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The Civil War: A Bittersweet Disappointment

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Introductory Consideration

The North's victory in the Civil War accomplished far less in establishing racial equality than what was expected. There are three factors that explain Supreme Court rulings that led to this failure. The first is political. The Court truly did not believe that a freed slave was equal to a white man. They agreed with the theory expressed by President Andrew Johnson when he issued his message vetoing the Civil Rights law.[1] The second, guaranteeing equal rights, the true purpose of the Fourteenth Amendment, did not become a part of the Constitution until after Lincoln's death. One of the sponsors of the Fourteenth Amendment was Senator Roscoe Conkling from New York and the other Senator Hiram Bingham of Connecticut. Conkling, in an argument before the Supreme Court, stated that the Amendment was to provide individuals and joint stock companies joint protections against discriminatory state and local taxes. During his lifetime, co-sponsor, Bingham, never voiced any contradiction with respect to what Conkling had said.[2] Later Boudin, a noted Constitutional scholar, wrote *Truth and Fiction about the Fourteenth Amendment. Infra at footnote 20.* The cases, while unsatisfactory, when taken as a whole do at least opine that the purpose of the Fourteenth Amendment was to protect the negroes. *Slaughter-House Cases,* 83 U.S. 36 (1873). But, one must never forget the comment later discussed at page 8 infra that the intent of the Fourteenth Amendment remains unclear. The third factor is that despite the initial rulings of the Court, focusing on

the words "no State …", there was never any movement to amend Section 5 of the Fourteenth Amendment to broaden its prohibition to include individual action.

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W.E.B Du Bois, responsible for founding the NAACP, wrote in 1903:

> The freedman has not yet found in freedom his promised land. Whatever of lesser good may have come in these years of change, the shadow of a deep disappointment rests upon the Negro people…[3]

Booker T. Washington, President of Tuskegee Institute, in an 1895 address stated:

> The wisest among my race understand that the agitation of questions of social equality is the extremist's folly…[4]

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The Civil War – the bloodiest War in history fought by Americans against fellow Americans – resulted in the loss of over 750,000 lives – more than all wars in American history combined, this two percent of the population – as well as an additional 200,000 who were wounded, without there being adequate anesthesia available and with the "saw" as the chief surgical instrument.[5] Families were splintered, father against son, brother against brother, cities wasted, the torture and slaughter of Union soldiers at Andersonville and Libby prisons and so much horrific harm, all to accomplish the goals of saving the Union, freeing of the enslaved, providing them with equality and protecting them against marauding white supremacists, which included members of the Ku Klux Klan and the group known as the Redeemers. In the battle at Antietam, the story goes that a Confederate major who lay wounded in the chest close by the Southern side could hear the cries for help from a private who lay wounded on the Union side. He recognized the cries as coming from his brother. The major refused medical aid and directed the medical corpsman to cross the line and care for his brother. Soon the corpsman returned and

told the major his brother had died. Sobbing, the major was taken to a first aid station where he too died. Both were buried side by side in the same cemetery but this provided little solace to their parents. Virtually all households in the South had a member who belonged to a white supremacist group.

Though the Union prevailed, and the negroes[6] went free, they suffered terribly, for there were no jobs available to them and Southerners believed that the Civil War was lost only because they were vastly outnumbered. Slavery "informs all our habits of thought, lies at our basis of our political faith and of our social existence," wrote William Henry Trescott who had been President Buchanan's secretary of state. He went on to write, "in a word, for all that we are, we believe ourselves, under God, indebted to the institution of slavery-for a national existence, a well ordered liberty, a prosperous agriculture, an exulting commerce, a free people and a firm government."[7] In Georgia, it was a high crime to teach a slave to read or write. Those enslaved who had escaped and were re-captured were often returned to their masters with their large toe surgically removed so they could not run any longer in an attempt to flee.

The result of the Civil War did not change the way Southerners held their prejudiced views which was that negroes ought continued to be treated as inferior and as mere property. The fact is, though freed from slavery, negroes still were not allowed in the District of Columbia without a pass. In South Carolina hundreds of negroes were imprisoned and two or three were frequently hanged at a time. During one month, five so lost their lives on a given day in May 1866.[8] Without work or monies they roamed aimlessly and were particularly vulnerable to Southerners' vicious behavior. In 1865 a Freedman's Bureau was created by Congress. It was designed to aid the freed slaves in finding work and housing, with the goal of making them self sufficient. It proved to be wholly ineffective in light of the opposition of the Confederates, and

the inability of the Union to enforce its orders. It was disbanded in 1871, leaving the freed slaves to fend for themselves.

For just over a decade following the end of the Civil War, a small number of those who had been enslaved believed in the dream of equality, for with the help of Radical Republicans, a number of negroes were elected to public office and to Congress, but this was short lived.

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What has always troubled students and scholars alike is why the Supreme Court resorted to deliberate, narrow decision-making with respect to the Enforcement provisions of the 14th Amendment[9] [particularly the Due Process Clause and the Equal Protection Clause], which became part of the Constitution on July 28, 1868. Congress was authorized in Section 5 to enforce, by appropriate legislation, the provisions of this Amendment. Court decisions discussed below had the effect of stripping the federal government of its ability to protect the freedmen's civil rights and allowing lawless whites to subject them to relentless terrorist acts.[10] One author wrote that "[b]y the dawn of the Twentieth Century, the United States had become a nation of Jim Crow laws, quasi-slavery and precisely the same two-tiered system of justice that existed in the slave era."[11] Black Codes predominated, discrimination continued unabated.

