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Plessy v. Ferguson
A Brief History with Documents

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Cover Art: *Negro Expulsion from Railway Car, Philadelphia*. Library of Congress, LCUSZ6245698.

Library of Congress Catalog Number: 96-84942
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Manufactured in the United States of America.

For information, write: Bedford/St. Martin's, 75 Arlington Street, Boston, MA 02116
 (617-399-4000)

ISBN-10: 0-312-13743-5 (paperback)

0-312-16284-7 (hardcover)

ISBN-13: 978-0-312-13743-4 (paperback)

978-0-312-16284-9 (hardcover)

Acknowledgments

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Foreword

The Bedford Series in History and Culture is designed so that readers can study the past as historians do.

The historian's first task is finding the evidence. Documents, letters, memoirs, interviews, pictures, movies, novels, or poems can provide facts and clues. Then the historian questions and compares the sources. There is more to do than in a courtroom, for hearsay evidence is welcome, and the historian is usually looking for answers beyond act and motive. Different views of an event may be as important as a single verdict. How a story is told may yield as much information as what it says.

Along the way the historian seeks help from other historians and perhaps from specialists in other disciplines. Finally, it is time to write, to decide on an interpretation and how to arrange the evidence for readers.

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Lynn Hunt
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saint²⁰ to the devil, — before this there rises a sickening despair that would disarm and discourage any nation save that black host to whom "discouragement" is an unwritten word.

They still press on, they still nurse the dogged hope, — not a hope of nauseating patronage, not a hope of reception into charmed social circles of stock-jobbers, pork-packers, and earl-hunters, but the hope of a higher synthesis of civilization and humanity, a true progress, with which the chorus "Peace, good will to men,"

"May make one music as before,
But vaster."²¹

Thus the second decade of the American Negro's freedom was a period of conflict, of inspiration and doubt, of faith and vain questionings, of *Sturm und Drang*.²² The ideals of physical freedom, of political power, of school training, as separate all-sufficient panaceas for social ills, became in the third decade dim and overcast. They were the vain dreams of credulous race childhood; not wrong, but incomplete and over-simple. The training of the schools we need to-day more than ever, — the training of deft hands, quick eyes and ears, and the broader, deeper, higher culture of gifted minds. The power of the ballot we need in sheer self-defense, and as a guarantee of good faith. We may misuse it, but we can scarce do worse in this respect than our whilom masters. Freedom, too, the long-sought, we still seek, — the freedom of life and limb, the freedom to work and think. Work, culture, and liberty, — all these we need, not singly, but together; for to-day these ideals among the Negro people are gradually coalescing, and finding a higher meaning in the unifying ideal of race, — the ideal of fostering the traits and talents of the Negro, not in opposition to, but in conformity with, the greater ideals of the American republic, in order that some day, on American soil, two world races may give each to each those characteristics which both so sadly lack. Already we come not altogether empty-handed: there is to-day no true American music but the sweet wild melodies of the Negro slave;

²⁰ Inspired by the French Revolution, Toussaint L'Ouverture led a revolt of blacks against the white French government of Haiti in August 1791.

²¹ These two lines come from the prologue to Alfred Lord Tennyson's "In Memoriam" (lines 28-29). The poem's Christmas setting inspires the line "Peace and goodwill, to all mankind" (28, line 12). In *Souls Du Bois* dropped the two lines from the first chapter and used them to end the ninth chapter. He also added a line to produce "That mind and soul according well, / May make one music as before, / But vaster."

²² Literally, "storm and stress" in German. In the latter half of the eighteenth century, *Sturm und Drang* German literature portrayed emotional individuals revolting against societal pressures.

the American fairy tales are Indian and African; we are the sole oasis of simple faith and reverence in a dusty desert of dollars and smartness. Will America be poorer if she replace her brutal, dyspeptic blundering with the light-hearted but determined Negro humility; or her coarse, cruel wit with loving, jovial good humor; or her Annie Rooney with *Steal Away*?²³

Merely a stern concrete test of the underlying principles of the great republic is the Negro problem, and the spiritual striving of the freed-men's sons is the travail of souls whose burden is almost beyond the measure of their strength, but who bear it in the name of an historic race, in the name of this the land of their fathers' fathers, and in the name of human opportunity.

