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♦ TBA BRIEFINGS ♦

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Defining Liberty

By Jim Rankin

"[I]n a revolution, as in a novel, the most difficult part to invent is the end."

Alexis de Tocqueville, The Recollections, pub. posth. (1893)

"We must learn to live together as brothers or perish together as fools."

Rev. Martin Luther King, Jr. (1963)

I was born in Topeka, Kansas in 1951. In 1951, the south maintained separate drinking fountains, separate waiting rooms at train and bus stations, and separate sections on street cars for blacks and whites, but not in Topeka. However Topeka, like many places in the north was, to an extent, a Jim Crow town, but unlike most places in the south, Topeka's Jim Crow laws were mainly designed to segregate white and black children in grammar school and junior high. Topeka High School was integrated, but the city's public school system operated eighteen elementary schools for whites and four for blacks. Also, the Gage Park swimming pool was "white only." Nevertheless, Topekans and other Kansans practiced Jim Crow policies in their private businesses. Topeka and Kansas hotels, restaurants, and theaters discriminated against blacks. Looking back, it seems strange that more than 80 years had passed between 1951 and the Confederate surrender at Appomattox Courthouse, passage of the Thirtieth and Fourteenth Amendments, and the 1875 Civil Rights Act (forbidding racial discrimination in hotels, trains, and other public spaces) with so little social improvement for American blacks.

What happened between the 1860s and 1951 to seemingly undo the sacrifice of war and the intensive struggles of reconstruction? In simple terms, it was the dubious 1876 election victory of Rutherford. B. Hayes and the United States Supreme Court.

A. The Election of 1876

Ulysses S. Grant was elected President of the United States in 1868 and served two terms until March 1877. President Grant's administration pursued a strict reconstruction policy, including reliance on the army and the newly created (1870) Justice Department, to enforce the Thirteenth, Fourteenth, and Fifteenth Amendments. There were, nevertheless, significant problems with ongoing violence in the south promulgated in large part by the newly formed Ku Klux Klan (1865) and other white supremacist groups.

By 1876, the public was losing interest in reconstruction given the successful use of force to end slavery and a lack of broad based public support for expanding the slavery fight into securing civil rights. The Panic of 1873 and the ensuing depression refocused the country on economic issues and away from securing the rights of former slaves. White supremacist democratic party "redeemer" politicians began to reassert themselves in the south and, but for executing the ambitious Civil Rights Act of 1875, the Grant administration's priorities had shifted from reconstruction to damage control over charges of corruption in civil service jobs. Given these circumstances, Grant chose not to run for a third term.

With the party divided over the economic crisis, Grant administration corruption, reconstruction policy, and improvement in the Democratic Party's fortunes, the Republican Party chances in the 1876 presidential election were not strong. Nevertheless, the shift in Republican Party policies kept the election close. The

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republicans nominated a three term Ohio governor with a reform reputation, Rutherford B. Hayes, to run against Samuel Tilden, the democratic governor of New York.

Tilden won the election by approximately 250,000 popular votes, but he was one electoral vote short of victory and the electoral votes in three southern states and in Oregon were disputed. Republican votes (mainly black voters) in the south were impacted by intimidation and voter fraud. Complications with an Oregon elector and the disputed status of electors in Florida, Louisiana, and South Carolina—the only three southern states remaining under the control of reconstruction republican governments—threw the election into chaos. After weeks of controversy concerning the proper electoral count, Congress finally established a fifteen man election commission to determine the electoral issue. The Commission's fifteen members were drawn as follows: five from the United States House of Representatives, five from the United States Senate, and five from the United States Supreme Court. The majority party in each legislative chamber got three seats on the Commission, and the minority party received two seats. Both parties agreed to this arrangement because it was understood that the Commission would have seven republicans, seven democrats, and Supreme Court Justice David Davis. Justice Davis was arguably the most trusted independent in the nation and thought to favor Tilden.

