

The Counterrevolution Gains Force

Even as Republican radicals struggled with the capstone, cracks appeared in the foundation. During the mid-1870s, with federal judges supportive and the Klan on the run, Republicans backed away from vigorous federal intervention in the South. In part this was a response to the success of the 1871–1872 campaign against the Klan and the concomitant decline in terrorism. There were deeper reasons for the party's new posture, however. Most Republicans viewed law enforcement as a state, not a federal, responsibility, considered the campaign against the Klan extraordinary, and were not prepared to continue it indefinitely. They were also concerned about the political consequences of further federal intervention. In a society that worshipped the self-reliant individual, was skeptical of active government, and had long viewed a strong central government as suspect, there was little enthusiasm for continuation of a large-scale federal enforcement program. Furthermore, Democrats charged that tales of Klan terror were nothing more than Republican propaganda, denounced the enforcement program as a ruthless effort to prop up unpopular, incompetent governments with federal bayonets, and portrayed President Grant as a latter-day Caesar. Aware that these charges effectively appealed to Americans' fear of military despotism, Republicans agreed that they must curb federal intervention in the South.

During 1873, Republican leaders began to distance themselves from the mailed-fist policies that had proved so effective in South Carolina.

Under George Williams, who succeeded Akerman as attorney general in late 1871, the Justice Department became more cautious about initiating new civil rights cases. While Williams did not order district attorneys to halt new prosecutions under the Enforcement and Klan Acts, he neither encouraged them to undertake vigorous action nor allowed them the resources necessary for large-scale prosecutions. In fact, the administration became more conciliatory toward white southerners, perhaps hoping that this would moderate their opposition to the new order and bring to an end charges of bayonet rule. Beginning in 1873, President Grant pardoned many of the Klansmen who remained in prison, and the attorney general ordered federal attorneys in the South to dismiss prosecutions against thousands of Klansmen who had been indicted between 1870 and 1872.

Events of 1873–1874 reinforced Republican cautiousness. Members of Grant's inner circle and prominent Republican congressmen implicated in financial scandals were the subjects of congressional investigations during 1873. With the scent of corruption trailing it, the party was also saddled with blame for the severe economic depression that struck in September 1873. Facing a hostile electorate as the 1874 congressional races approached, Republicans were reluctant to add to their woes by undertaking potentially unpopular action in the South. When the dust settled after the election, the party had been routed and a 110-vote Republican majority in the House had become a 60-vote margin for the Democrats. Shell-shocked and fearing further losses in important state elections in 1875, party leaders became even more reluctant to renew large-scale intervention in the South.

Taking advantage of Republican cautiousness, southern Democrats launched a new offensive against their adversaries between 1874 and 1876. By making active support for the Democratic party a test of racial solidarity, they increased the white turnout significantly. They also developed new techniques of intimidation that effectively reduced Republican turnout without reviving northern support for federal intervention. Armed Democrats regularly disrupted Republican meetings, demanding equal time to expose Republican "lies" or shouting down Republican speakers. Seeking to impress on blacks the perils of political involvement, armed bands rode through the countryside at night during the weeks preceding elections, firing small arms and sometimes even canon, and patrolled polling places on election day. And when they did resort to beatings and murders, they usually defined their targets carefully

and struck quickly rather than inaugurating an ongoing campaign of terror. Democrats also mastered the technique of the "race riot." They provoked altercations between their own supporters and Republicans and, under the pretext of self-defense, launched punishing attacks against their opponents. At the beginning of the 1875 election campaign in Mississippi, for example, white Democrats in Clinton precipitated a fight at a Republican rally in which several blacks and whites were killed. Alleging that the Republicans had initiated a war of the races, Democrats swept the surrounding countryside during the next two days, killing between twenty and thirty blacks and beating hundreds of others.

Despite his recent policy of conciliation and caution, Grant did not ignore the resurgence of violence. He authorized the War Department to station small squads of troops in areas where Democratic intimidation was most pronounced, hoping the presence of bluecoats would cow whites and reassure blacks. Under instructions from Washington, moreover, district attorneys, supported by troops, occasionally arrested persons charged with intimidating voters. The government's effort, however, was far too modest and ultimately proved woefully inadequate. There were too few troops available (by October 1874 only 7,000 bluecoats remained in the South) to make a show of force in more than a few trouble spots. And because the overwhelming majority were infantry, they possessed limited mobility and were not effective against mounted adversaries. Then, too, the number of prosecutions initiated under the Enforcement Act by federal attorneys was too small to serve as a deterrent. What was needed was a large-scale campaign of arrests and prosecutions patterned after the South Carolina effort of 1871–1872. Republican leaders, however, fearing that they lacked popular support for such a campaign, did not meet the Democratic challenge.

The results were disastrous for southern Republicans. Democrats were able to regain control of state government in Texas (where only one-third of the population were blacks) and Arkansas and Florida (where bitter factional disputes doomed Republicans) without resorting to widespread violence. In the rest of the unredeemed South, however, the new techniques of terror were crucial. In 1874, Alabama Democrats carried statewide elections, in part by employing violence and intimidation in key black belt counties, while Louisiana Democrats smashed Republican organizations in many rural parishes, winning control of the state assembly. The following year white Mississippians mounted an impressive campaign of terror to carry the state legislature. With that accom-

plished, they swiftly impeached Republican Governor Adelbert Ames. In 1876, Democrats in Louisiana and South Carolina effectively used violence to carry state elections, completing the process of redemption. By 1877, then, the Democratic counterrevolution had recaptured the South, ending Republican control in every state in the region.

