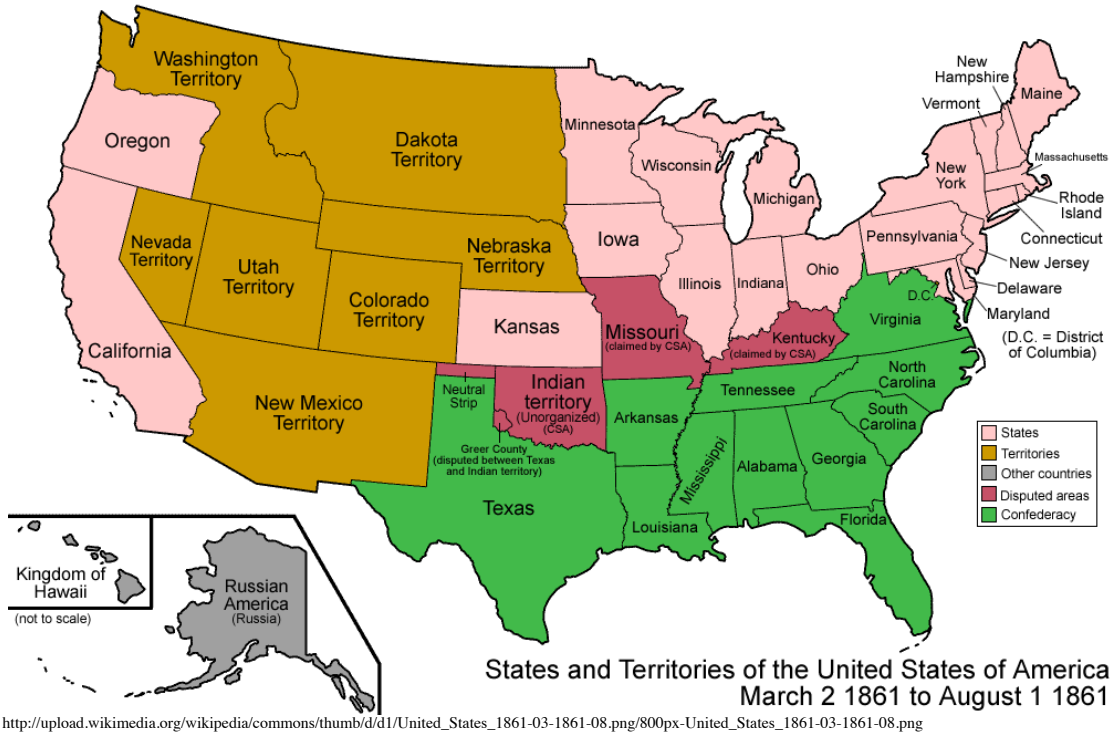
CHAPTER 5

The Civil War and the Reconstruction Era

The Constitutional Acknowledgement of Slavery: *Dred Scott v. Sandford* – The Executive Non-compliance with Judicial Resolutions: *Ex parte Merryman* – The Military Commissions: *Ex parte Milligan* – The Reconstruction Amendments – The First Reconstruction Amendment: The Abolition of Slavery – The Second Reconstruction Amendment: The Citizens Rights – The Third Reconstruction Amendment: The Right to Vote and the Race – The Right to Secede: *Texas v. White* – The "Gutting" of the Fourteenth Amendment: *The Slaughter-House Cases* – Racial Discrimination: *The Civil Rights Cases* – "Separate but Equal": *Plessy v. Ferguson*



http://upload.wikimedia.org/wikipedia/commons/thumb/d/d1/United_States_1861-03-1861-08.png/800px-United_States_1861-03-1861-08.png
User:Golbez/GNU Free Documentation License

Among American society's most traumatic experiences in its early history was the Civil War, which was fought in the years 1861 to 1865. The results of that war were firstly that the country lost as many men as were killed in all other wars, including two World Wars. Secondly, it resulted in enduring tensions within American society –between whites and blacks, and even whites and whites– for more than 100 years, and arguably the civil war is at the root of some of the national conflicts today.

There is no real academic agreement on the problems that caused the war. To some scholars, "[t]he seeds of dissension between the North and the South were carried

to Virginia in the ships commanded by Newport and to Massachusetts in the 'Mayflower'" (Lee, p. 11). Certainly, a critical issue between North and South was the controversy over slavery, the North being abolitionist and the South being pro-slavery. The controversy had already surfaced in 1787, at the time of the Constitutional Convention, but it was then seemingly resolved through several compromises. Seventy years after the Convention, those compromises were crumbling, and, by 1860, the congressmen from South Carolina left the U.S. Congress and proclaimed their state's secession from the Union. Shortly afterward, ten more states followed suit to establish the Confederate States of America. Then, South Carolina troops bombed the U.S. garrison in Charleston and the Civil War began.

The Constitutional Acknowledgement of Slavery: *Dred Scott v. Sandford*

It was thought that an explicit constitutional acknowledgment of slavery could easy the tensions that along the years had built among the states and, thus, the secession of the Southern states could be avoided. Although it was possible to find in several clauses of the original constitutional text a de facto recognition of slavery, the Constitution was neither clear nor categorical about it, and certainly it was not expressly rejected. The mainly puritan Northern states had pleaded for abolition; but the Southern states, that were heavily dependant economically on cheap labor, demanded a constitutional recognition of "their peculiar institution." To get such recognition by an amendment to the Constitution was impossible because the number of Congressmen from pro-slavery states could not muster the two thirds majority required in Article v to support its proposal, much less the three fourths majority for its ratification. However, it was possible to achieve such recognition through the judicial review process.

Dred Scott was a "Negro" slave born in Virginia. At the age of approximately 35 years, his owners took him to Missouri where, in 1832, Dr. John Emerson, a surgeon in the U.S. Army, bought him. During the next twelve years Scott followed Dr. Emerson to the different forts and barracks in which the surgeon served, initially in Illinois and then in Fort Snelling, the Wisconsin Territory. Both were "free territories," where slavery was not allowed. Dr. Emerson always treated Scott rather as an employee than as a slave, even allowing him to marry, something that slaves were not permitted to do because they could not get into a legal contract such as marriage.

