[117] *The Chicago Tribune,* 20 October 1883.
[118] Ibid.
[119] *Whig & Courier,* 22 October 1883.

Congress needed to create a new amendment that clearly gave the federal government power to protect individual rights.

The *Denver Republican* believed that civil rights were fundamental rights that should be protected by the federal government. On October 16, 1883, *The Denver Republican* published an article that stated, "It has always been the impression that, no matter how much trouble colored men might have in demanding social equality, they had equal rights with all men in public places. If they have not, then the work had been only half done. It is a farce to make them citizen and not five them the rights of citizens. The negro will before long be an important factor in America, his standing should be defined. What looseness there is should be put to right."[120] *The Denver Republican* did not agree that the federal government only protected economic and legal rights. They believed that all citizens of the United States should be guaranteed civil rights as well.

In the city of San Francisco, the location of one of the *Civil Rights Cases, The San Francisco Examiner* expressed their disappointment with the Supreme Court's decision. On October 17, 1883 an article was published in *The San Francisco Examiner* that explained the Supreme Court decision, "had occasioned consternation among the colored citizens of this city as well as elsewhere. For years the people in whose favor the bill was enacted have rested content in the belief that it was as binding as the Constitution itself and . . . the action of the Republican Supreme Bench . . . has naturally aroused the indignation of the colored race throughout the country. Then feeling seems to be particularly bitter in San Francisco, where there are so many intelligent and educated men and women of African descent."[121] The opinion of *The San Francisco Examiner* was not

[120] *The Denver Republican,* 16 October 1883.
[121] *The San Francisco Tribune,* 17 October 1883.

popular among most Americans. Many Americans did not consider African Americans educated or intelligent.

Individuals sent letters of support to Harlan and his opinion. Former Supreme Court Associate Justices William Strong and Noah Swayne agreed with Harlan's dissent. Strong wrote to Harlan, "At first I was inclined to agree with the Court but since reading your opinion, I am in great doubt. It may be that you are right. The opinion of the Court, as you said is too narrow- sticks to the letter, while you aim to bring out the Spirit of the Constitution."[122] Even former President Rutherford B. Hayes stated that he agreed with Harlan and felt that Harlan's dissent was "necessary" and "moral."[123] Yet, Strong, Swayne and Harlan never stated publicly that they agreed with Harlan. Their support was only documented in private letters to Harlan.

Some individuals too spoke out publicly against the decision in the *Civil Rights Cases.* On October 22, 1883 James M. Gregory held a rally at Lincoln Hall in Washington D.C. to protest the *Civil Rights Cases* decision. Over 3,000 people attended the rally and others were not allowed inside due to the limited space. Colonel Robert Ingersoll was one of the speakers at the rally. Ingersoll applauded John Marshall Harlan for dissenting in the case. Ingersoll stated:

> From this decision, John M. Harlan had the breadth of brain, the goodness of heart and the loyalty of logic, to dissent. By the fortress of Liberty, one sentinel remains at his post. For moral courage I have supreme respect, and I admire that intellectual strength that breaks the cords and chains of prejudice and dammed custom as though they were but threads woven in a spider's loom. This judge has associated his name with name with freedom and he will be remembered as long as men are free.[124]

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[122] Alan F. Westin, "John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner," *The Yale Law Journal* 66, (April 1957): 677.
[123] Westin, "John Marshall Harlan and the Constitutional Rights of Negroes," 681.
[124] Ibid., 675-676.

Ingersoll felt that Harlan was helping to progress African American citizenship in America.

Among the speakers was Frederick Douglass. The majority decision upset Douglas and he argued that the case was a setback for African American citizenship. As he stated, "We have been, as a race, grievously wounded, wounded in the house of our friends, and this wound is too deep and too painful for ordinary and measured speech."[125] Douglas encouraged African Americans to educate themselves to help further their rights.

Bishop Henry Turner was another African American who spoke out against the decision in the *Civil Rights Cases.* Turner was an advocate for African American civil and legal equality. Turner led the African Methodists Episcopal Church in Atlanta, Georgia. The *North Carolina Republican* Quoted Turner saying, "Nothing has hurt us so much since the day we were emancipated as the decision of the Supreme Court. Since that cruel decision I have heard nearly every colored man I meet traveling, abusing the Supreme Court justices. I have never heard so many prayers offered to heaven against a body of men."[126] Turner voiced the opinion of many African Americans who were disappointed with the decisions of the United States Supreme Court.

