The *Civil Rights Cases:* Black Popular Constitutionalism, Republican States' Rights, and Democratic Reconstruction and Resistance.•

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Recent scholarship has emphasized the bipartisan, bi-factional consensus aimed at minimizing changes to the federalist American polity after Reconstruction. While the *Civil Rights Cases* (1883) generated an underappreciated black popular constitutionalism that challenged the decision on nationalist grounds, elites in both parties embraced the decision as part of a post-war retrenchment rooted in both ideological and electoral calculations. The decision quickly came to be understood as the core of an implicit federalist pact: the Court would block tentative moves toward national institution building with the presumption that states would implement analogous protections. Such a deal proved immensely appealing to both parties, and nearly all Northern states passed such laws, with Southerners initially promising to follow suit before quietly resisting its terms. For mainstream Republicans, this resolved a possible tension between their underlying commitment to federalism and their desire to create a more racially egalitarian society. Centrist Democrats, struggling to reconstruct their party as a post-secession, national institution while still preserving Jacksonian states' rights beliefs, rushed to embrace the pact, especially where black voters could prove pivotal. In stark contrast to their efforts to block blacks' voting rights, northern Democratic elites pressured recalcitrant members to support state public accommodations laws and aggressively publicized their passage. Southern Democrats paid lip service to the decision but refused to pass public accommodations laws or enforce pre-existing statutes, engaging in a quiet campaign of passive resistance until political interest had waned.

"The decision is in the direction….of the old Calhoun doctrine of states rights as against federal authority."
- Frederick Douglass

"…the duty of protection against inequality and discrimination on account of color is thus devolved to the states."
- George Hoadly, Democratic Governor of Ohio

After the Supreme Court's 1883 decision in the *Civil Rights Cases*, which overturned the federal Civil Rights Act of 1875, many northern state legislatures moved quickly to pass state laws guaranteeing access to public accommodations regardless of race. Black Republicans condemned the case as wrongly decided and engaged in a

remarkable popular constitutionalist movement,[1] but criticism of the Court's decision was quite guarded among most white members of the GOP.

Although reversing the policy consequences of the *CRC*, many Republicans celebrated their bills not as resistance to or reversal of the decision but as implementing the justices' vigorous states' rights logic. Constrained by the need to demonstrate they had made their peace with the Civil War, Democrats, from both North and South, initially endorsed Republicans' constitutional settlement, promising that the *Civil Rights Cases* would give the party a chance to show that states' rights and the protection of black rights were not in tension but could instead be harmonized. Northern Democrats, under pressure from national party-building elites and keenly aware of electoral competitiveness, raced to fulfill that bargain, aggressively trying to pass—and take credit for—civil rights legislation. Dixie sounded similar themes, at least at first, in assuring northerners that the Court's expectation of southern protection of black rights was well-founded. Such promises proved hollow: those states whose Reconstruction governments had passed public accommodations laws left them silent and unenforced, while the rest passed nothing (with the exception of Tennessee, which passed a provocative law combining public accommodations and legally mandated segregation.)

I argue that the largely positive reaction to the *Civil Rights Cases (CRC)* and the enthusiastic embrace of its state-centered civil rights enforcement resulted from the desire to retrench national institutions and instead construct an alternative state-based regime of

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[1] Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 2000). Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2005); Bruce Ackerman, *We the People: Foundations* (Cambridge: Belknap Press of Harvard University Press, 1991).

civil rights enforcement. Stated bluntly, when presented with an opportunity to implement civil rights in a manner consistent with traditional understandings of federalism, political elites jumped at the chance. That it was not a complete cession made this even more appealing; the Supreme Court ostensibly reserved the power to approve similar national legislation should states fail to meet their civil rights responsibilities. Such a minimal supervisory role may or may not have been the most accurate reading of the Court's "state neglect" holding, but it offered the possibility of central influence without having to build up national institutions and, more importantly, an underlying, ideological support for national enforcement power except as a last resort.[2]

Reflecting a shared belief in retrenching national power, *The Civil Rights Cases* resulted in the exchange of a federal bill with an implicit promise of positive protective action on the part of the states. Doing nothing, in effect, ignored and violated the widely understood constitutional bargain, but in a way that resisted without offering direct and clear provocation. In the end, refusal to follow the widely understood, implicit constitutional pact and pass state analogues was almost solely confined to one-party Democratic states, but with the national parties committed to scaling back central power, that resistance needed only to be passive inaction to be a successful first step in constructing Jim Crow.

Federalism after the Civil War

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[2] The success of such efforts to ward off national power meant state-building had to take more torturous paths, such as the use of fiscal inducements. Kimberly Johnson, *Governing the American State: Congress and the New Federalism, 1877-1929* (Princeton: Princeton University Press, 2007).

Beginning with Michael Les Benedict, scholars have increasingly rejected the view of the post-war Republicans as ardent nationalists and instead argued that most, including diverse figures such as Lyman Trumbull, John Bingham, and Wendell Phillips, remained committed to preserving as much of the old federalist order as possible in building a post-slavery America.[3] While some of the Radicals had little interest in the constitutional niceties of federalism, others remembered its assistance in the cause of abolition. As William Nelson observed, "[a]lthough the protection of rights and the preservation of federalism strike us as inconsistent goals … [the two] seemed far more consistent to the Radicals, who had had a long history of using state institutions to protect human rights."[4] Provided that national regulations preempted state economic regulations, business was happy to contribute to this elimination of the wartime federal machine that, from their perspective, hopefully foreclosed redistributive possibilities.[5] The legal academy, fulfilling Tocqueville's observations about its conservatism and love of old forms, went about inculcating the traditional value of states' rights in its future generations.[6]

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[3] Michael Les Benedict, "Preserving the Constitution: The Conservative Basis of Radical Reconstruction," *JAH* 61 (1974): 65-90; Michael Les Benedict, "Preserving Federalism: Reconstruction and the Waite Court," *Supreme Court Review* 1 (1978): 39-79; William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge, MA: Harvard University Press, 1988); Earl Maltz, "Reconstruction without Revolution: Republican Civil Rights Theory in the Era of the Fourteenth Amendment," *Houston Law Review* 24 (March 1997): 221-279; Kurt T. Lash, "The Origins of the Privileges an Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment," *Georgetown Law Journal* 99 (2011): 332-334.

[4] William E. Nelson, "The Role of History in Interpreting the Fourteenth Amendment, Loyola *Law Review* 25 (1992): 1177-78. To many, the *Dred Scott* decision represented an illegitimate nationalist solution that would ultimately suppress anti-slavery states' rights. Mark Graber, *Dred Scott and the Problem of Constitutional Evil* (Cambridge: Cambridge University Press, 2008).

[5] Richard Bensel, *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877* (Cambridge: Cambridge University Press, 1991), 193, 237-38, 304. This was true even of what became Civil Rights Act; one Democrat feared that the erosion of private property rights implicit in the bill was the first sign of bringing the Paris Commune to America. *Congressional Globe* 42.2 (1872), 928.

[6] Charles Larsen, "Nationalism and States Rights in Commentaries on the Constitution after the Civil War," *American Journal of Legal History* 3 (1959): 360-369; Alexis de Tocqueville, *Democracy in America*, Harvey Mansfield and Delba Winthrop, eds. (Chicago: University of Chicago Press, [1840] 2000), 251-58.

Thus, accounts rooting commitment to a decentralized federalism within southern racial conservatism are incomplete at best, as northerners, especially northern Republicans, were just as likely to invoke federalism before the New Deal realignment.[7] While John C. Calhoun became something of a bogeyman among legal thinkers, with nullification and a compact theory understanding of state sovereignty reviled, what Keith Whittington calls a "centrist federalism" survived to represent a broad consensus.[8] Building on a political tradition represented by Andrew Jackson, this "states rights" position chartered a course between Calhoun's state sovereignty, on the one hand, and a centralizing nationalism linked with figures such as Daniel Webster on the other.[9] At least on questions of federalism, constitutional politics was far from polarized between the parties. As Sidney Milkis has argued, a strong ideology of decentralization,

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[7] Gary Gerstle, "The Resilient Power of the States Across the Long Nineteenth Century: An Inquiry into a Pattern of American Governance," Lawrence Jacobs and Desmond King, eds., *The Unsustainable American State* (Oxford University Press, 2009), 63.

[8] Whittington uses the term in describing antebellum debates, arguing that its very position in the middle made it politically unstable, but something quite close to that dual sovereignty vision did survive the Civil War. "The Political Constitution of Federalism in Antebellum America: The Nullification Debate as an Illustration of Informal Mechanisms of Constitutional Change," *Publius: The Journal of Federalism* 26.2 (1996): 14-17; Charles Larsen, "Nationalism and States Rights in Commentaries on the Constitution after the Civil War," *American Journal of Legal History* 3 (1959): 360-369. On the passing of sovereign states as constitutional interpreters, see Christian Fritz, *American Sovereigns: The People and America's Constitutional Tradition Before the Civil War* (New York: Cambridge University Press, 2008).
For a telling example of this sharp distinction, Justice Bradley, who overturned the Civil Rights Act of 1875 on federalism grounds, nonetheless privately ridiculed Calhoun's state sovereignty doctrines and lamented that Jackson did not hang him. Brandwein, *Rethinking the Judicial Settlement*, 90.

[9] The core of both Richard Ellis's *Union at Risk* and *Aggressive Nationalism* aims to show that this philosophy, which he frames as states-rights majoritarianism, represented the predominant thread in American thought. (Richard E. Ellis, *Aggressive Nationalism:* McCulloch v. Maryland *and the Foundation of Federal Authority in the Young Republic (*Oxford: Oxford University Press, 2007) and *The Union at Risk: Jacksonian Democracy, States' Rights, and the Nullification Crisis* (Oxford: Oxford University Press, 1987). On the transmission of this strand to Republican thought, see Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence (*Durham: Duke University Press, 1993); Mark Graber, "Jacksonian Origins of Chase Court Activism," *Journal of Supreme Court History* 25 (2000): 17-39; Eric Foner, *Free Soil, Free Labor, Free Men* (Oxford: Oxford University Press, 1970). For the argument that the Republicans were more resistant to this anti-statist streak, at least until the 1920s, see John Gerring, *Party Ideologies in America 1828-1996* (Cambridge: Cambridge University Press, 2001).

institutionally backed by local control of parties, nipped most federal activity in the bud, just as Martin Van Buren had hoped in building the Democratic Party.[10]

The Civil Rights Cases

The deadlocked presidential election of 1876 ushered in the formal end of Reconstruction, though it had arguably been on its way out for several years. Military efforts to protect blacks' civil and political rights had already waned, as that year's electoral map demonstrated. In the states of the former Confederacy, only Florida, Louisiana, and South Carolina returned Republican electors—after the Electoral Commission's decision to award their contested electoral votes to Hayes. The rest had already unquestionably reclaimed their traditional southern Democratic orientation. Moreover, Hayes's compromise of 1877—in which his administration agreed to withdraw the remaining federal troops from the South if Democrats would not oppose the commission's decision—did little but ratify the reality on the ground from previous November campaigns.[11] Even if Hayes were inclined, as his earlier ardent abolitionism might suggest, to press hard on civil rights, Democrats controlled the House of Representatives and would almost certainly use control of that chamber to block aggressive military reconstruction.[12]

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[10] Sidney Milkis, *Political Parties and Constitutional Government* (Baltimore: Johns Hopkins University Press, 1999) and Milkis, *The President and the Parties* (Oxford: Oxford University Press, 1993); Gerald Leonard, *The Invention of Party Politics: Federalism, Popular Sovereignty, and Constitutional Development in Jacksonian Illinois* (Chapel Hill: University of North Carolina Press, 2002).
[11] Charles W. Calhoun, *From Bloody Shirt to Full Dinner Pail: The Transformation of Politics and Governance in the Gilded Age* (New York: Hill and Wang, 2010), 54-59.
[12] For the classic account of Republican civil rights positions as deriving from electoral calculations, see Stanley P. Hirshon, *Farewell to the Bloody Shirt: Northern Republicans and the Southern Negro* (Bloomington: Indiana University Press, 1962). More sympathetic accounts are found in the work of Morgan Kousser and LaWanda Cox. (Morgan Kousser, *The Shaping of Southern Politics: Suffrage*

Advocates of civil rights frustrated by the Compromise of 1877 already butted up against another obstacle: the Supreme Court of the United States which, in a series of cases in the 1870s and early 1880s, sharply reduced the already minimal supervisory role of the federal government in guaranteeing a floor of constitutional rights.[13] In the *Slaughterhouse Cases* (1873) and *U.S. v. Cruikshank* (1876), the Court narrowly construed the 14th Amendment's privileges and immunities clause and resisted the incorporation of the Bill of Rights to the states.[14] These decisions rejected even the moderately federalist ground in which only the limited number of textually enumerated rights (e.g. the first eight amendments) would be incorporated against the states, much less more expansive natural rights. [15] Instead, the court sharply limited the potential scope of the Fourteenth Amendment and gave states a relatively free hand.

Restrictions and the Establishment of the One Party South, *1880-1910,* New Haven: Yale University Press, 1974).

Cox especially offers something of an apology for Northern Republicans in the 1870s and 1880s. She argues that the political situation meant Hayes had little option but to take seriously the "pledging of honor" of southern leaders. Hayes attempted to protect southern blacks after he realized how little such pledges mean, but it was too late, and ineffective without military enforcement. "Reflections on the Limits of the Possible," *Freedom, Racism, and Reconstruction*, ed. Donald G. Nieman (Athens: University of Georgia Press, 1997), 261; Pamela Brandwein, *Rethinking the Judicial Settlement of Reconstruction* (Cambridge: Cambridge University Press, 2011), 140-41. Against Hirshon, Woodward and other historians who contend northern Republicans sold out their black allies for political convenience, Cox argues that northern Republicans pushed quite hard, harder than prudence might suggest considering the facts on the ground ,but they were simply defeated by an impossible situation. (256-8).

[13] Congress was not totally inert here, taking measures to protect its Fifteenth Amendment gains at least. After *Slaughterhouse*, and then again in 1877, Congress issued revised statutes that distributed its election regulations all throughout the code, thereby making it more difficult for the courts to strike it down other than piecemeal. Vallely, *Two Reconstructions,* 243-44.