The question is whether this was the result solely of the decisions by the Court, or the conduct of the sponsors of the 14th Amendment and Congress, and the several legislatures, in choosing the language of the Amendment. While Lincoln pressed for the 13th Amendment, which he did not live to see become part of the Constitution, it appears that the 13th Amendment was but a makeweight into his final beliefs expressed in the Declaration of Independence, the Emancipation Proclamation and the Gettysburg Address that the Declaration of Independence

was meant to ensure the equality of all men, a principle which was later adopted by the addition of the 14th Amendment to the Constitution.

The Period of 1856 to 1865

In 1856, Chief Justice Taney, joined by six other justices in deciding the case of *Dred Scott v. Sanford*,[12] wrote in part: (1) Scott was not a citizen of any state and could not bring suit in federal court. In arriving at this decision, the language used was clear to the nation that the Negro could never be regarded as anything other than property, was unfit to associate with the white race, and had no rights which the white man was bound to respect. (2) Even though Scott had resided in a free territory, this did not make him a free man when he returned to a slave state. (3) The Due Process Clause of the 5th Amendment barred any law, such as the Missouri Compromise, that would deprive a slaveholder of his property, such as slaves, upon the incidence of migration into free territory.[13] The marker at Dred Scott's gravesite in St. Louis County correctly states that the result of the decision in his case was "ONE OF THE EVENTS THAT RESULTED IN THE CIVIL WAR."

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It was on April 9, 1865 that General Lee surrendered his army of Northern Virginia to Union General Ulysses S. Grant. Washington was aglow: a poster announced "[t]he year of jubilee has come! Let all the people rejoice! Two hundred guns will be fired at 3 o'clock, April 10th to celebrate the victories of our armies."[14] The War and the Thirteenth Amendment had "destroyed one of the two American ways of life forever and it had changed the legal status of the enslaved. It ended as it had begun with no one able to say exactly why it had come about and what it meant now that it was finished."[15] As one explores the reasons for the War, the prevailing belief is that it was fought to save the Union, that the Emancipation Proclamation freeing, as of

January 1, 1863, only those enslaved in the confederate states was motivated more by an attempt to weaken the South, than in the altruistic belief that slavery should end.[16] Few could deny men bled and died in a War that was in part waged to end slavery and to provide equality to the enslaved.

Despite the portrayal of President Lincoln in the movie *Lincoln* as having been motivated mainly by the moral issue of freeing the slaves, he had wrestled with a number of options to deal with the question of slavery. These included his view expressed in 1862, that the most effective way to deal with the question of slavery was to separate the races by colonization. He had advocated black emigration, for freed blacks to be willingly colonized in Liberia, Haiti, Central America or Moravia. In a delegation at the White House before freed blacks, President Lincoln in July 1863 recognized that no race has suffered torture and abuse equal to that of the Negro race, all at the hands of white racists. He went on to state that "it is better for us both, therefore, to be separated."[17] Leaving the meeting, Frederick Douglass stated that he believed Lincoln was committed to perpetuating slavery.

President Lincoln wrote in 1858:

> I am not, nor ever have been, in favor of bringing about in any way the social and political equality of the white and black races. I am not, nor ever have been, in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with white people. There is a physical difference between the white and black races, which I believe will forever forbid the two races living together on terms of social and political equality.[18]

President Lincoln made clear that he believed the Union had to be saved at whatever cost. He wrote Horace Greely, editor of the influential *New York Tribune* on August 22, 1862:

> [M]y paramount object in the struggle is to save the Union and is not either to save or destroy slavery. If I could save the Union without freeing any slave, I would do it, and if I could save it by freeing all the slaves, I would do it; and if I could save it by freeing some and leaving others alone, I would do that also. What

> I do about slavery and the colored race, I do it because I believe it helps to save the Union…

Greely criticized Lincoln for slowness in moving against slavery in 1862 and for insisting later on in 1864 for an abolition of slavery as an absolute condition of peace. Lincoln had earlier written to Joshua Speed that enslaved men were indeed encompassed by the words "all men are created equal" which was contained in the Declaration of Independence. He repeated this in his Emancipation Proclamation on January 1, 1863 and in the Gettysburg address on November 19, 1863. In 1863, he stated, repeatedly, that he had no intention of interfering with slavery in the states where it already existed. He supported the fugitive slave laws, the right of the states to establish slavery, and at a time, pleaded for support for a constitutional Amendment that would protect slave states from federal interference with the institution of slavery. His ideal of a statesman, Henry Clay, earned Lincoln's admiration. In his eulogy of Clay, Lincoln made clear that he was speaking at Clay's memoriam because Clay had rejected the abolitionist position, for that it would split the Union into fragments, but there came a time when he spent many hours trying to convince legislators of the wisdom and need for an addition to the Constitution abolishing slavery.

One has to conclude that by 1863, Lincoln was fairly committed to ending slavery and had evolved over time to the position that Greely criticized in 1864. The events of Lincoln's position over time were best described in Professor McPherson's book 'Tried By War.'[19] Professor McPherson not only extols Lincoln as a gifted writer but as a hands-on President during the War, issuing orders, visiting battlegrounds, strategizing and planning military actions, that is extraordinary when compared to other Presidents. He made frequent use of telegraphic communications with his field commanders.

