

Civil Rights in *America*

Civil Rights in America

A Handbook of Legal History

Daniel McLinden



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*Civil Rights in America:
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CHAPTER 1

Overview

General Statement

The needle of America's moral compass has landed on good, evil and everything in between. Slavery made a mockery of the American ideals set out in the *Declaration of Independence* and *US Constitution*.

American courts trampled on civil rights for one hundred fifty years. Then things began to change midway through the 20th century.

“All men are created equal” (*Declaration of Independence* 1776) did not count slaves as men and “Equal protection of the law” (*14th Amendment* 1868) was interpreted by the US Supreme Court to prevent states—but not their White citizens—from discriminating against Blacks.

Civil rights is a struggle. Here is a broad look at it.

Introduction

America is called “the great melting pot”—a land of opportunity—a nation of immigrants—with its prime resource—its people—the most diverse on earth.

Whites came to America for better lives. Blacks came in chains in cargo holds in slave ships.

Whites took land from Native Americans through double-dealing and military offensives.

To complete expansion westward the United States made war on Mexico.

While the Civil War led to deconstruction of the South and an end to slavery, reconstruction did not lead to racial equality.

Civil Rights

Civil rights are defined as the rights of citizens to political and social freedom and equality—the opposite of slavery and human degradation.

The American ideal for civil rights evolved in law from slavery to personal freedom and equal treatment under the law, *i.e.*, freedom from governmental interference in a person’s opinions, religious practices, beliefs, and private matters; and, equal treatment of persons regardless of their race, color, ethnicity, national origin, religious beliefs, sex (gender) or sexual orientation.

It took a bloody civil war over slavery to trigger the ideal of equal treatment under the law for Whites and non-Whites embodied in the 14th Amendment (1868).

But court decisions on the 14th Amendment narrowed it to apply to wrongful *state* action only, not *state* inaction or wrongful *private* action. These decisions fostered racial discrimination and led to more segregation laws.

The intended effect of the 14th amendment—racial equality and integration—went dormant for decades until the 1950s when the

door opened for court challenges and rulings. Today change continues toward racial equality, gender equality, personal privacy, same sex marriage and sexual orientation.

History

For seventy-six years (1789 to 1865) Whites had rights under the US Constitution (the supreme law of the land) but people of color did not. The Constitution, by ignoring slavery, left the issue of slavery to the States. State sovereignty gave states the power to decide to have slavery or not.

Northern states with small Black populations became free states. Southern states with agrarian economies built on slave labor became slave states.

The territorial footprint of the United States expanded in the 1800s from the Atlantic to the Pacific. White settlers took over Indian and Mexican lands. New states came into the Union. “Manifest Destiny” they called it—America’s self-proclaimed divine right to seize all territory from coast to coast.

With expansion, Northerners wanted to add *free* states to the Union; Southerners, *slave* states. The country was deeply divided over the slavery issue.

Missouri Compromise (1820)

The US Constitution (written in 1787 and ratified in 1789) was completely silent as to slavery. It did not use the word “slave” or “slavery” and merely referred to slaves as “other Persons” (*i.e.*, in contrast to “free Persons” or “Indians”) in a math formula for apportionment of direct taxes and congressional representation.

There was no discussion of the concept of slavery nor any argument for or against it in the Constitution.

It fell on each (sovereign) State to allow slavery or not.

In 1820 Congress passed a law called the Missouri Compromise. The compromise was to allow Missouri to come into the Union as a slave state in exchange for Maine coming in as a free state. All other lands north of Missouri's southern border at 36 degrees 30 minutes latitude—if, and when they became states—would come in as free states.

At that time lands to the north and south of the line were mainly Spanish territory—soon to become part of Mexico when it gained its independence from Spain (1821) the next year.

Within fifteen years (1836) Whites went to Mexican territory (Texas) and fought and formed a republic over its eastern half; Whites went to California and fought and formed a republic there (1846); and, President Polk solidified the United States' western territorial expansion with the Mexican American War (1846–1848) taking from Mexico a vast area of land (in addition to Texas and California) that is now all or part of Oklahoma, Kansas, Colorado, Wyoming, Utah, Nevada, New Mexico, and Arizona.

