The Cracked Foundation of Equality: How Nationalism Built the Legal Paradigm of the 19th Century

Leann Stoll, History and Political Science
Dr. Joel Sipress, Department of Social Inquiry

ABSTRACT

Through a deep exploration of the legal history of the 1800s it becomes apparent that two forms of nationalism existed in the United States in the 19th Century. Ethnic nationalism was the dominant nationalism until the late 1800s, when civic nationalist policies of equality began to triumph. Yet, ethnic nationalism continued to persist within state governments placing the nation at odds with itself. The Supreme Court of the United States attempted to create an ideological compromise, which resulted in a hybrid nationalism that flourished under law, allowing freedmen civic equality while denying social equality.

Precedent establishing the legal foundation of the United States used racist ideology as its dominant building block. However, this legal paradigm did not match the narrative of American equality, freedom and opportunity exhibited as the American nation. The two faces of the American nation, what nationalists preached and what the nation practiced came head to head as the Civil War warned in the words of Abraham Lincoln, that a divided nation would fall. Consequently, a shift occurred during the late 1800s as legislation originating at the federal level began to take on notions of equality, however it was not until after the Civil War ended that a fundamental change occurred in the law of the United States of America. Not only were all slaves forever free men, but Constitutional Amendments also secured civic equality regardless of race or previous conditions of servitude.

Consequently, a deep examination of the legal paradigm of the 19th Century and how it came to exist is necessary to fully understand how America went from a nation operating on racism, to a nation with an African American president. Legislation and Constitutional Amendments of the 19th Century laid the foundation to create equality in the United States. Neither the Civil Rights Movement of the 1960s nor an African American president in the year 2008 would have been possible without the monumental legal advances of the Civil War and Reconstruction Era. Yet, this shift in ideology was not widespread enough to affect lasting change, and many hopes for social equality remained for future generations to fulfill.

Most importantly, an ideological war dominated the 19th Century. Two opposing forms of nationalism sought dominance within the legal realm. The stake of this race between two ideas was monumental; it was to determine who was a member of the political and social community of the United States of America. Ethnic nationalists sought to maintain systems of racial inferiority and exclusion, whereas civic nationalists wished to create a domain of equality for all citizens regardless of ethnicity. In the late 1800s, the Supreme Court of the United States attempted a treacherous compromise between these two forms of nationalism. Therefore, understanding the idea of nationalism and recognizing the power an ideological construct can wield over a nation is imperative. As nationalist theorist Ernest Gellner states, “Having a nation is not an inherent attribute of humanity, but it has now come to appear as such.”

Nationalism is enthralling as it creates and sustains nations, but what exactly is it? It is not easily definable; it is a chameleon, which changes accordingly with its backdrop and thus its true shade lies in the eyes of the beholder. Nationalist theorist Craig Calhoun agreed with Michel Foucault when he called nationalism, “a ‘discursive formation’ a way of speaking that shapes our consciousness, but also is problematic enough that it keeps generating more issues and questions, keeps propelling us into further

---

talk, keeps producing debates over how to think about it.” This idea that people belonged to sovereign nations, which replaced the feudal system, nationalism, is defined by Benedict Anderson as “an imagined political community- and imagined as both inherently limited and sovereign.” Theorist Anthony D. Smith defines nationalism as “an ideological movement for attaining and maintaining identity, unity, and autonomy on behalf of a population deemed by some members to constitute an actual or potential ‘nation’.” Ernest Gellner sees it as a sentiment, which drew people together under the guise of common goals and attainment of rights to liberty under an umbrella concept of the nation festered by industrialization. Regardless of one’s perception of nationalism, its birthplace, or its parents, it is a powerful idea that changes with time, and has had a profound effect on American policies towards the people residing on United States soil.

Two divergent forms of nationalism, ethnic and civic, were involved in a violent tug of war within the 19th century legal domain of the United States. Ethnic nationalism was the dominant nationalism until the late 1800s, when civic nationalism gained dominance. While, this shift towards civic nationalism enforced lasting change, it was not widespread enough to completely overturn ethnic nationalist legal precedent in the United States. Thus, the Supreme Court of the United States attempted to reconcile the two ideologies and reunite the nation. This reconciliation required compromising social equality to maintain civic equality.

What is ethnic nationalism? Ethnic nationalism is a type of nationalism dictated by cultural and racial ties. Historian Mitchell Snay defines it as a “nationalism where the underlying loyalty in a state is attached to a specific group of people based on the perceived awareness of singular inherited characteristics, such as language, customs, and history.” This view of oneself as a member of a nation or community, where ethnic and cultural ties determine inclusion in the political community created a chasm of racism and legislative precedent legalizing segregation practices; a chasm that the United States has yet to cross over completely. According to nationalist theorist Anthony Smith, “Ethnic communities have quite commonly regarded themselves as the moral centre of the universe and as far as possible affected to ignore or despise those around them… in the ethnic model of the nation; citizenship becomes coextensive with the membership of the dominant ethnic community.” However, Smith highlights that “Ethnic nationalism does not involve a specific racist component, but manages to exclude non-members within and deny their rights,” Therefore, the plague of racism dominant in United States history can be attributed, within the paradigm created by Smith, as a side effect of an ethnic based nationalism.