However, just as the Electoral Commission Bill was passing Congress, the legislature of Illinois elected Davis to the United States Senate. Democrats in the Illinois legislature believed that they had purchased Davis's support by voting for him. They had, however, defeated themselves on the Electoral Commission. Instead of staying on the Supreme Court so that he could serve on the Commission, Davis resigned as a Justice on March 4, 1877, in order to take his Senate seat. His replacement on the Commission was Supreme Court Justice Joseph Bradley, a republican. Thus, the Commission voted 8 to 7—given its republican majority—to make Rutherford B. Hayes the President. Had Davis remained on the Commission, his vote would have been deciding and many thought it would have meant a Tilden victory.

The Election Commission was practically and constitutionally problematic and its determination was bitterly resented by democrats. Conspiracy theories involving secret

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deals persist to this day. None of these theories have been proven, but Congress appears to have worked out some sort of arrangement to prevent a Democratic Party filibuster over the Commission's decision for Hayes. Soon after being selected President, Hayes withdrew all federal troops from the south. This permitted the Democratic Party to consolidate solid control over the former Confederacy.

Thus in 1877, Reconstruction ended, the United States Supreme Court's opinions in *The Slaughter-House Cases*, 83 U.S. 36 (1873), and *United States v. Cruikshank*, 92 U.S. 542 (1875), made federal enforcement of the newly enacted civil rights reforms for black citizens difficult, and the cause of black civil rights was largely ignored until the 1950s. Jim Crow laws and practices persisted in the south and the north pursuant to the segregationist sentiments of the times.

B. The Civil Rights Cases - 1883

In 1883, there was an opportunity to correct the damage done by the waning public interest in the plight of black Americans, and there was an opportunity to revise the earlier holdings in the *Slaughter-House* and *Cruikshank* cases. It came in the form of five prosecutions under the Civil Rights Act of 1875 consolidated for appeal to the United States Supreme Court. *The Civil Rights Cases*, 109 U.S. 3 (1883).

Of the five cases one, *United States v. Murray Stanley*, arose out of an incident in a Hiawatha, Kansas hotel which resulted in a criminal prosecution originally heard in the Federal District Court in Topeka. *The Atchison Daily Globe*, on October 25, 1883, reported on the incident involving Bird Gee and Murray Stanley in these words:

> "A few years ago a colored man named Bird Gee, who lived near Highland, in Doniphan county, was stopping at the City Hotel, in this city. David Stanley kept the hotel; Murray was his son. Gee sat down at the breakfast table with the other guests. Allan McCowan, one of the guests, left the table and complained to Stanley. The son appeared in the dinning-room and ejected the colored man. Gee went before the United States Commissioner Shrere, at White Clond, and made his complaint. At the next term of the United States court Stanley was indicted."

The United States Supreme Court's opinion in *Stanley* and the other four consolidated cases was rendered by the same Justice Joseph P. Bradley who had cast the deciding republican vote in the election of 1877 to award the Presidency to Rutherford B. Hayes. The Court's vote was 8 to 1. Justice Bradley held that the Fourteenth Amendment which *inter alia* prohibited denial of equal protection of law by a state, did not permit Congress to regulate private acts such as that described in the Stanley-Gee incident in Kansas. The Court strengthened the State Action doctrine and held the Civil Rights Act of 1875 unconstitutional.

Justice Bradley stated:

> "[C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or

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Community Events Calendar

Boys and Girls Club
Harley Party
August 15th
DOWNTOWN TOPEKA
in front of the Celtic Fox
6 to 10 p.m.

Are you involved in a community event you think your fellow TBA members should know about? Let us know and we can include it on the Community Events Calendar.
Email your the event information to TopekaBar@sbcglobal.net .

THANK YOU
Susan William
with
Coffman, DeFries and Nothern, P.A.
for preparing the
Topeka Bar Associaton's
Annual Tax Return

Cultivating "You, Inc." A Clearly Defined Voice to Success

Leadership Development Conference

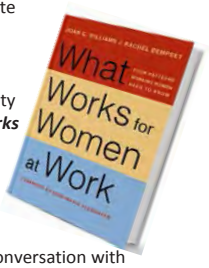
For all men and women attorneys, legal aids, legal and medical executives, private practice patient care and healthcare research professionals plus the university faculty members who teach them.