President Lincoln reached a final position in his thinking – he found "the better angels of his nature" – when he came to the belief that it was necessary that there had to be an Amendment to the Constitution abolishing slavery, protecting the rights of negroes, ensuring their equality and protection against violence as a condition for the cessation of the War and entreaties of the South for the end of the Civil War.[20] He spent many hours trying to convince legislators of the wisdom and need for additions to the Constitution. Tragically, he did not live to see the ratification of the 13th Amendment, for he died on April 15, 1865. It was on December 18, 1865 when Secretary of State Seward certified that the 13th Amendment had become a part of the Constitution. The 14th Amendment became part of the Constitution on July 28, 1868. Lincoln's legacy in the end was that freed slaves would enjoy freedom, equality, protection against racist terrorist acts of violence, and this would be the best way to save the Union.[21]

Steven Spielberg's portrayal of Lincoln as having a single-minded high moral commitment at all times to free slaves is not all borne out by the way history has shown he wrestled with the problem.

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One must agree with the observation that:

> …nobody was happy with the chaos and disarray and sheer brutality of events in the former Confederate states. Under military government blacks began to play a role proportional to their number in state legislatures, but as the states gradually escaped from what they described as "carpetbagger" government, the black freedmen were systematically disenfranchised and prevented from voting by organized campaigns of violence, murder, and lynching, in which the nascent Ku Klux Klan played a large role. In very short order, de facto racial segregation,

> share-cropping, and political impotence enforced by whites became the substitute for slavery in the South. Grant was unwilling – again very much like Ike [Eisenhower] less than a hundred years later – to use federal force to defend the rights of blacks or to challenge the Southern status quo – Grant had won the Civil War but had no interest in refighting it – and at the same time he had no wish to reward former Confederates or unreconstructed racists. He preferred to get the army out of there and leave the Southern states to their own devices…[22]

Post-Civil War Decisions Interpreting the Power of Congress Under the 14th Amendment[23]

Familiarity is assumed as to the five sections of the 14th Amendment. We deal with Sections 1 and 5, and the way the Supreme Court interpreted these sections.

The way the Court intended to construe Section 5 of the 14th Amendment was presaged in the 1873 *Slaughter-House Cases*.[24] The Court obviously was intent on maintaining a balance of power between the states and the federal government.

At issue was the constitutionality of the enactment of a law by the state of Louisiana which required that butchers of whatever color have their animals slaughtered at a central location which was owned by one corporation. The butchers, all of whom were white, claimed as plaintiffs that their privileges and immunities as citizens of the United States under the 14th Amendment were infringed by this state action which had created a monopoly. Justice Miller, writing for a majority of the Court held that the 14th Amendment's privileges or immunities clause did not make the federal government *the protector of all civil rights*.

While the federal government could and did protect a narrow list of rights traditionally associated with national citizenship such as habeas corpus, the right to assemble peaceably, to

petition for a redress of grievances, and the right to an impartial trial, citizens were nonetheless still required to seek protection of most of their civil rights by an appeal to the state. The Court made clear it doubted whether any action of the state, not directed by way of discrimination against negroes as a class, or on account of their race, would ever be held to come within the purview of the privileges and immunities clause, or of the equal protection clause of the 14th Amendment. The specific holding in the *Slaughter-House Cases* was that the state did not violate any privilege encompassed within the guarantee of the privileges or immunities clause, namely of United States citizenship.

Historians believe that had the Court not made this distinction between federal and state rights, Section 5 of the 14th Amendment would have given the federal government more power to protect the civil and natural rights of freedmen against the private actions of racists. Authorities believe Justice Miller's opinion for the Court revealed a Court tired of the excesses of the Radical Republicans.[25]

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Justice Goldberg, concurring in *Bell v. Maryland*, [26] wrote:

> Our sworn duty to construe the Constitution requires…that we read it to effectuate the intent and purposes of the framers. We must, therefore, consider the history and circumstances indicating what the Civil War Amendments were in fact designed to achieve.

Just what was intended by the 14th Amendment and the power that it conferred upon Congress, were key questions that would make the difference between whether Congress, under Section 5 of the 14th Amendment, could protect blacks against private actors who committed vicious acts against their persons or property and denied them basic civil rights.

As to the meaning of the 14th Amendment, the literature is extensive.[27] Some support the view that Congress was to be given the power to pass remedial legislation under Section 5 to

protect the rights of those who were injured by private actors. Others argue that a reading of the debates supports the view that Congress could only act to correct state action.

The great Learned Hand wrote that "history does not elucidate [the] contents of the 14th Amendment, cast as [it is] in such sweeping terms."[28]

However, what better evidence is there of the intention of the framers of the 14th Amendment to protect negroes against violations of their civil rights by private actors than the virtually contemporaneous enactments of the Enforcement Acts of 1869, 1870, 1871 and 1875 – all enacted pursuant to Section 5. These Acts provided for civil and criminal penalties against private citizens acting to offend the purpose of Section 1 of the 14th Amendment.

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Mr. Justice Strong, writing for the Court in *Ex parte Commonwealth of Virginia*[29] stated:

> *One great purpose* [emphasis added] of these Amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended to take away all possibility of oppression by law because of race or color…We have occasion in the *Slaughter-House Cases*, 16 Wall. 36, to express our opinion of their spirit and purpose, and to some extent of their meaning.