Dr. Emerson died in 1843, and his widow, Eliza Emerson, inherited all his property, including the slave Scott and his family. Scott attempted to buy his and his family's freedom, but Eliza refused to grant it.

With the help of abolitionist groups, Scott sued the widow in the courts of Missouri, claiming that he and his wife had become manumitted (set free) when Dr. Emerson had taken them to the free territories of Illinois and Wisconsin. He also pointed out that his daughters had never been slaves, both having been born in a state that did not recognized slavery. The first lawsuit was dismissed because, surprisingly, Scott was not able to get a single witness to declare that for twelve years he had been Emerson's slave. In a second trial, in 1850, Scott and his family achieved a judgment in their favor and were declared free. But the widow appealed, and in 1852 the Supreme

Court of Missouri reversed the decision, declaring Scott and his family to be slaves, property of Eliza.

By that time the estate of Dr. Emerson had been transferred to John F. A. Sanford, who was a citizen of New York State, and who thereby gained the ownership title to Scott and his family. Because the case now fell under "diversity jurisdiction," Sanford being a resident of New York and Scott of Missouri, the case could now be

> Roger B. Taney (1777-1864) was an American jurist and 5th Chief Justice of the United States. Born in Maryland, into a Catholic family, at the age of 18 years, when other students were entering university, he graduated with honors from Dickinson College. In 1799 he was admitted to the Bar, and in a short time became one of the most prominent attorneys in Maryland. Taney served in several state offices, first as a Federalist and then as a Jacksonian Democrat. In the presidential elections of 1828, Taney helped to win Maryland for Andrew Jackson, who repaid his assistance by choosing him first as acting Secretary of War, later as Attorney General of the United States, and finally as interim Secretary of the Treasury. As Attorney General, Taney supported several measures against Black people, considering legitimate a law of the State of South Carolina that prohibited free Blacks from entering the state, and declaring that Blacks could not be considered citizens. As the interim Secretary of the Treasury, and against the opinion of the majority in the Senate, Taney carried out the decision of President Jackson to close the Second Bank of the United States, so the Senate decided not to confirm him in the job and then rejected his nomination as Associate Justice of the Supreme Court (to replace Gabriel Duvall). At the death of John Marshall, President Jackson nominated Taney for the seat of Chief Justice and, after long debates, the Senate finally confirmed him in 1836. Taney held the office until his death in 1864, right before the Civil War ended. Roger B. Taney was the first Roman Catholic to reach the Supreme Court of the United States and, contrary to John Marshall's enlightened views, he was a strong defender of the state rights and opposed the expansion of federal government powers. Taney was certainly a brilliant jurist, but several unfortunate opinions earned him enmities on both political sides. As a consequence of the *Dred Scott v. Sandford* opinion, extreme abolitionists accused Taney of causing the Civil War, and Benjamin Curtis, one of the Associate Justices, was so upset with Taney's ruling that resigned his seat. After the *Ex parte Merryman* case, President Lincoln decided to ignore the decisions of the Chief Justice on any war related issue. Taney died in poverty. He lost his properties in the war and, due to his poor relationship with Lincoln's executive, his salary was not raised during the highly inflationary period of the war. It is odd that his own State of Maryland abolished slavery precisely on the same day of his death. Few attended his funeral, and President Lincoln did not make any public eulogy.

pursued in the federal courts. (Note that a federal court's Clerk misspelled Sanford's name as Sandford, and since the error has never been corrected.) Section 2 of Article III states that "The judicial Power shall extend [...] to Controversies [...] between Citizens of different States," which is commonly called "the Diversity (of Citizenship) Clause." In 1853, Scott's lawsuit was admitted to the United States District Court for the District of Missouri. The judge instructed the jury to apply Missouri's law and, since the state's Supreme Court had already ruled against Scott, the verdict in the Federal District Court was also against Scott.

Scott then appealed to the Supreme Court of the United States. Roger B. Taney, who had succeeded John Marshall as Chief Justice, wrote the main opinion of the

court. On the 6th of May of 1857 and by a vote of 7 to 2, the Court ruled against Scott.

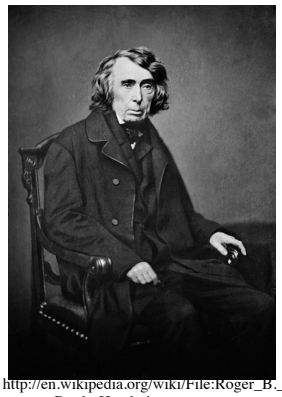
Taney decided that, in the first place, the diversity jurisdiction "between Citizens of different States" did not apply to this case because "Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States and not entitled as such to sue in its courts, and consequently that the Circuit Court had no jurisdiction of the case." He was not a citizen of Missouri nor of any other state and, as a "negro", he could never become a citizen. Thus, Scott could not sue in federal courts. In addition, Taney continued, it was "absolutely certain that the African race were not included under the name of citizens of a State, and were not in the contemplation of the framers of the Constitution when these privileges and immunities were provided for the protection of the citizen in other States."

http://lcweb2.loc.gov/pnp/cph/3a00000/3a08000/3a08400/3a08411r.jpg
Library of Congress, *Century Magazine*. 1887

Dred Scott

For Taney, all persons of African descent, free or slave, "had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect."

If the Court should now grant Scott's requests, he said, "[i]t would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went." To allow this, Taney followed, would be "inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State."



http://en.wikipedia.org/wiki/File:Roger_B._Taney_-_Brady-Handy.jpg
Mathew Brady, 1855-1865

Roger B. Taney

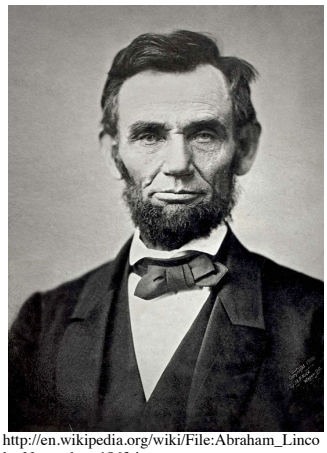
In a contradiction to his own decision, since the Chief Justice had established that the Court had no jurisdiction to hear the suit, Taney ruled that Scott had not become a free man when he was living in Minnesota and, furthermore, that the Congress of the United States had exceeded its constitutional powers prohibiting slavery in certain states and Territories, as it had done with the Acts known as The Missouri Compromises. In Taney's opinion, these Acts violated the Fifth Amendment, which prohibited "private property be taken for public use, without just compensation." Accepting the Compromises as constitutional meant that any person moving with his slaves to those Territories would lose them "without just compensation." Lastly, the Chief Justice concluded that any state legislation prohibiting slavery was likewise to be considered unconstitutional.