Although freedmen continued to vote in large numbers and Republicans still held office in some predominantly black counties after 1877, southern Democrats relied on fraud and intimidation of black voters to cling to power. As a prominent Mississippi Democrat admitted in 1890, "we have been stuffing the ballot boxes, committing perjury, and . . . carrying the elections by *fraud* and violence" since 1875.¹⁰ The consequences of Democratic hegemony were momentous. While blacks remained eligible to serve on juries, in most areas local officials manipulated jury selection procedures to exclude them. Consequently, black plaintiffs and defendants once again found justice elusive as they confronted all-white juries. Blacks also felt the economic consequences of redemption: Democratic legislatures repealed measures that the Republicans had enacted to protect agricultural laborers; state supreme courts developed legal doctrines that reinforced the authority of landowners against sharecroppers; sheriffs again used vagrancy statutes to compel reluctant black workers to accept unfavorable contracts with planters; and justices of the peace turned a deaf ear to complaints that black workers lodged against their employers. Absence of effective legal protection, combined with a steady decline in the price of cotton, left black sharecroppers and agricultural workers impoverished, reinforcing their economic dependence on whites. Black children also suffered as state legislatures cut support for public education and local officials reduced the proportion of school funds that went to black schools.

As southern Democrats moved ahead with the counterrevolution, the United States Supreme Court circumscribed national authority to protect civil rights. Most members of the Court were conservative northern Republicans who were not hostile to civil rights but had never shared the radicals' passion for equality. Like most of their contemporaries, they were committed to preserving a decentralized federal system and believed that this required strict limits on national authority and sharp delineation of state and national functions. It is difficult for Americans living in the late twentieth century to appreciate this commitment to federalism. We are the heirs of more than fifty years of steady growth of federal authority and believe that the scope of national power is virtually

limitless. Nineteenth-century Americans were products of a much different world, however. The federal government played little role in their day-to-day lives, and, with the exception of the local postmaster, they rarely encountered a federal official. Moreover, as products of a political tradition that equated centralized authority and tyranny, they believed that self-government demanded that local communities enjoy substantial autonomy. It is hardly surprising, therefore, that they viewed expansion of federal authority with suspicion.

Federalism was a principle that mattered, not merely a cover for hostility to blacks, as historians have sometimes suggested. Indeed, the concern for preserving state authority was reflected in decisions giving the states broad discretion to regulate business and restrict the rights of property owners in order to promote the general welfare. This is not to say that race did not matter. Had the justices been more sensitive to blacks' needs and more intent on protecting blacks' rights, they would have abandoned other principles that stood in the way; however, they were neither hostile nor indifferent to protection of black rights nor unwilling to expand federal civil rights authority. Rather, they were insufficiently committed to the rights of blacks to accept the truly radical expansion of federal power necessary to meet the exigencies of blacks.

The first indication of the Supreme Court's position came when it decided *The Slaughter-House Cases* in 1873. The cases were brought, ironically, not by former slaves, but by white butchers in New Orleans who challenged a state law that restricted their freedom to practice their trade. The butchers charged that the liberty to pursue a lawful occupation was a fundamental right of citizenship and therefore one of the privileges and immunities of United States citizenship protected by the Fourteenth Amendment. The implications for blacks were quite clear. If the Court accepted the butchers' argument, Congress and the federal courts would enjoy authority to protect a wide range of individual rights, thus enhancing their ability to guarantee the rights of blacks.

In a severe blow to civil rights advocates, a sharply divided Court rejected the butchers' position by a 5-4 margin. Writing for the majority, Justice Samuel Miller argued that the Fourteenth Amendment recognized dual citizenship, expressly stating that Americans were citizens of the United States *and* the state in which they resided. He inferred from this that they possessed two separate and distinct sets of rights, one set deriving from national and the other from state citizenship. Defining the former as those "which owed their existence to the national govern-

ment," Miller suggested that they were of decidedly limited scope. They included the right to habeas corpus, to assemble to petition the government for redress of grievances, to come to the nation's capital, to unfettered use of the nation's ports and navigable rivers, and to protection by the government while abroad. More basic rights, such as the right to pursue a trade, were among the rights of state citizenship and thus not protected by the Fourteenth Amendment. Since Miller made no reference to them, presumably the guarantees of the Bill of Rights were not included among the privileges and immunities of United States citizens and remained merely limitations on the authority of the national government.

Miller's opinion was greeted by sharp dissent, with Justice Noah Swayne charging that the majority had ignored the intent of the framers, transforming "what was meant for bread into a stone." Other dissenters argued that by making national citizenship primary, the Fourteenth Amendment had transformed the federal system, transferring responsibility for protecting fundamental rights to the national government. Although this analysis was persuasive, it threatened the federal system by transferring primary authority to define and protect individual rights from the states to Congress and the federal courts. Indeed, Miller feared that a broad construction of the amendment would lead to a "great departure from the structure and spirit of our institutions," "fetter and degrade" the states, and "radically change the whole theory of the relations between the State and federal government to each other and of both . . . to the people."¹¹ The threat of such revolutionary consequences prompted the Court's majority to slow the juggernaut of constitutional change, even if it had to do so through a strained interpretation of the amendment.

By holding that the privileges and immunities of United States citizens included only a few rights that were of limited importance to most persons, the decision trivialized the provision that contemporaries viewed as the heart of the Fourteenth Amendment. (Indeed, the privileges and immunities clause remains a dead letter in the late twentieth century.) Nevertheless, in dismissing the claims of the butchers, Miller emphasized that Congress had passed the postwar amendments in order to guarantee full freedom and genuine equality for blacks. The "pervading purpose" of the amendments, he emphasized, was "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." Thus Miller suggested that the Court would look favorably on assertions of national power designed to protect the rights of the former slaves. And while the *Slaughter-House* decision meant that the privileges and immunities clause would be of limited value, the Thirteenth Amendment and the equal protection clause of the Fourteenth Amendment might easily support legislation aimed at rooting out racially motivated violations of individual rights.¹²

The Court brought the implications of *Slaughter-House* into sharper focus in 1876, when it decided *United States v. Cruikshank*. William Cruikshank was one of a well-armed band of more than 100 whites who attacked blacks who had gathered outside the courthouse in Colfax, Louisiana in April 1873 to support local Republican officials whose claims to office had been challenged by Democrats. After their initial attack forced approximately 150 freedmen to take refuge in the courthouse, the whites torched the building, killed dozens of blacks as they fled the blaze, and subsequently shot in cold blood between 30 and 40 blacks who had surrendered. In all, perhaps 100 freedmen died in the massacre. In 1874, Cruikshank and two other participants were convicted in federal circuit court in New Orleans for violation of the Enforcement Act of 1870, which made it a crime to use force or intimidation to deprive citizens of rights granted by the Constitution or laws of the United States. Specific charges in the indictment accused the defendants of using violence to deny their victims the right to bear arms (protected by the Second Amendment), the right of assembly (protected by the First Amendment), and the right to equal protection of the laws and due process of law (protected by the Fourteenth Amendment).

