BLACK POPULAR CONSTITUTIONALISM AND FEDERALISM AFTER THE *CIVIL RIGHTS CASES*

Sean Beienburg and Benjamin B. Johnson**

In the widely criticized Civil Rights Cases *(1883), the Supreme Court invoked federalism to overturn a national public accommodation law and spawned more than a century of commentary. Observing history through the lens of the Civil Rights Era, modern readers often assume that the federalism commitments in the* Civil Rights Cases *were thinly veiled racism. But federalism was a near-universal value of political elites of the Era: the very elites that wrote and ratified the Fourteenth Amendment. The* Civil Rights Cases *upheld the (ultimately unsuccessful) civil rights compromise envisioned by contemporary elites: federalism would be respected so long as states did not violate or neglect civil rights. The compromise required two elements to succeed. First, the federal government must protect Black Americans' voting power and backstop their civil rights. Second, Black Americans would use their political power to protect their rights at the state level. This Article shows how Black voters and activists held up their end of the deal.*

The Civil Rights Cases *triggered a Black popular constitutionalism movement, led by Black policy entrepreneurs, that operated at the state level across the nation. This extra-judicial popular response forged a synthesis: federalism principles would be supported; but at the same time, access to public accommodation would be recognized as a civil right. So understood, the* Civil Rights Cases *provide an alternative justification for federal efforts to suppress Jim Crow in the 1960s. It provides a narrower and more historically rigorous foundation to protect the advances Black political movements have achieved in the decades since the* Civil Rights Cases. *It also complicates the relationship between federalism and civil rights.*

** Sean Beienburg, Assistant Professor, Arizona State University, School of Civic and Economic Thought and Leadership; Ben Johnson, Associate Professor, University of Florida, Levin College of Law. We thank Samuel Bray, Christian Burset, John Dinan, Paul Frymer, Mark Graber, Risa Goluboff, Dirk Hartog, Ken Kersch, Herschel Nachlis, and Keith Whittington.

TABLE OF CONTENTS

INTRODUCTION

In the 2022 term, the Supreme Court decided two cases that directly implicated the civil and voting rights of people of color. In *Merrill v. Milligan*,[1] the Court upheld an injunction blocking an Alabama redistricting map. In *Students for Fair Admissions, Inc. v. University of North Carolina*,[2] the Court struck down universities' ability to directly factor race into admissions. The first of these cases

1. *See* —— U.S. ——, 142 S. Ct. 879 (2022) (Thomas, J., in chambers).

2. *See* Students for Fair Admissions, Inc. v. Univ. of N. Carolina, 567 F. Supp. 3d 580 (M.D.N.C. 2021), *cert. granted before judgment*, 142 S. Ct. 896 (2022), *and rev'd sub nom.* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023).

implicated the Voting Rights Act;[3] the latter implicated the Civil Rights Act.[4] Both landmark pieces of legislation emerged from the Civil Rights Era of the mid-twentieth century, but the interplay of voting, civil rights, and the Supreme Court extends back much further. This Article looks back 140 years to a different era when the voting and civil rights of newly freed Black Americans were first contested at the Court. The civil rights question of the day was not admission to universities but access to public accommodation.

Congress passed the Civil Rights Act of 1875 (the "Act"), giving Black Americans guaranteed access to public accommodations like inns, public conveyances, and theaters; however, the Supreme Court struck down much of the Act in the *Civil Rights Cases* ("*CRC*") as beyond the scope of Congress's power.[5] The Court, over a powerful dissent by Justice Harlan, held that there was no evidence of "state action" that would trigger federal power under the Fourteenth Amendment. The decision was hailed and derided,[6] and given the scope of the issues involved, it is unsurprising that the commentary, both contemporaneously and in later academic treatments, interpreted the opinion quite differently.

The two most common criticisms of the Waite Court have always been that it was overly protective of federalism concerns and that it treated public accommodation as a social right instead of a civil right.[7] The justices, the latter critique runs, may have wanted to protect civic equality (e.g., equal ability to make contracts), but they did not want to promote social equality among the races. So while the Republican Congress might have thought that access to public accommodations was a civil right, the justices disagreed.[8]

Either way, it is widely believed that the *CRC* put a stake in Reconstruction attempts to protect public accommodations and civil rights more broadly. Republican dominance of Congress had fallen, and public support for Reconstruction had long since faded. Thus, the *CRC* and the soon-to-follow *Plessy v. Ferguson* decision demarcated the end of Reconstruction.[9] It would take more

---

3. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

4. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

5. Civil Rights Act of 1875, ch. 114, §§ 1–2, 18 Stat. 335.

6. *See infra* notes 112–13.

7. *E.g.*, Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 490 (2000).

8. It is clear from his opinion that Justice Bradley was aware of this debate; however, the opinion itself does not turn on this distinction. The Court expressly assumed for purposes of the opinion that access to public accommodations was a civil right that must be protected by government. The Civil Rights Cases, 109 U.S. 3, 13 (1883). Thus, we take critics of the opinion who focus on the then-important distinction between civil and social rights to be addressing their beliefs about the justices' hidden motives rather than the opinion as written.

9. *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954); Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1207 (2014). This is not to say that the federal government generally and the Court in particular were entirely unconcerned with civil rights following *Plessy*. Federal efforts to protect Black Americans

than 90 years for Congress to make another meaningful attempt at protecting the civil rights of Black Americans through the Civil Rights Act of 1964. The Warren Court would uphold that legislation not under the Fourteenth Amendment but as a proper exercise of Congress's Commerce Clause power.[10]

As this Article shows, this history is incomplete. Justice Bradley's majority opinion reflected the consensus of his time, the same understanding that birthed the Reconstruction Amendments. That consensus, widely shared by centrist and even some radical Republicans, Northern Democrats, and Southern Bourbons, retained constitutional commitments to federalism, including strict limits on federal powers, with two primary exceptions: the Thirteenth Amendment and, to a lesser extent, the Fifteenth Amendment. The Fourteenth Amendment's guarantee of equal protection of civil rights, however, was only available as a remedial power when states violated or failed to protect individuals. That is, the Thirteenth and Fifteenth amendments allowed Congress to act proactively to eliminate slavery and to guarantee political rights, but Congress could only be reactive under the Fourteenth Amendment. This is why the Court upheld federal statutes that protected political rights or were passed pursuant to the Thirteenth Amendment, even as it blocked the Civil Rights Act of 1875. The idea behind this careful balance was that if the federal government could secure Black Americans' political rights, they would be able to use their voting power to protect their own civil rights at the state level. It thus followed that protection of civil rights could be left to the states with the promise of a federal backstop.

By drawing on these insights and assembling the most thorough recreation of the state histories behind passage of these laws,[11] this Article argues for an interpretation of the constitutional politics of the *Civil Rights Cases* that also

---

were not entirely at an end. The Court was willing to enforce equal protection when there was clear evidence of state involvement. Thus, much of the Jim Crow era was about trying to push official racism into the private sector while keeping the statutes nominally neutral. So long as there was no clear state action, the Court seemed unwilling to intervene.

10. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 278–79 (1964). Interestingly, Justice Bradley's opinion foreshadowed such a possibility. It explicitly offered the Commerce Clause as a possible source of congressional power for at least parts of the 1875 Act, but since no party raised the issue, the Court declined to consider it. *See* George Rutherglen, *The Thirteenth Amendment, the Power of Congress, and the Shifting Sources of Civil Rights Law*, 112 COLUM. L. REV. 1551, 1560 (2012).

11. With the exception of the impressive but now somewhat dated article by Valeria W. Weaver, *The Failure of Civil Rights 1875–1883 and Its Repercussions*, 54 J. NEGRO HIST. 368 (1969), other treatments of these state-level legislative responses have tended to be cursory lists of passage. Even the relatively more-detailed accounts have been narrow in the service of the authors' broader interests (briefly discussed as a stage in the development of transportation segregation law in CHARLES LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION 17–18 (1987) and Northern Democratic Party politics in LAWRENCE GROSSMAN, THE DEMOCRATIC PARTY AND THE NEGRO: NORTHERN AND NATIONAL POLITICS 1868–1892, 60–109 (1976)). This Article not only synthesizes these in one place but also assembles newly available and now digitized local-level newspapers and previously ignored legislative histories, in particular passages by Northern Republicans. While poor state record-keeping means this is still not as complete an account as one might hope, it offers by far the most comprehensive account of these laws.

incorporates the work of Black activists to secure passage of state public accommodations laws that transformed America's vision of civil rights. Looking back over the horrors of Jim Crow, it is difficult to remember that at the time of the *CRC*, the major features of Jim Crow—widespread mandatory legal segregation and racial disenfranchisement—were years away, and Black voters were still an electoral force in the South. It is even harder to imagine how Republican elites at the time could have been somewhat optimistic about the possibility of racial equality (at least in the political and civic spheres), even in the South. Yet they were.

This Article situates the *CRC* in its historical and political context. It provides a more fulsome account of the politics that gave rise to and followed the *CRC*. Republicans were generally committed to securing access to public accommodations and to protecting civil rights more broadly. But their preferred method was to achieve this by protecting Black political power. Thus, while the Fourteenth Amendment provided a federal backstop for civil rights, freedmen would have the ability to look out for themselves. This vision represented a careful balance between bipartisan elite commitments to both federalism and civil rights. Achieving this vision would require two steps.

First, civil rights activists and sympathetic legislators needed to exercise political power at the state level to ensure states recognized access to public accommodations as a civil right to be protected. This served several purposes. It would establish a national legal consensus that such access was a civil right rather than a social right,[12] thus ensuring that if Congress were to enact a successor to the 1875 Act, there would be no doubt that such rights were civil rights.[13] It would also help establish a record that Congress could build on if necessary. That is, if states refused to pass legislation guaranteeing these rights or if they failed to enforce such legislation or common law guarantees, it would provide the record necessary to support future federal legislation. Finally, putting in the work to build support at the state level for public accommodation access would demonstrate that civil rights advocates were living up to their end of the implicit bargain: they would use what political power they could muster to defend civil rights in the states.

This was the project of a Black popular constitutionalism movement that arose in the wake of the *CRC*. The movement was astonishingly successful. A major, novel contribution of this Article is to tell the story of this exercise in popular constitutionalism.[14] When it began, there was no clear consensus that access to

---

12. In this way, activists could liquidate the meaning of the Fourteenth Amendment. *C.f.* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 35–36 (2019).

13. Supposing Congress did build a record that showed sufficient state neglect of the right to access public accommodations that it amounted to state action, the Court would still have to conclude that those rights were civil rights and thus the type of right protected by the Fourteenth Amendment's promised federal backstop. Recall that Justice Bradley's opinion merely assumed such rights were civil for the sake of argument.

14. As scholars of so-called "extrajudicial interpretation" have reminded us, constitutional interpretation is not exclusively the prerogative of the courts but also a variety of non-court actors, especially but not exclusively Congress and the presidency. *See generally* NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION (2004); Keith E.

public accommodations was a civil right. Many argued instead that it was a lesser "social" right. Before this constitutionalist movement was over, however, nearly every Northern state (and many in the South) recognized public accommodation access as a legally enforceable civil right. To achieve this, Black activists showed themselves to be savvy political operators. By engaging in electoral politics, Northern Democrats and Republicans in electorally contestable states had strong incentives to engage in position-taking on behalf of those pivotal popular constitutionalist voters.[15] In short, the Black popular constitutionalism movement held up its end of the deal.

Second, as Black voters pursued civil rights legislation at the state level, the federal government's half of the deal was its obligation to protect the voting power of freedmen in the South. In addition, the federal government was to serve as a backstop for Black Americans' civil rights if states violated or failed to protect them. The role of the Court, then, was to help to implement this deal. It would vindicate federal efforts to protect political rights while limiting federal overreach in the civil rights domain, leaving Black Americans and civil rights activists to pursue those ends through the political process at the state level.

In sum, this Article shows that the *CRC* was the Court's attempt to fulfill its role in a complicated constitutional scheme and to maintain the fragile balance that Republicans hoped would protect both constitutional values and Black Americans. In other words, the *CRC* vindicated a shared commitment to limit the growth of national power alongside an implicit promise of positive protective action affirming Black dignity on the part of the states.[16] Ultimately, Northern apathy in

---

Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 774 (2002); Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 401 (1986); J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS (2004); GEORGE THOMAS, THE MADISONIAN CONSTITUTION (2008); BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009); ANDREW BUSCH, THE CONSTITUTION ON THE CAMPAIGN TRAIL: THE SURPRISING POLITICAL CAREER OF AMERICA'S FOUNDING DOCUMENT (2007).

15. *See generally* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1975). While the passage of such laws even in non-competitive states counsels against a purely instrumentalist explanation, support for state public accommodations bills helped politicians demonstrate at least a superficial commitment to the inclusion of Black Americans in the public sphere.

16. We use the term "Black dignity" to approximate what Black activists (and their allies) realistically expected public accommodations law to achieve—not our modern notion of equality, but an opportunity for Black participation in previously white institutions. This vision—certainly not uncritical of race relations—joined political activism on behalf of legislation with self-affirmation and self-improvement designed to eliminate the possibility of competing explanations that rationalized white supremacy. Many of the accounts of the test cases under state public accommodations laws emphasized the respectability and bourgeois status of the Black customers, diners, etc., who had been expelled. This sharp distinction between the treatment of upper-class Black citizens—for whom race had been the only justification for removal—and lower-class Black citizens—who, like similarly situated white Americans, the law would continue to allow proprietors to screen out (e.g., on grounds

Congress and Southern hostility everywhere undermined these federal commitments. But that failure was still years in the future,[17] and the Court did not see it coming.

This Article centers the role of Black activists at the state level who deployed their political power to institute a change in constitutional doctrine. They successfully enshrined access to public accommodations as a civil right in state legislation across the country. This widespread diffusion of public accommodations laws created a hybrid constitutionalism that linked the Black movement's rights vision with a bipartisan and mainstream commitment to federalism. Previous research has shown that the presence of policy entrepreneurs and pressure from local interest groups are among the key predictors of policy diffusion among the states;[18] Black policy entrepreneurs and lobbying groups fulfilled that role by working to pass public accommodations laws in the state capitols. By passing and defending state-level civil rights legislation enforcing Black rights, state legislators modeled a constitutional settlement that subsequent reformers could use in attempting to bridge progressive political ends and conservative constitutionalism through state police powers.[19]

In the rest of this Article, we show how civil rights activists generally and Black Americans specifically lived up to their end of the implicit political compact embodied in the *CRC*. Unfortunately, the federal government failed to hold up its part. This story has three distinct implications. First, it demonstrates the need for a revised understanding of the *CRC* and the Court's role in the demise of Reconstruction. It was the loss of federal will, rather than the Court's decisions in cases like the *CRC*, that ultimately doomed efforts to create and maintain political and civil equality in the South. Second, the revised understanding of the *CRC* makes it possible to consider an alternative history different from the one Bruce Ackerman proposed in his Holmes Lectures.[20] Specifically, the Warren Court could have

---

of dress)—was often explicitly cited in considering passage of these laws. For a fuller explanation, see W.E.B. DU BOIS, *Of the Training of Black Men*, *in* THE SOULS OF BLACK FOLK 85 (Henry Louis Gates, Jr. ed., 2007); EVELYN HIGGINBOTHAM, RIGHTEOUS DISCONTENT: THE WOMEN'S MOVEMENT IN THE BLACK BAPTIST CHURCH, 1880–1920, at 185–229 (1994); Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 YALE L.J. 256 (2005).

17. *See infra* Part III discussing the Lodge Bill.

18. *See generally* Michael Mintrom, *Policy Entrepreneurs and the Diffusion of Innovation*, 41 AM. J. POL. SCI. 738 (1997); Donald P. Haider-Markel, *Policy Diffusion as a Geographical Expansion of the Scope of Political Conflict: Same-Sex Marriage Bans in the 1990s*, 1 STATE POL. & POL'Y Q. 5 (2001).

19. As Gary Gerstle has noted, such a vigorous assertion and development of the states' police powers was especially powerful in the late nineteenth century. Gary Gerstle, *The Resilient Power of the States Across the Long Nineteenth Century: An Inquiry into a Pattern of American Governance*, *in* THE UNSUSTAINABLE AMERICAN STATE 61 (Lawrence Jacobs & Desmond King eds., 2009). For a contemporary discussion of the importance and robustness of the states' police powers, see generally ELIHU ROOT, HOW TO PRESERVE THE LOCAL GOVERNMENT OF THE STATES (1907).

20. Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1779–85 (2007). Ackerman argues that the Warren Court either had to use the Commerce Clause or overturn the *CRC* entirely.

upheld the Civil Rights Act of 1964 under the Fourteenth Amendment because decades of Jim Crow provided ample evidence of state neglect of civil rights. Finally, the revised account of the *CRC* and renewed attention to the original understanding of the Reconstruction Amendments should inform the Roberts Court as it considers cases dealing with voting and civil rights. This history is a timely reminder that, as a matter of original public meaning, the Fourteenth and Fifteenth amendments operate quite differently. The former was understood to have a state action requirement that might be triggered by clear state neglect. The latter, by contrast, was seen as creating significant congressional power to protect against racial disenfranchisement so that the people could protect their own rights in the states: power that Congress could exercise with significantly lessened federalism concerns. Finally, this Article adds to a lively and current scholarly interest in the use of federalism and states' rights to achieve progressive ends and the limits of federal power to secure those aims.[21]

The Article is organized as follows. Part I reviews the political balance that emerged in the wake of the Civil War. Republican elites had competing commitments to upholding traditional constitutional notions of federalism and to protecting the rights of freedmen. To achieve both commitments, the Reconstruction Amendments gave Congress power to guarantee political rights while leaving the protection of civil rights to the political process with the promise of a federal backstop. Part II tells the sadly forgotten story of the largely successful exercise in popular constitutionalism achieved by Black activists following the *CRC*. Part III reconsiders the legacy of the *CRC* and offers some preliminary thoughts on what a better understanding of the relevant history may mean for the future of voting and civil rights.

I. CIVIL RIGHTS, VOTING RIGHTS, AND FEDERALISM AFTER THE CIVIL WAR

To win the Civil War and enforce the peace of Reconstruction, the Union had built up a Yankee Leviathan.[22] The army had served hand in hand with the Freedmen's Bureau, overseeing and providing schooling and other social services as the federal government had not done before. Three amendments to the Constitution authorized federal intervention in state affairs if necessary to protect individual rights. The Supreme Court explicitly condemned secession,[23] and

---

21. *See generally* Heather K. Gerken, *A New Progressive Federalism*, 24 DEMOCRACY 37 (2012); Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010); Robert A. Schapiro, *Not Old or Borrowed: The Truly New Blue Federalism*, 3 HARV. L. & POL'Y REV. 33 (2009); ERWIN CHEMERINSKY, ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY (2008); Jordan Goldberg, *The Commerce Clause and Federal Abortion Law: Why Progressives Might Be Tempted to Embrace Federalism*, 75 FORDHAM L. REV. 301 (2006); *infra* note 256.

22. *See generally* RICHARD BENSEL, YANKEE LEVIATHAN: THE ORIGINS OF CENTRAL STATE AUTHORITY IN AMERICA, 1859–1877 (1991).

23. Texas v. White, 74 U.S. 700, 726 (1869); *but see generally* CYNTHIA NICOLETTI, SECESSION ON TRIAL: THE TREASON PROSECUTION OF JEFFERSON DAVIS 313 (2017); SEAN BEIENBURG, PROHIBITION, THE CONSTITUTION, AND STATES' RIGHTS 23 (2019) [hereinafter BEIENBURG, PROHIBITION].

nullification appeared just as discredited.[24] Part of the South remained occupied by federal troops, enforcing the new amendments and their implementing bills like the Force Act of 1871.

And yet most of this machinery to defend the rights of newly freed people was gone by 1880. The Freedman's Bureau dissolved once it could no longer be justified by the war powers that had previously legitimated the Bureau's expansion into what were traditionally state affairs.[25] Meanwhile, the size of the Army shrank and its remaining presence in the South was withdrawn, ceding control of much of the region's politics to paramilitary terror.

Part of this shift was pure electoral politics: Northern voters, especially old-time Democrats who had given control of the country to the Grand Old Party (the "GOP") for a decade, now seemed to tire of these exertions. Beginning with the 1874 elections,[26] the electorate gave the Democrats control of the House in seven of the next nine Congresses, often by very large margins. Part of the shift was also rooted in what we would now think of as interest group lobbying: provided that national regulations preempted state economic regulations, business was happy to contribute to this elimination of the wartime federal machine that might otherwise be put to economically redistributive purposes.[27] But a key part of this retrenchment was constitutional, as well.

A. Federalism and Voting Rights

While it is true that the war discredited harder-edged versions of state sovereignty, such as nullification,[28] scholars have increasingly rejected the view of post-war Republicans as ardent nationalists. Instead, they have argued that diverse figures such as Lyman Trumbull, John Bingham, and Wendell Phillips—to say nothing of Abraham Lincoln himself—remained committed to preserving as much of the old federalist order as possible in building a post-slavery America.[29]

---

24. BEIENBURG, PROHIBITION, *supra* note 23, at 18–24; CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR 223 (2008).

25. Michael Les Benedict, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction*, 61 J. AM. HIST. 65, 78 (1974) [hereinafter Benedict, *Constitution*].

26. FONER, *infra* note 55, at 524–28.

27. BENSEL, *supra* note 22, at 193, 237–38, 304.

28. BEIENBURG, PROHIBITION, *supra* note 23, at 18–24. For a telling example of this sharp distinction between nullification or compact theory and states' rights, 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. PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 90 (2011).

