

PLESSY v. FERGUSON

THE CULMINATION OF A JUDICIAL AVALANCHE

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In the spring of 1865, masses of Negroes danced through the streets of Richmond, Virginia. The once proud capitol of the Confederacy had just surrendered to the invading Army of the Potomac, ending the bitter fighting of the Civil War. In the wake of the military struggle, the South lay devastated physically and socially: plantations were burned, farms destroyed, crops plundered and whole cities razed. But perhaps the most feared result of the North's victory was the emancipation of millions of slaves.

For generations Southern society had rested on the "peculiar institution," but in 1865 that institution had disappeared and left the South in a state of social and economic chaos. White Southerners shuddered at the thought of savages behaving as real people with rights identical to their own. On the other side, the newly freed slaves rejoiced, celebrating their freedom and anticipating future victories. They viewed the Union soldiers as liberators who surely would continue to help them in their quest for economic and social equality. Indeed, the North did in time provide protection, civil rights and even political rights to the Negroes, but only for a brief period. Civil rights legislation, the War Amendments to the Constitution and a period of experimental race relations raised blacks to the level of citizens. But the South did not wait long to "redeem" itself. Even before the end of Reconstruction, Southern leaders began to

strip away the fruits of the victory enjoyed by Southern blacks. The culmination of the Southern attack came in 1896 with the Supreme Court decision in Plessy v. Ferguson.

Narrowly interpreted, the Plessy case upheld only the constitutionality of a Louisiana statute segregating railroad cars by race. In reality, the case undercut the newly acquired rights of blacks under the War Amendments: the Thirteenth Amendment which freed blacks from slavery and the Fourteenth Amendment which guaranteed to all citizens equal protection under the law. The decision, handed down on May 18, 1896, upheld the constitutionality of the Louisiana statute and, in effect, gave legal sanction to Jim Crow legislation throughout the South. In the single dissent, Justice John Marshall Harlan objected to the majority decision. Harlan wrote, "In respect of civil rights, all citizens are equal before the law."<sup>1</sup> Harlan's words exposed the greatest error in the entire history of the Court. The War Amendments provided a basis for racial equality, but the Court grossly misinterpreted the amendments, especially distorting the meaning of the Fourteenth Amendment. This misinterpretation sanctioned racial segregation for fifty-eight years until the decision in Brown v. Board of Education in 1954 overturned it. Thus, the Plessy decision directly contradicted constitutional history and constitutional law and denied blacks the right to equal protection under the law for more than half a century. For these reasons, the decision deserves the harshest possible criticism.

Following the Civil War, the United States seemed to be moving toward wider acceptance of Negro rights. Unfortunately, the racial harmony of the Reconstruction period was brief and half-hearted. With the creation of the Freedman's Bureau in March of 1865, the War Department took responsibility for protecting and providing for the welfare of the freedmen. Agents of the Bureau, usually members of the Union Army, preached the "gospel of work" to cure what whites saw as the propensity of the freedmen toward indolence and unreliability. Acting as teachers and disciplinarians, agents worked to help the freedmen complete the transition from slavery to free labor as well as to protect them from fraud, harassment and violence.<sup>2</sup>

The agents of the Freedman's Bureau found it difficult to protect the black man for a number of reasons. First, Southern states enacted Black Codes in 1865, creating a system of social and economic control that clearly approximated slavery. The Codes defined Negroes as agricultural laborers, barred them from most other occupations, and compelled them to work. Negroes were free men but they lacked skills, property and rights that whites were bound to respect. Many were unemployed and lacked permanent residences. Vagrancy laws imposed arrests and fines, and if black vagrants were unable to pay, they were bound out for terms of labor to the men who did pay their fines. States enacted laws governing contracts between employers and laborers that frequently used the words "master" and "servant."<sup>3</sup> The transition

from slave labor to free labor was extremely difficult for blacks, and white Southerners did not offer them aid.

Second, the Bureau faced intransigent Southern planters who wanted more disciplinary authority over the freedmen and who resisted negotiating contracts with them. White farmers had depended on cheap and docile black labor and were not ready to accept Negro laborers as employees. In addition, former slaveholders feared insurrections by the newly freed blacks. The Black Codes returned the blacks to the fields and kept them there. This left contract negotiations as the freedmen's sole bargaining chip. By resisting these negotiations white farmers further restricted the Negro's social and economic mobility.<sup>4</sup>

Finally, the Bureau attempted to aid the freedmen in the face of President Andrew Johnson's efforts to protect the planters. Johnson took office in the shadow of the Republican Abraham Lincoln, but he quickly demonstrated that he was really a staunch Jacksonian Democrat. He favored quick, unqualified readmittance of the Southern states to the Union to protect white supremacy and states rights. Johnson was determined to implement his own program of reconstruction at the expense of Southern Negroes and the Republican party. He authorized state governments that quickly fell under the control of Southern conservatives, extended numerous pardons to ex-Confederates and returned lands to their former owners that had been previously confiscated by the federal government and distributed to freedmen. As a result, Johnson destroyed any chance the federal government might have

had to change the configuration of Southern society in 1865. His policy of self-reconstruction allowed conservatives to subject the freedmen to violence and exploitation. Bloody riots in Memphis and New Orleans and mass-murders in Texas and North Carolina were results of Johnson's actions.<sup>5</sup>

Federal support for the freedmen was close at hand. On December 6, 1865, Congress ratified the Thirteenth Amendment which provided that "neither slavery nor involuntary servitude, except as punishment for crime . . . shall exist within the United States." Congress then passed the Civil Rights Act of 1866 which conferred citizenship on the freedmen. Under its provisions "citizens of every race and color" would enjoy "equal benefits" of the laws as well as "equal protection" of person and property.<sup>6</sup> In early 1866 Johnson vetoed both the extension of the Freedman's Bureau and the Civil Rights Act, but Republican congressmen quickly overrode the vetoes. These actions signaled Johnson's break with the Republican Party, but the split proved to be a benefit for the party. Officially separated from the discredited president, the Republicans won landslide victories in the congressional elections of 1866. The tools to effectively challenge Johnson's states rights policy were in place.<sup>7</sup>

Challenges to Negro advancements quickly appeared. Blacks filed a series of test suits based on the Civil Rights Act of 1866 that charged defendants with denying sleeper accommodations to blacks on a Washington to New York train, refusing to sell theater tickets to Negroes in Boston, restricting blacks on

Baltimore streetcars and barring black women from waiting rooms and parlors in Virginia, Illinois and California. Between 1865 and 1873 most state and federal courts ruled in favor of Negro rights.<sup>8</sup> The major legal battles were yet to come, but the challenge to even token racial segregation had begun.

Challenges to black rights did not begin in the South which eventually became the hotbed of racial segregation. Except for the Virginia railroad case, the cases just noted originated in the North. Jim Crow was born in the North and reached an advanced age before moving South. Slavery ended in most Northern states by 1838, and Northern Negroes began to enjoy the "advantages" of free men. Blacks were painfully and constantly reminded, however, that they lived in a society based on white supremacy and Negro inferiority. Northern whites made sure that blacks understood their "place" in society by enforcing legal and extra-legal codes of segregation which systematically separated the two races in nearly every phase of their existence. Railroads, omnibuses, stagecoaches and steamboats either excluded Negroes entirely or assigned them to special Jim Crow sections. Most hotels, restaurants and resorts would not serve blacks, and segregation extended to schools, hospitals, prisons, cemeteries and even church pews. Ghettoes such as "Nigger Hill" and "New Guinea" in Boston and "Little Africa" in Cincinnati were far worse than any ghettoes which would develop in Richmond, Charleston or New Orleans. In 1858 Abraham Lincoln himself predicted that the physical differences between blacks and whites

would "for ever [sic] forbid the two races living together on terms of social and political equality."<sup>9</sup>

Northern Negroes had a greater experience with freedom than newly freed Southern Negroes. With three decades of freedom behind them, the Northern blacks were more inclined to test the guarantees of the Civil Rights Act of 1866. They also saw the Union victory in the Civil War as a sign that whites were prepared to extend civil rights to blacks because the war did result in emancipation and the passage of the Thirteenth Amendment.

By contrast, the Southern Negroes knew exactly what they wanted from freedom when the war ended. Freedmen traveled around the country in search of lost loved ones; slave marriages were legalized and slave names were repudiated as family pride returned to Southern blacks. For the Negroes freedom meant the long-awaited opportunity to pursue life, liberty and happiness. But Southern whites refused to accept the freedmen as their social or political equals. The black quest for equality required federal protection which began with the Thirteenth Amendment and the Civil Rights Act of 1866. But these signals were mixed with the half-hearted actions of the Freedman's Bureau, the brutal Black Codes and President Johnson's attitude in a manner that confused Southern Negroes. The federal government provided aid to the blacks, but fear and doubt still held the freedmen, fear of retaliation from Southern whites and doubt of the seriousness of federal protection.



