CHAPTER 1

SLAVERY AND THE FIRST RECONSTRUCTION: ESTABLISHING AND CONTESTING THE RACIAL ORDER

I. LAW AND WHITE SUPREMACY

Our nation was founded in contradiction, ostensibly committed to liberty while countenancing slavery. The Declaration of Independence proclaimed "that all men are created equal, and endowed by their Creator with certain unalienable Rights." The Constitution purported to "establish Justice . . . and secure the Blessings of Liberty." James Madison, in Federalist 1, argued that the Constitution is "the safest" course for the preservation of dignity, liberty, and happiness.

Yet the Constitution also protected slavery, even as it avoided use of the term. By the time of the Constitution's drafting, some northern states in which slavery had waned would have supported its nationwide abolition, but the southern states, with their agricultural economies and continuing need for cheap labor, would not have entered any Union that prohibited slavery. The Constitution thus granted Congress the power to respond to slave insurrections; declared that slaves who escaped into free states remained slaves; and determined that, for purposes of state representation in the House of Representatives, each slave would count as three-fifths of a person. The Constitution not only prohibited congressional abolition of slavery for more than two decades, it also precluded any amendment to the Constitution during that same period that would impair the slave trade. The Constitution's treatment of slavery highlights the role of law in mediating the tension between our nation's noble aspirations and its White Supremacist foundations.

While the bulk of this book focuses on contemporary racial controversies, we begin with an examination of the historical role of law in the development and persistence of White Supremacy. During the course of our history, law has alternately moved us closer to the ideal of racial justice and entrenched White Supremacy, all the while remaining inextricably intertwined with both who we are and who we want to be as a society.

Though many historical developments contributed to White Supremacy—prominent among them the decimation of Native

populations, colonialist and imperialist projects, and exclusionary immigration policies—slavery was especially integral to the development of White Supremacy and the law that enabled it. The early colonists initially met their need for cheap labor through indentured servitude, in which African and British people worked alongside each other for a term of years. By the 1600s, problems with the system of indentured servitude had become apparent; the freeing of servants created both potential competition for landowners and the need to continually purchase new servants. Servants who escaped could readily mix with a free population from whom they were indistinguishable.

Thus, in the 1600s, the system of indentured servitude gave way to the enslavement of Africans and, to some extent, Native peoples. All 13 colonies permitted slavery and, beginning in the seventeenth century, passed laws formally recognizing the institution. The enslavement of Africans became especially attractive—their dark skin disabled them from melding into the population of English settlers—and the enslavement of Native peoples became disfavored, partly due to the tensions it stoked with local tribes.

The justifications for slavery changed over time, as necessary to buttress the institution. The early colonists were Christian, and they justified slavery and the subjugation of Native peoples by highlighting that Africans and natives were not. That rationale eventually gave way to the belief that Africans and their descendants (many of whom became Christians) were subject to enslavement because, by virtue of their race, they were inherently inferior. The need for a stable ideological foundation for slavery thus produced the doctrine of racial inferiority.

White Supremacy ultimately came to be constituted both by material racial conditions (i.e., the institution and prevalence of slavery) and by racial consciousness (i.e., prevalent understandings of the meaning of race, and, in particular, belief in inherent racial inferiority). Racial conditions and racial consciousness reinforced each other. Slavery was defined in terms of race, and race was accepted as a sufficient justification for slavery. Subjugation came to seem normal, inevitable, and even desirable. Race became simultaneously a means of distributing rights and resources and of justifying that distribution. Even the poorest, most disadvantaged whites could take solace in the fact that they were not, and could not be, enslaved.

Then no less than now, law shapes racial conditions and racial consciousness. Through its allocation of legal entitlements, law shapes economic, social and political relationships and positions, distributing many of the burdens and the benefits of our collective life. Law also performs an expressive role; through communicating meanings, law helps to create our culture, to shape popular understandings of race and of racial justice. While the rule of law is popularly associated with justice, law may also underwrite injustice and bolster narratives that incline us

to accept as desirable or inevitable practices or outcomes that we should in fact oppose.

Myriad sources and forms of law have contributed to the racial order. Though recognized by the Constitution and perpetuated by the Supreme Court, slavery was also a matter of state law and depended for its stability on the cooperation of all manner of public officials and private citizens. Southern jurisdictions prohibited slaves from reading, leaving their masters' property without permission, assembling to worship, smoking in public, making loud noises, or defending themselves against assault. Though free black populations existed in the South, the slave regime limited the scope of their rights. The laws of northern states also denied many rights to free blacks, even as some were voters, property owners, merchants, and professionals.

The overthrow of slavery through the Civil War brought forth three amendments to the Constitution, one outlawing slavery, the others making the newly freed slaves rights bearing citizens. But the practical significance of these rights was stunted not only by the Supreme Court, but also by the actions of state legislatures, other government officials, and even private property owners. Many southern states enacted so-called Black Codes meant to recreate the conditions and depredations of slavery. Even rights that the Supreme Court or other sources of law had recognized—the right to own property, for example, or to serve on a jury—were often nullified in practice. A formal system of segregation, known as Jim Crow, spread throughout the South, and depended not only on the support of state laws, but also on social norms and the untold numbers of people who accepted its logic.

History not only illuminates law's complicity in the creation of White Supremacy, it also offers insight into the challenges of dismantling that system. The racial controversies of the past offer a template for the analysis of contemporary problems. As distant and distinct as the past may sometimes seem, the ways that decision-makers confronted challenges then can inform our choices now. Their questions are ours: In the years following the Civil War, what would it have meant to dismantle White Supremacy? To eliminate laws that take account of race? To guarantee important substantive rights for everyone? Would it have been enough to limit government power alone, or must private power and social norms have been transformed as well? Who should bear responsibility for dismantling White Supremacy? Legislatures or courts? States and localities or the federal government?

The concept of racial justice does not have a settled meaning, and we do not purport to offer a single conception here. But the pursuit of racial justice has long been informed, and sometimes limited, by the following clusters of principles and concepts:

i) Capitalism, Property and Profit

ii) Privacy, Liberty, and Autonomy

iii) Safety, Security, and Protection

iv) Custom, Tradition, Culture, and Community

v) Identity and Dignity

These categories provide tools or frameworks for evaluating whether, when, and how we have achieved racial justice or fallen short of the mark. Each of these clusters has roots in American political, legal, and social thought, and therefore represents shared values that judges, politicians, activists, scholars, and other commentators may draw upon to shape understandings of racial justice.

II. RACE, SLAVERY, AND JUDICIAL POWER

The pre-Civil War cases that follow frame the question of racial justice by foregrounding its antithesis: slavery. These cases prompt us to ask: What was the essence of the freedom and equality that slavery denied? How did the judges of the era address the intertwining of law with the social structure and cultural meanings of slavery?

The following decision from a state court demonstrates how a person's condemnation to slavery or entitlement to freedom turned on official determinations of race.

Hudgins v. Wrights

Supreme Court of Appeals of Virginia, 1806.
11 Va. 134.

■ JUDGE TUCKER.

In this case, the paupers claim their freedom as being descended from Indians entitled to their freedom. They have set forth their pedigree in the bill, which the evidence proves to be fallacious. But as there is no *Herald's Office* in this country, nor even a *Register* of births for any but white persons, and those *Registers* are either all lost, or of all records probably the most imperfect, our Legislature has very justly dispensed with the old common law precision required in a *writ of right*, and the reason for dispensing with it in the present case, is a thousand times stronger. In a claim for freedom, like a claim for money had and received, the plaintiff may well be permitted to make out his case on the trial according to the evidence.

What then is the evidence in this case? Unequivocal proof adduced perhaps by the defendant, that the plaintiffs are in the maternal line descended from Butterwood Nan, an old Indian woman;—that she was 60 years old, or upwards, in the year 1755;—that it was always understood, as the witness Robert Temple says, that her father was an Indian, though he cautiously avoids saying he knew, or ever heard, who, or what, her mother was. The other witness Mary Wilkinson, the only one except Robert Temple who had ever seen her, describes her as an old

Indian: and her testimony is strengthened by that of the other witnesses, who depose that her daughter Hannah had long black hair, was of a copper complexion, and generally called an Indian among the neighbours;—a circumstance which could not well have happened, if her mother had not had an equal, or perhaps a larger portion of Indian blood in her veins.

In aid of the other evidence, the Chancellor decided upon his own view. This, with the principles laid down in the decree, has been loudly complained of. [The chancellor (i.e., the lower court) has declared the appellee's free, reasoning that whoever would attempt to hold another person in slavery always bears the burden of proof.]

As a preliminary to my opinion upon this subject, I shall make a few observations upon the laws of our country, as connected with natural history.

From the first settlement of the colony of Virginia to the year 1778, all negroes, Moors, and mulattoes, except Turks and Moors in amity with Great Britain, brought into this country by sea, or by land, were SLAVES. And by the uniform declarations of our laws, the descendants of the females remain slaves, to this day, unless they can prove a right to freedom, by actual emancipation, or by descent in the maternal line from an emancipated female.

By the adjudication of the General Court, in the case of Hannah and others against Davis, April term, 1777, all American Indians brought into this country, and their descendants in the maternal line, are free.

Consequently I draw this conclusion, that all American Indians are prima facie FREE: and that where the fact of their nativity and descent, in a maternal line, is satisfactorily established, the burthen of proof thereafter lies upon the party claiming to hold them as slaves. To effect which, according to my opinion, he must prove the progenitrix of the party claiming to be free, to have been brought into Virginia, and made a slave between the passage of the act of 1679 [treating Indians as slaves], and its repeal in 1691.

All white persons are and ever have been FREE in this country. If one evidently white, be notwithstanding claimed as a slave, the proof lies on the party claiming to make the other his slave.

Nature has stampt upon the African and his descendants two characteristic marks, besides the difference of complexion, which often remain visible long after the characteristic distinction of colour either disappears or becomes doubtful; a flat nose and woolly head of hair. The latter of these characteristics disappears the last of all: and so strong an ingredient in the African constitution is this latter character, that it predominates uniformly where the party is in equal degree descended from parents of different complexions, whether white or Indians; giving to the jet black lank hair of the Indian a degree of flexure, which never

fails to betray that the party distinguished by it, cannot trace his lineage purely from the race of native Americans. Its operation is still more powerful where the mixture happens between persons descended equally from European and African parents. So pointed is this distinction between the natives of Africa and the aborigines of America, that a man might as easily mistake the glossy, jetty cloathing of an American bear for the wool of a black sheep, as the hair of an American Indian for that of an African, or the descendant of an African. Upon these distinctions as connected with our laws, the burden of proof depends. Upon these distinctions not infrequently does the evidence given upon trials of such questions depend; as in the present case, where the witnesses concur in assigning to the hair of Hannah, the daughter of Butterwood Nan, the long, straight, black hair of the native aborigines of this country. That such evidence is both admissible and proper, I cannot doubt. That it may at sometimes be necessary for a Judge to decide upon his own view, I think the following case will evince.

Suppose three persons, a black or mulatto man or woman with a flat nose and woolly head; a copper-coloured person with long jetty black, straight hair; and one with a fair complexion, brown hair, not woolly nor inclining thereto, with a prominent Roman nose, were brought together before a Judge upon a writ of Habeas Corpus, on the ground of false imprisonment and detention in slavery: that the only evidence which the person detaining them in his custody could produce was an authenticated bill of sale from another person, and that the parties themselves were unable to produce any evidence concerning themselves, whence they came, & c. & c. How must a Judge act in such a case? I answer he must judge from his own view. He must discharge the white person and the Indian out of custody, taking surety, if the circumstances of the case should appear to authorise it, that they should not depart the state within a reasonable time, that the holder may have an opportunity of asserting and proving them to be lineally descended in the maternal line from a female African slave; and he must redeliver the black or mulatto person, with the flat nose and woolly hair to the person claiming to hold him or her as a slave, unless the black person or mulatto could procure some person to be bound for him, to produce proof of his descent, in the maternal line, from a free female ancestor.—But if no such caution should be required on either side, but the whole case be left with the Judge, he must deliver the former out of custody, and permit the latter to remain in slavery, until he could produce proofs of his right to freedom. This case shows my interpretation how far the onus probandi may be shifted from one party to the other.

■ JUDGE ROANE, concurring.

The distinguishing characteristics of the different species of the human race are so visibly marked, that those species may be readily discriminated from each other by mere inspection only. This, at least, is

emphatically true in relation to the negroes, to the Indians of North America, and the European white people. When, however, these races become intermingled, it is difficult, if not impossible, to say from inspection only, which race predominates in the offspring, and certainly impossible to determine whether the descent from a given race has been through the paternal or maternal line. In the case of a Propositus of unmixed blood, therefore, I do not see but that the fact may be as well ascertained by the Jury or the Judge, upon view, as by the testimony of witnesses, who themselves have no other means of information:—but where an intermixture has taken place in relation to the person in question, this criterion is not infallible; and testimony must be resorted to for the purpose of shewing through what line a descent from a given stock has been deduced; and also to ascertain, perhaps, whether the colouring of the complexion has been derived from a negro or an Indian ancestor.

In the case of a person visibly appearing to be a negro, the presumption is, in this country, that he is a slave, and it is incumbent on him to make out his right to freedom: but in the case of a person visibly appearing to be a white man, or an Indian, the presumption is that he is free, and it is necessary for his adversary to shew that he is a slave.

In the present case it is not and cannot be denied that the appellees have entirely the appearance of white people: and how does the appellant attempt to deprive them of the blessing of liberty to which all such persons are entitled? He brings no testimony to shew that any ancestor in the female line was a negro slave or even an Indian rightfully held in slavery. Length of time shall not bar the right to freedom of those who, prima facie, are free, and whose poverty and oppression, (to say nothing of the rigorous principles of former times on this subject,) has prevented an attempt to assert their rights. But in the case before us, there has been no acquiescence. It is proved that John, (a brother of Hannah,) brought a suit to recover his freedom; and that Hannah herself made an almost continual claim as to her right of freedom, insomuch that she was threatened to be whipped by her master for mentioning the subject. It is also proved by Francis Temple (perhaps the brother of Robert) that the people in the neighbourhood said "that if she would try for her freedom she would get it." This general reputation and opinion of the neighbourhood is certainly entitled to some credit: it goes to repel the idea that the given female ancestor of Hannah was a lawful slave; it goes to confirm the other strong testimony as to Hannah's appearance as an Indian. It is not to be believed but that some of the neighbours would have sworn to that concerning which they all agreed in opinion; and, if so, Hannah might, on their testimony, have perhaps obtained her freedom, had those times been as just and liberal on the subject of slavery as the present.

No testimony can be more complete and conclusive than that which exists in this cause to shew that Hannah had every appearance of an Indian.

That appearance, on the principle with which I commenced, will suffice for the claim of her posterity, unless it is opposed by counter-evidence showing that some female ancestor of her's was a negro slave, or that she or some female ancestor, was lawfully an Indian slave. As to the first, there is no kind of testimony going to establish it. Robert Temple is not only entirely silent as to the colour and appearance of the mother of Nan, the mother of Hannah, but also as to that of Nan herself. The testimony of this witness (to say nothing of his probable interest in the question) is not satisfactory. His memory seems only to serve him so far as the interest of the appellant required. If Hannah's grandmother (the mother of Nan) were a negro, it is impossible that Hannah should have had that entire appearance of an Indian which is proved by the witnesses.—If they tell the truth, therefore, Hannah's grandmother was not a negro slave. This is more especially the case, if the father of Hannah were other than an Indian, and it is not proved nor can be presumed, that, in this country, at that time, her father was an Indian: in that case, Hannah would have had so little Indian blood in her veins, as not to justify the character of her appearance given by the witnesses. The mother and grandmother of Hannah must therefore be taken to have been Indians: but this will not suffice for the appellant unless they (or one of them) be shewn to have been Indian slaves.

Judges FLEMING, CARRINGTON, and LYONS, President, concurring, the latter delivered the decree of the Court as follows:

"This Court, not approving of the Chancellor's principles and reasoning in his decree made in this cause, except so far as the same relates to white persons and native American Indians, but entirely disapproving thereof, so far as the same relates to native Africans and their descendants, who have been and are now held as slaves by the citizens of this state, and discovering no other error in the said decree, affirms the same."

NOTES AND QUESTIONS

1. ***Racialization of Slavery.*** Note that the Chancellor, whose decision is on appeal, would have ignored appearance and always put the burden of proof on the party who is claiming to hold the other as a slave. Why isn't the Chancellor's position—the argument that legal presumptions should cut against slavery and in favor of freedom—the correct one? As an empirical matter, is it sensible to presume that all blacks are slaves? Why did the judges in this case reject the Chancellor's approach?

2. ***Liberty Versus Enslavement.*** The presumptions about race and slavery set forth in *Hudgins* were enormously important, eventually becoming settled law in virtually every part of the slaveholding South. Cases

such as *Hudgins* necessarily involved two different types of errors: freeing people who should by law be slaves and making slaves of people who should by law be free. In determining the appropriate legal rule, how should a court have balanced these two types of errors? Is there any legitimate reason not to employ a strong presumption in favor of liberty?

3. ***Defining Race.*** The law of most states in the period in which *Hudgins* was decided did not define race. Whites of that era generally believed that race was self-evident. But in 1705, in the course of prohibiting Native peoples, blacks, and mulattoes, as well as criminals, from holding any office of public power, the Virginia legislature defined a mulatto as "the child of an Indian, or the child, grandchild, or great grandchild of a Negro." In 1785, the legislature changed the definition of mulatto to include only those who had a quarter or more "of negro blood." Thus, Virginians who had one black great-grandparent and who were mulattos under the 1705 statute were now white under the 1785 statute. In 1910, a Virginia statute declared that anyone with one-sixteenth black ancestry was "colored." In 1930, anyone with any known black ancestry whatsoever was black. Why would the state have sought to enlarge the black population by making the definition of "colored" more capacious? What do these sorts of changes suggest to you about the meaning of race?

4. ***Identifying Race.*** The opinions in *Hudgins* point to many different ways of assessing a person's race: through appearance, ancestry, social understandings, self-identification, or behavior. What factors, in your view, best define race? Does the answer change depending on the reason the definition is sought?

In the following case, the Court grapples with the obligations of officials and private parties in free states to cooperate with the efforts of slave owners or slave catchers to capture escaped slaves. Northern states had enacted personal liberty laws that favored individuals' claims to freedom, while Congress, seeking to protect the property of slave owners, passed two Fugitive Slave Laws, one in 1793 and another in 1850. The latter of the two substantially strengthened slave owners' ability to reclaim their escaped slaves and is often cited as one of the events that helped precipitate the Civil War. *Prigg v. Pennsylvania* addresses Congress's authority to adopt the 1793 law and considers whether it preempted the personal liberty law adopted by Pennsylvania.

Prigg v. Pennsylvania

Supreme Court of the United States, 1842.
41 U.S. 539.

■ MR. JUSTICE STORY delivered the opinion of the court:

The plaintiff in error was indicted in York county, for having, with force and violence, taken and carried away from that county, to the state of Maryland, a certain negro woman, named Margaret Morgan, with a

design and intention of selling and disposing of, and keeping her, as a slave or servant for life, contrary to a statute of Pennsylvania, passed on the 26th of March 1826. That statute, in the first section, in substance, provides, that if any person or persons shall, from and after the passing of the act, by force and violence, take and carry away, or cause to be taken and carried away, and shall, by fraud or false pretence, seduce, or cause to be seduced, or shall attempt to take, carry away or seduce, any negro or mulatto, from any part of that commonwealth, with a design and intention of selling and disposing of, or causing to be sold, or of keeping and detaining, or of causing to be kept and detained, such negro or mulatto, as a slave or servant for life, or for any term whatsoever; every such person or persons, his or their aiders or abettors, shall, on conviction thereof, be deemed guilty of felony, and shall forfeit and pay a sum not less than five hundred, nor more than one thousand dollars; and moreover, shall be sentenced to undergo servitude for any term or terms of years, not less than seven years nor exceeding twenty-one years; and shall be confined and kept to hard labor.

The plaintiff in error pleaded not guilty to the indictment; and at the trial, the jury found a special verdict, which, in substance, states, that the negro woman, Margaret Morgan, was a slave for life, and held to labor and service under and according to the laws of Maryland, to a certain Margaret Ashmore, a citizen of Maryland; that the slave escaped and fled from Maryland, into Pennsylvania, in 1832; that the plaintiff in error, being legally constituted the agent and attorney of the said Margaret Ashmore, in 1837, caused the said negro woman to be taken and apprehended as a fugitive from labor, by a state constable, under a warrant from a Pennsylvania magistrate; that the said negro woman was thereupon brought before the said magistrate, who refused to take further cognisance of the case; and thereupon, the plaintiff in error did remove, take and carry away the said negro woman and her children, out of Pennsylvania, into Maryland, and did deliver the said negro woman and her children into the custody and possession of the said Margaret Ashmore. The special verdict further finds, that one of the children was born in Pennsylvania, more than a year after the said negro woman had fled and escaped from Maryland. Upon this special verdict, the court adjudged that the plaintiff in error was guilty of the offence charged in the indictment.

The question arising in the case, as to the constitutionality of the statute of Pennsylvania, has been most elaborately argued at the bar. The counsel for the plaintiff in error has contended, that the statute of Pennsylvania is unconstitutional.

There are two clauses in the constitution upon the subject of fugitives, which stands in juxtaposition with each other, and have been thought mutually to illustrate each other. They are both contained in the second section of the fourth article, and are in the following words: ‘A

person charged in any state with treason, felony or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.' 'No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up, on claim of the party to whom such service or labor may be due.'

The last clause is that, the true interpretation whereof is directly in judgment before us. Historically, it is well known, that the object of this clause was to secure to the citizens of the slave-holding states the complete right and title of ownership in their slaves, as property, in every state in the Union into which they might escape from the state where they were held in servitude. The full recognition of this right and title was indispensable to the security of this species of property in all the slave-holding states; and, indeed, was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted, that it constituted a fundamental article, without the adoption of which the Union could not have been formed. Its true design was, to guard against the doctrines and principles prevalent in the non-slave-holding states, by preventing them from intermeddling with, or obstructing, or abolishing the rights of the owners of slaves.

The clause manifestly contemplates the existence of a positive, unqualified right on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control or restrain. The slave is not to be discharged from service or labor, in consequence of any state law or regulation. Now, certainly, without indulging in any nicety of criticism upon words, it may fairly and reasonably be said, that any state law or state regulation, which interrupts, limits, delays or postpones the right of the owner to the immediate possession of the slave, and the immediate command of his service and labor, operates, *pro tanto*, a discharge of the slave therefrom.