²³ "Annie Rooney" is the title of a popular tune of the time. "Steal Away" is the title of a black spiritual. In *Souls Du Bois* changed these references to the more general "her vulgar music" and "the soul of the Sorrow Songs."

CHARLES W. CHESNUTT

The Courts and the Negro

ca. 1911

Charles Waddell Chesnutt (1858-1932) is acknowledged as the first important African American writer of fiction, although he pointed out that he was preceded by other important writers with African blood, including the Russian Alexander Pushkin and the French Alexander Dumas, the author of The Three Musketeers. Chesnutt's parents were from North Carolina where, in the age of slavery, they were "free people of color" with substantial amounts of European blood. In 1856 they moved north, married, and occupied a small home in a German neighborhood in Cleveland, where Charles was born. Charles's father served in the Union Army as a teamster and after the Civil War returned to Fayetteville, North Carolina, as the owner of a grocery store. Living in North Carolina, Charles experienced both Reconstruction and its end.

The Charles W. Chesnutt collection at the Fisk University library has two undated copies of this speech. The version reprinted here is copy 2; it has Chesnutt's signature and is clearly a later version, with a number of handwritten revisions. Internal evidence indicates that it was written between 1908 and 1911, most likely 1911. As it was not intended for publication, its few mechanical errors are not corrected here.

Chesnutt was an excellent student, learning European languages from a newly arrived German-Jewish immigrant. At twenty-two he was appointed principal of the State Normal Colored School. But he had already begun to contemplate a career as a writer. In 1883 he moved to New York and then to Cleveland, where he established himself as a professional stenographer and a lawyer. He also published stories in prestigious journals such as the *Atlantic Monthly*. By 1905, when he abandoned his literary career, he had published three novels, two books of short stories, and a biography of Frederick Douglass, all of which appeared after the Plessy decision.

In his first novel he unfavorably echoes Justice Henry B. Brown's majority argument in Plessy that in determining reasonableness a legislature can rely on "the established usages, customs and traditions of the people." Counseling a person of color who can pass as white and wants to do so, a lawyer in the novel declares that in South Carolina, if not North Carolina, the law was in the person's favor. "But custom," he adds, "is stronger than law — in these matters it is law." Such counsel would have been extremely poignant for Chesnutt, who himself could have passed as white but chose not to. In his second novel he describes the experience of a black physician named Miller forced to ride in a Jim Crow car. He includes the following passage:

At the next station a Chinaman, of the ordinary laundry type, boarded the train, and took his seat in the white car without objection. At another point a colored nurse found a place with her mistress.

"White people," said Miller to himself, who had seen these passengers from the window, "do not object to the negro as a servant. As the traditional negro, — the servant, — he is welcomed; as an equal, he is repudiated."

Miller's musings repeat the argument about the Louisiana law's exemption for nurses made by Plessy's attorney Albion W. Tourgée. The detail about the Chinese recalls Justice John Marshall Harlan's dissent.

Chesnutt had close contact with Tourgée. Ten years before the publication of Chesnutt's first book of stories, Tourgée offered to write a preface for such a collection. In 1893 Tourgée hoped to pressure the Supreme Court to decide in Plessy's favor by establishing a journal designed to sway public opinion, and he asked Chesnutt to serve as an editor. But Tourgée could not raise enough money to support the journal, and Chesnutt continued for twelve more years with his career as an author, although in his second novel he has a character comment, "The man who would govern a nation by writing its songs was a blethering idiot beside the fellow who can edit

its news dispatches." In *"The Disfranchisement of the Negro,"* his contribution to the 1903 book *The Negro Problem* (edited by W. E. B. Du Bois, Booker T. Washington, and others), he drew on his legal training.

The selection that follows is a previously unpublished speech Chesnutt gave after he abandoned his literary career. It offers a concise history of the Supreme Court's rulings affecting blacks. It also makes clear the importance Plessy has in that history.

The function of courts in the organization of modern society is to protect rights, — to pass upon disputes between man and man or between the individual and the State; and then, by their mandate, to set in motion the arm of the executive to prevent or punish a wrong or to enforce a right. Obviously if this great power be not rightly exercised, if it be swayed by prejudice or class interest, justice will not be done.