The congressional elections of 1866 gave the Republicans more than a two-thirds majority in Congress, and they used it to extend civil and later political rights to the freedmen. In February, 1867, Congress passed the first of four Military Reconstruction Acts. These acts overturned all of the existing state governments in the South and placed the South under military rule. In addition, the acts outlined the procedures for the readmittance of the states to the Union. They required the states to register voters, hold conventions to write new constitutions in accordance with the United States Constitution and hold referenda to ratify the constitution. They also required the states to extend full suffrage to blacks and disfranchise most ex-Confederate leaders. The acts effectively paralyzed the South by wiping out Southern leadership. Congress rendered Johnson virtually powerless to shape--though not to influence-- Reconstruction, and Presidential Reconstruction came to an end.<sup>10</sup>

The next step forward for the Negro was civil rights. Ratified on July, 9, 1868, the Fourteenth Amendment, the second War Amendment, gave another promise of citizenship to "all persons born or naturalized in the United States." It prohibited states from enforcing any law which abridged the privileges or immunities of citizens of the United States. It also prohibited any state from denying any person within its jurisdiction the "equal protection of the laws." Section Five gave Congress the power to enforce these provisions with "appropriate legislation."<sup>11</sup>

On the surface, the Fourteenth Amendment was a guarantee of federal protection to Negroes. According to Michigan Senator Jacob Howard, the equal protection clause abolished both class legislation in the states and the "injustices of subjecting one caste of persons to a code not applicable to the other"; it protected the fundamental rights of the black man with "the same shield which it throws over the white man." The "equal protection" clause and the "appropriate legislation" clause combined to give the Negro cause for hope. With Reconstruction governments firmly in place throughout the South and with Republicans dominating Congress, the amendment nearly concluded the revolution in race relations begun by war and emancipation. As long as the Radicals dominated Congress, they could use the amendment to pass affirmative legislation to protect Negro rights and guarantee their enforcement.<sup>12</sup>

Legislation granting civil rights to blacks was in place, but enforcement depended on the Executive. With their two-thirds majority the Radicals in Congress could amend the Constitution and enact legislation, but enforcement still depended on President Johnson. Johnson had campaigned vigorously against the Fourteenth Amendment, and initially only Tennessee ratified it. The President had no intention of implementing military reconstruction of the South, and clung stubbornly to his policy of self-reconstruction. As a result, he posed a serious obstacle to military reconstruction. The Radicals responded to his efforts to block their program by initiating impeachment

proceedings in February, 1868. Johnson barely escaped conviction and removal, and he remained in the White House until the spring of 1869. But the election of Ulysses S. Grant in 1868 prepared the way for the enforcement of Negro civil rights.<sup>13</sup>

During Grant's early years in office, the attention of the Congress turned to Negro suffrage. The Fourteenth Amendment contained one section that punished states for denying the right to vote to anyone because of race. It provided for the reduction of a state's electoral vote proportional by the number of people denied the right to vote. Yet, the amendment did not prohibit discriminatory practices in voting. On February 3, 1870, Congress ratified the Fifteenth Amendment that provided that the right to vote shall not be denied by the United States or by any State because of race, color or previous condition of servitude. The amendment represented the climax of Republican efforts to protect the Negro during the revolution in race relations. The Radicals had added three amendments to the Constitution: the Thirteenth that secured his freedom; the Fourteenth that guaranteed his civil equality; and the Fifteenth that presumably granted him suffrage. The Negro was "a man, a citizen, and a voter." The Radicals believed they could do no more. In fact, the fight for black equality had only begun.<sup>14</sup>

The federal government attempted to enforce the War Amendments by enacting a series of Enforcement Acts between 1870 and 1872. They designed the acts to prevent Southern whites from using corruption and violence to deny Negroes their rights. Grant

sent federal troops into New Orleans in 1872 and the Carolinas in 1871 and 1872, but by 1874 his administration had abandoned the effort to protect the freedmen. Many Radicals wanted to continue the effort, but they simply lacked the tools to succeed. White Southerners were determined to prevent Negroes from voting. During Reconstruction they accomplished their goal through fraud and violence. After the fall of the Radical governments, they switched to poll taxes, gerrymandering and redistricting, changing polling places or closing the polls before blacks could vote. Organizations such as the Ku Klux Klan and the Knights of the White Camelia developed under ex-Confederate leadership and terrorized Southern Negroes. Other groups such as the Red Shirts of South Carolina, the White Liners of Mississippi, the White Man's Party in Alabama and the White Leaguers of Louisiana used less direct but still effective weapons of social ostracism, economic pressure, fraud and corruption. Violence was so widespread and so widely supported that the federal government did not have either the desire or the ability to suppress it.<sup>15</sup>

The "last noble expression of Republicanism" came in 1875 when the Congress passed the second Civil Rights Act. This act required equal access to public accommodations in railroads, steamboats, stagecoaches, streetcars, restaurants, hotels and theaters, and prohibited exclusion from jury duty on the basis of race. Senator Charles Sumner of Massachusetts argued for one bold act to wipe away racial segregation. Equality was the law of the land, he argued, and segregation violated that law. When Congress

enacted the law in 1875, it was the highest affirmation of civil rights yet enacted into law. But in reality the act was an insignificant victory for Radical Republicans. It defined civil rights as equal access to places of entertainment, accommodation and transportation only. It did not include schools, colleges or cemeteries. Sumner included integration of schools and burial sites in the initial version of the act, but these provisions were removed from the final version. Sumner achieved his legislation, but it provided too little and lasted only a few years.<sup>16</sup>

The Civil Rights Act of 1875 was undercut when Southern Democrats returned to power during the 1870's. In the mid-term elections of 1874, the Republicans lost their control over the House of Representatives. The Democrats elected to Congress opposed the Civil Rights Act, arguing that access to public accommodations was purely social and had to be governed by the customs of the society. With Democrats back in power in the Southern states, enforcement of the act was impossible. As a result, the bill President Grant signed into law on March 1, 1875, was essentially meaningless.<sup>17</sup> Over the next decade, Southern Democrats, or Redeemers, attacked and destroyed the legislative victories that had extended civil and political rights to blacks.

The Redeemers first turned against the Civil Rights Act of 1875. The Democrats questioned the federal government's authority to regulate public accommodations and insisted that it was the

exclusive concern of the state governments. They insisted that regulation of railroads and schools were state concerns. Second, they interpreted the Fourteenth Amendment as a prohibition against actions by states, not by individuals who could exclude blacks from equal access to private accommodations. They tried to limit the rights protected by the amendment and the actions that Congress could take to protect them. Ultimately, the Southern Democrats questioned the federal government's power to regulate race relations. A series of legal decisions and a presidential election provided answers for these questions that gave little hope that either the Fourteenth Amendment or the Civil Rights Act of 1875 would be the "charter of liberty" that Sumner and his friends had envisioned.<sup>18</sup>

The legal setbacks began even before the passage of the Civil Rights Act of 1875. The Slaughterhouse Cases of 1873 provided the first test of the Fourteenth Amendment, but on grounds of economics and not of civil rights. The case arose from a statute passed by the military-backed government of Louisiana in 1869. The law created a new corporation in New Orleans with the exclusive right to erect a slaughterhouse and cattle landing, and forbid slaughtering animals at any other place in the area. Rival butchers challenged the statute on grounds that it deprived them of their right to earn a living, and therefore of the privileges and immunities of American citizens as well as the equal protection of the laws. The plaintiffs argued that the monopoly violated the guarantees of

the Fourteenth Amendment.<sup>19</sup>

In argument before the United States Supreme Court, plaintiff's lawyer John Archibald Campbell, a former Supreme Court Justice, appealed to the Civil Rights Act of 1866 and the Fourteenth Amendment and argued that they extended federal authority over the states to enforce the guarantees of the amendment. The Court, however, did not accept this reasoning. The Slaughterhouse opinion, written by Justice Samuel Miller of Iowa, ruled that subjecting the state governments to the control of Congress would "fetter and degrade" the lesser governments and radically change relations between the states and the federal government. The Court refused to bring within the power of the Congress or the jurisdiction of the Supreme Court "the entire domain of civil rights heretofore belonging exclusively to the state."<sup>20</sup>

Although it did not deal directly with race relations, the Slaughterhouse decision had disastrous implications for Southern Negroes. Framers of the Fourteenth Amendment desired first to guarantee civil rights and second to restrict state authority to prevent another political crisis similar to the one which caused the Civil War. To accomplish this, they attempted to centralize in the federal government extensive powers previously exercised by the states. The Radical Republicans dominated the federal government at that time, which assured the passage of the amendment and the nationalization of civil rights under supreme federal power.<sup>21</sup> The Slaughterhouse decision, however, ran

directly contrary to this thrust. It placed on the lawbooks an extremely narrow reading of Section One of the Fourteenth Amendment and returned to the states the powers that the framers of the amendment had given to the federal government. According to Stanley I. Kutler, the Court "aborted the more ambitious aspirations of Republican nationalism and laid the foundation for the legal subversion of Negro hopes for full equality."<sup>22</sup> To the Democrats the decision signaled the return of states rights to the redeemed Southern states. The Southern Democrats returned to power with the aid of a judicial avalanche that was only beginning to engulf the black man.

