Ohio Northern University Law Review

Volume 38 | Issue 1 Article 3

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Some constitutional amendments have an impact beyond their terms: they transform the way people look at the world. An amendment evidences a consensus for change, and may be a catalyst for more. For example, by the end of the Civil War the North reached a consensus against slavery that it implemented by the 13th Amendment.[1] The prohibition of slavery profoundly altered society: reflecting a view of African-Americans as members of society entitled to the fundamental rights of citizens. Abolition pushed against the racial discrimination embedded in law, and the Civil Rights Act of 1866 and the 14th Amendment followed.[2] Abolition also altered the common law both directly and indirectly.

The 13th Amendment commands that "[n]either slavery nor involuntary servitude . . . shall exist"[3] and empowers Congress to enforce that command.[4] The narrow legal application of the amendment does not prohibit all racial discrimination and limits Congressional power under it to issues concerning slavery, involuntary servitude, and their badges and incidents.[5] Nevertheless, abolition led to an acknowledgement of African-American citizenship that transformed the racial aspects of common carrier law.[6] Statutes and judicial decisions ended antebellum racial exclusion and discrimination on common carriers,[7] but the Constitution did not control all aspects of private relationships.[8] The idea of equality met existing racial prejudice. The collision produced the doctrine of "separate but equal" in

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1. *See* DAVID DONALD, THE POLITICS OF RECONSTRUCTION 1863-1867 7 (1965) (Republicans who voted for the Thirteenth Amendment were unanimous); U.S. CONST. amend. XIII.
2. U.S. CONST. amend. XIV; Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 18 U.S.C. § 242 (2006) and 42 U.S.C. §§ 1981-1982 (2000)).
3. U.S. CONST. amend. XIII, § 1.
4. *Id.* § 2.
5. *Id.* §§ 1, 2.
6. *See, e.g.*, *infra* pp. 123-126; Civil Rights Act of 1866, ch. 31 sec. 1, 14 Stat. 27 (1866).
7. *See, e.g.*, *infra* pp. 129-132.
8. *See* U.S. CONST. amend. XIII, § 1.

public transport.[9] Segregation grew in the shadow of the 13th Amendment until it took over the 14th Amendment in *Plessy v. Ferguson*.[10]

I. THE COMMAND—NEITHER SLAVERY NOR INVOLUNTARY SERVITUDE SHALL EXIST

Section 1 of the 13th Amendment abolished slavery and involuntary servitude.[11] Any law triggered by or expressly dependent on slavery no longer had force.[12] Former slaveholders might continue to treat their former slaves as though nothing had happened, but the situation had changed. Abolition removed the powers that slaveholders had over their slaves, such as a right to use physical force—"moderate correction."[13] But abolition did not end racial prejudice.[14]

Southern states adopted racially-discriminatory laws—restrictions on contract, property, and procedural rights—to compel the former slaves to remain in virtually the same position.[15] States contended that these "Black Codes" did not constitute slavery or involuntary servitude because they did not impose all the characteristics of slavery.[16]

Courts took a broader view of the essence of the prohibition, applying it even where the subjects retained some rights. For example, Supreme Court Justice Salmon P. Chase, on circuit in 1867, struck down the discriminatory Maryland apprentice law as an involuntary servitude prohibited by the 13th Amendment.[17] In the *Slaughter-House Cases*,[18] Justice Miller pointed to

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9. Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

10. *Id.* at 537.

11. *See* U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

12. The presumption of slave status upheld by the Supreme Court lost its meaning when slavery was abolished. *See generally* Prigg v. Pennsylvania, 41 U.S. 539 (1842).

13. Moody v. State, 54 Ga. 660, 661 (1875).

14. *See, e.g.*, THEODORE BRANTNER WILSON, THE BLACK CODES OF THE SOUTH (1965); JOEL WILLIAMSON, ED., THE ORIGINS OF SEGREGATION (1968).

15. *See, e.g.*, WILSON, *supra* note 14.

16. *See id.* at 70-71, 76-77, 138-39; ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 199 (1988).

17. *In re* Turner, 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14,247). Justice Chase also found the law violated the Civil Rights Act of 1866. *Id.* at 339. Maryland apprenticeship laws authorized state officials to make the children work for masters until the age of twenty-one. Brown v. State, 23 Md. 503, 506-07 (Md. 1865). White apprenticeship was a personal mentorship in which apprenticeship was a choice; the apprentice had a right to an education, and could not be assigned to others. *In re* Turner, 24 F. Cas. at 339. African-Americans did not have such rights in their indentures and were even described as the property and interest of the master. *Id.* at 339. Judge Hugh Lennox Bond of the Baltimore Criminal Court freed black children who had been taken from their parents, but the Maryland Legislature restructured the state court system to remove jurisdiction from Bond. *See* Richard P. Fuke, *Hugh Lennox Bond and Radical Republican Ideology*, 45 J.S. HIST. 569, 572 (1979); THE FREEDMAN'S RECORD, July 1865. It was left to Chase to strike down the law.