We have said, that the clause contains a positive and unqualified recognition of the right of the owner in the slave, unaffected by any state law or legislation whatsoever, because there is no qualification or restriction of it to be found therein; and we have no right to insert any, which is not expressed, and cannot be fairly implied. The owner must, therefore, have the right to seize and repossess the slave, which the local laws of his own state confer upon him, as property; and we all know that this right of seizure and recaption is universally acknowledged in all the slave-holding states. Upon this ground, we have not the slightest hesitation in holding, that under and in virtue of the constitution, the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave, whenever he can do it, without any breach of the peace or any illegal violence. In this sense, and to this

extent, this clause of the constitution may properly be said to execute itself, and to require no aid from legislation, state or national.

But the clause of the constitution does not stop here; nor, indeed, consistently with its professed objects, could it do so.

It says, 'but he (the slave) shall be delivered up, on claim of the party to whom such service or labor may be due.' Now, we think it exceedingly difficult, if not impracticable, to read this language, and not to feel, that it contemplated some further remedial redress than that which might be administered at the hands of the owner himself.

If, indeed, the constitution guaranties the right, and if it requires the delivery upon the claim of the owner (as cannot well be doubted), the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it.

Congress has taken this very view of the power and duty of the national government. The result of their deliberations was the passage of the act of the 12th of February 1793, ch. 51.

But it has been argued, that the act of congress is unconstitutional, because it does not fall within the scope of any of the enumerated powers of legislation confided to that body; and therefore, it is void. If this be the true interpretation of the constitution, it must, in a great measure, fail to attain many of its avowed and positive objects, as a security of rights, and a recognition of duties. Such a limited construction of the constitution has never yet been adopted as correct, either in theory or practice.

Our judgment would be the same, if the question were entirely new, and the act of congress were of recent enactment. We hold the act to be clearly constitutional, in all its leading provisions, and, indeed, with the exception of that part which confers authority upon state magistrates, to be free from reasonable doubt and difficulty, upon the grounds already stated. As to the authority so conferred upon state magistrates, while a difference of opinion has existed, and may exist still, on the point, in different states, whether state magistrates are bound to act under it, none is entertained by this court, that state magistrates may, if they choose, exercise that authority, unless prohibited by state legislation.

The remaining question is, whether the power of legislation upon this subject is exclusive in the national government, or concurrent in the states, until it is exercised by congress. In our opinion, it is exclusive.

In the first place, it is material to state (what has been already incidentally hinted at), that the right to seize and retake fugitive slaves and the duty to deliver them up, in whatever state of the Union they may be found, and, of course, the corresponding power in congress to use the appropriate means to enforce the right and duty, derive their whole validity and obligation exclusively from the constitution of the United States, and are there, for the first time, recognised and established in

that peculiar character. Before the adoption of the constitution, no state had any power whatsoever over the subject, except within its own territorial limits, and could not bind the sovereignty or the legislation of other states.

It is scarcely conceivable, that the slave-holding states would have been satisfied with leaving to the legislation of the non-slave-holding states, a power of regulation, in the absence of that of congress, which would or might practically amount to a power to destroy the rights of the owner.

To guard, however, against any possible misconstruction of our views, it is proper to state, that we are by no means to be understood, in any manner whatsoever, to doubt or to interfere with the police power belonging to the states, in virtue of their general sovereignty. We entertain no doubt whatsoever, that the states, in virtue of their general police power, possesses full jurisdiction to arrest and restrain runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds and paupers. The rights of the owners of fugitive slaves are in no just sense interfered with, or regulated, by such a course; and in many cases, the operations of this police power, although designed generally for other purposes, for protection, safety and peace of the state, may essentially promote and aid the interests of the owners. But such regulations can never be permitted to interfere with, or to obstruct, the just rights of the owner to reclaim his slave, derived from the constitution of the United States, or with the remedies prescribed by congress to aid and enforce the same.

Upon these grounds, we are of opinion, that the act of Pennsylvania upon which this indictment is founded, is unconstitutional and void.

■ MR. JUSTICE MCLEAN, dissenting:

The seizure which the master has a right to make under the act of congress, is for the purpose of taking the slave before an officer. His possession the subject for which it was made. The certificate of right to the service the subject for which it was made. The important point is, shall the presumption of right set up by the master, unsustained by any proof, or the presumption which arises from the laws and institutions of the state, prevail; this is the true issue. The sovereignty of the state is on one side, and the asserted interest of the master on the other; that interest is protected by the paramount law, and a special, a summary, and an effectual, mode of redress is given. But this mode is not pursued, and the remedy is taken into his own hands by the master.

The presumption of the state that the colored person is free, may be erroneous in fact; and if so, there can be no difficulty in proving it. But may not the assertion of the master be erroneous also; and if so, how is his act of force to be remedied? The colored person is taken and forcibly conveyed beyond the jurisdiction of the state. This force, not being

authorized by the act of congress nor by the constitution, may be prohibited by the state. As the act covers the whole power in the constitution and carries out, by special enactments, its provisions, we are, in my judgment bound by the act. We can no more, under such circumstances administer a remedy under the constitution, in disregard of the act, than we can exercise a commercial or other power in disregard of an act of congress on the same subject. This view respects the rights of the master and the rights of the state; it neither jeopardizes nor retards the reclamation of the slave; it removes all state action prejudicial to the rights of the master; and recognises in the state a power to guard and protect its own jurisdiction, and the peace of its citizen.

It appears, in the case under consideration, that the state magistrate before whom the fugitive was brought refused to act. In my judgment, he was bound to perform the duty required of him by a law paramount to any act, on the same subject, in his own state. But this refusal does not justify the subsequent action of the claimant; he should have taken the fugitive before a judge of the United States, two of whom resided within the state.

NOTES AND QUESTIONS

1. ***Was* Prigg *Rightly Decided?*** The Fugitive Slave Clause, Article IV, section 2, clause 3, guarantees the property interest of slave owners in the event that their slaves escape to a free state. But it does not explicitly grant Congress the power to enact legislation, such as the Fugitive Slave Act, enabling such recapture. Justice Story concluded nonetheless that the Constitution's Fugitive Slave Clause both deprived the states of any power to address the fugitive slave issue and authorized congressional legislation in furtherance of the Fugitive Slave Clause. Was he right on both counts?

2. ***Federalism and States' Rights.*** What do you make of the implication of Justice McLean's opinion—that states, if they wished, were entitled to create a presumption that all individuals within their jurisdiction were free? Under this view, the Pennsylvania statute could be justified as establishing a burden on the slave owner to prove that the person being apprehended was by law a slave. As not all black persons were slaves, imposing the burden on the slave catcher would protect the liberty interests of free persons of color, though at some cost to the slave owner. However just that approach, would it have been constitutional? Would the Constitution have justified states giving priority to the liberty interest of the black person over the property interest of the slave owner?

3. ***Justice Story the Abolitionist.*** Consider the fact that Justice Story was a staunch abolitionist. Does *Prigg* reflect the conscience of an abolitionist? What other motives could Justice Story have had in sustaining the constitutionality of the Fugitive Slave Act, despite his abolitionist views?

The Court's decision *in Prigg* did not resolve the fugitive slave controversy. After *Prigg*, some northern states simply declined to help enforce the Fugitive Slave Act, a possibility that the Supreme Court's *Prigg*

decision had ironically highlighted. Even as it struck down the Pennsylvania law, the Court permitted states to decline to help enforce the federal law. In response, Congress passed the Fugitive Slave Act of 1850, as part of the Compromise of 1850, which also abolished the slave trade in the District of Columbia and admitted California as a free state, while admitting New Mexico and Utah as territories with the slavery question left to future legislation. The 1850 Fugitive Slave Act levied a substantial fine on any law enforcement official who declined to arrest an alleged runaway slave. It also subjected anyone who aided a runaway slave to both a hefty fine and imprisonment. Slave catchers needed only to provide an affidavit attesting that an individual was actually a slave; the alleged slave was not entitled to a trial to assert a claim for freedom.

Dred Scott v. Sanford—perhaps the most infamous decision ever made by the Supreme Court—confronts the question whether state or federal law could alter the legal status of a slave who had departed the jurisdiction in which he was enslaved.

Dred Scott v. Sandford

Supreme Court of the United States, 1857.
60 U.S. 393.

[Dred Scott, admittedly once a slave but now claiming to be a citizen of Missouri, brought an action in federal court against John F.A. Sanford—whose name was apparently misspelled in the official case reports—a citizen of New York. Federal jurisdiction was premised on diversity of citizenship. In 1834, Scott's former owner had taken him from Missouri to Illinois, where they resided for two years before moving to Minnesota, which was then part of the Louisiana Territory. In 1838, they returned to Missouri, and Scott was sold as a slave to Sanford. Although slavery was legal in Missouri, it was prohibited in Illinois by the state constitution, and in the Louisiana Territory by the federal statute embodying the Missouri Compromise. Scott argued that these provisions made him a free man. In response, Sanford contended that the court lacked diversity jurisdiction over Scott's claim because, as a black man, Scott could not be a citizen of Missouri; moreover, he argued that Scott's time in Illinois and Minnesota could not deprive his owner of his property interest in Scott when he returned to Missouri.]

■ MR. CHIEF JUSTICE TANEY delivered the opinion of the Court.

There are two leading questions presented by the record:

1. Had the Circuit Court of the United States jurisdiction to hear and determine the case between these parties? And

2. If it had jurisdiction, is the judgment it has given erroneous or not?

The plaintiff in error, who was also the plaintiff in the court below, was, with his wife and children, held as slaves by the defendant, in the State of Missouri; and he brought this action in the Circuit Court of the United States for that district, to assert the title of himself and his family to freedom.

The declaration is in the form usually adopted in that State to try questions of this description, and contains the averment necessary to give the court jurisdiction; that he and the defendant are citizens of different States; that is, that he is a citizen of Missouri, and the defendant a citizen of New York.

The defendant pleaded in abatement to the jurisdiction of the court, that the plaintiff was not a citizen of the State of Missouri, as alleged in his declaration, being a negro of African descent, whose ancestors were of pure African blood, and who were brought into this country and sold as slaves.

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

It will be observed, that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country, and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State, in the sense in which the word citizen is used in the Constitution of the United States. And this being the only matter in dispute on the pleadings, the court must be understood as speaking in this opinion of that class only, that is, of those persons who are the descendants of Africans who were imported into this country, and sold as slaves.

The situation of this population was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to

cede it. These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war; and the people who compose these Indian political communities have always been treated as foreigners not living under our Government. It is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy. But they may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.

We proceed to examine the case as presented by the pleadings.

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

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character of course was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can by naturalizing an alien invest him with the rights and privileges secured to a citizen of a State under the Federal Government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character.

It is very clear, therefore, that no State can, by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it.

The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a State should be entitled, embraced the negro African race, at that time in this country, or who might afterwards be imported, who had then or should afterwards be made free in any State; and to put it in the power of a single State to make him a citizen of the United States, and endue him with the full rights of citizenship in every other State without their consent? Does the Constitution of the United States act upon him

whenever he shall be made free under the laws of a State, and raised there to the rank of a citizen, and immediately clothe him with all the privileges of a citizen in every other State, and in its own courts?

The court think the affirmative of these propositions cannot be maintained. And if it cannot, the plaintiff in error could not be a citizen of the State of Missouri, within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts.

It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else. And the personal rights and privileges guaranteed to citizens of this new sovereignty were intended to embrace those only who were then members of the several State communities, or who should afterwards by birthright or otherwise become members, according to the provisions of the Constitution and the principles on which it was founded. It was the union of those who were at that time members of distinct and separate political communities into one political family, whose power, for certain specified purposes, was to extend over the whole territory of the United States. And it gave to each citizen rights and privileges outside of his State which he did not before possess, and placed him in every other State upon a perfect equality with its own citizens as to rights of person and rights of property; it made him a citizen of the United States.

It becomes necessary, therefore, to determine who were citizens of the several States when the Constitution was adopted. And in order to do this, we must recur to the Governments and institutions of the thirteen colonies, when they separated from Great Britain and formed new sovereignties, and took their places in the family of independent nations. We must inquire who, at that time, were recognized as the people or citizens of a State, whose rights and liberties had been outraged by the English Government; and who declared their independence, and assumed the powers of Government to defend their rights by force of arms.

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was

framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

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

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

The opinion thus entertained and acted upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic. And, accordingly, a negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States. The slaves were more or less numerous in the different colonies, as slave labor was found more or less profitable. But no one seems to have doubted the correctness of the prevailing opinion of the time.

We proceed, therefore, to inquire whether the facts relied on by the plaintiff entitled him to his freedom.

The case, as he himself states it, on the record brought here by his writ of error, is this:

The plaintiff was a negro slave, belonging to Dr. Emerson, who was a surgeon in the army of the United States. In the year 1834, he took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At the time last mentioned, said Dr. Emerson removed the plaintiff from said military post at Rock Island to the military post at Fort Snelling, situate on the west bank of the Mississippi river, in the Territory known as Upper Louisiana, acquired by the United States of France, and situate north of the latitude of thirty-six degrees thirty minutes north, and north of the State of Missouri. Said Dr.

Emerson held the plaintiff in slavery at said Fort Snelling, from said last-mentioned date until the year 1838.

In the year 1835, Harriet, who is named in the second count of the plaintiff's declaration, was the negro slave of Major Taliaferro, who belonged to the army of the United States. In that year, 1835, said Major Taliaferro took said Harriet to said Fort Snelling, a military post, situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave, at said Fort Snelling, unto the said Dr. Emerson hereinbefore named. Said Dr. Emerson held said Harriet in slavery at said Fort Snelling until the year 1838.

In the year 1836, the plaintiff and Harriet intermarried, at Fort Snelling, with the consent of Dr. Emerson, who then claimed to be their master and owner. Eliza and Lizzie, named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat Gipsey, north of the north line of the State of Missouri, and upon the river Mississippi. Lizzie is about seven years old, and was born in the State of Missouri, at the military post called Jefferson Barracks.

In the year 1838, said Dr. Emerson removed the plaintiff and said Harriet, and their said daughter Eliza, from said Fort Snelling to the State of Missouri, where they have ever since resided.

Before the commencement of this suit, said Dr. Emerson sold and conveyed the plaintiff, and Harriet, Eliza, and Lizzie, to the defendant, as slaves, and the defendant has ever since claimed to hold them, and each of them, as slaves.

In considering this part of the controversy, two questions arise: 1. Was he, together with his family, free in Missouri by reason of the stay in the territory of the United States hereinbefore mentioned? And 2. If they were not, is Scott himself free by reason of his removal to Rock Island, in the State of Illinois, as stated in the above admissions?

We proceed to examine the first question.

The act of Congress, upon which the plaintiff relies, declares that slavery and involuntary servitude, except as a punishment for crime, shall be forever prohibited in all that part of the territory ceded by France, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, and not included within the limits of Missouri. And the difficulty which meets us at the threshold of this part of the inquiry is, whether Congress was authorized to pass this law under any of the powers granted to it by the Constitution; for if the authority is not given by that instrument, it is the duty of this court to declare it void and inoperative, and incapable of conferring freedom upon any one who is held as a slave under the have of any one of the States.

There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States. That power is plainly given; and if a new State is admitted, it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers, and duties of the State, and the citizens of the State, and the Federal Government. But no power is given to acquire a Territory to be held and governed permanently in that character.

But the power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of Government. The powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself. And when the Territory becomes a part of the United States, the Federal Government enters into possession in the character impressed upon it by those who created it. It enters upon it with its powers over the citizen strictly defined, and limited by the Constitution, from which it derives its own existence, and by virtue of which alone it continues to exist and act as a Government and sovereignty. It has no power of any kind beyond it; and it cannot, when it enters a Territory of the United States, put off its character, and assume discretionary or despotic powers which the Constitution has denied to it. It cannot create for itself a new character separated from the citizens of the United States, and the duties it owes them under the provisions of the Constitution. The Territory being a part of the United States, the Government and the citizen both enter it under the authority of the Constitution, with their respective rights defined and marked out; and the Federal Government can exercise no power over his person or property, beyond what that instrument confers, nor lawfully deny any right which it has reserved.

The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the States, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under Territorial Government, as well as that covered by States. It is a total absence of power everywhere within the dominion of the United States, and places the citizens of a Territory, so far as these rights are concerned, on the same footing with citizens of the States, and guards them as firmly and plainly against any inroads which the General Government might attempt, under the plea of implied or incidental powers. And if Congress itself cannot do this-if it is beyond the powers conferred on the Federal Government-it will be admitted, we presume, that it could not authorize a Territorial Government to exercise

them. It could confer no power on any local Government, established by its authority, to violate the provisions of the Constitution.

Now, as we have already said in an earlier part of this opinion, upon a different point, the right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guarantied to the citizens of the United States, in every State that might desire it, for twenty years. And the Government in express terms is pledged to protect it in all future time, if the slave escapes from his owner. This is done in plain words-too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection that property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.

Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident.

We have so far examined the case, as it stands under the Constitution of the United States, and the powers thereby delegated to the Federal Government.

But there is another point in the case which depends on State power and State law. And it is contended, on the part of the plaintiff, that he is made free by being taken to Rock Island, in the State of Illinois, independently of his residence in the territory of the United States; and being so made free, he was not again reduced to a state of slavery by being brought back to Missouri.

Our notice of this part of the case will be very brief; for the principle on which it depends was decided in this court, upon much consideration, in the case of Strader et al. *v.* Graham, reported in 10th Howard, 82. In that case, the slaves had been taken from Kentucky to Ohio, with the consent of the owner, and afterwards brought back to Kentucky. And this court held that their *status* or condition, as free or slave, depended upon the laws of Kentucky, when they were brought back into that State, and not of Ohio; and that this court had no jurisdiction to revise the judgment of a State court upon its own laws. This was the point directly before the court, and the decision that this court had not jurisdiction turned upon it, as will be seen by the report of the case.

So in this case. As Scott was a slave when taken into the State of Illinois by his owner, and was there held as such, and brought back in that character, his *status*, as free or slave, depended on the laws of Missouri, and not of Illinois.

It has, however, been urged in the argument, that by the laws of Missouri he was free on his return, and that this case, therefore, cannot be governed by the case of Strader et al. *v.* Graham, where it appeared, by the laws of Kentucky, that the plaintiffs continued to be slaves on their return from Ohio. But whatever doubts or opinions may, at one time, have been entertained upon this subject, we are satisfied, upon a careful examination of all the cases decided in the State courts of Missouri referred to, that it is now firmly settled by the decisions of the highest court in the State, that Scott and his family upon their return were not free, but were, by the laws of Missouri, the property of the defendant; and that the Circuit Court of the United States had no jurisdiction, when, by the laws of the State, the plaintiff was a slave, and not a citizen.

Moreover, the plaintiff, it appears, brought a similar action against the defendant in the State court of Missouri, claiming the freedom of himself and his family upon the same grounds and the same evidence upon which he relies in the case before the court. The case was carried before the Supreme Court of the State; was fully argued there; and that court decided that neither the plaintiff nor his family were entitled to freedom, and were still the slaves of the defendant; and reversed the judgment of the inferior State court, which had given a different decision. If the plaintiff supposed that this judgment of the Supreme Court of the State was erroneous, and that this court had jurisdiction to revise and reverse it, the only mode by which he could legally bring it before this court was by writ of error directed to the Supreme Court of the State, requiring it to transmit the record to this court. If this had been done, it is too plain for argument that the writ must have been dismissed for want of jurisdiction in this court. The case of Strader and others *v.* Graham is directly in point; and, indeed, independent of any decision, the language of the 25th section of the act of 1789 is too clear and precise to admit of controversy.

Upon the whole, therefore, it is the judgment of this court, that it appears by the record before us that the plaintiff in error is not a citizen of Missouri, in the sense in which that word is used in the Constitution; and that the Circuit Court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it. Its judgment for the defendant must, consequently, be reversed, and a mandate issued, directing the suit to be dismissed for want of jurisdiction.

■ MR. JUSTICE MCLEAN dissenting.

In the argument, it was said that a colored citizen would not be an agreeable member of society. This is more a matter of taste than of law. Several of the States have admitted persons of color to the right of suffrage, and in this view have recognized them as citizens; and this has been done in the slave as well as the free States. On the question of citizenship, it must be admitted that we have not been very fastidious. Under the late treaty with Mexico, we have made citizens of all grades,

combinations, and colors. The same was done in the admission of Louisiana and Florida. No one ever doubted, and no court ever held, that the people of these Territories did not become citizens under the treaty. They have exercised all the rights of citizens, without being naturalized under the acts of Congress.

There are several important principles involved in this case, which have been argued, and which may be considered under the following heads:

1. The locality of slavery, as settled by this court and the courts of the States.

2. The relation which the Federal Government bears to slavery in the States.

3. The power of Congress to establish Territorial Governments, and to prohibit the introduction of slavery therein.

4. The effect of taking slaves into a new State or Territory, and so holding them, where slavery is prohibited.

5. Whether the return of a slave under the control of his master, after being entitled to his freedom, reduces him to his former condition.

6. Are the decisions of the Supreme Court of Missouri, on the questions before us, binding on this court, within the rule adopted.

In the course of my judicial duties, I have had occasion to consider and decide several of the above points.

1. As to the locality of slavery. The civil law throughout the Continent of Europe, it is believed, without an exception, is, that slavery can exist only within the territory where it is established; and that, if a slave escapes, or is carried beyond such territory, his mater cannot reclaim him, unless by virtue of some express stipulation.

I will now consider the relation which the Federal Government bears to slavery in the States:

Slavery is emphatically a State institution. In the ninth section of the first article of the Constitution, it is provided 'that the migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.'

In the Convention, it was proposed by a committee of eleven to limit the importation of slaves to the year 1800, when Mr. Pinckney moved to extend the time to the year 1808. This motion was carried-New Hampshire, Massachusetts, Connecticut, Maryland, North Carolina, South Carolina, and Georgia, voting in the affirmative; and New Jersey,

Pennsylvania, and Virginia, in the negative. In opposition to the motion, Mr. Madison said: 'Twenty years will produce all the mischief that can be apprehended from the liberty to import slaves; so long a term will be more dishonorable to the American character than to say nothing about it in the Constitution.' (Madison Papers.)

The provision in regard to the slave trade shows clearly that Congress considered slavery a State institution, to be continued and regulated by its individual sovereignty; and to conciliate that interest, the slave trade was continued twenty years, not as a general measure, but for the 'benefit of such States as shall think proper to encourage it.'

The only connection which the Federal Government holds with slaves in a State, arises from that provision of the Constitution which declares that 'No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up, on claim of the party to whom such service or labor may be due.'

This being a fundamental law of the Federal Government, it rests mainly for its execution, as has been held, on the judicial power of the Union; and so far as the rendition of fugitives from labor has become a subject of judicial action, the Federal obligation has been faithfully discharged.

