

PURSUING THE AMERICAN DREAM SEPARATELY

This article presents the path towards equality in the USA, starting with the Civil War, through the segregation era and ending with the *Brown* case in 1954. Beginning with the *Reconstruction Amendments*, it analyzes problems that occurred after reconstruction in the South of the first segregationist practices, also called the Jim Crow Laws, confirmed by the Supreme Court in the *Plessy* case in 1896. The article also contains government initiatives specially projected to stop segregationist practice: a package of *Civil Rights Acts* between 1866 and 1875, which were finally held unconstitutional by the Supreme Court in the famous *Civil Rights Cases*. The final part of the article focuses on the “separate but equal” doctrine legitimated by the *Plessy* decision, and there is some analysis of the famous dissent opinion written by Justice Harlan who used the now-famous phrase “Color-Blind Constitution.”

“Separate but Equal,” as a doctrine, was conceived in order to stop the rising black movement, especially in the Deep South.¹ The Thirteenth, Fourteenth and Fifteenth Amendments made it possible to extend civil rights to those who had never had them before – Black Americans. Nonetheless, the cost of the self-evident truth which later on the Thirteenth Amendment contained proved to be enormous for the country, as it led to the outbreak of the Civil War.

The cost of continuing reconstruction of American society by adding the Fourteenth and Fifteenth Amendments could not be measured in any simple way. All hope held by African Americans that they finally could become real citizens, treated equally and with dignity, died soon after the war ended. Even though the Fourteenth and Fifteenth Amendments protected equal treatment and voting rights from deprivation by the state in the public sector, they did not mention anything about the private sector. An equal clause, after all, was very hard to achieve even in the public sector, since the 14th Amendment prohibited something that its language did not (Kull 1994: 111). The Supreme Court was not doing anything at that time to implement the Fourteenth Amendment. Voting rights provided by the Fifteenth Amendment made plausible the fulfilling of the revolutionary goal of “No Taxation without Representation,” long-awaited by African Americans. The doctrine “all men are created equal,” which had been fought for during the Civil War, neither was able to be attained in the South nor in the North. After the war almost 90 per cent of Black Americans still lived in the Southern states, and they didn’t have a chance to move to the North because Northern States had strict regulations concerning which Blacks could come and settle. In other words, they did not want them there.

¹ The term Deep South is strictly related to the six southern states – Alabama, Georgia, Louisiana, Mississippi and both Carolinas (Slomp 2009: 40).

The Fourteenth Amendment explicitly guaranteed the rights of citizens to due process and the equal protection of laws. The Fifteenth Amendment gave voting rights to African Americans, which increased political participation, but the South's response was very quick, and Southerners legitimated the "Jim Crow Laws."² Before the Civil War the term became popular as a label for a distorted view of the behavior of African Americans. In the 40s, abolitionists, used it as a way to describe the unfairness of separate railroad cars for the different races. After the Civil War the colloquial term "Jim Crow" was used increasingly to describe an array of different segregationist statutes and laws. Briefly speaking, "Jim Crow Laws" were used especially in the South to bring into effect segregationist practice in both the public and private sector of living. The "Deep South" gave a foundation to the doctrine "Separate but Equal," which the Supreme Court established as a precedent in *Plessy v. Ferguson* in 1896.

The natural death of the reconstruction idea in the South after the Civil War was a result of the return of the white elite to those territories, and put an end to the dream of Black Americans of becoming citizens. The "Redeemer"³ coalition started frightening practices to retain white supremacy in the South (Bartnicki 1995: 339). The coalition tried to abolish voting rights, not so long before given to African Americans. To frighten "descent slaves," as they called them, the coalition started intimidating practices and political cheating, forcing Blacks to vote for Democrats. In 1870 Mississippi implemented an Amendment to the state constitution which created a law to eliminate black voters, and soon after the "deep south" made good use of the example from Mississippi and implemented twin-like amendments to their state constitutions (Rubio 2001: 39).