The rights of citizens of the United States are embodied in constitutions and statutes. But these, at best, are mere declarations of principles, which, in the complex and shifting nature of society, it is left for courts to apply to the particular instance. And in so doing courts often give to constitutions and statutes constrictions which have the effect of greatly enlarging or narrowing their scope and sometimes, as I shall show, of even altering the whole course of government on matters of the most vital consequence. If public opinion acquiesce in these interpretations, they remain the law; if not, the legislature assumes to correct them by new statutes, and the process is thus begun all over again. Nowhere, in the history of our jurisprudence, has this power of courts been more strongly exerted than in the matter of Negro rights, and nowhere has it been more swayed by prejudice and class interest. We are taught, and properly taught, to hold our courts in high respect. As a rule this is not difficult. But courts are made up of human beings. Under wigs and gowns and titles and deferential formulas, judges are simply men, and subject, as other men, to every human frailty. I shall endeavor to trace, of course in an inadequate and sketchy way the history of Negro rights as affected by the decisions of the Supreme Court of the United States. This can be done most effectively by reference to a few leading cases. For the Court rarely reverses itself, and has followed the prevailing public opinion so closely, in its interpretation of the Constitution and laws applying to the Negro, that its decisions have seldom been disturbed by legislative enactment.

The historic antebellum case was, of course, the Dred Scott decision. Dred Scott was returned to slavery, and citizenship of the United States

was denied to negroes, thus repealing so far as it applied to them, Article 4 Section 2 of the Constitution: "The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States." Of this decision the venerable Justice Harlan said, in his dissenting opinion in the civil rights cases (109 U. S.): "It is said that the case of *Dred Scott* vs. Sandford overruled the action of two generations, virtually inserted a new clause in the Constitution, changed its character, and made a new departure in the workings of the federal government." Thus vast and portentous is the power resting in the hands of nine men who hold their office for life and are directly responsible to no one. This decision was purely a political one and deserved the outburst of indignation which greeted it and did so much to bring about the ultimate abolition of slavery.

How different was the attitude of Lord Mansfield in the parallel English case.¹ A negro who had been in England was sought to be returned to a British colony as a slave. He claimed his freedom. Lord Mansfield might have made a similar ruling to that of the Supreme Court, with much better warrant, for there was no written constitution to restrain him, and by custom negro slaves had often been brought into England by their masters and returned to the colonies. But the English jurist seized his opportunity to recognize a principle which enlarged human rights. The Supreme Court chose to give a narrow and strained interpretation of the law and thereby restrict human rights.

I think it is exceedingly unfortunate for the Negro that the seat of government should be located in the South. Inevitably the administration, the courts, the whole machinery of government takes its tone from its environment. The influence of social life upon government is well known — it has always been the power behind the throne. The fate of nations has more often been settled in clubs and parlors than in courts and parliaments. The influence of southern customs and southern caste which is and always has been enthroned at Washington, has colored the attitude of Presidents and congressmen and judges toward the Negro. To men living in a community where by law all men are denied the suffrage, it does not seem such an enormity that the Negro elsewhere should be left without it. To men living in a community where service and courtesy in public places is in large measure denied the Negro, there seems no particular enormity in separate car laws and similar iniquities. Had the capital of this nation been left at Philadelphia or

¹ William Murray, Earl of Mansfield (1705-1793), British lord chief justice (1756-1788), ruling in *Somerset v. Stewart* (1772).

established in Boston or New York, the Negro would long since, in my opinion, have had his rights enlarged and recognized. Justice Mansfield lived in a free country. Justice Taney lived in Maryland, and the Supreme Court sat in Washington.

The *Dred Scott* decision, with all its implications, remained the law until it was overturned by revolution, and the effort made to fix, by the Constitution, the rights of the colored race to equal citizenship. Certainly the language of the amendments is plain enough to bear that interpretation; and certainly that was the intent of those who drew them and promoted their passage. But they were, after all, mere statements of principles, not difficult of application in the North, but involving a social revolution in the South. It was necessary to embody them in federal and state statutes, and then, in order to render them effective, to enforce their application.

