

THE FOURTEENTH AMENDMENT & THE AFRICAN AMERICAN STRUGGLE FOR CIVIL RIGHTS

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On 18 February 2013, Mississippi became the last state to officially ratify the Thirteenth Amendment, formally overturning slavery. Their refusal to ratify the amendment represents one example of the disconnection between the way the law says society should behave and actual social practices. In the early twentieth century, the centrality of the Emancipation Proclamation and the Thirteenth Amendment to national memory spurred the march toward civil rights for African Americans. While these laws were certainly momentous, they were not decisive, nor were they effective in bringing about racial equality. The Thirteenth Amendment failed to better the lives of ex-slaves because it did not specify how to treat former slaves, but merely abolished the existence of the institution. The Fourteenth Amendment addressed this omission, but the enforcement of this document was limited, especially on the part of the Supreme Court and the President.

Much has been written about the ratification of the Fourteenth Amendment and the subsequent challenges in interpreting the document. In his 1957 article "There Is No 'Fourteenth Amendment,'" David Lawrence, founder and longtime columnist for *U.S. News and World Report*, argues that the Fourteenth Amendment was never a valid document.

Three-fourths of the states that comprised the union at the time needed to ratify the amendment. This did not happen, according to Lawrence, and since then, the courts have been acting under false pretenses. His interpretation of history illustrates the southern states' reluctance to ratify the amendment and the courts' unwillingness to interpret it as part of the ongoing struggle society against the idea of incorporation of the Fourteenth Amendment.¹ Historian Irving Brant considers the Fourteenth Amendment's incorporation in his book *The Bill of Rights: Its Origin and Meaning*. He argues that the amendment was intended to overturn those decisions of the Supreme Court that upheld the states' right to violate the Bill of Rights, such as the case *Dred Scott v. Sandford*, which denied that African Americans were citizens of the United States. This 1857 decision allowed states to create laws like the Fugitive Slave Act and other legislation that treated slaves as property. Brant goes on to argue that the framers' intent in writing the Fourteenth Amendment was not carried out until the mid-20th century, over eighty years after it was ratified.²

Connecting these two concepts, it is clear that white society's reluctance to accept freedmen as equals led to white society's denial of freedmen's civil rights. The unwillingness of many whites to accept the change in the social status of freedmen was mirrored in the court's limited interpretation of the Fourteenth Amendment in cases such as *Plessy v. Ferguson* (1896). Additionally, the Presidents of the late nineteenth century could have used their power and influence to push for greater equality among the races. Whether the reluctance to fully enact and enforce the Fourteenth Amendment was caused by the fact that the justices and the President were themselves part of a society that would not accept African Americans as equals or their fear of societal backlash against any efforts to enforce the Fourteenth Amendment is unclear. What is clear is that white society's prejudices affected the courts in a way that prevented the legal system from upholding the amendment. The Fourteenth Amendment was intended to undo the attempts of the southern states to enforce limits on African Americans in both political and social spheres through the Black Codes. However, the ratification of the amendment achieved little real change in the life of the everyday African American. The unwillingness of the Supreme

1. David Lawrence, "There Is No Fourteenth Amendment," *U.S. News and World Report*, 27 Sept. 1957.

2. Irving Brant, *The Bill of Rights: Its Origin and Meaning* (New York: Bobbs-Merrill Company, 1965), 316-340.

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Court and the President to enforce the *de jure* equality of African Americans outlined in the Fourteenth Amendment rendered the changes to the US Constitution impotent.

The story of the Thirteenth Amendment's failure provides a framework for understanding executive and judicial attitudes toward African American civil rights. For months after the Thirteenth Amendment's ratification, the legislatures of the southern states worked to restore the social order that had existed before the Civil War, which had been taken away by the federal government at the beginning of Reconstruction. The Black Codes, laws enacted mostly in 1865, spurred the US legislative branch to pass the Fourteenth Amendment. The amendment was limited by the fact that the Supreme Court largely ignored the Black Codes and did not rule on them until the 1950s and 1960s, almost a century after they were passed. Due to judicial and executive inaction, the amendment was not interpreted as anything more than a reiteration of the Thirteenth Amendment's declaration of emancipation for slaves, and it did not guarantee African Americans any civil rights as citizens of the United States. In other words, it produced the basis of *de jure* equality for former slaves, but in itself it had no power because its interpretation was so limited by the Supreme Court and the President.