Years later, the Chief Justice tried to justify his opinion in Dred Scott as an attempt to satisfy the demands of the pro-slavery states, and thus avoid their secession from the Union. Instead of appeasing the Southern states, the Court's ruling simply exacerbated the abolitionist attitudes in the Northern states. In his Presidential campaign of 1860, Abraham Lincoln declared that he would do everything possible to have the ruling overturned.

The Executive Non-compliance with the Judicial Resolutions: *Ex parte Merryman*

As indicated *supra*, alleging the tensions built up between the Northern and Southern states, South Carolina decided to break from the Union. Within one month six other states (Mississippi, Florida, Alabama, Georgia, Louisiana, and Texas) followed suit, and all the seven joined in the Confederate States of America. The Confederacy demanded that the federal government remove all federal troops from Southern lands, considering them to be a foreign invasion force. The Union ignored the demand and, on the 12th of April of 1861, the Confederacy commanded its troops to bomb the federal Fort Sumter in Charleston, South Carolina.

As a result of that attack, President Abraham Lincoln issued a Proclamation asking for volunteers from the Northern States to form an Army of 75,000 men, with the purpose of enabling the Union to repel any other Confederate attacks. In reaction to the Presidential Proclamation four more states (Virginia, Arkansas, Tennessee, and North Carolina) joined the Confederacy, and so began the civil war that lasted four years and resulted in more than 600,000 deaths.



http://en.wikipedia.org/wiki/File:Abraham_Lincoln_November_1863.jpg
Alexander Gardner, 1863

Abraham Lincoln

The Northern states responded quickly to President Lincoln's request, and four days later the first detachment of federal troops from Minnesota, plus four hundred volunteers from Pennsylvania, arrived in Washington. To reach the Capital the troops had to march through the city of Baltimore, in Maryland, a "frontier state" between the "North" and "South," where a significant part of the population sided with the secessionists. As the troops marched through the streets, a mob stoned them. The next day, a group of the Massachusetts militia arrived in Baltimore, and again a mob congregated to stone and fire upon them with the aim of preventing their embarkation on the train to Washington. The soldiers responded by firing at the mob and, in the consequent riot, four soldiers and twelve civilians died. That same evening, the Mayor of Baltimore and its Police Chief convinced Maryland's Governor (all of them Confederate sympathizers) to sabotage the railroad bridges by burning them, thus preventing the transportation of any additional Union troops to Washington by that route.

President Lincoln's response to the attacks on the Union troops and the burning of bridges was to issue a written order to the commanding General of the Army of the

United States, authorizing him to suspend the privilege of the writ of habeas corpus any time that, in his opinion, the maintenance of public safety required it (Rehnquist, pp. 13-25). Lincoln justified his order on the basis of the Constitution's Suspension Clause in Section 9, Article I, which states that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it".

One of the saboteurs was John Merryman, a resident of Baltimore who was arrested in May of 1861 by soldiers of the Union Army. When Roger B. Taney (who, in addition to Chief Justice of the Supreme Court, was Circuit Judge in the District of

> Abraham Lincoln (1809-1865) was an American attorney and politician, and 16th President of the United States. Born in Kentucky in 1809, his family moved to Illinois in 1830. Lincoln was elected to the General Assembly in 1834. Teaching himself law, he was admitted to the Bar in 1836, initiating a successful rural practice. In 1846 he was elected Representative to the Congress of the United States. After a campaign founded on the abolition of slavery, in 1860 he was elected President of the United States. In February of 1861, just one month before his inauguration, seven Southern states seceded from the Union, formed the Confederacy, and elected their own President. In April that year, Confederate troops attacked a federal fort in Southern territory, starting a civil war that lasted until 1865. After indecisive beginnings, the Union Army took control of the war and systematically defeated the Confederate troops. In 1864 most of the Confederate territory was under the control of the Union Army. Lincoln was nominated as the Republican candidate for the Presidential election, and chose a Democrat as Vice-President, forming the national Union Party and winning his re-election by a landslide. On April 9 1865, General Robert E. Lee, commander of the main Confederate Army, surrendered and the war was over. Six days later Lincoln was assassinated while watching a play at a theater in Washington, DC.

Baltimore) learned about the arrest of Merryman, he issued a writ of habeas corpus to the officer that had detained him. The writ ordered the officer to deliver the prisoner to the Circuit Court the very next day. The officer refused to comply with the writ, declaring that the General of the Army had ordered him to detain Merryman on charges of treason for "levying War against" the United States, and that the President of the United States had suspended the privilege of the writ of habeas corpus for public safety reasons.

In his writ of habeas corpus, Taney, acting on his authority as a Circuit Judge, had ordered the Commander of the Fort where Merryman was detained, to set him free immediately, declaring, firstly, that constitutionally the President had no power to suspend the writ of habeas corpus or to authorize military commanders to suspend it. The Habeas Corpus Clause was not part of Article II of the Constitution, dedicated to the Executive Powers, but of Article I, on the Legislative Powers held by Congress. And secondly, that the U.S. Army was not allowed to detain any person for infringement of the laws of the United States unless the Army was supporting the judiciary, and acted subordinated to it, or the detainee was subject to the military code of justice. Moreover, said Taney, if a civilian was detained by the military, the duty of the officer in charge was to release him immediately to the civilian authorities for judgment according to the law. Otherwise, "the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and

pleasure of the army officer in whose military district he may happen to be found" (*Ex parte Merryman*, 17 F. Cas. 144, 152).

In spite of certain opposition in Congress to the Presidential decree suspending the writ of habeas corpus, and of several other judicial opinions reiterative of the decision included in *Ex parte Merryman*, President Lincoln ignored all those opinions and ordered the federal troops to disregard any writ of habeas corpus issued by the judiciary and not to release the detainees to the civilian authorities. In 1863, Congress finally passed an Act authorizing the suspension of the writ of habeas corpus for the duration of the civil war, thus avoiding any possible claims of unconstitutionality over the detentions.