Nearly the polar opposite, civic nationalism leaves the door of the nation open to anyone who wishes to claim citizenship, without regard to ethnicity. Equal opportunities and rights are the defining characteristics of civic nationalism. As Mitchell Snay states civic nationalism “can be said to exist where primary loyalty is given to common citizenship in a national state governing specific territory.” As a primary loyalty, the nations’ state supersedes other group loyalties such as ethnic, religious, or sectional ties. Therefore, the problematic differences of these subgroups, which drive racism, are less important. Smith coins this type of nationalism territorial nationalism, defined as, “regard[ing] the nation as a form of rational association. In this version, the individual must belong to a nation, but can choose which to join. Four factors define the territorial nation: a definite, compact territorial homeland; common legal codes and the equality of all members before the law; the social and political rights of citizenship; and a

---

2 Craig Calhoun, Nationalism, (Minneapolis Minnesota: University of Minnesota Press, 1997), 3.
4 Smith, Myths and Memories, 103.
6 Smith, Myths and Memories, 196.
7 Ibid., 198.
8 Snay, Fenians Freedmen and Southern Whites, 8.
shared Civic religion and mass public culture."9 This is the type of equality-based nationalism that most people recognize as American Nationalism today.

One may guess when approaching the topic of Civil War and Reconstruction in the United States, one would be barraged with stories of nationalist conflict, and attempts to redefine the nation. Nevertheless, there is a reason all definitions of nationalism defined above are forwarded by Europeanists. Most American historians from all walks of methodology and areas of focus find themselves sectionalizing and grouping, or perpetrating studies of individuals; avoiding the study of ideas, especially big icky old-world ideas like nationalism, as they may the bubonic plague. Additionally problematic, most historians seek out facts instead of collective ideas, leaving American Nationalism as a collective ideology of the 19th century virtually undefined. While most scholars of this period fail miserably at attempts to study an idea, historians such as T.H. Breen and Barbara Fields, provide a roadmap for the proper way to study an idea, although their studies remain focused on ideas only indirectly related to 19th Century American nationalism.

Revisionist attempts to explain 19th Century America, set the conversational paradigm in which American Nationalism of the Civil War and Reconstruction period would be explored. Prominent Civil War historians such as Kenneth Stampp10, and Eric Foner, 11 in the spirit of Historical Social Science research, told the stories of groups during the era of reconstruction. However, their need to express ideas through divisions of class and politics, neglected nationalism, an idea worthy of study in its own right. This left a huge component of the tale of Civil War and Reconstruction unfilled.

Kenneth M. Stampp in The Era of Reconstruction12 sees race as the central issue of reconstruction. By perceiving the Union government as driven to establish equality, Stampp designed his entire work to refute the ethnic nationalist perspective. Yet, he never noted the presence of ethnic nationalism. Stampp reviewed the actions of political parties during reconstruction from 1865-1877, demonstrating the rise and fall of the power of the civic nationalists, termed in his work “Radical Republicans.” Stampp perceived racism, and racists, without acknowledging that such an ethnic based ideology was the driving force of the government for much of the 19th century.

Eric Foner in post-revisionist work, Nothing But Freedom: Emancipation and its Legacy, focused on class conflict as the underlying issue of reconstruction. Foner explored how land ownership and availability influenced freedmen and Southerners alike. Foner explained how and why Southerners excluded freedmen from the political community by land ownership requirements. Foner even discussed how immigration in other parts of the nation supported an ethnic nationalist view of the political community. Yet, Foner never called out nationalism.

Nonetheless, Foner and Stampp established the paradigm of inquiry for the era of Civil War and Reconstruction, which others tend to follow. Thus, inquires into the impact nationalism had on the era, tend to follow the framework of Historical Social Science13 or Classical Historian14 methods established by these two historians. Consequently, historians such as Edward J. Blum, and Mitchell Snay, who recognize that American Nationalism needs to be addressed, try to fill in one of the holes left behind by Stampp and Foner, by utilizing the same methodology as their predecessors. Seeing nationalism as a product of minor group loyalties, these historians attempt to establish a causal relationship, with

9 Ibid., 190.
nationalism always the result instead of the cause. Attempting to apply science to the study of ideas, they seem to forget an idea is not something one can touch, observe or analyze. It is elusive yet powerful.