The avalanche gained momentum in 1876 when the Supreme Court handed down decisions in United States v. Reese and United States v. Cruikshank. In U.S. v. Reese the Court limited the effect of the Fifteenth Amendment. In the view of the Court, the amendment forbid states to deny any citizen the right to vote because of race, color or previous condition of servitude, but it did not give any citizen the right to vote. This right was granted under state rather than federal law. Thus, Congress had exceeded its power to enforce the Fifteenth Amendment by enacting laws which penalized state officials who denied Negroes the right to vote or refused to receive or count votes cast by Negroes. At the same time, the Court overturned the Election Enforcement Act of 1870, holding that it was an "unconstitutional interference with the rights of the states."<sup>23</sup>

The Court's decision in U.S. v. Cruikshank also attacked the



power of the federal government to protect Negro voters. In this case, Louisiana whites attacked a predominantly black posse and killed more than one hundred Negroes. The Justice Department indicted approximately the same number of whites under the Election Enforcement Act of 1870, but arrested only nine. The state charged the defendants with conspiring to prevent citizens from exercising their rights of peaceful assembly, petition for redress of grievances and suffrage. A federal circuit court jury returned a guilty verdict, but an appeal based on the validity of the indictments sent the case to the United States Supreme Court. The Court ruled that the indictments were defective because the legislation in question covered only state action, and the indictments involved the actions of citizens against citizens. The Court therefore ruled that the defendants were not punishable under either the War Amendments or the Enforcement Act. The racially motivated mass murder had convinced a local jury to return a guilty verdict, but the United States Supreme Court failed to see that murder was a deprivation of the federal rights of the victims.<sup>24</sup>

The avalanche continued to gain momentum. The Supreme Court refused to allow the federal government to enforce the civil rights which were guaranteed under the War Amendments. It argued that such a construction would strip the states of effective legislative power and turn the Supreme Court into a censor of a state's legislation and the civil rights of its citizens. Enforcement of civil rights legislation was therefore a state

rather than a federal concern. The Court's interpretation of the Fourteenth Amendment and the legislation based on its provisions rendered the federal government powerless to protect the black man, and Southern states had no intention of enforcing his rights. In reality, the Court was beginning to articulate the Democratic interpretation of the Constitution, allowing a return to the federal system that existed before the Civil War.<sup>25</sup>

The Supreme Court had begun to support the Democratic version of Reconstruction and Redemption as early as 1873. By 1877 the transformation was essentially complete. Beginning with the Slaughterhouse decision, the Court enhanced the powers of the state at the expense of the federal government. A vote of five to four produced the decision. By contrast, a vote of eight to one produced decisions in U.S. v. Reese and U.S. v. Cruikshank, showing the transformation of the justices' opinions during the three year period. Between 1873 and 1876, the Court remained the same with one exception: Chief Justice Morrison R. Waite of Connecticut replaced Chief Justice Salmon P. Chase after his sudden death in April of 1873. Under Waite the Court continued its assault on congressional legislation, declaring repeatedly that Congress had exceeded its powers by enacting legislation to protect black voters. The vote of eight to one revealed the solidifying state-rights tendencies of the Court by 1876.<sup>26</sup>

The Court also participated in the Compromise of 1877 which brought an effective end to Reconstruction and Republican rule in the South even though the presidency remained in the hands of

the Republicans. The presidential election of 1876 failed to produce a victor between Republican Rutherford B. Hayes and Democrat Samuel J. Tilden. Congress established a fifteen-man Electoral Commission to resolve the controversy. It included five representatives from each house of Congress and five Supreme Court justices. The panel initially included seven Republicans, seven Democrats and one Independent. The Supreme Court Justices were Democrats Nathan Clifford and Stephen J. Field, Republicans Noah Swayne and William Strong and Independent David Davis. In January, 1877, however, the Illinois legislature elected Davis to the United States Senate, and the judge declared himself unavailable for service on the Commission. In his place the fifteenth seat went to Republican Justice Joseph Bradley. As the fifteenth and supposedly least partisan member of the Commission, Bradley's vote would decide the victor. The Democrats were optimistic, however, for Bradley had opposed the Enforcement Acts. In fact, on the eve of the Commission's decision, a close friend of Bradley's read the justice's opinion and reported that Bradley's decision assured Tilden would win the election. When the opinion was read the next day, however, it surprisingly concluded in favor of Hayes and gave the Republican the victory. The Democratic press excoriated Bradley, accusing him of being under the control of railroad interests, which a Republican president would also protect. Democratic charges of fraud and conspiracy produced a revolutionary fervor in the South. Republicans feared the outbreak of a second civil war unless a

compromise could be reached. After a long and complicated series of discussions, the two sides reached an agreement. In return for Hayes' election, Republicans withdrew the remaining federal troops from Southern states and halted enforcement of civil rights laws. In exchange for peaceful possession of the presidency, the Republicans abandoned the cause of the Negro.<sup>27</sup> Known as the Compromise of 1877, this resolution of the crisis brought a definite end to Reconstruction and Republican domination of the last three Southern states and gave a major boost to the Democratic Redeemers. For all practical purposes, the Southern Negro was entirely on his own.

With Redemption completed, the steamroller of legal decisions against the black man continued. In 1878 the Supreme Court handed down a decision in Hall v. DuCuir, a case dealing with public accommodations for the races. The case arose over yet another Louisiana statute passed in 1869 which required railroads to provide similar accommodations for all passengers and expressly forbid any discrimination on the ground of race. The Court decided without dissent that the statute was an "unwarranted interference with interstate commerce." Referring to "well known customary repugnancies," the Court ruled that it was reasonable for companies to regulate the seating of passengers "to preserve order and decorum" in situations where whites and blacks would be together.<sup>28</sup> For the first time the Supreme Court handed down an opinion that was overtly racist. To a degree, the facts of the case dealing with the interference of interstate

commerce hid the racist conclusion. Nonetheless, the Court assumed that because of the "well known customary repugnancies" of whites for Negroes, contact between the two races would breed disturbances. Southern blacks now had no reason even to hope for federal protection for their civil rights.

In the 1880's the judicial attack virtually stripped Negroes of their remaining constitutional rights and opened the door for racial segregation. In 1882 the Court's decision in United States v. Harris renewed the attack on the Fourteenth Amendment. The case arose in Tennessee where a mob took four blacks from the custody of a local sheriff, murdered one Negro and severely beat the others. The federal government contended that the state's failure to protect the blacks constituted a denial of the equal protection of the laws, and that Congress had the power to guarantee that protection. The Court ruled, however, that the Fourteenth Amendment did not cover "sins of omission"; only if the state discriminated by some affirmative act did it violate the Constitution, and only then did congressional powers come into play. In the view of the Court, the mob represented private action, and the state's failure to halt its actions did not constitute "constitutional culpability."<sup>29</sup> The decision, however, was not unanimous. Justice John Marshall Harlan, appointed in late 1877 as a reward for his support for Hayes, dissented, arguing that the Fourteenth Amendment demanded equal treatment for minorities. Harlan was a former slaveholder from Kentucky who had singlehandedly swung his state to Hayes during

the 1876 election. In 1882, Harlan began his transformation from a slaveholder into an advocate of social equality with his dissent in U.S. v. Harris. His more prominent dissents were yet to come.

Harlan's first great dissent came less than a year later in the Civil Rights Cases of 1883. Initiated in 1882 and 1883, the case encompassed six federal prosecutions under the Civil Rights Act of 1875 of individuals accused of denying hotel, theater and railroad accommodations to Negroes because of race. Three cases, U.S. v. Stanley, U.S. v. Ryan and U.S. v. Nicholls, involved hotel accommodations; two, U.S. v. Hamilton and Robinson and Wife v. Memphis and Charleston Railroad, involved railroads and one, U.S. v. Singleton, involved a theater. The decision handed down in October of 1883 held the Civil Rights Act of 1875 unconstitutional. Even more important, it had the effect of nullifying parts of the Fourteenth Amendment.<sup>30</sup>

In writing the Court's opinion, Justice Joseph Bradley continued the process of whittling down the War Amendments. The federal government argued that the Thirteenth Amendment had extended all the rights of citizens to Negroes and that the denial of equal access to public accommodations violated that amendment. Bradley, however, ruled that the amendment forbid only slavery and involuntary servitude, and could not be "stretched to cover the social discrimination of those involved." If the Court interpreted every act of discrimination as a renewal of slavery, it would run the issue into the ground. Bradley

failed to interpret discrimination as a form of slavery or involuntary servitude. In addition, the government argued that the Fourteenth Amendment gave Congress the power to legislate to protect the freedmen. In the view of the Court, Congress had no affirmative power of legislation. Instead, it had only remedial or corrective power when a state infringed on rights guaranteed by the amendment. In the 1875 Civil Rights Act, Congress had attempted to deal with prospective evils and had exceeded its constitutional powers. Thus in one stroke, the Court eliminated most of the powers delegated to Congress under the amendment and distorted the meaning and intent of the Fourteenth Amendment.<sup>31</sup>

Bradley did not stop there, however, and introduced into the debate the doctrine of "state action." The Court held the 1875 Act unconstitutional because Congress attempted to prohibit "private" rather than state acts. In 1883 few states had Jim Crow laws. The proprietors of restaurants, hotels or theaters and the management of railroads were "private" persons running "private" businesses, and were susceptible only to state regulation. Nothing in the Constitution made discrimination by individuals illegal. As a result, racial segregation could be enforced by private action, but the question of segregation by law as a violation of the Fourteenth Amendment still remained.<sup>32</sup>

In his dissent Harlan rejected each of Bradley's arguments. First, he described the freedom guaranteed by the Thirteenth Amendment as a "new constitutional right," secured by federal grants to the black citizens of the United States. He asked if

the nation intended to destroy slavery and then return the blacks to the states for protection and such civil rights as those states chose to provide. In his view, an affirmative answer to this question nullified the Thirteenth Amendment. Second, Harlan argued that Congress did indeed have affirmative powers of legislation under the Fourteenth Amendment. Denying that power deprived Section Five of any real meaning. Third, Harlan rejected the concept of private action in businesses which served public interest. Railroads, hotels, restaurants and theaters served important public functions and were regulated by the states. Their acts were "state" acts which could be regulated by Congress acting under the Fourteenth Amendment. Harlan stood alone in his dissent. The justices voted eight to one in favor of the decision. In effect, the decision nullified the power of the federal government to prevent segregation imposed privately and declared the sections of the Civil Rights Act of 1875 which forbid such acts invalid. This decision left unanswered only the question of state laws imposing segregation.<sup>33</sup> The Court invalidated acts requiring integration and opened the door for racial segregation by law.