Chase's decision to illustrate how the amendment reached involuntary servitude.[19]

Nevertheless, the Court rejected arguments that would broaden involuntary servitude to apply to any restrictions on liberty.[20] The plaintiffs in the *Slaughter-House Cases* argued that the slaughter-house monopoly created an "involuntary servitude" because it forced them against their will to use the sanctioned company.[21] Justice Miller denied this interpretation of the amendment:[22]

> To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government—a declaration designed to establish the freedom of four millions of slaves—and with a microscopic search endeavor to find in it a reference to servitudes, which may have been attached to property in certain localities, requires an effort, to say the least of it.[23]

Scholars debate the breadth of the 13th Amendment's command, ranging from the view that it prohibits only slavery[24] to contentions that a variety of constraints on individual choice constitute involuntary servitude.[25] Thus far the Court has used section 1 of the 13th Amendment

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18. 83 U.S. 36 (1873).

19. *Id.* at 69. The Court stated:

> It was very well understood that in the form of apprenticeship for long terms, as it had been practiced in the West India Islands, on the abolition of slavery by the English government, or by reducing the slaves to the condition of serfs attached to the plantation, the purpose of the article might have been evaded, if only the word slavery had been used. The case of the apprentice slave, held under a law of Maryland, liberated by Chief Justice Chase, on a writ of habeas corpus under this article, illustrates this course of observation.

Id.

20. *Id.* at 71.

21. *Id.* at 66.

22. *Slaughter-House Cases*, 83 U.S. 36 at 67-69.

23. *Id.*

24. Earl Maltz, The Thirteenth Amendment and Constitutional Theory (Feb. 26, 2011) (unpublished manuscript), *available at* http://digitalcommons.law.umaryland.edu/schmooze_papers/131/ (honoring "*the principles that underly the text*" as expansive interpreters claim is not original intent of the Amendment—"It was designed to outlaw the institution of slavery—no less, but no more.").

25. William Carter, Jr., The Thirteenth Amendment, Interest Convergence, and the Badges and Incidents of Slavery (Feb. 26, 2011) (unpublished manuscript), *available at* http://digitalcommons.law.umaryland.edu/schmooze_papers/118/ (13th Amendment underdeveloped badges and incidents of slavery because of lack of interest convergence); Julie Novkov, The Thirteenth Amendment and the Meaning of Familial Bonds (Feb. 26, 2011) (unpublished manuscript), http://digitalcommons.law.umaryland.edu/

only for slavery or for involuntary servitude that was very close to slavery, like the Maryland apprentice laws and peonage in Alabama,[26] and has turned a deaf ear to more extensive claims.[27]

II. THE EMPOWERMENT OF CONGRESS—CONGRESS SHALL HAVE POWER TO ENFORCE THIS AMENDMENT

Section 2 of the amendment empowered Congress to enforce the abolition of slavery and involuntary servitude.[28] Thus, Congress may establish a remedial framework for persons held in involuntary servitude or may make criminal the act of holding another in slavery.[29] Section 2 also supports Congressional legislation against the badges and incidents of slavery to assure that slavery and involuntary servitude will not exist.[30] Pursuant to this reasoning, Congress passed the Civil Rights Act of 1866, arguing that the abolition of slavery also authorized them to prohibit racial discrimination in contracts, property, and rights in court.[31]

Courts agreed that Congress could protect against a revival of slavery. Restrictions on commerce, property ownership, and court enforcement could compel the victims to servitude.[32] "Blot out this act and deny the constitutional power to pass it, and the worst effects of slavery might

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schmooze_papers/125/ (supporting either politically or someday legally gay marriage and immigrant rights); Maria Ontiveros, The Slavery and Involuntary Servitude of Immigrant Workers: Two Sides of the Same Coin (Feb. 26, 2011) (unpublished manuscript), *available at* http://digitalcommons.law.umaryland.edu/schmooze_papers/121/ (treatment of illegal workers coerces labor in violation of Thirteenth Amendment); Lea VanderVelde, A Grievance Based Interpretation of the Thirteenth Amendment (Feb. 26, 2011) (unpublished manuscript), *available at* http://digitalcommons.law.umaryland.edu/schmooze_papers/124/ (arguing for focus on the grievance of the affected, here Mrs. Dred Scott). These plausible extensions may have political as well as legal purposes.

26. *See* Bailey v. Alabama, 219 U.S. 219, 245 (1911).

27. *See, e.g.*, United States v. Stanley, 109 U.S. 3, 25 (1883) (Court refused to use the 13th Amendment to find "discrimination in enjoyment of accommodations in inns, public conveyances and places of amusement" unlawful).

28. U.S. CONST. amend. XIII, § 2.

29. *See id.* §§ 1-2.

30. *Id.*

31. As Senator Trumbull argued:

> With the destruction of slavery necessarily follows the destruction of the incidents of slavery. When slavery was abolished slave codes in its support were abolished also.
>
> Those laws that prevented the colored man going from home, that did not allow him to buy or to sell, or to make contracts; that did not allow him to own property; that did not allow him to enforce rights; that did not allow him to be educated, were all badges of servitude made in the interest of slavery and as a part of slavery.

HORACE WHITE, THE LIFE OF LYMAN TRUMBULL 258 (1913).