The Thirteenth Amendment abolished slavery and by implication extended to the former slaves the rights as well as the status of free men. The Fourteenth Amendment extended citizenship of the United States in terms to all persons born or naturalized in the country and subject to its jurisdiction; forbade the making of enforcement of any law which abridged the privileges or immunities of citizens or which should deprive any person of life, liberty or property without due process of law or deny to any person within its jurisdiction the equal protection of the laws.

One of the earliest federal statutes intended to carry into effect the principles of the Thirteenth and Fourteenth Amendments was the civil rights bill of 1866, by which were fixed the rights of negroes in the courts, their right to contract, to sue, to be parties, to testify, and their full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. In general these rights have been respected, so far as statutes and Supreme Court decisions are concerned, although the right to contract in marriage, and certain other rights, have been limited under the principle of police power in the State.

In the case of *Virginia vs. Reeves*, 100 U. S. 313 (1879)² it was held by the Supreme Court:

"The Fourteenth Amendment was ordained to secure equal rights to all persons, and extends its protection to races and classes, and prohibits any state legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws. The plain object

² *Virginia v. Rives*, 100 U. S. 313 (1880).

of this amendment, as well as of the statutes enacted prior thereto, was to place the negro race, with respect to its civil rights, upon the same level with the white. They made the rights and responsibilities, civil and criminal, of the two races exactly the same."

Such a statement would seem both comprehensive and conclusive. But a moment of reflection will show that it is neither. What constitutes race? When are rights equal or unequal? What is a denial of the equal protection of the laws? What are civil rights? What are civil and criminal responsibilities, and when are they the same, and exactly the same?

The answers of the Supreme Court to these questions, as they have come up, generally in cases based on the Fourteenth Amendment have fixed, for the present at least, the legal status of colored citizens.

When it became clear that in the former slave states civil rights, as Charles Sumner and the men of his school defined them, were to be denied the Negro in spite of the Fourteenth Amendment, the civil rights act of 1875 was enacted. It was not long before numerous cases involving this law were presented to the Supreme Court, and in 1883 (109 U. S.) five cases were considered together. By the opinion of the Court, sections 1 and 2 of the civil rights act were held unconstitutional, section 1 giving full and equal enjoyment to all citizens of the accommodations of inns, public conveyances and places of public amusement, and section 2 providing a penalty. It was held that these things were subject to regulation by the State only and that Congress had not power to legislate except as to State action which is subversive of the fundamental rights specified in the amendment, and that therefore the Fourteenth Amendment had no application. In this case Justices Bradley and Harlan filed dissenting opinions.³ Justice Harlan based his argument upon Article IV., Section 2, of the Constitution, heretofore quoted, and maintained that no State could deny privileges and immunities to colored persons on the ground that they were extended only to whites, and that the majority opinion, to the effect that the nation, in the absence of State laws, adverse to such rights and privileges, might not interfere for their protection and security, is a denial to Congress of the power by appropriate legislation to enforce one of the provisions of the Fifteenth Amendment.⁴ And quoting what I have already said in reference to the effect of the Dred Scott decision in changing the character of the Constitution, he expressed the fear that the decision in the civil rights cases would mark the opening of an era in which the rights to freedom and American

³ Bradley wrote the majority opinion and Harlan dissented.

⁴ Chesnut meant the Fourteenth Amendment.

citizenship cannot receive from the nation efficient protection. These were prophetic words.

In the course of the opinion of the Court, Justice Bradley said, very truly:

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

There is nothing to indicate, except the well known facts of the situation, whether or not this perfectly correct statement was made with jocular intent. Certainly there is such a stage, but it was obvious then that the Negro had not yet reached it. And Justice Harlan further says:

"The opinion proceeds upon grounds entirely too narrow and artificial. I cannot resist the conclusion that the substance and spirit of the recent amendments to the Constitution have been sacrificed to a subtle and ingenious verbal criticism."