The actual mechanism for the enforcement of *de facto* equality of freedmen was meant to be the Fourteenth Amendment. However, the Fourteenth Amendment lacked the proper support it needed to become an effective part of the Constitution due to the lack of consensus about how to treat the newly freed African American population. Almost all of the southern states refused to ratify it in 1866, mirroring the prevailing attitude of most white southerners.³ Though it was eventually ratified in 1868 by the reconstructed southern legislatures, the amendment still faced intense opposition from those parts of government that were the most responsible for ensuring that it was properly followed.⁴ The state legislatures did not abide by the amendment, creating the discriminatory laws that would later be called the Jim Crow laws in response to a white society that was unwilling to accept freedmen as equals. However, what truly doomed the amendment's effectiveness in the late nineteenth century were the Supreme Court and the executive branch's willful obstruction of the enforcement

of the Amendment. In effect, their refusal to enforce the Fourteenth Amendment allowed the malicious practices introduced by the Black Codes to continue under the Jim Crow laws.

It is hard to define what civil rights are, or when a person or race has achieved them. As such, it is important to look at the outward evidence of the "right or privilege, which if interfered with by another gives rise to an action for injury."⁵ By the broadest definition of civil rights—the legal recognition of a citizen's rights—the members of Congress did everything they could by ratifying the Fourteenth Amendment. Even if the amendment was not being followed, on its own the Fourteenth Amendment recognized that all people born slaves were entitled to the same protections that free people were. The Fourteenth Amendment overturned the accepted view established by the Supreme Court case *Dred Scott v. Sandford* that African American slaves were not citizens of the United States and thus did not deserve the protections associated with citizenship. However, the Fourteenth Amendment was only as effective as the people charged with enforcing it would allow it to be. Freedmen were given the authority to exercise their rights, but they did not have the power to do so. This partial *de jure* equality was not enough on its own to remove the years of damage that the institution of slavery had done to the balance of power between the races. It did provide a starting place, however, for the movement to develop when society was more ready to accept a change in the social structure. Though the Fourteenth Amendment did not spur momentous change, none of the later change could have been achieved without the amendment as precedent.

A narrower definition of civil rights is the opportunity for a citizen's rights to be practiced in safety. By this definition, the framers of the Fourteenth Amendment failed, because though African Americans were granted the legal rights to act as full citizens, they could not do so without fear for their lives and those of their family. About 3,000 blacks were lynched between 1888 and 1968, many of these men wrongly accused of rape.⁶ White Americans were afraid that giving African Americans legal rights would become a slippery slope and that the freedmen would soon gain social rights and be the equals of white men. For this reason, southern legislatures, which by 1877 were all firmly in the hands of the Democratic Party, enacted laws specifically

3. James E. Bond, *No Easy Walk to Freedom* (Westport, CN: Praeger Publishers, 1997), 5.

4. Bond, *No Easy Walk to Freedom*, 5.

5. Cornell, "Civil Rights: An Overview," *Legal Information Institute*, 19 August 2010, accessed 10 Nov. 2013.

6. Charles Chessnut, "Lynching," *Chessnutarchive.org*, 29 Jan. 1999, accessed 7 Dec. 2013.

limiting the rights of African Americans.⁷ In other words, society denied blacks the legal rights that the constitution said they possessed. Though they had *de jure* equality, they did not have *de facto* equality. *De facto* equality can be broken further down between equality in practice and equality in fact. While after the adoption of the Fourteenth Amendment African Americans had the right to equal citizenship, there were still underlying prejudices that prevented them from having true equality in society. The Fourteenth Amendment achieved neither form of civil rights, because *de facto* equality requires an effort by the society as a whole, whereas *de jure* equality only requires an effort by the people in power in the courts and the legislation.