[14] Lisa Goldstein, who is sympathetic to the historical evidence for incorporation and notes several justices had earlier supported the doctrine, argues that concerns about Southern violence led the Court to shy away from incorporating the Second Amendment. Instead, they chose to enable Southern Republicans to disarm Klan-affiliated militias in hope of pacifying an insurrectionist South. Leslie Friedman Goldstein, "The Specter of the Second Amendment: Rereading *Slaughterhouse* and *Cruikshank," SAPD* 21 (Fall 2007): 131-48.

[15] Kurt T. Lash, *The Fourteenth Amendment and the Privileges and Immunities of American Citizenship* (Cambridge: Cambridge University Press, 2014). More recent scholarship has tends to support the incorporation doctrine as fulfilling the anticipated effect of the amendment. See Bryan H. Wildenthal, "Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67," *Ohio State Law Journal* (2007) Akhil Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 2000); Michael Kent Curtis, *No State Shall Abridge: The Fourteenth*

The *Civil Rights Cases* in 1883 continued this trend toward state power, with only the one-time slaveholder, Kentuckian John Marshall Harlan, dissenting from an opinion that seemingly gutted the 14th Amendment's potential to break down an informal white supremacist regime.[16] This decision—and its wide margin—caught observers off guard insofar as nearly all the justices were northerners and all had been appointed by Republicans*:* incumbent president Chester Arthur appointed Horace Gray and Samuel Blatchford; the opinion author Joseph Bradley and Chief Justice Morrison Waite were Grant appointees; Justice Samuel Miller and the Democrat Stephen Field were picked by Lincoln; while Hayes selected Harlan and William B. Woods (as well as Stanley Matthews, who would be successfully renominated by James Garfield).[17]

At issue in the *Civil Rights Cases* were the public accommodations provisions passed in the Civil Rights Act of 1875.[18] Republicans, finally pushed out of power during

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Amendment and the Bill of Rights (Durham: Duke University Press, 1987), Earl Maltz, *Civil Rights, the Constitution, and Congress, 1863-1869* (Lawrence: University Press of Kansas, 2000); Michael Zuckert, "Completing the Constitution: The Fourteenth Amendment and Constitutional Rights," *Publius* 22 (1992):69-91. For those arguing against incorporation, see Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" *Stanford Law Review* 2 (1949): 5-139; Raoul Berger. *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge: Harvard University Press, 1977), and for an ambivalent stance, see William Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge: Harvard University Press, 1988).

[16] 109 U.S. 3 (1883).

[17] Woods, when a circuit court judge, had issued a muscular interpretation of the Fourteenth Amendment that incorporated the Bill of Rights in *U.S. v. Hall*, but later adopted as binding the Court's narrower reading. Ironically, correspondence with Justice Bradley, who also endorsed incorporation, had helped Woods decide to incorporate the First Amendment in *Hall*. Goldstein, "The Specter of the Second Amendment," 137, 143, 147.

Woods, Harlan, and Field were the only justices not nominated from the North, though Harlan was arguably the only non-Yankee among them. Woods had been elevated from the Fifth Circuit in Alabama, but he was an Ohio native who had become a Union general and remained in the South after the war. Field, a son of Connecticut Congregationalist ministers, had settled in California during the Gold Rush. In trying to understand the mystery of why these judges blocked incorporation "even in the face of Congressional intent to the contrary," Goldstein surveys historical accounts of many of these justices and finds them to be committed abolitionists and committed to Republican Reconstruction. "The Specter of the Second Amendment," 135-36, 139-40.

[18] For a thorough chronological summary of its legislative history, see Alfred Avins, "The Civil Rights Act of 187: Some Reflected Light on the Fourteenth Amendment and Public Accommodations," *Columbia Law Review* 66 (May 1966): 873-915.

the 1874 elections, moved to entrench one last push for civil rights and advanced several bills to that end. Abolitionists had already pressed for analogous bills since the beginning of the decade, but had encountered significant opposition, with even many northern papers dismissing public accommodations laws as "amusing," "tea table nonsense," and "legislative sentimentalism."[19] One version nearly passed in 1872, when Charles Sumner had coupled southern war amnesty with a particularly ambitious civil rights rider. (It applied not only to public accommodations but schools as well.) Liberal Republicans, already congealing into a splinter party on behalf of Horace Greeley, joined with Democrats to block it.[20] In 1874 the Senate passed the civil rights bill—still including education—in tribute to the dying Sumner, but the House initially declined to act.[21] Facing a high probability of future Democratic control, the 1875 lame duck Republicans quickly rushed through a variety of bills before their political window slammed shut.[22] "Taken together," Eric Foner noted, "the package embodied a combination of idealism, partisanship, and crass economic advantage typical of Republican politics."[23] The centerpiece of that package was the long-debated civil rights bill.

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[19] James M. McPherson, "Abolitionists and the Civil Rights Act of 1875," *Journal of American History* 52 (1965): 509

[20] McPherson, "Civil Rights Act of 1875," 493-510; Lawrence Grossman, *The Democratic Party and the Negro: Northern and National Politics 1868-1892* (Urbana: University of Illinois Press, 1976), 30-32.

[21] *CR* 43.1, 4176; McPherson, "Civil Rights Act of 1875," 506; Charles Lofgren, *The Plessy Case: A Legal-Historical Interpretation* New York: Oxford University Press, 1987), 137.

[22] Vallely argues that fair elections in the South would likely have shortened the periods of Democratic control during the 1870s and 1880s. By counting blacks for apportionment among the states, but blocking effective use of their votes, Democrats were able to narrowly eke out margins of victory that enabled them to organize the House. (*Two Reconstructions,* 147-48, 246-47).

[23] Foner, *Reconstruction,* 553. During those final months the Republican leadership scrambled to piece together a program that would simultaneously protect the interests of blacks going forward while removing the issue from congressional responsibility. Along with many other Republicans, Blaine and Garfield had blamed unpopular military reconstruction for the decimation of northern Republicanism, and hence decided to abandon that and push through the Civil Rights Bill. That bill, coupled with the Jurisdiction Removal Act to ensure federal courts heard claims for constitutional rights, served as the last major legislative effort on behalf of Southern blacks for a decade. Foner, *Reconstruction*, 555-6. See also Howard Gillman, "How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891," *APSR* 96 (September 2002): 511-524.

In an effort to implement the Fourteenth Amendment's promise that states could not deny equal protection of the laws, Republicans in Congress guaranteed everyone, regardless of race, 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." (Schools had been pulled from the list.)[24] As Justice Harlan's dissent (and advocates of the bill had) pointed out, covered businesses were not simply any profit-making operation in existence but only those specific classes that had, since the time of English common law, been considered (or spun off from) quasi-governmental charters subject to much more aggressive regulation.[25] Nonetheless, for Bradley and the other seven justices, theaters, hotels, inns, and the like were not, in the end, governmental actors, and thus the choice of such businesses to discriminate did not mean "the state" had denied the equal protection of the law.[26]As a result of this "state-action" doctrine, the justices held, such discrimination, however unfortunate, was private

[24] Cemeteries and churches had initially been removed as well in order to appease Matthew Hale Carpenter, an ardent advocate of civil rights whose constitutional textualism made him torn on the bill during its 1872 consideration. Further thinking, no doubt aided by Sumner's smug dismissals of Carpenter's scruples, would eventually make him an opponent, as will be shown later. Avins, "Fourteenth Amendment: Reflected Light," 885.

[25] *Civil Rights Cases,* 37-45; *Congressional Globe,* 42.2, (1872), 383; *McPherson*, "Civil Rights Act," 505; For a review of the precedents of English common law, as well as how they continued to be applied in other former British colonies, see Alfred Avins, "What is a Place of 'Public' Accommodation?" *Marquette Law Review* 52 (1968): 1-74. Theaters were notably not among those sites whose public access had been traditionally protected, and thus represented something of an innovation, as Charles Sumner's comments implicitly conceded (*Congressional Globe,* 42.2, (1872), 381-4, and for theaters specifically see 383, as well as Avins, "Fourteenth Amendment: Reflected Light, 879-80, for the common law judicial citations Sumner invoked.) For a compilation of the Senate's 1874 discussion of whether theaters fell within the common-law expectations of access, see Avins, "Fourteenth Amendment: Reflected Light," 904-906.

[26] Pamela Brandwein tries to rehabilitate Bradley's opinion by suggesting that Bradley and the rest of the Waite court were not animated by a narrow conception of state action but of rights. In her analysis, Bradley *did* believe the Fourteenth Amendment provided a role for proactive federal activity if states were negligent in enforcing core *civil* rights. In this reading, state neglect that develops into a "custom" justifies federal intervention to protect civil but not social rights—with public accommodations access understood as belonging to the latter. *Rethinking the Judicial Settlement of Reconstruction* (Cambridge: Cambridge University Press, 2011), especially 79-80.

activity covered by the states' police powers and not within the limited authority of the federal government.[27]

Nonetheless, as Pamela Brandwein has argued, the decision, far from being a simple question of state-action doctrine, had embedded within it a framework of "state neglect" still potentially authorizing enforcement of the Fourteenth Amendment. Briefly stated, the logic of "state neglect," formulated by mainstream Republicans like James Garfield, enabled the federal government to pass legislation not only blocking state activity but filling the void where states clearly failed to act in protecting rights.[28]

Bradley's opinion included clear elements of "state neglect," although less explicitly than in contemporary but less publicized cases, including circuit court cases on which the justices sat.[29] Bradley contrasted the prospective orientation of the 1875 Act with what he saw as the more obviously responsive Civil Rights Act of 1866. The preceding bill was **"**clearly corrective in its character, intended to counteract and furnish redress against State laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified."[30] The 1875 act, by way of contrast, had no evidentiary backing:

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[27] When skepticism of judicial review prompted efforts to restrict it during the 1910s and 1920s, Southerners would occasionally cite the Civil Rights Cases in its defense. See William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937* (Princeton: Princeton University Press, 1994), 66.

[28] Laurent B. Frantz, "Congressional Power to Enforce the Fourteenth Amendment Against Private Acts," *Yale Law Journal* 73 (1964):1358-60; Brandwein, *Rethinking the Judicial Settlement*, 50-51.

[29] Brandwein, *Rethinking the Judicial Settlement,* 169-70. In Brandwein's earlier, more APD-oriented article on the *Civil Rights Cases*, she argues that the decision's comparatively understated "state neglect" doctrine is best understood as an instance of intercurrence*,* with the Waite Court struggling to preserve its legitimacy in a system of multiple orders splintering over the protection of black rights. By preserving the doctrine's availability for judicial development, it maintained the possibility of aggressive action in a more limited sphere, rather than provoking a confrontation with the increasingly unreliable elected branches. "A Judicial Abandonment of Blacks? Rethinking the 'State Action' Cases of the Waite Court," *Law and Society Review* 41 (June 2007): 343, 386, esp 348; Karen Orren and Stephen Skowronek, *The Search for American Political Development* (Cambridge: Cambridge University Press, 2004).

[30] *Civil Rights Cases*, 16.

> An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the States. It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offences, and shall be prosecuted and punished by proceedings in the courts of the United States.[31]

This, Bradley, argued, meant that the bill exceeded the authorization of the Fourteenth Amendment. "It is not individual offences, but abrogation and denial of rights, which [the Amendment] denounces and for which it clothes the Congress with power to provide a remedy. …. [T]he remedy to be provided must necessarily be predicated upon that wrong."[32] Because the Civil Rights Act neither struck down noxious positive state legislation *nor* purported to result from a clear failure of states to responsibly protect rights, it exceeded the enumerated grant of authority from the Fourteenth Amendment and therefore fell afoul of the federalism protections of the Tenth.

That the bill seemed to come with the presumption of unconstitutionality was not an accident; Sumner had done himself no favours in advocating it, although later floor managers had been more careful following his death. Rather than engage his sympathetic but constitutionally scrupulous colleagues in legal argument, as they needed to support the bill over their states rights' qualms, he largely hectored them with platitudes and religious moralizing. Constitutional beliefs did constrain Sumner—for example, he excluded restaurants on the grounds that the common law did not similarly infuse them with quasi-governmental status[33]—but his cavalier rhetoric and seeming embrace of consequentialism in justifying the bill when pressed with good faith skepticism obscured

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[31] *Civil Rights Cases,* 14.
[32] *Civil Rights Cases*, 17-18.
[33] Avins, "Fourteenth Amendment: Reflected Light," 889; An 1881 New York case (Kopper v. Willis, 9 Daly 460) rejected a suit arguing that restaurants were not inns for purposes of the state's public accomidations law. The court intead held that restaurants were filling a role traditionally held by inns.

any legal credibility he had.[34] An exchange with Maine Senator Lot Morrill nicely illustrates this. Morrill, a long-time Sumner ally who nonetheless opposed the bill on states' rights grounds, found himself derided by the Massachusetts Republican for giving "ante-bellum Democratic speeches."[35] In language that no doubt unnerved lawyerly judges, Sumner distinguished between the two men's constitutional principles. Sumner proclaimed "a new rule of interpretation for the Constitution, according to which, every clause and every line and every word…is to be interpreted uniformly for human rights"; by way of contrast, his erstwhile ally Morrill "finds no power for anything unless it be distinctly written in positive precise words. He cannot read between the lines; he cannot apply a generous principle which will coordinate everything there in harmony with the Declaration of Independence."[36] When Morrill pressed, asking Sumner if he was really reducing constitutional argument to citing the Declaration, and Sumner replied in the affirmative, an exasperated Morrill sighed that he was "pretty much done arguing with the Senator," to much laughter.[37]

Whether the Court would have upheld the Civil Rights Act in the presence of demonstrated state neglect is unclear. Bradley's opinion professed agnosticism on the question of whether access to "public conveyances, and places of public amusement is one of the essential rights of the citizen which no State can abridge or interfere with";

Milton R. Konvitz and Theodore Leskes, *A Century of Civil Rights* (New York: Columbia University Press, 1961), 158-59.

[34] Bertram Wyatt Brown, "The Civil Rights Act of 1875," *Western Political Quarterly* 18 (1965):766-767. Perhaps the most important such figure was Matthew Carpenter, whose opposition would be widely invoked in the popular debate on the decision, and about whom more will be said below.

[35] Globe 42.2/Appendix 5, 42.2 728-31, Avins, "Fourteenth Amendment: Reflected Light," 883. The phrase is Morrill's, but it is a faithful summary of Sumner's argument.