In a complicated ruling that focused on the indictment under which the defendants had been convicted (rather than the constitutionality of the Enforcement Act), the Supreme Court reversed the convictions and dealt a severe blow to the government's civil rights authority. Chief Justice Morrison Waite noted that the right to bear arms, freedom of assembly, and the other guarantees of the Bill of Rights were merely limitations on the national government, not rights that were enforceable against states and private individuals. Following the logic of *Slaughter-House*, he suggested that they were among the rights of state citizenship. Consequently, Waite concluded that they were not rights granted by the Constitution and that violation of them by private citizens was not punishable under the Enforcement Act (which punished infringements on rights granted by the Constitution). The Court was now harvesting the

bitter fruit of *Slaughter-House*. It had circumscribed the rights of United States citizens, rights that could be said to be granted by the Constitution and therefore were within Congress's power to protect. As *Cruikshank* tragically demonstrated, this seriously compromised the government's authority to protect individual rights.

The chief justice also rejected those parts of the indictment that accused the defendants of depriving citizens of equal protection and due process of law. This amounted to charging the defendants with murder, he concluded, a crime that came within the purview of state authority. The due process and equal protection clauses of the Fourteenth Amendment, according to Waite, added "nothing to the rights of one citizen . . . against another," but were merely restrictions on state action. They authorized Congress to provide remedies against denial of equal protection or due process by states and their officers, but did not empower it to punish private citizens who violated the rights of others. Thus the Court implicitly rejected the more expansive reading of the equal protection clause offered by Judge Woods in *United States v. Hall*, making it more difficult for the national government to protect blacks against wrongs inflicted by private citizens. With southern state governments now firmly in the hands of Democrats, who were not inclined to afford blacks personal security, this left blacks largely at the mercy of their white neighbors.¹³

When it decided *The Civil Rights Cases* in 1883, the Court used the state action theory to strike down the provisions of the Civil Rights Act of 1875 banning discrimination in hotels, restaurants, theaters, and public transportation. Justice Bradley, who wrote the Court's opinion, denied that the Fourteenth Amendment's equal protection clause sanctioned the law. It merely prohibited discrimination by state authorities, he held, not by private individuals and businesses. Bradley also denied that the Thirteenth Amendment authorized the statute. He admitted that it abolished all "badges and incidents" of slavery and decreed "universal civil and political freedom throughout the United States." He also conceded that the Thirteenth Amendment, unlike the Fourteenth, was not directed exclusively at state action, and that Congress's power to enforce it included authority "to enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents." Bradley denied, however, that discrimination against blacks by proprietors of hotels and restaurants, which had been common in the free states during the antebellum years, was a badge of servitude. "It would be

running the slavery argument into the ground," he concluded, "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 . . . take into his coach . . . or admit to his . . . theater. . . ." ¹⁴

Bradley's opinion did not go unchallenged. The black press likened it to Taney's infamous *Dred Scott* opinion, and one week after it was announced, Frederick Douglass denounced the decision at a mass protest meeting in Washington, D.C. On the Court itself, Justice John Marshall Harlan, a Kentucky Republican who had once owned slaves, penned an eloquent dissent. Harkening back to the idealism that had animated the Republican party's civil rights program, he characterized Bradley's analysis as "entirely too narrow and artificial," charging that its "subtle and ingenious verbal criticism" sapped "the substance and spirit of the recent Amendments." "Constitutional provisions, adopted in the interest of liberty, and for the purpose of securing . . . rights inhering in a state of freedom, and belonging to American citizenship," he explained, "have been so construed as to defeat the ends . . . which they attempted to accomplish. . . ." ¹⁵

Although the Court narrowed the scope of national power under the postwar amendments, it by no means abandoned the framers' commitment to equality. In *Strauder v. West Virginia* (1880), it held that a law that restricted jury service to white men violated the Fourteenth Amendment's equal protection clause. In the process, it reaffirmed that the amendment had been designed to protect the former slaves from hostile state action and to guarantee that "all persons, whether colored or white, shall stand equal before the laws of the States." Moreover, the Court suggested that it would not tolerate laws establishing racial classifications. As Justice William Strong explained,

The words of the [Fourteenth] Amendment . . . 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 . . . and discriminations which are steps towards reducing them to the condition of a subject race.¹⁶

The justices also proved willing to provide remedies against state officials who were guilty of enforcing nominally impartial laws in a discriminatory fashion. In *Ex parte Virginia*, decided at the same term as

Strauder, the Court upheld the prosecution of a Virginia judge charged with systematic exclusion of blacks from juries in his court. Justice Strong noted that the Fourteenth Amendment was designed "to take away all possibility of oppression by law because of race or color," but denied that its reach was limited to formal enactments of the legislature. "Whoever, by virtue of a public position under a state government, . . . takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, . . . his act is that of the State," he explained. "This must be so or the constitutional provision has no meaning."¹⁷ In 1880, in *Neal v. Delaware*, the justices indicated that blacks might prove discrimination even if they did not introduce testimony showing that officials had consciously intended to keep blacks off juries. In reversing the conviction of a black man who had been indicted by an all-white grand jury and tried by an all-white petit jury, the Court held that the fact that no black had served on a jury in a state that was fifteen percent black constituted adequate proof of discrimination.

