CHAPTER 1

American Apartheid

Power concedes nothing without demand.
It never did and it never will.

—Frederick Douglass[1]

Liberty and equality have been closely interconnected throughout American history. This is true in both a negative and a positive sense. In the negative sense, the denial of liberty supported the denial of equality and vice versa. White-controlled government and private interests in the United States denied African Americans equality in political, economic, educational, and social spheres and suppressed their liberty by restricting their rights to speak, publish, assemble, petition, and worship. Denials of equality and liberty are two sides of the same coin—a coin that came up "heads, I win; tails, you lose." This was American apartheid.[2] Yet the connection also existed in a positive sense: the exercise of liberty supported equality and vice versa. Even when liberty and equality were heavily restricted by law—especially to people of color—during American apartheid, to the extent greater racial equality was achieved, it was essentially tied to the exercise of First Amendment liberty values.

To be sure, this era is too long and complex to provide more than just an overview in one chapter, so here I focus on the most significant legal developments regarding liberty and equality with some attention to extralegal aspects to support major themes. The chapter addresses liberty and equality in three suberas: colonial history, the Antebellum era, and post–Civil War to the 1930s. This examination reveals that progress in racial equality was painful and slow and fell far short of substantive liberty and equality. However, it also demonstrates a symbiotic relationship between liberty and equality that contributed significantly to the progress that did occur. African Americans and their allies

used the First Amendment values of free speech, religion, the press, assembly, and petition to advance racial equality, and in turn, advances in racial equality led to greater legal protections for African American liberty. In effect, an irresistible force managed to budge an immovable object. Why? As will be explained in more detail in chapter 4—liberty and equality promote greater inclusion and participation and oppose orthodoxy.

THE COLONIAL ERA

The first Africans to arrive on continental US soil were slaves of Spanish colonists in Georgia in 1526, the Tampa Bay area in 1528, and St. Augustine in 1565.[3] The Africans who arrived in the English Jamestown colony in 1619 became indentured servants,[4] but by 1636 only whites could be indentured servants.[5] Enslavement of African Americans—and Native Americans—was widely practiced prior to its legalization in, for example, Massachusetts (1641), Connecticut (1650), Virginia (1661), Maryland (1663), New York (1664), and New Jersey (1664). As early as 1688, a few colonists opposed slavery,[6] and English judicial decisions against slavery beginning in 1705 culminated in the 1772 *Somerset* case freeing all existing English slaves.[7] The decision did not apply to the American colonies.

The details of the oppression of slaves varied according to the nationality of the colonizer, the geographical location of the colonial outpost, the colony's demographics, the prevailing modes of economic production, and the operation of the Atlantic slave trade affecting overall quantity, sex ratio, and geographical source of the slaves.[8] It is beyond my present purposes to join the debate on whether racism led to slavery, slavery led to racism, or they commingled to produce the resulting system.[9] The salient fact for my purposes is when the United States was founded in 1776, both racism and slavery were firmly in place. Slavery was legal in all thirteen colonies, and white supremacy was assumed even by the white minority who opposed slavery.

Freedom of speech and press were severely curtailed for colonists and slaves in the colonial era. The English Parliament Licensing Order of 1643 and Licensing Act of 1662 required government approval of publications until the laws' repeal in 1694, but censorship in the colonies predated these laws and continued after their repeal. Consider a few examples. The first US printer—Stephen Day of Cambridge, Massachusetts—was arrested and paid a £100 bond pledging not to further offend officials only four years after opening his press in 1639.[10] Massachusetts had licensers of the press from 1662 to 1755. Virginia forbade printing between 1682 and 1729. The first

newspaper, *Boston's Publick Occurrences Both Forreign and Domestick*, began in 1690 but was out of business four days later after offending the governor.[11] Because criticisms of public officials or material considered immoral or blasphemous were punishable, hundreds of colonists were required to recant offensive speeches or writings, were expelled from the community or colony, or worse.[12] The long arm of colonial censorship was a forgotten part of history until Leonard Levy's *Legacy of Suppression* was published in 1960.[13] Levy's "discovery" of extensive colonial censorship, considered radical and revisionist in 1960, is now orthodoxy.

To be sure, colonists criticized and satirized government institutions, policies, and authorities, but they did so at great peril because speech that had a "bad tendency" was illegal.[14] Expression was not protected if it undermined authority, order, or morality. Many successful prosecutions claimed that a newspaper editor committed criminal libel (sedition) merely by criticizing a colonial official. Although the jury famously acquitted John Peter Zenger after his lawyers argued that truth was a defense against criminal libel in *Crown v. John Peter Zenger* (1735), true statements deemed seditious continued to be punished.[15] Truth as a defense against charges did not become law until after the colonial period. The New York legislature was first to pass such a law in the aftermath of *People v. Croswell* (3 Johns. Cas. 337 NY 1804).[16]

Colonial government also curtailed freedom of religion. Since slaves were chattel, their ability to worship was subject to the whims of their masters. For free men, freedom of religion primarily consisted of the legal right of a local majority Christian denomination to exclude, oppress, or even kill others.[17] For example, the Puritan Church received state tax money and punished nonconformists with fines, whippings, prison, banishment, or hanging. Although the Anglican church in Virginia permitted non-Anglicans to worship as they chose, they were banned from public office, restricted to specific meeting houses or locations, and forced to pay taxes to support the Anglican church. The Anglican church also was established by law in Maryland, South Carolina, North Carolina, Virginia, Georgia, and metropolitan New York. Localized majority-rule religious establishments existed in Massachusetts, Connecticut, New Hampshire, and Vermont. Catholics in Massachusetts could hold public office only after renouncing the pope. The colonial textbook (*New England Primer*) and its 1800s replacement (*McGuffey's Readers*) framed all knowledge around a Protestant worldview.[18]

In sum, liberty and equality in the colonial era were predominantly the privilege of white, propertied, Protestant males. African Americans, free or enslaved, had little liberty or equality.