In the years after the Civil War, society was unsure of how to incorporate the African Americans freed by the Thirteenth Amendment. Out of about twelve million people living in the South at the start of the Civil War, around three to four million were slaves.⁸ The question of what to do with the slaves quickly became a point of contention. Would they become integrated into white society? Was it possible, as many had thought in earlier years of slavery, to send them back to Africa? The fact was that the majority of white southerners, whether former slaveholders or men who had never owned a slave in their lives, did not consider freedmen equals. There was a basic religious idea that Africans were evil in nature due to the color of their skin, taken to be an outward sign of God's curse upon black men that they were to be "servants of servants" as descendants of Ham.⁹ For this reason, many whites in both the North and the South believed that African Americans deserved to be subordinate. If they could not be slaves anymore, then they would have to be "put in their place" through other means.

This idea of the inherent inferiority of African Americans found its way into many of the changes worked by the southern states during

early Reconstruction. When the plantation system fell apart with the end of slavery in 1865, government officials began a process of finding a new solution to the labor problem. The end of slavery created a hole in the labor industry, leaving many large plantations without their coerced labor force. This gave many former slave owners a large incentive to retain as many of their former slaves as they could. For the most part, this meant that freedmen were no less dependent on their masters than they had been as slaves, though some were awarded wages or allowed to rent.¹⁰ African Americans themselves had little choice except to continue working for their former owners. Very few former slaves were trained in trades, which meant that the only real option for their economic advancement was continuing to work the land. Even those who were skilled in trades could usually not procure a business license from the state governments, as African Americans were not allowed to own businesses in most states according to sections of the Black Codes of 1865 and 1866.¹¹ Though radical Republicans wanted to confiscate plantation land and redistribute it to the newly freed slave population, there was not much support for this idea in the North.¹² Since this course of action would have ended the days of labor-intensive, large-scale lucrative farming in the South, it would have made little economic sense for white southerners to actually implement the "40 acres and a mule" plan that became the rallying cry of the freed slaves.¹³

The new solution looked a lot like the old one, only with a different face. Most planters initially claim to have tried wages, but they found that black labor was less reliable under this system.¹⁴ In some regions, former slaves found that working only a few days could sustain them for a week, which led them to work other odd jobs, a practice called turpentineing. African Americans tended towards jobs that lent them the most freedom. But the wage system was not a good option for the planters economically. Therefore, they began to use a system of sharecropping in which blacks worked their plot of land under the supervision of the landholder and had to give up a certain amount of their crop. Gerald D. Jaynes, an economic historian, argues that white planters turned to the sharecropping

7. J. William Harris, *The Making of the American South: A Short History, 1500-1877* (Malden, MA: Blackwell Publishing, 2006), 232.

8. Bowdoin, "Data Analysis: African Americans on the Eve of the Civil War," Bowdoin.edu, accessed 12 Nov. 2013.

9. Ham was the son of Noah, who, happening upon his father naked and passed out from drinking, did not turn his eye away from the shame of his father. For this Noah cursed his son and all of his descendants to be the servant of servants. This story is told in Genesis 9:24-27. One interpretation of this verse was that God marked men black to show their evil lineage and to signify them as the fitting servants of white people. See Daniel Roger, "Evidence of Black Africans in the Bible," *Grace Communion International: 1998, 2007*, accessed 12 Nov. 2013 for explanations of the different theories for the appearance of "blacks" that have arisen from the Bible.

10. W. Fitzhugh Brundage, "A Portrait of Southern Sharecropping: The 1911-1912 Georgia Plantation Survey of George Preston Brooks," *Georgia Historical Society* (1993): 171.

11. Bond, *No Easy Walk to Freedom*, 36.

12. Harris, *The Making of the American South*, 239.

13. Brundage, "A Portrait of Southern Sharecropping," 167.

14. Brundage, "A Portrait of Southern Sharecropping," 171.

system in a time of economic distress.¹⁵ However, blacks only accepted sharecropping as an alternative to wages when they had no other choice.¹⁶ Sharecropping was a symptom of the *de facto* persistence of the institution of slavery in that there was much supervision of the black workers by white planters and that landholders received an unfairly large percentage of the profits made from the crop. To be sure, sharecropping was not the same everywhere. Some white landowners made their sharecroppers partners in the business and allowed them to keep more of the profits. In either case, the fate of the former slave was still economically entangled with that of his former master.