Instead of offering a bold argument about the nature of 19th Century American nationalism, scholars such as Edward J. Blum in his book *Reforging the White Republic: Race, Religion, and American Nationalism 1865-1898*, and Mitchell Sny in *Fenians, Freedmen, and Southern Whites: Race and Nationality in the Era of Reconstruction* both emphasized the role of nationalism in reconstruction. However, both attached explanations of nationalism to sectional differences, offering the reader a mere addition to the studies completed by Stampp and Foner. Blum viewed ethnic nationalism as Southern phenomenon, spawned by the loss of the war, in return, civic nationalism was viewed as an ideology belonging to Radical Republicans. Snay also connected nationalist divisions to sectional groups. While busy linking southern whites to the Democratic Party, terming them ethnic nationalists and the Union League to the Republican Party, coining them civic nationalists, Snay missed the widespread force of ethnic nationalism throughout the laws of the U.S. government.15

While finally breaking from the discourse of why reconstruction failed, John Pettegrew, in his history of everyday life during the Civil War, immersed the reader in the era’s war culture, and thereby attached American nationalism to it.16 In the spirit of all those before him, Pettegrew took it upon himself to attach nationalism to a group, soldiers of the Civil War, but at least his group attachment represented the nation as a whole, instead of a segmented portion. In his article, *The Soldier’s Faith: Turn-of-the-Century Memory of the Civil War and the Emergence of Modern American Nationalism* this combat and war historian with a twinge of psycho historical inquiry, concluded that American Nationalism is really a sense of duty for ones country, which was born of Civil War military heroism, and the memorialization created in its aftermath. Pettegrew claimed this was the origin of the idea that America was the savior of oppressed peoples of the world.17 Other historians such as Dorothy Ross, James A. Rawley, and Jon W. Blassingame, make it quite clear that this savior of the world-based nationalism was in existence far before the onset of the Civil War.

Viewing divergent forces of nationalism as an effect of Civil War conflict, Blum, Snay, and Pettegrew made a critical mistake. All neglect legal history, which evidences a battle of civic and ethnic nationalism before the Civil War. Instead, historical inquiry has been trapped within the confines of truth and facts. Scholarship has been wearing blinders and only seeing what is in front of it and clear, instead of conducting an exploration of an elusive idea. One thing must be clear. This study is meant to define a shadow, the shadow of the nation- its nationalism. The legal history of the United States is but one of the many ways to track the progression of nationalist ideology within the state, but it is not the only way. However, this clear depiction of the conflicting nature of 19th century federal policies clearly portrays a struggle of ideas, and I find it quite amusing historians are so caught up with new fangled measures of establishing history, they forgot to inquire into the most obvious and available paper trail left behind by the nation.

Contrary to the beliefs of Pettegrew, prior to the onset of the Civil War, civic and ethnic nationalism both existed in the United States of America. The Supreme Court case *Dred Scott v. Sandford* shows two opinions of nationalism present in one court ruling, with ethnic nationalism taking the dominant position. After Emancipation, legislation and amendments to the Constitution began to show a shift to civic nationalism in the federal government. Ethnic nationalism persisted at a state level creating state endorsed Black Codes. The Supreme Court was asked to define the depth of power granted to federal government under the 13th, 14th, and 15th Amendments to the Constitution. In *The Civil Rights Cases* and *Plessy v. Ferguson* the Supreme Court attempted to reconcile ethnic and civic nationalisms, consequently allowing state sponsored racism in the United States.

15Snay, *Fenians, Freedmen, and Southern Whites*, 44.
“Ethnic communities have quite commonly regarded themselves as the moral centre of the universe and as far as possible affected to ignore or despise those around them.”

Anthony D. Smith

Early 19th century legal precedent stood within the box of ethnic nationalism, yet at the same time the battle between the two forces of nationalism had already began in the United States. *Dred Scott v. Sandford* came before the United States Supreme Court in 1857 illustrating the existence of rival nationalisms in the United States prior to the onset of the Civil War. While addressing the question of automatic emancipation, the Court established ethnic nationalism as the dominant nationalism within its ranks. However, the dissenting opinions show the presence of civic nationalism as a minority viewpoint.

*Dred Scott*, a slave from Missouri, sued in federal court contending automatic emancipation because his master had brought him into Wisconsin Territory, which Congress had established as free by the Missouri Compromise. The question brought before the Supreme Court by this case was “whether [Scott’s] residence on free soil had changed his status as a slave.” The Court found that since Scott was of the African race he could not be a citizen, therefore he had no standing to sue in a federal court. Chief Justice Taney, speaking for the majority of the Court also declared that even if Scott would have had standing to sue, residence on free soil did not free him.

Taney’s framing of the question for the Court reflects ethnic nationalism, “simply this: 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, and as such become entitled to all the rights, and privileges and immunities, guaranteed by that instrument to the citizen.” Taney, speaking for the majority of the Court, goes on to hold that such persons, African Americans, were not intended to be included by the authors of the Constitution and therefore did not deserve the rights granted to citizens.