INEQUALITY IN THE ANTEBELLUM ERA

The colonists' break from English rule resulted in few immediate improvements in liberty or equality for most African Americans, but the winds of change began to stir. There were approximately half a million slaves at the founding of the United States, most living in the South, where they composed about 40 percent of the population.[19] The Declaration of Independence adopted by the Continental Congress on July 4, 1776, boldly proclaimed "all men are created equal"; this did not mean all men (or women) had equal legal rights or liberties. The new nation's hero and first president, George Washington, owned slaves from age eleven to his death in a state with a 40 percent slave population and only 1 percent free blacks. He was raised to believe in white superiority and black people as mere chattel, but he came to believe slavery ought to be gradually abolished and was the only founding father who owned slaves to free them.[20] Thomas Jefferson considered slavery a moral depravity that violated natural law and rights and was the greatest threat to the survival of the new nation, yet he also believed in white superiority and the impossibility of free whites and free blacks living peacefully together.[21]

The 1790 Naturalization Act restricted citizenship to free white men, but a growing consensus in the North against slavery led states to adopt policies gradually abolishing slavery.[22] Over time, abolitionists convinced northerners that slavery conflicted with biblical teachings, had debilitating and dehumanizing effects on the slave owner, violated the natural law of individual liberty, and led to murder, robbery, lewdness, and barbarity. Delaware's constitution (1776) outlawed the importation of slaves, but not slavery itself. Vermont's constitution (1777) freed male slaves over age twenty-one and female slaves over eighteen. Pennsylvania (1780) freed the future children of existing slaves. Slavery was abolished in Massachusetts in 1783 by judicial interpretation of the state's constitution. New Hampshire (1783), Connecticut (1784), Rhode Island (1784), and Maine (1789) passed laws gradually ending slavery. The Northwest Ordinance (1787) outlawed slavery in the territory but permitted the recapture and return of fugitive slaves.

Few Southerners were convinced by moral arguments, and there was a strong economic component to the divide over slavery.[23] This division led to three compromises in the 1789 US Constitution, replacing the 1781 Articles of Confederation and Perpetual Union. The "slave clauses" did not explicitly establish or justify slavery but implicitly acknowledged it. The Three-Fifths Clause in Article 1, Section 2, Clause 3 stated: "Representatives and direct

Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons." This was a compromise between Northerners, who didn't want slaves to count in determining political representation, and Southerners, who wanted slaves to count as whole persons. The deadlock was resolved by including taxes. The North thereby limited the political impact of slaves in the census count, and the South limited their federal tax liability. The Slave Trade Clause in Article 1, Section 9, Clause 1 stated, "The Migration or Importation of such Persons as any of the State now existing shall think proper to admit, shall not be prohibited by Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such importation, not exceeding ten dollars for each person." This clause permitted existing states with slaves to continue the slave trade without federal interference for twenty years with only a concession to a potential tax. The sunset provision and non-application to new states combined with leaving the option for a state to ban slavery within its own borders to satisfy Northern and Southern interests. The Fugitive Slave Clause in Article 4, Section 2, Clause 3, stated, "No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due." This avoided establishing slavery as a constitutional right (the persons involved were held to service or labor under state law) and provided no enforcement mechanism (which satisfied Northern interests); however, it recognized a slave owner's state-sanctioned property right in a slave (which satisfied Southern interests).

After the Revolutionary War, the free black population increased slightly in the South because a few owners freed slaves who fought against the Crown. For example, prior to the war, 1 percent of blacks lived free in Virginia; after the war, 4 percent lived free. The continuation of slavery as a dominant mode of labor in the South meant that most African Americans continued to lack even the most basic forms of liberty and equality. Slave codes varied by state, but typically slaves could not legally marry, be educated, carry a gun, assemble without a white person present, conduct any business without the consent of their owner, preach, keep dogs or stock, or cultivate land for personal use. A slave who used abusive or provocative language toward a white person was subject to a maximum of thirty-nine lashes.[24] Slaves worked on plantations and

in pottery mills, textile centers, iron mills, dockyards, and more. They had no legal right to freedom of religion but were not forced to become Christians, as were slaves in many other New World countries, because from "colonial times through the first decades of the nineteenth century most southern slave owners feared Christian slaves would become unruly servants or might even demand freedom and equality."[25] By the 1830s and 1840s, Southern slave owners came to believe, as an Alabama judge put it, "religious instruction, properly directed, not only benefits the slave in his moral relations [but] also enhances his value as an honest, faithful servant and laborer."[26]

The existence of free blacks in the South was a thorn in the side of the white establishment. Freedmen were a living refutation of white supremacist ideology and increased slave discontent. Thus, when the number of free blacks in the South doubled to 260,000 between 1820 and 1860 and interracial sex threatened white purity, the white establishment defined "black" in broader terms and began to enforce a rigid black-slave white-free dichotomy with restrictions on emancipation; systems of registration, taxation, and guardianship; forced expulsions; and "voluntary" enslavement. The repression was successful: by the 1850s, free blacks in the South "had nowhere to go."[27]