Jim Crow laws began to appear in the 1880's, and after the Civil Rights Cases they appeared with greater frequency. Tennessee adopted the earliest Jim Crow law in 1881, requiring railroad companies within the state to provide separate cars for Negro passengers. For financial reasons the practice did not spread at that time.<sup>34</sup> In 1887, only four years after the Civil



Rights Cases, Florida adopted a law requiring railroads to carry blacks in separate cars or behind partitions. Mississippi followed in 1888, Texas in 1889, and in 1890 the segregation laws received their first test (see appendix one). In Louisville, New Orleans, and Texas Railway v. Mississippi, the Supreme Court upheld the Mississippi statute against the argument that segregation was an impermissible burden on interstate commerce. This case contrasted with the 1878 decision in Hall v. DuCuir which had held that **integration** was such a burden on interstate commerce. The Court distinguished the two cases by ruling that the Mississippi statute required separation of the races in **intrastate** commerce. In view of this restriction, the Court ruled that the act did not infringe on the powers of the Congress and upheld the law. The decision seemed to confirm the Court's "silent acquiescence" in the South's resolution to the problems of race relations. Harlan dissented and, pointing to the decision in Hall v. DuCuir, demanded that the Court be consistent in its interpretation of the commerce clause. But by 1890 the rest of the Court was more interested in upholding segregation. After the decision six more Southern states passed Jim Crow laws in the next two years, including Louisiana in 1890.<sup>35</sup>

Louisiana's separate car law signaled a new era of race relations in that state. Since 1877, the most striking aspect of race relations in the state was "the absence of a system." There was no consistent, effective system of social control of the Negro race. The Negro's relationship to the white man had yet to

be legally defined. On one hand, discrimination, political manipulation and harsh treatment were widespread, but on the other, such treatment had not yet been "systematized or legalized, and a degree of experiment still prevailed in race relations." Negroes were treated well in some parts of the state, at least in part because many of them could still vote; in 1890 black voters still outnumbered whites. Louisiana Negroes took advantage of their majority, winning eighteen seats in the state legislature in 1890 and electing black sheriffs in a few parishes.

In public transportation, segregation did exist but integration was "the rule rather than the exception on most Louisiana railroads." Where the races were separated, it was the result of private initiative, not the authority of law. But by 1890, Louisiana blacks began to feel the growing influence of conservative whites. The state began to abandon its efforts to protect Negro life, liberty and property, and lynchings increased in frequency and violence. When propaganda for legalizing segregation started, conservatives applauded rather than resisted the movement.<sup>36</sup>

Negroes were well aware of the crisis at hand and quickly challenged the segregation statute. On May 24, 1890, just a few days after the Jim Crow bill appeared in the state legislature, that body received a memorial entitled "Protest of the American Citizens Equal Rights Association of Louisiana Against Class Legislation." The protest denounced the separate car law as

"unconstitutional, un-American, unjust, dangerous, and against sound public policy." It called the statute a "free license to the evilly disposed to insult, humiliate, and maltreat persons of dark skin."<sup>37</sup> The challenge to segregation had begun.

Two signers of the memorial were Louis A. Martinet and Rudolph L. Desdunes, members of an elite group of blacks in New Orleans. This group, the major source of black leadership and strength in Louisiana, led the resistance to segregation. These people were cultured, educated and wealthy, and had lived in freedom for generations. They had four different newspapers in New Orleans in which to express their views. Martinet and Desdunes used the New Orleans Crusader, a militant weekly paper founded by Martinet in 1889, to fight the statute. Using both the Crusader and railroad officials who opposed the bill because providing separate cars would increase their operating expenses, the eighteen Negro members of the state legislature stalled the separate car legislation. Nevertheless, on July 10, 1890, it passed the Assembly and Governor Francis Tillon signed it into law. Martinet and Desdunes blamed the passage on the black Republican legislators who had agreed to vote to overturn a veto of a lottery bill in exchange for votes against the Jim Crow law, and failed to make their bargain good. In Martinet's words, "The Lottery Bill could not have passed without their votes; they were completely the master of the situation."<sup>38</sup>

Political manipulation broke down Negro resistance, and Louisiana had its first segregation law. Ironically entitled "An

act to promote the comfort of the passengers," the new law required railroads to provide "separate but equal" accommodations for the races, and made it a criminal offense for any person to take a seat reserved for passengers of the other race.<sup>39</sup> For the first time, Louisiana Negroes found their place in "free society" defined by a law which assigned them to a separate car for the "comfort of the passengers." Before 1890 segregation in Louisiana had been limited to private action, and the Supreme Court had refused to find that private acts of discrimination denied blacks the equal protection of the laws required by the Fourteenth Amendment. But the question of segregation by law as a violation of the Fourteenth Amendment remained, and the blacks were quick to test the constitutionality of this Jim Crow legislation.

Rather than boycott the railroads, the New Orleans blacks wanted to test the constitutionality of the law in the courts. Immediately following its passage, they began to collect money to test the law. On September 1, 1891, a group of eighteen Negroes led by Martinet and Desdunes formed the "Citizens Committee to Test the Constitutionality of the Separate-Car-Law," and by October 11, they had raised fifteen hundred dollars. The committee also opened correspondence with Albion Winegar Tourgee of Mayville, New York. In October of 1891, Tourgee became leading counsel for the committee.<sup>40</sup>

In 1890 Tourgee was probably the most famous surviving Carpetbagger. His fame derived from the six novels he had written about his Reconstruction experiences in North Carolina. He had

been born in Ohio, served as an officer in the Union Army, and in 1865 moved to Greensboro, North Carolina, to practice law. There, he became a leader of the Republican party, took a major role in writing the state's radical constitution and served as judge of a superior court for six years.<sup>41</sup>

Martinet contacted Tourgee, however, because he was vocal, militant and persistent in his fight for Negro equality, attacking his enemies in speeches, articles and books. According to C. Vann Woodward, he was a "Northerner who resembled Southerners in his indolence, his independence, and his readiness to accept a challenge." When Martinet began to correspond with him, Tourgee was beginning to organize the biracial National Citizens Rights Association with himself as provisional president. In six months, he recruited more than one hundred thousand members. Tourgee brought to the fight against segregation in Louisiana "a combination of zeal and ability" that the New Orleans elite could not have found elsewhere.<sup>42</sup>

Tourgee worked with James C. Walker, a local Republican lawyer in New Orleans, to devise strategy for the test. Initially, railroad officials were surprisingly cooperative. One railroad posted Jim Crow signs but did not enforce them. Two others wanted to help with the test because separate cars added to their operating expenses, but public opinion scared the officials into acquiescing with the law. Tourgee finally decided that a white passenger would object to a black passenger sitting in a white coach. The conductor would then order the black

passenger to a Jim Crow car, the Negro would refuse and the white passenger would swear out a complaint. The defendant would petition for a writ of habeas corpus and bring the matter before a court.<sup>43</sup> The key was to get the matter before a court to test the constitutionality of the statute.

