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ABSTRACT

Every moment in human history can be characterized by someone as "socially and politically charged." For a large portion of the population of the United States, nearly the entire history of the country has been socially and politically charged, first because they were enslaved and then because they were subjected to discriminatory laws and unequal treatment under what became known as "Jim Crow." The history of the United States has also been a period of social and political upheaval for American Indians, the people who occupied the territory that became the United States before European settlement. Although both African-Americans and American Indians often turned to the federal courts for help, by and large, the Supreme Court of the United States turned them away, refusing their pleas for

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protection from the sources of their political and social difficulties. The law, as exemplified in Supreme Court decisions, carried on in politically and socially charged times as if nothing was the matter.

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INTRODUCTION

Every moment in human history can be characterized by someone as "socially and politically charged." Humanity careens from one existential crisis to the next, but only some crises are acknowledged by society's dominant forces. For example, the late 1780s were among the more politically and socially charged years in the United States.[1] Shays's Rebellion and other events exposed the defects in the Articles of Confederation that led to the framing of a new constitution designed to create a stronger and more self-sufficient central government.[2] At the same time, however, for approximately 20 percent of the country's population, those years were socially and politically charged for another reason: they were enslaved, treated by their country and masters as property, and subjected to the most serious violations of human rights known to man.[3] In addition to forced labor and no freedom of movement, they were subjected to physical and sexual violence, denial of educational opportunities, and destruction of their families and other social units.[4] And the voices of these nearly 700,000 Americans were not heard above perhaps a whisper at the convention that led to the creation of the United States of America as we now know it.[5]

The history of the United States has also been a period of social and political upheaval for another group of people occupying its territory, the American Indians. Socially, their most serious problem was initially death due to diseases brought to the continent by immigrants, which may have killed as many as 90 percent of the native population in the period after white settlement.[6] Those left alive were conquered by European immigrants who virtually

1. *See* Jonathan Smith, *The Depression of 1785 and Daniel Shay's Rebellion*, 1 WM. & MARY Q. 77, 84 (1948).

2. *Id.* at 78-79.

3. *See* Mary Mederios Kent, *Immigration and America's Black Population*, 62 POPULATION BULL. 3, 3 (2007).

4. *See Slavery in America*, HIST. (Aug. 28, 2019), https://www.history.com/topics/black-history/slavery#section_11 [https://perma.cc/NJ3J-TZZ7].

5. *See, e.g.*, *The Constitution and Slavery*, CONST. RTS. FOUND., https://www.crf-usa.org/black-history-month/the-constitution-and-slavery [https://perma.cc/76GV-8CR7].

6. *See The Story of ... Smallpox—and Other Deadly Eurasian Germs*, PBS (2005), https://www.pbs.org/gunsgermssteel/variables/smallpox.html [https://perma.cc/9443-CDSF].

destroyed their political and social structures.[7] The conquerors repeatedly violated and disavowed treaties and other promises that they had made with the vanquished nations.[8] Sometimes the government of the United States rescued the American Indians from dire straits, while, at other times, it put them there and left them to their collective fate.[9]

After the end of slavery and the quieting of the direct attack on the social and political structures of the American Indians, things were better. But still, the American people were involved in ongoing crises. For decades after the end of slavery, the federal government was unwilling to recognize the rights of African Americans or force the states to respect those rights that had been put down on paper after the end of the Civil War.[10] And the federal government's treatment of American Indians has continued to be marked by cruelty and mismanagement.[11]

This Article is about how the Supreme Court of the United States reacted to these socially and politically charged periods for African Americans and American Indians, with the primary focus on the situation of African Americans during the post-Reconstruction period. This was a period when African Americans looked to the federal courts for protection from Jim Crow legislation that threatened to place them in a situation nearly as unequal and demeaning as

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7. *See* FRANCIS JENNINGS, THE FOUNDERS OF AMERICA 229 (1st ed. 1993). *But see, e.g.*, Joseph Heath, *An Integral Pillar of the Colonization and Forced Assimilation Policies of the United States in Violation of Treaties*, ONONDAGA NATION (June 7, 2018), https://www.onondaganation.org/news/2018/the-citizenship-act-of-1924/ [https://perma.cc/C328-B645] ("For over four centuries the Haudenosaunee have maintained their sovereignty, against the onslaught of colonialism and assimilation.").

8. *See* Jennings, *supra* note 7, at 223, 226.

9. *See, e.g.*, *Trail of Tears*, MUSEUM CHEROKEE INDIAN, https://www.cherokeemuseum.org/archives/era/trail-of-tears [https://perma.cc/9QFF-7Y8K] (explaining how over 4000 Cherokee people perished when they "were forcibly taken from their homes, incarcerated in stockades, forced to walk more than a thousand miles, and removed to Indian Territory"); Christine Haug, *Native American Tribes & U.S. Government*, VICTORIANA MAG. (2016), http://victoriana.com/history/nativeamericans.html [https://perma.cc/MSW8-5GKE] (describing the creation of the Bureau of Indian Affairs and the Treaty of Fort Laramie in which the federal government agreed to respect American Indian tribes' territorial boundaries and make annual payments to them).

10. *See* P. SCOTT CORBETT ET AL., U.S. HISTORY 458 (2014).

11. *See, e.g.*, Andrew Boxer, *Native Americans and the Federal Government*, HIST. TODAY (Sept. 2009), https://www.historytoday.com/archive/native-americans-and-federal-government [https://perma.cc/R2HU-B37Q].

slavery. As we shall see, by and large, the Court reinforced the dominant social forces' determination not to recognize the one long social and political crisis that constituted the late nineteenth century for these millions of Americans.[12] Certainly, the Justices were aware of the world around them, and yet their decisions contributed to the crises, adding to the misery that millions of Americans were suffering at the hands of the federal and state governments. While, of course, the Civil War and everything surrounding it was recognized as a series of political and social crises, the Court appeared unconcerned with the interests of anyone outside the white, dominant political and social establishment.[13] The law, as exemplified in Supreme Court decisions, failed to react as if it was operating in politically and socially charged times.[14] Mostly, it carried on as if nothing was the matter.

Perhaps that is the intended message—in politically and socially charged times, the Court will be a force of stability, helping to quell challenges to existing power structures, even if it requires ignoring suffering and injustice. Those rare occasions when the Court steps in to protect nondominant social groups may occur only when it appears that even greater instability and damage to dominant interests would result if it did not. It is, of course, true that during at least part of the twentieth century the Court assumed a leading role in championing the rights of African Americans, both in explicitly racial cases and in other cases in which the human, social, and political rights of African Americans were threatened.[15] This may be partly due to an accident of history when, for the first time, the Supreme Court was occupied by a majority of relatively liberal Justices.[16] Even then, American Indians continued to fare poorly in the Supreme Court, perhaps because nothing that might be done to

12. *See infra* Part II.B.
13. *See infra* Part II.B.
14. *See infra* Part II.B.
15. *See infra* Part II.B.
16. *See* Dan Keating et al., *How Often Does the Supreme Court Overturn Precedents Like* Roe v. Wade*?*, WASH. POST (May 21, 2019), https://www.washingtonpost.com/politics/2019/05/21/how-often-does-supreme-court-overturn-precedents-like-roe-v-wade/ [https://perma.cc/LG29-RTV5].

them would seriously threaten the stability of the country as a whole.[17]

I. A BRIEF LOOK AT THE SUPREME COURT AND THE AMERICAN INDIAN TRIBES

In the limited space available, I could not possibly do justice to the history of the mistreatment of the American Indians by the European immigrants to North America, the government of the United States, and its Supreme Court. There is no question that European settlement of North America was and continues to be a great tragedy for the people who were here before them. There are a few cases that will illustrate the treatment of American Indians sufficiently without going into great detail.[18] The point is that while these people suffered social upheaval and political crises, the Supreme Court of the United States was of no value to them and actually aided and abetted their oppression.[19]

In 1785 and 1786, the Government of the United States, the Cherokee Nation, and the Choctaw and Chickasaw Nations entered into a series of treaties known as the Hopewell Treaties, named for the Hopewell Plantation in South Carolina where they were signed.[20] These treaties were later supplemented by the Treaty of Holston and several additional treaties, with additional agreements being made as late as 1819.[21] These treaties established boundaries between lands controlled by the United States and lands controlled by the Cherokee people.[22]

In 1831, the Cherokee Nation brought a bill in the original jurisdiction of the Supreme Court of the United States, seeking to restrain the State of Georgia from enforcing Georgia law in Cherokee territory and seizing Cherokee land in violation of the treaty

17. *See* Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, A.B.A. (Oct. 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol--40--no--1--tribal-sovereignty/short_history_of_indian_law/ [https://perma.cc/U65V-CG9F].