The majority of the Court argued that the founders treated Negroes as inferiors when they wrote the Constitution. The Court stated, Negroes were “at that time considered as a subordinate and inferior class of beings, who had been subjigated by the dominant race, and whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them.” [Emphasis added.] Thus, ethnicity defined who was a member of the political community. Looking to the founding fathers intent in the formation of the nation was the Court’s way of establishing what Anthony Smith terms an *ethnie*. Smith defines an *ethnie* as “named groups with shared ancestry myths and memories or ‘ethno-history,’ with a strong association, though not necessarily possession of, a historic territory or homeland.” When *ethnie* meets state in the realm of ethnic nationalism it defines whom is included in the political community.

Speaking for the dominance of ethnic nationalism in the *ethnie* of the United States, the Court chose to depict the founders as racists instead of hypocrites; attempting to preserve the stately past of the Fathers of the Constitution. If the language of the Declaration of Independence were interpreted to encompass humanity as a whole, our beloved founders of the United States of America would become imposters to what they practiced, as they had owned slaves themselves. Smith claims, “that all nations require, and every nationalist seeks to provide, a suitable and dignified past.” The Court declared, “The men who framed this Declaration were great men-high in literary acquirements-high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not, in any part of the civilized world, be supposed to embrace the Negro

---

18 Dred Scott v. Sandford. 60 US.393 (United States Supreme Court, 1857).
19 Dred Scott v. Sandford.
20 Ibid.
21 Smith, Myths and Memories, 105.
22 Ibid., 176.
race...” [Emphasis added]. Therefore, because of legal precedent painting America as a white nation, ethnic nationalism dominated law of the 1850s.

The Court also found evidence for ethnic nationalism in the Supreme Law of the Land. Within two different sections of the Constitution, the Court found basis for their ruling and consequently defined the root of ethnic nationalist sentiment within the foundation of this nation. The Constitution of the United States allowed the newly formed states to import slaves until 1808, and protected slave owners rights to their slaves. The Court looked to Article 1 Section 9 stating that it pointed, “Directly and specifically to the Negro race as a separate class of persons, and shows[ing] clearly that they were not regarded as a portion of the people or citizens of the government then formed.”

Additionally, the fugitive slave clause of the Constitution stated that a slave who escaped into free territory was not free, so granting Scott his freedom would nearly violate the Constitution. The majority of the Court’s ruling in Dred Scott, and its interpretation of the Constitution shows the power of ethnic nationalism in the 1850s.

In contrast to the majority opinion, Justice McLean’s dissent reflected the assumptions of civic nationalism in Dred Scott v. Sandford. In his dissent Justice McLean wrote, “Being born under our Constitution and laws, no naturalization is required, as one of foreign birth, to make [Scott] a citizen. The most general and appropriate definition of the term citizen is ‘a freeman. Being a freeman, and having his docile in a State different from that of the defendant, he is a citizen within the Act of Congress, and the Courts of the Union are open to him.’”

Unlike the majority opinion of the case, Justice McLean’s argues that the founders realized the error of slavery and attempted to diminish its presence. In his dissent, McLean states, “James Madison...was solicitous to guard the language of the Constitution as to not to convey the idea that there could be property in man.” This debate over whether any man Negro or not could be declared another’s property became one of the central debates between ethnic and civic nationalists.

Justice Curtiss also dissented in Dred Scott, finding historical precedent of which to refer. Suggesting the government originally accepted Negroes as citizens, Curtiss claimed free Blacks were active in the ratification of the U.S. Constitution and therefore they were part of the political community. Curtiss quoted the fourth Article of Confederation: “The free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice, excepted, shall be entitled to all the privileges and immunities of free citizens of the several states.” Curtiss claimed the neglect of the authors of the Articles of Confederation to term citizenship in the paradigm of race showed intent for equality in America.

Both Curtiss’ and McLean’s dissents in the Dred Scott Case are attempts to revamp the ethnie driving American Nationalism. Unlike the majority’s ethnie depicted by Taney, the dissents had to search slightly farther into history to resurrect a past suitable for their civic form of nationalism. According to Smith, : “Ethnic communities can reasonably be said to have survived in something like their earlier forms, if successive generations continue to identify with some persisting memories, symbols, myths and traditions.”