The first case in which a court articulated the "separate but equal" doctrine was a decision before the Civil War, *Roberts v. City of Boston*. A Black citizen of Boston, Massachusetts, mounted a case that challenged the segregated school system of which he was forced to be a part. The Supreme Court of Massachusetts confirmed that Black people of the state were entitled by law to have equal rights, constitutional and political (Beckman 2004: 772). However, providing separate schools for Black children did not violate these rights which the state constitution contained. The lawsuit based on equal protection did not come from federal law but from the state constitution and preceded the advent of the Fourteenth Amendment's Equal protection by nearly two decades. The plaintiff in this case was a Black child named Sarah Roberts, whose father tried to enroll her in the primary school nearest their home. She was denied en-

² Jim Crow Laws connotes segregationist laws enacted by various southern states. The term had its origins in the minstrels of the early nineteenth century and was made popular by the minstrel Thomas "Daddy" Rice in the 1820s. Using burned cork to blacken his face, attired in ill-fitting, tattered garments, and smiling broadly and profusely, Rice imitated the dancing and singing of Black entertainers. Rice called his routine "Jumping Jim Crow" and said that he based it on an act he had seen in 1828 by an elderly and crippled Louisville stableman belonging to a Mr. Crow (Beckman 2004: 524).

³ This name was given to the elite of white owners in the South, who, according to <http://www.experiencefestival.com/a/Redeemer/id/1896816> – formed a loose political coalition in the post-Civil War U.S. South, which consisted of pre – war Democrats, Union Whigs, Confederate army veterans, and individuals interested in industrial development. They sought to "redeem" the South by undoing the changes brought about by the Radical Republicans. Although the various groups had widely different visions of the South, they shared a commitment to implement stricter economic and political control of blacks. Their coming to power was commonly referred to as Redemption.

rollment because this school was reserved for white children only. The Boston School Committee established and administrated 160 primary schools for children, but only two were designed to be used exclusively to educate Black children living in the city (according to http://supreme.lp.findlaw.com/supreme_court/briefs/00-1406/00-1406.mer.ami.aclu.pdf). The attorney for Sarah Roberts was Charles Sumner, one of the most famed abolitionists, future U.S. senator from Massachusetts, and chief architect of the Civil War reconstruction Amendments. He argued that Black children have an equal right to attend general public schools. This argument is almost identical to the one adopted 105 years later by the U.S. Supreme Court in its *Brown v. Board of Education* (1954) opinion (Beckman 2004: 772). The Chief Justice Lemuel Shaw found that Sumner's vision of equality was correct, though treating people under the law differently in accordance with their station in life does not violate the state constitution which developed equality. Referring to the decision in *Roberts v. City of Boston*, Justice Shaw said that prejudice was not created by the law and in turn could not be changed by any further law.

Following the ratification of the 14th Amendment in 1868, still a few northern states provided public schools only for white children without provisions for Blacks and other minorities. As a response to the ratification equal clause Amendment, the South started separate taxation to support the separate school system, but this kind of action was held unconstitutional. Sumner discovered that separate schools were very difficult to establish, especially in the South. The framers of the Fourteenth Amendment had written an antidiscrimination principle to the constitution but the first generation of judges declined to read what had not been written (Kull 1994: 89). The question of whether the reconstruction amendments prohibited segregation did not come before the court until *Plessy* in 1896. Earlier decisions ultimately presented no exception to the rule because decisions had already established disinclination.

The critical decisions come from *Slaughter House* and *Strauder v. West Virginia*, where the Supreme Court confirmed no exception to the rule, but it was done in a very controversial way. The *Slaughter House* Case arose from a contest between rival factions of New Orleans politicians over the spoils to be extracted from the privilege of operating the municipal abattoirs (Kull 1994: 90). One of the factions was Black. Justice Miller said that the Amendments had been created to secure equal rights, especially of descent slaves, and the court would respect the language of the Amendments as well as their spirit, and in any case would not deny the protection of rights, though the party interested may not be of African descent. Thus, federal rights and state rights are two different things, and to make a correct remedy, a proper distinction is needed (Abernathy and Perry 1993: 25). The Amendments said that the law in the States shall be the same for Blacks as for Whites, but according to the *Strauder*⁴ decision, which was merely condemning the state law that put Blacks under an express disability to which Whites were not subjected, they still did not mention anything about equality of the races.