32. United States v. Rhodes, 27 F. Cas. 785, 794 (C.C.D. Ky. 1866) (No. 16,151).

speedily follow. It would be a virtual abrogation of the amendment."[33] More than a century later, the Supreme Court held that the Civil Rights Act of 1866 forbade racial discrimination in private transactions, and that the 13th Amendment authorized Congress to legislate to eliminate badges or incidents of slavery.[34]

When Congress enacted the Civil Rights Act of 1875 prohibiting racial discrimination in public accommodations, Justice Harlan said that innkeepers, common carriers, and places of public accommodation had a quasi-public character that required them to be open to all, and that discrimination by such a quasi-public entity was a badge or incident of slavery.[35] Nevertheless, Justice Bradley wrote for the majority of the Supreme Court that "it would be running the slavery argument into the ground" to find the amendment authorized such legislation.[36] Unlike the civil rights protected by the 1866 Act, Justice Bradley considered public accommodations a social right that was not a badge or incident of slavery.[37]

Plaintiffs had argued that exclusion from public accommodations was a badge or incident of slavery because laws in some states during slavery required carriers and places of public accommodations to deny African-Americans access.[38] Bradley responded that the exclusion was a means of preventing slaves from escaping and not an incident of slavery itself.[39] Slaves lack legal rights and therefore could not contract, own property, or sue.[40] But slaves could ride on carriers with their master or with their master's permission.[41] Discrimination on carriers had long been common in the North where slavery did not exist, and Bradley considered it a purely associational matter.[42]

Scholars continue to debate the deference to be paid to Congressional views on the badges and incidents of slavery, and whether the specific

33. *Id.* (holding that Congress had power to enact the provisions for equality in testimony as a means to enforce the 13th Amendment. Swayne found federal jurisdiction under the Civil Rights Act of 1866 for the prosecution of white citizens who broke into the home of a black woman in Kentucky and assaulted her, because Kentucky prevented African-Americans from testifying against whites).

34. Jones v. Mayer, 392 U.S. 409, 438 (1968).

35. *The Civil Rights Cases*, 109 U.S. at 42 (Harlan, J., dissenting).

36. *Id.* at 24-25 (majority opinion).

37. Pamela Brandwein, Features of Conventional Scholarly Wisdom About the Thirteenth Amendment (Feb. 26, 2011) (unpublished manuscript), *available at* http://digitalcommons.law.umaryland.edu/schmooze_papers/122/.

38. *The Civil Rights Cases*, 109 U.S. at 20-21.

39. *Id.*

40. *Id.* at 22.

41. *Id*. at 21-22.

42. *Id.* at 25.

legislation is necessary and appropriate to remove them;[43] however, the Court has not yet reversed its *Civil Rights Cases* decision that racial discrimination in public accommodations is not a badge or incident of slavery and that Congress enjoys only a limited power under the 13th Amendment.[44]

III. THE RECONSIDERATION OF EXISTING LAW

Although the Supreme Court did not consider racial discrimination in public accommodations to violate section 1 of the 13th Amendment and believed it beyond the reach of the section 2 enforcement power of Congress, supporters thought the amendment would have far greater effect than its words alone suggest. They were right.

IV. ABOLITION'S IMPACT ON FUNDAMENTAL RIGHTS

Many abolitionists contended that slavery corrupted the masters and the society that tolerated or approved it.[45] Some Republican advocates of the amendment emphasized the impact of slavery on free men of both races, arguing that it deprived them of fundamental rights.[46] The debaters were not clear on how the amendment would secure fundamental rights such as

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43. Alexander Tsesis, Congressional Authority to Interpret the Thirteenth Amendment (Feb. 26, 2011) (unpublished manuscript), *available at* http://digitalcommons.law.umaryland.edu/schmooze_papers/127/; Jennifer McAward, Congressional Authority to Interpret the Thirteenth Amendment: A Response to Professor Tsesis (Feb. 26, 2011) (unpublished manuscript), *available at* http://digitalcommons.law.umaryland.edu/schmooze_papers/117/; Linda McClain, Involuntary Servitude, Public Accommodations Laws, and The Legacy of *Heart of Atlanta Motel v. United States* (Feb. 26, 2011) (unpublished manuscript), *available at* http://digitalcommons.law.umaryland.edu/schmooze_papers/115/. At least some Radical Republicans apparently believed that the Amendment conferred plenary power on Congress to vindicate fundamental rights. *See* Robert Kaczorowski, *Epilogue: The Enduring Legacy of the Thirteenth Amendment*, *in* THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 300 (Alexander Tsesis ed., 2010).

44. *The Civil Rights Cases*, 109 U.S. at 21-22, 25.

45. *See* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 40-51 (1970).

46. Senator Henry Wilson of Massachusetts said:

> Twenty million free men in the free States were practically reduced to the condition of semi-citizens of the United States; for the enjoyment of their rights, privileges, and immunities as citizens depended upon a perpetual residence north of Mason and Dixon's line. South of that line, the rights which I have mentioned [freedom of speech, of religion and the right to peaceably assemble and petition for redress of grievances], and many more which I might mention, could be enjoyed only when debased to the uses of slavery.