African Americans in Northern states suffered legal, political, and social inequality through law, social norms, and mob violence. Indiana passed a law expatriating free blacks and prohibiting the entrance of new ones; Illinois, Iowa, and Delaware excluded blacks from the militia, public schools, and testifying against a white person.[28] Northern states customarily enforced segregation on stagecoaches, steamboats, and trains, which led an English observer to comment there were "two nations—one white and another black—growing up together within the same political circle, but never mingling on a principle of equality."[29] Most states did not allow black men to vote, although there were exceptions and changes over time.[30] For example, in 1821 New York placed a $250 property requirement on black men at the same time it dropped most property requirements for white men. Pennsylvania allowed black men to vote until stripping them of that right in 1838. Rhode Island disenfranchised black men in 1822 but returned the right to vote after the so-called Dorr Rebellion in 1843. Massachusetts granted black men the right to vote in the 1780s and never changed course. According to Christopher Malone, the voting changes resulted from changes in the economics of racial conflict, political race affiliation, and racial coalitions.[31] White supremacy in the North was also enforced by mob violence. John Hope Franklin and Elizabeth Brooks Higginbotham observe, "Riots, murders, the destruction of churches, schools, and orphanages occurred in the Mideast and the Northeast."[32]

African Americans were denied educational equality by law, social norms, and mob violence. Slave codes in the South typically prohibited blacks from attending school or even reading and writing.[33] Free blacks in the South had worse education than those in the North. For example, in 1850 about 1,500 of 2,000 black children attended school in Boston, whereas fewer than 300 out of 6,500 did in Louisiana, and only 40 out of 22,000 in Virginia; in 1860 about 33 percent of black children were schooled in the North but only 4 percent were schooled in the South.[34] The situation was only slightly better in the North. The first African Free School was not founded until 1787 in New York, and it did not receive public funding until 1824. A school for black girls in Canterbury, Connecticut, had to struggle through attempted arson and uses of a vagrancy law to prosecute students from out of state.[35]

The example of Boston is illuminating. Boston schools initially included blacks, but black parents petitioned for separate schools as early as 1787 because of widespread harassment of their children by white teachers and students. Their petition was denied by the state legislature, so a private segregated school was established in 1798. Eventually, black children were admitted only into segregated primary schools on Belknap and Sun Court Streets; beyond primary grades, they were admitted only to the segregated Smith School. By the 1840s, black parents petitioned for integrated schools because of prejudice resulting from segregated schools and objections to paying tax dollars to support public schools their children could not attend. Their petitions were rejected, so Benjamin Roberts brought the first suit in the nation against "separate but equal" practices on behalf of his daughter, Sarah. Charles Sumner, an outspoken white abolitionist, and Robert Morris, one of the first African American lawyers, argued that the Massachusetts constitution and state laws were color-blind, and the racially segregated schools were thus illegal. In a decision foreshadowing the future "separate but equal" doctrine of the US Supreme Court, the Massachusetts Supreme Court rejected their argument. *Roberts v. City of Boston*, 59 MA 198 (1850), held that the policy was adopted and enforced in a legally sound manner and separate education was equal. Any resulting racial prejudice "is not created by the law, and probably cannot be changed by the law."

The role the US Supreme Court would play in legal disputes over liberty and equality was unclear. A democracy can function without judicial review (the ability of a court to overturn primary legislation),[36] and the power of the Supreme Court to strike down congressional acts was a matter of contention.[37] The US Supreme Court first addressed the constitutionality of an act of Congress in *Hylton v. United States*, 3 US 171 (1796), when it upheld a federal

tax on carriages for conveying people. Seven years later it struck down an act of Congress for the first time. *Marbury v. Madison*, 5 US 137 (1803), unanimously held the Judicial Act of 1798 was unconstitutional because it extended the jurisdiction of courts beyond the limits established in Article III of the Constitution.[38] In defending the right of the court to nullify federal legislation, Chief Justice John Marshall emphasized that the absence of judicial review meant an act of Congress would be constitutional just because Congress passed it, not because it fulfilled the requirements of the Constitution. This negates the foundation of all written constitutions. Second, the Constitution grants judicial power to all cases arising under the Constitution, and this power can only be fulfilled if the court can nullify an act of Congress violating the Constitution. Third, judges are required to take an oath to uphold the Constitution. They could not keep this oath if they refused jurisdiction on a case alleging an act of Congress violated the Constitution. Finally, the Constitution declares itself the supreme law of the land and only those laws consistent with the Constitution are also law.[39]

Marbury is one of the most important Supreme Court opinions. By 2014, the Court had invalidated 176 acts of Congress.[40] Yet as we shall see, throughout American apartheid the court frequently exercised that power to uphold racial inequality and restrict civil liberty. Even in those rare cases—such as the Cherokee Nation cases addressed next—in which the Court ruled in favor of a racial minority, other factors mitigated or negated its impact.