In the formation of the Federal Constitution, care was taken to confer no power on the Federal Government to interfere with this institution in the States. In the provision respecting the slave trade, in fixing the ratio of representation, and providing for the reclamation of fugitives from labor, slaves were referred to as persons, and in no other respect are they considered in the Constitution.

We need not refer to the mercenary spirit which introduced the infamous traffic in slaves, to show the degradation of negro slavery in our country. This system was imposed upon our colonial settlements by the mother country, and it is due to truth to say that the commercial colonies and States were chiefly engaged in the traffic. But we know as a historical fact, that James Madison, that great and good man, a leading member in the Federal Convention, was solicitous to guard the language of that instrument so as not to convey the idea that there could be property in man.

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

the rights of suffrage when the Constitution was adopted, and it was not doubted by any intelligent person that its tendencies would greatly ameliorate their condition.

Many of the States, on the adoption of the Constitution, or shortly afterward, took measures to abolish slavery within their respective jurisdictions; and it is a well-known fact that a belief was cherished by the leading men, South as well as North, that the institution of slavery would gradually decline, until it would become extinct. The increased value of slave labor, in the culture of cotton and sugar, prevented the realization of this expectation. Like all other communities and States, the South were influenced by what they considered to be their own interests.

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

The power of Congress to establish Territorial Governments, and to prohibit the introduction of slavery therein, is the next point to be considered.

Under the fifth head, we were to consider whether the status of slavery attached to the plaintiff and wife, on their return to Missouri . . . This doctrine is not asserted in the late opinion of the Supreme Court of Missouri, and up to 1852 the contrary doctrine was uniformly maintained by that court.

In its late decision, the court say that it will not give effect in Missouri to the laws of Illinois, or the law of Congress called the Missouri compromise. This was the effect of the decision, though its terms were, that the court would not take notice, judicially, of those laws.

In 1851, the Court of Appeals of South Carolina recognized the principle, that a slave, being taken to a free State, became free. (Commonwealth *v.* Pleasants, 10 Leigh Rep., 697.) In Betty *v.* Horton, the Court of Appeals held that the freedom of the slave was acquired by the action of the laws of Massachusetts, by the said slave being taken there. (5 Leigh Rep., 615.)

The slave States have generally adopted the rule, that where the master, by a residence with his slave in a State or Territory where slavery is prohibited, the slave was entitled to his freedom everywhere. This was the settled doctrine of the Supreme Court of Missouri. It has been so held in Mississippi, in Virginia, in Louisiana, formerly in Kentucky, Maryland, and in other States.

The law, where a contract is made and is to be executed, governs it. This does not depend upon comity, but upon the law of the contract. And if, in the language of the Supreme Court of Missouri, the master, by taking his slave to Illinois, and employing him there as a slave, emancipates him as effectually as by a deed of emancipation, is it possible

that such an act is not matter for adjudication in any slave State where the master may take him? Does not the master assent to the law, when he places himself under it in a free State?

The States of Missouri and Illinois are bounded by a common line. The one prohibits slavery, the other admits it. This has been done by the exercise of that sovereign power which appertains to each. We are bound to respect the institutions of each, as emanating from the voluntary action of the people. Have the people of either any right to disturb the relations of the other? Each State rests upon the basis of its own sovereignty, protected by the Constitution. Our Union has been the foundation of our prosperity and national glory. Shall we not cherish and maintain it? This can only be done by respecting the legal rights of each State.

If a citizen of a free State shall entice or enable a slave to escape from the service of his master, the law holds him responsible, not only for the loss of the slave, but he is liable to be indicted and fined for the misdemeanor. And I am bound here to say, that I have never found a jury in the four States which constitute my circuit, which have not sustained this law, where the evidence required them to sustain it. And it is proper that I should also say, that more cases have arisen in my circuit, by reason of its extent and locality, than in all other parts of the Union. This has been done to vindicate the sovereign rights of the Southern States, and protect the legal interests of our brethren of the South.

Let these facts be contrasted with the case now before the court. Illinois has declared in the most solemn and impressive form that there shall be neither slavery nor involuntary servitude in that State, and that any slave brought into it, with a view of becoming a resident, shall be emancipated. And effect has been given to this provision of the Constitution by the decision of the Supreme Court of that State. With a full knowledge of these facts, a slave is brought from Missouri to Rock Island, in the State of Illinois, and is retained there as a slave for two years, and then taken to Fort Snelling, where slavery is prohibited by the Missouri compromise act, and there he is detained two years longer in a state of slavery. Harriet, his wife, was also kept at the same place four years as a slave, having been purchased in Missouri. They were then removed to the State of Missouri, and sold as slaves, and in the action before us they are not only claimed as slaves, but a majority of my brethren have held that on their being returned to Missouri the status of slavery attached to them.

I am not able to reconcile this result with the respect due to the State of Illinois. Having the same rights of sovereignty as the State of Missouri in adopting a Constitution, I can perceive no reason why the institutions of Illinois should not receive the same consideration as those of Missouri. Allowing to my brethren the same right of judgment that I exercise myself, I must be permitted to say that it seems to me the principle laid

down will enable the people of a slave State to introduce slavery into a free State, for a longer or shorter time, as may suit their convenience; and by returning the slave to the State whence he was brought, by force or otherwise, the status of slavery attaches, and protects the rights of the master, and defies the sovereignty of the free State. There is no evidence before us that Dred Scott and his family returned to Missouri voluntarily. The contrary is inferable from the agreed case: 'In the year 1838, Dr. Emerson removed the plaintiff and said Harriet, and their daughter Eliza, from Fort Snelling to the State of Missouri, where they have ever since resided.' This is the agreed case; and can it be inferred from this that Scott and family returned to Missouri voluntarily? He was removed; which shows that he was passive, as a slave, having exercised no volition on the subject. He did not resist the master by absconding or force. But that was not sufficient to bring him within Lord Stowell's decision; he must have acted voluntarily. It would be a mockery of law and an outrage on his rights to coerce his return, and then claim that it was voluntary, and on that ground that his former status of slavery attached.

If the decision be placed on this ground, it is a fact for a jury to decide, whether the return was voluntary, or else the fact should be distinctly admitted. A presumption against the plaintiff in this respect, I say with confidence, is not authorized from the facts admitted.

The Supreme Court of Missouri refused to notice the act of Congress or the Constitution of Illinois, under which Dred Scott, his wife and children, claimed that they are entitled to freedom. . . . The Missouri court disregards the express provisions of an act of Congress and the Constitution of a sovereign State, both of which laws for twenty-eight years it had not only regarded, but carried into effect.

If a State court may do this, on a question involving the liberty of a human being, what protection do the laws afford? So far from this being a Missouri question, it is a question, as it would seem, within the twenty-fifth section of the judiciary act, where a right to freedom being set up under the act of Congress, and the decision being against such right, it may be brought for revision before this court, from the Supreme Court of Missouri.

■ MR. JUSTICE CURTIS dissenting.

The plaintiff alleged that he was a citizen of the State of Missouri, and that the defendant was a citizen of the State of New York. It is not doubted that it was necessary to make each of these allegations, to sustain the jurisdiction of the Circuit Court. The defendant denied that the plaintiff was a citizen of the State of Missouri. The plaintiff demurred to that plea. The Circuit Court adjudged the plea insufficient, and the first question for our consideration is, whether the sufficiency of that plea is before this court for judgment, upon this writ of error. The part of the judicial power of the United States, conferred by Congress on the Circuit Courts, being limited to certain described cases and controversies, the

question whether a particular case is within the cognizance of a Circuit Court, may be raised by a plea to the jurisdiction of such court. When that question has been raised, the Circuit Court must, in the first instance, pass upon and determine it. Whether its determination be final, or subject to review by this appellate court, must depend upon the will of Congress; upon which body the Constitution has conferred the power, with certain restrictions, to establish inferior courts, to determine their jurisdiction, and to regulate the appellate power of this court. The twenty-second section of the judiciary act of 1789, which allows a writ of error from final judgments of Circuit Courts, provides that there shall be no reversal in this court, on such writ of error, for error in ruling any plea in abatement, *other than a plea to the jurisdiction of the court*. Accordingly it has been held, from the origin of the court to the present day, that Circuit Courts have not been made by Congress the final judges of their own jurisdiction in civil cases. And that when a record comes here and it appears to this court that the Circuit Court had not jurisdiction, its judgment must be reversed, and the cause remanded, to be dismissed for want of jurisdiction.

To determine whether any free persons, descended from Africans held in slavery, were citizens of the United States under the Confederation, and consequently at the time of the adoption of the Constitution of the United States, it is only necessary to know whether any such persons were citizens of either of the States under the Confederation, at the time of the adoption of the Constitution.

Of this there can be no doubt. At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens.

The conclusions at which I have arrived on this part of the case are:

First. That the free native-born citizens of each State are citizens of the United States.

Second. That as free colored persons born within some of the States are citizens of those States, such persons are also citizens of the United States.

Third. That every such citizen, residing in any State, has the right to sue and is liable to be sued in the Federal courts, as a citizen of that State in which he resides.

Fourth. That as the plea to the jurisdiction in this case shows no facts, except that the plaintiff was of African descent, and his ancestors were sold as slaves, and as these facts are not inconsistent with his citizenship of the United States, and his residence in the State of

Missouri, the plea to the jurisdiction was bad, and the judgment of the Circuit Court overruling it was correct.

I dissent, therefore, from that part of the opinion of the majority of the court, in which it is held that a person of African descent cannot be a citizen of the United States; and I regret I must go further, and dissent both from what I deem their assumption of authority to examine the constitutionality of the act of Congress commonly called the Missouri compromise act, and the grounds and conclusions announced in their opinion.

NOTES AND QUESTIONS

1. ***What's the Injustice?*** How exactly did the Court err in *Dred Scott*? Was the problem that the Justices were racist, and imposed their own (outdated) moral views? Or was the problem simply their willingness to give effect to the racist views of the Founders? More succinctly, is the problem the racist of the Justices or the racism embedded in our history? Either way, does *Dred Scott* suggest that the Civil War was inevitable, that the slavery issue could not have been resolved any other way?

2. ***What Could Have Been Done Differently?*** Given the existing state and federal law, could the Court have justifiably declared Scott free as the result of the time he spent in Illinois or Minnesota? Or would the Court have overstepped its role by doing so? How might Justice Taney have written a narrower opinion rejecting Scott's claim? Is there anything the Court could have done to eliminate slavery while avoiding the Civil War?

3. ***Are You Persuaded?*** Were the opinions of the dissenting judges persuasive as a matter of law? Is it even possible to decide a politically controversial case based simply on "the law"? Or must a Justice necessarily consider his own moral views, the potential reactions to any decision, and various policy considerations?

III. FROM SLAVERY, TO CIVIL WAR, TO SEGREGATION

Chief Justice Taney may have hoped his opinion in *Dred Scott* would resolve the conflict over slavery. It did not. It inflamed tensions and helped to precipitate the Civil War. Southern states began to secede from the Union shortly after Lincoln's election in 1860. Congress, in an effort to lure them back, proposed a Thirteenth Amendment to the Constitution that would have precluded the abolition of slavery, either by legislation or constitutional amendment. Lincoln referred favorably to the amendment in his first inaugural address, and it was submitted to the states for ratification. The outbreak of the Civil War ended the deliberation.

President Lincoln's January 1863 issuance of the Emancipation Proclamation is often thought to have freed the slaves. But it did no such thing. Indeed, it did not even accomplish what it purported to do, which was to free the slaves only in those states then in rebellion against the

Union. The Emancipation Proclamation did, however, transform a war to preserve the Union into a war to end slavery. In January 1865, Congress proposed a Thirteenth Amendment to ban slavery, and by December 1865, after the conclusion of the war, it had been ratified.

Southerners lost the war, but they didn't stop fighting. The Ku Klux Klan formed throughout the South to use violence and intimidation to assert white supremacy. Almost all the states in the former Confederacy soon passed the Black Codes aimed at recreating the conditions of slavery. Among numerous other restrictions, the Black Codes imposed travel and movement restrictions on former slaves, precluded them from any employment other than as tenant farmers or laborers, punished vagrancy harshly, and limited the rights of the former slaves to own property. A Mississippi statute, for example, prohibited blacks' intermarriage with whites, restricted their rental of property to certain areas, and required that they have employment and a place to live and proof of such. The law also provided that "if a freedman, free negro or mulatto quits . . . the service of his or her employer before the expiration of his or her term of service without good cause . . . , any person may arrest him, and bring him back at an expense to be deducted from the employee's pay." Another provision provided that "all freemen, free negroes and mulattoes in this State . . . found . . . with no lawful employment or business, or found unlawfully assembling themselves together either in the day or night time . . . shall be deemed vagrants, and on conviction thereof, shall be fined and imprisoned at the discretion of the court."

Congress passed the Civil Rights Act of 1866 largely in response to the Black Codes. The Act conferred citizenship on all "persons" born in the United States. The Act also guaranteed the right of all citizens, without respect to race, color, or previous condition of servitude, "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens."

As Congress debated the 1866 Act, many, including some of the Act's supporters, raised the question whether Congress had the power to promulgate the Act. As a result, Ohio Congressman John Bingham introduced a first draft of what would become the Fourteenth Amendment. The text of the Amendment went through numerous iterations, and in late April 1866, the Joint Committee on Reconstruction proposed the text that was eventually added to the Constitution: "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, and property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The language that is now the first sentence of the Fourteenth

Amendment—"all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside"—was added to overrule *Dred Scott* and reinforce the rights of citizenship provided in the 1866 Act. The Amendment was ratified in 1868. Like the Thirteenth Amendment (and the Fifteenth Amendment), the Fourteenth Amendment also contains a clause that grants Congress the power to enforce its substantive provisions—a triumph of federal power in the wake of the Civil War.

After the Civil War, Congress enacted a slew of statutes in an effort to bolster blacks' citizenship. In addition to the Civil Rights Act of 1866, Congress passed the Reconstruction Act of 1867, which put the South under military control, banned confederate leaders from voting, compelled southern states to adopt new constitutions, and required the ratification of the Fourteenth Amendment as a condition for readmission to the Union. Congress also passed the Enforcement Act of 1870 (also known as the Civil Rights Act of 1870), which protected the right to vote for black males against unlawful state action and private violence. The Civil Rights Act of 1871 (also known as the Ku Klux Klan Act) authorized the President to use military force to address racial violence by the Klan and other white supremacist organizations. The Civil Rights Act of 1875 guaranteed equal access to public accommodations, such as inns and public conveyances.

But Reconstruction was short-lived. Andrew Johnson (who had ascended to the presidency following Lincoln's death) opposed much of what Congress sought to accomplish, including the establishment of the Freedman's Bureau established to aid former slaves. He and his Democratic Party believed it encroached upon states' rights and would impede slaves' self-reliance by offering them too much assistance. Crippled by political stalemate, the Freedman's Bureau closed in 1872. By 1876, federal troops withdrew from the South as part of the Compromise of 1876, which resolved the contested presidential election of that year, awarding the presidency to Republican candidate Rutherford B. Hayes in exchange for his ending Reconstruction.

In the decades after the war, the Supreme Court also interpreted the Reconstruction Amendments narrowly, even as the Court itself recognized that they were intended to secure the freedom and political equality of the freed slaves. In the *Slaughter-House Cases*, 83 U.S. 36 (1873), the Court first interpreted both the Thirteenth and Fourteenth Amendments. Louisiana butchers had filed a lawsuit challenging as a violation of the Reconstruction Amendments a statute that granted a monopoly to engage in the business of slaughtering to a single company. In rejecting the plaintiffs' arguments, the Court stated that the "one pervading purpose" of the Reconstruction Amendments is "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the

oppressions of those who had formerly exercised unlimited dominion over him." The Court described the Equal Protection Clause as remedying the "evil" of racial discrimination represented by the "existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class."

But perhaps more consequential was the Court's rejection of the butchers' claim that the grant of the monopoly violated the privileges and immunities of citizenship. The Court interpreted that Clause exceedingly narrowly to protect only a limited set of rights of "national" citizenship, which did not include the sorts of economic or labor rights the butchers sought to advance. The case thus rendered a central component of the Fourteenth Amendment—the Privileges and Immunities Clause—a dead letter. The Court emphasized that the Reconstruction Amendments did not displace the states as guarantors of civil rights, observing that "[u]nder the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the State with powers for domestic and local government, including the regulation of civil rights—the rights of persons and property—were essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the states." A later ruling in *The Civil Rights Cases* reveals the devastating implications of that view.

The Civil Rights Cases

Supreme Court of the United States, 1883.
109 U.S. 3.

■ BRADLEY, J.

These cases are all founded on the first and second sections of the act of congress known as the 'Civil Rights Act,' passed March 1, 1875, entitled 'An act to protect all citizens in their civil and legal rights.' Two of the cases, are indictments for denying to persons of color the accommodations and privileges of an inn or hotel; two of them are for denying to individuals the privileges and accommodations of a theater. The case against the Memphis & Charleston Railroad Company was [for] the refusal by the conductor of the railroad company to allow the wife to ride in the ladies' car, for the reason, as stated in one of the counts, that she was a person of African descent.

It is obvious that the primary and important question in all the cases is the constitutionality of the law; for if the law is unconstitutional none of the prosecutions can stand.

The sections of the law referred to provide as follows:

> 'Section 1. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other

> places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.
>
> 'Sec. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay the sum of $500 to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall, also, for every such offense, be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than $500 nor more than $1,000, or shall be imprisoned not less than 30 days nor more than one year.

Are these sections constitutional? The essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, and theaters; but that such enjoyment shall not be subject to any conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude. In other words, it is the purpose of the law to declare that, in the enjoyment of the accommodations and privileges of inns, public conveyances, theaters, and other places of public amusement, no distinction shall be made between citizens of different race or color, or between those who have, and those who have not, been slaves. Its effect is to declare that in all inns, public conveyances, and places of amusement, colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement, as are enjoyed by white citizens; and vice versa. The second section makes it a penal offense in any person to deny to any citizen of any race or color, regardless of previous servitude, any of the accommodations or privileges mentioned in the first section.

Has congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the constitution before the adoption of the last three amendments. The power is sought, first, in the fourteenth amendment, and the views and arguments of distinguished senators, advanced while the law was under consideration, claiming authority to pass it by virtue of that amendment, are the principal arguments adduced in favor of the power.

The first section of the fourteenth amendment,—which is the one relied on,—after declaring who shall be citizens of the United States, and of the several states, is prohibitory in its character, and prohibitory upon the states. It declares that "no state shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the amendment invests congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited state law and state acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon congress, and this is the whole of it. It does not invest congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation, or state action, of the kind referred to. It does not authorize congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the fourteenth amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect.

And so in the present case, until some state law has been passed, or some state action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the fourteenth amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity, for the prohibitions of the amendment are against state laws and acts done under state authority.

An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the fourteenth amendment on the part of the states. It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offenses, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the states; it does not make its operation to depend upon any such wrong committed.

If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may not congress, with equal show of authority, enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property? The assumption is certainly unsound. It is repugnant to the tenth amendment of the constitution, which declares that the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.

Of course, these remarks do not apply to those cases in which congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the states, as in the regulation of commerce with foreign nations, among the several states, and with the Indian tribes, the coining of money, the establishment of post-offices and post-roads, the declaring of war, etc. In these cases congress has power to pass laws for regulating the subjects specified, in every detail, and the conduct and transactions of individuals respect thereof. But where a subject is not submitted to the general legislative power of congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular state legislation or state action in reference to that subject, the power given is limited by its object, and any legislation by congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers.

If the principles of interpretation which we have laid down are correct, as we deem them to be,—and they are in accord with the principles laid down in the cases before referred to, as well as in the recent case of U. S. v. Harris, decided at the last term of this court,—it is clear that the law in question cannot be sustained by any grant of legislative power made to congress by the fourteenth amendment. That amendment prohibits the states from denying to any person the equal protection of the laws, and declares that congress shall have power to enforce, by appropriate legislation, the provisions of the amendment. The law in question, without any reference to adverse state legislation on the subject, declares that all persons shall be entitled to equal accommodation and privileges of inns, public conveyances, and places of public amusement, and imposes a penalty upon any individual who shall deny to any citizen such equal accommodations and privileges. This is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement. It supersedes and displaces state legislation on the same subject, or only allows it permissive force. It ignores such legislation, and assumes that the matter is one that belongs to the domain of national regulation. Whether it would not have been a more effective protection of the rights of citizens to have clothed congress with plenary power over the whole subject, is not now the question. What

we have to decide is, whether such plenary power has been conferred upon congress by the fourteenth amendment, and, in our judgment, it has not.

But the power of congress to adopt direct and primary, as distinguished from corrective, legislation on the subject in hand, is sought, in the second place, from the thirteenth amendment, which abolishes slavery. This amendment declares 'that neither slavery, nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction;' and it gives congress power to enforce the amendment by appropriate legislation.

This amendment, as well as the fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.

It is true that slavery cannot exist without law any more than property in lands and goods can exist without law, and therefore the thirteenth amendment may be regarded as nullifying all state laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed that the power vested in congress to enforce the article by appropriate legislation, clothes congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United Stated; and upon this assumption it is claimed that this is sufficient authority for declaring by law that all persons shall have equal accommodations and privileges in all inns, public conveyances, and places of public amusement; the argument being that the denial of such equal accommodations and privileges is in itself a subjection to a species of servitude within the meaning of the amendment. Conceding the major proposition to be true, that that congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery, with all its badges and incidents, is the minor proposition also true, that the denial to any person of admission to the accommodations and privileges of an inn, a public conveyance, or a theater, does subject that person to any form of servitude, or tend to fasten upon him any badge of slavery? If it does not, then power to pass the law is not found in the thirteenth amendment.

In a very able and learned presentation of the cognate question as to the extent of the rights, privileges, and immunities of citizens which cannot rightfully be abridged by state laws under the fourteenth amendment, made in a former case, a long list of burdens and disabilities of a servile character, incident to feudal vassalage in France, and which were abolished by the decrees of the national assembly, was presented for the purpose of showing that all inequalities and observances exacted by one man from another, were servitudes or badges of slavery, which a great nation, in its effort to establish universal liberty, made haste to wipe out and destroy. But these were servitudes imposed by the old law, or by long custom which had the force of law, and exacted by one man from another without the latter's consent. Should any such servitudes be imposed by a state law, there can be no doubt that the law would be repugnant to the fourteenth, no less than to the thirteenth, amendment; nor any greater doubt that congress has adequate power to forbid any such servitude from being exacted.