CONG. GLOBE, 38TH CONG., 1ST SESS. 1202 (1864). Similarly, Representatives John Kasson of Iowa and Green Smith of Kentucky argued for the amendment by stressing the loss of free speech that had occurred in the slave states. CONG. GLOBE, 38TH CONG. 2D SESS. 193 (1865) (statement of Rep. Kasson); *Id.* at 237 (statement of Rep. Smith).

free speech.[47] Nevertheless, proponents believed that the abolition of slavery would affect a broad network of ideology and relationships, not just the narrow conception of status.[48]

Abolition's social, economic, and political effects satisfied traditional requirements of "changed conditions" for overturning old constitutional interpretations and common law decisions.[49] The understanding that abolition should result in the protection of fundamental rights of African-Americans resulted in the extension of citizenship for African-Americans and changes in the law of common carriers.[50] The amendment altered laws that did not expressly turn on slave status because courts took a different view of African-Americans in its wake.[51]

V. AFRICAN-AMERICAN CITIZENSHIP

Chief Justice Taney's opinion in *Dred Scott v. Sandford*[52] divided people born in the United States and subject solely to its jurisdiction into three classes: citizens, slaves, and free negroes.[53] Although the 13th Amendment abolished slavery, it did not on its face affect the status of free negroes.[54] Nevertheless, the Civil Rights Act of 1866 stated that all persons born in the United States were citizens.[55] Republicans supporting the statute believed that the amendment had effectively overruled *Dred Scott*.[56] But how did it do so? [57] A close look at the mechanism for this transformation

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47. CONG. GLOBE, 38TH CONG., 1ST SESS. 1202 (1864) (statement of Sen. Wilson); CONG. GLOBE, 38TH CONG. 2D SESS. 193 (1865) (statement of Rep. Kasson); CONG. GLOBE, 38TH CONG. 2D SESS. 237 (1865) (statement of Rep. Smith).

48. CONG. GLOBE, 38TH CONG., 1ST SESS. 1202 (1864) (statement of Sen. Wilson); CONG. GLOBE, 38TH CONG. 2D SESS. 193 (1865) (statement of Rep. Kasson); CONG. GLOBE, 38TH CONG. 2D SESS. 237 (1865) (statement of Rep. Smith).

49. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (change of facts, development of related doctrine makes old decision outmoded); WILLIAM L. REYNOLDS, JUDICIAL PROCESS IN A NUTSHELL 167-70 (3d ed. 2002).

50. *See infra* pp. 123-132.

51. *See infra* pp. 128-132.

52. 60 U.S. 393 (1857).

53. *Id.* Indigenous people were subject to the jurisdiction of their tribes, although the United States also exerted authority over them. *Id.* at 403-04.

54. U.S. CONST. amend. XIII.

55. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 18 U.S.C. § 242 (2006) and 42 U.S.C. §§ 1981-1982 (2000)).

56. MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 48 (1986); Rebecca Zietlow, *Congressional Enforcement of the Rights of Citizenship*, 56 DRAKE L. REV. 1015, 1024-26 (2008).

57. Professor Chambers uses citizenship to illustrate a transformational view of the 13th Amendment. He suggests that the amendment may contain a principle that ought to be considered in the interpretation of other provisions of the Constitution. *See* Henry Chambers, Why Originalism is of such Little Use in Interpreting the Constitution (Feb. 26, 2011) (unpublished manuscript), *available at* http://digitalcommons.law.umaryland.edu/schmooze_papers/119/.

reveals how the amendment could affect change in an area beyond its direct scope—not only black citizenship, but also racial discrimination by common carriers.

The 13th Amendment did not expressly make citizens of all African-Americans born in the United States.[58] An opponent of black citizenship could argue, as Taney did in *Dred Scott*, that free blacks were not considered citizens under the original Constitution and that Congress could only confer citizenship on persons born abroad.[59] Republicans argued that the 13th Amendment transformed the position of African-Americans and made it appropriate for Congress to state that change,[60] as it did in the first section of the Civil Rights Act of 1865.[61] The amendment destroyed the rationale for denial of citizenship.

Taney's controversial views rested on three premises: First, that negroes could be reduced to slavery.[62] The 13th Amendment rendered the first premise irrelevant—no one could be reduced to slavery any more.[63]

Taney's second premise contended that African-Americans were stigmatized by anti-miscegenation laws,[64] but this was a weak premise from the start. The anti-miscegenation laws may have been stigmatic, but they restricted both races.[65] Finally, Taney's third premise for denying citizenship to African-Americans was that American society viewed discrimination against African-Americans as necessary.[66] He illustrated the third premise by showing that nowhere in the nation except Maine did they have civil and political rights equal to whites.[67] He argued that the consequences of citizenship would endow blacks with privileges and immunities that were unacceptable to whites, such as the right to travel, freedom of speech, and the right to bear arms.[68] Finally he said "that this class of persons were governed by special legislation directed expressly to

58. *See* U.S. CONST. amend. XIII.

59. *Scott*, 60 U.S. at 421.

60. CURTIS, *supra* note 56, at 48-49; Zietlow, *supra* note 56, at 1024-26.

61. *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 18 U.S.C. § 242 (2006) and 42 U.S.C. §§ 1981-1982 (2000)).