The Military Commissions: *Ex parte Milligan*

Although abolitionism and anti-secessionism feelings were well rooted in the Northern states of the Union, as the previous case *Ex parte Merryman* shows, many civilians, and even government officers in the so-called "border states," sympathized with the secessionists and sided with the Confederacy. They helped physically by sabotaging Union infrastructures, and morally by organizing public demonstrations in favor of the Confederacy or against the conscription by the U.S. Army.

In August of 1862, the Union's Secretary of War issued an order authorizing and directing U.S. marshals and local police anywhere in the United States to arrest and

> Salmon P. Chase (1808-1873) was an American jurist and politician, 6th Chief Justice of the Supreme Court of the United States. Born in New Hampshire, he graduated from Dartmouth College at the age of 18, and was admitted to the Bar two years later. In 1830 Chase moved to Ohio to practice law there. The death of his wife five years later reinforced his religious and abolitionist beliefs. In 1849, Chase was elected U.S. Senator for Ohio, affirming always his abolitionist position. In 1855 he was elected governor of Ohio and in 1860 U.S. Senator for that state. But he immediately left this seat to become Secretary of the Treasury in Lincoln's Cabinet. As Secretary of the Treasury, Chase established a new national banking system and introduced paper money as legal currency. At the death of Roger B. Taney, President Lincoln nominated Chase as Chief Justice and the Senate confirmed him the same day. Chase held that office until his death. His stance towards blacks was radically opposed to his predecessor, Roger B. Taney, and Chase admitted the first African-American lawyer to appear before the Supreme Court.

imprison "any person or persons who may be engaged, by act, speech, or writing, in discouraging volunteer enlistments, or in any way giving aid and comfort to the enemy, or in any other disloyal practice against the United States" (Rehnquist, p. 60). All persons suspected of aiding the enemy's cause were to be tried summarily by military commissions. (Military commissions are different to Courts-martial and have fewer 'due process' guarantees than those of ordinary courts.) It is not known how many civilians were tried by military commissions in the Northern states during the war, but most probably their number exceeded three thousand.

The *Habeas Corpus Act of 1863* gave constitutional validity to the arrests and detentions of civilians without the indictment process. An allegation of some risk to

public safety was sufficient for an individual to be brought before the military courts. In October of 1864, without a court order Union troops arrested an Indiana attorney, Lambdin P. Milligan, and other civilians, who were said to manifest sympathy for the secessionist cause. That same month, all of them were tried by a military commission on charges of "Conspiracy against the Government of the United States; Affording aid and comfort to rebels against the authority of the United States; Inciting insurrection; Disloyal practices; and Violation of the laws of war" (71 U.S. 2, 6). In the trial, many of their constitutional rights were infringed, particularly the presumption of innocence, and all were sentenced to death. Their execution was scheduled for May 1865. But the war ended in April of that year, and then the defendants appealed their sentences, first to the Federal Circuit Court of the District of Indiana and, subsequently, to the Supreme Court of the United States.

The Supreme Court, presided now by Salmon P. Chase, who had replaced the deceased Roger B. Taney, ruled that, although the Habeas Corpus Act allowed the military to arrest civilians without having to hand them over to civilian courts, it did not mean that those civilians could be detained and tried without the indictment of a Grand Jury, as ordained in the Fifth Amendment. The suspension of the writ of habeas corpus did not mean that all other constitutional rights were equally suspended and that civilians could be incarcerated and held without evidence and formal charges. The Court's opinion added that the military commissions had no jurisdiction to try, convict, and sentence, civilian citizens in those states where ordinary civilian courts were open and operating normally. Moreover, the Supreme Court said that Congress was not empowered to grant such authority to the military. The Act passed in 1863 had no validity. For civilians to be tried by military commissions they must be residents in a rebellious state, prisoners of war, or Army or Navy recruits, because the constitutional "right to a speedy and public trial, by an impartial jury" of the Sixth Amendment had been "ordained and established" for peace and for war. Moreover the Sixth Amendment applied in all cases and circumstances to both governors and governed. Consequently, neither Congress nor the President, not even the judiciary, could change any of the safeguards to the civil liberties included in the Constitution, except that of suspending "The Privilege of the Writ of Habeas Corpus" under very specific circumstances. And since the civilian courts in the State of Indiana were open and operating normally when Milligan was arrested, the military commission could not constitutionally try any of its civilian population who were not an Army or Navy recruit, or a prisoner of war. Therefore, the trial of Milligan by a military commission had been unconstitutional and he should be let free.

As a result of this ruling by the Supreme Court, Milligan and the other condemned men were set free. (Incidentally, once he was free Milligan sued for half a million dollars from the Army general who had ordered his arrest, alleging that his constitutional rights had been infringed. But the courts granted him the symbolic amount of five dollars, reasoning that Milligan himself had contributed to his detention by demonstrating, in time of war, against his legitimate government.)

The most relevant issues in this Court's opinion are that it fixed and separated the constitutional powers of the President and those of Congress in terms of their powers to limit the rights of individuals, such as the right of habeas corpus, and established that, in most situations, civilian courts took precedence over military courts

to try civilians, even during times of war.

