Chapter 1

Introduction: The Supreme Court and Civil Rights

In the late Summer of 1868 three bodies were found in a cabin in rural Lewis County, Kentucky. The victims, all of whom were black, were members of the same family. Jack Foster lay sprawled in the doorway of the cabin, his wife Sallie nearby. Sallie's mother, Lucy Armstrong, blind and nearly ninety, lay dead on a bed. In the words of one of the first men on the scene, Jack and Sallie Foster "were cut in several places, almost to pieces."

A trail of blood led from the cabin out through the woods toward a nearby cabin. The fourth victim, eleven-year-old Richard Foster, badly wounded, had crawled away from the scene of the carnage toward the nearest refuge. Testimony offered later at trial indicated that "Mr. Nichols (the cabin's occupant) had retired to bed but being aroused by the call of Richard, he got up and went to the door and when he found Richard in a wounded and exhausted condition . . . took him in and went for help."

The men summoned by Nichols discovered the bodies in the cabin, still warm. They also found a lone survivor hiding under a bed, a few feet away from the blood and wreckage, twelve-year-old Laura Foster. Her brother Richard was mortally injured and would barely survive the night. Hence, in the coming proceedings against the assailants Laura Foster was to be the only living witness.

The immediate question posed by the sheriff's men who had found the bodies related to the identity of the attackers. Who had massacred the family and why? A dying declaration was sought

from Richard as to the horrific events which had transpired in the Foster cabin. At the end of his statement, which was taken down word for word, he affixed his *X*. Laura Foster was also questioned as to who had come to the cabin and what had happened. Dying brother and terrified sister recounted the same story.

Some time after nightfall, perhaps around nine o'clock, two young white men, local residents, John Blyew and George Kennard, had come to the cabin, the dogs barking as they had come over a fence and approached the front door. Lucy Armstrong was preparing to go to bed. Sallie Foster was sewing a patch in a pair of britches. Blyew and Kennard were in the cabin only a short while before the assault started. Richard was the first victim. "Blyew struck me, but I do not know with what, about that time I think that George Kennard ran out of the house, and John Blyew was still killing us. I thought at this time I heard my Pap holler 'Oh.'"

Shortly after sunrise deputies descended on the Blyew cabin, there finding John Blyew and George Kennard. They also found two pair of freshly washed trousers and a pair of muddy boots. It was also determined that a short time before the killings Kennard had told Blyew that he believed there would soon be another war about the "niggers" and when it came he intended "to go to killing niggers." Indeed he was not sure that he would not "begin his work of killing them before the war should actually commence."

The arrests of Blyew and Kennard commenced the criminal proceedings. The trousers, boots, and statements constituted important but inconclusive evidence. Freshly washed trousers, muddy boots, and angry statements do not prove participation in mass murder. They constituted the kind of evidence used in a criminal proceeding to corroborate the testimony of a principal witness. Standing alone they were insufficient to secure an indictment, much less a conviction. Under most circumstances the testimony of an eye witness to the commission of the crime and a dying declaration by the victim of the violent act would have been sufficient to secure a conviction. The facts attending the murder of the Foster family presented an insurmountable problem however.

Under Kentucky law a person of African descent could not give testimony in a criminal proceeding against a white defendant. The language was convoluted but the meaning was clear. Under section 1, chapter 107 of the Revised Statutes of Kentucky a "negro or indian" could be a competent witness in cases involving "only negroes or indians . . . but in no other case." In other words, in a state criminal proceeding neither the eyewitness testimony of

Laura Foster nor the dying declaration of Richard Foster would be admissible against Blyew and Kennard. There was no way in which prosecution in a state court could result in a conviction.

Two years earlier however Congress had passed the first civil rights law in the history of the Republic. The Civil Rights Act of 1866 had been drafted in reaction to the so-called black codes, laws enacted in a number of states of the defeated confederacy having the intent and effect of restoring domination over the newly freed black population via such devices as "labor contracts" imposing a type of peonage.

A key provision of the Civil Rights Act of 1866 gave jurisdiction to federal courts for "all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State, or locality, where they may be, any of the rights secured to them" for reasons of race. The language of this clause provided the basis for the assumption of federal jurisdiction over the case, and allowed the prosecution of Blyew and Kennard to proceed under federal jurisdiction in a federal court.

Laura Foster testified against the assailants, recounting the details of the bloody slaughter and responding to the prosecution's query for in-court identification of the attackers. Over defense objections the written account of Richard Foster's dying declaration with his *X* affixed was introduced into evidence. All of the other testimony, corroborative in nature, came from white witnesses. A pair of britches, a patch half sewn into them, was found near Sallie Foster's body. It did appear that Lucy Armstrong was about to turn in when struck down. Freshly washed trousers and muddy boots were found in the Blyew cabin the morning after the attack.