Essentially, the Dred Scott Case, when explored, leaves little doubt that there were two opinions of nationalism in the United States at the onset of the Civil War. Not all lawmakers were White supremacists focusing on ethnic nationalist sentiment, but not many supported equality for African Americans during that era. Smith’s conception of nationalism being ethnically based can be applied to the ruling of this case. The majority of the Court relied on historical myths related to the inferiority of an other (Freedmen) to further subjigate. As Smith states “Ethnic myths are vital ‘evidence’ for territorial ‘title-deeds;’ association of the people with historic events and persons resident within a particular terrain

23 Dred Scott v. Sandford.
26 Smith, Myths and Memories, 129.
is a *sin qua non* of the quest for a recognized ‘homeland’…any title deed refers to an historically defined terrain, for which validation is by ‘historic right’ rather than Actual possession.”27 Yet, the *Dred Scott* ruling established precedent to discriminate against freedmen and slaves alike. Setting strong precedent for the next fifty years to follow, The *Dred Scott Case* erected many roadblocks for civic nationalism.

A legal shift occurred during the Civil War as legislation at a federal level in the United States slowly began granting freedom to slaves. However, motivation to incorporate freedmen into the political community was a minority viewpoint until after Emancipation. Early on during the war, actions taken by the government to free slaves were strategic actions, meant to help win the war against the Confederacy. Over time what began as a way to win the war against the insurrectionary South, transitioned into a dominant civic nationalism reflected within Congressional actions of the United States. After emancipation, an era of nationalistic regeneration began. In Smith’s terms an act of regeneration consists of, “a summons to the people, mobilizing the members of the community, tapping their collective emotions, inspiring them with moral fervor, activating their energies for national goals, so as to reform and renew the community.”28 This renewal took a civic nationalist perspective in the form of law.

To witness the shift to civic nationalist dominance, one must look to early government documents, which reveal ethnic nationalist sentiments. For instance, the original draft of the Secretary of War, Simon Cameron’s Annual Report (1861) did not reveal any civic nationalist reasoning for ending slavery. Instead, the Report reveals that actions taken by the Union were calculated to win the war. When addressing the question of what to do about the slaves, Cameron wrote, “shall they, armed by their masters, be placed in the field to fight against us, or shall their labor be continually employed in reproducing the means for supporting the armies of rebellion?”29 This clearly shows that strategic need was the driving force, and no move toward civic nationalism was taken.

Cameron makes it clear a primary reason for granting freedom to slaves was that the South had been rebellious. “By the master’s treason and rebellion he forfeits all right to the labor and service of his slave; and the slave of the rebellious master, by his service to the Government, becomes justly entitled to freedom and protection.”30[Emphasis added] Without the treason of the Southern States of the Confederacy, there would not have been the result of freedom. Therefore, in a very twisted sense, the South freed the slaves.

The *Second Confiscation Act of 1862* passed by a wartime Congress, verified the dominance of ethnic nationalism within Congress. The opening line of the Act states that “every person who shall hereafter commit the crime of treason against the United States, and shall be adjudged guilty thereof, shall suffer death, and all his slaves, if any, shall be declared and made free.”[Emphasis added] Simply, a wartime Congress challenged slavery without any justification in civic nationalist terms.

Additionally, the Act allows for the exemption from loss of *property* if the master was loyal to the Union. The *Second Confiscation Act* states, “no slave escaping into any State… shall be delivered up, or in any way impeded or hindered of his liberty… unless the person claiming said fugitive shall first make oath … [that they had] not borne arms against the United States in the present rebellion, not in any way given aid and comfort thereto.”31 Only those who were involved in the rebellion would suffer the loss of slaves.

Finally, it is exceptionally clear that the United States Government at this time did not intend to include freedmen into the political community of its nation, they intended to colonize present residents elsewhere. Section 12 of the *Second Confiscation Act* states, “And be it further enacted, That the President of the United States is hereby authorized to make provision for the transportation, colonization,

---

27 Ibid., 69.
28 Ibid., 178.
29 Simon Cameron, Secretary of State, *Draft and Final Versions of a Passage in the Secretary of War’s Annual Report 1861,* (Freedmen & Southern Society Project: University of Maryland).
31 United States Congress: Senate and House of Representatives, *Second Confiscation Act,* (1862), Sect. 10.
and settlement, in some tropical country beyond the limits of the United States,[emphasis added] of such persons of the African race, made free by the provisions of this Act, as may be willing to emigrate, having first obtained the consent of the government of said country to their protection and settlement within the same, with all the rights and privileges of freemen." Therefore, clearly the legal tone of the era of the Civil War was to free the slaves to gain militarily against the Confederacy, and then ship the freedmen elsewhere to be free.

However, by incorporating former slaves into the military for strategic purposes, the government forced itself to face the fact that a soldier of the Union Army, regardless of color deserved rights and respect. Thus, the first group of freedmen to garner the government’s seal of equality was African American soldiers fighting for the Union army. In the eyes of the state, a soldier was a soldier and deserved protection. In 1863, President Lincoln issued a Military Order, which protected Black Prisoners of War (POW). Lincoln stated, “The law of nations and the usages and customs of war as carried on by civilized powers, permit no distinction as to color in the treatment of prisoners of war as public enemies. [Emphasis added] To sell or enslave any captured person, on account of his color, and for no offence against the laws of war, is a relapse into barbarism [emphasis added] and a crime against the civilization of the age.” Here, in almost a direct contrast to Taney’s opinion delivered for the Court in the Dred Scott Case six years prior, Lincoln states that the rest of the world is not racist in the realm of military affairs and the U.S. will no longer go against the grain. This shows two different projections of nationalism, prevalent within the same decade, evidencing a war of ideas that would continue long after the conclusion of the Civil War.