29. MARK WAHLGREN SUMMERS, THE ORDEAL OF THE REUNION: A NEW HISTORY OF RECONSTRUCTION (2014); Benedict, *Constitution*, *supra* note 25, at 78; Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1 SUP. CT. REV. 39 (1978); MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863–1869 (1974) [hereinafter BENEDICT, COMPROMISE]; Mark A. Graber, *Jacksonian Origins of Chase Court Activism*, 25 J. SUP. CT. HIST. 17 (2000); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL

Though a few radicals had little interest in the constitutional niceties of federalism, most remembered its assistance in the cause of abolition.[30] Moderate and conservative Republicans remained even more devoted to federalism, both as a desirable political principle and as a general requirement of the constitutional text.[31] For most legislators, expanding federal power required either the emergency powers of territorial conquest or a constitutional amendment. Conservative Republicans

---

PRINCIPLE TO JUDICIAL DOCTRINE (1988); Earl M. Maltz, *Reconstruction Without Revolution: Republican Civil Rights Theory in the Era of the Fourteenth Amendment*, 24 HOUS. L. REV. 221 (1987) [hereinafter Maltz, *Reconstruction Without Revolution*]; KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 3–8, 79–83 (2014); LaWanda Cox, *Reflections on the Limits of the Possible*, *in* FREEDOM, RACISM, AND RECONSTRUCTION 271 (Donald G. Nieman ed., 1997); BRANDWEIN, *supra* note 28, at 38–39, 102–03; *see also* SEAN BEIENBURG, PROGRESSIVE STATES' RIGHTS: THE FORGOTTEN HISTORY OF FEDERALISM (forthcoming 2024) [hereinafter BEIENBURG, PROGRESSIVE STATES' RIGHTS]; BEIENBURG, PROHIBITION, *supra* note 23. On the commitment to federalism in non-Southern state constitutions since the time of the Founding and after the Civil War, see Sean Beienburg, *Teaching Federalism: State Sovereignty Declarations in State Constitutions*, 11 AM. POL. THOUGHT 232 (2022). President Lincoln had been adamant in distinguishing his expanded (but geographically and temporally limited) war powers from those which he could exercise consistently with a peacetime federal system, beginning with his inaugural pledge to follow through on the 1856 GOP platform's promise never to touch slavery in the states, and extending to his opposition to the Wade–Davis bill as the Civil War waned. James Oakes, *Natural Rights, Citizenship Rights, States' Rights, and Black Rights: Another Look at Lincoln and Race*, *in* OUR LINCOLN: NEW PERSPECTIVES ON LINCOLN AND HIS WORLD 125–27 (Eric Foner ed., 2008); 2 MICHAEL BURLINGAME, ABRAHAM LINCOLN: A LIFE 659–60 (2012). Even Eric Foner, who along with James McPherson is among the leading historians who see a strong shift to a national orientation, observes this ideological continuity among Republicans. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 242-43 (1988). On McPherson's nationalism, see JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 858–61 (C. Vann Woodward ed., 1988) [hereinafter MCPHERSON, BATTLE CRY].

30. "Although 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." William E. Nelson, *The Role of History in Interpreting the Fourteenth Amendment*, 25 LOY. L. REV. 1177, 1177–78 (1992). *See also* BEIENBURG, PROHIBITION, *supra* note 23, at 18–24.

31. This commitment to federalism, and the resulting uncertainty over the legality of the Civil Rights Act of 1866—ostensibly passed in pursuance of the Thirteenth Amendment—led to its shoring up with the Fourteenth a few years later. Passage of the Fourteenth Amendment and the readmission of the Southern states demonstrated the continued pull federalism had on all but a few radicals like Thaddeus Stevens and Benjamin Wade. We do not mean to imply that preserving federalism was the only purpose of the Amendment. *See, e.g.*, Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61, 122–34 (2011). Rather, throughout this Article, we assert that the GOP's broad and preexisting commitment to federalism should inform our understanding of how the Supreme Court—both its majority and its dissent—understood the Amendment in the *CRC*. Notably, Justice Harlan similarly viewed federalism as one of the fundamental values of the American Constitution, even as he found the Civil Rights Act of 1875 constitutional due to understanding Congress to have a specific power here under the Fourteenth Amendment. Justice Harlan's understanding of and commitment to federalism is a major theme of BEIENBURG, PROGRESSIVE STATES' RIGHTS, *supra* note 29.

wanted as little change to the old state-oriented order as possible, but the much larger centrist faction, and even some of the radicals, shared the conservatives' basic commitment to federalism, writing the Fourteenth Amendment accordingly.[32]

Federal enforcement of Black suffrage through the Fifteenth Amendment served as a notable outlier to a general re-emphasis on federalism. Still, the Fifteenth Amendment was a singular and categorically limited intervention designed to minimize change to the federalist order.[33] To make this system work, Southern states had to have fair voting procedures by which Black voters and sympathetic white voters could protect civil rights through the political process. To this end, Republicans required Southern states to accept Black suffrage as a condition of re-entering the Union. In theory, this requirement enabled the construction of a politically viable, largely Black, Republican Party in Dixie that would allow Black voters to protect their own rights at the state level and free the national party to shift attention to economic development.[34] This development in turn would relieve Northern Republicans of the burden of managing reconstruction, solidified Black suffrage—to the benefit of Republicans—in the North as well and allowed the federal government to return its focus to issues like national economics.[35]

The Republicans' logic essentially foreshadowed John Hart Ely's constitutional theory of "representation reinforcement," in which judicial doctrine would be especially sympathetic to the construction of fair electoral processes but would be more hesitant in overturning other legislation. The Republican balance attempted to establish a procedural framework through which the federal government might intervene in state affairs but otherwise left the states to decide on

---

32. BENEDICT, COMPROMISE, *supra* note 29, at 169–70, 315–24; Maltz, *Reconstruction Without Revolution*, *supra* note 29. Republican congressmen rejected more expansive proposals, leaving a rather limited final version that merely prevented the states from denying suffrage based on race, dismaying some of the more radical members of Congress. XI WANG, THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE AND NORTHERN REPUBLICANS, 1860–1910, at 42–48 (1997).

33. Republicans did not understand the Fifteenth Amendment as giving them plenary power over elections. The text of the Amendment's section one is similarly written in an equivalent negative construction to the Fourteenth Amendment, banning states from depriving suffrage on racial grounds, and the enforcement power is by "appropriate" legislation. So, as the Supreme Court recognized, this was a robust power, especially compared to the Fourteenth Amendment, but not an unlimited one. That is part of why even though Southerners decried the 1890 federal elections bill ("the Lodge Bill") as a "Force Bill," it was narrowly drafted to primarily create federal observers to ensure fair registration and voting practices, and its author Henry Cabot Lodge specifically disavowed a takeover of local elections protocols. *See* Henry Cabot Lodge, *The Federal Election Bill*, 151 N. AM. REV. 257, 258–60 (1890). We discuss the Lodge Bill *infra* note 114 and accompanying text.

34. RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 38–44 (2004); FONER, *supra* note 29, at 449; ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 79, 82 (rev. ed. 2009). Kousser argues that aggressive suffrage intervention is proof against those arguing for a constitutional conservatism preserving federalism, but as we argue the two are not necessarily in tension. J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, *in* CONTROVERSIES IN MINORITY VOTING: A TWENTY-FIVE YEAR PERSPECTIVE ON THE VOTING RIGHTS ACT OF 1965, at 138–39 (1992).

35. FONER, *supra* note 29, at 449.

their policies.[36] If the courts and Congress could ensure a fair electoral process, then hopefully most controversies could be resolved at the ballot box.

As LaWanda Cox argued:

> [T]he concern of Republicans for state and local government was no superficial adulation of the Constitution; it was deeply rooted in their commitment to self-government. [But] Republicans did not uphold states'-rights federalism without qualification. They believed that they had found a way to protect freedmen in their new citizenship status by modifying, rather than destroying, the traditional federal structure.[37]

Earl Maltz's study of Reconstruction constitutionalism similarly concluded that Republicans saw a suffrage amendment as a "narrowly defined federal encroachment that would leave the balance of power between the state and federal governments otherwise unaltered," successfully "balancing the perceived need to impose impartial suffrage nationwide with their basically conservative constitutional philosophy."[38]

As a result, the Fifteenth Amendment could be understood as the least intrusive, most narrowly tailored single intervention in state affairs that would still be able to achieve a floor of rights—perfectly in line with the Republicans' state-centered theories of public accommodations law. It is thus unsurprising that even the same Waite Court justices who struck down the Civil Rights Act would nonetheless approve federal efforts to ensure fair voting.[39]

Implementing aggressive intervention in one political domain—suffrage—allowed, and was perfectly consistent with, constitutional conservatism elsewhere. Under this framework, the federal government could ensure the fairness of the political process within the states (as well as the enforcement of the basic floor of the Bill of Rights and of civil, though not social, rights). At that point, the Republicans could otherwise maintain the traditional boundaries between state and federal power *and* preserve a state-oriented polity and strict fidelity to limited enumerated powers.[40]

---

36. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 147–50 (1938).

37. Cox, *supra* note 29, at 270.

38. EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869, at 135 (1990).

39. BRANDWEIN, *supra* note 28, at 144–60.

40. Although Frederick Douglass later criticized the *Civil Rights Cases*, he had initially argued for the same basic logic—prioritizing enforcement of Black suffrage, which would then empower state enforcement of civil rights—as the model both most likely to succeed and most consistent with what Douglass characterized as the almost unanimously held value of American federalism. *See* FREDERICK DOUGLASS, *Reconstruction*, ATL. MONTHLY, Dec. 1866 [hereinafter DOUGLASS, *Reconstruction*], *reprinted in* FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS, 592–97 (Philip S. Foner & Yuval Taylor eds., 1999).

If the Fifteenth Amendment was the least intrusive and most narrowly tailored single intervention in state affairs that would still be able to achieve a floor of rights, this intervention into the states' traditional sovereignty was also one that Republicans were willing to enforce aggressively.[41] Thus, although Republicans had been hesitant to expand the scope of federal power, they remained committed to vigorous enforcement within those widened boundaries. Throughout the 1860s and early 1870s, the Republican Congress and the Court laid the groundwork for a meaningful, federally enforced Black suffrage, belying the criticism that Northern Republicans were single-mindedly favoring federal power. Thus, even the same Waite Court justices that would strike down the Civil Rights Act of 1875 approved federal efforts to ensure fair voting. When congressional Republicans pushed through the Fifteenth Amendment and then the various Enforcement (or Klan) Acts, the Waite Court justices offered wide latitude and strong approval in cases like *United States v. Butler*, *Ex parte Siebold*, and *Ex parte Yarbrough*.[42]

In short, Republicans envisioned a government that protected Black rights while minimizing changes to federal-state relations. The Fourteenth Amendment promised federal intervention to protect a floor of fundamental rights. The Fifteenth Amendment was designed to empower Black voters in the political process so that such intervention would be unnecessary in the first place.

In contrast, Democrats retained their basic attachment to states' rights after the Civil War and consistently opposed not only passage of the Reconstruction Amendments but most efforts to enforce them. Unlike the Republicans, most of whom were committed to federalism as a principle but less explicit about it as a rallying cry, the Democratic Party made states' rights a core, perhaps even *the* core, of the Party's rhetoric. Its platforms consistently included obligatory and almost talismanic declarations of states' rights and state sovereignty, calling back to prewar heroes like Jefferson and Jackson.[43] This fixed feature of the Democratic Party brand

---

41. Although Ulysses Grant and other Republicans hoped the ratification of the Fifteenth Amendment would conclude Reconstruction, they demonstrated a willingness to use force to prevent paramilitary violence aimed at disenfranchising Black voters in the South. *See* WANG, *supra* note 32, at 51–54.

42. United States v. Butler, 1 Hughes 457 (1877); *Ex parte* Siebold, 100 U.S. 371 (1879); *Ex parte* Yarbrough, 110 U.S. 651 (1884). *See also* BRANDWEIN, *supra* note 28, at 144–60. Moreover, Congress was not totally inert here, taking measures to protect its Fifteenth Amendment gains at least. After *Slaughterhouse* (Slaughter-House Cases, 83 U.S. 36 (1873), 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. VALELLY, *supra* note 34, at 243–44.

43. *See, e.g.*, the first few paragraphs of the Democrats' 1872, 1880, 1884, and 1888 platforms, *1872 Democratic Party Platform*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/1872-democratic-party-platform [https://perma.cc/4Z9S-FALM]; *1880 Democratic Party Platform*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/1880-democratic-party-platform [https://perma.cc/4ZKU-EJLD]; *1884 Democratic Party Platform*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/1884-democratic-party-platform [https://perma.cc/6Y77-26MC]; *1888 Democratic Party Platform*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/1888-democratic-party-platform [https://perma.cc/BA94-V64Y].

became something of a draw for Americans ready to move on from the War. Many Republicans, after all, had been former Jacksonian Democrats who agreed with traditional Democratic positions on federalism and trade policy but had broken with that Party's hardline defense of slavery.[44] With the cleavages of the Civil War ostensibly fading, and the issue of slavery seemingly resolved by the Thirteenth Amendment, some of those Democrats drifted back to the Party due to anxieties about postwar centralization. As their eventual response to the *CRC* showed, the question of white supremacy retained the potential to split Democrats.[45] Nonetheless, commitment to states' rights was widely agreed upon, and a commitment to limited federal power remained a central feature of the Democratic Party's platform.[46]

Democrats were not unique, however, in their commitment to federalism. As Douglass had observed at the end of the Civil War, the "idea [of] the right of each State to control its own local affairs—[was] an idea, by the way, more deeply rooted in the minds of men of all sections of the country than perhaps any one other political idea."[47] This bipartisan support for states' rights reflected America's effort—dating back to at least Andrew Jackson—to find a middle way between Calhoun's hardline understanding of state sovereignty that led to nullification, on the one hand, and a centralizing nationalism, on the other hand. In other words, federalism and states' rights were not simply a more palatable way to protect the Southern racial order, but a constitutional value embraced across the ideological spectrum and throughout the country.

B. The Civil Rights Act of 1875 and the Civil Rights Cases

While the Thirteenth Amendment gave Congress vast proactive powers to eradicate slavery, and the Fifteenth gave the Legislature reduced, but still prophylactic, power to protect voting rights, the Fourteenth Amendment provided more limited and reactive power to protect civil rights. Initially passed to ensure the Civil Rights Act of 1866 would survive,[48] the Fourteenth Amendment would be the asserted source for congressional attempts to pass federal civil rights acts in subsequent years.

One such attempt nearly passed in 1872, when Charles Sumner had coupled Southern war amnesty with a particularly ambitious civil rights rider that would have applied not only to public accommodations but to schools as well. Liberal

---

44. Graber, *supra* note 29; ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN 149–85 (1970).

45. The cleavage was not strictly North–South, with Southern Bourbons as relative racial moderates and some Northern Democrats rhetorically indistinguishable from antebellum Dixie.

46. As we have already seen, however, this commitment to federalism and limited national powers was bipartisan. *See supra* notes 29 and 43.

47. *See infra* note 69, at 593. Gerstle, *supra* note 19, at 63; BEIENBURG, PROHIBITION, *supra* note 23; BEIENBURG, PROGRESSIVE STATES' RIGHTS, *supra* note 29. *See generally* RICHARD E. ELLIS, AGGRESSIVE NATIONALISM: *MCCULLOCH V. MARYLAND* AND THE FOUNDATION OF FEDERAL AUTHORITY IN THE YOUNG REPUBLIC 17–18 (2007).

48. *See* Lodge, *supra* note 33, at 259.

Republicans, already congealing into a splinter party on behalf of Horace Greeley, joined with Democrats to block it.[49]

After losing badly in the 1874 elections, lame duck Republicans took one last chance to pass civil rights legislation.[50] The Civil Rights Act of 1875 was the centerpiece of a package of legislation that "embodied a combination of idealism, partisanship, and crass economic advantage typical of Republican politics."[51] Relevant to the eventual litigation, the Act guaranteed "full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances, . . . theaters, and other places of public amusement."[52] For Fredrick Douglass, the Act raised a "banner on the outer wall of American liberty" and a "noble moral standard" affirming that "they were all equal before the law; that they belonged to a common country and were equal citizens."[53]

---

49. MCPHERSON, BATTLE CRY, *supra* note 29, at 715; GROSSMAN, *supra* note 11, at 31. 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. 43 CONG. REC. 4175–76 (1874); McPherson, *Abolitionist*, *infra* note 52, at 505–06; *see* LOFGREN, *supra* note 11, at 71, 137.

50. Valelly argues that fair elections in the South would likely have reduced Democratic congressional control during the 1870s and 1880s. By counting Black Americans for apportionment but blocking effective use of their votes, Democrats were sometimes able to eke out narrow congressional margins. VALELLY, *supra* note 34, at 147–48, 246–47.

51. FONER, *supra* note 29, at 553. During those final months, the Republican leadership scrambled to piece together a program that would simultaneously protect the interests of Black Americans 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 effort 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 Black Americans for a decade. *See id.* at 555–56.

52. Civil Rights Act of 1875, ch. 114, § 1, 18 Stat. 335, 336. For a thorough chronological summary of its legislative history, see generally Alfred Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 COLUM. L. REV. 873, 885 (1966). *See also* James M. McPherson, *Abolitionists and the Civil Rights Act of 1875*, 52 J. AM. HIST. 493, 506 (1965) [hereinafter McPherson, *Abolitionists*]; GROSSMAN, *supra* note 11, at 32; LOFGREN, *supra* note 11, at 71, 137; FONER, *supra* note 29, at 553–56; 43 CONG. REC. 4175–76 (1874). Republicans pulled schools from the list, infuriating many Black organizations and newspapers, though Republicans insisted this was preferable to accepting the constitutionality of "separate-but-equal," which had been offered as a compromise. This forms an essential part of Michael McConnell's argument that originalist methodology holds school segregation unconstitutional. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1080 (1995) [hereinafter McConnell, *Originalism*]. Cemeteries and churches had initially been removed as well in order to appease Matthew Hale Carpenter, 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.

53. FREDERICK DOUGLASS, *The Civil Rights Case*, Speech at the Civil Rights Mass-Meeting Held at Lincoln Hall, Washington, D.C. October 22, 1883, [hereinafter DOUGLASS, *The Civil Rights* Case], *in* FREDERICK DOUGLASS: SELECTED SPEECHES AND

The Act intervened in two separate, and now familiar, public debates. One involved the scope of federal power under the Reconstruction Amendments. The other concerned the proper classification of public accommodations as either "civil" or "social" rights.[54] The Civil Rights Act of 1875 claimed broad federal power to intervene in what had previously been considered the sovereign domain of the states and asserted that access to public accommodations was a civil right.[55]

The Act spurred some litigation, but not an overwhelming amount. The first case reached the Court within 18 months, but the justices delayed six years before hearing it.[56] When the Court did address the Act, it consolidated six different appeals and decided them all in a single case—the *CRC*.[57] By the time the justices took up the *CRC*, the Court had demonstrated a clear commitment to protecting federalism against an expansive reading of the Fourteenth Amendment. While the Court had been willing to go along with expansive use of Thirteenth and Fifteenth Amendment authority, the Court—in an effort to maintain a more traditional balance of state and federal powers—had consistently interpreted the federal government's powers under the Fourteenth Amendment more narrowly.[58]

WRITINGS, 691–92 (Philip S. Foner & Yuval Taylor eds., 1999). Politically, the Act represented the last gasp of Reconstruction-era Republican control of Congress. Richard A. Primus, *The Riddle of Hiram Revels*, 119 HARV. L. REV. 1680, 1718 (2006) [hereinafter Primus, *The Riddle*].

54. There is a general consensus in the literature that the Reconstruction Era imagined three distinct types of rights. As Bruce Ackerman explains, there were "three spheres of life . . . worth distinguishing:" the "political sphere" (mainly voting); the "civil sphere" (life, liberty, property, and contract); and the "social sphere" (everything else). "Within this traditional trichotomy, the Reconstruction Amendments protected political and civil rights but not social rights." BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 130 (2014). *See also* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 139 (2011); JACK M. BALKIN, LIVING ORIGINALISM 222 (2011); McConnell, *Originalism*, *supra* note 52, at 1016; Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71, 130 n.241 (2013); Reva Siegel, *Why Equal Protection No Longer Protects,* 49 STAN. L. REV. 1111, 1120–21 (1997); David A. Strauss, *Can Originalism Be Saved?*, 92 B.U. L. REV. 1161, 1169 (2012); Ronald Turner, *The Problematics of the Brown-Is-Originalist Project*, 23 J. L. & POL'Y 591, 598–99 (2015); Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1207, 1207 (1992). *But see* Ilan Wurman, *Reconstructing Reconstruction-Era Rights*, 109 VA. L. REV. 885, 943 (2023) (questioning the existence of a separate category of social rights).

55. The Act "breached traditional federalist principles more fully than any previous Reconstruction legislation" and represented "an unprecedented exercise of national authority." FONER, *supra* note 29, at 556.

56. *See* Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115, 137 (1994) [hereinafter McConnell, *The Forgotten*].

57. The Civil Rights Cases, 109 U.S. 3, 4 (1883).

58. *See, e.g.*, Slaughter-House Cases, 83 U.S. 36 (1873). In *Slaughterhouse*, the Supreme Court held that economic rights were not within the privileges and immunities of the United States guaranteed by the Fourteenth Amendment. Finding otherwise, Justice Samuel Miller insisted, would radically alter the relationship between the federal and state governments, making the Court "a perpetual censor" over nearly all state legislation. *Id.* at

To overcome this, those supporting the constitutionality of the Civil Rights Act of 1875 would have to win on two points. First, they would have to convince the Court that the Statute was a valid exercise of congressional power (at least as operating in the states rather than in federal territory) under either the Thirteenth or Fourteenth Amendment. Second, they would have to convince the Court that access to public accommodations is a civil right. The Court ultimately decided the plaintiffs did not establish the first premise.

Justice Bradley's opinion began by *assuming* that access to public accommodations was a civil right worthy of government protection. Nonetheless, the Court declared the Act was not a proper use of congressional power under either Amendment. According to the Court, an innkeeper denying access to a prospective guest was neither a badge of slavery nor a denial by the state.[59] Thus, the 1875 Act was constitutionally invalid.