Friday, August 21, 2015 | 7:30 am – 5:00 pm

Overland Park Convention Center
6000 College Boulevard, Overland Park, KS 66211

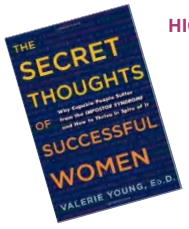
CLE: 2 LAW PRACTICE MANAGEMENT hours have been approved by the Kansas Bar Association.

Why attend? Leadership characteristics and skills cross all professions are not gender specific and address career growth and advancement issues typically found in highly successful professionals within any academic setting, private practice or business. *Networking works!*



KEYNOTE: Joan Williams, J.D., Distinguished Professor and Chair, Founding Director of the Center for WorkLife Law, University of California, Hastings College of Law and co-author of ***What Works for Women at Work*** (New York University Press, January, 2014) and author of *Unbending Gender: Why Family and Work Conflict and What to Do About It* (Oxford University Press, 2000)

SPECIAL GUEST: Justice Carol Beier, J.D., a member of the Kansas Supreme Court will discuss, during a 20 minute "Conversation with Justice Beier" over lunch, her lifetime professional involvement with women's issues and career advancement among other issues.



HIGHLIGHTS:

- ***Conference MC - Cynthia Newsome,*** *Kansas City's Midday Anchor for 41 Action News, specializing in health reporting*
- **Valerie Young, EdD.**, Author, *Finding your Calling* and *The Secret Thoughts of Successful Women: Why Capable People Suffer from the* ***Imposter Syndrome***
- *30 extraordinary presenters & panelists*
- *Lessons from Legends Cocktail Reception*

Registration DEADLINE August 7th

AGENDA, Additional Details and REGISTER ONLINE @ ***www.kumc.edu/wims/2015-healthcare-and-justice-conference/registration-information.html***

REGISTRATION OPENS AT 7:30 a.m. with CONTINENTAL BREAKFAST

Conference sponsors are listed on-line.

executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual."

The Civil Rights Cases, 109 U.S. at 17.

These words may be a reference to Justice Bradley's supposed distinction between "natural" or "civil" rights protected by common law and state statutes as opposed to "social rights" which were to be primarily protected by the Constitution, but his words were clearly understood by the public as prohibiting the federal government from interfering with almost any act of private race discrimination.

Interestingly, Justice Bradley referred to other powers of Congress:

"Of course, these remarks do not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the States, as in the regulation of commerce with foreign nations, among the several States… Congress has power to pass laws for regulating the subjects specified in every detail, and the conduct and transactions of individuals in respect thereof."

The Civil Rights Cases, 109 U.S. at 18.

Unfortunately, Justice Bradley ignored that precise ground of support for the 1875 Civil Rights Act. In fact, one of the five consolidated cases involved railroad accommodations. Some eighty years later, Congress would ground Title II of the 1964 Civil Rights Act on its legislative power under the Commerce Clause.

There was, however, a reconstruction amendment where the State Action doctrine could not interfere with Congressional efforts to impact private behavior. The Thirteenth Amendment was passed to absolutely abolish slavery and involuntary servitude throughout the United States. The Thirteenth Amendment, being absolute in its terms, went beyond matters of state action. The Thirteenth Amendment abolished private property rights in persons and prohibited private conduct if it involved slavery. Justice Harlan wrote in his dissent:

"I am of opinion that such discrimination practiced by corporations and individuals in the exercise of their public or quasi¬-public functions is a badge of servitude, the imposition of which Congress may prevent under its power, by appropriate legislation, to enforce the Thirteenth Amendment; and consequently… the act of March 1, 1875, is not, in my judgment, repugnant to the constitution."

The Civil Rights Cases, 109 U.S. at 43 (Harlan, J., dissenting).

Further, in referring to the 1875 Civil Rights Act, Justice Harlan borrowed words from an earlier case and stated:

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> "[I]n *Sinking Fund Cases*, 99 U.S. 700, we said: 'It is our duty, when required in the regular course of judicial proceedings, to declare an act of Congress void if not within the legislative power of the United States, but this declaration should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.'"
>
> *The Civil Rights Cases*, 109 U.S. at 27-28 (Harlan, J., dissenting).