Not all African Americans agreed with Douglas and Turner. Some African Americans thought that the 1875 Civil Rights Act hindered African Americans from achieving civil rights. The African Americans Arkansas newspaper, the *Weekly Mansion,* argued that the 1875 Civil Rights Act caused more racism because Congress created it to assist the African American race. Whites became resentful because the Civil Rights Act

[125] Frederick Douglass, *The Frederick Douglass Papers: Series One, Speeches, Debates and Interviews* (New Haven, Connecticut: Yale University Press, 1979), 122.
[126] *North Carolina Republican,* 22 May 1884.

favored African Americans. The *Weekly Mansion* urged African Americans not to rely on legislation to gain civil rights.[127] Newspapers and African American leaders encouraged their race to gain education and property to achieve civil rights. African Americans could not rely on the state governments to create legislatures to protect civil rights.

The *Civil Rights Cases* was a key United States Supreme Court decision involving African American civil rights of the nineteenth century because that decision settled the question about which level of government should protect civil rights of African Americans. The United States Supreme Court held that it was unconstitutional for the federal government to take away the power from states to protect civil rights; as a result, the decision led to many years of neglect from the state governments to protect African American civil rights. Historian John R. Howard believed that The *Civil Rights Cases* made more of an impact on the American public than the later 1896 decision in *Plessy v. Ferguson.* He argued in his book *The Shifting Wind:The Supreme Court and Civil Rights from Reconstruction to Brown* that, "although from the standpoint of a legal doctrine *Plessy* was to prove more important than the *Civil Rights Cases*, the *Civil Rights Cases* were perceived by people at the time as having much more to do with how they conducted their everyday affairs then wax to be true at the time regarding *Plessy*."[128]

The *Civil Rights Cases* affected both African Americans and white Americans. On, October 23, 1883, the *Concord Monitor* reported on the impact of the cases: "This decision, so important to the colored portion of the population, and so widely at variance with the popular view of the question, has naturally created a great sensation here, not

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[127] *Weekly Mansion* 10 November 1883.
[128] Howard, *The Shifting Wind,* 131.

only among the colored people, but among the whites as well, and particularly among the lawyers and politicians."[129] The *Civil Rights Cases* marked an end to the interpretation of the Civil War amendments. The *Civil Rights Cases* set the precedent of how the Supreme Court would interpret civil rights, national citizenship federalism and the civil war amendments until well into the twentieth century. When the United States Supreme Court announced the decision of *Plessey v. Ferguson* (1896) few Americans reacted. The *Plessey* decision did not receive as much national attention as the *Civil Rights Cases* because Americans already believed from the *Civil Rights Cases* that the federal government could not regulate civil rights. Newspapers did not report *Plessey* until days after the decision had been made and no rallies were held in Washington D.C. to discuss African Americans civil rights. The nineteenth century debate about African American civil rights had ended in the United States Supreme Court 13 years earlier with the *Civil Rights Cases.*

[129] *Concord Monitor,* 23 October 1883.

CHAPTER FOUR: CONLCUSION

On May 17, 1954, United States Supreme Court Chief Justice Earl Warren read the Court's unanimous decision in *Brown v. Board of Education* (1954). It was the unanimous decision of the United States Supreme Court that state mandated segregation in public schools was unconstitutional due to the Fourteenth Amendment. Chief Justice Warren echoed the dissenting opinion of Associate Justice John Marshall Harlan in 1883 that separate facilities for races was not equal and all of the other Supreme Court Justices supported Chief Justice Warren's opinion.

Although the decision in *Brown v. Board of Education* only applied to segregation in public schools, it was nonetheless a watershed moment in the struggle for African American civil rights. The *Brown v. Board of Education* decision began a second constitutional revolution. This second constitutional struggle for African American civil rights proved more successful than the first. Its success can be attributed to several factors, most notably, cultural shifts in racial attitudes of white Americans and a commitment by the federal government to oversee minority rights. Once mainstream America recognized the need for African American equal rights as a matter of simple justice, the federal government became more involved in limiting state powers and thereby blurred the traditional lines of federalism.