The committee's first attempt to test the law came on February 24, 1892. Daniel Desdunes, a young black man, bought a ticket to Mobile, Alabama, and took a seat on the white coach of the Louisville and Nashville Railroad. Desdunes was arrested and committed to trial for violating the Louisiana statute. Walker filed a plea of not guilty on March 21 and attacked the constitutionality of the Jim Crow law. Before the trial, however, the Louisiana State Supreme Court handed down a decision which aborted the Desdunes case.<sup>44</sup>

The decision in Abbott v. Hicks, handed down on May 25, upheld the argument of the Pullman Company that the Jim Crow law was unconstitutional because it applied to interstate passengers. The case arose when a conductor on the Texas and Pacific Railway was prosecuted for admitting a black passenger to a white car. The decision of the State Supreme Court upheld the conductor's contention that the Negro held a ticket for a destination in Texas, and either the separate car law was not intended to apply to interstate transportation, or if it did apply, it was a violation of the interstate commerce clause of the Constitution. Because Desdunes was an interstate passenger, the decision upheld Walker, and the state dismissed the charges against Desdunes. The

Desdunes victory was empty, however, because the law still applied to intrastate passengers. All of the states bordering Louisiana had adopted similar Jim Crow laws, making the exemption of interstate passengers meaningless to Negroes in Louisiana and to the committee itself because it left the principle unchallenged.<sup>45</sup>

The decision in Abbott v. Hicks forced the committee to attack the statute a second time. On July 16 Homer Adolph Plessy purchased a ticket from New Orleans to Covington, Louisiana, and boarded the white coach of the East Louisiana Railroad. Plessy described himself as seven-eighths Caucasian and one-eighth African, and swore that his African blood was not discernible, so the railroad must have been informed of the plan and agreed to cooperate. When the conductor requested Plessy to move to a Jim Crow car, he refused and was immediately arrested and charged with violating the segregation statute. In the arraignment Tourgee and Walker argued before Judge John Ferguson of the Criminal District Court for the Parish of New Orleans that the Jim Crow law was null and void because it conflicted with the Constitution of the United States. The prosecution cited the requirement of the law for equal accommodations and even asserted that "interracial repugnancies, such as the foul odors of blacks at close quarters," made the law reasonable. In November Judge Ferguson issued a written opinion in which he overruled Walker's contention. Counsel for Plessy then had two possible routes to the United States Supreme Court. Ordinarily, the case would have

gone to trial in Federal District Court, then to the Circuit Court of Appeals before arriving at the United States Supreme Court. In state court systems, however, any case could be appealed from the state supreme court directly to the United States Supreme Court if it involved the constitutional rights of an individual or if a state statute was declared unconstitutional under the United States Constitution. Tourgee chose the state route, appealing the decision directly to the Louisiana State Supreme Court. By staying in the state system and arguing that the segregation statute was unconstitutional, Tourgee was guaranteed a "more expeditious" trip to the United States Supreme Court. In that decision, the case of Plessy v. Ferguson was born.<sup>46</sup>

In the State Supreme Court the issue was whether a law requiring "separate but equal" accommodations for the races violated the Fourteenth Amendment. Five of the eight states which passed segregation laws between 1887 and 1892, including Louisiana, had used this wording. Unfortunately for Plessy, Francis Tillon was the Chief Justice of the State Supreme Court in 1892. Tillon had been the governor who had signed the Jim Crow bill into Louisiana law. The Court handed down its decision, written by Justice Charles Fenner, in December of 1892. Justice Fenner denied that the question of equality of accommodations was involved. He stated that accommodations did not have to be identical to be equal, and he cited lower federal court decisions to support his ruling. The Court upheld the law, ruling that



dissatisfaction caused by the law was based on "some misconception." But the Court did not deal directly with the Fourteenth Amendment, and Plessy's counsel petitioned for a writ of error that took the case to the United States Supreme Court on the grounds that the 1890 statute violated the guarantees of the War Amendments.<sup>47</sup> The two previous courts had avoided Plessy's main contention, but the Supreme Court would have to face the issue directly. Tourgee would finally get an opportunity to argue the constitutionality of the law.

A three-year delay ensued before the Supreme Court heard the case, and Tourgee used the delay to prepare his argument. The delay pleased the attorney who believed that time was on his side and that years of agitation would turn public opinion in his favor. Unfortunately he was wrong, and the tide continued to mount against his cause.<sup>48</sup> As time passed racial prejudice grew stronger and continued to undermine the freedoms previously enjoyed by the Negro. In time Tourgee realized the futility of fighting for Negro rights in a society wholly dominated by conservative whites. In 1896, however, he remained optimistic and used the delay to complete his brief. He knew the Plessy case would be a major factor in his crusade for black rights.

Tourgee divided his brief into two main arguments. He began by launching a moral attack on the practice of segregation itself, which he called his "property argument." Tourgee argued that Plessy had been deprived of property without due process of law. The property in question was his reputation as a white man.

He called this reputation "the most valuable sort of property" because it was "the master key to the golden door of opportunity." Intense racial prejudices excluded any man believed to be a Negro from the companionship of white men, and therefore from the "avenues of wealth, prestige, and opportunity." Tourgee said that he chose a "nearly white" man for the test, not to defend the black man against discrimination from the whites, but to defend the "nearly white" man from the penalties of color. "From such penalties the colored man himself admittedly has no defense." Finally, Tourgee added that most white people would choose death over life as a black man if given the choice.<sup>49</sup> This portion of the brief was the weakest because Tourgee relied solely on emotion and his own moral interpretation of segregation. Except for Harlan, the justices of the Court certainly had not demonstrated sympathy for the plight of Southern Negroes in the cases which preceded Plessy. By contrast, they had expressed disregard for the rights of Negroes, and undoubtedly they would disagree with Tourgee's moral interpretation.

Tourgee's main argument relied on the constitutional rights guaranteed to all citizens. Tourgee defined slavery as a "legal condition of subjection to the dominant class," and argued that segregation produced distinctions of a "servile character, coincident with the institution of slavery." The law therefore directly violated the Thirteenth Amendment. Next, Tourgee argued that the first section of the Fourteenth Amendment derived from

the Declaration of Independence, which was not a fable but "an all-embracing formula of personal rights on which our government is based." He also argued that the segregation law was intended to promote the happiness of one class by asserting its supremacy and the inferiority of the other. It kept the Negro in a state of dependency for "the gratification and recognition of white superiority and white supremacy of right and power." He asked the justices to imagine themselves ordered into a Jim Crow car, and summed up his argument, "Justice is pictured blind and her daughter, the Law, ought at least to be color blind."<sup>50</sup>

Touree received aid in preparing his brief from Samuel Field Phillips, a friend and former colleague from North Carolina. Thirteen years earlier, as United States Solicitor General, he had suffered defeat before the Supreme Court in the Civil Rights Cases of 1883. He supplemented Touree's brief with a description of the future of race relations. He called the separate but equal doctrine a "taunt by law" of people who had been slaves and argued that such a law clearly violated the War Amendments. He added that the Jim Crow principle could be endlessly applied to other relations. States could segregate persons based on such absurd distinctions as hair color, birthplace or religion, and could require blacks to walk on one side of the street, paint their houses and vehicles a certain color and wear clothes of a certain color.<sup>51</sup>

The Court did not hand down a decision in the case until 1896, and in the interval conditions worsened considerably for

the Negro. Throughout the South the retreat from Reconstruction gained speed. Legislatures enacted new segregation laws and lynching hit new peaks. In addition, Populist gains in 1892 and 1894 led conservatives to warn of Negro domination and call for white solidarity. Disfranchisement spread across the South. Two states had disfranchised the Negro, and several others, including Louisiana, were planning to take the same course (see appendix two). In 1892 Congress defeated the Lodge Bill that would have extended federal supervision to the elections of federal officials. By 1896 the forces that had held Jim Crow in check were in full retreat. Whites were prepared to deprive blacks of the remaining rights they had acquired during Reconstruction. The Supreme Court might have been able to stem this tide, but fear of public opinion, deference to the prejudices of the majority and Democratic political thought motivated the Court during this period.<sup>52</sup> The stage was set for the decision in Plessy v. Ferguson.

On May 18, 1896, the Supreme Court handed down its decision upholding the ruling of the Louisiana State Supreme Court. In rhetoric that reflected a poor understanding of history and constitutional law, Justice Henry Billings Brown of Michigan wrote the majority opinion:

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 races upon terms unsatisfactory to either. Laws permitting and even requiring segregation do not necessarily imply the inferiority of either race to the

other. . . .<sup>53</sup>

Justice Brown was wrong. If the framers of the Fourteenth Amendment had one clear intention, it was to abolish all legal distinction based on color. Further, Brown's reference to social equality was wholly irrelevant. Social equality did not result because two people rode side by side on the same train.<sup>54</sup>

Continuing, Justice Brown cited legal precedents for the constitutionality of the Jim Crow law. The Supreme Court had never considered the constitutionality of racially segregated transportation under the Fourteenth Amendment, and the tribunal had to search for precedents in the decisions of lower courts, a practice that was not mandatory for the high Court. In reality, the Court was searching for authority to "buttress a weak opinion."<sup>55</sup> Justice Brown cited the 1849 case of Roberts v. City of Boston in which the Massachusetts Supreme Court had sustained the right of the city to maintain separate schools for Negroes. This opinion created the "separate but equal" doctrine, but it had been handed down twenty years before the Fourteenth Amendment was ratified. In addition, Brown referred to the Court's interpretation of the Fourteenth Amendment in the Slaughterhouse Cases and its extension of this narrow interpretation in the Civil Rights Cases. Neither of these cases nor any other case he cited raised the question of the constitutionality of racial segregation itself. Brown did bring up the cases of Hall v. DuCuir and Louisville, New Orleans, and Texas Railway v. Mississippi, but these cases dealt with restrictions on

segregation based on the commerce clause and not with the principle itself. According to Barton Bernstein, the Court had to "distort [these] cases before it could pollute the streams of law" with the separate but equal doctrine.<sup>56</sup>