18. *See infra* notes 36-44 and accompanying text.

19. *See infra* notes 36-44 and accompanying text.

20. *See* Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201, 231 (2007).

21. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 5-6 (1831).

22. *Id.* at 5.

obligations of the United States.[23] The Constitution grants federal courts jurisdiction over "[c]ontroversies ... between a State ... and foreign States" and in cases "in which a State shall be Party" the Constitution places original jurisdiction in the Supreme Court.[24] Thus, the Court's jurisdiction over the cases depended on whether the Cherokee Nation was a foreign state.

To this question, the Supreme Court answered in the negative, declaring that the American Indian tribes, while possessing a degree of sovereignty over their lands within the borders of the United States, are best characterized as "domestic dependent nations."[25] The Supreme Court thus could not hear this dispute, a dispute that was vital to the continued existence of the Cherokee Nation and which turned on the effects of treaties entered into between the Cherokees and the U.S. government.[26] As we shall see, the key point for present purposes is this: the Court could not hear the case because the Cherokee Nation was not considered a foreign state.[27] This determination did not necessarily mean that in a proper case, the Supreme Court would not enforce the treaties that granted the Cherokee Nation a degree of autonomy over their lands.[28] But it did mean that American Indian tribes would not be considered foreign nations by the courts of the United States.

Although the Supreme Court enforced the Cherokee Nation's power over its reservation in a subsequent case,[29] the Court later analogized the American Indian tribes to foreign nations when confronted with congressional abrogation of treaty obligations that resulted in the loss of millions of dollars worth of tribal lands.[30] In 1867, the United States entered into The Medicine Lodge Treaty,

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23. *Id.* at 1.

24. U.S. CONST. art. III, § 1.

25. *Cherokee Nation*, 30 U.S. at 17.

26. *Id.* at 20.

27. *Id.*

28. One year later, the Court heard a dispute between a citizen of Vermont and the State of Georgia and determined that Georgia could not require a state license for nonmembers to live within tribal boundaries. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 542, 561-62 (1832). The Court observed that "[t]he Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter." *Id.* at 561.

29. *Id.*

30. Lone Wolf v. Hitchcock, 187 U.S. 553, 555-67 (1903).

recognizing control over certain lands by the Kiowa and Comanche Tribes and creating a reservation for their benefit.[31] Later, the Apache tribe also became a signatory to the treaty.[32] Article twelve of that treaty provided that no subsequent treaty could provide for the alienation of reservation land without the signatures of three-quarters of the adult male American Indians residing on the land.[33] In 1892, a new treaty was entered into which gave up the reservation, provided for the allotment of title to some reservation land to individual American Indians, and paid the tribes two million dollars.[34] Although at the time the new treaty was entered into, the signatories agreed that more than the required three-quarters of the adult male inhabitants had signed, the Kiowa, Comanche, and Apache Tribes soon claimed that the three-fourths requirement had not been met and that the new treaty had been procured by fraud.[35]

On June 6, 1900, supplemented by further statutes enacted in 1901, Congress enacted a bill purporting to ratify the provisions of the 1892 treaty.[36] Lone Wolf, a member of the Kiowa Tribe, brought a suit in equity in the courts of the District of Columbia purporting to represent all members of the Kiowa, Comanche, and Apache American Indians, seeking to invalidate the 1892 treaty.[37] Shortly after the Supreme Court of the District of Columbia denied Lone Wolf's application for a preliminary injunction, the President of the United States issued a proclamation opening up the ceded reservation lands to settlement by non-Indians.[38]

On appeal to the Supreme Court, Lone Wolf claimed that the alienation of reservation land was void because it had not been consented to by the required three-quarters of adult male inhabitants and that the seizure of the reservation land without such consent violated the Constitution's Fifth Amendment, presumably the

31. *Id.* at 554.
32. *Id.* at 554, 559.
33. *Id.* at 554.
34. *Id.* at 554-55.
35. FRANK POMMERSHEIM, BROKEN LANDSCAPE 131, 133 (2009).
36. *See Lone Wolf*, 187 U.S. at 556-60. Congressional ratification was necessary due to a federal statute enacted in 1871 prohibiting new treaties with American Indian nations. Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified as 25 U.S.C. § 71 (2018)). Thus, the 1892 treaty could go into effect only by an act of Congress.
37. *See* Lone Wolf v. Hitchcock, 19 App. D.C. 315, 320-21 (1902).
38. POMMERSHEIM, *supra* note 35, at 135.

requirement that government must compensate the owners of private property for any takings.[39] Had this land been owned by non-Indian, American citizens, Congress certainly could not have legislatively seized it without paying just compensation.[40] In denying Lone Wolf's claim, the Court analogized to the law governing international treaties: "[A]s with treaties made with foreign nations ... the legislative power might pass laws in conflict with treaties made with the Indians."[41] In other words, American Indian tribes, although clearly by Supreme Court precedent not foreign nations, would be treated as such by the government and the Supreme Court when it suited the interests of the United States. The decision in Lone Wolf's case is an example of the Supreme Court's reaction to social upheaval—when an oppressed, weak group is experiencing social crisis, the Court consistently sides with dominant forces.[42] Although the American Indian tribes have won and continue to win some legal battles in the Supreme Court,[43] Lone Wolf's case and others like it signify that the American Indian tribes cannot look to the Supreme Court for protection of their basic rights.[44]

II. SLAVERY AND JIM CROW

From 1641, when Massachusetts became the first British colony to legalize slavery, until 1865, with the end of the Civil War, millions of people were legally enslaved in the territory that currently comprises the United States of America.[45] For those millions of people, each and every day was a time of great social and political upheaval.[46] People were kidnapped from their homes, transported

39. U.S. CONST. amend. V.

40. *See* Joseph William Singer, *Sovereignty and Property*, 86 NW. L. REV. 1, 2 (1991).

41. *Lone Wolf*, 187 U.S. at 566, 568.

42. *See* Corinna Barrett Lain, *Three Supreme Court "Failures" and a Story of Supreme Court Success*, 69 VAND. L. REV. 1019, 1020, 1022-23 (2016).

43. *See, e.g.*, Herrera v. Wyoming, 138 S. Ct. 1686, 1691 (2019).

44. *See generally* Singer, *supra* note 40; Joseph William Singer, *The Indian States of America: Parallel Universes & Overlapping Sovereignty*, 38 AM. INDIAN L. REV. 1 (2013).

45. *See* William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711, 1713, 1743 (1996).

46. *See* Patricia M. Muhammad, *The Trans-Atlantic Slave Trade: A Forgotten Crime Against Humanity as Defined by International Law*, 19 AM. U. INT'L L. REV. 883, 899-902

to distant lands, deprived of all human, social, and political rights, and legally treated as property by their so-called owners.[47] All of this was abetted by a legal system whose seminal document, the Magna Charta Libertatum of 1216, or Great Charter of Liberties, proclaimed that

> [n]o free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.[48]

Even in 1216, the system was infected by the realization that some people, those not included in the phrase "free man," could be stripped of their rights without lawful judgment.[49]

A. The Early Decisions

The courts of the United States, under the influence of the Great Charter, perpetuated the slavery system, effectively aiding and abetting the great injustices done to millions of people experiencing social and political upheaval.[50] Lest we be tempted to dismiss the judicial acceptance of slavery as a product of the times and required by positive law, it is important to place the early decisions in context. By the early nineteenth century, the international slave trade was steadily subjected to widespread condemnation.[51] It was legislatively outlawed by the British Parliament in 1807,[52] and in 1810 found by a British court to be contrary to the law of nations.[53] In the United States, Congress outlawed the slave trade immediately

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(2004).

47. *See id.* at 892-93.

48. *English Translation of Magna Carta*, BRIT. LIBR. (G.R.C. Davis trans., 1963), https://www.bl.uk/magna-carta/articles/magna-carta-english-translation [https://perma.cc/2QW3-9GML].

49. *See id.*

50. *See, e.g.*, Roberta Alexander, Dred Scott*: The Decision that Sparked a Civil War*, 45 N. KY. L. REV. 643, 645 (2007).

51. *See* EARL M. MALTZ, SLAVERY AND THE SUPREME COURT, 1825-1861 4 (2009).