Despite provisions of the treaty ending the war, Whites did not treat Mexicans in those areas as equals. Over time Mexican Americans were relegated to menial positions and inferior (segregated) schools. (Better education since the 1940s has helped Mexican Americans evolve politically and economically.)

Kansas-Nebraska Act (1854)

In 1854 Congress passed the Kansas-Nebraska Act overturning the Missouri Compromise to the extent Kansas and Nebraska—located on land designated “free” by the Missouri Compromise—would not come in as free states pursuant to the Missouri Compromise—but would hold elections on the question whether they would declare themselves free or slave states—so-called popular sovereignty.

Dred Scott Decision (1857)

In 1857 the United States Supreme Court decided the *Dred Scott* case. The Court held Dred Scott, a slave, did not have standing to sue for his freedom because the US Constitution gave him no rights. He was not a *person* under the Constitution rather *property* (of a White person). According to the Court, Scott's presence or residence in a free state or territory was not enough to establish his freedom.

In that year (1857) the people of the United States were at odds over the question of slavery and the outcome of the *Dred Scott* case. Abolitionists deplored the Court decision. And it, along with the national debate over the extension of slavery into new territories, laid the groundwork for civil war.

Civil War (1861–1865)

The political divide over slavery led to a new political party (Republican) against slavery expansion. Its candidate for President, Abraham Lincoln, won the vote in 1860. He did not stress ending slavery but only ending its expansion into new territories. After he was elected, southern states withdrew (seceded) from the Union.

This triggered the Civil War (1861 to 1865) between the northern states that stayed in the Union and fought to preserve it, and the southern states that left it to form their own alliance called the Confederate States of America.

The death toll in the Civil War was 655,000.

In 1865 the Confederacy lost the Civil War and surrendered to the Union, Lincoln was assassinated only days later, and the 13th Amendment was ratified ending slavery.

Southern revisionists have attempted to rewrite history by falsely claiming the war was fought for states' rights—when in fact it was clearly over slavery.

Civil War Amendments to the Constitution aka Reconstruction Amendments

Three amendments came out of the Civil War. They were designed to protect individuals from governmental interference and to recognize basic human rights—the 13th, 14th and 15th Amendments.

The 13th *abolished slavery and involuntary servitude.*

The 14th *applied 5th Amendment due process requirements to states and gave equal protection under the law.* Every person, White or non-White, was to get equal treatment under the law. Despite this constitutional mandate the amendment's aims were subverted by the courts for nearly a century and some states' efforts to disadvantage people of color and other groups continue today.

The 15th *gave freed Black men the right to vote.* (It would take another 50 years (1920) and the 19th Amendment for women to get it.)

Reconstruction (1865–1877)

In 1863 Lincoln signed the Emancipation Proclamation freeing slaves and he initiated a plan in very small measure to export freed slaves to Africa and Central America. He also invited Black soldiers into the Union Army.

Frederick Douglass, a runaway and emancipated slave, was the most well-known Black of his day—writer, orator, journalist, religious abolitionist and forward thinker (also standing for women's rights). He counseled Lincoln, participated in the Underground Railroad, worked for Black recruitment in the Union Army, rebuffed Lincoln's "back to Africa" idea, but believed Lincoln was deep down a true abolitionist.

Lincoln did not live for the Reconstruction era (1865 to 1877). The Reconstruction Act passed over presidential veto (Andrew Johnson) in 1867. It was a time to rebuild the South—thoroughly

devastated by war after the Union Army's scorched earth policy—and put Blacks on par with Whites.

Blacks voted and gained political and economic power. But long denied educations, few could read or write. Efforts to school Blacks got underway. Northerners poured into the South, some to help with schooling but most to profit from reconstruction. Southerners derided their opportunism—calling them *carpetbaggers* (since the luggage they came with was made of carpeting material)—and they called their Southern collaborators, *scalawags* (a term first meaning a farm animal of little value then a worthless person).

At every turn the South resisted putting Blacks on equal footing with Whites.