In the civil rights decision the Court did not hold that the things complained of were not deprivations of rights, but merely that they were not attributable to any action of the State. For it is the *State* which is prohibited by the Fourteenth Amendment from denying to any person within its jurisdiction the equal protection of the laws, and this amendment has been held not violated until the denial of the rights has some State sanction or authority. I do not recall whether this argument was made or not, but why would it not have been a good one, in that case, and in cases which are made under the civil rights laws of the northern States: Railroad companies are creatures of the State. Whatever powers they exercise are derived from the State and to that extent they are the agents of the State, and the State is responsible for their acts. Similar reasoning would apply to inns and common carriers, labor unions and other bodies, either chartered by the State or enjoying special benefits by statute or by common law.⁵

But to my mind the most important and far reaching decision of the Supreme Court upon the question of civil rights is that in the case of *Plessy vs. Ferguson*, a case which came up from Louisiana in 1895. (163 U. S., 537.) The opinion is a clear and definite approval of the recognition by State laws, of color distinctions, something which had theretofore been avoided in civil rights cases. It establishes racial caste in the United

⁵ Harlan did make an argument similar to this one.

States as firmly as though it were established by act of Congress. To the opinion Mr. Justice Harlan dissented with his usual vigor, and Justice Brewer did not hear the argument or participate in the decision. The Court cited the passage quoted by me from a former decision:

"The Fourteenth Amendment was ordained to secure equal rights to all persons, and extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws, and made the rights of the two races exactly the same."

And then the Court stabbed in the back, and to death, this ideal presentment of rights,⁶ and threw its bleeding corpse to the Negro, — the comprehensive Negro, black, brown, yellow, and white — the plaintiff in that case, which involved the separate car law of Louisiana, was seven-eighths white and showed no sign of the darker blood — as that court's definition of his civil status:

"But in the nature of things it (the Fourteenth Amendment) 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. If the two races are to meet on terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. When the government, therefore, has secured for each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all the functions respecting social advantages with which it is endowed. Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same place.

"A statute which implies merely a legal distinction between white and colored races — a distinction which is founded in the color of the two races and which must always exist so long as men are distinguished from the other race by color — has no tendency to destroy the legal equality of the two races or reestablish a state of involuntary servitude."⁷

When it was suggested in the argument that to sustain such discriminating laws might justify separate cars for people with red hair or aliens,

⁶ Chesnut wrote in the phrase "in the following language:" and marked the rest of the paragraph in parentheses, most likely for omission in oral presentation.

⁷ Chesnut runs together quotations taken from various parts of Brown's opinion.

or require people to walk on different sides of the street, or require colored men's houses to be in separate blocks, the Court in the opinion, said that such regulations must be reasonable. And the Court held:

"In determining the question of reasonableness, it is at liberty to act with reference to the usages, customs, and traditions of the people, with a view to the promotion of their comfort and the preservation of the public peace and good order."

It is obvious where this leaves the Negro, and it is difficult to see where the Fourteenth Amendment has any application.

The opinion in *Plessy vs. Ferguson* is, to my mind, as epoch-making as the *Dred Scott* decision. Unfortunately, it applies to a class of rights which do not make to the heart and conscience of the nation the same direct appeal as was made by slavery, and has not been nor is it likely to produce any such revulsion of feeling.

Another extract from the opinion makes one wonder whether the Court was merely playing with the subject:

"We consider the underlying failure of the plaintiff's argument to consist in the assumption that the enforced separation of the races stamps the colored race with the badge of inferiority. If this be so, it is not by reason of anything found in the act itself, but solely because the colored race chooses to put that construction upon it."

I presume that hanging might be pleasant if a man could only convince himself that it would not be painful, nor disgraceful, nor terminate his earthly career. It is perhaps true that some Negroes — I suspect very few people of mixed blood — have seemed to accept this reasoning. But I have never been able to see how a self-respecting colored man can approve of any discriminating legislation.⁸

To do so is to condone his own degradation, and accept an inferior citizenship. If discrimination must of necessity be submitted to, it should meet no better reception than silence. Protest were better still.

I need not suggest the far-reaching effect of this decision. The colored people of the South have been, it would seem, as completely segregated as the business of daily life will permit. Perhaps the lowest depths of race hatred have not been sounded, but a more humiliating, insulting, and degrading system is hardly conceivable under even a nominally free

⁸ Chesnut struck out the start of a paragraph that reads, "Some kinds, for instance, the separate school system, might be justified on the ground of convenience, expediency." This struck-out part of a sentence comes at the end of a manuscript page, and Chesnut discarded the following page, so we do not know how he would have continued the paragraph. We should remember, however, that even Plessy's attorneys did not dispute the existence of segregated school systems.

government. Under *Plessy v. Ferguson* there is no reason why any northern State may not reproduce in its own borders the conditions in Alabama and Georgia. And it may be that the Negro and his friends will have to exert themselves to save his rights at the North.