The Court's clearest indication that it would not tolerate discrimination came in 1886 when it decided *Yick Wo v. Hopkins*. The case was brought by a Chinese laundry operator who challenged a San Francisco ordinance that prohibited persons from operating laundries in wooden buildings without a permit from city officials. Although ostensibly designed to prevent fires, Yick Wo charged that the law's real purpose was to exclude Chinese from the laundry business. Indeed, he demonstrated that all applications for permits by Chinese had been denied while only one non-Chinese had been refused a permit. The Court, noting that the "actual operation" of the law was "directed . . . against a particular class," declared it a violation of the equal protection clause. "Though the law itself be fair on its face and impartial in appearance, yet if it is applied . . . with an evil eye and an unequal hand . . . the denial of equal justice is still within the prohibition of the Constitution," concluded Justice Stanley Matthews.¹⁸

The Court also upheld federal authority to protect blacks' political rights. In *United States v. Reese*, decided in 1876, the Court struck down two provisions of the Enforcement Act of 1870, one punishing state officials and the other private individuals who denied any otherwise qualified person the right to vote. The problem, according to the Court, was that while the Fifteenth Amendment prohibited interference with the right to vote on account of race, the sections of the Enforcement Act

under consideration went beyond this, authorizing prosecution of persons who denied any qualified voter the right to vote for any reason whatsoever. Significantly, however, Chief Justice Waite did not invoke the state action theory to strike down the provision that punished private individuals. And he asserted that the Fifteenth Amendment "has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress[.]. . . exemption from discrimination in the exercise of the elective franchise on account of race. . . ."¹⁹ Waite's analysis suggested that the government had authority to prosecute both private individuals and state officials who used force, violence, intimidation, or economic coercion to deny citizens the right to vote because of race. Indeed, a year later, sitting as circuit justice in South Carolina, Waite sustained indictments against whites who were prosecuted for acts of violence against blacks during the 1876 campaign.

In *Ex parte Yarborough*, decided in 1884, a unanimous Supreme Court endorsed Waite's position. Jasper and Dilmus Yarborough and seven other white Georgians (all members of the Pop and Go Club, a Democratic terrorist organization) had been convicted for violation of the Enforcement and Klan Acts for their part in violence against blacks who had voted in a hotly contested congressional election in 1882. The defendants appealed, contending that under the Court's rulings in *Cruikshank* and *The Civil Rights Cases*, the federal government did not have authority to punish private citizens for civil rights violations. Justice Miller unequivocally rejected their argument. He pointed out that Article I, section 4 of the Constitution gave Congress power to regulate the election of its members and justified legislation (like the provision of the Klan Act under which Yarborough was prosecuted) punishing persons who attempted to control congressional elections by fraud and violence. According to Miller, Congress had ample authority to protect the Republic by guaranteeing that "the votes by which its members . . . are elected shall be the free votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice."²⁰

The Court's ruling in *Yarborough* recognized that the government had broad authority to protect blacks against political terrorism. Although it merely upheld the government's authority to punish violence at congressional elections, federal and state elections were generally conducted at the same time. As a practical matter, therefore, the ruling enabled federal

officials to police most state elections. In fact, Miller's opinion strongly suggested that the government had authority to use the Enforcement Act against persons who attempted to intimidate black voters in any election, regardless of whether candidates for national representative were on the ballot. He expressly reaffirmed the constitutional guarantee of exemption from racially motivated discrimination against voters. In addition, because he held that Congress possessed authority to protect this right from infringement by private individuals as well as by state officials, the opinion strongly suggested that the national government could prosecute parties who sought in any election to intimidate voters because of their race.

While hardly a champion of blacks, the Court thus supported limited federal protection of civil rights, especially in the area of voting rights. Sections of the Enforcement Act of 1870 and the Klan Act punishing infringement of the right to vote, intimidation of voters, and election fraud remained on the books and, in fact, had been reenacted by Congress in 1874 as part of *The Revised Statutes*. Encouraged by the Court's rulings in *Reese* and *Yarbrough*, the Justice Department vigorously enforced these measures throughout the 1880s and the early 1890s. Indeed, for attorneys general and their subordinates, Reconstruction did not end in 1877; prosecuting voting rights cases and ensuring "a free ballot and a fair count" continued to be a high priority. Federal attorneys and marshals in the South won indictments against thousands of election officials who refused to permit blacks to register or vote, stuffed ballot boxes, and engaged in other types of skullduggery aimed at neutralizing the votes of blacks and their allies. They also prosecuted hundreds of individuals who resorted to violence to keep blacks away from the polls or to punish those who had dared to vote.

Despite this effort, the Justice Department won few convictions. Defendants were generally regarded by their white neighbors as heroes persecuted by meddling outsiders. Communities contributed generously to their defense funds, and when cases went to trial, federal attorneys faced batteries of highly skilled defense lawyers. In order to put together cases that experienced defense counsel could not pick apart, harried federal attorneys needed the services of detectives to help them assemble evidence. They also required the assistance of experienced trial lawyers who could help them develop strategies for prosecution and present cases effectively in court. These hotly contested cases frequently involved large numbers of witnesses and lengthy trials, thus resulting in substantial

expenses for summoning witnesses and jurors. Congress, however, facing considerable pressure to reduce federal spending, consistently denied the department adequate resources. While federal attorneys' overall caseloads quadrupled during the last quarter of the nineteenth century, Justice Department appropriations only doubled. Consequently, department officials frequently denied prosecutors' requests to hire detectives and additional attorneys. In fact, they occasionally ordered federal attorneys to dismiss cases because they did not have sufficient funds to cover the costs of prosecution.

Juries proved an even greater obstacle to success. Although federal juries continued to be racially mixed, they also included white Democrats who sympathized with defendants and denied the legitimacy of the prosecutions. Because a guilty verdict required the assent of the entire jury, prosecutors had to convince some jurors who were not only skeptical, but often downright hostile. Moreover, because blacks were often eyewitnesses to or victims of the crimes and because community pressure prevented most whites from coming forward to testify against defendants, federal attorneys had to rely heavily on black testimony. Convincing hostile white jurors to change their minds on the basis of evidence offered by blacks was not easy. As one distressed federal attorney explained, "The law is plain—the facts are plain, but I can't make a white democratic juror believe colored witnesses nor force him to vote [for conviction]. I can't keep politics out of the human mind and I can't make the jury commissioners select more impartial men."²¹

Although it produced few convictions, the Justice Department's effort was not completely without effect. It served notice that northern Republicans had not abandoned support for civil rights and suggested that any systematic effort to deny blacks the right to vote through literacy tests and poll taxes would meet resistance. To underscore this, Republicans in Congress conducted regular investigations of southern election fraud and violence. Combined with opposition from poor whites, who feared that poll taxes and literacy tests would disfranchise them, the government's campaign to protect the voting rights of blacks helped keep the disfranchisers in check during the 1870s and 1880s. Before 1890, only Georgia and Virginia (which experimented with poll taxes in the 1870s) and South Carolina (which in 1882 established a complicated system of balloting effectively disfranchising illiterate blacks) had enacted legislation designed to disfranchise blacks.