White society throughout the former Confederacy also began rebuilding the social order of the antebellum South. After being readmitted to the Union, many of the former Confederate States began to pass laws specifically differentiating between blacks and whites.¹⁷ These laws negated the freedom promised to African Americans in the Thirteenth Amendment. Though African Americans were no longer slaves, they were still treated as second-class citizens. As the editor of the Gainesville *New Era* announced in June 1865, months before the adoption of Florida's Black Codes, an inferior social and political status for blacks and a status of superiority for whites was "the natural order of American Society."¹⁸

Slaves were generally considered by white southern society to be fraudulent and untrustworthy individuals who tended toward criminal activities. Before emancipation, slave owners had constantly worried about slaves who were trying to get out of work by lying about sickness, breaking farming equipment, or stealing from the master.¹⁹ White critiques of African American morality did not fade with emancipation. As previously stated, there was a wide-spread view that blacks who received wages worked less reliably than blacks who sharecropped. This prejudice was one of the main reasons that Black Codes were passed in the southern states. Southern legislators thought these codes would protect society

from the untrustworthy freedmen population.²⁰ Another justification for these laws was that many white southerners believed emancipation would not last and that the next Congress would abolish the Thirteenth Amendment.²¹

In the North, these laws were met with harsh criticism, as it became evident that there would be no *de facto* freedom for freedmen until there was protection for them under the law.²² The Black Codes undid many of the hopes that abolitionists had for the Thirteenth Amendment. Florida's Black Codes, for instance, had sections that recommended temporary slavery for those who could not pay their fines or taxes.²³ This law put many African Americans constantly struggling to support themselves back on the auction block. To make matters worse, freedmen were required to pay a head tax and fund their own public schools.²⁴ These drains on their income increased the economic stresses on freedmen. Black Codes in many states also strove to define a "Negro" as someone with as little as one-eighth African blood.²⁵ This allowed the law to give preferential treatment to whites and to create special punishments, such as whipping, for blacks. Though the Thirteenth Amendment declared that slaves were freed from bondage, there was no guarantee that they would be able to exercise their rights in the former Confederacy.

All of these conditions required the drafting and ratification of the Fourteenth Amendment. Northern abolitionists knew they had to impose some official restrictions on the southern states in regard to their treatment of the freedmen. In 1866, Congress passed both the Freedmen's Bureau Bill, which imposed fines on states that did not enforce the equal status of freedmen, and the Civil Rights Act, which extended citizenship to former slaves and granted them equal protection under the law. These were both vetoed by President Andrew Johnson, though in the case of the Civil Rights Act, Congress was able to override the veto. Legislation was not working. A constitutional amendment, it was thought, was the only way. The Fourteenth Amendment was furiously debated in every southern state, and the amendment was not passed in six states outside the south.²⁶ The source of the strife in the south, interestingly enough, had more to do with sections two

15. Gerald D. Jaynes, *Branches Without Roots: The Genesis of the Black Working Class, 1862-1882* (New York, 1985), 191-192.

16. Jaynes, *Branches without Roots*, 217-218; Brundage, "A Portrait of Southern Sharecropping," 172.

17. Joe M. Richardson, "Florida Black Codes," *Florida Historical Society* (1969): 365.

18. Gainesville *New Era*, 9 June 1865; Richardson, "Florida Black Codes," 367.

19. Hirschfeld, Fritz. *George Washington and Slavery: A Documentary Portrayal* (1997).

20. Richardson, "Florida Black Codes," 368.

21. Richardson, "Florida Black Codes," 367.

22. Richardson, "Florida Black Codes," 368.

23. Richardson, "Florida Black Codes," 374.

24. Richardson, "Florida Black Codes," 374.

25. Richardson, "Florida Black Codes," 374.

26. Lawrence, "There Is No Fourteenth Amendment."

through four of the Amendment, which detailed punishments for former Confederates. Section Three stated that they could no longer serve in public office if they had defected during the war, which automatically eliminated many of the powerful men of the antebellum period.²⁷ The Republicans wanted state legislatures and congressmen from the Confederacy that they could trust to work with the government of the United States. More importantly, they wanted to get rid of secessionists in the southern governments. Therefore, the people elected to the Congress in 1866 were mostly pre-war Whigs and Constitutional Unionists who wanted their states to reenter the Union, though the “reconstructed” legislatures did not last more than a few years in every state.²⁸

The Fourteenth Amendment consists of five sections aimed at protecting the rights of African Americans. Section One of the amendment defines an American citizen as anyone “born or naturalized in the United States” and, more importantly, contains several clauses protecting the privileges of a citizen from interference by state governments.²⁹ Section Two repealed the three-fifths compromise by declaring that representation will be determined by the whole number of persons in each state, and stipulates that if the voting rights of any male twenty-one years of age or older is denied him, the state will be denied part of their representation. Section Three bars any man who served as a representative in Congress prior to the Civil War and then abandoned his post to side with his state from serving in Congress. Section Four takes over the responsibility for the debt the rebelling states incurred during the war, but also denies them any right to compensation for the slave property they lost as a result of the Thirteenth Amendment. Section Five gives Congress the power to enforce the amendment.