Lincoln implemented this ideology by declaring that treatment of Confederate POW’s would be consistent with the treatment of African American POW’s. Lincoln stated, that “for every soldier of the United States killed in violation of the laws of war, a rebel soldier shall be executed; and for everyone enslaved by the enemy or sold into slavery, a rebel soldier shall be placed at hard labor on the public works and continued at such labor until the other shall be released and receive the treatment due to a prisoner of war.” This order declared essentially an eye for an eye principle, but that underlying principle, that a freedmen’s eye is worth as much as a white persons’ portrays a transition in the direction of the state. A transformation in policy, from an attitude in which African Americans were primarily viewed as property, to one of them as fellow humans deserving respect under the laws of war.

The Law Equalizing the Pay of Black Soldiers (1864) was another example of equality based legislation regarding the military. This legislation stated, “That all persons of color who have been or may be mustered into the military service of the United States shall receive the same uniform, clothing, arms, equipment, camp equipage, rations, medical and hospital attendance, pay and emoluments, other than bounty, as other soldiers of the regular or volunteer forces of the United States of like arm of the service, form and after the first day of January, eighteen hundred and sixty-four.” This transition to affect equal benefits within the military was monumental. From the onset of admittance of freedmen into the armed forces, they had suffered greatly, with unfulfilled hopes of equality. With insufficient rations and unequal care, these men suffered the scorn of discrimination under the ethnic nationalist majority for the duration of the war as their blood spilled quietly, as did all other soldiers. Such a declaration of equality within the armed forces, again, attacked the ethnic nationalist perspective, while solidifying the power civic nationalists had gained.

---

32 Second Confiscation Act, Sect. 12.
33 Abraham Linclon, Order by the President, (1863).
34 Ibid.
“If war among the whites brought peace and liberty to the blacks, what will peace among the whites bring?” - Frederick Douglass

Despite the rise of civic nationalism at the federal level during the Civil War, ethnic nationalism persisted in many state governments after 1865. Black Codes became prevalent in the South as a way to force freemen back into their former subordinate roles. Unable to return African Americans to slavery, ethnic nationalists did everything they could to stop them from gaining anything except freedom.

The parish of St. Landry in the state of Louisiana, for example, passed a set of Black Codes in the year 1865. The Codes restricted social equality of freemen, by limiting rights in the private sector. St. Landry, among other things, established regulations requiring freedmen to be under the employment of a white person to remain law abiding. Additionally, the Codes restricted freemen’s right to assemble under the First Amendment. Forbidding freedmen from meeting “between the hours of sunrise and sunset” the state infringed on rights granted to them with citizenship. The parish of St. Landry was not the only place ethnic based Black Codes began to appear.

The states of Mississippi and South Carolina also established Black Codes limiting citizenship rights of freedmen. One Mississippi code regulated freedmen’s ability to choose employment or unemployment: “Every civil officer shall, and every person may, arrest and carry back to his or her legal employer any freedman, free negro, or mulatto who shall have quit the service of his or her employer before the expiration of his or her term of service without good cause.” Even more shocking, the state of Mississippi also made it illegal for freedmen to carry firearms, directly encroaching Second Amendment rights to bear arms. South Carolina moved to completely exclude Blacks after emancipation. The Constitution passed by the state in 1865, not only discriminated against Blacks, but also restricted their political freedom. The South Carolina Information Highway today describes the state’s former Actions as “failing to grant African-Americans the right to vote. It also retained racial qualifications for the legislature.” Consequently, Black people had no power to combat the unfair laws; much like a return to the Dred Scott era ideology.

In response to the predominance of ethnic nationalism in state law, Congress attempted to impose Civic nationalism legislatively. The first action they took was to pass The Civil Rights Act of 1866. Even after President Johnson vetoed the legislation, Congress acquired enough support to override the presidential veto demonstrating the pinnacle of civic nationalist pursuits. The Act stated, “That all persons born or naturalized in the United States… are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude….. Shall have the same right in every state or territory in the United States, to make and enforce contracts, and to sue, and be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real property, and personal property, for full and equal benefit of all the laws and proceedings for the security of person and property…” This blunt statement of rights was meant to curb state suppression.