52. *See id.*

53. *See* The Amedie (1810) 12 Eng. Rep. 92, 97 (appeal taken from Vice Adm.).

upon the expiration of the Constitution's provision protecting it[54] and strengthened the prohibition in 1819.[55] In 1821, Justice Story, sitting as Circuit Justice, concluded that the "slave trade was contrary to the law of nations as well as domestic law."[56] Yet when the issue reached the full Court in *The Antelope*,[57] the Court concluded that, while the slave trade was contrary to the law of nature, it was not contrary to the law of nations, and thus, based on the proof at trial, some of the people on board the ship in question could legally be held as the slaves of Spanish claimants in Florida.[58]

There were, of course, important judicial decisions that refused to carry slavery any further than required by applicable positive law.[59] The most famous example is Lord Mansfield's opinion in *Somerset v. Stewart*, in which he decided that slavery existed only as a matter of positive law and, therefore, could not be introduced into a new territory without a legislative act supporting it.[60] Chief Justice Lemuel Shaw of Massachusetts followed this reasoning when he held that slaves brought temporarily into Massachusetts, where slavery was by then illegal, were freed by the act of entering the state.[61] But in the Supreme Court of the United States, the weight of authority was decidedly on the side of the slave system, culminating in *Dred Scott*'s rule that even free blacks, if descended from slaves, were not citizens of the United States and thus could not invoke the diversity jurisdiction of the federal courts to seek their freedom.[62]

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54. *See* Act Prohibiting the Importation of Slaves of 1807, ch. 22, 2 Stat. 426.

55. *See* Act in Addition to the Acts Prohibiting the Slave Trade of 1819, ch. 101, 3 Stat. 532; MALTZ, *supra* note 51, at 4.

56. MALTZ, *supra* note 51, at 5 (citing United States v. La Jeune Eugenie, 26 F. Cas. 832, 851 (C.C.D. Mass. 1822) (No. 15,551)).

57. The Antelope, 23 U.S. (10 Wheat.) 66 (1825).

58. *Id.* at 66, 126-27.

59. *See* Somerset v. Stewart (1772) 98 Eng. Rep. 499, 510.

60. *See id.*

61. *See* Commonwealth v. Aves, 35 Mass. (18 Pick.) 193, 224 (1836); *see also* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 94 (1975). Chief Justice Shaw was also the author of the Massachusetts Supreme Judicial Court's decision in *Roberts v. City of Boston*, 59 Mass. 95 (5 Cush.) 198, 210 (1850), in which the court upheld the constitutionality of racially segregated schools in the city of Boston.

62. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

B. Reconstruction

The period after the Civil War was one of great social and political upheaval—possibly the most politically and socially charged moments in the history of the United States, other than the war itself.[63] In the years immediately following the Civil War, in many states, Reconstruction governments composed of Republicans, freedmen, and people of African descent who had never been enslaved legislatively removed racial restrictions on voting and granted equal rights to all.[64] Louisiana was an especially good example of this phenomenon.[65] Louisiana's 1867-1868 constitutional convention included white and black members[66] and produced a constitution, adopted in March 1868, that eliminated de jure racial discrimination, included voting rights for all, and outlawed racial discrimination, even in privately owned modes of public transportation.[67] The many victories for equal rights in the formerly Confederate states were short-lived, and the Supreme Court of the United States actively abetted the "redemption"[68] of the South by the white supremacist establishment.[69]

In nearly every post-Civil War case involving race relations that came before the Supreme Court, the white establishment prevailed. Decision after decision limited the scope of civil rights laws and Congress's power to legislate in the field.[70] Many of these decisions were legal landmarks that set the framework for Jim Crow laws that lasted until the civil rights movement of the 1950s and 1960s.[71]

It was not obvious immediately after the Civil War that the Supreme Court would lead the legal march to Jim Crow. Three early

63. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1, 10 (2002).

64. *See* Eric Foner, *The Supreme Court and the History of Reconstruction—and Vice Versa*, 112 COLUM. L. REV. 1585, 1586 (2012).

65. *See* LA. CONST. of 1868 art. XIII, 98.

66. *See* CHARLES VINCENT, BLACK LEGISLATORS IN LOUISIANA DURING RECONSTRUCTION 48 (2011).

67. *Id.*

68. *See* NICHOLAS LEMANN, REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR 188 (2006).

69. *See* Foner, *supra* note 64, at 1588.

70. *Id.*

71. *See* James W. Fox Jr., *Doctrinal Myths and the Management of Cognitive Dissonance: Race, Law, and the Supreme Court's Doctrinal Support of Jim Crow*, 34 STETSON L. REV. 293, 302, 314-15 (2005).

Supreme Court decisions affecting race relations, including two from Louisiana, were won by the progressive side.[72] The first was the landmark *Slaughter-House Cases*,[73] known today mainly for construing the Privileges and Immunities Clause of the Fourteenth Amendment narrowly.[74] At the time, the decision in the *Slaughter-House Cases* was understood as a victory for the progressive Republican government in Louisiana against the racist establishment in the butchering business.[75] The second was a little-known case that upheld a procedural aspect, added in 1871, to an anti-discrimination statute that Louisiana's Republican legislature enacted in the late 1860s under its 1868 constitution.[76]

The arguments rejected in the *Slaughter-House Cases* foreshadowed the principles that prevailed at the Supreme Court during the *Lochner* era.[77] The case was a challenge to economic regulation of the business of slaughtering animals in the New Orleans area that the challengers framed as an individual rights case.[78] A Louisiana statute passed by the Republican legislature in 1869, which the Louisiana Supreme Court had upheld, made it unlawful to keep or slaughter animals in the City of New Orleans on the east bank of the Mississippi River.[79] The law, intended to protect the health and safety of New Orleans residents from the ill effects of butchery, also established a new corporation to which it gave a monopoly over slaughterhouse operations in three Louisiana parishes.[80] The legislature may have also been concerned with race discrimination in the business.[81]

Incumbent slaughterhouse operators and butchers challenged the law, claiming it violated the Thirteenth and Fourteenth

72. Walker v. Sauvinet, 92 U.S. 90, 92 (1875); R.R. Co. v. Brown, 84 U.S. (17 Wall.) 445, 446 (1873); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 36-37 (1873).

73. 83 U.S. at 36.

74. *See* Michael A. Ross, *Justice Miller's Reconstruction:* The Slaughter-House Cases*, Health Codes, and Civil Rights in New Orleans, 1861-1873*, 64 J.S. HIST. 649, 649 (1998).

75. *See id.* at 652.

76. *Walker*, 92 U.S. at 90, 92.

77. *See generally* Lochner v. New York, 198 U.S. 45 (1905).

78. *Slaughter-House Cases*, 83 U.S. at 57, 59.

79. *Id.* at 38, 44.

80. *Id.* at 39, 43.

81. *See* Ross, *supra* note 74, at 656, 664.

Amendments.[82] They claimed it created an involuntary servitude, abridged their privileges and immunities as citizens of the United States, denied them equal protection, and deprived them of property without due process of law.[83] The main claim was that the statute deprived butchers in New Orleans "of the right to exercise their trade."[84] One aim of the statute was to remove economic and social barriers to black participation in the business of raising animals.[85] At the time, it was understood that the *Slaughter-House* plaintiffs were mounting a conservative challenge to state regulatory power with the aim of preserving white economic and racial domination in the business of slaughterhouses.[86]

The Court's decision upholding the statute took an expansive view of the regulatory powers of state and local governments and a narrow view of the scope of the Privileges and Immunities Clause of the Fourteenth Amendment.[87] On governmental power, the Court stated, "[I]t is both the right and the duty of the legislative body—the supreme power of the State or municipality—to prescribe and determine the localities where the business of slaughtering for a great city may be conducted."[88] The Court noted that government-granted monopolies can be contrary to the public interest and have been condemned in England and Europe, but it found that American representative bodies could be presumed to be acting in the public interest and so could grant them.[89] Such monopolies were not as suspect as those granted by unelected monarchs.[90]

The Court also found ample justification for the law in the health and safety problems that had been generated by the location of slaughterhouses throughout the city.[91] As Michael Ross described the legislative record:

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82. *Slaughter-House Cases*, 83 U.S. at 43.
83. *Id.* at 50, 56.
84. *Id.* at 60.
85. *See* Ross, *supra* note 74, at 656.
86. *See id.* at 661.
87. *See id.* at 649-50.
88. *Slaughter-House Cases*, 83 U.S. at 61.
89. *Id.* at 62.
90. *Id.* at 65.
91. *Id.* at 62.