[36] CG 42.2 (1872), 730

[37] CG 42.2 (1872), 730-31. Carpenter would join Morrill's revulsion at Sumner's loose construction and imputation of binding law to the Declaration, but would, for the time being, lean toward viewing the bill as constitutional. CG 42.2 (1872), 761, 763.

such a question was unnecessary in light of the lack of either state action or state neglect.[38] Regardless of the justices' internal views, the opinion was widely interpreted as a call for states to end their neglect of public accommodations protections. As will be shown later, actors outside the court quickly came to understand the decision as imposing an obligation akin to state neglect, and they moved quickly to call for or pass state laws replacing the federal act.

Among commentators outside of government, the decision was generally received quite favorably.[39] (That the Court itself was not sharply attacked is unsurprising; in most

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[38] *Civil Rights Cases*, 19. Working with Bradley's private correspondence, Brandwein argues that his firm placement of public accommodations within the minimally protected category of "social rights" made such a judgement "unlikely." *Rethinking the Judicial Settlement,* 179-80.

Michael McConnell is the most forceful in arguing that only sloppiness in drafting determined the Act's fate. Michael W. McConnell, "Originalism and the Desegregation Decisions," *Virginia Law Review* 81 (1995): 947-1140, 1090-91. Jack Balkin relies on and extends McConnell's findings to formulate a particularly robust conception of "state neglect" authority, reinforced by a strong reading of the citizenship clause of the Fourteenth Amendment. "The Reconstruction Power," *New York University Law Review* 85 (2010): 1820-22, 1832-45, esp 1846-56.

See also Laurent B. Frantz, "Congressional Power to Enforce the Fourteenth Amendment Against Private Acts," *Yale Law Journal* 73 (1964):1353-1384, Frank Michelman, "Conceptions of Democracy in American Constitutional Argument," Tennessee Law Review 56 (1989): 307-308 n54; Robert C. Post and Reva Siegel, "Equal Protection by Law: Federal Antidiscrimination Legislation After *Morrison* and *Kimel*," *Yale Law Journal* 110 (2000):441-526, esp 475-76.

George Thomas similarly sees the decision as part of a "*political* retreat from *constitutional* commitments"(60) and interprets the case as plausibly holding that "Congress may not reach private discrimination under section 5, unless the state first *fails to act"* (63). *The Madisonian Constitution.* (Baltimore: Johns Hopkins University Press, 2008).

[39] Of course, not all Republicans supported the holding. John Sherman poured out rage on the decision: not only did it violate the "avowed intention" of the drafters of the amendments, and "emasculated" his and his peers' handiwork, it "undermine[d] the foundation stone of Republican principles." "Senator Sherman Says the Supreme Court Destroyed the Foundation of the Republican Party," *St. Louis Post Dispatch*, November 20, 1883, 2. Samuel Shellaberger, another 14th Amendment Framer, agreed, while Robert Ingersoll was, after Sherman and Harlan, arguably the most aggrieved critic. "Reviving Race Issues: Supreme Court Denounced for its Civil Rights Decision," *Washington Post*, October 23, 1883, 1; "Editorial Article 2," *Washington Post*, October 26, 1883, 2. The *Post* reprinted an article contrasting Ingersoll's seeming lawlessness—proposing to replace the Court—with that of a convention of black Illinois voters petitioning for a state equivalent, which the *Post* hoped would be the typical response to the decision. "The Colored Question: Colonel Ingersoll Criticized; The Illinois Position Commended," *The Chicago News*, reprinted in the *Washington Post*, October 22, 1883, 2.
For one particularly eloquent critique, from an anonymous Kentuckian to an Ohio paper, see "Letter to the Editor," *Cincinnati Commercial Tribune*, October 27, 1883, 1.

cases, throughout the error legislators and most commentators treated the Supreme Court as a good-faith actor neutrally applying the law as best as possible, albeit with occasional error).[40] Democratic papers unanimously cheered the decision and crowed that even GOP justices had justified their fierce opposition during its passage.[41] Republican papers were less vocal, but some strongly supported the holding on grounds of federalism or reluctantly defended the Court's decision even if disappointed by its policy result.[42] The *New York Times* took pains to offer its support in a variety of articles. It reminded readers that during original consideration of the bill in the early 1870s, its editorial board had dismissed the bill as "impracticable, unwise, and above all, without authority in the Constitution" and they continued to reiterate that position during its various debates in Congress.[43] When the district court had overturned the bill over the summer, the *Times* endorsed the court opinion on the grounds that "Congress appears to have gone far beyond its limits."[44] A fair reading of the Fourteenth Amendment, it said, only

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[40] Howard Gillman, "The Collapse of Constitutional Originalism and the Rise of the Notion of the 'Living Constitution' in the Course of American State-Building," *Studies in American Political Development* 11 (September 1997): 191-247; At the national level, various court curbing measures were floated but went nowhere due to the same fundamental faith in the Court. William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937* (Princeton: Princeton University Press, 1994). As Stephen Engel has suggested in a modification of this argument, court-curbing measures, especially the more credible efforts, increasingly were the product of partisan efforts to correct and capture the Court for a particular constitutional vision, rather than crush it entirely. Stephen Engel, *American Politicians Confront the Court: Opposition Politics and Changing Responses to Judicial Power* (Cambridge: Cambridge University Press, 2011).

[41] "The Civil Rights Bill: It is Declared Unconstitutional by the Supreme Court," *Washington Post,* October 16, 1883, 1; "Editorial Article 5," *Washington Post*, October 17, 1883, 2.
The *Washington Post* soon mocked Sherman's outrage, alleging that he wanted to make "an amendment to the amendment" with a secret gloss unsupported by a "plain" reading. "Mr. John Sherman on Civil Rights," *Washington Post*, November 21, 1883, 2. A Montana paper similarly took advantage of Sherman's comments to mock his abilities as a lawyer. *Butte Daily Miner*, December 1, 1883, 1.

[42] For a collection of favourable northern Republican editorials, see the compilation in "The Civil Rights Decision: Press Comments," *Baltimore Sun,* October 17, 1883, 5; "The Civil Rights Decision," *Malvern (Iowa) Leader*, October 25, 1883, 1; "Civil Rights," *Postville (Iowa) Weekly Review*, November 10, 1883, 1; West Virginia Republicans also apparently objected: a Democratic paper there gloated their rivals suddenly turned hostile to Bradley's judgement, but not when he was the pivotal member of the Electoral Commission. *Wheeling Register* (WV), October 27, 1883, 2.

[43] "The Rights of Negroes," *New York Times*, October 18, 1883, 3.

[44] "The Question of Equal Rights," *New York Times*, June 17, 1883, 6.

empowered federal intervention in response to clear state failure, and primary action to enforce civil rights ought therefore come from the states.[45] That was why, the *Times's* editorial board concluded, "the views presented by Judge Bradley…seemed to flow clearly and easily from the obvious meaning and purport of the Fourteenth Amendment…[and were] easily understood and convincing"—in sharp contrast to "the laborious efforts it requires" to support Harlan. [46] The decision, another paper observed, "will prove less of a surprise to jurists than to those who take a sentimental…view over the entire question."[47] The GOP affiliated *Philadelphia Evening Telegraph* went so far as to pronounce that "it is difficult to understand how anyone who will read [the decision] carefully…can for a moment question it."[48] Some did, of course: "as unfounded as any ever rendered" since *Dred Scott*, one newspaper vented, with the decision substituting a "cold, narrow, and technical interpretation" for "the spirit and intention...of the framers" that could be discerned by "every man of intelligence."[49]

The *Chicago Tribune* which, as Pamela Brandwein argues, both paid careful attention to Reconstruction era cases and was the institution most representative of mainstream Republican thought, combined its understandings of rights hierarchies and federalism to justify the decision. As a preface to the detailed textual analysis that followed, the *Tribune* bluntly summarized its position: "An intelligent reading of the two amendments sustains the decision."[50] While the federal government could *and should* proactively act in defense of *civil* rights, public accommodations, the *Tribune* asserted,

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[45] "Civil Rights Cases Decided," *New York Times,* October 16, 1883, 4; "The Civil Rights Decision: No Change in the condition of Colored People Involved," October 16, 1883, 4.
[46] "Judge Harlan's Reasoning," *New York Times,* November 21, 1883, 4.
[47] "Press Comments," *Baltimore Sun*.
[48] Ibid.
[49] "The Quirks of the Law," *Alberta Lea (Minnesota) Standard,* October 24, 1883, 1.
[50] "The Civil Rights Decision," *Chicago* Tribune, October 17, 1883, 4.

were within the set of rights understood as *social* rights, which were not within the positive scope of the Fourteenth Amendment. (Nor was this a new position; although the *Tribune* weakly and briefly defended the bill on its passage, it generally sounded themes of constitutional skepticism and framed it as a "Social Rights" bill.) When Frederick Douglass criticized the opinion as more of "the old Calhoun doctrine," the *Tribune* sharply criticized his blending of two different political philosophies.[51] What Douglass did not appreciate is that political elites, especially those drifting in legal circles, drew a subtle but sharp contrast between the pure state sovereignty doctrines of Calhoun discredited by the Civil War and a strong commitment to a states' rights-inflected dual sovereignty. They were, in a way, all Jacksonians now.[52]

Many were adopting, in effect, the position strenuously pushed by Matthew Hale Carpenter, the New Hampshire Republican widely considered among the Senate's constitutional experts, during the final floor debate in 1875.[53] Carpenter had praised the bill as "a signal triumph of humanity" but one he regretted could not be squared with the Constitution's balance of federalism. His colleagues' efforts to do so were nothing less

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[51] Brandwein, *Rethinking the Judicial Settlement,* 63-86, 170-72; "Civil Rights v. Social Rights," November 6, 1883, 4; "The Social Rights Decision," October 20, 1883, 4. Her account focuses on the *Chicago Tribune*, which she sees as particularly representative, but also sketches the broader skepticism that existed in 1875 among both congressional and media Republican opinion elites. *The Oregonian*, although in a far more racist state (whose constitution imposed a variety of constraints on blacks), offered similarly subtle but mainstream GOP opinion. "The Civil Rights Decision," *Oregonian*, October 22, 1883, 4.

[52] Les Benedict, "Preserving Federalism," Larsen, "Nationalism and States' Rights,". Though see S.G.F. Spackman, "American Federalism and the Civil Rights Act of 1875,"*Journal of American Studies* 10 (December 1976): 313-328 for an alternative interpretation of the nationalism of the amendment's authors.

[53] See for example, "The Civil Rights Decision," *Chicago Tribune*, October 17, 1883, 4. Carpenter would also argue for a narrow reading of the bill as counsel in the *Civil Rights Cases* themselves (Spackman, "American Federalism and the Civil Rights Act of 1875," 318-19.)**.** Carpenter was definitely no reactionary, but his constitutional conservatism was often at odds with his progressive policy views. For example, he served as Myra Bradwell's lawyer in her challenge to Illinois's ban on female lawyers in *Bradwell v. Illinois*,, but authored a Senate opinion rejecting the New Departure movement's legal claims that the Fourteenth Amendment instituted women's suffrage. Jack M. Balkin, "How Social Movements Change (Or Fail to Change) the Constitution: The Case of the New Departure," *Suffolk Law Review* 39 (2005): 43.

than "fantastic."[54] In his prophetic jeremiad, Carpenter had declared that "I am compelled to vote against this bill.. [and full of] confidence that if it should become a law, the judicial courts will intervene to vindicate the Constitution."[55] The Court had done little more, these papers said, than vindicate not only the Constitution but Carpenter as well.[56]

GOP-aligned papers pleaded with black voters to remain onboard, arguing that the Republican judges were doing their duty with a good faith (and correct) interpretation of the Constitution. Any fair reading of the record, they begged, showed that the party took seriously its obligation to protect blacks as much as the law permitted—especially compared to the Democrats. [57]

Most black citizens were less than impressed by such pleas.[58] In widely circulated comments, Frederick Douglass immediately condemned the decision as the

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[54] *Congressional Record,* 43.2 (1875), 1861. Similar constitutional questions had troubled supporters of the 1866 Civil Rights Bill and the Fourteenth Amendment. See Earl Maltz, "Reconstruction without Revolution: Republican Civil Rights Theory in the Era of the Fourteenth Amendment," *Houston Law Review* 24 (March 1997): 255-59; 267-275.

[55] *Congressional Record,* 43.2 (1875), 1863

[56] Others saluted Carpenter's GOP allies who had similarly opposed the bill, for example, William Phelps of New Jersey. "Palatable Crow," *Trenton Times*, October 20, 1883, 4. Newspapers similarly praised Ohio Democratic Senator (and former state chief justice) Allen Thurman, whose federalism attacks once concluded with the observation that he would "have to get blind and be unable to read the Constitution" before supporting the bill. *CG* 42.2 (1872)*,* 280; *Cleveland Plain Dealer*, October 25, 1883, 2; *Daily Arkansas Gazette,* October 24, 1883, 4.
Some, most notably the *Chicago Tribune*, also argued against the constitutionality of the Civil Rights Act by alleging it to be among the hated species of class legislation. This was because the law protected blacks but not the Irish, Jews, or other social undesirables, who lacked an equivalent statutory protection (on top of the common law). *Chicago Tribune*, October 18, 1883, 4; Brandwein, *Rethinking the Judicial Settlement*, 174-78, 186-88; "The Civil Rights Business: A Howl About Nothing—No Fears for the Colored People," *New Haven Register,* October 23, 1883, 1.

[57] "The Civil Rights Act," *San Francisco Chronicle*, December 21, 1883, 2; "The Negro and His Friends," *Waterloo (IA) Courier*, January 24, 1884, 1.