Yet, The Civil Rights Act of 1866 was not enough to secure equality; consequently, civic nationalism was written into the Constitution when the Fourteenth Amendment was ratified on July 9th, 1868, clarifying who was considered a citizen of the United States. This Amendment directly attacked State’s attempts to subjugate freedmen. The 14th Amendment reads, “All persons born or naturalized in the United States and subject to the jurisdiction therefore, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens [emphasis added] of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal
protection of laws.”  This Amendment to the Constitution removed any question that may have lingered regarding the citizenship of freedmen, and solidified the fact that all citizens were constitutionally allotted the right to life, liberty, and property. This Amendment directly defined who was and could become a member of the political community; finally including freedmen.

The 15th Amendment soon followed attempting to curb individual state’s power to disenfranchise freedmen. The 15th Amendment, ratified on February 3, 1870 served as a final blow to ethnic nationalist Black Codes. Section 1 states, “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”  This Amendment was to once and for all include African Americans in the political community.

Congress then forged through with The Civil Rights Act of 1875, meant to impose social equality. Suddenly with The Civil Rights Act of 1875, it became a federal crime to affect social inequality. The Act declared, “it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law.”

The Civil Rights Act of 1875 then went on to list the venues in which discrimination was forbidden. “Be it enacted, That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.”  The moment this policy was enacted, the hopes and dreams of civic nationalists around the United States were realized for an ephemeral moment.

Congress laid the foundation for complete equality by the year 1875. The Fourteenth Amendment and The Civil Rights Act of 1866 removed racial classification from citizenship requirements, the Fifteenth Amendment defined rights of citizens and denied any state violation thereof, and The Civil Rights Act of 1875 banned ethnic nationalism in the social sector. However, two Supreme Court cases soon took the wind out of the sails of civic nationalism and created precedent to establish segregation in the United States.

Once again, this battle between rival nationalisms came before the Supreme Court of the United States of America. Within two monumental cases, the Court attempted to reconcile the ideological forces. This compromise sacrificed social equality while maintaining civic equality. The Civil Rights Cases served as the first attempt of the Supreme Court to create a truce between civic and ethnic nationalisms. The Civil Rights Cases, which came before the Court in 1883, called the constitutionality of The Civil Rights Act of 1875 into question, particularly whether Congress really had the power to construct such an Act under the recent Amendments to the United States Constitution. Discriminatory practices within the business and services sector of the United States became a crime prosecuted at a federal level, under The Civil Rights Act of 1875. The plaintiffs in these cases sought to challenge such enforcement of the Act.

The Court, in an overwhelming majority held that Congress had no authority under the Constitution to enact The Civil Rights Act of 1875. Speaking on behalf of the Court, Justice Bradley declared the Act intruded on the powers reserved to the states by the Tenth Amendment, which declares that powers which are not specifically allotted to the federal government remain within the realm of the state. The Court’s ruling, however, rested not only on the grounds of states’ rights. The Court clung to the ethnic nationalist ethnie when interpreting the Fourteenth Amendment. Citing historical separation of races and previous conditions of peace under such a system, the Court insinuated that legislating racial

---

43Ibid.
45Ibid.
mixing as the *Civil Rights Act of 1875* did would cause conflict. Bradley states, “There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens; yet no one, at that time, thought that it was any invasion of their personal status as freemen because they were not admitted to all the privileges enjoyed by white citizens."[Emphasis Added] or because they were subjected to discriminations in the enjoyment of accommodations in inns, public conveyances, and places of amusement. Mere discrimination on account of race or color was not regarded as badges of slavery.”

Justice Harlan provided the sole dissenting civic nationalist voice in *The Civil Rights Cases*. Harlan believed the majority had read the recent Amendment too narrowly and out of context. He stated “The substance and spirit of the recent Amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism.” Harlan also believed that the true spirit of the Amendments was to “secure, through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship…” Yet, the intent of the civic nationalists was ignored by the majority opinion of the Court. Harlan goes on to declare, “But I do hold that since slavery, as the Court has repeatedly declared, was the moving principal cause of the adoption of that amendment, and since that institution rested solely on the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races.”

*Plessy v. Ferguson* came before the Supreme Court merely four years after *The Civil Rights Cases*. The ruling served as the final solution of the Court to the racism inherent in ethnic nationalism and the need for social and political equality inherent in civic nationalism. This solution promoted state enforced separate and inferior facilities for African Americans and resulted in prolonged ethnic nationalist sentiment into the 20th Century. After this precedent, established segregation thrived until *Brown v. Board of Education* in 1954. Fifty-seven years of state endorsed racism followed the ruling in this monumental case.

In 1897, a man named Homer Plessy, who was only one-eighth black, refused to sit in the colored section of a Louisiana train. The state of Louisiana, arrested and convicted Plessy for violating laws of segregation. Appealing the case all the way to the Supreme Court, Plessy claimed the Louisiana law violated the rights granted to him under the Thirteenth and Fourteenth Amendments.