> The abattoirs were bloody, filthy, and unregulated. Burly butchers killed the animals with hammers or knives, then skinned, gutted, and hung their fly-covered carcasses on hooks to dangle unrefrigerated for hours, even days. The mass of gory waste generated by these squalid businesses was then thrown directly into either the streets or the Mississippi River. A New Orleans doctor testified to a legislative committee: "Barrels filled with entrails, liver, blood, urine, dung, and other refuse, portions in an advanced stage of decomposition, are constantly being thrown into the river .... poisoning the air with offensive smells and necessarily contaminating the water near the bank for miles." Much of the rotting refuse from the slaughterhouses and stock landings collected in the river around the giant suction pipes from which New Orleans drew its water supply. "When the river is low," the president of the New Orleans Board of Health testified, "it is not uncommon to see intestines and portions of putrefied animal matter lodged immediately around the pipes. The liquid portion of this putrefied matter is sucked into the reservoir." Pilings designed to stop the bulk waste matter from entering the pipes proved inefficient, and the pumping system repeatedly clogged.[92]

Finding that the law fell within the traditional powers of state and local government, the Court turned next to whether it violated any provision of the newly adopted amendments to the Constitution. The amendments' primary purpose, the Court said, was to protect the newly freed slaves and other racial minorities—not to interfere with existing state regulatory power over businesses such as slaughterhouses.[93] The Court refused to read the Privileges and Immunities Clause as creating extensive federal power superseding that of the states.[94] In the Court's view, the clause merely prohibited discrimination against persons from other states and guaranteed a limited range of rights implicit in federal citizenship such as the right to bring claims against the government and to access outlets

92. *See* Ross, *supra* note 74, at 654 (omission in original) (first quoting *H.R. Special Committee on the Removal of the Slaughter Houses*, 1867 Leg., Sess. 2-2 (La. 1857) (statement of Dr. E. S. Lewis); then quoting State v. Fagan, 22 La. Ann. 545, 553 (1870); and then citing Ronald M. Labbe, *New Light on the Slaughterhouse Monopoly Act of 1869*, *in* EDWARD F. HAAS, LOUISIANA'S LEGAL HERITAGE 150 (1983)).

93. *Slaughter-House Cases*, 83 U.S. at 71-72, 78.

94. *Id.* at 77-78.

of foreign commerce.[95] The Court also found no violation of due process or equal protection, saying that to read those clauses to invalidate the Louisiana slaughterhouse statutes would work a radical redistribution of government power away from the states and toward the federal government.[96] (A few decades later, during the so-called *Lochner* era, the Supreme Court would read the Due Process Clauses of the Fifth and Fourteenth Amendments to protect background property and contract rights and invalidate all kinds of economic regulation.)[97]

The *Slaughter-House Cases*' narrow construction of the Privileges or Immunities Clause has long been lamented as a defeat for the cause of progressive change.[98] Civil rights advocates believe that the Court could have used the clause as a tool to protect blacks against Jim Crow laws that restricted, inter alia, voting, property ownership, and entry into professions.[99] Given the convulsive changes throughout American constitutional law that have occurred since 1873, the Court's narrow reading of the Privileges or Immunities Clause in that one decision cannot explain why the Court has never read the Clause more broadly.

The Court's second progressive decision on race was also handed down in 1873, and it involved segregation of passengers on a Virginia railroad that, with permission of Congress, passed through the District of Columbia.[100] In 1863, when the Alexandria and Washington Railroad Company applied for permission to alter its route in the District of Columbia, Congress agreed on the condition that "no person shall be excluded from the cars on account of color."[101] By 1868, the railroad's successor, the Washington, Alexandria, and Georgetown Railroad Company, had established a rule or practice

95. *Id.* at 77.

96. *Id.* at 77-78, 80.

97. *See* Lochner v. New York, 198 U.S. 45, 53 (1905); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE 2 (1993).

98. *See* Ross, *supra* note 74, at 649-52; *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 502 (5th ed. 2015) ("[T]he Supreme Court interpreted the clause in an extremely narrow manner and thus precluded its use as a vehicle for applying the Bill of Rights to the states.").

99. *See* Ross, *supra* note 74, at 649-50.

100. R.R. Co. v. Brown, 84 U.S. (17 Wall.) 445, 451-52 (1873).

101. *Id.* at 452.

of providing separate cars for colored passengers and barred Catharine Brown, a woman of color, from the car reserved for "white ladies."[102] The railroad's defense to her suit over this treatment was that she was offered a seat in a car reserved for colored ladies which was equal, in all respects, to the white ladies' car.[103] The Supreme Court, in an opinion by Justice David Davis, rejected the railroad's argument, pointing out that the phrase "excluded from the cars" must be understood to require integration, since actual exclusion was never practiced by railroads.[104] Given the lack of a history of race-based exclusion, Congress must have been aiming at segregation. This is consistent with the understanding in later cases that legislation requiring racial equality did not allow for segregation unless the statute explicitly said so.

The Court's third major decision on race, 1875's *Walker v. Sauvinet*, dealt with a procedural point that arose under Louisiana's prohibition on race discrimination in places of public accommodation.[105] The case arose after Walker refused to serve Sauvinet, Civil Sheriff of Orleans Parish, in his New Orleans saloon.[106] When the jury deadlocked, which the Louisiana legislature anticipated would be likely in discrimination cases, the trial judge, pursuant to a provision of a recently enacted Louisiana statute, decided in favor of Sauvinet.[107] Walker claimed that this procedure deprived him of his privileges and immunities as a citizen of the United States under the *Slaughter-House Cases* and that it was contrary to due process.[108] In an opinion by Chief Justice Morrison Waite, the Supreme Court rejected both arguments.[109] It found that there is no federal right to trial by jury in state court common law actions and that the principal requirement of due process as understood at that time—that process be followed "according to the law of the land"—

102. *Id.* at 447-48.
103. *Id.* at 452.
104. *Id.* at 449, 452-53.
105. 92 U.S. 90 (1875).
106. *Id.* at 90; Sauvinet v. Walker, 27 La. Ann. 14, 16 (1875).
107. *Walker*, 92 U.S. at 91-92.
108. *See id.*
109. *Id.* at 92-93.

was satisfied, since the Louisiana court had followed Louisiana law.[110] Justices Field and Clifford dissented without opinion.[111]

It is impossible to draw general conclusions about the Court's behavior from these few decisions, but it seems fair to speculate that the Court exhibited a favorable attitude toward preserving and even shepherding the social changes that were occurring during this period of social and political upheaval. The Justices must have known that most southern whites resented the participation of blacks in their governments and those governments' efforts to outlaw racial discrimination. The futures of millions of Americans were hanging in the balance, and law was obviously likely to play a central role in those futures.

The Court's attitude would soon shift strongly away from supporting progress and toward reinstalling and reinforcing the previous social and racial hierarchy in the newly reunited country. Right around the same time as the decision in Sheriff Sauvinet's case, the Court began to lay the groundwork for a narrower view of the reach of federal civil rights law. In *United States v. Reese*, the Court invalidated a federal statute imposing criminal penalties on state election officials who wrongfully denied citizens the right to vote.[112] Reese and a codefendant refused to allow William Garner, "a citizen of the United States of African descent" to vote.[113] The federal statute in question, the Enforcement Act of 1870, provided for the punishment of state officials and others who failed to allow citizens to perform acts necessary to qualify to vote or who "by force, bribery, threats, intimidation, or other unlawful means, hinder[ed], delay[ed], [etc.], or ... combine[d] with others to hinder, delay, prevent, or obstruct, any citizen from doing any act required to be done to qualify him to vote, or from voting, at any election."[114] The Court, in another opinion by Chief Justice Waite, found that the law was too broad to be supported by the Fifteenth Amendment because it made no reference to race as the motivation for the denial of the

110. *Id.* This is no longer the prevailing understanding of the Due Process Clause. *See* Mathews v. Eldridge, 424 U.S. 319, 332-33 (1976); Frank Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 85-86.

111. *Walker*, 92 U.S. at 93.

112. 92 U.S. 214 (1875).

113. *Id.* at 215.