The Reconstruction Amendments

In an attempt to undermine the social structures of the Confederacy, President Lincoln signed the first day of 1863 an executive order known as the Emancipation Proclamation. The order freed –on paper at least– every slave in the rebellious states. It is not clear that the President had the power to issue such an executive order, particularly considering it was directly opposed to the current precedent established by the Supreme Court's opinion in *Dred Scott v. Sandford*. Equally, there was no practical

> Andrew Johnson (1808-1875) was an American politician and the 17th President of the United States. Born in North Carolina, into a very poor family, he became an orphan at the age of 3. Without any access to formal education, Johnson taught himself to read and write. Married at the age of 18, his wife taught him the basic elements of arithmetic. A tailor by trade, at the age of 25 he was elected Mayor of his town. Two years later he was elected Representative to the legislature of Tennessee, and in 1841 Senator in that state. From 1843 to 1853, Andrew Johnson was a Representative for Tennessee in the Congress of the United States, and in 1857 U.S. Senator. When in 1861 Tennessee seceded from the Union, Andrew Johnson was the only Senator from all the Southern states who remained in the U.S. Senate. When Republican Lincoln prepared his candidacy for re-election in 1864, he chose Andrew Johnson, a Democrat, as running mate in an attempt to bridge Southern and Northern interests. After the assassination of Abraham Lincoln, Vice-President Johnson assumed the presidency following the procedure established then in the Constitution. In 1868, the House of Representatives impeached Andrew Johnson in a dispute over dismissal of a Cabinet member, but the Senate acquitted him. (Bill Clinton has been the only other President impeached by the House.) In 1874, Andrew Johnson returned to his seat in the U.S. Senate, the only president to do so after the end of his Presidential term.

possibility of executing the order in the territories controlled by the Confederate government. The main goal of the executive order was to offer foreign powers, particularly Great Britain and France, an image of a just and righteous Union government in favor of human rights and of a wicked Confederacy opposed to them, in an attempt to prevent those foreign powers from siding with the secessionists. As the Union troops advanced into Confederate territory, they executed the President's order and freed the slaves they encountered.

The Civil war ended formally the 9th of April of 1865, when Confederate general Robert E. Lee surrendered his Army to Union general Ulysses S. Grant. In the following months, other Confederate troops surrendered to the Union Army. On the 20th of August of 1866, President Andrew Johnson, who had succeeded Abraham Lincoln after his assassination, signed a Proclamation "Declaring that Peace, Order, Tranquillity, and Civil Authority Now Exists in and Throughout the Whole of the United States of America." However, the former Confederate states continued under military control far beyond this date, during a period known as the Reconstruction Era. The name –highly euphemistic– implied the process of reorganization and restoration of the

constitutional federal institutions in the Confederate states. While the duration of the era is not clearly defined, we could say that it began in 1863, with the Emancipation Proclamation, and ended with the Compromise of 1877, when President Rutherford B. Hayes removed the federal troops that remained in the occupied Southern states.

Both Presidents Lincoln and Johnson understood that, in order to get the country out of its calamitous situation after the Civil War (particularly the Southern states), a "reconstruction" plan was needed to restore both political order and economic welfare. Such "reconstruction" certainly had its material side, since the cities, industry and agricultural framework, destroyed during the war, had to be rebuilt. But it also had a political and a social side, the aim being to return the secessionist states to the Union and to change their pro-slavery society into an abolitionist one.

The Thirteenth, Fourteenth, and Fifteenth Amendments were approved and ratified during the Reconstruction Era, and are therefore called the "Reconstruction Amendments". The Thirteenth Amendment abolished slavery in 1865; in 1868 the Fourteenth Amendment extended citizenship, and associated rights, to "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof;" and finally, in 1870, the Fifteenth Amendment prohibited the United States and any of its states to deny or abridge "on account of race, color, or previous condition of servitude" the right of the citizens to vote.

The First Reconstruction Amendment: The Abolition of Slavery

The immediate aim of the Thirteenth Amendment was to integrate into the Constitution all President Lincoln's executive orders and proclamations for the abolition of slavery. As already mentioned, the first attempt to enforce emancipation was a war punishment action against the secessionist states through the Emancipation Proclamation of 1863. At the end of the Civil War and in spite of this Proclamation, slavery was still present in a number of the states. Even in some of the Northern states, such as Delaware or Kentucky, slavery was legal, and eighteen "apprentices for life" –"slaves" by another name– were registered in New Jersey, where theoretically slavery had been abolished since 1846.

But the facts were that, in 1864, Section 2 of Article IV and the *Dred Scott v. Sandford* Supreme Court opinion were a valid part of the Constitution, and both recognized slavery as constitutionally legal. That construction could not be modified by an Act of Congress or by an executive order of the President, but only by a new opinion of the Supreme Court of the United States overturning Taney's or by an amendment to the Constitution. In January of that year, while the Civil War was still being fought, an amendment was introduced in Congress for the constitutional abolition of slavery. But the proposed text did not get the two-thirds majority in both houses required to achieve approval. Finally, in January of 1865, with the political support of the recently reelected President Lincoln, Congress approved the current text of the Amendment. On the same day, the text was sent to the states for ratification and, by December of that year, the required three-fourths of the states ratified it and the Amendment became part of the Constitution.

In addition to the emancipation of all the slaves, the Thirteenth Amendment

modified the distribution of the Representatives in Congress and the direct taxes paid by each of the several states (both procedures included in Section 2 of Article I), as well as a definition, in Section 2 of Article IV, of the rules applying to any "Person held to Service or Labour in one State, under the Laws thereof, escaping into another" state, that is, of fugitive black slaves. It should be noted, however, that it was not but until 1873, in the Slaughter-House Cases opinion, that the Thirteenth Amendment was construed to be applicable to other conditions of servitude, such as the treatment of Mexican peons or the Chinese coolies employed on the transcontinental railroad.

The Supreme Court of the United States has rarely cited the Thirteenth Amendment in its opinions; and when it has done so, it has been mainly to void state legislation that placed employees in a condition of servitude to their employers. Initially, the Court strictly limited the application of the Amendment to labor situations, but after 1968, in the *Jones v. Alfred H. Mayer Co.* opinion, the Court construed the Amendment to protect generally against any kind of racial discrimination.

It should be noted, however, that the Supreme Court excludes the applicability of the Thirteenth Amendment to certain special labor relationships, such as employment in the merchant marine, where the seamen on board relinquish some of their personal liberty. The same exclusion applies to the duties that a municipality may impose on its citizens in an emergency situation. Neither did the Amendment relieve citizens from military service or from serving as a juror.

Another peculiarity of this Amendment is that the prohibition of "slavery nor involuntary servitude" applies to the government –state and federal– as well as to private individuals. Thus, an individual subjecting another person to any form of enslavement will be charged with a violation of the Constitution, in addition to the corresponding violations of labor or penal laws.