But is there any similarity between such servitudes and a denial by the owner of an inn, a public conveyance, or a theater, of its accommodations and privileges to an individual, even though the denial be founded on the race or color of that individual? Where does any slavery or servitude, or badge of either, arise from such an act of denial? Whether it might not be a denial of a right which, if sanctioned by the state law, would be obnoxious to the prohibitions of the fourteenth amendment, is another question. But what has it to do with the question of slavery?

The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offenses. Congress, by the civil rights bill of 1866, passed in view of the thirteenth amendment, before the fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible from; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property, as is enjoyed by white citizens. Whether this legislation was fully authorized by the thirteenth amendment alone, without the support which it afterwards received from the fourteenth amendment, after the adoption of which it was re-enacted with some additions, it is not necessary to inquire. It is referred to for the purpose of showing that at that time (in 1866) congress did not assume, under the authority given by the

thirteenth amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.

We must not forget that the province and scope of the thirteenth and fourteenth amendments are different: the former simply abolished slavery: the latter prohibited the states from abridging the privileges or immunities of citizens of the United States, from depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. The amendments are different, and the powers of congress under them are different. What congress has power to do under one, it may not have power to do under the other. Under the thirteenth amendment, it has only to do with slavery and its incidents. Under the fourteenth amendment, it has power to counteract and render nugatory all state laws and proceedings which have the effect to abridge any of the privileges or immunities which have the effect to abridge any deprive them of life, liberty, or property without due process of law, or to deny to any of them the equal protection of the laws. Under the thirteenth amendment the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not; under the fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against state regulations or proceedings.

The only question under the present head, therefore, is, whether the refusal to any persons of the accommodations of an inn, or a public conveyance, or a place of public amusement, by an individual, and without any sanction or support from any state law or regulation, does inflict upon such persons any manner of servitude, or form of slavery, as those terms are understood in this country? Many wrongs may be obnoxious to the prohibitions of the fourteenth amendment which are not, in any just sense, incidents or elements of slavery. Such, for example, would be the taking of private property without due process of law; or allowing persons who have committed certain crimes (horse-stealing, for example) to be seized and hung by the *posse comitatus* without regular trial; or denying to any person, or class of persons, the right to pursue any peaceful avocations allowed to others. What is called class legislation would belong to this category, and would be obnoxious to the prohibitions of the fourteenth amendment, but would not to the prohibitions of the fourteenth when not involving the idea of any subjection of one man to another. The thirteenth amendment has respect, not to distinctions of race, or class, or color, but to slavery. The fourteenth amendment extends its protection to races and classes, and prohibits any state legislation

which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.

Now, conceding, for the sake of the argument, that the admission to an inn, a public conveyance, or a place of public amusement, on equal terms with all other citizens, is the right of every man and all classes of men, is it any more than one of those rights which the states by the fourteenth amendment are forbidden to deny to any person? And is the constitution violated until the denial of the right has some state sanction or authority? Can the act of a mere individual, the owner of the inn, the public conveyance, or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the state, and presumably subject to redress by those laws until the contrary appears?

After giving to these questions all the consideration which their importance demands, we are forced to the conclusion that such an act of refusal has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the state; or, if those laws are adverse to his rights and do not protect him, his remedy will be found in the corrective legislation which congress has adopted, or may adopt, for counteracting the effect of state laws, or state action, prohibited by the fourteenth amendment. It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business. Innkeepers and public carriers, by the laws of all the states, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them. If the laws themselves make any unjust discrimination, amenable to the prohibitions of the fourteenth amendment, congress has full power to afford a remedy under that amendment and in accordance with it.

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. There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty, and property the same as white citizens; yet no one, at that time, thought that it was any invasion of their personal status as freemen because they were not admitted to all the privileges enjoyed by white citizens, or because they were subjected to discriminations in the enjoyment of accommodations in

inns, public conveyances, and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery. If, since that time, the enjoyment of equal rights in all these respects has become established by constitutional enactment, it is not by force of the thirteenth amendment, (which merely abolishes slavery,) but by force of the fourteenth and fifteenth amendments.

On the whole, we are of opinion that no countenance of authority for the passage of the law in question can be found in either the thirteenth or fourteenth amendment of the constitution; and no other ground of authority for its passage being suggested, it must necessarily be declared void, at least so far as its operation in the several states is concerned.

This conclusion disposes of the cases now under consideration. In the cases of United States v. Ryan, and of Robinson v. Memphis & C.R. Co., the judgments must be affirmed. In the other cases, the answer to be given will be, that the first and second sections of the act of congress of March 1, 1875, entitled 'An act to protect all citizens in their civil and legal rights,' are unconstitutional and void, and that judgment should be rendered upon the several indictments in those cases accordingly. And it is so ordered.

■ HARLAN, J., dissenting.

The opinion in these cases proceeds, as it seems to me, upon grounds entirely too narrow and artificial. The substance and spirit of the recent amendments of the constitution have been sacrificed by a subtle and ingenious verbal criticism. . . . By this . . . I mean only, in this form, to express an earnest conviction that the court has departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted.

The thirteenth amendment, my brethren concede, did something more than to prohibit slavery as an institution, resting upon distinctions of race, and upheld by positive law. They admit that it established and decreed universal civil freedom throughout the United States. But did the freedom thus established involve nothing more than exemption from actual slavery? . . . Had the thirteenth amendment stopped with the sweeping declaration, in its first section, against the existence of slavery and involuntary servitude, except for crime, congress would have had the power, by implication, according to the doctrines of *Prigg v. Com.*, repeated in *Strauder v. West Virginia*, to protect the freedom thus established, and consequently to secure the enjoyment of such civil rights as were fundamental in freedom. But that it can exert its authority to that extent is now made clear, and was intended to be made clear, by the express grant of power contained in the second section of that amendment.

That there are burdens and disabilities which constitute badges of slavery and servitude, and that the express power delegated to congress to enforce, by appropriate legislation, the thirteenth amendment, may be

exerted by legislation of a direct and primary character, for the eradication, not simply of the institution, but of its badges and incidents, are propositions which ought to be deemed indisputable. They lie at the very foundation of the civil rights act of 1866. Whether that act was fully authorized by the thirteenth amendment alone, without the support which it afterwards received from the fourteenth amendment, after the adoption of which it was re-enacted with some additions, the court, in its opinion, says it is unnecessary to inquire. But I submit, with all respect to my brethren, that its constitutionality is conclusively shown by other portions of their opinion. It is expressly conceded by them that the thirteenth amendment established freedom; that there are burdens and disabilities, the necessary incidents of slavery, which constitute its substance and visible form; that congress, by the act of 1866, passed in view of the thirteenth amendment, before the fourteenth was adopted, undertook to remove certain burdens and disabilities, the necessary incidents of slavery, and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property as is enjoyed by white citizens; that under the thirteenth amendment congress has to do with slavery and its incidents; and that legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not. These propositions being conceded, it is impossible, as it seems to me, to question the constitutional validity of the civil rights act of 1866. It remains now to inquire what are the legal rights of colored persons in respect of the accommodations, privileges, and facilities of public conveyances, inns, and places of public amusement.

1. As to public conveyances on land and water. The sum of the adjudged cases is that a railroad corporation is a governmental agency, created primarily for public purposes, and subject to be controlled for the public benefit.

Such being the relations these corporations hold to the public, it would seem that the right of a colored person to use an improved public highway, upon the terms accorded to freemen of other races, is as fundamental in the state of freedom, established in this country, as are any of the rights which my brethren concede to be so far fundamental as to be deemed the essence of civil freedom.

2. As to inns. The same general observations which have been made as to railroads are applicable to inns. . . . The[ ] authorities are sufficient to show a keeper of an inn is in the exercise of a quasi public employment. The law gives him special privileges, and he is charged with certain duties and responsibilities to the public. The public nature of his

employment forbids him from discriminating against any person asking admission as a guest on account of the race or color of that person.

3. As to places of public amusement. [P]laces of public amusement, within the meaning of the act of 1875, are such as are established and maintained under direct license of the law. The authority to establish and maintain them comes from the public. The colored race is a part of that public. The local government granting the license represents them as well as all other races within its jurisdiction. A license from the public to establish a place of public amusement, imports, in law, equality of right, at such places, among all the members of that public. This must be so, unless it be—which I deny—that the common municipal government of all the people may, in the exertion of its powers, conferred for the benefit of all, discriminate or authorize discrimination against a particular race, solely because of its former condition of servitude.

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

It remains now to consider these cases with reference to the power congress has possessed since the adoption of the fourteenth amendment.

[U]nder what circumstances, and to what extent may congress, by means of legislation, exert its power to enforce the provisions of this amendment?

The assumption that this amendment consists wholly of prohibitions upon state laws and state proceedings in hostility to its provisions, is unauthorized by its language. The first clause of the first section . . . created and granted, as well citizenship of the United States, as citizenship of the state in which they respectively resided. It introduced all of that race, whose ancestors had been imported and sold as slaves, at once, into the political community known as the 'People of the United States.' Further, they were brought, by this supreme act of the nation, within the direct operation of that provision of the constitution which declares that 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.' Article 4, § 2.

The citizenship thus acquired by that race, in virtue of an affirmative grant by the nation, may be protected, not alone by the judicial branch of the government, but by congressional legislation of a primary direct character; this, because the power of congress is not restricted to the enforcement of prohibitions upon state laws or state action. It is, in terms distinct and positive, to enforce 'the provisions of this article' of

amendment; not simply those of a prohibitive character, but the provisions,—all of the provisions,—affirmative and prohibitive, of the amendment. It is, therefore, a grave misconception to suppose that the fifth section of the amendment has reference exclusively to express prohibitions upon state laws or state action. If any right was created by that amendment, the grant of power, through appropriate legislation, to enforce its provisions authorizes congress, by means of legislation operating throughout the entire Union, to guard, secure, and protect that right.

It is, therefore, an essential inquiry what, if any, right, privilege, or immunity was given by the nation to colored persons when they were made citizens of the state in which they reside? . . . That they became entitled, upon the adoption of the fourteenth amendment, 'to all privileges and immunities of citizens in the several states,' within the meaning of section 2 of article 4 of the constitution, no one, I suppose, will for a moment question. What are the privileges and immunities to which, by that clause of the constitution, they became entitled? To this it may be answered, generally, upon the authority of the adjudged cases, that they are those which are fundamental in citizenship in a free government, 'common to the citizens in the latter states under their constitutions and laws by virtue of their being citizens.'

There is one, if there be no others—exemption from race discrimination in respect of any civil right belonging to citizens of the white race in the same state. That, surely, is their constitutional privilege when within the jurisdiction of other states. And such must be their constitutional right, in their own state. . . . It is fundamental in American citizenship that, in respect of such rights, there shall be no discrimination by the state, or its officers, or by individuals, or corporations exercising public functions or authority, against any citizen because of his race or previous condition of servitude.

If, then, exemption from discrimination in respect of civil rights is a new constitutional right, secured by the grant of state citizenship to colored citizens of the United States, why may not the nation, by means of its own legislation of a primary direct character, guard, protect, and enforce that right? . . . The legislation congress may enact, in execution of its power to enforce the provisions of this amendment, is that which is appropriate to protect the right granted. Under given circumstances, that which the court characterizes as corrective legislation might be sufficient. Under other circumstances primary direct legislation may be required. But it is for congress, not the judiciary, to say which is best adapted to the end to be attained.

My brethren say that when a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be

the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws. What the nation, through congress, has sought to accomplish in reference to that race is, what had already been done in every state in the Union for the white race, to secure and protect rights belonging to them as freemen and citizens; nothing more. The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens. The difficulty has been to compel a recognition of their legal right to take that rank, and to secure the enjoyment of privileges belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained. At every step in this direction the nation has been confronted with class tyranny, which a contemporary English historian says is, of all tyrannies, the most intolerable, 'for it is ubiquitous in its operation, and weighs, perhaps, most heavily on those whose obscurity or distance would withdraw them from the notice of a single despot.' Today it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time it may be some other race that will fall under the ban. If the constitutional amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be, in this republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant. The supreme law of the land has decreed that no authority shall be exercised in this country upon the basis of discrimination, in respect of civil rights, against freemen and citizens because of their race, color, or previous condition of servitude. To that decree—for the due enforcement of which, by appropriate legislation, congress has been invested with express power—every one must bow, whatever may have been, or whatever now are, his individual views as to the wisdom or policy, either of the recent changes in the fundamental law, or of the legislation which has been enacted to give them effect.

For the reasons stated I feel constrained to withhold my assent to the opinion of the court.

NOTES AND QUESTIONS

1. The Civil Rights Cases. The *Civil Rights Cases* are a consolidation of five cases alleging violations of the Civil Rights Act of 1875: *U.S. v. Stanley*, out of Kansas; *U.S. v. Ryan*, out of California, *U.S. v. Nichols*, out of Missouri; *U.S. v. Singleton*, out of New York; and *Robinson and Wife v. Memphis & Charleston Rail Company*, out of Tennessee. The *Stanley* and *Nichols* cases were prosecutions by the United States for denying nondiscriminatory hotel accommodations. The *Ryan* and *Singleton* cases were federal criminal prosecutions for failure to provide nondiscriminatory access to theatres. The

Robinson case was an action to recover the statutory penalty against the Charleston Rail Company for denying Sallie Robinson the right to ride in the "ladies car" of the train.

In the wake of the Act, many African Americans seized the opportunity to access services previously denied them. For instance, "in Wilmington, North Carolina, a saloon customer demanded that a barkeep be arrested for refusing to serve him." Such attempts to exercise newly guaranteed rights did not sit well with many whites. *See* A. K. Sandoval-Strausz, Travelers, Strangers, and Jim Crow: Law, Public Accommodations, and Civil Rights in America, 23 L. & Hist. Review 53 (2005). How might these dynamics highlight the importance of courts in the protection of rights? What might be the limits of law and judicial intervention in the face of entrenched prejudice?

2. ***What Did the Civil Rights Act of 1875 Mean?*** The Court noted, "it is the purpose of the law to declare that, in the enjoyment of the accommodations and privileges of inns, public conveyances, theaters, and other places of public amusement, no distinction shall be made between citizens of different race or color." The Court then went on to argue that Congress did not have the power under the Fourteenth Amendment to create substantive rights "which are within the domain of state legislation." In the view of the Court, did the Civil Rights Act create a right of access for African Americans, or merely preclude the denial of rights on the basis of race? How significant is the difference between these two formulations?

3. ***The State Action Doctrine and Limits on Congressional Power.*** Notwithstanding section 5 of the Fourteenth Amendment, which grants Congress the "power to enforce, by appropriate legislation, the provisions of this article," the Court concluded in the *Civil Rights Cases* that Congress did not have the power to pass the Civil Rights Act of 1875. The Court declared that Section 1 of the Fourteenth Amendment applies only to "state action" and that Section 5 only permits Congress to regulate "state action," not the behavior of private actors. The Court wrote that Congress could police "state laws and acts done under state authority." Did the defendants—innkeepers, theatre owners, railroad operators and the like—not operate their establishment "under state authority"? The Court could have found state action. As Professor Joseph Singer has noted, before the Civil War, the common law "probably required all businesses that held themselves out as open to the public to serve anyone who sought service." Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Northwestern L. Rev. 1283, 1292 (1996). The common law began to allow denials of service only when African Americans started to demand the right to access public accommodations. So, two questions arise: Should the court have limited Congress's Section 5 power to state action? Should the Court have found that the law did target actions taken under "state authority"? How would you construct a decision upholding the 1875 Act?

4. ***The Thirteenth Amendment.*** The Court concluded that the Fourteenth Amendment did not grant Congress the power to enact the Civil Rights Act because that Amendment did not authorize Congress to adopt "direct and primary, as distinguished from corrective, legislation on the

subject in hand." But as the Court acknowledged, the Thirteenth Amendment does not contain any such limitations. Nevertheless, the Court argues that discrimination in public accommodations does not constitute a badge of slavery under the Thirteenth Amendment. Why? Professors Jack Balkin and Sanford Levinson argue that, "[t]he colonial vision that opposed slavery to republican liberty held that slavery meant more than simply being free from compulsion to labor by threats or physical coercion. Rather, the true marker of slavery was that slaves were always potentially subject to domination and to the arbitrary will of another person." *The Dangerous Thirteenth Amendment*, 112 Colum. L. Rev. 1459, 1484 (2012). How are the sorts of exclusions at issue in the *Civil Rights Cases* tantamount to "domination" or otherwise so egregious as to come within the purview of the Thirteenth Amendment? What do you make of Justice Harlan's argument that discrimination by common carriers, inns, and places of amusement constitutes a badge of servitude?

5. *Federalism and* The Civil Rights Cases. The Court found the statute unconstitutional in part because Congress had legislated on matters reserved to the states. The Court also pointed out that the Act applied indiscriminately to states, regardless of the extent to which they protected the rights of black citizens. Are these federalism arguments consistent with the essence of the Reconstruction Amendments, which made the federal government the guarantors of political equality for people of color? Is the Court's assumption that the states, particularly the states of the former Confederacy, would protect the rights of black citizens realistic? Should proof of state violations of section 1 of the Fourteenth Amendment have been required to justify congressional action? What would count as a state violation? What if states guaranteed rights, but then did not provide effective remedies? What if state law were silent as to the rights of blacks?

6. *The Aftermath of* The Civil Rights Cases. The effect of the Court's decision was mixed. Some states reacted by taking up the mantle of protection. "Within two years of the ruling, eleven state legislatures in the North and West passed civil rights statutes of their own, and by century's end a total of eighteen states had mandated racial equality in public accommodations." Sandoval-Strausz, *supra*, at 78. For the most part, the federal government did not attempt to protect citizens of color from racial discrimination in public accommodations in a robust way until 1964, when it passed Title II of the Civil Rights Act of 1964, relying on its power to regulate interstate commerce. The Interstate Commerce Act of 1887, which established the Interstate Commerce Commission, contained a promising provision, but it was interpreted so narrowly by the Court that it did not provide any relief to black citizens. Professor Sandoval-Strausz notes that, in the wake of the *Civil Rights Cases*, access to public accommodations by blacks in the South was uncertain and highly dependent on local custom and even the individual preferences of proprietors. By the beginning of the twentieth century, almost all Southern states had laws requiring segregation on common carriers, in public accommodations, and in other public spaces. The very state laws that mandated access for blacks thus became the basis of de jure segregation.

The post-Reconstruction retrenchment by the Court, Congress, and southern states limited the radical potential of the Reconstruction Amendments. But in the late nineteenth and early twentieth centuries, that status of blacks within the polity was complex, and the Court's treatment of the rights protected by the Fourteenth Amendment distinguished among the spheres into which its protections reached; whereas the Court applied the Fourteenth Amendment to the realms of political and civil rights, it did not extend the Amendment to the private and social spheres. In the cases that follow, the Court simultaneously offered a vigorous defense of the rights of freedmen and of the legal justifications for segregation and inequality.

Strauder v. West Virginia

Supreme Court of the United States, 1879.
100 U.S. 303.

■ MR. JUSTICE STRONG delivered the opinion of the court.

The plaintiff in error, a colored man, was indicted for murder in the Circuit Court of Ohio County, in West Virginia, on the 20th of October, 1874, and upon trial was convicted and sentenced. The record was then removed to the Supreme Court of the State, and there the judgment of the Circuit Court was affirmed. The present case is a writ of error to that court, and it is now, in substance, averred that at the trial in the State court the defendant (now plaintiff in error) was denied rights to which he was entitled under the Constitution and laws of the United States.

In the Circuit Court of the State, before the trial of the indictment was commenced, the defendant presented his petition, verified by his oath, praying for a removal of the cause into the Circuit Court of the United States, assigning, as ground for the removal, that 'by virtue of the laws of the State of West Virginia no colored man was eligible to be a member of the grand jury or to serve on a petit jury in the State; that white men are so eligible, and that by reason of his being a colored man and having been a slave, he had reason to believe, and did believe, he could not have the full and equal benefit of all laws and proceedings in the State of West Virginia for the security of his person as is enjoyed by white citizens, and that he had less chance of enforcing in the courts of the State his rights on the prosecution, as a citizen of the United States, and that the probabilities of a denial of them to him as such citizen on every trial which might take place on the indictment in the courts of the State were much more enhanced than if he was a white man.' This petition was denied by the State court, and the cause was forced to trial.

The law of the State to which reference was made in the petition for removal and in the several motions was enacted on the 12th of March, 1873 and it is as follows: 'All white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as

jurors, except as herein provided.' The persons excepted are State officials.

In this court, several errors have been assigned, and the controlling questions underlying them all are, first, whether, by the Constitution and laws of the United States, every citizen of the United States has a right to a trial of an indictment against him by a jury selected and impanelled without discrimination against his race or color, because of race or color; and, second, if he has such a right, and is denied its enjoyment by the State in which he is indicted, may he cause the case to be removed into the Circuit Court of the United States?

It is to be observed that the first of these questions is not whether a colored man, when an indictment has been preferred against him, has a right to a grand or a petit jury composed in whole or in part of persons of his own race or color, but it is whether, in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury.

The questions are important, for they demand a construction of the recent amendments of the Constitution. If the defendant has a right to have a jury selected for the trial of his case without discrimination against all persons of his race or color, because of their race or color, the right, if not created, is protected by those amendments, and the legislation of Congress under them. The Fourteenth Amendment ordains that 'all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'

This is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments, as we said in the *Slaughter-House Cases (16 Wall. 36)*, cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and

others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation. To quote the language used by us in the *Slaughter-House Cases*, 'No one can fail to be impressed with the one pervading purpose found in all the amendments, lying at the foundation of each, and without which none of them would have been suggested,—we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over them.' So again: 'The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied, and by it [the Fourteenth Amendment] such laws were forbidden. If, however, the States did not conform their laws to its requirements, then, by the fifth section of the article of amendment, Congress was authorized to enforce it by suitable legislation.' And it was added, 'We doubt very much whether any action of a State, not directed by way of discrimination against the negroes, as a class, will ever be held to come within the purview of this provision.'

If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. It ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizens, who, being citizens of the United States, are declared to be also citizens of the State in which they reside). It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the

amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

That the West Virginia statute respecting juries—the statute that controlled the selection of the grand and petit jury in the case of the plaintiff in error—is such a discrimination ought not to be doubted. Nor would it be if the persons excluded by it were white men. If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there by any doubt of its inconsistency with the spirit of the amendment. The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

The right to a trial by jury is guaranteed to every citizen of West Virginia by the Constitution of that State, and the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. Blackstone, in his Commentaries, says, 'The right of trial by jury, or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter.' It is also guarded by statutory enactments intended to make impossible what Mr. Bentham called 'packing juries.' It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy. Prejudice in a local community is held to be a reason for a change of venue. The framers of the constitutional amendment must have known full well the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was doubtless a motive that led to the amendment. By their manumission and citizenship

the colored race became entitled to the equal protection of the laws of the States in which they resided; and the apprehension that through prejudice they might be denied that equal protection, that is, that there might be discrimination against them, was the inducement to bestow upon the national government the power to enforce the provision that no State shall deny to them the equal protection of the laws. Without the apprehended existence of prejudice that portion of the amendment would have been unnecessary, and it might have been left to the States to extend equality of protection.