In *Ex parte Commonwealth*, the Court upheld the conviction of an official – a state judge – who acted purposefully to exclude negroes from grand and petit juries in violation of an Enforcement Act passed pursuant to Section 5. The Court in *Tennessee v. Davis*[30] and *Strauder v. West Virginia*[31] upheld federal criminal offenses against defendants who had obstructed the empanelling of a federal jury.

Following the conclusion of the Civil War, the Ku Klux Klan and the Redeemers roamed freely, believing they were beyond the reach of prosecution by federal authorities. No worse example of the way negroes were mistreated at their hands exists on record than the so-called

"Colfax Massacre" in Colfax, Louisiana in April 13, 1873. Two hundred members of a black state militia group guarded the Colfax courthouse where officials of the Republican Governor had their offices. A group of 300 white vigilantes, consisting mostly of armed members of the Ku Klux Klan and other white supremacist groups arrived on horseback, bringing a canon. They stormed the Courthouse intent on seizing the governorship for another candidate. After a short battle, the freedmen surrendered and laid down their arms, whereupon the vigilantes shot and killed over 150 unarmed freedmen [there has been a dispute as to the number killed, but the marker at the site states that the number was 150].

The "Colfax Massacre" was said to "kill the hopes and dreams of reconstruction," but it is acknowledged that the prosecution's case was seriously fraught and the trial tactics of the prosecutor were entirely misplaced. The proof dealt with murder and conspiracy, but there was no reference to the protection of the Fourteenth Amendment during trial or final argument. It was for this reason that there was widespread speculation that the prosecution failed to satisfy its obligation to tie the murderous acts to the Fourteenth Amendment. The indictment did make reference to the victims as persons of color and that was a reason for the terrible acts of terror, but the prosecution in presenting the evidence did not sufficiently raise the matter of racial motivation or connect by the evidence or argument the link between the actions of the wrongdoers to the Enforcement Act or the Fourteenth Amendment. Of course, Justice Bradley who later passed on the decision of the trial judge "seemed to lose sight of the race war in the prosecutions recreation of individual acts of violence."[32] The Enforcement Act was designed to prohibit violent acts of the KKK and other organized groups, which were designed to persons of rights protected by the Fourteenth Amendment.

The *New York Times* stated that the massacre was appalling in its atrocity and "would appear to be more like the work of fiends than that of civilized men in a Christian country."[33] Nine wrongdoers, among the large group, were prosecuted under the Enforcement Act of 1870. This Enforcement Act was passed pursuant to the Civil Rights Act of 1866. It forbade the intimidation of persons freely exercising any right or privilege secured by the Constitution. Three men were found guilty of conspiracy and fifteen other charges.

Justice Bradley, sitting in circuit in *United States v. Cruikshank,*[34] in ruling on the denial by the trial court of motions in arrest of judgment for those convicted of participating in the Colfax crimes, wrote that the Fourteenth Amendment did not authorize Congress to pass a general system of municipal law for the security of personal property, nor did it authorize Congress to pass laws for the punishment of ordinary crimes, for that was the responsibility of state government. Bradley relied on the decision in the *Slaughterhouse* cases,[35] stating that the exclusion of the actions of individuals from the purview of the Fourteenth Amendment was contrary to the intention of the framers. Even though the indictment made reference to the Fourteenth Amendment, Bradley believed that it was beyond the scope of the federal government to sustain a prosecution, except as state action was involved or agents of the state were wrongdoers. "Where acts of individuals threaten the enjoyment of the rights of citizens," according to the Bradley decision, "the federal government was helpless to interfere. The power of Congress simply did not extend, for the passage of laws were sought to suppress ordinary crimes committed within the state."

The case was reviewed and decided by the Supreme Court in 1876.[36] Chief Justice Waite delivered the opinion for the Court and affirmed the reversal of the grant of the motion below. The Court held that:

> The government of the United States, although it is, within the scope of its powers, supreme and beyond the States, can neither grant nor secure to its citizens rights or privileges which are not expressly or by implication placed under its jurisdiction. All that cannot be so granted or secured are left to the exclusive protection of the States. To bring a case within the operation of the act of 1870, [known as the "Enforcement Law"] it must appear that the right the enjoyment of which the conspirators intended to hinder or prevent was one granted by the constitution or laws of the United States.

The Supreme Court's decision and opinion was a victory for white supremacy, so technical was the language of Justice Bradley and the Court. While Chief Justice Waite acknowledged that race was the cause of the hostility "it was not so averred." He wrote "the defect is here is not in form … but in substance." He believed that only narrowly defined charges of racial discrimination tied to the requirements of the Fourteenth and Fifteenth Amendments could invoke the protections of these Civil War Amendments. Those studying *Cruishank* came away with the view that Bradley sitting in Circuit had dismissed the prosecution on technical grounds whereas Waite dealt more with substance and the limited power of the federal government.

In *United States v. Harris,*[37] the government proceeded with a prosecution under the Enforcement Act on 1871, based on Section 5, known as the Ku Klux Klan Act, which had been enacted by Congress to protect persons against invasion of their rights by the state or by private actors. The Court held that the "state action doctrine" mandated a reversal of the convictions for the reason that the criminal penalties portion of the statute (Section 2 of the 1871 Enforcement Act) was unconstitutional.[38] The joy that this must have brought to white supremacist groups can only be imagined.