Colonists also enslaved Native Americans, often for export to other colonies to prevent them from escaping to familiar territory. Some Native tribes—including the Cherokee—kept war captives as slaves or enslaved others as a means of benefiting from or assimilating to "white ways."[41] Because slave records usually did not indicate race, there is no reliable estimate of the overall numbers of Native American slaves.[42] South Carolina was an exception. Its 1708 population of 9,580 included 4,100 African American slaves and 1,400 Native American slaves.[43]

The Cherokee Nation, whose territory encompassed land in eight Southeastern states, began to lose land to colonists in the late 1700s through land disputes, violence, and war. The climax came in 1828 when the Georgia legislature passed laws annexing Cherokee land; abolishing their government, courts, and laws; and establishing a process for confiscating their land and redistributing it to whites. The federal executive branch refused to protect the Cherokee from the state's assault, so the tribe petitioned the US Supreme Court to strike down the laws. They argued that they were a foreign nation subject to treaty

with and action by the federal government alone according to the Constitution's Treaty Clause, Article 2, Section 2, Clause 2.

The Cherokee Nation lost. *Cherokee Nation v. Georgia*, 30 US 1 (1831), held the Supreme Court had no jurisdiction because Indian nations within US borders were not "foreign nations."[44] Rather, they were "domestic dependent nations" in a "state of pupilage" resembling that of a "ward to his guardian." The court disregarded the merits of their plea, and the tribe was subject to the oppressive state laws despite Chief Justice Marshall's observation that "if courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined."[45] In other words, the court would address only "what the law is," not "what the law should be," and the court determined what "the law" is by identifying the original meaning of the phrase "foreign nation." Whether this provided substantive justice or fairness to the Cherokee was irrelevant.

A second legal case involving the Cherokee was already in progress. In 1825, Congregationalist missionary Samuel Worcester and his family moved from Vermont to live with the Cherokee. He taught the Gospel and the English language, helped establish the first Native American newspaper (the *Cherokee Phoenix*), and assisted tribal leaders in defending their rights against white encroachment. To stop people like Worcester, Georgia banned non-Indians from Indian land without a license from the state in 1830. In an "early instance of religiously based civil disobedience and dissent,"[46] Worcester and ten other white people wrote a newspaper article opposing the law and intentionally got themselves arrested for residing on Indian land without a license. All were convicted. Nine accepted pardons. Worcester and one other refused the pardon to appeal their conviction.

In a stunning reversal from its 1831 decision, the Supreme Court held in *Worcester v. Georgia*, 31 US 515 (1832), that the Cherokee Nation was a foreign nation subject to agreement only with the federal government, not individual states. The Georgia law was unconstitutional. Why did the court reverse itself? There is evidence the justices regretted their earlier decision. Justice Joseph Story, for example, wrote to his wife on March 4, 1832: "Thanks be to God, the Court can wash their hands clean of the iniquity of oppressing the Indians and disregarding their rights."[47] Yet no such language appears in the decision. Instead, the court defended its new view about the legal status of the Cherokee with an analysis of the legal relationships, especially treaties, between the tribe and colonial, federal, and state governments, including Georgia. Rather than look only to the text of the Constitution or the intentions of the framers,

the Court looked more broadly into the history of the relationships and, in ruling that indigenous peoples were subject only to federal control, struck a blow against the states' rights doctrine that has played a pivotal role in our nation's history.[48]

Tragically, the Cherokee legal victory was purely symbolic.[49] Enforcement was in the hands of the Executive Branch of government, and Presidents Andrew Jackson and Martin Van Buren continued the practice of removing tribes to "Indian Territory" west of the Mississippi. Thousands of Cherokee died during their forced removal from 1836 to 1839.[50]Abolitionists recognized the common plight of African Americans and Native Americans. Lewis Perry notes, "virtually every antislavery reformer who withdrew from the gradualist colonization movement in favor of immediate abolitionism linked this radical step to disgust at Jacksonian Indian policy."[51] A graphic example: the masthead of the influential abolitionist William Lloyd Garrison's publication *The Liberator* depicted participants in a slave market trampling Indian treaties.

Women were denied liberty and equality, too.[52] Unmarried women had more rights than married women, but they still could not vote, lacked equal employment and education opportunities, and more. A married woman lost virtually all legal rights due to the English common law doctrine of coverture.[53] For example, married women had a right to a lifestyle consistent with her husband's status and property she owned prior to marriage remained hers, but she could not sell or otherwise dispose of that property herself.[54] At the nation's founding, New Jersey was the only state to allow women (who met property requirements) to vote but rescinded that right in 1807. The constitutions of Wyoming (1869) and Utah (1870) granted women suffrage, but women in Utah were disenfranchised by the Edmunds-Tucker Act (1887) in which Congress annulled numerous state laws stemming from Mormon practices and authorized seizure of church assets to use for public schools as a threat to make Mormons accept the ban on polygamy. Women did not gain the right to vote generally until the Nineteenth Amendment was ratified in 1920. States gradually reduced coverture from the mid- to the late nineteenth century, but the US Supreme Court did not rule it unconstitutional until *Kirchberg v. Feenstra*, 450 US 455 (1981), struck down Louisiana's "Head and Master" law giving husbands sole control of marital property.