114. *Id.* at 216-17; Enforcement Act of 1870, ch. 114, 16 Stat. 140.

right to vote.[115] The Court refused to read a requirement of racial motivation into the statute, viewing that as a "new law" that only Congress has the power to enact.[116]

Reese was a relatively minor decision because it implied that Congress could redraft the statute to include a racial motivation and thus criminalize racially motivated interference with the right to vote. More significant decisions were, however, on the horizon. The *Cruikshank* decision, rendered the following year, was a major victory for the white supremacist redemption movement.[117] *Cruikshank* involved the federal prosecution of more than 100 of the white participants in the 1873 Colfax riot in which as many as 150 blacks were killed by whites attempting to forcibly take control of the Grant Parish courthouse.[118] *Cruikshank* was an early test of the boundary between state and federal criminal jurisdiction involving civil rights. The prosecutions were brought under a provision of the Enforcement Act of 1870 that created a federal crime when "two or more persons ... injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States, or because of his having exercised the same[.]"[119] The federal rights that the indictment alleged included the right of blacks to peaceably assemble, the right not to be deprived of life or liberty without due process of law, and the right to bear arms.[120] In an opinion by Chief Justice Waite, the Court found that the indictments failed to properly allege violations of any right guaranteed by the United States Constitution.[121]

The Waite Court's analysis in *Cruikshank* provided a blueprint for future judicial resistance to pleas from blacks for protection from both legal and extralegal oppression. The opinion includes a mixture of broad, principled statements on the reach of federal law and a technical discussion of defects in the indictments.[122] The Court

115. *Reese*, 92 U.S. at 220-22.
116. *Id.* at 221.
117. United States v. Cruikshank, 92 U.S. 542 (1876).
118. *Id.* at 560 (Clifford, J., dissenting).
119. *Id.* at 548 (majority opinion) (quoting Enforcement Act of 1870, ch. 114, 16 Stat. 141).
120. *Id.* at 551-53.
121. *Id.* at 559.
122. *See id.* at 550-53.

first generally outlined principles of federalism under which the states remained the primary protectors of individual rights, even after the adoption of the post-Civil War constitutional amendments explicitly limiting state power.[123] The Court found that the right to assemble—which the government alleged the defendants had violated—was a First Amendment right that applied only against the federal government, not against the states.[124] The Court noted that the indictment might have been upheld if it had alleged that the defendants had intended to prevent assembly for "consultation in respect to public affairs and to petition for a redress of grievances."[125] This highly technical analysis is often encountered in criminal law, where, under the "rule of lenity," all legal and factual doubts are traditionally resolved in favor of the defendant.[126]

The Court found each of the remaining counts in the indictment defective. With respect to the victims' right to bear arms, the Court said—in a holding that would remain good law until 2010—that the Second Amendment right to bear arms is addressed only to the federal government and cannot be violated by state or local authorities.[127] The Court found that the counts involving life and liberty were defective because, although the victims were identified as "of African descent," the indictment did not specifically allege "that this was done because of the race or color of the persons conspired against."[128] This must have been frustrating to the victims and federal prosecutors in *Cruickshank*, because everyone in the country knew that what happened in Colfax was a race-based conflict.

The Court's expressed concern was that letting this indictment allege a federal crime would shift the balance of power between the states and the federal government too far toward the federal government.[129] Counts in the indictment alleged, for example, that the defendants deprived their victims of life and liberty without due

123. *Id.* at 550-51.

124. *Id.* at 552.

125. *Id.* at 552-53.

126. Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 698 (2017).

127. *Cruikshank*, 92 U.S. at 553; *see* McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) (holding that the Due Process Clause of the Fourteenth Amendment applies the Second Amendment right to bear arms to both the federal and state governments equally).

128. *Cruikshank*, 92 U.S. at 554.

129. *See id.* at 553-54.

process.[130] The Court observed that this would bring all cases of murder or false imprisonment within federal criminal jurisdiction.[131] To preserve the traditional federalist structure of the United States, the Court said federal jurisdiction must be limited.[132]

The Court also relied on the developing doctrine of state action to rule against the prosecution. According to the Court, "the case as presented amount[ed] to nothing more than that the defendants conspired to prevent certain citizens of the United States, being within the State of Louisiana, from enjoying the equal protection of the laws of the State and of the United States," and equal protection applied only to governmental action, not to the behavior of one citizen toward another.[133]

The Court shut its eyes to the social and political context of the case, ignoring the race issue and the importance of federal protection for blacks against the resurgence of white supremacist power across the South.[134] The Colfax massacre, as it was often called, had been covered widely in newspapers and had prompted hearings in Congress.[135] The opinion, by contrast, is largely a technical discussion of the requirements of federal criminal jurisdiction under the Enforcement Act.[136] Its rhetorical flourishes were confined to the importance of maintaining state control over its criminal law.[137] Chief Justice Waite expressed no concern over the social problem of racial discrimination.[138] The decision was unanimous, save for a Justice Clifford opinion, styled as a dissent, which actually agreed with the Court's result, though for different reasons.[139] He thought the indictments were too "vague and indefinite" and thus did not meet the traditional requirements for certainty and fair notice in

130. *See id.* at 545.
131. *See id.* at 553-54.
132. *See id.* at 549-51.
133. *Id.* at 554.
134. *See id.*
135. LEEANNA KEITH, THE COLFAX MASSACRE 66-67, 114-15 (2008).
136. *Cruikshank*, 92 U.S. at 560-65 (Clifford, J., dissenting).
137. *See id.* at 556-57 (majority opinion).
138. *See id.*
139. *See id.* at 559 (Clifford, J., dissenting).

criminal prosecutions.[140] That had also been Justice Bradley's view, when he heard the case while riding circuit in Louisiana.[141]

The next major race-based civil rights case to reach the Supreme Court was the 1878 decision in *Hall v. Decuir*.[142] This case involved the application of Louisiana's prohibition of racial discrimination in transportation to a riverboat operating on the Mississippi River.[143] The Court held that Louisiana could not enforce its law on the river because enforcement would interfere with interstate commerce by regulating conduct on a navigable waterway and imposing potentially conflicting regulations as riverboats moved from one state to another.[144] As Chief Justice Waite explained it, "A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced" and

> [o]n one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments.... Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business.[145]

While the *Cruikshank* Court was concerned with federal overreaching, Chief Justice Waite's opinion in *Hall v. Decuir* expressed the opposite concern, that Louisiana intruded on federal authority over interstate commerce by trying to apply its civil rights law on the Mississippi River.[146] In another of Waite's bloodless, apparently technical opinions, he appeared to be much more concerned with maintaining the proper boundary between federal and state authority than with protecting people of color from the continuing and burgeoning effects of racial discrimination throughout the country.

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140. *See id.* at 565.
141. United States v. Cruikshank, 25 F. Cas. 707, 715 (D. La. 1874), *aff'd* 92 U.S. 542 (1875).
142. 95 U.S. 485 (1878).
143. *See id.* at 485-87.
144. *See id.* at 488-91.
145. *Id.* at 489.
146. *See id.* at 497-98.

The decision in *Hall v. Decuir* was reached by the Supreme Court Justices in October 1877 and announced in January 1878.[147] The year 1877 was very significant for the history of race relations in the United States. In a compromise that led to the victory of Rutherford B. Hayes in the disputed 1876 presidential election, the new Republican administration agreed to remove federal troops from southern states, essentially abandoning African Americans to their fate at the hands of resurgent white supremacist governments.[148] The political winds may have been too strong for the Court to resist, but, in retrospect, it is clear that the decisions in *Cruickshank* and *Hall* signaled the Court's determination to aid in the suppression of the movement for racial justice and reinforce preexisting social and racial hierarchies.

The Court's efforts to suppress social change neared their pinnacle in a pair of much more significant civil rights cases decided by the Supreme Court under Chief Justice Waite in 1883. In that year, the Court struck down two federal civil rights statutes: a portion of the Civil Rights Act of 1871 and the entire Civil Rights Act of 1875. The first case, *United States v. Harris*, involved a criminal provision of the Civil Rights Act of 1871 clearly aimed at the Ku Klux Klan.[149] The statute provided:

> If two or more persons in any State or Territory conspire or go in disguise upon the highway or on the premises of another for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws, each of said persons shall be punished by a fine of not less than $500 nor more than $5,000, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment.[150]

147. *Id.* at 485.

148. *Compromise of 1877*, HIST. (June 7, 2019), https://www.history.com/topics/us-presidents/compromise-of-1877 [https://perma.cc/9EQN-FXXM].

149. 106 U.S. 629 (1883).

150. *Id.* at 632 (quoting Civil Rights Act of 1871 (Ku Klux Klan Act), ch. 22, § 2, 17 Stat. 13-14 (codified as amended at 42 U.S.C. § 1985(3) (2018))) (internal quotation marks omitted).