The first constitutional revolution took place after the Civil War. Following the Civil War, Americans had to rebuild the nation. That rebuilding process was both physical and psychological in nature. With the end of slavery, the federal government helped direct the new status and new role of African Americans in the society. In addition, Americans questioned the traditional ideals of federalism in post Civil War society. In response, a constitutional revolution took place. The United States Supreme Court had to answer questions of African American rights and roles in America society and federalism.

Congress had long debated these issues before, during and after the Civil War. Initially, Congress created the 1865 Freedmen's Bureau and Civil Rights Act of 1866. The Freedmen's Bureau provided African Americans aide in employment and education, but the Civil Rights Act provided African Americans citizenship not only in their states, but citizenship at the national level. Almost immediately concerns arose among members of Congress regarding the constitutionality of the bill. Republican Senator Lyman Thumbull from Illinois assured Congress that states would remain in charge of protecting individual rights just as they were before the Civil War.

Conservative Republicans and the Democrat Party at the time did not want African Americans to have the same social rights as white Americans. They did not want to vote for the Civil Rights Act if civil rights included social rights for African Americans. The Civil Rights Act provided African Americans with legal rights and not social rights; therefore, African Americans would be equal before the law, but not economically and certainly not socially.

Proponents of such legislation in Congress believed that they needed a new amendment to insure the values contained in the Civil Rights Act of 1866 became fundamental law. While Radical Republicans began to draft the Fourteenth Amendment, moderate Republicans concerned themselves with issues such as the social equality of the races and the changes in federalism implied by the Fourteenth Amendment. Notably, Congress drafted the Fourteenth Amendment in broad language, and as a result, African American rights were not defined specifically. After the states ratified the Fourteenth Amendment, questions remained regarding the equality, role, and status of African Americans.

The United States Supreme Court interpreted the meaning of the Fourteenth Amendment. Between 1873 and 1875, it decided three cases that clarified the amendment and Congress's power to create appropriate legislation. Ultimately, the United States Supreme Court decided on the civil rights of African Americans protected by the federal government. The first case requiring an interpretation of the Fourteenth Amendment was the 1873 *Slaughterhouse Cases.* Ironically, *Slaughterhouse* did not involve African Americans, but the decision of the justices affected African Americans and their struggle for civil rights. Four judges dissented in *The Slaughterhouse Cases.* Justice Joseph Bradley wrote one of the dissenting opinions. He believed that the Fourteenth Amendment had indeed expanded federal power to protect individual rights, which were defined as individual economic rights to earn a living, against business monopolies.

Chief Justice Samuel Miller disagreed with Justice Bradley and wrote the majority opinion for the Supreme Court. Chief Justice Miller interpreted the Fourteenth

Amendment's rights of citizens guaranteed by the federal government while maintaining the tradition of protecting individual rights to the states. Chief Justice Miller's narrow interpretation set a precedent that influenced other justices' interpretations. In addition, African Americans faced a narrow interpretation of the Fourteenth Amendment when they argued before the Supreme Court.

On March 27th, 1876, The United States Supreme Court handed down its decision in two other cases directly related to the constitutionality of the Fourteenth Amendment, *U.S. v. Cruikshank* and *U.S. v. Reese.* Again, the Supreme Court agreed with the narrow interpretation of the Fourteenth Amendment set by Justice Miller and they continued traditional federalism. The federal government could not expand their powers to protect individual rights for African Americans. Ultimately, the states held the oversight of individual rights. Hence, private individuals and businesses could continue to discriminate against African Americans and no one else including the federal government processed the legal power to intervene.

In 1875, Congress passed a Civil Rights Act to allow African Americans into places of public accommodation. Many white Americans believed that the Civil Rights Act of 1875 was unconstitutional, and as such, they did not follow the law. African Americans tested the Civil Rights Act of 1875 by attempting to patronize local businesses. Some businesses allowed African Americans equal service, but most did not. Eventually, the United States Supreme Court joined five separate cases as the 1883 *Civil Rights Cases.*

The decision of the United States Supreme Court in *The Civil Rights Cases* was not surprising to many Americans. Associate Justice Joseph Bradley wrote the Supreme

Court majority opinion and was consistent with the previous cases involving the interpretation of the Fourteenth Amendment. Justice Bradley stated that the Civil Rights Act of 1875 provided the federal government more power than was intended by the Constitution; therefore, the Civil Rights Act of 1875 was unconstitutional. It was the states, and not the federal government, that had the right to regulate private businesses. The federal government could intervene only if the state governments created their own legislation that discriminated against African Americans. Therefore the federal government could only regulate state action not state inaction.