The Second Reconstruction Amendment: The Citizens Rights

The emancipation carried out by the Thirteenth Amendment did not eliminate the racial discrimination that African-Americans were subjected to, but rather increased it. As a reaction against the Amendment, many Southern states passed "Black codes" in which, like in their British and Spanish precedents, the rights and liberties of African-Americans were curtailed or eliminated. As examples of those codes, blacks were not allowed to vote in the elections nor serve as jurors; they could not testify against a white person, carry guns, or even defend themselves if attacked by a white; blacks could not own or lease land property, and they could not work in any occupation other than agriculture or domestic service.

Other discriminatory laws were more cunning and, indeed, wicked. For example the vagrancy laws applied to traveling African-Americans who, unable to demonstrate an occupation or domicile, were sentenced to hard labor. Other examples include the apprentice laws, forcing orphans of former slaves to work for free for their parents' masters; or the anti-miscegenation laws; and so on.

It has been mentioned in Chapter 4 that, originally, the Supreme Court construed the Bill of Rights in a restrictive way, compelling the behavior of federal

government only, but not of the states. For instance, in the *Barron v. Baltimore* opinion, of 1833, Chief Justice Marshall sustained that the Fifth Amendment clause "nor shall private property be taken for public use, without just compensation" was not applicable to the Mayor and the City of Baltimore, and, consequently, they were not compelled to compensate John Barron for damages caused to his property by certain public works in the city. In 1866, Congress had passed the Civil Rights Act, which granted American citizenship to any person born in the United States, guaranteeing, thus, the citizenship to former slaves. But, given the precedent of the *Baron v. Baltimore* ruling, Congress feared that the Supreme Court could declare the Civil Rights Act unconstitutional, or that, being an ordinary law, it could be easily modified by a future Congress with different political values. To avoid any of these potential problems, Congress approved the text of the Fourteenth Amendment and submitted it to the states in 1866. The ratification process was highly controversial. Most of the Southern states refused to ratify it. So Congress set up in them military governments that approved it and, thereby, achieved the required majority for ratification. Ohio and New Jersey had already submitted their ratifications, but withdrew them in protest against the imposition of military governments. It was not until July of 1868 that the requirement for "three-fourths of the states" to approve was finally reached. (Eventually, Ohio and New Jersey ratified the Amendment… in 2003!)

The Fourteenth Amendment is the most frequently cited by the Supreme Court when it comes to the resolution of the fundamental rights of individuals. It includes some of the most important clauses applying to American jurisdiction. In its first section, the Amendment incorporates the following five clauses: the Citizens Clause, the Due Process Clause, the Equal Protection Clause, the Privileges or Immunities Clause, and finally the Incorporation Clause. (Some of these clauses are briefly explained in Chapter 7.)

A quick reading of the Amendment text –"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"– could give the understanding that its purpose was "to incorporate" the Bill of Rights to the states. The process followed by the Supreme Court to reach such "incorporation" has been, however, much slower and much more difficult, only reaching that "incorporation" well into the twentieth century.

Initially, the opinions of the Supreme Court interpreted the Fourteenth Amendment in a way that mainly limited the rights the Amendment sought to protect. As an example, in 1873 the Supreme Court had denied in its finding for the *Slaughter-House Cases* that the Bill of Rights was applicable to the states. The Court reached the paradoxical conclusion that there existed two different citizenships, federal and state; and these were independent of each other. The rights of one were separate from the other. The Court concluded that the "privileges or immunities" in the Amendment were those of the United States, but not those of the states. The opinion held that the main purpose of the Amendment was to grant American citizenship to the former slaves, and nothing else. Three years after the Slaughter-House Cases opinion, the Court resolved in *United States v. Cruikshank, et al.*, that "[t]he fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another." The Court reached a similar conclusion in 1883, in the *Civil Rights Cases*, where it declared

unconstitutional the *Civil Rights Act of 1875* because this law of Congress invaded a power reserved to the states. It was up to these, and not to Congress, to prohibit and punish any violation by private individuals of the rights contained in the Amendment.

In spite of the plain intention and meaning of the Amendment, it took the Supreme Court more than ninety years to overturn the precedent established in *Barron v. Baltimore*. In 1925, in the case of *Gitlow v. New York*, part of the Bill of Rights became integrated into the legislation of the states. But it was only after World War II that the Court construed the Fourteenth Amendment in a more liberal and generous way. For example, in 1954, the Supreme Court admitted in *Brown v. Board of Education of Topeka* that the de jure racial segregation in public schools was a violation of the Equal Protection Clause of the Fourteenth Amendment. Then, in 1966, after the assassination of three civil rights activists in Mississippi by Ku Klux Klan members, the Supreme Court ruled, in *United States v. Price, et al.*, that although the Court had consistently held to date that "[t]he Fourteenth Amendment protects the individual against state action, not against wrongs done by individuals," it now held that private individuals "acting under color of law" were indictable for any violation of the Bill of Rights. This ruling finally overturned the precedent established 90 years earlier in *United States v. Cruikshank, et al.* (Refer to Chapter 4 for a more complete list of incorporated rights).

In addition to its first section, the Fourteenth Amendment includes some other clearly "Reconstructionist" clauses. One of them punished, by a proportional reduction of Representatives in Congress, those states denying or abridging the right to vote to "any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States". Another clause prohibited any person "engaged in insurrection or rebellion against the [United States], or [who had] given aid or comfort to the enemies thereof" from becoming a relevant officer of the United States or of the states. "But Congress may by a vote of two-thirds of each House, remove such disability." Finally, the Amendment declared "illegal and void" any "debts, obligations and claims" incurred "in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave."

The Third Reconstruction Amendment: The Right to Vote and the Race

Despite the forgoing two amendments, in 1869 African-American citizens in the Southern states were consistently denied, by all kinds of tricks and stratagems, the right to vote. The former Confederate states preferred to incur the penalty imposed by the Fourteenth Amendment, and see their representation in Congress reduced, rather than allow black people the right of suffrage. To resolve this situation, Congress approved the Fifteenth Amendment, explicitly prohibiting to deny or abridge any person "his" right to vote "on account of race, color, or previous condition of servitude." The Amendment was ratified in less than a year. (But it should be recalled that almost all the Southern states were under military government at that time).