However, the most egregious example of the Supreme Court's unwillingness to treat negroes as equal under the law was the decision in the *Civil Rights Cases*,[39] which involve five consolidated cases. The contested issue in these cases was the constitutionality of the Civil

Rights Act of 1875. The Act was passed pursuant to what the Congress believed its powers to be under Section 5 of the 14th Amendment. It sought to protect the civil rights of all citizens and provided, in part, that anyone violating the rights of persons to the full and equal enjoyment of accommodations, advantages, facilities, and privileges of public conveyances on land or water, theaters or other places of public enjoyment would be liable for damages in a civil action and also would be guilty of a misdemeanor. The *Cases* involved: the refusal to serve a meal to a Negro at a hotel; the refusal to accept a Negro as a guest at a hotel; the refusal of a doorkeeper to allow entry of a Negro to sit in the dress circle of an opera performance; the denial of a black woman with a first class ticket to have access to the ladies' car on a railroad and to restrict her to a coach known as the smoking car; the refusal to service a black in a barbershop.

The Court in 1883 denied relief to the Plaintiffs by declaring the Enforcement Act of 1875 unconstitutional. Justice Bradley, delivering the opinion for the Court, wrote that to enforce the Act would be to permit Congress "to legislate upon subjects which are within the domain of the state." He went on to write that Congress only had the power under Section 5 to enact *corrective* legislation that was necessary to counteract laws that the states adopted in violation of provisions of the 14th Amendment. Justice Bradley concluded the opinion for the Court by writing:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected.[40]

Justice John Marshall Harlan, in his dissent, wrote that the pre-Civil War Supreme Court had upheld Congressional laws forbidding individuals to interfere with recovery of fugitive

slaves and that was precedent enough to sustain the Act of 1875. To strike down the Act would mean that "the rights of freedom and American citizenship cannot receive from the Nation that efficient protection which heretofore was unhesitatingly accorded to slavery and the rights of masters." He continued that even under the "state action doctrine," the Act was constitutional, since so many of the defendants worked for companies that had been licensed and could be viewed as agents or instrumentalities of the state. In his closing, he wrote that "the Amendments had been passed not to favor the freedmen, but to include them as equals, and if they were not deemed protected, then at some future time, it may be some other race that will fall under the ban of discrimination…there cannot be in this republic any class of human beings in practical subjection to another class."

An editorial in The *New York Times* on October 16, 1883, stated that the paper felt vindicated in its prediction that the Court would overturn the Enforcement Act of 1875. The *Brooklyn Daily Eagle* in 1883 wrote that it was time that the freedmen learned that "his advancement from a position of mere dependency on his white neighbors was to be brought about, not by fulminations of politicians but by self-respect, patience, hard work and general good behavior on his own part…the Supreme Court continues to be true to the spirit and structure of our government."

Few cases have had such negative references in their history as this case. The noted constitutional scholar Lawrence Tribe, in his treatise *American Constitutional Law*,[41] concluded that "…the Court proceeded, most *(in)famously* [emphasis added] in the 1883 *Civil Rights Cases* to construe restrictively or simply to invalidate, much of Congress' post-War civil enforcement of legislation by adopting an extremely narrow view of the legitimate objects of the Fourteenth

Amendment, thus preserving in law autonomy that the states had largely lost politically in the wake of the Civil War."[42]

After the 14th Amendment was construed only as a prohibition against state action, the badges of slavery increased by the actions of private persons. Negroes suffered not only indignities at the hands of private actors, but also were murdered, large numbers were lynched, and other horrendous acts were committed against them. State prosecutions were few, as were convictions for criminal offenses.

Lincoln's earlier remark about Negro suffering still haunts us. The cases decided under the 14th Amendment in the post-Civil War era raised serious concerns that, given the enormous cost to the nation by reason of the Civil War, the civil rights of the negroes were not fully protected. It is true that the addition of the 13th Amendment and the right to vote in the 15th Amendment were critical steps afforded to the freedmen. [These Amendments, however, continued to be thwarted by court decisions, and the action of states, and warrant separate treatment.] Violence to life and property continued unabated.

Despite the enormous criticism of these decisions, which had the effect of opening the door to vigilante violence and more, the Supreme Court as late as 2000, in *United States v. Morrison*[43] still followed them as *sound* authority. There, then Justice Rehnquist, for a divided court, wrote:

> The force of the doctrine of *stare decisis* behind these decisions [*Civil Rights Cases* and *United States v. Harris*] stems not only from the length of time they have been on the books, but also from the ***insight*** [emphasis added] attributable to members of the court at that time.

How does one explain the actions of the post-Civil Rights era justices? No doubt, it was in keeping with the culture of the times following the end of the Civil War that many persons expressed agreement with the message accompanying President Johnson's March 27, 1866 veto

of the Civil Rights Act. The president questioned whether it was "sound policy" to make an entire colored population citizens of the United States. "Can it be reasonably supposed that they possess the requisite qualifications to entitle them to all the rights of federal citizenship? Have the people of the several States expressed such a conviction when the four million freed men have just emerged from slavery?"[44] As late as 1898, the Supreme Court in *Williams v. Mississippi*[45] (where it was held as to the claim that there was prejudice by administrators in the selection of grand jurors, a defendant could not rely on circumstantial evidence to demonstrate unlawful discrimination), the court quoted, without adverse comment, the terrible words contained in the opinion of the Supreme Court of Mississippi in the 1896 case of *Ratliff v. Beale*[46]:

> By reason of its previous condition of servitude and dependencies, this race had acquired or accentuated certain peculiarities of habit, of temperament, and of character, which clearly distinguished it as a race from the whites; a patient, docile people, but careless, landless, migratory, with narrow limits, without forethought and its criminal members given to furtive offenses…

By the end of the century the Court announced a "separate but equal" doctrine in *Plessy v. Ferguson.*[47] It was not a case concerned with education. A Negro paid for a first class ticket on a railroad between the cities of New Orleans and Covington in the State of Louisiana. The company was incorporated under the laws of Louisiana as a common carrier. While the case dealt with the 13th Amendment, it demonstrates how ready the Court was to embrace the doctrine that negroes would not enjoy laws that would be the same for blacks as well as whites.