In view of these considerations, it is hard to see why the statute of West Virginia should not be regarded as discriminating against a colored man when he is put upon trial for an alleged criminal offence against the State. It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. Is not protection of life and liberty against race or color prejudice, a right, a legal right, under the constitutional amendment? And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?

We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color. As we have said more than once, its design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it. To quote further from 16 Wall., *supra:* 'In giving construction to any of these articles [amendments], it is necessary to keep the main purpose steadily in view.' 'It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.' We are not now called upon to affirm or deny that it had other purposes.

The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property. Any State action that denies this immunity to a colored man is in conflict with the Constitution.

Concluding, therefore, that the statute of West Virginia, discriminating in the selection of jurors, as it does, against negroes because of their color, amounts to a denial of the equal protection of the laws to a colored man when he is put upon trial for an alleged offence against the State, it remains only to be considered whether the power of Congress to enforce the provisions of the Fourteenth Amendment by appropriate legislation is sufficient to justify the enactment of sect. 641 of the Revised Statutes.

A right or an immunity, whether created by the Constitution or only guaranteed by it, even without any express delegation of power, may be protected by Congress. Prigg v. The Commonwealth of Pennsylvania, 16 Pet. 539. So in *United States* v. *Reese* (92 (U. S. 214), it was said by the Chief Justice of this court: 'Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and manner of the protection may be such as Congress in the legitimate exercise of its legislative discretion shall provide. These may be varied to meet the necessities of the particular right to be protected.' But there is express authority to protect the rights and immunities referred to in the Fourteenth Amendment, and to enforce observance of them by appropriate congressional legislation. And one very efficient and appropriate mode of extending such protection and securing to a party the enjoyment of the right or immunity, is a law providing for the removal of his case from a State court, in which the right is denied by the State law, into a Federal court, where it will be upheld. This is an ordinary mode of protecting rights and immunities conferred by the Federal Constitution and laws. Sect. 641 is such a provision. It enacts that 'when any civil suit or criminal prosecution is commenced in any State court for any cause whatsoever against any person who is denied, or cannot enforce, in the judicial tribunals of the State, or in the part of the State where such prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial, or final hearing of the case, stating the facts, and verified by oath, be removed before trial into the next Circuit Court of the United States to be held in the district where it is pending.'

This act plainly has reference to sects. 1977 and 1978 of the statutes which partially enumerate the rights and immunities intended to be guaranteed by the Constitution, the first of which declares that 'all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.' This act puts

in the form of a statute what had been substantially ordained by the constitutional amendment. It was a step towards enforcing the constitutional provisions. Sect. 641 was an advanced step, fully warranted, we think, by the fifth section of the Fourteenth Amendment.

We have heretofore considered and affirmed the constitutional power of Congress to authorize the removal from State courts into the circuit courts of the United States, before trial, of criminal prosecutions for alleged offences against the laws of the State, when the defence presents a Federal question, or when a right under the Federal Constitution or laws is involved.

That the petition of the plaintiff in error, filed by him in the State court before the trial of his case, made a case for removal into the Federal Circuit Court, under sect. 641, is very plain, if, by the constitutional amendment and sect. 1977 of the Revised Statutes, he was entitled to immunity from discrimination against him in the selection of jurors, because of their color, as we have endeavored to show that he was. It set forth sufficient facts to exhibit a denial of that immunity, and a denial by the statute law of the State.

There was error, therefore, in proceeding to the trial of the indictment against him after his petition was filed. The judgment of the Supreme Court of West Virginia will be reversed.

NOTES AND QUESTIONS

1. ***Conceptions of Equal Protection.*** How exactly did the West Virginia statute violate equal protection? Consider some possibilities. (A) The statute denied to black citizens the right to perform their civic duty by serving on juries, a right that is available to white citizens. (B) The statute denied to all defendants the right to have a jury process unaffected by race. (C) The statute denied to black defendants the right to have a jury process that is unaffected by racial discrimination in jury selection. (D) The statute denied to black defendants the right to a fair criminal procedure because white jurors are unlikely to give black defendants a fair hearing. (E) The statute communicates an expressive and unconstitutional message that blacks are not full citizens. (F) The statute contains an express racial classification on its face. (G) The statute contains an express racial classification on its face and singles out black citizens for disfavored treatment. Which of the above possibilities best represents the Court's understanding of the constitutional violation in *Strauder*?

2. ***Universality Versus Particularity.*** How does the Court characterize the purposes of the Fourteenth Amendment? On the one hand, the Court states that the Fourteenth Amendment "was primarily designed" to protect black citizens. On the other hand, the Court notes that, "the spirit of the amendment" would be violated by a statute that excluded "all naturalized Celtic Irishmen" from jury service. How should we understand the purpose of the Fourteenth Amendment and should that understanding matter today when interpreting its reach?

3. ***Reconciling* Strauder *with the* Civil Rights Cases.** Is *Strauder* consistent with the *Civil Rights Cases*? Which of these factors most helps to justify the Court's ruling in *Strauder*, given the precedent of the Civil Rights cases: the distinction between federal and state law, the type of rights at issue, or the distinction between affirmative and negative rights?

4. ***White Supremacy.*** What do you make of the Court's characterization of blacks as "abject and ignorant" and as "mere children" who were "unfitted to command the respect of those who had superior intelligence"? What work, if any, do these views do in the opinion? Should we dismiss these views as the product of the times? Are they harmless in light of the fact that the Court reached the "right" result? Consider these questions as you read *Plessy v. Ferguson* below.

Plessy v. Ferguson

Supreme Court of the United States, 1896.
163 U.S. 537.

■ MR. JUSTICE BROWN, delivered the opinion of the court.

This case turns upon the constitutionality of an act of the general assembly of the state of Louisiana, passed in 1890, providing for separate railway carriages for the white and colored races.

The first section of the statute enacts 'that all railway companies carrying passengers in their coaches in this state, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations: provided, that this section shall not be construed to apply to street railroads. No person or persons shall be permitted to occupy seats in coaches, other than the ones assigned to them, on account of the race they belong to.'

The information filed in the criminal district court charged, in substance, that Plessy, being a passenger between two stations within the state of Louisiana, was assigned by officers of the company to the coach used for the race to which he belonged, but he insisted upon going into a coach used by the race to which he did not belong. Neither in the information nor plea was his particular race or color averred.

The petition for the writ of prohibition averred that petitioner was seven-eighths Caucasian and one-eighth African blood; that the mixture of colored blood was not discernible in him; and that he was entitled to every right, privilege, and immunity secured to citizens of the United States of the white race; and that, upon such theory, he took possession of a vacant seat in a coach where passengers of the white race were accommodated, and was ordered by the conductor to vacate said coach, and take a seat in another, assigned to persons of the colored race, and, having refused to comply with such demand, he was forcibly ejected, with

the aid of a police officer, and imprisoned in the parish jail to answer a charge of having violated the above act.

The constitutionality of this act is attacked upon the ground that it conflicts both with the thirteenth amendment of the constitution, abolishing slavery, and the fourteenth amendment, which prohibits certain restrictive legislation on the part of the states.

1. That it does not conflict with the thirteenth amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument. Slavery implies involuntary servitude,—a state of bondage; the ownership of mankind as a chattel, or, at least, the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property, and services. This amendment was said in the *Slaughter-House Cases,* 16 Wall. 36, to have been intended primarily to abolish slavery, as it had been previously known in this country, and that it equally forbade Mexican peonage or the Chinese coolie trade, when they amounted to slavery or involuntary servitude, and that the use of the word 'servitude' was intended to prohibit the use of all forms of involuntary slavery, of whatever class or name. It was intimated, however, in that case, that this amendment was regarded by the statesmen of that day as insufficient to protect the colored race from certain laws which had been enacted in the Southern states, imposing upon the colored race onerous disabilities and burdens, and curtailing their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value; and that the fourteenth amendment was devised to meet this exigency.

So, too, in the *Civil Rights Cases,* 109 U. S. 3, it was said that the act of a mere individual, the owner of an inn, a public conveyance or place of amusement, refusing accommodations to colored people, cannot be justly regarded as imposing any badge of slavery or servitude upon the applicant, but only as involving an ordinary civil injury, properly cognizable by the laws of the state, and presumably subject to redress by those laws until the contrary appears. 'It would be running the slavery question into the ground,' said Mr. Justice Bradley, 'to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business.'

A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude. Indeed, we do not understand that the thirteenth amendment is strenuously relied upon by the plaintiff in error in this connection.

2. By the fourteenth amendment, all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are made citizens of the United States and of the state wherein they reside; and the states are forbidden from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or shall deprive any person of life, liberty, or property without due process of law, or deny to any person within their jurisdiction the equal protection of the laws.

The proper construction of this amendment was first called to the attention of this court in the *Slaughter-House Cases,* 16 Wall. 36, which involved, however, not a question of race, but one of exclusive privileges. The case did not call for any expression of opinion as to the exact rights it was intended to secure to the colored race, but it was said generally that its main purpose was to establish the citizenship of the negro, to give definitions of citizenship of the United States and of the states, and to protect from the hostile legislation of the states the privileges and immunities of citizens of the United States, as distinguished from those of citizens of the states.

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.

One of the earliest of these cases is that of *Roberts v. City of Boston,* 5 Cush. 198, in which the supreme judicial court of Massachusetts held that the general school committee of Boston had power to make provision for the instruction of colored children in separate schools established exclusively for them, and to prohibit their attendance upon the other schools. 'The great principle,' said Chief Justice Shaw, 'advanced by the learned and eloquent advocate for the plaintiff [Mr. Charles Sumner], is that, by the constitution and laws of Massachusetts, all persons, without distinction of age or sex, birth or color, origin or condition, are equal before the law. * * * But, when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the

same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security.' It was held that the powers of the committee extended to the establishment of separate schools for children of different ages, sexes and colors, and that they might also establish special schools for poor and neglected children, who have become too old to attend the primary school, and yet have not acquired the rudiments of learning, to enable them to enter the ordinary schools. Similar laws have been enacted by congress under its general power of legislation over the District of Columbia (sections 281–283, 310, 319, Rev. St. D. C.), as well as by the legislatures of many of the states, and have been generally, if not uniformly, sustained by the courts.

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

The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theaters, and railway carriages has been frequently drawn by this court. Thus, in *Strauder v. West Virginia,* 100 U.S. 303, it was held that a law of West Virginia limiting to white male persons 21 years of age, and citizens of the state, the right to sit upon juries, was a discrimination which implied a legal inferiority in civil society, which lessened the security of the right of the colored race, and was a step towards reducing them to a condition of servility.

It is claimed by the plaintiff in error that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is 'property,' in the same sense that a right of action or of inheritance is property. Conceding this to be so, for the purposes of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property. If he be a white man, and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so-called 'property.' Upon the other hand, if he be a colored man, and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.

In this connection, it is also suggested by the learned counsel for the plaintiff in error that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that

a house or vehicle of one color is as good as one of another color. The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class. Thus, in *Yick Wo v. Hopkins,* 118 U. S. 356, it was held by this court that a municipal ordinance of the city of San Francisco, to regulate the carrying on of public laundries within the limits of the municipality, violated the provisions of the constitution of the United States, if it conferred upon the municipal authorities arbitrary power, at their own will, and without regard to discretion, in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying or the propriety of the places selected for the carrying on of the business. It was held to be a covert attempt on the part of the municipality to make an arbitrary and unjust discrimination against the Chinese race. While this was the case of a municipal ordinance, a like principle has been held to apply to acts of a state legislature passed in the exercise of the police power.

So far, then, as a conflict with the fourteenth amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the fourteenth amendment than the acts of congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each

other's merits, and a voluntary consent of individuals. As was said by the court of appeals of New York in *People v. Gallagher*, 93 N. Y. 438, 448: 'This end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed.' 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 the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.

It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different states; some holding that any visible admixture of black blood stamps the person as belonging to the colored race; others, that it depends upon the preponderance of blood; and still others, that the predominance of white blood must only be in the proportion of three-fourths. But these are questions to be determined under the laws of each state, and are not properly put in issue in this case. Under the allegations of his petition, it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race.

■ MR. JUSTICE BREWER did not hear the argument or participate in the decision of this case.

■ MR. JUSTICE HARLAN dissenting.

By the Louisiana statute the validity of which is here involved, all railway companies (other than street-railroad companies) carry passengers in that state are required to have separate but equal accommodations for white and colored persons, 'by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations.'

Only 'nurses attending children of the other race' are excepted from the operation of the statute. No exception is made of colored attendants traveling with adults. A white man is not permitted to have his colored servant with him in the same coach, even if his condition of health requires the constant personal assistance of such servant. If a colored maid insists upon riding in the same coach with a white woman whom she has been employed to serve, and who may need her personal attention while traveling, she is subject to be fined or imprisoned for such an exhibition of zeal in the discharge of duty.

However apparent the injustice of such legislation may be, we have only to consider whether it is consistent with the constitution of the United States.

That a railroad is a public highway, and that the corporation which owns or operates it is in the exercise of public functions, is not, at this day, to be disputed. Mr. Justice Strong, delivering the judgment of this court in *Olcott v. Supervisors,* 16 Wall. 678, 694, said: 'That railroads, though constructed by private corporations, and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence. So, in *Township of Pine Grove v. Talcott,* 19 Wall. 666, 676: 'Though the corporation [a railroad company] was private, its work was public, as much so as if it were to be constructed by the state.' So, in Inhabitants of *Worcester v. Western R. Corp.*, 4 Metc. (Mass.) 564: 'The establishment of that great thoroughfare is regarded as a public work, established by public authority, intended for the public use and benefit, the use of which is secured to the whole community, and constitutes, therefore, like a canal, turnpike, or highway, a public easement.' 'It is true that the real and personal property, necessary to the establishment and management of the railroad, is vested in the corporation; but it is in trust for the public.'

In respect of civil rights, common to all citizens, the constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and under appropriate circumstances, when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. Indeed, such legislation as that here in question is inconsistent not only with that equality of rights which pertains to citizenship, national and state, but with the personal liberty enjoyed by every one within the United States.

The thirteenth amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country. This court has so adjudged. But, that amendment having been found inadequate to the protection of the rights of those who had been in slavery, it was followed by the fourteenth amendment, which added greatly to the dignity and glory of American citizenship, and to the security of personal liberty, by declaring that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state

wherein they reside,' and that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship. Finally, and to the end that no citizen should be denied, on account of his race, the privilege of participating in the political control of his country, it was declared by the fifteenth amendment that 'the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude.'

These notable additions to the fundamental law were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems. They had, as this court has said, a common purpose, namely, to secure 'to a race recently emancipated, a race that through many generations have been held in slavery, all the civil rights that the superior race enjoy.' They declared, in legal effect, this court has further said, 'that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states; and in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color.' We also said: 'The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy; and discriminations which are steps towards reducing them to the condition of a subject race.' It was, consequently, adjudged that a state law that excluded citizens of the colored race from juries, because of their race, however well qualified in other respects to discharge the duties of jurymen, was repugnant to the fourteenth amendment. At the present term, referring to the previous adjudications, this court declared that 'underlying all of those decisions is the principle that the constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the general government or the states against any citizen because of his race. All citizens are equal before the law.' *Gibson v. State,* 162 U. S. 565, 16 Sup. Ct. 904.

It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars

occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of accommodation for travelers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary. The fundamental objection, therefore, to the statute, is that it interferes with the personal freedom of citizens. 'Personal liberty,' it has been well said, 'consists in the power of locomotion, of changing situation, or removing one's person to whatsoever places one's own inclination may direct, without imprisonment or restraint, unless by due course of law.' If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so; and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each.

It is one thing for railroad carriers to furnish, or to be required by law to furnish, equal accommodations for all whom they are under a legal duty to carry. It is quite another thing for government to forbid citizens of the white and black races from traveling in the same public conveyance, and to punish officers of railroad companies for permitting persons of the two races to occupy the same passenger coach. If a state can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street, and black citizens to keep on the other? Why may it not, upon like grounds, punish whites and blacks who ride together in street cars or in open vehicles on a public road *558 or street? Why may it not require sheriffs to assign whites to one side of a court room, and blacks to the other? And why may it not also prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the consideration of the political questions of the day? Further, if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the state require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of

his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case.

It was adjudged in that case that the descendants of Africans who were imported into this country, and sold as slaves, were not included nor intended to be included under the word 'citizens' in the constitution, and could not claim any of the rights and privileges which that instrument provided for and secured to citizens of the United States; that, at time of the adoption of the constitution, they were 'considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them.' 19 How. 393, 404. The recent amendments of the constitution, it was supposed, had eradicated these principles from our institutions. But it seems that we have yet, in some of the states, a dominant race,—a superior class of citizens,—which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race. The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the constitution, by one of which the blacks of this country were made citizens of the United States and of the states in which they respectively reside, and whose privileges and immunities, as citizens, the states are forbidden to abridge. Sixty millions of whites are in no danger from the presence here of eight millions of blacks. The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I

allude to the Chinese race. But, by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union, who are entitled, by law, to participate in the political control of the state and nation, who are not excluded, by law or by reason of their race, from public stations of any kind, and who have all the legal rights that belong to white citizens, are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race. It is scarcely just to say that a colored citizen should not object to occupying a public coach assigned to his own race. He does not object, nor, perhaps, would he object to separate coaches for his race if his rights under the law were recognized. But he does object, and he ought never to cease objecting, that citizens of the white and black races can be adjudged criminals because they sit, or claim the right to sit, in the same public coach on a public highway.

The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the constitution. It cannot be justified upon any legal grounds.

The result of the whole matter is that while this court has frequently adjudged, and at the present term has recognized the doctrine, that a state cannot, consistently with the constitution of the United States, prevent white and black citizens, having the required qualifications for jury service, from sitting in the same jury box, it is now solemnly held that a state may prohibit white and black citizens from sitting in the same passenger coach on a public highway, or may require that they be separated by a 'partition' when in the same passenger coach. May it not now be reasonably expected that astute men of the dominant race, who affect to be disturbed at the possibility that the integrity of the white race may be corrupted, or that its supremacy will be imperiled, by contact on public highways with black people, will endeavor to procure statutes requiring white and black jurors to be separated in the jury box by a 'partition,' and that, upon retiring from the court room to consult as to their verdict, such partition, if it be a movable one, shall be taken to their consultation room, and set up in such way as to prevent black jurors from coming too close to their brother jurors of the white race. If the 'partition' used in the court room happens to be stationary, provision could be made for screens with openings through which jurors of the two races could confer as to their verdict without coming into personal contact with each other. I cannot see but that, according to the principles this day announced, such state legislation, although conceived in hostility to, and enacted for the purpose of humiliating, citizens of the United States of a particular race, would be held to be consistent with the constitution.

I do not deem it necessary to review the decisions of state courts to which reference was made in argument. Some, and the most important, of them, are wholly inapplicable, because rendered prior to the adoption of the last amendments of the constitution, when colored people had very few rights which the dominant race felt obliged to respect. Others were made at a time when public opinion, in many localities, was dominated by the institution of slavery; when it would not have been safe to do justice to the black man; and when, so far as the rights of blacks were concerned, race prejudice was, practically, the supreme law of the land. Those decisions cannot be guides in the era introduced by the recent amendments of the supreme law, which established universal civil freedom, gave citizenship to all born or naturalized in the United States, and residing here, obliterated the race line from our systems of governments, national and state, and placed our free institutions upon the broad and sure foundation of the equality of all men before the law.

I am of opinion that the state of Louisiana is inconsistent with the personal liberty of citizens, white and black, in that state, and 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. Slavery, as an institution tolerated by law, would, it is true, have disappeared from our country; but there would remain a power in the states, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom, to regulate civil rights, common to all citizens, upon the basis of race, and to place in a condition of legal inferiority a large body of American citizens, now constituting a part of the political community, called the 'People of the United States,' for whom, and by whom through representatives, our government is administered. Such a system is inconsistent with the guaranty given by the constitution to each state of a republican form of government, and may be stricken down by congressional action, or by the courts in the discharge of their solemn duty to maintain the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding.

NOTES AND QUESTIONS

1. ***Equality.*** What is the most persuasive basis for Plessy's challenge to the law that forbade him from sitting in a railcar assigned to whites: a denial of equality, liberty, or property? The case is best known for its holding that Plessy was not denied equality. In what way was Plessy denied equality? Consider some possibilities:

One argument is that the railcars were unequal. This was true to some extent. The so-called colored passengers were assigned to the cars that were closer to the engine and therefore more exposed to smoke and soot. Was the Court's error in failing to acknowledge the unequal quality of the railcars? If the railcars were truly identical, would Plessy have no basis to complain?

Why might Plessy have declined to argue that the railroad cars were, in fact, unequal?

Another argument on Plessy's behalf is that, even if the cars were equal, the state's motivation was premised on a belief in black inferiority. Justice Harlan characterizes the segregation law as rooted in the view "that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens." How could the majority convince itself otherwise? In other words, it seems obvious to us that, while the law at issue was formally equal in that it prohibited whites from sitting with blacks and vice versa, but the legislature that passed the law was clearly attempting to keep blacks away from whites. Professor Jamal Greene points out that the court in *Plessy* may simply have been following a strong tradition of refusing to look into the motives of legislatures. *See The Anticanon*, 125 Harv. L. Rev. 379, 416 (2011). Greene argues that *Plessy* was well within the mainstream of legal thought at the time it was decided, and that it is therefore a mistake to see it as an example of poor legal reasoning.

Moreover, even accepting Harlan's view of the state's motives, how can racist motives make a law that otherwise treats people the same a denial of equality? If a company creates separate restrooms for men and women, believing one sex is inferior, but the restrooms are identical in quality and quantity, what is the harm? Perhaps the harm is in the message sent by the law. That seems to be how the Court characterizes Plessy's argument, as based on "the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority." The Court counters that, "[i]f this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." Is the Court wrong in its assessment of the law's message? Even if the law does stigmatize blacks, is the message of a segregating law really its principal harm?

Equally important, ought courts be in the business of judging whether laws that are formally equal on their face carry implicit messages? Is it realistic to expect courts to perceive the messages expressed by laws differently from the legislatures who enact them or the public subject to them? Professor Michael Klarman argues that the *Plessy* decision was completely understandable in light of prevailing economic and social conditions, including the "dominant racial norms of the period," with which the majority opinion was "fully congruent." *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 Va. L. Rev. 1, 27 (1996).