62. *Scott*, 60 U.S. at 407 ("They had for more than a century before been regarded as beings . . . and that the negro might justly and lawfully be reduced to slavery for his benefit.").

63. U.S. CONST. amend. XIII.

64. *Scott*, 60 U.S. at 408.

65. *Id.* (The Maryland province of 1717 stated "that if any free negro or mulatto intermarry with any white woman, of if any white man shall intermarry with any negro or mulatto woman, such negro or mulatto shall become a slave during life . . . .").

66. *See id.* at 421.

67. *Id.* at 416.

68. *Id.* at 416-17.

them, and always connected with provisions for the government of slaves, and not with those for the government of free white citizens."[69]

Taney's home state of Maryland provided strong evidence for his final premise. Many laws discriminating against free African-Americans arose from concern to maintain the institution of slavery.[70] Fearing slaves might revolt against their masters, legislatures prohibited unlicensed meetings of free blacks, possession of dogs and guns, and immigration into the state.[71] Attempting to prevent slaves from escaping, states imposed licensing requirements for travel out of state and excluded free black testimony that might help free slaves or limit a master's power over them.[72] Concerned that rebellious slaves might steal from their masters, states required licenses for African-Americans who sold farm goods.[73]

In *Dred Scott*, Taney argued that free African-Americans were not citizens because they could have their rights stripped from them,[74] but most laws stripped them of rights in order to maintain slavery. Because Taney's third premise flowed from slavery, abolition undermined his argument.[75] When there are no slaves, there is no sense in having laws "connected with provisions for the government of slaves . . . ."[76] Thus, the destruction of the institution meant that many racially-discriminatory laws lost their rationale.

The 14th Amendment resolved the question of African-American citizenship without the need for a court decision on the citizenship effect of the 13th Amendment.[77] Nevertheless, the reasoning for the citizenship consequences of the 13th Amendment played a critical role in some judicial decisions in other areas.[78]

VI. TRANSPORTATION

The abolition of slavery impacted transportation. Although common carriers had a common law obligation to carry all goods and passengers,[79]

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69. *Scott*, 60 U.S. at 421.

70. *See* David Bogen, *The Maryland Context of Dred Scott: The Decline in the Legal Status of Maryland Free Blacks 1776-1810*, 34 AM. J. LEGAL HIST. 381 (1990).

71. *Id.* at 403-05.

72. *Id.* at 404-05.

73. *Id.* at 404.

74. *See Scott*, 60 U.S. at 403-05.

75. *See id.* at 416-17.

76. *Id.* at 421.

77. *See* U.S. CONST. amend. XIV.

78. *See The Civil Rights Cases*, 109 U.S. at 23.

79. A common carrier "is bound to receive and carry, all the goods offered for transportation, subject to all the responsibilities incident to his employment; and is liable to an action in case of refusal." New Jersey Steam Navigation Co. v. Merchs. Bank, 47 U.S. (6 How.) 344, 382-83 (1848). JOSEPH K. ANGELL, A TREATISE ON THE LAW OF CARRIERS OF GOODS AND PASSENGERS BY LAND AND BY WATER

antebellum carriers treated race as good cause for an exception because there were so many reasons to refuse passage to African-Americans, whether slave or free.[80] Abolition undercut the reasons for refusal and led courts and legislatures to eliminate the exception.[81]

VII. ANTEBELLUM EXCLUSION

Prior to the Civil War, African-Americans could be refused passage on common carriers in the South on the grounds that the captain feared that they might be slaves trying to escape; Justice Bradley remarked on this in the *Civil Rights Cases*.[82] In Maryland, railroads and steamboats carefully guarded against transporting slaves because the ship's master could be held liable.[83] In 1834, the Court of Appeals of Maryland upheld liability against a steamboat company for failure to find a runaway slave even though the ship's master permitted a limited search.[84] Based on the law of 1839, the company would be liable for a penalty of five hundred dollars for transporting any slave without the written permission of the slave's owner and—in the event the slave escaped—the transportation company would also be liable to the owner for the value of the slave.[85]

465-77 (3d ed. 1859). *See also* Jencks v. Coleman, 13 F. Cas. 442 (C.C.D. R.I. 1834) (No. 7,258). The court stated:

> The right of passengers to a passage on board of a steamboat is not an unlimited right. But it is subject to such regulations as the proprietors may prescribe, for the due accommodation of passengers, and for the due arrangement of their business. The proprietors have not only this right, but the farther right to consult and provide for their own interests in the management of such boats, as a common incident to their right of property.

See also Merriam v. Hartford & New Haven R.R. Co., 20 Conn. 354 (1850); Jordan v. Fall River R.R. Co., 5 Cush. 69 (Mass. 1849); Bennett v. Dutton, 10 N.H. 481 (1839); Crouch v. Great N. Ry. Co. (1854) 156 Eng. Rep. 1031 (11 Exch. 742).

80. *See* Penn, Delaware & Md. Steam Navigation Co. v. Hungerford, 6 G. & J. 291 (Md. 1834).

81. An 1867 Pennsylvania statute prohibited railroad companies from making any distinction on account of race or color. *See* Cent. R.R. Co. of N.J. v. Green, 86 Pa. 427, 430-32 (Pa. 1878). In 1885, Michigan enacted a similar public accommodations law. *See* Ferguson v. Gies, 82 Mich. 358 (Mich. 1890).