The jury brought back two guilty verdicts and on December 5, 1868, sentence was pronounced. John Blyew and George Kennard were to be "taken to the common jail of Jefferson County and there safely kept, until Friday, January twenty second, in the year of our Lord Eighteen Hundred and Sixty-nine, on which day between sunrise and sunset, the Marshall" was to hang them by the neck until dead.

On January 9, 1869, two weeks before the scheduled executions, the attorneys for the condemned men filed an appeal, setting the case on the road to the Supreme Court.

The pursuit of an appeal following a criminal conviction requires the defendant's appellate counsel to argue that substantial error in the proceedings against the accused violated one or more constitutionally protected rights and resulted in the conviction. An

appeal directed to the nation's highest court requires as a threshold condition that the defendant allege error relative to a right protected under the United States Constitution. Hence, in the Writ of Error setting the case of *Blyew v. United States* on the road to the Supreme Court, Whitaker and Jackson, the attorneys for the condemned men, contended that the offense done to the rights of John Blyew and George Kennard had been of constitutional dimensions.

The United States Supreme Court sets its own docket in that it determines which cases it will hear and which cases it will not hear. Irrespective of appellate counsel's vigorous and impassioned contention that a case presents issues of constitutional importance, certiorari may not be granted. The granting of certiorari—literally, an agreement to review the record from below, including the record of any intermediate appellate court proceedings—allows appellate and opposing counsel to submit substantial written arguments to the court in the form of briefs, and on a scheduled date to appear before the court for oral argument.

Bland Ballard, the judge before whom Blyew and Kennard's attorneys appeared to initiate the appeals process, recognized that the case was "both new and important." And indeed it had excited great interest throughout the state. A joint resolution of the Kentucky General Assembly directed the governor to seek state entry on behalf of Blyew and Kennard, Kentucky contending that the removal of the case to federal court constituted a usurpation by the federal government of the state's authority to deal with a criminal matter.

It was the first case in which the full court would construe those provisions of the Civil Rights Act of 1866 which seemed to provide federal protection against state abuse, and it was also the first civil rights case ever heard by the Supreme Court.

In the fall of 1870 a full nine-member court met. The turmoil of the preceding decade had also brought turmoil to the Court. Within weeks of the outbreak of the Civil War in 1861 John Campbell of Georgia had resigned his seat and joined the confederacy. Abraham Lincoln had made four appointments, seeking justices who would be sympathetic to the federal government's enormous expansion of power as it pursued the war effort. The Court had fluctuated in size, finally being affixed at nine by Congress. The expansion in number allowed President Ulysses Grant to nominate two new justices, William Strong and Joseph Bradley, whom he hoped would side with the federal government in various challenges to the validity of the paper money it had issued during the war.

In December of 1871 one of those new associate justices, William Strong, handed down the court's decision in the case of *Blyew v. United States.* It was a split decision, Strong speaking for the majority. He began by reviewing the exact language of the relevant provisions of the Civil Rights Act of 1866, then recounted the grisly details of the murders. He then stated that counsel for Blyew and Kennard and for the State of Kentucky had raised a number of points on appeal of which one had come to be paramount, "Whether the Circuit Court had jurisdiction of the offence charged in the indictment." Both sides had focused on this issue in oral argument, and it was the focus of the majority holding.

That holding can be summarized as follows: The language of the Civil Rights Act provided federal jurisdiction for all causes civil and criminal affecting persons denied their rights because of race. In a criminal proceeding the only parties affected are the government, in the sense that the government wins a conviction or it does not, and the accused party, in the sense that the accused party is exonerated and goes free or is convicted and made subject to punishment. "Obviously the only parties to such a cause (a criminal proceeding) are the government and the person indicted. They alone can be reached by any judgment pronounced."

The victim of a homicide may be the subject of a criminal proceeding but cannot be said to be affected by the outcome of the proceeding. Thus with regard to, for example, ninety-year-old Lucy Armstrong. "In no sense can she be said to be affected by the cause (the criminal proceeding). Manifestly the act refers to persons in existence."

Neither are witnesses affected parties in a criminal proceeding. "Those who may possibly be witnesses . . . are no more affected by it than is every other person, for any one may be called as a witness." If the mere fact that one or more of the witnesses to a proceeding happened to be black was sufficient to justify federal jurisdiction then any case in which there was a black witness could be removed from state to federal court. Surely that was not the intention of the Act.