The latest and, and since *Plessy vs. Ferguson*, the most serious blow delivered by the Supreme Court to Negro rights — it was in fact a restriction of the rights of white men, and involved the Negro only indirectly — is that of *Berea College vs. Kentucky*, (1908). A recent statute of Kentucky forbade the receiving of both the white and Negro races as pupils for instruction in any institution of learning. (Ky. Acts 1904, ch. 85, page 181.) Berea College was indicted and fined for a violation of the statute, some of which the court found unconstitutional; but it affirmed the judgment below, sustaining the constitutionality of the section upon which it was based, the principal ground of the decision being that the original charter of Berea College had been conditioned upon the right of the legislature to revoke or alter it, and that the statute of Kentucky was in effect an amendment of the charter which did not defeat or substantially impair the object of the grant being "to give instruction to all who might apply, and promote the cause of Christ." The Supreme Court of the United States accepted the decision of the Kentucky Court on the ground that the judgment being upon a non-federal ground, fairly construed, sustained the decision, and that the decision by a State court of the extent and limitation of the powers conferred by the State upon one of its own corporations is of a purely local nature. The Court did not consider the statute as a whole, but only the section above referred to.

Justice Harlan, dissenting, said: "In my judgment the Court should directly meet and decide the broad question presented by the section. It should adjudge whether the statute, as a whole, is or is not unconstitutional, in that it makes it a crime against the state to maintain or operate a private institution of learning where white and black pupils are received, at the same time, for instruction. . . . I am of the opinion that in its essential parts, the statute is an arbitrary invasion of the rights of liberty and property guaranteed by the Fourteenth Amendment against hostile state action, and is, therefore, void."

Since this decision Berea College, the attitude of which in the matter was scarcely heroic, though perhaps justified by the law of self-preservation, has set aside certain moneys and promoted the collection of a fund to establish a school which should provide for colored students the advantages formerly offered by Berea College, and since then the Jim Crow annex of that institution has been dodging injunctions and pro-

tests, seeking a place to lay its woolly head and to rest its tired feet. All honor to Justice Harlan. There is no more inspiring spectacle than this grand old man, ever steadfast to right and justice, fighting unwearingly, never yielding, and almost always defeated, for the principles which were so dearly bought by the Civil War. I know nothing with which to compare it except the staunchness of the New York *Evening Post* and the *Independent*, which, with a few individuals, amid all the ruck of concession and compromise have kept alight the torch of liberty against the day when in the language of the civil rights cases, the Negro shall "take the rank of a mere citizen . . . and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected" — the time when the colored race shall have gained sufficient strength to protect itself, or until the democratic spirit now so nearly dead in the nation shall have become again a vivifying flame. I hope they may live to see the day.

The Right to Vote

The Fifteenth Amendment provided that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, on account of race, color or previous condition of servitude," and Congress was given power in the Amendment to enforce by appropriate legislation its provisions.

The right of the colored men to vote on equal terms with white men as provided by the Fifteenth Amendment, has never been denied in terms by any state, but in effect disfranchisement is general throughout the South. A few individuals are permitted to vote, but the race is disfranchised; and the race, and not the individual, is the social unit. It was easily within the power of the government to strangle the movement for disfranchisement at its birth. It would have been as easy for the Department of Justice to work up a case involving disfranchisement, as it was to work up the recent cases against peonage, and to have them taken to the Supreme Court in the ordinary course. And the Court might have held, as it did in the cases involving the right to sit on juries, that the action of State officers charged with the execution of the law was as much a violation of the Constitution as an act of the legislature. But on the contrary, it took the narrow view, and held that so long as the State did not discriminate in terms against negroes as such, there was no violation of the constitutional provision, — though in effect it might disfranchise the race.