The Civil Rights Cases ended the national conversation concerning the rights of African Americans until the 1950's. Several other cases did reach the United States Supreme Court; however, the justices continued to uphold the decisions made in *The Slaughterhouse Cases, Cruikshank, Reese* and *The Civil Rights Cases.* Reflecting the social and racial values of that era, the Supreme Court decided that upholding federalism was more important than protecting African American civil liberties.

America faced a new constitutional revolution after the Civil War. Americans needed to decide if federalism had changed and whether and how to include African Americans into American society if at all. The states ratified three constitutional amendments in the years following the Civil War, but the United States Supreme Court determined that these new amendments did not change the traditional value of federalism. The states remain in charge of individual rights. These decisions meant that white majorities decided the rights African Americans held.

The Supreme Court decisions in these cases were inline with the values and thinking of the majority of Americans at the time. Many American believed that African

Americans did not deserve equal social rights to whites and, therefore, supported the justices' decisions. A cultural change needed to happen in America before African Americans received equal civil rights before the law. That change happened; but it did not occur for another half century later when Chief Justice Warren read his opinion in the *Brown v. Board of Education.*

CHAPTER FIVE: HISTORIOGRAPHY

The Civil War produced dramatic changes in American life. After its conclusion, Americans had many questions concerning the rebuilding of the nation. Even more questions existed in regards to the roles of both African Americans and southerners in post- Civil War America. Much has been written about Reconstruction as well as the constitutional revolution that occurred. Historian's opinions vary markedly. Many have analyzed the majority opinion in United States Supreme Court cases to develop an idea of American's values. For this thesis, literature analyzing the Reconstruction, the Constitution, and United States Supreme Court Cases were critiqued to help develop a sense of the time and the people living in it.

Eric Foner developed one of the most comprehensive histories of the Reconstruction time period in his book, *Reconstruction: America's Unfinished Revolution, 1863-1877.*[130] Foner offers a new interpretation of the time period, by arguing that Reconstruction was not a complete failure as previous historians have argued. Foner began his book with the Emancipation Proclamation. He described the active involvement of African Americans pre and post Civil War in their efforts to achieve equality. African Americans did not act passively during Reconstruction; rather, they helped to bring about change in American society, North and South.

[130] Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York: Harper & Row, 1988).

Foner did not argue that Reconstruction was a complete success; but, he refuted the idea that Reconstruction was a complete failure. He employed many sources to demonstrate the context of Reconstruction and its monumental goals. It was unrealistic to think that most Americans, especially southern whites, would change their racial views completely after the Civil War. Hence, Foner proposed that while some successes occurred during Reconstruction, ultimately, by 1877, the revolution was unfinished by.

Charles Fairman wrote an extensive analysis on the Reconstruction time period and the United States Supreme Court in his work *History of the Supreme Court of the United States Volume 6, Reconstruction and Reunion, 1864-1888.*[131] Fairman drew from a large pool of resources about Reconstruction and the United States Supreme Court including legal decisions, newspapers and court documents. His book can be used as a resource for other primary sources as well as an interpretive history of the time period. Fairman discussed many topics in his volume of the Supreme Court including an interpretation of the Fourteenth Amendment. In his conservative interpretation of the Civil War amendments, Fairman proposed that no clear intent of the Fourteenth Amendment existed.[132]

New York Unieristy School of Law Professor William E. Nelson agrees with Fairman's assessment of the Fourteenth Amendment. In his book, *The Fourteenth*

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[131] Charles Fairman, *History of the Supreme Court: Reconstruction and Reunion* (New York, New York: MacMillan, 1971).

[132] For other interpretations of the Reconstruction time period see Pamela Brandwein, *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth* (Durham, NC: Duke University Press, 1999). Brandwein studied Reconstruction using the social and political views of the time and also the United States Supreme Court's interpretation of the Reconstruction amendments and created a sociology interpretation of constitutional law.