As long as they were not legally barred from voting, southern blacks

refused to be pushed out of politics. Equating the franchise with freedom, personal dignity, and equal citizenship, they were well aware that political decisions had a significant bearing on their lives. Consequently, in most states of the former Confederacy, blacks continued to vote at a high rate and occasionally mounted serious challenges to Democratic hegemony. In a number of heavily black counties, redemption did not bring an end to Republican control; candidates elected by former slaves continued to serve as state legislators, local officials, and sometimes even congressmen. In addition to retaining power in black belt enclaves, Republicans mounted periodic challenges that threatened Democratic control at the state level. In Tennessee, where Unionist whites in the mountainous eastern counties joined with blacks in the central and western counties to support Republican candidates, the party remained a threat to Democratic control. Indeed, the Republican gubernatorial candidate won election in 1880, when the Democrats divided, and the party won more than forty percent of the vote in statewide elections during the remainder of the decade. In North Carolina, support from mountain Unionists in the west and blacks in the east enabled Republicans to come within a whisker of regaining control of the state in 1880. During the next two decades, Republicans would remain a force to be reckoned with in North Carolina politics.

In other states, Republicans forged alliances with dissident Democrats. During the late 1870s and throughout the 1880s, independent political movements, backed mainly by poor white farmers who were alienated by the economic policies of conservative Democratic leaders, emerged throughout the region. By joining forces with the dissidents, Republicans were able to mount serious challenges in Florida, Arkansas, and Texas. In Virginia, disaffected Democrats known as the "Readjusters" (they advocated reducing or "readjusting" the state debt, most of which was held by outside investors) formed an alliance with Republicans that shook the Old Dominion. Uniting white farmers and blacks, the Readjusters controlled the state between 1879 and 1883, when Democrats regained control in a campaign won through violence and fraud.

There were also other indications that blacks were not resigned to second-class citizenship in the years following the end of Reconstruction. Even in the South, where Democrats dominated the legislatures and the courts and protesters risked violent reprisals, blacks continued to challenge discrimination through legal and political action. When Democrats resegregated the New Orleans public schools in 1877, the city's blacks

turned to the courts, arguing that segregation denied them the equal protection guaranteed by the Fourteenth Amendment. Although they were not successful, their action suggests that they did not accept second-class citizenship and continued to use the legal process to assert their rights. In other parts of the South, where segregated schools had emerged during Reconstruction, most blacks accepted the redeemers' continuation of dual school systems; however, black conventions protested unequal funding of black schools and demanded that state governments devote equal resources to black and white schools. In Kentucky and North Carolina, where Democratic legislatures provided that taxes paid by members of each race be used to support their own schools, blacks used legal and political action to have the laws reversed and to secure more equitable funding.

It was in the North, however, that blacks made the greatest gains against segregation during the 1880s. While in 1883, the Supreme Court had ruled that Congress lacked authority to ban discrimination in places of public accommodation, it left the way open for individual states to enact such measures. Indeed, comments by Justice Bradley in his opinion in *The Civil Rights Cases*, as well as the Court's well-established tolerance of state legislation to promote the public welfare, suggested that states enjoyed broad authority to enact antidiscrimination measures. Making the most of this, blacks who met in Washington, D.C. in 1883 to protest the Court's decision urged civil rights advocates to press for state legislation to replace the federal law struck down by the Court. The North's tiny black community (blacks comprised only about two percent of the region's population) responded energetically. In Ohio, for example, blacks formed a network of equal rights leagues to demand civil rights legislation. Between 1884 and 1887, Ohio and twelve other northern states passed laws prohibiting discrimination in hotels, restaurants, public transportation, and places of amusement. During the late 1880s and the 1890s many of these states expanded the list of places covered by the acts, and four additional states passed antidiscrimination measures. Moreover, in enforcing these laws, state courts refused to permit businesses to make any distinction on account of color. In the three states where the issue arose, they ruled that restaurant and theater owners could not segregate blacks within their establishments.

Northern blacks also continued their campaign for integrated schools. Blacks had won admission to white schools in most of New England prior to the Civil War, and during the late 1860s and 1870s they had used

effectively political and legal action to end school segregation in seven other states. Yet school boards in a number of northern states maintained separate schools for blacks, and state courts in Nevada, Ohio, California, and Indiana had ruled that separate schools did not violate guarantees of equality contained in the Fourteenth Amendment and state constitutions. During the 1880s and 1890s blacks and their white allies won legislation mandating integrated schools in seven additional northern states, including laws reversing the effects of prosegregation court decisions in California and Ohio. Throughout the North black litigants enjoyed frequent success in cases they brought against school boards that operated separate schools for blacks. In deciding these cases, state courts usually relied on state constitutional provisions and statutes to strike down segregation and, with one exception, held that the Fourteenth Amendment did not require integration. Nevertheless, as a result of litigation and political action, there were few segregated schools in the North by 1900.