---

78. Three years later, the Supreme Court rejected a claim that most subsequent commentators argue was supported by the original meaning and intent of the Fourteenth Amendment. In *United States v. Cruikshank*, 92 U.S. 542 (1876), the Court construed the Fourteenth Amendment's Privileges and Immunities Clause to resist even the incorporation of the enumerated Bill of Rights to the states, despite language in *Slaughterhouse* that hinted at doing precisely that. Leslie Goldstein, who 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. Leslie Friedman Goldstein, *The Specter of the Second Amendment: Rereading* Slaughterhouse *and* Cruikshank, 21 STUD. AM. POL. DEV. 131, 135, 144 (2007). Originalists disagree about the extent to which rights beyond those enumerated in the Constitution's explicit text, especially but not exclusively the Bill of Rights, are also binding on the states. *See, e.g.*, LASH, *supra* note 29, at 6–7, 79–83 (arguing the states' rights position rejecting most "unenumerated" rights). For the more expansive understanding incorporating, for example, fundamental economic rights position, see generally RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT (2021). *But see* ILAN WURMAN, THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT 107 (2020) (arguing against incorporation).

59. There is general agreement that Justice Bradley was correct that the Fourteenth Amendment requires some state action, though there is significant disagreement about where he seemed to draw the line. *See, e.g.*, Primus, *The Riddle*, *supra* note 53, at 1719; Henry Paul Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 18–19 n.100 (1975). There is less agreement that Justice Bradley was correct on the second point. As Justice Harlan's dissent in the *CRC* decision (and advocates of the civil rights bill) pointed out, covered businesses were not simply any profit-making operations 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. The Civil Rights Cases, 109 U.S. at 37–45; CONG. GLOBE, 42d Cong., 2d Sess. 383 (1872). McPherson, *Abolitionist*, *supra* note 52, at 505. 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. For theaters specifically, see Sumner's comments in CONG. GLOBE, 42d Cong., 2d Sess. 383 (1872), as well as Avins, *supra* note 52, at 879, 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 CONG. GLOBE, 42d Cong., 2d Sess. 904–06 (1872). *See also* HUGH DAVIS, "WE WILL BE SATISFIED WITH NOTHING LESS": THE AFRICAN AMERICAN STRUGGLE FOR EQUAL RIGHTS IN THE NORTH DURING RECONSTRUCTION 130–31 (2011).

Justice Bradley's opinion has been the subject of frequent criticism and is suspected of thinly veiled racism. This may be true, but one need not assume evil motives to explain the decision. Indeed, given the long leash the Court gave Congress to dismantle and disrupt white supremacy in the South under the Thirteenth and Fifteenth amendments, it is difficult to explain why the same justices would be motivated by racism in Fourteenth Amendment cases that involved less intrusive federal actions. Instead, it makes more sense to understand the *CRC* as a part of the Court's broader Fourteenth Amendment jurisprudence that was aimed at maintaining a careful constitutional balance.

As we have detailed, the way the Court understood this balance was that Black political power should take the lead in promoting and defending civil rights at the state level. Only if states violated or neglected Black civil rights would federal intervention be appropriate. The possibility that neglect could amount to state action under the Fourteenth Amendment has been surprisingly overlooked by many previous commentaries on the *CRC*. This logic of "state neglect," formulated by mainstream Republicans like James Garfield, enabled the federal government to pass legislation not only blocking state activity but also filling the void where states clearly failed to act in protecting certain essential rights.[60]

Justice Bradley's *CRC* opinion recognized "state neglect," although less explicitly than in other contemporary cases, including circuit court cases on which the justices sat.[61] Both state action and state neglect required state wrongdoing, and Justice Bradley said as much before even turning to assess the nature of the rights claim. Thus, Justice Bradley contrasted the prospective orientation of the 1875 Act with what he saw as the more obviously responsive Civil Rights Act of 1866. The

---

60. *See* Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 73 1353, 1358–60 (1964); BRANDWEIN, *supra* note 28, at 50–51. Michael McConnell is the most forceful in arguing that only sloppiness in drafting (by not insisting on a tighter neglect hook) determined the Act's fate. McConnell, *Originalism*, *supra* note 52, at 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. Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1846–56 (2010). *See also* Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443 (1989); Post & Siegel, *supra* note 7, at 475–76. George Thomas similarly sees the decision as part of a "political retreat from constitutional commitments" and interprets the case as plausibly holding that "Congress may not reach private discrimination under Section 5, unless the state first fails to act." THOMAS, *supra* note 14, at 60, 63. A recent line of scholarship has argued that much of the work traditionally attributed to the Equal Protection Clause was perhaps more accurately attributed to the Privileges and Immunities Clause, or even the Citizenship Clause. *See, e.g.*, CHRISTOPHER R. GREEN, EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE (2015); WURMAN, *supra* note 58, at 48–115; BARNETT & BERNICK, *supra* note 58, at 128–55, 230–33, 320–50; Kurt T. Lash, *The State Citizenship Clause*, U. PENN. J. CON. L. (forthcoming 2023). Participants in the debates that we discuss throughout were not consistent in citing either Privileges and Immunities or Equal Protection, and we take no position on which provision provides the guarantee of access—both are written in the "no state shall" language and so implicate the same questions of "state action" or "state neglect."

61. *See* BRANDWEIN, *supra* note 28, at 169–70.

earlier 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."[62] The 1875 Act, by way of contrast, had no evidentiary backing:

> 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.[63]

This, Justice Bradley argued, meant that the Bill exceeded the authorization of the Fourteenth Amendment. "[I]t 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."[64] Because the 1875 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.[65]

According to this analysis, Justice Bradley and like-minded mainstream Republicans believed the Fourteenth Amendment did provide a role for proactive federal activity if states neglected to enforce core civil rights. The complication was that "civil" rights were only one category of a very loose tripartite hierarchy through which contemporary political leaders understood rights claims.[66] State neglect could

---

62. The Civil Rights Cases, 109 U.S. 3, 16 (1883).

63. *Id.* at 14.

64. *Id.* at 17–18.

65. That the Bill seemed to come with the presumption of unconstitutionality was not an accident. Sumner had done himself no favors in advocating it, although later floor managers had been more careful following his death. Justice Harlan, in his later dissent, focused on the claim that common-law created state action such that public accommodations access was a civil right, as Black and radical Republican popular constitutionalism insisted. Thus, under the logic of Republican thought, state neglect in securing that right and enforcing such claims under the enumerated enforcement power of the Fourteenth Amendment would constitute a valid exercise of federal authority over the states; the debates then would be about the scope of common law and the states' evidentiary record in fulfilling or neglecting to fulfill its obligations. But when Sumner's sympathetic but constitutionally scrupulous colleagues asked for such kinds of legal argument, which they needed to support the Bill over their states' rights qualms, Sumner dismissed their concerns, largely hectoring them with platitudes and religious moralizing that obscured his legal credibility. *See* Bertram Wyatt-Brown, *The Civil Rights Act of 1875*, 18 W. POL. Q. 763, 766–67 (1965). In other words, what could have been a narrower debate about the evidentiary record of southern accommodations access, or perhaps about more carefully tailored remedies to more closely connect the Bill to Republican theories of "state neglect," instead became associated with constitutional freewheeling of the sort that was much easier for critics of public accommodations laws to dismiss as federal meddling with mere "social rights."

66. Siegel, *supra* note 54, at 1124–25; RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 153–73, 154 n.12, 169–71 (1999).

allow the federal government to reach civil rights, but its additional power did not necessarily allow the protection of other rights understood as "political" rights, and it certainly did not allow federal intervention on behalf of mere "social" rights.[67] The hazy and thoroughly permeable divisions between these three categories of rights created further complications, as the category in which a particular right fell was defined by political contestation more than anything else. Thus, if one wanted to protect a right, one would frame it as a civil right; conversely, one could disparage a rights claim by dismissing it as merely a social right—more akin to convention and free choice, and thus not a legally enforceable right.[68]

State neglect thus coupled a more generous reading of federal power under the Fourteenth Amendment with a more complicated understanding of rights. To meet the threshold of state neglect, a claim needed not only to fall within a protected rights category but also to pass an empirical test of neglect. Mainstream Republicans may have been more generous with federal power under the Fourteenth Amendment than a purely state-action interpretation allowed, but they remained committed to limiting federal power and accordingly drafted its text to be a negative and corrective authorization only. Any other reading granting Congress preemptive authority to enforce such a broad set of rights would risk giving a centralized national government effectively unchecked police power.

C. Public Responses to the Civil Rights Cases

Popular reaction to the decision largely tracked the broader debate about the relationship between Congress's Fourteenth Amendment power and federalism, and for obvious reasons, there were sharp differences of opinion across racial lines.

1. The Response of Black Leaders

In widely circulated comments, Frederick Douglass, who had once written at length about the importance of federalism and defended suffrage as the singular intervention necessary to maintain both civil rights and decentralization, immediately condemned the decision as the product of "the old Calhoun doctrine of State rights as against Federal authority."[69] A hastily convened meeting of civil

---

67. *See* BRANDWEIN, *supra* note 28, at 79.

68. For discussions of the malleability of framing rights within these categories, see Kate Masur, *Civil, Political, and Social Equality After Lincoln: A Paradigm and a Problematic*, 93 MARQ. L. REV. 1399, 1405 (2010) [hereinafter Masur, *Equality After Lincoln*]; KATE MASUR, AN EXAMPLE FOR ALL THE LAND: EMANCIPATION AND THE STRUGGLE FOR EQUALITY IN WASHINGTON, D.C. 227 (2010); Rebecca J. Scott, *Public Rights, Social Equality, and the Conceptual Roots of the* Plessy *Challenge*, 106 MICH. L. REV. 777, 802 (2008). *But see* WURMAN, *supra* note 58 (contesting the use of this framework).

69. *The Negroes: Opinions of Prominent Colored Men on the Recent Supreme Court Decision*, CHI. DAILY TRIB., Oct. 19, 1883, at 1; *The Social Rights Decision*, CHI. DAILY TRIB., Oct. 20, 1883, at 4. Douglass had once written an extended defense of federalism in which he worried about overreach in Reconstruction measures. These, he explained, would fail "unless the whole structure of the government is changed from a government by States to something like a despotic central government, with power to control even the municipal regulations of States, and to make them conform to its own despotic will." Such an idea, he said, was in tension with the states' rights idea "more deeply rooted in the minds of men of

rights activists in Washington, D.C. issued a resolution criticizing the decision and expressing skepticism for common law solutions.[70] Newspapers with predominantly Black audiences roundly condemned the *Civil Rights Cases*.[71] The *Cleveland Gazette* echoed Douglass, 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.[72]

In a remarkable display of popular constitutionalism, citizen groups throughout the country held meetings in the weeks following the Court's decision to debate and protest that decision. Such gatherings had been ongoing since the appellate courts had blocked the Civil Rights Act earlier in the year. These meetings represented an important step in the emerging Black popular constitutionalism movement that, as we will show in the next Part of this Article, transformed the national understanding of civil rights by working at the state level. But before those state-level actions could begin, the movement had to first cohere around a response to the *CRC*.

That response was predictably, though not universally, hostile.[73] Some Black leaders and speakers at these meetings defended the opinion on the legalistic grounds that the Court had adopted, but most were unmoved and issued petitions and statements reviling Republican betrayal.[74] If the editors of the *Arkansas*

---

all sections of the country than perhaps any one other political idea." The solution he proposed was identical to the Republicans' idea of targeted but minimal intervention: to ensure Black people "have the power to protect themselves" via "one condition to the exercise of the elective franchise, for men of all races and colors alike." DOUGLASS, *Reconstruction*, *supra* note 40, at 593–96. For Republican reactions to Douglass's change of tone, see BRANDWEIN, *supra* note 28, at 170–72.

70. Its statement, however, pointedly refused "words of indignation or disrespect aimed at the Supreme Court." *Civil Rights Decision: An Immense Mass Meeting of the Colored Citizens and Their Friends at Lincoln Hall*, CLEVELAND. GAZETTE, Oct. 27, 1883, at 1.

71. Weaver, *supra* note 11, at 368–82.

72. *Civil Rights Law: Declared Unconstitutional by the Supreme Court*, CLEVELAND GAZETTE, Oct. 20, 1883, at 2; *Colored Indignation: The Effects of the Supreme Court Decision*, ATLANTA CONST., Oct. 17, 1883, at 1.

73. 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 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." *Civil Rights and Secession: The Subjects of Discussion at a Colored Mass-Meeting*, WASH. POST, Aug. 30, 1883, at 2.

74. *See* SHAWN LEIGH ALEXANDER, AN ARMY OF LIONS: THE CIVIL RIGHTS STRUGGLE BEFORE THE NAACP 61 (2012); *Colored Citizens on the Supreme Court*, THE SUN (Balt.), Nov 30, 1883, at 1; *A New Issue in Virginia: The Colored Men Raising the Question of Civil Rights*, N.Y. TIMES, Oct. 26, 1883, at 1; *Iowa: Civil Rights in Des Moines*, CHI. DAILY TRIB., Oct. 22, 1883, at 6; *The Negroes: Large Meeting Held at Indianapolis, Ind. to Consider the Recent Supreme Court Decision*, CHI. DAILY TRIB., Oct. 23, 1883, at 3; *Civil Rights Act: Mass Meeting of Colored Men Last Night*, S.F. CHRON., Oct. 23, 1883, at 8; *The Colored Republican Club: How the President's Messenger Regards the Civil Rights Declaration*, WASH. POST, Oct. 29, 1883, at 2. For meetings of Black voters along the North–South border endorsing the decision, see *The Civil Rights Decision: A Sensible Address*, ST. LOUIS

Mansion, a newspaper run by and for Black readers, endorsed the decision as correctly decided, African Methodist Episcopal Church ("AME") Bishop Henry McNeal Turner could thunder that the "barbarous" decision should be "branded, battle-axed, sawed, cut and carved with the most bitter epithets and blistering denunciations that words can express . . . . It absolves the allegiance of the Negro to the United States."[75]

A small Draft Harlan movement appeared, with some suggesting that nominating for President the author of the powerful *CRC* dissent was the only way to keep disaffected Black Republicans in the party and turning out to vote.[76] In response to speculation that Justice Samuel Miller—part of the *CRC* majority—might make an excellent Republican presidential 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.[77] Nor would the decision be immediately forgotten: an 1887 meeting of the AME condemned Justice Bradley and Chief Justice Waite by name, and that year's commemoration of the constitutional centennial in Philadelphia suffered from low Black interest, attributed in part to disillusionment with the decision.[78]

Federalism, in particular, represented an almost unbridgeable chasm between at least one strand of an emerging Black popular constitutionalist movement and the theories of mainstream Republicans. Where the median Republican drafter of the Fourteenth and Fifteenth amendments had been uneasy about their implications for nation-state relations, remaining doggedly committed to

---

DISPATCH, Oct. 24, 1883, at 4 (reporting on the address of a group of Black leaders in Louisville, Kentucky, endorsing the Court's opinion); *The Colored Men's Grievances*, THE LANDMARK (Statesville, N.C.), Oct. 19, 1883, at 1; *The Civil Rights Decision: Cincinnati Colored Men Acquiesce in the Action of the Court*, DETROIT FREE PRESS, Oct. 23, 1883, at 2. Other Louisville attendees were more in tune with Black opinion elsewhere, decrying it as the worst decision in Supreme Court history. *See Telegraph Briefs*, LAWRENCE J., Oct. 19, 1883, at 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, at 1.

75. Weaver, *supra* note 11, at 372; John Dittmer, *The Education of Henry McNeal Turner*, *reprinted in* BLACK LEADERS OF THE NINETEENTH CENTURY 265 (Leon Litwack & August Meier eds., 1988). The *Los Angeles Times* and *New York Tribune* offered similarly frantic reporting on a bishop—presumably Turner—attending the annual meeting of the AME who claimed that, if the rights of Black Americans continued to be ignored, there would be a revolution. *See A Civil Rights Decision Denounced*, L.A. TIMES, Oct. 19, 1883, at 1; *The States and Civil Rights*, N.Y. TRIB., Oct. 20, 1883, at 4. Turner had transitioned from a conservative and accommodationist member of the Georgia Constitutional Convention to one of the most radical (and quotable) Black leaders of the latter half of the nineteenth century upon seeing that state's government return to the hands of Confederate sympathizing white Southerners.

76. *See A New Star: Supreme Court Justice Harlan Talked for President*, ST. LOUIS POST DISPATCH, Oct. 24, 1883, at 1. Robert Ingersoll wished that Justice Harlan would run. *See Ingersoll Speaks*, RENO EVENING GAZETTE, Jan. 15, 1884, at 2.

77. Editorial, W. RECORDER (Kan.), Jan. 3, 1884, at 2.

78. *They Want Civil Rights: Colored Preachers Denounce Two Supreme Court Justices*, N.Y. TIMES, Apr. 29, 1887, at 4; Primus, *The Riddle*, *supra* note 53, at 1729.

federalism, Black popular constitutionalism was often much more robustly nationalist, firmly within the Radical Republican tradition that made other Republicans so uneasy.[79] In Douglass's widely circulated comments on the decision, not only did he (and Senator Bruce) explicitly equate the Republicans' federalist theories with those of Calhoun, but his explanation of the decision also entirely dismissed the federalism that remained so dear to the Republicans—unsurprisingly prompting a sharp response from the *Chicago Tribune*.[80]

Douglass's more elaborate comments at the mass meeting further illustrated the divide, expressing frustration with the legal niceties Justice Bradley employed to preserve federalism. Douglass protested that the Court had abused a technicality to obscure more important constitutional values. He could not believe that for the Court, "[t]he unconstitutionality of the case depends wholly upon the party committing the act. If the State commits it, it is wrong; if the citizen of the state commits it, it is right . . . ." For Douglass, this was a distinction without a difference. "What does it matter to a colored citizen," he asked, "that a State may not insult and outrage him, if a citizen of a state may?"[81] But as Justice Harlan had gone to great pains to point out, the *legal* case depended on the assumption that public accommodations were not simply businesses and private parties but quasi-state actors. In dismissing that divide, which was essential to Justice Bradley's opinion and, in its own way, to Justice Harlan's, Douglass argued that the Fourteenth Amendment empowered action against states *and* against individuals. Douglass's interpretation thus moved even beyond the more expansive state-neglect revisionism: this was akin to a national police power, which to mainstream Republicans was akin to heresy (as Douglass himself had once agreed). For the Republicans (and Democrats) who remained committed to federalism as a constitutional starting point, this tension was alarming, and the response to the *CRC* only inflamed the divide.

2. The Response of White Republicans

For white Republicans who had spent much of Reconstruction wrangling with this question, federalism remained a cherished political value, not something so easily dismissed as the discredited belief of a hated political foe. Political elites, especially those in legal circles, drew a subtle but sharp contrast between the pure state sovereignty doctrines of Calhoun and a strong commitment to a states'-rights-inflected dual sovereignty. They were, in a way, all Jacksonians now.[82]

Only an extremely Washington-focused perspective could lead one to conclude that "[a]lmost all [of] the leading minds [out] of our public men dissent from the decision of a majority of the Court."[83] Many elites were adopting, in effect,

---

79. *See* DAVIS, *supra* note 59, at 60, 70, 106–07.

80. *The Civil-Rights Decision*, CHI. DAILY TRIB., Oct. 17, 1883, at 4.

81. DOUGLASS, *The Civil Rights Case*, *supra* note 53, at 691. It should be noted that Douglass is explicitly discussing the Fourteenth Amendment here, not the Thirteenth Amendment, which allows direct, non-corrective federal action.

82. *See* BEIENBURG, PROHIBITION, *supra* note 23, at 21–25.

83. Editorial, W. RECORDER (Kan.), Dec. 28, 1883, at 2. Among the *Recorder*'s list of prominent opponents, for example, only Ingersoll was not either a senator,

the position strenuously pushed by Matthew Hale Carpenter, the Wisconsin Republican widely considered among the Senate's constitutional experts, during the final floor debate in 1875.[84] 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 than "fantastic."[85] In his prophetic jeremiad, Carpenter had declared, "I am compelled to vote against the bill," and full of "confidence that, if it shall become a law, the judicial courts will intervene to vindicate the Constitution."[86]

Among white commentators outside of government, the decision was generally received favorably, albeit for different reasons.[87] Unsurprisingly, Democratic papers unanimously cheered the decision and crowed that even GOP justices had justified their fierce opposition during its passage.[88] But while there was some anger at the Court from Republican papers,[89] most were in agreement with the

---

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, Nov. 11, 1883, at 1; Stanley Philip Hirshon, *Farewell to the Bloody Shirt: Northern Republicans and the Southern Negro, 1877–1893*, at 237–38 (1959) (Ph.D. dissertation, Columbia University) (ProQuest).

84. *See, e.g.*, *The Civil-Rights Decision*, supra note 80, at 4.

85. 43 CONG. REC. 1861 (1875).

86. *Id.* at 1863.

87. 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, but it also "emasculated" his and his peers' handiwork and "undermine[d] the foundation stone of the Republican principles." *Senator Sherman Says the Supreme Court Destroyed the Foundation of the Republican Party*, ST. LOUIS POST-DISPATCH, Nov. 20, 1883, at 2. Samuel Shellabarger, another Fourteenth Amendment Framer, agreed, while Robert Ingersoll was, after Sherman and Justice Harlan, arguably the most aggrieved critic. *See Reviving Race Issues: The Supreme Court Denounced for Its Civil Rights Decision*, WASH. POST, Oct. 23, 1883, at 1; Editorial, *Article Two – No Title*, WASH. POST, Oct. 26, 1883, at 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*, CHI. NEWS, *reprinted in* WASH. POST, Oct. 22, 1883, at 2. For one particularly eloquent critique from an anonymous Kentuckian to an Ohio paper, see *Letter to the Editor*, CINCINNATI. COM. TRIB., Oct. 27, 1883, at 1. The Democratic *Washington Post* soon mocked Sherman's outrage, alleging that he wanted to make "amendments to the amendments" with a secret gloss unsupported by a "plain" reading. *Mr. John Sherman on Civil Rights*, WASH. POST, Nov. 21, 1883, at 2. A Montana paper similarly took advantage of Sherman's comments to mock his abilities as a lawyer. Editorial, BUTTE DAILY MINER, Dec. 1, 1883, at 2.