In his analysis of the Louisiana statute itself, Brown centered his attention on the question of the law's reasonableness. He referred to the established customs and traditions of the people and argued that they promoted comfort, public peace and good order.<sup>57</sup> But in justifying the legislation, he committed two grave errors. First, he assumed that racial segregation was a custom or tradition when segregated transportation was, in fact, a recent creation in the South. By 1896 nine Southern states had enacted Jim Crow laws, but seven of the laws were less than eight years old. In Virginia, for example, Negroes rode in the same cars "exactly as white people." Second, the Court assumed that a law was reasonable when it followed custom and unreasonable when it did not. Laws that violated custom and tradition are usually unenforceable and may therefore be called unreasonable. This does not mean, however, that custom must be reflected in law. Custom may exist independent of law, and custom is not violated if it is not enacted into law or supported by law.<sup>58</sup>

Brown mistakenly assumed that social prejudices could not be overcome by legislation, and that equal rights could not be secured by the forced association of the races:

Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences,

and the attempt to do so can only result in accentuating difficulties of the present situation. . . . If one race be inferior to the other socially, the Constitution cannot put them in the same plane.<sup>59</sup>

But Plessy had not asked for integration; he had requested only an end to legislation that was grounded in prejudice. Laws can change unjust customs and traditions, even to the extent of uprooting them. By refusing to acknowledge that laws could shape social attitudes or at least social actions, the Supreme Court assured that Jim Crow would become customary and the treatment of Negroes as second-class citizens habitual.<sup>60</sup>

Finally, with his reference to "physical differences," Justice Brown condemned the Negro to biological inferiority. The biologists and anthropologists of the time readily demonstrated Negro inferiority by citing skull weights, brain sizes, pelvic expanses and a variety of other physiological and psychological traits. In addition, they showed that rates of disease and criminality were higher for blacks than whites. Whites had advanced higher on the scale of evolution and were more mature and civilized than blacks. Brown's uncritical acceptance of the biological and anthropological theories of the age was a serious mistake, especially when he used them to justify his limitation of the civil rights of a supposedly inferior race.<sup>61</sup> Ironically, the decision which the sociology of the nineteenth century sustained in 1896, the sociology of the twentieth century destroyed in 1954.

The justices upheld Brown by a vote of eight to one. Nevertheless, the opinion was very poorly written and based on

extremely weak arguments. The separate but equal doctrine was not actually a part of the opinion. In fact, the decision lacked any really fundamental argument to sustain the legality of Jim Crow. The majority held that the Constitution did not interpose any obstacle to racial segregation. But in defending this view, the Court did not refer to the Constitution. Instead, it referred to social equality, irrelevant legal precedents, custom, prejudice and the scientific beliefs of the late nineteenth century. The Court fell prey to prejudice itself and followed the tide of public opinion in upholding segregation. Ironically, Tourgee's constitutional arguments could have destroyed the legality of segregation everywhere. Instead, the Court upheld segregation and left the Negro without any means to force the states to protect the civil rights supposedly guaranteed him by the Fourteenth Amendment.<sup>62</sup>

Justice John Marshall Harlan supported the Negro's fight for equality. In his lone dissent, he described the "thin disguise" of separate but equal accommodations as a "badge of servitude wholly inconsistent with the civil freedom and equality before the law established by the Constitution." The decision, he insisted, could not be justified upon any legal grounds. The Constitution was supposed to be "color blind." Under it no superior or dominant ruling class of citizens existed. He correctly predicted that the decision would stimulate further aggressions against the rights of black citizens, and encourage the belief that state enactments could defeat the intentions of



the federal government when it adopted the War Amendments. If states could legally enforce this law, they could legally separate Protestants from Catholics and native-born from naturalized citizens, and compel Negroes to use one side of the street and whites the other. Harlan was correct, of course; in time the states did place blacks in a position of total inferiority and keep them there for half a century.<sup>63</sup>

Few people other than Harlan, however, understood the ramifications of the decision. Newspapers gave the case very little attention. The same two-paragraph article appeared in both the New York Times and the Richmond Dispatch on May 19, 1896, the day after the Court handed down its decision. The article, entitled "Louisiana's Separate Car Law," spanned only thirty-four lines of one column. The first paragraph briefly related the facts of the case and added that segregation in schools and "other similar laws" justified the decision. The second paragraph was a three-sentence synopsis of Harlan's dissent. Two days later, an editorial appeared in the Richmond Dispatch which expressed relief at the decision. Entitled "Separate Coaches," this one-column, thirty-four line editorial defended the "necessity of such a law . . . to secure the comfort of all concerned." It also argued that the requirement that the railroad provide equal accommodations prevented "unfair discrimination." Finally, the editorial expressed "fear" that the segregation law would not pass the test of fairness, but predicted that because the Court declared Jim Crow constitutional, it would probably

spread across the Southern states (see appendix three).<sup>64</sup>

The Richmond editorial defended a major characteristic of Southern race relations: continuity. Southerners valued continuity in history, and feared change because more often than not it brought trouble.<sup>65</sup> In the aftermath of the Civil War, however, major changes had occurred. The most significant was the emancipation of the slaves. Defeat and Reconstruction forced the white South to endure the change, but when Reconstruction ended, the Redeemers took control of the states and attempted to restore race relations to a condition as close to slavery as possible. Segregation was one result of the return of white domination. But the crusade for white supremacy did not begin immediately after the collapse of Reconstruction. The Negro remained under the protection of the federal government although the effectiveness of that protection was generally low and the black man was largely on his own. There ensued a period of experiment and variety in race relations throughout the South.<sup>66</sup> This experiment, however, was doomed to failure by the mounting attack on Negro rights, both formal and informal, that reached a peak in the decision of the Supreme Court in Plessy v. Ferguson.

The federal government extended civil and political rights to blacks in the War Amendments, but even then the treatment of the freedmen foreshadowed segregation and disfranchisement. The Thirteenth and Fourteenth Amendments prohibited slavery and guaranteed the equal protection of the laws, but most white Southerners did not accept the changes. The assumption that

whites were superior and blacks innately inferior had provided one justification for slavery, and the same belief justified segregation. Hotels and restaurants were "generally off limits" for most Negroes. Hospitals, jails and other public buildings regularly separated blacks when they accommodated them at all. For example, opera houses in New Orleans confined black patrons to the upper tiers of boxes, and in Charleston, Richmond and Savannah, blacks were either excluded from parks and gardens entirely or allowed to visit them only at certain hours. The doctrine of white supremacy required separation of the races in most aspects of life in the "new order" of Southern society. Segregation, legal or extra-legal, had the consent or at least the acquiescence of even the supposedly radical Reconstruction governments.<sup>67</sup> The experiment in post-war race relations was not a complete success even at the start of the era of freedom.

The judicial attack on Negro rights began in the 1870's. In 1873 the Slaughterhouse decision was the first restrictive interpretation of the Fourteenth Amendment, returning to the states powers that the framers of the amendment had given to the federal government. In 1876 U.S. v. Reese and U.S. v. Cruikshank denied Congress the power to protect Negro rights. Finally, Hall v. DuCuir in 1878 struck down a Louisiana statute expressly forbidding racial discrimination. The beginnings of this judicial avalanche coincided with the return of conservative power in the South as Reconstruction ended.

The experiment rapidly gained momentum. The Compromise of

1877 officially recognized the end of federal support for the Republican state governments and began the period of Redemption and white supremacy. It was a time of experiment, and no uniform pattern of race relations emerged. Neither race had yet had time to become accustomed to the change in its relations with the other. In places of public entertainment and accommodation, Negroes often met with rebuffs and sometimes evictions, but sometimes they did patronize restaurants, bars, waiting rooms and theaters. In 1878 Colonel Thomas Wentworth Higginson of Massachusetts, an abolitionist and the commanding officer of a black regiment during the Civil War, visited Virginia, South Carolina and Florida to investigate race relations after the withdrawal of federal troops. He found "a condition of outward peace" which made him wonder if "some covert plan lurked underneath for crushing or reenslaving" the Southern blacks. Higginson compared the "tolerance and acceptance" of Negroes on trains, streetcars, at the polls and in courts and legislatures with their position in his native New England, and he decided the South came away better in the comparison.<sup>68</sup>

This essentially fair treatment of blacks extended into the 1880's and even the 1890's in some Southern states. In 1885 T. McCants Stewart, a black man, traveled from Boston to his native South Carolina. On the way he rode on trains crowded with whites, ate in a station dining room in Petersburg, Virginia, and engaged in conversation with whites "for no other reason than to pass the time of day." He found traveling more pleasant there than in

parts of New England. A newspaper editorial published in 1886 in the Richmond Dispatch referred to the requirement of the state constitution that all officers take an oath that recognized the political and civil equality of all men. Negroes conversed with whites, sat on juries with whites and practiced law in the same courtrooms as whites without provoking opposition. Some Northern visitors found the intimacy between the races distasteful. They especially objected to black and white children playing together.<sup>69</sup>

In politics Southern Negroes continued to vote and hold office after Reconstruction. Every session of the Virginia General Assembly between 1869 and 1891 contained black members. Blacks introduced bills into the legislature just as did whites. North Carolina voters elected fifty-two Negroes to the lower house of the legislature between 1876 and 1894. Forty-seven blacks served in the South Carolina General Assembly between 1878 and 1902. And sixteen blacks sat in the Louisiana General Assembly which passed the Jim Crow law in 1890 which led to the Plessy case.<sup>70</sup>

Southern race relations after the war were clearly inconsistent. Southern Negroes did not walk out of slavery into a world of segregation, nor did they walk into a society that welcomed them with open arms. Instead, they escaped slavery and entered a period of experiment and variety marked by the lack of a uniform pattern of race relations. Exploitation existed, but it did not yet follow that the exploited had to be segregated and

disfranchised. There was still a choice to be made.<sup>71</sup>

In the mid 1880's, however, whites rejected all but one of the possible alternatives, and the "capitulation to racism" began. The reconciliation of North and South began in 1883 with the decision in the Civil Rights Cases in which the Court, in effect, permitted racial segregation. Shortly afterward, the first Jim Crow laws began to appear on Southern statute books. Florida enacted the first law in 1887, a statute requiring separate accommodations for the races on railways, and in the next five years seven Southern states adopted some variation of the law.<sup>72</sup> The post-war flexibility broke down and the Negro's place in Southern society was increasingly defined by the demands of white supremacy.