Northern blacks' continued success in the battle against discrimination did not mean that racism was dead in the North. Social contact between whites and blacks was rare, aversion among whites to contact with blacks in public places was still widespread, and most whites denied that blacks were their equals. If anything, northern racism became stronger during the 1880s and 1890s, as respected biologists and social scientists placed the imprimatur of science on the myth of black inferiority by asserting that blacks had not reached the same intellectual or moral level as whites. Given the persistence of racism, northern blacks continued to suffer discrimination and, despite the new public accommodations laws, were frequently denied admission to white theaters, hotels, restaurants, and amusements. The public accommodations laws gave blacks remedies against such abuses, and they frequently sued those who discriminated against them; however, because confrontations with hostile proprietors were unpleasant and lawsuits were expensive, many blacks chose to avoid places where they knew they were not welcome. White prejudice also consigned most blacks to menial, low-paying jobs, depriving them of the opportunities offered by an expanding economy. And whether or not they were willing to sue, state law offered no redress against employment discrimination.

Nevertheless, northern blacks' political and legal victories were not meaningless. In practical terms, they gave black children access to white schools, which were better funded and offered greater educational opportunities than were available in the South's separate and unequal

schools. Even though discrimination continued, greater fluidity in race relations existed in the North. Consequently, northern blacks, unlike their southern counterparts, were not subject to constant and blatant reminders that they were regarded as an inferior caste, unfit to associate with whites. Furthermore, the victories of the 1870s and 1880s established the principle of colorblind citizenship as part of the North's dominant public philosophy. As the Michigan Supreme Court noted in 1890, "there must be and is an absolute, unconditional equality of white and colored men before the law. . . . Whatever right a white man has in a public place, the black man has also."²² This marked a significant change from the antebellum era, when most Republicans had assured their constituents that they did not support black suffrage, much less blacks' right to equal access to public accommodations. While the principle of colorblind citizenship often amounted to little more than empty rhetoric, it nevertheless upheld a standard that blacks could press whites to honor in practice as well as in name. And given the political and legal techniques they had learned and the confidence they had gained in over half a century of agitation for reform, blacks would not be bashful about holding whites to their promises.

The Triumph of Racism

While northern blacks' campaign for civil rights accelerated during the years after Reconstruction, southern blacks' gains were swept away by a rising tide of white supremacy. During the late 1870s and 1880s southern blacks had refused to accept the Democratic counterrevolution, using political and legal means to defend their rights. Yet while they had won occasional victories, their position generally had deteriorated. Beginning in the late 1880s and stretching into the first two decades of the twentieth century, southern Democrats launched a ferocious new offensive that reduced blacks to second-class citizenship.

Despite Democrats' efforts to deter them, blacks had continued to vote at a high rate in most states during the 1870s and 1880s. Indeed, they had frequently joined with poor white farmers who had bolted the Democratic party because of dissatisfaction with its economic policies, forming coalitions that forced the dominant Democrats to resort to even greater violence and fraud in an effort to maintain their power. This pattern continued in the 1890s, as many economically distressed white farmers

left the Democratic party to join the Populists. The new party pledged itself to use the power of government on behalf of working people, advocating nationalization of the railroads, a vigorous campaign against big business, wholesale reform of the financial system, and establishment of producer-operated cooperatives that would free farmers from dependence on merchants. Like the independent parties of the 1870s and 1880s, the Populists hoped to attract black voters to their cause, uniting poor whites and blacks in a coalition that would drive the Democrats from power. In North Carolina, where Populists fused with the Republican party, the strategy worked, at least temporarily; and in a number of other southern states, only widespread violence and unprecedented fraud by the Democrats defeated it.

Shaken by this challenge, southern Democrats moved to undercut the opposition by disfranchising blacks. Aware that the Fifteenth Amendment prohibited them from openly denying blacks the right to vote, Democrats sought to accomplish their objective indirectly. By requiring voters to pay poll taxes (small annual head taxes usually amounting to less than three dollars per year), they could reduce the black electorate substantially. The great majority of southern blacks were desperately poor agricultural laborers and sharecroppers. Trapped in a vicious credit system that kept many in debt from year to year, precious little cash passed through their hands. Consequently, a tax of only three dollars could put the ballot beyond their reach. The literacy test offered disfranchisers an even more effective tool. Given the legacy of slavery and the meager support for black schools in the aftermath of Reconstruction, illiteracy among blacks was widespread. In 1890, more than half of the adult black males in the South could not read, and many others were barely literate. Fairly administered, literacy tests (which required prospective voters to prove that they could read a provision of the state or federal constitution) would deny the ballot to most black men; applied by partisan white officials who were bitterly opposed to black suffrage, they would cut even further into the black electorate.

For Democratic leaders, literacy tests and poll taxes had an added attraction. Although publicly they emphasized the effect these measures would have on blacks, Democrats were well aware that they would also take their toll on poor whites. The region's depressed agricultural economy affected whites as well as blacks, leaving many white farmers on the brink of ruin and forcing many others into the poverty of tenancy and sharecropping. Poverty also bred illiteracy; in 1900, twelve percent

of southern whites could neither read nor write. The new voting requirements, therefore, would exclude many whites from voting, and happily for Democratic leaders, these would be the men who had defected from the party during the 1880s and 1890s.

Although blacks and dissident whites bitterly opposed disfranchisement, conservative Democrats achieved their objective. Beginning with Florida and Tennessee in 1889 and Mississippi in 1890 and concluding with Georgia in 1908, measures designed to prune the electorate were adopted throughout the South. Each of the eleven states of the old Confederacy made payment of a poll tax a requirement for voting, and five heightened the effect of the tax by making it cumulative (i.e., requiring voters to pay poll taxes for previous years as well as for the year of the election). Seven of these states coupled the poll tax with a literacy test, and seven adopted the secret ballot, which served as a *de facto* literacy test because illiterates were unable to read it. Except for Florida, each of these states supplemented the poll tax with a literacy test or the secret ballot or both. In five states, Democratic leaders established loopholes for whites—a concession necessary to obtain sufficient support for passage of the disfranchisement measures. Several states exempted from the literacy test those who owned a certain amount of property (usually \$300) or enacted understanding clauses that enfranchised those who could explain a passage of the constitution when it was read to them by the registrar. Several states supplemented these with grandfather clauses that waived literacy tests for those who were descendants of persons who had been qualified to vote prior to 1867 (the year southern blacks gained the ballot) or who had fought for the Union or Confederacy.