88. *The Civil Rights Bill: It Is Declared Unconstitutional by the Supreme Court*, WASH. POST, Oct. 16, 1883, at 1; *A Mistake of Four Letters*, WASH. POST, Oct. 17, 1883, at 2.

89. One paper said the decision was "as unfounded as any ever rendered" since *Dred Scott v. Sandford*, 60 U.S. 393 (1857), and substituted a "cold, narrow, and technical interpretation" for "the spirit and intention . . . of the framers" that could be discerned by "every man of intelligence." *The Quirks of the Law*, ALBERTA LEA STANDARD (Minn.), Oct. 24, 1883, at 1.

Court.[90] Notably, this included prominent organs of mainstream Republican opinion like the *New York Times*[91] and the *Chicago Tribune*.[92] Surveying the response from Republican papers, the (Democratic) *Baltimore Sun* observed that the decision "will prove less of a surprise to jurists than to those who take a sentimental . . . view of the entire question."[93] The GOP-affiliated *Philadelphia Evening Telegraph* went so far as to pronounce that "it is difficult to understand how any one who will read [the decision] carefully . . . can for a moment question it."[94]

3. The Democrats' Response

Southern Democrats (and their Northern allies) generally professed not indignation but humble gratitude to the Supreme Court: gratitude for their freedom from the last vestige of federal control and with magnificent irony, gratitude for a

---

90. For a collection of favorable Northern Republican editorials, see the compilation in *The Civil Rights Decision: Press Comments—What Gov. Cameron and Senator Riddleberger Say*, THE SUN (Balt.), Oct. 17, 1883, at 5 [hereinafter *The Civil Rights Decision*, THE SUN (Balt.)]; *The Civil Rights Decision*, MALVERN LEADER, Oct. 25, 1883, at 4; *Civil Rights*, POSTVILLE WEEKLY REV., Nov. 10, 1883, at 1.

91. The *New York Times* took pains to offer its support for the decision 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. *The Rights of Negroes*, N.Y TIMES, Oct. 18, 1883, at 4. 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." *The Question of Equal Rights*, N.Y. TIMES, June 17, 1883, at 6. A fair reading of the Fourteenth Amendment, it said, only empowered federal intervention in response to clear state failure, and primary action to enforce civil rights ought therefore to come from the states. *See Civil Rights Cases Decided*, N.Y. TIMES, Oct. 16, 1883, at 4; *The Civil Rights Decision: No Change in the Condition of Colored People Involved*, N.Y TIMES, Oct. 16, 1883, at 4. That was why, its editorial board concluded, "[t]he views presented by Judge Bradley . . . seemed to flow clearly and easily from the obvious meaning and purport of the [F]ourteenth [A]mendment" and "were easily understood and convincing"—in sharp contrast to "the laborious effort which it requires" to support Justice Harlan. *Judge Harlan's Reasoning*, N.Y. TIMES, Nov. 21, 1883, at 4.

92. The *Chicago Tribune*, which both paid careful attention to Reconstruction era cases and was representative of mainstream Republican thought, combined its understandings of rights hierarchies and federalism to justify the decision. BRANDWEIN, *supra* note 28, at 75–82, 170–72. 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." *The Civil-Rights Decision*, *supra* note 80, at 4. While the federal government could *and should* proactively act in defense of *civil* rights, the *Tribune* asserted that public accommodations were *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 of federalism. BRANDWEIN, *supra* note 28, at 63–86, 170–72; *Civil v. Social Rights*, CHI. DAILY TRIB., Nov. 6, 1883, at 4; *The Social Rights Decision*, CHI. DAILY TRIB., Oct. 20, 1883, at 4. The *Oregonian* offered similarly subtle but mainstream GOP opinion. *The Civil Rights Decision*, MORNING OREGONIAN, Oct. 22, 1883, at 4.

93. *The Civil Rights Decision*, THE SUN (Balt.), *supra* note 90, at 5.

94. *Id.*

chance to use that restored state sovereignty in vigorous protection of the rights of Black Americans.[95] The *San Francisco Chronicle* took the curious position that a good faith reading of the Reconstruction Amendments actually supported Justice 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.[96] The non-aligned *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, "[i]t will then be admitted that the doctrine of State rights is not all a 'damnable heresy,' and that centralization is not the end and aim of republican institutions."[97]

Constrained by the need to demonstrate they had made their peace with the Civil War, Democratic elites endorsed Republicans' constitutional settlement, promising that the *CRC* would give the Party a chance to show that states' rights and the protection of Black Americans' 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 pass—and take credit for—civil rights legislation.[98]

Southern opinion leaders offered responses pitching the decision as something of a bargain in which federal oversight would be struck in exchange for state enforcement—precisely the moderate federalist position favored by Republicans trying to join progressive views with conservative constitutionalism. 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

---

95. Editorial, WASH. POST, Oct. 17, 1883, at 2; *A Righteous and Welcome Decision*, ATLANTA CONST., Oct. 16, 1883, at 4; *A Friend's Advice to the Democrats*, EVANSVILLE COURIER, Oct. 19, 1883, *reprinted in* N.Y. TIMES, Oct. 28, 1883, at 6; *The Rights of Colored Men: What Senators Hampton and Butler Say of the Civil Rights Decision*, N.Y. TIMES, Oct. 24, 1883, at 1. 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*, N.Y. TRIB., Oct. 25, 1883, at 4; Editorial, *Article 2 – No Title*, WASH. POST, Oct. 26, 1883, at 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 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*, CHI. TRIB., Mar. 24, 1887, at 3.

96. Editorial, S.F. CHRON., Oct. 17, 1883, at 2.

97. *Sweeping Away the Rubbish*, BOS. DAILY GLOBE, June 19, 1883, at 2.

98. *See infra* notes 157–80 (discussing the case of Ohio).

national citizenship and an end to slavery, but the justices had merely rejected the later, unconstitutional GOP extensions.[99]

Instead, the Court had ruled that the federal government could not act unless states either directly deprived or failed to protect 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* argued that market competition for Black dollars would institute equality.[100] Indeed, some insisted, without the specter of federal intervention, white Southerners need no longer fear and resent Black citizens for their ability to call down federal tyranny, and therefore 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.[101]

D. Proposed Federal Policy Responses to the CRC

Whatever the legal theories involved, the practical effect of the Court's decision in the *CRC* was to put a significant roadblock in front of future federal efforts to proactively protect Black civil rights. Policymakers in D.C. floated a variety of possible responses to the *CRC*. President 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."[102] Critics regarded this as far too tepid, meek encouragement of an unspecified bill; they remained convinced the Court would strike anything meaningful that Congress bothered passing.[103]

Supporters of a more aggressive federal stance regarding civil rights enforcement could have responded in several ways. On the fringes, one citizen suggested making admission of statehood from Western territories dependent on

---

99. *News from Washington: The Civil Rights Act Void*, THE SUN (Balt.), Oct. 16, 1883, at 1; *Unconstitutionality of the Civil-Rights Act*, THE SUN (Balt.), Oct. 17, 1883, at 2.

100. *Unconstitutional Civil Rights*, ATLANTA CONST., June 29, 1883, at 4.

101. *See id.*; *see also* Editorial, ALGONA UPPER DES MOINES, Oct. 24, 1883, at 1; Weaver, *supra* note 11, at 370.

102. Chester A. Arthur, *Third Annual Message*, Dec. 4, 1883, https://www.presidency.ucsb.edu/documents/third-annual-message-13 [https://perma.cc/E6HV-BM33]. Throughout the address President Arthur proposed various measures to Congress, such as more aggressive regulation of railroads, but expressed reservations about the balance of federal and state authority and urged Congress to consider only "lawful" legislation.

103. The editors of the *Western Recorder* praised nearly all of President 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: "[O]ur advice to colored men is to send no petition to Congress. Let us cease to be beggars, and become men." *The President's Message*, W. RECORDER (Kan.), Dec. 21, 1883, at 2.

passing civil rights bills.[104] Anticipating the twentieth-century approach, others proposed using the Commerce Clause power to legitimate congressional action to regulate at least some of these operations.[105] But in the main, the Act's core supporters had two primary options.

First, they could do nothing. Some commentators, including one prominent Black Democrat in Ohio, argued that the *CRC* ruling accomplished little and so warranted little response. Since, as Justice Harlan had reminded readers, the covered businesses retained common law obligations to serve all qualified travelers, tort options remained if those businesses discriminated without cause.[106] Further, viewed in a hopeful light, this option allowed for a good test of Southern commitment to the Union and their willingness to abide by their promises on matters of race.

The *Chicago Tribune* dismissed this option from the start, observing that if the Act really did not accomplish anything, a lot of very smart men had done a lot of needless labor.[107] Taking note of the many promises loudly offered by Southern politicos, the editors nevertheless rejected this position due to prior duplicity from Dixie. Instead, they advocated a legislative option: repass a more technically precise bill with a stronger state action hook, one that would hopefully satisfy judicial censors.[108] Leading this fight, Ohio Senator John Sherman, who had strongly supported Sumner's initial efforts to pass a civil rights bill, continued his fight from

---

104. *Civil Rights: How They May Be Secured in New States by Congress*, CINCINNATI COM. TRIB., Dec. 8, 1883, at 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: THE CLASH THAT SHAPED MODERN CHURCH–STATE DOCTRINE 230–33 (2012).

105. *The States and Civil Rights*, *supra* note 75, at 4. See *infra* Section IV.A discussing *Heart of Atlanta Motel* and *Katzenbach v. McClung*, 379 U.S. 294 (1964), 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 this alternative reasoning (though ridiculed it as fantastic in reference to theaters) in his rejection of the 1875 version. 43 CONG. REC. 1861–63 (1874).

106. The Act's sponsors at the time had made a similar argument, downplaying the bill's radicalism by insisting it created no new rights, only new remedies. *See* LOFGREN, *supra* note 11, at 137. In order to effectuate the predicate 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. *See* Alfred Avins, *What Is a Place of 'Public' Accommodation?*, 52 MARQ. L. REV. 1, 12 (1968); *Senator Edmunds's Bills: A New Civil-Rights Act—Polygamy and Rights of Suffrage*, THE SUN (Balt.), Dec. 5, 1883, at 1.

107. *See How to Secure Civil Rights for Negroes*, CHI. DAILY TRIB., Oct. 30, 1883, at 4. *See also An Able Ohio Head Turned*, DET. FREE PRESS, Oct. 19, 1883, at 4; Editorial, MARSHALL DAILY CHRON., Oct. 22, 1883, at 2; BRANDWEIN, *supra* note 28, at 172–73 n.58, (observing that the same argument had circulated in 1875).

108. Despite their support for this option, the editors found it insufficient. *How to Secure Civil Rights for Negroes*, *supra* note 107, at 4. *See also* WISCONSIN ST. J., Oct. 23, 1883, at 4 ("If the civil rights act, which was intended to remedy a well-recognized evil, is not effectual for that purpose, then some act should be framed which will do so, while at the same time it avoids all constitutional objections.").

a decade before, trying to figure out how to make such a new bill work.[109] 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.[110] It is worth emphasizing, then, that the mainstream organs of Republican thought *did* wish to see an ultimate federal guarantee of Black peoples' civil rights, just one more carefully tailored to the balance of federal and state power under the Constitution.

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."[111] To that end, GOP legislators put forward several proposals for "the coming plank of the Republican platform: the Sixteenth Amendment."[112] The best known was that of Senator James F. Wilson of Iowa, who proposed that "Congress shall have power by appropriate legislation to protect citizens of the United States in the exercise and enjoyment of their rights, privileges and immunities and assure them of equal protection by the laws."[113] In a Senate close to partisan parity, to say nothing of a House under almost two-to-one Democratic control, such an amendment—like Sherman's more moderate proposal for a more technically precise bill—went nowhere in the 48th Congress.

These last two options (legislation and amendment) responded to the Black popular constitutionalist view that the federal government needed (or already had) sufficient authority to enforce civil rights protections across the country. Whether this power was vindicated by more carefully crafted legislation or established by a new amendment, these proposals all aimed at resolving the question of how to handle the interaction of civil rights and states' rights.

II. RESPONSES TO THE *CIVIL RIGHTS CASES*: THE RISE OF BLACK POPULAR CONSTITUTIONALISM

Whether the Court would have upheld the Civil Rights Act in the presence of demonstrated state neglect is unclear.[114] Mainstream Republicans' constitutional

---

109. Sherman had backed Sumner by arguing that the privileges and immunities of citizenship entailed common law access. CONG. GLOBE, 42d Cong., 2d Sess. 843–44, 3192–93 (1872).

110. *The Danville Riot and Other Outrages to Be Investigated*, LAWRENCE DAILY MORNING NEWS, Jan. 25, 1884, at 4; *The National Capital: Sherman Offers a Resolution on Southern Murders*, Jan. 25, 1884, at 1.

111. *How to Secure Civil Rights for Negroes*, *supra* note 107, at 4.

112. *Editorial*, DAVENPORT WEEKLY GAZETTE, Oct. 24, 1883, at 6; *An Important Decision*, WISCONSIN WEEKLY, Oct. 24, 1883, at 4.

113. *Civil Rights in Congress: Senators Garland and Wilson's Views*, ARK. WEEKLY MANSION, Dec. 15, 1883, at 1. For the effort by Indiana Representative William H. Calkins, see *The National Capital: Civil Rights*, CLEVELAND GAZETTE, Dec. 15, 1883, at 1.

114. *See infra* note 121, at 19. Michael McConnell has argued that the decision was narrower than often perceived, and a modified and more precise Civil Rights Act could easily have been fixed to the Court's satisfaction. McConnell, *The Forgotten*, *supra* note 56, at 137–38. Of course, by the time Republicans took control of the government with sufficient numbers to pass such a bill, the party had given up on national enforcement of rights, as

theories had collided with the popular constitutionalist understandings of Black Americans. As previously discussed, Black leaders usually had a more nationalist view and argued for more federal authority to guarantee civil rights, while white Republicans pursued a compromise between longstanding federalism values and a commitment to protecting civil rights. There was the ground on which the *CRC* was decided, but as mentioned, there was a second issue lurking in the case: the status of public accommodation access as either a protected civil right or an unprotected social right.

Black advocates of a public accommodations law had long argued that the effort to conflate legal access to common carriers with "social equality" was farcical.[115] Douglass was especially impatient with "respectable papers like the *New York Times* and the *Chicago Tribune* [that] persist in describing the Civil Rights Bill as a Social Rights Bill."[116] Public accommodations and social equality were distinct concepts: Douglass had slept in English hotels previously rented by lords and ridden in cars that ladies, dogs, and fools alike had occupied without thinking that temporary occupation of the same space made any of them equals.[117] Black activists were making precisely the same claim as Justice Harlan: no one was insisting government inspectors would coerce purely social interaction, like ensuring equal access to a dinner party.[118] They did, however, insist that the common-law rule regarding access to public facilities like common carriers was a *legal* right, not a socially desirable status.[119]

---

demonstrated by the failure of Henry Cabot Lodge's 1890 bill to enforce the Fifteenth Amendment, derided as the "Force Bill" in the South but usually called the Lodge Bill. *See supra* note 33.

115. DAVIS, *supra* note 59, at 103–05.

116. DOUGLASS, *supra* note 53, at 692–93.

117. *Id.*

118. The Civil Rights Cases, 109 U.S. 3, 59–60 (1883); STEPHEN KANTROWITZ, MORE THAN FREEDOM: FIGHTING FOR CITIZENSHIP IN A WHITE REPUBLIC, 1829–1889, at 382–89 (2012).

119. As Charles Dudley Warner observed of his travels through the South, and recounting the views of an "intelligent colored man, whose brother was formerly a Representative in Congress," social status was not the goal:

> Social Equality is a humbug. We do not expect it, we do not want it. It does not exist among the blacks themselves. We have our own social degrees, and choose our own associates. We simply want the ordinary civil rights, under which we can live and make our way in peace and amity. This is necessary to our self-respect . . . . My wife is a modest, intelligent woman, of good manners, and she is always neat, and tastefully dressed. Now, if she goes to take the cars, she is not permitted to go into a clean car with decent people, but is ordered into one that is repellant, and is forced into company that any refined woman would shrink from. But along comes a flauntingly dressed [white] woman, of known disreputable character, whom my wife would be disgraced to know, and she takes any place that money will buy. It is this sort of thing that hurts.

Charles Dudley Warner, *On Horseback*, ATL. MONTHLY, Oct 1885, https://www.theatlantic.com/magazine/archive/1885/10/on-horseback/634490/ [https://www.perma.cc/M47B-GB7T].

For those opposed to public accommodations laws, reframing Black Americans' legal claims into one of mere *social equality* served as a rhetorically effective bludgeon to marginalize the more inclusive legal vision. Such a maneuver was possible within the loosely tripartite categories of civil rights, political rights, and social rights because these categories were impermanent, hazily defined, and politically constructed. Whatever was in each of the categories, however, everyone agreed that social rights were the least protected. Thus, opponents of any particular rights claim could wield, and had wielded, the club of "social rights" as a pejorative catchall to trivialize and discredit that claim.[120] In short, Black popular constitutionalism sought to ensure that public accommodations remained a civil right within common law legal protections rather than simply a social decision akin to dinner party invitations.

Justice 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"; such a question was unnecessary in light of the rest of the decision.[121] No state action occurred if common carriers were not state actors, and no evidence was offered in the record to substantiate a state neglect claim. If a state neglect claim were offered alongside evidence that rights were violated, then and only then would Justice Bradley have to decide whether the asserted public accommodations access counted as a protected *civil* right or an unprotected *social* right. Because no direct state action occurred and because no evidence of state neglect was offered, the decision avoided conclusively holding that access to public accommodations was an unprotected social right, but to Black observers, that was the clear implication.[122] Thus, Black activists took it upon themselves to reestablish the legal status of public accommodation access as a civil right through the political process; based on the positive reception of most elites to the *CRC* decision, they had their work cut out for them.

A. State Politics and the Potential for Racial Realignment

The relevant state politics were defined by two features. First, Black voters began to rethink their fervent commitment to the Republican Party. Second, states across the nation and controlled by both parties reacted to the *CRC* to reaffirm the balance envisioned in the *CRC*: the federal government would stay out so long as the states stepped up. What is often missed, however, is the intersection of these two features. As we detail below, it was often sophisticated Black leaders who used the pivotality of Black voters to push states to pass civil rights legislation.

---

120. KANTROWITZ, *supra* note 118, at 382–89; Masur, *Equality After Lincoln*, *supra* note 68, at 1399–1406.

121. *The Civil Rights Cases*, 109 U.S. at 19.

122. Working with Justice Bradley's private correspondence, Brandwein demonstrates that his firm placement of public accommodations within the minimally protected category of "social rights" made such a judgment "unlikely" in his case. BRANDWEIN, *supra* note 28, at 179–80.

1. Rethinking Party Loyalties

By the middle of the 1880s, Black Americans no longer had a reliable ally in Congress. Democrats had taken control of the House of Representatives and, soon after, the presidency, which made proposals like Sherman's modified Civil Rights Act or Wilson's constitutional amendment dead ends. Northern voters were tiring of Reconstruction and voting Democratic, leading some Republicans to similarly move beyond Black rights; in the wake of the *CRC*, Black Americans lost even the parchment protections of public accommodation access offered by the 1875 Act. It was hardly surprising that Black voters began to question what exactly their loyalty to the Republican Party was getting them. 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 Black citizens as much as the law permitted—especially compared to the Democrats.[123] Many Black citizens were less than impressed by such pleas.[124]

With such unreliable allies, some Black leaders openly discussed the need for Black voters to de-align from the Republican Party—or to credibly threaten to do so.[125] The problem, as observed by many, including often frustrated Black Republicans, was that the alternative was often much worse. The *Oregonian* posited that Black Americans' 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 Democrats had enacted fiercely anti-Black laws—made this an unlikely development.[126] Thus, Black voters were

123. *The Civil Rights Act*, S.F. CHRON., Dec. 21, 1883, at 2; *The Negro and His Friends*, WATERLOO COURIER (Iowa), Jan. 24, 1884, at 1.

124. 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 Black political actors: 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 those "colored people of the same culture and education" and thus largely welcomed in white circles of "intelligence and refinement" who appreciated the importance of being able to exclude undesirables. *Color and Conduct*, DETROIT FREE PRESS, Oct. 18, 1883, at 4; *The Negroes*, CHI. DAILY TRIB., *supra* note 69, at 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, Oct. 20, 1883, at 2.

125. Joseph Beard, Jr., Letter to the Editor, *Not for Harrison: A Colored Man Who Emphatically Declares for Cleveland*, DETROIT FREE PRESS, Aug. 3, 1888, at 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 Right Negroes*, CHI. TRIB., Aug. 1, 1888, at 4. On electoral capture of Black voters, see generally PAUL FRYMER, UNEASY ALLIANCES: RACE AND PARTY COMPETITION IN AMERICA (2010).

126. *The Civil Rights Decision*, MORNING OREGONIAN, *supra* note 92, at 4.

left at the mercy of "the rich, conservative, and aristocratic" Republican elite and its turn toward business.[127]

White Republicans and Democrats followed these debates and calculated how to preserve (or chip away at) the loyalty of Black voters. State public accommodations laws offered Republicans a way to renew their fidelity to Black rights rather than be dismissed as a mere business party, while, for many Democrats, the debate over state laws offered a chance to establish their commitment to Black rights in the first place. For Black leaders, the benefits of state-level civil rights legislation were clear. Such legislation would give Black citizens both new state causes of action and provide a basis for future federal intervention. If the state itself recognized access as a civil right, neglecting those rights would justify federal intervention, and the state could no longer seriously argue that the neglected rights were mere social rights.