But once more, in spite of the striking clarity of the constitutional text, many states –and it should be noted both "Southern and Northern" states– found ways to

"deny or abridge the right of citizens of the United States." The administrative tricks to disfranchise African-Americans were numerous: to demand literacy tests (that were not exerted on the white population); approving special poll taxes; failing to publish the location of the voting places; setting up "grandfather clauses" that required a voting ancestor at a date prior to the Civil War; or simply applying physical violence against those black people who tried to exercise their right. (See Chapter 7 for more information on this issue.)

The Right to Secede: *Texas v. White*

As in the previous cases of *Marbury v. Madison* or *McCulloch v. Maryland*, in *Texas v. White* the Supreme Court took advantage once more of an apparently insignificant lawsuit to establish a major constitutional doctrine. The original suit was for the recovery of certain U.S. Treasury bonds that the State of Texas allegedly had illegally sold during the Civil War. The Supreme Court grabbed the opportunity and ruled that the states could not secede from the Union through any legislative or executive act of their own governments. Not even Texas, which before joining the Union had been an independent nation –the Republic of Texas–, could do so, because it had freely and voluntarily joined the Union, and once a state had become a member of the federation, it could not change its mind and secede by an act or decree of its own government. Such act or decree, even if all the citizens of that state ratified it, was null and void as were all other laws and acts enacted under a decree of secession.

When in 1861 Texas seceded from the Union and became a part of the Confederacy, it held in its coffers U.S. Treasury bonds worth ten million dollars. These bonds had been received when Texas joined the Union in 1845, as compensation over a border dispute with the United States. At the outbreak of the Civil War, the Confederate government of Texas decided to sell part of the bonds to finance the Confederate Army. On learning of these intentions, the U.S. Federal Government issued a Proclamation declaring illegal any purchase of such bonds. Despite the Proclamation, Texas secretly sold bonds worth one million dollars to George W. White and John Chiles, who in turn sold them to "good faith third party" investors. Once the war ended, the new "Reconstruction government" established in Texas sued White and Chiles for the recovery of the bonds or their value, declaring the sale had been illegal and its aim had been to foment rebellion against the United States. The lawsuit was filed in the Supreme Court of the United State since the Constitution granted in its Section 2 of Article III original jurisdiction to the Supreme Court in all cases "in which a State shall be a party."

The Court ruled the sale to be void and ordered either the return of bonds or a payment in cash to their value. But the most relevant issue addressed in the Court's opinion sustained that "[t]he Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form and character and sanction from the *Articles of Confederation*. By these, the Union was solemnly declared to 'be perpetual.' And when these *Articles* were found to be

inadequate to the exigencies of the country, the Constitution was specifically required 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, with the obligation to make itself more perfect if the circumstances required it, is not?" (74 U.S. 700, 724-725). Thus the Court interpreted that the states, once bound by the ratification of the Constitution, could not secede unilaterally from the Union.

The relationship of Texas to the Union was, as described above, different to the rest of the states. Moreover, Texas was not a former colony in the way of the original thirteen states; neither was it the result of the natural process of development taking place in the Territories owned by the United States, such as Mississippi or Tennessee; and it had not been purchased from a foreign nation, as had been Louisiana or Florida. Before its admission to the Union in 1845, Texas was an independent Republic, the territory of which its inhabitants had won from Mexico through a bloody revolution in 1836. Then, those same inhabitants had decided it was more convenient for them to join the United States than to remain independent and subject to a constant harassment from Mexico. The Supreme Court understood that "[w]hen, therefore, Texas became one of the United States, she entered into an indissoluble relation. [...] The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States." Consequently it should be, "[c]onsidered therefore as transactions under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union. If this were otherwise, the State must have become foreign, and her citizens foreigners". The Court concluded that "[t]here was no place for reconsideration or revocation, except through revolution or through consent of the States." (74 U.S. 700, 726 ff.)

The "Gutting" of the Fourteenth Amendment: The *Slaughter-House Cases*

A few years after the ratification of the Fourteenth Amendment, the Supreme Court interpreted, in the *Slaughter-House Cases* opinion, that the Amendment was designed to protect the "privileges or immunities" of the citizens of the United States and was not applicable to the "privileges or immunities" of the states.

In the middle of the nineteenth century, the surrounding area to the city of New Orleans had more than a thousand slaughterhouses, butchering over 300,000 head of cattle a year. Owing to the lack of a proper sewer system, animal entrails frequently infected the city and, as a logical consequence, its sanitary conditions were deplorable. Outbreaks of cholera, yellow fever, malaria and similar epidemics were common. To solve that problem, the Louisiana legislature passed a law granting to The Crescent City

Live-Stock Landing and Slaughter-House Company a 25-year monopoly of the business, on the understanding that the company would centralize its operations in a specified location well away from the city and its public water and sewer services. The corporation itself was not engaged in the slaughter of the animals, but it just rented space to a number of butchers, who were not allowed to slaughter anywhere else in the region.

Several groups of butchers sued the corporation and the State of Louisiana, alleging that, by granting such a monopoly, their rights protected by the Fourteenth Amendment had been violated. As a consequence of the Louisiana law, they claimed to have been forced to shut down their abattoirs and that they were deprived of their right to earn a living, which was one of the "privileges or immunities" protected by Section 1 of the Fourteenth Amendment.

By a narrow margin of 5 to 4, the Supreme Court ruled that the State of Louisiana had not violated the Fourteenth Amendment because the latter was aimed at protecting federal citizenship rights and not state citizenship rights. The Court ruling construed that there were two citizenships. "It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a state, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual. We think this distinction and its explicit recognition in this Amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several states," said the opinion (83 U.S. 36, 73-74). Consequently, the privileges protected by the federal government were not necessarily applicable to the states.

The Court recognized that the Fourteenth Amendment had formally "overturn[ed] the Dred Scott decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt" (83 U.S. 36, 73). So the Amendment was primarily intended to protect former slaves and could not be applied to other situations, such as this one.

In its dissent, Justice Stephen J. Field considered that the majority's opinion had rendered the Fourteenth Amendment "a vain and idle enactment, which accomplished nothing and most unnecessarily excited Congress and the people on its passage" (83 U.S. 36, 96).