[58] They were not, of course, the only ones, but certainly a disproportionate number of critics were black. The D.C. wire presses immediately interviewed a handful of prominent local blacks: most notable of these were Douglass, former Senator Bruce, and the D.C. treasurer, the last of whom actually defended the decision on the grounds that the bill had been class legislation. Democratic papers latched onto his statement as proof that "colored people…of refinement"—those largely welcome in similarly cultured white circles—appreciated the importance of being able to exclude undesirables; "Color and Conduct," *Detroit Free Press*, October 18, 1883, 4; "The Negroes: Opinions of Prominent Colored Men on the Recent

product of "the old Calhoun doctrine of states rights as against federal authority," and he would later bitterly lament that "the future historian will turn to the year 1883 to find the most flagrant example of this national deterioration."[59] A hastily convened meeting of civil rights activists in Washington, D.C. issued a resolution criticizing the decision and expressing skepticism for common law solutions, but its statement pointedly refused "words of indignation or disrespect aimed at the Supreme Court."[60] Black papers roundly condemned the *Civil Rights Cases.*[61] The *Cleveland Gazette* echoed Douglas, dismissing the decision as little more than "toadying to the South in establishing the Calhoun theory of 'states rights,'" a sentiment also endorsed by former Mississippi Senator Blanche Bruce.[62]

In a remarkable display of popular constitutionalism, in the following weeks citizen groups throughout the country held meetings to debate and protest the decision. Such gatherings had been ongoing since the appellate courts had blocked the Civil Rights Act earlier in the year. At a D.C. area meeting in August, one bitter participant proposed giving southerners what they claimed to want: a complete separation of the races. (Of

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Supreme Court Decision," *Chicago Tribune,* October 19, 1883, 1 A black lawyer wrote to the *Cleveland Gazette* arguing that the *Civil Rights Cases* were not of themselves that important, since the bill did little on the ground, but did presage future judicial hostility to the claims of black citizens due to Republican flirtations with creating a white southern branch. John P. Green, "Civil Rights: Deep Game Being Played by Arthur Politicians—What Next?" *Cleveland Gazette,* October 20, 1883, 2. Douglass had recently been frustrated by Republican inaction on the public accommodations law; despite his personal appeal to Attorney General Benjamin Brewster, the Justice Department did not bring charges against a railroad that expelled an AME bishop. Hirshon, *Farewell to the Bloody Shirt,* 102.

[59] "The Negroes: Opinions of Prominent Colored Men on the Recent Supreme Court Decision," *Chicago Tribune,* October 19, 1883, 1; "The Social Rights Decision," *Chicago Tribune,* October 20, 1883, 4; Frederick Douglass, *The Life and Times of Frederick Douglass, Written by Himself: His Early Years as a Slave, His Escape from Bondage, and His Complete History* (1892; reprint, New York, 1962), 539, quoted in David Blight, "For Something Beyond the Battlefield: Frederick Douglass and the Struggle for the Memory of the Civil War," *JAH* 75 (1989): 1159.

[60] "Civil Rights Decision: Immense Mass Meeting of the Colored Citizens and Their Friends at Lincoln Hall," *Cleveland Gazette,* October 27, 1883, 1.

[61] "Valeria Weaver, "The Failure of Civil Rights 1875-1883 and its Repercussions," *Journal of Negro History* 54 (1969), 368-382, 371-2.

course, this was reported not as a display of black nationalism or self-reliance but, without a hint of irony from a Democratic paper, condemned as "secession.")[63]

Some black leaders and speakers at these meetings defended the bill on the legalistic grounds that the Court had adopted, but most were unmoved and issued petitions and statements reviling Republican betrayal.[64] (Southern papers ran with reports that one such meeting turned riotous in Texas).[65] A small Draft Harlan movement appeared, with some suggesting that his nomination was the only way to keep disaffected

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[62] "The Civil Rights Law," *Cleveland Gazette*, October 20, 1883, 2; "Colored Indignation: The Effects of the Supreme Court Decision," *Atlanta Constitution*, October 17, 1883, 1.

[63] "Civil Rights and Secession: The Subjects of Discussion at a Colored Mass Meeting," *Washington Post*, August 30, 1883, 2.

[64] Shawn Leigh Alexander, *An Army of Lions: The Civil Rights Struggle Before the NAACP* (Philadelphia: University of Pennsylvania Press, 2012), 61; "Colored Citizens on the Supreme Court," *Baltimore Sun*, Nov 30, 1883, 1; "A New Issue in Virginia: The Colored Men Raising the Question of Civil Rights," *New York Times*, October 26, 1883, 1; "Iowa: Civil Rights in Des Moines," *Chicago Tribune*, October 22, 1883, 6; "The Negroes: Large Meeting Held at Indianapolis, Ind. to Consider the Recent Supreme Court Decision," *Chicago Tribune*, October 23, 1883, 3; "Civil Rights Act: Mass Meeting of Colored Men Last Night," *San Francisco Chronicle*, October 23, 1883, 8; "The Colored Republican Club: How the President's Messenger Regards the Civil Rights Declaration," *Washington Post*, October 29, 1883, 2.

For meetings of blacks along the North-South border endorsing the decision, see "The Civil Rights Decision: A Sensible Address," *St. Louis Dispatch*, October 24, 1883, 4 (reporting on the address of a group of black leaders in Louisville, Kentucky, endorsing the Court's opinion) "The Colored Men's Grievances" (reprinting that address in full), *The Landmark (Statesville, NC),* October 19, 1883, 1; and "The Civil Rights Decision: Cincinnati Colored Men Acquiesce in the Action of the Court," *Detroit Free Press,* October 23, 1883, 2. Other Louisville attendees were more in tune with black opinion elsewhere, decrying it as the worst decision in Supreme Court history. "Telegraph Briefs," *Lawrence Journal,* October 19, 1883, 1). In their convention in June of 1884, the Colored Men's National Executive Committee (the follow-up to the Louisville conference) called for an amendment to override the *Civil Rights Cases* and place protection of civil rights within the national government. "The Colored Men's Demand," *Trenton Times*, June 3, 1884, 1.

Nor would the decision be immediately forgotten: an 1887 meeting of the AME Church condemned Justice Bradley and Chief Justice Waite by name. "They Want Their Civil Rights: Colored Preachers Denounce Two Supreme Court Justices," *New York Times,* April 29, 1887.

[65] "Negro Outbreak," *St. Louis Post-Dispatch*, October 29, 1883, 7. The sheriff dispatched to the reported incident found that "considerable excitement existed" but no evidence of violence, only meetings. *New York Herald-Tribune*, November 1, 1883, 1. The *Los Angeles Times* and *New York Tribune* offered similarly frantic reporting on a bishop attending the annual meeting of the African Methodist Episcopal Church who claimed that, if the rights of blacks continued to be ignored, there would be a revolution. "A Civil Rights Decision Denounced," *Los Angeles Times*, October 19, 1883, 1; "The States and Civil Rights," *New York Tribune*, October 20, 1883, 4.

black Republicans in the party and turning out.[66] In response to speculation that Justice Samuel Miller—part of the majority—might make an excellent Republican candidate, the black editors of the *Kansas Western Recorder* tartly observed that Miller would have to nullify the Fifteenth Amendment as well in order to stand a chance.[67]

Southern opinion leaders offered responses carefully calculated to please their Yankee supporters. Many offered editorials remarkably similar to the moderate federalist position of the *New York Times* and *Chicago Tribune*. The *Baltimore Sun,* for example, similarly cited Carpenter, Schurz, and other Republicans in declaring that the decision helped restore the proper allocation of state and federal power. The Court's decision, it explained, accurately reflected the changes that the amendments had made, such as national citizenship and an end to slavery, but the justices had merely rejected the later, unconstitutional GOP extensions.[68]

These Democrats (and their northern allies) professed not self-righteousness, not indignation, but humble gratitude to the Supreme Court: gratitude to be free of the last vestige of federal control and, with magnificent irony, for a chance to use that restored state sovereignty in vigorous protection of the rights of blacks.[69] (The *Cleveland Plain*

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[66] "A New Star: Supreme Court Justice Harlan Talked for President," *St. Louis Post Dispatch*, October 24, 1883, 1. Robert Ingersoll wished that Harlan would run. "Ingersoll Speaks," *Reno Evening Gazette*, January 15, 1884, 1.

[67] *Kansas Western Recorder*, January 3, 1884, 2.

[68] "News from Washington: Civil Rights Act Void," *Baltimore Sun*, October 16, 1883, 1; "Unconstitutionality of the Civil Rights Act," *Baltimore Sun,* October 17, 1883, 2

[69] "Editorial Article 3," *Washington Post*, October 17, 1883, 2; "A Righteous and Welcome Decision," *The Atlanta Constitution*, October 16, 1883, 4; "A Friend's Advice to the Democrats," *Evansville (IN) Courier,* October 19, reprinted in story of the same name, *New York Times*, October 28, 1883, 6; "The Rights of Colored Men: What Senators Hampton and Butler Say of the Civil Rights Decision," *New York Times*, October 24, 1883, p1. The *New York Tribune* printed a compilation of excerpts from southern papers, which, it assured its readers, proved that southern "Democratic politicians and newspapers are anxious to be on good terms with blacks." "Civil Rights in the South," *New York Tribune*, October 25, 1883, 4; "Editorial Article 2," *Washington Post*, October 26, 1883, 2. Southern newspapers continued to publicly profess allegiance to that promise; for example, see the *Chicago Tribune's* coverage of reaction to John Sherman's visit to Birmingham in 1887. The proprietor of the hotel in which he was staying refused to

Dealer could not resist a bit of gloating, laughing that some squirming Republicans now pronounced Bradley a "fit successor to the author of the *Dred Scott* decision" but had approved when he had corruptly given them the presidency in 1876, but such spiteful responses were uncommon.)[70] The *San Francisco Chronicle* took the curious position that a good faith reading of the Reconstruction amendments supported Harlan's position, but added that the Court's overzealousness in protecting states' rights (even more than the text of the Constitution demanded) was nonetheless a welcome development.[71] The *Boston Globe* had earlier praised the lower court decision striking down the bill, appreciating that "the rights of states are beginning to be recognized again after having been flagrantly ignored." Looking forward to the restoration of the proper balance between federal and state power, the *Globe* hopefully predicted, "It will then be admitted that the doctrine of states rights is not a 'damnable heresy' and that centralization is not the end and aim of republican institutions."[72]

The Court had ruled that the federal government could not act unless states deprived them of rights, and the friends of Dixie insisted that they would fulfill the duties the justices commanded. Appealing to the North's free labor ideology, the *Atlanta Constitution* had argued that market competition for black dollars would institute equality.[73] Harlan, the *St. Louis Dispatch* argued, had strangely adopted the most "monstrous and revolutionary" interpretation of the amendment that his then-fellow

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admit black visitors to see the senator; the *St. Louis Globe Democrat* and Birmingham's *News* both professed to be scandalized. "Civil Rights in Alabama: A Birmingham Landlord Bounces Senator Sherman's Colored Visitors," *Chicago Tribune*, Mar 24, 1887, 3.

[70] "Judge Bradley and His Civil Rights Decision," *Cleveland Plain Dealer,* October 27, 1883, 4; see also "The Civil Rights Decision," *Rockingham (Harrisonburg, VA) Register*, October 25, 1883, 1.

[71] "Editorial Article Number 2," *San Francisco Chronicle*, October 17, 1883, 2.

[72] "Sweeping Away the Rubbish," *Boston Globe*, June 19, 1883, 2. ; "Another 'Civil Rights' Case in Washington," *Boston Globe*, September 2, 1883, 2.

[73] "Unconstitutional Civil Rights," *Atlanta Constitution*, June 23, 1883

Democrats had warned about in opposing ratification, rather than the moderate effect that Republicans had insisted it would have. In short, although Harlan had converted to Republican politics, the Johnson-supporting Southerner had been politically baptized by the rhetoric of Democratic hardliners rather than the moderate abolitionism of longtime Republicans like Miller and Bradley.[74] Indeed, some insisted, without the specter of federal intervention, white southerners need no longer fear and resent blacks for their ability to call down federal tyranny, and civil rights violations would cease. With that obstacle removed, the two races would now come together as equals, fellow citizens in states that very much took seriously the obligations and responsibilities that came with the Supreme Court's restoration of their state's sovereignty.[75]

Some members of the South Carolina senate were more forthright in openly rejecting the implicit bargain of the *Civil Rights Cases*: immediately after the opinion was announced they moved to repeal the state's limited Reconstruction era civil rights laws, which the more politically astute Democratic press helped block.[76] Unwittingly embodying the old crack about the deprivation of the poor and rich alike from the right to sleep under a bridge, Georgia Senator Joseph Brown pledged that he would ensure no white interlopers would menace the black cars of any of the railroads he owned.[77] Other southerners were more adept than Brown at public relations: the editors of the

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[74] "The Dissenting Justice," *St. Louis Dispatch,* October 25, 1883, 4.
[75] See note above; "Untitled Editorial," *Algona Upper Des Moines*, October 24, 1883, 1; also Valeria Weaver, "The Failure of Civil Rights 1875-1883 and its Repercussions," *Journal of Negro History* 54 (1969), 368-382, 370.
[76] "The Civil Rights Bill," *New York Times*, November 29, 1883, 1; "Colored Press Comments on the Topics of the Day," *Harrisburg (PA) State Journal,* December 13, 1883, 2. (I have been unable to locate the original *Charleston News and Courier* story that the *Harrisburg State Journal* excerpts, but it is certainly consistent with the former's politically savvy efforts to fend off Yankee intervention by insisting on South Carolina's zealous protection of black rights. See succeeding footnotes for more on the *Courier's* efforts.

Charlestown News and Courier operated as a clearing-house for southern propaganda, keenly watching Northern papers for attacks on southern civil rights, quickly (and cheerfully) refuting any allegations of southern treachery. Thus, they wrote in November 1883, we "take pleasure in informing the [Indianapolis] *Journal* that [a civil rights bill] was passed originally by the Republicans *and was re-enacted by the Democratic Legislature in 1882."* [emphasis in original.] It simply had never needed to be enforced- and wasn't. [78] In response to a debate running between the *Atlanta Constitution* and *Century* magazine, the *Courier* editors boasted that "in South Carolina, there is a civil rights law as stringent as any that Congress ever placed upon the statute books."[79] This was not simply rallying the troops at home: the *Boston Journal* favourably commented on the *News and Courier's* contribution to the exchange.[80]

Policy-makers in D.C. floated a variety of possible responses to the *Civil Rights Cases*. Chester Arthur concluded his annual message by remarking on the Court's decision and promising that "[a]ny legislation whereby Congress may lawfully supplement the guaranties which the Constitution affords for the equal enjoyment by all the citizens of the United States of every right, privilege, and immunity of citizenship will receive my unhesitating approval." [81] Critics regarded this as far too tepid, meek

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[77] "Effect of the Civil Rights Decision," *Baltimore Sun*, October 22, 1883, 5. Texas Governor Ireland responded with a call for segregated railroad transportation. "Will Not Run Separate Coaches," *Harrisburg Patriot*, October 24, 1883, 1.
[78] See "South Carolina Reports," *Charleston News and Courier,* November 6, 1883, 2.
[79] "In Plain Black and White- II," *Charleston News and Courier*, April 3, 1885, 4; and "In Plain Black and White- I," *Charleston News and Courier,* April 2, 1885, 4. The paper would follow up to the *Century*'s own later installment, conceding that blacks remained excluded in practice from some elements of elite society, but that this was an aberration and that the civil rights bill was working to maintain equality in schools and most important institutions. "The Silent South," *Charleston News and Courier,* September 14, 1885, 4.
[80] "Civil Rights in the South," *Boston Journal*, April 7, 1885, 2.
[81] "Third Annual Message," December 4, 1883, found at http://millercenter.org/president/speeches/detail/3753 . Throughout the address Arthur proposed various

encouragement of an unspecified bill; they remained convinced the Court would strike anything meaningful Congress bothered passing.[82] The *Chicago Tribune* observed several possible responses. The first was to do nothing but let the political processes test Southern fidelity. Taking note of the many promises loudly offered by southern politicos, the editors nevertheless rejected this position due to prior duplicity from Dixie. The second option was to repass a technical bill with a stronger state action hook, one which would hopefully escape judicial censors. The editors recommended this but found it insufficient. (The third option was an amendment, to be discussed below).[83] Ohio Senator John Sherman, who had strongly supported Sumner's initial efforts to pass a Civil Rights Bill, continued his fight from a decade before.[84] He issued a resolution listing the refusal of southern states to enforce civil rights in prosecuting various crimes—thereby clearly establishing state failure—and proposing a new bill.[85]

Some, including one prominent black Democrat in Ohio, argued that the *Civil Rights Cases* did little, so warranted little response. Since, as Harlan had noted, the covered businesses retained common law obligations to serve all qualified travelers, tort

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measures to Congress, such as more aggressive regulation of railroads, but expressed reservations about the balance of federal and state authority and urged them to consider only "lawful" legislation.