82. *The Civil Rights Cases*, 109 U.S. at 21-22 (1883) ("It may be that by the Black Code (as it was called), in the times when slavery prevailed, the proprietors of inns and public conveyances were forbidden to receive persons of the African race, because it might assist slaves to escape from the control of their masters. This was merely a means of preventing such escapes, and was no part of the servitude itself.").

83. *See Penn, Delaware*, 6 G. & J. 291.

84. *Id.*

85. Md. Laws Ch. 375 (1838). Earlier laws provided for fining ships captains "three dollars . . . per hour for carrying away negroes without passes, and for allowing slaves on board." JEFFREY R. BRACKETT, THE NEGRO IN MARYLAND 82 (1889). In 1825, the statute was amended to require clerks and captains to keep lists of all negroes allowed to sail and providing a fine of one thousand dollars for carrying away a colored person contrary to the act. Md. Laws Ch. 85 (1825).

Maryland Federal District Court Judge William Fell Giles explained how these laws supported carrier discrimination:

> As long as slavery existed a slave could make no contract, and the laws were very stringent to prevent common carriers from transporting colored persons who were slaves; in fact, some of the common carriers of the State refused to carry colored people as passengers without first obtaining a bond of indemnity signed by white persons to save them harmless in the event that the passengers should turn out to be slaves. This grew out of the fact that the Court of Appeals had decided that color was presumptive evidence of the condition of servitude.[86]

As Judge Giles noted, carriers used fear of slave escapes to justify exclusion of free African-Americans as well.[87] Statutes also imposed travel limits on free blacks. Statutes required free blacks traveling by ship to have a certificate of freedom plus a certificate of identity describing them.[88] Further, any negro or mulatto leaving the state for more than thirty days without leaving a written statement of his plans and intention to return with the clerk of the county court, or without bringing back a certificate showing that he was restrained from returning by illness or coercion, would be treated as a resident of another state.[89] The free negro would thus be subject to all the laws prohibiting immigration from another state. A number of states prevented free negroes from entering.[90] This was constitutional under *Dred Scott* because if African-Americans were not citizens, the Privileges and Immunities Clause of Article IV did not apply to them.[91] The corollary of exclusion empowered common carriers to refuse to carry African-Americans whose transport they feared might violate the laws of the state.

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86. *Baltimore City Passenger Railway*: *Who Shall Ride in the Cars? Test Case in United States Circuit Court*, BALT. AMERICAN & COMMERCIAL ADVERTISER, Apr. 30, 1870, at 1 (reporting on the case of Alexander Thompson, who was ejected from a seat in a covered portion of the car and forced onto the uncovered platform).

87. *Id.*

88. Earlier laws provided for fining ships captains "three dollars . . . per hour for carrying away negroes without passes, and for allowing slaves on board." JEFFREY R. BRACKETT, THE NEGRO IN MARYLAND 82 (Herbert B. Adams ed., John Hopkins University 1908) (1889). In 1825, the statute was amended to require clerks and captains to keep lists of all negroes allowed to sail and providing a fine of one thousand dollars for carrying away a colored person contrary to the act. Md. Laws Ch. 85 (1825).

89. Md. Laws Ch. 323 §1, 2 (1832).

90. *See, e.g.*, *id.* §1 (1832); *see also* 1828-1829 N.C. Sess. Laws ch. 34, p. 21.

91. *See Scott*, 60 U.S. 393; U.S. CONST. art. IV. Many states, like Maryland and Virginia, prohibited free negro immigration from other states.

VIII. ANTEBELLUM DISCRIMINATION

Slaves might accompany their masters in steamboat facilities in the South,[92] but African-Americans traveling on their own often received shabby treatment. William Chambers wrote of the inferior eating areas for coloreds on a steamer crossing the Susquehanna river.[93] Steamboats often had separate quarters for negroes, sometimes in the hull next to the crew.[94]

Even in northern states like Michigan and Pennsylvania, African-Americans received second class treatment.[95] The courts reasoned that the common law obligation of carriage did not cover the manner and location and allowed companies to exclude African-Americans from the enclosed portion of vehicles.[96] Samuel Ringgold Ward wrote of other discrimination in the North.[97] His ticket for a voyage to Liverpool had a notation that specifically required him to eat in his cabin because of his race, and his wife and children were excluded from a ship's cabin on a trip from New York to Canada.[98] Although a conductor in Ohio who excluded an African-American from a streetcar was convicted of battery, the exclusion was total and the opinion did not require equal facilities.[99] In short, carriers freely discriminated against African-Americans before the war in both the North and the South, contending successfully either that they were justified in excluding them or in treating them as second-class travelers so long as they were carried.

IX. POST-ABOLITION RECONSIDERATION OF COMMON CARRIER LAW

The abolition of slavery transformed antebellum racial practices. As Professor Joseph Singer has written:

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92. Mrs. Hugh McLeod, *Account of the Loss of the Steamer Pulaski*, GEORGIA HIST. Q., June 1919, at 63-95 (Her brother's nurse shared the cabin with his wife and three of his children).