These propositions yielded the conclusion: "(T)he Circuit Court had not jurisdiction of the crime of murder committed in the district of Kentucky, merely because two persons who witnessed the murder were citizens of the African race, and for that reason incompetent by the law of Kentucky to testify in the courts of that state. They are not persons affected by the cause."[1]

The two dissenters, Joseph Bradley and Noah Swayne, went

directly to the heart of the majority holding. "Suppose that, in any State, assault and battery, mayhem—nay, murder itself, could be perpetrated upon a colored man with impunity, no law being provided for punishing the offender, would not that be a case of denial of rights to the colored population of that State? Would not the clause of the civil rights bill now under consideration give jurisdiction to the United States. . . . Yet, if an indictment should be found . . . the technical parties to the record would only be the United States as plaintiff and the criminal as defendant."[2]

In other words, under the logic of the majority holding there was no circumstance, no matter how outrageous the criminal act, under which federal jurisdiction could be assumed. Had it not been a crime at all under Kentucky law for a white man to kill a black man, federal jurisdiction could not be assumed upon commission of a slaying. If the witnesses were white there would be no statutory basis for federal jurisdiction, and if the witnesses were black they would be deemed parties not affected by the outcome of the proceedings. The dissenters argued that the majority had taken an approach to the law "too narrow, too technical, and too forgetful of the liberal objectives it had in view."[3]

On April 1, 1872 the Supreme Court issued the final document in its first civil rights case. "On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause, be, and the same is hereby ordered reversed. And that this cause be and the same is hereby remanded to the said Circuit Court with directions to arrest the judgement."[4]

Blyew and Kennard were to be freed.

The Blyew decision came toward the end of Salmon P. Chase's tenure as chief justice. In March of 1874 he was replaced as chief justice by Morrison Waite, a Midwestern railroad lawyer who had never held a judicial post nor practiced before the Supreme Court. The Courts that sat in the last days of the Chase regime and the first terms of the Waite administration had a profound impact on the fate of African Americans. Their holdings were among the most important ever issued. Although sharply divided on matters of race, Congress managed in the ten years following the end of the Civil War to put in place a substantial body of law intended to provide equal rights for black citizens. Inevitably the meaning and constitutionality of these laws were challenged by forces hostile to the idea of equality. Inevitably, also under Article Three, Sections One and Two of the United States Constitution, it fell to the Supreme Court to

rule on the constitutionality and reach of the new legislation.

All of the challenges to the new laws presented cases of first impression. In other words, the Court could only weakly be guided by precedent. The decisions in the first civil rights cases coming before the Court at the end of the Chase regime and the beginning of the Waite years created precedent. They created the legal framework within which issues crucial to black rights were to be adjudicated for decades to come. Those crucial years also saw the Court majority adopt a mode of analysis regarding race and rights that continues to be employed by Court conservatives and that, in this discussion, is termed "formalism." The Blyew holding provides an example of formalism insofar as it derived from a narrow, hyperliteral reading of statutory language which allowed for a conclusion that ignored the underlying unpleasant racial realities the statute was intended to address. As is indicated in the third chapter, the Court's formalist analysis in the first cases coming before it significantly altered the course of race relations in the United States for decades to come, and into the indefinite future.

This book focuses on the Supreme Court and civil rights from the end of the Civil War through *Brown v. Board.* The Court played a decisive role in molding the relationship between race and rights during that ninety-year period and therefore a decisive role in determining what the country was and what it was to become. *Brown* marked a turning point in the meaning and place of race in American society. The holding contributed to the erosion of the moral legitimacy accorded segregation and helped impel the civil rights movement toward the major legislative success of the 1960s, the Civil Rights Act of 1964.

To the extent that an understanding of the past facilitates an understanding of the present, a grasp of the role of the Supreme Court in shaping the dynamics of race in the United States between the end of the Civil War and *Brown*, informs and deepens an understanding of the country's racial odyssey in the post-*Brown*, post-civil rights era.

The Court's formal, legal role in the judicial process is defined by Article 3, Sections 1 and 2 of the Constitution, and make it the final arbiter of the meaning of the language of the Constitution. In practical terms the use and abuse of power under either federal or state law, raising the possibility that a plaintiff's rights under the Constitution have been violated yield appellate jurisdiction to the Supreme Court to decide the matter.

This formal role has made the Court an institution of peculiar

and decisive importance in terms of race and rights. The tension between an egalitarian national ethic embodied in the Declaration of Independence and the Constitution and a social dynamic tending toward racial exclusion made the Court a key player in determining the meaning of the language embodying the national ethic and therefore the substance of day-to-day racial realities. The Court's holdings on matters of race are legal pronouncements going to the balance of rights between minorities and the majority. They also have significant political and sociological consequences insofar as they affirm certain values with regard to race and rights and discredit others. They have major consequence with regard to patterns of racial stratification, and, historically, they have shaped the agendas of the civil rights movement and the legislative and executive branches of government.

In this work the Court is examined in historical and social context, the focus being on the reciprocal relationship between it and the larger social and political worlds of which it is a part. The Supreme Court sets its own docket, but the controversies and conflicts that yield the cases it selects to hear are spawned by fissures and contradictions in the political and social systems. Having selected the issues it will address, the Court's holdings affect and reshape the social and political worlds. This book chronicles that reciprocal relationship in terms of race and rights. It examines the manner in which the Supreme Court made the world of race relations in America from the end of the Civil War through the post-World War II days and responded to the cases yielded by the world it had made.