Segregation is a doctrine also known as a natural process of separation, polarization, stratification and so-called "putting apart from others," based on differences

⁴ In the *Strauder* case, Virginia State Law prohibited black people from serving on juries, thus ensuring that black defendants were always judged by white citizens. *Strauder* was a black defendant and a former slave. In his opinion a white jury couldn't give a full equal hearing as a black or mixed jury could.

in the biological makeup of people. Recent social research shows that segregation still exists, although the degree of existence is subject to debate. It is still manifest in residential patterns by ethnicity, gender, occupation, education, income, religious preferences and partner selection (Beckman 2004: 795). Segregation in the post-civil War period in America, especially in the Deep South, was used largely as a strategy to maintain the purity of the elites, also known as the Redeemer Coalition. The main point of the strategy was to maintain White domination over minorities, and, what was even more important at that time, to prevent minorities from mixing with the majority. This was a dominant trend in America during the slavery period, reconstruction era and in the modern era prior to the civil rights movement. Segregation was used in all of these periods to enforce the separation of races and ethnic groups.

Despite being segregated, Blacks were forced to vote for democrats, and those who refused to vote against their will were deprived of voting rights. One of the best-known depriving practices was the “Grandfather Clause,” which stated that, every Black male whose ancestor was able to vote in 1860 could vote without voting tests,⁵ which was ironic because in 1860 only white men actually had voting rights (Abraham and Perry 1994: 333). According to some stats, at the beginning of the 20th century in Louisiana, of about 130 thousand registered Afro-Americans, only 5 thousand voted and a few years later the amount fell to merely 1,324 black voters (Bartnicki 1995: 339). So, as we can observe, the 15th Amendment gave political rights *sense largo*, and voting rights *sense strict*, though state legislatures barred black voters from voting and political rights.

In 1866, a year after the 13th Amendment was ratified and a year before the 14th Amendment would be ratified, the government wrote a collection of affirmative acts with one purpose, to help implement the 13th Amendment frames in the South, where white elites were trying to restore white supremacy. It was also an attempt to make a foundation for the upcoming 14th and 15th Amendments. Fren though the Reconstruction Amendments and Civil Rights Act of 1866 were functioning, segregation became common and widespread in postbellum America.

Benign Discrimination, as the segregation doctrine used to be called, was hitting public facilities such as railroads, steamboats, public conveyances, hotels, licensed theaters, houses of public entertainment, common schools and institutions of learning authorized by the law, as well as churches and cemetery associations (Tsisis 2008: 112). One to the failure in facing equality, the government filled with reconstruction abolitionists one more time decided to provide an affirmative act named the Civil Rights Act of 1875, which was ratified merely hours before the New Congress started, when the Republicans lost with 96 seats. The recent act provided a so-called window to look at the 14th Amendment and to be viewed as a range of its power to protect the

⁵ According to <http://arimelman.com/blog/?p=43>, one of the possible solutions for this is a Voter Literacy Test, a test designed to test people’s understanding of core issues before allowing them to vote. There is a huge stigma in American history regarding these tests because they were used in the south from 1860–1960 to prevent blacks and other racial minorities from voting. They were used specifically to discount the opinions of minorities. Blacks would be given harder tests, judged on subjective scales, and their applications would be rejected by a racist counsel. There was good reason to pass the 1964 “Civil Rights Act” which restricted the need to take the test to people who had completed fewer than six years of formal education. When that wasn’t enough, the “Voting Rights Act of 1965” suspended the use of literacy tests entirely. This was upheld by the Supreme Court.

equal privileges and immunities of citizenship. The Congress passed the Civil Rights Act to aid Blacks; the act made it a federal crime for any owner or operator of a hotel, public conveyance or theater to deny the full enjoyments of the accommodations thereof because of race or color (Abraham and Perry 1994: 333). It was the last gasp of the stepping down republicans, principled reconstruction, which created a new constitutional reality in the United States, although the reconstruction reaffirmed the principles of individual liberty and equality. The Supreme Court did not share the same welfare as Congress and could not read what had not been written in those Amendments, which of course was reflected in the passed Civil Rights Acts, finally held unconstitutional in the Civil Rights Cases in 1883.