Here, too, abolitionists saw the connection between illiberty and inequality, and liberty and equality. For example, Harriet Beecher Stowe, author of the famous abolitionist novel *Uncle Tom's Cabin*, observed in an 1869 speech that the condition of women under coverture was in many respects like the condition of

African Americans.[55] Stowe was arguing against both sets of inequalities, and her opponents understood the link as well. Opponents of the Civil Rights Act of 1866 objected to increased equality and liberty for African Americans on the basis it would lead to increased equality and liberty for women, too. In other words, they considered it bad enough to grant equal rights to former slaves, but to grant them to married women was even worse.[56] Frederick Douglass, the escaped slave who became a celebrated orator, author, and politician, took the link further in advocating equal rights for blacks, women, Native Americans, and immigrants.[57]

SUPPRESSION OF CIVIL LIBERTY IN THE ANTEBELLUM ERA

Government authorities and vigilantes continued to suppress free speech, press, assembly, petition, and religion after the nation's founding.[58] One of the most important examples is the Sedition Act. Just seven years after the Bill of Rights was ratified, the Federalist Party, led by President John Adams, passed the Alien and Sedition Acts of 1798, creating restrictions on immigration (Naturalization Act), dangerous noncitizens (Alien Friends Act), noncitizens from a hostile nation (Alien Enemies Act), and citizens critical of government (Sedition Act). They claimed the laws were needed to prevent the French Revolution from spreading to our shores. The Democratic-Republican Party, led by Thomas Jefferson, objected to the Sedition Act. They believed it violated the Constitution's free speech clause and would be used for political purposes to persecute critics of the Federalists. They were right: high-profile political prosecutions under the Sedition Act indicted fourteen people and convicted ten.[59] Fortunately, popular backlash contributed to a Democratic-Republican victory in the 1800 elections, and the new regime let the Sedition Act lapse, freed those still serving sentences, and repaid fines.

The legislative lapse of the Sedition Act did not mean speech, press, assembly, petition, and religion were free from government suppression. First, none of the legal cases involving the Sedition Act reached the Supreme Court, and the lower courts that heard the cases—including three with Supreme Court justices "riding circuit"—upheld its constitutionality.[60] Second, *Barron v. Baltimore*, 32 US 243 (1833), unanimously held the Bill of Rights—including the First Amendment—applied only to acts of Congress.[61] The Court reasoned that constitutional limits only apply to states where expressly stated, and the Bill of Rights did not expressly state their application to state government. The decision left states free to restrict civil liberties as they saw fit within the

limits of their own constitution. Third, the Supreme Court was minimally protective of speech in the few cases involving acts of Congress it considered. Its initial First Amendment case, *Anderson v. Dunn*, 19 US 204 (1821), held that the power of Congress to punish contempt of Congress was limited to "the least possible power adequate to the end proposed," but it did not identify any limits or requirements regarding the content of the speech Congress could consider contempt.[62] Fourth, the bad tendency test continued to be used to punish unpopular speech and criticisms of government. There were convictions for criticism of President Jefferson in 1804,[63] a sheriff in 1811,[64] and an 1824 case involving blasphemy.[65] The bad tendency test was used to punish political dissent as late as *Gitlow v. New York*, 268 US 652 (1925), and *Whitney v. California*, 274 US 357 (1927). Finally, even if the criticism of government was true, one could still be found guilty of seditious libel. Massachusetts, for example, did not pass a law allowing truth as defense against sedition until 1855.[66] The Supreme Court did not explicitly prohibit sedition laws until *New York Times v. Sullivan*, 376 US 254 (1964).[67]

Consider African American publications. The first black copyrighted publication was *A Narrative of the Proceedings of the Black People during the Late Awful Calamity in Philadelphia* (1794). It argued for respect, freedom, and equal citizenship. The first black newspaper—just one of nearly 900 newspapers in the nation at the time—was *Freedom's Journal*, launched in New York in 1827 as an avenue for black expression and response to racism. There was virtually no Antebellum black press in the slave-holding South. The *Daily Creole* in New Orleans published for a short time circa 1856 but was pressured by whites to oppose abolitionism. In the North, about forty black newspapers published prior to the Civil War, but they suffered from frequent changes in ownership or bankruptcy due to financial difficulties related to white disinterest or antagonism, low black literacy rates, a social justice agenda not motivated by profitmaking, and low advertising revenue.[68] Before the Civil War, the black press often focused on uplifting messages to blacks rather than criticisms of racism and inequality to avoid antagonizing whites or inciting mob violence.[69] Some did advocate abolitionism—such as Frederick Douglass's *North-Star* and *Frederick Douglass' Paper*—and some blacks wrote for *The Liberator*. But "radical" black writings—such as David Walker's *An Appeal to the Coloured Citizens of the World* in 1829 urging black readers to fight their oppression and convince white Americans to abandon the evil institution of slavery—faced government and vigilante suppression. In Charleston and New Orleans, distributors of Walker's book were arrested, and harsh penalties were enacted for its circulation in other places.[70] Georgia announced an award of $10,000 to anyone who could hand over

Walker alive and $1,000 to anyone who murdered him. Walker died mysteriously just a few months later.[71]

Freedom of religion continued to be suppressed. New York's constitution banned Catholics from public office. In Maryland, Catholics (but not Jews) had civil rights equal to Protestants because the state had a substantial Catholic population. Connecticut did not disestablish the Congregationalist Church until it adopted a constitution in 1818, and Massachusetts did not disestablish the Congregationalist Church until 1833. Public schools continued their Protestant bias. *McGuffey's Readers* replaced the *New England Primer* but continued to preach a Protestant world-view.[72] The Civilization Act of 1819 provided funds for only Protestant missionaries to convert Native Americans. Public schools continued to require devotional reading from the King James Bible (KJB) and other Protestant religious observances. Protestants battled over whose interpretation of the KJB to require in public schools until they found a common foe in the 1820s to 1840s: Irish and German Catholic immigrants. Protestant leaders publicly supported Protestant teachers and KJB reading in public schools as a means to convert Catholic children.[73] Public school textbooks included blatantly anti-Catholic references.[74] Catholic children in public schools who refused to engage in reading the KJB or other Protestant observances were punished—often by beating or caning—or were expelled from school, a practice that continued in some states into the twentieth century.[75] When Catholics protested the discrimination, violent Protestant mobs often retaliated.[76]