There is no simple or single explanation for the Court's actions over time. A variety of factors come into play, but vary in their importance or centrality from one historical period to another. The picture is complex, but there are patterns. The explanation is not simple, but the facts are amenable to synthesis in an overarching and integrating statement.

The broad framework used to organize the discussion rests on the following five propositions: (1) The role of the Supreme Court as regards race and rights cannot be understood without grasping the centrality of the idea of race in American thought and culture. However, (2) the Court's role in the evolving race story cannot be viewed as a mere reflection of cultural forces, elite wishes, or popular views. (3) The function of the Supreme Court within the framework of the Constitution, the nature of law itself, and the lifetime tenure of justices have yielded a decisive, independent role to

it in shaping the course of race relations in the nation. (4) The substantive outcomes yielded by that independence have been a consequence also of the fact that the Court is, in a sociological sense, a small group, and is subject to small group dynamics. In addition, (5) the Court's ongoing role as regards race and rights cannot be understood without perceiving how events were viewed by Afro-Americans as they unfolded. What did *The Civil Rights Cases of 1883* mean to Afro-Americans at that time? What did *Plessy* mean to Afro-Americans at that time? The Supreme Court became an actor largely in response to petitions for redress pressed by Afro-Americans. What drove ongoing faith in the Court such as to set in motion multiple successive circumstances in which the Court had the opportunity anew to define the scope and limits of black freedom?

The balance of this chapter enlarges on these propositions in the interest of clarifying the underlying assumptions and approach. The chapter closes with an outline of the book's organization.

Race, Culture, and the Supreme Court

Fundamental to a grasp of the performance of the Supreme Court in terms of race and rights is an understanding of the idea of race in American culture. In a larger sense the role of the Supreme Court in matters of race cannot be understood without grasping the moral ambiguity attending the founding of the United States. The compromises made in matters of race at the moment of creation yielded a national fate tormented by that ambiguity and yielded to the Supreme Court the impossible task of interpreting the national charter, the Constitution, in such a manner as to reconcile a deep national impulse to exclude on racial grounds with an equally deep, national commitment to inclusive and humanistic values.

The events attending the formation of the new nation spoke of moral contradiction and unhappy compromise. In December of 1775, with the fate of the rebellion in doubt, George Washington wrote to the Continental Congress stating his intention of departing from policy by allowing the enlistment of free blacks to the ranks of those fighting for independence. In closing he indicated: "if this is disapproved by the Congress I will put a stop to it." The Congress did not disapprove.[5]

Within a year Nace Butler, Francis Freeman, Pomp Liberty, and Joel Taburn entered the lists, the number of blacks serving ris-

ing eventually to five thousand.[6] In July of 1776, seven months after the Continental Congress had by its silence consented to the enlistment of black troops, Thomas Jefferson submitted draft language for a proposed Declaration of Independence to the men gathered in Philadelphia. That draft contained language condemning slavery as an offense "against human nature itself" and "an assemblage of horror."[7]

In a letter to James Madison, written in 1784, one year after independence had been won, Jefferson commented on the fate of his proposal: "The clause respecting slavery was lost by an individual vote only." Jefferson understood the moral contradiction now made indelibly a part of national identity. "What an incomprehensible machine is man! who can endure toil, famine, stripes, imprisonment, and death itself, in vindication of his own liberty, and the next moment, be deaf to all those motives whose power supported him through his trial, and inflict on his fellow men, a bondage, one hour of which is fraught with more misery than ages of that which he rose in rebellion to oppose."[8]

But Jefferson as a slave holder himself reflected the contradiction and went on, as did the other founding fathers, to ratify a Constitution which explicitly protected slavery in five clauses. Two centuries later the historian David Brion Davis asked, "had the nation begun with a Faustian bargain obligating all future generations to pay the debt?"[9]

The consequences of those early compromises provide the backdrop against which the history of the Court has unfolded. At the inception of the nation, race was made part of national identity. The earliest naturalization laws were written in 1787, 1795, 1798, and 1802 and although varying in detail they all limited the acquisition of citizenship to "freeborn whitemen." Blacks, free or slave, Indians, and all other nonwhites were excluded from possible inclusion in the national family.

Whatever benefits accrued to those among the Founding Fathers who fought to make racial exclusion part of the national charter and national identity, yet other benefits accrued to the waves of European immigrants who came to the nation's shores in the nineteenth and twentieth centuries. In Europe they were "Irish" or "Italian" or "Polish" or "Scots." They might also have been worker or peasant, tradesman or serf, but in the United States they were also "white." Whatever differences of custom or language might have separated them in the old world, whatever tribal hostilities might have set one against the other in Europe, in the

new world they were linked in the kinship of race. They were "white" and hence could become part of the national family. However marginal their class status, there were places they could go where no black, rich or poor, could go. Whatever they were, they were not "the other." The idea of race and the reality of racial exclusion were central to acquiring a subjective identity as an "American." They played an important role in the assimilation of diverse immigrant populations into American society.