The Civil Rights Cases concerned litigation about five different points provided by the Civil Rights Act of 1875. The first four reviewed criminal prosecution; two of the defendants were found guilty of denying a Black access to an inn. The third case was a result of prohibiting Blacks from enjoying an opera in New York. The fourth was similar to that in New York and was about refusing a seat in a theater in San Francisco. The fifth and the last took place in Tennessee, where the state government started civil action against a railroad company which had forbidden a Black woman from riding in the ladies car. On October 15th 1883, the Supreme Court declared in the above-mentioned cases that section 1 and 2 of the Civil Rights Act of 1875 were unconstitutional, and the court ruled that the 14th amendment only authorized congress to legislate against discrimination by the state, not by private individuals, in accordance with the Civil Rights Act of 1875 (Padover 1995: 277).

The Republican-dominated Supreme Court did not follow the civil war amendments way of nationalize a thinking based on traditional federalism. As a result of the critical Slaughterhouse Case, protection of most civil rights and liberties remained in the hands of the state. In the ruling on the Civil Rights Act of 1875, the Supreme Court held that the act went too far according to the Congress's legislative power under the 14th Amendment, and the court also held that the 13th Amendment's abolition of slavery did not include the right to equal accommodation, since those particular rights had nothing to do with the so-called badges of slavery. The majority understood that individual rights weren't the subject matter of the 14th Amendment. Only when the state abridges privileges and immunities is Congress empowered to enact appropriate legislation (Beckman 2004: 188). The majority also examined an authority of Congress under the 13th Amendment and said that it protected only fundamental rights as an essence of citizenship, thus it did not extend to individual relations between the regular citizens proscribed by the Civil Rights Act of 1875. Thus, the Civil Rights Act of 1875 in the Supreme Court opinion was incompatible with the 13th and 14th Amendments, and what is more important, it unconstitutionally circumvented the state law by regulating private wrongs. The majority opinion was written by Justice David J. Brewer and was 7:1, but in this case a single and prophetic dissent opinion was written by Justice John Marshall Harlan, a former slaveholder and southern aristocrat, who voiced support for the Civil Rights Act under his alternative interpretation of the 13th and 14th Amendments. Harlan pointed out that upholding of the Fugitive Act of 1793 (*Prigg v. Commonwealth of Pennsylvania*) and the Fugitive Act of 1850 (*Ableman v. Booth*) in which the majority affirmed that Congress had the right and authority to force individuals to assist in retrieving fugitive slaves regardless of the state law. In his opinion, the 13th Amendment under its frames gave Congress the authority to uproot slavery

institutions by any legislation that made eradication of all slavery badges, including unequal accommodation. Thus Harlan states that the Fourteenth Amendment “was the first instance in our history of the investiture of Congress with affirmative power by the legislation to enforce an express prohibition upon the States.”

The precedent established by this case was affirmed in 1896 in *Plessy v. Ferguson*, in which the Supreme Court upheld Louisiana Law mandated racially segregated railroad transportation. Once again, the majority concluded that badges of slavery have nothing to do with separate accommodation; again, Harlan made his dissent, in which such segregation was discrimination and violated both the 13th and 14th Amendments. Furthermore, in his now famous sole dissenting opinion in this case, he rightly stated that the intention of the Louisiana law was to exclude Black people from the coaches occupied by whites, and in his opinion there were no other ways to explain that legislation’s purpose (Beckman 2004: 676). He also wrote the now often quoted phrase “Our Constitution is colorblind, and neither knows nor tolerates classes among citizens.” Thus all citizens are equal before the law, which is obvious before the court. The *Plessy* precedent authorizes “the Separate but Equal” doctrine, which paralyzed for over fifty years the “privileges and immunities” following from the Reconstruction Amendments, creating a segregated country with one race above another. No one can have any doubt about which race was the privileged race. The precedent in *Plessy v. Ferguson* was abolished in 1954 in the *Brown v. Board of Education of Topeka* precedent, in which the majority finally implemented the 14th Amendment. What is even more important, the Supreme Court stated that a separated school system violated the equal protection clause which the 14th Amendment added to the constitution.

To conclude, I would like to end my presentation of the vision of equality with the famous statement delivered to the public by Robert F. Kennedy: “Some men see things as they are and ask why. Others dream things that never were and ask why not?” And I think this is the best way to describe the path to racial equality, which was finally created by the Supreme Court. However, this outlook in future would become far too common and destructive in the form of Reverse Discrimination under the government’s Affirmative Action program.

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