The Court ruled that the Louisiana statute providing for separate railway carriages for white and colored races did not violate the Amendment by having imposed any badge of slavery, provided there were separate and equal accommodations for white and colored races. Justice Harlan, dissenting, wrote that the 13th Amendment does not "permit the withholding or the

deprivation of any rights necessarily inhering in freedom...It decreed universal civil freedom in this country."[48] He further wrote that there should be no law discriminating between the civil rights of white and colored citizens; the Civil War Amendments had eradicated the rights of states to enact such laws. The law of Louisiana, he stated, was "hostile to both the spirit and letter of the Constitution of the United States. If laws of like character should be enacted in the several states of the Union, the effect would be in the highest degree mischievous."[49] It need not be expansively discussed how the negroes carried badges of slavery by reason of the separate but equal doctrine until the action of the Court in 1954.

It is terribly disturbing that even though the Court post-Civil War contained giants of the Court, Justices Bradley, Brewer, Miller, Field, Waite and Harlan, they (with the exception of Harlan) refrained from embracing what was the later expressed approach of Justice Brennan, who had pointed to alternative available provisions of the Constitution to uphold Congress' power. The post-Civil War Justices in the 19th Century chose not to do so.

Means By Which The Congressional Enforcement Acts Under Section 5 Could Have Been Upheld

Was the "state action doctrine" the only way the post-Civil War era Court could have decided the breach of the Fourteenth Amendment? Was the legislative history so clear that Congress could only act to correct discriminatory state action?

The Enforcement Acts of 1869, 1870, 1871 and 1875 could have been sustained by reference to Article 1, Section 8, Clause 18, authorizing Congress to make all laws "which are necessary and proper" to effectuate rights guaranteed by the Constitution.[50] [The necessary and

proper clause is often referred to as the Constitution's "elastic" clause]. The Acts similarly could have been sustained by reference to Article 1, Section 8, Clause 3, the commerce clause.[51]

Justice Brennan, in *United States v. Guest,*[52] expressing what he believed to be the true power of the Congress and the Court under Section 5 of the 14th Amendment, appended a lengthy statement which a majority of the Justices joined. He argued Congress' power was broader than that cited by the Court in the *Civil Rights Cases*. He wrote:

> Although the Fourteenth Amendment itself…speaks to the State or to those acting under the color of its authority, legislation protecting rights created by that Amendment…need not be confined to punishing conspiracies in which state officers participate. Rather, Section 5 authorizes Congress to enact laws that it concludes are reasonably necessary to protect the right created by and arising under that Amendment…

In *Katzenbach v. Morgan*,[53] the Court did resort to the commerce clause as a source of power, using it to uphold the constitutionality of a provision of the Voting Rights Act.

Congress could have made clear in a Message accompanying the Enforcement Acts following the Civil War, that it was enacting the legislation under any one of the above provisions or theories. It did not.

The Bureau Of Refugees, Freedmen And Abandoned Lands Referred To As The Freedman's Bureau

The Freedmen's Bureau bill was established by President Lincoln with the intention of assisting freed slaves by affording them clothing, education and funds to make freedom a reality. It was not enough to simply notify an enslaved person that he/she was now free, but provide them with guidance or assets with which to allow for integration into society.

The Richmond, Virginia riots following Lee's surrender made it clear that those enslaved needed assistance. It was an important Bureau during the period of the early reconstruction

period in providing necessary assistance to the freed men, but it was disbanded in or around 1872, well before it had served the high minded purpose which prompted its establishment. One of its key purposes was to help find lost family for African Americans, teach them to read and write, and provide legal advocates, but by 1869, the Bureau lost most of its funding, and as a result, had been forced to cut most of its staff.

It is absolutely incredulous that President Andrew Johnson had vetoed a renewal of the charter for the Bureau because he thought it was unconstitutional. For a race that generally knew no benefits of freedom, with education being denied, and states punishing by a felony conviction those who had sought to teach the enslaved reading and writing, with educational facilities and colleges being denied to the enslaved, for many it was thought to be more to their advantage to stay with the plantation owner than to venture out without adequate programs to assure equality. States did meet their obligations with respect to the feeding of the formally enslaved, but the negative feelings had the effect of causing many negroes to correctly feel they are unwanted. If there is fault to be found with President Lincoln's final and deep commitment to the end of slavery, it was his failure to establish, with the aide of Congress, a viable and long lasting Freedmen's Bureau.[54]

Conclusion

When one looks back to the post-Civil Rights era and the actions of the Court and Congress in the 19th Century, no fair minded reader can say that the Court did what it could to read Section 5 of the 14th Amendment and various Enforcement Acts in a way to vindicate the

legacy of President Lincoln. But if the Court bears responsibility for these failures, then it must be shared with the sponsors of the 14th Amendment [Conkling and Bingham] and the several legislatures which had the opportunity to fashion the Amendment with language that was later embodied in the several Enforcement Acts, the first enacted as early as 1869. Given the predilection of 19th Century justices, 1869 was too late to act, given that the 14th Amendment became part of the Constitution in 1868, and no member of Congress had the courage to propose an Amendment that would make clear that Congress intended by a new Amendment to authorize provisions of the various Enforcement Acts.