93. WILLIAM CHAMBERS, THINGS AS THEY ARE IN AMERICA 253-54 (William and Robert Chambers 1854).

94. DAVID HOLLY, TIDEWATER BY STEAMBOAT: A SAGA OF THE CHESAPEAKE 53, 222-23 (John Hopkins University Press 1991); Lila Line, *Steamboat Days on Chesapeake Bay*, NAUTICAL COLLECTOR, Aug. 1995, at 50-51.

95. *See, e.g.*, Day v. Owen, 5 Mich. 520 (Mich. 1858) (holding that steamboats must carry African-American passengers, but may exclude them from using the cabins); Goines v. M'Candless, 4 Phila. R. 255 (Ct. Com. Pl. 1861) (upholding exclusion of negroes from riding inside passenger cars).

96. *Day*, 5 Mich. at 525-26; *Goines*, 4 Phila R. at 255.

97. *See* SAMUEL RINGGOLD WARD, AUTOBIOGRAPHY OF A FUGITIVE NEGRO (Arno Press 1855).

98. *Id.* at 147, 228-29.

99. State v. Kimber, 3 Ohio Dec. Reprint 197 (Ct. Com. Pl. 1859) (convicting Henry Kimber, who ejected an African-American from a city passenger railroad in Hamilton County, Ohio, for battery on the grounds that common carriers are bound to carry all races).

> The year 1865 marked an enormous turning point in the history of public accommodations law . . . . The case law that emerged after 1865 is absolutely consistent in affirming a common-law right of access to places of public accommodation without regard to race until the time of the Jim Crow laws of the 1890s. This right of access is premised not only on the traditional duties of public accommodation, but also on newly emerging conceptions of racial equality.[100]

Northern states outlawed discrimination in public accommodations after the war by legislation and by common law decision or both.[101] The change in common carrier law after the Civil War had two aspects. Carriers could no longer exclude African-Americans on the basis of race—the amendment rendered fears of escape or immigration law violation baseless.[102] But carriers were also prohibited from treating negroes worse than they treated whites: courts imposed a common law "separate but equal" standard that prohibited the previously-existing disparity in facilities.[103]

For example, a Philadelphia lower court in 1865 found ejection from a streetcar was actionable because the war had changed the common law, even before the 13th Amendment was ratified:[104]

> The logic of events of the past four years has in many respects cleared our vision and corrected our judgment; and no proposition has been more clearly wrought out by them than that the men who have been deemed worthy, to become the defenders of the country, to wear the uniforms of the soldier of the United States, should not be denied the rights common to humanity . . . .[105]

A few years later, the Pennsylvania Supreme Court approved segregation on streetcars when the accommodations for African-Americans were "not inferior."[106] The decision assumed that common carrier law required carriers to carry African-Americans and that the requirement had

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100. Joseph W. Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1357 (1996).

101. An 1867 Pennsylvania statute prohibited railroad companies from making any distinction on account of race or color. *See Cent. R.R. Co. of N.J.*, 86 Pa. at 430-32. In 1885, Michigan enacted a similar public accommodations law. *See Ferguson*, 82 Mich. at 364.

102. *See* Earl M. Maltz, *"Separate But Equal" and the Common Carriers in the Era of the Fourteenth Amendment*, 17 RUTGERS L.J. 553 (1985-86).

103. *See* Derry v. Lowry, 6 Phila. R. 30-32 (Ct. Com. Pl. 1865).

104. *Id.* at 30.

105. *Id*. at 33.

106. W. Chester & Phila. R.R. Co. v. Miles, 55 Pa. 209, 211 (Pa. 1867).

an equality component—imposing a "separate but equal" standard.[107] The court noted that the case arose "before the passage of the Act of 22d March 1867, declaring it an offence [sic] for railroad companies to make any distinction between **passengers** on account of race or color," recognizing the probability that the statute went beyond the new common law to forbid segregation as well.[108]

The changes in the common law were not limited to the North.[109] In Maryland, Judge Giles struck down streetcar discrimination in Baltimore as a violation of the common law.[110] He acknowledged that carriers freely discriminated against colored people before the war, but:

> [a]ll that, however, has passed away. Slavery has been abolished, and the reason for such rule and regulation no longer exists. Under the Fourteenth Amendment to the Constitution of the United States the colored man has become a citizen, and can sue in the United States Courts. After citing several authorities, Judge Giles said: "It appears to me that no common carrier has a right to refuse to carry any peaceable man who is willing to pay his fare."[111]

Judge Giles' reference to 14th-Amendment citizenship referred to the ability of the plaintiff to get the suit into federal court, but the abolition of slavery provided the fulcrum for his substantive decision that common carriers must carry African-Americans.[112] The application of the common carrier law to African-Americans gave them a common law right of access to passage, and, moreover, that right included equal treatment with other passengers.[113] Judge Giles followed his own decision in several later cases in which plaintiffs won judgments for common carrier mistreatment on the grounds that their accommodations were inferior to those of whites.[114]

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107. *Id.*

108. *Id*. at 215.