Finally, consider the Court's distinction between equality with respect to civil and political rights, on the one hand, and social rights, on the other. Civil and political rights, which include the right to serve on juries, to own and dispose of property, and to enter into contracts, receive strong constitutional protection. Thus the Court in *Strauder* invalidated the exclusion of minorities from jury service because the implicated the civil right to a fair trial. However, the Court explained, the Fourteenth Amendment does not ensure social equality, which includes the ability to attend integrated schools, marry someone of a different race, and ride in an

integrated railcar. In the realm of social rights, the Court reasoned, the question of legality is whether the regulation is "reasonable," for which "there must necessarily be a large discretion on the part of the legislature . . . [which] is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."

The Court in *Plessy* thus affirmed its commitment to uphold "absolute equality of the two races before the law" with respect to civil and political rights, and reasonable separations with respect to social rights, at least where the separate facilities are "equal but separate." Is that really such an implausible interpretation of equality sufficient to accuse the *Plessy* Court of racism? Again, is it realistic to expect the Court to have a view of rights radically different from the culture of the time? As Professor Klarman observes, a "generally consistent body of state and lower federal court precedents had sustained the 'separate but equal' doctrine for a quarter century before the Supreme Court provided its imprimatur in *Plessy*." *Id.* So, how exactly did the *Plessy* Court err when it rejected Plessy's equality claim?

2. ***Liberty.*** Perhaps the Court erred by failing to protect Plessy's liberty, a point that Justice Harlan's dissent endorses emphatically: "The fundamental objection, therefore, to the statute, is that it interferes with the personal freedom of citizens." What freedom or liberty was Plessy denied? He could still travel by rail and do so in a car that, at least by statute, was of equal quality. Did his constitutional freedom include the right to sit with white passengers? If so, then was the law equally liberty-denying to white people, at least those who would want to sit with black passengers? Do you believe most black passengers wanted to sit with white passengers? And what if white or black passengers did not want to sit with passengers of the other race? Do they have a liberty interest at stake that the law protected? Is liberty a more or less persuasive way to understand the harm of the law in *Plessy* than a denial of equality?

3. ***Property?*** Another argument Plessy made was that he was denied a property right. This claim is not against the segregation in the law but in its application to him. He claimed he had a property interest in his race, namely, his whiteness. The Court describes Plessy as "seven-eighths Caucasian and one-eighth African blood; that the mixture of colored blood was not discernible in him." Does he have a legitimate claim that his reputation of being white is a kind of property interest that Plessy was unjustly denied as a result of being deemed black? Albion Tourgée, one of Plessy attorneys, made this argument in his Brief:

> How much would it be *worth* to a young man entering upon the practice of law, to be regarded as a *white* man rather than a colored one? Six-sevenths of the population are white. Nineteen-twentieths of the property of the country is owned by white people. Ninety-nine hundredths of the business opportunities are in the control of white people. These propositions are rendered even more startling by the intensity of feeling which excludes the colored man from the friendship and companionship of the white man. Probably

> most white persons if given a choice, would prefer death to life in the United States *as colored persons*. Under these conditions, is it possible to conclude that the *reputation of being white* is not property? Indeed, is it not the most valuable sort of property, being the master-key that unlocks the golden door of opportunity?

Brief for Plaintiff in Error at 9, *Plessy* (No. 210).

Are you persuaded that racial identity is a property right, or at least something analogous? Does such a conception make sense today, when the market for legal and other services is no longer racially segregated by law? The Court seems to accept the premise that whiteness is a property interest that deserves protection in a case in which a white man is mistakenly deemed black. But the Court simply accepts that Homer Plessy is black because that is how Louisiana state law designated him. How can a state define away a property interest that the Constitution protects? For an influential account of whiteness as a property interest, *see* Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707 (1993).

4. ***What Is Race?*** Although Plessy was 87.5% white and 12.5% black, Louisiana defined him as colored, *i.e.,* black. Was Plessy black, or was he just considered to be black? What's the difference? If most of Homer Plessy's ancestors were white, why wasn't he white? The Court notes that states differed in the proportion of "colored blood" a person must have to be considered colored, ranging from requiring a preponderance of colored heritage to having any "visible admixture" of colored heritage. The Court defers to Louisiana's definition, stating that, "these are questions to be determined under the laws of each state, and are not properly put in issue in this case." Notice then that Plessy's race would vary between colored and white as he travels from state to state. Does that make sense that a state legislature can define, and presumably re-define, different meanings of race for people with identical ancestry and appearance? For a discussion of racial categorization during the Plessy era, see R. Richard Banks and Jennifer L. Eberhardt, Social Psychological Principles and the Legal Bases of Racial Categorization, in Racism: The Problem and the Response (1998) (Jennifer L. Eberhardt and Susan T. Fiske, eds.).

5. ***Colorblindness.*** Justice Harlan's dissent is famous for arguing that the Constitution is "colorblind." Harlan specifies that the rights that the Constitution secures to all regardless of color are the civil rights mentioned in the majority opinion (e.g., the rights to vote, enter contracts, sue, serve on juries, and own and dispose of property). Does this suggest that Harlan believed, as did the majority, that the Fourteenth Amendment does not mandate social equality between the races? Harlan seems to endorse white supremacy in the following passage: "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty." What is the relation, then, between law and social equality? Does the maintenance of a social caste system require a racially discriminatory legal system? Or might caste be compatible with a

colorblind legal regime? For an argument that colorblindness is compatible with continued racial inequality, see R. Richard Banks, "Nondiscriminatory" Perpetuation of Racial Subordination, 76 Boston University Law Review, 669 (1996). Further complicating things, Harlan seems to argue that people of Chinese ancestry are rightly denied the protections of the Fourteenth Amendment: "There is a race [the Chinese] so different from our own that we do not permit those belonging to it to become citizens of the United States." Is Harlan suggesting that the Chinese are not entitled to the basic civil rights that African Americans and whites are entitled to? If so, doesn't that mean that Harlan's commitment to colorblindness is, at best, unevenly applied, with some racial minorities (blacks) receiving constitutional protection and others (Chinese) being denied this protection?

6. ***Racial Symmetry.*** Recall that the Court places responsibility exclusively with the colored race for perceiving the segregation law as stigmatizing. It supports this point by "reversing the groups," *i.e.,* hypothesizing what would happen if blacks and whites were in each other's position. The Court says whites would not feel stigmatized by a similar law if it were passed by a black legislature: "The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption." Is that true? If a black dominated legislature passed a law separating blacks and whites, would whites not feel stamped with a badge of inferiority? If not, why not?

7. ***The Effect of Law on Racial Attitudes.*** The Court suggests that it is misguided to attempt to legislate equality, writing: "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 the difficulties of the present situation." Is the Court correct about the limited effect of law? How, precisely, does law shape our society? How would you assess the relative importance of law's effects on racial conditions versus racial consciousness? In Chapter 2, you will study the legal reforms of the Civil Rights Movement of the 1960s. Ask yourself, did changes in the law help diminish the racism in American society? How so?

8. ***The Practical Effect of*** **Plessy.** During the early decades of the twentieth century, de jure segregation spread throughout the South. Facilities of all sorts were legally and formally segregated on the basis of race—theaters, parks, schools, trains, bathrooms, even drinking fountains. White supremacy operated under the guise of the system described, misleadingly, as "separate but equal." In a series of cases following *Plessy* and until about 1930, the Court reaffirmed *Plessy* and sanctioned segregation in numerous settings. In *Cumming v. Richmond County Bd. of Educ.*, 175 U.S. 528 (1899), Justice Harlan wrote for the Court upholding a county's decision to extend free public education to white schools only. He wrote:

> If, in some appropriate proceeding instituted directly for that purpose, the plaintiffs had sought to compel the board of education, out of the funds in its hands or under its control, to establish and maintain a high school for colored children, and if it appeared that the board's refusal to maintain such a school was in fact an abuse of its discretion and in hostility to the colored population because of their race, different questions might have arisen in the state court.
>
> [W]hile all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land. We have here no such case to be determined.

How do you reconcile this decision with Harlan's dissent in *Plessy* (and also his dissent i*n Berea College v. Kentucky*, 211 U.S. 45 (1908), in which the Court upheld a state law requiring segregation of private schools chartered by the state)?

The Reconstruction Amendments and the extensive civil rights legislation enacted in the years after the Civil War offered vehicles for upending unequal legal and social structures. But in the decades immediately following their enactment, their reach proved limited, and between the 1880s and 1950s, Congress passed no civil rights legislation, and the courts did little to spur reform.

IV. COLONIALISM, IMMIGRATION, AND THE COMPLEXITIES OF THE RACIAL ORDER

The American racial order has long pivoted on the black/white divide, but it has also been shaped by the presence, exclusions, and mobilizations of numerous other groups. In the words of the late historian Aristide Zolberg, the United States, since its inception, has been a "Nation by Design."

> [T]he self-constituted American nation not only set conditions for political membership, but also decided quite literally who would inhabit its land, violently eliminate[ing] most of the original dwellers, actively recruit[ing] Europeans they considered suitable for settlement, elaborate[ing] devices to deter those judged undesirable, and even attempt[ing] to engineer the self-removal of liberated slaves, deemed inherently unqualified for membership. Immigration policy not only emerged as a major instrument of American nation-building, but also fostered the notion that the nation could be designed,

> stimulating the elevation of that belief into an article of national faith.

Aristide Zolberg, *A Nation by Design: Immigration Policy in the Fashioning of America* 1–2 (Russell Sage Foundation: New York (2006)). Nation building occurred as well through our nation's pursuit of Manifest Destiny, including the acquisition of vast territories in the Southwest and colonies in the Caribbean and Pacific that once belonged to Spain and Mexico. These imperial undertakings led to the United States dominion over many indigenous inhabitants, including millions of people we today call Latinos or Hispanics.

While no single casebook could do justice to the complexities generated by our history, we do intend this project as the beginnings of an effort to situate studies of Racial Justice in the context of a variegated understanding of this country's history and demography. What follows is a brief survey of some of the Supreme Court's nineteenth century precedents that reflect a young nation's efforts to situate some of these racialized groups in the constitutional order, even as it violently subjugated or excluded them.

A. NATIVE PEOPLES AND THE FORMATION OF THE UNITED STATES

Neither the colonies nor the United States could have taken shape without the subjugation and near elimination of the Continent's indigenous populations. Though scholars debate the numbers, by one estimate, when European explorers first "discovered" what is now known as the Americas, approximately 20 million people comprising hundreds of tribes inhabited the territory. *See* Jared Diamond, Guns, Germs and Steel 211 (1997); Angela R. Riley, *Indians and Guns*, 100 Geo. L.J. 1675, 1684 (2012). Within what would become the United States, colonists both slaughtered and enslaved indigenous peoples.

Independent indigenous societies survived the formation of the United States nonetheless, but their status has been fraught from the beginning. Congress and the Supreme Court repeatedly have been forced to grapple with the tension between colonialism and principles of republican constitutionalism, including the commitments to "limited government, democracy, inclusion, and fairness." Philip Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 383 (1993). In the words of the renowned Indian law scholar Philip Frickey, the Constitution was a document for "the colonizers" and treated "Indians and tribes as outsiders," mentioning them only three times and establishing Congress's plenary authority to regulate them. Frickey, Marshalling Past and Present, at 383.

In the first significant Indian law case heard by the Supreme Court, Chief Justice Marshall's opinion reflects this distance between

Europeans and Natives, as well as his opening attempt to reconcile colonialism with constitutionalism. In *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) at 572–73, in the course of resolving a dispute between two non-Indians to a piece of land a tribe had sold to the federal government, he defined the consequences of discovery and concluded that the European sovereign could extinguish a tribe's title to the land "either by purchase or conquest." *Id.* at 57. In describing the theory of discovery, he wrote:

> [T]he tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.
>
> What was the inevitable consequence of this state of things?
>
> Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill, prevailed.
>
> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.

Id. at 590.

But Marshall also wrote that tribes' "rights to complete sovereignty, as independent nations, were necessarily diminished" but not extinguished entirely, *id.* at 574. In later cases he developed the concept of tribal sovereignty to protect native interests in self-government. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), for example, he characterized tribes as "a distinct political society, separated from others, capable of managing its own affairs and governing itself." Yet he also described them as "domestic dependent nations," *id.* at 16, whose relations to the United States resembled "that of a ward to his guardian." *Id.* at 17. *See also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (holding that a Georgia law requiring state permission for presence on a Cherokee reservation was preempted by the "sovereign-to-sovereign" relationship between the tribe and the federal government).

But even as the Supreme Court recognized a semblance of tribal sovereignty, the federal government continued to exercise its authority over tribes in ways designed to arguably continue the conquest. Seven years after the Court's judgment in *Johnson v. M'Intosh*, Congress enacted the Indian Removal Act, which was designed to force Native

peoples living east of the Mississippi to relocate west. The justification for their removal included the belief that Native peoples did not know how to cultivate their land properly and therefore were not entitled to it—a conclusion based on familiar Lockean understandings of property ownership that then justified federal seizure. *See* Lindsay Glauner, The Need for Accountability and Reparation: 1830–1976 The United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide against Native Americans, 51 DePaul L. Rev. 911 (2002). The Act led to the uprooting of tens of thousands of Southern Native peoples from their homes. The infamous Cherokee "Trail of Tears," which produced severe misery and privation on the populations forced West, stemmed from this Act. Despite Cherokee efforts to adapt to the U.S. constitutional order—the tribe adopted a constitution that resembled the American one, for example—nineteenth century federal Indian policy resulted in ongoing efforts to marginalize and even destroy tribes.

The U.S. government today recognizes Indian tribes as sovereign entities entitled to exercise authority over their members. Tribes may relinquish aspects of their sovereignty by agreement with the United States government, but the basic principle of tribal autonomy remains the key component of relations between the United States and Native peoples. For an illuminating discussion of tribal sovereignty, *see* Felix Cohen, *Handbook of Federal Indian Law* § 4.01 (2012 ed.). But what exactly does tribal sovereignty mean in a context in which the federal government has the power to regulate tribes and extinguish tribal claims to land? Does tribal sovereignty reflect a respect for Native peoples' autonomy and self-determination? Or does tribal sovereignty reflect a refusal to incorporate Native peoples within the American polity? Is it possible to recognize simultaneously Native peoples' sovereignty and citizenship?

Consider the fact that before the passage of the Indian Citizenship Act of 1924, which made all native-born Native peoples citizens of the United States, Native peoples were not considered United States citizens. In *Elk v. Wilkins*, 112 U.S. 94 (1884), the Supreme Court considered whether the Fourteenth Amendment's Citizenship Clause, intended to overturn *Dred Scott*, also granted birthright citizenship to Native peoples, such that the petitioner had been denied his constitutional rights by a local registrar in Omaha who refused to recognize him as a qualified voter. Despite the fact that the petitioner had severed relations with his tribe, the Court concluded that, because he was born a member of the tribe, he could become a citizen of the United States only through naturalization. Citing Justice Marshall's foundational opinions, the Court wrote that the Indian tribes were "alien nations, distinct political communities . . . with whom the United States might and habitually did deal . . . either through treaties . . . or acts of congress . . . and were not part of the people of the United States." *Id.* at

99. Citizens at birth had to be "completely subject to [the political jurisdiction of the United States], owing them direct and immediate allegiance." *Id.* at 102. Although Indians were born within the geographical boundaries of the United States, they were "no more born into the United States and subject to the jurisdiction thereof" as the Fourteenth Amendment stipulates than "children born within the United States, of ambassadors or other public ministers of foreign nations." *Id.*

Today, Native peoples are citizens both of the United States and of their tribes. It is worth noting that not all Native peoples approve of the conferral of United States citizenship. Some activists and commentators have argued that Native peoples should focus their energies on internal tribal affairs rather than participating in American politics, and that those who do not participate in tribal government are betraying the principle of indigenous self-government. A variant of this argument is that the desire to exercise American citizenship rights at the expense of engagement with tribal politics reflects mainstream American values and thus the rejection of indigenous values. For a provocative discussion of the perils of neglecting tribal self-government, *see* Robert B. Porter, The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples, 15 Harv. Black Letter L. Rev. 107 (1999). Should Native peoples assimilate into the American political community? Or should they maintain and seek to broaden a separate political identity?

The Supreme Court today maintains a steady diet of federal Indian law cases. In addition to intricate questions of statutory interpretation, the Court has grappled with the reach of tribal jurisdiction and the implications of the recognition of tribal sovereignty for the constitutional rights of members and non-members alike. For instance, in 2008, the Court framed the issue in this way:

> The ability of nonmembers to know where tribal jurisdiction begins and ends, it should be stressed, is a matter of real, practical consequence given "[t]he special nature of [Indian] tribunals," *Duro v. Reina,* 495 U.S. 676, 693, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990), which differ from traditional American courts in a number of significant respects. To start with the most obvious one, it has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes. *See Talton v. Mayes,* 163 U.S. 376, 382–385, 16 S.Ct. 986, 41 L.Ed. 196 (1896); F. Cohen, Handbook of Federal Indian Law 664–665 (1982 ed.) (hereinafter Cohen) ("Indian tribes are not states of the union within the meaning of the Constitution, and the constitutional limitations on states do not apply to tribes"). Although the Indian Civil Rights Act of 1968 (ICRA) makes a handful of analogous safeguards enforceable in tribal courts, 25

> U.S.C. § 1302, "the guarantees are not identical," *Oliphant*, 435 U.S., at 194, 98 S.Ct. 1011, and there is a "definite trend by tribal courts" toward the view that they "ha[ve] leeway in interpreting" the ICRA's due process and equal protection clauses and "need not follow the U.S. Supreme Court precedents 'jot-for-jot,' " Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 Am. Indian L.Rev. 285 (1998) . . . In any event, a presumption against tribal-court civil jurisdiction squares with one of the principal policy considerations underlying *Oliphant*, namely, an overriding concern that citizens who are not tribal members be "protected . . . from unwarranted intrusions on their personal liberty," 435 U.S., at 210, 98 S.Ct. 1011.
>
> Tribal courts also differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in the independence of their judges. Although some modern tribal courts "mirror American courts" and "are guided by written codes, rules, procedures, and guidelines," tribal law is still frequently unwritten, being based instead "on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices," and is often "handed down orally or by example from one generation to another." Melton, *Indigenous Justice Systems and Tribal Society*, 79 Judicature 126, 130–131 (1995). The resulting law applicable in tribal courts is a complex "mix of tribal codes and federal, state, and traditional law," National American Indian Court Judges Assn., Indian Courts and the Future 43 (1978), which would be unusually difficult for an outsider to sort out.

Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 337, 128 S. Ct. 2709, 2724 (2008).

Quite apart from these persistent legal questions, and the debate over whether tribal sovereignty is too thin on the one hand or provides too much insulation from the requirements and benefits of the Constitution on the other, Native peoples in the United States today face many of the inequalities and exclusions experienced by other racial minorities, often in acute form. One in four Native peoples lives below the poverty line, compared to one in ten non-Hispanic Whites. *See* American Community Survey Reports, The American Community—American Indians and Alaska Natives (May 2007). Native peoples are much less likely to have high school diplomas and bachelor's degrees than their white counterparts, and they are incarcerated at a disproportionate rate. In addition, rates of violent crime on reservations are double the national average, and rates of violence against women are high. *See* James Anaya, Report of the Special Rapporteur on the rights of indigenous peoples 9–10 (30 August 2012). Just as we grapple with the

extent to which our histories of slavery and segregation remain responsible for institutional racism and the material inequalities faced by African Americans, the United States' history as a colonial power weighs heavily in contemporary struggles for equality and justice for Native peoples.

B. IMMIGRATION, CITIZENSHIP, AND EXCLUSION

Until 1965, race and national origin were explicit criteria in the selection of immigrants to the United States. The immigration reforms of that year ended the national origins quotas that had favored European migrants from Northern and Western nations over those from Southern and Eastern European nations. The reforms also eliminated the final vestiges of the outright exclusion of Asians (which had started in the late 19th century with laws barring the entry of Chinese immigrants).

In part because race arguably remains a factor in the construction and operation of our nation's immigration policy, it is important to understand the history of race-based exclusions and of efforts to reconcile them with our national identity. The cases discussed below reveal still more of the fraught origins of our multi-racial society.

In the 1860's, the United States entered into treaties with China that facilitated the arrival of immigrant laborers, primarily to assist in the construction of the trans-continental railroad. The California gold rush fueled westward movement and development of the United States and thus the need for immigrant labor. By the 1880's, growing anti-Chinese sentiment in the West, coupled with a nationwide depression, gave rise to numerous discriminatory state laws in California and eventually led Congress to enact the Chinese Exclusion Act of 1882, which suspended the entry of all Chinese laborers. A subsequent enactment required Chinese laborers present in the United States to obtain and carry certificates proving their entitlement to be in the country.

In *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), the Supreme Court concluded that the Chinese Exclusion Act was a valid exercise of federal power. The Court reasoned:

> To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. . . . It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us. . . . If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be

> stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.

What do you make of this sort of national security argument, which perceives a threat to the nation in the presence of supposedly unassimilable migrants? Recall that Justice Harlan, in his dissent in *Plessy* rejecting the logic and constitutionality of black-white segregation, nonetheless appears to accept without question the exclusion of Chinese people from U.S. citizenship, noting that they are a race "so different from our own." He points to the irony of permitting the Chinese to share railcars with whites while prohibiting black citizens from doing the same.

But the question of Chinese citizenship and status under the Constitution has always been more complex than this commentary taken on its own would suggest. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), for example, the Court held that a local San Francisco ordinance that gave municipal authorities discretion to determine who could operate a public laundry amounted to arbitrary discrimination against the Chinese. Most important for our purposes, the Court interpreted the Equal Protection Clause to include Chinese immigrants, noting that "[t]he rights of petitioners, as affected by the proceedings of which they complain, are not less because they are aliens and subjects of the emperor of China." 118 U.S. 368, 369. And even though the Chinese in particular, and later Asians in general, were prohibited from becoming naturalized citizens until 1952, the Court also gave effect to the Clause's universalistic language in a seminal case construing the reach of the Fourteenth Amendment's Citizenship Clause.

In the 1898 case of *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), the Supreme Court confronted the question "whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil[e] and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the fourteenth amendment of the constitution: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.' " The Court wrote of the Citizenship Clause:

> It is declaratory in form, and enabling and extending in effect. Its main purpose doubtless was, as has been often recognized by this court, to establish the citizenship of free negroes, which had been denied in the opinion delivered by Chief Justice Taney in *Scott v. Sandford*; and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States. But the opening words, "All persons born," are

> general, not to say universal, restricted only by place and jurisdiction, and not be color or race.