Amendment: From Political Principle to Judicial Doctrine,[133] Nelson argued that the writers of the Fourteenth Amendment had several different intents. He focused on specifically the Republican debates in favor of the Fourteenth Amendment, because those arguments extend equal rights to the states while also preserving America's traditional value of federalism. States could still create their own laws that were equal to all of their citizens. Nelson's book provides an insightful account to the different viewpoints of Congress during the debates on the Fourteenth Amendment.

William Gillette took a similar approach as Nelson while analyzing the Fifteenth Amendment. Gillette analyzed the debates in Congress and the state ratifications of the Fifteenth Amendment in his book, *The Right to Vote: Politics and the Passage of the Fifteenth Amendment.*[134] Gillette believed that the ratification of the Fifteenth Amendment was by no means a moral stance on equality by northern Republicans. Gillette explained that their motivation for creating the Fifteenth Amendment was to gain support from Black voters.

Harold Hyman and William Wiecek approach Constitutional History by placing the issue of slavery in the spotlight of their book *Equal Justice Under Law: Constitutional Development, 1835-1875.*[135] Hyman and Wiecek used the issue of slavery to analyze how Constitutional interpretations changed over the time frame. They do not focus on one particular United States Supreme Court case involving slavery; rather they

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[133] William Edward Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge, Massachusetts: Harvard University Press, 1988).
[134] William Gillette, *The Right to Vote: Politics and the Passage of the Fifteenth Amendment* (Baltimore, Maryland: John Hopkins Press, 1965).
[135] Harold M. Hyman and William M. Wiecek, *Equal Justice Under Law: Constitutional Development, 1835-1975* (New York, New York: Harper and Row, 1982).

incorporated many cases from 1835 through American western expansion, the Civil War and Reconstruction.

Equal Justice Under Law also analyzes the issue of property rights and its interpretation under the Constitution. The Founders created the Constitution to protect the rights of American citizens. Included in these rights are the right to life, liberty and ownership of property. Property rights related directly to slavery, as the United States Supreme Court had determined in the 1857 *Dred Scott Case*. In that decision, a majority of the Supreme Court held that slaves were property and the Constitution should protect the right of people to own slaves.

As America progressed through the nineteenth century, so did the constitutional protection of slavery. In 1861, America entered into a Civil War and, in time, the nation amendment the Constitution to abolish slavery. Hyman and Wiecek used the last half of their book to examine the evolution of the Constitution in regards to protecting the rights of former slaves. During Reconstruction, Southern society was not willing to accept equal rights for former slaves, even though the Constitution provided protection for African Americans under the Thirteenth, Fourteenth and Fifteenth Amendments. Hyman and Wiecek contend that the Nineteenth Century provided equal justice for African Americans under law, but the law was difficult to enforce. Therefore, the reality of equality for African Americans was not achieved by 1875.

Herman Belz also analyzed the rights of African American before the law in his book, *Emancipation and Equal Rights: Politics and Constitutionalism in the Civil War Era.*[136] Belz discussed the importance of interpreting historical events in the context of

[136] Herman Belz, *Emancipation and Equal Rights: Politics and Constitutionalism in the Civil War Era* (New York: Norton, 1978).

the time they occurred. He argues that Reconstruction should be interpreted by the views and culture of the time rather than by today's standards. Belz asserted that Reconstruction was radical for the time and not a failure, as many historians suggest. Belz work is similar to Hyman and Wiecek because it focuses African American equality before the law, even though Belz's work focuses on the Civil War and Reconstruction Era.

Howard N. Rabinowitz explored the Reconstruction period through race relations in urban areas in the south in his book, *Race Relations in the Urban South 1865-1890.*[137] Rabinowitz assessed how African Americans transitioned from slaves to freemen by using legal documents such as court records, housing, economic transitions and census data. He believed that segregation of African Americans replaced their exclusion in the urban southern society.[138]

White Terror; the Ku Klux Klan Conspiracy and Southern Reconstruction and *The Great South Carolina Ku Klux Klan Trials* are two books that focus specifically on race relations between Africans Americans and the white supremacy group, the Ku Klux Klan.[139] Allen W. Trelease complied an expansive history of the Klu Kux Klan activity throughout the south during Reconstruction and groups his evidence by location rather than chronological. Trelease also included organizations such as the Knights of the

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[137] Howard N Rabinowitz, *Race Relations in the Urban South, 1865-1890* (New York: Oxford University Press, 1978).