Were there enough reasons to conclude that so much was accomplished in consequence of President Lincoln's efforts and the enormous loss of life in the War? The struggles of the Civil rights movement, and the actions of the South in violent opposition to the rightful claims of equality, the eventual need for the Civil Rights Act of 1964, and the blow to protection of the right to vote given the Supreme Court's decision to invalidate a key part of the Voting Rights Act of 1965.[55] Despite the post-decision claim that the Section would be restored with a proper foundation, neither the Democrats nor the Republicans show anything but apathy "to correct" the decision of the Supreme Court. In the face of the forgoing, and the patently obstructive acts, in the main by formerly confederate states, to take advantage of the decision holding Section 5 of the Voting Rights Act to be unconstitutional, one must conclude that what was hoped for by the victory in the Civil War and the legacy of President Lincoln's efforts have largely been frustrated.[56]

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James A. Garfield, who served as the 20th President from March 5, 1881 until he was assassinated on September 19, 1881, said with respect to equality of negroes: "…is freedom 'the

bare privilege of not being chained…' If this is all, then freedom is a bitter mockery, a cruel delusion and it may well be questioned whether slavery were not better. Let us not commit ourselves to the absurd and senseless dogma that the color of one's skin shall be the talisman of liberty."

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In the end, is it any wonder that W.E.B. Du Bois and Booker T. Washington made the observations they did at the end of the 19th Century, which were quoted at the beginning of this article?

To be sure, W.E.B. Du Bois, writing in 1904, looking back on the period from the time at the end of the Civil War made the following observation:

> The slaves went free, stood a brief moment in the sun, then moved back toward slavery.[57]

[1] Freund, Sutherland, DeWolfe, Howe, *Constitutional Law, Vol. 2* (Little, Brown and Company 1954)
[2] Boudin, *Truth and Fiction about the Fourteenth Amendment.*
[3] W.E.B. Du Bois, *The Souls of Black Folk* (Chicago: A.C. McClurg & Co. 1903).
[4] Ward, *Unforgivable Blackness* (Vintage Books, 2006).
[5] Downes, "Sick From Freedom," Liberation as a Death Sentence.
[6] Reading the cases before the Supreme Court in the 19th Century, there is no consistency as to how the freedmen were described. At times they were described as persons of African descent. Other times they are referred to as negroes or freedmen or blacks or colored persons. In Ward, *Unforgivable Blackness* (Vintage Books, 2006), the author reports that the freedmen objected to the term African-Americans, believing that it was anachronistic and favored being described as negroes. As we write, we are aware that the term Afro-Americans is more appropriate today, but since we deal with cases decided in the mid-19th Century, we have to use the descriptions utilized during that period.
[7] Genovese, *Fatal Self-Deception* (Fox-Genovese Cambridge, 2012)
[8] An extraordinarily informative publication is the Special Commemorative Issue "The Civil War" at pages 130-131, published by the Atlantic in December 2011.

[9] The 14th Amendment was the most contentious of the Civil War Amendments. It was bitterly resisted by what had been the Confederate states. They agreed to it when it was made clear that it was essential to have their agreement before they could regain their representation in Congress. While Lincoln did not speak of the 14th Amendment as such, he made clear his commitment to the Declaration of Independence that all men were created equal and that Due Process was concomitant with liberty and equality. It is inconceivable that he would have acceded to the negroes being treated without Equal Protection of the law and with denial of Due Process. The 15th Amendment was ratified on March 30, 1870. Lincoln did not believe universal suffrage, guaranteed by federal law, was appropriate. He believed that the right to vote was better left to the states. In his last public address, he urged state constitution makers in Louisiana to extend the franchise of the right to vote to particular negroes. Of course Lincoln's position might have evolved had he witnessed the roadblocks put up by the state legislatures to deny negroes the right of suffrage.

[10] There were instances of horrendous acts of violence in New York City in July 1863 following the Conscription Act when whites rioted for days mainly because they did not have the funds to buy a draft "exemption" and further, they opposed fighting to free enslaved blacks. Kunhardt, et al., *Lincoln* (Knopf).

[11] Goldstone, *Inherently Unequal: The Betrayal of Equal Rights By The Supreme Court, 1865-1903* (Walker and Company, 2011).

[12] 60 U.S. 393 (1856).

[13] *Id.*

[14] Catton, *The Civil War* (American Heritage Book, p. 591, New York 1982).

[15] *Id.*

[16] Gallagher, The Union War, Harvard Univ. Press (2011).

[17] Kunhardt, et al., *Lincoln* (Knopf).

[18] Debate at Charleston, Illinois, September 18, 1858.

[19] Penguin Press, 2008.

[20] President Garfield argued, while in Congress, for a resolution that would end the practice of requiring free blacks to carry a pass to enter the nation's capital. Millard, *Destiny of the Republic* (Random House, 2011).