[82] The editors of the *Western Recorder* praised nearly all of Arthur's address, but dismissed his comments on civil rights, sarcastically observing that "Congress need not pass any more civil rights bills to be overturned," instead arguing for black self-reliance: "Our advice to colored men is to send no more petitions to Congress. Let us cease to become beggars, and become men." *Western Recorder,* December 21, 1883, 2.

[83] **"**How to Secure the Rights of Negroes," *Chicago Tribune*, October 30, 1883, 4. See also *Wisconsin State Journal,* October 23, 1883, 4.

[84] Sherman had backed Sumner by arguing that the privileges and immunities of citizenship entailed common law access. *CG* 42.2 (1872), 843-44; 3192-93.

[85] "The Danville Riot and Other Outrages to Be Investigated," *Lawrence Daily Morning News,* January 25, 1884, 4; "The National Capital: Sherman Offers a Resolution on Southern Murders," January 25, 1884, 1. In effect, Sherman was anticipating Congress's response to *U.S. v. Lopez*—adding a section of findings to bolster constitutionality. Even Sherman, however, was not a hardliner on the decision. During his 1887 southern trip, John Sherman obliquely defended the *Civil Rights Cases*, telling students at Fisk University that the Republicans would do everything possible to leverage the party's moral and legal suasion on behalf of civil rights, but would do nothing that violated the Constitution. "Sherman in Nashville: Why Tennessee Ought to Be a Republican State," *Chicago Tribune*, Mar 25, 1887, 3.

options remained if those businesses discriminated without cause (this was the fourth option that the *Tribune* had dismissed at the start, observing that a lot of very smart men had done a lot of needless labor were that the case).[86] In order to effectuate such lawsuits, George Edmunds proposed a new civil rights bill that would modify federal courts' jurisdiction by transferring cases that had a race claim to them, but the bill went nowhere.[87] Inspired by an option used after the failure of the national Blaine Amendment, one citizen suggested making admission of statehood from western territories dependent on passing civil rights bills.[88] Anticipating the 20th century option, others proposed using the commerce clause powers to legitimate congressional action to regulate at least some of these operations.[89]

Finally, an amendment remained an option to "put an end to this vexed question" at last, "complet[ing] the work begun by the Republican Party twenty-two years ago."[90] To that end, GOP legislators put forward several proposals for "the coming plank of the Republican platform: the Sixteenth Amendment."[91] The best known was that of Senator James F. Wilson of Iowa, who proposed that ""Congress shall have power by appropriate

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[86] "An Able Ohio Head Turned," *Detroit Free Press,* October 19, 1883, 4; "Untitled Editorial," *Marshall Daily Chronicle,* October 22, 1883, 2; **"**How to Secure the Rights of Negroes," *Chicago Tribune*, October 30, 1883, 4. Also see Brandwein, *Rethinking*, 172-73, FN 58, which notes that the same argument had circulated in 1875.

[87] Avins 12; "Senator Edmund's Bills: A New Civil Rights Act—Polygamy and Rights of Suffrage," *Baltimore Sun*, December 5, 1883, 1.

[88] "Civil Rights: How They May Be Secured in New States by Congress," *Cincinnati Commercial Tribune*, December 08, 1883, 7. Congress had begun using this tactic in the territories to establish "Baby Blaine" amendments restricting use of governmental money by and for religious organizations after the failure of the national amendment. Steven K. Green, *The Bible, The School, and the Constitution* (Oxford: Oxford University Press, 2012), 230-33.

[89] "The States and Civil Rights," *New York Tribune*, October 20, 1883, 4. See *Heart of Atlanta* and *Katzenbach v. McClung* for the Court's decision to uphold the public accommodations of the analogous Civil Rights Act of 1964 on commerce clause grounds. Carpenter had proposed and ridiculed this reasoning in his rejection of the 1875 version. *Congressional Record,* 43rd Congress, 2nd. Sess. (1875):1861-3.

[90] **"**How to Secure the Rights of Negroes," *Chicago Tribune*, October 30, 1883, 4.

[91] "Untitled Editorial," *Davenport (IA) Weekly Gazette,* October 24, 1883, 1. "An Important Decision," *Wisconsin Weekly*, October 24, 1883, 4.

legislation to protect citizens of the United States in the exercise and enjoyment of their rights, privileges and immunities and to assure them of equal protection by the laws." The Constitution, Wilson argued, was not self-enforcing, so the Court's interpretation necessitated his amendment to give Congress that power.[92] In a Senate close to partisan parity, to say nothing of a House under almost two-to-one Democratic control, Wilson's amendment went nowhere.[93]

Perhaps the amendment's most notable effect was in provoking the *Chicago Tribune* to turn momentarily and uncharacteristically nationalist. The "Wilson amendment," it explained, "will complete the conversion of the United States from a league of independent sovereignties, according to the old Calhoun doctrine, into a Nation….The agitation in that direction comes properly from the Republican Party. If the Democratic Party shall use its temporary advantage in Congress to check the progress of Nationalism, it will have to answer to the American people."[94]

Although many Republicans in D.C. condemned the *Civil Rights Cases*, outright criticism of the ruling, or the Supreme Court as an institution, was almost nonexistent among state officials. Only an extremely Washington-focused perspective could lead one to conclude that "almost all of the leading minds out of our public men dissent from the

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[92] "Civil Rights in Congress: Senator Garland and Wilson's Views," *Arkansas Mansion*, December 15, 1883, 1. For the effort by Indiana Representative William H. Calkins, see "The National Capital: Civil Rights," *Cleveland Gazette,* December 15, 1883, 1.

[93] "Civil Rights," *Chicago Tribune,* December 14, 1883, 4; "An Unnecessary Move," *New York Times,* December 14, 1883,

[94] "Civil Rights," *Chicago Tribune,* December 14, 1883, 4. Of course, that would not be the first time an angry decentralist sounded themes directly opposed to what he otherwise believed. Andrew Jackson's irrational, white-hot rage against Calhoun during the tariff crisis had led him to sound ultra-nationalist themes—endorsing positions so strong to surprise even Daniel Webster, to say nothing of frightening Jackson's usual allies. Martin Van Buren did his best to calm them down, but many (such as John Tyler) temporarily decamped for the Whig Party. Ellis, *The Union at Risk,* passim.

decision of a majority of the Court."[95] Outside of the capital, public comments expressed virtually no vocal disagreement with the decision, instead seeing it as a charge to implement the substantive egalitarianism through state legislation. Without explicitly mentioning the Supreme Court, New Jersey Governor Leon Abbett—a Democrat—observed that corporations with special government charters could not distinguish on grounds of race.[96] Iowa Governor Buren R. Sherman, a Republican, took a disappointed but respectful tone in considering the Supreme Court's decision. "If it be true that the several acts of Congress…are not upheld by the Constitution" due to a lack of preceding state action, he observed, "I am in favor of such legislation in our own state, as will secure these rights to every class of our citizens"[97] Such a bill unanimously cleared both houses after garnering the approval of the state's Federal Relations Committee (suggesting the bill was indeed specifically considered a response to the Court's federalism analysis).[98] Michigan legislators received a petition from "the colored voters and tax-payers" observing that, "since the Supreme Court…seems to have indicated by its decision of the Civil Rights Bill that the subject properly belongs to the jurisdiction of the states," the state would have to act. Thus, the petition's signers requested that

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[95] *Western Recorder*, December 28, 1883, 2. Among the *Recorder's* list of prominent opponents, for example, only Ingersoll was not either a senator/representative or a D.C. area black leader, but he was certainly well entrenched in the city's political class. Other D.C. Republicans fanned out to rally support, such as Senator Benjamin Harrison, who visited a meeting of his black constituents in Indianapolis and rallied opposition to the decision. Harrison and his adviser also floated an amendment. "Political," *Jackson Sentinel (Maquoketa, IA),* November 11, 1883, 1; Hirshon, *Farewell to the Bloody Shirt,*, 104-5.
Several federal officials—a postmaster and district attorney among them—joined members of the Pittsburg bar in angrily decrying the decision, but that reaction seems unusual. "Pittsburg: The Action of the Supreme Court Condemned," *Chicago Tribune,* October 18, 1883, 1.

[96] "Governor Abbett on Civil Rights," *Baltimore Sun,* Jan 30, 1884, 1.

[97] "Second Inaugural Address," January 17, 1884, printed in *The Messages and Proclamations of the Governors of Iowa*, vol. 5 (Iowa City: Iowa, 1904), 321.

[98] *Journal of the House of Iowa 1884*, 338, 514; *Journal of the Senate of Iowa 1884*, 443; *Laws of the Twentieth General Assembly of Iowa 1884*, Ch 105, p. 107-108.

legislators pass just such a bill, as had been proposed by their state legislator, R.J. Dickinson, and the state's representatives and senators did so.[99] [100]

All told, within two years of the Court's decision, nearly all northern state legislatures had passed public accommodations laws at their first opportunity (in addition to the three states that had passed public accommodations legislation beforehand: Massachusetts in 1865, New York in 1873, and Kansas in 1874). Pennsylvania (1887) and Wisconsin (1895) would follow within a decade, while the new state of Washington would pass a public accommodations law upon admission to statehood in 1890.[101] In the Northeast, only three states: Maine, Vermont, and New Hampshire—did not pass any such legislation.[102] Many of these state bills were actually broader in scope than the federal bill had been, for example, adding barber shops and explicitly clarifying that restaurants were also included (some argued that they plausibly fell within the common law definition of inns.)

With the dubious exception of Tennessee, which passed a bill providing access to public accommodations—but only if segregated—no states in the South, even those that had opposed the Confederacy, would pass any public accommodations legislation in response, and those that had during Reconstruction left them inert. Tennessee's path-breaking institutionalization of segregation was not its first instance of resistance to

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[99] Ibid., 1102-1103; *Journal of the Senate of Michigan 1885,* 1059; *Public Acts of the Legislature of the State of Michigan, Regular Session of 1885*, ch. 130, p. 131-32; "Civil Rights: A Meeting of Colored Citizens Passes Resolutions in Favor of the Adoption of the Measure Now Before the Legislature," *Detroit Free Press,* March 11, 1885, 8.

[100] *Journal of the House of Representatives of Michigan 1885*, 573.

[101] Milton R. Konvitz and Theodore Leskes, *A Century of Civil Rights* (New York: Columbia University Press, 1961), 157; Weaver, "Failure of Civil Rights," 373. Edwin G. Walker, a leader in the Massachusetts black community, unsuccessfully petitioned the state's Republican Governor, George Robinson, to lobby other northern states to copy Massachusetts' plan in the wake of the *Civil Rights Cases*. "Civil Rights," *Boston Globe,* March 13, 1884, 9.

[102] This is likely a function of the very small number of black Americans residing in those states. See appendix.

public accommodations law. In the wake of the initial Civil Rights Act it passed a provision excluding the presumed common law right of access from public accommodations—in effect, blocking state remedies for civil rights.[103] (Delaware did the same).[104] Kentucky blacks delivered petitions requesting a civil rights bill and reminding them of that important bloc of voters, but the legislature was unmoved.[105] Georgia legislators "laughed the bill right out of the House," with only three black members supporting it.[106]

Surprisingly, the first legislature to press on was the pivotal state of Ohio—whose legislature and governor were now under the control of a resurgent Democratic Party (largely due to the GOP's electorally suicidal embrace of prohibition, over John Sherman's protests).[107] Ohio Republicans, of course considered themselves a vanguard of civil rights and the war's abolitionist legacy— a not unjustifiable claim for a state that had produced Grant, Hayes, Garfield, the Sherman brothers, Chase, and James Ashley. Urged on by an extremely well-organized lobby of black-led civil rights groups, Republicans moved quickly to pass a bill proposed by William Mathews.[108] As Republican George Washburn told a Democratic member on the floor during debate, with

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[103] Kenneth W. Mack, "Law, Society, Identity and the Making of the Jim Crow South: Travel and Segregation on Tennessee Railroads, 1875-1905," *Law and Social Inquiry* 24 (1999): 381-84

[104] *Acts of Tennessee,* 1875 (chap. 130), p.216; *Acts of Tennessee,* 1885, (Chap. 68), 124-25; Laws of Delaware, 1875 (chap. 194), p. 322; Richard, Bardolph, ed. *The Civil Rights Record: Black Americans and the Laws, 1849-1870* (Thomas Y. Crowell Co., New York, 1970), 76, 82, 126. Several southern states had passed such laws during Reconstruction, and North Carolina's Democratic Governor Zebulon Baird had pushed through an accommodation law even as Reconstruction ended in 1877. See Vallely, *Two Reconstructions*, 80-81, Bardolph, *Civil Rights Record*, 72-75.