The Plessy decision represented the final capitulation of the Union to racism. Beginning with the Slaughterhouse decision in 1873, the Supreme Court gradually whittled away the rights of blacks in a series of decisions which ended with Plessy in 1896. Yet, the Court was supposed to be the highest protector of individual rights in the United States, but between 1873 and 1896, the Court failed miserably to protect the rights of black citizens. Accordingly, the Court must take full responsibility for the destruction of Negro rights. Public opinion against the Negro was very strong in the South, but the justices were supposed to be above public opinion. Congress had extended the rights of citizenship to the newly freed slaves through the War Amendments and civil rights acts, and these statutes should have

been the framework for the natural development of race relations. Instead, the Court struck down these statutes and left the Negro with "nothing but freedom." Rather than protect the positive national legislation, the Supreme Court served as a tool for the abandonment of the Negro's cause.<sup>73</sup> The abandonment culminated in the Plessy decision upholding the constitutionality of segregation and sanctioning a practice previously grounded only in discrimination and racial hatred. This was the Supreme Court's greatest mistake.

In the aftermath of Plessy, Justice Harlan saw his predictions vindicated. Once the Court ruled that segregation was constitutional, Jim Crow began to expand into nearly every aspect of Southern society. The Negro's place became more and more clearly defined: in courts, schools, libraries, parks, theaters, hotels, residential districts, hospitals, insane asylums, cemeteries and even sidewalks. Segregation laws appeared in "waves." Before the turn of the century only Georgia had a Jim Crow law applying to streetcars, but by 1907 ten Southern states had adopted them. At the turn of the century, the doctrine of racism reached a "crest of acceptability and popularity" that carried over into the first two decades of the twentieth century. Segregation became increasingly extreme. Signs reading "For Whites Only" and "Colored" appeared over doorways, pay windows, stairways, lavatories, toilets, drinking fountains, cups and glasses.<sup>74</sup>

Whites drew the color line with incredible thoroughness,

applying the Jim Crow principle to areas even Harlan and Tourgee had failed to anticipate. Jim Crow laws became public symbols and daily reminders of the Negro's inferiority. Plessy v. Ferguson became the leading authority for courts that sustained the constitutionality of racial segregation, and it held that position for exactly fifty-eight years, until May 17, 1954, when Brown v. Board of Education overturned the decision and destroyed the doctrine of "separate but equal." It provided a "legalistic smokescreen behind which an exploitive society operated for the next six decades, for while things were separate, they were rarely, if ever, equal." The Supreme Court itself legitimized the oppression and furthered the decline of the Negro after 1896.<sup>75</sup> Justice Harlan himself best described the regret of a few liberal whites that the Court had committed such an error:

We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of law which practically puts the brand of servitude and degradation upon a large class of our fellow citizens-our equals before the law.<sup>76</sup>



## ENDNOTES

<sup>1</sup>Plessy v. Ferguson, 163 U.S. 537 (1896).

<sup>2</sup>Leon F. Litwack, Been in the Storm So Long: The Aftermath of Slavery (New York: Vintage Books, 1979), 379-383; August Meier and Elliott Rudwick, From Plantation to Ghetto, 3d. ed., American Century Series (New York: Hill and Wang, 1976), 166.

<sup>3</sup>Meier, From Plantation, 166, 170-171; Litwack, Been in the Storm, 366.

<sup>4</sup>Litwack, Been in the Storm, 336-386; Meier, From Plantation, 170-171.

<sup>5</sup>Dan T. Carter, When the War Was Over: The Failure of Self-Reconstruction in the South, 1865-1867 (Baton Rouge: Louisiana State University Press, 1985), 24-60.

<sup>6</sup>J.R. Pole, The Pursuit of American Equality in American History (Los Angeles: University of California Press, 1978), 169; Alan F. Westin, "The Case of the Prejudiced Doorkeeper," in Quarrels That Have Shaped Our Constitution, ed. John Garraty (New York: Harper and Row, 1964), 130; Constitution, amend. XIII, sec. 1.

<sup>7</sup>Eric L. McKittrick, Andrew Johnson and Reconstruction (Chicago: University of Chicago Press, 1960), 274-325, 428-447.

<sup>8</sup>Westin, "The Prejudiced Doorkeeper," 130.

<sup>9</sup>C. Vann Woodward, The Strange Career of Jim Crow, 3d. ed. (New York: Oxford University Press, 1974), 17-19, 20-21.

<sup>10</sup>McKittrick, Johnson and Reconstruction, 13.

<sup>11</sup>Constitution, amend. XIV.

<sup>12</sup>Alexander Bickel, "The Original Understanding of the Segregation Decision," Harvard Law Review 69 (1955): 42-43, 51; Loren P. Beth, The Development of the American Constitution, 1877-1917, New American Series, eds. Henry Steele Commager and Richard B. Morris (New York: Harper and Row, 1971), 192-193.

<sup>13</sup>McKittrick, Johnson and Reconstruction, 12-14, 358, 508.

<sup>14</sup>Constitution, amends. XIV and XV; William Gillette, Retreat from Reconstruction, 1869-1879 (Baton Rouge: Louisiana State University Press, 1979), 23-24.

<sup>15</sup>Gillette, Retreat from Reconstruction, 25-55.

<sup>16</sup>Gillette, Retreat from Reconstruction, 197, 261, 270; Pole, Pursuit of Equality, 179-180.

<sup>17</sup>Gillette, Retreat from Reconstruction, 198, 272-273; Pole, Pursuit of Equality, 180.

<sup>18</sup>Beth, Development of Constitution, 192-193; Gillette, Retreat from Reconstruction, 196, 198-199.

<sup>19</sup>Slaughterhouse Cases, 16 Wall. 36 (1873); Stanley I. Kutler, Judicial Power and Reconstruction Politics (Chicago: University of Chicago Press, 1968), 138; Charles Warren, The Supreme Court in United States History, 3 vols., 1856-1918 (Boston: Little, Brown, and Company, 1922), 257-259; Pole, Pursuit of Equality, 178-179.

<sup>20</sup>Warren, Court in History, 3: 259-260; Harold M. Hyman and William W. Wiecek, Equal Justice Under Law: Constitutional Development, 1835-1875, New American Series, eds. Henry Steele Commager and Richard B. Morris (New York: Harper and Row, 1982), 475-478.

<sup>21</sup>Warren, Court in History, 3: 261-262; Hyman, Justice Under Law, 475-478; Pole, Pursuit of Equality, 178-179.

<sup>22</sup>Kutler, Judicial Power, 165.

<sup>23</sup>Warren, Court in History, 3: 324; The Supreme Court and Its Work (Washington, D.C.: Congressional Quarterly, 1981), 196.

<sup>24</sup>United States v. Cruikshank, 92 U.S. 542 (1876); Hyman, Justice Under Law, 488-489; Warren, Court in History, 3: 325-326; Charles A. Lofgren, The Plessy Case: A Legal-Historical Interpretation (New York: Oxford University Press, 1987), 72.

<sup>25</sup>Kutler, Judicial Power, 165-166.

<sup>26</sup>Supreme Court and Its Work, 22-24.

<sup>27</sup>Ibid, 24; Hyman, Justice Under Law, 493; C. Vann Woodward, Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction (Boston: Little, Brown, and Company, 1951), 8, 150-165.

<sup>28</sup>Hall v. DuCuir, 95 U.S. 485 (1878); Pole, Pursuit of Equality, 183-185.

<sup>29</sup>United States v. Harris, 106 U.S. 269 (1883); Lofgren, Plessy Case, 72; Beth, Development of Constitution, 193; Hyman, Justice Under Law, 496-499.

<sup>30</sup>Hyman, Justice Under Law, 496-499; Pole, Pursuit of Equality, 188-190; Alan Westin, "John Marshall Harlan and the Constitutional Rights of Negroes: Transportation of a Southerner," Yale Law Journal 66 (1956-1957): 674-675; Westin, "The Prejudiced Doorkeeper," 138; Robert Cushman, Leading Constitutional Decisions, 15th ed. (Englewood Cliffs, New Jersey: Prentice Hall, 1977), 408; Beth, Development of Constitution, 196.