[138] C. Vann Woodard also explores race relations in the south in his book, *The Strange Career of Jim Crow* (New York: Oxford University Press, 1974). He looks at the racial attitudes of the time period specifically focuses on the United States Supreme Court interpretation of segregation laws in the *Civil Rights Cases* and *Plessey v. Ferguson.*

[139] Allen W. Trelease, *White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction* (New York: Harper & Row, 1971) and Lou Williams Falkner, *The Great South Carolina Ku Klux Klan Trials, 1871-1872* (Athens, Georgia: University of Georgia Press, 1996).

White Camellia and Knights of the Rising Sun in his examination of race relations. Trelease argued that the southern Democrats used the KKK to regain control of their southern governments after Reconstruction by terrorizing African Americans and radical Republicans.

Lou Falkner Willams focused on the 1870s KKK trials in South Carolina in her book, *White Terror; the Great South Carolina Ku Klux Klan Trials.*[140] *White Terror* documented the federal involvement in the civil rights and trials during the Reconstruction. Although the main focus of *White Terror* was the KKK trials, Williams used the trials to show the interpretation of the new Reconstruction amendments and Enforcement Acts. The narrow interpretation of the United States Supreme Court would set a precedent for their decisions in *Cruikshank, Reese* and the *Civil Rights Cases.*

Two books that focus on specific United States Supreme Court cases during Reconstruction are Ronald Labbe and Jonathan Lurie's *The Slaughterhouse Cases: Regulation, Reconstruction and the Fourteenth Amendment* and LeeAnna Keith's *The Colfax Massacre: The Untold Story of Black Power, White Terror, and the Death of Reconstruction.*[141] Both books focus on this controversial period in United States history and both books analyze how the United States Supreme Court interpreted the Constitution post Civil War. Congress enacted many new laws after the Civil War and white southerners challenged their constitutionality. Labbe, Lurie and Keith all describe the new constitutional jurisprudence that was emerging in the United States.

[140] Lou Williams Falkner, *The Great South Carolina Ku Klux Klan Trials, 1871-1872* (Athens, Georgia: University of Georgia Press, 1996).
[141] Robert M. Labbe and Jonathan Lurie, *The Slaughterhouse Cases: Regulation, Reconstruction and the Fourteenth Amendment* (Lawrence, Kansas: University Press of Kansas, 2003) and LeeAnna Keith, *The Colfax Massacre: The Untold Story of Black Power, White Terror and the Death of Reconstruction* (Oxford: Oxford University Press, 2008).

In *The Slaughterhouse Cases,* Labbe and Lurie described how the United States Supreme Court first interpreted the Fourteenth Amendment when a group of butchers from New Orleans used it to assert their economic right to earn a living at an honest trade. Louisiana enacted a state statute that mandated that the butchers in New Orleans had to move their slaughterhouse due to sanitary concerns in the city. The butchers felt that this decision violated their rights as business owners and took their case to the states courts, and in time, to the federal courts. The butchers, lead by John Campbell, argued that the Fourteenth Amendment stated, "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States," and the new law violated their privileges as business owners to pursue a lawful trade.

The *Slaughterhouse Cases* were the first time that the United States Supreme Court interpreted the Fourteenth Amendment. Labbe and Lurie not only explained the justices decisions, but also analyze the impact of their decisions on future cases. As Labbe and Lurie explain, Justice Miller disagreed with Campbell's argument and believed that the Fourteenth Amendment only applied to African Americans. Miller also found the Fourteenth Amendment only applied to privileges guaranteed by the federal government and business ownership was not one of those rights. Miller's narrow interpretation of the Fourteenth Amendment limited the rights protected by the federal government and had many effects on future United States Supreme Court cases involving African Americans. Even though African Americans were not involved with this case, this decision limited the ability of African Americans to use the Fourteenth Amendment to defend their civil rights.