In the case of *Giles vs. Harris* (189 U. S. 475), where a negro was refused the right to register, the Court did not find that a wrong had not been done, but, assuming, for the sake of argument that the facts claimed were true and that the Constitution had been disregarded, declared itself impotent to enforce any mandate it might make in that behalf and referred the plaintiff to Congress for relief. To this decision Justices Brewer, Brown and Harlan dissented. Other cases have been before the Court, but it has steadily refused to face the main issue and has entrenched itself behind a hedge of technicalities. It will require, in all probability, some such extreme measure as that proposed, the other day, in Maryland, to force a decision; and there are those who have so little confidence in the majority of the Court as at present constituted, where similar questions are involved, as to be glad the question was not put up to them until there is some greater assurance of an effective public demand to back up a right decision.⁹ There is little more that the states can do, within the limit of the Fourteenth Amendment as now construed, to further defeat Negro rights. For the Supreme Court to repeal, by judicial construction, the uniform application of the Fourteenth and Fifteenth Amendments, would be a calamity indeed.

SIXTEEN YEARS AFTER THE DECISION

Reprinted in this section are excerpts from works by two white lawyers, Charles Wallace Collins and Henry Billings Brown, the author of the majority decision in *Plessy*. Whereas Collins's selection justifies the majority opinion, Brown's, written a year before his death, shows he had second thoughts.

⁹ The Maryland act refers either to the Straus Amendment, passed by the state legislature in 1908 but defeated by popular referendum in the 1909 general election, or, more likely, the Digges Amendment, which was defeated in the 1911 general election. Both were blatant attempts to disfranchise African Americans. The Digges Amendment, for instance, conferred the right to vote on all white males of legal age and residence but required all other male citizens — that is, African Americans — to have owned and paid taxes on at least five hundred dollars worth of real or personal property for at least two years prior to their application to register. It was such a challenge to the Fifteenth Amendment that whites in other southern states worried that it might affect their more carefully crafted evasions of the spirit of the Constitution. Indeed, in 1915 the Supreme Court struck down an Oklahoma law similar to the Straus Amendment in *Guinn v. U. S.*, 238 U. S. 347. For more on the Maryland amendments, see Margaret Law Calcott, *The Negro in Maryland Politics, 1870-1912* (Baltimore: Johns Hopkins University Press, 1969), 126-33.

CHARLES WALLACE COLLINS

From The Fourteenth Amendment and the States 1912

Charles Wallace Collins (1879-1964) was affiliated with the University of Chicago and was a member of the Alabama bar. His 1912 book is an extensive study of the Fourteenth Amendment that grew out of a paper he read before the Government Club of Harvard University in February 1911. Parts of it were previously published in the American Law Review, the Yale Law Journal, the Columbia Law Review, and the South Atlantic Quarterly. Adopting a view of history as progress, Collins argued that each generation needs to evaluate the laws that govern it: "There may not always be the necessity for a change in the organic law. There is the necessity for reexamination and reevaluation" (140). He claimed to examine the amendment from a perspective removed from the partisan climate in which it was passed and argued that, as an attempt to take control away from the states and give it to the federal government, the amendment had failed as a constitutional ideal. In contrast, the "ideal of local government is one of our most precious heritages from an heroic past. It is the school in which self-control, independence, and liberty are bred" (148). Surveying the vastly different local conditions from state to state, Collins claimed that "diversity makes local government essential to justice. The Supreme Court should not be required to pass upon . . . local questions" (149). When the Court goes against the wishes of the local population, he added, it breeds "disrespect and contempt among people for Federal authority" (149). The amendment's failed ideal should, according to Collins, have led to its repeal. But recognizing the difficulty of repealing an amendment, he turned his support to what he saw as a progressive bill proposed by Senator Jonathan Bourne Jr. of Oregon. That bill required a unanimous decision of the Supreme Court to declare a state law unconstitutional.

Collins's attack on the Fourteenth Amendment was not narrowly motivated by racism. In fact, he recognized that the amendment had failed to live up to its original intention to protect the rights of freedmen and had instead become a form of protection for corporate interests: "The Amendment, though intended primarily as a protection of the negro race, has in these latter days become a constitutional guarantee to the corporations that

Charles Wallace Collins, *The Fourteenth Amendment and the States* (Boston: Little, Brown, 1912), 70-72.