The new requirements had a dramatic effect on the southern electorate; in the years following their enactment, registration among blacks plummeted. By 1910, black registration had decreased to fifteen percent in Virginia and to less than two percent in Alabama and Mississippi. Although loopholes and discriminatory administration of the laws allowed many whites to dodge the effects of the literacy requirements, the new laws took their toll on whites as well. Many were too proud to admit that they could not read and declined to exploit the loopholes, while others were excluded from voting because they were too poor to pay their poll taxes. Therefore while white registration remained at approximately eighty percent in Virginia and Alabama, it decreased to approximately fifty percent in Louisiana and to sixty percent in Missis-

issippi. As J. Morgan Kousser, the leading student of suffrage restriction had noted, the disfranchising measures "insured that the Southern electorate for half a century would be almost all white; yet . . . [they] did not guarantee all whites the vote."²³

Passage of legislation mandating segregation—the Jim Crow laws²⁴—coincided with disfranchisement. Separation of the races in churches, schools, public transportation, hotels, and restaurants had become customary in the decades following the war. During the late 1870s and 1880s, however, some states began to codify custom, mandating segregation in prisons and public schools. Beginning in the late 1880s and continuing through the first two decades of the twentieth century, southern legislatures and city councils went to work with a new fervor, enacting a mountain of laws and ordinances to formalize and to put the force of law behind what had been largely customary arrangements.

The move to give white supremacy the force of law was a natural product of a turbulent era. As white Democrats launched their disfranchisement campaigns, they stoked the fires of racial prejudice white hot in order to focus attention on blacks (rather than poor whites) as the primary targets and to convince those who were concerned about the impact on poor whites that disfranchisement was necessary at all costs. The disfranchisers repeatedly denounced blacks as ignorant, lazy, criminally inclined, and venal, a race demonstrably unqualified to exercise political rights. In an atmosphere poisoned with racial hatred, it is hardly surprising that laws designed to further degrade blacks attracted broad support. Continued black assertiveness and activism in the decade after Reconstruction also contributed to the emergence of segregation. It reminded southern whites that they had not fully established white supremacy, the goal of the redeemers. In fact, many whites feared that a new generation of blacks who had never known slavery was coming to maturity and that they might pose an even stiffer challenge to white supremacy than had their parents. Frustrated by their failure to restore black deference and concerned about the future, the establishment of legally sanctioned segregation offered white southerners a powerful means of asserting their power and dominance. Moreover, given the deep racism that existed throughout the South, adoption of segregation statutes by one or two states led legislators in neighboring states to follow suit, quickly spreading the laws across the region.

Jim Crow came to the South in three waves. Between 1887 and 1891 most states of the former Confederacy adopted laws requiring railroads to

provide separate but equal accommodations for the two races. Then, beginning in 1901 with Virginia, most southern states passed laws requiring urban street railroads to separate black and white passengers. Finally, during the 1910s, states and localities created a complex web of regulations designed to extend the logic of separation to all spheres of southern life. A number of states forbade whites and blacks to be taught together, even in private schools, and barred teachers and nurses from serving students or patients of another race. States and cities established separate parks and mandated residential segregation. Some states required manufacturers to designate different entrances for white and black employees, to maintain separate pay windows, toilets, and water buckets, and to separate workers by race on the job. Not content with segregating school children, North Carolina and Florida required that public school textbooks used by children of different races be stored separately. And, though not required by law, many courts kept separate Bibles for swearing black and white witnesses.

The results of the segregation campaign were devastating for southern blacks. Since the end of the Civil War they had lived in a world increasingly separate from whites. Yet the triumph of Jim Crow infused this separateness with deeper meaning and force. By the early twentieth century, southern blacks lived in a world circumscribed by signs designating "white" and "colored" facilities. Separate Bibles in courtrooms as well as separate waiting rooms in train stations served as constant reminders that whites considered them a degraded caste. The signs, together with the intricate set of laws establishing segregation, made blacks adapt to ludicrous rules that varied from state to state and city to city, further underscoring whites' power.

In the face of the white onslaught, a growing number of black leaders—most notably Booker T. Washington, president of Alabama's Tuskegee Institute—renounced the battle for political and social equality. Blacks should be concerned not with integration and political rights, they argued, but with obtaining the education and skills that would enable them to advance economically and, gradually, to earn political rights and social acceptance by whites. In communities across the South, however, many blacks rejected accommodationism as a dead end. As a powerless, proscribed group, they argued, blacks would be even more vulnerable to white aggression and would find their efforts at advancement continually thwarted. Viewing segregation and disfranchisement as an effort "to humiliate, degrade, and stigmatize the negro," more militant leaders

urged resistance "in order to maintain our self-respect."²⁵ In at least twenty-seven cities, blacks launched boycotts of segregated streetcars between 1900 and 1910, some lasting as long as two years. Black leaders also turned to the courts, charging that Jim Crow legislation violated the letter and the spirit of the Fourteenth and Fifteenth Amendments. Without the aid of a national organization to raise funds and develop legal strategy, a number of southern black communities raised money locally to support litigation aimed at derailing the movement for white supremacy.

Blacks' constitutional claims, however, were unequivocally rejected by the Supreme Court. During the 1870s and 1880s the Court had been dominated by northern Republicans who, although quite conservative, nonetheless had come of age at the height of the struggle against slavery and who shared their party's commitment to emancipation and equal rights. Their rulings had narrowed the compass of the postwar amendments, restricting the government's authority to punish civil rights violations by private citizens. However, they had emphasized that the postwar amendments had been adopted to guarantee the former slaves equal rights and that they clearly barred discriminatory state action, whether it was carried out through blatantly discriminatory laws or by more subtle means. The six new justices who came to the Supreme Court between 1888 and 1894 were of a different generation. Although most were northern Republicans, they had come of age at a time when northern interest in Reconstruction was dimming and scientists were giving respectability to racism. Consequently, the new justices were less inclined than their predecessors to protect the constitutional rights of blacks.