Section Four proved to be a major point of contention. It said that the federal government took over responsibility for the war debts of the southern states, but also prohibited the US or state governments from giving compensation to slave owners whose slaves had been freed.³⁰ Many former slave owners hoped that they could convince the federal government to compensate them for the slaves that they had lost. The amendment effectively took that off the table. Although the states needed the federal

government to take some of the burden of the war debts off of them, they did not want to give up the possibility that they could reap some economic benefit from the loss of their property.

Section One did not get much of the press’s attention at the time, but in later years it came to be considered the most important part of the amendment.³¹ The amendment declared that the states could not “deprive any person of life, liberty, or property, without due process of law” and could not deny citizens “the equal protection of the laws.”³² In effect, the amendment declared that the states had the responsibility to protect the rights of all citizens, including freedmen. The fact that Section Five gave Congress the power to intervene if the states did not follow the amendment also made the states reluctant to ratify it. In fact, ten southern states rejected the amendment in 1867 before ratifying it in 1868.³³

Such was the state of reconstruction when Homer Plessy boarded a white car in a segregated train. Plessy was seven-eighths Caucasian and one-eighth African, and he exhibited few physical characteristics of a black man.³⁴ He sat in the white car and refused to move when the conductor asked him to. In Louisiana, under the Separate Car Act of 1890, Plessy was supposed to be traveling in a separate car meant for African Americans. The Supreme Court of Louisiana convicted him of breaking the law, but Plessy appealed the decision, and the case went to the Supreme Court of the United States. The main question that had to be answered by the court was whether or not the Thirteenth and Fourteenth Amendments had been violated by the arrest of Homer Plessy.

The decision of the court was that the law violated neither the Thirteenth nor the Fourteenth Amendment. The court’s reasoning was that Plessy’s race was not indicated when he was asked to move into the car meant for Negroes.³⁵ He was not forced into involuntary servitude, which meant that the Thirteenth Amendment was not violated. The court also decided that the Fourteenth Amendment had not been breached because the cars were equal in quality. Though the phrase was not used in the opinion, this decision led to the phrase “separate, but equal” which dominated society until the 1960s. The longer-lasting effects of this case were that the Supreme Court refused to incorporate the Fourteenth Amendment, allowing state

27. US Const. amend. XIV, § 3.

28. Bond, *No Easy Walk to Freedom*, 8; Harris, *The Making of the American South*.

29. US Const. amend. XIV, § 1.

30. US Const. amend. XIV, § 4.

31. Bond, *No Easy Walk to Freedom*, 8.

32. US Const. amend. XIV, § 1.

33. Lawrence, “There Is No Fourteenth Amendment.”

34. *Plessy v. Ferguson*, 163 US 537, 539 (1896).

35. *Plessy*, 163 US at 539.

laws that legally sanctioned segregation to continue. This interpretation of the Fourteenth Amendment remained prevalent until after World War II. As a result, two generations grew up experiencing segregation and blatant racial discrimination against blacks. The Supreme Court is supposed to protect the Constitution and to strike down laws made by the states that take away the rights of their citizens. By upholding the legislation that had become common in every southern state, the Supreme Court actively violated the Fourteenth Amendment.