2. Recognizing and Upholding the Federalism-Civil Rights Bargain in the States

Outside of Washington, D.C., legislators and politicians expressed virtually no vocal disagreement with the decision, instead describing it as a charge to implement 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.[128] 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."[129] 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).[130]

Importantly, legislative supporters of state public accommodations law included not only expected Republican allies but also Democrats, who felt increasing pressure to move on from the Civil War.[131] Unlike the federal Civil Rights

---

127. LAWRENCE GAZETTE (Kan.), Oct. 25, 1883, at 1.

128. *Governor Abbett on Civil Rights*, THE SUN (Balt.), Jan. 30, 1884, at 1.

129. Buren R. Sherman, *Second Inaugural Address*, Jan. 17, 1884, *in* 5 MESSAGES AND PROCLAMATIONS OF THE GOVERNORS OF IOWA 321 (Benjamin F. Shambaugh ed., 1904).

130. H.R. 7, 20th Sess., at 338, 514 (Iowa 1884); S. 11, 20th Sess., at 443 (Iowa 1884); 1884 Iowa Acts 107–08.

131. As Grossman recognized, while electoral self-interest played a massive part, this cannot be a purely electoral story of "balance of power" politics. GROSSMAN, *supra* note 11, at 99–106. Disaggregating the Republican side is even harder, as both a commitment to civil rights and electoral incentives pointed in the same direction. An electoral self-interest account explains some instances well, but not others. Of those states that passed public accommodations law by 1885, Connecticut, Illinois, Indiana, Ohio, and New Jersey were all tightly contested and had a high percentage of Black voters—strong cases for a presumption of instrumentalism. Michigan was unusually close at the presidential level in 1884, but not in doubt otherwise. By way of contrast, Colorado, Minnesota, Iowa, and Nebraska had neither significant Black populations nor competitive elections. For the classic account of Republican

Act of 1875 overturned by the Court, these state acts garnered support and sometimes enthusiastic backing from Northern Democrats.

Consider the case of New Jersey. It passed a civil rights bill in 1884. Its Democratic Governor, Leon Abbett—a onetime ferociously racist Copperhead[132]—issued a veiled criticism of the *CRC* and made known his support for public accommodations protection.[133] New Jersey's Democratic legislature easily passed a civil rights bill—after watering down the Republican-favored original to create civil penalties "so small that it would never pay to sue for them."[134] 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 sincere or insincere Democrats might have been, they were united, with all but a handful of them voting to back the bill.[135] As national Democrats had hoped, this effort to move the Democratic Party's position on civil rights did not go unnoticed.[136] Democrats across the country pointed to New Jersey as proof the Party was not racist.[137]

In contrast, some members of the South Carolina Senate were forthright in openly rejecting the implicit bargain of the *CRC*: 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.[138]

---

civil rights positions as deriving from electoral calculations, see Hirshon, *supra* note 83. More generous accounts situating Republican commitment to civil rights (but not specifically to public accommodations laws) within ideological beliefs are found in the work of Morgan Kousser and LaWanda Cox. *See generally* J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTIONS AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910 (1974) [hereinafter KOUSSER, THE SHAPING]; COX, *supra* note 29, at 260–61; BRANDWEIN, *supra* note 28, at 140–41.

132. "Copperheads" were Northern citizens who, during the Civil War, opposed the War and advocated for a negotiated reunification with the South. Virtually all Copperheads were Democrats, but most Northern Democrats were not Copperheads.

133. GROSSMAN, *supra* note 11, at 71–72.

134. *A Disgraceful Farce*, TRENTON TIMES, Mar. 6, 1884, at 4. *The Laugh Went Round*, TRENTON TIMES, Feb. 28, 1884, at 1.

135. *Legislators' First Day*, TRENTON TIMES, Jan. 9, 1884, at 1; *Legislation at Trenton: The Assembly and Civil Rights*, N.Y. TRIB., Mar. 20, 1884, at 2; *Slapped in the Face: Armitage Is Struck by Burgess*, TRENTON TIMES, Mar. 20, 1884, at 1; *Excitement in Trenton: Personal Encounter Between Assemblymen*, N.Y. TRIB., Mar. 21, 1884, at 5.

136. *See Democratic Governors Showing Their Hands*, W. RECORDER (Kan.), Feb. 8, 1884, at 2.

137. The Senate passed it unanimously; five Democrats voted no in the lower chamber. S. 1, 108th Sess., at 142–43 (N.J. 1884); Assembly 14, 108th Sess., at 806, 1114–15 (N.J. 1884); GROSSMAN, *supra* note 11, at 71; *An Enlightened Step*, TRENTON TIMES, Feb. 1, 1884, at 2 (reprinting an editorial from the *Pittsburgh Dispatch* hailing Abbett for his civil rights advocacy).

138. *The Civil Rights Bill*, N.Y. TIMES, Nov. 29, 1883, at 1; *Colored Press Comments on the Topics of the Day*, HARRISBURG STATE J. (Pa.), Dec. 15, 1883, at 2. (We 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 infra* notes 140–41 for more on the *Courier's* efforts.

But most of their legislative peers were more adept at public relations, and other press outlets were no less politically engaged in trying to demonstrate South Carolina would behave itself by protecting civil rights and eliminating the need for federal intervention. For instance, the editors of the *Charlestown News and Courier* operated as a clearinghouse for Southern propaganda, keenly watched Northern papers for attacks on Southern civil rights, and quickly (and cheerfully) refuted any allegations of Southern treachery. Thus, they wrote in November 1883 that they "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*." According to the *Courier*, that bill simply had never needed to be enforced—and wasn't. [139] In response to a debate in *Century* magazine between George W. Cable, a Southern critic of white supremacy, and Henry Grady, the editor of the *Atlanta Constitution*, 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."[140] This was not simply rallying the troops at home: the *Boston Journal* favorably commented on the *News* and *Courier's* contribution to the exchange.[141]

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. That meant that the Democratic Party 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, to Black

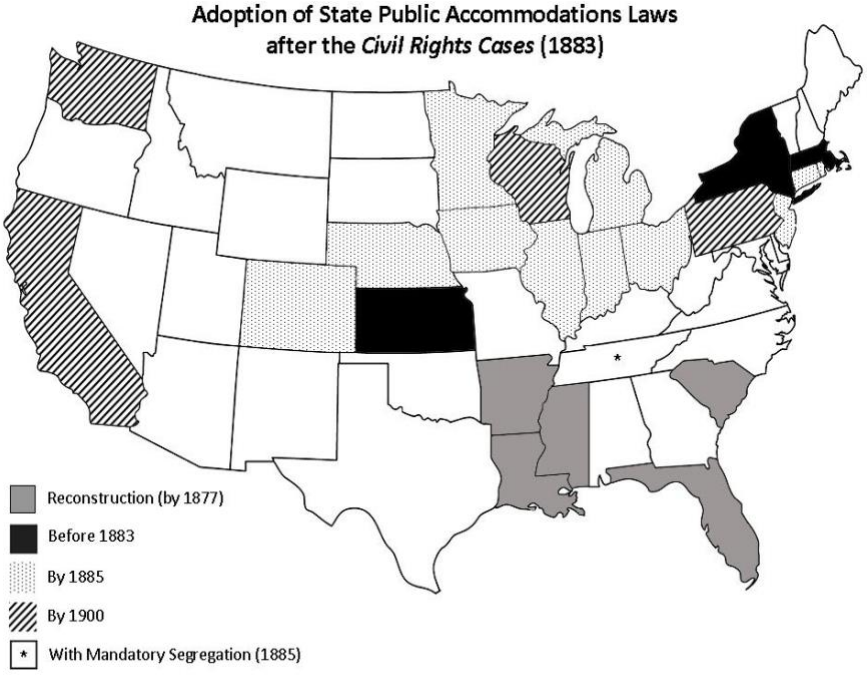
---

139. *See The South Carolina Reports*, CHARLESTON NEWS & COURIER, Nov. 6, 1883, at 2.

140. *In Plain Black and White-II*, CHARLESTON NEWS & COURIER, Apr. 3, 1885, at 4; *In Plain Black and White-I*, CHARLESTON NEWS & COURIER, Apr. 2, 1885, at 4. In response to Cable's second installment, charging Southerners with seeking to avoid "recognition of rights proposed in the old Civil Rights Bills" or in "the Freedman's Case in Equity" on grounds that Southerners feared it would generate "social chaos," the *Charleston News and Courier* conceded that Black Americans 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 & COURIER, Sept. 14, 1885, at 4. For Cable's first essay in the *Century*, see *The Freedman's Case in Equity*, 29 CENTURY 409 (1885); for Henry Grady's response reprinted in the *Century*, see *In Plain Black and White*, 29 CENTURY 910 (1885), and for Cable's follow-up, *The Silent South*, 30 CENTURY 676 (1885). McConnell, who similarly perceives an implicit promise of a Reconstruction deal of Southern protection, argues that it fell apart not due to disingenuousness but because the Bourbon political faction of elite, business-oriented Southerners who dominated Southern politics in the 1870s and early 1880s—and which disavowed the constitutionality of mandatory segregation during the 1875 debates—was replaced by populists happy to mandate race discrimination. McConnell, *The Forgotten*, *supra* note 56, at 130–31, 139.

141. *Civil Rights in the South*, BOSTON J., Apr. 7, 1885, at 2. Not all Southerners accepted the spirit of the implicit pact: 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. *Effect of the Civil-Rights Decision*, THE SUN (Balt.), Oct. 22, 1883, at 5. Texas Governor Ireland responded with a call for segregated railroad transportation. *Will Not Run Separate Coaches*, HARRISBURG PATRIOT, Oct. 24, 1883, at 1.

Americans' civil rights.[142] State passage of civil rights legislation would allow Democrats to put the Civil War behind them while holding onto their states' rights commitments. That Black voters were increasingly seen as potentially pivotal in some Northern states only added to this pressure.



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).[143] 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.[144] In the Northeast, only three states—Maine, Vermont, and

142. CHARLES W. CALHOUN, FROM BLOODY SHIRT TO FULL DINNER PAIL: THE TRANSFORMATION OF POLITICS AND GOVERNANCE IN THE GILDED AGE 73 (2010). For a general treatment of this strategy, see generally GROSSMAN, *supra* note 11.

143. 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. S. JOURNAL, 96th Sess. 507 (N.Y. 1873); ASSEMB. JOURNAL, 96th Sess. 615–16 (N.Y. 1873); GROSSMAN, *supra* note 11, at 63.

144. MILTON R. KONVITZ & THEODORE LESKES, A CENTURY OF CIVIL RIGHTS 157 (1961); Weaver, *supra* note 11, at 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*, BOS. GLOBE, Mar. 13, 1884, at 3.

New Hampshire—did not pass any such legislation.[145] 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.[146] These developments, as we show below, are largely the fruits of a successful effort by Black leaders to press state officials for civil rights relief. Unsurprisingly, however, these efforts were largely ineffectual in Southern states dominated by Democrats.

With the dubious exception of Tennessee, which passed a segregation bill also providing access to public accommodations, no states in the South would pass any public accommodations legislation in response to the *CRC* ruling, not even those that had opposed the Confederacy. The states that had passed such laws during Reconstruction left them inert.[147] Although Southern governors inaugurated the 1884 legislative sessions by thoroughly insisting on the centrality of states in protecting Black Americans' rights, none followed Northerners in passing legislation.[148] Tennessee's path-breaking institutionalization of segregation—under the cover of public accommodations law—was not its first instance of narrowing public accommodations law and mirrored a much clearer effort to evade the Civil Rights Act of 1875. In the wake of that Civil Rights Act, Tennessee passed a provision excluding the presumed common law right of access from public

---

145. As with at least one of the three far western states that did not pass legislation (Nevada), this is likely partly a function of the very small number of Black Americans residing in those states (at least as of 1890). Oregon's political culture made passage unlikely, even if it had a larger Black population, but California, which did have a much larger Black population, would pass one soon after, as discussed below. In our view, this is further evidence of the importance of political pressure from Black activists in the larger story of state civil rights bills. *See* 1 CAMBRIDGE UNIVERSITY PRESS, HISTORICAL STATISTICS OF THE UNITED STATES MILLENNIAL EDITION: POPULATION, at tbls.Aa4613-4675 (Nev.), Aa5342-5404 (Or.) & Aa2443-2539 (Cal.) (Susan. B. Carter et al. eds., 4th ed. 2006), http://hsus.cambridge.org/HSUSWeb/toc/showTable.do?id=Aa2244-6550 [https://perma.cc/UDX3-KKWL] (last visited Aug. 5, 2023) [hereinafter POPULATIONS].

146. Some argued that they plausibly fell within the common law definition of inns. For the text of the bills to compare to the federal one, see *infra* note 189.

147. Several Southern states (Arkansas, Florida, Louisiana, Mississippi, and South Carolina) had passed such laws during Reconstruction, and North Carolina's Democratic Governor Zebulon Baird Vance had pushed through a non-binding resolution calling for civil rights equality even as Reconstruction ended in 1877. *See* VALELLY, *supra* note 34, at 80–81; RICHARD BARDOLPH, THE CIVIL RIGHTS RECORD: BLACK AMERICANS AND THE LAWS, 1849–1870, at 72–75 (1970). We use the definition of the South that Ira Katznelson and Sean Farhang do: the 11 states of the Confederacy plus the 6 states that mandated segregation before *Brown* (Delaware, Kentucky, Maryland, Missouri, Oklahoma, and West Virginia). Sean Farhang & Ira Katznelson, *The Southern Imposition: Congress and Labor in the New Deal and Fair Deal*, 19 STUD. AM. POL. DEV. 1, 1 n.1 (2005).

148. Mississippi Governor Robert Lowry began the 1884 legislative session by informing the assembled members that the state, not the federal government, was the guarantor of rights. South Carolina's governor offered a similar extended rebuttal of fears that Democratic control of the presidency in 1884 would lead to the termination of civil rights, insisting he had heard no one in South Carolina discuss the withdrawal of Black rights. S. JOURNAL, Reg. Sess. 16–17 (Miss. 1884); Hugh S. Thompson, *Inaugural Address*, Dec. 4, 1884, *in* S. JOURNAL, 56th Sess., at 78–80 (S.C. 1884); H.B. 162, 1884–1885 Reg. Sess., at 59, 882 (Ala. 1884).

accommodations—in effect, blocking state remedies for civil rights.[149] Delaware did the same.[150] An Alabama representative submitted a public accommodations bill on the first day of the 1884 session, where it died an unceremonious death in committee.[151] Black residents in Kentucky delivered petitions requesting a civil rights bill that reminded legislators that Black voters were an important bloc, but the legislature was unmoved.[152] Georgia legislators "laughed [the bill right] out of the House," with only three Black members supporting it.[153] Some local Democrats feared that Virginia, dominated by the biracial coalition led by the Republican-affiliated Readjuster William Mahone, would pass a tough civil rights act,[154] but it did not.

B. Black Leadership in State Civil Rights Legislation

What is particularly notable in many (if not most) states is that Black political power was responsible for these civil rights bills. In response to the Court's decision in the *CRC*, Black-led groups dedicated to expanding civil rights—including public accommodations laws—organized, mobilized, and worked to cast their popular constitutionalist understanding of rights into law. By petition-gathering and aggressive lobbying, as well as through prudent stewardship of bills by Black state legislators, these groups and their allies advanced the passage of state public accommodations laws in nearly all of the Northern states. For example, Michigan passed a civil rights bill after its legislators received a petition from the "colored voters and tax-payers," observing that 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 legislator representing those Black constituents, R.J. Dickinson, proposed the bill and the state legislature passed it.[155] In this Section, we detail examples of interstate policy diffusion that demonstrate the success of the

149. Kenneth W. Mack, *Law, Society, Identity, and the Making of the Jim Crow South: Travel and Segregation on Tennessee Railroads, 1875–1905*, 24 L. & SOC. INQUIRY 377, 381–84 (1999).

150. Act of Mar. 24, 1875, ch. 130, 1875 Tenn. Acts 216; Act of Mar. 25, 1875, ch. 68, 1875 Tenn. Acts 124–25; Act of Mar. 25, 1875, ch. 194, 1875 Del. Acts 322; Bardolph, *supra* note 147, at 76, 82, 126. It is notable, too, that Tennessee passed its law after the 1884 elections returned a smaller but still sizable Democratic majority to Congress, as well as sending Grover Cleveland to the presidency.

151. *See generally* Ala. Reg. Sess. (1884–1895).

152. *Jeff Davis and the South: The Colored Kentuckians Plead for Justice*, N.Y. FREEMAN, May 8, 1886, at 1; *The Mississippi Cut-Throats: A Civil Rights Bill*, N.Y. FREEMAN, Mar. 27, 1886, at 1; *Blanton Duncan Crazy: A Talk with His Colored Daughter*, N.Y. FREEMAN, Feb. 27, 1886, at 4.

153. *Laughed Down: The Civil Rights Bill in the Georgia Legislature Ridiculed to Death*, CHI. DAILY TRIB., Oct. 13, 1885, at 2.

154. *Negro Social Rights: How the Southern Press View the Supreme Court Decision*, CHI. DAILY TRIB., Oct. 27, 1883, at 12.

155. H. JOURNAL, 33rd Reg. Sess. 573, 1102–03 (Mich. 1885); S. JOURNAL, 33rd Reg. Sess. 1059 (Mich. 1885); Act of May 28, 1885, No. 130, 1885 Mich. Pub. Acts 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, Mar. 11, 1885, at 8.

Black popular constitutionalist movement as both a policy entrepreneur and as an interest group lobby.[156]

1. Ohio: A Case Study

The first legislature to press forward in advancing Black rights was the pivotal state of Ohio—now under the control of a resurgent Democratic Party, at least at the gubernatorial level. Urged on by an extremely well-organized lobby of Black-led civil rights groups, Republican legislators moved quickly to pass a bill proposed by William Mathews.[157] As Republican George Washburn told a Democratic member on the floor during debate, with 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 . . . ."[158]

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.[159] 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.[160]

Although his pedigree gave him unmatched credibility on the issue, Hoadly 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

---

156. Jack Walker, *The Diffusion of Innovations Among the States*, 63 AM. POL. SCI. REV. 880 (1969).

157. Weaver, *supra* note 11, at 375. *Colored Leagues Forming in Ohio: Widespread Political Organization to Secure Civil Rights*, N.Y. TRIB., Feb. 26, 1884, at 1.

158. *Speech of Hon. George Washburn*, ELYRIA REPUBLICAN, Jan. 31, 1884, at 4.

159. *Making Another Move*, CLEVELAND PLAIN DEALER, Oct. 18, 1883, at 1; *Governor Foster's Message: His Fourth and Last Effort*, MIAMI HELMET, Jan. 10, 1884, at 1; *A Friend's Advice to the Democrats*, EVANSVILLE COURIER (Ind.), Oct. 19, *reprinted in* N.Y. TIMES, Oct. 28, 1883, at 6; *The States and Civil Rights*, N.Y. TRIB., Oct. 20, 1883, at 4; *The Civil Rights Decision*, SUMMIT CNTY. BEACON (Akron, Ohio), Oct. 24, 1883, at 4. The *Bee*, a paper with a predominantly Black readership, challenged that if "Democratic leaders of this county [sic] are tired, as they claim to be, of the butchery of the colored people in the South the best way to show it is [to first] stop it and [second] adopt in every Democratic state a comprehensive and manly [c]ivil [r]ights [b]ill." THE BEE (D.C.), Dec. 8, 1883, at 2. Even Kentucky Democrats were urged to pass legislation to fulfill party pledges. *Blanton Duncan Crazy*, *supra* note 152, at 4.

160. 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 DAILY REG. (Ill.), Dec. 8, 1883, at 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, *supra* note 11, at 82–93, 104.

had decisively rejected the theories about the "superior sovereignty of the states" that could block enumerated powers in the Constitution.[161] Nonetheless, he insisted, every power not enumerated within the text remained both a state right and, in the case of individual rights not guaranteed by the federal text, a state obligation. That was true even if the "habitual use of and submission to war powers ha[d] left the minds of many good citizens in apt condition to forget even until now that the Constitution likewise reserves all non-delegated powers 'to the states respectively, or to the people.'"[162] The error of the Civil Rights Act, he continued, was that it "adopted for the Federal Government the power of police within the states."[163] That was why "the duty of protection against inequality and discrimination on account of color [wa]s thus devolved to the states."[164] 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 some Republicans in advancing the passage of their own, much narrower bill rather than the Republicans' more comprehensive alternative.[165]

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.[166] In response, the House narrowly modified the bill to more closely 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.[167] With that, the bill, widely described as "the same as the one declared unconstitutional by the . . . Supreme Court," passed. This development was then widely noted throughout the country.[168] The Equal Rights Association still protested

---

161. *Inaugural Address*, NEWARK DAILY ADVOC. (Ohio), Jan. 15, 1884, at 2.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Ohio Democrats and Civil Rights*, D.C. EVENING STAR, Jan. 23, 1884, at 1; *Hoadly's Inaugural Address: How Is it Regarded by Ohio Congressmen*?, WHEELING REG., Jan. 26, 1884, at 1; *A Civil Rights Bill: Stirs Up Political Animosities in the House*, CLEVELAND GAZETTE, Jan. 12, 1884, at 2; *Routing a Reporter . . . Lively Session of the Democratic Caucus at Columbus*, CINCINNATI COM. TRIB., Jan. 31, 1884, at 2.

166. *To the Colored Voters of Ohio*, CLEVELAND GAZETTE, Mar. 8, 1884, at 3. "*Civil Rights" in Ohio: A Democratic Law Which Discriminates Against the Negro*, CHI. DAILY TRIB., Feb. 28, 1884, at 1.