The ruling in *The Civil Rights Cases* acutely established precedent that social discrimination was acceptable, and in *Plessy*, the Court further solidified that compromise. The majority of the Court dismissed the Thirteenth Amendment claims, stating, “it [the law] does not conflict with the thirteenth amendment, which abolished slavery… slavery implies involuntary servitude, -a state of bondage; the ownership of mankind as chattel” and thus was not even related to the issue at hand.

In regards to the Fourteenth Amendment, the Court held, separate facilities did not create an inferior status for freedmen. Obviously focusing on the ethnic nationalist *ethnie* once again Justice Brown, on behalf of the majority of the Court stated, “The object of the Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either."[Emphasis added] On behalf of the majority of the Court, Brown stated that such laws of separation, “do not necessarily imply the inferiority [emphasis added] of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their
police power.\textsuperscript{51} The Court also went so far as to say it was freedmen who were stamping themselves "with a badge of inferiority."\textsuperscript{52}

The Court had clearly been stuck between two nationalism involved in a violent tug of war throughout the 19\textsuperscript{th} Century. Imposition of social equality within the South was not suitable, whereas a return of African Americans to the status of slaves was constitutionally prohibited. Since neither side could hold dominance as it had in the past, the Court found it reasonable to discriminate in public places if the state chose to do so, while leaving legal and political rights of Freedmen unscathed. This served as the final compromise between the two belief systems. Brown wrote for the Court, "In determining the question of reasonableness, it is at liberty to act with reference to the established customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."\textsuperscript{53}

Recognizing the deeply rooted ethnic nationalism in state governments, the Court decided that social equality could not be forced. The Court stated, "The argument also assumes that social prejudice may be overcome by legislation, and that equal rights cannot be secured to the Negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals."\textsuperscript{54}

Justice Brown speaking for the majority of the Court essentially felt that the legal realm was not the proper place to solve discriminatory practices. It is within the people, and who is defined as the people, by the people could put an end to subjugation. Stating, if "one race be inferior to the other socially, the Constitution of the United States cannot put them on the same plane."\textsuperscript{55} The Court stated, "legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences…" civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically.

Yet, Justice Harlan recognized that this middle ground between nationalisms took a step backwards towards ethnic nationalism. Dissenting vehemently, Harlan declared, "I deny that any such legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. Indeed such legislation as that is here in question is inconsistent not only with that equality of rights which pertains to citizenship, national and state, both with the personal liberty enjoyed by everyone [sic] within the United States..." [Emphasis Added]. Recognizing clearly that separate facilities were simply a clear reestablishment of ethnic nationalism, Harlan declared such separation wrong. "It is one thing for railroad carriers to furnish, or be required by law to furnish, equal accommodations for all whom they are under legal duty to carry. It is quite another thing for the government to forbid citizens of the white and black races from traveling in the same public conveyance and to punish officers of railroad companies for permitting persons of the two races to occupy the same passenger coach."\textsuperscript{56}

Harlan offered a beautiful expression of civic nationalism in his dissent. Looking forward, Harlan stated, "The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.... state enactments which, in fact proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?"\textsuperscript{57}

\textsuperscript{51}Ibid.
\textsuperscript{52}Ibid.
\textsuperscript{53} Ibid.
\textsuperscript{54} Ibid.
\textsuperscript{55} Ibid.
\textsuperscript{56} Ibid.
\textsuperscript{57} Ibid.
Prior to the onset of the Civil War two forms of nationalism existed within the legal paradigm of the United States of America. The Supreme Court Case *Dred Scott v. Sandford* shows two opinions of nationalism present in one Court ruling, with ethnic nationalism taking the dominant position. After Emancipation, legislation and Amendments to the Constitution began showing a shift to civic nationalism in federal policy. Ethnic nationalists persisted at a state level creating state endorsed Black Codes. In *The Civil Rights Cases* and *Plessy v. Ferguson* the Supreme Court attempted to reconcile two nationalisms, consequently allowing state sponsored racism in the United States.

The ideological compromise of the Supreme Court in the *Civil Rights Cases* and *Plessy v. Ferguson* opened the door to segregation in the United States. Redefinition of the political community was established but social equality was lost in translation. The segregation that formed in the aftermath of the 19th Century remained a dark spot on the consciousness of the American rhetoric of equality. Nevertheless, by maintaining the political rights of freedmen, the Court’s balancing act paid off during the 20th Century. With the foundation for equality established, America was able to truly overcome practices of subjugation and stand true to values of equality based citizenship in the social sphere as well as the political sphere. Revolutions of thought again altered the definition of the nation, and consequently, the future was able to reshape the *ethnie* of the United States of America.
Bibliography


Dred Scott v. Sandford. 60 U.S. 393 (1857) (United States Supreme Court, March 6, 1857).


The Civil Rights Cases. 109 U.S. 3 (United States Supreme Court, October 15, 1883).