Id. at 467. The Court spelled out the logical conclusion of holding that the Fourteenth Amendment did not reach the children of parents who were citizens or subjects of other countries: it would be "to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens of the United States." *Id.* at 474.

How do you reconcile the Court's willingness to protect the constitutional rights of Chinese immigrants and acknowledge the citizenship status of children born to Chinese parents with its acceptance of racially exclusionary immigration and naturalization laws? Is it consistent as a matter of political theory to exclude Chinese from naturalization but to understand them as included within the terms of birthright citizenship?

Despite these cases incorporating Chinese immigrants and their children into the political order, racial restrictions on naturalization remained in place until 1952. An immigrant hoping to become a naturalized United States citizen had to be either of "African descent" or a "free white person." Some Asian immigrants seeking to naturalize sought to claim whiteness, giving rise to two Supreme Court cases, excerpted below, that sought to define that category. These cases highlight a fluid understanding of whiteness and underscore how courts and other legal actors have manipulated its meaning to re-enforce racial exclusion.

In thinking about what these cases suggest about the construction of racial identity, it is also important to understand that, during the 1920's, whiteness (or what we would consider whiteness today) was not enough to entitle someone to entrance into the polity. In the early twentieth century, Congress enacted immigration quotas to significantly limit the entrance of undesirable peoples from Southern and Eastern Europe whose racial status was either ambiguous or beside the point, at the same time that it enacted outright prohibitions of Asian immigration. These laws reflected the culmination of decades of debate over the desirability of different immigrant stock, and they effectively implemented the recommendations of the Dillingham Commission, a joint House-Senate Commission that met from 1907–1910 to study the state of immigration to the United States. In its more than 40 volume report, the Commission constructed a dichotomy between "old" (good and Northern European) and "new" (bad and Southern and Eastern Europeans) immigrants—the former assimilated seamlessly and the latter remained mired in ethnic enclaves.

Throughout the first decades of the twentieth century, Congress had attempted to block the entry of "lower-quality" immigrants through devices such as literacy tests. Presidents Wilson and Roosevelt both

vetoed these bills (Congress eventually enacted a literacy test over Wilson's veto), though both Presidents also wrote tracts with eugenic or racialized overtones, about the low quality of certain immigrants and the importance of assimilation. But the system's ethnic ideologies were also complemented by economic compromises. Congress, for example, did not subject Western Hemisphere immigration to quotas, and large numbers of Mexicans entered during this period to satisfy labor needs.

Among the important conceptual questions raised by the immigration and naturalization laws of this period are: to what extent were they about race, or the production of race, and to what extent did they implicate the intersection of ethnicity and class? Rogers Smith has argued that the immigration laws of this period helped re-enforce the segregationist ideologies used to subjugate the black population. Rogers Smith, *Civic Ideals* (1999). In tracing the effects of the immigration laws, Desmond King has highlighted the failure of the 1924 quota regime to produce the racial make-up desired by Congress, as well as the gradual assimilation of once undesirable white Europeans and the corresponding disappearance of ethnic enclaves. According to King, the "complex system of races" reflected in the immigration debates of this period eventually gave way to "a strict scheme of black and white," according to which the assimilation experience of European immigrants came to be the standard against which "blacks were measured—and found wanting." Desmond King, *Making Americans: Immigration, Race, and the Origins of Diverse Democracy* (2002).

Takao Ozawa v. United States

Supreme Court of the United States, 1922.
260 U.S. 178.

■ MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The appellant is a person of the Japanese race born in Japan. He applied, on October 16, 1914, to the United States District Court for the Territory of Hawaii to be admitted as a citizen of the United States. Including the period of his residence in Hawaii appellant had continuously resided in the United States for 20 years. He was a graduate of the Berkeley, Cal., high school, had been nearly three years a student in the University of California, had educated his children in American schools, his family had attended American churches and he had maintained the use of the English language in his home. That he was well qualified by character and education for citizenship is conceded.

The District Court of Hawaii, however, held that, having been born in Japan and being of the Japanese race, he was not eligible to naturalization under section 2169 of the Revised Statutes, and denied the petition.

[We must] inquire whether, under section 2169, the appellant is eligible to naturalization. The language of the naturalization laws from 1790 to 1870 had been uniformly such as to deny the privilege of naturalization to an alien unless he came within the description 'free white person.' By section 7 of the act of July 14, 1870 (16 Stat. 254, 256 [Comp. St. § 4358]), the naturalization laws were 'extended to aliens of African nativity and to persons of African descent.' Is appellant, therefore, a 'free white person,' within the meaning of that phrase as found in the statute?

On behalf of the appellant it is urged that we should give to this phrase the meaning which it had in the minds of its original framers in 1790 and that it was employed by them for the sole purpose of excluding the black or African race and the Indians then inhabiting this country. It may be true that those two races were alone thought of as being excluded, but to say that they were the only ones within the intent of the statute would be to ignore the affirmative form of the legislation. The provision is not that Negroes and Indians shall be excluded, but it is, in effect, that only free white persons shall be included. The intention was to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified. It is not enough to say that the framers did not have in mind the brown or yellow races of Asia. It is necessary to go farther and be able to say that had these particular races been suggested the language of the act would have been so varied as to include them within its privileges.

If it be assumed that the opinion of the framers was that the only persons who would fall outside the designation 'white' were Negroes and Indians, this would go no farther than to demonstrate their lack of sufficient information to enable them to foresee precisely who would be excluded by that term in the subsequent administration of the statute. It is not important in construing their words to consider the extent of their ethnological knowledge or whether they thought that under the statute the only persons who would be denied naturalization would be Negroes and Indians. It is sufficient to ascertain whom they intended to include and having ascertained that it follows, as a necessary corollary, that all others are to be excluded.

The question then is: Who are comprehended within the phrase 'free white persons'? Undoubtedly the word 'free' was originally used in recognition of the fact that slavery then existed and that some white persons occupied that status. The word, however, has long since ceased to have any practical significance and may now be disregarded.

We have been furnished with elaborate briefs in which the meaning of the words 'white person' is discussed with ability and at length, both from the standpoint of judicial decision and from that of the science of ethnology. It does not seem to us necessary, however, to follow counsel in their extensive researches in these fields. It is sufficient to note the fact

that these decisions are, in substance, to the effect that the words import a racial and not an individual test, and with this conclusion, fortified as it is by reason and authority, we entirely agree. Manifestly the test afforded by the mere color of the skin of each individual is impracticable, as that differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible gradations from the fair blond to the swarthy brunette, the latter being darker than many of the lighter hued persons of the brown or yellow races. Hence to adopt the color test alone would result in a confused overlapping of races and a gradual merging of one into the other, without any practical line of separation. Beginning with the decision of Circuit Judge Sawyer, *In re Ah Yup,* 5 Sawy. 155, Fed. Cas. No. 104 (1878), the federal and state courts, in an almost unbroken line, have held that the words 'white person' were meant to indicate only a person of what is popularly known as the Caucasian race.

The determination that the words 'white person' are synonymous with the words 'a person of the Caucasian race' simplifies the problem, although it does not entirely dispose of it. Controversies have arisen and will no doubt arise again in respect of the proper classification of individuals in border line cases. The effect of the conclusion that the words 'white person' means a Caucasian is not to establish a sharp line of demarcation between those who are entitled and those who are not entitled to naturalization, but rather a zone of more or less debatable ground outside of which, upon the one hand, are those clearly eligible, and outside of which, upon the other hand, are those clearly ineligible for citizenship. Individual cases falling within this zone must be determined as they arise from time to time by what this court has called, in another connection 'the gradual process of judicial inclusion and exclusion.'

The appellant, in the case now under consideration, however, is clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side. A large number of the federal and state courts have so decided and we find no reported case definitely to the contrary. These decisions are sustained by numerous scientific authorities, which we do not deem it necessary to review. We think these decisions are right and so hold.

The briefs filed on behalf of appellant refer in complimentary terms to the culture and enlightenment of the Japanese people, and with this estimate we have no reason to disagree; but these are matters which cannot enter into our consideration of the questions here at issue. We have no function in the matter other than to ascertain the will of Congress and declare it. Of course there is not implied—either in the legislation or in our interpretation of it—any suggestion of individual unworthiness or racial inferiority. These considerations are in no manner involved.

United States v. Bhagat Singh Thind

Supreme Court of the United States, 1923.
261 U.S. 204.

■ MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This cause is here upon a certificate from the Circuit Court of appeals requesting the instruction of this Court in respect of the following questions:

> 1. Is a high-caste Hindu, of full Indian blood, born at Amritsar, Punjab, India, a white person within the meaning of section 2169, Revised Statutes?
>
> 2. Does the Act of February 5, 1917, disqualify from naturalization as citizens those Hindus now barred by that act, who had lawfully entered the United States prior to the passage of said act?'

No question is made in respect of the individual qualifications of the appellee. The sole question is whether he falls within the class designated by Congress as eligible.

Section 2169, provides that the provisions of the Naturalization Act 'shall apply to aliens being free white persons and to aliens of African nativity and to persons of African descent.'

If the applicant is a white person, within the meaning of this section, he is entitled to naturalization; otherwise not. Mere ability on the part of an applicant for naturalization to establish a line of descent from a Caucasian ancestor will not ipso facto to and necessarily conclude the inquiry. 'Caucasian' is a conventional word of much flexibility, as a study of the literature dealing with racial questions will disclose, and while it and the words 'white persons' are treated as synonymous for the purposes of that case, they are not of identical meaning.

In the endeavor to ascertain the meaning of the statute we must not fail to keep in mind that it does not employ the word 'Caucasian,' but the words 'white persons,' and these are words of common speech and not of scientific origin. The word 'Caucasian,' [is by no] means clear, and the use of it in its scientific sense probably wholly unfamiliar to the original framers of the statute in 1790. When we employ it, we do so as an aid to the ascertainment of the legislative intent and not as an invariable substitute for the statutory words. Indeed, as used in the science of ethnology, the connotation of the word is by no means clear, and the use of it in its scientific sense as an equivalent for the words of the statute, other considerations aside, would simply mean the substitution of one perplexity for another. But in this country, during the last half century especially, the word by common usage has acquired a popular meaning, not clearly defined to be sure, but sufficiently so to enable us to say that its popular as distinguished from its scientific application is of appreciably narrower scope. It is in the popular sense of the word,

therefore, that we employ it as an aid to the construction of the statute, for it would be obviously illogical to convert words of common speech used in a statute into words of scientific terminology when neither the latter nor the science for whose purposes they were coined was within the contemplation of the framers of the statute or of the people for whom it was framed. The words of the statute are to be interpreted in accordance with the understanding of the common man from whose vocabulary they were taken.

They imply, as we have said, a racial test; but the term 'race' is one which, for the practical purposes of the statute, must be applied to a group of living persons now possessing in common the requisite characteristics, not to groups of persons who are supposed to be or really are descended from some remote, common ancestor, but who, whether they both resemble him to a greater or less extent, have, at any rate, ceased altogether to resemble one another. It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them to-day; and it is not impossible, if that common ancestor could be materialized in the flesh, we should discover that he was himself sufficiently differentiated from both of his descendants to preclude his racial classification with either. The question for determination is not, therefore, whether by the speculative processes of ethnological reasoning we may present a probability to the scientific mind that they have the same origin, but whether we can satisfy the common understanding that they are now the same or sufficiently the same to justify the interpreters of a statute—written in the words of common speech, for common understanding, by unscientific men—in classifying them together in the statutory category as white persons.

The eligibility of this applicant for citizenship is based on the sole fact that he is of high-caste Hindu stock, born in Punjab, one of the extreme northwestern districts of India, and classified by certain scientific authorities as of the Caucasian or Aryan race. The Aryan theory as a racial basis seems to be discredited by most, if not all, modern writers on the subject of ethnology. A review of their contentions would serve no useful purpose.

The term 'Aryan' has to do with linguistic, and not at all with physical characteristics, and it would seem reasonably clear that mere resemblance in language, indicating a common linguistic root buried in remotely ancient soil, is altogether inadequate to prove common racial origin. There is, and can be, no assurance that the so-called Aryan language was not spoken by a variety of races living in proximity to one another. Our own history has witnessed the adoption of the English tongue by millions of negroes, whose descendants can never be classified

racially with the descendants of white persons, notwithstanding both may speak a common root language.

The word 'Caucasian' is in scarcely better repute. It is at best a conventional term, with an altogether fortuitous origin,[1] which under scientific manipulation, has come to include far more than the unscientific mind suspects. According to Keane, for example, it includes not only the Hindu, but some of the Polynesians (that is, the Maori, Tahitians, Samoans, Hawaiians, and others), the Hamites of Africa, upon the ground of the Caucasic cast of their features, though in color they range from brown to black. We venture to think that the average well-informed white American would learn with some degree of astonishment that the race to which he belongs is made up of such heterogeneous elements.[2]

The various authorities are in irreconcilable disagreement as to what constitutes a proper racial division. For instance, Blumenbach has 5 races; Keane following Linnaeus, 4; Deniker, 29. The explanation probably is that 'the innumerable varieties of mankind run into one another by insensible degrees,' and to arrange them in sharply bounded divisions is an undertaking of such uncertainty that common agreement is practically impossible.

It may be, therefore, that a given group cannot be properly assigned to any of the enumerated grand racial divisions. The type may have been so changed by intermixture of blood as to justify an intermediate classification. Something very like this has actually taken place in India. Thus, in Hindustan and Berar there was such an intermixture of the 'Aryan' invader with the dark skinned Dravidian.

In the Punjab and Rajputana, while the invaders seem to have met with more success in the effort to preserve their racial purity, intermarriages did occur producing an intermingling of the two and

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[1] 2 Encyclopaedia Britannica (11th Ed.) p. 113: 'The ill-chosen name of Caucasian, invented by Blumenbach in allusion to a South Caueasian skull of specially typical proportions, and applied by him to the so-called white races, is still current; it brings into one race peoples such as the Arabs and Swedes, although these are scarcely less different than the Americans and Malays, who are set down as two distinct races. Again, two of the best marked varieties of mankind are the Australians and the Bushmen, neither of whom, however, seems to have a natural place in Blumenbach's series.'

[2] Keane himself says that the Caucasic division of the human family is 'in point of fact the most debatable field in the whole range of anthropological studies.'

And again: 'Hence it seems to require a strong mental effort to sweep into a single category, however elastic, so many different peoples-Europeans, North Africans, West Asiatics, Iranians, and others all the way to the Indo-Gangetic plains and uplands, whose complexion presents every shade of color, except yellow, from white to the deepest brown or even black.

'But they are grouped together in a single division, because their essential properties are one, * * * their substantial uniformity speaks to the eye that sees below the surface * * * we recognize a common racial stamp in the facial expression, the structure of the hair, partly also the bodily proportions, in all of which points they agree more with each other than with the other main divisions. Even in the case of certain black or very dark races, such as the Bejas, Somali, and a few other Eastern Hamites, we are reminded instinctively more of Europeans or Berbers thanks to their more regular features and brighter expression.'

destroying to a greater or less degree the purity of the 'Aryan' blood. The rules of caste, while calculated to prevent this intermixture, seem not to have been entirely successful.

It does not seem necessary to pursue the matter of scientific classification further. We are unable to agree with the District Court, or with other lower federal courts, in the conclusion that a native Hindu is eligible for naturalization under section 2169. The words of familiar speech, which were used by the original framers of the law, were intended to include only the type of man whom they knew as white. The immigration of that day was almost exclusively from the British Isles and Northwestern Europe, whence they and their forebears had come. When they extended the privilege of American citizenship to 'any alien being a free white person' it was these immigrants—bone of their bone and flesh of their flesh—and their kind whom they must have had affirmatively in mind. The succeeding years brought immigrants from Eastern, Southern and Middle Europe, among them the Slavs and the dark-eyed, swarthy people of Alpine and Mediterranean stock, and these were received as unquestionably akin to those already here and readily amalgamated with them. It was the descendants of these, and other immigrants of like origin, who constituted the white population of the country when section 2169, re-enacting the naturalization test of 1790, was adopted, and, there is no reason to doubt, with like intent and meaning.

What, if any, people of Primarily Asiatic stock come within the words of the section we do not deem it necessary now to decide.

What we now hold is that the words 'free white persons' are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word 'Caucasian' only as that word is popularly understood. As so understood and used, whatever may be the speculations of the ethnologist, it does not include the body of people to whom the appellee belongs. It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as white. The children of English, French, German, Italian, Scandinavian, and other European parentage, quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin. On the other hand, it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry. It is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely racial difference, and it is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation.

It is not without significance in this connection that Congress, has now excluded from admission into this country all natives of Asia within designated limits of latitude and longitude, including the whole of India.

This not only constitutes conclusive evidence of the congressional attitude of opposition to Asiatic immigration generally, but is persuasive of a similar attitude toward Asiatic naturalization as well, since it is not likely that Congress would be willing to accept as citizens a class of persons whom it rejects as immigrants.

NOTES AND QUESTIONS

1. ***Statutory Interpretation.*** On what does the Court rest its decision in these two cases? Precedent? Science? Current social understandings? Legislative intent? If the Court is to decide such a case based on legislative intent, is it more sensible to consider who was intended to be excluded from citizenship, or who was intended to be included? Is the Court's reasoning in *Ozawa* and *Thind* consistent?

2. ***The Fluidity of Race.*** Does the meaning of "free white person" in the naturalization statute necessarily remain the same across time? If not, what causes its meaning to shift? Moreover, if the Court is to determine the meaning of naturalization laws by looking to the intent of their framers, doesn't that create problems for members of racial groups that today are considered "white" but that 200 years ago were perhaps not so regarded?

3. ***Are Race-Based Restrictions Necessarily Racist?*** The Court says at the end of *Thind* and also at the end of *Ozawa* that its decision and the naturalization statute have nothing to do with racism. Is it possible for a Court, in interpreting this type of statute, to engage in any type of racial classification *without* entrenching racial hierarchies? What would have been the least racist, legitimate approach the Court could have taken?

4. ***Race and National Identity***. *Ozawa* and *Thind* reflect a time when our nation thought of itself as white. Notwithstanding the demise of overtly race-based naturalization laws, and the changing demographics of our own nation, one might ask: is our national identity still shaped by race? Is there any sense in which America remains a "white nation"? Or in which the experiences of racial minorities remain marginalized? For a discussion of this issue in the context of gender relations, see R. Richard Banks, *Are African Americans Us?* 93 Boston Univ.L.Rev. 681 (2103).

V. A TWENTIETH-CENTURY RECKONING

One lesson of our history is that, as one form of racial subordination is (seemingly) vanquished, another may arise. Racial conflict is less resolved than relocated. In part, our inability to attain racial justice reflects the indeterminacy of our ideals, the inevitable interplay of competing conceptions of what racial justice demands. How should we treat people now? And, also, how should we respond to the acknowledged injustices of the past? The final case in this chapter, *Korematsu v. United States*, raises both issues.

After the Japanese attack on Pearl Harbor, the government interned more than 110,000 people of Japanese descent (nearly 2/3 of them United

States citizens). In *Korematsu*, the Court upheld the conviction of a Japanese citizen for violating a military order excluding Japanese on the West Coast from certain zones, thus condoning their internment. Ironically, *Korematsu* was also the first case in which the Supreme Court held that racial classifications were to be subject to the most stringent form of judicial scrutiny, an approach that continues to shape the law today.

Korematsu v. United States

Supreme Court of the United States, 1944.
323 U.S. 214.

■ MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner, an American citizen of Japanese descent, was convicted in a federal district court for remaining in San Leandro, California, a 'Military Area', contrary to Civilian Exclusion Order No. 34 of the Commanding General of the Western Command, U.S. Army, which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area. No question was raised as to petitioner's loyalty to the United States.

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

Exclusion Order No. 34, which the petitioner knowingly and admittedly violated was one of a number of military orders and proclamations, all of which were substantially based upon Executive Order No. 9066. That order, issued after we were at war with Japan, declared that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities. * * * "

One of the series of orders and proclamations, a curfew order, which like the exclusion order here was promulgated pursuant to Executive Order 9066, subjected all persons of Japanese ancestry in prescribed West Coast military areas to remain in their residences from 8 p.m. to 6 a.m. As is the case with the exclusion order here, that prior curfew order was designed as a "protection against espionage and against sabotage." In *Kiyoshi v. United States*, we sustained a conviction obtained for violation of the curfew order. The Hirabayashi conviction and this one thus rest on the same 1942 Congressional Act and the same basic executive and military orders, all of which orders were aimed at the twin dangers of espionage and sabotage.

We upheld the curfew order as an exercise of the power of the government to take steps necessary to prevent espionage and sabotage in an area threatened by Japanese attack.

In the light of the principles we announced in the Hirabayashi case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did. True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our Hirabayashi opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas.

Here, as in the Hirabayashi case . . . , " * * * we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it."

Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.

We uphold the exclusion order as of the time it was made and when the petitioner violated it. . . . In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. . . . But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.

■ MR. JUSTICE FRANKFURTER, concurring.

[T]he validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless. To talk about a military order that expresses an allowable judgment of war needs by those entrusted with the duty of conducting war as 'an unconstitutional order' is to suffuse a part of the Constitution with an atmosphere of unconstitutionality. The respective spheres of action of military authorities and of judges are of course very different. But within their

sphere, military authorities are no more outside the bounds of obedience to the Constitution than are judges within theirs. To recognize that military orders are 'reasonably expedient military precautions' in time of war and yet to deny them constitutional legitimacy makes of the Constitution an instrument for dialectic subtleties not reasonably to be attributed to the hard-headed Framers, of whom a majority had had actual participation in war. If a military order such as that under review does not transcend the means appropriate for conducting war, such action by the military is as constitutional as would be any authorized action by the Interstate Commerce Commission within the limits of the constitutional power to regulate commerce. And being an exercise of the war power explicitly granted by the Constitution for safeguarding the national life by prosecuting war effectively, I find nothing in the Constitution which denies to Congress the power to enforce such a valid military order by making its violation an offense triable in the civil courts.

■ MR. JUSTICE ROBERTS, dissenting.

[T]he indisputable facts exhibit a clear violation of Constitutional rights.

This is not a case of keeping people off the streets at night as was *Kiyoshi Hirabayashi v. United States*, nor a case of temporary exclusion of a citizen from an area for his own safety or that of the community, nor a case of offering him an opportunity to go temporarily out of an area where his presence might cause danger to himself or to his fellows. On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States.

The predicament in which the petitioner thus found himself was this: He was forbidden, by Military Order, to leave the zone in which he lived; he was forbidden, by Military Order, after a date fixed, to be found within that zone unless he were in an Assembly Center located in that zone. General DeWitt's report to the Secretary of War concerning the programme of evacuation and relocation of Japanese makes it entirely clear . . . that an Assembly Center was a euphemism for a prison. No person within such a center was permitted to leave except by Military Order.