In the same summer in which slavery was written in to the national charter, the Founding Fathers also composed language that forcefully and eloquently stated that natural law endowed all persons with an inalienable rights. In forbidding titles of nobility and inherited political or ecclesiastical privileges it opened up to the common man the possibility of making of his life what he could. Professor Sylvia Frey indicated the impact of the doctrines advanced by the architects of the new nation:

> The Revolution . . . put a weapon in the hands of the oppressed. It was more than a set of laws. It was a language. Under British rule, the language of both political and social relations was essentially paternalistic. The language of politics assumed the subordination of the people to the King . . . of the People to their rulers. The language of the Republic assumed equality in at least the political if not in all social sides of these relations. The struggles for equality could in the future be fought out in the language of the Republic.[10]

A succession of scholars from DeTouqueville on have grasped the centrality and paradox of the idea of race in American culture. Gunnar Myrdal's classic on the "American Dilemma," published toward the middle of the twentieth century, examined American culture in terms of its strained adaptations to the conflict between deep commitment to egalitarian and humanist values, on the one hand, and its equally deep commitment to racialist doctrines and racial exclusion, on the other. With varying degrees of intensity and with shifts in the weighting of commitment to one side or the other, that conflict has characterized the nation from its inception. It has been the peculiar fate and judicial role of the Supreme Court to work at the intersection of that contradiction, attempting to reconcile the irreconcilable.

According to Professor Paul Finkelman, "The jurisprudence surrounding fugitive slaves was the most divisive constitutional

issue in antebellum America."[11] It fell to the Supreme Court to attempt to resolve the contradiction built into the structure and ideology of the nation. To what extent could the federal government limit the spread of slavery? To what extent would federal law support slave states in the return of runaways from free states? The Supreme Court became the arena for resolving the increasingly bitter confrontations over slavery, but as Finkelman indicated, "While settling legal issues, none of (the) cases satisfactorily dealt with the moral and political questions raised when human beings escaped to freedom."[12]

In the last major case on race and rights heard before the onset of the Civil War, a Court majority attempted a final, definitive resolution to the moral dilemma posed by race in the context of a nation otherwise committed to equal rights. The failure of that resolution helped bring on the Civil War. The precise legal issues posed in the *Dred Scott v. Sandford* were technical in nature, turning at the most basic level on whether Dred Scott, suing in federal court for his freedom, was a citizen of the state of Missouri, citizenship being necessary to invoke the jurisdiction of that court. As Finkleman indicated, Chief Justice Roger Taney "wrote a long and complicated opinion in which he attempted to settle, at one stroke, the troubling issue of slavery and the federal territories."[13] The political impact of the case derived both from its substance, declaring unconstitutional the Missouri Compromise, which had sought to limit the spread of slavery, and from the substance and language of the declarations regarding blacks and the moral character of slavery.

Invocation of the jurisdiction of the federal court presupposed citizenship and, hence, Taney and the majority addressed the question of whether that jurisdiction had been properly invoked. "Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States?" The answer, Taney held, was no.[14]

This conclusion was supported with an elaborate argument using "original intent" as the mode of constitutional analysis. In other words, the Constitution should mean what the Founding Fathers intended it to mean and not what subsequent jurists would like it to mean. This approach allowed the majority to conclude that there was no moral contradiction or dilemma because the Founding Fathers and subsequent generations had, for good reason, never intended that blacks be part of the national family. Taney's

attempt to resolve the moral dilemma failed. The holding of *Dred Scott* exacerbated conflict between North and South, and it took a civil war to resolve the issue of slavery.

This book starts at that point. Race has been the most persistent and divisive issue in the life of the Republic. It has always had major consequences for the ways in which social and political life are organized. It has always been an indelible aspect of personal self-identification and has shaped collective views about what the nation is, is becoming, and should be.

Elites, Popular Culture, and the Supreme Court

An argument in support of the proposition that the holdings of the Supreme Court reflect political pressures, elite preferences, and cultural realities has intuitive appeal and a degree of serious, scholarly support. It is necessary, therefore, to briefly discuss the limitations of that approach with regard to race, rights, and the Supreme Court in terms of setting forth the framework employed in this work.

From the time legal realism rose to prominence as a mode of analysis in the first decades of the twentieth century many scholars have recognized that law is imbedded in a social, political, and cultural matrix. Contemporary approaches to legal analysis such as Critical Legal Studies and Critical Race Theory also place law in a larger social network. Clearly, the initial proposition guiding this work regarding the centrality of the idea of race in American culture speaks to the necessity of placing the Court in a larger arena. The central issue is not whether law and the courts are influenced by extralegal factors but the extent to which they are influenced.