[105] "Jeff Davis and the South: The Colored Kentuckians Plead for Justice," *New York Freeman,* May 9, 1886, 1; "The Mississippi Cut-Throats: A Civil Rights Bill," *New York Freeman*, March 27, 1886, 1; "Blanton Duncan Crazy- Civil Rights in the Kentucky Legislature," *New York Freeman*, February 20, 1886, 4.

[106] "Laughed Down: The Civil Rights Bill in the Georgia Legislature Ridiculed to Death," *Chicago Tribune*, October 13, 1885, 2.

[107] "Untitled Editorial," *Davenport Weekly Gazette,* October 24, 1883, 1.

the federal Civil Rights Act held to apply "only in the territories and the District of Columbia…the power to protect their rights is imposed on the States. That is why we are here today…"[109]

The state's Democrats found themselves in the same bind as many D.C. Republicans had been. After the Court's decision, Buckeye Democrats felt pressure to pass a bill not only from local Republican papers and activists, but also from national Democrats needing to validate the *Civil Rights Cases*' promise of state responsibility.[110] This rebranding represented a late stage of the so-called "New Departure," in which Democratic leaders tried to reinvent their party as a credible national institution, rather than a sectional band of bitter diehards and Copperhead enablers, as the bloody-shirt waving Republicans insisted they were. That meant that the Democracy had to demonstrate its sympathy with, at the very least, a conservative Unionist interpretation of the Civil War, committed to its fruits of the Reconstruction Amendments and, implicitly, blacks' civil rights. (Such calculations had led them to nominate Winfield Scott Hancock in 1880. Hancock, a revered Union general, pledged 'to resist with all my power any attempt to impair or evade the full force and effect of the Constitution," including the

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[108] Weaver, "Failure of Civil Rights," 375. "Colored Leagues Forming in Ohio: Widespread Political Organization to Secure Civil Rights," *New York Tribune*, February 26, 1884, 1.
[109] "Speech of Hon. George Washburn," *Elyria Republican*, January 31, 1884, 4.
[110] "Making Another Move," *Cleveland Plain Dealer,* October 18, 1883, 1; "Governor Foster's Message: His Fourth and Last Effort," *Miami (H) Helmet*, January 10, 1884, 1; "A Friend's Advice to the Democrats," *Evansville (IN) Courier,* October 19, reprinted in story of the same name, *New York Times*, October 28, 1883, 6; "The States and Civil Rights," *New York Tribune*, October 20, 1883, 4. *Summit County Beacon* (Akron, Ohio), 10-24, 1883, 4. The *Washington Bee*, a paper with a predominantly black readership, challenged "Democratic leaders tired, as they claim to be, of the butchery of the colored people in the South…. [to first] stop it and [second] adopt in every state a comprehensive and manly civil rights bill." *Washington Bee,* December 08, 1883, 2. Even Kentucky Democrats were urged to pass legislation to fulfill party pledges. Blanton Duncan Crazy- Civil Rights in the Kentucky Legislature," *New York Freeman*, February 20, 1886, 4.

In 1873 New York Democrats had practiced what they preached, with roughly half of their members in each house backing the state public accommodations bill [*Journal of the Senate of New York 1873*, 507;

Reconstruction amendments.)[111] State passage of civil rights legislation would allow Democrats to hold onto their states' rights commitments while easing away from the open white supremacy that alienated northern voters, white and black alike. That blacks were increasingly seen as potentially pivotal voters in some northern states only added to this pressure.

Fortunately for Ohio Democrats, their governor-elect was uniquely suited for this problem. In his inaugural address, George Hoadly—a former Republican and protégé of Salmon Chase—had strongly endorsed a civil rights bill.[112] Although his pedigree gave him unmatched credibility on the issue, he nonetheless went to great lengths to explain his position. In justifying his party's turn on civil rights, Hoadly offered a relatively subtle lecture detailing his understanding of American federalism. He reminded his listeners that the Civil War had decisively rejected the theories about the "superior sovereignty of the states" who could block enumerated powers in the Constitution. Nonetheless, he insisted, every power not enumerated within the text remained both a state right and a state obligation, even if the "habitual use of and submission to war

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Journal of the Assembly of New York, 615-16; Lawrence Grossman, *The Democratic Party and the Negro: Northern and National Politics 1868-1892* (Urbana: University of Illinois Press, 1976), 63.

[111] Calhoun, *From Bloody Shirt to Full Dinner Pail,* 73. For a general treatment of this strategy, see Grossman, *Democratic Party and the Negro.*

[112] Hoadly was the subject of a pamphlet circulating in Ohio, entitled "When the Democrats Rule," which speculated Hoadly could parlay his civil rights stance into the presidency. "When the Democrats Rule: A Literary Production Which is Creating Considerable Comment." *Rockford* (IL) *Daily Register,* December 8, 1883, 2. Hoadly's stance, and his general aggressiveness in promoting opportunities for black Ohioans, was not merely opportunistic, however. He followed the political career of his mentor and law partner Salmon Chase, as a religiously motivated, fanatical abolitionist, Radical Republican, Liberal Republican, and finally, Democrat, and he would govern as such (Grossman, *Democratic Party and the Negro*, 82-93, 104).

Hoadly was not the first Democratic governor from Ohio to recognize this pivotal bloc of voters. Jacob Cox, who had once fiercely opposed black suffrage, nonetheless urged Andrew Johnson to sign the Civil Rights Bill in 1866 on grounds both pragmatic and ideological. He declared "all true union men" support legal equality, and by 1867 explained that blacks should vote in Ohio since the south had been forced to accept them also**.** LaWanda Cox, "Civil Rights: The Issue of Reconstruction," *Freedom, Racism, and Reconstruction*, ed. Donald G. Nieman (Athens: University of Georgia Press, 1997), 119.

powers has left the minds of many good citizens in apt condition to forget even until now that the Constitution likewise reserves all nondelegated powers 'to the states respectively, or to the people.'" The error of the Civil Rights Act, he continued, was that it "adopted for the Federal Government the power of police within the states." That was why "the duty of protection against inequality and discrimination on account of color is thus devolved to the states."[113] Hoadly's conclusion frustrated members of his party among whom old Democratic beliefs held, with some mocking the proposed bill as "nonsense" and hoping it would die in committee. A few Democrats, however, understood the party's problem and moved quickly to validate their partisans' promises to enforce black rights, joining Republicans in advancing the passage of their own, much narrower bill rather than the Republicans' more comprehensive alternative.[114]

An ugly debate and contentious legislative history followed. The Senate passed a watered down bill, garnering protests from not only the Ohio Equal Rights Association but the Democratic Governor Hoadly as well.[115] In response, the House narrowly modified it to resemble the Republicans' broader plan—yet only one dissenting House vote, and none in the Senate, appeared on the final roll call. Legislators simply felt they could not go on the record with such a vote. [116] With that, the bill widely described as

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[113] "Inaugural Address," January 14, 1884, printed in *Daily Advocate (Greenville, OH)*, January 15, 1884, p1.

[114] "Ohio Democrats and Civil Rights," *DC Evening Star*, January 23, 1884, 1; "Hoadly's Inaugural Address: How is It Regarded by Ohio Congressmen?" *Wheeling Register,* January 26, 1884, 1; "A Civil Rights Bill: Stirs Up Political Animosities in the House," *Cleveland Gazette,* January 12, 1884, 2; "Routing a Reporter…Lively Session of the Democratic Caucus at Columbus," *Cincinnati Commercial Tribune,* January 31, 1884, 2.

[115] "To the Colored Voters of Ohio," *Cleveland Gazette*, March 8, 1884, p3. "'Civil Rights' in Ohio: A Democratic Law Which Discriminates Against Negroes," *Chicago Tribune*, February 28, 1884, 1.

[116] Weaver, "Failure of Civil Rights," 375." "Senator Crowell," *Coshocton Daily Age,* February 16, 1884, 2 *Journal of the Senate of Ohio 1884*, 100; *Journal of the House of Representatives of Ohio 1884*, 156-57.; for criticism from the Governor and the civil rights activists, see. "Ohio Colored Men," *Goshen Daily News*, February 28, 1884, 1; "Miscellaneous Notes," *Cedar Rapids Evening Gazette,* February 29, 1884, 5; "The Civil Rights Bill Repudiated," *Lima (OH) Daily Republican*, February 29, 1884, 1.

"the same as the one declared unconstitutional by the Supreme Court" had passed, a development widely noted throughout the country.[117]

The early weeks of the Ohio legislature proved a hotbed of proposals to help restore civil rights protections more broadly.[118] In addition to the bill that passed (and a slew of rival proposals), the legislature debated a resolution calling for an amendment to the Constitution to overcome the result of the *Civil Rights Cases.*[119] The language of the proposed amendment resolution was cagey and understated in its negative assessment of Bradley's opinion: "under this decision, Congress has no power of direct or primary legislation… but is limited to corrective legislation." Its Republican sponsors were, however, blunt in rejecting southerners' claims of egalitarianism. "In several states of this Union," the resolution text declared, "the rights of the colored people are not only not secured to them, but are openly and shamelessly violated, in open disregard of the rights intended to be secured by the 14th Amendment." [120] In a rare bit of anti-Court commentary designed to also advance partisan ends, Democrats modified the resolution to condemn the Supreme Court 'for its late cowardly decision in depriving colored men of their civil rights."[121]

"The colored voters of Ohio," the *Plain Dealer* crowed, "are not likely to forget that the first civil rights bill in any state has been enacted by the Democratic legislature of

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[117] "State Capital [sic]: Passage of the Civil Rights Bill," *Cleveland Gazette* February 9, 1884, 1; "State Affairs: Ohio: The Civil Rights Bill," *Chicago Tribune* Feb 6, 1884, 3; "Ohio Legislature," *Burlington Hawkeye,* February 6, 1884, 5; "Editorial Notes," *Reno Evening Gazette*, February 6, 1884, 1; Untitled, *Nevada State Journal*, February 10, 1884, 3.
[118] "Ohio Legislature: Bills Introduced to Obliterate the Color Line," *Chicago Tribune*, March 9, 1884, 9.
[119] E.g. SB 1, HB 4, 6, 49.
[120] *Journal of the Senate of Ohio 1884,* 65-66.
[121] *Journal of the Senate of Ohio, 1884*, 334; *Journal of the House of Ohio, 1884,* 631; *General and Local Laws of Ohio, 1884*,90; Grossman, *Democratic Party and the Negro,* 86.

Ohio in the face of the bitter opposition of the Republicans."[122] A Democratic paper urging the state's black voters to realign saluted Ohio's Democrats for "restoring, by [their] law, the civil right bill which the Supreme Court annulled." This proved, the editors insisted, that Democrats were blacks' honest allies out to make substantive policy differences rather than "sickening professions of friendship" that masked betrayal by the Republican justices. (In describing legislative affairs the paper also described the state's failed amendment, though its editors understandably declined to clarify the party breakdown to their readers).[123]

Although the amendment vote failed, Ohioans would continue to oppose redeemers' white supremacy—and to attempt to compete for black voters in the crucial, closely divided swing state. Hoadly continued to press for color-blind, inclusive legislation.[124] Disingenuous electoral gamesmanship did not go unobserved: the *Cleveland Gazette* acidly noted that one of the civil rights bill's chief Democratic backers was caught explaining to other constituents that "the Democrats do not want the 'nigger' vote."[125] The following year, elements of both parties worked to eliminate the state's school segregation law, but hostility to school integration from both white and black constituencies led the bill to narrowly fail.[126] More symbolically, they would stand against one of the major gestures of postwar reconciliation in 1888, when Grover Cleveland nominated prominent former secessionist Lucius Quintus Cincinnatus Lamar

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[122] *Cleveland Plain Dealer*, February 7, 1884, 2; "Going to Celebrate," *Cleveland Plain Dealer,* February 8, 1884, 1. The *Cleveland Plain Dealer's* attempts to blame Republican opposition to a Democratic civil rights bill on their stinginess with civil rights—not because the Democratic alternative was far narrower in application—caused much amusement for the proprietors of a New Mexico paper who sarcastically printed their handiwork. *Santa Fe New Mexican Review,* February 21, 1884, 2.
[123] "Untitled Editorial," *Newark Daily Advocate,* February 6, 1884, 2. "Legislative Summary," *Newark Daily Advocate,* January 25, 1884, 2.
[124] *Cleveland Gazette*, January 17, 1885, 1.
[125] "The Civil Rights Bill a Bait," *Cleveland Gazette*, February 9, 1884, 2.

to the Supreme Court. The Mississippi Democrat had famously eulogized Charles Sumner in a move widely seen as a burying of the hatchet and forgiveness of Radical Republicanism by leading men of the South. [127] Cleveland's nomination of the first native Southerner to the Court since the Civil War similarly ratified northern acceptance of the pact.[128]

Ohioans were not buying. The upper house first floated a fierce protest that deemed him, based on Lamar's refusal to endorse the Reconstruction amendments, as "biased and prejudiced against the [Constitution]" and therefore "disqualified and unfitted to sit in a court as a judge, whose function is to interpret and determine the meaning of scope of that instrument." [129] Instead, however, the senate agreed to drop that for the even fiercer House version. Membership on the Court, it declared, should be reserved only for one "who believes in the binding and inviolable character of the federal constitution and the validity of all and separate amendments thereto, [that] all qualified electors shall have the right to exercise their franchise freely…[without threat of] fraud, violence, or terrorism." Lamar, by contrast, had disqualified himself by rejecting and refusing…to be governed by the amendments to the Constitution," by defending Jefferson Davis, and, in a line that likely troubled even many fellow Republicans, "by his belief in the doctrine of states' rights."[130]

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[126] Grossman, *Democratic Party and the Negro*, 87-89.
[127] As Lamar wrote privately, he volunteered for the job less out of respect for Sumner and more for a platform in which to humanize the South to northerners bitter about the war and thus inclined to ignore politicians from the old Confederacy. For example, he believed that when the Senate considered Sumner's Civil Rights Act of 1875, Democratic statements only served to antagonize northern "oppressors" who, to Lamar's horror, dispatched "a *negro"* to respond [italics in original]. Mattie Russell, "Why Lamar Eulogized Sumner," *Journal of Southern History* 21 (1955): 374-78.
[128] Hayes nominated William B. Woods from Alabama and the Fifth Circuit, but Woods had been an Ohio Democrat and Union soldier turned carpetbagger.
[129] SJR 5, *Journal of the Senate of Ohio, 1888*, 18-19.
[130] HJR 3, *Journal of the House of Representatives of Ohio 1888*, 27, 35.