<sup>31</sup>Civil Rights Cases, 109 U.S. 3 (1883); Warren, Court in History, 3: 334-335; Beth, Development of Constitution, 193-195; Pole, Pursuit of Equality, 188-190, 193-194.

<sup>32</sup>Civil Rights Cases; Cushman, Leading Decisions, 408; Westin, "The Prejudiced Doorkeeper," 138; Beth, Development of Constitution, 194-195.

<sup>33</sup>Civil Rights Cases; Beth, Development of Constitution, 195-196; Pole, Pursuit of Equality, 188-190.

<sup>34</sup>Meier, From Plantation, 203-204; Stanley J. Folmsbee, "The Origin of the First 'Jim Crow' Law," The Journal of Southern History 15 (May 1949): 240.

<sup>35</sup>Louisville, New Orleans, and Texas Railway v. Mississippi, 133 U.S. 587 (1890); Beth, Development of Constitution, 196; Pole, Pursuit of Equality, 185-186; John E. Semonche, Charting the Future: The Supreme Court Responds to a Changing Society, 1890-1920, no. 5, Contribution in Legal Studies, ed. Paul L. Murphy (Westport, Connecticut: Greenwood Press, 1978), 15; C. Vann Woodward, "The Case of the Louisiana Traveler," in Quarrels That Have Shaped Our Constitution, ed. John Garraty (New York: Harper and Row, 1964), 146-147.

<sup>36</sup>C. Vann Woodward, American Counterpoint: Slavery and Racism in the North-South Dialogue (Boston: Little, Brown, and Company, 1964), 212-215.

<sup>37</sup>Ibid, 215.

<sup>38</sup>Ibid, 215-216.

<sup>39</sup>Woodward, "The Louisiana Traveler," 146-147; Harold W. Chase and Craig R. Ducat, Constitutional Interpretations: Cases-Essays-Materials (St. Paul: West Publishing, 1979), 741.

<sup>40</sup>Woodward, American Counterpoint, 215-217; Woodward, "The Louisiana Traveler," 148-150.

- 41 Woodward, American Counterpoint, 217.
- 42 Ibid, 219-220.
- 43 Ibid, 219-220.
- 44 Ibid, 220-221; Woodward, "The Louisiana Traveler," 148-150.
- 45 Woodward, American Counterpoint, 220-221; Lofgren, Plessy Case, 39-41.
- 46 Woodward, "The Louisiana Traveler," 150-151; Woodward, American Counterpoint, 221-222; Lofgren, Plessy Case, 41-42.
- 47 Woodward, American Counterpoint, 222; Woodward, "The Louisiana Traveler," 151; Chase, Constitutional Interpretations, 741.
- 48 Woodward, American Counterpoint, 223.
- 49 Woodward, "The Louisiana Traveler," 152; Woodward, American Counterpoint, 224-225.
- 50 Woodward, "The Louisiana Traveler," 152-153; Woodward, American Counterpoint, 224-225; Sidney Kaplan, "Albion Tourgee: Attorney for the Segregated," Journal of Negro History 49 (April 1963): 130-131.
- 51 Woodward, American Counterpoint, 225-226; Robert D. Miller, "Samuel Field Phillips: The Odyssey of a Southern Dissenter," North Carolina Historical Review 58 (July 1981): 279.
- 52 Woodward, American Counterpoint, 227; Woodward, "The Louisiana Traveler," 153.
- 53 Plessy v. Ferguson.
- 54 Robert J. Harris, The Quest for Equality: The Constitution, Congress, and The Supreme Court (Baton Rouge: Louisiana State University Press, 1960), 99.
- 55 Barton J. Bernstein, "Case Law in Plessy v. Ferguson," Journal of Negro History 47 (July 1962): 192.
- 56 Bernstein, "Case Law," 193; Woodward, "The Louisiana Traveler," 154.
- 57 Cushman, Leading Decisions, 410.

<sup>58</sup>Barton J. Bernstein, "Plessy v. Ferguson: Conservative Sociological Jurisprudence," Journal of Negro History 48 (July 1963): 199-200.

<sup>59</sup>Plessy v. Ferguson.

<sup>60</sup>Harris, Quest for Equality, 101; Bernstein, "Conservative Jurisprudence," 205; Semonche, Charting the Future, 83-84.

<sup>61</sup>Bernstein, "Conservative Jurisprudence," 203; Harris, Quest for Equality, 101.

<sup>62</sup>Woodward, American Counterpoint, 227; Semonche, Charting the Future, 83-84.

<sup>63</sup>Cushman, Leading Decisions, 411-412; Westin, "Harlan and Constitutional Rights," 691, 708.

<sup>64</sup>"Louisiana's Separate Car Law," New York Times, 19 May 1896 (same article appeared in Richmond Dispatch on same day); "Separate Coaches," Richmond Dispatch, 21 May 1896.

<sup>65</sup>C. Vann Woodward, Thinking Back: The Perils of Writing History (Baton Rouge: Louisiana State University Press, 1986), 68.

<sup>66</sup>Ibid, 82.

<sup>67</sup>Woodward, Strange Career, 11, 13-14, 22.

<sup>68</sup>Ibid, 31-37.

<sup>69</sup>Ibid, 38-43.

<sup>70</sup>Ibid, 52-54.

<sup>71</sup>Ibid, 44.

<sup>72</sup>Ibid, 70; C. Vann Woodward, Origins of the New South, 1877-1913 (Baton Rouge: Louisiana State University Press, 1971), 211-212.

<sup>73</sup>"Interview with Everette G. Allen, Jr. on the Interpretation of the Plessy Case," interview by E.G. Allen, III (Richmond: April, 1987); Kutler, Judicial Power, 165-166.

<sup>74</sup>Woodward, Origins, 211-212; Woodward, Strange Career, 74, 97-102.

<sup>75</sup>Woodward, "The Louisiana Traveler," 158; Germaine A. Reed, "Race Legislation in Louisiana," Louisiana History 6 (Fall 1965): 392; Chase, 729.

76 Plessy v. Ferguson.

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## APPENDIX ONE

### ADOPTION OF JIM CROW RAILWAY STATUTES

1881 Tennessee (not enforced because of financial burdens)  
1887 Florida  
1888 Mississippi  
1889 Texas  
1890 Louisiana  
1891 Alabama  
Arkansas  
Kentucky  
Georgia  
1898 South Carolina  
1899 North Carolina  
1900 Virginia

## APPENDIX TWO

### I. DISFRANCHISEMENT OF THE SOUTHERN NEGRO

#### A. Through Constitutional Conventions

By the years indicated, the following states had disfranchised the Negro through conventions that amended the states' constitutions.

1890	Mississippi
1895	South Carolina
1898	Louisiana
1900	North Carolina
1901	Alabama
1901-1902	Virginia
1908	Georgia
1910	Oklahoma

B. Between 1890 and 1910, poll taxes, literacy tests and other means were used in the following states:

Florida, Tennessee, Arkansas, and Texas



### APPENDIX THREE

#### NEWSPAPER ARTICLES ON PLESSY DIRECTLY FOLLOWING DECISION

The following appeared in the New York Times and the Richmond Dispatch on 19 May 1896:

##### "Louisiana's Separate Car Law"

Washington May 18 - The Supreme Court to-day, in an opinion read by Justice Brown, sustained the constitutionality of the law of Louisiana requiring the railroads of the State to provide separate cars for white and colored passengers. There was no inter-State commerce feature on the case, for the railroad upon which the incident occurred giving rise to the case-Plessy vs. Ferguson-the East Louisiana Railroad-was and is operated wholly within the State. The opinion states that by analogy to the laws of Congress and of many of the States requiring the establishment of separate schools for children of the two races and other laws, the statute in question was within the competency of the Louisiana Legislature exercising the police power of the State. The judgement of the Supreme Court of the State upholding the law was therefore affirmed.

Mr. Justice Harlan announced a very vigorous dissent, saying he saw nothing but mischief in all such laws. In his view of the case, no power in the land had the right to regulate the enjoyment of civil rights upon the basis of race. It would be just as reasonable and proper, he said, for States to pass laws requiring separate cars to be furnished for Catholics and Protestants, or for descendants of those of the Teutonic race and those of the Latin race.

The following editorial appeared in the Richmond Dispatch on 21 May 1896:

##### "Separate Coaches"

The Supreme Court of the United States has affirmed the constitutionality of the Louisiana statute providing for separate coaches for white and colored passengers on the railroads in the State. This decision was hardly expected. It is none the less a law of the land. We quote an exchange as follows:

"The necessity of such a law exists only in the South, and the statute would never have been enacted but for conditions

which made the separation of the races in railroad travel apparently unavoidable, in order to secure the comfort of all concerned. The railroads are required to supply the colored passengers with accommodations substantially equal to those with which the whites are furnished, and there is thus no unfair discrimination. The matter of separate coaches has been agitated for several years in the Southern states, and it has been feared that a law to this effect would not stand the test of the courts. Now that the Supreme Court has declared the Louisiana statute constitutional, it is probable that the Legislatures of other Southern States will enact similar laws."

Some colored people make themselves so disagreeable on the cars that their conduct leads white men to ponder the question whether a law such as that of Louisiana is not needed in all the Southern States.

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Amendment XV (Ratified in 1870)