The second proposition guiding discussion in this work posits that while the Court is influenced by the larger social environment it is not wholly a creature of that environment. It is not merely an instrument of elite designs or a reflection of political and cultural forces. A brief exposition of a more expansive view of the role of outside influences on the Court followed by a test of that view against the elements of the Court's record as regards race and rights establishes the case for a more balanced and limited position, recognizing that the Court is acted upon but is also a powerful independent actor.

In his book *The Tempting of America*, Robert Bork, former law professor, appellate court judge, solicitor general, and Supreme

Court nominee offered a version of what might be termed the "elite dominance theory." The Court's history can be divided into identifiable eras, Bork stated, and, "in each era the Court responded to the ideology of the class to which the justices felt closest. By observing the values the Court chooses to enforce, it is often possible to discern which classes have achieved dominance at a given time in our history. Dominance . . . refers to the tendency of a class's ideas and values to be accepted by the elites that form opinion. In this century we have seen the Court allied to business interests and the ideology of free enterprise. We have seen that ideology lose its power with the arrival of the New Deal and the effect of that ideological shift on the Supreme Court. The intellectual class has become liberal and that fact has heavily influenced the Court's performance."[15]

Judge Bork stated a type of hypothesis purporting to explain the broad thrust of the Court's holdings over time. As a hypothesis this kind of explanation for the Court's holding is subject to test against the facts of history. The central point here is not whether Judge Bork in particular was right or wrong but whether a particular kind of explanation for the Court's actions is right or wrong. At the immediate factual level so many counterexamples can be adduced that the validity of elite-dominance hypothesis is doubtful. For the sake of discussion let us regard the president and his most important supporters in and out of government as elites.

An historical inquiry relative to race and rights does not support the Bork-type hypothesis. The holdings of the Court under Chief Justice Edward Douglass White ran counter to the sentiments of the segregationist-minded Woodrow Wilson administration. Ironically, White was an exconfederate soldier who had been nominated for chief justice in 1910 by President William Howard Taft as part of a "southern strategy" intended to secure the support of the states of the old confederacy in his unsuccessful bid for reelection. Woodrow Wilson, his successor, promptly proceeded to introduce racial segregation in the federal workplace and to express his hostility to black interests in other ways. He also nominated the rigid segregationist James Clark McReynolds to the bench as soon as an opening materialized.

Among the cases on race and rights coming before the White Court were two that were crucial to the future of blacks. In 1917 the Court took up *Buchanan v. Warley*, a case that is given considerable attention in chapter 5. At issue was the constitutionality of municipal ordinances that divided cities into black zones and white

zones. These were, quite simply, apartheid laws and they were proliferating in number across the country. An examination of the case record on *Buchanan v. Warley* indicates that the possibility of explicit racial zoning enjoyed widespread support in political and economic quarters. As with all such statutes, the law passed in Louisville, Kentucky, rested on premises the Supreme Court itself had articulated in *Plessy v. Ferguson* in 1896. Government may make racial distinctions in law where a legitimate governmental interest is advanced. The maintenance of racial peace is a legitimate governmental interest. The separation of the races by law promotes racial peace.

Given the *Plessy* premise, there was no inherent limit to the extent to which segregation could be imposed. The logic of *Plessy* was not inconsistent with a de jure apartheid. The Louisville ordinance was yielded by that logic; hence, Louisville would argue that racial zoning laws were constitutional insofar as they were simply means for accomplishing the legitimate state objective of maintaining racial peace.

A unanimous Supreme Court held that Louisville's statute was unconstitutional despite the fact that it and similar laws in numerous cities enjoyed great support. For reasons that are discussed at length in chapter 5 the Court rested its holding on the assertion that these laws infringed on a constitutionally guaranteed right to contract, rather than on any premise calling into question the fundamental legitimacy of race based laws.[16] But, as is also indicated in chapter 5, it was widely understood at the time by persons of all political persuasions that the holding had enormous implications for the direction of race relations in the country.

In the *Guinn* case, decided two years earlier, also dealt with in chapter 5, the White Court also departed from the expectations and hopes of the Wilson administration. The case had begun to work its way up the appellate ladder during the preceding Taft Administration but did not reach the Supreme Court until after Wilson's election. Under circumstances described in chapter 5 the United States had become a party to the action on behalf of plaintiff's contesting the constitutionality of an Oklahoma law which had the effect of disenfranchising blacks by making access to the ballot contingent upon having had a forebear who would have been eligible to vote. The wording of the law and certain of waiver provisions made it possible for an illiterate European immigrant to vote while excluding black college graduates from the polling place. It fell to Wilson's segregationist-minded administration to argue the case, sentiment

being expressed that a loss would not be a tragedy. The Court decision overturning the law on Fifteenth Amendment grounds could in no way be said to reflect elite views. At stake was the access of blacks to the ballot at a time when blacks who could vote were overwhelmingly Republican. Wilson's Democratic Party administration was hostile to blacks on party as well as racial grounds.