The case arose out of a lynching.[151] An armed mob—including, incredibly, the County Sheriff, R.G. Harris—raided the Crockett County, Tennessee jail to seize four black prisoners.[152] Despite the efforts of a deputy, William A. Tucker, to stop them, the mob removed the four black prisoners from the jail and beat all four, killing one.[153] The perpetrators, including Sheriff Harris, were prosecuted by federal authorities.[154] The indictments charged that the beatings and killing arose from a conspiracy among the defendants to deprive the victims of their rights, privileges, and immunities under federal law, and that the conspiracy aimed to prevent the local authorities, including Deputy Sheriff Tucker, from protecting the victims' federal rights.[155]

It is obvious from the language of the statute ("conspire or go in disguise") that Congress was referring to groups such as the Ku Klux Klan, then terrorizing blacks and advocates of equal rights all over the South.[156] The criminal provision of this statute had been incredibly successful.[157] In 1871 alone, federal prosecutors brought thousands of prosecutions against the Klan and similar gangs, and, with 1143 convictions, succeeded in temporarily restoring peace and security to large areas of the South.[158]

The issue before the Supreme Court, which the lower court divided on, was whether Congress had the power to enact this provision.[159] The government argued for four sources of constitutional power: the Thirteenth, Fourteenth, and Fifteenth Amendments and the original Privileges and Immunities Clause of the Constitution.[160] After dismissing the Fifteenth Amendment as concerned solely with the right to vote, the Court turned its attention to Section One of the Fourteenth Amendment, finding that it could not support the

151. *See id.* at 631-32.
152. *Id.* at 629-31.
153. *Id.* at 629-32.
154. *Id.*
155. *Id.* at 631-32.
156. *See id.* at 632 (quoting Civil Rights Act of 1871 (Ku Klux Klan Act), ch. 22, § 2, 17 Stat. 13-14 (codified as amended at 42 U.S.C. § 1983 (2018))) (internal quotation marks omitted).
157. *See* RON CHERNOW, GRANT 708 (2017).
158. *See id.*
159. *See Harris*, 106 U.S. at 636-38.
160. *See id.* at 636-37.

statute because, by its terms, it was aimed only at official governmental action, not private conduct.[161] It found it

> perfectly clear, from the language of the first section that its purpose ... was to place a restraint upon the action of the states.... [T]he section of the law under consideration is directed exclusively against the action of private persons, without reference to the laws of the State or their administration by [the officers of the state], we are clear in the opinion that it is not warranted by any clause in the Fourteenth Amendment to the Constitution.[162]

That Harris, as County Sheriff, had been acting under color of state law was not considered.

The Court found that the Thirteenth Amendment did not authorize Congress to pass the Civil Rights Act of 1871 because the Act went beyond prohibiting conduct related to slavery to matters that were the exclusive preserve of the states.[163] Citing his opinion in the *Reese* case, Chief Justice Waite drew a line between what was the state's business and what was the federal government's and refused to read the newly enacted amendments as giving Congress the power to stamp out race discrimination for itself, which needed to remain a state preserve.[164] The Court also held that Article Four, Section Two's Privileges and Immunities Clause did not give the federal government the power to interfere with matters of private behavior governed by state law.[165] "[T]his section, like the Fourteenth Amendment, is directed against State action," not personal behavior, said the Court.[166] Prosecuting racial violence was left to the states.[167]

Eight months after the *Harris* decision, the Waite Court decided the *Civil Rights Cases*, striking down the Civil Rights Act of 1875.[168] The Civil Rights Act of 1875 was a federal public accommodations

161. *See id.* at 637-38.
162. *Id.* at 638, 640.
163. *See id.* at 640-41.
164. *See id.* at 641-42 (citing United States v. Reese, 92 U.S. 214 (1875)).
165. *See id.* at 643-44.
166. *Id.* at 643.
167. *Id.*
168. 109 U.S. 3 (1883).

law prohibiting racial discrimination in specified businesses that served the general public.[169] It declared 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.[170]

Did "full and equal" include prohibiting segregation? If so, this provision would have changed the result in cases such as *Hall v. Decuir*.

The original proposal that led to the Civil Rights Act of 1875 was drafted in 1870 by Senator Charles Sumner of Massachusetts and John Mercer Langston, a successful lawyer, public servant, and diplomat and one of the founders of Howard University Law School.[171] Sumner introduced their civil rights bill each year until his death in 1874.[172] Sumner was the leading champion in the Senate for civil rights for African Americans and was famously caned in the Senate chamber by South Carolina Representative Preston Brooks after delivering a fiery antislavery speech that insulted South Carolina Senator Andrew Butler, Brooks's cousin.[173] Reportedly, among Sumner's last words before he died in 1874 were, "[T]ake care of the civil-rights bill."[174] When it was passed and signed into law by President Grant in 1875, it was clear to all that blacks were in danger of being relegated to a position of social and political inferiority similar to where they were under slavery, and their resistance was becoming increasingly futile.[175]

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169. *See* Civil Rights Act of 1875, ch. 114, 18 Stat. 335.

170. *See id.*

171. *Langston, John Mercer*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, https://history.house.gov/People/Detail/16682 [https://perma.cc/Y5QL-M6M7].

172. *See* FREDERICK J. BLUE, CHARLES SUMNER AND THE CONSCIENCE OF THE NORTH 202-05 (1994).

173. *See* STEPHEN PULEO, THE CANING: THE ASSAULT THAT DROVE AMERICA TO CIVIL WAR ix-x (2012).

174. DAVID H. DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN 586-87 (1996).

175. *See* Melvin I. Urofsky, *Civil Rights Act of 1875*, BRITANNICA, https://www.britannica.com/topic/Civil-Rights-Act-United-States-1875 [https://perma.cc/2QXY-MFEG].

The *Civil Rights Cases* consisted of five consolidated cases from Kansas, Missouri, California, New York, and Tennessee prosecuting operators of various businesses for violating the 1875 Act.[176] They dealt with the broad swath of the Act's coverage including denials of accommodations to blacks in a hotel, a theater, an opera house, and a railroad.[177] The central purpose of the Act, said the Court, was "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."[178] The only issue the Court addressed was whether Congress had the power to enact it.[179]

Justice Joseph P. Bradley wrote the opinion for the Court, focusing on the enforcement clauses of the Thirteenth and Fourteenth Amendments.[180] As for the Fourteenth Amendment, Justice Bradley's analysis expanded on *Harris*.[181] As in *Harris*, which struck down a provision of the 1871 Act, the federal government could not regulate private discrimination because the Fourteenth Amendment reached only state action.[182]

> [U]ntil 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.[183]

The Court's analysis of the Thirteenth Amendment was more complex, for, in abolishing the private relationship of master and slave, that amendment clearly regulates purely private conduct. The Court assumed, as the government argued, that "the power vested

176. *See Civil Rights Cases*, 109 U.S. 3, 4-5 (1883).
177. *Id.*
178. *Id.* at 9-10.
179. *See id.* at 8-26.
180. *See id.*
181. *Id.* at 18-19.
182. *Id.* at 11.
183. *Id.* at 13.

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 States[.]"[184] The Court then explained why, in its view, private exclusion from public accommodations was not a badge or incident of slavery.[185] The Court began by detailing the legal features of slavery:

> Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offenses.[186]

While the Thirteenth Amendment gave Congress the power to legislate against these features of slavery, as it had done in the Civil Rights Acts of 1866 and 1870, the Court asked if refusing to provide service to a person of a certain race was a badge or incident of slavery federally enforceable under the Thirteenth Amendment (in the types of businesses addressed in the Civil Rights Act of 1875).[187] Here, the Court's analysis was conclusory, stating only:

> 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.... 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.[188]

The Court did not conclude that the law was powerless to prohibit racial segregation or exclusion. Although in *Hall v. Decuir* the Court

184. *Id.* at 20.
185. *See id.* at 20-25.
186. *Id.* at 22.
187. *Id.* at 23-24.
188. *Id.* at 24-25.

placed authority over race discrimination on navigable waters in the federal government, this time the Court opined that state law could require the operators of public accommodations to admit all regardless of race:

> 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.[189] 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.[190]

The Court appears not to have considered whether the Civil Rights Act of 1875 could be constitutionally applied to cases such as Madame Decuir's that arose on modes of interstate transportation.