Hoadly and other Democrats worked zealously to translate these civil rights efforts into electoral success in 1885.[131] Hoadly explained that during their term in office his party had protected black rights, whereas the Republicans and their Supreme Court had "held the Republican Civil Rights Bill Unconstitutional. Our Democratic Legislature gave you, my colored friends, equal rights with me… My friend [the Republican candidate Joseph Foraker] says I cannot get the colored vote. Perhaps not, but I know enough to do the colored people justice, whether they vote for me, or not."[132] They did not, as Republicans successfully argued that, racial liberal though *he* was, Hoadly's party remained committed to white supremacy in the South.[133] Sherman and McKinley proved particularly aggressive and effective in waving the bloody shirt on Foraker's behalf.[134]

New Jersey similarly followed the course of Ohio, even down to its Democrats being invoked elsewhere as proof the party was not racist.[135] Not only was New Jersey one of the handful of legislatures to meet, and thus pass, a bill in 1884, but its Democratic governor, as noted above, issued a veiled criticism of the decision and made known his support for public accommodations protection.[136] Finally, as in Ohio, its Democratic legislature easily passed a civil rights bill—after watering down the Republican-favored

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[131] "Gov. Hoadly's First Speech," *Baltimore Sun*, September 7, 1885, 5. They had, since the beginning of considerations, tried to stake out a claim to the bill and deny Republicans the opportunity for position-taking. "The Ohio Legislature," *Fort Wayne Gazette*, January 10, 1884, 5.

[132] Grossman 91. Hoadly was not the first to make the argument that Republican actions were weaker than their rhetoric, but he was not as conspiratorial as some in his party who alleged Republicans intentionally designed a weak, constitutionally dubious bill to keep blacks in line while doing nothing to actually improve their lot. "The Civil Rights Discussion," *Detroit Free Press,* October 18, 1883 4. Of course, that is more or less exactly what state level Democrats did in most states where they controlled the legislative process.

[133] Grossman, *Democratic Party and the Negro* 91.

[134] Hirshon, *Farewell to the Bloody Shirt,* 138-42.

[135] The senate passed it unanimously; five Democrats voted no in the lower chamber. *Journal of the Senate of New Jersey, 1884*, 142-43; *Minutes and Votes and Proceedings of the General Assembly of New Jersey, 1994,* 816, 1115; Grossman, *Democratic Party and the Negro*, 71; "An Enlightened Step," *Trenton Times*, February 1, 1884, 2 (reprinting an editorial from the *Pittsburgh Dispatch* hailing Abbett for his civil rights advocacy.)

original to create civil penalties "so small that it would never pay to sue for them."[137] As a result Trenton Republicans, who offered the bill as the session's first legislative activity and did most of its floor advocacy, more than grumbled that Democrats were insincere and credit-taking: they had a fistfight on the floor about it. However insincere they might have been, the Democracy was united in that insincerity, with all but a handful of them voting to back it.[138] As national Democrats had hoped, the efforts by Abbett and Hoadly to move the Democratic Party's position on civil rights did not go unnoticed.[139]

Iowa and Connecticut also passed legislation in 1884.[140] Connecticut's Democrats had long cultivated the black vote, and the ease of passage suggests how eager both parties were to remain in the good graces of that swing bloc—a fact those swing voters boasted about and which southern blacks observed with envy. After the state's black community partially drafted and heavily lobbied for the bill, it passed both houses without dissent (after being proposed by a Democrat), and Democratic Governor Thomas Waller signed it. Connecticut legislators went a step further than simply passing an analogue to the 1875 act, requesting a congressional commission "to inquire into the progress of the colored citizen since 1865."[141]

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[136] Abbett had once been a ferociously racist Copperhead. Grossman, *Democratic Party and the Negro*, 71-72.

[137] "A Disgraceful Farce," *Trenton Times*, March 6, 1884, 4. "The Laugh Went Round," *Trenton Times,* February 28, 1884, 1;

[138] "Legislators' First Day," *Trenton Times*, January 9, 1884, 1; "Legislation at Trenton: The Assembly and Civil Rights," *New York Tribune,* March 20, 1884, 2; "Slapped in the Face: Armitage is Struck by Burgess," *Trenton Times*, March 20, 1884, 1; "Excitement in Trenton: Personal Encounter Between Assemblymen," *New York Tribune*, March 21, 1884, 5.

[139] "Democratic Governors Showing Their Hands," *Kansas Western Recorder*, February 8, 1884, 2.

[140] Iowa had about 1/3 of each house not vote or abstain, but the journal and the all but non-existent newspaper coverage among the many local papers I searched, suggest that passage was never in doubt or strongly contested**.** *Journal of the House of Representatives o f Iowa 1884,* 338, 514; *Journal of the Senate of Iowa 1884*, 443. ; *Laws of the Twentieth General Assembly of Iowa,* 107-108.

[141] Grossman, *Democratic Party and the Negro,* 77; *Journal of the House of Connecticut 1884*, 752; *Journal of the Senate of Connecticut 1884*, 698-99; Fishel 326; on the Civil Rights Bill, "Insisting on their Rights: The Colored Citizens' Convention of the State of Connecticut," *New York Times*, December 31,

The following year, when many legislatures met for the first since the Court's decision, seven other states passed public accommodations bills. Rhode Island Republicans offered a bill, but influential black Democrat George Downing convinced the Democrats to pass an even stronger one, prompting Downing to comment that the state's Democrats were more egalitarian than members of its GOP.[142] Colorado, the most recently admitted member of the Union, served as the first western state to approve public accommodations legislation. Its senate committee on federal relations approved the bill easily, setting the tone for its passage.[143] (That several state federal relations committees considered the bills indicated the tight nexus between their actions and the Supreme Court.) Indiana's Republicans—said to be more hostile to the Court's decision than their partisans elsewhere on account of their state's racism—nonetheless declined to call a special session, although some had debated doing so.[144] At their regular session, Representative James Matthew Townsend, the second black to be elected to that state's legislature, failed to get through his comprehensive bill eliminating all racial distinctions—including the militia and marriage—but he did succeed in pressing legislators to pass Senator W.C. Thompson's public accommodations law. Once the state's Democrats succeeded in rebuffing efforts to reintroduce Townsend's bill as amendments to Thompson's, nearly all of them also endorsed the public accommodations

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1883, p2. *Huntsville Gazette*, April 5, 1884, 2; *Journal of the House of Representatives of Connecticut 1884,* 260, 649; *Journal of the Senate of Connecticut 1884*, 624. The bill's Democratic sponsor compared his bill to the federal equivalent. "Civil Rights in Connecticut," *Chicago Daily Tribune,* March 26, 1884, 7.

[142] Grossman, *Democratic Party and the Negro,* 80. No Rhode Island journals exist in the 1880s, but the text of the bill is found in *Acts and Resolves 1885*, 171.

[143] *Journal of the Senate of Colorado 1885,* 1233, 1407-1408 *of the House of Colorado 1885,* 1933-34 "State Legislature," *Colorado Springs Gazette,* April 4, 1885, 3.

[144] "Politicians in Indiana: Interest Awakened by the Civil Rights Decision," *New York Times,* October 28, 1883, 7.

component, likely in order to avoid the more radical alternatives. Only five rural Democrats opposed the bill.[145]

Other Midwestern states passed public accommodations laws, though dissent was more than nominal. Almost a quarter of Minnesota's senate dissented, with a handful in the lower house.[146] Although there were mixed feelings about the necessity of a bill in Illinois, with many observing that the state's businesses were solicitous enough of elite black customers, Lincoln's home state passed one anyway.[147] Roughly one fifth of each Illinois chamber disapproved of a bill drafted and shepherded by Representative John W.E. Thomas, the first black member of the Illinois legislature (in which he had served off and on since 1877). All of the bill's opponents were Democrats (as were the abstainers), but the party was far from monolithic. A Democrat offered the most eloquent speech on its behalf.[148] Some members of the party, especially those in the Chicago and Cook County areas, voted for it, with a few even appearing at the meeting held by Springfield's black community to celebrate its passage.[149] A comment made on the floor by one unnamed Democrat captured the frustration in which his partisans found themselves, electorally trapped: they went along, he grumbled, only "to take the sting out of it," an assessment shared by a disgusted Democratic observer in Missouri who chalked

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[145] *Rochester Tribune,* January 3, 1885, 1; "The Legislature," *Crown Point Register,* February 19, 1885, 4; *Goshen Times*, February 19, 1885, 2. "The Relics of a Barbarous Age: James Matthew Townsend and Black Laws," *Traces of Indiana and Midwestern History* (Winter 2009): 36-41. *Journal of the House of Indiana 1885*, 1119, *Journal of the Senate of Indiana 1885,* 268; Grossman, *Democratic Party and the Negro*, 97

[146] *Journal of the Senate of Minnesota 1885*, 331; *Journal of the House of Minnesota 1885*, 656-57

[147] "Must be Accommodated," *Chicago Tribune*, June 5, 1885, 3; *Kansas City Star,* June 8, 1885, 2.

[148] "From the Garden City: The Civil Rights Bill Passes the House," *Cleveland Gazette,* April 11, 1885, 2. There had been some concern that the GOP would stall the bill for credit-taking, but my suspicion is this was likely just to ensure follow-through. "A Civil Rights Bill," *Cleveland Gazette,* June 6, 1883, 2.

[149] David A. Joens, *From Slave to Legislator: John W.E. Thomas, Illinois's First African American Lawmaker* (Carbondale and Edwardsville: Southern Illinois University Press, 2012), 112-115. "They Ratify," *Journal of the House of Representatives of Illinois 1885,* 445-7; *Journal of the Senate of Illinois*

it up to "pure cowardice."[150] By 1886, public accommodations laws had been passed by every non-southern state except for the three far western states (California, Nevada, and Oregon), the three upper New England states (Vermont, New Hampshire, and Maine), as well as Wisconsin and Pennsylvania.

In 1887 Pennsylvania passed a civil rights bill, with almost no debate or opposition; the senate vote was unanimous, with three Democrat holdouts in the lower chamber.[151] The seemingly inexplicable delay is curious and demands further research, as Pennsylvanians were among those pushing hardest to undo the Court's decision. Moreover, two percent (107,596) of its population was black, making that population among the largest both as a percentage and a total number.[152]

Well-covered incidents of discrimination in Wisconsin in 1889 prompted action in the Badger State. The most notable was the high profile case of *Howell v. Witt*—in which the Democratic judge Daniel Johnson used Harlan's common-law protection reasoning to find for the plaintiff, Owen Howell, who had been excluded from a Milwaukee opera house. When the legislature returned the next year in 1891, newspapers and black leaders pressed for the civil rights bill they had been sitting on since Howell's

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1885, 872; "They Ratify: Colored Citizens Agree That the Civil Rights Bill is about the Proper Thing," *Chicago Tribune*, June 19, 1885, 8.

[150] "A Busy Day: Passage by the Senate of the Civil Rights Bill and Several Other Bills," *Chicago Tribune*, June 5, 1885, 3; *Kansas City Star,* June 8, 1885, 2.

[151] The *Philadelphia Evening Bulletin* hopefully suggested that the non-controversial treatment of this "declaration of principles" prophesied future racial peace; the legislation, the editors argued, was a product, not a cause, of changing attitudes. "Pennsylvania on Record," *Philadelphia Evening Bulletin*, May 6, 1887, reprinted in *New York Freeman,* May 21, 1887, p1. Ira V. Brown, "Pennsylvania and the Rights of the Negro, 1865-1887," *Pennsylvania History* 28 (1961): 45-57, 56. *Journal of the House of Pennsylvania 1887,* 1125; *Journal of the Senate of Pennsylvania 1887,* 1177. Brown could not find an explanation for the lag; nor have I.

[152] "The Civil Rights Decision: Representative Brown's Opinion of It—His Letter to Justice Harlan," *Wellsboro (PA) Agitator*, January 1, 1884, 2. See Appendix for statistics. Another possible explanation is that Pennsylvania did not have a black member of the legislature, since, as noted above, they often served as policy entrepreneurs on equal accommodations bills in the mid 1880s. "Doings of the Race," *Cleveland Gazette*, July 3, 1886, 1, reprinting an article from the *Philadelphia Sentinel*.

exclusion. However, with the Democrats in control of the state legislature—and with the memory of the *Civil Rights Cases'* implicit pact more distant—no passage took place until the GOP reclaimed the state house in the 1894 elections. When it did pass, it seemed to do so without any comment or acknowledgement whatsoever.[153]

The mass admission of new states during the last two decades of the 19th century did not, however, bring with it a much broader reach of public accommodations laws. Of the seven, primarily Mountain West states joining the Union between 1886 and 1896, only Washington would enact a public accommodations law.[154]

One final push took place in the wake of the national government's continued withdrawal from the protection of the equal rights of black citizens. Again over a stirring, solo jeremiad from John Marshall Harlan, the Supreme Court sided with Louisiana in the infamous *Plessy v. Ferguson.*[155] Showing how far the nation had moved in the fifteen years since the *Civil Rights Cases,* Louisiana did not face legal challenge for merely *allowing* discrimination on a public carrier but for proactively *requiring* it. Those appalled by *Plessy* did not wait long for a state response. On the first day of California's 1897 legislative session, a widely acknowledged leader in the state GOP proposed the very sort of bill that had gotten him run out of Reconstruction Louisiana two decades before. Henry Dibble had served as the right-hand man and legal advisor to Louisiana's

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[153] "What Is Going on In Milwaukee: Convention of Colored Citizens to Secure Civil Rights," *Chicago Tribune,* November 27, 1889, 9; Leslie H. Fishel, Jr., "The Genesis of the First Wisconsin Civil Rights Act," *Wisconsin Magazine of History* 49 (1966): 324-333. During the first failed attempt at passage in 1891, Democrats, not insensibly, wondered why Wisconsin's Republicans had not passed such a bill during the two decades in which they had run the show (329-331). The failure of the legislature to do so during the previous session, when nearly all of the rest of the North passed such bills, is indeed a puzzle.

[154] The Dakotas (split from a single territory after failed joint admission efforts in the mid 1880s), Montana, Idaho, Wyoming, Utah were the others. None of the final three states—Oklahoma, New Mexico, or Arizona—enacted public accommodations laws. Thus, the proposal to condition statehood on passage of public accommodations protections turned out to be quite prescient. "Civil Rights: How They May Be Secured in New States by Congress," *Cincinnati Commercial Tribune*, December 08, 1883, 7.