Paramilitary groups, mainly southern Civil War veterans, set fires to Black neighborhoods, kidnapped, lynched and murdered Blacks, and intimidated Black voters, Black politicians and White sympathizers. The Ku Klux Klan (KKK) was formed in Tennessee, the Redshirts in Mississippi and the White League in Louisiana.

Congress passed legislation in 1870 known as the Ku Klux Klan Act to protect freedmen's right to vote, hold office, serve on juries, and get equal protection under the law. The act was strengthened in 1871 to empower the President (Grant) to declare martial law, impose heavy penalties against terrorist organizations and use military force to put down the KKK and other white supremacists.

Grant mainly succeeded but the Redshirts of Mississippi extended their influence to South Carolina and North Carolina. And on voting days Redshirts on horseback brandished weapons and threatened and intimidated Blacks and other Republican voters.

Reconstruction failed.

The Ku Klux Klan drifted into the shadows but reemerged throughout the South and other pockets of the country after the 1915 film "The Birth of a Nation" vilifying Blacks and glorifying the Confederacy and the Klan. The Klan came out again against Blacks. Klan members hid behind their white hoods and robes.

Bound by racism and bigotry they operated in the dead of night and got away with burning crosses on Black front yards, beating, lynching and murdering Blacks.

What initially looked like racial gains were replaced with pervasive segregation, and suppression of black education, voting and economic opportunity. Legislative and judicial oppression, harsh treatment, illiteracy and poverty remained at the core of Black life.

And not just in the South.

Other Setbacks to Freedom

After the Civil War, its amendments, and the Civil Rights Acts of 1866, 1870, 1871 and 1875, the emerging goal was to treat all persons equally under the law. But courts, including the US Supreme Court, found ways to gut the notion of social equality.

The Court interpreted “equal protection” of Whites and Blacks under the 14th Amendment to prohibit *state* discrimination but not *private* (individuals) discrimination.

The Court’s refusal to apply the 14th Amendment to *all* discriminatory action both *state* and *private* led states—mainly but not entirely in the South—to enact more discriminatory laws (the Black Codes and Jim Crow laws—derogatorily named after a theatrical character depicting a slave and a traditional slave song “Jump Jim Crow”).

These laws aimed at Blacks restricted education, the right to travel, vote, testify in court, and sit on juries, among other things, giving greater impetus to an era rife with the badges, incidents and vestiges of slavery. These laws promoted segregation based on skin color.

It was not until the mid-20th century when courts began to stand up for equal protection.

The struggle did not end there. Southern and conservative states continued to enact laws undermining individual freedoms by,

among other things, suppressing voting rights, limiting reproductive rights, and denying individuals' basic rights because of their sexual orientation.

Slavery (1619–1865)

Slavery existed in America from when slaves were first brought to Jamestown, Virginia (1619) and continued through America's declaration of independence (1776), writing (1787) and ratification of the US Constitution (1789), and the Civil War (ending in 1865).

Slaves, denied basic human rights, were prisoners of their White masters. Slavery was marked by mental, physical and sexual abuse. Slaves were roundly denied education, the right to marry, or control of their children. They lived and died in extreme poverty under the White man's whip with no civil rights. A very small minority were freed or escaped to the North.

Slavery lasted 246 years in North America.

Juneteenth (short for "June Nineteenth") marks the day when federal troops arrived in Galveston, Texas in 1865 to take control of the state and make sure Blacks were set free. The troops' arrival came two and a half years after the signing of the Emancipation Proclamation (January 1, 1863). Juneteenth honors the end to slavery in the US and is considered the longest-running African American holiday.

Indigenous People (Native Americans—American Indians)

Native Americans populated the New World before the White man came. Their population was drastically reduced through contact with the White man.

Two things caused the American Indian population to go from an estimated 12 to 15 million with the arrival of Columbus (1492) to 237,000 by 1900:

- (1) American Indians lacked immunities to European diseases; this accounted for the majority of their deaths—primarily from smallpox but from other diseases including measles, influenza, whooping cough, diphtheria, typhus, bubonic plague, cholera, and scarlet fever; and,
- (2) westward continental expansion and the influx of European immigrants in the 1800s led the US to turn Indian land into new territories and states, force relocation of Indian nations and tribes, and war with and massacre the ones who fought to stand their ground.