At yet an earlier time and from a different political perspective, the Court could also have been said to have failed to reflect the perspective of political elites. Much of the civil rights legislation passed in the years following the end of the Civil War reflected the pragmatic interests of the Republican Party. The 1868 presidential election was the fourth contested by the new party. In 1860 Abraham Lincoln had been elected with barely 40 percent of the vote. Four years later, running while the war was still being fought, he had beaten George McClellan by only a few hundred thousand votes. In 1868 war hero Ulysses Grant had beaten Horace Seymour, a the lackluster Democratic Party candidate, and his rabidly antiblack running mate Frank Blair by four hundred thousand votes. Historians estimate that perhaps four hundred thousand of Grant's votes came from blacks newly able to exercise the franchise. An important, and perhaps decisive portion, of Grant's support had come from freedmen able to exercise the ballot because of a northern military presence in the southern states.

Moved by both principle and self-interest the Republicans in Congress pushed for a constitutional amendment barring denial of the ballot for racial reasons, and for legislation empowering the United States attorneys and the attorney general to undertake criminal prosecution of those who sought for racial reasons to bar black voting. These efforts yielded the Fifteenth Amendment, the Enforcement Acts of 1870 and 1871, and the so-called Klan Act, which, in amended form, was used decades later by J. A. Croson to sue the Richmond city council in a reverse discrimination suit.

The Republican Party, dominant in the executive and legislative branches of government and therefore representative of a measure of both popular opinion and of nonpolitical elite opinion had both a pragmatic and a principled interest in seeing the various constitutional challenges to the Enforcement Act and the Klan Acts mounted by southern forces defeated. In a series of holdings dealt with in chapter 3 the Court disappointed those hopes. The effect of the holdings was to rob the federal government of the capacity to deal legally with Klan and other antiblack terror.

As is indicated in the third chapter, the number of cases pros-

ecuted plunged dramatically following holdings which called into question the constitutionality, reach, and meaning of the Enforcement Acts. Republican efforts to reach a rapprochement with the white south following the deadlock outcome of the 1876 presidential election were generated, in part, by Court holdings making it difficult for the federal government to combat night rider and Klan violence directed at driving blacks from the political arena. As is also indicated in chapter 3, but for Supreme Court emasculation of Justice Department efforts to prosecute night riders, the near tie in the 1876 election might never have occurred.

As these examples suggest, one of the problems with the elite-dominance hypothesis is its assumption of a unified elite. As often as not there is no unified elite point of view, and even if there is the Supreme Court might not follow it. For example, in the Grant era elite opinion was sharply divided on the specifics of race and rights. The Court could not be said to have reflected an elite view because there was no single such view.

By contrast, during the Wilson era there was something close to an elite and popular consensus on the desirability and necessity of racial segregation. At the level of popular culture blacks were objects of derision and ridicule in high art and low. At one end of the spectrum the classic film "Birth of a Nation" released in 1915 was a celebration of the Ku Klux Klan, while at the other end the Florian Slappy series and such shorts as "A Coon in Love" and "The Wooing and Wedding of a Coon" showcased the black as fool. Revisionist history had begun to portray the prewar, slave South in idyllic terms while presenting the reconstruction period as one in which black greed, cupidity, and ignorance had brought ruin to Dixie.

The Kentucky law tested in *Buchanan v. Warley* reflected near universal white acceptance of segregation and its underlying rationale. The nation was ready for laws creating black zones. The Edward Douglass White court, sitting in an era in which the desirability of racial subordination of blacks was taken as self evident, handed down the first decisions in a decade positing limits as to the extent of that subordination. Hence, there is no reasonable reading of the Court's history that lends credence to an elite-dominance hypothesis regarding the Court's holding reflecting or being inspirations of something called an "elite."

An alternative to the elite-dominance interpretive model suggests that the Court's holdings reflect the broad cultural values and norms of a given time, the shared assumptions about what is true

and what is not true, and how the world works. A variant on this approach, more amenable to testing as a hypothesis, suggests that the Court is to some degree influenced by public opinion, Thomas R. Marshall took this approach in *Public Opinion and the Supreme Court.*[17]

Although Marshall and others point to weak linkages between the Court's decisions and public opinion, an assessment of the historical record suggests that while the Court's holdings may coincide with public views the Court is not guided by public opinion. Again, as with elite views there has rarely been anything approaching a unified public stance on most of the issues attending race and rights, hence the Court could not be guided by public opinion even if it wanted to. And indeed "public opinion" in the modern, polling sense of the term is a phenomenon that originated during the 1930s with the first fledgling efforts of George Gallup and his organization to devise samples and reliable interview techniques.