Reconstruction Governor Henry Warmoth, before Dibble had fled west—after a brief stint in Arizona—upon the state's Redemption. Now he was regarded as the brains of the California Republican Party, and he successfully moved the Golden State to take the opposite path of his old home state.[156] In the wake of *Plessy,* other states strengthened their fines and enforcement of the civil rights bill they had passed in the 1880s, but no other state would add a public accommodations law until Oregon in 1953.

Conclusion

The Supreme Court's decision in the *Civil Rights Cases* had exposed a tension among Republicans and some Northern Democrats, between two of their professed and seemingly serious commitments: to federalism and to protecting the hard-won civil rights of southern blacks.[157] They were, in short, caught between twin commitments to their classical liberalism. Tocqueville (and in turn, Louis Hartz) famously derived America's commitment to political liberty from the nation's relatively egalitarian material situation at the time of settlement.[158] That belief in liberty, Tocqueville continued, played out in the American commitment to local government and federalism, especially when

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[155] 163 U.S. 157 (1896); Charles A. Lofgren, *The* Plessy *Case: A Legal-Historical Interpretation* (New York: Oxford University Press, 1988).
[156] Charles McClain, "California Carpetbagger: The Career of Henry Dibble," *Quinnipiac Law Review* 28 (2010): 885-967, 954-955. "Dibble's Civil Rights Bill," *Record-Union (Sacramento),* Jan. 20, 1897, 7.
[157] Michael Les Benedict, "Preserving the Constitution: The Conservative Basis of Radical Reconstruction," *JAH* 61 (1974): 65-90; Michael Les Benedict, "Preserving Federalism: Reconstruction and the Waite Court," *Supreme Court Review* 1 (1978): 39-79; Earl Maltz, "Reconstruction without Revolution: Republican Civil Rights Theory in the Era of the Fourteenth Amendment," *Houston Law Review* 2 (1987): 221-279; Foner, *Reconstruction*, 242-43; LaWanda Cox, "Limits of the Possible," 271; Brandwein, *Rethinking the Judicial Settlement,* 38-39, 102-103.
[158] Alexis de Tocqueville, *Democracy in America.* Ed. Harvey Mansfield and Delba Winthrop. (Chicago: University of Chicago Press, [1840] 2000), 1.1.1-1.1.5.; Louis Hartz,, *The Liberal Tradition in America* (New York: Harcourt Brace, 1955).

embodied as law.[159] As good liberals, then, Americans loved law, loved liberty, and loved equality—a self-conception especially important to a Republican Party which had grown out of a movement committed to upward mobility derived from economic opportunity. All had equality in the dignity and self-ownership of labour; all outside that dignity comprised "the Slave Power" or the victims of its corruption.[160] Republicans could no longer just blame the Slave Power for unmerited gaps in equality, but, as Carpenter lamented in opposing a law he held to be "a signal triumph of humanity," their constitutional commitment to the political liberties of federalism also seemed to be pulling the other way.

The American liberal, in Du Bois's estimation, was "handicapped by a legal mind," leading to an embrace of constitutional 'hair-splitting' and 'fetich worship' that blocked Americans from implementing equality.[161] If, as Hartz argued, accidents of history resulted in an almost unthinking liberalism, the *Civil Rights Cases* put Republicans in a position where they had to do a lot of thinking—and struggle to articulate a reconciliation.

23 years after the decision, Elihu Root would similarly try to reconcile a deeply federalist constitutional conservatism with progressive politics. Should states fail to implement economic regulation pursuant to their police powers, Root warned, there

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[159] Tocqueville, *Democracy in America,* 1.1.8. This did not translate to anything resembling a pure libertarianism, however, as Americans were quite comfortable with an active local government protecting the public good. William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 1996).

[160] Foner, *Free Soil.*

[161] W.E.B Du Bois, *Black Reconstruction in America* (Oxford: Oxford University Press, [1935] 2007) 233-234, 279, 270, 275. Echoing Du Bois, Swedish sociologist Gunnar Myrdal grumbled that a singularly dominant and conservative 'fetishistic cult of the Constitution" and its forms threaten the spirit of the American Creed's demands for equality. "If upheld solely by individual choice, social segregation manifested by all white people in an American community can be-and is- defended by the norm of personal liberty, ["the second main norm of the American Creed"]. Gunnar Myrdal, *An American Dilemma* (New

would eventually be little alternative but the construction of national power.[162] The widespread movement for uniform state legislation—akin to the state-by-state implementation of public accommodations laws—suggested that this solution still appealed to political elites.[163]

The *Civil Rights Cases* provoked a popular discussion arguably as large as anything since *Dred Scott* some twenty-five years earlier. Newspaper coverage was widespread, and black Americans who opposed the decision built a mass network of activism to press for their rights to equal access of public accommodations. A combination of bloody-shirt electioneering and principle—the exact balance hard to determine—led outraged Republicans to pass analogous state bills, most at the first chance presented. By 1900, the only northeastern states that did not have such laws were the three staunchly Republican, upper New England states, with only a tiny numbers of blacks who could be discriminated against—or vote. During the 1950s, more states added public accommodations, leaving the inner Mountain West, most of the South, and Hawaii as holdouts. By 1978, only Hawaii and the eleven Confederate states did not have public accommodations laws. [164]

The response was nominally bipartisan, but, although reversing Supreme Court policy, it was both rooted in the Court's decision and was *arguably* redundant in light of the common law. Politically savvy Democrats—especially governors with broader

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York: Harper Brothers, 1944), 12, 573. See also Nikhil Singh, *Black is a Country* (Cambridge: Harvard University Press, 2004), 25-27.

[162] Elihu Root, "How to Preserve the Local Government of the States: A Brief Study of National Tendencies." Speech to the Pennsylvania Society in New York, Wednesday, December 12, 1906, printed as *How to Preserve the Local Government of the States* (New York: Brentano's, 1907).

[163] William Graebner, "Federalism in the Progressive Era: A Structural Interpretation of Reform," *Journal of American History* 64 (1977): 331-357.

electorates—and their allies in party newspapers moved to enact, and publicly take credit for, state public accommodations laws , but old beliefs died hard among many of the rank-and-file less keen on protecting black rights.

Even with such undesirable allies, some openly discussed the need for blacks to dealign from the Republican Party—or credibly threaten to do so.[165] The problem, as observed by many, including often frustrated black Republicans, was that the alternative was often much, much worse. The *Oregonian* posited that black political protection theoretically would be strongest if their votes were distributed between both parties, but that the racist national record of the Democratic Party, including in Oregon, where it enacted fiercely anti-black laws, made this an unlikely development.[166] Thus, they were left at the mercy of "the rich, conservative, and aristocratic" Republican elite and its turn toward business.[167]

During the immediate aftermath Southern Democrats similarly pledged fealty to and gratitude for the *Civil Rights Cases*, though their intentions were almost comically apparent. Instead, southern legislatures took no action, engaging in passive resistance to the spirit of the decision and waiting out Northern desire to integrate public establishments. Violating the popularly shared understanding of the *Civil Rights Cases*, those southern states with Reconstruction era public accommodations laws ignored them

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[164] Lisa Gabrielle Lerman & Annette K. Sanderson, "Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws," *NYU Review of Law and Social Change* 7 (Spring 1978): 233.

[165] On electoral capture of black voters, see Paul Frymer, *Uneasy Alliances: Race and Party Competition in America* (Princeton: Princeton University Press, 2010). "Not for Harrison: A Colored Man Who Emphatically Declares for Cleveland," *Detroit Free Press,* August 3, 1888, 4. Peter Clark, a black Democrat often quoted for his great copy, largely repeated the arguments of southern apologists, tempered with black self-reliance, in forming his case for realignment on behalf of localist Democracy. This led a bewildered *Chicago Tribune*—an editorial board reasonably committed to federalism—to sigh exasperatedly about "The Folly of States Rights Negroes," *Chicago Tribune*, August 1, 1888, 4.

[166] "The Civil Rights Decision," *Oregonian*, October 22, 1883, 4.

[167] *Lawrence Gazette,* October 25, 1883, 1.

and the others declined to follow the north and pass new ones. Although most northern states had passed civil rights bills in response, one black New York minister argued that the civil rights cases symbolized the turning point in race relations—perhaps, he speculated, to the harm of the North as well.[168]

Soon after, segregation laws, aided by a flexible ruling of the Interstate Commerce Commission offering carriers wide leverage in transporting passengers, would sprout throughout the region, stamped by the Court's *Plessy* decision in 1896.[169] Concerns were raised about the possibility that a provision in an interstate commerce bill, restricting "unreasonable" discrimination by carriers, could be construed as transportation desegregation. [170]A judicially reinvigorated state police power could now help states dictate segregation to corporations. [171] Perhaps best illustrating the change in climate, South Carolina dropped its façade and repealed the civil rights bill the *Charleston News and Courier* so strenuously publicized, replacing it with segregated transportation—pursuant, the legislature noted, to the ICC decision.[172] In the decade following, Dixie's united Southern Democrats would move from superficial obedience to often explicit rejection of the legitimacy of Reconstruction Amendments, especially the 15th

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[168] "The Northern Color Line: Steadily Becoming More Sharply Drawn," *New York Times*, April 28, 1889, 9.

[169] Tennessee passed the first such transportation segregation law in 1881. Eight states passed them in the years following the ICC's decision (FL 1887, MS 1888, TX 1889, LA 1890, AL, KY, AR, GA 1891). After a gap of a few years, five more states moved to segregate transportation in the decade after *Plessy* (SC 1898, NC 1899, VA 1900, MD 1904, OK 1907) Richard Bardolph, ed. *The Civil Rights Record: Black Americans and the Laws, 1849-1870* (Thomas Y. Crowell Co., New York, 1970), 44-45.

[170] "The Negros and the Interstate Commerce Bill," *Atlanta Constitution*, March 29, 1887, 4.

[171] Gerstle, "Resilient Power of the States," 72.

[172] In a particularly cynical move, a key backers of the repeal bill argued that the Fourteenth Amendment would now protect blacks. "Civil Rights in the South," *New York Times*, December 25, 1889, 1. South Carolinians continued to propagandize on their behalf; two years before, a letter to the editor of the *Times* commented on the author's recent railroad trip in which he shared a first-class car with blacks on a train from Columbia. The writer explained that "in no Northern state would this crowd of darkies have been treated with the same consideration by this conductor and train attendants." "Civil Rights in South Carolina," *New York Times,* December 25, 1887, 8.

Amendment, as it established the authoritarian enclaves and white supremacy that came to structure its politics in the 20th century.[173]

The reaction to the *Civil Rights Cases*, then, offers a case of national constitutional deliberation in most of the states of the Union, as Americans struggled to embed the hard fought values of the Civil War while nonetheless retrenching national power. White Republican opinion leaders grappled with a tension between their strongly held commitments to equality and federalism; the constitutional settlement, they concluded, was to pass state analogues to the overturned Civil Rights Act of 1875. With some notable exceptions, blacks condemned the decision as wrongly decided, and they mobilized an impressive outpouring of popular constitutionalism against it, as well as kept pressure on legislators to pass state bills.[174] (Some also served as policy entrepreneurs in state houses.). How substantive that legislation was depended on the Democrats involved; some, especially former Republicans, sought to make real policy change, while the old-timers pressed bills that were as superficial as they could get away with.

Suggesting that Southern resistance to Reconstruction in the late 19th century was conditional and strategic, Southern Democrats gave every indication of fulfilling the implicit pact. With the House under Democratic control, passage of another Civil Rights Act, which the Court's "state neglect" doctrine could potentially uphold, never became a

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[173] V.O. Key , Jr. with Alexander Heard, *Southern Politics in State and Nation* (New York: Alfred A Knopf, 1949); Robert A. Mickey, "The Beginning of the End for Authoritarian Rule in America: *Smith v. Allwright* and the Abolition of the White Primary in the Deep South, 1944-1948, *Studies in American Political Development* 22 (Fall 2008):143-182.

[174] This disconnect between a more expansive, rights protective popular understanding and a more technical interpretation by elites foreshadows George Lovell's findings from the Civil Rights Bureau, although the legal sophistication of the 1883-85 black protestors was far greater than most of the letter writers in Lovell's sample. George Lovell, *This is Not Civil Rights: Discovering Rights Talk in 1939 America* (Chicago: University of Chicago Press, 2012)

threat. In the final decade of the 19th century southern Democrats could break from even this relatively light pressure. Instead, they could join the rest of their colleagues, unified by the twin objectives of party-building and thwarting black suffrage.[175] Once the terrain shifted to an issue on which the national parties were polarized and northern Democrats also opposed black rights—Fifteenth Amendment suffrage and its implementation via the Lodge Bill—southern resistance to national constitutionalism could be more outwardly defiant.[176]

Appendix

Black Population of non-Southern states[177]

1890	Total	As % of Population
CA	11,322	0.9
CO	6215	1.5
CT	11,547	1.6
IL	57,028	1.4
IN	45, 215	2.1
IA	10,685	0.5
KS	49, 710	3.4
ME	1190	0.1
MA	22,144	1.0
MI	15,223	0.7
MN	3683	0.2
MT	1490	1.1
NE	8913	0.8

[175] Rick Vallely, *The Two Reconstructions* (Chicago: University of Chicago Press, 2004).

[176] As Kousser argues, echoing speculation from C. Vann Woodward, the electoral map and presidential politics created a perverse incentive for Northern Democrats to support far more racist policies at the national level than they would otherwise and indeed did practice at the state level. J. Morgan Kousser, "The Voting Rights Act and the Two Reconstructions," in Chandler Davidson and Bernard Grofman eds., *Controversies in Minority Voting: A Twenty-Five Year Perspective on the Voting Rights Act of 1965* (Washington: Brookings Institution, 1992), 135-76.

[177] "State Populations, Series Aa2244-6650," *Historical Statistics of the United States Millennial Edition* Online, doi:10.1017/ISBN-9780511132971.Aa2244-655
http://hsus.cambridge.org/HSUSWeb/toc/showTable.do?id=Aa2244-6550

NV	242	0.5	
NH	614	0.1	
NJ	47,638	3.2	
NY	70,092	0.1	
ND	373	0.2	
OH	87,113	2.4	
OR	1186	0.4	
PA	107,596		2.0
RI	7393	2.1	
SD	541	0.1	
VT	937	0.3	
WA	1602	0.4	
WI	2444	0.1	