167. *See* Weaver, *supra* note 11, at 375; *Senator Crowell*, COSHOCTON DAILY AGE, Feb. 16, 1884, at 2; S. JOURNAL, 66th Sess. 100 (Ohio 1884); H. JOURNAL, 66th Sess. 156–57 (Ohio 1884). For criticism from the Governor and the civil rights activists, see *Ohio Colored Men*, GOSHEN DAILY NEWS, Feb. 28, 1884, at 1; *Miscellaneous Notes*, CEDAR RAPIDS EVENING GAZETTE, Feb. 29, 1884, at 5; *The Civil Rights Bill Repudiated*, LIMA DAILY REPUBLICAN (Ohio), Feb. 29, 1884, at 1.

168. *State Affairs: The Ohio Senate Passes a Democratic Bill to Redistrict the State—The Probable Results*, CHI. DAILY TRIB. Feb. 6, 1884, at 3; *The State Capital: Passage of the Civil Rights Bill*, CLEVELAND GAZETTE, Feb. 9, 1884, at 1; *Ohio Legislature*, BURLINGTON HAWKEYE, Feb. 6, 1884, at 5; *Editorial Notes*, RENO EVENING GAZETTE, Feb. 6, 1884, at 1; Editorial, NEV. STATE J., Feb. 10, 1884, at 3.

that the final version was too weak.[169] (This was not, however, the final word. Thanks to the influence wielded by Black voters, a subsequent legislature would revise the compromise bill that Hoadly signed, almost fully restoring it to the earlier, stronger proposed version.[170])

The early weeks of the Ohio legislature proved a hotbed of proposals to help restore civil rights protections more broadly.[171] In addition to the bill that passed (and a slew of rival civil rights proposals), the legislature debated a resolution (S.J.R.16) calling for an amendment to the Constitution to overcome the result of the *CRC*.[172] The language of the proposed amendment resolution was cagey and understated in its negative assessment of Justice 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 of the 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." [173] In a rare bit of anti-Court commentary designed to also advance partisan ends, Democrats modified the resolution (S.J.R. 16) to condemn the Supreme Court "for its late cowardly decision in depriving colored men of their civil rights."[174]

The *Plain Dealer* crowed that "[t]he colored voters of Ohio are not likely to forget that the first civil rights bill in any state has been enacted by the Democratic legislature of Ohio in the face of the bitter opposition of the Republicans."[175] 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 Black Americans' 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 resolution calling for a federal amendment, though its editors understandably declined to clarify the party breakdown to their readers.[176])

Although the amendment resolution vote failed, Ohioans would continue to oppose efforts by Southerners to restore white supremacy—and to attempt to compete for Black voters in the crucial, closely divided swing state. Hoadly

---

169. DAVID A. GERBER, BLACK OHIO AND THE COLOR LINE, 1860–1915, 236, 331–32 (1976).

170. *Id.*

171. *Ohio Legislature: Bills Introduced to Obliterate the Color-Line—A Scene in the House*, CHI. DAILY TRIB., Mar. 9, 1884, at 9.

172. *See e.g.*, additional bills S. 1, H.R. 4, 6, and 49 from the 66th legislative session (Ohio 1884).

173. S. 16, 66th Sess., at 66 (Ohio 1884).

174. S. 154, 66th Sess., at 334 (Ohio 1884); H.R. 154, 66th Sess., at 631 (Ohio 1884); S.J.R. 16, 66th Sess. (Ohio 1884); GROSSMAN, *supra* note 11, at 86.

175. Editorial, CLEVELAND PLAIN DEALER, Feb. 7, 1884, at 2; *Going to Celebrate*, CLEVELAND PLAIN DEALER, Feb. 8, 1884, at 1.

176. Editorial, NEWARK DAILY ADVOC., Feb. 6, 1884, at 2. *Legislative Summary*, NEWARK DAILY ADVOC., Jan. 25, 1884, at 2.

continued to press for color-blind, inclusive legislation.[177] 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 'n[*****]' vote."[178]

Hoadly and other Democrats worked zealously to translate these civil rights efforts into electoral success in 1885.[179] Hoadly explained that during their term in office, his party had protected Black rights, whereas the Republicans and their Supreme Court had not:

> [They] 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.[180]

They did not, as Republicans successfully argued that, racial liberal though *he* was, Hoadly's party remained committed to white supremacy in the South.[181] Ohio Senator John Sherman and Representative (and future president) William McKinley proved particularly aggressive and effective, invoking the memory of Civil War dead on Foraker's behalf on the campaign trail.[182] (Through pressure on Republicans, especially Foraker—who believed Black voters were pivotal—Ohio's Black voters achieved significant civil rights successes over the next decade, including a lynch law and the strengthening of Hoadly's bill.)[183]

2. Black Popular Constitutionalism in Other States

Connecticut's Black community partially drafted and heavily lobbied for its civil rights bill. Connecticut Democrats had long cultivated the Black vote; a Democrat cheerfully introduced the legislation, and it passed the state legislature without difficulty. Democratic Governor Thomas Waller signed the bill in 1884. The ease of passage suggests how eager both parties were to remain in the good graces of Black voters, who were emerging as a key swing bloc. Connecticut legislators

---

177. Editorial, CLEVELAND GAZETTE, Jan. 17, 1885, at 1.

178. *The Civil Rights Bill a Bait*, CLEVELAND GAZETTE, Feb. 9, 1884, at 2.

179. *Gov. Hoadly's First Speech: Denouncing Sectionalism and the Bloody Shirt*, THE SUN (Balt.), Sept. 7, 1885, at (supp.) 1. 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, Jan. 10, 1884, at 5.

180. GROSSMAN, *supra* note 11, at 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 Black voters in line while doing nothing to actually improve their lot. *The Civil Rights Discussion*, DETROIT FREE PRESS, Oct. 18, 1883, at 4.

181. GROSSMAN, *supra* note 11, at 91.

182. Hirshon, *supra* note 83, at 163.

183. GERBER, *supra* note 16, at 229–36, 331–32. Foraker would go onto the Senate, where he would champion the cause of Black soldiers dishonorably discharged by Roosevelt after the 1906 Brownsville Affair, setting in motion the end of his career at the hands of a vindictive Roosevelt. *See generally* James A. Tinsley, *Roosevelt, Foraker, and the Brownsville Affray*, 41 J. NEGRO HIST. 43 (1956); JOHN D. WEAVER, THE SENATOR AND THE SHARECROPPER'S SON: EXONERATION OF THE BROWNSVILLE SOLDIERS (1997).

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 citizens since 1865."[184]

Black political power was again on display the following year when many legislatures met for the first time since the Court's decision. That year, seven other states passed public accommodations bills. In Rhode Island, George Downing—a Black Democrat—convinced Democrats to pass an even stronger civil rights bill than the one offered by Republicans. Downing was then able to boast that his state's Democrats were more egalitarian than members of its GOP.[185]

In Indiana, Representative James Matthew Townsend, the second Black man 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 component, likely in order to avoid the more radical alternatives. Only five rural Democrats opposed the bill.[186]

Other Midwestern states passed public accommodations laws, though dissent was more than nominal.[187] In Illinois, Representative John W.E. Thomas, the first Black member of the Illinois legislature (in which he had served off and on

---

184. H.R.J. Res. 202, Jan. Sess., at 752 (Conn. 1884); H.R.J. Res. 202, *in* S., Jan. Sess., at 698 (Conn. 1884); GROSSMAN, *supra* note 11, at 77; Leslie H. Fishel, Jr., *The Genesis of the First Wisconsin Civil Rights Act*, 49 WIS. MAG. HIST. 324, 326 (1966); *Insisting on Their Rights: The Colored Citizens' Convention of the State of Connecticut*, N.Y. TIMES, Dec. 31, 1883, at 2; Editorial, HUNTSVILLE GAZETTE, Apr. 5, 1884, at 2; H.R. 206, Jan. Sess., at 260, 649 (Conn. 1884). The bill's Democratic sponsor compared his bill to the federal equivalent. *Civil Rights in Connecticut*, CHI. DAILY TRIB., Mar. 26, 1884, at 7.

185. GROSSMAN, *supra* note 11, at 80. No Rhode Island journals existed in the 1880s, but the text of the bill is found in 1885 R.I. Acts & Resolves 171.

186. Editorial, ROCHESTER TRIB., Jan. 30, 1885, at 1; *The Legislature*, CROWN POINT REG., Feb. 19, 1885, at 4; GOSHEN TIMES, Feb. 19, 1885, at 2. Derek Hickerson, *The Relics of a Barbarous Age: James Matthew Townsend and Indiana's Black Laws*, 21 TRACES IND. & MIDWESTERN HIST. 36, 36–40 (2009); S. 43, 54th Sess., at 265–68 (Ind. 1885); H. JOURNAL, 54th Sess., at 1119 (Ind. 1885); GROSSMAN, *supra* note 11, at 97. In addition, 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. That several state federal relations committees considered the bills indicated the tight nexus between their actions and the Supreme Court. *See* S. 161, 5th Sess., at 1233, 1407–08 (Colo. 1885); S. 161, *in* H.R., 5th Sess., at 1933–34 (Colo. 1885); *State Legislature*, COLO. SPRINGS GAZETTE, Apr. 4, 1885, at 3.

187. Almost a quarter of Minnesota's senate dissented, along with a handful in the lower house. *See* S. 181, 24th Sess., at 331 (Minn. 1885); S. 181, *in* H.R., at 656–57 (Minn. 1885). Iowa, which passed legislation in 1884, had about one-third of each house not vote or abstain, but the journal and the nearly nonexistent newspaper coverage among the many local papers we searched suggest that passage was never strongly contested. H.R. 7, 20th Sess., at 338, 514 (Iowa 1884); S. 11, 20th Sess., at 443 (Iowa 1884); Act of Mar. 29, 1884, ch. 105, 1884 Iowa Acts 107–08.

since 1877), drafted and successfully shepherded a civil rights bill through the legislature. Thomas had to overcome significant opposition. There were mixed feelings about the necessity of a bill in Illinois. Interestingly, opponents often led with the argument that it was unnecessary since businesses were already quite solicitous of elite Black customers. Ultimately, thanks to Thomas's efforts, Lincoln's home state passed a civil rights bill anyway.[188]

The power of the Black political movement successfully divided Democrat opposition in Illinois. Many state Democrats recognized the power of Black voters and those voters' deep investment in this issue. 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.[189] This was not all ex-post position-taking. Almost certainly looking to build support in the Black community, a Democrat offered the most eloquent speech on its behalf.[190] A comment made on the floor by one unnamed Democrat captured the frustration in which his partisans found themselves, electorally trapped by the success of the Black constitutional populism movement: he and his colleagues went along, he grumbled, only "to take the sting out of it."[191]

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), and Wisconsin and Pennsylvania—and of these, only California and Pennsylvania had sizable populations of Black citizens (greater than 0.5%).[192]

Pennsylvania would pass a bill the following year with almost no debate or opposition; the Senate vote was unanimous, with three Democrat holdouts in the lower chamber.[193] The *Philadelphia Inquirer* observed, on May 4, 1887, that

---

188. *Must Be Accommodated*, CHI. DAILY TRIB., June 5, 1885, at 3; Editorial, KAN. CITY EVENING STAR, June 8, 1885, at 2.

189. DAVID A. JOENS, FROM SLAVE TO LEGISLATOR: JOHN W. E. THOMAS, ILLINOIS'S FIRST AFRICAN AMERICAN LAWMAKER 113–14 (2012); H.R. 45, 34th Sess., at 445 (Ill. 1885); H.R. 45, *in* S., 34th Sess., at 872 (Ill. 1885); *They Ratify: Colored Citizens Agree That the Civil-Rights Bill Is About the Proper Thing*, CHI. DAILY TRIB., June 19, 1885, at 8.

190. *From the Garden City: The Civil Rights Bill Passes the House*, CLEVELAND GAZETTE, Apr. 11, 1885, at 2. There had been some concern that the GOP would stall the bill for credit-taking, but this was likely just to ensure follow-through. *A Civil Rights Bill*, CLEVELAND GAZETTE, June 6, 1885, at 2.

191. An assessment shared by a disgusted Democratic observer in Missouri who chalked it up to "pure cowardice." *A Busy Day: Passage by the Senate of the Civil-Rights and Several Other Bills*, CHI. DAILY TRIB., June 5, 1885, at 3; Editorial, KAN. CITY EVENING STAR, June 8, 1885, at 2.

192. On the small Black populations of these states, see POPULATIONS, *supra* note 145, though Oregon's well-known anti-Black politics made passage there very unlikely.

193. 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*, PHILA. EVENING BULL., May 6, 1887, *reprinted in* N.Y. FREEMAN, May 21, 1887, at 1. Ira V. Brown, *Pennsylvania and the Rights of the Negro, 1865–1887*, 28 PENN. HIST. J. MID-ATL. STUD. 45, 56 (1961); H. JOURNAL, Reg. Sess. 1125 (Pa. 1887); S. JOURNAL, Reg. Sess. 1177 (Pa. 1887).

"[Pennsylvania's] act to provide civil rights for all the people, regardless of race or color, was passed finally," referring to successful passage by the State House of Representatives.[194] This would make one think that the bill had been percolating and a subject of intense debate, perhaps even for years.[195] Yet nothing could be further from the truth. Pennsylvania newspapers barely mentioned procedural advancement of the bill in the preceding weeks, beyond noting that it cleared first reading, second reading, and final passage; no mention of any such bill in the previous years is apparent from a search of newspaper records.[196] *The Harrisburg Independent* observed that this would create a new state remedy to "give equal rights before the law to all" outside of federal courts.[197] A few papers paraphrased three brief lines of floor debate: sponsor Schneider observing the bill was necessary considering the Supreme Court decision; Representative Criswell agreeing that it was to "put in force in this state the general bill on the subject" (presumably "general" meaning federal); and Representative Hasset pronouncing the bill was "for buncomb."[198]

Why it took until 1887 for Pennsylvania to not just pass but even seriously debate such legislation is hard to understand. Two percent (107,596) of its

---

194. *Real Women's Rights*, PHILA. INQUIRER, May 4, 1887, at 7. Other newspapers reprinted the short wire report of the event. *See, e.g.*, WILKES-BARRE TIMES LEADER, May 4, 1887, at 4; YORK DAILY, May 4, 1887, at 4; READING TIMES, May 4, 1887, at 1. The *Canonsburg Notes* gave a slightly longer write up. *Doings at Harrisburg*, CANONSBURG NOTES, May 5, 1887, at 1.

195. One newspaper remarked, *after passage*, that a Republican newspaper had conceded that Black people in Pennsylvania had no better luck with hotels than they did in South Carolina, *Law for the Colored Man*, PITTSBURGH DAILY POST, May 20, 1887, at 4. Another criticized a discriminatory Bethlehem hotel. HARRISBURG TEL., May 17, 1887, at 2. Newspapers also reported several incidents of a skating rink discriminating against Black patrons in Reading in 1884 and in Bethlehem in 1885. *Not Allowed to Skate*, WILKES BARRE REC., Mar. 27, 1885, at 2; *The Color Line in the Rink*, PHILA. TIMES, Mar. 26, 1885, at 2. The first piece argued that this suit would be filed under the Fifteenth Amendment; the latter described it as "the first case under the civil rights act ever instituted in this city," but it is unclear to what act it was referring—presumably the federal one. *The Color Line in the Rink, supra.* An account of the Reading incident similarly said it would "test their rights in the courts under the civil rights bill." *A Civil Rights Breeze in Reading*, PHILA. TIMES, Nov. 27, 1884, at 1.

196. A search of the Newspapers.com deluxe search engine for "civil rights" turns up hundreds of articles in 1884–1886, but nothing related to consideration of any Pennsylvania bill. In the first seven months of 1887, one sees discussion of procedural updates, but literally one line, usually a wire-style report duplicated in multiple papers. *See e.g.*, *A Question of Revenue*, PITTSBURGH DAILY POST, Apr. 28, 1887, at 1 (noting the bill cleared second reading); *Rutan's Commerce Bill*, PITTSBURGH DAILY POST, Apr. 29, 1887, at 1 (noting that it was amended); *High License*, WILKES-BARRE REC., May 12, 1887, at 1 (noting the bill cleared a Senate committee after the House); *Out of the Woods*, PITTSBURGH DAILY POST, May 17, 1887, at 4 (noting the bill cleared senate second reading); *Pennsylvania Legislature*, YORK DISPATCH, May 18, 1887, at 1 (noting the bill passed the Senate); *Signing Bills*, HARRISBURG TEL., May 24, 1887, at 1 (noting Governor Beaver signed the bill); *The Governor Hard at Work*, WILKES-BARRE REC., May 25, 1887, at 1 (also noting that Governor Beaver signed the bill); *Bills Signed*, PHILA. INQUIRER, May 25, 1887, at 7.

197. Editorial, HARRISBURG INDEP., May 4, 1887, at 1.

198. *In Favor of the Divorce Bill*, PITTSBURGH DAILY POST, Apr. 26, 1887, at 6; *The State's Law Makers*, CARLISLE SENTINEL, Apr. 26, 1887, at 2.

population was Black, which was significantly larger—both as a percentage and as an absolute number—than most other northern states, and Pennsylvanians in Congress had been sharp critics of Justice Bradley's opinion.[199] And almost immediately after passage, the law was tested by Warren Jackson, a messenger in the state treasury who refused a sale of ice cream.[200] Thus, the seemingly inexplicable delay is curious; historian Ira Brown could not find an explanation for the lag, and nor have we.[201] (The explanation that the turnover of the governorship from Democrat Robert Pattison to Union officer and Republican James Beaver was responsible is unpersuasive, for example.) However, consistent with the idea that Black policy entrepreneurs were often vital to the success of state civil rights bills, one *possible* explanation for the slow emergence of such legislation in otherwise friendly Pennsylvania is that the State did not have a Black member of the legislature.[202]

Unfortunately, as the *CRC* receded in the public consciousness, progress slowed. Wisconsin would not pass civil rights legislation until 1894.[203] Progress

---

199. *The Civil Rights Decision: Representative Brown's Opinion of It—His Letter to Justice Harlan*, WELLSBORO AGITATOR (Penn.), Jan. 1, 1884, at 2.

200. *The Color Line at Harrisburg*, LANCASTER DAILY NEW ERA, June 18, 1887, at 1; *The Deck Cleared: Testing the Civil Rights Act*, SCRANTON TRIB., June 18, 1887, at 1.

201. *See generally* Brown, *supra* note 193.

202. *Doings of the Race*, CLEVELAND GAZETTE, July 3, 1886, at 1 (reprinting an article from the *Philadelphia Sentinel*). Party politics offers a superficial explanation, but one that fails under scrutiny. In the 1886 elections, Republicans had recaptured the governorship and secured a veto-proof senate majority, and thus party turnover offers a superficially appealing explanation. However, such an answer fails when we remember the behavior of both every other mid-Atlantic state legislature in 1885 *and* the Pennsylvania legislature's action in the subsequent session. Although Democrat Robert Pattison reigned as Governor in 1885, the Republicans had a veto-proof majority in the House and close to one in the Senate. Even with the almost impossible expectation that both Pattison and *all* Democrats in the legislature opposed the bill and could have theoretically sustained a veto blocking its passage, it is difficult to believe that Republicans would not have seized a chance to see a bill go down and attack the civil rights record of the only Democratic governor the state elected between 1860 and 1934. As is evident from the behavior of other Northern Democrats in this study, such an assumption of uniform Democratic hostility is completely ahistorical; if anything, we should have expected to see them offer such a bill to appeal to the large Black electorate as well. That civil rights went from never even considered in 1885, despite Pennsylvania's electorate producing the strongest incentives to do so, to (as we would expect) bipartisan, almost completely unanimous, and non-controversial, remains baffling. Party breakdown of the 1885 legislature (141R–60D and 31R–19D), SMULL'S LEGISLATIVE HAND BOOK & MANUAL OF THE STATE OF PENNSYLVANIA 844, 855 (1885); and the 1887 legislature (134R–66D–1G, 34R–16D), SMULL'S LEGISLATIVE HAND BOOK & MANUAL OF THE STATE OF PENNSYLVANIA 651, 662 (1887).

203. Well-covered incidents of discrimination in Wisconsin in 1889 prompted action in the Badger State. The most notable incident was the high-profile case of *Howell v. Litt*—in which the Democratic judge Daniel Johnson used common-law protections 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 exclusion. However, with the Democrats in control of the state legislature—and with the memory of the *Civil Rights Cases*

similarly stalled in the West. The mass admission of new states to the Union during the last two decades of the nineteenth century did not 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 in this era.[204]

Moreover, the promise of robust federal enforcement of civil rights against affirmative state encroachment did not survive the century. Over a stirring, solo jeremiad from Justice Harlan, the Supreme Court sided with Louisiana in the infamous *Plessy v. Ferguson*.[205] Showing how far the nation had moved in the 13 years since the *Civil Rights Cases*, Louisiana defeated a legal challenge not only for *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, Henry Dibble, 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.[206] In the wake of *Plessy*, other states

---

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. *See What Is Going on in Milwaukee: Convention of Colored Citizens to Secure Civil Rights*, CHI. TRIB., Nov. 27, 1889, at 9; Fishel, Jr., *supra* note 184, at 332.

204. The Dakotas (split from a single territory after failed joint admission efforts in the mid-1880s), Montana, Idaho, Wyoming, and Utah were the others. None of the final three contiguous states—Oklahoma, New Mexico, or Arizona—admitted after 1896 enacted public accommodations laws on statehood.

205. *See* Plessy v. Ferguson, 163 U.S. 537, 550–51 (1896); LOFGREN, *supra* note 11.