Racial Discrimination: The *Civil Rights Cases*

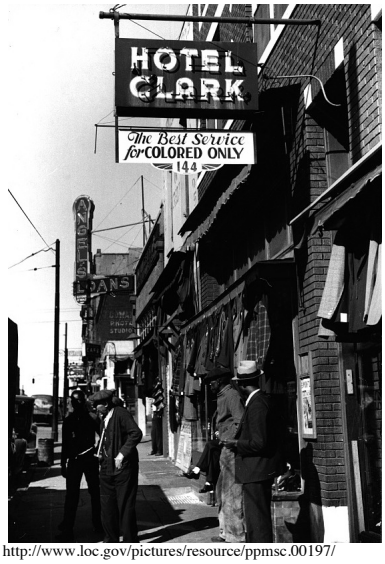
Under the title *The Civil Rights Cases*, the Supreme Court consolidated five appeals against the U.S. Congress *Civil Rights Act of 1875*, alleging the law was unconstitutional.

To prosecute racial discrimination in trains, hotels, and theaters across the country, which was prevalent at the time, Congress passed An act to protect all citizens in their civil and legal rights. In its first section the Act enacted "[t]hat all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public

conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude" (*US Statutes at Large*, vol. XVIII, p. 335). The second section established certain fines and penalties to "any person who shall violate the foregoing section."

Five cases of discrimination reached the Supreme Court as a result of appeals against lower court rulings (*U.S. v. Stanley*; *U.S. v. Ryan*; *U.S. v. Nichols*; *U.S. v. Singleton*; and *Robinson and wife v. Memphis & Charleston Railroad Company*). Two of the cases were for denying hotel accommodations to black people, another two for denying access to theaters, and the fifth and final one for denying an African-American woman access to the ladies car in a train.

By a majority of 8 to 1, the Court ruling sustained the decisions of the lower courts because "[i]t is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment" (109 U.S. 3, 11). Furthermore, the Thirteenth Amendment banned any form of slavery, but it did not prohibit racial discrimination. "Mere discriminations on account of race or color were not regarded as badges of slavery," said the Court (109 U.S. 3, 25). So Congress could not use the power granted in that Amendment to legislate against any kind of discrimination by private individuals or corporations.



http://www.loc.gov/pictures/resource/ppmsc.00197/
Marion Post Wolcott, 1939

Memphis, Tennessee, 1939

The Fourteenth Amendment granted Congress "the power to enforce, by appropriate legislation, the provisions of this article." So Congress could apply any corrective measures against any state legislation impairing the rights protected by the Amendment, namely, citizenship, due process, equal protection Clause and the rights described under privileges or immunities. The Court decided, however, that Congress was not allowed to legislate on the matter because the power to enforce such civil rights on its citizens was reserved to the state. Otherwise, the Court said, the legislative power of the states would be empty and meaningless. It ruled that the *Civil Rights Act of 1875* had invaded the reserved power of the state. Thus, the Supreme Court concluded, "the first and second sections of the act of Congress of March 1st, 1875, entitled 'An Act to protect all citizens in their civil and legal rights,' are unconstitutional and void" (109 U.S. 3, 26).

"Separate but Equal": *Plessy v. Ferguson*

As revealed by the previous discussion of racial discrimination cases, by the end of the nineteenth century segregation was still prevalent across United States. The Reconstruction efforts to eliminate that discriminatory situation by the Thirteenth, Fourteenth and Fifteenth Amendments had foundered in the face of state legislation

enacted to sustain the status quo existing before and during the Confederacy. In the Southern states, discrimination, indeed, was exacerbated by a spirit of revenge against the emancipation of the slaves. The Supreme Court opinions of the time seemed to connive with the states, being more oriented toward restoring the former discriminatory practices than applying the clear text of the Amendments. One of these opinions of the Supreme Court, worthy of further attention, was *Plessy v. Ferguson*, of 1896.

Homer Plessy, a citizen of the State of Louisiana, challenged, on the grounds that it was unconstitutional, a law requiring railroad companies within its borders to apply racial segregation in their trains. He had been forcibly detained and accused of civil disobedience. In 1892, Plessy purchased a first class train ticket and sat in the "whites only" car. Although seven of his great-grand parents were white, Plessy was considered by the state to be colored, so the conductor ordered him to move to a car for blacks. When Plessy refused to comply, he was ejected from the train by force, detained and sentenced to prison for violating Louisiana's *Separate Car Act*, which required "equal but separate" railroad cars for blacks and whites in its trains.

By a majority decision of 7 to 1 (the Report indicates that one of the nine Justices did not participate in the decision of this case), the Supreme Court ruled that the state laws forcing racial segregation were not unconstitutional as alleged by the plaintiff. According to the Court, the Louisiana law that required the railroad companies operating in the state to implement the necessary measures to guarantee the racial separation in their trains, did not violate the Commerce Clause nor the Thirteen Amendment, since the Court had already "intimated" in 1873, in the *Slaughter-House Cases*, that the Thirteenth "amendment was regarded by the statesmen of that day as insufficient to protect the colored race from certain laws which had been enacted in the Southern states, imposing upon the colored race onerous disabilities and burdens, and curtailing their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value; and that the fourteenth amendment was devised to meet this exigency" (163 U.S. 537, 542), but that this last Amendment was also insufficient. "The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power" (163 U.S. 537, 544).

For the Court, the doctrine of "Separate but Equal" was the best way to save all social prejudices of the time, since "[a] statute which implies merely a legal distinction between the white and colored races –a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color– has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude" (163 U.S. 537, 543).

In his solitary dissent, Justice John Harlan denounced, nevertheless, that "[t]he white race deems itself to be the dominant race in this country. [...] But in view of the

constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guarantied by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race. In my opinion," Justice Harlan concluded, "the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case" (163 U.S. 537, 559).

Shortly after Plessy, in 1899 the Supreme Court extended the same doctrine of "Separate but Equal" to the American public schools in the opinion *Cumming v. Richmond County Board of Education*. The doctrine the Supreme Court had sanctioned was the constitutional norm in the United States until 1954, when the Court overturned it in the opinion expressed in the case of *Brown v. Board of Education*.

States and Territories of the United States of America
July 10 1890 to January 4 1896

http://en.wikipedia.org/wiki/File:United_States_1896-01-1896-05.png
User:Golbez/GNU Free Documentation License