The Court must have known that its decision in the *Civil Rights Cases* was a major defeat for the cause of racial justice in the United States. In particular, it appears that Justice Bradley chose to support the forces of white supremacy, perhaps in capitulation to the violent resistance that the cause of equality was encountering throughout the South.[191] In 1871, Justice Bradley, in a case concerning federal jurisdiction over claims alleging that blacks had been denied the right to testify, had written the following:

> Slavery, when it existed, extended its influence in every direction, depressing and disfranchising the slave and his race in every possible way. Hence, in order to give full effect to the National will in abolishing slavery, it was necessary in some way to counteract these various disabilities and the effects flowing from them. Merely striking off the fetters of the slave, without

189. *Id.* at 25. This understanding of state law may have been true at one time, but it was soon replaced with an understanding that businesses that had traditionally been required to accept all paying customers were now free to discriminate based on race. *See* Joseph William Singer, *No Right to Exclude: Public Accommodations Law and Private Property*, 90 NW. U. L. REV. 1283, 1287-1301 (1996).

190. *Civil Rights Cases*, 109 U.S. at 25. The Court's apparent assumption that Congress had power under the Fourteenth Amendment to prohibit racial discrimination in public accommodations seems inconsistent with the Court's rejection of power under the Fourteenth Amendment to pass the Civil Rights Act of 1875. *See id.*

191. *See* CHERNOW, *supra* note 157, at 568, 571-72.

> removing the incidents and consequences of slavery, would hardly have been a boon to the colored race. Hence, also, the amendment abolishing slavery was supplemented by a clause giving Congress power to enforce it by appropriate legislation. No law was necessary to abolish slavery; the amendment did that. The power to enforce the amendment by appropriate legislation must be a power to do away with the incidents and consequences of slavery, and to instate the freedmen in the full enjoyment of that civil liberty and equality which the abolition of slavery meant.[192]

African Americans rightly regarded the Supreme Court's invalidation of the Civil Rights Act of 1875 as catastrophic. The title of an 1893 account of the case provides the flavor of this reaction: "*The Barbarous Decision of the United States Supreme Court Declaring the Civil Rights Act Unconstitutional and Disrobing the Colored Race of All Civil Protection. The Most Cruel and Inhuman Verdict Against a Loyal People in the History of the World*."[193] The combination of *Hall v. Decuir* and the *Civil Rights Cases* must have outraged southern blacks; the Court told them in *Hall v. Decuir* that *only* Congress could address discrimination on riverboats, then, in the *Civil Rights Cases*, that Congress lacked all power to do so.[194] The situation looked like a Catch-22. Paired with *Hall*, the message seemed simply to be that the Supreme Court was hostile to any antidiscrimination legislation—whether state or federal.

Justice John Marshall Harlan, the former slaveowner turned judicial champion of civil rights for blacks,[195] wrote a long, impassioned dissent from the decision in the *Civil Rights Cases*, criticizing the Court for being overly technical and ignoring the "soul" of the law, which he thought should control the interpretation of constitutional amendments.[196] Harlan viewed the Commerce Clause as a source of

192. Blylew v. United States, 80 U.S. (13 Wall.) 581, 601 (1871) (Bradley, J., dissenting).

193. BISHOP H.M. TURNER, THE BARBAROUS DECISION OF THE UNITED STATES SUPREME COURT DECLARING THE CIVIL RIGHTS ACT UNCONSTITUTIONAL AND DISROBING THE COLORED RACE OF ALL CIVIL PROTECTION. THE MOST CRUEL AND INHUMAN VERDICT AGAINST A LOYAL PEOPLE IN THE HISTORY OF THE WORLD. ALSO THE POWERFUL SPEECHES OF HON. FREDERICK DOUGLASS AND COLONEL ROBERT G. INGERSOLL, JURIST AND FAMOUS ORATOR. (1893) (ebook).

194. J. Clay Smith, Jr., *Justice and Jurisprudence and the Black Lawyer*, 69 NOTRE DAME L. REV. 1077, 1099 (1994).

195. *See* Goodwin Liu, *The First Justice Harlan*, 96 CALIF. L. REV. 1383, 1383-87 (2008).

196. Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

authority for the Act, at least for interstate travelers.[197] *Hall v. Decuir* had held that only Congress had the power to regulate the practices of steamboats in interstate commerce.[198] To Harlan, *Hall v. Decuir* provided strong support for federal power to require equal treatment in interstate travel, which would save at least some applications of the Civil Rights Act of 1875.[199]

The next race case to reach the Supreme Court was very similar to *Hall v. Decuir* except that it arose on a railroad. Emboldened by *United States v. Harris* and the *Civil Rights Cases*, the southern states continued to enact Jim Crow laws.[200] A challenge to the constitutionality of one such law reached the Supreme Court in 1890.[201] An 1888 Mississippi statute required that "all railroads carrying passengers in this State (other than street railroads) shall provide equal, but separate, accommodation for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition, so as to secure separate accommodations."[202] Railroads usually opposed such rules because the rules increased their cost of operations.[203]

In August 1888, the Louisville, New Orleans & Texas Railway Company was indicted for not providing separate accommodations as required by law.[204] The railroad said it was an interstate operation, carrying passengers from Tennessee to New Orleans, "and other points in the state of Louisiana ... and elsewhere throughout the United States," and that the railroad had always "provided equal but not separate accommodations for passengers of the white and colored races[.]"[205] The railroad also said that it operated only interstate trains through Mississippi and, therefore, under *Hall v. Decuir*, the statute was unconstitutional as applied to their railroad.[206]

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197. *See id.* at 61.
198. *Id.*
199. *Id.*
200. *See* Singer, *supra* note 189, at 1354-57; *see also* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 67-72 (Commemorative ed. 2002).
201. Louisville, New Orleans & Tex. Ry. Co. v. Mississippi, 133 U.S. 587 (1890).
202. *Id.* at 588 (quoting Act of Mar. 2, 1888, ch. 27, § 1, 1888 Miss. Laws 48).
203. *See id.* at 591.
204. Louisville, New Orleans & Tex. Ry. Co. v. State, 6 So. 203, 203 (Miss. 1889).
205. *Id.*
206. *Id.* at 203-04.

After losing in the Supreme Court of Mississippi, the railroad brought the case to the Supreme Court of the United States, renewing its argument that the statute interfered unconstitutionally with interstate commerce.[207] Justice David Brewer's opinion for the Supreme Court rejecting the railroad's claim was brief.[208] He stated, inaccurately, that in *Hall v. Decuir*, Louisiana's Supreme Court had determined that the statute challenged there sought to regulate interstate travelers coming into the State of Louisiana and then characterized Mississippi's law as applying "solely to commerce within the State."[209] Mississippi, the Court concluded, had power to regulate the purely intrastate activities of its railroads.[210]

The next, and most important, shoe to drop in the Supreme Court's post-Civil War racial odyssey was *Plessy v. Ferguson*.[211] This landmark case, familiar to all who study the history of race and the law in the United States, presented the Supreme Court with an opportunity to act on the vision of the Fourteenth Amendment it had formulated in the *Civil Rights Cases*: the nullification of "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."[212]

In *Plessy*, a Louisiana statute requiring racial segregation on railroad cars, either through separate cars or via a divider, was challenged as violating the Equal Protection Clause of the Fourteenth Amendment.[213] The Louisiana Railway Accommodations Act of 1890, also known as the Separate Car Law, required

> 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.... No person or persons, shall be permitted to occupy

207. *Louisville, New Orleans & Tex. Ry. Co.*, 133 U.S. at 589.
208. *Id.* at 588-92.
209. *Id.* at 591.
210. *Id.* at 592.
211. 163 U.S. 537 (1896).
212. 109 U.S. 3, 11 (1883).
213. 163 U.S. at 541-43.

> seats in coaches, other than, the ones, assigned, to them on account of the race they belong to.[214]

The statute also imposed fines and imprisonment for passengers insisting on riding in the incorrect car, provided fines for railroad employees who refused to enforce the law, and required railroads to post a copy of the law in each passenger coach and ticket office.[215] But the key substantive provision of the statute was that railroads must "provide equal but separate accommodations for the white, and colored races."[216]

Plessy v. Ferguson was a test case with roots in "black opposition to the Louisiana Separate Car Act" from the day it was introduced into the Louisiana General Assembly.[217] This was a period of intense social crisis for African Americans in the South, and, in Louisiana, a newly formed group, the American Citizens' Equal Rights Association, wrote a "memorial" in opposition to the bill invoking basic American principles such as "all men are created equal."[218] Nevertheless, the bill passed, and they, together with other opponents of the Act, organized quickly to plan a case to challenge it as unconstitutional.[219] It was expected that the railroads would cooperate, since they were opposed to the Act on economic grounds.[220]

The test case was planned by a committee that included two of the signers of the memorial, Louis A. Martinet and Rodolphe Desdunes, well-known New Orleans men of color.[221] The Committee adopted the name "Citizens' Committee" to stress that their claim to equal treatment arose from their status as citizens of Louisiana and the United States.[222] In his paean to his fellow French-speaking people of color, Desdunes characterized the Committee's purpose as

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214. *Id.* at 540 (quoting Act of July 10, 1890, No. 111, § 1, 1890 La. Acts 152, 153) (internal quotations omitted).