206. Henry Dibble had served as the right-hand man and legal advisor to Louisiana's Reconstruction Governor Henry Warmoth, before Dibble had fled west—after a brief stint in Arizona—upon the state's re-capture by Southern white supremacists. 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. Charles McClain, *California Carpetbagger: The Career of Henry Dibble*, 28 QUINNIPIAC L. REV. 885, 954–55 (2010). *See also Dibble's Civil Rights Bill*, REC. UNION (Cal.), Jan. 20, 1897, at 7. California's was conspicuously the only public accommodations bill which did not include public conveyances, which it would not for another 20 years. Weaver, *supra* note 11, at 373; 1919 Cal. Stat. 309. Considering the sphere in which *Plessy* approved segregation was public transportation, this seems a surprising omission—until one remembers the Southern Pacific Railroad's strong influence over California politics before Hiram Johnson's revolution in 1910. Railroads ferociously opposed state laws both blocking and imposing segregation, and there is no reason to presume the comparatively more powerful Southern Pacific, which had the power to block such legislation, would not have pressed against it. I have been unable to procure legislative history confirming this specific case, but it would follow from the industry's behavior in fighting both Plessy v. Ferguson, 163 U.S. 537 (1896) (on equal protection grounds) and Hall v. DeCuir, 95 U.S. 485 (1877) (using negative Commerce Clause arguments to overturn a Reconstruction era anti-discrimination law). BARBARA YOUNG WELKE, RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865–1920, at 345–47 (2001). Thus Dibble, and his counterparts considering the 1893 bill, could choose between a partial law (and protest against *Plessy*) or none at all. California had passed a public accommodations law in 1893, but its impotence left it almost

strengthened their fines and enforcement of the civil rights bills they had passed in the 1880s, but no other state would add a public accommodations law until Oregon in 1953.

III. THE FAILURE OF THE FEDERAL GOVERNMENT TO UPHOLD ITS END OF THE BARGAIN

Recall that the constitutional balance promoted by a post-war bipartisan consensus and endorsed by the Court envisioned a two-step protection of civil rights. First, Black voters would be able to mobilize to defend their rights at the state level. To make such mobilization possible, the Fifteenth Amendment weakened the federalism guardrails around congressional power in the voting rights domain. In effect, Congress could override state efforts to deny Black political power through the voting booth. Second, if states proactively violated civil rights or systematically countenanced such violations by others, the federal government could then provide a backstop. As we have seen, Black voters and politicians did their part. They mobilized at the state level to press legislators to pass civil rights legislation. But the federal government failed to uphold its part of the bargain.

Problems with the federal government's part of the program were apparent from the start. The desire to implement the Fourteenth Amendment by creating a supportive electorate, such as by disenfranchising Confederates, soon proved inadequate, especially after Andrew Johnson's own effort to build a conservative Democratic Party by undermining the disenfranchising oaths and reinflating the Southern white electorate with liberal pardons.[207] Republicans then moved to reinforce the Fourteenth Amendment and equal citizenship with the Fifteenth Amendment and its guarantee of color-blind suffrage.

Although the Fifteenth Amendment did not, strictly speaking, establish a federal right to vote, it did deny the abridgment of voting on racial grounds. As key Reconstruction Republican Jacob Howard explained, once the states temporarily out of the Union (because of the Civil War) were readmitted, they would reclaim control over suffrage, which is why a Fifteenth Amendment modifying that constitutional rule was necessary.[208] That Congress would implement this change by amendment also confirmed that it was an exception that proved the rule of otherwise presumptively locating power within the states. As self-proclaimed states' rights prohibitionists would later assert in defending the Eighteenth Amendment against

---

immediately forgotten. Most treatments, both at the time and today, use 1897 as the year in which the State had a functioning public accommodations law. S. 438, 30th Sess., at 1137 (Cal. 1893); 1893 Cal. Stat. 220. For Dibble's bill, see S. 225, 32d Sess., at 712–13 (Cal. 1897); Assembly 4, 32d Sess., at 455 (Cal. 1897); 1897 Cal. Stat. 137.

207. On Republicans' focus on political enforcement of Reconstruction, see Mark A. Graber, *The Second Freedmen's Bureau Bill's Constitution*, 94 TEX. L. REV. 1361 (2016). On Johnson's defeat of efforts to enforce Reconstruction via a loyal electorate, culminating in his Christmas 1868 Proclamation 179 issuing a full pardon, see VALELLY, *supra* note 34, at 25–26.

208. Cong. Globe, 40th Cong., 3d Sess. 987 (1869).

charges of undermining federalism, a textual amendment thus vindicated states' rights and a strict construction of the Constitution rather than undermined them.[209]

Such a system was theoretically coherent, if optimistic, as it was predicated on a national consensus to ensure implementation. But there was indeed reason to think it possible. Throughout the 1870s, the Ku Klux Klan and other Southern paramilitaries had waged a vicious effort to intimidate Republicans, both Black and white, from voting—and lost. Congress, the military, and President Grant fought back with various efforts, most notably the "Ku Klux Klan Act." The latter's efforts were relatively successful; the first Klan collapsed and, as Reconstruction ended, Black turnout in the South was largely comparable to white turnout in the North, even after the ostensible withdrawal of military forces. Thus, at least for a while, the experiment appeared viable, and Black and white turnout would remain comparable until the mid-1880s, experiencing a slow decline from then until 1900, at which point it dropped precipitously.[210]

Neither random chance nor violence can account for that drop: it was the product of Southern legislators' decisions to implement poll taxes, literacy tests, and other mechanisms of electoral exclusion, ostensibly consistent with, but functionally hostile to, the Fifteenth Amendment.[211] In this case, partisan and regional considerations overlapped in such a way as to encourage Southern Democrats to press back as hard as necessary to block the aims of Reconstruction and defeat the Fifteenth Amendment.[212]

At the 1885 meeting of the New York Republican Convention, Senator Warner Miller condemned the "disloyalty to the government [that] deliberately resist[ed] and endeavor[ed] to defeat [the] Constitution and its laws." This was, he warned his followers, "exactly what the great majority of Democrats in the Southern States were doing . . . [t]o resist and defeat the Government of the United States . . . [by] depriv[ing] that vital portion of the Constitution of all effect" in order to secure "political power to which the Constitution and the laws gives them no right."[213] Miller's speech was clearly designed to rally the troops, but the coming decades would validate his central claim of Southern obstruction of the Fifteenth Amendment (without suffering the reduced suffrage consequences of the Fourteenth, to which Miller was alluding).

---

209. BEIENBURG, PROHIBITION, *supra* note 23, at 29–40.

210. Georgia, which had instituted a poll tax, and Mississippi, the site of particularly concentrated violence, were the only states in which a majority of eligible Black voters did not participate in 1880. KOUSSER, THE SHAPING, *supra* note 131, at 12–15.

211. *Id.*

212. For the canonical treatments of the Fifteenth Amendment and Black suffrage, see KOUSSER, THE SHAPING, *supra* note 131. *See also* VALELLY, *supra* note 34; ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 88–93 (Basic Books rev. ed. 2009). On the efforts to use state constitutional conventions to build a Jim Crow South, see PAUL E. HERRON, FRAMING THE SOLID SOUTH: THE STATE CONSTITUTIONAL CONVENTIONS OF SECESSION, RECONSTRUCTION, AND REDEMPTION, 1860–1902 (2017).

213. *Senator Miller on the Southern Question*, N.Y. TRIB., Sept. 25, 1885, at 4.

Complicating the issue on the federal side of the bargain was the Republican Party's loss of power at the national level. Republicans did not regain control of the federal government until after the 1888 elections. When it regained control, it faced two problems related to the bargain. First, opposition to voting reforms had continued to thwart Republican efforts to remake the Southern electorate by guaranteeing voting rights for Black Americans. Second, as the voting problem drastically worsened and Southerners moved to implement Jim Crow in the latter half of the 1880s, the Republicans would have had to spend a great deal of political capital to respond to state violations of civil rights in the South. In essence, the federal government had, by 1888, already failed to provide either the voting protections or the federal backstop for civil rights.

Nonetheless, Republicans did not abandon the plan. They retook the government in the 1888 elections with the victory of the Ohio-born, Indiana Republican and former Civil War general Benjamin Harrison as President. The Party's 1888 platform aimed directly at Southern voter suppression:

> We hold the free and honest popular ballot and the just and equal representation of all the people to be the foundation of our Republican government and demand effective legislation to secure the integrity and purity of elections, which are the fountains of all public authority. We charge that the present Administration and the Democratic majority in Congress owe their existence to the suppression of the ballot by a criminal nullification of the Constitution and laws of the United States.[214]

With this as their announced aim and with unified control of the government, they undertook one last effort to protect Black voting power in the South: The Lodge Elections Bill.

The bill, drawn up by Massachusetts Representative Henry Cabot Lodge, would have instituted aggressive federal oversight of elections, using a combination of powers derived from Article I, Section 4 and the Fifteenth Amendment while carefully tailoring the bill to respect state autonomy.[215] As with the Amendment itself, successful implementation of the Lodge Bill could have accomplished Republicans' long-standing efforts to enfranchise Black Southern voters—fulfilling, as a matter of justice, their beliefs in self-government (both as individuals and as local governments) and the protection of rights, while also entrenching a Southern Republican Party.

Instead, in one of the most underappreciated moments of political tragedy in American political history, the Lodge Bill became the first bill to fall to a filibuster despite having presidential support, clearing the House, and having an obvious majority of senatorial support.[216] Though the national Democratic Party, and indeed many of its component state parts in the North, bore no particular animosity to Black

---

214. *Republican Party Platform of 1888*, AM. PRESIDENCY PROJECT, June 19, 1888, https://www.presidency.ucsb.edu/documents/republican-party-platform-1888 [https://perma.cc/98Q5-7LKB].

215. *See generally* Lodge, *supra* note 33.

216. VALELLY, *supra* note 34, at 121; SARAH A. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE 129–35 (1997).

persons, and indeed in some cases had worked to protect state-level public accommodations access, they had strong partisan reasons to be hostile to efforts to interfere with Southern suffrage.[217]

While maintaining unity among themselves, canny Democrats divided the Republican Party, splitting its northern and western branches. In exchange for Democratic support for a silver coinage act, particularly helpful to the economies of Colorado and Nevada, a handful of western Republican senators peeled away from their Yankee companions—just enough to maintain the filibuster and block the Bill.[218] The threat of the Lodge Bill had triggered the prospect of state protests, but few actually occurred. Instead, most governors and legislators took a wait-and-see approach, suspecting—correctly—that Congress would lose its nerve (or, in the case of Silver Republicans, their souls) and block the Lodge Bill.

Gubernatorial statements and legislative resolutions thus took an even-tempered tone, but one warning of consequences if the Bill passed. Mississippi's Governor John Marshall Stone modeled this measured approach. Although the government was "now in the hands of a party whose expressions [were] inimical to our interests and whose leaders [were] continually menacing us with unfriendly legislation," Stone hoped and expected that disinterest among Northern voters would prevent "measures already prepared for sectional purposes of oppression."[219] In discussing Tennessee's recent disenfranchising changes to secure an "intelligent popular will" via a poll tax, its outgoing governor, Democrat Robert Taylor, similarly urged his successors to ensure the fair and impartial improvement and enforcement of the state's voting laws. He explained this would "fore[stall] any reason for federal interference," thereby "stoutly maintaining the sole right of the state to control this, its own affair." The alternative, though one he suspected the American voters would ultimately not support, was an electoral reform understood as a "conflict . . . impending between Federal and State . . . which . . . if persisted in, threaten[ed] the stability of the republic."[220] Texas Democrats unsurprisingly adopted a similar resolution, though three weeks later reprinted Texas Congressman William Harrison Martin's celebratory telegram to Governor Hogg: "rejoice with us in the defeat of the Force Bill," which the legislative journal reported, "was [met]

---

217. 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—especially in the electoral sphere. Southern Bourbons, comparatively enlightened—or more accurately, indifferent—on racial matters than many other Southern Democrats, reacted with terror to this threat to their political dominance. Their fellow partisans in the North, realizing that winning Democratic coalitions at the national level depended on holding the South and peeling off a couple swing states (e.g., New York), joined the opposition. KOUSSER, THE SHAPING, *supra* note 131, at 135–76; C. VANN WOODWARD, THE BURDEN OF SOUTHERN HISTORY 97 (1st ed. 1960).

218. Hirshon, *supra* note 83, at 200–32; Daniel Wallace Crofts, *The Blair Bill and the Elections Bill: The Congressional Aftermath to Reconstruction* 337–38 (1968) (Ph.D. dissertation, Yale University) (ProQuest).

219. John M. Stone, *Inaugural Address*, Jan. 13, 1890, *in* S. JOURNAL, Reg. Sess., at 67 (Miss. 1890).

220. Robert L. Taylor, *Governor's Message*, Jan. 12, 1891, *in* S. JOURNAL, 47th Sess. 23 (Tenn. 1891).

by loud and repeated cheering."[221] Other Southerners could not share that enthusiasm: a governor of Alabama blamed his state's poor economy on the Republican takeover—not merely on their economic policies but on business uncertainty apparently derived from fear of the Lodge Bill and its effects on the Southern social and economic order.[222]

As expected, every Southern state Democratic platform condemned the Lodge Bill; their New England members tried to ignore the Bill, while the New York branch claimed the Bill's aim would be to regulate New York City.[223] Midwestern Democrats sounded similar themes. By a *three-to-one* margin, Nebraska's House voted to protest the "Force Bill" as "the boldest stroke of centralization and imperialism since the establishment of the republic . . . [and] a menace to our free institutions."[224] Wisconsin's Democratic legislators—the same that were bottling up the state's public accommodations law—instructed its representatives in Congress to oppose the Bill, which legislators in other midwestern states attempted to do.[225] Indiana's Democratic Governor Claude Matthews subsequently condemned the Lodge Bill along with other purported efforts to infringe the Tenth Amendment.[226]

The 1892 election seemed to validate Southern Democrats' optimism. The Democratic platform began with three paragraphs decrying the "Force Bill" as "the most infamous bill that ever crossed the threshold of the Senate" and "a revolution practically establishing monarchy on the ruins of the Republic."[227] This set the tone for what was, in the assessment of historian Stanley Hirshon, the "most explicitly racist national political campaign since 1868," one focused on the specter of the "Force Bill." Cleveland denounced the Lodge Bill as an "atrocious measure" offering a "direct attack upon the spirit and theory of our Government," while both Harrison and Lodge seemed to ignore the Bill in the campaign, and the GOP platform gave a formal but brief endorsement.[228] Even had the Lodge Bill passed, Democrats would very likely have repealed it as they had much of the rest of the federal election code in 1894, a political reality that caused a depressed George Hoar (the Bill's Senate sponsor) to abandon subsequent efforts to protect the rights of

---

221. H. JOURNAL, 22d Sess. 175 (Tex. 1891).

222. *Governor's Message*, Nov. 16, 1892, *in* S. JOURNAL 1892–1893 Reg. Sess., at 14–15 (Ala. 1892).

223. GROSSMAN, *supra* note 11, at 150–52.

224. H. JOURNAL, 22d Sess., at 347 (Neb. 1891); *see also* S. JOURNAL, 22d Sess., at 164 (Neb. 1891).

225. H.R.J. Res. 2, Extra Sess., at 110 (Wis. 1892); Ohio Democrats substituted a Republican resolution on behalf of the 1890 election bill for a tirade against it as partisan and a violation of rights of self-government. H. JOURNAL, 89th Sess., at 26, 52 (Ohio 1890). In 1891, Republicans killed a similar Democratic resolution on a voice vote. H. JOURNAL, 89th Sess., at 324 (Ohio 1891).

226. *Inaugural Address of Hon. Claude Matthews, Governor*, *in* S. JOURNAL, 58th Sess., at 56 (Ind. 1893).

227. *1892 Democratic Party Platform*, AM. PRESIDENCY PROJECT, June 21, 1892, http://www.presidency.ucsb.edu/ws/index.php?pid=29585 [https://perma.cc/T7SW-F233].

228. Hirshon argues such silence was seen as tacit consent to the Democratic charges of the bill's tyranny, Hirshon, *supra* note 83, at 239–43, while Calhoun sees it as Republicans' resignation that their Northern electorates believed that. CALHOUN, *supra* note 142, at 143.

Black voters in the South.[229] Leading newspapers bought into Southern claims that freedmen would be better treated if the federal government withdrew its supposedly polarizing threat; *The Nation* even cited the *CRC* in putting forward this logic to help justify its opposition to the Lodge Bill.[230]

Democratic victories and retirements meant that the core of the old-guard Republicans most committed to voting rights—Benjamin Harrison, John Sherman, James Blaine, George Edmunds, and others—were gone by 1892, and terror of the Lodge Bill convinced Democrats to move swiftly in repealing most Reconstruction-era voting laws. Even after Republicans swept back into power, their replacements were often much younger men more interested in business issues—especially after the 1896 election suggested a viable presidential strategy bringing together the votes of both the North and West could allow the GOP to totally write off the South.[231] Although many Republicans remained committed to protecting Southern voting in the abstract, political realities meant the Party turned its interest in national election supervision toward surveillance of Democratic machines in swing states. Supervising the polls in New York, New Jersey, Connecticut, California, and Ohio offered a higher electoral return—and at a lower cost.[232] New York politics may have been rough, but Tammany simply did not generate the violence of Tillman and his South Carolina ruffians—merely a higher electoral payoff.

With the defeat of the Lodge Bill and the Supreme Court unanimously accepting Mississippi's claim that its disenfranchising provisions were akin to the North's competence provisions rather than part of an effort to undermine the Fifteenth Amendment,[233] Southern disenfranchisement was secure. Valelly's account contains a disheartening litany of Republicans' newfound indifference to Black disenfranchisement in the decades after the failure of the Lodge Bill and the consolidation of the Fourth Party System. For example, in 1898 President McKinley, who had apparently strongly backed the Bill as a congressman, turned a blind eye to pleas from North Carolina Republicans for support against armed Democratic coups; his silence offered implicit acknowledgment that further disenfranchisement would go unchallenged. Theodore Roosevelt and Henry Cabot Lodge mused that while they theoretically supported a suffrage plank in the Party's platform, it should be left out on tactical grounds. William Howard Taft insisted the Fifteenth Amendment was good law and that Southerners remained faithful to its letter by disenfranchising unintelligent whites such that "the domination of an ignorant,

---

229. Hirshon, *supra* note 83, at 238–46; Crofts, *supra* note 215, at 351.

230. Crofts, *supra* note 215, at 354–55.

231. BRANDWEIN, *supra* note 28, at 142. After canvassing private correspondences, as well as the willingness of Republican party strategists to make race and not economics the litmus test for cross-party fusion in the south, Kousser argues that most Republicans remained genuinely committed to this project until the mid-1890s. KOUSSER, THE SHAPING, *supra* note 131, at 20–23. Cox, who credits Republican efforts on behalf of Black voters in the South to ideology rather than instrumental electoral politics, does ruthlessly condemn the Silverite turncoats as exceptions to a good faith GOP. COX, *supra* note 29, at 261.

232. *See generally* Scott C. James & Brian L. Lawson, *The Political Economy of Voting Rights Enforcement in America's Gilded Age: Electoral College Competition, Partisan Commitment, and the Federal Election Law*, 93 AM. POL. SCI. REV. 115 (1999).

233. Williams v. Mississippi, 170 U.S. 213, 220 (1898).

irresponsible electorate" of all races could be avoided.[234] And Southerners were bold about seeking to enact into law, via formal repeal of the Reconstruction Amendments, what they had already achieved in practice.[235]

*****

Critics of the *CRC* often overstate the likely effects of the Court's decision. The Court's decision, while bitterly remembered by Black Americans, did little to change their situation, as both the Civil Rights Act of 1875 and the few pre-existing Southern analogues had largely already become a "dead letter" due to underenforcement.[236] Immediately after the passage of the federal law, many Black Americans attempted to put it to work. Despite willing plaintiffs and a generous compensatory scheme for participating lawyers, prosecutions and suits dipped very sharply after a couple of years. A combination of popular resistance in the form of hostile juries and lukewarm implementation by many federal officials, especially

234. VALELLY, *supra* note 34, at 131–44. On McKinley's former support for the Lodge Bill, see KOUSSER, THE SHAPING, *supra* note 131, at 20–23. Even Hirshon, not inclined to accept the good faith of Republicans on civil rights, credited Lodge with being a true believer due to his family legacy of abolition and boyhood awe at the Civil War. Hirshon, *supra* note 83, at 200–05. Lodge would continue his drift away from his earlier idealism, perhaps becoming one of the "grandsons of abolitionists, ashamed of their fathers' faith in black men" who instead rushed to repudiate *democracy*. W.E.B. DU BOIS, BLACK RECONSTRUCTION: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLD PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880, at 152, 489 (1935). A doleful Lodge, by this point a senior statesman and boss of the Massachusetts Republican Party, would invoke his bitter defeat in enforcing the Fifteenth Amendment as grounds to avoid passing what he expected would be the similarly rejected prohibition amendment. *See* BEIENBURG, PROHIBITION, *supra* note 23, at 81–82. Taft's reversal is especially poignant considering his father Alphonso Taft, Grant's Attorney General, had aggressively enforced Article I, Section 4. BRANDWEIN, *supra* note 28, at 131–34. One particularly blunt example is a 1916 Theodore Roosevelt letter to Henry Cabot Lodge in which Roosevelt dismissed a new "force bill" overseeing Southern elections. Roosevelt explained that he was appalled by Southern apportionment being inflated by the disenfranchised Black population and that the Fifteenth Amendment was a failure that only made the Fourteenth Amendment's suffrage mechanism not work either. 8 THE LETTERS OF THEODORE ROOSEVELT: THE DAYS OF ARMAGEDDON, 1909–1919, at 1131 (Elting Elmore Morison ed., 1954).

235. For a list of Southern congressional proposals to kill the Fourteenth and Fifteenth amendments during this period, see MICHAEL ANGELO MUSMANNO, PROPOSED AMENDMENTS TO THE CONSTITUTION: A MONOGRAPH ON THE RESOLUTIONS INTRODUCED IN CONGRESS PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA 208–10 (1976).