Indian braves who fought back were often ferocious in their killing and mutilation of Whites.

Formal US policy was *not* to annihilate the Indian (genocide) but fraudulently induced and broken treaties creating and shrinking reservation land, together with the US Army's politically sanctioned efforts at warring with the Indian, appeared aimed at just that.

Asian Americans

Asians in the United States have been the object of racial prejudice, unjust laws and court rulings. Asians first began to emigrate to the US in the mid-19th century to work in the West in gold fields and on railroads under dangerous conditions made worse by severe cold and heat.

Like slaves and other immigrant groups they did the pick-and-shovel-hard-labor jobs that built America. Fifteen to twenty thousand Chinese worked on the first transcontinental railroad.

Hundreds of their lives were lost in blasting accidents laying track and tunneling through the solid rock of western mountains.

Since coming to America, Asians have undergone violent and unjust discrimination but now have mainly overcome it.

Asians' unjust treatment included laws barring them from testifying in court and preventing them from becoming citizens; their immigration to America was cut off for years and otherwise restricted; Whites burned down China towns, rioted against Chinese, excluded Asians from union jobs; and, the US government conducted a race-based wartime internment (imprisonment) of Japanese Americans including those who were US citizens at the time.

With respect to Covid 19 in 2020 persons of Asian descent were verbally abused, name-called, coughed and spat on, even physically assaulted, as the coronavirus continued to upend American life. As political rhetoric blaming China for the coronavirus escalated from the US President (Trump) and others, law enforcement officials and human rights advocates saw increasing numbers of hate crimes and incidents of harassment against Asians.

This came at a time when Asians were the biggest immigration group in the United States just ahead of Hispanics (mainly from Mexico and Central America).

Civil Rights and the Courts

The history of civil rights in America is reflected in its laws and court decisions calculated to engender fairness and overcome racial and other kinds of widespread injustice.

But laws and court decisions do not always translate into practice.

The United States Supreme Court has the power to interpret the Constitution. The interpretation of the Constitution usually occurs on a case by case basis.

Unless a provision in the Constitution gets tested in court its legal significance is unsettled. Likewise, a federal law or state law enacted by Congress or a state legislature may or may not be in conflict with the Constitution. Whether or not the law is in conflict can only be determined after it has been challenged in court.

Regarding civil rights, there has been discrimination against persons based on race, color, national origin, religion, sex (gender), sexual orientation, age, and disabilities. The Supreme Court has had opportunities to end such discrimination.

Often, early on, the Court failed to do so. Yet over time both legislation and court decisions have increasingly done so.

Assignment

Write a summary of Chapter 1 in your own words. Also, for upcoming assignments, if you have not briefed a case it would be helpful to familiarize yourself with a briefing method. As students of history and students of law it is essential to know how to brief a case.

Traditionally the method for briefing a case is referred to by the acronym IRAC. IRAC stands for Issue Rule Argument Conclusion.

Issue—The key legal question(s) in the case phrased in the form of a question.

Rule—The source(s) of law relevant to the issue.

Argument—A discussion blending the law and facts of the case in a logical progression toward a legal or equitable conclusion.

Conclusion—The decision reached in the case.

Some briefers use FIRAC. It starts with the facts of the case and proceeds with IRAC.

Here is an example of FIRAC using *Garner v. Louisiana (1961)* a sit-in civil rights case:

Facts: John Burrell Garner, a Black student and two Black friends sat at the White lunch counter of Sitman's Drug Store in

Baton Rouge, Louisiana. The store owner having lunch at the same counter asked them to move to the Black counter across the store but they refused. They just sat there. They were still just sitting there when police officers arrived after the store owner finished his lunch and called them. The police arrested Garner and the others for disturbing the peace.

Issue: Did Garner violate the Louisiana “disturbing the peace” statute?

Rules: Louisiana “disturbing the peace” statute and 14th Amendment

Argument: The Louisiana statute lists several examples of disturbing the peace (fighting, drunk in public, violent conduct by three or more persons, unlawful assembly, interrupting a lawful assembly, or committing any other act to unreasonably disturb or alarm the public).