The *Plessy* decision on its own did not cripple the Fourteenth Amendment. Though the case legally sanctioned the separation of the races, there was an explicit instruction in the decision that commanded the facilities of each race must be equal in quality. It was up to the President to carry out those instructions. However, President Andrew Johnson had not created an enforcement mechanism to ensure that facilities were the same quality for blacks as they were for whites. Johnson famously vetoed both the Civil Rights Act and the Freedmen's Bureau Act in 1866. Johnson, a Tennessee senator before the war, grew up in the slave society of the South, though he never owned any slaves. As a result, he had sympathy for the southerners and was often criticized for not punishing the southern states as much as some Radical Republicans wanted. Many people feared that in his haste to readmit the south into the union, Johnson would sacrifice African Americans rights to "security for social rights of any kind."³⁶ While Congress was able to override Johnson's veto and pass some legislation protecting African American rights, the enforcement of those laws fell to the President. Johnson was apathetic at best toward the plight of the freedmen. In fact, Johnson actively opposed equal rights for African Americans, especially voting rights. Johnson suggested that, "moral, educational, and property qualifications be instituted for white voters" in order to elevate the right of voting.³⁷ Under this policy, many African Americans were not able to vote even though the Fourteenth Amendment guaranteed them rights as citizens. While Johnson did not take any actions to enact this type of policy, he certainly acted to make sure that Congress could not pass any significant legislation protecting the rights of freedmen.

The subsequent Presidents—Grant, Hayes, Garfield, Arthur, Cleveland and Harrison—acted neither for nor against the interests of the

African American population. Grant, elected in 1868, was unwilling to act in favor of the African Americans, but he did not act against Congress's attempts to do so. He signed the Civil Rights Act of 1875, the pet project of Charles Sumner, into law.³⁸ However, Grant did not have a significant role in passing the legislation, so his approval of that law does not necessarily hint at his interest in civil rights. Furthermore, after 1877, the majority of northerners agreed that Reconstruction was over, and that the rights of African Americans had been firmly established.³⁹ Therefore, for the majority of the late 1800s and early 1900s, civil rights for African Americans were not considered by a majority of the population, and as such, the Presidents did not take many actions to further the cause of racial equality.

The Fourteenth Amendment declared *de jure* equality, but in almost every southern state that declaration was ignored and blatantly violated. The northern states, though they did not pass legislation limiting the rights of African Americans, also ignored the amendment's instructions for the most part. *De facto* equality proved elusive for the next hundred years as African Americans waited for the men who would bring civil rights back into the forefront of the public consciousness. Hugo Black, one of the justices most responsible for the Supreme Court's broader interpretation of the Fourteenth Amendment, did not join the court until 1937, nearly seventy years after the amendment was passed. Lyndon B. Johnson, one of the most active Presidents in passing civil rights legislation, was not elected until over ninety years after 1868. Malcolm X and Martin Luther King Jr. did not arrive on the national stage until the early 1960s, bringing with them ideas that would change society's perceptions of African Americans. The Fourteenth Amendment brought with it the promise of hope, the expectation that in the future African Americans would attain the ever-elusive reality of civil rights.

In the beginning, however, the amendment was virtually ignored, allowing African Americans only the most basic legal rights. The Supreme Court case *Plessy v. Ferguson* provides one example in which the court actively refused to enforce the Fourteenth Amendment. Likewise, President Johnson vetoed most of the legislation that could have helped the former slaves. The failure of the amendment to do its job points to a more fundamental problem. Congress, the court system, state governments, and the President

36. Eric Foner, "Andrew Johnson and Reconstruction: A British View," *The Journal of Southern History* (1975): 383.

37. Foner, "Andrew Johnson and Reconstruction," 382.

38. Bertram Wyatt-Brown, "The Civil Rights Act of 1875," *The Western Political Quarterly* (1965): 763-775.

39. Harris, *The Making of the American South*, 245.

actively tried to undermine the objectives of the amendment. Even without the support of the people or the state governments, the Supreme Court and the President should have enforced the Constitution. However, the court would not expand the protections of the Bill of Rights to include African Americans until after the World Wars. Until society had changed the men in charge of interpreting and enforcing the Constitution, blacks continued to be mistreated by their own governments and neighbors.

Plessy revealed that the legal prohibition of discrimination by the Fourteenth Amendment was ignored by the states because of late nineteenth-century society. Though the Fourteenth Amendment declared that African Americans were not to be treated differently by the state governments, the Jim Crow Laws flagrantly disregarded that intention in favor of the interests of former slave-holders in southern states who suddenly found themselves without a captive workforce. In fact, the courts, the state governments, and the President all actively undermined the efforts of the reconstructed Congress to protect the population of freedmen.