236. *See, e.g.*, *A Colored Man's Rights: The Law of Equality Evaded and Virtually Ignored*, WASH. POST, Aug. 13, 1883, at 1; MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 49–50 (2004). Northern laws were inconsistent in their effectiveness; while searches of contemporary newspaper databases do turn up a fair number of actions, as Klarman notes, without an NAACP or a similar support structure to help fund challenges, and with often unsympathetic juries, the state laws often similarly went underenforced. On the importance of support structures, see CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 26–71 (1998).

judges skeptical of its constitutionality, had ground enforcement to a halt after a promising start.[237] State laws fared little better.[238]

Thus, it is unsurprising that, at the time of the ruling, Frederick Douglass had protested the decision's implications more than its effect, conceding the Act's ineffective implementation. For Douglass, the Civil Rights Act had encouraged a moral vision of civic equality, especially in the North.[239] Many feared that the Supreme Court, by striking down the Act, also struck down that moral vision and its robust rights claim with it.

In its place, the Court had backed a compromise that set aside federalism concerns in the voting context so that Black voters could protect their civil rights at the ballot box. Coupled with vigorous enforcement of the Fifteenth Amendment, such a constitutionalism of progressive federalism offered theoretical promise, as Black voters could use the ballots to force states to protect their rights, with congressional intervention as a backstop in cases of state failure (or "neglect"). States would use their police powers, perhaps competing with one another to advance rights.

This compromise failed, but the failure to secure access to public accommodations for Black Americans hardly belongs to the Court alone or even primarily. Dixie, still largely in the hands of the Bourbons, had initially assured Northerners that the Court's expectation of Southern protection of Black rights was well-founded. Such promises proved hollow, especially with the cultivation of a generation of much more white supremacist populists whose disenfranchisement of Southern Black voters suffused the region.[240] Moreover, in the final decade of the nineteenth century, Northern Democrats joined their Southern colleagues, unified by the linked objectives of party-building and thwarting Black suffrage, and managed to succeed in co-opting just enough Republican votes to defeat the Lodge Bill and prevent federal suffrage enforcement in 1890.[241] Split as Democrats might have been on state-level public accommodations law, they could work together in undermining Black voting rights. Thus, the response to the *Civil Rights Cases* instead served as another waypoint toward the development of the state-based Jim

---

237. John Hope Franklin, *Enforcement of the Civil Rights Act of 1875*, 6 PROLOGUE: THE JOURNAL OF THE NATIONAL ARCHIVES 225 (1974).

238. New York's act preceding the 1875 law proved ineffective. DAVIS, *supra* note 59, at 119. Minnesota and Wisconsin's penalties were small and thus ineffective deterrents. By way of contrast, Iowa's white jurors balked at what they saw as disproportionately punitive penalties from the state's tougher public accommodations law. As a result of such jury nullification, Iowa only achieved three successful prosecutions before the penalty structure was changed 1923. LESLIE A. SCHWALM, EMANCIPATION'S DIASPORA: RACE AND RECONSTRUCTION IN THE UPPER MIDWEST 207 (2009); *see also* Robert Edward Goostree, *Civil Rights in Iowa: The Statute and Its Enforcements* (Aug. 1950) (Ph.D. dissertation, University of Iowa) (ProQuest). On the mixed success of these state laws, see LOFGREN, *supra* note 11, at 19–20.

239. DOUGLASS, *supra* note 53, at 691–92. For a nearly identical retrospective opinion a few years later, see Letter to the Editor, *The Civil Rights Business: A Howl About Nothing—No Fears for the Colored People*, NEW HAVEN REG., Oct. 23, 1883, at 1.

240. KOUSSER, THE SHAPING, *supra* note 131.

241. VALELLY, *supra* note 34.

Crow South and, in so doing, established the authoritarian enclaves that came to structure the region's politics in the twentieth century.[242]

In the end, Congress failed to live up to its end of the bargain. While the Black popular constitutionalism movement did establish public accommodation access as a civil right, the apathy of the North, treachery of the West, and the hostility of the South meant the federal government failed to hold up its part of the deal. As a result, the promise of a federal civil rights backstop in general (and public accommodations access specifically) faltered along with the rest of the promises made to Black Americans at the end of the Civil War. Still, the legacy of this overlooked movement is profound.

IV. RECONSIDERING THE *CIVIL RIGHTS CASES* IN LIGHT OF BLACK POPULAR CONSTITUTIONALISM

The story of the *CRC* and the Black popular constitutionalism it inspired offers lessons for today. Taken in isolation or viewed *only* as a step along the road to Jim Crow, the *CRC* decision has long been regarded as a disaster, but that assessment only tells half the story. Black Americans who opposed the decision built a mass network of activism to press for their rights to equal access to public accommodations. A combination of electioneering and principle—the exact balance hard to determine—led Republicans and Northern Democrats to pass analogous state bills, most at the first chance presented. In so doing, they reinforced the commitment to decentralized federalism while enshrining the Black popular constitutionalist conception of rights into state law. Accordingly, this story has implications for our present understanding of civil rights, voting rights, and federalism.

A. A Missed Opportunity: An Alternative Originalist Defense of the Civil Rights Act of 1964

It would take until the 1960s for the federal government to fulfill its promise to backstop civil rights for Black Americans. Unfortunately, when the Court considered the Civil Rights Act of 1964, it forgot many of the lessons taught by the Black popular constitutionalist movement of the late nineteenth century. The Warren Court overturned the effect of the *CRC* but not the justices' reasoning. Rather than engage the Fourteenth Amendment in *Heart of Atlanta Motel, Inc. v. United States*,[243] the Court turned to the Commerce Clause. In so doing, a risk-averse Justice Clark chose to treat the 1964 Act as, to use Bruce Ackerman's characterization, mere "garden variety New Deal regulation of interstate commerce [that] treat[ed] its moral significance almost as an embarrassment."[244] Thus, the justices sidestepped the Black popular constitutionalist movement's insistence on a claim to public accommodations as a *right*, as well as the Waite Court's federalism anxieties. A decision upholding the Civil Rights Act of 1964 on Fourteenth Amendment grounds, as Justice Douglas wanted, would not even have needed to

242. V. O. KEY, JR., SOUTHERN POLITICS: IN STATE AND NATION (1949); ROBERT MICKEY, PATHS OUT OF DIXIE: THE DEMOCRATIZATION OF AUTHORITARIAN ENCLAVES IN AMERICA'S DEEP SOUTH, 1944–1972 (2015).

243. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

244. ACKERMAN, *supra* note 54, at 315.

formally overrule much—or any—of the *CRC*. The interpretation of Fourteenth Amendment power outlined in this Article would have provided sufficient authority to block the core of Jim Crow.

The *CRC* set out a clear path to protect civil rights; the failure to do so was primarily one of political will, not judicial malfeasance. The *CRC* opinion itself does not reject the claim of public accommodations as an enforceable right, and, as we have detailed at length above, most states had since recognized public accommodations as an enforceable civil right.[245] Justice Bradley rejected the 1875 Act because he insisted that Congress acted prospectively without either evidence or assertion of a state failure. With decades of Jim Crow behind it, *Heart of Atlanta* could have effectively reprinted the *CRC*'s discussion of the Fourteenth Amendment, noted that Congress now claimed and had empirical evidence to support a finding of massive state neglect, and thus found Congress was using its power remedially—all perfectly consistent with the *CRC*.

As the state response to the original *CRC* showed, such an opinion grounding *Heart of Atlanta* (and especially *Katzenbach v. McClung*[246]) in the Fourteenth Amendment popular constitutionalist synthesis described here would have been preferable on several grounds.[247] First, it would have been more closely aligned with the moderate federalism of the Amendment's nineteenth century drafters and judicial interpreters, avoiding the national police power they all feared. Second, it would have ratified the centrality of the rights claim so fervently pushed by Black popular constitutionalists rather than fold civil rights into mere "humdrum commercial regulation."[248] Finally, such an opinion would have provided a much firmer foundation for rights enforcement should the Supreme Court decide to retreat from the almost limitless Commerce Clause power it created in *Wickard v. Filburn*.[249] In other words, it would have been both more consistent with the original understanding of constitutional federalism *and* more protective of civil rights.

In the present day, this alternative reasoning might be more attractive to the Roberts Court. It largely immunizes originalists against claims that returning to pre-New Deal understandings of the Commerce Clause would threaten Title II of the now foundational Civil Rights Act of 1964. In other words, and against the views of some recent conservatives arguing that the 1964 Act put an end to the notion of

---

245. Lisa Gabrielle Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 233 (1978); Wallace F. Caldwell, *State Public Accommodations Laws, Fundamental Liberties, and Enforcement Programs*, 40 WASH. L. REV. 841 (1965) (listing initial passage and remedies available of all state public accommodation laws up to 1965).

246. Katzenbach v. McClung, 379 U.S. 294 (1964).

247. Even a pre-New Deal interpretation of the Commerce Clause could arguably authorize the regulation's applicability to travelers staying in a hotel next to an interstate highway—the connection to the channels of commerce was quite clear and did not rely on any indirect substantial effects or aggregation. But it would be harder to get at the type of institution in *McClung* under a narrower originalist commerce understanding, whereas a Fourteenth Amendment public accommodations jurisprudence could still reach it.

248. ACKERMAN, *supra* note 54, at 148–49.

249. Wickard v. Filburn, 317 U.S. 111 (1942).

limited federal power, such an understanding would still be situated within a meaningfully decentralized federalism.[250]

B. Distinguishing Congressional Power Under the Separate Reconstruction Amendments

There is always a temptation to conflate federal powers under the distinct Reconstruction Amendments. From a textualist point of view, this is understandable. Compare the grants of power to Congress in each. The Thirteenth Amendment gives Congress power to "enforce this article by appropriate legislation."[251] The Fourteenth grants Congress power to "enforce, by appropriate legislation, the provisions of this article."[252] The Fifteenth says Congress can "enforce this article by appropriate legislation."[253] Yet despite the nearly identical language, the amendments actually give Congress different amounts of authority in distinct domains.

As we have discussed, Congress's Thirteenth Amendment power is vast. It defies constraints of federalism and reaches both states and individuals. The Fifteenth Amendment similarly allows Congress to act preemptively, and it also permits Congress to override some traditional state powers related to voting, though in a more circumscribed way. The Fourteenth Amendment gives Congress only remedial power. To exercise it, Congress must respond to some state action (including neglect) that denies individuals protection of their civil rights.

This distinction was fundamental to the *CRC*. Not only did it rely on a basic distinction between civil and political rights, but it also recognized that Congress had different powers under different amendments. Abandoning the *CRC*'s legal approach downplays this important distinction. The consequences of this abandonment are potentially profound. Consider *Shelby County v. Holder*, which blocked enforcement of section 4(b) of the Voting Rights Act for violating the "equal sovereignty of the states" and federalism, and in which Justice Thomas argued that section 5 was also questionable for the same reasons. Since the facts used to justify the existing formula were more than 40 years old, the Court decided Congress needed to redo the formula.[254]

In effect, the Court decided that the Voting Rights Act, as renewed by Congress, was not responsive to the current facts on the ground, and as such, Congress lacked the power to override traditional federalism concerns. This analysis entirely failed to recognize a distinction between Congress's powers under the Fourteenth and Fifteenth amendments. As the *CRC* showed, Congress has only remedial powers under the Fourteenth Amendment, but the entire constitutional

---

250. Christopher Caldwell has argued the Civil Rights Act of 1964 has created a rival constitution that threatens to displace the Constitution of 1787 (or the 1860s). CHRISTOPHER CALDWELL, THE AGE OF ENTITLEMENT: AMERICA SINCE THE SIXTIES (2020). Helen Andrews characterized it as the "law that ate the Constitution." Helen Andrews, *The Law That Ate the Constitution*, 20 CLAREMONT REV. BOOKS 44 (2019) (reviewing CHRISTOPHER CALDWELL, THE AGE OF ENTITLEMENT: AMERICA SINCE THE SIXTIES (2020)).

251. U.S. CONST. amend. XIII, § 2.

252. U.S. CONST. amend. XIV, § 5.

253. U.S. CONST. amend. XIII, § 2.

254. Shelby Cnty. v. Holder, 570 U.S. 529, 557 (2013).

compromise that was the genesis of the *CRC* hinged on a more prophylactic Congressional power under the Fifteenth Amendment. Put differently, Congress would need to build a record of rights violations to use Fourteenth Amendment power. The point of the Fifteenth Amendment was to make sure Black voters had sufficient power to keep such a record from developing in the first place.

In essence, the Court in *Shelby County* used the *CRC* framework for *civil* rights in the voting rights context. The Waite Court that decided the *CRC*, however, was markedly more deferential to federal interventions on voting.[255] Unfortunately, when the Court turned its back on the *CRC*, it lost sight of this important distinction.

C. Rethinking Federalism

The history of federalism, as an idea at least, belies any easy characterization as a mere tool of racism. To be sure, federalism has been a tool wielded by racists, but it was taken up by abolitionists before that. The account of the *CRC* and subsequent Black popular constitutionalism movement provided above demonstrates a need to rethink the relationship between civil rights and federalism.

Federalism as an idea has come full circle at least twice. Prior to the Civil War, states' rights were a rallying cry and cudgel for abolitionists who decried national legislation like the Fugitive Slave Act. After the War, Southern states turned the tables and used the Republican commitment to federalism against national efforts to protect freedmen. Things turned again when progressives looked to federalism to allow states to experiment with new policies and programs in defiance of the Court's aggressive liberty of contract jurisprudence.[256] The wheel continued to turn with continued states' rights defenses of Jim Crow. In recent years, progressive scholars like Heather Gerken have sought to reclaim federalism for progressive ends.[257]

The *CRC* is a particularly interesting example of the intersection of federalism and civil rights. It is quite clear that Southern racists celebrated Justice Bradley's opinion and the view of federalism he espoused. They recognized it as a limit on the federal government's power to interfere with their efforts to undermine

---

255. That is not to say the justices of the Waite Court would have necessarily come out the other way in *Shelby County* or that it was necessarily wrongly decided. We only suggest that current justices should not simply import the normal rules of federalism to the domain of voting rights without dealing with the unique history of the Fifteenth Amendment. One could read the majority opinion in *Shelby County* to say that that Amendment provides prophylactic powers without a record so long as they are used against all states equally or against some states if there is a record. That would be consistent with a distinction between the Fourteenth and Fifteenth amendments' grants of power. We take no position on whether that view would be consistent with the original public meaning of the Fifteenth Amendment. We only note that the Court did not even consider the point.

256. *See generally* Sean Beienburg, *Progressivism and States' Rights: Constitutional Dialogue Between the States and Federal Courts on Minimum Wages and Liberty of Contract*, 8 AM. POL. THOUGHT 25 (2019). For nineteenth and early twentieth century commitment to federalism by progressives more broadly, see BEIENBURG, PROGRESSIVE STATES' RIGHTS, *supra* note 29.

257. *See, e.g.*, Heather K. Gerken, *A New Progressive Federalism*, 24 DEMOCRACY: J. IDEAS 37 (2012). See also BEIENBURG, PROGRESSIVE FEDERALISM, *supra* note 29, at chapters 1 and 7 for a discussion of contemporary progressive efforts to consider federalism.

Reconstruction. On the other hand, even some radical Republicans who had deep and longstanding commitments to Black civil rights agreed with the Court's view of states' rights.

Analyzing federalism in the context of the post-War political environment, however, requires much more than an investigation into the personal motives of the justices. If one is concerned with protecting the rights of minorities, the constitutional balance promoted by Reconstruction Republicans and endorsed by the Court in the *CRC* is a vital object lesson. The history we have recounted demonstrates two facts. First, the balance did not hold. Second, the balance failed not because of constitutional infirmity or state politics, but because of national politics. Congress proved entirely incapable of protecting either the voting or civil rights of freedmen, even though it ultimately had the constitutional power to do both even within constitutionally limited federal authority. It always had the power to defend voting rights under the Fifteenth Amendment, but it did not have the will, and the Lodge Bill failed. By the early 1890s, there was more than enough evidence of state neglect of civil rights to justify a new federal civil rights statute. It never happened.

Perhaps the most surprising lesson of post-*CRC* politics is the capacity to advance civil rights initiatives in the states. For generations of lawyers and academics taught to view federalism through the prism of Jim Crow, it is strange to think of states as the likely vehicle to advance the interests of minorities. But the Black popular constitutionalism movement of the 1880s shows that it can be done, and it can have an impact.

V. CONCLUSION

The Supreme Court's decision in the *CRC* exposed a tension among Republicans and some Northern Democrats between two of their professed commitments: federalism and protecting the hard-won civil rights of Black Americans. For most Black Americans and their radical Republican allies who were less invested in federalism, the opinion was catastrophic. In addition to limiting federal power to achieve integration, the ruling made it possible to dismiss access to public accommodations as a social preference rather than a legally enforceable right. But the Court and political elites around the nation recognized the decision as a part of an intentional compromise to preserve these dual commitments. By guaranteeing freedman political power through voting, the hope was that federal intervention would be unnecessary.

This careful balance relied on Black political power at the state level. In the wake of the *CRC*, a Black popular constitutionalism movement skillfully cornered Democrats into joining a bipartisan commitment to public accommodation access as a protected civil right. Constrained by the need to demonstrate that they had made their peace with the Civil War, Democrats from both the North and the South initially endorsed Republicans' constitutional settlement, yielded to the Black political movement, and promised that the *CRC* would give their party a chance to show that states' rights and the protection of Black rights were not in tension but could instead be harmonized.

While this reliance on state legislation for Black civil rights guarantees was dependent on aggressive intervention in one political domain—suffrage—it allowed and was perfectly consistent with constitutional conservatism elsewhere. If the federal government could ensure the fairness of the political process within the states (as well as the enforcement of the basic floor of the Bill of Rights and of civil rights), then the Republicans could otherwise maintain the traditional boundaries between state and federal power and preserve a state-oriented polity while also building a state-based but federally guaranteed civil rights regime.

That the decision allowed for the possibility that public accommodations access could be a civil right made this effort to vindicate the right through the states especially appealing; the Supreme Court's decision 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 a federal floor of rights without having to build up national institutions. More importantly, it supplied an underlying ideological support for avoiding national enforcement except as a last resort.

The incorporation of state politics thus indicates a vision that was both more protective of rights *and* more firmly rooted in American constitutional thought and practice than a purely national account would indicate. The proto-originalism of Matthew Carpenter and many other mainstream Republicans led them to believe that the framers of the Fourteenth Amendment had authorized the national government to act only in the case of certain rights. While disagreeing on what types of rights the Amendment included, all but the most radical Republicans agreed that the federal government could not simply make the first move in enforcing civil rights. The states, however, were vested with the presumptive police powers to act for the public good rather than only within the more limited domain of enumerated powers. This meant states could consider the legal merit of the rights themselves. Using that power, states passed their own civil rights acts that both affirmed a more inclusive civic membership and more generally vindicated the Black popular constitutionalist claims about what counted as a legally enforceable civil right.[258]

This story adds complexity to our scholarly understanding of popular constitutionalism. Early treatments of the subject presumed such movements were fundamentally progressive, but more recent critics and later observers have argued that its most consequential moments have instead been conservative. The response to the *CRC* indicates a more mixed perspective. On the one hand, defenders of the state public accommodations laws—including some Black activists, supportive governors, and legislative policymakers—explained state passage as a difference between the plenary powers of the states and the limited powers of the federal

258. An apt example is Governor Leon Abbett's assessment that "New Jersey has thus established conclusively the equal rights of all men, without regard to race or color," which is obviously self-congratulatory, but nonetheless indicates a very different sentiment than condescending dicta references to the "special favorite of the laws." Leon Abbett, *Civil Rights*, Jan. 13, 1885, *in* MINUTES OF VOTES AND PROCEEDINGS OF THE ONE HUNDRED AND NINTH GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY 51–52 (1885); The Civil Rights Cases, 109 U.S. 3, 25 (1883).

government: in effect, rejecting the nationalism of some strands of Black popular constitutionalism. Thus, the response to the decision served as a ratification of the states' rights position shared by Democrats and all but the most radical Republicans. At the same time, however, passage of these laws served as a marked victory for the Black popular constitutionalist conception of rights, rejecting efforts to dismiss equal access to the public sphere as a mere social grace offered at private discretion.

Looking to the actions of states in the wake of the *CRC* forces us to reassess this ruling and its legacy. Even if, as some contemporaries observed, public accommodations laws served mostly symbolic purposes due to weak enforcement implementation, those critics of the decision nonetheless lamented the overturning of the Civil Rights Act as an affront. The states' response, in which nearly the entire North rose up to pass civil rights legislation, suggests at least a partial victory for Black equality. Even if white legislators acted insincerely, that they were forced to act shows that Black citizens were an important voice and an electoral force to be reckoned with. Even the Ohio representative hissing about the "n[*****] vote" *still had to yield to their will and defer to their agency*. Frederick Douglass and other critics of the decision held it to be a terrible loss, but arbitrarily privileging that moment neglects the hard work of the Black policy entrepreneurs and petitioners who successfully restored the idea of Black membership in almost the entire North. That the victory was incomplete and short-lived cannot be denied, but the culprit was not the Court. In the end, it was not federalism that doomed the compromise, but a lack of federal will.

FIGURE 1

APPENDIX

Black Population of non-Southern States

1890

State	Total	As % of Population	State	Total	As % of Population
CA	11,322	0.9	NV	242	0.5
CO	6215	1.5	NH	614	0.1
CT	11,547	1.6	NJ	47,638	3.2
IL	57,028	1.4	NY	70,092	0.1
IN	45, 215	2.1	ND	373	0.2
IA	10,685	0.5	OH	87,113	2.4
KS	49, 710	3.4	OR	1186	0.4
ME	1190	0.1	PA	107,596	2
MA	22,144	1	RI	7393	2.1
MI	15,223	0.7	SD	541	0.1
MN	3683	0.2	VT	937	0.3
MT	1490	1.1	WA	1602	0.4
NE	8913	0.8	WI	2444	0.1

Source: "State Populations, Series Aa2244-6650," *Historical Statistics of the United States Millennial Edition* Online, doi:10.1017/ISBN-9780511132971.Aa2244-655