The law upheld religious discrimination in public schools.[77] The First Amendment offered Catholics (or any other religious minority) no protection. *Permoli v. Municipality No. 1 of New Orleans*, 44 US 589 (1845), held the "constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitution and laws."[78] Protestant bias in public schools was so pervasive that it was a shock when the Ohio Supreme Court ruled in *Board of Education v. Minor*, 23 Ohio 211 (1872) that the Cincinnati school board could lawfully choose not to require KJB reading. Wisconsin was the first state to ban Protestant devotional KJB reading in public schools in *State ex rel Weiss v. District Board*, 76 WI 177 (1890). The US Supreme Court did not ban devotional Bible reading in public schools until *Abington v. Schempp*, 374 US 203 (1963).

Abolitionism was the most significant movement uniting liberty and equality. The antislavery movement became the nation's lightning rod when it expanded dramatically in the 1820s and 1830s and began to include free blacks and runaway slaves and demand an immediate end to slavery rather

than gradual abolition.[79] Patrick Rael provides an excellent account of famous and lesser-known African Americans who contributed to this effort despite the obstacles against them and shows how the "universalist" appeals they developed are still invoked in contemporary struggles for racial justice.[80] States and the federal government went to great lengths to suppress the antislavery message.[81] Southern states restricted and later banned antislavery speech and press with draconian penalties, including the death penalty,[82] and demanded that Northern states follow suit.[83] When abolitionists flooded the mail with newspapers and pamphlets, defenders of slavery failed to convince Congress to ban abolitionist speech and press, but they succeeded in getting the Post Office to censor the US mail[84] and Congress to impose a gag rule on abolitionist petitions. Although Northerners eventually rejected legal censorship of abolitionism when they realized it was a denial of their own liberty,[85] significant legal actions and mob violence against abolitionists still occurred in the North.[86] Abolitionists were threatened, beaten, and even killed.[87] Perhaps the most famous abolitionist martyr was Elijah Lovejoy, a minister and newspaperman who had three abolitionist presses in St. Louis destroyed by mobs before he was killed by gunfire defending his fourth press in Alton, Illinois, in 1837. Rather than suppress abolitionism, Lovejoy's death sparked widespread protests and increased support for the end of slavery.

The divide over slavery led to a series of hotly debated political compromises as new states were admitted. The Missouri Compromise (1820–1821) admitted Missouri as a slave state and Maine as a free state to maintain the balance in the Senate. The Compromise of 1850 admitted California as a free state and left slavery to the voters in New Mexico and Utah, but it also included the Fugitive Slave Act, strengthening requirements to return escaped slaves. The Kansas-Nebraska Act of 1854 further inflamed passions by repealing the Missouri Compromise so Kansas voters could make it a slave state to balance Nebraska as a free state. The demand that abolitionist speech be protected—argued especially by the Liberty Party, the Free Soil Party, and eventually the Republican Party—grew louder. Finally, the US Supreme Court leaped into the scalding cauldron with a decision many legal scholars consider its worst.[88]

Dred Scott was a born a slave in Virginia but lived and worked in Illinois (a free state) and Wisconsin (a free territory). Assisted by abolitionists, Scott sued for his freedom in Missouri state court in 1846, appealing to legal precedents in other states that granted slaves freedom under similar conditions. He lost in the state courts, so he sued in federal court in 1853 and appealed negative decisions all the way to the nation's highest court. It was the sixth time

the Supreme Court rejected a slave's petition for freedom,[89] and a big loss for African Americans. *Dred Scott v. Sandford*, 60 US 393 (1857), held the Missouri Compromise of 1820 to be unconstitutional since the Fifth Amendment protects the rights of slave owners, and neither enslaved African Americans nor free blacks descended from slaves could be citizens or entitled to any protections of citizenship. Chief Justice Roger Taney, writing the 7–2 majority opinion, ruled that the authors of the constitution considered blacks inferior beings, unfit to associate with the white race—so inferior they had no rights that whites were bound to respect. Moreover, he claimed that granting Scott's petition would have disastrous consequences:

> For if [African Americans] were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which [the slave states] considered necessary for their own safety. It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them full liberty of speech in public and in private upon all subjects upon which [a slave state's] own citizens might speak; to hold public meetings upon public affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.[90]

Taney and others hoped the *Dred Scott* decision would put an end to the national conflict over slavery. It did not. It prompted the economic Panic of 1857 and intensified the abolitionist movement and Southern ambitions to extend slavery to the free territories. The decision merely threw fuel on the flames that exploded into the Civil War.