The first major test of the new justices' position on civil rights came in 1896, when the Court decided *Plessy v. Ferguson*. The case had been initiated by the American Citizens Equal Rights Association, a group organized by New Orleans blacks to challenge an 1890 Louisiana law requiring railroads to provide separate but equal accommodations for blacks. The association was represented by Albion Tourgee of New York, who had served on the front line of the Reconstruction-era battle for equality as a Republican leader in North Carolina and who had remained an eloquent advocate of the cause after returning to the North. Hewing to the arguments developed by abolitionist legal theorists and Reconstruction-era Republican congressmen, Tourgee denied that the law's guarantee of equivalent facilities satisfied the requirements of the

Fourteenth Amendment's equal protection clause. The entire purpose of the postwar amendments, he emphasized, was to eradicate caste and establish a colorblind Constitution. By separating blacks from whites, he concluded, the Louisiana statute stigmatized and degraded blacks, subjected them to invidious discrimination, perpetuated the spirit of caste, and therefore was patently unconstitutional.

The Court's response suggested that the arguments of Reconstruction-era Republicans rang hollow to the new justices. Justice Henry Brown, a Michigan Republican who in 1890 had replaced Justice Samuel Miller, wrote the Court's opinion, sustaining the law's constitutionality. Reading the scientific racism of the 1890s back into the 1860s, Brown asserted that the amendment's framers must have understood that there was a deep natural aversion to racial intermingling. Consequently, he asserted, they had merely intended to guarantee "the absolute equality of the races before the law," not social equality. Brown concluded therefore that the amendment was satisfied by the Louisiana statute's requirement of equal but separate facilities. Blind to the campaign of racial hatred that was then raging in the South, he denied Tourgee's assertion that the statute "stamps the colored race with a badge of inferiority." "If this be so," the justice blithely explained, "it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." Only John Marshall Harlan, a veteran of Reconstruction-era political battles who had served on the Court for nearly twenty years, dissented, predicting that "the judgment this day rendered will . . . prove to be quite as pernicious as . . . the *Dred Scott* case."²⁶

Three years later, when it decided *Cumming v. School Board of Richmond County, Ga.*, the Supreme Court suggested that it would not be overly scrupulous in guaranteeing that segregated facilities were actually equal. The case was brought by Augusta, Georgia blacks to challenge the school board's decision to close the county's only black high school. Since the board continued to support several white high schools, the plaintiffs charged that it had deprived black children of opportunities afforded whites, thereby denying them equal protection. A unanimous Court turned aside their argument, however, signaling that under the guise of separate but equal blacks might be consigned to grossly unequal schools, services, and accommodations.

The Court also sustained disfranchisement. While the new voting requirements disfranchised many poor whites, they were directed principally at blacks. Not only did many states include understanding clauses,

property tests, and grandfather clauses offering whites ways around the literacy tests, but the new laws had a much more drastic effect on blacks than on whites. Moreover, the rhetoric accompanying disfranchisement suggested that southerners were determined to eliminate blacks from politics. Despite the fact that the disfranchisement laws were racially neutral on their face, therefore, a good case could be made that they violated the Fifteenth Amendment.

In 1898, when it decided *Williams v. Mississippi*, the Court rejected such an argument. Justice Joseph McKenna, a California Republican who had recently joined the Court, admitted in his opinion that the Mississippi Supreme Court had openly suggested that the state's poll tax and literacy test were designed to disfranchise blacks. Indeed, it had been quite candid in discussing the purpose of the measures:

Within the field of permissible action under the limitations imposed by the Federal Constitution, the [state constitutional] convention swept the circle of expedients to obstruct the exercise of suffrage by the negro race. . . . By reason of its previous condition of servitude and dependencies, this race had acquired or accentuated certain peculiarities of habit . . . which clearly distinguished it as a race, from the whites—a patient, docile people; but careless, landless, migratory within narrow limits, without forethought; and its criminal members given to futile offenses, rather than to the robust crimes of the whites. Restrained by the Federal Constitution from discriminating against the negro race, the convention discriminates against its characteristics.²⁷

Nevertheless, McKenna concluded that “‘nothing tangible can be deduced from this,’” adding that the state’s voting requirements did not deny anyone the right to vote on the basis of race. In sum, states might devise clever strategies to defeat the spirit of the Fifteenth Amendment so long as they did not expressly violate its provisions.²⁸

By the end of the century, then, the postwar amendments’ revolutionary promise of a colorblind Constitution that empowered the national government to guarantee its citizens civil equality lay unfulfilled. Given the ferocity of southern resistance, most white Americans’ unwillingness to centralize power in the national government, the waning of concern for black rights in the North, and the resurgence of racism nationwide, the nation reneged on promises made in the heat of the Civil War and Reconstruction. During the 1870s and 1880s the Supreme Court had significantly restricted the scope of national power to protect individual rights, effectively curtailing (although not destroying) the revolutionary

potential of postwar amendments and civil rights laws. With the addition of new members to the Supreme Court in the 1890s, the Court capitulated to the racist fury that was sweeping the South. Placing form above substance, ignoring the purpose of the postwar amendments, and demonstrating a perverse ignorance of southern legislators’ intent, the Court accepted segregation and disfranchisement.

Consequently, blacks entered the new century stripped of the promise of the Reconstruction revolution. Northern blacks were in a better position than black southerners, but with no thanks to federal Constitutional guarantees. Through political and legal action they had been able to win passage of legislation guaranteeing them equal civil rights, and state courts, relying on state constitutional provisions and statutes, had handed down decisions protecting these rights. Despite the law, however, racism remained powerful among northerners, as evidenced by the behavior of northerners who served on the Supreme Court, and frequently undercut the rights to which blacks were entitled. It was in the South, however, where ninety percent of the nation’s blacks lived in 1900 that the capitulation to racism was most evident. There blacks were subjected to a humiliating system of segregation in all aspects of their lives, a system that, despite the legal fiction of separate but equal, consigned them to schools and other facilities that were separate and visibly unequal. They were also systematically denied the ballot, the principal symbol of citizenship in the Republic. Marked by the law as members of an inferior caste and denied political power, they were left by the law to the tender mercies of their white neighbors.