However, Justice Bradley and the majority ignored the force of Justice Harlan's arguments ruling that the Thirteenth Amendment did not reach the area of private conduct in public accommodation and ignoring his plea for judicial modesty. In closing the majority opinion, Justice Bradley wrote these unfortunate words:

> "When a man has emerged from slavery, and, by the aid of beneficent legislation, has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected."

Bradley's opinion set the framework for the continued enforcement of Jim Crow laws and practices throughout the first half of the 20th Century. Such laws were also reinforced by the "separate but equal" rationale by the Supreme Court in *Plessy v. Ferguson*, 163 U. S. 537 (1896) (where Justice Harlan again dissented).

In 1963 Lyndon Johnson, the 36th President appeared before Congress and made the case for change with these words:

> "We have talked long enough in this country about equal rights. We have talked for a hundred years or more. It is time now to write the next chapter – and to write in the books of law."
>
> Lyndon B. Johnson, First address to Congress as President, 1963.

And so, in that year, Congress acted to right the injustice done years before as a result of the election of 1876 and the *Civil Rights Cases* by enacting the Civil Rights Act of 1964:

> "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, … without discrimination or segregation on the ground of race, color, religion, or national origin."
>
> 42 U.S.C. § 2000a(a) (Civil Rights Act of 1964, Section 201(a)).

Almost immediately, a motel owner in Atlanta, Georgia challenged the public accommodation provision of the Act in federal court, claiming among other things, that the new law violated his Fifth

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Save the Date

YLD Golf Tournament
September 18, 2015
Cypress Ridge Golf Course

Turkey Shoot
November 20, 2015
Creekside at Berryton

Holiday Party
December 3, 2015
Governor's Row House

Welcome New Members

Fahryn E. Hoffman
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Amanda Wilwert
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Amendment rights. The plaintiff claimed that the new Act made it impossible for him to choose customers and operate his property as he wished effecting an unconstitutional deprivation of property without due process of law. In December, 1964, the United States Supreme Court, noting that Americans had become increasingly mobile, held that the public accommodations provisions of the Act were related to interstate commerce regardless of how local the private business operation might appear to be. The Court held that the Fifth Amendment did not restrict reasonable regulation of inter-state commerce under Article I Section 8 of the Constitution. *See The Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

The Court's 1964 ruling confirmed that Congress had successfully undone almost one hundred years of discrimination against black Americans and impliedly affirmed that the course set by Congress in the Civil Rights Act of 1875 should not have been interrupted. *Heart of Atlanta Motel* signaled that continued public accommodation discrimination through Jim Crow practices and local laws would no longer be tolerated. Practical implementation of this concept would continue to take time; however the legal path was finally clear.

[1] The *Slaughter-House Cases* (1873) dealt with the Louisiana legislature's creation of a monopoly for favored butchers in a state-owned slaughterhouse in New Orleans. Butchers who were excluded sued under the Fourteenth Amendment. The Supreme Court upheld the monopoly ruling that the privileges and immunities clause of the Fourteenth Amendment only protected rights derived from the federal constitution (which did not include protection from state or local monopolies) not rights derived from state citizenship. The Court further held that the Fourteenth Amendment's equal protection clause was intended only to protect the rights of Freedmen against state action, not to assure all citizens, regardless of race, the economic privileges of the state.

[2] The Court addressed the rights of blacks in *Cruikshank v. United States* in 1875. This case involved the single greatest massacre of blacks in American history, in which white democrats killed approximately 200 black republicans. Federal officials prosecuted and three whites were convicted. The Supreme Court reversed the convictions, holding *inter alia* that whites had not engaged in "state action" during the massacre.

[3] Obviously, in 1954, the Supreme Court acted to change course at least with regard to desegregation of schools in *Brown v. The Topeka Board of Education,* 374 U.S. 483 (1954). Later, in *Cooper v. Aaron*, 358 U.S. 1 (1958) the Supreme Court held that states could not nullify federal laws and court rulings (e.g. *Brown v. The Board*, supra), thus forcing integration of Little Rock schools.