215. *Id.* at 540-41.

216. *Id.* at 540.

217. *See* CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION 28 (1987).

218. *Id.*

219. *Id.* at 29-30.

220. *See* Gail Heriot, *Don't Blame the Railroad for* Plessy v. Ferguson, VOLOKH CONSPIRACY (May 18, 2018, 8:50 AM), https://www.reason.com/2018/05/18/don't-blame-the-railroad-for-plessy-v-fer/ [https://perma.cc/F4NP-SU8Y].

221. *See* LOFGREN, *supra* note 217, at 29.

222. *See id.*

"to protest the adoption and enforcement of the statutes that established the unjust and humiliating treatment of the black race in Louisiana."[223] They recruited well-known New Yorker (and Reconstruction-era official in North Carolina) Albion Tourgee to their cause as lead attorney.[224] They decided that their best hope was for someone to get arrested for violating the Act, after which they would use the habeas corpus procedure to secure the quickest possible process for bringing the challenge to court.[225]

After their first test case failed, Homer Plessy was arrested for violating the Act after he insisted on traveling in a car reserved for whites.[226] Plessy's train operated wholly intrastate, and the Assistant District Attorney carefully avoided any technical problems that would prevent a conviction.[227] After Plessy's motion to dismiss the case was denied by Judge John Howard Ferguson, his lawyers maneuvered to have the case heard by the Louisiana Supreme Court as quickly as possible by bringing a petition in that court against Judge Ferguson seeking Plessy's acquittal.[228] The Louisiana Supreme Court issued its decision against Plessy on December 19, 1892, and his lawyers brought the case to the Supreme Court of the United States.[229]

Plessy's lawyers claimed that the Act violated the Thirteenth and Fourteenth Amendments.[230] The Supreme Court's decision of May 18, 1896, denying Plessy's appeal was the final blow in the effort to resist restoration of white supremacy in the South. The Court's opinion was written by Justice Henry Billings Brown, a Massachusetts Republican.[231] Given the *Civil Rights Cases*' narrow interpretation of the Thirteenth Amendment, Justice Brown had little difficulty dispatching Plessy's Thirteenth Amendment argument.

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223. Rodolphe L. Desdunes, *Non Hommes et Notre Histoire* (1911), *translated in* OUR PEOPLE AND OUR HISTORY 142-43 (Sister Dorothea Olga McCants trans., 1973).

224. LOFGREN, *supra* note 217, at 30.

225. *Id.* at 31-32, 41.

226. *Id.* at 41.

227. *Id.*

228. *Id.* at 42.

229. *See Ex parte* Plessy, 11 So. 948 (La. 1893).

230. Plessy v. Ferguson, 163 U.S. 537, 542 (1896).

231. *See id.* at 540; Sean A. Scott, *Segregation Setback: The Story of* Plessy v. Ferguson, LAW & LIBERTY (Aug. 5, 2019), https://www.lawliberty.org/book-review/segregation-setback-the-story-of-plessy-v-ferguson/ [https://perma.cc/CB2T-XRPX].

Echoing (and relying upon) the opinion in the *Civil Rights Cases*, Justice Brown stated,

> [I]t 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.... Indeed, we do not understand that the Thirteenth Amendment is strenuously relied upon by the plaintiff in error in this connection.[232]

Justice Brown's analysis of the Fourteenth Amendment question refuted every legal and practical argument Plessy's lawyers made against legally required segregation. It must have been heartbreaking to people of color of the day. The Court began by distinguishing between legal equality and social equality,[233] and placing the rights African Americans were asserting in resistance to segregation into the category of social rights:

> 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.[234]

Justice Brown then rejected the argument that segregation was equivalent to putting a badge of inferiority on nonwhites, blaming that perception on the victims of segregation:

> 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

232. *Plessy*, 163 U.S. at 542-43.

233. *See* Rebecca J. Scott, *Public Rights, Social Equality, and the Conceptual Roots of the* Plessy *Challenge*, 106 MICH. L. REV. 777, 778, 783 (2009).

234. *Plessy*, 163 U.S. at 544.

> 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.[235]

Justice Brown's opinion treated segregation as a normal, accepted, valid exercise of state police power, citing Charles Sumner's unsuccessful challenge to the segregation of Boston's public schools and Congress's establishment of segregated public schools in the District of Columbia.[236] To Justice Brown, laws requiring segregation and forbidding interracial marriage did not infringe upon the right to equality as long as they applied equally to all.[237]

Justice Harlan was the lone dissenter in *Plessy*. His dissent argued quite simply for a constitutional mandate of color-blind government:

> [T]he 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.... 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.[238]

Justice Harlan invoked social reality to dispute the argument that segregation does not imply the perceived inferiority of nonwhites: "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."[239] In those times, a constitutional rule of color-blind treatment would have been a giant step toward equality.

Before the *Plessy* decision, the South had been "redeemed" politically when conservative whites retook southern governments through violence, intimidation, and manipulation of the political and electoral processes.[240] Legally, *Plessy* was the capstone on the Waite Court's dismantling of efforts to protect the right of people of

235. *Id.* at 551.
236. *Id.* at 544.
237. *See id.* at 551.
238. *Id.* at 554-55 (Harlan, J., dissenting).
239. *Id.* at 557.
240. NICHOLAS LEMANN, REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR 185 (2006).

color to a full and equal place in the public sphere. Fledgling Republican Party institutions in the South and the mixed-race governments that arose after the Civil War were demolished as the former rebels regained control over governments throughout the South. Efforts to retain the right to vote, which some people of color had enjoyed for decades in Louisiana and other southern states, were dashed when the Supreme Court, in 1903, held that the federal courts lacked jurisdiction to intervene on behalf of blacks seeking injunctive relief to force the State of Alabama to register them to vote.[241] In a challenge to similar Louisiana restrictions on voting, the plaintiffs abandoned their case after losing in state court, recognizing that appeal to the Supreme Court of the United States was hopeless.[242] As George Carlin said in reference to the detention of Japanese Americans during World War II, "Just when these American citizens needed their rights the most, their government took 'em away."[243]

It may be that invalidating segregation in the nineteenth century would have been deeply unpopular and even unenforceable.[244] But the Court's decisions rendered Congress virtually impotent in the face of widespread and violent oppression of nonwhite populations throughout the South. The Court's decision to overrule *Plessy* in 1954[245] was met with a storm of resistance and may not have succeeded in integrating education in the United States,[246] but it dramatically advanced the cause of equal rights for African Americans far beyond the public school context.

CONCLUSION

Virtually every moment in the history of civilized human society has been experienced by some people as "politically and socially

241. *See* Giles v. Harris, 189 U.S. 475 (1903); *see also* Giles v. Teasley, 193 U.S. 146 (1904).

242. *See* REBECCA SCOTT, DEGREES OF FREEDOM 197 (2008) (discussing the litigation in State ex rel. Ryanes v. Gleason, 112 La. 612 (1904)).

243. George Carlin, *You Have No Rights*, YOUTUBE (Mar. 12, 2008), https://www.youtube.com/watch?v=hWiBt-pqp0E&t=9s [https://perma.cc/TX5K-348L].

244. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 10 (2004).

245. Brown v. Board of Education, 347 U.S. 483 (1954).

246. *See generally* CHARLES T. CLOTFELTER, AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION (2004).

charged." For Native Americans and African slaves in the United States and its preindependence colonies, every moment of every day was a crisis of the highest political and social order, although society's dominant forces did not recognize them as such. In these circumstances, although they often pretend to be governed by preexisting legal rules, courts have no choice but to take sides, as they have done more recently on issues arising out of the war on terror, abortion rights, and gun control, to name but a few politically and socially charged issues. With exceptions that certainly test my observation,[247] it seems to me that the Supreme Court of the United States acts most strongly in politically and socially charged times to reinforce preexisting social and political hierarchies to the detriment of those who need the protection of the legal system the most.

247. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723 (2008) (holding that Congress may not suspend the right to habeas corpus for noncitizen prisoners held at the detention center at Guantanamo Bay, Cuba); Roe v. Wade, 410 U.S. 113 (1973) (recognizing women's right to choose abortion).