[21] To Frederick Douglass, the former slave turned social reformer, writer and statesmen, credit goes to his efforts that led to the 15th Amendment non-discriminatory right to vote.

[22] Korda, *Ulysses S. Grant: The Unlikely Hero*, pg. 169 (Harper Collins 2013).

[23] The 13th Amendment gave Congress the power to enforce the prohibition on slavery. In *Hodges v. United States,* 203 U.S. 1 (1906) [overruled by *Jones v. Mayer,* 392 U.S. 409 (1968)] the Court reversed the conviction of three men to drive freedmen from their employment in a lumber mill. The reversal was based on the fact that the Amendment was meant as a limitation on state power, and was deemed controlled by the Civil Rights Cases. As to the 15th Amendment, in the courts initial view, it held that it did not confer the right to vote but merely invested the citizens with a right to be exempt from discrimination in the exercise of the right on account of race, color or previous condition of servitude. *United States v. Reese*, 92 U.S. 214 (1866). But, there were decisions which protected negroes against discrimination in the federal voting process. *Ex-parte Yarborough*, 110 U.S. 651 (1884). *See also, Logan v. United States*, 144 U.S. 263 (1892), where The Court held that Congress has a right to protect a citizen of the United States in the custody of a United States marshal under a lawful commitment to answer for an offense against the United States on the ground that the citizen is entitled to a right secured to him by the Constitution or laws of the United States. This inline with the distinction made in the *Slaughter-House Cases,* 83 U.S. 36 (1873).

[24] 83 U.S. 36 (1873).

[25] Ross, *Justice [Miller] of Shattered Dreams*, Louisiana State Univ. Press p. 209

[26] 378 U.S. at 289-316, 335-340.

[27] Van Alstyne, *The Fourteenth Amendment, The Right to Vote and The Understanding of the 39th Congress* (Faculty Publications, Duke University, School of Law, 1965). In Graham, *The Conspiracy Theory of the 14th Amendment*, 47 Yale L.J. 371 (1938), the author wrote that the notorious, Roscoe Conkling, framed the Amendment to provide individuals and joint stock companies protections against discriminatory state and local taxes. President Lincoln and the Court in *Texas v. White*, 74 U.S. 700 (1868), took the view that the confederate states never left the Union, for the Union was perpetual. Also see Boudin, *Truth and Fiction about the Fourteenth Amendment*, 16 New York University Law Review 19 (1938).

[28] Hand, *The Bill of Rights* (p. 30, 1959).

[29] 100 U.S. 339 (1880).

[30] 100 U.S. 257 (1880).
[31] 100 U.S. 303 (1880); *See also U.S. v. Reese*, 92 U.S. 214 (1875).
[32] Keith, *The Colfax Massacre* (Oxford University Press 2008)
[33] This draws upon the excellent work of Goldstone's wonderful book, *Inherently Unequal*, *supra*.
[34] 1 Woods 308, 25 F.Cas. 707 (1874).
[35] 83 U.S. 36 (1873)
[36] 92 U.S. 542 (1876).
[37] 106 U.S. 629 (1883).
[38] *As late as 1951*, the Court in a civil case, *Collins v. Hardyman*, 341 U.S. 651 affirmed a dismissal of a *civil* complaint that had been brought pursuant to the Ku Klux Klan Act. Justice Jackson, an eminent member of the Court, delivered the opinion, writing: "[t]he act properly known as the Ku Klux Klan Act was passed by a partisan vote in a highly inflamed atmosphere." The Court held that the Act had provided for criminal and civil penalties. These civil penalties were written in indistinguishable form. Since the criminal penalty portion of the Enforcement Act had been declared unconstitutional in *Harris*, the civil penalty portion of the Act was thus not available to plaintiffs in an action to recover monetary damages or declaratory relief. See also *Shelley v. Kraemer,* 334 U.S. 1 (1948).
[39] 109 U.S. 3 (1883)
[40] *Id*.
[41] (Foundation Press, 2000).
[42] See also Schwartz, *Statutory History of the United States: Civil Rights* (1970).
[43] 529 U.S 528 (2000).
[44] Freund, Sutherland, DeWolfe, Howe, *Constitutional Law* (Little, Brown and Company 1954).
[45] 170 U.S. 213 (1898).
[46] 74 Miss. 247 (1896)
[47] 163 U.S. 537 (1896).
[48] *Id.*
[49] *Id.*
[50] See *McCulloch v. Maryland*, 17 U.S. 316 (1879). The use of the terms suggest, according to the Court, that whether congress acted properly was not a question to be resolved by the judiciary, but by the People through the electoral process.
[51] *Gibbons v. Ogden*, 22 U.S. 1 (1824); *Morrison* held that the commerce clause had been applied too expansively and the Violence against the Women's Act of 1994, VAWA, 42 U.S.C. Sec. 13981 exceeded Congress' power under the commerce clause. *See also United States v. Lopez*, 514 U.S. 549 (1995).
[52] 383 U.S. 745 (1966).
[53] 384 U.S. 641 (1966).
[54] Foner, Eric, *Reconstruction – America's Unfinished Revolution, 1863-1877* (1988).
[55] *Shelby County v. Holder*, 570 U.S. ___(June 25, 2013)
[56] See "Professor Gates" on PBS, 2013.
[57] Quoted in Mannino, *Shaping America: the Supreme Court and American Society* (Univ. of South Carolina Press, 2011).