When the Civil War began, Northern censors turned their attention from abolitionists to critics of President Abraham Lincoln and the war.[91] Prior to the war, Republicans had criticized Democrats for endorsing the right of Southern states to ban abolitionist speech and for its complicity in mob actions against

abolitionists in Northern states.[92] The Republican Party 1856 presidential slogan was, "Free Speech, Free Press, Free Men, Free Labor, Free Territory, and Frémont."[93] Once the war began, the Republican government attempted to control war news with restrictions on newspaper correspondents, the telegraph lines, and the mail; arrests of newspaper editors; and restraint of the press.[94] Congress passed a law prohibiting speech counseling resistance to the draft, and Lincoln's suspension of the writ of habeas corpus (a judicial mandate for the government to bring a prisoner before the court to determine whether the detention is lawful) enabled the military to arrest and indefinitely detain citizens for disfavored expression even where civilian courts still operated. The military conducted mass arrests of war dissenters in border states and regulated news to troops to control elections and took control of border state governors. Many dissidents were threatened, persecuted and assaulted; even churches joined in by inspiring members to abuse the "treasonous."[95] In 1864, congressional Republicans attempted to expel Peace Democrats Benjamin Harris (MD) and Alexander Long (OH) for speaking in Congress against the war. Thomas Carroll summarizes: "A brief glance through the Civil War history will convince one that the rights of individuals were considerably abridged, and no adequate remedy existed in many cases."[96] In sum, legal protections for First Amendment values were little recognized for whites in Antebellum America and not at all for blacks.[97] Yet exercising First Amendment values still contributed toward at least some progress in racial equality.

INEQUALITY IN THE POST–CIVIL WAR ERA

Prosecuting the war led to considerable changes in the role and power of the federal government and president, the structure and nature of the economy, and more. These changes led the Supreme Court toward a new understanding of the Constitution in which they continued to refrain from imposing First Amendment protections on state actions but began to impose liberty of contract protections on the states.[98] As the focus on liberty of contract and continuing denial of First Amendment values played out, the "haves" got cake with icing, the "have nots" got bread, and African Americans got stale crumbs.

Union victory in 1865 led to passage of the Reconstruction amendments. The Thirteenth Amendment (1865) abolished slavery and nullified the *Dred Scott* decision. The Fourteenth Amendment (1868) guaranteed all citizens due process and equal protection of the law and barred states from violating citizen privileges and immunities. The Fifteenth Amendment (1870) prohibited

discrimination in voting rights based on "race, color, or previous condition of servitude." Sadly, the Reconstructionist ambition to provide greater equality for freed slaves and their descendants—despite some initial progress—largely went unfulfilled as its policies and practices were deconstructed.[99]

In the immediate aftermath of the war, there was little done to help freed blacks. The Southern economy was devastated by the war, so former slaves had little or no economic opportunity. Congress established the Freedmen's Bureau in 1865 to assist former slaves and displaced whites, but the agency was abandoned when Congress didn't renew its authorizing legislation, due to objections to its expansion of federal authority. Moreover, when the postwar Congress began its session, the unrepentant South sent an host of former Confederate politicians and military leaders, including the former vice president, six Cabinet officials, fifty-eight representatives, and four generals. Former confederates took control of state government and enacted "Black Codes" to continue white domination of the freed slaves. South Carolina outlawed interracial marriage, established compulsory apprenticeships for black children beginning at age two, upheld unwritten contracts providing the black "servant" with food and clothing but no salary, and prohibited blacks from engaging in any business without an annual license (which few could afford).[100] Black people were convicted of petty offenses to "apprentice" them to white landowners to pay off the fine. Mississippi blacks were not permitted to own or lease farmland. Laws allowed white employers to "apprentice" black orphans and children who lacked "proper parental support," but not white youth.

The Reconstruction era began in 1866 when the "radical" Republicans gained enough seats to overcome vetoes by President Andrew Johnson to abolish the ex-Confederate-led state governments and Black Codes, establish Reconstruction state governments, and send 20,000 federal troops to enforce these changes. With ex-Confederates banned from voting and black men now voting, 16 African Americans were elected to Congress, over 600 were elected to state legislatures, and hundreds more were elected to local offices.[101]

Consider the example of Robert Smalls from South Carolina. Smalls first gained national attention in 1862 when he freed himself, his crew, and their families from slavery by commandeering a Confederate ship to run the US blockade. His example led President Lincoln to accept African American soldiers into the army and navy, and Smalls was present at as many as seventeen major battles. In 1864, his eviction from a streetcar for refusing to give up his seat to a white passenger led a coalition of reformers to persuade the Pennsylvania legislature to ban racial discrimination in public transportation.

After the war, Smalls became a successful businessman in Beaufort, founded the Republican Party of South Carolina, helped found and fund a black newspaper, and won election to the South Carolina state legislature and the US House of Representatives. As Reconstruction was deconstructed, his political roles declined, but Smalls served as a federal customs collector until 1913 and died in 1915. His legacy lives on through many memorials; for example, his name was given to forts, warships, and roads, and his home was designated a National Historic Landmark.

Defenders of American apartheid, the "Redeemers," retaliated violently against Reconstruction. In 1867 the Ku Klux Klan spread through the South, terrorizing and murdering blacks and white sympathizers. Federal and state efforts to squelch the Klan only led to the formation of more violent groups such as the Pale Faces, Knights of the White Camelia, and White Brotherhood. A reign of terror employing threats, intimidation, whipping, lynching, and even armed insurrection befell the South. These last two techniques deserve further discussion.