109. In addition to the judicial changes to the common law discussed in the text, Reconstruction legislatures in the south imposed prohibitions on carrier discrimination. *See* CATHERINE A. BARNES, JOURNEY FROM JIM CROW: THE DESEGREGATION OF SOUTHERN TRANSIT 3 (1983). Subsequent statutes imposing segregation in those states retained the requirement that carrier seating must be equal for the races. *See*, *e.g.*, Louisiana Acts 1890, No. 111, p. 152; Mississippi Acts of 1888, p. 48.

110. *Who Shall Ride in the Cars?*, *supra* note 86, at 1.

111. *Id.*

112. *Id.*

113. *Id.*

114. *The Street Car Case*, BALT. AMERICAN & COMMERCIAL ADVERTISER, Nov. 13, 1871, at 4 (reporting on the case of John Fields v. The Baltimore City Passenger Railway Company); *The Rights of Colored Passengers on the Chesapeake Steamers*, BALT. AMERICAN & COMMERCIAL ADVERTISER, June 19, 1872, at 2 (reporting on the case of Josephine Carr v. E.S.L. Young).

In the *Civil Rights Cases*, Justice Bradley assumed that African-Americans were entitled to equal access to common carriers and public accommodations as part of state law—i.e. the common law.[115] If the state enforced the right of others to public accommodations and common carriers but did not protect African-Americans, it would violate the 14th Amendment because the antebellum exception could no longer be justified.[116] If the carrier's exclusion policy violated anyone's rights:

> his redress is to be sought under the laws of the State; or if those laws are adverse to his rights and do not protect him, his remedy will be found in the corrective legislation which Congress has adopted, or may adopt, for counteracting the effect of State laws, or State action, prohibited by the Fourteenth Amendment.[117]

States avoided the 14th Amendment's constitutional prohibition in two ways. First, the state could abolish the common law by statute and deny the right of access to carriers and inns to everyone.[118] Although Tennessee did this in 1875, the impact of the denial on white travelers made it politically problematic.[119]

Alternatively, states could enforce a right of access while permitting the carrier to choose the location of the passenger—i.e., equal in access and physical accommodations but separated by race.[120] Both races would have the right to first-class facilities, but the state would not give either race a right to a particular location, leaving the carrier free to segregate the races.[121] This was the path chosen.[122]

African-Americans brought numerous suits in the latter half of the 19th century on the basis of either a common law or a statutory right to carriage

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115. *The Civil Rights Cases*, 109 U.S. at 9-10.

116. *Id.*

117. *Id.* at 24.

118. *See* Palmer v. Thompson, 403 U.S. 217, 226 (1971) (upholding the closing of a public pool in order to avoid having to integrate it).

119. Act of Mar. 23, 1875, Ch. 130, 1875 Tenn. Pub. Acts §1 ("The rule of the Common Law giving a right of action to any person excluded from any hotel, or public means of transportation, or place of amusement, is hereby abrogated . . . .").

120. *See* Stephen J. Riegel, *The Persistent Career of Jim Crow: Lower Federal Courts and the "Separate but Equal" Doctrine, 1875-1896*, 28 AM. J. LEGAL HIST. 17, 30-31 (1984); *see also* Sarah M. Lemmon, *Transportation Segregation in the Federal Courts Since 1865*, 38 J. NEGRO HISTORY 174, 176 (1953).

121. Sarah M. Lemmon, *Transportation Segregation in the Federal Courts Since 1865*, 38 J. NEGRO HISTORY 174, 176 (1953).

122. Even federal judges enforcing the Civil Rights Act of 1875 sometimes held that its prohibition of discrimination did not prohibit racial separation. *See* Stephen J. Riegel, *The Persistent Career of Jim Crow: Lower Federal Courts and the "Separate but Equal" Doctrine, 1875-1896*, 28 AM. J. LEGAL HIST. 17, 32-33 (1984).

arising after the Civil War.[123] "Separate but equal" became the legal standard behind which they won victory after victory against discriminatory treatment.[124] That same standard became a barrier when subsequently applied by the Court in the very different context of the equal protection clause of the 14th Amendment.[125]

123. *See* David Bogen, *Why the Supreme Court Lied in Plessy*, 52 VILL. L. REV. 411 (2007); David Bogen, *Precursors of Rosa Parks: Maryland Transportation Cases Between the Civil War and World War I*, 63 MD. L. REV. 721 (2004).

124. *See* Chicago & Nw. R.R. Co. v. Williams, 55 Ill. 185 (Ill. 1870); Green v. City of Bridgeton, 10 F. Cas. 1090 (D.C.S.D. Ga. 1879) (No. 5,754); The Sue, 22 F. 843 (D. Md. 1885); Longwood v. Memphis & C.R. Co., 23 F. 318 (C.C. Tenn. 1885); Houck v. Southern Pac. R. Co., 38 F. 226 (C.C.W.D. Tex. 1888); People v. King, 110 N.Y. 418 (N.Y. 1888); Heard v. Ga. R.R. Co., 1 I.C.C. 719 (1888); Heard v. Ga. R.R Co., 2 I.C.C. 508 (1889).

125. *Plessy*, 163 U.S. at 543-44; s*ee Why the Supreme Court Lied in Plessy*, *supra* note 123, at 171.