■ MR. JUSTICE MURPHY, dissenting.

This exclusion of "all persons of Japanese ancestry, both alien and non-alien," from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over "the very brink of constitutional power" and falls into the ugly abyss of racism.

The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so 'immediate, imminent, and impending' as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger. Yet no reasonable relation to an 'immediate, imminent, and impending' public danger is evident to support this racial restriction which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law.

It must be conceded that the military and naval situation in the spring of 1942 was such as to generate a very real fear of invasion of the Pacific Coast, accompanied by fears of sabotage and espionage in that area. The military command was therefore justified in adopting all reasonable means necessary to combat these dangers. In adjudging the military action taken in light of the then apparent dangers, we must not erect too high or too meticulous standards; it is necessary only that the action have some reasonable relation to the removal of the dangers of invasion, sabotage and espionage. But the exclusion, either temporarily or permanently, of all persons with Japanese blood in their veins has no such reasonable relation. And that relation is lacking because the exclusion order necessarily must rely for its reasonableness upon the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways. It is difficult to believe that reason, logic or experience could be marshalled in support of such an assumption.

That this forced exclusion was the result in good measure of this erroneous assumption of racial guilt rather than bona fide military necessity is evidenced by the Commanding General's Final Report on the evacuation from the Pacific Coast area. In it he refers to all individuals of Japanese descent as 'subversive,' as belonging to 'an enemy race' whose 'racial strains are undiluted,' and as constituting "over 112,000 potential enemies * * * at large today" along the Pacific Coast.[3] In support of this blanket condemnation of all persons of Japanese descent, however, no reliable evidence is cited to show that such individuals were generally

[3] Further evidence of the Commanding General's attitude toward individuals of Japanese ancestry is revealed in his voluntary testimony on April 13, 1943, in San Francisco before the House Naval Affairs Subcommittee to Investigate Congested Areas, Part 3, pp. 739–40 (78th Cong., 1st Sess.):

> I don't want any of them (persons of Japanese ancestry) here. They are a dangerous element. There is no way to determine their loyalty. The west coast contains too many vital installations essential to the defense of the country to allow any Japanese on this coast. * * * The danger of the Japanese was, and is now-if they are permitted to come back-espionage and sabotage. It makes no difference whether he is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty. * * * But we must worry about the Japanese all the time until he is wiped off the map. Sabotage and espionage will make problems as long as he is allowed in this area. * * * '

disloyal, or had generally so conducted themselves in this area as to constitute a special menace to defense installations or war industries, or had otherwise by their behavior furnished reasonable ground for their exclusion as a group.

Justification for the exclusion is sought, instead, mainly upon questionable racial and sociological grounds not ordinarily within the realm of expert military judgment, supplemented by certain semi-military conclusions drawn from an unwarranted use of circumstantial evidence. Individuals of Japanese ancestry are condemned because they are said to be "a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion." They are claimed to be given to 'emperor worshipping ceremonies' and to 'dual citizenship.' Japanese language schools and allegedly pro-Japanese organizations are cited as evidence of possible group disloyalty, together with facts as to certain persons being educated and residing at length in Japan. It is intimated that many of these individuals deliberately resided 'adjacent to strategic points,' thus enabling them "to carry into execution a tremendous program of sabotage on a mass scale should any considerable number of them have been inclined to do so." The need for protective custody is also asserted. The report refers without identity to 'numerous incidents of violence' as well as to other admittedly unverified or cumulative incidents. From this, plus certain other events not shown to have been connected with the Japanese Americans, it is concluded that the "situation was fraught with danger to the Japanese population itself" and that the general public "was ready to take matters into its own hands." Finally, it is intimated, though not directly charged or proved, that persons of Japanese ancestry were responsible for three minor isolated shellings and bombings of the Pacific Coast area, as well as for unidentified radio transmissions and night signalling.

The main reasons relied upon by those responsible for the forced evacuation, therefore, do not prove a reasonable relation between the group characteristics of Japanese Americans and the dangers of invasion, sabotage and espionage. The reasons appear, instead, to be largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation. A military judgment based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations. Especially is this so when every charge relative to race, religion, culture, geographical location, and legal and economic status has been substantially discredited by independent studies made by experts in these matters.

The military necessity which is essential to the validity of the evacuation order thus resolves itself into a few intimations that certain

individuals actively aided the enemy, from which it is inferred that the entire group of Japanese Americans could not be trusted to be or remain loyal to the United States. No one denies, of course, that there were some disloyal persons of Japanese descent on the Pacific Coast who did all in their power to aid their ancestral land. Similar disloyal activities have been engaged in by many persons of German, Italian and even more pioneer stock in our country. But to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights. Moreover, this inference, which is at the very heart of the evacuation orders, has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy. To give constitutional sanction to that inference in this case, however well-intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.

No adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry. It is asserted merely that the loyalties of this group "were unknown and time was of the essence." Yet nearly four months elapsed after Pearl Harbor before the first exclusion order was issued; nearly eight months went by until the last order was issued; and the last of these 'subversive' persons was not actually removed until almost eleven months had elapsed. Leisure and deliberation seem to have been more of the essence than speed. And the fact that conditions were not such as to warrant a declaration of martial law adds strength to the belief that the factors of time and military necessity were not as urgent as they have been represented to be.

Moreover, there was no adequate proof that the Federal Bureau of Investigation and the military and naval intelligence services did not have the espionage and sabotage situation well in hand during this long period. Nor is there any denial of the fact that not one person of Japanese ancestry was accused or convicted of espionage or sabotage after Pearl Harbor while they were still free, a fact which is some evidence of the loyalty of the vast majority of these individuals and of the effectiveness of the established methods of combatting these evils. It seems incredible that under these circumstances it would have been impossible to hold loyalty hearings for the mere 112,000 persons involved—or at least for the 70,000 American citizens—especially when a large part of this number represented children and elderly men and women.[4] Any

[4] During a period of six months, the 112 alien tribunals or hearing boards set up by the British Government shortly after the outbreak of the present war summoned and examined

inconvenience that may have accompanied an attempt to conform to procedural due process cannot be said to justify violations of constitutional rights of individuals.

I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution.

■ MR. JUSTICE JACKSON, dissenting.

Had Korematsu been one of four—the others being, say, a German alien enemy, an Italian alien enemy, and an [American] convicted of treason but out on parole—only Korematsu's presence would have violated the order. The difference between their innocence and his crime would result, not from anything he did, said, or thought, different than they, but only in that he was born of different racial stock.

Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. . . . [H]ere is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign. If Congress in peace-time legislation should enact such a criminal law, I should suppose this Court would refuse to enforce it.

[Perhaps we cannot]confine military expedients by the Constitution, but neither would I distort the Constitution to approve all that the military may deem expedient. This is what the Court appears to be doing, whether consciously or not. I cannot say, from any evidence before me, that the orders of General DeWitt were not reasonably expedient military precautions, nor could I say that they were. But even if they were permissible military procedures, I deny that it follows that they are constitutional. If, as the Court holds, it does follow, then we may as well say that any military order will be constitutional and have done with it.

The limitation under which courts always will labor in examining the necessity for a military order are illustrated by this case. How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has been taken by this or any other court. There is sharp controversy as to the credibility of the DeWitt

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approximately 74,000 German and Austrian aliens. These tribunals determined whether each individual enemy alien was a real enemy of the Allies or only a 'friendly enemy.' About 64,000 were freed from internment and from any special restrictions, and only 2,000 were interned.

report. So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable. And thus it will always be when courts try to look into the reasonableness of a military order.

In the very nature of things military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy. Neither can courts act on communications made in confidence. Hence courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.

I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority.

NOTES AND QUESTIONS

1. ***Who Was Fred Korematsu?*** Born in Oakland, California in 1919, Korematsu was the third of four sons of Japanese parents who immigrated to the United States in 1905. When Korematsu's family packed up to leave their home to comply with the evacuation order, Korematsu, who had a good-paying welder's job and an Italian-American girlfriend, refused to go. He and his girlfriend instead moved to Nevada, where Korematsu underwent plastic surgery on his eyelids to make him look less Japanese. He changed his name to Clyde Serra and claimed to be of Spanish and Hawaiian heritage. But he was eventually arrested and jailed for violating the order. An ACLU lawyer asked him to be the named plaintiff in a case challenging the Japanese exclusion orders. Korematsu agreed, and the case made its way to the

Supreme Court while Fred himself remained confined in an internment camp in Utah. Annie Nakao, "Overturning a wartime act decades later," *San Francisco Chronicle*, December 12, 2004. What relevance, if any, do these particular facts have in your understanding or assessment of the case?

2. Korematsu*'s Precursors.* After the outbreak of World War I, German immigrants, and even American-born citizens of German descent, fell under suspicion of being disloyal. Wendy McElroy, *WWI, Xenophobia and Suppressing Political Opposition*, History News Network (Apr. 11, 2010), *available at*: http://historynewsnetwork.org/blog/125397. In the name of national security, the U.S government required 250,000 immigrants from Germany (who had not become United States citizens) to register at their local post office, to carry their registration cards at all times, and to report any change of address or employment. Of those aliens, 6,300 were also arrested. Thousands more were interrogated and investigated. More than 2000 were interned for the duration of the war in two camps in Utah and in Georgia. Arnold Krammer, *Undue Process: The Untold Story of America's German Alien Internees*. Rowman & Littlefield Pub Incorporated, 1997. For more on nationalistic fervor and xenophobia during World War I, *see*: John Higham, *Strangers in the land: Patterns of American nativism*, 1860–1925. Rutgers University Press, 2002. Does this historical background make the internment of Japanese Americans during World War II seem more understandable? Less objectionable? Or more outrageous?

3. *The Case of Italians and Germans.* During World War II, more than 11,000 people of German ancestry (along with a smaller number of Italians) were interned, pursuant to the same Executive Order that authorized the internment of Japanese Americans. Most of those interned were non-citizens, either long-term residents in the case of Germans, or people in the country temporarily in the case of Italians. Although General DeWitt (the same Commander who ordered the removal of people with Japanese ancestry) did press for the large-scale removal of Germans and Italians, President Roosevelt and his Secretary of War rejected the proposal, in part due to political opposition to mass detention of Germans. Immigrants from Germany and their children constituted a sizeable portion of the U.S. population. Instead, Germans and Italians received individualized hearings adjudicating their loyalty before being interned. Do you think anything other than racism can account for the differential treatment of Europeans and Japanese? In light of the way Germans and Italians were treated, would you say that a less restrictive order against Japanese—that all Japanese Americans report for individual questioning, so that their loyalty could be determined—would have been permissible? Would the Japanese internment have been less objectionable if it (or the individualized questioning) had been limited to Japanese non-citizens? Would the fact that the law at the time precluded Japanese immigrants from becoming naturalized citizens figure into your analysis?

4. *Judicial Review.* The majority in *Korematsu* expressed reluctance about second-guessing military officials' judgments during wartime. When a race classification so clearly burdens a particular racial group, is such

deference ever appropriate? What exactly does strict scrutiny mean in the hands of the *Korematsu* majority?

5. ***Making Amends for Internment.*** In four related steps, the federal government has attempted to make amends for the internment of Japanese Americans. First, in 1948, President Truman signed the Japanese-American Claims Act, which provided compensation to Japanese Americans for economic losses due to their forced evacuation from their homes. Congress appropriated $38 million to settle 23,000 claims for damage to property and businesses. The final claim was adjudicated in 1965.

Second, in 1980, President Jimmy Carter appointed the Commission on Wartime Relocation and Internment of Civilians (CWRIC) to investigate the internment. The Commission's report, titled *Personal Justice Denied*, found little evidence of Japanese disloyalty at the time and attributed the internment to racism. According to the report, "the record does not permit the conclusion that military necessity warranted the exclusion of ethnic Japanese from the West Coast." The evidence on which General DeWitt supposedly relied—signaling from shore to enemy submarines, and arms and contraband found by the FBI during raids on ethnic Japanese homes and businesses—was deemed not credible. An investigation by the Federal Communications Commission found no substantiated cases of shore-to-ship signaling. And the arms and contraband confiscated by the FBI from ethnic Japanese were items normally in the possession of law-abiding civilians. The FBI concluded that their searches had uncovered no dangerous persons that "we could not otherwise know about." (*Personal Justice Denied*, Summary, p. 7).

Third, in 1984 a federal district court overturned Fred Korematsu's conviction, noting that the government had "knowingly withheld information from the courts when they were considering the critical questions of military necessity." *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984). The government had not made available to the courts documents and reports in its possession that undermined the claim that the people of Japanese descent represented a credible threat to the United States. The court ruled that the submission of the withheld evidence likely would have changed the Court's decision in *Korematsu*.

Fourth, Congress passed the Civil Liberties Act of 1988, officially acknowledging the "fundamental injustice" of the evacuation and paying reparations of $20,000 to each internee. The Act noted that "the evacuation, relocation, and internment of civilians during World War II . . . were carried out without adequate security reasons and without any acts of espionage or sabotage documented by the Commission, and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership." The Act went on: "For these fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese ancestry, the Congress apologizes on behalf of the Nation." For more on Japanese Americans' reparations, *see* Eric K. Yamamoto, Margaret Chon, Carol L. Izumi, Jerry Kang & Frank H. Wu, *Race, rights, and reparation: Law and the Japanese American internment*. Aspen Law & Business (2nd Ed., 2013).

None of these efforts to make amends encompassed the Germans and Italians who were interned. In *Jacobs v. Barr*, 959 F.2d 313 (D.C. Cir. 1992), the court of appeals considered an equal protection challenge to the Civil Liberties Act of 1988 by a German American who alleged that he was interned along with his German father during the war, even though neither was ever found to have engaged in any wrongdoing. Rejecting the claim, the court found ample evidence in the legislative history of the Civil Liberties Act of 1988 that Japanese American internees (but not their German American counterparts) were the victims of racial prejudice. The court noted no mass exclusion or detention of German (or Italian) Americans was ordered, and those detained, including the plaintiff and his father in *Jacobs*, were first given due process hearings to establish their threat to national security. Are you persuaded by these distinctions? Is it sensible and justifiable to compensate one set of innocent internees but not another?

6. ***Native Peoples and Reparations.*** In addition to the internment, the U.S. government has also paid reparations to Indian tribes to redress a wide range of claims, including violations of treaties for which a judicial remedy was denied, and the loss of lands under treaties signed under duress. The total cost of the program, created by Congress in 1946, is estimated at $800 million. *See* Final Report of the United States Indian Claims Commission, H.R. Doc. No. 96–383 (1980). How is the case of Native peoples in the U.S. different from that of Japanese Americans?

7. ***African Americans and Reparations.*** The question of reparations for African Americans is longstanding. During Reconstruction, freedmen were promised "40 acres and a mule"—a refrain that has been used since to invoke the idea that blacks ought to be compensated. In fact, no such reparations have ever been made on account of slavery. Slave owners were required to relinquish their slaves, but not their land. Various institutions, however, have extended reparations to African Americans for other wrongs. After reviewing these examples, consider what you think offers the best means of making amends for the past, and in what contexts, if any, such amends should be made.

a. ***The Tuskegee Syphilis Experiment.*** Between 1932 and 1972 the U.S. Public Health Service studied the progression of untreated syphilis in hundreds of rural African-American men in Alabama. The aim was to document the dire effects of the disease. Officials told the men that they were receiving free healthcare from the government, and in fact did receive free medical exams, meals and burial insurance. But the government did not provide the men appropriate medical treatment for syphilis, even after penicillin became a widely used and effective treatment in the 1940s. The federal government, the American Medical Association and National Medical Association (a nationwide group of black doctors) continued to officially support the study as late as 1969.

An Associated Press story in 1972 prompted a public outcry about the study. A government panel subsequently concluded that the study was "ethically unjustified." In the mid-1970s, the U.S. government settled a class action lawsuit brought on behalf of the heirs of the deceased study

participants, agreeing to contribute approximately $10,000,000 to a settlement fund, which was used to create the Tuskegee Health Benefit Program (THBP). THBP provided lifetime medical benefits and burial services to all study participants, widows and offspring. In 1997, President Bill Clinton, in a White House ceremony that included Tuskegee study participants and their families, formally apologized for the study. The federal government also contributed to establishing the National Center for Bioethics in Research and Health Care at Tuskegee, which opened in 1999 to explore issues that underlie research and medical care of African Americans and other underserved people.

b. ***Tulsa Race Riots Lawsuit.*** In 1921, after a black man was accused of sexually assaulting a white woman, whites rioted and decimated the black community of Tulsa, Oklahoma. Hundreds of armed white men gathered outside the courthouse where the man was being held, and a group of armed black men arrived to prevent his lynching. After a shot was fired, the black men fled to Greenwood, a wealthy black neighborhood popularly known as "black Wall Street," and the white men chased them. The Tulsa police chief apparently enabled the ensuing battle by deputizing hundreds of white men and commandeering gun shops to arm them. A state government report estimated that roughly 300 people were killed and more than 8,000 left homeless as a result of the attack. No one was convicted or compensated. Not until decades later was a state commission formed that investigated the episode and recommended payments to the survivors. A lawsuit filed on behalf of the survivors in 2003 was dismissed due to the statute of limitations having run.

c. ***Truth and Reconciliation Commission.*** On November 3, 1979, in Greensboro, North Carolina, members of the Ku Klux Klan and the American Nazi Party shot and killed five protest marchers at a rally organized by communists intended to demonstrate opposition to the Klan. In 2004, a private organization, the "Greensboro Truth and Reconciliation Commission," declared that it would take public testimony and examine the causes and consequences of the Greensboro massacre. This private group (which lacked any government recognition or authority) was patterned after the state-created Truth and Reconciliation Commissions in post-apartheid South Africa. The Greensboro TRC aimed to give hope to victims "who have waited in vain for their governments to show the political will to address past injustices." *See* Magarrell, Lisa, Joya Wesley, and Bongani Finca. *Learning from Greensboro: Truth and reconciliation in the United States*. University of Pennsylvania Press, 2010. When might a public discussion to air out controversies be useful as a way to reckon with past wrongs? Does the fact that the North Carolina Truth and Reconciliation Commission was not officially recognized by the state matter? Should claims for past injustices be made before a committee, a court, a governmental agency, Congress?

d. ***Brown University Steering Committee on Slavery and Justice and Subsequent University Actions.*** In 2003, Brown University President Ruth Simmons appointed a committee of faculty, students, and administrators to investigate and report on the University's involvement

with slavery and the trans-Atlantic slave trade. The Committee's final report, presented to President Simmons in October 2006, led to a number of changes; the University i) took steps to recast its official history to present a more complete picture of its origins, ii) established a major research and teaching initiative on slavery and justice, which included strengthening and expanding the Department of Africana Studies; iii) raised a permanent endowment in the amount of $10 million to establish a Fund for the Education of the Children of Providence, and iv) expanded support to Historically Black Colleges and Universities. How effective are these efforts as a means of making amends for the past?

Following campus protests against racial injustices in November 2015, the president of Princeton University agreed to consider the demands of student protesters, including opening a debate about Woodrow Wilson's legacy at Princeton. This would potentially include removing the name of Woodrow Wilson, the 28th U.S. president, a segregationist who some believe supported the ideas of the Ku Klux Klan, from a residential college, from the Woodrow Wilson School of Public Policy and International Affairs, and from any other buildings. Mary Hui, "After protests, Princeton debates Woodrow Wilson's legacy," The Washington Post, Nov 23, 2015. Should Universities "cleanse" themselves of their connection to our slave past by changing names of buildings named after slave-owners or racists? What are the drawbacks of such moves?

8. ***Reparations and Slavery.*** Let's consider now how the United States should make amends for the wrong of slavery, if at all. One form of making amends would be a simple apology. On a visit to Africa in 1998, President Bill Clinton apologized for the slave trade. Congressional resolutions apologizing for slavery were passed separately by the House of Representatives in 2008 and by the Senate in 2009. The nonbinding Senate resolution sponsored by Sen. Tom Harkin, D-Iowa, was similar to the House resolution, acknowledging the wrongs of slavery without offering any reparations. These resolutions were never reconciled or signed by the President. Consider the following excerpt from the 2009 Senate resolution (S. Con. Res. 26):

> "(1) APOLOGY FOR THE ENSLAVEMENT AND SEGREGATION OF AFRICAN-AMERICANS.—The Congress—(A) acknowledges the fundamental injustice, cruelty, brutality, and inhumanity of slavery and Jim Crow laws; (B) apologizes to African-Americans on behalf of the people of the United States, for the wrongs committed against them and their ancestors who suffered under slavery and Jim Crow laws; and (C) expresses its recommitment to the principle that all people are created equal and endowed with inalienable rights to life, liberty, and the pursuit of happiness, and calls on all people of the United States to work toward eliminating racial prejudices, injustices, and discrimination from our society. (2) DISCLAIMER.—Nothing in this resolution—(A) authorizes or supports any claim against the United States; or (B) serves as a settlement of any claim against the United States."

Every year since 1989, Rep. John Conyers has introduced some version of the "Commission to Study Reparation Proposals for African Americans Act" (H.R. 40), portions of which are reproduced below:

> "A BILL
>
> To acknowledge the fundamental injustice, cruelty, brutality, and inhumanity of slavery in the United States and the 13 American colonies between 1619 and 1865 and to establish a commission to examine the institution of slavery, subsequently de jure and de facto racial and economic discrimination against African-Americans, and the impact of these forces on living African-Americans, to make recommendations to the Congress on appropriate remedies, and for other purposes.
>
> Sec. 3 ESTABLISHMENT AND DUTIES
>
> The Commission shall perform the following duties:
>
> (7) Recommend appropriate remedies in consideration of the Commission's findings. In making such recommendations, the Commission shall address among other issues, the following questions:
>
> (A) Whether the Government of the United States should offer a formal apology on behalf of the people of the United States for the perpetration of gross human rights violations on African slaves and their descendants.
>
> (B) Whether African-Americans still suffer from the lingering effects of [slavery].
>
> (C) Whether, in consideration of the Commission's findings, any form of compensation to the descendants of African slaves is warranted.
>
> (D) If the Commission finds that such compensation is warranted, what should be the amount of compensation, what form of compensation should be awarded, and who should be eligible for such compensation."

Do you think the Act is a good idea? Is there a benefit to studying the issue of reparations for past harm? Why do you think the bill never passes in Congress? Do you think it would ever pass? Should it?

For more on African-American reparations, *see* Kim Forde-Mazrui, *Taking conservatives seriously: a moral justification for affirmative action and reparations*, 92(3) Cal. L. Rev. 683 (2004); Keith B. Hylton, *A Framework for Reparations Claims*, 24 BC Third World LJ 31 (2004).