During the height of lynching between 1889 and 1918, more than 2,500 African Americans were lynched by white mobs, often in front of crowds who would take home pieces of the victim as souvenirs.[102] Between 1877 and 1950, more than 4,000 black men, women, and children were lynched for such "offenses" as walking behind a white woman, attempting to quit a job, reporting a crime, or organizing sharecroppers.[103] Local newspapers provided graphic details, including horrific descriptions of torture, and the Southern press "was extremely creative when it came to providing moral, if not legal, justification for the action of lynch mobs."[104] Southern editors who opposed lynching faced mob violence themselves.[105] Republicans in Congress tried to pass a federal law against lynching, but the Southern Democratic voting bloc consistently prevented its passage.

White supremacists also conducted armed insurrections. The Wilmington, North Carolina, massacre provides one example. On November 10, 1898, after two years of vitriolic anti-Reconstruction rhetoric, white supremacists invaded Wilmington with the support of many white churches to end the successful political fusion of white Lincoln Republicans and blacks in a city that was half African American. A Gatling gun was brought to town, and a mob of thousands went on a killing and burning spree. As many as sixty people were killed, the only black newspaper in the state was destroyed, elected black officials (including the biracial mayor) were chased from town, black property was

confiscated, and a new white supremacist mayor and city council were installed. More than 2,000 blacks left the city in the wake of the violence.

The Supreme Court supported the reign of terror and deconstruction of Reconstruction in a series of decisions. *Blyew v. United States*, 80 US 581 (1872), freed two white Kentucky men who murdered four members of a black family (two young girls survived). The dying son crawled to neighbors and identified the two perpetrators, but Kentucky law prohibited black testimony against whites. Authorities took the case to federal court. The all-white jury from a neighboring county found the two men guilty and sentenced them to hang. On appeal, the Supreme Court freed the men because it held that state law prohibited black testimony against whites and dead victims have no rights to protect under the Civil Rights Act.[106] The court again turned a blind eye to racist violence when *United States v. Harris*, 106 US 629 (1882), held the federal government could not prosecute vigilante lynching under the Civil Rights Act or the Fourteenth Amendment.

Arguably, the most devastating ruling was *Slaughter-House Cases*, 83 US 36 (1873). The cases concerned a group of slaughterhouses dumping offal upstream from New Orleans that caused repeated cholera outbreaks and other hazards. After several unsuccessful attempts to deal with the problem, the city convinced the state legislature to grant an exclusive franchise to the Crescent City Live-Stock Landing and Slaughter-House Company in 1869 to ensure animal slaughtering was done at an appropriate location. Opponents of the law filed federal lawsuits, claiming it violated the Privileges and Immunities Clause of the Fourteenth Amendment. Crescent City victories in all the lower court decisions were upheld 5–4 in the Supreme Court decision consolidating the lawsuits. The court majority held that the authors of the Privileges and Immunities Clause intended to protect only former slaves and to protect only federal rights violated by state law. Plaintiffs lost because they were not former slaves and the state law did not violate any federal right. The decision was significant because it protected Jim Crow state laws from lawsuits appealing to the Privileges and Immunities Clause. The *Slaughter-House* holding on this clause remains in force "even though the history of the amendment makes plain its objective was to impose the federally adopted civil rights upon the states."[107] When the Supreme Court began striking down Jim Crow state laws in the twentieth century, it was via the Due Process and Equal Protection Clauses of the Fourteenth Amendment; however, that approach has been problematic because substantive due process was not part of the original meaning of those clauses.[108]

United States v. Cruikshank, 92 US 542 (1875), "finished the job of gutting the Privileges and Immunities Clause by explicitly holding it did not incorporate the First or Second Amendments as to the states."[109] The case involved white Democrats in Louisiana who murdered black voters in election violence. They were convicted of violating the right to freedom of assembly and the right to keep and bear arms under the Due Process Clause and Enforcement Clause of the Fourteenth Amendment. The Supreme Court ruled that these clauses applied only to state action, not private action. Thus, black victims had to rely on state protection . . . protection everyone knew states did not provide. *Cruikshank* has never been overturned.[110]

Republicans responded to *Cruikshank* with the Civil Rights Act of 1875, the last of seven civil rights laws passed between 1866 and 1875.[111] The law established the right to "full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." Premised on the Enforcement Clause of the Fourteenth Amendment, it enabled black people who were denied equal accommodation by private businesses to sue in federal court. However, the US Supreme Court ruled 8–1 in the *Civil Rights Cases*, 109 US 3 (1883), that the Civil Rights Act of 1875 was unconstitutional. Congress did not pass new civil rights legislation for eighty-two years.

The deconstruction of Reconstruction by Southern state governments was abetted by a nefarious political compromise, further Supreme Court decisions, and mob violence. Democrat Samuel Tilden won the popular vote in 1876 and had 184 electoral votes to the 165 electoral votes of Republican Rutherford B. Hayes, but Southern Democrats offered to give 20 disputed electoral votes—and thus the election—to Hayes on the condition that 20,000 federal troops were withdrawn from the South. The deal was done, and when federal troops were withdrawn in 1877, Reconstruction governments were toothless. Frank Latham writes, "During the next thirty years, the Southern white set out to control or get rid of the Negro by a combination of fraud, trickery, threats, and violence."[112] The black vote was suppressed by devious tactics, such as moving polling places far from their homes, closing ferries on election days to prevent them from getting to polling places, organizing abusive and violent whites to guard the polls, and simply not counting their votes when cast. The Supreme Court continued its pernicious habit upholding racial inequality. *United States v. Reese*, 92 US 214 (1876), held that a white Kentucky magistrate could lawfully