Keith also discussed the interpretation of the Fourteenth Amendment during Reconstruction. *The Colfax Massacre* analyzed the immunities and privileges guaranteed by the federal government and which government, state or federal, should enforce them. Prosecuting lawyer, J.R. Beckwith argued that the men killed during the Colfax Massacre had their Fourteenth Amendment rights violated. Associate Justice Joseph Bradley disagreed in the *U.S. vs. Cruikshank* case. Justice Bradley argued that Beckwith did not provide sufficient evidence that the rights of African Americans were denied due to their race. Justice Bradley used the early interpretation of the Fourteenth Amendment during the Slaughterhouse Cases to support his decision.

The Colfax Massacre should be read after *The Slaughterhouse Cases* because the effects of the *Slaughterhouse Cases* are shown in the judges' decisions during the *U.S. v. Cruikshank.* Keith provided an explanation of the judges' decisions, but she did not focus on the impact of the decision. Labbe and Lurie provided better analysis of the Fourteenth Amendment due to their research into the new interpretation of the Fourteenth Amendment and the effect that event had on United States Supreme Court decisions in the future. Labbe and Lurie also provided sufficient and detailed information for the audience to understand the context of the *Slaughterhouse Cases.* Keith also provided extensive research into the background of the Colfax Massacre, but some of the information proved irrelevant to the case. The actual analysis of the case does not occur until half way through the book and Keith paid little attention to the effects of the case.[142]

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[142] For further information on The Colfax Massacre see Charles Lane, *The Day Freedom Died: The Colfax Massacre, the Supreme Court and the Betrayal of the Constitution* (New York: Henry and Holt Co., 2008). Lane describes the Colfax Massacre and the subsequent trial in the United States Supreme Court. Although, Lane uses many of the same sources as Keith, his book is more of a retelling of the event rather than an analysis

Robert M. Goldman focuses on the Unites States Supreme Court's interpretation of the Fourteenth and Fifteenth Amendment in his book, *Reconstruction and Black Suffrage: Losing the Vote in Reese and Cruikshank.*[143] Goldman's focus was broader than Keith's because he focused on two specific United States Supreme Court cases involving the Fourteenth Amendment. Goldman argued that the United Stated Supreme Court interpretation in *Reese* and *Cruikshank* allowed state restrictions of voter registration and voting by citing both cases and the majority and dissenting opinions in both cases.

Charles A. Lofgren analyzed the United States Supreme Court decision in *Plessey v. Ferguson* in his book *The Plessey Case: A Legal Historical Interpretation.*[144] Lofgren began his book with an analysis of the scientific, social and political norms of the late nineteenth century. Lofgren argued that the Supreme Court decision in *Plessey* was an affirmation of political and social views of the time and not the beginning of new segregation laws in America. *Plessey* upheld the previous Supreme Court decision in *The Civil Rights Case* and Justice Harlan again wrote the dissenting opinion.

Several authors have focused on the progression of African American civil rights through the legal and judicial systems. Mark S. Weiner and John R Howard focus on the legal path Africans Americans needed to take in order to achieve legal and social equality in America. Weiner's book, *Black Trials: Citizenship from the Beginnings of Slavery to the End of Caste,* began his book with the earliest legal cases involving slavery, while

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of the United States Supreme Court's decision and interpretation of the Fourteenth Amendment.

[143] Robert M. Goldman, *Reconstruction and Black Suffrage: Losing the Vote in Reese and Cruikshank* (Lawrence, Kansas: University Press of Kansas, 2001).

[144] Charles A. Lofgren, *The Plessey Case: A Legal-Historical Interpretation* (New York: Oxford University Press, 1987).

John R Howard's book, *A Shifting Wind: The Supreme Court and Civil Rights from Reconstruction to Brown,* did not begin until the Reconstruction period.[145] Both books argued that the Supreme Courts' narrow interpretation of the Constitution and new amendments limited the development of African American civil rights. The United States needed a cultural shift in majority society's attitudes before African Americans could achieve equal rights before the law.[146]

[145] Mark Stuart Weiner, *Black Trials: Citizenship from the Beginnings of Slavery to the End of Caste* (New York: Random House, 2004) and Howard

[146]See also, Milton Konvitz, *A Century of Civil Rights* (New York: Columbia University Press, 1961) for more information about the progression of African American civil rights through the United States Supreme Court.

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