Garner did none of these things. There is no evidence in the record of any conduct except sitting at Sitman’s. Absent evidence against a person no person can be lawfully convicted.

Due process requires any conviction be based on substantial evidence. The 14th Amendment applies due process requirements to the states.

Here the conviction without evidence under the state “disturbing the peace” statute amounted to a denial of due process.

Conclusion: The Louisiana court judgment is reversed.

CHAPTER 2

Courts, Slavery and Discrimination

Dred Scott v. Sandford (1857)

Dred Scott, a slave, sued for freedom on the ground that he had temporarily resided in a free state (Illinois) and free territory (Wisconsin). The Court found the Missouri Compromise (1820), and a prior Congressional act (1787) establishing free territories around the Great Lakes, unconstitutional because the Constitution itself did not give Congress power to regulate slavery in any state or territory (as the Missouri Compromise and the 1787 congressional act purported to do).

The Court also found the Constitution did not consider persons of African descent citizens entitled to any rights or protections under it. The Court found slaves personal “property” of their owners.

The Court denied Scott his freedom.

[Context—Most slaves never got to travel. At that time establishing a presence or residency in some free states was a means to a slave's freedom under that state's law. The Chief Justice's refusal to recognize a Black as a person underscored his lack of humanity and moral failure to dignify individuals of color. It was a ruling for slaveholders, slavery expansionists, and those Americans who degraded and exploited Blacks for economic and other reasons.]

United States v. Cruikshank (1876)

This case involved the disputed 1872 Louisiana gubernatorial election and the Colfax massacre. The outcome of the election was still in doubt when months later on Easter Sunday 1873 hundreds of freedmen (Black Republicans), some armed and part of the state militia, assembled around the Grant Parish Courthouse in Colfax to protect it from a much more heavily-armed white militia hell-bent on taking it over.

By next day the white militia had lost three members but had killed between an estimated 60 to 150 freedmen. It was a hateful crazed slaughter made more deranged by the murder of Blacks after surrender and after being taken prisoners.

Cruikshank and others were charged with murder, violation of the Klan Act (Enforcement Act of 1870) (*i.e.*, conspiring to deprive freedmen of federal constitutional rights), depriving them of their freedom to assemble (1st Amendment), their right to bear arms (2nd Amendment), and depriving them of their lives under the 14th Amendment.

The majority opinion of the US Supreme Court based its decision on its interpretation of the country's political system with its built-in duality marked by state and federal sovereignty.

The Court found freedom of assembly and the right to bear arms to predate the Constitution. The Court rationalized that these

constitutionally protected rights found in the Bill of Rights protected an aggrieved party not from private citizens acting to deny them such rights but only from Congress if it were to act in some way to deny these rights.

The Court also found that 14th Amendment protection meant the federal government guaranteed a persons' rights would not be infringed by state action—a guaranty that did not extend to private (individual) action—and here there was no state action only private action.

The Court found the Klan Act claims misguided or not sufficiently framed.

The court rejected the claims and reversed the convictions.

[Context: The case went from local courthouse massacre to US Supreme Court massacre.

It was a ruling for the Klan.

It emboldened white paramilitary groups to terrorize Blacks. Federal efforts to protect Black civil rights had evaporated.

Reconstruction was over.

The Supreme Court took the language “No state ... shall ... deprive any person of life, liberty, or property [or] deny to any person within its jurisdiction equal protection of the laws” in the 14th Amendment literally, applying it to *state* action only (No *state* shall) and not to (the murderers’) *private* actions.

Later decisions relented somewhat in allowing the 1st and 2nd Amendments to apply to state action instead of congressional action only.

But overall the 14th Amendment stood for equal protection for *all* but only as to *state* wrongdoing and not *private* wrongdoing.

The question in the first instance is “Does ‘No state shall deprive [or] deny’ refer specifically and narrowly to the action of a state or does it mean that no state shall allow deprivation or denial of rights to any person within its jurisdiction BY ANYONE—NOT JUST THE STATE?”