In any event the relationship between what the Court does and what the public thinks is a fairly complicated matter. Even though a substantial proportion of the public might subscribe to basic value positions on matters of race there is no clearly formulated or articulated public view on many of the important but technical issues that come before the Court. The 1989 case *Patterson v. McClean* provides an example. At the technical level the case dealt with whether Brenda Patterson, a black woman, could use provisions of the Civil Rights Act of 1866 to pursue redress against a supervisor whom she alleged had harassed her on racial grounds, the relevant clause being one which afforded blacks the same right to contract as enjoyed by whites. In effect, did the language of the Civil Rights Act of 1866 speak only to the matter of the right to form a contract, in the sense of a right not to be denied a job on racial grounds, or did it also provide the basis for a suit under circumstances in which the employer fell short in terms of performance of the contract by tolerating racial harassment of the minority employee.

This was an important but technical question going to the issue of the legal basis on which a minority employee might pursue a claim based on an allegation of a hostile racial environment. Obviously, whatever the public's views as to whether racial remarks on the job constitute levity or harassment it has no view on the applicability of the Civil Rights Act of 1866 as the framework within which legal redress for a claim of harassment might be pursued.[18]

With regard to basic value positions on sensitive issues the Court's holdings appear sometimes to crystallize public opinion rather than reflect it. An analysis of public opinion polls in the years immediately preceding the 1954 *Brown v. Board* decision indicates that there was no expressed public support for school integration prior to that landmark decision. Indeed there was little felt need for racial reform at all. Less than three years before Brown was first argued before the Court less than half the public believed that the federal government should take any steps to curb racial discrimination in employment or intervene to curb lynching.[19] The Court's holding in *Brown* and subsequent cases appears to have provided moral affirmation for integrationist views in addition to substantive legal mandates affecting how people and institutions behaved on a day-to-day basis. Their holdings were also among the factors contributing impetus to the civil rights movement.

In summary, the Court's holdings on race and rights cannot be understood in terms of the influence of elites or as reflective of broad cultural beliefs or public opinion. No view that sees the Court as politically or culturally subordinate can accurately explain the historical record. The Court is an independent actor, better understood in the words of law professor and exponent of Critical Race Theory, Patricia Williams. "There is great power in being able to see the world as one will and then to have that vision enacted."[20]

The Supreme Court as a Small Group

The Supreme Court's functions as defined in the Constitution and the lifetime tenure of the justices allow it to play an independent role in national life. The manner in which that role is played out is, in part, a function of the nature of the Court as a social entity.

The third premise upon which this book rests entails viewing the Court as a small group. Various of the social sciences have made attempts to develop a theoretical understanding of human behavior in small groups. The closed nature of the Supreme Court has not made it a readily available subject for study, yet by the terms of its charter and its rules of operation it is the quintessential small group. An inference as to the actual dynamics of the interaction of the justices and therefore of the interpersonal processes having major consequence for their holdings is yielded by a close study of the available records.

The numerous justices serving on the Court between Joseph Bradley and William Strong, nominated by President Grant in 1869, and Earl Warren, nominated by Dwight Eisenhower in 1953, varied enormously in intellect and personality. At crucial junctures in the evolution of the Court's pronouncements on race and rights these differences became part of the combination of factors having consequence. An understanding of these factors would not be sufficient alone to explain the Court's actions at crucial points in the history of the race struggle, but are important in facilitating an understanding of those actions. An example and the tentative generalization yielded by it will suffice.

In 1872 Chief Justice Salmon Portland Chase died. As is indicated in chapter 3, Chase had risen to national prominence in the fight against slavery and would have been a leading force in both the moral and legal struggle for equal rights in the years after the war, save for a compromise of principle in the pursuit of ambition that destroyed his credibility on matters of race. Chase was replaced by Morrison Waite who had no judicial experience and who had never practiced before the Supreme Court. Among his new colleagues was justice Joseph Bradley, a man of enormous intellectual prowess, predisposed to taking a dim view of those less well endowed. He would later make contemptuous comments regarding the modest gifts of Waite's successor as chief justice, Melville Fuller, but sought in public to ingratiate himself with Fuller and bring Fuller under his influence as he done, successfully, with Waite.

Waite's legal experience lay entirely in the areas of business and commercial law. As the initial pivotal cases dealing with black rights began to come before the Court he admitted a lack of knowledge about the issues and came to lean heavily on Bradley. Later, in another context, he acknowledged Bradley's influence on his thinking. Although the purported author of the 1876 *Reese* and *Cruikshank* holdings, key cases eviscerating post–Civil War laws intended to support black rights, he was not their intellectual sire. His colleagues had sought to lend the holdings the weight of the chief justice's office. As is indicated in chapter 3, his *Cruikshank* holding, undermining federal efforts to protect blacks from mob violence, closely tracked Bradley's circuit court opinion, but he still had to be reminded while drafting the holding to cite relevant precedent cases, and owned up to the fact that he was not used to citing cases.

Bradley was the driving intellectual force behind the Court's key reconstruction era holdings, his influence being yielded by